

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

**AND**

**IN THE MATTER OF CONSTABLE [REDACTED] ([REDACTED] OF THE  
[REDACTED] POLICE DEPARTMENT**

**DECISION ON SECTION 117 REVIEW OF FINAL INVESTIGATIVE REPORT**

**TO: CONSTABLE [REDACTED]**

**AND TO: SERGEANT [REDACTED], INVESTIGATING OFFICER**

**AND TO: INSPECTOR [REDACTED], DISCIPLINE AUTHORITY**

**AND TO: CHIEF CONSTABLE [REDACTED]**

**AND TO: MR. STAN LOWE, POLICE COMPLAINT COMMISSIONER**

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***INTRODUCTION***

1. On 15 August 2014, the Police Complaint Commissioner ordered a review of the 22 July 2014 decision of the Discipline Authority (Inspector [REDACTED]), who found that two of three allegations of discreditable conduct made against Constable [REDACTED] of the [REDACTED] Police Department ([REDACTED] were unsubstantiated, and that a third allegation was substantiated. A Notice of Appointment of Retired Judge, issued by the Police Complaint Commissioner on 15 August 2014, appointed me to conduct a s. 117 *Police Act* review of Inspector [REDACTED] decision.
2. Inspector [REDACTED] made his decision based on the contents of the Final Investigative Report submitted to him on 15 July 2014 by Sergeant [REDACTED], the investigating officer.
3. Sergeant [REDACTED] investigation was initiated subsequent to an Order for Investigation made by Officer of the Police Complaint Commissioner. The original Order was made by the Police Complaint Commissioner, pursuant to s. 93 of the *Police Act*, on 15 January 2015. The original Order related to two acts of alleged discreditable conduct (Allegations 1 and 2). An Amended Order for Investigation

adding a third act of alleged discreditable conduct (Allegation 3) was issued on 15 May 2014.

4. On 22 September 2014 the Office of the Police Complaint Commissioner provided me with the material required under s. 117(6) of the *Police Act*.

#### **THE ALLEGATIONS**

5. The Notice of Appointment of Retired Judge identifies the following three allegations against Constable [REDACTED] all of which were alleged to have occurred on 12 December 2013 at the [REDACTED] in [REDACTED] BC when Constable [REDACTED] was off duty.

##### **Allegation 1 – Discreditable Conduct**

It is alleged that Constable [REDACTED] committed the misconduct of Discreditable Conduct as per section 77(3)(h) of the *Police Act* by urinating on the floor inside the [REDACTED].

##### **Allegation 2 – Discreditable Conduct**

It is alleged that Constable [REDACTED] committed the misconduct of Discreditable Conduct as per section 77(3)(h) of the *Police Act* by identifying himself as a police officer with the [REDACTED] and flashing his badge when approached by security staff.

##### **Allegation 3 – Discreditable Conduct**

It is alleged that Constable [REDACTED] committed the misconduct of Discreditable Conduct as per section 77(3)(h) of the *Police Act* by inappropriately touching two women inside the [REDACTED].

#### **THE DISCIPLINE AUTHORITY'S DECISION**

6. Inspector [REDACTED] determined that Allegation 2 was substantiated and that Allegations 1 and 3 were not substantiated. His decision was in agreement with the investigative findings of Sergeant [REDACTED], as contained in his Final Investigative Report.

7. In accordance with the accepted procedures for the conduct of s. 117 reviews, my decision is limited to addressing the correctness of the findings of the Discipline Authority that Allegations 1 and 3 were not substantiated on the record available in this matter.

