IN THE MATTER OF THE *POLICE ACT*, RSBC 1996, c. 367

AND IN THE MATTER OF A REVIEW ON THE RECORD INTO THE DECISION OF CHIEF CONSTABLE JIM CESSFORD DATED JANUARY 6, 2015 SUBSTANTIATING DECEIT (X5) AND NEGLECT OF DUTY AGAINST CONSTABLE FELIPE GOMES, #1776 OF THE DELTA POLICE DEPARTMENT

WRITTEN SUBMISSIONS OF THE DISCIPLINE AUTHORITY CHIEF CONSTABLE JIM CESSFORD (Ret.) OF THE DELTA POLICE DEPARTMENT

The Law

Procedural History

1. The Discipline Authority adopts the procedural history outlined in the submissions of Commission Counsel.

Review on the Record

2. Reviews on the Record are governed by Section 141 of the *Police Act*. After a review of the disciplinary decision, the adjudicator must:
    - Decide whether any misconduct has been proven;
    - Determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126, and;
    - Recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

The Standard of Correctness

3. Section 141(9) provides that the standard of review to be applied to a discipline authority's decision is correctness.

4. The Supreme Court of Canada has stated that reviewing a decision on a standard of correctness involves the following:

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

5. While a reviewing court or tribunal must undertake its own analysis of the case without deference to the lower level decision-maker's reasoning process, recent cases have confirmed that this does not mean that the views of that decision maker are ignored. Earlier this year, the Alberta Court of Appeal in the context of a discussion on the standard of correctness stated:

> It is worth noting that a correctness standard of review does not mean that the opinions of the tribunal are ignored. When the court is applying its legal expertise to the interpretation of the statute, it should always take note of the tribunal's perspective on the issue from a policy point of view. The two are not mutually exclusive. The correctness of a particular interpretation of a statute is not determined in the abstract, but only by considering the statutory provisions in the full policy and factual context
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> *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)* 2015 ABCA 85, para. 32

6. It is submitted that in reviewing the discipline authority's decision for correctness in this case, his perspective as Chief Constable responsible for the operation and maintenance of the reputation of the Delta Police Department must be considered. The disciplinary and corrective measures set out in s.126 must be interpreted within the policy and

factual context existing in the police department as expressed by the Chief Constable in his reasons.

Disciplinary and Corrective Measures

7. Section 126 of the *Police Act* governs disciplinary and corrective measures for discipline authorities and adjudicators.

> **126** (1) After finding that the conduct of a member is misconduct and hearing submissions… the discipline authority must,… propose to take one or more of the following disciplinary or corrective measures in relation to the member:
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> a. dismiss the member;
> b. reduce the member's rank;
> c. suspend the member without pay for not more than 30 scheduled working days;
> d. transfer or reassign the member within the municipal police department;
> e. require the member to work under close supervision;
> f. require the member to undertake specified training or retraining;
> g. require the member to undertake specified counselling or treatment;
> h. require the member to participate in a specified program or activity;
> i. reprimand the member in writing;
> j. reprimand the member verbally;
> k. give the member advice as to her or his conduct.
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> (2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,
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> a. the seriousness of the misconduct,
> b. the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct,
> c. the impact of proposed disciplinary or corrective measures on the member and on her or his family and career,
> d. the likelihood of future misconduct by the member,
> e. whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
> f. the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,

g. the range of disciplinary or corrective measures taken in similar circumstances, and
h. other aggravating or mitigating factors.

(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.

Correction versus discipline – the interpretation of s. 126(3) of the *Police Act*

8. An adjudicator or discipline authority must impose a sanction that corrects or educates unless doing so is unworkable or brings the administration of police discipline into disrepute.

9. The question is whether a reasonable member of the public aware of all of the circumstances would consider a sanction other than dismissal to be unworkable or undermine public confidence in administration of police discipline.

