

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367

AND

IN THE MATTER OF A REVIEW OF
ALLEGATIONS OF MISCONDUCT
AGAINST

[REDACTED]
OF THE [REDACTED] POLICE DEPARTMENT

NOTICE OF DECISION

TO:

[REDACTED]

(Complainants)

AND TO:

[REDACTED]

c/o [REDACTED] Police Department

Professional Standards Section

AND TO:

[REDACTED]

[REDACTED] Police Department

Professional Standards Section

AND TO:

[REDACTED]

[REDACTED]

AND TO:

Mr. Stan T. Lowe,

Police Complaint Commissioner

INTRODUCTION

1.

[REDACTED]

of the [REDACTED] Police Department [REDACTED] is

alleged to have committed one count of misconduct. It is alleged specifically that

[REDACTED]

committed "discreditable conduct" through his involvement

in a submission to an Adjudicator that was found not to provide balanced, fair, complete and accurate information.

2. The submission arose in relation to a separate police-disciplinary proceeding involving [REDACTED], which was heard and decided by Adjudicator [REDACTED]. The submission was made by way of a letter to the Adjudicator by [REDACTED] Chief Constable [REDACTED] which advocated for Constable [REDACTED] to be dismissed (the "Letter", the final version of which is signed and dated [REDACTED]). [REDACTED] was involved in the preparation of the Letter. It is a submission letter that is at the heart of this matter.
3. My review analyzes whether, based on the written material before me, [REDACTED]'s conduct appears to constitute misconduct.

THE LEGAL ISSUE

4. The decision I must make, must comply with s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367, as am (the "Act"). That provision states that it is my duty to determine whether "the conduct of the member... appears to constitute misconduct" (*per* s. 117(9)), based on a review of the report, evidence and records supplied to me. In this context I do not to hear live witnesses nor consider additional evidence or submissions from the participants. Instead, I am to conduct a paper-based review. That is what I have done.
5. As I read s. 117 and more generally Part 11, Division 3 of the *Police Act*, I must make clear that I am not sitting on appeal from any previous finding that a misconduct allegation was not substantiated. My focus is not on the correctness of an earlier finding, but rather I am to reach my own conclusion about whether the materials support a finding of apparent misconduct. I note that s. 117(1)(b) says that the retired judge conducting the review is to "make her or his own decision on the matter."

BACKGROUND

6. The misconduct allegation involving [REDACTED] relates to his involvement in the Letter, which was a submission made by [REDACTED] Chief Constable [REDACTED] to an Adjudicator who was addressing the penalty phase of a *Police Act* public hearing.
7. The background which gave rise to the public hearing involving [REDACTED] Constable [REDACTED] is as follows. On [REDACTED], Constable [REDACTED] was on duty as a [REDACTED] member. In the early morning hours he was involved in arresting a man who had stolen a Jeep Cherokee and driven dangerously through the streets of [REDACTED]. Constable [REDACTED] case went to a public hearing before Adjudicator [REDACTED], who found misconduct on two counts:

Count One:

Deceit, section 77(3)(f)(i)(A) of the *Police Act* — That on or about [REDACTED], at or near [REDACTED] British Columbia, it is alleged Constable [REDACTED] committed the disciplinary default of Deceit by making false or misleading oral statements regarding: the details of a police involved collision at [REDACTED] and [REDACTED] Street, the denials that he was engaged in a pursuit and the claim that the suspect, [REDACTED], was attempting to “ram” his police vehicle.

Count Three:

Neglect of Duty, section 77(3)(m)(ii) of the *Police Act* — That on or about [REDACTED] at or near [REDACTED] British Columbia, it is alleged Constable [REDACTED] committed the disciplinary default of Neglect of Duty when he engaged in an unauthorized pursuit, failed to broadcast and clarify essential information for responding members and the supervisor and continued to pursue the suspect driver post-collision.

