

CONCLUSION OF PROCEEDINGS

Pursuant to s.133(6) of the *Police Act*, RSBC 1996 c.367

OPCC File 2015-10371
August 15, 2022

To: Mrs. [REDACTED] and Mr. [REDACTED] (Complainants)

And to: [REDACTED] (former Member)
c/o Richard Peck, Q.C.
Peck and Company Barristers

And to: His Worship Mayor Kennedy Stewart (Chair, Vancouver Police Board)
Mayor, City of Vancouver

And to: The Honourable Justice Wally Oppal, Q.C. (Discipline Authority)
Retired Justice of the BC Court of Appeal

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

Background

From May 26, 2014, to May 30, 2014, a Public Hearing took place into the conduct of then Vancouver Police Department (VPD) Constable [REDACTED]. The Adjudicator, Mr. William Smart, QC, found that Constable [REDACTED] committed allegations of *Deceit* and *Neglect of Duty*. On October 31, 2014, Adjudicator Smart issued his decision in regards to appropriate disciplinary or corrective measures for Constable [REDACTED]. As part of this proceeding, [REDACTED] in his capacity as a participant in the Public Hearing, submitted correspondence in the form of a letter to Adjudicator Smart in support of the position that dismissal of Constable [REDACTED] was the only workable and appropriate discipline.

Adjudicator Smart noted that Constable [REDACTED] counsel and union agent took issue with the contents of [REDACTED] letter and the description or characterization of many of the referred incidents. He concluded that the appropriate and just discipline in the matter was a suspension for a total of 40 working days.

In his decision, Adjudicator Smart commented on the letter submitted by [REDACTED] with the following:

The opinion of a [REDACTED] and the evidence he or she may be able to present at a disciplinary hearing can provide valuable assistance to an adjudicator. Doing so also ensures that an adjudicator appreciates the impact their decision may have on that Police Department. It is self-evident, however, that any opinion and evidence from a [REDACTED] is expected to be balanced, fair, complete and accurate.

The letter provided by the [REDACTED] is [sic] this case failed to meet those expectations. Its preparation was delegated to others. This is understandable given the [REDACTED] many other responsibilities. My criticism is not directed at the [REDACTED] personally but rather at the Department and is meant to encourage the Department to exercise more care in the future.

On January 23, 2015, the Office of the Police Complaint Commissioner (OPCC) received a copy of Mrs. [REDACTED] and Mr. [REDACTED] (Complainants) registered complaint describing their concerns with [REDACTED] of the VPD. The Complainant's concerns arose during the course of the Public Hearing involving their son, Constable [REDACTED] in September 2014.

The Complainants alleged that some of the information provided in the letter submitted by [REDACTED] was misleading, inaccurate, and untrue. They alleged that [REDACTED] comments were made for the sole purpose of attempting to mislead the Adjudicator in support of his submission that Constable [REDACTED] should be dismissed. They noted the comments of Adjudicator Smart, which stated that any opinion from a [REDACTED] should be balanced, fair, complete, and accurate.

On February 12, 2015, the OPCC determined that the complaint was admissible based on information contained within it, as well as information which came to the attention of then Police Complaint Commissioner Stan Lowe (former Commissioner) from the VPD and the Public Hearing itself. The conduct was potentially defined as *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* and the *Notification of Admissibility of Complaint* included [REDACTED] as well as [REDACTED]

Investigation

[REDACTED] (now retired) of the Burnaby RCMP was appointed as the external *Police Act* investigator (Investigator). On May 31, 2016, the Investigator submitted the Final Investigation Report (FIR) to the Discipline Authority. The FIR concluded that [REDACTED] "signed a submission letter that was a product of a flawed business process which lacked clear accountabilities, professional research, and sourcing of material along with a superfluous editing process". The Investigator commented that "the submission letter was a collective effort and an organizational failure and not the product of a singular person, including [REDACTED] .

Pursuant to section 135(2)(b) of the *Police Act*, retired judge Mr. Ian H. Pitfield was appointed by the former Commissioner to exercise the powers and perform the duties of the Discipline Authority in relation to this matter.

Discipline Authority Decision

On June 10, 2016, Mr. Pitfield, as the Discipline Authority, issued his decision in relation to the allegation of *Discreditable Conduct* against ██████████ pursuant to section 112 of the *Police Act*.

