

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367
AND
IN THE MATTER OF A REVIEW OF
ALLEGATIONS OF DECEIT AND DISCREDITABLE CONDUCT
AGAINST
CONSTABLE [REDACTED]
OF THE [REDACTED] POLICE DEPARTMENT

NOTICE OF DECISION

TO: Constable [REDACTED] Police Department
AND TO: Chief Constable [REDACTED] Police Department
AND TO: Inspector [REDACTED] Police Department
AND TO: Sergeant [REDACTED] Police Department
AND TO: Mr. Stan Lowe, Police Complaint Commissioner

Introduction

[1] On November 26, 2015, the Police Complaint Commissioner ordered a review by a retired judge of a disciplinary authority's determination that two allegations of discreditable conduct by or on the part of Constable [REDACTED], a member of the [REDACTED] Police Department, could not be substantiated. The allegations arose out of the officer's conduct at a roadblock where he blew "Fail" on an Approved Screening Device ("ASD"). The Commissioner framed the allegations as follows:

Discreditable Conduct, pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department; specifically, failing to cooperate with an impaired driving investigation.

Discreditable Conduct, pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department; specifically, driving while impaired in contravention of the *Motor Vehicle Act*.

Discreditable Conduct, pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department; specifically, Constable [REDACTED] identified himself as a police officer for the purpose of gaining favourable treatment.

[2] Section 77 of the *Police Act* defines discreditable conduct:

77 (1) In this Part, "misconduct" means

...

(b) conduct that constitutes ...

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

...

(h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

(i) acting in a disorderly manner that is prejudicial to the maintenance of discipline in the municipal police department;

(ii) contravening a provision of this Act or a regulation, rule or guideline made under this Act;

(iii) without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada;

[3] None of the three allegations pertains to conduct described in subparagraphs (h)(i) through (iii). Whether the officer's conduct amounts to discreditable conduct turns on the answer to the question whether the officer knew or ought to have known his conduct would be likely to bring discredit on the [REDACTED] Police Department.

[4] In an earlier decision I expressed agreement with the test articulated by the Ontario Civilian Commission on Police Services in *Mancini v. Constable Martin Courage*, OCCPS #04-09, namely:

The concept of discreditable conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.

[5] In this case, the disciplinary authority concluded that the allegation of discreditable conduct occasioned by driving while impaired could be substantiated. That determination is not relevant for purposes of this review. The Commissioner ordered the review of the other complaints pursuant to s. 117 of the *Police Act* because he considered that there was a reasonable basis on which to conclude that the disciplinary authority's determination was incorrect.

[6] The purpose of this review is to determine whether, by way of an independent assessment of the evidence, the disciplinary authority's conclusion in respect of either allegation stands, or whether the conduct complained of appears to constitute misconduct. Any determination on review that no misconduct can be substantiated is final and binding. Any determination that the evidence appears to support a finding of misconduct results in the retired judge becoming the disciplinary authority in relation to the complaint and the person responsible for the conduct of a disciplinary proceeding.

Overview

[7] On [REDACTED] hours, [REDACTED] was stopped at a roadside roadblock operated by the [REDACTED] on [REDACTED] in [REDACTED]. [REDACTED] Const. [REDACTED] approached

[REDACTED] s vehicle and asked when he last had something to drink. [REDACTED] replied "several days ago". Const. [REDACTED] believed he detected the smell of alcohol and observed what he thought to be bloodshot eyes. He required [REDACTED] to blow on an ASD. The reading was "Fail" indicating that the amount of alcohol in [REDACTED] s blood exceeded the lawful limit of 80 milligrams per 100 millilitres of blood. The device does not determine an individual's actual blood alcohol level. Const. [REDACTED] asked [REDACTED] whether he wanted to undergo a second test. He responded that he did not. When asked again about consumption, [REDACTED] said he had consumed alcohol "a long time ago". Const. [REDACTED] s vehicle was impounded and he was subjected to an immediate 90-day driving prohibition.

[8] Inspector [REDACTED] of the Professional Standards Section, [REDACTED] Police Department, initiated the complaint regarding [REDACTED] s conduct. The Commissioner admitted the complaint. [REDACTED] Police Department Deputy Chief [REDACTED] was appointed the discipline authority. The task of investigating the complaint and compiling a final investigation report was assigned to Sergeant [REDACTED] a [REDACTED] Police Department member. She concluded that the allegation of discreditable conduct of driving while impaired could be substantiated while the other two allegations could not. The discipline authority concurred in her recommendations. The Commissioner did not and this review is the result.

