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File 2019335821 (C-059)

ROYAL CANADIAN MOUNTED POLICE

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

Between:

Constable Daniel Kohl
Regimental Number 56299
HRMIS 000170275

(Appellant)

and

Commanding Officer, "O" Division
Royal Canadian Mounted Police

(Respondent)

(the Parties)

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CONDUCT APPEAL DECISION

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ADJUDICATOR: Nicolas Gagné
DATE: September 14, 2022

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SYNOPSIS

The Appellant faced two allegations under section 8.1 of the RCMP *Code of Conduct* for providing a false, misleading written statement to a superior or a person in authority, while being involved as a Subject Member in a *Code of Conduct* investigation. The Appellant allegedly deleted a text message from an exchange before submitting the conversation to the Conduct Authority and then claimed the deleted offending text message was sent by a fellow RCMP officer without his knowledge.

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

On appeal, The Appellant argues that the Board's behaviour raised a reasonable apprehension of bias; that the Board breached his right to procedural fairness when it did not call two crucial witnesses and when it held the Appellant to a higher standard of proof than the Conduct Authority Representative; and, that the decision is unreasonable because it was unsupported by the evidence. The Appellant also argues that methods employed by the investigator breached his right to procedural fairness. Accordingly, the Appellant sought full reinstatement, including all pay, benefits and overtime, that he would have received since the issuance of the decision.

The appeal was referred to the RCMP External Review Committee (ERC) for review. The ERC found that Board did not demonstrate a reasonable apprehension of bias; did it not breach the relevant principles of procedural fairness; and, that the Board's decision was not clearly unreasonable.

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

INTRODUCTION

[1] Constable (Cst.) Daniel Kohl, Regimental Number 56299 (Appellant) appeals the decision of an RCMP Conduct Board (Board) finding that two allegations (Allegations) raised against the Appellant, for providing a false or misleading written statement contrary to section 8.1 of the *Code of Conduct*, were established. Based on that finding, 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, demonstrates a reasonable apprehension of bias, is based on an error of law, and is otherwise clearly unreasonable (Appeal, pp 6-7). The Appellant requests a reinstatement of his position, full compensation for what he would have received had he not been dismissed, including, but not limited to, base salary, value of benefits and overtime pay (Appeal, p 292).

[3] The Appellant also made an application to have Allegation 1 declared statute-barred or alternatively be granted a stay of proceedings. This application was denied by the Board and does not form part of the appeal.

[4] In accordance with subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (*RCMP Act*) the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report issued on June 8, 2022 (ERC C-2021-004 (C-059)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

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

[6] In rendering this decision, I have considered the material that was before the Board who issued the decision that is the subject of this appeal (Material), as well as the 415-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.

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

BACKGROUND

[8] The ERC summarized the factual background leading to the conduct hearing as follows (Report, paras 6-13):

> [6] This appeal stems from the Appellant's behaviour during a conduct investigation into a complaint filed by a citizen. The Appellant responded to a traffic call from Ms. BB about a truck on her road that she captured on her dashcam which she believed was violating the load clearance. After talking to Ms. BB by way of email, the Appellant recommended that Ms. BB apply to join the RCMP and notified her that he believed she should receive an award for her dedication to traffic safety. The Appellant notified Ms. BB that he had organized a meeting on March 17, 2017, between herself and his supervisor, Sergeant (Sgt.) TG to discuss the award.
>
> [7] During this time, the Appellant had been transferred to another division and was preparing to move provinces. In fact, Sgt. TG testified that the Appellant never advised him of the meeting he had organized with Ms. BB. I note that the Appellant was supposed to leave the province on March 16, 2017.
>
> [8] The Appellant's scheduled departure was changed to 1:00 p.m. on March 17, 2017. Although his departure had been postponed, he did not attend the meeting between Ms. BB and Sgt. TG. As organized by the Appellant, Ms. BB attended the "Y" District Office at 11:00 a.m. on March 17, 2017, to speak to Sgt. TG. Sgt. TG, not being aware of the meeting, had to be called back to the office as he was off-site at a partner agency. Upon returning to the office, Sgt. TG had to inform Ms. BB that the Appellant should have nominated her for the award, that the time for filing the application for that award had already passed, and that he was not there to give her an award.
>
> [9] Ms. BB filed a complaint against the Appellant with the Civilian Review and Complaints Commission. A *Code of Conduct* investigation was ordered related to the Appellant's actions surrounding his correspondence with Ms. BB and setting up the meeting between herself and Sgt. TG.
>
> [10] During the *Code of Conduct* investigation, the Appellant provided the investigator a copy of text messages between Sgt. TG and himself, that were exchanged after Sgt. TG met Ms. BB at the "Y" District Office, on March 17, 2017. This exchange of text messages differed from the one provided to the investigator by Sgt. TG. In the Appellant's version, the texts were missing a derogatory message he had sent to Sgt. TG.
>
> [11] As a result of this discrepancy in text messages, a second allegation under section 8.1 of the *Code of Conduct* was added to the conduct proceedings, namely, that the Appellant had provided false information to the investigator. In response to this new allegation, the Appellant provided a letter from Cst. KX stating that he, Cst. KX, was the one who had sent the derogatory text

> message and that the Appellant had no knowledge of it as he had erased the message he sent and had not told the Appellant about it.
>
> [12] The Conduct Authority, Superintendent (Supt.) CL, advised that the second allegation would be addressed in a new *Code of Conduct* investigation on April 5, 2018.
>
> [13] The Conduct Authority mandated an investigation on April 11, 2018, into the second allegation to determine whether the Appellant had provided false information to the investigator in the initial *Code of Conduct* investigation.

[9] The second *Code of Conduct* investigation was completed on July 23, 2018 (Material, 2 of 2, p 111). It contained the following Allegation:

> On or about 2017-10-23, at or near the city of W, in the Province of X, [the Appellant] did provide a false, misleading written statement to a superior or a person in authority, Sgt. D.M., a Professional Standards Unit investigator, while being involved as a Subject Member in a *Code of Conduct investigation*, contrary to section 8.1 of the RCMP *Code of Conduct.*

Investigation Reports

[10] The ERC summarized the contents of the two investigations reports as follows (Report, paras 16-20):

> [16] The Investigation Report included the original allegation's investigation report resulting from the complaint filed by Ms. BB and its appendices, as well as the supplemental investigation. All materials for the Investigation Report are found in the Material, 2 of 2, with pages noted below.
>
> [17] The original investigation report was included in an effort to put together a timeline of the events of March 17, 2017. The original investigation includes the request for a *Code of Conduct* investigation (pages 3-4); the briefing note to the Commanding Officer (CO) (pages 5-6); the Investigation Report (pages 7-30); the computer notations of the Appellant's response to the traffic incident (pages 35-50); screenshots of the text messages from Sgt. TG (pages 53-54); a query of the book Sgt. TG authored (pages 56-59); copies of email correspondence between Ms. BB and the Appellant (pages 61-99); the Appellant's original response to the investigation (pages 101-105); and a copy of the correspondence between the Investigator and Sgt. TG to clarify some of the investigator's questions (pages 106-108). There were also audio statements from Ms. BB and Sgt. TG, with transcripts (pages 326-339 and pages 340-343 respectively).

> [18] The second Investigation Report included: the mandate letter dated April 11, 2018 (page 109); the Report (pages 111-124); the original *Code of Conduct* Mandate Letter (page 125); a request for a *Code of Conduct* investigation (page 129); the Appellant's submissions to the Conduct Authority for the original conduct meeting, which includes the statement from Cst. KX (pages 131-134); a request for assistance from the Professional Standards Unit (PSU) in "Y" province from the investigator (pages 135-138); the Appellant's relocation e-ticket itinerary (pages 139-141); a statement from [Staff Sergeant (S/Sgt.)] GS, Acting Commanding Officer (A/CO) in "X" Division who served the Appellant with the *Code of Conduct* investigation original allegations' (pages 142-144); Conduct Investigation Mandate Letter dated May 7, 2018, for Cst. KX providing a false statement (pages 145-146); card transaction reports for Cst. KX for March 17, 2017 (page 147); and the Appellant's response to the initial Allegations (page 148). The investigator also conducted an oral interview with S/Sgt. AB, who was A/CO in "X" Division for a time and spoke with the Appellant (transcript found at pages 326-328). The investigators also obtained the video footage of the cameras at the "Y" Main Detachment and "Y" District Office to determine what time Cst. KX arrived and left those offices [...].
>
> [19] A supplemental investigation was conducted and a supplementary report was provided to the Conduct Authority on October 9, 2018, which included the original investigation plus additional information (pages 149-322). Only the new information will be noted. The supplemental investigation was requested by the Conduct Authority on July 31, 2018, to provide an analytical timeline to March 17, 2017, for Sgt. TG, Ms. BB, Cst. KX and the Appellant's actions, the Appellant's March 17, 2017, card access logs and video surveillance, confirmation as to whether the Appellant still had access to the "Y" District Offices on that day, a copy of the Appellant and Cst. KX's duty notebooks for March 17, 2017, and Cst. KX's assigned police vehicle's unit history for March 17, 2017 (pages 206-207).
>
> [20] The supplemental investigation also included the Appellant's taxi claim for the relocation (pages 311-315), a "Y" offices' "Officer Radio Log", including Sgt. TG's log (pages 316-318); an analytical timeline of events put together by S/Sgt. ML, the Investigator in "Y" Division; his response to the investigator about other additional information sought by the Conduct Authority (pages 319-320); a *Code of Conduct* flowchart of the location of Sgt. TG, Ms. BB, Cst. KX and the Appellant, created by an analyst at the Conduct Authority's request (pages 321-322).

Investigation report evidence

[11] The ERC has provided a summary of the relevant aspects of the Investigation Report contents that are material to the resolution of this appeal (Report, paras 22-30):

[22] On April 23, 2018, the investigator sought and was granted access to the Appellant and Cst. KX's emails and text messages, for the period between January 26, 2018, and April 23, 2018. He was advised on May 3, 2018, that no messages were logged on the Appellant's and Cst. KX's Blackberry devices and there was no trace of any messages between them on the system (page 118).

[23] On April 26, 2018, the investigator in "Y" Division notified the lead investigator that Cst. KX was served a mandate letter via email for a *Code of Conduct* investigation for providing a false statement. Cst. KX had indicated that he did not wish to attend the detachment or meet anyone in person to be served with the mandate letter (page 118).

l24l On May 7, 2018, the investigator in "Y" Division, further informed the investigator that he had inquired with Canadian Air Traffic Security Authority (CATSA) at the departure airport about security video coverage for March 17, 2017, and was advised that they only retained video for 30 days. He further stated that because the Appellant had checked in online, Air Canada did not have information pertaining to when the Appellant actually checked into the airport and dropped off his luggage (page 118).

[25] On May 15, 2018, the investigator emailed the Conduct Authority to advise that the "Y" Division's attempts to contact Cst. KX had been unsuccessful. He requested that the Conduct Authority attempt to contact Cst. K.X. to ask him where he and the Appellant had met for coffee and at what time (page 118). The Conduct Authority was likewise unsuccessful at contacting Cst. KX and the Appellant did not have a contact number for Cst. KX.

[26] Using the Card Access Log and Video Surveillance, the investigator in "Y" Division estimated an approximate timeline, noting that "[t]here is only surveillance video covering the front main door and employee back door. However there are no other normally used entry and exit doors at the "Y" District Office" (pages 18-19):

> 09:46:59 - Cst. KX entered the "Y" Main Detachment vehicle gate.
>
> 09:50:54 - Cst. KX entered the "Y" Main Detachment front entrance door and went through the interview room hallway.
>
> 10:28:06 - Cst. KX left the Main Detachment via the "Y" main front foyer doors. Cst. KX was carrying what appeared to be a take-out coffee cup and a black binder.
>
> 10:39:00 - Cst KX scanned his access card at the back door at the "Y" District office.
>
> 10:40:00 - Cst KX entered the back door at the "Y" District office carrying what appeared to be the same coffee cup and a cell phone only.

He walked down the hallway towards the General Duty and front counter hallway.

11:01:00 - Ms. BB approached the “Y’ District office front counter and spoke to a front counter employee, then sat down to wait on bench.

11:22:38 - Sgt. TG came to the front counter and spoke with Ms. BB

11:26:51- Ms. BB shook Sgt. TG’s hand and left the front counter.

12:37:05 - Cst. KX walked towards the back door of the “Y” District office only carrying a cell phone. He then turned around and walked back into the office area. He was not wearing an outer jacket.

12:38:07 - Cst. KX exited the back doors of the “Y” District office wearing his outer jacket.

12:55:20 - Cst. KX entered back at the “Y” Main Detachment vehicle gate.

12:57:00 - Cst. KX entered the main front entrance door.

[27] The investigator in “Y” Division relied on Google Maps to determine the distance between locations. The following shortest distance and average fastest driving times noted by the investigator from these locations were as follows (pages 120-121):

- “Y” Main Detachment to “Y” District Office-4.5 km, 9-minute drive
- “Y” Main Detachment to “Y” international airport-33 km, 33-minute drive.
- “Y” District Office to “Y’ international airport-29 km, 36-minute drive

[28] The investigator in “Y” Division attended the “Y” District Office and noted there were three other doors leading to the outside. One was at a loading area that requires card reader access from the exterior. The other two had push bars from the inside, but had no access from the exterior. The investigator noted that if anyone left through any of the three doors, they would still need to come through a card access door or from the front counter. Cst. KX was only seen entering and exiting the “Y” District Office on one occasion. The Appellant was not seen entering or exiting the “Y” District Office during this time frame (page 121).

[29] The investigator in “Y” Division reviewed Cst. KX’s emails from February 1, 2017, to May 2, 2017, which was the last day the system showed him opening any emails. The following was found:

2017-02-24 - The Appellant forwarded Cst. KX a copy of the initial correspondence he had with Ms. BB, in which he suggested

she considers joining the RCMP. There were no additional comments made from the Appellant to Cst. KX in the email.

2017-03-02 - The Appellant sent Cst. KX an updated copy of the correspondence he had with Ms. BB with the continued conversation of him suggesting she seeks employment with the RCMP. There were no additional comments from the Appellant to Cst. KX in the email.

2017-03-02 - Cst. KX replied by writing, "Just epic".

2017-03-29 - The Appellant emailed Cst. KX to ask if he was at work. Cst. KX did not reply until 2017-04-04, at which time, the Appellant simply asked if he could call him.

2017-04-05 - The Appellant emailed Cst. KX and asked how his day was. Cst. KX replied it was not a good day and he had no news regarding his *Code*.

2017-04-13 - The Appellant emailed Cst. KX to advise of his interest in a specialized unit. Nothing in the email was in relation to any of their *Code of Conduct* matters.

[30] The investigative log was also disclosed, and can be found in the Appeal materials, pages 255-278, which includes his attempts to speak to Cst. KX, including the times he went to his home, as noted in this particular investigative log.

Allegations

[12] Based on the foregoing investigations, the Commanding Officer of "X" Division issued a Notice of Conduct Hearing containing two Allegations that the Appellant had breached the *Code of Conduct* (Material, 1 of 2, pp 4-11). The Allegations and their particulars or itemized as follows:

Allegation 1

On October 23, 2017, at or near X, in the Province of X, [the Appellant] failed to provide complete and accurate accounts pertaining to the carrying out of his responsibilities, the performance of his duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force, contrary to section 8.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.

Particulars

[1] At all material times, you were a member of the Royal Canadian Mounted Police (RCMP") and were posted to Y Division, at Y Detachment, in the province of Y, then X Division, at the X Detachment, in the province of X.

[2] On February 22, 2017, Ms. B.B. contacted RCMP to report an oversized vehicle travelling on a road with size restrictions. Ms. B.B. had taken videos of the oversized truck with her “wind shield-mounted camera”. Y RCMP file GO# XXX XXXX-XXXXX was created, you were assigned officer.

[3] Between February 23, 2017 and March 13, 2017, you exchanged emails with Ms. B.B. initially regarding Y RCMP file GO# WW XXXX-XXX-XXXXX.

i. On March 9, 2017, you sent Ms. B.B. an email in which you stated, “I think given the work you’ve done, I’d like to nominate you for an OIC (Officer in Charge) Award [...] I’m going to talk to my Sergeant if you’re interested and we’ll see about filling out the nomination paperwork.

ii. On March 13, 2017, you sent Ms. B.B. an email in which you stated, “I’ve made an appointment for you to meet with Sergeant T.G. on Friday March 17th, at 11:00 am at our district office [...] Please bring some of your better dash cam video examples to help convince him that you deserve this OIC award. Good luck!”

