

IN THE MATTER OF THE APPEAL FROM DISCIPLINE PROCEEDING OF
CST. RAVINDER THANDI #244
PURSUANT TO THE PROVISIONS OF THE POLICE ACT

REPLY SUBMISSIONS OF CST. THANDI TO OCCP SUBMISSIONS

1. Section 141(4) provides an unfettered discretion to allow the adjudicator to consider evidence not contained in the disciplinary decision or his service record. This power is to be exercised where there are “special circumstances” and it is “necessary and appropriate” to do so.

Statutory Discretion in Context of Correctness as Standard of Review

2. The statutory discretion must also be seen in the context of the adjudicator’s mandate to determine the appeal on the basis of the standard of correctness as opposed to some lesser standard which may make the provision of additional evidence moot. In order to reach a conclusion on the correctness of the disciplinary decision hearing, the new evidence can provide a more nuanced understanding of the whole of the evidence led at the hearing. This is especially true where the evidence is from an individual attempting to recall their thought process during a period of impaired functioning.

Special Circumstances Ignored in OCCP Submission

3. It is respectfully submitted that the submission of the OCCP ignores the fact that the Appellant submissions identify the “special circumstances” as being the very nature of the evidence from which the adjudicator is to make a determination. The nature of the evidence raises significant challenges for counsel attempting to lead evidence of an individual suffering from two well-documented mental disorders. This challenge involves the ability not only to accurately recall events, but also, to

recall one's own thought processes while in a hypomanic or a profoundly depressed state. Added to this are the after-the-fact admissions of Constable Thandi which occurred at a time when his mental functioning was intact and he was fully willing to acknowledge that he engaged in improper conduct regardless of the integrity of his memory.

4. The evidence sought to be admitted is extremely limited and is not an attempt to get a second kick at the can. The record is quite clear regarding Constable Thandi's evidence, as his challenges in recalling details and his flawed recollection of continuing to take medication when the Pharmacare printout showed that he was not illustrate the .
5. This evidence sought to be advanced is largely in relation to his recollection, over the period he was off his medication, of his thought processes generally and not specifically in relation to contentious issues which were canvassed at the discipline hearing. It is respectfully submitted that this evidence would be of benefit to the adjudicator with little inconvenience to the process. Given that Constable Thandi could lose his career, reputation and ability to support himself and his mother, there are tremendous consequences facing him and his recovery. Constable Thandi has been denied disability benefits by his insurance provider, which required the commencement of litigation.

Manner of Handling Situation Permitted Insurer to Deny Coverage

6. The high profile criminal charges and culpable dismissal allowed the insurer to argue that Constable Thandi was dismissed for cause, with no regard for his psychiatric status and the profound stress that he has endured.

OCCP Submission Ignores Nature of Evidence to be Led as "Special Circumstances"

7. The OCCP submission goes beyond the narrow application brought and is effectively an attempt to get into the merits of the appeal. As a bell cannot be unrung, it is necessary to address those submissions so as not to prejudice the application before this review hearing. I will be providing the adjudicator with the thrust of the arguments and evidence led at the disciplinary hearing on behalf of Constable Thandi but given my commitments in Calgary I have not had the time

- to provide proper transcript references. The purpose of addressing, what appears to be the OCCP's attempt to argue the merits of the appeal, it is simply to avoid prejudice to a fair determination of the narrow application before the adjudicator.
8. Virtually all of OCCP submissions relate to attempting to support the reasoning of DA Rich instead of addressing the relevance, nature and probative value of the evidence sought to be admitted. It is submitted that this is an attempt to demonstrate that the decision was well-reasoned and well-founded on clear evidence, instead of addressing the specific application. In fact DA Rich fails to describe how he reached his conclusions that Constable Thandi was not in a very hypomanic state given his "out of character behavior" and the decision to cease using his medications given his feeling of wellness(this is common in individuals who experience hypomania)
 9. There will be very detailed submissions on the extent to which DA Rich completely failed to answer the simple question as to whether there was a nexus between Constable Thandi's mental illness and the impugned behavior. Many precedents will be advanced where very serious errors of judgment, including fraud extending over a five-year period, was held to be the result of simple severe depression.
- Bipolar II & OCD Impact Executive & Moral Judgment & Impulse Control**
10. Both hypomania and depression impact frontal lobe function, which is the center of executive and moral thinking. Bipolar II disorder is also characterized by a lack of impulse control and a manic belief in the correctness of one's actions. This impairment affects the ability of an individual to appreciate the consequences of their actions, including the appropriateness of embarking upon a high risk intimate relationship as was the case here.
 11. The inability to reflect on one's decisions and make accurate logical and moral judgments is also the core of the disorder. Proper medication can entirely reverse this condition. Unlike Bipolar I where an individual can have psychotic episodes, Bipolar II disorder is largely characterized by depression and occasional hypomania which is often seen as normal state.