Review of the Evidence

[9] Sgt. [REDACTED] interviewed four officers and reviewed the [REDACTED] PRIME ("Public Records Information Management System") File relating to the incident.

[10] Sgt. [REDACTED] interviewed [REDACTED] Const. [REDACTED] on [REDACTED]. He confirmed that he was the officer who first questioned [REDACTED] at roadside. He asked [REDACTED] when he last had a drink. [REDACTED] replied "three days ago". Const. [REDACTED] detected a strong smell of liquor coming from [REDACTED] s breath and observed bloodshot eyes. He did not believe [REDACTED] and decided to obtain an ASD reading. He administered the test after confirming that [REDACTED] had not

consumed any alcohol within 15 minutes of being stopped. Consumption within that time frame would give rise to a false high reading.

[11] When Const. [REDACTED] was giving instructions on the use of the device and about to obtain the reading, [REDACTED] said he was usually on the other side or usually the one getting the breath sample. Those statements led Const. [REDACTED] to believe [REDACTED] was a police officer. He asked for whom he worked. [REDACTED] told him it was the [REDACTED] Police Department.

[12] After obtaining the "Fail" reading, Const. [REDACTED] asked [REDACTED] again when he had last had a drink. His reply was "a long time ago". He asked [REDACTED] if he wanted to undergo a second test. [REDACTED] said he did not.

[13] Const. [REDACTED] had ticketed [REDACTED] for speeding about one year prior to the [REDACTED] incident. He said he did not recognize [REDACTED] at the roadblock and he was just another driver until [REDACTED] told him who he was whereupon the name "rang a bell." Const. [REDACTED] could not recall seeing [REDACTED] on any other occasion since the ticket incident.

[14] Const. [REDACTED] says that he did not accord [REDACTED] any favouritism because he was a police officer, and [REDACTED] did not ask for any favours or leniency. He described [REDACTED] as being clearly upset with himself and concerned for his job. But for the lie about consumption, Const. [REDACTED] did not find any aspect of [REDACTED] s behaviour or comments to be inappropriate.

[15] Const. [REDACTED] decided that he should advise someone in the [REDACTED] Police Department that a member had been stopped and had failed the ASD test. After writing up the driving prohibition, he called Sgt. [REDACTED], a member of the [REDACTED] Police Department and the [REDACTED] supervisor on the evening in question. Following the call, [REDACTED] asked if Sgt. [REDACTED] would be coming to the scene. When told he would not be coming, [REDACTED] asked Const. [REDACTED] to call him again and to ask him to come.

[16] Sgt. [REDACTED] interviewed Sgt. [REDACTED] on [REDACTED]. He had been at the [REDACTED] roadblock earlier in the evening but had gone back to his office to conclude another investigation. He received two calls from Const. [REDACTED] the first to report that a driving prohibition had been imposed on a member, and the second to say that [REDACTED] would like him to go to the scene, for what reason he did not know. When he got to the scene, [REDACTED] got into the passenger seat of Sgt. [REDACTED]'s vehicle. He said how stupid he was and Sgt. [REDACTED] did not disagree. He said [REDACTED] was concerned and self-critical but the conversation was not "over the top". [REDACTED] did not express anger toward any officer. When [REDACTED] calmed down [REDACTED] told him "it was going to be all right". He drove [REDACTED] home, which Sgt. [REDACTED] describes as a not uncommon practice vis-à-vis anyone to whom a driving prohibition was issued.

[17] Sgt. [REDACTED] said he did not observe signs of significant impairment and could not detect the smell of alcohol when [REDACTED] was in his vehicle. His view was that if [REDACTED] had been forthcoming about when he had been drinking, he may have "slipped through" the roadblock without being required to submit to the test. He did not ask [REDACTED] how much he had had to drink or when. Nothing in the course of conversation caused Sgt. [REDACTED] to think that [REDACTED] was looking for favours or leniency. He spoke to Const. [REDACTED] who told him that [REDACTED] had not tried to use his position to obtain favourable treatment.

[18] Const. [REDACTED] interviewed Const. [REDACTED] the second officer at the roadblock. He recalled [REDACTED] asking when Sgt. [REDACTED] would arrive at the scene. He was not party to the conversation between [REDACTED] and Const. [REDACTED] and was therefore unable to add to the narrative except to say that he did not hear or see anything to suggest that [REDACTED] acted in an inappropriate manner towards Const. [REDACTED] or that he used his position as a police officer in an attempt to gain favour or leniency.