8. Adjudicator [REDACTED] reached these findings on [REDACTED]. The public hearing was then adjourned for a penalty hearing. It is somewhat before and during this adjournment period that the Letter was prepared.
9. I have reviewed revisions of the Letter as it went through the drafting process, along with emails enclosing revisions and offering comments on the Letter. It began as a legal submission to be made by counsel for the Chief Constable, but soon evolved to a letter from the [REDACTED] Chief Constable addressed to the Adjudicator. There were many revisions of the Letter, often with the "track changes" feature showing who suggested what. The Letter was the subject of review and commentary by a number of senior members within the Department.
10. According to the Final Investigative Report ("FIR") prepared by [REDACTED] [REDACTED], the draft Letter was revised no less than 18 times, with over a dozen people contributing to it in some fashion. According to the FIR, [REDACTED] was significantly involved in preparing the Letter, as I discuss below.
11. The final Letter, as filed with the Adjudicator at the public hearing, was seven pages long. It is conveyed in the strongest possible terms that Constable [REDACTED] should be dismissed. It read:

Based on his previous record of disciplinary defaults, a history of ethically deficient decisions, a sub-standard work history, and the seriousness of the latest breaches of [REDACTED] policy and the *Police Act*, I do not believe corrective measures are appropriate. They have not worked in the past and to consider them again in such a serious circumstance would bring the administration of police discipline into serious disrepute. The potential outcome would be damage to the reputation of the [REDACTED], a reduction in the confidence of the public, and impairment of the ability of the [REDACTED] to be effective in the community. In my view, these consequences are unacceptable. The only choice for me is to ask for termination of Constable [REDACTED] employment.

12. When the public hearing on the penalty resumed, not surprisingly, Constable [REDACTED] raised serious objections to its contents. Chief Constable [REDACTED] then provided a further clarifying letter dated [REDACTED]. On [REDACTED], Adjudicator [REDACTED] disagreed with the Chief Constable's submission that this was an appropriate case for dismissal and instead, imposed a 40-day suspension. It appears that Adjudicator [REDACTED] was troubled by the contents of the letter. As a postscript to his reasons on discipline, the Adjudicator wrote as follows:

68. The opinion of a Chief Constable and the evidence he or she may be able to present at a disciplinary hearing can provide valuable assistance to an adjudicator. Doing so also ensures that an adjudicator appreciates the impact their decision may have on that Police Department. It is self-evident, however, that any opinion and evidence from a Chief Constable is expected to be balanced, fair, complete and accurate.

69. The letter provided by the Chief Constable in this case failed to meet those expectations. Its preparation was delegated to others. This is understandable given the Chief Constable's many other responsibilities. My criticism is not directed at the Chief Constable personally but rather at the Department and is meant to encourage the Department to exercise more care in the future.

13. Constable [REDACTED], [REDACTED], made a written complaint focusing on Chief Constable [REDACTED] conduct in preparing and submitting the Letter. Following this complaint, [REDACTED] was appointed to conduct an external investigation. His Final Investigative Report relating to [REDACTED] was completed on [REDACTED]. He concluded that the submission Letter was a product of a flawed business process on the part of [REDACTED]. He wrote: "Overall, the submission letter was a collective effort and an organizational failure and not the product of a singular person, including Chief Constable [REDACTED]". He concluded that the available evidence did not support an allegation of misconduct in relation to [REDACTED].

14. The matter relating to [REDACTED] then went to [REDACTED] Chief Constable [REDACTED], as Discipline Authority under s. 112 of the Act. On [REDACTED], Chief Constable [REDACTED] determined that the allegation of misconduct against [REDACTED] was unsubstantiated.
15. A parallel complaint relating to Chief Constable [REDACTED] has been handled separately, as it must, given his status as Chief Constable of a municipal department. I want to make clear that my analysis focuses on the allegation of misconduct pertaining to [REDACTED] and does not address the distinct situation of Chief Constable [REDACTED]. I am assessing the allegation against [REDACTED] separately and on the basis only of the materials presently before me.
16. Finally, on 11 July 2016, the Police Complaint Commissioner appointed me, under s. 117, to review the matter. Shortly after that date, I was provided with the materials for my review, specifically the FIR prepared by [REDACTED] [REDACTED] and the records referred to in that report.

ANALYSIS AND DISCUSSION

17. The law is not in dispute. Under the *Police Act*, misconduct is defined in s. 77. The specific allegation relating to [REDACTED] is, as put in the Notice of Appointment of Retired Judge:
- That [REDACTED] committed Discreditable Conduct pursuant to section 77(3)(h) of the *Police Act* by conducting himself in a manner which he knew, or ought to have known, would be likely to bring discredit on the municipal police department. Specifically, when [REDACTED] and Chief Constable [REDACTED] in their written submission to the Adjudicator, failed to provide balanced, fair, accurate and complete information.
18. The subsection referred to, s. 77(3)(h), identifies one specific type of "disciplinary breach of public trust", defined as follows:

"discreditable conduct," which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know,

would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

- (i) Acting in a disorderly manner that is prejudicial to the maintenance of discipline in the municipal police department;
- (ii) Contravening a provision of this Act or a regulation, rule or guideline made under this Act;
- (iii) Without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada.