12. Significant stressors such as divorce, car accidents and unwarranted investigations (as was the case here) can serve as triggers for the hypomanic state which may be followed by a decision to cease taking medication given that they are feeling so well.

Challenges faced by Counsel in leading evidence

13. It is very difficult for legal counsel, raised on the premise that a person intends the natural consequences of their actions, to understand the profound yet subtle ways by which mental illness can impact judgment and moral reasoning. The definition of Bipolar II is, in substance, defined by out of character behavior of engaging in “high-risk activities which have the likelihood of turning out poorly”. By definition, this is a disorder which impacts judgment while providing the individual with profound feelings of confidence which further impair their ability to reflect on the command their decisions.
14. It is almost humorous to see the reaction of individuals to the possibility that a police constable may have a condition which, if not treated, can lead to impaired judgment. In fact, the research in human decision-making demonstrates that flawed decision making is part of the evolutionary shortcuts built into the human brain. Daniel Kahneman in his book **Thinking Fast and Slow** outlines the research demonstrating the profound flaws in human judgment and how individuals cherry pick facts to support an emotional response. This is certainly the experience of trial counsel and judges who understand our flawed human condition. The majority of the flawed decisions are made by officers who have no disability and whose only affliction is hubris or a para military disposition.

Constable Thandi was a Capable Constable despite his Disabilities

15. Constable Thandi worked with the investigating officer Sgt. [REDACTED] for three years. Sgt. [REDACTED] described Constable Thandi as a very capable police officer who we enjoyed working with. Constable Thandi testified that his OCD condition actually allows him to be extremely methodical and detailed and that working is a very important part of his life. He testified that his understanding of mental illness

- allowed him to respond effectively to many troubled individuals and to other members on the Force who were dealing with their own mental health issues.
16. Rather than seeing mental illness as simply another illness, there is a tremendous stigma and fear attached to it. This is certainly demonstrated by the manner in which he was dealt with by the APD.

Stressful Life Events Preceded Hypomanic Episode

17. Constable Thandi's problems were the result of a series of stressful life events which led to a hypomanic episode and his decision to go off his medication. Since hypomanic episodes are rare in bipolar two disorder they are not readily recognized by the individual experiencing them or even their psychiatrist as they can simply appear to be a period of wellness
18. Constable Thandi's current long-standing profound depression was largely the result of the APD's failure to deal with this matter as an employment issue. The APD choose to expose him to the humiliation of criminal charges, press releases regarding the fraud charges (without explanation), years of unemployment, and finally, the termination of his compensation which resulted in overwhelming financial stress given his denial of disability benefits.

Constable Thandi's Evidence at Hearing was Largely Limited to Impugned Decisions and Did Not Pursue the Extent to which He was Generally Able to Reflect Upon Routine Decisions Made

19. Constable Thandi was asked about specific recollection of the various events and he had no recollection, or only limited recollection, of some of those events. In addition, he was interrogated several times and prepared for a hearing so he had a general recognition of a basic timeline. What was not pursued by counsel as carefully as it could have been (had counsel understood the scope of challenge more completely), is the fact that Constable Thandi generally had no recollection of engaging in the type of reflective thought processes that one would have when entering into a relationship with a younger woman with a profoundly dysfunctional background, thinking of the consequences of becoming a caretaker to her child, expending large amounts of money on her, and preparing to bring her

into his mother's home. While none of these are unlawful actions, they certainly demonstrate Constable Thandi's profoundly impaired judgment.