10. There are no court level decisions in B.C. interpreting s. 126 of the *Act* or outlining the procedure or standard for dismissing a police officer. However, several decisions of public hearing adjudicators under the B.C. *Police Act* have considered this issue. While these decisions are not binding authority, to the extent that they are of assistance, it may be beneficial to take them into consideration.

11. In the recent public hearing decision in the matter of *Constable Chris Charters of the Vancouver Police Department*, Adjudicator Smart considered the language of s.126(3) and commented as follows:

> The *Act* does not define "unworkable", "disrepute", or "precedence" so I turn to the Dictionary for assistance. The *Oxford Dictionary of English,* Second Edition, Revised, defines "unworkable" as: "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".

> Applying these definitions and the modern principle of statutory interpretation, s. 126(3) requires that I 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. [para. 21, 22]

12. Recognizing that this is not an easy task, Adjudicator Smart commented:

> 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 measures move 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.* Emphasis added]
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> *Charters and Vancouver Police Department*, October 31, 2014, Adjudicator W.B. Smart Q.C. at para 23

13. It is submitted that after considering the various aggravating and mitigating factors set out in s.126, the discipline authority was correct in determining that dismissal from the police force is the only appropriate and just disciplinary measure in this case. Any other sanction is simply unworkable and undermines public confidence in the police disciplinary system.

Aggravating and Mitigating Factors

Seriousness of the misconduct

14. It is submitted that the Discipline Authority was correct when he found that the deceit in this case was extremely serious and amounted to a strong aggravating factor.

15. In the recent decision of *Constable Adam Page* Adjudicator Ian Pitfield stated that deceit is intrinsically more serious than other misconduct offences:

> *In my opinion, deceit is the most serious disciplinary default that can be committed by a police officer*. The fact an officer knowingly makes a false or misleading statement in a duty report or in the course of reporting to, or being interviewed by,

> a senior officer must adversely affect one's assessment of the officer's integrity and honesty, and one's assessment of his or her suitability to be or remain a member of a police department. Integrity is a core value the public has a right to expect and demand of police officers in order that the public will have confidence in the fair, lawful, and trustworthy administration of justice. Lying or the making of misleading statements in relation to an officer's dealings with a member of the public cannot be condoned. *In my opinion, the public has a right to expect that dismissal will always be a sanction for consideration where deceit is at the core of a disciplinary default*.
>
> In addition, it must be apparent that deceit compromises internal organizational effectiveness. A police organization must be able to expect and receive honest accounts of incidents and the involvement of officers in them from its members. Nothing can compromise police effectiveness more readily than loss of confidence in an officer's preparedness to tell the truth to superiors whatever the consequences may be. [Emphasis added]
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> *Page and Abbotsford Police Service*, *(Part II),* 17 April, 2013, at para. 11 and 12

16. The degree of seriousness of a misconduct finding will vary and there is no presumptive automatic penalty of dismissal for deceit. Some acts of deceit will be more culpable than others and each case must be judged on its own facts. In *Charters*, Adjudicator Smart highlighted that seriousness of the misconduct is "always a crucial factor but particularly so when considering dismissal."

> *Charters*, supra at para. 36
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> *Jansen and South Coast B.C. Transportation Authority Police Service*, 13 February 2014, Adjudicator C. Lazar (p. 4)

17. The deceit in this case was planned, deliberate and carefully orchestrated. It stretched out over a period in excess of two years: From August, 2012 until November, 2014. It did not occur in the "heat of the moment" as in *Charters* nor is it a "momentary lapse" as in *Page*.

18. Constable Gomes was directed to provide his notes for the Lahkan investigation on August 13, 2012. Sometime between that date and August 28, 2012, when he submitted them to the investigator, Constable Gomes decided to embark on a course of

deception by creating detailed notes and holding them out as if they were made at the time of the event.