19. As I understand the misconduct allegation here, it is not a contravention of paras (i)-(iii). Instead, the alleged misconduct arises in preparing the Letter in a manner that the member knows, or ought to know, would be likely to bring discredit on the [REDACTED]. It is apparent to me that a carefully prepared, accurate and fair letter would not tend to bring discredit on a police department. But an inaccurate letter prepared without care, prone to misleading the reader, would give rise to the likelihood of bringing discredit on the department. The question is whether the Letter in this case can be characterized that way. And if it can, is the specific involvement of [REDACTED] such that it appears to constitute misconduct?

The accuracy and fairness of the Letter

20. As complainants under the *Police Act*, the [REDACTED] raised concerns about the lack of balance with the Letter. Based on my review of the Final Investigative Report and the evidence and records referenced in that report, there appear to be instances in which the Letter describes matters in a potentially misleading way.
21. The Letter gives a number of examples of what are said to be ethical or professional failings on the part of Constable [REDACTED]. This includes the officer's previous misconduct in police pursuits, mishandling of firearms, and poor job

- performance. It paints the picture of a deeply flawed member, lacking any redeeming qualities.
22. When one compares the Letter to the underlying or source information, there are some discrepancies. As an example, the Letter refers to Constable [REDACTED] having a "history of engaging in unauthorized pursuits", and indicates that he had been "interviewed/cautioned on two separate occasions for *his failure* to follow the [REDACTED] procedure governing pursuits" (emphasis added). Yet, the Letter went on, he chose again to engage in high-risk conduct that was contrary to policy. This description was elaborated on in another part of the Letter, referring to when "Constable [REDACTED] pursued a vehicle without activating his lights and sirens and without authority to engage in the pursuit".
23. These words left the impression that Constable [REDACTED] was the driver, just as in the [REDACTED] case. In fact, in the [REDACTED] incident, he was the passenger not the driver. While this may not relieve him of responsibility completely, it is an important fact that should have been made plain in the Letter.
24. In his clarifying letter of [REDACTED], Chief Constable [REDACTED] indicated that he was aware that Constable [REDACTED] was the passenger, not the driver, in the [REDACTED] pursuit matter, but maintained the relevance was that Constable [REDACTED] had been spoken to about his conduct in relation to two prior pursuits.
25. As a further example, the Letter paints a negative picture about Constable [REDACTED]'s low-volume work while serving on the Telephone Response Team, going so far as to set out statistics for the number of calls he handled and the number of reports he prepared. More generally, the Letter focuses on the negatives, in making the case for dismissal. This negative portrayal was unalleviated by any positive information, despite the fact that performance appraisals for Constable [REDACTED] had indicated he was meeting or exceeding expectations; the FIR described that the officer's "performance appraisals were very positive". In addition Constable [REDACTED]'s files contained approximately 21

letters of appreciation and recognition about his positive performance. It cannot be said that the Letter was fair, balanced or accurate.

26. It would seem, with the benefit of hindsight, that many of the problems with the Letter might have been avoided. A draft of the Letter was shown to [REDACTED] [REDACTED], who gave critical feedback and identified inaccuracies. He contacted Chief Constable [REDACTED] and expressed serious reservations about the contents of the Letter, based on its apparent unfairness and lack of balance. He was specifically concerned that the submission was factually incorrect and misrepresented Constable [REDACTED]'s discipline and work performance. Constable [REDACTED] said that he initially assumed that it was someone other than the Chief Constable who prepared the letter but that the Chief Constable stated, "It's my letter, I wrote the bulk of it." He did make reference to others who prepared the document. It appears these problems were not adequately addressed despite them being identified.
27. I fully agree with Adjudicator [REDACTED] in that he was right to criticize the Letter for a lack of accuracy, completeness and balance. Appropriate care was not taken in preparing this unusual document. It goes without saying that officers who face discipline under the *Police Act* must be treated with fairness.

[REDACTED]'s role in preparing the Letter

28. Having reached that view of the Letter, the particular question for me, on this review, is whether these failings may fairly be said to amount to apparent misconduct on the part of [REDACTED]. The answer to this, in my assessment, turns on the nature of [REDACTED]'s work on, and responsibility for, the preparation of the Letter.
29. According to the Final Investigative Report ("FIR") prepared by [REDACTED] [REDACTED], [REDACTED] took conduct of the Letter after lawyer [REDACTED] had drafted it initially as a legal submission rather than a letter. At the time, [REDACTED] was the Officer-in-Charge of [REDACTED].

