



Office of the  
Police Complaint Commissioner

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British Columbia, Canada

RR: 2015-02  
OPCC File: 2014-9611

**NOTICE OF REVIEW ON THE RECORD**

Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Review on the Record into the Conduct of Constable Batiuk  
of the South Coast British Columbia Transportation Authority Police Service**

To: Constable Marlene Batiuk (#137) (Member)  
c/o Kevin Woodall  
Cristine Woodall Barristers and Solicitors

And to: Acting Chief Officer Barry Kross (Discipline Authority)  
c/o South Coast BC Transportation Authority Police Service  
Professional Standards Section

**WHEREAS:**

**Investigation**

1. On April 27, 2014, the Office of the Police Complaint Commissioner received information from Staff Sergeant Doug Fisher of the South Coast British Columbia Transportation Authority Police Service (SCBCTAPS) in relation to an incident which occurred on April 27, 2014. According to Staff Sergeant Fisher, Constable Batiuk engaged in a street check of a suspicious male at Gateway Skytrain Station in Surrey, British Columbia. Constable Batiuk obtained the male's identification and the male returned to his vehicle to wait for the check to be completed. It was reported that the male then attempted to use his vehicle to hit Constable Batiuk. Constable Batiuk used her police issued weapon to fire two shots at the male's vehicle as he fled the scene. Staff Sergeant Fisher also reported that Constable Batiuk had failed to write police notes or submit a PRIME statement in relation to the incident.
2. On September 30, 2014, after reviewing the information forwarded by the SCBCTAPS, the Police Complaint Commissioner ordered an investigation into the conduct of Constable Batiuk pursuant to section 93(1) of the *Police Act*. SCBCTAPS Professional Standards

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Stan T. Lowe  
Police Complaint Commissioner

5<sup>th</sup> Floor, 947 Fort Street  
PO Box 9895 Stn Prov Govt  
Victoria, British Columbia V8W 9T8  
Tel: (250) 356-7458 / Fax: (250) 356-6503

investigator, Staff Sergeant Fisher, conducted an investigation into this matter and on April 15, 2015, he submitted the Final Investigation Report to the Discipline Authority.

3. On April 27, 2015, following his review of the FIR, the Discipline Authority notified Constable Batiuk that a Discipline Proceeding would be held in relation to the substantiated allegations, namely:
  - Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* - neglecting without good and sufficient cause to promptly and diligently do anything that it is one's duty as a member to do, namely failing to make notes regarding the shooting incident of April 27, 2014.
  - Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* - neglecting without good and sufficient cause to promptly and diligently do anything that it is one's duty as a member to do, namely failing to provide evidence to the Surrey RCMP of the assault of Transit Police Constable Leaver on April 27, 2014.

The following allegations were not substantiated and were concluded by this office on May 26, 2015:

- Improper Use or Care of Firearms, pursuant to section 77(3)(k) of the *Police Act* - failing to use or care for a firearms in accordance with the standards or requirements established by law, relating to the discharge of Constable Batiuk's firearm on April 27, 2015.
- Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* - neglecting without good and sufficient cause to promptly and diligently do anything that it is one's duty as a member to do, namely failing to write, in a timely manner, a police report in regards to the shooting incident of April 27, 2015.

### **Discipline Proceeding**

4. On September 10, 2015, following the Discipline Proceeding, and after considering the available evidence and submissions, the Discipline Authority made the following determinations in relation to the allegations:
  - (1) That Constable Batiuk committed Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* when she failed to make notes regarding the shooting incident of April 27, 2014.
  - (2) That Constable Batiuk committed Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* when she failed to provide evidence to the Surrey RCMP of the assault of Transit Police Constable Leaver on April 27, 2014.
5. Constable Batiuk was provided a copy of Inspector MacDonald's findings in relation to each allegation of misconduct and determinations on appropriate disciplinary or corrective measures at Discipline Proceeding. Constable Batiuk was informed that if she was

aggrieved by either the findings or determinations she could file a written request with the Police Complaint Commissioner to arrange a Public Hearing or Review on the Record.