[4] On March 17, 2017, you were not at the Y District office when Ms. B.B. arrived to meet with Sergeant (Sgt.) T.G. regarding the Officer in Charge award. Sgt. T.G. was unaware of the appointment and had to explain to Ms. B.B. that she was not getting an award. Ms. B.B. was upset.

[5] Following his meeting with Ms. B.B. on March 17, 2017, you and Sgt. TG. exchanged the following text messages:

Sgt. T.G. (11:31): “B.B. showed up at DY today. You’re a fucking jerk off. If you were still here I’d give you a 1004.”

Appellant (11:37): “New phone. Who’s this?”

Sgt. TG (11:48): “Is this Dan?”

Appellant (11:49): No, I just got this number yesterday”

Sgt. TG (11:51): “Oh, my bad.”

Appellant (11:51): “I got a free phone when I bought this shitty book “dark resolution’...threw the book away but kept the phone”

Appellant (11:51): “Fuck you, Kohl”

Appellant (11:51): “You’re such a fucking ass hat.”

[6] “Dark Resolution” is a reference to a book authored by Sgt. T.G.

[7] On April 19, 2017, Ms. B.B. filed a complaint against you with the Civilian Review and Complaints Commission for the RCMP for wasting her time and lying about setting up the meeting with Sgt. T.G. for the Officer in Charge award.

[8] On June 2, 2017, in response to Ms. B.B.'s complaint, a *Code of Conduct* investigation was ordered to investigate whether you contravened sections 2.1 and 7.1 of the *Code of Conduct* ("ACMT 2017 336384").

[9] On September 6, 2017, Sgt. D.M. sent you an email to request your voluntary participation in a Subject Member interview regarding ACMT 2017 336384.

[10] On October 23, 2017, you provided a written statement to Sgt. D.M. regarding ACMT 2017 336384, which included the following false and/or misleading accounts pertaining to Sgt. T.G.

a. "I spoke with my Sergeant T.G. about my interactions with B.B. and her passion for justice and I asked him if he would be willing to meet with her to discuss a possible nomination. Sergeant T.G. asked me about B.B.'s age and physical appearance and he agreed to meet with her if she "dressed nice".

b. Sergeant T.G. agreed to the meeting and I asked if we could set a date and time as if was just days away from my transfer date and I wanted to attend as well [...] Sergeant T.G. agreed on the condition that I reminded him on my final shift, which was to be March 12".

c. "I have no doubts whatsoever that I told Sergeant T.G. about this meeting and its purpose".

[11] In addition, as part of your October 23, 2017, written statement to Sgt. D.M. regarding ACMT 2017 336384, you provided a screen shot of the text messages you exchanged with Sgt. T.G. on March 17, 2017. The screen shot you submitted omitted the text you sent at 11:51 PST, "I got a free phone when I bought this shitty book 'dark resolution' ... threw the book away but kept the phone".

[12] You therefore submitted incomplete, inaccurate, false and/or misleading accounts to Sgt. D.M. in your October 23, 2017, written statement regarding ACMT 2017 336384, as the Subject Member in a *Code of Conduct* investigation.

Allegation 2

On April 2, 2018, at or near X, in the province of X, [the Appellant] failed to provide complete and accurate accounts pertaining to the carrying out of his responsibilities, the performance of his duties, the conduct of investigating the actions of other employees and the operation and administration of the Force, contrary to section 8.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.

Particulars

[1] At all material times, you were a member of the Royal Canadian Mounted Police ('RCMP") posted to Y Division, at Y Detachment, in the province of Y, then X Division at the X Detachment, in the province of X.

[2] Between February 23, 2017, and March 17, 2017, you worked with Cst. K.X. at Y Detachment.

[3] Between February 23, 2017, and March 13, 2017, you exchanged emails with Ms. B.B., initially regarding Y RCMP File GO# XXXX-XXXX-XXXX.

i. On March 9, 2017, you sent Ms. B.B. an email in which you stated. Ì think given the work you've done, I'd like to nominate you for an OIC (Officer in Charge) Award [...] I'm going to talk to my Sergeant if you're interested and we'll see about filling out the nomination paperwork".

ii. On March 13, 2017, you sent Ms. B.B. an email in which you stated, "I've made an appointment for you to meet with Sergeant T.G. on Friday March 17th at 11:00 am at our district office [...] Please bring some of your better dash cam video examples to help convince him that you deserve this OIC Award. Good Luck!"

[4] On February 24, 2017, and March 2, 2017 you forwarded emails from your email exchange with Ms. B.B. to Cst. K.X.. On March 2, 2017, Cst. K.X.'s reply to the forwarded email exchange was, "Just epic".

[5] On March 17, 2017, you were not at the Y District office when Ms. B.B. arrived to meet with Sergeant (Sgt.) T.G. regarding the Officer in Charge award. Sgt. T.G. was unaware of the appointment and head to explain to Ms. B.B. that she was not getting an award. Ms. B.B. was upset.

[6] Following his meeting with Ms. B.B. on March 17, 2017, you and Sgt. T.G. exchanged the following text messages:

Sgt. T.G. (11:31): "B.B. showed up at DY today. You're a fucking jerk off. If you were still here I'd give you a 1004."

Appellant (11:37): "New phone. Who's this?"

Sgt. TG (11:48): "Is this Dan?"

Appellant (11:49): No, I just got this number yesterday"

Sgt. TG (11:51): "Oh, my bad."

Appellant (11:51): "I got a free phone when I bought this shitty book "dark resolution'...threw the book away but kept the phone"

Appellant (11:51): "Fuck you, Kohl"

Appellant (11:51): "You're such a fucking ass hat."

[7] "Dark Resolution" is a reference to a book authored by Sgt T.G.

[8] On April 19, 2017, Ms. B.B. filed a complaint against you with the Civilian Review and Complaints Commission for the RCMP for wasting her time and lying about setting up the meeting with Sgt T.G. for the Officer in Charge award.

[9] On June 2, 2017, in response to Ms. B.B.'s complaint, a *Code of Conduct* investigation was ordered to investigate whether you contravened sections 2.1 and 7.1 of the *Code of Conduct* ("ACMT 2017 336384").

[10] On September 6, 2017, Sgt. D.M. sent you an email to request your voluntary participation in a Subject Member interview regarding ACMT 2017 336384.

[11] On October 23, 2017, you provided a written statement to Sgt. D.M. regarding ACMT 2017 336384. As part of your written statement, you provided a screen shot of the text messages you exchanged with Sgt. T.G. on March 17, 2017. The screen shot you submitted omitted the text you sent at 11:51 PST, "I got a free phone when I bought this shitty book 'dark resolution'... threw the book away but kept the phone".

[12] On March 27, 2018, you were served with a Notice of Conduct Meeting and a copy of the *Code of Conduct* Final Report regarding ACMT 2017 336384. In the Notice of Conduct Meeting, the Conduct Authority, Supt. C.L., advised you that there was sufficient information in the investigative materials to make a finding that you had also contravened section 8.1 of the *Code of Conduct*, for "providing a false, misleading written statement to a superior or person in authority, as a 'subject member' in a Code of Conduct investigation" based on discrepancies in your October 23, 2017, written statement regarding ACMT 2017 336384. You were provided with an opportunity to provide written representations and respond to the allegations against you.

[13] S/Sgt. G.S. had been briefed that there were excerpts missing from the screen shot of your text message exchange with Sgt. T.G.. On March 27, 2018, while serving you the Notice of Conduct Meeting, S/Sgt. G.S. asked you if you were aware that there was an issue with the version you had submitted. You told S/Sgt. G.S. that you were aware and the reason that your version was missing some lines was because it was a voluntary statement, and the missing excerpts were embarrassing or unprofessional so you decided to leave them out. In regards to the *Code of Conduct* proceeding, S/Sgt. G.S. told you to be honest with Supt. C.L. and not lie about anything else.

[14] About a week before you met with Supt. C.L. for your Conduct Meeting, you asked S/Sgt. A.B. about "what type of individual" or "guy" Supt. C.L. was S/Sgt. A.B. told you to "say the truth". In regards to the discrepancy between the versions of text messages submitted by you and Sgt. T.G., you told S/Sgt. A.B. that your six-year-old kid saw a bad word in the text and erased it.

[15] On April 2, 2018, you sent Supt. C.L. an email with the subject line, "response to code of conduct allegations". On April 5, 2018, at your Conduct Meeting, you were advised that based on the materials you provided on April 2, 2018, the section 8.1 allegation would be addressed in a new *Code of Conduct* investigation ("ACMT 2018 336257"). A

second Conduct Meeting was held on April 11, 2018, which addressed ACMT 2017 336384.

[16] In your “response to code of conduct allegations”, emailed to Supt. C.L. on April 2, 2018, you denied typing the omitted text message, with the false and/or misleading explanation:

> One of my former Y co-workers confessed to me that he was the one who sent the message from my phone when I briefly handed it to him at a coffee shop. I have attached a signed statement from my former co-worker, which explains the discrepancy. Ultimately, I have to take responsibility for the text message; although I was not the author, it was still sent from my phone.

[17] Your “response to code of conduct allegations” emailed to Supt. C.L. on April 2, 2018, included a written statement, signed by Cst. K.X., on March 30, 2018, which stated that he had sent the omitted text message.

[18] Cst. K.X.’s March 30, 2018, statement to Supt. C.L. indicated that he was writing “in regards to the Code of Conduct investigation into [the Appellant]”.

[19] Cst. K.X.’s March 30, 2018, statement to Supt. C.L. stated, “if you have any questions, you can contact me at XXX-XXX-XXXX’. Supt. C.L. attempted to contact Cst. K.X. regarding the statement, but Cst. K.X. never responded to Supt. C.L.

[20] Cst. K.X.’s March 30, 2018, statement to Supt. C.L. was false and/or misleading. Cst K.X. was not with you at 11:51 PST when the omitted text message, “I got a free phone when I bought this shitty book ‘dark resolution’...threw the book away but kept the phone” was sent from your phone. Specifically, the following statements in Cst. K.X’s March 30, 2018, statement to Supt. C.L. were false and/or misleading:

> “I was the one who sent that particular text message from [the Appellant’s] phone”
>
> “We were having coffee when [the Appellant] received text messages from T.G.”
>
> “I asked him what was this about and he just mentioned that him and T.G. had a dispute and he was trying to avoid him by saying he got a new number”.
>
> “[The Appellant] handed me the phone to show me the conversation, I found it humorous and I quickly typed a message to T.G. in which I made a joke about one of his books. Then I deleted the message so [the Appellant] would not see it”.
>
> “There is no way that [the Appellant] would have any knowledge that that message ever even existed”.

> [21] RCMP Y Building Access Logs and surveillance videos of March 17, 2017, indicate that Cst. K.X. entered the Y District office at 10:39 PST and exited the Y District office at 12:38 PST. At 11:05:35 PST, at the same time Ms. B.B. is waiting in the Y District front lobby for Sgt. T.G., Cst K.X. can be seen also attending at the front counter. There is no record of you entering the Y District office on March 17, 2017. You were transferred to "X" Division and on March 17, 2017, you were on Air Canada flight ACXXXX to X, which departed from the Y International Airport at 13:00 PST. In your October 23, 2017, written statement regarding ACMT 2017 336384, you described your inability to pick up a rental car, and not having enough time to attend the 11:00 PST meeting due to having to take a taxi to the airport in time to check-in for your flight at 13:00 PST.
>
> [22] By submitting the false and/misleading explanation that Cst. K.X. "sent the message from [your] phone when [you] briefly handed it to him at a coffee shop", and including Cst. K.X.'s written statement, dated March 30, 2018, in your "response to code of conduct allegations", you submitted false and/or misleading accounts to a Conduct Authority, as the Subject Member in a *Code of Conduct* proceedings.

Pre-hearing conferences

[13] The Board held three pre-hearing conferences (PHC) on April 10, April 26, and May 21, 2019.

[14] During the first PHC, the Appellant brought a preliminary motion to have Allegation 1 declared statute barred for being filed outside the time limits, or, in the alternative, declared an abuse of process, due to delay. The Board denied the motion on May 21, 2019. The Board found that the investigator's knowledge of the facts was not sufficient to demonstrate knowledge of the circumstances in the mind of the Conduct Authority. The Board also found that the delay associated with PSU filing their original Investigation Report did not prejudice the Appellant and was not an abuse of process. The Appellant is not appealing the preliminary motion decision.

[15] At the May 21, 2019, PHC, the Conduct Authority Representative (CAR) advised the Board that she wished to call Cst. KX as a witness. The Appellant did not object. The CAR cautioned that it may not be possible to have Cst. KX testify because she was under the belief that he may be living overseas. The Board noted that, while it could issue a summons, it may prove difficult to enforce. Moreover, the Board was skeptical of what "added value" his testimony would provide, so it committed to a review of the file before determining whether to call Cst. KX (Appeal,

p 245). At that same PHC, the Parties agreed that it would be unnecessary to call the Conduct Authority and removed him from the witness list (Appeal, p 246). Later, on May 24, 2019, the Board denied the CAR's request to call Cst. KX as a witness (Appeal, p 244). The Appellant did not object to this decision.

[16] Meanwhile, the Appellant made several additional disclosure requests of the CAR. The Board ordered that the evidence be provided and the CAR did so. The CAR asked for a supplemental investigation relating to the "north side door", but the Board determined that the expert testimony of Mr. RS, an RCMP Information Technology expert would suffice. The CAR also asked for the Record of Decision (RoD) for Cst. KX's conduct proceedings, but that request was denied by the Board (Appeal, pp 245-246).

Conduct hearing exhibits

[17] The ERC summarized the contents of the exhibits relied upon at the hearing (Report, paras 36-45):

> **a) Investigation Report with Exhibits**
>
> [37] The Investigation Report is discussed previously in this report, beginning at paragraph 14, and will not be repeated here.
>
> **b) RCMP Annual Evaluations and Awards**
>
> [38] The Appellant provided his RCMP annual performance evaluations from March 2011 to March 2018 (Material, 1 of 2, pages 721-752), awards and recognition from superiors to support his good work with the RCMP, and a list of cases he was in charge of for 2018.
>
> [39] The awards and recognition include notification of the Appellant winning the Alexa Award for Road Safety (Material, 1 of 2, pages 708-713); recognition that the Appellant, along with two other officers, assisted in the investigation of a person of interest to the Australian authorities who sent appreciation for their help in the investigation (Material, 1 of 2, page 714); recognition that the Appellant greatly assisted in obtaining crucial information from two distraught sexual assault victims and evidence that led to the arrest of two suspects (Material, I of 2, pages 717-718) and; recognition of the Appellant's positive treatment of a Syrian refugee who had been robbed, which changed the man's opinion of police, including the RCMP (Material, 1 of 2, pages 719-720).
>
> [40] The Appellant's evaluations are generally positive and note throughout that he is a strong investigator who seeks to improve his skills, needs little

supervision, is reliable for complex investigations and has an overall good performance. However, some evaluations also mention that he needs to work on his communication skills, to "soften" his approach to some clients and that his hard line on some issues has come across as a bad attitude (Material, 1 of 2, pages 737, 742). The Performance Evaluation for March 2012 indicated that he received a complaint from the public, but no details of that complaint were included (Material, 1 of 2, page 727).

[41] The Appellant also provided an email from a media relations office in "Y' Division which thanked him for doing a detailed report for a politically motivated assault that was attracting media attention (Material, 1 of 2, page 761).

[42] The Appellant provided a message from an RCMP Communications Coordinator who forwarded a positive message received through Facebook about the Appellant who was very nice and helpful dealing with a neighbour hitting a car and driving away (Material, 1 of 2, page 762).