██████████ and was responsible for the Department's ██████████
██████████ The conduct or oversight over the Letter was given to ██████████
██████████ because of his position within ██████████ his experience, and his background
knowledge of the ██████████ internal investigation.

30. It is also important to note that Chief Constable ██████████ told investigators that it was ██████████ was the "principal author" of the Letter, and that ██████████ was working closely with lawyer ██████████. Chief Constable ██████████ said that he delegated ██████████ to take a leading position in the preparation of the Letter.
31. In speaking with investigators, Deputy Chief Constable ██████████, who gave input on the Letter, said he would have expected the Letter to be impeccably sourced, so that when it came to the Chief it would simply be a matter of him adjusting the tone. Deputy Chief Constable ██████████ said the Letter was prepared by a member at the ██████████ level with the assistance of a ██████████ lawyer retained for that work.
32. In a similar vein, the present ██████████ Chief Constable, ██████████, said that if ██████████ had done his due diligence then all the facts in the Letter would be correct. Chief Constable ██████████ did not know what contribution to the Letter was made by ██████████ or their counsel, but said there was a presumption that they had done their due diligence and reviewed records held at the Professional Standards and Human Resources offices.
33. The Final Investigative Report documents the evidence given by numerous people in ██████████ management in a senior capacity. In the main, these witnesses describe a collective decision to prepare a submission in support of dismissal, but that ██████████ was the key person in the Department involved in drafting the Letter. ██████████ was asked about the accuracy of information in the Letter (by Deputy Chief Constable ██████████ by

[REDACTED] and by Chief Constable [REDACTED], and confirmed it was all accurate information.

34. In his interview with investigators, [REDACTED] said he never reviewed Constable [REDACTED] personnel file, but did look at performance reviews, police pursuit reports relating to two pursuits, his discipline record, documentation about his work activity at the Telephone Response Team, and that he spoke with the Telephone Response Team supervisor. He received summarized information about Constable [REDACTED]'s background as part of the original [REDACTED] internal investigation of the officer. It appears that on some points, he relied on secondary sources or earlier documents summarizing information, without going to the source materials to fact-check or confirm details. Likewise, it does not appear he delegated or assigned this task to anyone under his command. According to the FIR, [REDACTED] was the only person to obtain and review Constable [REDACTED] Human Resources personnel file, for the purpose of reviewing the Letter.
35. [REDACTED] indicated that there was no documentation that gave him instructions on the Letter. He acknowledged that he took ownership of preparing the Letter even though that task was not expressly assigned to him, although he said he had a limited role in the Letter and that at the end of the day the Chief is responsible for the Letter.
36. From my review of the whole of the evidence, I must find that [REDACTED] [REDACTED] was significantly involved in preparing the Letter, and bore responsibility for ensuring the accuracy of certain details. Based on the materials before me, I conclude that the test under s. 117 is met, and that the conduct at issue appears to constitute misconduct under the *Police Act*.

CONCLUSION AND NEXT STEPS

37. I make a finding, pursuant to s. 117(9) of the *Police Act*, that [REDACTED] [REDACTED]'s conduct in preparing the Letter appears to constitute misconduct, specifically discreditable conduct contrary to s. 77(3)(h).
38. As mandated by s. 117, I hereby give notice of this finding, and rely on my analysis above as the basis for reaching that conclusion. The evidence I have reviewed appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures.
39. I am prepared to offer a prehearing conference to [REDACTED] under s. 120 of the Act, and I can indicate that the range of disciplinary or corrective measures I am considering includes "advice as to conduct", and a verbal or written reprimand (as specified under ss. 126(1)(i), (j), and (k) of the Act).
40. In accordance with s. 117(8) of the Act, I hereby give notice to the complainants of their right to make submissions at a discipline hearing under s. 113.
41. At the discipline hearing, [REDACTED] has the right pursuant to s. 119 to request permission to call and examine or cross-examine witnesses, provided such request is made in writing and is made within 10 days of receipt of this notice of decision.

Dated at Vancouver, British Columbia this 28th day of July, 2016.



The Honourable Wally Oppal, Q.C.
Retired Justice of the Appeal Court of British Columbia