In his decision, Mr. Pitfield conducted a review of the evidence contained in the FIR. Mr. Pitfield commented that it was clear that ██████████ *“was involved in and supported the decision to urge dismissal of Constable ██████████. Mr. Pitfield further commented that “The decision to write a letter to the adjudicator and the subject matter with which it was concerned were not routine and every day matters with which ██████████ and his executive were customarily involved”.*

Mr. Pitfield was concerned that there was nothing he could see to suggest that ██████████ *“consulted with Mr. ██████████ or anyone else regarding obligations he might have to deal fairly and objectively with the employee whose dismissal he was seeking”.* Mr. Pitfield was also concerned that he could find nothing in the FIR and related material *“indicating that anyone at the senior levels of the VPD advised ██████████ to be cautious and to be fair and objective when writing to the adjudicator”.* Mr. Pitfield noted that the Adjudicator stated *“it self-evident that the opinion from a ██████████ be balanced, fair, complete and accurate.”* Mr. Pitfield felt that this was *“overlooked or forgotten by all involved in the letter-writing process”.*

Mr. Pitfield outlined the exchange of correspondence between ██████████ and the ██████████ ██████████. Constable ██████████ had pointed out numerous errors to ██████████ and called the letter *“misleading, dishonest and a misrepresentation of the facts”.* Mr. Pitfield further commented that *“Little if anything appears to have been done by anyone on the ██████████ direction or otherwise to fully consider the concerns raised by Constable ██████████”.*

In making his determination on the allegation, Mr. Pitfield commented:

“In my opinion, both the public and members of the VPD would expect that the ██████████ would not sign a letter regarding an employee that was unbalanced, inaccurate in important respects, and considerably short of a fulsome assessment of a member’s overall performance when that performance, separate and apart from the member’s conduct giving rise to the defaults he had been found to commit, was alleged to support the most serious of sanctions, namely, the termination of employment.”

“It is well known and accepted that a disciplinary authority’s decision under the Police Act is to be made fairly and objectively. In order that that be done, full, fair, and frank disclosure of all the relevant circumstances is expected from those connected to the issue. It is for that reason that the adjudicator stated that it is “self-evident that the opinion of a ██████████ must be balanced,

fair, complete and accurate." The letter emanating from ██████████ in this case did not meet the threshold requirement".

Mr. Pitfield did not share the view that "deficiencies in the process by which the letter evolved can excuse accountability". Mr. Pitfield further stated that "A responsible approach to the development of a letter to the adjudicator need not have been a challenge" and noted that Constable ██████████ VPD records were readily available from several departments.

Mr. Pitfield determined:

"Having regard for all of the evidence accumulated by the RCMP investigation as contained in the FIR, it appears that ██████████ determination to procure the dismissal of a VPD employee resulted in a departure from the expected norm and the compilation of an incomplete, sub-standard and unbalanced portrayal of Constable ██████████ history with the VPD".

"The ██████████ is the "boss". He was an eager supporter of dismissal in this case. He provided direction to and participated in a seriously flawed business process throughout. He did not act to correct or alleviate the flaws when they were pointed out to him. It appears that the allegation of misconduct against ██████████ may be substantiated".

Mr. Pitfield offered ██████████ a prehearing conference with a written reprimand as the disciplinary or corrective measure being considered. ██████████ declined this offer.

Judicial Reviews

On September 22, 2016, the respondent members, ██████████ and ██████████ filed a petition with the Supreme Court of British Columbia requesting that the court quash the decisions of the former Commissioner and Mr. Pitfield as Discipline Authority.

On August 2, 2019, the Honourable Madam Justice Choi issued her decision on the matter. Madam Justice Choi dismissed the petitions on the basis of prematurity. The court noted that the administrative process has not yet "run its course" which is a process the legislature designed to occur in full first before judicial review.

Madam Justice Choi concluded:

"In the case at bar, none of the PCC's four decisions under review are decisions on the merits. The PCC did not determine whether any misconduct was substantiated. They were decisions made to move the administrative process forward. While Discipline Authority Pitfield's decision was on the merits, the discipline proceeding is not concluded. I must, therefore, find that the petitions are premature and must be dismissed".

