

IN THE MATTER OF THE *POLICE ACT*, RSBC 1996, c. 267, as amended

**AND IN THE MATTER OF A REVIEW ON THE RECORD
INTO THE CONDUCT OF
CONSTABLE MARLENE BATIUK (#137)
OF THE SOUTH COAST BRITISH COLUMBIA
TRANSPORTATION AUTHORITY POLICE SERVICE**

SUBMISSIONS OF COMMISSION COUNSEL

INTRODUCTION AND SCOPE OF THIS REVIEW ON THE RECORD

1. This Review on the Record ("ROR") was ordered by the Police Complaint Commissioner ("PCC") by virtue of a Notice of Review on the Record dated November 18, 2015 (the "Notice of ROR"), pursuant to the provisions of the *Police Act* (the "Act").
2. Counsel for Cst. Batiuk had sought the ROR in relation to both allegations described at paragraph 9 of the Notice of ROR.
3. As set out in the Notice of ROR at paragraphs 9 through 14, the PCC ordered the ROR on only one of those two allegations, in particular:
 - (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.
4. The other allegation noted at paragraph 7(1) of the Notice of ROR (failing to complete notes) is no longer extant, and is not the subject of this ROR.

5. Section 77(3)(m) of the Act states:

(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:

(m) "neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:

- (i) properly account for money or property received in one's capacity as a member;
- (ii) promptly and diligently do anything that it is one's duty as a member to do;
- (iii) promptly and diligently obey a lawful order of a supervisor.

6. The focus of the allegation at hand (section 77(3)(m)(ii)) is whether Cst. Batiuk, as a member as defined in the Act, neglected, without good and sufficient cause, to "promptly and diligently do anything that it" was her duty to do.
7. There is no issue that Cst. Batiuk was at all material times a "member", as defined in the Act, and that the assessment of her conduct is properly before the Adjudicator in this ROR.
8. Counsel for Cst. Batiuk makes two essential points at paragraphs 1(I) and 1(II) on page 2 of his submissions which I will summarize as:
- a. The Discipline Authority ("DA") erred by finding that Cst. Batiuk failed to prepare a report, when that allegation was no longer before him (it having already been dismissed by the same DA at an earlier phase of the process);
 - b. The DA erred by finding that Cst. Batiuk, without good and sufficient cause, did not provide evidence to the Surrey RCMP regarding the alleged assault of Cst. Leaver.

9. The standard of review of the disciplinary decision of the DA by the Adjudicator is, pursuant to section 141(9) of the Act, correctness.
10. The burden of proof applied by the DA was correctly set out at page 2 of the Form 3 Findings of Discipline Authority (the "Form 3"), and there appears to be no issue in that regard. In short, the applicable standard of proof of misconduct is the balance of probabilities, which requires that the evidence must be sufficiently clear, convincing and cogent.

FACTS

11. In the first two paragraphs at page 3 of the Form 3, the DA accurately sets out the general background of the allegations.
12. Counsel for Cst. Batiuk similarly sets out the general background of the allegations at paragraphs 2 through 5 of his submissions.
13. Cpl. Gillies of the Surrey RCMP attended at the scene of the shooting on April 27, 2014. He spoke to both Cst. Batiuk and Cst. Leaver. Cst. Batiuk told Cpl. Gillies the following at that time (see p. 134 of the FIR):

Corporal GILLIES located two GVTAPS members, Constable LEVER and Constable BATIUK. Corporal GILLIES asked for initial details of the incident, and Constable BATIUK advised that she and Constable LEVER had observed a male digging through the bushes beside the sidewalk on the east side of University Drive. They spoke to the male, who identified himself as Christopher NASH, through court documents he produced to members. BATIUK observed a large bulge in the jacket of NASH, who refused to allow himself to be patted down by members. NASH then fled to his vehicle (BCL: 806WVS), got in through the passenger door, then backed up. BATIUK advised she thought NASH was going to drive over her, and fired her duty pistol twice at NASH, while he was in the vehicle. NASH then fled north bound, in the vehicle, on University Drive.

