Decision of the Adjudicator
Pursuant to section 141(9) of the *Police Act*, R.S.B.C. 1996, c. 367

In the matter of the Review on the Record into the Ordered Investigation of Corporal Trish McLaughlin of the West Vancouver Police Department

WVPD File: 2015-11906
OPCC File: 2015-11200
December 19, 2016

To: Corporal Trish McLaughlin, #170, Member
% West Vancouver Police, Department
Professional Standards Section

And To: Mr. Stan T. Lowe, Police Complaint Commissioner

And To: Inspector Brian MacDonald, Discipline Authority
% South Coast British Columbia
Transportation Authority Police Service
Professional Standards Section

And To: Chief Constable Len Goerke, West Vancouver Police
% West Vancouver Police Department
Professional Standards Section

And To: Mr. Michael Tammen, Q.C., Commission Counsel

And To: Mr. M. Kevin Woodall, Member's Counsel

Introduction

[1] In a Notice pursuant to Section 137(2) dated October 26, 2016, Police Complaint Commissioner Stan T, Lowe ordered a Review on the Record in respect of the Discipline Authority's Section 125(b) findings and Section 128(1)(b) discipline record provided in this matter on August 8, and September 21, 2016 respectively.

[2] The disciplinary faults alleged in the Notice are:

1. That Corporal McLaughlin committed 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, it is alleged that Corporal McLaughlin committed the misconduct

of discreditable conduct when she failed to pass the Approved Screening Device test for alcohol consumption on October 11, 2015.

2. That Corporal McLaughlin committed 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, it is alleged that Corporal McLaughlin committed the misconduct of discreditable conduct when off duty she identified herself as a police officer to the officer conducting an impaired driving investigation and asked for preferential treatment.

[3] The allegations arise out of Corporal McLaughlin's conduct in relation to being stopped at an impaired driving check stop on October 11, 2015. During the ensuing investigation, Corporal McLaughlin admittedly identified herself as a West Vancouver Police member, suggested to the investigating officer that he just call a taxi and tow her car, and provided a breath sample that registered "fail" on an approved screening device.

[4] Following a discipline proceeding, the Discipline Authority, Inspector MacDonald, found that both allegations were substantiated. After submissions on disciplinary or corrective measures he imposed penalties of dismissal on the first, and a two-day suspension on the second.

[5] The member sought a review, resulting in the proceeding before me. Through her counsel Mr. Woodall she admits the first allegation but takes issue with the disciplinary measure of dismissal. She submits that a 4-day suspension is appropriate. With respect to the second allegation, Corporal McLaughlin denies misconduct but agrees with the two day suspension if I find misconduct to be proven.

[6] Commission Counsel Mr. Tammen agrees that dismissal is a disproportionate penalty on the first allegation, and submits that an appropriate result would be a suspension combined with a demotion in rank for a specified period of up to a year. He supports the finding of misconduct and the penalty imposed on the second allegation.

[7] Counsel agreed that, particularly in light of the penalty imposed by the DIsciplinary Authority, which appears to have been unexpected, it was appropriate that I receive additional evidence consisting of testimony from the member, and letters from Chief Constable Goerke of the West Vancouver Police and a health practitioner engaged by Corporal McLaughlin. I ruled pursuant to Section 141(4) that such evidence be received, and it was introduced at a hearing on December 16, 2016.

[8] In conducting this review I have considered all of the materials specified in Section 141(3) of the *Police Act* as well as the additional evidence introduced at the hearing. The standard of review is one of correctness. The issue is whether the misconduct is proven on a balance of probabilities based on a body of clear, convincing and cogent evidence.

[9] In light of the fact that counsel agreed I should set aside the dismissal, and considering that any appropriate period of suspension I imposed if I agreed with counsel would have been amply completed by the time of the hearing, there arose some urgency to my making a decision. Accordingly, while acknowledging that I am to consider the issue of correctness thoroughly, and separately from the decision of the Discipline Authority, I do not propose to recite facts that are not in dispute, nor to reanalyze issues that are not in dispute or with respect to which I find myself in agreement with Inspector MacDonald. These reasons may therefore appear somewhat abbreviated in the recitation of the underlying facts, history of the proceedings, submissions of counsel and legal precedent. All salient details may be found on the record, including the additional evidence, which I have considered in entirety.