6. On October 20, 2015, our Office received a request from Constable Batiuk that the Police Complaint Commissioner exercise his authority to arrange a Review on the Record pursuant to section 138(1) of the *Police Act*.
7. Constable Batiuk's counsel, Mr. Kevin Woodall, submitted the following reasons for requesting the Review on the Record:
  - (1) Constable Batiuk should not have been found to have committed Neglect of Duty for failing to complete police notes because the Transit Police were aware that she had not completed those notes, and acquiesced. Moreover, the department must order a police officer to complete notes that may incriminate her in order to reconcile her *Charter* rights with her duties as a police officer.
  - (2) Inspector MacDonald found that Constable Batiuk committed Neglect of Duty for failing to provide evidence to the RCMP, erroneously basing that conclusion on facts related to a previously unsubstantiated allegation. Inspector MacDonald did not address the allegation that Constable Batiuk committed misconduct by asking to see the video before being interviewed by the Surrey RCMP. Constable Batiuk was never ordered to prepare a police report. Departments must order a member to write reports that may incriminate her in order to reconcile her *Charter* rights with her duties as a police officer.
8. Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a public hearing or review on the record if the Commissioner considers that there is a reasonable basis to believe that: the Disciplinary Authority's findings under section 125(1) are incorrect; the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or, if the Commissioner considers that a public hearing is necessary in the public interest.

## Decision

9. I have reviewed the record of the disciplinary decision and the associated determinations. Pursuant to section 138 of the *Police Act*, I have determined that a Review on the Record is required as I consider there is a reasonable basis to believe that the Discipline Authority's finding that Constable Batiuk committed Neglect of Duty by failing to provide evidence to the Surrey RCMP of the assault of Transit Police Constable Leaver on April 27, 2014, is incorrect. In that regard, it is my view that the Discipline Authority was correct in finding that Constable Batiuk had a duty pursuant to section 8 of Transit Police Policy OC010 to assist the RCMP's investigation by providing evidence and that Constable Batiuk neglected that duty. However, it is uncertain whether there exists sufficiently clear, convincing and cogent evidence that, based on legal advice and without the protection of her statement

being compelled by order from a supervisor, Constable Batiuk did not have good and sufficient cause to not provide evidence to the Surrey RCMP without first refreshing her memory from the video.

10. I have also determined that a review on the record is necessary in the public interest. In determining that a review on the record is necessary in the public interest, I have determined that there is a public interest in receiving guidance from a retired judge regarding respondents and witnesses in *Police Act* investigations being permitted to review video recordings of incidents for the purposes of refreshing memory prior to providing statements.
11. With respect to Allegation 1, that Constable Batiuk committed Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* when she failed to make notes regarding the shooting incident of April 27, 2014, I have determined that there is not a reasonable basis to believe that Inspector MacDonald's finding was incorrect. That allegation has been addressed in a previous decision.
12. In my view, the investigation into the allegations against Constable Batiuk and the discipline proceedings in relation to this matter were conducted in a thorough and professional manner. Based on the foregoing, I am satisfied that it will not be necessary to examine witnesses or receive evidence that is not currently part of the record of disciplinary decision. Furthermore, I am satisfied that a public hearing is not required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline. I have determined that a Review on the Record is a more effective and efficient means of adjudicative review in all the circumstances. I note that pursuant to section 141(4) of the *Police Act*, in "special circumstances", an adjudicator has the discretion to receive evidence outside of what is contemplated as the focus of the Review.
13. Accordingly, pursuant to sections 137(2) and 141 of the *Police Act*, I am arranging a Review on the Record. Pursuant to section 141(9), the standard of review to be applied by the Adjudicator to a disciplinary decision is correctness.
14. It is therefore alleged that Constable Batiuk committed the following disciplinary default, pursuant to section 77 of the *Police Act*:
  - (1) That Constable Batiuk committed Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act* when she failed to provide evidence to the Surrey RCMP of the assault of Transit Police Constable Leaver on April 27, 2014.
15. Pursuant to section 141(5) the *Police Act*, Constable Batiuk, or her agent or legal counsel, may make submissions concerning the matter under review.
16. Pursuant to section 141(6) of the *Police Act*, the Police Complaint Commissioner or his commission counsel may make submissions concerning the matter under review. I hereby advise that I have retained commission counsel, who will make submissions on my behalf concerning the matter under review.

17. Pursuant to section 141(7)(b) the Adjudicator may permit the Discipline Authority or Discipline Representative to make submissions concerning the matters under review.

**THEREFORE:**

1. A review on the record is arranged pursuant to section 137(1) and 141 of the *Police Act*.
2. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Carol Baird Ellan, retired Provincial Court Judge, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*.

**TAKE NOTICE** that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

501 - 947 Fort Street, PO Box 9895 Stn Prov Govt, Victoria, BC V8W 9T8  
Telephone: 250-356-7458 • Toll Free: 1-877-999-8707 • Facsimile: 250-356-6503

DATED at the City of Victoria, in the Province of British Columbia, this 18th day of November, 2015.



Stan T. Lowe  
Police Complaint Commissioner