IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING
AGAINST
CONSTABLE [redacted]
OF THE [redacted] POLICE DEPARTMENT

REASONS FOR DECISION

TO: Constable [redacted] Police Department

AND TO: Sergeant [redacted] Police Department

AND TO: Mr. Stan Lowe, Police Complaint Commissioner

AND TO: [redacted] Counsel for Constable [redacted]

Introduction

[1] This disciplinary proceeding results from the Police Complaint Commissioner's refusal to accept a 6-day suspension imposed by agreement at a prehearing conference in relation to an allegation of misconduct against Constable [redacted] namely:

> That on [redacted] Constable [redacted] committed discreditable conduct pursuant of section 77(3)(h) of the *Police Act* when he failed to cooperate with an impaired driving investigation.

[2] The allegation is one of three advanced by the Commissioner against Const. [redacted] who was stopped at a [redacted] roadside check stop on [redacted] Asked when he last consumed alcohol, Const. [redacted] replied "three days ago". The investigating officer observed signs that made his suspicious. He asked Const. [redacted] to blow on an Approved Screening Device. The device registered "Fail". It was readily apparent that Const. [redacted] had lied about his consumption. Later in discussions with the investigating

officer, Const. [redacted] admitted that he had been drinking beer within a few hours of being stopped. He was issued an immediate driving prohibition. In the course of conversation with the officer, Const. [redacted] identified himself as a member of the [redacted] Police Department.

[3] Upon receipt of a complaint from the [redacted] about Const. [redacted] conduct, the Commissioner ordered an investigation into three allegations: discreditable conduct by failing to cooperate with an impaired driving investigation; discreditable conduct by driving a vehicle while impaired; and discreditable conduct by identifying himself as a police officer for the purpose of gaining favourable treatment.

[4] The disciplinary authority first appointed by the Commissioner substantiated the allegation relating to the operation of a motor vehicle and offered Const. [redacted] a prehearing conference. Const. [redacted] accepted the invitation and admitted the allegation. On [redacted] the disciplinary authority issued reasons and imposed a four-day suspension as a sanction for that conduct.

[5] The disciplinary authority declined to substantiate the other allegations. The Commissioner considered that result to be unreasonable. On November 26, 2015, he referred the two unsubstantiated allegations to me for review. I concluded that it appeared that the allegation relating to interference with an impaired driving investigation could be substantiated, but that arising from Const. [redacted] identification of himself as a police officer could not. The Commissioner accepted my determination.

[6] I directed that Const. [redacted] be offered a prehearing conference in relation to the allegation of interference. He accepted the invitation. Const. [redacted] admitted the allegation at the prehearing conference. The prehearing conference resulted in the imposition of a 6-day suspension.

[7] As I have noted previously, the Commissioner considered the 6-day suspension to be unreasonable and inappropriate. The Commissioner declined to accept the agreed upon sanction because "the discipline and/or corrective measures proposed [did] not adequately address the seriousness of Const. [redacted] conduct." Pursuant to s. 118 (1) of the *Police*

Act, the Commissioner directed that the allegation be the subject of a discipline proceeding before me as the discipline authority. The proceeding took place in [redacted] on [redacted]

Submissions of Counsel

[8] Const. [redacted] once again admitted that he had engaged in discreditable conduct. Counsel appearing on his behalf suggested I should impose the same 6-day suspension as had been imposed at the prehearing conference. Counsel submitted that the suspension imposed in relation to the operation of a motor vehicle while impaired was at the top end of the range for that kind of default. He submitted that when determining that to be the appropriate sanction, the disciplinary authority regarded the statement made by Const. [redacted] to the investigating officer with regard to when he had last consumed alcohol as an aggravating circumstance, rather than a separate instance of misconduct, and took that fact into account when fixing the 4-day period of suspension. That fact should be recognized when fixing a sanction in respect of the interference default.

[9] Counsel submitted that the suspension imposed in relation to the interference allegation was also at the top end of the range to the extent a range could be identified from precedents reported by the Commissioner's office in annual reports for the years 2011 through 2015.

[10] Finally, counsel submitted that the 6-day suspension should be accepted because it was the result of a prehearing process, represented a sanction the disciplinary authority considered reasonable, and had been accepted by Const. [redacted] In the circumstances, counsel submitted that a 6-day suspension was reasonable and appropriate.

Analysis and Decision

[11] The purpose of this proceeding is neither to approve nor reject the determination made at the prehearing conference. Rather, the purpose is to consider all of the relevant circumstances and to determine the appropriate sanction in relation to the finding of misconduct by interfering with the course of an impaired driving investigation.