[10] I will consider the merits of the second allegation to determine whether it has been proven, before turning to the issue of disciplinary measures.

Second Allegation

[11] As set out in the Notice, the substance of the second allegation is the combined act of Corporal McLaughlin's identifying herself as a police officer and seeking preferential treatment in relation to an impaired driving investigation. I have already observed that Corporal McLaughlin admits having identified herself as a police officer, and having suggested that the investigating officer, Constable Paul Stevens of the Integrated Road Safety Unit, call a tow truck and a taxi. However, she denies intending that her remark be taken as seeking preferential treatment.

[12] Prior cases referred to by counsel have established that the mere act of identifying oneself as an officer while being investigated is not discreditable conduct if there is a reasonable explanation other than the seeking of favour. I agree with the Discipline Authority's observation that at the time when Corporal McLaughlin first identified herself as a police officer, which was in response to a question about whether she was familiar with the roadside screening device, she was not engaging in misconduct. The issue, as Inspector MacDonald correctly identified it, was whether the request Corporal McLaughlin made after that, to be permitted to just go home in a taxi, amounted to her seeking preferential treatment based on her status as a police officer.

[13] Inspector MacDonald based his decision that misconduct was substantiated on Constable Stevens' November 25, 2015 statement and Corporal McLaughlin's December 29, 2015 statement, both made to Sergeant Anne Mason Young of the West Vancouver Police. Constable Stevens stated that Corporal McLaughlin identified herself as a West Vancouver member when he asked if she knew about the roadside screening device, and said that before he had her provide a sample she had asked if they could just call a tow and pretend nothing had happened, or words to that effect. He was imprecise in the sequence of the conversation or exact words used.

[14] In her statement, Corporal McLaughlin stated that she had said to Constable Stevens "...can I just take a taxi home? I know what this is. I'm a police officer, West Van."

[15] Inspector MacDonald essentially found that Corporal McLaughlin both temporally and intentionally linked her status as an officer with her request to be permitted to go home in a taxi. Indeed, he specifically found that she mentioned her status as a police officer during the remark about calling a taxi, which on my close reading of the transcripts, and with the benefit of further evidence, I find was likely not the case. Nonetheless, in Corporal McLaughlin's own statement made less than three months after the incident, she essentially uttered both of the statements in the same breath, and in reverse order. Clearly they were combined, in her mind, at that time.

[16] Inspector MacDonald admittedly did not have the benefit of hearing Corporal McLaughlin testify. In the hearing before me she stated clearly that her comment about being a police officer was confined to her response to Constable Stevens about whether she was familiar with the roadside screening device. She stated that after Constable Stevens read the demand but before he administered the test, she and he had a conversation about a member of the Integrated Road Safety Unit that they both knew. This conversation lasted less than a minute. Constable Stevens then asked if Corporal McLaughlin had any questions, to which she responded with her remark about calling a taxi.

[17] Corporal McLaughlin acknowledged in her testimony that in addition to suggesting that a taxi and a tow truck be called, she suggested that Constable Stevens take her driver's licence. She specifically denied intending to suggest that Constable Stevens give her a 24 hour suspension in lieu of proceeding with his investigation. She stated that her remark was not an attempt to obtain preferential treatment through her status as a police officer; rather something flippant: a "stressful, awful piece of humour". She stressed that she knew, as Constable Stevens confirmed to her, that he did not have the option of doing anything less than having her perform the test and suffer the legal consequences. She said that she therefore did not expect her remark to be taken as anything other than a joke. It should be noted that Constable Stevens also stressed in his statement that he took it as nothing more.

[18] While there is initial attraction to Mr. Woodall's argument based on Corporal McLaughlin's testimony that the preference she is accused of seeking was practically impossible, I am not ultimately persuaded that it matters. The definition of discreditable conduct in Section 77(3)(h) is "conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department..."

[19] I am not convinced that what Corporal McLaughlin may have intended by the remark, or what Constable Stevens perceived, is determinative. The question is outward perception, and what the officer "knows, or ought to know" will likely discredit her department. Mr. Woodall has submitted that the fact that there were other officers present at the roadblock with Corporal McLaughlin and Constable Stevens supports a conclusion that Corporal McLaughlin could not have intended her remark to be taken seriously. To the contrary, the question is whether this was conduct becoming an officer of the rank of Corporal, faced with a roadside impaired driving investigation. There was case law cited in this matter in which an officer described being "affronted" by the mere display of a badge at a road stop.