14. Later on April 27, 2014, Cpl. Hanson of the Surrey RCMP described Cst. Batiuk and Cst. Leaver providing basic details of the incident, and cooperating with having photographs taken of them and the securing of Cst. Batiuk's firearm (see FIR, pp. 99 and 102).
15. Neither Cpl. Gillies nor Cpl. Hanson were interviewed for the purposes of the FIR.
16. Cpl. Ali Mirza provided a "duty report" to S/Sgt. Fisher, who included it at pp. 389-390 of the FIR (Cpl. Mirza was not interviewed for the FIR):

From: Ali Mirza [<mailto:ali.mirza@rcmp-grc.gc.ca>]
Sent: December-03-14 10:15 AM
To: Fisher, Doug
Cc: Mirza, Ali
Subject: Contact with Cst. Batiuk for statement

Good morning Doug,

I couldn't locate exact dates and times of my contact with Cst. BATIUK and/or her counsel / agent however, the pertinent details and context of my contact is as follows:

In approximately mid May 2014, I called Cst. BATIUK's phone number provided by yourself and left a message asking for a call back in relation to a witness statement. There was no reply for a while and after speaking with you I learned she was away from the office and I could expect to hear back from her upon her return.

In approximately late May / Early June I spoke with Cst. BATIUK's Counsel, David BUTCHER in detail about what I needed from her for my investigation, which was simply a witness statement detailing the circumstances of the interaction between herself, Cst. LEAVER and Nash on April 27, 2014 leading to the physical altercation between NASH and Cst. LEAVER. I informed Mr. BUTCHER that I was interested in everything Cst. BATIUK could tell me that contributed to that event up to, but not including the point where shots were fired by the police and he could be present if he so chose during the statement. He told me she wanted to view the Gateway Towers video surveillance footage prior to providing her statement. I told him I could show her the footage up to the point just prior

to the shooting, but that would be after she had given me her statement. He told me he didn't doubt my intentions however based on his professional experience he saw issues with that, i.e, comparison between an officer's accounts of the event against video footage. He told me he would consult with Cst BATIUK and get back to me. I never did hear from him again, despite leaving a follow up message in late June.

In late August, I spoke with Jim GARNET then from your office, who told me he was the "Agent" for Cst BATIUK. He mentioned he was trying to help so that her return to work could be expedited. We spoke about what I needed from her, essentially repeating my conversation with David ALBERT. He said he would speak with her. I spoke with him once more where he relayed that Cst. BATIUK was in process of changing her Counsel and would have an answer for me based on the advice of her new Counsel.

In Sept 2014, myself and Cst BATIUK spoke and she relayed to me that she was hoping to expedite the process so that she could return to regular duties sooner then later. I told her that all I needed from her was her statement in the capacity of a witness and that her account need not proceed to the point where the shooting occurred. She told me she would consult with her new Counsel and respond. I heard back the same day from her where I learned that her new Counsel also advised her not to provide me a statement. There was the ever present question of whether I would allow her to view the video footage capturing the event and I told her that as per Surrey RCMP's practices I would show her the video but only after I had obtained her account, again up until the physical altercation between Cst. LEAVER and NASH. I relayed to her that as per feedback from Crown Counsel there was further information required before charges could be considered against NASH. I had the circumstances as provided by Cst. LEAVER, I had the radio communication between her and dispatch, I had the video surveillance footage and I had witness statements - all providing an account of the incident where Cst. LEAVER and NASH engaged in a physical altercation, however I did not have her version / her side of events that I felt was needed to paint the overall picture, i.e, how the interaction with NASH affected her officer/46 public safety concerns from the start to the point where Cst. LEAVER and NASH were involved in the physical altercation. I asked if she would be willing to send me a written statement approved by her Counsel. Cst. BATIUK felt that would be doable, however after consulting with her Counsel she informed me that based on her Counsel's advice she would not be doing so. It was my impression that Cst. BATIUK wanted to provide her statement to me however decided against it in consideration of the advice she received.

I later received a voice mail message from her asking me to send an email to her Counsel detailing the points of my request and her reasons for declining to provide her statement. I did not do so as I did not feel that met the scope of my investigation. As per your request, this is the summary of my interaction with Cst. BATIUK in relation to the attempts made to secure her witness statement for potential charges against Christopher NASH.

If you care for my personal opinion, I would say after directly hearing the full extent of my request Cst. BATIUK did want to provide me her statement, however due to the pending process from your office, the advice provided to her from at least two Counsels prevented her from doing so.

Let me know if I can assist further.