20. Similarly, while he generally addressed specific breaches of the no-contact orders and his impaired functioning, Constable Thandi was not asked to address the extent to which he was able to reflect on decisions made in other areas of his life over the post-suspension period.
21. It is respectfully submitted that this evidence would permit the adjudicator to understand the broader impact of the disorder and how his judgment was impaired, which demonstrates more clearly that he was suffering from hypomania. This evidence would also allow the adjudicator to appreciate the difficulty of a witness attempting to piece together an understanding of conduct that he or she engaged in when suffering from two psychiatric disorders. The psychiatric evidence led by Dr. ██████ indicated that Bipolar II fueled his OCD, a disorder which was largely something that he had controlled and managed well for decades.
22. Counsel for the Commissioner references DA Rich's statement of the onus on the member to demonstrate mental illness. However, logic would dictate that this onus is satisfied once it is demonstrated that the member is suffering from psychiatric disorders which directly impact voluntariness, foreseeability, moral judgment and impulse control. Once this onus is satisfied, any onus to prove culpability, or lack thereof, is on the employer.

No Theory Advanced as to why Thandi Engaged in Criminal Conduct

23. There was no evidence led by the APD challenging the psychiatric evidence of Dr. ██████. Moreover, no theory was advanced as to why Constable Thandi, a twenty-year member with a good record pre-2012, would deliberately deceive a HR employee who he valued as a friend and who had helped him deal with the many depression-related absences which are a feature of his condition.
24. DA Rich at no time tendered an explanation as to why Constable Thandi, with full knowledge that other constables had been dismissed for small variances in expense accounts, would take such a risk when he did not even know whether Ms. ██████ needed specific benefits. His decision can only be understood in the

context of hypomania which drove him to the unassailable belief that ■■■ was the woman of his dreams and his life partner who would solve all of his problems, including the regular depression that hounded him.

No Violence or Decision Placing Public or Coworkers at Risk

25. This is not a case of a police constable engaging in work behavior which caused risk to other officers or members of the public. There is no evidence whatsoever that anything like that has occurred. The benefit issue involved impaired judgment with respect to the status of his relationship and does not demonstrate any propensity to engage in hostile or reckless behavior. It also occurred during a period where he had been off his medication following a series of stressors and when he was dealing with an aspect of his disorder that he had little experience with (i.e. hypomania).

Many Decisions Where Nexus is Established with Minimal Evidence

26. The decision of *Toronto (Metropolitan) v. Metropolitan Civil Employees Union Local 43* 13 C.L.A.S. 30 concerned an ambulance driver who was employed for 20 years and had an exemplary employment and service record. He was fired due to the improper use on numerous occasions over a five-year period of Department of Ambulance Services credit cards for the purchase of gasoline for his own private car. The board in this decision had no problem connecting his profoundly impaired judgment with the depressive disorder which he was suffering from.

Flawed use of Thandi's Insight When Healthy as Evidence of Culpability

27. Counsel for the OCCP in paragraph 13 cites the cross-examination of Constable Thandi, including the extent to which he acknowledged that he did not investigate the requirements for benefits, that he acknowledged his application was false, and when shown a text, that he acknowledged that he had advised Ms. ■■■ that they needed to be removed from his benefits plan after their breakup.
28. Constable Thandi had no recollection of actually filling out the form and his admissions were acknowledgements of the impropriety of his conduct through the eyes of a healthy brain. One would expect that deliberately engaging in a fraudulent act, with the knowledge that lesser acts had resulted in the dismissal of his fellow officers, would be highly impressed in his memory. Of course, this

decision was made during a period of hypomania characterized by impaired judgment which was exacerbated by profound and grandiose confidence in his decision making.