[20] Corporal McLaughlin acknowledges the remark was unfortunate, but to my mind, it was less akin to “gallows humour” as suggested by counsel than to joking about a “bomb” in the security zone at an airport. It may in fact not matter what she intended. An officer with the level of supervisor, already identified as a fellow member, should not be seen by fellow officers to apparently request more lenient treatment than they would afford any member of the public, or indeed, to even joke about it.

[21] Even if proof that Corporal McLaughlin intended to receive a preference is necessary to a finding of misconduct, I am not convinced that the obvious and apparent intention has been disproven. It is hard to see how the remark could have been intended in any other way given that it fairly quickly followed Corporal McLaughlin’s identification of herself as a member. I agree with Inspector MacDonald that the proximity makes the two statements virtually inextricable, and Corporal McLaughlin’s own statement to Sergeant Mason Young supports that conclusion.

[22] I recognize that Mr. Woodall’s argument is that the alternative Corporal McLaughlin suggested was not legally available and therefore could not be (and was not) taken as a serious suggestion. In relation to this argument, firstly, I agree with Mr. Tammen that the three “prongs” to Corporal McLaughlin’s acknowledged request -- the request for the taxi and the tow and the offer to surrender her licence -- are less consistent with a flippant, offhand, nervous remark than with an itemized, calculated suggestion as to an available legal alternative. Further, the fact that Constable Stevens responded, and Corporal McLaughlin acknowledged, that “we don’t do that any more” does not establish that the alternative was legally impossible, only that it was contrary to policy, objectionable, and should not have been suggested.

[23] It is relevant that Corporal McLaughlin had not provided a sample at the time that she made the remark. I am not satisfied based on what is before me that a decision on Constable Stevens’ part to decline to test her and just send her home, with or without a 24 hour suspension, was out of the question at that point.

[24] I am of the view that the preponderance of cogent and credible evidence on the record and before me favours a finding that Corporal McLaughlin was seeking a preference. I find that the allegation of discreditable conduct has been proven.

Disciplinary or Corrective Measures

1. First Allegation

    a. Dismissal vs. Suspension

[25] As I have noted, both counsel submit that dismissal was an excessive penalty in the circumstances. This view is supported by the letter from Chief Constable Goerke of the West Vancouver Police Department filed in the proceedings. I agree with that assessment.

[26] Inspector MacDonald in his September 21 report did an admirable job of addressing the enumerated disciplinary factors set out in Section 126(2), and rather than proceed through them here on a sequential basis, I propose only to highlight the aspects on which I differ with Inspector MacDonald.

[27] In considering the Section 126(2)(d) and (e) factors of the likelihood of future misconduct, and whether the member accepts responsibility and is willing to take steps to prevent recurrence, Inspector MacDonald noted that he had not heard Corporal McLaughlin take responsibility for her actions, and, later, that she had indicated to the West Vancouver Police Board in December 2015 that she had been too busy or was not ready to seek counseling in reference to the October 11, 2015 incident. He also placed significant reliance on the existence of a prior incident in which Corporal McLaughlin had arrived at work under the influence of alcohol, for which she was disciplined in May 2015.

[28] In fairness, Inspector MacDonald specifically noted that he did not have before him any medical evidence that would serve to explain the repeated incidents of misconduct within the relevant time frame. The additional evidence received on the review before me significantly distinguishes the circumstances from those available to the Discipline Authority.

[29] Specifically, Corporal McLaughlin's testimony, supported by the letter from her health care professional, demonstrates considerable insight into the underlying causes of the two occasions of alcohol-related misconduct. Corporal McLaughlin has sought and received counseling for these underlying causes. Without detailing them, those causes were significant, and situational.

[30] Based on what is before me now, I am satisfied that the behaviour in question was confined to a specific period of Corporal McLaughlin's life when due to her "pride and concern for others' perception of her work ethic" she refused measures such as a stress leave suggested by her health practitioner that would have assisted her to deal with significant disturbing life events. She has since accepted counseling and curtailed her alcohol consumption to a responsible level, such that her health practitioner is, as of October 11, 2016, "unaware of any alcohol related concerns."