Regards

Ali

17. At page 3 of the Form 3, the DA notes (paragraphs 3 and 4) that "Transit Police were notified that Constable Batiuk had refused to provide any evidence to the Surrey RCMP". Also, it is noted that on September 30, 2014 the Office of the Police Complaint Commissioner had issued an Order for Investigation. That Order led to the FIR prepared by S/Sgt. Fisher.
18. In his submissions, counsel for Cst. Batiuk notes at paragraph 6 that the decision of the IIO not to assume jurisdiction did "not mean that Cst. Batiuk faced no criminal or *Police Act* jeopardy", and that the investigation under this Act "could lead to criminal charges, *Police Act* proceedings or both".
19. Cpl. Mirza's summary, set out above, makes reference to, *inter alia*, correspondence he had with Crown Counsel. There appears to have been no suggestion of criminal charges being contemplated against anyone other than Mr. Nash *at that point*. S/Sgt. Fisher notes at page 14 of the FIR (last sentence) the conclusion of the IIO and RCMP that "after watching the video on April 27, 2014, that the shooting appeared not to be criminal in nature". S/Sgt. Fisher does note, at p. 15 of the FIR (second

paragraph) that the OPCC had “some concern” that the shots fired “may have placed some civilians” at risk of danger, raising the spectre of a criminal offence (for example, careless use of a firearm).

20. In her first statement to S/Sgt. Fisher, Cst. Batiuk stated that Cpl. Mirza had told her that she was not being investigated and that he wanted her statement to “put the nail in the coffin” (FIR, p. 362, l. 773, to p. 363, l. 786). Both her lawyers had advised her not to provide a statement to the RCMP until she had seen the video (FIR, p. 362, ll. 758-761).
21. Crown Counsel decided, “in early 2015”, that no charges would be approved in relation to Mr. Nash (FIR, page 15, first paragraph).
22. Counsel for Cst. Batiuk notes, correctly, that at no time was Cst. Batiuk *ordered* (emphasis added) to provide a statement to RCMP Cpl. Mirza.
23. The DA notes, at page 12 of the Form 3, that Cst. Batiuk “met the obligations of the *Police Act* in relation to her statement and duty report”. Her duty report (dated October 28, 2014) is found at page 328 of the FIR, and she ultimately did provide two statements (commencing at pages 334 [December 18, 2014] and 375 [March 20, 2015] of the FIR). However, the DA went on to find at page 12 that although Cst. Batiuk had met her obligations under the *Police Act* investigation, she had “failed to meet the requirements of the Transit Police policy on notebooks and providing reports to the Surrey RCMP”.
24. Both Cst. Leaver and Cst. Batiuk were advised by an RCMP member (seemingly Cpl. Gillies) to speak to a lawyer and/or an agent on the day of the incident (FIR, p. 288, l. 971 to p. 289, l. 986 [Leaver]; p. 360, ll. 703-712 [Batiuk]).

25. The GV GO 2014-6042 file (FIR, pages 30-85) contains various references to the provision of a report by Cst. Batiuk. Of note are the following FIR pages:
- a. 68 (May 21, 2014): Matter remains assigned to S/Sgt. Schinkel to obtain a Subject Behaviour Officer Response Report ("SBORR") from both Cst. Batiuk and Cst. Leaver;
 - b. 66 (May 28, 2014): Cst. Batiuk seeks extension to file SBORR, as there is "no indication of when the investigation will be complete";
 - c. 77 (July 2, 2014): One member (Cst. Leaver) is awaiting copy of statement to Surrey RCMP before submitting SBORR. Other member (Cst. Batiuk) "has yet to submit their duty report which will be in conjunction with the SBORR submission";
 - d. 82 (October 19, 2014): Cst. Batiuk statement outstanding and due date of October 28, 2014 set.

DISCUSSION

The Duty to Complete and Provide a Report to the RCMP

26. The DA commenced his analysis of the allegation at hand at page 9 of the Form 3. Relying upon sections 5 and 16 of the Transit Police Patrol Responsibilities Policy, he concluded that Cst. Batiuk had a duty to complete (obviously in written form, given the context) a "report of her observations" (p. 10, first paragraph). Further, relying upon section 8, the DA found Cst. Batiuk had a "duty to assist" the RCMP in their investigation into the "the assault of Constable Leaver and the discharge of Constable Batiuk's firearm" (p. 10, fourth paragraph). At page 11, the DA found that Cst. Batiuk breached her "duty to provide a report to to [sic] assist....the RCMP, who were investigating the assault of Constable Leaver and the discharge of Constable Batiuk's firearm".

