OPCC File: 2015-10950

IN THE MATTER OF THE REVIEW ON THE RECORD
RE: CONSTABLE GABRIEL OF THE VANCOUVER POLICE DEPARTMENT

SUBMISSIONS OF COUNSEL FOR CONSTABLE GABRIEL

1. FACTS

1. Constable Gabriel is in substantial agreement with much of the submissions of Commission Counsel. The areas of disagreement are set out below.

2. The facts of Cst. Gabriel's misconduct are set out in the submissions of Commission Counsel. Cst. Gabriel has admitted his misconduct.

3. Cst. Gabriel would stress one important fact in addition to the facts of his misconduct. His employment history has been described as follows:

> Detective Constable Gabriel has been a member of the VPD since January 3, 1991. At the time of the incident he was, assigned to the Special Investigation Section, Polygraph Unit. He is a very experienced polygrapher who, from all accounts, has performed these often high-risk investigative assignments in an exemplary fashion.
>
> Detective Constable Gabriel has demonstrated exemplary behaviour throughout his career and been the recipient of the following commendations:
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> - Deputy Chief's Unit Citation - 2013 incident - SCU
> - Chief Constable's Unit Citation - Project Scourge (serial child sex offender)
> - Chief Constable's Unit Citation - 2010 Incident
> - Chief Constable's Unit Citation - 2006 McMynn kidnapping
> - Inspector's commendation - 2001 incident
> - Inspector's Commendation - 1993
>
> Detective Constable Gabriel has no previous substantiated incidents of misconduct on his service record of discipline.

4. Cst. Gabriel is much nearer the end of his policing career than the beginning. His long and exemplary service gives a much better indication of his fundamental character than the misconduct that he has recently admitted. For an officer with an unblemished service record of discipline, receiving the discipline Cst. Gabriel has received in this case has already had a profound corrective and educational effect, which is the primary purposes of the *Police Act*.

2. PERIOD OF SUSPENSION

5. In considering whether to uphold the suspension as proposed by the discipline authority, or to increase it as proposed by Commission Counsel, the Adjudicator may wish to consider the following principle. The imposition of penalty in *Police Act* cases, like the imposition of sentence in criminal cases, is largely a matter of discretion and judgment. Appeal courts will intervene only when the lower court has made an error of principle; that is, when the sentence imposed is well beyond the range of sentences that could be justified on the principles of sentencing. Therefore, criminal appeal courts are reluctant to make minor alterations to the length of sentences.

6. Second, criminal trial courts and courts of appeal will consider the totality principle: that is, when a person is convicted of related offences, the total sentence should comply with the principles of sentencing regardless of how the individual elements of a sentence may be applied to the individual counts.

7. It is submitted that similar principles should guide a retired judge considering a review on the record. The standard that the commissioner must apply when arranging a review on the record or a public hearing is that the must be a "reasonable basis" to conclude that the decision of the discipline authority is "incorrect." A period of suspension that is within the range of reasonable penalties cannot be said to be "incorrect," even if someone reviewing it (the police complaint commissioner or a retired judge) might have imposed a penalty at some other point within the range. This supports the argument that a discipline authority's judgement and discretion in decisions on penalty should be granted deference, and should not be set aside except for a clear error of principle.

8. Here, the total suspension that Commission Counsel proposes is a minor variation on the total suspension that the discipline authority proposed. Cst. Gabriel acknowledges that the range of suspension proposed by Commission Counsel is within the range that the discipline authority himself could have proposed. However, Cst. Gabriel also says that the period of suspension that the discipline authority did propose is within the range of reasonable disciplinary and corrective measures on the facts of this case. The variation proposed by Commission Counsel amounts to a variation within the reasonable range. It does not reflect a clear error of principle.

9. Therefore, it is submitted that the Adjudicator should first answer the question of policy – whether, in any review under the *Police Act*, it is appropriate to set aside a penalty that is within the range of reasonable penalties, even if the reviewer would have imposed a different penalty within that range – before considering the next question, whether in this case there should be any alternation to the total period of suspension.

3. BETTER DEFINITION OF TRAINING COMPONENT

10. Cst. Gabriel does not disagree with the concerns of commission counsel that the form of training that Cst. Gabriel must take could be specified more clearly. That said, in criminal cases judges may order very specific counselling, or may direct that a person undergo such counselling as a third person (a probation officer, a doctor, a psychologist) may direct. There is no reason why the same practice cannot be followed in appropriate cases. As a matter of principle, it is not "incorrect" to leave to determine the nature and extent of retraining in the hands of a chief constable or his or her delegate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

M. Kevin Woodall
Counsel for Cst. Gabriel.