██████████ and ██████████ appealed the decision of Madam Justice Choi to the Court of Appeal for British Columbia (BCCA). In their decision dated April 29, 2021, the BCCA upheld the decision of Madam Justice Choi and dismissed both appeals. The Honourable Mr. Justice Abrioux writing for the unanimous court stated:

“Furthermore, the timing of these appeals cannot be ignored. The s. 82 decisions the appellants now challenge date to February 12 and 13, 2015. Despite this, they raised no objections until they received unfavourable decisions from the respective DAs, on June 10, 2016 in the case of [REDACTED] and July 28, 2016 in the case of [REDACTED]. They then waited several months before seeking judicial review, a process that has been ongoing since September and December 2016 respectively. It has been over six years since these proceedings began, and still no resolution is in sight. These appeals illustrate, as well as any, the dangers of prematurely seeking judicial review of ongoing administrative proceedings.”

Discipline Proceeding

Pursuant to section 123(1)(a) of the *Police Act*, the Discipline Authority must hold and preside over a discipline proceeding in respect of the matter. Given the passage of time while the respondents sought judicial review before the Supreme Court and Court of Appeal, Mr. Pitfield was no longer able to continue in the role of the Discipline Authority for [REDACTED]. Therefore, on August 28, 2019, Mr. Wally Oppal, QC, was appointed as the new Discipline Authority.

In relation to [REDACTED] role in the matter, an informal Complaint Resolution (CR) was proposed pursuant to section 157 of the *Police Act*. On February 3, 2022, my office issued a *Confirmation of Complaint Resolution* letter confirming that the resolution reached was adequate and appropriate to the circumstances and advised that we would take no further action as it relates to [REDACTED] involvement.

From February 23 to February 24, 2022, the Discipline Proceeding commenced in front of Mr. Oppal. [REDACTED] provided evidence based on his investigation and conclusions he had reached. In addition, [REDACTED] provided evidence regarding his role in the matter. No other witnesses were called or gave evidence at the Discipline Proceeding.

Pursuant to section 113 of the *Police Act*, the Complainants filed submissions in support of a 20-day suspension for [REDACTED]. The Complainants submitted that the actions of [REDACTED] not only had a negative impact on the VPD but also on their son. They further submitted that [REDACTED] actions not only destroyed their son’s professional career and reputation, but his actions bring a lack of integrity and credibility to the VPD.

On May 30, 2022, Mr. Oppal issued his decision. Based on the whole of the evidence before him, he found that [REDACTED] did not commit discreditable conduct stating:

“There is no statutory provision under the Act, which governs the duty of a [REDACTED] in relation to writing a letter to a Discipline Authority. The receipt of any letter in a hearing is in the discretion of the Disciplinary Authority to act reasonably in determining whether to accept or reject the letter as admissible written evidence. I do think however, that there is an implied duty for a person in the position of a [REDACTED] to be accurate in a letter that would have the potential to affect the career of an officer. In this case, the letters did contain inaccuracies,

however, those inaccuracies were brought to the attention of Adjudicator Smart by counsel and by [REDACTED].

The Office of the Police Complaint Commissioner (OPCC) completed its review of the decision issued by the Discipline Authority pursuant to section 133 of the *Police Act* in this matter.

The Complainants and [REDACTED] were provided a copy of Mr. Oppal's findings in relation to the allegation of misconduct and were informed that if they were aggrieved by either the findings or determinations they could file a written request with the Police Complaint Commissioner to arrange a Public Hearing or Review on the Record.

Request for Review on the Record

On June 30, 2022, the Complainants submitted a request to the Commissioner for a Review on the Record. In their request, the Complainants outlined that the letter in question was described at many judicial/quasi-judicial levels by numerous individuals as inaccurate. They submitted that Mr. Oppal failed to address this crucial component and failed to address that [REDACTED] had the inaccuracies pointed out to him by Mr. [REDACTED] prior to the submission of the letter.

The Complainants further stated that Mr. Pitfield's comment regarding factual inaccuracies and omissions not being corrected despite the VPD union alerting [REDACTED] "*carried an incredible amount of weight throughout the investigation and FIR and was a considerable decision-making point for [sic] Hon. Pitfield*". They noted that this was not considered within Mr. Oppal's decision.