27. Counsel for Cst. Batiuk submits (section 3.1) that the alleged misconduct of not writing a report had already been dismissed at the earlier, section 112 stage of the discipline process (the Notice of Discipline Authority's Decision ("NDAD") dated April 23, 2015).
28. The NDAD conclusion at page 5 is that the allegation of "failing to write, in a timely manner, a police report in regards to the shooting incident of April 27, 2014" was "not substantiated". As noted by the DA at that time, Cst. Batiuk had requested an extension for the SBORR, and was granted one "until the Surrey investigation is concluded". The DA notes that once Cst. Batiuk was informed of the Surrey investigation was concluded, she had submitted an SBORR.
29. The former Allegation 3 in the NDAD did not refer directly to an "SBORR". Instead, it referred to Cst. Batiuk "failing to write, in a timely manner, a police report.....".
30. As noted in paragraph 25(c), above, it appears to have been understood that Cst. Batiuk would, in addition to the SBORR, be providing a duty report "in conjunction with [her] SBORR submission" - in other words, at the conclusion of the RCMP investigation.
31. Cst. Batiuk submitted her SBORR at the conclusion of the RCMP investigation. Her duty report, dated October 29, 2014 (FIR, page 329) was apparently submitted at the same time. This appears to have been exactly what was envisioned further to the GO Report of July 2, 2014 (FIR, p. 77).

32. Accordingly, there is much force to the submission of counsel for Cst. Batiuk that the failure to write “a police report” allegation had already been concluded in Cst. Batiuk’s favour.
33. Indeed, as noted by the DA at page 12 of the Form 3, Cst. Batiuk met her obligations in relation to her SBORR and duty report pursuant to the *Police Act* investigation -- it was for that reason that the original Allegation 3 in the NDAD was not substantiated by the DA. That decision was approved of by the PCC (see Notice of ROR, paragraph 3).
34. Despite finding that Cst. Batiuk had met her reporting obligations pursuant to the *Police Act* investigation, the DA relied upon the reporting requirements of sections 5 and 16 of the Transit Police Patrol Responsibilities Policy. He found that Cst. Batiuk had a “duty” to prepare a “complete report of her observations” (p. 10 of the Form 3, second paragraph). This envisions, clearly, a form of written report.
35. Further, the DA found that section 8 of the Policy, which states that “the SCBCTAPS will support and assist” the Jurisdictional Police Department (in this case, the RCMP), created a “duty” upon Cst. Batiuk - personally - to “assist” the RCMP in its investigation of the assault of Cst. Leaver (Form 3, p. 10, fourth paragraph).
36. At that point, the DA summarized his decision at page 11 of the Form 3, finding the breach was the failure “to provide a report to assist” the RCMP. The balance of the Form 3 then explores the merits of whether Cst. Batiuk acted “without good and sufficient cause”.
37. However, this Allegation, originally framed as “Count 4” in the FIR (p. 5), was based upon the contention that Cst. Batiuk “did not cooperate with the Surrey [RCMP] investigator” (FIR, p. 25) request for an oral statement (not

a written report). The allegation was focused on Cst. Batiuk's position that she would provide an oral statement once she had been shown the video (having taken legal advice in this regard). At the section 112 stage, the DA substantiated the allegation as such in the Form 2.

38. Accordingly, counsel for Cst. Batiuk is correct that the focus of the DA in this allegation should not have been whether Cst. Batiuk had provided a written "report to assist the RCMP".
39. Instead, and as framed by the FIR and substantiated by the DA, the focus of this allegation at the discipline proceeding should have been Cst. Batiuk's response to the RCMP request for an oral statement.
40. At paragraph 46, counsel for Cst. Batiuk frankly acknowledges that Cst. Batiuk had a "general duty to cooperate with the RCMP in the investigation they were conducting." However, he goes on to submit (paragraphs 46 to 61) that the "scope and nature" of that duty are not found in the policies relied upon by the DA, and in any event, must be balanced against Cst. Batiuk's constitutional rights.

The Evidence Actually Sought by the RCMP

41. With respect, it must be firmly kept in mind that the allegation at hand is Cst. Batiuk's alleged "failure to provide evidence to the Surrey RCMP".
42. First, it must be noted that Cst. Batiuk did provide some "evidence" to the Surrey RCMP, in the form of her initial report to Cpl. Gillies at the scene on April 27, 2014 and her cooperation with the investigation conducted that same day by Cpl. Hanson. This is, among other things, indicative of a general willingness to cooperate from the outset.