[43] The Appellant provided letter of thanks from a superintendent for his hard work while he was on a meal break in finding a pepper spray can thrown into the bushes, leading to the arrest of a suspect who had assaulted three people (Material, page 763).

c) Letters of Support

[44] The Appellant submitted five letters of support. None of the letters specifically mention the manner of the allegations the Appellant was facing, but generally advised that they are aware he is facing conduct allegations. Each of the letters is fairly brief and does not specifically speak about what the Appellant was facing (Material, 1 of 2, pages 707 ,715, 716, 760, 765-766).

d) Exhibits Provided at the Hearing:

[45] I note that some exhibits were provided during the hearing. The CAR provided the "Fire Evacuation Plan", which shows the floor layout for the "Y" District Office, on which Sgt. T.G., the Investigator in "Y' Division, and the Appellant all provided comments on it, with their own notations (Material, 1 of 2, pages 548, 552, 553). The CAR provided a "Night Shift Report" which S/Sgt. AB was questioned about (Material, 1 of 2, pages 549-551). The Appellant also provided an article about a safety volunteer with the RCMP (Material, 1 of 2, pages 554-556).

CONDUCT BOARD HEARING

[18] The Board held a four-day conduct hearing from June 25 to June 28, 2019. The Board heard witness evidence and submissions from the Parties and then rendered an oral decision on June 27, 2019. The Board found both Allegations established then heard submissions, but no

testimony, on the conduct measures to be imposed. On June 28, 2019, the Board ordered the Appellant to resign within 14 days, or be dismissed and issued oral reasons for its decision (Appeal, pp 8-52).

Hearing on the Allegations

[19] The Appellant denied the Allegations (Material, 1 of 2, pp 801, 813). Accordingly, seven witnesses testified at the hearing. The ERC summarized the relevant portions of each witness' testimony as follows (Report, paras 49-104):

> **a) S/Sgt. DM - Investigator in "X" province**
>
> [49] S/Sgt. DM testified about his policing background and history with the RCMP.
>
> [50] S/Sgt. DM testified that the investigation related to whether or not the Appellant had made a false statement during the investigation into the original allegation. As some of the information relating to the Appellant was in a different province, he reached out to the PSU in the other province to assist in the investigation. S/Sgt. DM testified that it is possible to obtain cellular phone records that could show where someone was generally located at a specific time, dependent on the number of towers a cell provider had in the area and that he did not know if the Appellant and Sgt. TG used their work phones or personal phones to send the text messages to each other.
>
> [51] S/Sgt. DM further testified that the other investigator requested Air Canada information and airport security information relating to the Appellant. They had not sought a production order for further information from Air Canada because it would not be relevant to the case. In his view, it did not contain information relating to when the Appellant checked in his baggage at the airport.
>
> [52] S/Sgt. DM stated that he conducted an audio recorded interview with S/Sgt. AB and got a written statement from S/Sgt. GS, who were both A/COs in "X" Division for the Appellant. He further stated that he obtained any text or PIN messages between the Appellant and Cst. KX from their work phones. S/Sgt. DM testified that he reached out to Supt. CL to contact Cst. KX as he and the other investigator had no success in their attempts to contact him. The letter provided by Cst. KX stated that Supt. CL could contact him if he had any questions. That being the case, S/Sgt. DM contacted Supt. CL to see if Cst. KX would return a phone call from him to obtain some information about the meeting he had with the Appellant. S/Sgt. DM stated this was not a usual procedure, but he believed that other than repeatedly trying, he was out of options to contact Cst. KX (Material, 1 of 2, pages 843-851).

[53] S/Sgt. DM testified that Supt. CL asked for a further investigation after receiving the Investigation Report in July 2018, including an analytical timeline of events. He noted that he was not aware that policy required it to be concluded within seven days. S/Sgt. DM agreed that, at the time he filed the Investigation Report, they had been unsuccessful at contacting Cst. KX. He further stated that the *Code of Conduct* investigator's attempts to meet the service standard of 90 days and that the steps taken in a *Code of Conduct* investigation aren't as extensive. He explained that it was because of a number of factors, including resources; however, matters are taken seriously and they do what they can through their investigative steps, including allowing the member to provide a statement and follow-up statements (Material, 1 of 2, pages 851-863).

[54] S/Sgt. DM testified, on cross-examination, that the supplemental investigation included a timeline of events for March 17, 2017, that was created by an analyst, as well as Appellant's access logs and notebooks for the offices in "Y" province. He testified that they still had not been successful in contacting Cst. KX and that after contacting the coffee shop where Cst. KX and the Appellant met, they were informed that they did not retain their videos for more than 30 days. S/Sgt. DM admitted that he did not think of checking the cell towers to see if the phone was located in the area of the coffee shop at the time the text was sent (Material, 1 of 2, pages 863-868).

[55] S/Sgt. DM testified that he believed Cst. KX's duty status around April 2018 was that he was suspended tor a *Code of Conduct* allegation (Material, 1 of 2, page 870).

b) Sgt. TG - Appellant's Supervisor in "Y" Division

[56] Sgt. TG testified to his approximately 15 years of experience, most of it was in the "Y" Detachment. He testified that he supervised the Appellant a number of times over the years and that he knew him for approximately nine years. He stated that the Appellant was never late, he was a capable investigator and that he gave him difficult tasks that needed to be done competently (Material, 1 of 2, pages 873-874).

[57] Sgt. TG testified that on March 17, 2017, he was working the day shift and had begun his day at another location. He testified that he received a call that Ms. BB was at the "Y" District Office for a meeting with him, and because he believed it was to complain about a member, he made his way to the office immediately. Upon his arrival at the "Y" District Office, he remembers receiving an email on his work phone from Ms. BB, who had copied him on an email she had sent to the Appellant about an award, and about his not being there to meet with her, but he does not remember the specifics. Sgt. TG testified that Ms. BB said that the Appellant had told her that Sgt. TG was going to give her an award and that he could just go ahead and do that. He responded that he could not do that and that the Appellant should have nominated her himself. He further testified that she asked why the Appellant was not responding to any emails, to which he advised that he

had left the province. Ms. BB was upset about this information, and asked why the Appellant would say she was getting an award, and she eventually left the detachment (Material, 1 of 2, pages 875-877).

[58] Sgt. TG testified that he had no knowledge of the meeting prior to being called back to the office. He recalled having had prior interactions with Ms. BB on other complaints she had filed, but never in person. Sgt. TG testified that Ms. BB had previously complained about Cst. KX not taking steps in another traffic complaint she had filed with supporting dashcam footage (Material, 1 of 2, pages 877-880).

[59] Sgt. TG testified that after Ms. BB left the "Y" District Office, he sent a string of text messages to the Appellant in a fit of temper that he acknowledges as being extremely inappropriate. As a result, the Appellant filed a harassment complaint against him for which the Commanding Officer sanctioned him to complete the Respectful Workplace course, as well as the Conduct Authority course. Sgt. TG further noted that, at the time of the events, he had three misconduct allegations resulting from an inappropriate relationship with a subordinate and was on administrative duties. (Material, 1 of 2, pages 880-882).

[60] Sgt. TG next testified to the layout of the "Y" District Office and the exits/entrances of the building, drawing on a map of the layout of the office which was added as Exhibit A (Material, 1 of 2, page 548). He explained that there are a couple of doors that are locked from the outside and, while it is possible to exit through them, it was not a common route since they went through people's offices (Material, 1 of 2, pages 882-887).

[61] On cross-examination, Sgt. TG stated that, as the Sergeant in the "Y" District Office, he would have been responsible for up to, approximately, 19 people with an average night of 200 dispatch calls which fluctuates, depending on the day. He agreed that he had probably forgotten something that someone had told him previously as he was very busy on his shifts. Sgt. TG explained that Ms. BB was a chronic complainer. He anticipated when he was told she was at the office on March 17 that it would be a difficult discussion (Material, 1 of 2, pages 888-892).

[62] Sgt. TG agreed that he had sent the email chain from Ms. BB to his supervisor who suggested that it was possible the Appellant forgot to tell him about the meeting. Sgt. TG testified that he did not believe this was a miscommunication or that he had forgotten about the meeting. He further testified that he did not know if Cst. KX had been reporting to him that day nor if he was in the office that day. Sgt. TG stated that the Appellant would have had to turn in his work phone when he left "Y" Division. However, he had seen people send messages on other "GroupWise" accounts (Material, 1 of 2, pages 894-899).

[63] Sgt. TG acknowledged that one of the *Code of Conduct* proceedings against him included failing to be honest with his supervisor about his relationship with a subordinate (Material, 1 of 2, pages 887-902).

[64] On re-examination from the CAR, Sgt. TG clarified that he would have remembered the meeting if he and the Appellant had previously discussed it. Being called to the meeting would have triggered the memory and he would not have responded with such "vitriol" to the Appellant had the meeting been pre-arranged (Material, 1 of 2, pages 904-905).

c) S/Sgt. AB - Appellant's Supervisor in "X" Division and A/CO

[65] S/Sgt. AB testified that his discussion with the Appellant was a short, casual conversation where the Appellant was seeking information about Supt. CL. He advised the Appellant that Supt. CL was a "straight-shooting guy", as he's been "on the beat" and "knows the streets" with a background in PSU. He told the Appellant he should just admit if he did not provide all the text messages to Supt. CL and be honest. S/Sgt. AB stated that the Appellant told him that his six-year old had deleted the text in question because he saw a bad word in it (Material, 1 of 2, pages 907-912).

[66] S/Sgt. AB testified that, for a time, he was the A/CO of the "X" District Office where the Appellant transferred to, and that on average, he was in charge of 105 people in a very busy office. On cross-examination, S/Sgt. AB testified that, although he did not take notes of his conversation with the Appellant about the text messages, he was quite certain that the Appellant stated his six-year-old deleted the missing text message. He remembered this fact because of the age of the child having the ability to delete a text message. He further testified that he had seen the discrepancy in the text messages provided by the Appellant and that if there had not been a discrepancy, there wouldn't have been an issue (Material, 1 of 2, pages 912-921, 925).

[67] S/Sgt. AB testified that a duty report, entered as "Exhibit B" (Material, 1 of 2, page 549-551) at the hearing, showed the Appellant as being "Off Duty Sick" on June 15, but that he had not yet verified the data with the other systems, including HRMIS to ensure it was accurate, and admitted that the duty report could be inaccurate. S/Sgt. AB testified that while he had sent an email to S/Sgt. GS that the Appellant needed to be "read the riot act" after missing two days of work due to sick leave, but if it was only one day of sick leave, he would change his mind (Material, 1 of 2, pages 921-924).

d) Mr. RS - Card Scanner Technician

[68] Mr. RS is an Information Technology (IT) Team Leader for the RCMP in "Y" Division (Affidavit - Material, 1 of 2, pages 771-774).

[69] Mr. RS identified the Floor Evacuation Plan as the floor plan for the "Y" District Office (Material, 1 of 2, page 775). He testified that if the conference room doors were opened, an alarm would sound. He indicated that he verified that this alarm was functional on March 17, 2017, by running a report for the month of March 2017, which showed the door opening the day before and after March 17. However, he testified that the report indicated that there was no trigger for March 17, which meant that the door was not opened on that day.

e) S/Sgt. GS - A/CO in "X" Division

[70] S/Sgt. GS testified that he served the Notice of Conduct Hearing for the original allegation to the Appellant as he was the A/CO of the detachment at the time. He had discussed the incident with the previous A/CO, S/Sgt. AB, who indicated that it appeared to be a practical joke gone wrong (Material, 1 of 2, pages 964-965).

[71] S/Sgt. GS indicated that when he met with the Appellant, he had the investigation package open on his desk to the pages with the disputed text messages, which were clearly visible to the Appellant. The Appellant displayed no surprise and stated that he knew why he was there. S/Sgt. GS testified that the Appellant stated that he had not included the missing text message because it was embarrassing and unprofessional (Material, 1 of 2, pages 946-949).

[72] S/Sgt. GS testified that Supt. CL indicated that, while he had not made up his mind yet, he was considering a two-day suspension under the *Conduct Measures Guide*. S/Sgt. GS stated that the Appellant was not worried about being dismissed since S/Sgt. AB had already advised him that he was looking at maybe one or two days. S/Sgt. GS did not confirm this information, but advised that he was not facing the loss of his employment. S/Sgt. GS advised the Appellant that he should not lie, that it was very important to tell the truth and "take his lumps".

f) S/Sgt. ML - Investigator in "Y" Division

[73] S/Sgt. ML testified that he had 22 years of policing experience.

[74] S/Sgt. ML identified the Fire Evacuation Plan for the "Y" Division office and identified five security cameras on the building. He drew on the map and identified where the cameras were for the Board (Material, 1 of 2, page 552). S/Sgt. ML testified that Cst. KX was seen entering the "Y" District Office on camera 1, scanning his card, and then camera 2 shows him in the interior of the office. S/Sgt. ML testified that Cst. KX exited the same door he entered (Material, I of 2, page 973).

[75] He further testified that Cst. KX was on "Detachment Services", which is an Administrative Duty Unit, where members who are not fully operational are assigned on restricted duties. It is located at the "Y" Main Detachment, not the "Y" District Office where Cst, KX was seen attending. S/Sgt. ML testified that there are also videos of the "Y" Main Detachment showing Cst. KX entering and exiting that office a few minutes prior to entering the "Y" District Office (Material, 1 of 2, pages 977-978).

[76] S/Sgt. ML testified that he used Google maps to determine an approximate driving time from the "Y" District Office to the "Y" airport, which was 29 kilometres and a driving time of approximately 36 minutes. This method was solely to create an approximation because it was impossible to recreate the exact driving conditions. The resulting travelling time would be under ideal driving conditions; and from his own experience living in the

area and near the airport, 36 minutes would be quite fast (Material, 1 of 2, page 978, 990, 1016).

[77] S/Sgt. ML confirmed with Air Canada that the Appellant checked in one piece of luggage, which meant he had to drop it physically off at the airport. He further testified that Air Canada advised him that the Appellant checked in online and had physically checked one piece of luggage.

Although Air Canada knew the time the Appellant had boarded the plane, that information could not be disclosed without a production order. Such an order was not sought since S/Sgt. DM, the investigator in "X" Division, decided a production order was not needed (Material, 1 of 2, pages 978-982).

[78] S/Sgt. ML testified that there was a related conduct proceeding for Cst. KX at the same time, which is why there is information related to Cst. KX in the investigation log (Material, 2 of 2, pages 986-987).

[79] S/Sgt. ML testified that he had attempted to talk to Cst. KX many times during the course of the investigation and had attended his residence without success. Throughout the entire investigation and parallel investigation, they had difficulty contacting Cst. KX and that he had essentially cut ties with the RCMP. S/Sgt. ML further testified that he had gone to Cst. KX's residence more than is in the report but that it's documented in the other case file, and did not think it was relevant to disclose in this file (Material, 1 of 2, page 996-1001, 1011).

[80] S/Sgt. ML testified that the Appellant had concerns that the fact that there was a *Code of Conduct* investigation being conducted against him was known to other members. There were no formal inquiries into this issue. However the investigators did ascertain that nobody could explain how this information was leaked (Material, I of 2, page 1007).

[81] S/Sgt. ML testified that he believed that Cst. KX was within the "Y' District office on March 17, 2017, al11:51 a.m. due to the time he entered and departed, and being seen at the front counter around 11 :00 a.m. (Material, 1 of 2, pages 1015).

g) The Appellant

[82] The Appellant testified that he joined the RCMP in 2008 and was posted to the "Y" detachment. After his wife was diagnosed with depression and his son with autism, he requested a transfer to "X' province to be closer to their families. He transferred in March 2017 to "X" province (Material, 1 of 2, pages 1024-1025).

[83] The Appellant testified that if he was going to leave the "Y" Detachment building, he would use one of three exits (Material, 1 of 2, page 553) depending on where his car was parked or his destination, including through the conference room doors Mr. RS testified as being alarmed. The Appellant testified that the door was usually unlocked and you could just walk in and

out of the door without having to use a card (Material, 1 of 2, pages 1026-1031). The Appellant drew the exits on the map for the Board.

[84] The Appellant testified that he asked Sgt. TG if he would be willing to meet with a member of the public to nominate them for an OIC Award if he thought they were deserving and Sgt. TG agreed, and asked the Appellant to remind him on his last shift. The Appellant testified that he was sure he told him the meeting was on March 17, on one of his last shifts. He further testified that he tried to make it very clear to Ms. BB that it was just to discuss the award, not that she was receiving one (Material, 1 of 2, pages 1043-1045).

[85] The Appellant indicated that he was supposed to transfer out of the province on March 16, but because of a delay he left on March 17. He testified that he did not attend the meeting because he was worried it would be too long and he did not want to appear rude by leaving in the middle of it. He further stated that he was not professionally dressed as he was dressed for travel. The Appellant testified that he did not know why Sgt. TG believed he was pulling a prank on him, because he would never do that to a supervisor (Material, 1 of 2, pages 1046).