[12] In my opinion, the process in this instance was flawed because of the bifurcation of the disciplinary proceedings. The allegations against Const. [redacted] arose out of a single incident in which the officer was stopped as would have been the case with any other operator of a vehicle approaching the check stop. There was no complaint from any member of the public or any police officer regarding the manner in which Const. [redacted] had operated his vehicle. Const. [redacted] was stopped in the ordinary course of the police operation. Asked when he last consumed alcohol, Const. [redacted] replied "three days ago". The investigating officer observed signs that made him doubt the veracity of that statement and Const. [redacted] was required to blow on an Approved Screening Device. The fact the device registered "Fail" indicated that Const. [redacted] had lied to the investigating officer. The "Fail" reading resulted in an immediate 90-day driving prohibition and the impoundment of Const. [redacted] vehicle for 30 days. In the course of events, Const. [redacted] also told the investigating officer that he was a member of the [redacted] Police Department.

[13] The allegations of misconduct were admitted into the discipline process following a complaint from police to the Commissioner. The process initially resulted in a determination by the disciplinary authority following a review of the Final Investigation Report that only the allegation of operating a motor vehicle while impaired contrary to the *Motor Vehicle Act*, as opposed to the *Criminal Code*, had been substantiated. However, the disciplinary authority said that he regarded the misleading statement that Const. [redacted] made to the investigating officer to be an aggravating factor. The disciplinary authority proposed a sanction of a 5-day suspension without pay. In the course of his reasons for doing so, the disciplinary authority noted that suspensions in comparable cases ranged from 2 to 5 days for off-duty municipal police officers over which the Commissioner has jurisdiction, while the comparable for [redacted] officers appeared to be 8 to 10 days. Const. [redacted] accepted the offer of a prehearing conference.

[14] For reasons that are not clear to me, but perhaps as a result of the lack of more flexible time constraints in the *Police Act*, the prehearing conference proceeded notwithstanding that the lack of substantiation on the other two allegations must have been of concern to the Commissioner's office as evidenced by his direction that the disciplinary authority's decision on those allegations be reviewed by a retired judge. If the *Police Act*

does not permit extension of the time within which a prehearing conference must proceed, the Commissioner's residual power to refuse acceptance of a sanction should provide the means of ensuring that the entirety of the discipline proceeding be completed before any sanctions are imposed. That kind of requirement is consistent with the basic principle that the totality of a sentence for separate offences arising out of related circumstances must be reasonable and not excessive. While the totality principle is grounded in the criminal law, I see no reason why it should not be adapted and applied in determining the appropriate sanctions for misconduct under the *Police Act*.

[15] Application of the totality principle was discussed in considerable detail in *R. v. Hutchings*, 2012 NLCA 2. At its core, the principle is intended to ensure that the aggregate sentence or sanction for multiple offences in criminal law or multiple disciplinary defaults in the context of the *Police Act*, as the case may be, is just and appropriate, particularly when consecutive sanctions are imposed. While many factors should be taken into account, the starting point is to determine an appropriate sanction for each default and then to consider whether the cumulative result is reasonable and appropriate having regard for all the relevant circumstances.

[16] In my opinion, the bifurcation of the procedure in this case did not permit respect for the totality principle. It is a principle that I must consider in deciding upon an appropriate sanction for discreditable conduct in the nature of interference with an impaired driving investigation. I propose to consider what was done in relation to the driving default, to independently consider the interference default, and to consider whether the combined result is reasonable rather than excessive.

[17] Prior decisions cited by counsel for Const. [redacted] from Annual Reports originating with the Commissioner's office in the period from 2011 through 2015 indicate a wide range of sanctions for operating a motor vehicle when off duty and apparently impaired:

OPCC File	Nature of Misconduct	Sanction
2011-6092	Impaired and in a state of intoxication while driving resulting in roadside suspension;	Written reprimand and 2-day suspension

	improper display of police badge	
2010-5922	Blowing "warn" on ASD resulting in roadside suspension; improper display of police badge	Verbal reprimand, advice as to future conduct
2010-5619	Driving under the influence of alcohol resulting in 24-hour roadside prohibition	1-day suspension
2011-6328	Operating vehicle under the influence resulting in 90-day roadside suspension; improper display of police badge	Two 1-day suspensions
2011-6633	Operating an ATV while drinking and driving	Written reprimand
2011-6938	Failing breathalyser test resulting in roadside suspension	1-day suspension and verbal reprimand
2012-8129	Blowing "Fail" on ASD resulting in 90-day driving prohibition	1-day suspension
2013-9151	Blowing "Warn" on ASD resulting in 3-day driving prohibition	1-day suspension
2013-9070	Blowing "Fail" on ASD resulting in 90-day driving prohibition and 30-day vehicle impoundment; improper display of police badge	5-day suspension for driving; 2-day consecutive suspension for display of badge