43. Second, Cst. Batiuk was not asked for a written report by Cpl. Mirza. As set out in Cpl. Mirza's email summary to S/Sgt. Fisher, the "evidence" he wanted to obtain from Cst. Batiuk was a formal, oral statement, taken from her in person. This is clear from Cpl. Mirza's email to S/Sgt. Fisher, which notes his invitation to Mr. Butcher, QC (then counsel for Cst. Batiuk) to be present when the statement is taken.
44. With respect, the evidence the RCMP sought from Cst. Batiuk was not the sort of written "report" envisioned by Sections 5 and 16 of the Transit Police Patrol Responsibilities Policy cited and relied upon by the DA. Cpl. Mirza did not want nor seek any such "report" from Cst. Batiuk – he wanted to take an oral statement from her (and, if desired by Cst. Batiuk, to do so in the presence of her counsel).
45. Respectfully, viewed in light of the evidence the RCMP actually sought from Cst. Batiuk (an oral statement), whether or not Cst. Batiuk had a duty to prepare a written report further to the above Transit Police policy (and whether or not she did prepare one) is not probative of the allegation that she "failed to provide evidence" sought by the RCMP investigator.
46. In addressing this issue of her duty to provide a written report to Cpl. Mirza, commencing at page 13 of the Form 3, the DA relied upon the duty of Cst. Batiuk in relation to her "notes". That was an issue of a separate allegation which earlier in the Form 3 the DA had resolved against her (and which is not an issue on this ROR). At the bottom of page 13, the DA finds that Cst. Batiuk did not need to be ordered to perform any "duty", and in any event, her justification for not completing notes was not reasonable.
47. With respect, the issue at that stage of the matter was not the failure to make notes. Nor was it the failure to provide Cpl. Mirza with a written report. The issue, squarely framed, was whether Cst. Batiuk failed to

provide the evidence sought by Cpl. Mirza of the RCMP. Cpl. Mirza was not seeking neither Cst. Batiuk's notes nor a written report. Cpl. Mirza was seeking an oral statement from Cst. Batiuk.

48. To that end, the *Wood v. Schaeffer* decision (FIR, p. 461 et seq) is of limited assistance to the issue at hand. The seminal issue in that case was whether, under the particular Ontario Act and Regulations, an officer subject to an investigation by Ontario's Special Investigation Unit (into a matter involving serious injury or death) was entitled to consult counsel before preparing notes. The Court's majority decision makes very clear the limited scope of the issues determined in that case (see paragraphs 29-30).
49. In this case, the RCMP was conducting the criminal investigation. Accordingly, the RCMP was entitled to conduct it and gather such evidence as the RCMP deemed appropriate. Irrespective of any duty Cst. Batiuk is alleged to have had to prepare a written report pursuant to one or more internal Transit Police policies, and irrespective of whether or not she breached any such duty, the RCMP was not seeking, and at no point did seek, that form of evidence from her. The RCMP wanted an oral witness statement: nothing more, nothing less.
50. With respect, the allegation as framed cannot be proven to the requisite standard on the basis that Cst. Batiuk failed to provide the RCMP with a written report which the RCMP did not seek.

The Nature and Scope of the "Duty to Support and Assist"

51. As noted earlier, the DA vested upon Cst. Batiuk a duty to provide a report to assist the RCMP, pursuant to Section 8 of the Transit Police Patrol Responsibilities Policy (Form 3, page 11, first paragraph). The DA found

Cst. Batiuk breached that duty by failing to provide a "report", having cited Cst. Batiuk's responses to S/Sgt. Fisher's questions (Form 3, pp. 10-11, with reference to page 386 of the FIR).

52. The questions and answers set out at pages 10-11 of the Form 3 must be read in context. The question asked by S/Sgt. Fisher at page 385 of the FIR, and which immediately preceded the exchange cited in the Form 3, related to Cst. Batiuk's "decision not to write a report" (FIR, p. 385, ll. 278-279).
53. In concluding at page 18 of the Form 3, the DA found "that the report to the Surrey RCMP was required and was not provided", contrary to the Transit Police Patrol Responsibilities Policy, and concluded that the allegation was proven to the requisite standard. Again, with respect, the DA seems focused on a failure to complete and provide the RCMP with a written report.
54. As discussed at length above, Cpl. Mirza of the RCMP did not seek a written report from Cst. Batiuk. He did not seek any written report which may have been prepared by Cst. Batiuk pursuant to any internal Transit Police policy. Quite simply, Cpl. Mirza requested an oral witness statement from her.
55. It is respectfully submitted that the allegation as framed cannot be proven to the requisite standard on the basis that Cst. Batiuk failed to provide the RCMP with a written report which the RCMP did not seek.

Summary with respect to Finding of Breach by Failure to Complete a Report

56. The allegation at issue in this ROR was set out earlier, and is reproduced for ease of reference:

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.