[86] The Appellant testified that he sent an email from Ms. BB to Cst. KX because it was "interesting". In his view, Cst. KX's response of "just epic" was because he found her response to be "to stand out, to be different than what most people respond to when you recommend that they apply to the RCMP". He stated that Cst. KX and him were work friends, but did not see each other socially outside of work. The Appellant returned his work cell phone on his last shift (March 13, 2017) and used only his personal cell phone to communicate after that point (Material, 1 of 2, pages 1048-1050).

[87] The Appellant testified that he was staying at a hotel near his house from March 14 to March 17; his receipt showed he checked out of the hotel at 10:46 a.m. He went to a coffee shop to meet a couple of work colleagues, including Cst. KX, arriving at approximately 11:15 a.m.. The Appellant explained that, while he was at the coffee shop, Sgt. TG texted him rude messages that he did not want to deal with it so he replied "new phone, who's this". He told Sgt. TG that he just got the phone a day ago and that was all the messages the Appellant sent him. The Appellant testified that he showed the texts messages to Cst. KX at the coffee shop to ask if he should file a complaint against Sgt. TG. He briefly left his phone on the table to pick up his order and then grabbed it and left for the airport at approximately 11 :54 a.m. (Material, 1 of 2, pages 1051, 1055).

[88] The Appellant testified that he had checked into his flight online as soon as he was able, and had been to the "Y" airport multiple times on previous travels. When travelling solo, he did not like getting to the airport too early, maybe an hour or 45 minutes in advance and his taxi was driving pretty fast, with no traffic. He stated that it took approximately 20 minutes, contrary to the investigator in "Y' Division's testimony that his Google search resulted in an approximation of 36 minutes. He further testified that the investigator's

search was in 2018, and there were a lot of changes to the roads since 2017 (Material, 1 of 2, pages 1055-1062).

[89] The Appellant forgot to get a receipt as it was the only time he took a taxi during his whole relocation and he would usually rent a car when possible. The Appellant testified that he texted his relocation officer about the missing taxi receipt at 12:20 p.m. while waiting in the CATSA line, approximately a two-minute walk from the taxi drop-off.

[90] The Appellant testified that Cst. KX sent the text message to Sgt. TG "I got a free phone with this shitty book, Dark Resolution" (Material, 1 of 2, page 1063).

[91] The Appellant received an email from Ms. BB in April 2017, asking him why he was not at the meeting and why Sgt. TG knew nothing about it. That was the last he heard of the matter until some members from "Y' Division told him that Sgt. TG had advised them that he had provided a statement to PSU for the complaint Ms. BB filed and a *Code of Conduct* investigation was coming.

[92] The Appellant gave a statement to S/Sgt. DM and he was truthful in that statement. He further testified that he had a conversation with the previous A/CO in his office, where the A/CO told the Appellant to be honest with Supt. CL at the hearing. The Appellant did not want to answer the A/CO when he asked him about the text discrepancies, so he walked away from the office. The A/CO started to follow him down the hallway and asked him more questions, including who deleted the message, and the Appellant told him that it could have been his five-year-old son, who had been known to delete messages from his phone before. In the Appellant's view, the A/CO repeated it as a fact and was clearly not listening that it was just a possibility. The Appellant then went into the bathroom and it was the end of their conversation (Material, 1 of 2, pages 1065-1068).

[93] The Appellant testified that at the time he spoke with the previous A/CO, he did not know what had happened to the text message and his son was five not six. The Appellant stated that he had sent himself an email about the conversation and he had not noticed that the A/CO had not taken notes of their conversation. The Appellant remembered that the A/CO asked him how his son had deleted the message, and the Appellant stated that his son uses his phone for many programs for his autism. The Appellant testified that his son had previously deleted messages from his and his wife's phone with bad words in them, like the "shitty" message, and he did not know the word "fuck" so that's why he wouldn't have deleted those messages. The Appellant further testified he had never used the word "shitty" in a professional context (Material, 1 of 2, pages 1069-1070).

[94] The Appellant testified that S/Sgt. GS, the A/CO who served him with the original allegations' initial *Code of Conduct* investigation materials, asked to see him regarding serving him *Code of Conduct* investigation documents. Although the A/CO had indicated that the Appellant did not need to have a

representative present, he indicated that when he met the A/CO, the latter questioned the Appellant about documents he had on his desk; to which the Appellant responded that he did not want to talk about it. When the A/CO asked him if he was worried about being dismissed, the Appellant was of the view that it sounded like a threat to have him cooperate. Contrary to the A/CO's testimony, the Appellant stated that the former told him that Supt. CL had indicated that the Appellant would receive a few days' forfeiture of pay. The Appellant believed it was some sort of incentive to discuss the issue of the text messages. The Appellant testified that he did not know how the Conduct process worked and was not aware that they could decide the punishment before the hearing.

[95] The Appellant further stated that the A/CO continued to ask him questions. He asked him if he was embarrassed about the message sent from his phone. The Appellant answered that he was embarrassed and would apologize to Sgt. TG. While the A/CO testified that it was a casual conversation, it was actually a 3O-minute interrogation by the A/CO (Material, 1 of 2, pages 1073-1074).

[96] The Appellant confirmed that he has not given any false statements throughout any of the conduct proceedings (Material, 1 of 2, page 1076).

[97] The Appellant stated that he did not attend the "Y" District Office on March 17, 2017, and did not see Cst. KX enter or leave the building (Material, 1 of 2, pages 1078-1079).

[98] On cross-examination, the Appellant agreed that during his meeting with the previous A/CO, he was advised to tell the truth at the conduct proceedings and he explained that his child could possibly have deleted the text message (Material, 1 of 2, pages 1080-1084).

[99] The Appellant testified that he had seen the Conduct Hearing Investigation Report from the original allegation before his meeting with the A/CO and so was not surprised by the discrepancy in the text messages, but could not remember where he had seen Conduct Hearing Investigation Report. The Appellant acknowledged that only one part of his meeting with the A/CO felt threatening, when he asked him if he was worried about being fired, and that the rest of the meeting felt intimidating (Material, 1 of 2, pages 1093-1095).

[100] The Appellant testified that he filed a harassment complaint against Sgt. TG in April 2018, regarding the text messages Sgt. TG sent to him on March 17, 2017. He was surprised to get the text messages from him and that it was unprofessional to pretend it was not his phone, but he wanted to avoid conflict. The Appellant agreed that he did not state in his harassment complaint that he was not the one who had sent the text message that made Sgt. TG swear at him twice; however, he explained that he was confined to the amount of information he could include due to the size of the boxes on the form. He also testified that he was aware of the importance of including

> important information and agreed that police officers should not lie in an investigation (Material, 1 of 2, pages 1095-1110).
>
> [101] The Appellant indicated that he met multiple people at the coffee shop on March 17, however, he had trouble remembering names, and explained that it was because they did not use both first and last names when speaking to each other. He further testified that he remembered other people there, but when he later asked them, none of them remembered being there (Material, 1 of 2, pages 1146-1147).
>
> [102] The Appellant further testified that he tried to call Sgt. TG the morning of March 17, 2017, to remind him of the meeting, but did not leave a voicemail, because he does not like to leave voicemails and texting him did not occur to him. He also stated that he did not email Sgt. TG because he was not a friend and the Appellant did not want Sgt. TG to have his personal email address (Material, 1 of 2, pages 1148-1149).
>
> [103] The Appellant testified that he believed this was "all getting resolved" on that day because that is what Supt. CL had said.
>
> [104] The Appellant testified that he arrived at the airport at approximately 12:15 p.m. on March 17, 2017, and at the coffee shop at 11:15 a.m. When asked why his timing differed from what the one in his response to the allegations, which says 11:30 a.m., the Appellant explained that he was not sure of the time because he did not check his watch but that it was sometime between 11:15 a.m. and 11:30 a.m. The Appellant testified that, as it was a small airport, it was possible that he was in the airport security screening line at 12:20 p.m. when he sent the email to his relocation officer, after leaving the taxi, obtaining the baggage tags for his bag and dropping it off, which he agreed took about five minutes total (Material, 1 of 2, pages 1170-1172).

Conduct Board decision

[20] On October 18, 2019, the Board issued written reasons on both the Allegations and the conduct measures (Appeal, pp 8-52).

Witness credibility and reliability

[21] The Board began by providing the legal test to determine that a breach of section 8.1 of the *Code of Conduct* has occurred, namely (Appeal, p 20):

> 1) the identity of the subject member;
>
> 2) the subject member provided an account of his actions on file;
>
> 3) the account was false, misleading, inaccurate or incomplete; and,

> 4) the subject member knew that the account was false, misleading, inaccurate or incomplete.

[22] The Board noted that, when assessing the testimony of the witnesses, it had to "consider whether he or she is being truthful as well as whether his or her evidence is reliable... and may find a witness's evidence to be truthful but unreliable" (Appeal, p 23).

[23] The Board commented that, in order to assess credibility, it was required to look at the totality of the evidence and had to "consider the impact of the inconsistencies in that evidence and whether, when taken as a whole in the context of the totality of the evidence, they impact the witnesses' credibility" (Appeal, p 23). The Board further observed that "a trier of fact must determine whether the witness's story is consistent with the most probable interpretation of the surrounding facts" (Appeal, p 24).

[24] The Board preferred the testimony of the CAR's witnesses to that of the Appellant. The Board found the "X" Division's investigator to be credible, commenting that he "answered questions directly, did not seek to embellish, and acknowledged where his memory was not clear. His evidence was consistent with the evidence in the record and with that of other witnesses" (Appeal, p 24).

[25] Despite its overall findings, the Board did identify concerns with the reliability of the investigator's evidence with respect to a few narrow topics: he could not recall whether the texts in question had been sent from the Appellant's personal or work phone and he could not recall the details of the "Y" Division investigator's efforts to contact Cst. KX (Appeal, p 24).

[26] The Board noted that Sgt. TG was frank in acknowledging that he was also the subject of a *Code of Conduct* proceeding, unrelated to this matter, concerning an allegation under section 8.1 of the *Code*, wherein he allegedly tried to avoid accountability by not submitting a complete report on his relationship with a subordinate. He also acknowledged that his text messages to the Appellant, sent March 17, 2017, were unprofessional and that he had received a negative performance log as a result (Appeal, p 25).

[27] The Board was satisfied with the credibility of S/Sgt. AB, who was at some point the acting Officer-in-charge (A/OIC) of the Appellant's detachment in "X" Division (referred to as A/CO by

the ERC). The A/OIC provided his statement to the "X" Division investigator on April 23, 2018. His oral evidence at the hearing was consistent with his statement. Despite the A/OIC's consistency, the Board identified some issues with the reliability of his evidence. For instance, his recollection of the precise wording used by the Appellant may not have been as accurate as he insisted (Appeal, p 25).

[28] The Board found Mr. RS to be credible and reliable. He provided clear responses on the functioning of the door alarms and access control at the "Y" Detachment and had no personal interest in the hearing (Appeal, p 26).

[29] The Board found that S/Sgt. GS, the previous A/OIC who served the Appellant with the investigation material on the original *Code of Conduct* allegations, was forthcoming in his evidence; did not minimize or embellish his recollection of interactions with the Appellant; provided evidence consistent with his original statement to the investigator; and, raised no cause for concern with his credibility or reliability. The Board also concluded that the previous A/OIC was able to accurately recount the tone and length of the conversation with the Appellant in considerable detail and was able to aptly explain his actions before, during and after the conversation in question (Appeal, p 26).

[30] The Board did not identify any concerns with the "Y" Division's investigator. The Board found his demeanour was neutral and his responses direct. It did not identify any embellishment and he acknowledged where his memory was not precise. The Board found his evidence to be reliable. The investigator referenced his investigative log when counsel referred him to specific passages, but he did not excessively rely on the log (Appeal, p 27).

[31] Unlike the other witnesses, the Board identified multiple issues with the Appellant's credibility and found that it was not possible to list every single inconsistency raised in his statements and testimony. The Board found that the Appellant's inconsistencies referred not only to his accounting of the discrepancy found in the text messages he provided compared to what was obtained, but to virtually every aspect of the evidence he provided. The ERC summarized a few such examples that illustrate the scope of the issue (Report, para 117):

- The Appellant's accounts changed from one statement to another, both his response to the Investigator and his oral evidence. The Appellant insisted that he would have reopened the investigation in the traffic complaint filed by Ms. BB but for her unwillingness to provide a statement. However, a review of the emails between Ms. BB and the Appellant shows that she offered multiple times to provide a statement and the Appellant did not acknowledge her offer. The Appellant concluded his investigation within 16 minutes of the call being received with a notation that Ms. BB is a "chronic caller" (para. 49);
- The Appellant contradicted himself at least twice about his intent to attend the March 17, 2017, meeting with Ms. BB. In his October 23, 2017, statement, he stated it was his intention to attend, and explained that it was only on the morning of March 17, 2017, when he could not find a rental car that he decided not to attend out of concern he would miss his flight. While in his oral evidence, he asserted that it was never his intention to attend the meeting, as he was scheduled to leave on March 16, 2017, when he set up the meeting. The accounts are irreconcilable (para. 50).
- The Appellant testified to events that were often unsupported by the evidence, such as why he was not surprised by the text messages when speaking to the previous A/CO, because he had previously read the report, which was a new revelation, unsupported by the evidence in the record. The Appellant could not remember how or when he was able to access the Investigation Report before it was served to him (para. 53);
- In his response to the Investigators, the Appellant stated that his conversations with the two A/COs, were "interrogations", but he did not substantiate that characterization. However, in his testimony, he stated that the meetings were "aggressive and confrontational interactions". This was not put to the witnesses during their testimony (para. 54);
- The Appellant provided a very detailed timeline of his activities on the morning of March 17, 2017, in his response to the Investigators, with times precisely noted, up to the minute. In his testimony, the timeline shifted, with him now arriving at the coffee shop at 11:15 a.m. instead of 11:30 a.m. He testified he met with several people, not just Cst. KX, but had some trouble providing their names. The Appellant testified that he arrived at the airport at 12:15 p.m., printed off his luggage tag, dropped off his luggage at the self-serve "bag drop" and made his way to the CATSA line, so the email to his Relocation Services Officer was when he was in the CATSA line at 12:20 p.m., instead of when he exited the cab at the airport (para. 55);
- The Appellant made accusations against other members that were inaccurate or exaggerated, for example, accusing Sgt. TG of making false or misleading statements to the investigator, but upon cross-examination it was revealed that Sgt. TG had not concealed or misrepresented any information. The Appellant also suggested that the A/CO had behaved

improperly when reviewing a report. The evidence showed that the Appellant's suggestions of improper behaviour were speculative at best (para. 56);

- The Appellant omitted the text of 11:51 a.m. in his harassment complaint form against Sgt. TG. The evidence suggests this was done, more likely than not, to lend greater credence to the Appellant's position that Sgt. TG's texts were sent without provocation; and
- The Appellant acknowledged during cross-examination that he was aware of the discrepancy in the text messages when he filed that complaint on March 27, 2018, and his explanation that there was only limited space to type on the form, strains credulity (para. 57).

Sufficiency of the investigation

[32] While the Member Representative (MR) suggested that the investigation was insufficient, the Board found that there was no suggestion that the investigation's flaws created a breach of procedural fairness. The MR highlighted several perceived omissions from the investigation process and argued that they compromised the CAR's case. The MR pointed out that the Record did not contain the phone records that would prove the location to the Appellant's phone; the CAR did not secure a production order for information from Air Canada; and, insufficient efforts were made to obtain a statement from Cst. KX (Appeal, p 31).

[33] The Board concluded that it would be inappropriate to appraise the investigation without a formal motion pertaining to its sufficiency. The Board also emphasized that the question was whether the evidence considered was sufficiently, clear, cogent, and convincing to support the finding that the Allegations were established on a balance of probabilities. The Board concluded that the supposed gaps in evidence identified by the MR did not render the investigation insufficient (Appeal, p 31).

[34] The Board observed that it was unknown whether the Appellant's cell phone records would be available after two years and regardless (Appeal, p 31):

> [A]t best, the information that could have been garnered would have placed [the Appellant's] phone in a general area. The records would not have resolved the question of who sent the message in question.

[35] The Board noted that the Appellant could have requested a supplemental investigation to collect the cell phone records, but he did not. In fact, the Appellant did not even provide the location of the coffee shop; he could not explain why he failed to do so in cross-examination (Appeal, p 31).

