

## **IN THE MATTER OF THE POLICE ACT**

**Cst. Felipe Gomes**

**Delta Police Department**

**Review on the Record of Proceedings before DA Cessford**

**Submissions of Mark Jette, Commission Counsel**

### **I. Procedural History**

1. On 1 December 2014, Cst. Gomes admitted the conduct set out in allegations 1-4 and 6 of the Amended Notice of Discipline Hearing dated 24 October 2014 ( exhibit 17 at the Discipline Proceeding).
2. On 6 January 2015, DA Cessford issued his findings, and proposed the penalty of dismissal for allegations 1-4, and suspension without pay for ten (10) days for allegation 6.
3. With respect to allegations 1-4, Cst. Gomes admitted to misconduct which is particularized as deceit.
4. Allegations 1 and 2 are both related to what has been referred to as the Pabla incident. As set out in allegation 1, Cst. Gomes created notes for that file which he misrepresented as having been made at the time or shortly after the incident. During the PSS investigation of that matter, Cst. Gomes made false and misleading statements to investigators, claiming to have made contemporaneous notes related to the Pabla incident, which is the subject matter of allegation 2.
5. Allegations 3 and 4 set out a similar pattern of deceit, this time with respect to another matter which is referred to as the Lakhan incident. Once again, Cst. Gomes created notes for the file which he misrepresented as having been made at

the time or shortly after the incident (allegation 3), and he made false and misleading statements to PSS investigators to the same effect (allegation 4).

6. In allegation 5, Cst. Gomes admitted that he neglected his duty to keep an accurate record in his police notebook, and neglected his duty to maintain his notebook in a manner that conformed to force policy and training. These allegations arise in part from evidence supporting allegations 1 and 3, and from observations of his note taking practices made by PSS investigators who inspected numerous notebooks over an extended time period. That examination revealed his habit of leaving blank a substantial number of notebook pages following brief entries, and the voiding of pages in his notebooks.
7. The only allegations not admitted by Cst. Gomes was allegation 5, which arose from his statement that the Lakhan notes were lost when that notebook became damaged, and his explanation that he had copied the contents and threw away the original. In his Notice of Discipline Authority's decision dated 17 February 2014 (marked as exhibit 8 at the Discipline Proceedings), DA Cessford found that this allegation was unsubstantiated for the following reasons:

[25] On my analysis of the information I find that there are not sufficient grounds to constitute misconduct. For the purposes of this decision to refer the matter to a hearing, I find that I do not accept Cst. Gomes' explanation that he had damaged and subsequently disposed of the notebook. Based on the information contained in the reports this story does not seem plausible.

Exhibit 8, page 5, para. 25.

## **II. Review on the Record**

8. This review on the record was ordered by the Police Complaint Commissioner on 17 February 2015. The sole matter to be determined is the appropriateness of the disciplinary measures proposed by the DA.

9. The standard of review to be applied by the Adjudicator at a Review on the Record is correctness.

*Police Act*, section 141(9)

10. The Supreme Court of Canada has defined the standard of correctness in the following terms:

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

*Dunsmuir v. New Brunswick* 2008 SCC 9 at para. 50.

11. In performing this review, the Adjudicator will consider the available disciplinary or corrective measures set out in section 126(1) of the *Police Act*, the aggravating and mitigating factors in ss. (2), and the approach set out in ss.(3):

(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.

### **III. Aggravating and Mitigating Circumstances**

12. Counsel for Cst. Gomes refers to his client's background in policing both in Delta and with the CFSEU, his favourable performance appraisals, and support letters which were filed and marked as exhibits 18 and 19 at the Discipline Proceeding.

13. In his reasons issued 6 January 2015, the DA accepted that Cst. Gomes' performance appraisals were complementary and that they serve as a mitigating factor (p.8, para. 33).
14. The DA also commented on the support letters, and noted some of the common themes which are generally recognized as mitigating in their effect (para. 67). He also commented on aspects of the support letters which served to reduce their import, in particular that some of the writers were not aware of the allegations, were only aware of some allegations, or were aware only that he had admitted to allegations involving deceit without reporting their understanding that these were four allegations of deceit, or that they were aware of the specific conduct admitted by Cst. Gomes (para. 68-70, 74-5).
15. These issues were raised during oral submissions made by counsel for Gomes at the Discipline Proceeding, where the letters were tendered and marked as exhibits. Counsel's initial response did not do much to change the perception that most if not all of the letter writers were not particularly well informed regarding the conduct Gomes was admitting to at that hearing. Counsel returned to the topic later in his submissions, and reported that according to Staff Sergeant Hall, all union members had been given a full briefing on the entire case. It remained unclear which if any of the letter writers might have attended that briefing, or what exactly they were told at the union meeting.