57. As discussed above, RCMP Cpl. Mirza sought an oral witness statement from Cst. Batiuk in relation to this matter.
58. The DA concluded that the misconduct was proven on the basis that Cst. Batiuk failed to provide the RCMP with a written report, relying on various Transit Police policies in that regard.
59. For all of the foregoing reasons, it is respectfully submitted that Cst. Batiuk cannot be found to have committed misconduct by failing to provide evidence to the Surrey RCMP in the form of a written report.
60. The DA's decision is rooted in the failure by Cst. Batiuk to provide the RCMP with a form of report that was not requested or required by the RCMP. To that extent, the decision is not correct.

Failure to Provide a Statement to Cpl. Miraz

61. On this ROR, s. 141(10)(a) provides that the Adjudicator must, after a review of a disciplinary decision, decide whether any misconduct has been proven.
62. It has been respectfully submitted that the failure by Cst. Batiuk to provide a written report which was not sought by the RCMP is not misconduct, and that to that extent, the DA's decision is not correct.

63. However, the Adjudicator must still determine if any misconduct has been proven to the requisite standard.
64. There is no question that:
- a. Cpl. Miraz requested an oral witness statement from Cst. Batiuk. Citing Surrey RCMP "practice", not policy (FIR, p. 389-390), Cpl. Miraz would not accede to Cst. Batiuk's pre-condition that she would provide a statement if she could first review the video;
 - b. Cst. Batiuk, having received advice from two senior and experienced counsel, did not provide the requested oral witness statement since the RCMP would not permit her to first review the video recordings.
 - c. At no time was Cst. Batiuk ordered by her supervisor to provide an oral statement to the RCMP.
65. On the ROR, the question remains: Does Cst. Batiuk's decision not to provide an oral statement without first seeing the video, and absent a supervisor's order compelling her to do so, constitute a failure to provide evidence to the RCMP in this matter, such as to constitute misconduct?

Did Cst. Batiuk commit Neglect of Duty by neglecting to provide an oral statement to the Surrey RCMP without good and sufficient cause

66. As noted at paragraph 43 of the submissions of counsel for Cst. Batiuk, the first step in the analysis is to determine if Cst. Batiuk had a duty to provide the requested oral witness statement to the RCMP.
67. As counsel for Cst. Batiuk frankly acknowledges (paragraph 46 of his submissions), Cst. Batiuk had a "general duty to cooperate with the RCMP in the investigation they were conducting".

68. However, in addressing the scope of section 8 of the Transit Police Patrol Responsibilities Policy, counsel for Cst. Batiuk notes at paragraph 57 that this section of the Policy does not impose a duty on an individual member, but on the police force in general. Moreover, he submits that this cannot impose “a duty to provide a statement on the terms unilaterally imposed by the RCMP investigator in the present case”.
69. It must be recalled that the response of the RCMP to Cst. Batiuk’s request to review the video in advance of the oral statement was that this was contrary to “Surrey RCMP’s practices” (FIR, p. 389). There is no further explanation in this regard, and Cpl. Mirza was not interviewed such that the nature, extent and genesis of this “practice” could be explored in detail.
70. As noted earlier, and referred to at paragraph 13 of the submissions by counsel for Cst. Batiuk, at no time was she ordered by a supervisor to provide a “statement” to RCMP Cpl. Mirza. Her supervisor could have issued such an order, which would have compelled her to do so. It is not clear on the evidence in the FIR why that was not done.
71. The DA addressed the issue of whether an order was required to compel Cst. Batiuk to comply with a policy (Form 3, pp. 13-14). However, as noted earlier, the focus that portion of the Form 3 focused on note taking and report writing, not the provision of an oral witness statement to the RCMP in these circumstances.
72. Similarly, in discussing an exception in a situation where an officer may face a potential criminal charge (Form 3, pages 14-18), the DA again focuses on the duty to make a written report or prepare notes. Again, the issue at hand is any duty on an officer to provide an oral witness statement in these circumstances. The DA ultimately concludes that if

there is a duty to make a “report”, the potential of a criminal charge does not provide an exception to that duty.

73. The FIR, at page 25, focused on Cst. Batiuk not cooperating with the RCMP request for an oral statement, and cited the background policy in that regard.
74. It appears that in this case, Cst. Batiuk was perhaps unlikely to be the subject of a criminal investigation (see paragraphs 18 to 19, above). However, counsel for Cst. Batiuk correctly notes at paragraphs 33 and 34 of his submissions that there often remains some potential for criminal jeopardy even when it is not presently contemplated (counsel cites *R. v. Shipley and Wong*, (BCPC (unreported) May 29, 2015, Vancouver No. 12035-2). It should be noted that, unlike this case, in that case the officers had reviewed the video prior to submitting the final Report to Crown Counsel.
75. In his submissions, counsel for Cst. Batiuk notes that statements may have multiple uses, often depending upon their genesis (paragraphs 23-24). He goes on to contrast the implications for statements which are compelled as opposed to those which are considered voluntary (see, generally, paragraphs 35 to 40).
76. In the DA’s Form 3, the Supreme Court of Canada decision in *Regina v. Fitzpatrick*, [1995] 4 SCR 154, is cited at page 14. Ultimately, as noted earlier, the DA concluded that no “exception” is afforded to a police officer to make “a report if there was the potential of a charge against the officer” (Form 3, page 18). As before, I will note that the focus of the DA in the Form 3 was on notes and written reports, not oral witness statements to an officer engaged in a criminal investigation.