29. The above examples cited by the OCCP, rather than supporting guilt, demonstrate that Constable Thandi's thinking was profoundly distorted by a hypomanic episode. Rather than looking at the appropriate rules which govern the benefit plan as one would expect of a police officer, he expressed the unshakable belief that Ms. [REDACTED] was his life mate and they would be together forever. This is not the thinking of a trained police officer but rather that of an individual suffering from hypomania which prevented him from not only understanding the flawed nature of his decision to apply for benefits, but also, his decision to enter into a relationship with a woman 20 years his junior who was unemployed, raised in foster care, had criminal associations, and had a young child. By any standard, this was a relationship bound to fail and was not the answer to all of his prayers.

Answers provided by Constable Thandi are Retrospective

30. Constable Thandi's admission that the application was false was predicated with "well now that I look back, yes, it was false". The fact that he goes on to acknowledge that he knew it at the time is of limited significance given that he is being pressed by an experienced trial lawyer and is torn between the need to admit his wrong and the challenge of recalling the flawed thinking processes which led to his impaired judgment.
31. Where mental illness creates problematic behavior, further impairs an appropriate assessment of the behavior, and generates strong obsessive thoughts with limited impulse control, the probative value of after-the-fact admissions of wrong is of no value in determining the degree of culpability.
32. Similarly, an acknowledgement that a mentally ill individual knew that their behavior was wrong in no way answers the question as to whether they are criminally culpable. This is because their judgment was impaired by a rush of well-being and grandiosity which drives their behavior and gives them the illusion of having ultimate confidence in decision making, when in fact, their ability to exercise judgment is impaired.

Attempt to Establish Thandi's Medical Status Based on Cross-examination

33. Much is made in the OCCP submissions in relation to Constable Thandi's agreement with discipline counsel that he agreed with Dr. [REDACTED] notes that he was doing well in January 2013 and that his psychiatric condition was in remission in March and April 2013. Of course he felt he was doing well in that he was no longer suffering from a deep depression which routinely plagued him and he believed he had met the woman of his life would solve all of his problems. His conclusion as to whether his psychiatric condition was in remission is wholly irrelevant given that the impact of the disorder is to impair one's ability to self-regulate to step back and properly assess the wisdom of your behavior.

Hypomanic Portion of Bipolar II Disorder Very Difficult to Diagnose

34. Dr. [REDACTED] also testified that Bipolar II disorder is very difficult to diagnose given that the depressed individual simply appears to be in a good space in their life. Constable Thandi testified that in earlier years, he had gone through periods of intense productivity and periods of invincibility but these had always resulted in a financial gain and he never understood these to be a part of his disorder. In addition, individuals experiencing a hypomanic episode are likely to cease taking their medication given their feelings of elation and well-being which is in stark contrast to their feelings during their frequent depressive periods.

Failure to Take Medication-Part of Disorder

35. The evidence led by Dr. [REDACTED] is that individuals who are suffering from hypomania are so overwhelmed with feelings of well-being that they routinely go off their medication. The fact that Constable Thandi was incorrect about when he discontinued his medication demonstrates his poor memory. The PharmaNet records indicated that he was off his medication from 2012 through to April 2014. This is entirely consistent with him being in a hypomanic phase.
36. The evidence led by Dr. [REDACTED] was that Constable Thandi was very aware of when he was in a depressive state and would take himself out of his work until he was able to return to the workplace. This led Dr. [REDACTED] to fail to recognize Constable Thandi's hypomania given that it followed a period of depression after his divorce

was finalized in 2010. Typically routine blood testing provides a practical mechanism to ensure compliance for an individuals with Bipolar II disorder.

Admissions Breach

Dr. [REDACTED] testified that the Bipolar II element of Constable Thandi's disorder had the effect of fuelling his OCD. He described that typically, Constable Thandi and other individuals with OCD do not act out on their thoughts but simply engage in harmless behaviours to try manage the intrusive thoughts. He testified however that the Bipolar II mood disorder can fuel the OCD causing the person afflicted to act out on his obsessive thoughts. Constable Thandi was given conditions which even DA Rich felt were bound to fail and incapable of being met as a result of Constable Thandi's overwhelming OCD. Some of the conditions imposed were completely unnecessary, including Constable Thandi's inability to go to the restaurant that he and his family enjoyed and where he had a very close friend, even when Ms. [REDACTED] was not present. In addition, he was to have no contact with Ms. [REDACTED] mother even though he had a close relationship with her.