19. This deception extended to his delivery of falsely created notes related to the Pabla investigation in November, 2012 and through three separate interviews with investigators over the course of the following 10 months. During his final interview in October, 2013, Constable Gomes "came clean" about his learning disability and attempted to justify his poor note taking and previous bizarre behaviour on personal embarrassment about having to disclose a learning challenge.

20. One would expect that after admitting to a learning challenge, Constable Gomes would no longer need to be untruthful. However, during that same interview, Constable Gomes perpetuated his deception by spinning an elaborate web of lies (discussed below) in an attempt to explain away the various problems and inconsistencies with his version of events. He maintained those untruths through two separate requests for further investigation – in March, 2014 and September, 2014. It was only shortly before the hearing on December 1, 2014, that Constable Gomes advised that he was prepared to admit that his various versions of events were complete fabrications.

21. The following evidence is clear and undisputed:

- Constable Gomes had no notebook entries related to two separate police files which resulted in citizen complaints about his conduct.

- He created lengthy and detailed notebook entries for each of the two separate occurrences where no notes existed before.

- He did this not once, but on two separate occasions. The first was on or about August 28, 2012 and concerned the Lahkan investigation. The second was nearly three months later, on or about November 19, 2012 and concerned the Pabla file.

- Constable Gomes lied on multiple occasions during three separate interviews with investigators over the course of 10 months about having made the notes in both matters at the time of the events.

- In the case of the Lahkan notes, Constable Gomes created an elaborate and detailed fabrication about how his notebook was destroyed in the rain and he had to throw it out. He further explained how the photocopied notes he handed in to the investigator were from that destroyed notebook but that because of a prank he instigated against a supervisor, he had somehow managed to retain these photocopies for approximately six months.

- Constable Gomes went so far as to *actually orchestrate* a scene where he recopied notes from a wet notebook into a second book in front of fellow police officers on his shift so he would be able to tell investigators that others saw him do it.

- He also went out of his way to ensure he had a "discussion" about the wet notebook with a fellow police officer, Constable Porter, so he would have a witness that he could refer to investigators.

- After Constable Gomes relayed this fabricated discussion to the investigator, he contacted Constable Porter (who was away from work on leave at the time) to speak to him about the fact that he was going to be interviewed about his recollection of their lost notebook discussion. As a police officer with his level of experience, Constable Gomes was well aware that this kind of interference in an investigation into his conduct was completely inappropriate.

- Constable Gomes' elaborate lies and fabricated factual scenarios were communicated to the investigator knowing that she would be required to follow up

and conduct additional investigation to verify his assertions, unnecessarily prolonging this investigation and wasting precious resources to look into claims that *he knew were false at the time he made them in October, 2013*.

22. Taking the foregoing into account, it is submitted that the discipline authority was absolutely correct in his finding at paragraphs 26-28 that:

> …This extensive investigation was prolonged and further perpetuated as the result of the false information given by Constable Gomes. These were planned and deliberate acts of deception over time. He continued his deception right up to the very last minute just prior to the hearing in December when he decided to admit to his misconducts.
>
> Constable Gomes had several opportunities to set the record straight and conclude this matter. Instead, he chose to continue with the false and misleading statements and he continued with the deception, thereby increasing its severity.
>
> It is clear by the evidence and through Constable Gomes own admissions that he knowingly and intentionally made false statements and knowingly provided false information to the investigators.

23. The Discipline Authority was correct in his finding that the misconduct in this case was of the utmost level of seriousness and constitutes a strong aggravating factor. The level of calculation, planning and deliberation Constable Gomes displayed over an extended period of time (over two years) take this case out of the ordinary and make it far more severe than the other cases presented by the defence where police officers were allowed to retain their employment.

Employment History

24. Employment history is an important consideration in all cases. It is submitted that the Discipline Authority was correct in finding that Constable Gomes' performance appraisals acted as a mitigating factor and that his extensive and recent disciplinary history was an aggravating factor.