The Complainants further submitted that the issue in this matter needed or ought to take into consideration if the letter was accurate. However, based on Mr. Oppal's decision advising that the issue is "*whether there is a duty on the part of a [REDACTED] to provide a submission to an adjudicator in a disciplinary matter that is neutral, fair or balanced*", the Complainants stated that this part of the decision "*clearly indicates the presiding issue in his decision is not based on whether [REDACTED] letter was untrue, inaccurate or misleading*" (emphasis theirs). The Complainants disagreed that fairness was achieved because there was representation by counsel, fairness should have been achieved by providing an accurate letter.

Furthermore, the Complainants disagreed with Mr. Oppal that there are "*no statutory provisions under the Act*" which governs the duty of a [REDACTED] when writing a letter to a Discipline Authority as the Act has clear "*statutory provisions*" when preparing official documents or reports, namely *Deceit* pursuant to the *Police Act*. Lastly, the Complainants provided that Mr. Oppal failed to address an official document on this matter in his decision related to the CR process involving [REDACTED].

Commissioner's decision

Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner:

- (c) considers that there is a reasonable basis to believe that
 - (i) the discipline authority's findings under section 125 (1) (a) are incorrect, or
 - (ii) the discipline authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128 (1), or
- (d) otherwise considers that a public hearing or review on the record is necessary in the public interest.

In reviewing the previous decisions made by various retired judges in this matter, including that of Adjudicator Smart at the original Public Hearing, it is clear that the process in drafting the letter in question and the review mechanisms in place was significantly flawed. Adjudicator Smart commented that “*My criticism is not directed at the [REDACTED] personally but rather at the Department and is meant to encourage the Department to exercise more care in the future*” and Mr. Pitfield stated “*[REDACTED] provided direction to and participated in a seriously flawed business process throughout*”. In addition, the Investigator opined that “*the submission letter was a collective effort and an organizational failure and not the product of a singular person, including [REDACTED]*”.

Based on a review of the available evidence, we do not find a reasonable basis to believe that the decision of Mr. Oppal is incorrect. The drafting of the letter in question was the result of the input of a number of members of the VPD executive with legal advice.

As noted above, two retired judges and a senior external Investigator all provided their comments in relation to the department exercising more care, the “seriously flawed business practice”, and “organizational failure”. While these conclusions speak for themselves, they were either preliminary decisions in the investigative process, or comments made outside of the Discipline Proceeding involving [REDACTED]. Mr. Oppal, as the ultimate Discipline Authority, had the benefit of hearing directly from the Investigator, [REDACTED] himself, and reviewing submissions made by the parties. Mr. Oppal had the benefit of the totality of the evidence before him.

In consideration of the Public Interest factors contained in section 138(2) it must be acknowledged that the lengthy delay in the hearing of this matter before a Discipline Authority, is concerning and unfortunate. With specific regard to section 138(2)(b), this matter clearly placed ongoing emotional harm upon the Complainants while they awaited accountability regarding the actions of two very senior police officers. However, parties to police discipline matters have a right to seek judicial review and challenge the decisions of this office or appointed adjudicators. In this case the respondents pursued their rights vigorously but were ultimately unsuccessful.

With regard to section 138(2)(a) in considering the nature and seriousness of the complaint or alleged misconduct, there is no doubt that the nature and seriousness of this matter is significant. A police officer’s career was significantly impacted and their employment rights impugned. As noted above through the comments of the retired judges in this matter, the public should expect senior leaders to act reasonably and fairly at all times and exercise due care and supervision over the Human Resource processes of their organization.

Notwithstanding the foregoing, this matter has been fully reviewed before a retired member of the judiciary arm's length from this office. As noted, after hearing evidence and submissions he decided that the conduct in this matter of [REDACTED] did not amount to misconduct. There is therefore no reasonable prospect that a further proceeding will change that outcome.

Therefore, upon review of the totality of the matter and in consideration of all of the factors listed in section 138(1) & (2) of the *Police Act*, the Commissioner has determined that the evidence is not clear, convincing, and cogent to establish a reasonable basis to believe the decision is incorrect nor is a Public Hearing or Review on the Record necessary in the public interest.

Therefore, there are insufficient grounds to arrange a public hearing or review on the record in the circumstances. The Police Complaint Commissioner has been briefed on this matter and has made this determination.

The decision to conclude this matter is final and this office will take no further action.

[REDACTED]

[REDACTED]

Director - Oversight Operations

cc: [REDACTED]