Profound Anxiety and Helplessness led to Breaches of the no Contact Order

37. More importantly, Constable Thandi was profoundly worried that Ms [REDACTED] was in imminent danger given that the person who had initiated the complaint had a background of criminal activity and fraud. He described his level of anxiety and obsessive thoughts as being overwhelming and that he had no ability to resist these compulsions. To analyze the conduct of an individual who is dealing with mental illness on the same standard as a cognitively healthy individual is absurd and is simply a refusal to understand both the initial hypomanic period and its consequences, along with the depressive cycle after his serious 2013 MVA.
38. The breaches of conditions and failure to report only occurred after Constable Thandi was publicly humiliated by the manner of the arrest on his birthday and the press conference that identified fraud but failed to mention repayment and that it was a benefits issue. The subsequent termination of his income prior to the discipline hearing has placed additional crushing burdens on a man who has lost the career he loved, his self-respect and his friends all because he had two serious mental conditions which he managed successfully for two decades.

**Failure to take Medication During Period of Reported Well-Being
(Hypomania)**

39. . An APD Sgt. triggered an unwarranted investigation which involved retaining a psychiatrist to assess Constable Thandi. This investigation was solely provoked by the prejudice of the Sgt. who simply assumed that he was not doing well and that he was fabricating the MVA incident. His as significant pain from the 2013 MVA and this unnecessary scrutiny certainly added to the stressors Constable Thandi was facing while his relationship with Ms. [REDACTED] was coming to an end.
40. DA Rich having been responsible for the manner of his arrest, the public announcement of his criminal fraud charges and the financial stress from terminating his compensation prior to a determination of his guilt resulted in Constable Thandi having protracted depression, disabling insomnia, severe anxiety and obsessive thoughts. Yet DA Rich makes specious distinctions between Constable Thandi's breach of the no contact order and his failure to report the breaches. A profound depression can impair judgment just as much as bipolar disorder can. Moreover, one wonders how, in his distorted thinking, Constable Thandi is going to alleviate his profound anxiety if he acknowledges his breaches when this may result in him being incarcerated. This is hardly a groundless worry given that he was arrested and charged with fraud instead of being charged under the medical services plan legislation with something more appropriate to the offense, particularly in light of his psychiatric disability.

Abuse of Process

41. The OCCP submissions go into some detail about the fact that Constable Thandi had pled guilty criminal charges for which he received a conditional discharge. Constable Thandi testified that he had spent \$30,000 consulting several criminal lawyers only to be told that introducing a defence of mental illness would likely cost two hundred thousand dollars, which he did not have.
42. DA Rich ignores the fact that detailed submissions were advanced at the hearing which outlined the exception to the operation of the doctrine of abuse of process as outlined by Justice Arbour in the decision of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. These submissions received no meaningful

analysis by DA Rich. In the Supreme Court of Canada decision, the Court recognized that the doctrine of abuse of process is not to be rigidly applied and that judicial discretion governs its application to avoid injustice.

43. The facts of the *Toronto (City)* decision involved a full trial and appeal and an attempt to reargue the factual basis led in the previous hearing. The facts of the subject case are in direct contrast to the aforementioned decision in that Constable Thandi entered into a guilty plea and there was no determination on the merits. While there are statutory provisions deeming the conviction to be conclusive, there is a separate issue then as to whether the common law doctrine of abuse of process precludes the underlying issues from being determined in a subsequent hearing where plea bargains are involved. *Criminal Code* defence of insanity is founded on an 18th Century common law defence and largely requires a set psychosis or significant break with reality. In order to advance Bipolar II disorder as a defense in a criminal prosecution, Constable Thandi would likely have had to face off against the resources of the Federal Government and take the matter to the Supreme Court of Canada, which is clearly beyond his means. While Bipolar I disorder can involve psychotic breaks, this is not the case with Bipolar II, which is often difficult to diagnose in that the condition can be seen largely as a depressive disorder and a hypomanic state may be viewed as an indication that the patient is doing well.