*Discipline Proceedings Transcript, 2 December 2014, pages 51 and 56.*

16. The DA found that he could not place much weight on the letters without information that the writers "were aware of the full facts of the allegations concerning his falsifying notes and repeated deceit to investigators in this case. It is also not clear to me how many of these co-workers would continue to express such unqualified support if they were fully aware of the facts in this case."

*Findings of Discipline Authority, p. 16, para. 75.*

17. "Unqualified support" in this instance included repeated statements that the letter writers (almost all of whom were serving police officers), would be happy to serve with Cst. Gomes in the event that he were permitted to continue his policing career. It is submitted that where letters are provided in part to support the view that the officer's return to active policing would be welcomed by the membership, there must clear evidence that the writers understand with clarity the conduct which has resulted in discipline for those letters to have any meaningful impact on this aspect of the DA's decision.
  
18. Another mitigating factor advanced at the Discipline Proceeding and again in written submissions for this Review on the Record arises from the report prepared by Dr. Jim Roche. Counsel has conceded that the doctor's ADHD diagnosis does not excuse the deceit which was admitted in allegations 1-4, but he also argues that this diagnosis provides an explanation for Cst. Gomes' struggles with not-taking, and some understanding for the embarrassment Gomes experienced as a result of his condition, which lead in turn to his deceitful cover up when confronted with PSS investigators.

*Gomes written submissions at paras 19-30.*
  
19. The import of this submission appears to be that what Gomes did was not sinister, it was just a coping mechanism gone wrong. Cst. Gomes has admitted to experiencing attention deficit issues over a period of years prior to the Pabla and Lakhan investigations. PSS investigators uncovered a pattern of note taking over an extended time period, whereby Gomes would routinely leave blank large sections of his notebooks contrary to his training and department policy, and most probably so that he would have available the option of completing his notes at some later time. That practice in the Pabla and Lakhan examples ended with the fabrication of notes, followed by repeated and elaborate lies to avoid being caught for this sloppy and dangerous practice. This was clearly more than a failed coping mechanism, it was a system built upon the edifice of deceit in the carrying out of routine police duties.

20. The aggravating factors here are many, and were reviewed with some care by DA Cessford in his reasons, beginning with his review of the seriousness of the misconduct, the first in a list of factors set out in s. 126(2)(a) of the *Police Act*.  
*Findings of Discipline Authority*, pp. 7-8, paras 26-31.
21. It is submitted that the most disturbing aspects of this officer's conduct was that his deceit was repeated over an extended period of time, coupled with his refusal to accept responsibility for his actions almost until the very end.
22. This late conversion to culpability can best be appreciated by Gomes' request through counsel for additional investigation of new evidence relevant to allegations 3 and 4 reported by PSS Staff Sgt. Gain in a memorandum dated 24 September 2014 (marked as exhibit 13 at the Discipline Proceeding). In his initial Notice of Discipline Authority on 17 February 2014 (exhibit 8), DA Cessford had determined that there were reasonable grounds to conclude that allegations had been made out. This opinion was repeated in an Amended Notice of Discipline Authority dated 20 May 2014 (exhibit 12).
23. The 24 September memorandum setting out the new evidence was provided to counsel for Gomes. On 25 September counsel requested a supplementary investigation and an adjournment of the discipline hearing which had been scheduled to commence on 20 October 2014 (exhibit 14). The DA acceded to both requests, and ordered Staff Sgt. Gain to take a series of additional investigative steps (exhibit 15). A Supplemental Final Investigation Report dated 24 October 2014 was produced pursuant to the DA's direction.
24. The report of 24 October 2014 added to the already overwhelming body of evidence establishing that Cst. Gomes had not made contemporaneous notebook entries for the Lakhan matter, had lied to PSS investigators on multiple occasions when asked that direct question, and had fabricated notes which he then passed

off as contemporaneous work product. Of course all of this would have been known to Gomes when his request for further investigation was made.

25. While it is generally recognized that, in criminal law terms, a guilty plea is a factor which goes to mitigation of sentence, the circumstances here are such that it becomes harder and harder to accept that there is anything mitigating about a plea which follows a request that PSS investigators spend time pursuing information in a vain attempt to identify a defence where there was no hope. While Cst. Gomes is free to pursue every remedy and run down every lead, by doing so here he has undercut his own claim that he has been humbled by this experience, recognizes the error of his ways, and can now be trusted to return to policing in the community.