[18] In my opinion, verbal or written reprimands and minimal suspensions for operating a motor vehicle while off duty and under the influence of alcohol sufficient to result in a "Fail" reading on an ASD are woefully inadequate and the disciplinary authority rightly decided the sanction should be greater. In my opinion, given the serious consequences associated with drinking and driving, the important role played by police in reducing the incidence of drinking and driving, and the public expectation that police officers will respect the laws they themselves enforce, suspension should be the rule rather than the exception, the minimum should be not less than 3 days, and the maximum, in the range of 7 to 10 days. It follows that

the 4-day suspension resulting from the prehearing conference in this instance was within what I would suggest is the reasonable range without regard for any aggravating circumstances.

[19] Had there been no bifurcation of the process, the disciplinary authority would have had to consider the appropriate sanction for the additional misconduct, namely interfering with a police investigation by making a false statement. As he had done with driving defaults, counsel for Const. [redacted] identified a number of proceedings in which sanctions had been imposed for misleading or dishonest statements, or for the improper display of a police badge. Most of those cited are not germane to the misconduct of concern in this case.

[20] Of note, however, is OPCC File 2011-6937 in which an officer was engaged in an improper relationship with the complainant while the officer was the primary investigator on the file; the officer spent periods of time at the complainant's residence while on duty; and the officer knowingly made a misleading or false oral statement to his supervisor regarding the nature of his relationship with the complainant. The three offences resulted in 12-day, 4-day, and 10-day suspensions, respectively, to be served consecutively. The result was a cumulative 26-day suspension. Having regard for the context in which the misleading statement was made, the circumstances appear to me to be considerably more egregious than the circumstances surrounding Const. [redacted] misconduct.

[21] Misleading or lying cannot be condoned whether as between officers of comparable rank, or as between an officer and his or her superior. That said, in all cases the circumstances giving rise to and surrounding the lie are relevant factors.

[22] In my opinion there are some mitigating factors to be considered in this case. After lying at the outset, Const. [redacted] cooperated with the investigation in all respects. Const. [redacted] accepted the invitation to two prehearing conferences, admitted both defaults, and accepted the result flowing from each prehearing conference thereby acknowledging the wrongdoing and sparing the disciplinary process considerable additional expense.

[23] Const. [redacted] has served as a member of the [redacted] Police Department for 14 years without any other substantiated misconduct whether on or off duty. A letter of support

from Const. [redacted]s supervising staff sergeant, entered as an exhibit at the proceeding before me, is also germane:

> ... I have been Const. [redacted]s direct supervisor for the past year while he has been on A Watch at the [redacted] Police Department:
>
> Specific to the incident in which Const. [redacted]s now facing a disciplinary hearing, I want to assure the adjudicator that Const. [redacted] has not taken his disciplinary default(s) lightly. Const. [redacted] has never voiced any excuse and accepts full blame/responsibility for his actions that have led to this hearing. Const. [redacted], since this incident, has been walking the walk of shame in our department, knowing that what he did was wrong and showed poor judgment on his part.

[24] The prehearing conference process is intended to promote the just, speedy and cost-efficient conduct of the disciplinary process. The conferences are a vital part of the process. Their use should be encouraged. As a consequence, unless the result clearly falls outside the range of reason, whether below or beyond the appropriate range, I am of the view that acceptance of the prehearing conference result best serves the disciplinary process.

[25] In my view the low end of the range for conduct of the kind in question might be as little as a 3-day suspension while the maximum could be as much as 12 days depending upon the circumstances. If the circumstances appear to warrant a suspension of greater duration, other sanctions such as reduction in rank or dismissal should be considered.

[26] While Const. [redacted]accepted the 6-day suspension resulting from the prehearing conference and that sanction falls within what I consider the appropriate range before taking into account the specific circumstances, it is my view that the bifurcation of the process resulted in a cumulative suspension of 10 days which is excessive having regard for prior decisions and sanctions to date and all of the surrounding circumstances including Const. [redacted]s immediate and continuing cooperation after he made the false statement to the investigating officer.

[27] A suspension of 6 days on a standalone basis in this case would be reasonable, but after taking into account the overriding principle of totality, I conclude that the appropriate cumulative suspension resulting from Const. [redacted]s conduct on [redacted], should not exceed 8 days.

[28] I therefore impose a 4-day suspension without pay in relation to the interference default, to be served consecutively to the sanction earlier imposed for the driving default.

Dated at Vancouver, British Columbia this 1st day of June 2016.

Hon. Ian H. Pitfield