[36] The Board also found that the potential evidence to be obtained from Air Canada would not be useful as the information would only confirm when the Appellant checked into his boarding gate, not when he arrived at the airport (Appeal, p 32).

[37] The Board acknowledged that all measures taken to contact Cst. KX were not contained in the Investigation Report and it could not consider that which was not included in evidence. Nevertheless, the Board concluded that the evidence included was not problematic. It showed that the "Y" Division investigator attempted to contact Cst. KX at home during the day, which the Board found to be appropriate because Cst. KX was suspended and was required to check in weekly. Accordingly, the Board concluded it was not unreasonable to surmise that he would be home midday, during the work week (Appeal, p 32).

Events leading up to the March 17, 2017, meeting between Sgt, TG and Ms. BB

[38] The Board concluded that the Appellant's correspondence with Ms. BB did not appear genuine. It provided several reasons for this observation, as summarized by the ERC (Report, para 123):

> 1) despite identifying her as a "chronic caller" on the General Occurrence Report, he suggested she join the RCMP;
>
> 2) he suggested she joins as an Auxiliary Member and would give her a recommendation, but he never contacted the people in charge of the program;
>
> 3) he forwarded an email to Cst. KX from Ms. BB, with a dashcam video attached, to which Cst. KX responded, 'Just epic". The Appellant's explanation that it was in response to the video from Ms. BB is not credible and it was likely in reply to the exchange between Ms. BB and the Appellant. This appears to be a joke between Cst. KX and the Appellant (Appeal, pp 32-33).

[39] The Board further concluded that Sgt. TG would have been unlikely to support Ms. BB for an OIC Award because he had previously warned her about her driving and had made no efforts

to support her documentation of other traffic violations. The Board observed that it was Ms. BB who had copied Sgt. TG onto the email thread with the Appellant, and that the Appellant had not provided any communication to Sgt. TG on this subject.

[40] The Board found Sgt. TG's explanation for his perception of events to be reasonable. He stated that, had he been told about the meeting, it would have "come back to him" when he was informed that Ms. BB had arrived and was waiting to speak to him. Sgt. TG stated he also would not have been so angry with the Appellant were he equipped with foreknowledge of the meeting (Appeal, pp 33-34).

[41] Ultimately, the Board concluded that it was more plausible that the Appellant had played a prank on Sgt. TG and Ms. BB by scheduling the meeting, not attending, and not advising Sgt. TG of its occurrence (Appeal, pp 34).

The Appellant's meeting with S/Sgt. GS, the A/OIC who served him with the investigation material from the original Code of Conduct allegations

[42] The Appellant testified that his conversation with the previous A/OIC was a threatening and "confrontational interaction" where he was ordered to close the door and sit down. He stated that the previous A/OIC coerced him into providing an explanation for the missing text messages or face the threat of losing his job. The Board found this testimony was not credible and observed that it would be illogical that the Appellant would "take the time to document the range of conduct measures mentioned in the meeting, but not make any notation about the nature of such an allegedly intimidating interaction" (Appeal, p 36).

[43] The Appellant testified that he had previously seen the Investigation Report and was aware of the discrepancy in the text messages provided by him and Sgt. TG; however, he testified he did not remember how he had come across the Investigation Report. The Board did not find this testimony to be credible and the Appellant's version of events was not put to the previous A/OIC on cross-examination. Instead, the Board found the A/OIC's version of events to be more plausible in light of his previous experience as a Staff Relations Representative, the Board's ongoing concern with the Appellant's credibility and lack of evidence supporting the Appellant's contention (Appeal, p 37).

Conversation with S/Sgt. AB, the A/OIC who talked to the Appellant about Supt. CL

[44] The Board determined it "unlikely that S/Sgt. AB would have pursued the Appellant from his office into the hall, during the lunch hour in a busy office, repeatedly demanding to know something simply to satisfy a banal curiosity". The Board concluded that the Appellant's version of his interaction with the A/OIC was not credible and calling the meeting an interrogation does not prove that it was one.

[45] The Board noted that it had concerns about the precise wording recalled by the A/OIC. For example, it did not find that the Appellant "unequivocally" stated his son had deleted the text message. Nevertheless, the Board found it "highly implausible" that the A/OIC would have "guessed" that his son may have deleted the text message, without any prompt from the Appellant.

[46] The Board found that it more likely that the Appellant had told the A/OIC that his son had possibly deleted the text message as an explanation for the discrepancy contained in his October 23, 2017, statement (Appeal, p 38).

Written statement of April 2, 2018

[47] The Board determined that the Appellant's proposed timeline of events for March 17, 2018, was not credible. The Board concluded that Cst. KX did not leave the "Y" District Office to meet the Appellant at a coffee shop and that the Appellant did not attend a coffee shop prior to arriving at the airport. Furthermore, the Board found that the Appellant's statement as to why he did not attend the meeting he had scheduled between Ms. BB and Sgt. TG lacked credibility.

[48] The ERC summarized the movement of Cst. KX, which the Board had determined based on the Investigation Report, the analytical timeline, and security footage (Report, para 130):

> [130] The Board found that Cst. KX was in the "Y" District Office at 11:51 a.m., not at the coffee shop with the Appellant as alleged. The Board found that based on the Investigation Report, including the analytical timeline and the security footage, Cst. KX entered the "Y" Main Detachment vehicle gate at 9:46:59 a.m. and left at 10:28:06 a.m. The evidence further showed Cst. KX entering the "Y" District Office at 10:39 a.m., proceeding to the general duty and front desk area. The Board noted that he was seen at the front counter at 11:05:55 a.m. and he appeared to be looking at his phone while a regular member was speaking to Ms. BB. Cst. KX is next seen walking towards the

> west door at 12:37:05 p.m., turning around and returning with his jacket. He exited the offices at 12:38:07 p.m. and re-entered the "Y" Main Detachment at 12:57 p.m. The Board agreed with the investigator in "Y" Division's assessment that it was unlikely that Cst. KX left by another door, which would require him to cross through someone's office or the conference room. The Board further found that, given its overall credibility findings of the Appellant, it did not find his assertion that the conference room door was often left unlocked to be credible. In fact, the Board found that the evidence showed that the "access report showed that the conference room door was not opened or closed on March 17, 2017" (Appeal, pages 40-41).

[49] The ERC then summarized the movement of the Appellant based on his testimony and the relevant exhibits (Report, paras 131-132):

> [131] The Board found that the Appellant had changed his flight from "Y" province to "X" province on March 15, 2017, from March 16, 2017, to March 17, 2017. The Board found that the parties agreed the distance from the Appellant's hotel to the coffee shop was approximately 10 kilometres. The Board found that the Appellant's proposed timeline of events found in his response provided to the investigator in "X" Division not to be credible or reliable. Both his activities and the timeline changed over the course of the Appellant's testimony. The Board found that the Appellant's timeline where he checked out of the hotel at 10:46 a.m.; arrived at the coffee shop at 11:15 a.m.; left the coffee shop at 11:53 a.m.; arrived at the airport at 12:15 p.m.; and was in the CATSA line at 12:20 p.m. to be not feasible. The Board stated that "[i]n order to be feasible, [the Appellant] would have had to pay the taxi driver, exit the taxi, collect his luggage, enter the airport, proceed to the self-serve kiosks where he printed his luggage tags and deposited his bag, and be standing in the CATSA line up within five minutes of arriving at the airport. I do not find this to be a realistic timeline" (Appeal, page 42).
>
> [132] The Board further found that the Appellant asserted that he did not attend the meeting with Ms. BB and Sgt. TG because he was worried about missing his flight, but testified that it was not his practice to arrive early to the airport and there were plenty of other flights that afternoon if he missed the 1:00 p.m. flight. The Board found that the Appellant's accounting of his activities on the morning of March 17, 2017, to be not credible or reliable (Appeal, page 43).

Attempts to contact Cst. KX

[50] The Board found that the "Y" Division investigator made multiple attempts by telephone, email, and in person to contact Cst. KX. The Board determined that the evidence established that Cst. KX had cut off lines of communication with the RCMP as of April 26, 2018. He obstructed

or avoided attempts from the RCMP to contact him or serve him with documents. He did not reply to emails and he could not be reached at the phone number he provided. The Board did not agree with the MR's argument that a negative inference should be drawn from the PSU's inability to obtain a statement from Cst. KX. The Board attributed little weight to the fact that Cst. KX was found not to be credible at his own conduct hearing (Appeal, pp 43-44).

Findings on the Allegations

[51] The Board determined both Allegations that the Appellant contravened section 8.1 of the *Code of Conduct* were established on a balance of probabilities.

Allegation 1

[52] Based on the totality of the evidence, the Board determined that the Appellant knowingly provided incomplete and/or inaccurate information to the investigator in a *Code of Conduct* investigation. The Board found that the Appellant's interaction with Supt. CL established, on a balance of probabilities, that he deliberately omitted the text he sent to Sgt. TG at 11:51 a.m. in his statement to the "X" Division investigator on October 23, 2017.

[53] The Board preferred the evidence of the previous A/OIC to that of the Appellant, and found that the Appellant spontaneously admitted to omitting the text in question, ostensibly because he did not feel it necessary to include the text in a voluntary statement (Appeal, pp 44-45).

[54] The Board ultimately concluded that the Appellant was aware of the omitted text message when he was serviced with the Notice of Conduct Meeting and the Investigation Report. The Appellant's assertion on cross-examination that he had seen the report prior to that date was not supported by the evidence. Accordingly, the Board found that the Appellant knowingly provided a false, misleading, inaccurate or incomplete account while the subject member in a *Code of Conduct* investigation when he deliberately omitted the text from his statement to the "X" Division investigator.

Allegation 2

[55] The Board found that it had sufficiently reliable evidence to conclude, on a balance of probabilities, that the Appellant pulled a prank on Ms. BB and Sgt. TG, with Cst. KX's knowledge. The Board determined that the evidence did not support the Appellant's statement that he had met Cst. KX at a coffee shop prior to his flight (Appeal, pp 45-47). The ERC summarized the evidence that buttressed the Board's findings (Report, para 138):

> a) The video and card log evidence in the Investigation Report established that Cst. KX entered the "Y" District office at approximately 10:40 a.m., on March 17, 2017. He was seen at the front counter at 11:05 a.m., the same time that Ms. BB was waiting for Sgt. TG and was not seen leaving again until 12:38 p.m. The reliability of that evidence was not in question.
>
> b) Based on that evidence, a reasonable inference was made that Cst. KX and the Appellant did not meet on the morning of March 17, 2017. Therefore the explanation provided by the Appellant and the signed statement from Cst. KX are necessarily false.
>
> c) It was more likely than not that the meeting between Ms. BB and Sgt. TG was a prank against Sgt. TG at the expense of Ms. BB and the timing of the email exchange between Cst. KX and the Appellant, as well as the content of the emails forwarded, make it more likely than not that Cst. KX was in on the prank.
>
> d) Preferred the testimony of the previous A/CO of his meeting with the Appellant.
>
> e) The A/CO was a credible witness and that his recollection of the overall tone and scope of his conversation with the Appellant was more credible and reliable.

Conduct measures

[56] Given that there was no witness testimony provided in support of conduct measures, the Board relied upon the evidence filed before the hearing.

[57] In his submissions on measures, the MR advanced that the *Conduct Measures Guide* (*CMG*) delineates a range of 21 days to dismissal for comparable breaches of the *Code* and that the conduct measures should fall within the aggravated range (Material, 1 of 2, p 1293).

[58] The MR contrasted the Appellant's circumstances with those noted in the *CMG* in the aggravated range, including compromising investigations or affecting the rights of a third party,

neither of which occurred in this case. He further submitted that anything in the aggravating range, short of an order to resign would be appropriate in the circumstances (Material, 1 of 2, p 1295).

[59] The MR noted that the Appellant was a member of the Force for 11 years, had an outstanding work record, no prior discipline, and that two of the CAR's witnesses had confirmed that the Appellant was very capable. The MR also provided supporting letters indicating the Appellant would be welcome to work with the authors again. He emphasized that the Appellant had used his time under suspension to volunteer with an organization in "X" Division (Material, 1 of 2, p 1296).

[60] Finally, the MR provided two decisions where the members engaged in deceit but were not dismissed, in support of the Appellant's argument that dismissal was not warranted. The MR argued that the Board could instead impose significant financial penalties of around 60 days' pay and impose an order that Appellant not be allowed to seek promotion for several years (Material, 1 of 2, p 1297).

[61] Meanwhile, the CAR argued that the Appellant should resign within 14 days or be dismissed. She suggested that this is not a case in which the imposition of educative or remedial conduct measures would be appropriate based on the fact that the Appellant was found to have deliberately provided a false account to superiors during an internal investigation. The cases provided by the CAR show that is unacceptable (Material 1 of 2, p 1283).

[62] The CAR submitted that the Appellant was attempting to avoid accountability for his misconduct in two conduct investigations, and so he stood to receive a personal gain from his dishonesty. Moreover, he involved another member in his attempt to avoid responsibility (Material, 1 of 2, p 1288). Given that the misconduct involved two separate allegations, the CAR argued that the Appellant had demonstrated a pattern of behaviour that was deliberate, intentional, and planned; it was not a "spur of the moment" decision (Material, 1 of 2, p 1288).

[63] Finally, the CAR argued that the Appellant's behaviour constituted a breach of the core values of the Force, namely, of honesty, integrity, professionalism, accountability, and respect. The CAR submitted that the Appellant's character is incongruent with his role as a police office,

and there are not sufficient mitigating factors to outweigh the aggravating factors (Material, 1 of 2, p 1292).

Decision on conduct measures

[64] The Board began by determining the available range of conduct measures; then considered the aggravating and mitigating factors; and, applied the appropriate legal principles, such as the principle of proportionality.

[65] The Board consulted the *CMG* and the cases provided by the Parties in order to determine the appropriate conduct measures to impose. It concluded that the range fell between 21 days' financial penalty and dismissal (Appeal, p 49).

[66] The Board weighed the Appellant's 11 years of service and strong performance against instances of a "poor attitude" or "unprofessional style of communication" and determined that these factors reduced the mitigating nature of his strong service record (Appeal, p 50).

[67] The Board also found that the letters of support submitted by the Appellant did not demonstrate that the authors were aware of the specific nature of the contraventions. Accordingly, the Board attributed little weight to them (Appeal, p 50). Nevertheless, the Board listed the Appellant's "demonstrated efforts to support the communities in which he lived, be it through proactive policing initiatives or volunteer activities" as a mitigating factor (Appeal, p 50).

[68] Ultimately, the Board found that (Appeal, p 51, para 160):

> [The Appellant's] misconduct, is at its core, lying in the course of a *Code of Conduct* investigation, in which he was the subject member, in order to avoid accountability for his actions. The importance of the conduct process as a means to maintain public confidence in the RCMP is set out in a number of the decisions cited by the parties. The conduct process serves as a check and balance on the vast powers conferred on police officers. [The Appellant's] misconduct demonstrates a lack of honesty, integrity, professionalism and accountability. Whether by omission or by submitting a false statement, [the Appellant] purposely set out to undermine the conduct process. The prolonged nature and the deliberate planning involved in the Appellant's deceptive behaviour are particularly troubling to me. His actions demonstrate a lack of respect, if not contempt for, the conduct process.

[69] For these reasons, the Board found that it could not retain the Appellant as a member of the RCMP and ordered him to resign within 14 days, or be dismissed (Appeal, p 51). The Appellant was served with the written decision on October 31, 2019.

APPEAL

[70] The Appellant submitted his Statement of Appeal to the OCGA on November 12, 2019, and his appeal submissions on July 16, 2020 (Appeal, p 3; Appeal, pp 109-182).

Appellant's submissions

[71] The Appellant argues that the Board's behaviour has raised a reasonable apprehension of bias; that the Board breached his right to procedural fairness when it did not call two crucial witness and when it held the Appellant to a higher standard of proof than the CAR; and, that the decision is unreasonable because it was unsupported by the evidence. The Appellant also argues that methods employed by the investigator breached his right to procedural fairness. Accordingly, the Appellant seeks full reinstatement, including all pay, benefits, and overtime, that he would have received since the issuance of the decision.

Respondent's submissions

[72] The Respondent provided her submissions to the OCGA on September 3, 2020 (Appeal, pp 211 -278).