[19] Sgt. [REDACTED] interviewed [REDACTED] on [REDACTED]. Sgt. [REDACTED] summarized his evidence in the Final Investigation Report as follows. [REDACTED] said

that he had had a few interactions with Const. [REDACTED] and knew him. He said that when Const. [REDACTED] first approached his vehicle he said "Hi, [REDACTED]" and that Const. [REDACTED] said "Hi" to him. The statement differs from that of Const. [REDACTED] who said the first sign of possible recognition occurred after the ASD test had been administered and he was filling out paperwork related to the incident.

[20] [REDACTED] told Sgt. [REDACTED] that he had consumed approximately 4 cans of beer on the evening in question, the last one having been consumed about 45 minutes before the stop. The roadside reading shocked him. He told Sgt. [REDACTED] that he did not ask for a second ASD test because he was embarrassed to be in the situation he faced, did not want to complicate matters, and just wanted to let Const. [REDACTED] do his job.

[21] [REDACTED] did not recall telling Const. [REDACTED] that he last consumed alcohol "three days ago". He said Const. [REDACTED] asked him a lot of questions, he did not recall the conversation, and rather than guess he simply did not recall. Specifically, he did not recall Const. [REDACTED] asking him whether he had consumed any alcohol in the 15 minutes preceding the stop. He attributed his lack of recall to the fact that many questions were asked, his emotional state, and the stress he was feeling at the time. He did not attribute the lack of recall to impairment.

[22] When asked why he would have told Const. [REDACTED] he last consumed alcohol three days ago but had blown a "Fail", [REDACTED] responded that it was a stressful time for him and he was fearful of a number of things including his job.

[23] [REDACTED] s recollection of his discussion at the time of taking the ASD test differs from that of Const. [REDACTED]. [REDACTED] recalls saying only that he knew how to blow into the ASD and he knew how it worked. He said that Const. [REDACTED] replied "you know I have to say all this stuff."

[24] [REDACTED] did not recall when, in the course of events, mention of the speeding ticket first arose, but he acknowledges that after the driving prohibition was

issued he and Const. ██████████ engaged in conversation suggesting that not much had been said between them to that point.

[25] ██████████ said it was he who asked that Sgt. ██████████ to come to the roadblock. He did so because he knew that what was happening was very bad for him professionally, he knew he had to take responsibility for his actions, and he wanted the Department to know what had happened. He also wanted to ask Sgt. ██████████ what would happen going forward.

[26] The only note of significance in the PRIME database is the following:

Cst ██████████ again [after the "Fail" reading and after asking if ██████████ wanted a second reading] asked Cst. ██████████ "when was your last drink?" Cst. ██████████ pointed out that Cst. ██████████ had lied to him about when his last drink was and Cst. ██████████ wanted to ensure that Cst. ██████████ 's last drink had not been in the 15 minutes prior to the test. The driver stated his last drink had been "a long time ago." Cst. ██████████ again asked Cst. ██████████ if he had anything with alcohol in the 15 minutes prior to the test. Cst. ██████████ stated "no."

Analysis

[27] Two questions must be addressed. The first is whether ██████████ identified himself as a police officer for the purpose of gaining favourable treatment. The second is whether ██████████ failed to cooperate with an impaired driving investigation. Although neither form of misconduct is specifically mentioned in s. 77(3)(h), the words "without limitation", mean that discreditable conduct is any conduct that the member knows, or ought to know, would be likely to bring discredit on the ██████████ Police Department.

[28] In my opinion, the fact that a member advises an investigating officer that he is a police officer does not of itself amount to discreditable conduct. It can reasonably be expected that persons in the same profession when dealing with an incident that is related to their profession will come to know that each of them is a police officer. In order that identifying oneself as a police officer will amount to discreditable conduct, there must be objective or subjective evidence from which

one can conclude that the purpose of identifying oneself as another officer was to gain favourable treatment in the circumstances.

[29] It is possible, but much more likely the exception than the rule, that an officer would explicitly identify himself as a police officer and ask for leniency or favouritism. Were an officer to do so, the statement, which is a subjective statement of intention or purpose, would compel a finding of misconduct. In other instances, regardless of what was said, the timing and method of disclosure, which constitute objective evidence, may permit one to infer that the officer's purpose in acting as he did was to seek leniency or favouritism from another officer. Such might be the case, for example, should an officer, without saying anything, openly display his police identification immediately whether with or separate from his driver's licence and vehicle registration.