#### **IV. The Case Law**

26. It is respectfully submitted that the decisions provided by counsel for Gomes and reviewed in his written submissions are all distinguishable for a variety of reasons. Most significantly, not one of the police officers who avoided dismissal in those cases had a prior record of four disciplinary offences.
27. Constable Charters committed the disciplinary defaults of deceit and neglect of duty arising out of an attempt to box in and stop a motorist. The deceit arose from three radio broadcasts made by Charter during this encounter. The adjudicator found that only two of those broadcasts were substantiated as deceit.
28. In his decision on discipline, Adjudicator Smart in Charters looked to the dictionary to define the terms set out in s. 126(3) of the Police Act. He found that “unworkable” is “not able to function or be carried out successfully; impractical”, “disrepute” as “the state of being held in low public esteem”, and “precedence” as

“the condition of being considered more important than something else; priority in importance.” [21]

29. In applying those definitions and the language of section 126(3), Adjudicator Smart concluded that he is required to “give priority to measures that rehabilitate (correct and educate) unless doing so would be impractical or cause the administration of police discipline to be held in low public esteem.” [22]

30. It is often observed that applying a test to a given set of circumstances is always more difficult than simply stating the test. Adjudicator Smart offered this guideline:

“However, there is not always a bright line between what measures would or would not be workable, and would or would not bring the administration of police discipline into disrepute. Further, although the two factors are stated in the alternative, in my view, they may be considered cumulatively. As such, the closer the proposed rehabilitative measure moves along the spectrum towards the unworkable or what would bring the administration of police discipline into disrepute, the more likely the appropriate and just discipline will be more punitive measures.” [23]

31. While finding that the two disciplinary defaults committed by Charters were serious, Mr. Smart found that the misconduct occurred over only a few minutes, and was the result of a provocation by the other driver. His decisions were “made quickly and in the heat of the moment”, and that his “purpose or motivation throughout was to stop the (other vehicle) and apprehend the driver.” [37-38]

32. While Mr. Smart did not find that dismissal was required, he certainly did indicate that the deceit allegation was to be taken very seriously. The total penalty imposed was a 40 day suspension, with 30 days of that allocated to the deceit count. [64-67]

33. In a decision which counsel for Gomes has characterized as “the most similar to the present case...”, Constable Ken Jansen committed the disciplinary default of



deceit when he made notes, two PRIME entries within days of each other, wrote a duty report and gave an oral statement to PSS investigators, all of which were found to have been false and misleading. These incidents were rolled up in a single allegation (pp. 1-2). Later in her reasons, Adjudicator Lazar found that the four allegations all relate to the initial reporting of the incident, and should be viewed collectively (p. 6).

*Gomes written submissions* at para. 39.

34. Adjudicator Lazar found that Jansen had misrepresented facts by exaggerating the peril that his fellow officer was facing, and by omitting any mention of injuries sustained by the civilian who was involved with that member, as well as any explanation of how they were inflicted. She found that Jansen was attempting to assist the other officer. His later deceit during an interview by police investigators was viewed as more self-serving, and placed Jansen in the mid-range of cases dealing with findings of deceit (pp. 4-5)
35. Jansen was a junior officer with only two years of experience, so his file contained no performance appraisals. There is no mention of prior disciplinary defaults (p. 5). His conduct was characterized at least in part as a “misdirected effort to demonstrate solidarity with another officer.” Ms. Lazar was satisfied that this was not a mistake he would make again (p. 6). The discipline imposed was a 14 day suspension and a reduction in rank. In imposing the suspension, Ms. Lazar took account of the fact that Jansen had been dismissed without pay for the previous seven months (p. 10).
36. Adam Page was disciplined for abuse of authority (assault), and two instances of deceit when he made false and misleading statements regarding that incident. The assault was determined not to have been of the most severe kind, and Page plead guilty when he was charged criminally; the sentence imposed was a conditional discharge (para 9). He was suspended for 3 days for the abuse of authority/assault aspect of the case (para. 15). Page had no prior disciplinary defaults in his five year career (para. 9).

37. Adjudicator Pitfield referred to a letter from the Chief of the Transit police force, and found that the Chief had not said that it would be difficult or impossible to accommodate Page as a member of the department other than on active patrol, and that he “construed the Chief’s support for Const. Page to be neither positive or negative, but neutral.” (para. 20)
38. Mr. Pitfield commented on the fact that Page could not hope to contradict video and voice recordings of his encounter with the complainant, and that the event was witnessed by a fellow officer and a store loss prevention officer (para. 24). In other words, the deceit employed by Page would seem to have lacked anything like the levels of sophistication and pre-meditation employed by Constable Gomes in this case.
39. Constable Page was not dismissed, but he was suspended for 25 days for each of two allegations of deceit, with those suspensions to be served concurrently one to the other, but consecutive to the 3 day suspension imposed for the assault (para. 27).
40. Constable GP accessed CPIC for a non-police purpose and improperly disclosed information from that database. He gave investigators false and misleading statements about that access to make it appear that his actions were taken in the course of normal police duties. It was accepted that GP believed that he was acting to protect his girlfriend’s children after learning that a contractor she had hired had a CPIC entry indicating he was a suspect in a child exploitation offence (that data was not correct, something which was not known to GP at the time). GP’s policing background was exemplary. He did not have a record of prior disciplinary offences (p. 6). The DA imposed a reprimand in writing and 20 day suspension (p. 9).
41. Constable WB faced one allegation of deceit arising from statements made to a PSS investigator looking into an allegation that she had illegally entered an