[73] The Respondent submits that the Board did not demonstrate aa reasonable apprehension of bias and that the Appellant is taking parts of the decision out of context. The Respondent also submits the Board did not breach the Appellant's right to procedural fairness when it did not call two witnesses. Moreover, the Respondent notes that Appellant knew the witnesses would not be called prior to the hearing and did not object.

[74] Finally, the Respondent argues that the Board properly weighed and considered all the evidence and rendered a decision that was reasonable.

Appellant's reply submissions

[75] The Appellant provided his reply submissions to the OCGA on October 6, 2020 (Appeal, pp 288-299). As noted by the ERC (Report, para 155):

> The Appellant submits that the Respondent is mischaracterizing what the Board found in its decision; is not imputing reasons found in the decision; and is making assumptions which are not supported by the decision itself.

[76] The Appellant also argues that the Respondent did not respond to the investigators' failure to disclose relevant information to the Appellant.

PRELIMINARY MATTERS

Referability and timeliness

[77] I agree with the ERC that there are no concerns in this matter with respect to its referability or timeliness (Report, para 157).

New evidence

[78] Alongside his appeal submissions, the Appellant provided several additional pieces of information, including a picture supposedly showing when he viewed the text messages; an after-the-fact affidavit attesting to the picture's authenticity; and, an email from Air Canada.

[79] The Appellant argues that the picture, and the associated affidavit, shows he first viewed the text messages and allegation with S/Sgt. AB, the A/OIC at the time, on February 24, 2018. He presents this picture to demonstrate why he was not surprised when he later viewed the report with S/Sgt. GS, the A/OIC who served him with it (Appeal, pp 133, 294). The affidavit was included in response to the Respondent's objection to the picture because there was no attestation to its authenticity included (Appeal, p 212). The email from Air Canada indicates the time that the Appellant boarded his flight on March 17, 2017 (Appeal, pp 144).

[80] The Commissioner has discretion when considering what evidence to accept in a conduct appeal. Section 32 of the *Commissioner's Standing Orders* (*Grievances and Appeals*), SOR/2014-

289 [(*CSO (Grievances and Appeals)*] states that the Commissioner "may accept any evidence submitted by a party".

[81] However, subsection 25(2) of the *CSO (Grievances and Appeals)* limits this discretion by stipulating that evidence or information that was not presented to the original decision maker cannot be filed on appeal, unless the evidence or information was not available to the Appellant at the time of the disputed decision:

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

[82] Section 5.3.1.5 of *Administration Manual*, chapter II.3 "Grievances and Appeals" (Appeals Policy) reflects the same limitation as set out in paragraphs 25(2)(a) and (b) 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.

[83] The criteria for determining whether to admit new evidence on appeal is set out in jurisprudence in *Palmer v The Queen*, [1980] 1 SCR 759 (*Palmer*). *Palmer* states that new evidence may be permitted on appeal if:

i. it would be in the interests of justice to do so;
ii. the evidence could not reasonably have been submitted at the hearing;
iii. it is relevant to an issue;
iv. it is credible; and,

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

[84] All of these criteria must be met in order for the additional evidence to be considered on appeal (*David Suzuki Foundation v Canada (Health)*, 2018 FC 379, at paras 13-19).

Picture and affidavit

[85] I agree with the ERC that the picture and affidavit are not admissible (Report, para 169).

[86] The Appellant did not make an initial submission on the picture. He merely included it on appeal as a footnote to his argument about how he knew of the inconsistency in the text messages, to demonstrate that he had taken a picture of the discrepancy at a meeting with the A/OIC in February, 2018.

[87] In response, the Respondent notes that the Appellant did not provide an explanation for the picture and argues that it was reasonable to presume that the Appellant had known about the picture prior to the Board rendering its decision. Moreover, the Respondent points out that the Appellant provided no attestation as to the picture's authenticity in his previous submissions. Finally, the Respondent states that it is illogical to accept that the Appellant was "intrigued" enough to take a picture, but failed to submit this explanation as part of his detailed responses before or at the conduct hearing (Appeal, p 212).

[88] In reply, the Appellant argues that this evidence should be allowed because it supports his testimony, and refutes the Board's conclusion that he was lacking credibility with respect to his foreknowledge of the texts (Appeal, p 289).

[89] In applying the *Palmer* test, delineated above, I find that the document is relevant and cogent to the appeal; however, the Appellant has not satisfied to requirements of due diligence and credibility. The Appellant could have provided the picture to the Board prior to the hearing or before the conduct measures were determined. The picture was in his possession before he replied to the investigation in March, 2019, and has not adequately explain why he did not provide the document prior to this juncture. Moreover, the credibility of the picture and affidavit are untested. Given the myriad of concerns raised with respect to the Appellant's credibility, the document cannot automatically be presumed credible.

Air Canada email with flight boarding time

[90] I agree with the ERC that the email is not admissible (Report, para 175). The Parties did not provide submissions on whether the email should be admitted, but they did speak to its relevance.

[91] The credibility of the email is not disputed as it was sent by Air Canada to the Appellant.

[92] The Appellant did not satisfy the due diligence requirement because he was aware that the March 17, 2017, timeline was in question. The Appellant had the Investigation Report in his possession prior to the conduct hearing and could have requested the information contained in the email if he wanted to place it before the Board.

[93] The relevancy and cogency requirements are not met either. The email speaks to the time the Appellant boarded the flight on March 17, 2017. However, it does not speak to the aspects of the timeline that are in dispute, namely, where the text message was sent from; who sent it; or, where the Appellant was at 11:51 am.

[94] The evidence submitted by the Appellant on appeal do not satisfy the *Palmer* test and so I exclude them from consideration for the purpose of this appeal.

MERITS OF THE APPEAL

Considerations on appeal

[95] The appeal process in conduct matters is not one where the appellant has the opportunity to have their case reassessed *de novo* in front of a new decision maker. Rather, it is an opportunity to challenge a decision already made. When considering an appeal of a decision rendered on a conduct matter, the adjudicator's role is governed by subsection 33(1) of *the CSO (Grievances and Appeals)*, which stipulates:

> 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.

[96] The adjudicator's role will be confined to determining if the appealed decision was reached in violation of the applicable principles of procedural fairness, is tainted by an error of law, or is clearly unreasonable.

[97] When it comes to an appeal of conduct measures, subsection 45.16(3) of the RCMP Act provides the potential outcomes:

> (3) The Commissioner may dispose of an appeal in respect of a conduct measure imposed by a conduct board or a conduct authority by
>
> (a) dismissing the appeal and confirming the conduct measure; or
>
> (b) allowing the appeal and either rescinding the conduct measure or, subject to subsection (4) or (5), imposing another conduct measure.

[98] In accordance with section 5.6.2 of the Appeals Policy, when fulfilling this role, the adjudicator must consider the following documents in their decision-making:

> 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.

[99] The Appellant indicated on his Statement of Appeal that he is of the opinion that the Board's decision was reached in violation of the applicable principles of procedural; was based on an error of law; and, is clearly unreasonable. I will now assess each ground of appeal in the order listed by the ERC and, where necessary, I will provide the respective standard of review.

Breach of procedural fairness

[100] When the Appellant claims that the Board's decision does not respect the applicable principles of procedural fairness, he must demonstrate that the Board did not follow an adequate procedure in reaching its decision, establishing that at least one the following rights have been breached:

- The right to know what matter will be decided and the right to be given a fair opportunity to state his case on this matter;
- The right to a decision from an unbiased decision maker;

- The right to a decision from the person who hears the case;
- The right to reasons for the decision.

Standard of review

[101] On appeal, procedural fairness is assessed on the strict standard of review of correctness, as illustrated by the Federal Court of Canada in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321:

> 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 paragraphs 49, 54 and 56; *Baker*, at paragraph 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).

[102] The Appellant raises two distinct arguments with respect to matters of procedural fairness: an apprehension of bias and a failure to call certain witnesses.

Reasonable apprehension of bias

[103] The Appellant questions paragraph 161 of the Board's decision, which reads as follows (Appeal, p 51):

> Throughout these proceedings, I listened for, but did not hear, any evidence that [the Appellant] is self-aware, recognizes the seriousness of his actions, or takes any personal responsibility in any aspect of the circumstances leading up to this hearing. To the contrary, he perpetuated his deceptive behaviour during the hearing by asserting new facts, not previously received, which I have found to be unsupported by the evidence. I am left without any assurance that [the Appellant] will learn from this experience and that it will not be repeated.

[104] The Appellant cites the Supreme Court of Canada (SCC) decision in *Wewayakum Indian Band v Canada*, 2003 SCC 45, as support for the argument that a reasonable person, upon viewing this paragraph, would believe that the Board did not have an open mind while determining the Allegations and had not decided the matter fairly.

[105] The Appellant also argues that the Board erred in finding that the Appellant had engaged in a prank against Ms. BB. He suggests that the Board should have instead followed the decision made by Supt. CL in the first conduct meeting decision, namely, that the Appellant was respectful when communicating with Ms. BB. Moreover, the Appellant argues that the Board "listened for" the Appellant to admit that the meeting was a prank and used the absence of any such confession as an aggravating factor when determining conduct measures. The Appellant adds that, by "listening" for the Appellant to admit he was conducting a prank, the Board showed a reasonable apprehension of bias as it had pre-emptively decided that he violated the *Code of Conduct* (Appeal, p 114). Finally, he argues that the finding that he had engaged in a prank was made to bolster the Board's credibility finding (Appeal, p 115).

[106] Meanwhile, the Respondent submits that paragraph 161 of the decision does not create a reasonable apprehension of bias and that the Appellant is taking the paragraph out of context. The Respondent agrees that the Appellant identified the correct test for ascertaining whether a reasonable apprehension of bias has been raised.

[107] The Respondent notes that, when assessing an allegation of reasonable apprehension of bias, a decision-maker's words must be consider in context. He notes that paragraph 161 is located under the heading "Decision on conduct measures". The Appellant chose not to testify in the conduct measures phase of the hearing, instead leaving the Board to rely on, among other things, the testimony provided by the Appellant during the allegations phase. The Respondent also argues that the Board's determinations on the aggravating and mitigating factors is entitled to a high level of deference (Appeal, p 214).

[108] The Respondent argues that the Board's proceedings would not cause a reasonable and informed person to find that the Board was unlikely to determine the matter fairly and that the Record provides no indication to support the Appellant's allegation of bias.

[109] The Respondent submits that the Board did not “re-determine the Original Allegation”. The events that preceded the missing text, sent at 11:51, March 17, 2017, were relevant to the Allegations in the Notice of Conduct Hearing. The Respondent argues that the allegation that the Appellant provided false or misleading information during a *Code of Conduct* investigation would necessarily relate to the investigation itself. Accordingly, the Respondent argues that the Board was permitted to consider the Record in its entirety and deal with all evidence as it saw fit (Appeal, p 215).

[110] In rebuttal, the Appellant argues that the Board did not qualify the remarks in paragraph 161, for example by noting that it only reviewed the Appellant’s evidence for an admission of guilt *after* determining that the Allegations were made out. Rather, the Board stated that it listened for an admission of “personal responsibility” “throughout the proceedings”, not after commencing the conduct measures phase. The Appellant states that this demonstrates predetermination and bias (Appeal, p 290).

[111] Finally, the Appellant argues that the Board is not allowed to render an additional finding that he engaged in “deceptive behaviour” based only on the assertion that he presented “new facts… unsupported by evidence” as was done in paragraph 161.

[112] I agree with the ERC that the contents of paragraph 161, as well as the decision in its entirety, do not raise a reasonable apprehension of bias (Report, para 197).

[113] The Parties correctly identified the test for a reasonable apprehension of bias, as confirmed by the Supreme Court of Canada in *Yukon Francophone School Board v Yukon (Attorney General)*, [2015] 2 S.C.R.282:

> [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > … what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly […]
>
> [21] This test — what would a reasonable, informed person think — has consistently been endorsed and clarified by this Court […]

> [22] The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind […]
>
> […]
>
> [25] Because there is a strong presumption of judicial impartiality that is not easily displaced […], the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation […]
>
> [26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias […]

[114] Meanwhile, in *R v S(RD)*, [1997] 3 SCR 484, at paragraph 111, the Supreme Court defined the test for a reasonable apprehension of bias as follows:

> […] This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case […] Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances […]

[115] It is established in jurisprudence that there is a presumption of impartiality that exists for decision makers (see for instance the decisions of the Federal Court and Federal Court of Appeal in *Britton v Royal Canadian Mounted Police*, 2012 FC 1325, at paragraph 36; *Zündel v Citron*, [2000] 4 FC 225, at paragraphs 36-37 [*Zündel*]; *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] FCJ No 509 (CA), at paragraphs 27 and 29. It therefore falls on the Appellant to establish a reasonable apprehension of bias.

[116] The offending paragraph cited by the Appellant is located on page 44 of the Board's decision, under the heading "Conduct Measures". The Board clearly conveyed that it had moved onto the determination of the appropriate conduct measures, after having established that the Allegations were proven on a balance of probabilities. The *CMG* lists as a possible mitigating factor the acceptance of responsibilities for one's actions, and as an aggravating factor a lack of remorse. A reasonable person, informed of the circumstances, would conclude that these considerations are a part of the appropriate determination of conduct measures. Accordingly, they are not indicative of a predetermination of culpability by the Board.

[117] As noted by the Respondent, the Appellant did not testify during the conduct measures portion of the conduct hearing (Material, 1 of 2, pp 1196 and 1282). As a result, the Board was required to rely on the evidence provided during the allegations phase. I agree with the ERC that this is what the Board meant when it said it was "listening throughout" (Report, para 195).

[118] The Board is obligated to consider all the evidence. In the absence of testimony from the Appellant about the conduct measures, specifically with respect to whether he took responsibility for his actions, the Board had no alternative but to consider his testimony during the allegations portion of his testimony. This does not demonstrate a reasonable apprehension of bias on the part of the Board.

[119] The Board took care to carefully and explicitly weigh the mitigating and aggravating factors in this case and explained why the latter outweighed the former, contributing to a finding that dismissal is the appropriate sanction (Appeal, p 50, para 157). The Board emphasized the Appellant's persistent dishonesty was a central factor to determining the Conduct Measures. The Board noted that dishonesty runs contrary to the essential elements of a member's core values including honesty, integrity, professionalism, compassion, accountability, and respect (Appeal, p 51, paras 159-160). The Board's careful deliberation concerning the mitigating and aggravating factors demonstrate that it gave full consideration of the appropriate conduct measures to impose, without any apprehension of bias.

[120] Moreover, the Board did not "re-determine" the original allegations, as the Appellant alleges; rather, it considered the evidence before rendering findings on the allegations. As observed by the ERC (Report, para 197):

> […] Part of this determination included the finding that the Appellant was not at the "Y" District Office during the meeting between Ms. BB and Sgt. TG. Sgt. TG testified he did not know anything about the meeting and he had to explain to Ms. BB that she was not receiving an award, upsetting her, which was particular 4 of Allegation 1 (Appeal, page 46, para. 132) […]

[121] The original Allegation referred to whether the Appellant contravened section 2.1 of the *Code of Conduct* due to failure to treat others with respect and courtesy. The Conduct Authority in that case found that the Appellant had arranged a meeting between Ms. BB and Sgt. TG without informing Sgt. TG that the meeting would occur. The Appellant's actions caused embarrassment for both Ms. BB and Sgt. TG and generated mistrust of the Appellant. The Conduct Authority found this behaviour to be discourteous toward Sgt. TG. The Board did not make any redetermination of the Conduct Authority's findings in its decision, particularly given that particular 4 of Allegation 1 was simply that Sgt. TG had to explain to Ms. BB that she was not getting an award, which in turn upset her. A reasonable person, informed of the context, would not find a reasonable apprehension of bias based on the Board's examination of the relevant evidence.

[122] Finally, as noted by the ERC "[t]he Appellant's argument that the Board cannot find "deceptive behaviour" based on its assessment of the credibility of the Appellant at the hearing must fail" (Report, para 198). The Board was merely attempting to determine whether it could accept remorse or "acceptance of responsibility" as a mitigating factor. Ultimately, the Board determined that it could not identify any remorse, as there was no evidence of this mitigating factor throughout the proceedings. A reasonable person, informed of the situation and viewing the actions of the Board in their entirety, would not find a reasonable apprehension of bias.