77. In *Regina v. White*, [1999] 2 SCR 417, the Supreme Court considered a driver's statutory duty to provide certain information pursuant to what was then section 61 of the *BC Motor Vehicle Act*, and the use which may be made of such information in any subsequent criminal proceedings. The Court distinguished the case from *Fitzpatrick* (the Court noted at paragraph 66 that the accident report at issue in *White* "is not at all analogous to the hail reports and fishing logs in *Fitzpatrick*, which La Forest J. compared to business records..."). At paragraph 67 of *White*:

67 In sum, then, the analogy which the Crown has endeavoured to draw between the context of this case and that in *Fitzpatrick* is inapt. The principle against self-incrimination is strongly brought into play by numerous aspects of the context surrounding the compulsion to make an accident report under s. 61 of the Motor Vehicle Act. A driver who makes a statement pursuant to the statutory duty set out in s. 61 is entitled, at least, to use immunity in criminal proceedings in relation to the contents of that statement.

78. The issue raised by counsel for Cst. Batiuk is the position of a police officer who has not been absolved of potential criminal jeopardy being asked (in the absence of any statutory compulsion or compulsion by order from her supervisor) to provide an oral witness statement to an RCMP officer investigating a criminal offence on the basis of a general police department policy to "support and assist" the RCMP "as requested", or alternatively as part of her acknowledged "general duty to cooperate with the RCMP in the investigation they were conducting" (submissions of counsel for Cst. Batiuk, paragraph 46).

79. The concern is that without some direct, formal compulsion, more there is a risk that any statement provided could ultimately be characterized as voluntary, rather than compelled, with consequent loss of the protection afforded by the principle of use immunity. With respect, this seems contrary to the basic principles expressed in *White*.

80. Interestingly, the Act does provide for statements to be compelled from municipal police officers for the purpose of conduct proceedings under the Act. In particular, sections 101 and 102 set out the powers of an investigator to compel a statement, and the limited use which can be made of any such compelled statement (counsel for Cst. Batiuk refers to these sections at paragraphs 23 and 38; I will note that section 40 of the *RCMP Act* has a similar provision).
81. Thus, for conduct investigations under the auspices of the *Police Act*, a member can be compelled to give a statement pursuant to section 101, but the member is protected from the use of that statement other than as provided by section 102.
82. A police officer is also compelled to provide a statement if ordered to do so by her supervisor. As noted, that did not occur in this case.
83. In light of the use immunity protection provided to an officer being investigated for a police conduct matter, it would seem incongruous that a member would, absent statutory compulsion or compulsion by her supervisor's order, be required by "general policy" or "general duty" to comply with a request to provide an oral statement in a criminal investigation in circumstances where the statement may ultimately be viewed as voluntary, not compelled, and potentially used against the member in a criminal proceedings.
84. It is clear that there was no statutory or supervisor's order compelling Cst. Batiuk to provide the oral statement to Cpl. Miraz in this case. The DA relied on general policies to found a duty (though he was speaking of a written report, as discussed earlier).

85. On the evidence in the FIR, it is respectfully submitted that it has not been proven that there was the duty suggested by the DA in the particular circumstances of this case.
86. Moreover, even if such a duty did exist, this is a case where the evidence demonstrates that Cst. Batiuk had good and sufficient cause such that alleged misconduct is not proven.
87. First, it is respectfully submitted that for the reasons set out above, Cst. Batiuk was not offered the clear protection of her proposed statement to Cpl. Miraz being compelled by an order from her supervisor. This left unresolved for her the issue of whether the statement might later be viewed as compelled or voluntary, with consequent uncertainty about the use (if any) which could be made of it in another proceeding (in particular, a criminal proceeding). As discussed above, though it was unlikely she would be charged with a criminal offence at that stage, that consequence had not and could not have been foreclosed at the time she was being asked to make the oral statement to Cpl. Miraz.
88. S/Sgt. Fisher notes at p. 25 of the FIR that “on the available evidence” Cst. Batiuk did not “appear” to ask “the RCMP” about her jeopardy. However, there are at least four problems with this:
- a. The “available evidence” in the FIR on this point was limited because S/Sgt. Fisher did not interview anyone from the RCMP, including Cpl. Mirza;
 - b. The RCMP view of her jeopardy is not determinative, since it is Crown Counsel who ultimately makes the charge assessment;
 - c. The OPCC had expressed concern (FIR, page 15, paragraph 2) that the shots fired may have placed some civilians at risk (raising, for example, the possibility of consideration of an offence of careless use of a firearm (s. 86 of the *Criminal Code*)). It must be