apartment suite to arrest one of the occupants. She insisted that the door had been open when she entered the suite. She had already been disciplined for three additional defaults arising from her actions at the apartment that evening. In that first Disciplinary Proceedings, the Chief concluded that the deceit allegation had not been made out on the evidence. These reasons arise from a reconsideration of that finding ordered by the PCC (Discipline Reasons at para. 16).

42. The essence of the deceit committed by WB was set out in this finding made by Adjudicator Pitfield:

“On all of the evidence I must and do conclude that the officer intended to assert, without acknowledging any possibility that she might have been in error, that the door was ajar in order to attempt to justify her entry in the face of an investigation into a complaint that she had unlawfully entered the premises. As the officer acknowledged, opening a closed door without a warrant to search was unlawful in the circumstances that prevailed on the evening of March 23, 2009.” (Discipline reasons, para. 56)

43. In the penalty phase, it was learned that WB had received three concurrent two day suspensions for the other disciplinary defaults arising from her conduct at the apartment (Penalty reasons, para. 3). The adjudicator identified the deceit as serious, and found that WB had not accepted responsibility for that default, and declined to acknowledge that she might have been mistaken about the door (Penalty reasons, para. 5). The mitigating factors included the absence of a record for prior disciplinary defaults and a good record of employment (Penalty reasons, para. 6). At that time the Adjudicator was limited to a 5 day maximum period of suspension; that penalty was imposed, to run consecutive to the three two day suspensions arising from the same incident (Penalty reasons, paras. 10-11).

## V. The Penalty

44. In reviewing the relevant factors set out in s. 126(2) of the Act, there are powerful reasons to conclude that DA Cessford was correct when he determined that the only appropriate penalty remedy here is dismissal. It is respectfully submitted that the factors of critical significance are these:

- (a) The seriousness of the misconduct spanning two separate PSS investigations and a considerable period of time; it is accepted that the deceit here is very serious and deserving of serious sanction.
- (b) The member's record of employment is good when one considers the performance appraisals and some of the comments made in the letters of support, but is also coloured in a significant way by his record of disciplinary defaults, something which distinguishes Constable Gomes from most of the officers in the cases submitted on his behalf.
- (c) It is accepted that dismissal would have a serious impact on Gomes and his family.
- (d) The likelihood of future misconduct must be measured at least in part against his disciplinary record, and by the fact that he engaged in the same deceitful behaviour for two separate incidents over an extended period of time.
- (e) While Constable Gomes has accepted responsibility by pleading to these allegations, he has done so at the last minute, and only after making a last gasp effort to identify something which might offer a defence in the Lakhan matter.
- (f) There is no evidence that the department or its policies contributed to the multiple instances of deceit perpetrated by Constable Gomes. At best there may have been a failure on the part of the DPD to review his note taking practices, which only goes to the allegation dealing with his faulty not taking.
- (g) The range of disciplinary or corrective measures taken in similar circumstances must begin with the premise that dismissal was

under active consideration in all of the cases submitted by Gomes, and that lengthy suspensions were imposed (where available by statute) in each case, and that dismissal is a sanction which has been imposed by DA's in a number of cases. None of the cases relied upon by Constable Gomes have featured conduct as serious as what we are considering here, conduct which must be viewed in combination with Gomes' record of prior disciplinary defaults.

(h) Other aggravating and mitigating factors have been discussed elsewhere in these submissions.

45. It is respectfully submitted that anything short of dismissal would be "unworkable" in this case, and would bring the administration of police discipline into disrepute. In the case of Constable Gomes, those lines have been crossed. Support for this conclusion can be found in the comments made by DA Cessford toward the end of his reasons dated 6 January 2015. We commend to you and adopt as submissions here the reasons of DA Cessford at paragraphs 79-95.

46. It is respectfully submitted that the appropriate sanction for allegations 1-4 is dismissal.

Dated at Vancouver, British Columbia, this 19th day of May, 2015.

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