The Board erred by failing two call two witnesses

[123] The Appellant argues that the Board's decision not to summon Cst. KX and Supt. CL constitutes a breach of procedural fairness.

[124] The Appellant insists that Cst. KX was a key witness because his written statement is integral to Allegation 2. He alleges that the failure to call Cst. KX is based entirely on the CAR's unsubstantiated statement that he lives outside of the country. The Appellant argues that the Board

should have honoured the CAR's request to call Cst. KX and should have issued a summons in order to do so, even if it would have been "difficult to enforce".

[125] The Appellant also notes that Supt. CL was summoned but advised the Board a few months before the hearing that he was not available to testify, without providing any justification. The Appellant argues that the Board should not have allowed this as Supt. CL's evidence was crucial. For example, the Appellant emphasized the need for testimony on the email that Supt. CL carbon copied to the conduct investigator stating that "dismissal should be contemplated/sought in this matter".

[126] The Appellant submits that the Board's decision not to summon these two witnesses prevented the Appellant from providing evidence to corroborate his defence.

[127] Meanwhile, the Respondent argues that the Board did not err by deciding not to call Cst. KX or Supt. CL to testify because the Appellant never stressed the "crucial" nature of their testimony at the hearing. The Respondent notes that the Appellant did not propose any witnesses and his MR submitted that there was "no evidence in dispute in the Investigation Report and the statement from Cst. KX is not contradicted by any admissible evidence" (Appeal, p 231).

[128] The Respondent notes that, after the CAR advised that she had no further need for Supt. CL's oral evidence, the Appellant also stated he had no need to examine him (Appeal, p 246).

[129] The Respondent submits that the Appellant had ample opportunity, including as part of his response; during the pre-hearing conferences; or, at any time during the conduct proceedings, to illustrate the necessity of the witnesses. He never did so.

[130] Finally, in reply, the Appellant submits that he bore no responsibility to call Cst. KX as a witness; instead, the Respondent bore the burden of proving their case.

[131] The Appellant adds that the Board should have called Cst. KX in order to demonstrate that his statement was a lie. Instead, the Appellant alleges that the Board relied on an uncorroborated statement that the witness was "out of the country". Accordingly, the Appellant submits that the Board did not fulfill the "high degree of procedural fairness" owed to a member facing a potential discharge order (Appeal, p 291).

[132] The Appellant had a responsibility to raise any procedural issue at the first opportunity (*Zündel)*. This principle has been exposed in many decisions, including in *Chrétien v Canada (Attorney General)*, 2005 FC 925, where the Federal Court stated that the party who has experienced, for example, a reasonable apprehension of bias on the part of the decision-maker, must raise this procedural issue immediately before the tribunal "and must not remain silent, relying on such [an apprehension] only if the outcome turns out badly".

[133] In *Zündel* the Federal Court of Appeal held:

> [4] ...AECI's whole course of conduct before the Tribunal constituted an implied waiver of any assertion of a reasonable apprehension of bias on the part of the Tribunal. The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it participated fully in the hearing, and must therefore be taken impliedly to have waived its right to object […]
>
> [8] The appellant further argues that he did not waive his right to object and, indeed, that he did so promptly after the decision in *Bell Canada*, supra, was handed down. I accept that any waiver to be effective must be made freely and with full knowledge of all the facts relevant to the decision whether to waive or not: *Ex parte Pinochet Ugarte (No. 2)*, [1999], 2 W.L.R. 272 (H.L.). ... it seems to me, therefore, that this was not a reason for failing to raise the issue of institutional independence at the outset. instead of doing so, the appellant, who was represented by counsel throughout, proceeded with the hearing before the Tribunal without raising the slightest objection up to the time that he filed the motion of March 31, 1998.

[134] The Appellant had representation from an MR throughout the proceedings. The Appellant and his MR did not raise as an issue that Supt. CL or Cst. KX should be required to appear before the Board, even though they were advised approximately one month prior to the hearing that they would not be called to testify (Appeal, pp 244-246).

[135] Instead, the Appellant chose not to call any witnesses and agreed that it was not necessary to cross-examine Supt. CL when advised that the CAR no longer needed to call him as a witness (Material, 2 of 2, p 924). The Appellant agreed to not having Supt. CL testify; accordingly, no procedural breach occurred.

[136] The CAR originally asked for Cst. KX to appear as a witness but suggested that this may be difficult to achieve as he was thought to be out of the country (Material, 2 of 2, p 924). Now, the Appellant is suggesting that the CAR's statement was incorrect because it was not tested. The Appellant was informed on May 24, 2019, that the Board had determined it did not need to hear Cst. KX's testimony. The Appellant could have objected to the Board's decision at the time but chose not to.

[137] The Appellant participated in the hearing without objecting to the absence of Supt. CL or Cst. KX's crucial evidence. He made submissions about Cst KX's written statement and the lack of oral testimony, again without objecting to his absence. The Appellant submitted that Cst. KX's letter placed the burden on the CAR to prove that the Appellant had sent the disputed text message, but did not state, at the time, that failure to call Cst. KX would amount to a breach of procedural fairness.

[138] I agree with the ERC that the Appellant waived his right to alleged a breach of procedural fairness with respect to the handling of these two witnesses. The Appellant participated "in the pre-hearing conferences, conduct hearings, cross-examining witnesses, testifying himself, and providing submissions" (Report, para 214) The Appellant cannot now allege an abuse of the process when he failed to raise the issue before the Board and is not satisfied with the result of the hearing.

[139] The Appellant also argues that it was not his responsibility to call Cst. KX or Supt. CL to testify. While the Appellant argues that the Board should have called the members, it is the responsibility of the Parties to do so. Section 18 of the *Commissioner's Standing Orders (Conduct)*, SOr/2014-291 [*CSO (Conduct)*] states that the parties must provide a list of witnesses they wish to call, and then the Board establishes a list of witnesses that it will hear and provide reasons for why it may accept or reject any requested witnesses. The Board did just that in May 2019.

[140] The ERC considered this issue in C-2016-005 (C-017). The Adjudicator agreed with the ERC that a conduct board does not have any obligation to call witnesses on behalf of the parties. Here, the Appellant had many opportunities to dispute to the Board's decision not to issue a summons for Cst. KX but chose not to. Upon learning that the CAR no longer intended to call

these witnesses, the Appellant could have requested that they be summoned himself. The Appellant is barred from raising this issue as a ground of appeal because he never objected it in during the PHCs, in his submissions, or at hearing itself.

The Board's decision is clearly unreasonable and unsupported by evidence

Standard of review

[141] While the Appellant argues that the Respondent's decision is based both on an error of law and is clearly unreasonable, I find that his arguments with respect to the Board's findings deal entirely with the Board's appreciation of the facts and inferences made therefrom. Moreover, The Appellant frames his argument that the Board placed a higher burden of proof upon him as a matter of procedural fairness. I find that this argument also refers to the Board's appreciation and of the facts. The standard established at subsection 33(1) of the *CSO (Grievances and Appeals)* for questions of facts or questions of mixed facts and law is whether the decision is clearly unreasonable. I will now examine the applicable standard of review.

[142] In *Canada (Attorney General) v Zimmerman*, 2015 FC 208, at paragraph 45, Justice McVeigh of the Federal Court postulates that "[r]easonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12)."

[143] While considering the Supreme Court decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov)*, Justice Norris of the Federal Court, in *Bell Canada v Hussey*, 2020 FC 795, examined the concept of reasonable decision, underlining the following, at paragraph 30:

> Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The decision maker's reasons should be read in light of the record

> and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-95). When considering whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[144] However, subsection 33(1) of the *CSO (Grievances and Appeals)* dictates that I must determine whether the decision is "clearly unreasonable", as opposed to simply "unreasonable". What exactly is this "clearly unreasonable" standard? The Federal Court, in *Kalkat v Canada (Attorney General)*, 2017 FC 794, and the Federal Court of Appeal, in *Smith v Canada (Attorney General)*, 2021 FCA 73, both accepted that the term "clearly unreasonable" used in the *CSO (Grievances and Appeals)* is effectively the same as the "patently unreasonable" standard, which has long been recognized in jurisprudence.

[145] There is a distinction to make between an "unreasonable" decision and one that is "clearly unreasonable", the latter being the threshold applicable to conduct appeals under the *CSO (Grievances and Appeals).* In *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, the Supreme Court commented as follows on the difference:

> [56] I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
>
> [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. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v Public Service Alliance of Canada*, [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.

[146] The Supreme 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."

[147] My duty here is to determine if the Appellant has established whether the Board, by relying on the evidence (or lack thereof) used to come to its conclusion, rendered a clearly unreasonable decision. In this assessment, I am guided by the words of the majority in the Supreme Court decision in *British Columbia (Worker's Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25 [*BC (WCAT)*]. In this matter, the Supreme Court was called upon to determine whether a tribunal decision was "patently unreasonable", the term used at section 58 of *British Columbia's Administrative Tribunals Act*, S.B.C. 2004, c.45. More specifically, the Supreme Court examined when a tribunal's reliance on evidence can veer into the realm of a "patently unreasonable" decision.

[148] In *BC (WCAT)*, the Supreme Court held, at paragraph 30:

> The Tribunal's conclusion that the workers' breast cancers were occupational diseases caused by the nature of their employment was a finding on a question of fact (*Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 29). That finding is therefore entitled to deference unless Fraser Health demonstrates that it is patently unreasonable — that is, that "the evidence, viewed reasonably, is incapable of supporting a tribunal's finding of fact" (*Toronto (City) Board of Education*, at para. 45). Because a court must defer where there is evidence *capable of supporting* (as opposed to *conclusively demonstrating*) a finding of fact, patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient (*Speckling v. Workers' Compensation Board (B.C.)*, 2005 BCCA 80, 209 B.C.A.C. 86, at para. 37). Simply put, this standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder

> from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder.
>
> [Italics in original, underlining added.]

[149] Finally, in their Recommendation C-013, the ERC held that "whether a decision on appeal was clearly unreasonable for the purposes of subsection 33(1) of the *CSO (Grievances and Appeals)* in the context of an alleged error of fact or mixed fact and law by a conduct authority is a consideration of whether the error was a clear or manifest error that was determinative to the decision on appeal". The ERC therefore recognizes the deference that needs to be afforded to a decision maker achieving conclusions based on an appreciations of the facts.

[150] I must therefore refrain from intervening in the decision unless the Appellant establishes that the Board's decision is tainted by a clear, manifest, and determining error, thereby demonstrating that the decision is clearly unreasonable. It is not enough to merely demonstrate that the reasons provided are *insufficient.* The Appellant must prove that the Board has not only committed an error, but also that the error is such that I have no other choice but to quash the decision. Such is the standard imposed by the *CSO (Grievances and Appeals)*. Accordingly, I must give a high degree of deference to the Board's decision.

Submissions

[151] The Appellant argues that the Board's decision was clearly unreasonable for two reasons:

i. The Board erred by holding the Appellant to a higher evidentiary standard of proof than the CAR witnesses (Appeal, page 116); and
ii. The Board erred by making findings not supported by the evidence.

[152] The Appellant provides several arguments to support his submission that he was held to a higher standard of proof. For one, he notes that the Board did not believe his account of the meetings with the A/OIC because he didn't take notes on it, even though it did not doubt the other witnesses who did not provide notes of the same meetings.

[153] Secondly, he points out that the Board relied on minor discrepancies (15-minute time differences, a year later) in support of its adverse credibility finding. By contrast, the Board did

not object to similar issues from witnesses, including the A/OIC who allegedly made false records of the Appellant's leave.

[154] The Appellant also argues that the Board did not make note that S/Sgt. DM, an investigator in "X" Division, and the A/OIC failed to caution the Appellant before obtaining his statements.

[155] The Appellant submits that it was unreasonable for the Board to claim it would be inappropriate to critique the investigatory methods employed without a formal motion. He contrasted that decision with the fact that the Board critiqued the Appellant for presenting new evidence at the hearing and attributed it little weight because it had not previously disclosed.

[156] The ERC summarized a number of other arguments forwarded by the Appellant in regard to findings made by the Board and how they are baseless, rendering the decision clearly unreasonable (Report, para 221):

- Ms. BB offered to provide a statement multiple times, and the Appellant did not acknowledge the offer (para. 49), even though an email between the Appellant and Ms. BB shows the Appellant asking her for a statement, which she never provided;
- the Appellant had not intended to attend the meeting he arranged between Ms. BB and Sgt. TG (para. 50), even though he testified that he did, and ignored his testimony that it was his inability to obtain a rental car that led to him being unable to attend the meeting;
- the Appellant could not answer on cross-examination how he arrived at the scene of Ms. BB's traffic complaint (para. 51), even though he was not questioned on that fact on cross-examination;
- his oral testimony about his timing on March 17, 2017, he was inconsistent with the information he provided in his response to the Investigation (para. 55), even though the timing in his response was only approximate times;
- the Appellant had trouble remembering the names of the people he met at the coffee shop, along with Cst: KX (para. 55), while in reality he only paused on one name because he was used to only addressing that Cst. by his first name and they did not usually use last names;
- the cell phone records not having answered the question of who sent the text was unreasonable (para. 63), because, the cell phone records would have shown the Appellant was where he said he was and would have bolstered his credibility;

- the time the Appellant checked in for his flight at the gate would not have helped in establishing that his timeline was unreasonable (para. 65) as it would have shown when he boarded the aircraft and would have helped collaborate his timeline;
- the A/CO would not have followed the Appellant during lunch hour in a busy office, repeatedly demanding to know something as a "banal curiosity" (para. 91), even though neither the A/CO nor the Appellant testified that the office was busy. Further, it would not have been "banal curiosity" but a central issue for the Appellant's conduct matter, as it was directly contradictory to the Appellant's testimony that S/Sgt. AB followed him down the hall interrogating him about what happened to the message;
- the investigator in "Y" Division's testimony about Cst. KX's time at the "Y" District Office was correct (para. 102-103), even though the video footage he was testifying about was never disclosed and that it could have shown Cst. KX exiting the office to meet the Appellant as the Appellant testified was unreasonable;
- the Appellant having walked from the hotel to the coffee shop, ten kilometres with his luggage in tow (para. 107), when in fact the Appellant testified that he took a taxi to the coffee shop, and was not questioned further about this trip, was unreasonable;
- the investigator in "Y" Division confirmed that, using Google maps, it was an estimated 36 minutes from the "Y" District Office to the airport (para. 109), even though the Google map search was done a year after the Appellant travelled, and there were significant changes to the roads since then, which the Board ignored, even though the Appellant testified about them;
- it would be unreasonable that the Appellant would have been in the security screening lineup at the airport within five minutes of arriving in a taxi for his timeline to be true (para. 110), when the Appellant testified that the airport in question was small, with only one terminal and providing no justification as to why it did not believe the Appellant's testimony;
- he was inconsistent by testifying he was not concerned with the time he left the coffee shop because he did not like to arrive early to the airport (para. 111). The Appellant testified he did not want to be rude if he had to leave the meeting with Ms. BB early and he was not professionally dressed, since he dressed for travel comfort, not a meeting;
- and the investigator in "Y" Division attempted to get in touch with Cst. KX many times without any success (para. 114), when in fact the investigator did talk to Cst. KX when he called in and all S/Sgt. ML told him was that there were some documents to give him, thereby it is not

> surprising that Cst. KX was not receptive to this vague and unspecified order.

[157] The Respondent argues that the Board's findings are reasonable and supported by the evidence. The Board assessed the credibility and reliability of each of the CAR's witnesses and thoroughly considered all evidence put before it.

[158] The Respondent submits that the Board held both the CAR and the Appellant to the appropriate burden of proof, namely, on a balance of probabilities. He argues that the Board's reason for rejecting the Appellant's account was due to its evolving and shifting nature. The Respondent insists that the Appellant's timeline discrepancies are not minor given that the Appellant's defence was predicated on his ability to meet with Cst KX within an extremely short timeframe.

[159] The Respondent refutes the Appellant's claim that the A/OIC "was found to have made false records". The Respondent notes that the A/OIC conceded that the records he kept on the Appellant's leave may not have been accurate when questioned about their veracity (Material 1 of 2, p 923).

[160] The Respondent points out that the Appellant did not raise the argument that he had not been cautioned prior to providing statements when the matter was before the Board.

[161] Similarly, the Respondent points out that the Appellant had ample opportunity to bring a motion relating to the nature of the investigation and the Record shows that the Board was alive to flaws within the investigation and considered how these flaws impacted the evidence.