25. Police officers are held to higher standards of conduct than regular members of the public and are expected to exercise integrity and high moral conduct in the performance of their duties. A review of Constable Gomes employment history shows a significant and consistent history of misconduct over a short period of time.

26. This is Constable Gomes' fifth formally substantiated *Police Act* misconduct finding since 2010. In addition to the current findings of deceit (X4) and neglect of duty, his past misconduct relates to findings of abuse of authority, discreditable conduct (X2), unauthorized use of CPIC/PRIME, and neglect of duty.

27. While the disciplinary measures imposed in these matters were not significant, a perusal of the particular disciplinary charges involved suggests a pattern of disregard for the standards of restraint, professionalism and integrity that society expects of police officers who, by virtue of the tremendous power vested in them, are held to high standards of conduct.

Acceptance of responsibility and likelihood of recurrence

28. Acceptance of responsibility or remorse is a mitigating factor toward disposition. Conversely, conduct which demonstrates a lack of acceptance of responsibility is properly considered an aggravating factor.

(a) <u>Guilty Plea</u>

29. Meaningful recognition of the seriousness of the misconduct may appear in a guilty plea although the fact of a plea in and of itself is not determinative. It is open to a discipline authority or adjudicator to find that the police officer does not accept full responsibility despite the guilty plea.

30. It is respectfully submitted that the discipline authority was correct in accepting Constable Gomes' plea of guilt as a mitigating factor.

(b) Apology and Cooperation with the investigation

31. A meaningful apology may be a demonstration of remorse or acceptance of responsibility as will be meaningful cooperation with the disciplinary investigation. In the present case, it is submitted that the apology tendered by Constable Gomes is self-serving and does not reflect true remorse or acceptance of responsibility.

32. In his letter of apology (Exhibit 20) and during his statement to the discipline authority at the hearing, Constable Gomes placed the blame for his actions squarely on his Attention Deficit Hyperactive Disorder (ADHD) and his "Portuguese stubbornness" which he alleges, prevented him from asking for help. However, what is clear is that his ADHD played no role in his decision to mislead investigators by fabricating:
    - a tale about a destroyed notebook
    - photocopied notes from a "prank" on a supervisor
    - evidence of him transcribing a wet notebook in the presence of other police officers
    - requesting further investigation as late as September 2014, on a concocted story about submitting notes to the RCMP in April instead of February 2012 which would support his destroyed notebook" fabrication (Exhibit 14).

33. There is nothing in Constable Gomes' statement to the discipline authority which acknowledges any specific responsibility for:
    - failing to cooperate with the investigation
    - actively deceiving investigators, and;
    - unnecessarily prolonging the investigation of these matters.

34. It is submitted that a general statement that he has "disappointed" his chief, coworkers and his department is a wholly insufficient expression of remorse.

35. Constable Gomes' conduct throughout the investigation demonstrates no remorse whatsoever for his actions. Not only did he not cooperate with the investigation but, as discussed above, he actively misled the investigators over a two year period and only owned up to his extensive pattern of deceit on the eve of trial.

36. It is further submitted that while Constable Gomes did plead guilty it was only after evidence was uncovered in September, 2014 that effectively removed any doubt about the falsity of the destroyed notebook story and confirmed that the notes he handed in for the Lahkan investigation were created at a later date.

37. For these reasons, it is submitted that minimal weight ought to be attached to Constable Gomes' guilty plea and his apology as it does not demonstrate a real acceptance of remorse for his actions.

Likelihood of future misconduct by the member

38. The discipline authority was correct in finding that if Constable Gomes is allowed to remain a police officer, the likelihood of recurrence of misconduct in the future is high.

39. The misconduct in this case was not an isolated incident that is atypical of the character of this police officer. Constable Gomes made a deliberate choice to actively deceive his superiors over a two year period. Even taking into account his alleged embarrassment over his ADHD, once that was admitted to S/Sgt. Gain during his third interview in October 2013, he nevertheless continued with his deception for over a year – inventing the destroyed notebook excuse and fabricating false evidence of his recopying a wet notebook in the presence of some of his co-workers.