[30] I find Const. ██████████'s evidence of the time and manner in which he engaged in a discussion with ██████████ about his being a police officer and the issue of the prior speeding ticket is reliable and to be preferred to ██████████'s version of events.

[31] ██████████ says he has poor recollection of the events and the course of the conversation. His evidence that he called Const. ██████████ by name upon first being stopped is unreliable and I do not accept it. I will say, however, that had ██████████ identified himself to Const. ██████████ in that manner, that, and the other objective evidence, might have provided a base from which one could conclude that the allegation of misconduct attributable to the fact that ██████████ identified himself as a police officer for the purpose of seeking leniency or favourable treatment could be substantiated.

[32] I accept the evidence of Const. ██████████ who says that he did not construe any of ██████████'s comments or actions to be an attempt to gain favourable treatment.

[33] In the same vein, nothing in the conversation between Sgt. ██████████ and ██████████ that occurred after the driving prohibition had been imposed provides a base from which one might be able to conclude that ██████████ was looking for leniency or favouritism. Sgt. ██████████'s description of the conversation and the questions ██████████ asked indicate that he appreciated the predicament he was in and suggest he was trying to understand what would happen going forward. Expressing that interest or concern is a natural reaction and does not constitute discreditable conduct.

[34] In my opinion, nothing in the course of events taken as a whole provides a base from which to infer that ██████████ identified himself as a police officer for the purpose of gaining favourable treatment. I conclude, therefore, that this allegation of discreditable conduct cannot be substantiated.

[35] The second allegation of misconduct is that ██████████ engaged in discreditable conduct when he interfered with an investigation by lying to Const. ██████████ about his consumption of alcohol. ██████████'s statement that he had last consumed alcohol three days' prior was patently false. The question therefore is simply this: can the fact that a police officer lies to another officer when one's conduct is the subject of investigation constitute discreditable conduct?

[36] Insofar as roadblocks are concerned, an officer's investigation of a motorist commences when the officer first approaches and questions the driver about the consumption of alcohol. The purpose of the stop, the approach, and the initial questions is to investigate or determine whether the motorist appears to have consumed alcohol to a degree that warrants the administration of an ASD test.

[37] It is likely the case that many ordinary citizens, when asked about the consumption of alcohol at a roadblock will lie about their recent consumption. There is no sanction as regards the lie itself where a member of the general public is concerned. The same cannot be said of police officers subject to the strictures of the *Police Act* and subject to sanction should they commit a disciplinary breach of public trust defined by s. 77 of the *Act* to include discreditable conduct.

[38] With good reason, the public places considerable trust in police forces to address and deter driving under the influence of alcohol. Moreover, the public can reasonably expect individual officers to be truthful in their dealings with other officers, whatever the circumstances, and whether on or off duty. It is unlikely that the public would condone the conduct of an officer who lies to another officer for the purpose of avoiding or attempting to avoid the requirement that he or she submit to an ASD test at a roadblock. Knowledge that an officer had engaged in conduct of that kind would be likely to bring discredit upon the police department of which the officer is a member.

[39] I conclude that the evidence in this case appears sufficient to substantiate the allegation that ██████████ engaged in discreditable conduct by failing to cooperate with the investigation initiated at the roadblock.

Notice of Next Steps

[40] As required by s. 117(8) of the *Police Act*, I hereby provide notice to Const. ██████████ as follows:

- (a) For the reasons set forth herein, the evidence does not establish that Const. ██████████ engaged in discreditable conduct by identifying himself to Const. ██████████ as a police officer;
- (b) For the reasons set forth herein, the evidence referenced in the final investigation report appears sufficient to substantiate the allegation that Const. ██████████ engaged in discreditable conduct by lying about his recent consumption of alcohol thereby failing to cooperate with an impaired driving investigation;
- (c) A prehearing conference will be offered to Const. ██████████;
- (d) Const. ██████████ has the right pursuant to s. 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.
- (e) The range of disciplinary or corrective measures being considered include:
 - a. Reduction in rank; and
 - b. Suspension without pay for not more than 30 scheduled working days.

[41] Pursuant to s. 117(8) of the *Police Act*, I hereby give notice to the complainant, Inspector ██████████ of his right pursuant to s. 113 of the *Police Act* to make submissions at any discipline proceeding.

Dated at Vancouver, British Columbia this 9th day of December 2015.

“Ian H. Pitfield”

Hon. Ian H. Pitfield