[162] The Respondent asserts that the Board was permitted to treat inconsistencies in the Appellant's statements and testimony as a reflection on his credibility.

[163] The Respondent also submits that the Board did not err in its assessment of the previous A/OIC's evidence. While he did not take notes of his meeting with the Appellant, he did provide a statement within a month of the conversation and his testimony was consistent with the statement; the Respondent argues that the assessment of the A/OIC's evidence is a question of mixed fact and law, which requires deference.

[164] The Respondent adds that the Board did not err when finding that Ms. BB did offer to provide a statement, an offer that was ignored by the Appellant as demonstrated by the evidence (Appeal, p 252).

[165] The Respondent argues that the Board did not err when finding that the Appellant's statements and testimony were inconsistent and that the Board sufficiently justified its findings concerning the whereabouts of Cst. KX on March 17, 2017. The Respondent points out that the Board had concrete evidence on this point, including video surveillance and access card records that placed Cst. KX in the "Y" Division Office at 11:51 on March 17, 2017.

[166] The Respondent submits that the Board did not make a manifest and determinative error with respect to its finding of how the Appellant arrived at the coffee shop. While the Appellant testified that he arrived by taxi, the Board had justification to doubt his evidence.

[167] The Respondent refers to the fact that the Board acknowledged the limitations in the testimony provided by the investigator with respect to Google maps. The investigator had noted it was impossible to recreate the travel conditions on that day; accordingly, Google maps was merely used as an estimate of travel time.

[168] The Respondent argues that the Board was within its rights to rely on common sense when it rejected the Appellant's evidence concerning the airport security line-up. The Respondent suggests the Board deserves deference for its decision to reject the Appellant's statement that he did not want to be late for the meeting with Ms. BB while also indicating he was cavalier about missing his flight.

[169] Furthermore, The Respondent argues that the Board made no error with respect to finding that the investigator's attempts to contact Cst. KX were adequate and constituent with the investigative log.

[170] In rebuttal, the Appellant alleges that the Respondent is attempting to read in "common sense" as a justification for the Board's finding when the Board never cited common sense as a reason for its finding with respect to the Appellant's allegedly nonsensical March 17, 2017, timeline.

[171] Finally, the Appellant argues that the Respondent did not address the investigator's failure to release video footage of the main front door at the District Office from March 17, 2017. According to the Appellant, this represents a serious error since it was cited in the Investigation Report, which stated that there are normally no other entry and exit doors at the office used aside from the alarmed emergency exit doors.

Findings

[172] I agree with the ERC that the Board did not err in its credibility assessment of the Parties (Report, para 244). The Board correctly noted that its responsibility was to determine whether the CAR had established the Allegations on a balance of probabilities, and that there is no objective test for sufficiency; rather, the decision must be based on clear and cogent evidence (*F.H. v McDougall*, 2008 SCC 53) (Appeal, p 20, paras 16 and 17).

[173] ln *Huang v Canada (Citizenship and immigration)*, 2018 FC 940 *(Huang)*, the Federal Court of Canada revisited the principle that was canvassed *in Ferguson v Canada (Citizenship and immigration)*, 2008 FC 1067 (*Ferguson*) regarding the relationship between the weight, sufficiency, and credibility of evidence. At paragraph 42 of *Huang* the Federal Court stated:

> The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. Reliability of the evidence is one thing, but the evidence must also have sufficient probative value to meet the applicable standard of proof. A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision-maker. The law of evidence operates a binary system in which only two possibilities exist; a fact either happened or it did not. If the trier of fact is left in doubt, the doubt is resolved by the rule that one party carries the burden of proof and must ensure that there is sufficient evidence of the existence or non-existence of the fact to satisfy the applicable standard of proof. In [*McDougall*], the Supreme Court established that there is only one civil standard of proof in Canada, the balance of probabilities: evidence "must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".

[174] At paragraph 44 the Federal Court went on to note further:

> ...when a trier of fact assesses the weight and sufficiency of the evidence, he or she "is 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). It is not only evidence that has passed the test of reliability (i.e., credible evidence) that may be assessed for weight and sufficiency. 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.

[175] Before analyzing the Board's reasoning in its totality, I note that the Board's decision contains two factual errors.

[176] First, the Board found that the Appellant had not explained how he traveled from his hotel to the coffee shop. The Board assumed he walked and noted how unlikely it would be for the Appellant to walk 10 kilometers, with luggage, in 30 minutes (Appeal, p 42, para 107). In reality, the Appellant testified that he had taken a taxi from his hotel to the coffee shop, but erroneously only claimed for one taxi ride to the airport. No further questions were put to the Appellant on this topic at the conduct hearing (Material, 1 of 2, p 1052).

[177] Secondly, the Board found that the Appellant was unable to explain how he arrived, within 50 seconds of being dispatched, at the scene of the traffic accident that Ms. BB had reported (Appeal, p 28, para 51). In reality, the Appellant was never questioned on this particular issue. The incident report shows that the Appellant was dispatched at 15:56:41 and arrived at the scene at 15:57:50, then cleared it at 16:11:24 (Material, 2 of 2, p 41). The Appellant was questioned about the report and testified that someone else had entered information into the system on his behalf (Material, 1 of 2, pp 1124-1125).

[178] The standard by which I must assess whether the Board had a proper analysis to support its finding is illustrated in *Victoria Times Colonist v Communications, Energy and Papeworkers*, 2008 BCSC 109 (affirmed 2009 BCCA 229), at paragraph 65, where the British Columbia Court of Appeal noted that the task is:

> 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 […]

[179] Here, the two identified errors do not render the decision as having no "tenable line of analysis" to support the decision. These two errors relate to the Board's findings with respect to the Appellant's credibility; however, the Board identified numerous reasons, as mentioned above, for questioning his credibility. The ERC summarized many discrepancies in the Appellant's statements and testimony that contributed to the Board's negative assessment of his credibility (Report, para 248):

> a) the Appellant provided a very detailed timeline of his activities on the morning of March 17, 2017, in his subsection 15(3) response, with times noted precisely, up to the minute and in his oral evidence the timeline shifted by 15 minutes. The Board found that this evolving testimony by the Appellant was not credible (Decision, para. 55, 106, 110);
>
> b) the Appellant was not credible about his interactions with the A/CO who served the Appellant with the original allegations' *Code of Conduct* investigation materials, S/Sgt. GS as, when he was first questioned about his response to S/Sgt. GS showing him the discrepancies in the report, he testified that he had previously seen it but could not explain how or when, which was unsupported by the evidence on the record (Decision, para. 53). The Board further found that for the Appellant to have viewed the discrepancy in the text messages prior to being served the report would have been a breach of the investigation process, and the Board did not believe the Appellant that he had viewed it prior to meeting S/Sgt. GS (Decision, para. 85);
>
> c) following his meeting with S/Sgt. GS, the A/CO who served him with the original allegations' *Code of Conduct* investigation materials, the Appellant had sent himself an email mentioning that S/Sgt. GS had referenced that the Appellant was looking at measures in the range of two to three days. He could not explain why it makes no reference to the fact that it was allegedly an interrogation in which he felt coerced to give an explanation about the text messages under threat of losing his job. The Appellant testified that this was because he had to leave to pick up his children. The Board found this explanation to be "incredible" that the Appellant would note the two to three days, but not the confrontational nature of the meeting (Decision, para. 84). The Board found S/Sgt. GS's version of events more plausible, given the purpose of the meeting, S/Sgt.

GS's background and the other concerns around the Appellant's credibility; and

d) the Appellant's testimony that S/Sgt. AB, the A/CO who discussed the Conduct Authority with him, felt it necessary to engage in such a "forceful interaction" with him because he did not think that S/Sgt. AB "knew how messages got deleted from the phone or how it was possible. I don't know if he's very tech savvy" to be unlikely and that the interaction was more likely the way S/Sgt. AB described, finding the Appellant's version not to be credible (Decision, paras. 89-92).

[180] I agree with the ERC that the discrepancies highlighted by the Board and the shifting nature of the Appellant's testimony clearly show a rational and tenable line of analysis to support a conclusion that the Appellant lacks credibility. The two errors identified do not undermine the decision such that it would now be considered irrational. The entire analysis of the Appellant's credibility does not rely on these two erroneous conclusions, and so they do not constitute fatal flaws in the overall decision of the Board.

[181] It is also relevant that the Appellant acknowledged that the CAR witnesses called at the hearing were credible and that he explicitly accepted the credibility of each witness (Material, 1 of 2, p 1224). He even commented that the Investigation Report was completely credible and reliable (Material, 1 of 2, p 1232).

[182] The Appellant's argument that there are credibility issues with the report contradicts his submissions at the conduct hearing. The Appellant did not dispute the credibility of the witnesses at the hearing. Accordingly, he cannot now state on appeal that they should not have been considered credible or that they were held to a different standard of proof after acknowledging otherwise.

[183] The Board explicitly acknowledged that it was required to determine the truthfulness of witnesses and consider whether their evidence was reliable, on a balance of probabilities, in the context of the totality of the evidence. The Board stated that when inconsistencies impact a witness's credibility, the probability of the facts sworn to cannot be determined solely based on a witness's demeanour, but also whether there is an air of reality to their statement, such that it has "the clear ring of truth to it" (Appeal, pp 16-17, paras 25-30).

[184] The Board found that the A/OICs were both credible and the Appellant himself agreed. I find that it was reasonable for the Board to make this finding given the consistency between their responses one month after the interactions and then again before the Board.

[185] While the Appellant argues otherwise, the Board clearly considered the credibility of one of the A/OICs' testimony, namely S/Sgt. AB. The Board identified concerns with his recall of the words used by the Appellant in their meeting (Appeal, p 25, para 40). This demonstrates that the Board did in fact assess the credibility of each witness and held them to the same standard of proof as the Appellant. Moreover, the Appellant's statement that S/Sgt. AB "was found to have made false records" is not supported by the Record. The latter merely acknowledged that his records may not have been accurate when questioned about their veracity (Material, 1 of 2, p 923). Clearly, S/Sgt. AB was not trying to mislead the Board about these records, nor do those records relate to the Allegations. The records referred to the Appellant's attendance records; S/Sgt. AB testified that he was unaware if they had yet been double-checked for accuracy. There was no error in the Board's analysis pursuant to S/Sgt. AB's credibility. The Appellant's attempt to characterize this sidebar as "making false records" is inaccurate.

[186] The Appellant now argues that the Board gave more weight to the CAR's witnesses and failed to address perceived flaws in the investigation. Yet, during the hearing, the MR only raised three issues with the investigation, namely, failure by the investigators to:

> [O]btain the Appellant's telephone records; obtain information from Air Canada; and failure to document the times they attempted to contact Cst. KX in the Investigation Report, which shows times only during the week and during working hours.

[187] The Board addressed these "perceived gaps" raised by the MR at the hearing and in its decision. The Board found that they were not the critical flaws the MR portrayed them to be (Appeal, p 31, paras 61-66).

[188] The Appellant could have recalled the CAR's witnesses at the hearing to address any further questions arising from his own testimony. He opted not to. He cannot now fault the Board for not recalling the witnesses when they were neither requested or necessary. The Board did not err in this respect. The Board weighed the evidence and it is not my responsibility to now re-weigh

that evidence on appeal. The Appellant is required to demonstrate that the Board made an error with respect to the witness testimony and the Appellant has not discharged that burden.

[189] It was reasonable for the Board to draw a negative inference from the shifting timelines provided by the Appellant when comparing his testimony to his written response provided under subsection 15(3) of the *CSO (Conduct)* (Appeal, p 29, para 55). While the Appellant may claim that his response was an approximation, the timelines he provided go to the core of his defense against the allegation that he falsely denied sending the disputed text message. He changed many facets of his timeline including a 15-minute inconsistency, a change of his location from where he sent an email to his relocation officer, as well as the identify and number of other people with him at the coffee shop. The Board did not err when it determined that the Appellant's evidence changed over time.

[190] It was not necessary for the Board to cite "common sense" as a reason to find that the Appellant's testimony was not credible, considering the thorough and detailed analysis of its credibility assessments (Appeal, p 41, paras 104-111). According to the Federal Court (*Aguilera v Canada (Minister of Citizenship and Immigration),* 2008 FC 507, para 40, citing *R.K.L. v Canada (Minister of Citizenship and Immigration*), 2003 FCT 1 16, [2003] F.C.J. No. 162 (QL) at paras 9-11):

> [N]ormally, the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms".

[191] For example, the Board had sufficient evidence to support the finding that Ms. BB offered to provide a statement to the Appellant. The Record shows that MS. BB asked the Appellant to confirm whether he required a report; the Appellant never responded to her request (Material, 2 of 2 pp 87, 88). The Record demonstrates that the Appellant ignored the question. Accordingly, the Appellant's assertion that he asked for a statement but never received an answer is directly contradicted by the evidence. The Board did not err in its finding on this matter, nor did it err in relying on its finding, in part, to draw a negative inference as to the Appellant's credibility.

[192] Nor did the Board err with respect to its handling of the cell phone records. The Appellant could have contested their absence before the conduct hearing, as he had already requested a

separate supplemental investigation (Appeal, p 31, paras 63, 64). The Board correctly noted that these records may not be available two years later and, regardless, they would not have resolved ultimate question of who sent the text message. The Appellant may now allege that they would have bolstered his credibility, but it was his responsibility to ask for them and it was not unreasonable for the Board to conclude that these records would not have resolved any evidentiary dispute.

[193] I also agree with the Board that confirming the Appellant's check-in time would not bolster his credibility. There was no dispute as to when the Appellant was on the plane. The relevant question is where the Appellant was between 10:45am (when he checked out of his hotel, and 12:20 (when he sent an email to his relocation officer from the airport. Evidence that he boarded the flight at 12:35 does not speak to the relevant gap in time. The Board did not err in finding that Air Canada's evidence was irrelevant (Appeal, p 32, para 65).

[194] The Appellant's statement that neither he nor S/Sgt. AB, the A/OIC, testified that the office was busy at the time of their meeting is inaccurate. S/Sgt. AB testified that the office was a large and busy one, at the busiest airport in Canada (Material, 1 of 2, p 915). Accordingly, the Board did not err when it concluded that the day the Appellant and S/Sgt. AB met was a busy one. Nor did the Board err in findings that it was unlikely that S/Sgt. AB would chase the Appellant in order to satisfy a "banal curiosity" given that he had no personal involvement with the ongoing conduct matter as it related to the original allegation.

[195] The Appellant alleges that the investigator did not disclose all videos. On January 31, 2022, the ERC requested clarification on this matter. On February 18, 2022, they were advised of the following (Correspondence with OCGA, Feb. 18, 2022):

> [T]that [Sgt. D.H.] ha[s] looked into this matter further and believe there may have been a misunderstanding in this instance concerning the surveillance footage. The use of the wording, "surveillance video covering the front main door" was used in a general sense by the investigator in his report to describe the footage. The list of video surveillance footage as noted in the Appellant's counsel's email is the full list of videos that exist in this matter, all of which were previously disclosed to the Appellant.

[196] The Board clearly explained that it relied on the Investigation Report, as well as the video and audio recordings submitted. The Board concluded that this evidence was more credible than the Appellant's testimony (Appeal, pp 40-43). The evidence supports the Board's conclusion and so I find no error in this respect.

[197] The Board's finding that Cst. KX was deliberately not responding to investigators and the RCMP is supported by the Record (Appeal, pp 255-278). I agree with the ERC that the Appellant is making excuses for Cst. KX's behaviour without providing any evidence to dispute the Board's finding that Cst. KX was deliberately making himself unavailable.

[198] Finally, the Appellant never raised during the conduct hearing the issue of not receiving a warning before providing statements. He did not provide a submission on this subject, so he never afforded the Board an opportunity to rule on it. As noted previously, the Appellant has an obligation to raise arguments at the first instance. The Appellant cannot withhold them only to raise them on appeal. He is precluded from doing so; therefore, I will not speak to this submission.

[199] Based on the foregoing, I find that the Board's decision was supported by the evidence. Accordingly, it was not clearly unreasonable.

DISPOSITION

[200] Pursuant to paragraph 45.16(1)(a) of the *RCMP Act*, the appeal is dismissed and the conduct measure imposed by the Board is confirmed.

[201] 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*.

September 14, 2022

Nicolas Gagné
Recourse Appeal and Review Adjudicator

Date