[31] In relation to the issue of alcohol, I would have preferred to hear that Corporal McLaughlin recognized that, given two significant alcohol-related occasions of misconduct involving four separate substantiated incidents of misconduct, she was a person who should simply abstain from the consumption of alcohol. That would have gone further toward alleviating concerns about her relapsing into self-medication when traumatic events occur. I infer from both Inspector MacDonald's decision and the remarks of Chief Goerke that they have concerns about the possibility of future misconduct, and I as well do not consider these factors under Section 126(2) to have been completely addressed at present.

[32] While it is not necessary for me to review the Discipline Authority's decision, I consider it instructive to observe that he may have fallen into error in the manner in which he dealt with

Section 126(3), or perhaps at least in the manner in which he expressed its relevance. That Section provides:

> (3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

[33] Inspector MacDonald stated, “Section 126(3) of the Police Act is triggered when the Discipline Authority considers one or more disciplinary or corrective measures are necessary. I do not consider that is necessary in this case. Further education of Corporal McLaughlin would not be viable…” I agree with counsel that it appears Inspector MacDonald may have moved from a decision that a suspension was insufficient directly to a decision that dismissal was required.

[34] Section 126(3) clearly directs a discipline authority to consider correctional and educational measures in preference to punitive measures. In my view a proper interpretation of Section 126 as a whole is that in considering the appropriate penalty or penalties, a discipline authority should consider each successive measure set out in Section 126(1), starting with the least severe, and consider whether the measure is both necessary for correction and education, and also not unworkable or contrary to the administration of police discipline. If the conclusion to the latter is that more is required, the analysis should “step up” to the next available disciplinary measure.

[35] The appropriateness of a given measure will require a review of relevant prior cases, which sets out the appropriate range of penalties as well as the applicable principles. In the case of alcohol-related driving incidents involving police officers, there is an ample body of law outlined in the chart provided by Mr. Woodall in his submissions in this proceeding as well as in the Disciplinary Proceeding. The chart is set out in the Discipline Disposition Record at pages 4 and 5. That survey of cases is most helpful and the author should be commended for taking the time to collate them. The relevant discipline cases to date as shown in the chart set a range of penalty starting with reprimand and ending with a suspension of 8 days for two incidents of misconduct similar to those in this case.

[36] Added to the range of penalties set out in the cases, I also take into account the principles articulated by Adjuducator I. H. Pitfield in a June 1, 2016 decision on a disciplinary proceeding:

> [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.

[37] These remarks were addressed, as were all of the cases set out by Mr. Woodall, to situations in which the members did not have prior incidents. In this case there are two alcohol-related occasions of misconduct, with four separate substantiated allegations. It is hard to disagree with Inspector MacDonald's view, or Mr. Tammen's submission, that the circumstances are significantly more aggravated than most of the prior cases for that reason; however, given the information that is now before me, I disagree with Inspector MacDonald's conclusion that this is a case "at the extreme end of the spectrum." Even if that were the proper characterization, I would not be of the view that the next logical step would be dismissal.

[38] Mr. Woodall submitted that the proximity in time between the two incidents could be considered a mitigating factor, or at least an indication that the behaviour was anomalous in the course of what was an otherwise distinguished and exemplary career. While I do not agree that the fact of the prior incident, and its disciplinary result of a one day suspension coming just 5 months before this incident, can be considered mitigating in any fashion, I am of the view that the two occasions must be considered in the context of the circumstances now presented and may be taken as situational and anomalous; confined to a particularly difficult period in Corporal McLaughlin's life. In addition, I agree with the submission of both counsel that the member should not be penalized twice for the prior incident and that the totality of the penalty should be considered. Further, as I have noted, I interpret Section 126 as dictating something of a "step up" approach to discipline with an emphasis on correction and education over punishment where it is workable and appropriate.