Discretionary factors

44. Justice Arbour makes it very clear that the doctrine of abuse of process is a discretionary remedy, and as such, is fundamentally flexible in its application. In paragraph 53 she notes as follows:

“The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against re-litigation, either through the doctrine of res judicata or that of the abuse of process, would create unfairness. If for instance, the stakes in the original proceeding were too minor to generate of full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the

discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision

(Danyluk supra, at paragraph 51, Franco, supra, at paragraph 55)

45. It is submitted that the case at hand falls into the above exception in that the stakes in the criminal proceeding, his lack of criminal record, numerous letters of reference and the minimal nature of the offense had to be weighed against the disproportionate costs and uncertainty of having to fund a mental illness defence all the way to the Supreme Court of Canada. Surely what was done with proper legal advice was the identical decision which all but the wealthiest Canadians would do.
46. The Police Union did not fund any of his criminal defence but have funded his disciplinary hearing and, to a lesser degree, his appeal. In addition, the disciplinary processes and/or grievance procedures are much more appropriate and cost-effective mechanisms for determining what are essentially employment and human rights issues. The investigation which led to Constable Thandi's prosecution at no time attempted to determine the extent to which his psychiatric disorders played a part in the impugned conduct. Moreover, their conduct of arresting Constable Thandi in a public place on his birthday after luring him with the offer of a heart-to-heart chat with a colleague resulted in him being suicidal and, for the first time in his career, actively taking steps toward committing suicide. His charges were publicly announced in a press conference and had a profound impact on a proud Sikh whose extended family is comprised of proud members of the Canadian and Indian military and police and sheriff services.
47. Had this conduct been properly dealt with as an employment matter, DA Rich would not have been faced with the legal questions as to the role of the Police and the human rights legislation. If it was felt to be necessary to proceed with criminal charges, then this should have been dealt with by way of diversion.
48. The ADP investigator Sgt. ██████ testified that he spent nine months full time conducting the investigation. Along with this investment, there were many other officers involved in interviewing numerous witnesses and several interrogations of Constable Thandi.

49. Sgt. ██████ testified that other than a brief interview of Dr. ██████ at Constable Thandi's insistence, they made no effort whatsoever to understand the role that Constable Thandi's disorders may have played in his conduct. At no time was the occupational psychiatrist that had been consulted in 2013 called to provide an interview or opinion. Sgt. ██████ testified that while he understood that issues of compulsion were relevant defences in criminal prosecutions, they took no steps to investigate in this area and believed that that would be dealt with at a later time. It is respectfully submitted that this demonstrates a significant departure from a reasonable employment practice which would seek to understand the "out of character behaviour" of a long-term police Constable who had successfully dealt with these two challenging psychiatric conditions for almost two decades. Even the most perfunctory investigation would have demonstrated that he had been off his medication for most of the critical period, and therefore, likely to engage in "high-risk behaviour which is likely to turn out poorly" which is the hallmark of Bipolar II disorder.
50. While the current law requires the mentally ill individual to demonstrate the role their mental illness played in the impugned behavior, it is respectfully submitted that this is done by simply advancing the relationship between the mental illness and its ability to impair cognitive judgment. It is submitted that this is sufficient to meet any onus, particularly in light of the evidence of Constable Thandi's ability to manage to significant mental illnesses prior to 2012.
51. The attempts to point to inconsistencies in the evidence of an individual who has gone through a period of hypomania and profound depression is akin to shooting fish in a barrel. It proves nothing except that individuals in the throes of psychiatric illnesses involving massive changes in brain neurochemistry will have challenges in accurately reporting events, and more importantly, the thought processes which led to those events.
52. Rather than focusing on the Constable Thandi's period of disability following major life changes, and his current disability largely created by the ADP's terrible treatment, the Human Rights Code requires that an employer respond compassionately and appropriately to individuals suffering from a disability and

be governed by medical evidence in determining their return to gainful employment.

Respectfully submitted,

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