

**In the matter of the Review on the Record into the Complaint against
Constable Gabriel of the Vancouver Police Department**

WRITTEN SUBMISSIONS OF COMMISSION COUNSEL

OVERVIEW

1. This Review on the Record, pursuant to s. 138 of the *Police Act*, concerns the appropriateness or adequacy of disciplinary/corrective measures imposed by a Discipline Authority on July 12, 2016, following Cst. Gabriel's acceptance of responsibility of two allegations on June 8, 2016.
2. The two allegations which Cst. Gabriel admitted were:
 1. discreditable conduct pursuant to s. 77(3)(h) of the *Police Act*, specifically attempting to use his position as a police officer to encourage the complainant to enter into a relationship with him and sending inappropriate sexual and pornographic text messages to her;
 2. improper disclosure of information pursuant to s. 77(3)(i)(i) of the *Police Act*, specifically providing the complainant with a DVD of an interview Cst. Gabriel conducted with a sexual assault suspect during the course of his duties.
3. The substance of the allegations and supporting statements and documentation is thoroughly summarized in the final investigation report (FIR) prepared by S/Sgt. Duncan Scurrah of the West Vancouver Police Department.

4. In spite of the admission of responsibility on the part of Cst. Gabriel, DA Superintendent Eely of the Vancouver Police Department provided reasons for substantiation at Appendix A of Form 3, Findings of Discipline Authority. In addition, DA Eely provided reasons for the disciplinary and corrective measures imposed at Appendix A of his Form 4, Discipline Disposition Record. Ultimately, DA Eely would have imposed the following disciplinary/corrective measures:
 1. Discreditable conduct: suspension without pay for 12 scheduled working days and a requirement that the member take “ethics based training, specifically related to power imbalances”.
 2. Improper disclosure of information: a written reprimand and a requirement that the member take “specific training related to VPD disclosure of information policies”.
5. A summary of the procedural history of this matter is contained in the original Notice of Review on the Record, dated September 22, 2016.

POSITION OF COMMISSION COUNSEL

6. It is submitted that the disciplinary or corrective measures imposed with respect to both allegations are inappropriate and inadequate. Specifically, the period of suspension should be in the range of 15 to 18 days. In particular, there should be imposed a suspension of three to five scheduled working days with respect to allegation #2, improper disclosure of information. Secondly, with respect to each allegation, the requirement in regard to specific training must be much more detailed and particularized than that which is contained in the Appendix to Form 4. It is submitted that this tribunal should identify and direct that the member take specific courses of retraining designed to address the two instances of misconduct.

SUMMARY OF FACTS

7. The facts upon which disciplinary and corrective measures were imposed are not in dispute. Cst. Gabriel was assigned, in his capacity as a polygraph operator for the VPD, to conduct an interview and polygraph examination of the complainant, Cheryl Hamada, an applicant for a position with VPD. In particular, Ms. Hamada had applied to be a community services program officer. At the conclusion of the interview, Cst. Gabriel provided Ms. Hamada with a business card which contained his personal cellular telephone number. Thereafter, Cst. Gabriel and Ms. Hamada engaged in sporadic cellular telephone communication, including telephone calls and text messages. They met in person in social settings approximately four times, including one evening meal at a restaurant, which was described by Cst. Gabriel in his statement as “date like”, and concluded with him kissing Ms. Hamada afterward in his car.
8. During the course of one of the social occasions, Ms. Hamada introduced Cst. Gabriel to her friend, with whom Cst. Gabriel engaged in a relationship.
9. Among the text messages which Cst. Gabriel sent to Ms. Hamada were the following:
 - “I’d rather you just sleep with me, but okay”;
 - a photo of a naked female with a large tattoo on her buttocks; and
 - “Why can’t u just fuck me then?”.
10. At one point, Cst. Gabriel and Ms. Hamada exchanged text messages about the fact that Ms. Hamada’s application for employment had been deferred (as opposed to rejected). In reference to a recruiting staff member named Mark Burgess, Cst. Gabriel texted Ms. Hamada as follows:

- “you have known that Mark and I were friends...he asked if I was still talking to you...I said yes...and he said tell her to call me. They would have terminated u for the meds...he deferred you because of medisys but also because he knew that we were friends.”

11. In another exchange of text messages (reproduced at pages 26 and 27 of the FIR), with reference to Ms. Hamada advising Cst. Gabriel that she had been speaking with a traffic authority employee named Simon Ho about Cst. Gabriel, the latter texted *inter alia* the following:

- “too late...its comeback to me”
- “he is a fuckin big mouth mother fucker”
- “he is a fuckin TA for godsakes...”
- “anyways...I’m drunk...have a good night”
- “and your prof...all they want is to get into your pants...jesus”
- “you shoulda just stuck with your plan cheryl...”
- “what does he know...dumb fucker”

12. Cst. Gabriel explained in his statement that the reference to sticking with “the plan” was for Ms. Hamada to wean herself off anti-depressant medication and reapply to the VPD.

13. In addition, Cst. Gabriel admitted in his statements to “sexting” with Ms. Hamada, and said that the two of them were exchanging sexual or flirtatious messages. He stated that Ms. Hamada sent him photographs of herself in lingerie. Ms. Hamada denied sending any such photographs to Cst. Gabriel.