40. As discussed previously, Constable Gomes also requested additional investigation on two separate occasions including a statement from late September, 2014 maintaining a

story about a voice message on his work phone and advising that he recalled handing in his notes to the RCMP in April 2012, which would support his destroyed notebook fabrication, instead of February, 2012, as clearly demonstrated by the computer file management system.

41. While Constable Gomes is entitled to put the employer to the proof of the allegations, his actions in actively misleading investigators throughout this investigation provide stark insight into this police officers character and willingness to lie when it is in his interest to do so.

42. In *Charters*, Adjudicator Smart commented as follows on this issue:

> It is critical to my decision whether I am satisfied Cst. Charters has learned from his mistakes and will not repeat them. If he has not and cannot, then it would be unworkable to have him continue as a member of the VPD and doing so would bring the administration of police discipline into disrepute
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> *Charters*, supra, at para. 62

43. It is submitted that past behaviour is the best predictor of future conduct. Constable Gomes actions in this case, when combined with his past disciplinary history demonstrating a pattern of abuse of his authority as a police officer, do not provide any comfort that if given the opportunity, he will not engage in misconduct in the future when it suits him.

a. The Character letters

44. The discipline authority was correct in admitting the characters letters submitted by Constable Gomes but determining that little weight could be attached to them as it was unclear what the writers of these letters had been told of the facts in this case. There is ample legal authority for the correctness of that view.

Demaria v. Law Society of Saskatchewan 2013 SKQB 178 at para. 104-115

Boldt v. Law Society of Upper Canada, 2012 ONLSAP 0013 at para 57-59

45. Character evidence is not determinative of the potential for rehabilitation in the face of grievous misconduct and countervailing dispositional considerations. It is only one factor of many to be assessed.

Range of discipline in other cases

46. It is well established that the principle of *stare decisis* does not apply to the police discipline process. While a comparison of similar cases is an essential component of arriving at a fit penalty, each case must be judged on the facts peculiar to it.

McPhee v. Brantford Police, OCPC August 3, 2012, at para. 120

47. It is submitted the misconduct in this case was far more serious than that in the cases cited by the defence where the police officers were able to retain their employment.

48. The *WB (New Westminster)* and *GP (Abbotsford)* cases are readily distinguishable from this case. With respect to the *WB* case, Adjudicator Pitfield stated in his subsequent decision in *Page* (at paragraph 25) that public hearing counsel had not sought dismissal and that the parties had in effect made a joint submission for a brief suspension. The *GP* case is distinguishable on its facts and is of limited utility given the highly unusual circumstances present in that case.

49. The *Page* case is similarly distinguishable on its facts. The deceit in *Page* related to providing a duty report that was clearly contradicted by the evidence of two eyewitnesses and a videotape. Constable Page then repeated the same version of events as contained in his duty report in his interview with the investigator. Adjudicator Pitfield imposed a lengthy suspension for the deceit commenting that “it is

difficult to comprehend how he thought his statements whether written or oral would successfully contradict the recording." (para. 24)

50. In the *Charters* case, Adjudicator Smart found that the deceit occurred in the "heat of the moment," in the context of a high speed pursuit where there had been contact between the two vehicles on two occasions. In his decision, Adjudicator Smart stated:

> There are, however, mitigating circumstances. The misconduct occurred over only a few minutes and was in response to Mr. Davidson's actions at the intersection of Rupert Street and School Road when he drove or pushed the Cherokee out of Cst. Charters' "box and pin", what Cst. Charters perceived as ramming. Cst. Charters was surprised and likely provoked by what occurred and became even more determined to apprehend the driver of the Cherokee. This is what led Cst. Charters to breach the Vehicle Pursuit Policy and follow the Cherokee.
>
> I find that while Cst. Charters tried to stay some distance back from the Cherokee as it drove north on Rupert Street, after the Cherokee lost control in Rupert Park and came to a standstill, Cst. Charters seized the opportunity. As the Cherokee drove out of the Park and back onto Rupert Street, Cst. Charters struck the rear of the Cherokee with the front of his vehicle in an effort to stop or immobilize the Cherokee. After failing to do so, he broadcast a false and misleading description of what had just occurred in an effort to cover-up his own misconduct. These decisions were made quickly and in the heat of the moment. Cst. Charters' purpose or motivation throughout was to stop the Cherokee and apprehend the driver.
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> *Charters*, supra at paras. 37, 38

51. The case of *Constable Jansen* of the Transit Police, while of some assistance, is similarly distinguishable on the facts. In that case, Adjudicator Lazar found that Jansen was a keen young officer who misrepresented facts in an effort to help a fellow officer in that officer's decision to deploy a Taser. He had no previous disciplinary record. In addition, the Adjudicator determined that four of the five deceits should be considered collectively as part of one transaction.

52. The remaining stand-alone deceit concerned statements made during a discipline interview. Adjudicator Lazars' comments suggest that the officer's deceptive statements were made in the context of an adversarial interview where he spent a

significant amount of time defending himself from allegations of excessive use of force from the investigator.

53. In the decision on the merits dated December 6, 2013, Adjudicator Lazar stated as follows at paragraphs 21 and 22:

> From his questions it appears that Fisher views Spear's attack on Booker as unprovoked and unjustified. Since I have concluded on a balance of probabilities that Booker did initiate this interchange by punching Spears, I am more sympathetic to Jansen's efforts to explain what happened and what was not caught on the video. If he was wrong about when it was during the video stream that the physical exchange between Spears and Booker occurred, I am not inclined to attribute that to any attempt to deceive.
>
> Fisher spent some time on the fact that Jansen had said nothing about the earlier incident when Spears had aggressively manhandled Booker while he was in handcuffs. Jansen acknowledged that seeing this on the video he realized it was totally inappropriate but said at the time he really did not think much of it. I believe he may well be telling the truth about this. There is also a lot of interrogation about how he came to file his report. Fisher suggests that it took repeated requests from the RCMP investigator. Jansen denies this. No evidence was called on this hearing to substantiate Fisher's suggestions so I accept Jansen's evidence on this issue.
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> *Jansen*, supra, decision of Adjudicator Lazar dated December 6, 2013

54. It is submitted that the particular facts and the dynamics at play in the *Jansen* case make it of limited utility in arriving at a fit penalty in the present case. Unlike Constable Jansen, Constable Gomes is an experienced police officer with 11 years' service. He committed the deceit for the purpose of covering up his own misconduct, and perpetuated that deceit by misleading investigators for over two years. This level of planning and deliberation take this out of the realm of comparison with the *Jansen* case.

55. It is respectfully submitted that dismissal is well within the range of appropriate penalties for findings of deceit.

> *Decision in OPCC File No. 2011-6125 (SCBCTAPS)*
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> *Decision in OPCC File No. 2011-6162 (Delta)*

ADHD issue

56. It is agreed that a police employer has a duty to accommodate its employees to the point of undue hardship. However, in order for the employee to rely in his or her disability, there must be a clear nexus between the disability and the misconduct in question.

57. It is submitted that while the diagnosis of ADHD may be related to the deficiencies in Constable Gomes' notes, it in no way explains or excuses his repeated deceitful statements to investigators in this case.

58. Even if he was "embarrassed" by the deficiencies in his note-taking, that cannot explain or excuse his actions in making up detailed stories about destroyed notebooks, pranks played on supervisors and voice messages indicating when he had filed notes that Constable Gomes devised and perpetuated after he had confessed his ADHD to the investigators in this case. Constable Gomes maintained this course of deception for over one year after he had "come clean" to investigators about his ADHD.