[39] For all of the above reasons, with respect to the first allegation, I am of the view that a suspension is appropriate, and that dismissal is not necessary. However, in light of the range and principles set out in recent prior decisions and the fact of the prior incident here, my view is that the suspension should be higher than that proposed by counsel. I therefore consider that a suspension of 10 days is necessary and appropriate. I will go on to consider whether any additional measures are necessary under Section 126, but will add firstly that in light of Corporal McLaughlin's having been suspended without pay by the West Vancouver Police Board for over a month in December 2015 and January 2016 and then again off work without pay now since late September, 2016 following the dismissal imposed by the Discipline Authority, I will specify that the 10 day suspension has already been long and amply satisfied.

b. Demotion vs. Supervisory Conditions on Return to Work.

[40] Commission Counsel Mr. Tammen submits that in addition to suspension, I should consider a demotion for Corporal McLaughlin. His written submission was filed before receipt of the letter from Chief Constable Goerke, who agreed that Corporal McLaughlin could return to work but suggested special supervisory measures before she returns to supervisor status.

[41] Mr. Tammen based his position on essentially the same loss of confidence type concerns expressed by the Chief, but added that if the member retained her rank while conducting regular

police duties the supervisory role may be accorded to her out of deference or necessity, whether or not it is assigned to her.

[42] Chief Goerke gave careful consideration to the terms of Section 126(3) and in particular whether a supervised return to work would either be unworkable or bring the administration of police discipline into disrepute. He noted the likelihood of negative media attention and the consequent damage to the reputation of the West Vancouver Police from publication of this proceeding. He nonetheless concluded that Corporal McLaughlin could return to employment, with special supervisory measures removing her supervisory responsibilities for a period of time. He did not recommend demotion.

[43] While I am not bound by the Chief's recommendations and must consider the provisions of section 126 independently, I find them persuasive. I am inclined to defer to the Chief's view of what might indeed be "workable" and not to conclude, as urged by Mr. Tammen, that demotion is necessary to remove the supervisory aura created by rank.

[44] Mr. Woodall pointed out that demotion would have a signficant financial impact. I understand from the Chief's letter that the same practical effect can be achieved without removing her rank. Corporal McLaughlin has already been off work for a total of almost four months with no pay. While in a case without the disciplinary history of this one I might well consider demotion to be an appropriate and necessary measure, the difficulty I have with it here is that it would compound the significant penalty that she has actually now served, which all parties at this level and stage of the proceeding agree was exceedingly disproportionate. Had that significant penalty not already been exacted, I may have entertained demotion as an appropriate response.

[45] Conversely I am not persuaded by Mr. Woodall's submission that a suspension is sufficient. Corporal McLaughlin cannot avoid her rank, and while she is to be recognized for having achieved it through exemplary and diligent effort, it comes with a higher duty to maintain her exemplary behaviour and to adhere to a higher standard, not just than the public, but than other officers. I am nonetheless confident that with the measures I will impose, she will in time return to that standard, both in fact and in the eyes of her fellow officers.

[46] Accordingly I find that Corporal McLaughlin need not be demoted as a disciplinary measure, but that the following disciplinary or corrective measures are necessary and appropriate:

(1) Pursuant to Section 126(1)(d) Corporal McLaughlin will be reassigned to non-supervisory duties for a period of not less than 9 months from the date of her return to work, and she shall not thereafter be assigned to supervisory duties until she has been assessed by the West Vancouver Police Chief Constable or a person designated by him in a manner which satisfies the Chief Constable as to her supervisory capacity;
(2) Pursuant to Section 126(1)(g) Corporal McLaughlin will be required to continue in counseling with her current health practitioner or another professional of equal or greater qualification for a period of 18 months from the date of her return to work,

and to provide to the Chief Constable every 90 days a letter from her practitioner asserting that they are aware of no concerns in relation to her misuse of alcohol.

[47] Because these specific terms were not discussed in submissions I am prepared to entertain written submissions from counsel or Chief Goerke, if either of the above conditions needs to be clarified or adjusted before or following Corporal McLaughlin's return to work. However, I recommend as immediate a return to work as can be practically achieved, and suggest that any specific details that I may need to address not serve as an obstacle to that.

2. Second Allegation

[48] In relation to the second allegation, counsel agree with the disciplinary measure imposed by the Discipline Authority of two days' suspension. Accordingly I do not propose to interfere with it, although a higher penalty, in the range of 5 days, would not have been inappropriate in all the circumstances, in my view. Again, the two-day suspension will be deemed to have been already satisfied.

Carol Baird Ellan, Retired Judge