14. With respect to the allegation of improper disclosure of information, Cst. Gabriel clearly loaned a DVD to Ms. Hamada which depicted a video interrogation between

him and a sexual assault suspect named Mohammed Ali on July 12, 2008. Ms. Hamada returned the DVD to him some weeks or months after he loaned it to her, after taking a screen shot of the DVD itself. The precise contents of the DVD are not part of the record. However, a summary of the contents is contained in the FIR attachments, as a 15-page GO No. VA2007-237227. It clear from the summary of that interview that Cst. Gabriel questioned the suspect Ali about several sexual assaults of female complainants. Cst. Gabriel produced photographs of each of those complainants to the suspect. Cst. Gabriel revealed addresses of areas where the sexual assaults occurred, including a partial address of a location where one of the complainants was living at the time. Details of the sexual assaults perpetrated upon the complainants included such matters as inserting finger into anus, the performance of oral sex by a complainant on the suspect, and the suspect ejaculating on the face of one complainant. In short, a good deal of personal information of a highly sensitive nature was contained on the DVD.

15. Ms. Hamada said in her statement that she watched a portion of the DVD, but found it boring, so she did not finish viewing it prior to returning it to Cst. Gabriel. Ms. Hamada in her statement opined that Cst. Gabriel loaned her the DVD as a way of making himself seem important.

16. Cst. Gabriel in his written statement stated that he offered to lend the video to Ms. Hamada to assist her with some courses she was taking at BCIT. He stated that the video had been shown in a public courtroom, that it did not reveal any police techniques, and that he had used it as a training aid at the Justice Institute.

ARGUMENT

17. The sole focus of this Review on the Record is whether the disciplinary or corrective measures proposed are inappropriate or inadequate (s. 138(2)(d)(ii)). The position

of Commission Counsel is that globally, the measures proposed are both inappropriate and inadequate.

18. Pursuant to s. 141(9) of the *Police Act*, the standard of review is “correctness”.

19. Commission Counsel says the DA erred in the following ways:

- a. in imposing an inadequate suspension with respect to the first allegation. A suspension of 15 working shifts without pay would be appropriate;
- b. in failing to specify the “ethics based training” which the Respondent was required to take with respect to power imbalances;
- c. in imposing a written reprimand, rather than a consecutive period of suspension with respect to allegation #2. An appropriate period of suspension would have been three to five days; and
- d. in failing to specify the “specific training related to VPD disclosure” policies which the member was required to take.

20. With respect to the period of suspension for the first allegation, the Discipline Authority set out the aggravating and mitigating factors and set out range of penalty imposed in similar cases. The DA then found as follows: “In truth, the penalty could have been more significant, had Gabriel’s employment history not been so favourable, and had he not demonstrated remorse and acceptance of responsibility.”

21. Commission says that the penalty should have been more significant, in all the circumstances. A more appropriate range of penalty would be a significant suspension, short of demotion or dismissal, something more in the range of 15 days, which is half of the potential maximum under the statute. However, Commission Counsel’s position is that a global total suspension duration should be in the range of 15 to 18 days, and that such may be obtained by not interfering with the

suspension on the first allegation, but imposing a consecutive suspension of three to five working days with respect to allegation #2.

22. With respect to allegation #2, it is submitted that the Discipline Authority erred in considering the seriousness of the misconduct, and in particular failed to assess the deleterious effect on the privacy interests of third parties occasioned by the improper disclosure.

23. In the final two pages of the Form 3 Appendix A, the DA clearly focused (as did, in fairness, the FIR) on the fact that the DVD was the “property of the VPD”. The DA properly rejected Cst. Gabriel’s justification for disclosing the DVD to Ms. Hamada as any form of “teaching aid”, given the fact that she was not a JI trainee, but rather a member of the public who had applied for a position with VPD, and a position other than that of a regular member. In short, the DA found that there could be no justification, and was none, for Cst. Gabriel to loan the DVD to Ms. Hamada.

24. Moreover, the evidence as a whole does not support any part of Cst. Gabriel’s explanation that he regularly used that particular DVD in his training at the Justice Institute. In addition, Cst. Gabriel’s explanation that the DVD was part of a “public record” in court proceedings involving the accused Ali rings hollow. Even if the DVD of the interview at some point became a full exhibit in court proceedings involving the accused, it would not ordinarily be in the public domain. Access to court exhibits is the exception, not the norm, and is generally only granted to interested members of the media on application and with notice to affected parties.

25. The focus on property interests rather than privacy interests by the DA was, with respect, misguided. The single most aggravating factor with respect to the disclosure of the DVD to Ms. Hamada, a member of the public, was the violation of the privacy interests of both the accused Ali, and more importantly, the complainants in that case. Clearly, the DVD depicted photographic images of the complainants,

as shown by Cst. Gabriel to the suspect. Moreover, it contained detailed descriptions by the complainants of the various sexual indignities perpetrated upon them by the suspect. Finally, it contained information about the locations of the offences, including locations where complainants were residing at the time of the offences. That sort of information is highly personal, and its release to any member of the public was a gross violation of the privacy interests at issue.

26. As such, rather than a written reprimand, the disciplinary measures imposed with respect to that allegation should have been a period of suspension, in the range of three to five days, consecutive to the period of suspension imposed on allegation #1.

27. Finally, with respect to corrective measures, specifically further training recommended by the DA, Commission Counsel submits that a specific course or courses of retraining must be specified as part of the disciplinary disposition record.


28. Pursuant to s. 181(2) of the *Police Act*, the Chief Constable of the municipal police department must “take every reasonable step to ensure that the disciplinary or corrective measure is taken”. It is therefore important, when further training is ordered, that the order directing same be very specific, and should including the following:

- a. number of hours of course work or retraining required;
- b. the exact course to be taken, if readily known;
- c. if not, the exact type of course and information as to course provider;
- d. other specific information about the required training which permits the Chief Constable to ensure that the corrective measures are fully completed by the Respondent member.

29. Absent such specific information, there is a real risk that the corrective measures will “slip through the cracks”, and there is no meaningful way for the Police Complaint

Commissioner to receive appropriate information and assurances from the Chief Constable regarding completion of training.

All of which is respectfully submitted,



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November 15, 2016