59. In *Page*, Adjudicator Pitfield stated that a police officer must be prepared to tell the truth to superiors, no matter what the consequences may be. It is submitted that personal embarrassment is not a relevant mitigating factor:

> A police organization must be able to expect and receive honest accounts of incidents and the involvement of officers in them from its members. Nothing can compromise police effectiveness more readily than loss of confidence in an officer's preparedness to tell the truth to superiors whatever the consequences may be.
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> *Page and Abbotsford Police Service*, *(Part II),* 17 April, 2013, at para. 12

Reference to *R v. McNeil*

60. In his decision the disciplinary authority made the following comment about the potential relevance of the decision of the Supreme Court of Canada in *R. v. McNeil*:

> [88] There has been much discussion surrounding the ability of a police officer who has had an allegation of deceit proven against them to testify in court. The implications of the case involving the McNeil matter come into play in this regard. It is highly likely that the allegations as proven against Constable Gomes will affect his ability to testify in a court of law.
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> [89] It is also my experience and given discussion with the judiciary and the Crown that they would be reluctant to accept the evidence or to prosecute a case involving blatant acts of deceit by a police officer.

61. It is respectfully submitted that the discipline authority's comments are correct, measured and completely appropriate in the circumstances of this case for the following reasons:

- Counsel for Constable Gomes correctly anticipated that the *McNeil* issue may be a consideration and raised it with the discipline authority in his submissions. There is no fairness issue with respect to it subsequently being referred to by the discipline authority in his reasons.

- The discipline authority, as a senior police officer, is clearly entitled in law to rely on his knowledge and experience of the law of disclosure and the potential impact that such serious findings could have on a police officers' credibility in giving evidence.

- The discipline authority did not conclude that Constable Gomes could not continue as police officer because of the deceit findings but only that it would be a factor in

his ability to testify in court or in having his evidence accepted, which therefore makes it a factor for overall consideration in arriving at a fit disposition in this case.

- Similar comments made by police adjudicators have been upheld in other police discipline cases.

  McPhee v. Brantford Police, OCPC August 3, 2012, at paras. 74-78

Summary on the issue of dismissal

62. It is respectfully submitted that the evidence is overwhelming that dismissal is the appropriate disciplinary measure in this case and that the discipline authority was correct in recommending the dismissal of Constable Gomes from the Delta Police Department.

63. It is submitted that the misconduct in this case is so serious that a reasonable person, fully informed on the facts of this case would find that the failure to dismiss Constable Gomes would undermine public confidence in the police disciplinary system. The public has a right to expect that:
    - a police officer who fabricates notes where none existed before,
    - lies about it repeatedly to his superiors for over two years,
    - makes up stories that unnecessarily prolong an investigation, and;
    - has a previous history of discipline convictions

    will not be allowed to continue to serve the citizens of Delta as a sworn police officer in any capacity.

64. Imposing a penalty other than dismissal in the circumstances of this case is similarly unworkable. In some cases, the misconduct is so serious and the pattern of disregard for the office of Police Constable is so flagrant that nothing short of dismissal will satisfy the legitimate requirement for public respect for the Constabulary. The issue is not

about whether it would be impossible to place Constable Gomes in some hidden area of the Delta Police Department or that there is no hope for rehabilitation. That is not the test.

65. Constable Gomes' misconduct directly undermines the standards the public expects of police officers and shows a flagrant disregard for the core values of honour, integrity, courage and trust espoused by the Delta Police Department. His continued employment as a Delta police officer is impractical or unworkable as it actively undermines the reputation of the Department.

Order Requested

66. It is respectfully submitted that the decision of the discipline authority to recommend dismissal in this case should be confirmed as correct.

67. In the alternative, it is submitted that based on all of the evidence, dismissal is the appropriate disciplinary measure in this case.

Dated May 20, 2015.

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