recalled that the OPCC can report a matter to Crown Counsel pursuant to section 111 of the Act;

- d. Cst. Batiuk had not yet seen the video, and it could not be said at that stage of the matter that a criminal prosecution was foreclosed in the event of significant discrepancies between any statement she did give and the video.

- 89. With regard to no order being made by Cst. Batiuk's supervisor to compel her to provide an oral statement, the FIR sheds no light on why that did not occur.
- 90. Second, Cst. Batiuk received and relied upon the advice from two very senior counsel, both of whom have extensive experience dealing with matters under the Act. In this case, Cst. Batiuk clearly relied upon that legal advice when she declined to provide a statement without first viewing the video. That she relied heavily on that legal advice appears clear from Cpl. Miraz's "personal opinion", as set out toward the end of his email to S/Sgt. Fisher (FIR, p. 389-390). Though it is fair to consider the responsibility for the decision as resting ultimately with Cst. Batiuk, the decision was made on the basis of legal advice.
- 91. Counsel for Cst. Batiuk notes the *Todd* decision at paragraphs 67-70. The facts relating to Cst. Batiuk are distinct: Cpl. Miraz intended to take the statement from Cst. Batiuk in the presence of her counsel. No issue of Cst. Batiuk's right to have counsel present was engaged in this case. With respect, the suggested broad extension of the *obiter dicta* comments of the Adjudicator in the *Todd* decision is neither applicable nor helpful to the analysis of this case. In any event, though an administrative decision maker may find guidance from a decision of another administrative decision maker, in general *stare decisis* does not apply.

92. Third, as this case illustrates, there is some diversity of practice in this Province with respect to when, or if, a witness or subject officer will be shown a video capturing, in whole or in part, the events at issue for the purpose of refreshing memory prior to providing a statement:
- a. Cpl. Miraz declined to show the video to Cst. Batiuk until he had received her oral statement, citing Surrey RCMP policy. That policy is not provided, nor does the FIR explore the nature or scope of that policy. Cpl. Miraz was not interviewed.
 - b. On the contrary, S/Sgt. Fisher (a member of the same agency as Cst. Batiuk) did show her the video in advance of her providing her duty report and the two oral statements for the *Police Act* investigation (FIR, p. 6, "arrow bullet" at second line on page). Again, any policy underlying that decision was not provided, nor does the FIR explore the nature or scope of that policy.
93. The above constellation of factors inform the analysis of whether Cst. Batiuk neglected, without good and sufficient cause, to provide the oral statement without first seeing the video.
94. In considering all of the above, it seems clear that Cst. Batiuk's decision in these circumstances not to provide a statement until she first viewed the video recording could not be said to be a decision which could be characterized as her neglecting to do so without good and sufficient cause.

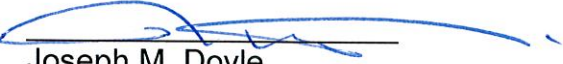
Conclusion on Misconduct Allegation

95. It is respectfully submitted that for all the foregoing reasons that the allegation at issue in this ROR be found not proven.

Recommendations at a later stage

96. As referred to above, one aspect of this matter was varied practice in relation to showing witnesses or subject officers video recordings in advance of obtaining statements. Divergent practices typically represent divergent views, particularly in an area where technology has advanced such that video recordings, from various sources, are more prevalent than ever before.
97. The availability and use of video evidence in various forms of proceedings, including under this Act, is widespread. Yet, how and in what circumstances a witness or subject officer should be able to refresh their memory remain a subject of discussion.
98. Some of the issues in this case are the basis for the Police Complaint Commissioner's respectful request (at paragraph 10 of the Notice of ROR) for the Adjudicator to consider hearing submissions at a later stage of this matter, with a view to providing such guidance in the form of recommendations as may be appropriate.

All of which is respectfully submitted this 5th day of January, 2016.



Joseph M. Doyle
Commission Counsel