**ALLEGATION 1 – DISCREDITABLE CONDUCT BY URINATING IN** [REDACTED]  
[REDACTED]

*A. The Relevant Evidence*

8. The only available direct evidence pertaining to this allegation is found in the statements of two civilian witnesses, [REDACTED], a food and beverage server at the [REDACTED], [REDACTED], a housekeeper at the [REDACTED], and in the CCTV video from the [REDACTED] security cameras.
9. Ms. [REDACTED] describes encountering an obviously intoxicated man (Constable [REDACTED] in the [REDACTED] of the [REDACTED] at about 11:20 or 11:30 p.m. When she saw him he was in a corner of the [REDACTED] near a table patrons eat and drink at, facing towards a [REDACTED] mounted in the wall. His back was to her. He appeared to her to be doing something with his hands inside the front of his pants (something she concluded rather than saw). A short while later, [REDACTED] turned around and attempted, unsuccessfully, to leave the [REDACTED] by the [REDACTED], a door leading out of the [REDACTED] that was locked at the time.
10. Constable [REDACTED] then turned around again and walked past her as he left the lounge through an open doorway that led to the [REDACTED]. As he passed Ms. [REDACTED] she asked him how she could help him, to which he replied: "Nothing, nothing". The CCTV video time display shows that Constable [REDACTED] was in the [REDACTED] for two minutes and 24 seconds.
11. After Constable [REDACTED] left the [REDACTED], Ms. [REDACTED] approached the table in question, which she said was "clean" before Constable [REDACTED] arrived. Once at the table she said she saw liquid "on the table, on the chair" and "the carpets" below the table.
12. She did not know what the liquid was but believed it was urine. She did not detect any odour.

13. Ms. [REDACTED] was called to the [REDACTED] at about 11:30 pm to clean up a "spill". She noticed three sets of unused chopsticks and three disposable spoons on the table, which she threw out. She also saw "not so much" water on the table, and what she called "a little bit more spilled water" under the table. She also observed "a sprinkle" of water on a chair at the table. She estimated the total amount of "water" was about half a cup.
14. Ms. [REDACTED] wiped up the "water" with a green cloth and a paper towel. She tried to smell the water, but it had no odour. The liquid had no colour, it was just "clear water".
15. The CCTV video and stills from that video show Constable [REDACTED] in the [REDACTED] and attempting unsuccessfully to leave through the locked door. Constable [REDACTED] was noticeably staggering when in the view of the CCTV. He is out of the picture during the time he was observed near the table and [REDACTED] by Ms. [REDACTED]
16. Constable [REDACTED] was interviewed in a recorded statement which covered all three allegations. A review of the entire record supports Constable [REDACTED] admission that he was highly intoxicated at all relevant times.
17. Constable [REDACTED] along with other members of his [REDACTED] PD unit, was at the [REDACTED] for a Christmas party. He said he arrived at the [REDACTED] at about noon on 12 December 2013. While there he ate with his colleagues and drank alcoholic beverages. After Sergeant [REDACTED] noted that the incident(s) happened at about 11:20 pm on that date, he asked Constable [REDACTED] to describe how much he had to drink that day. Constable [REDACTED] answered: "I don't recall. A lot." When Sergeant [REDACTED] asked him to describe his level of intoxication on a scale of 1-10, with 10 being "falling down drunk", Constable [REDACTED] responded: "About an eight, eight and a half".
18. Constable [REDACTED] said he recalls having "lunch dinner" with other members of his unit during the afternoon and then heading for the [REDACTED] later in the afternoon, "probably around 5:00, 6:00ish". While there he [REDACTED] and then went "upstairs" where he had a "couple more drinks". The next recollection Constable [REDACTED] had was when he was spoken to by [REDACTED] security personnel, which according to the CCTV video was at approximately 11:23 pm, after the alleged acts of discreditable conduct had occurred. Constable [REDACTED] told Sergeant [REDACTED] he has no recollection of the intervening time period.

19. A review of the available CCTV video footage shows that Constable [REDACTED] had seriously impaired motor skills, consistent with his admission that he was highly intoxicated. There is no available evidence to suggest that his assertion that he has no recollection of the relevant events was anything other than genuine.

*B. Decision*

20. The question I am required to answer is: "Does the evidence in relation to this allegation appear sufficient to substantiate the allegation and require the taking of disciplinary steps or corrective measures?"
21. Based on a careful review of the entire record, I find that the evidence in relation to this allegation appears insufficient to substantiate the allegation. While there is no doubt that Constable [REDACTED] was highly intoxicated when he entered the [REDACTED] at the [REDACTED] and may well have engaged in some unusual behaviour, there is simply not enough evidence to permit any reasonable decision maker to conclude that he urinated in the [REDACTED] on 12 December 2013.

**ALLEGATION 3 – DISCREDITABLE CONDUCT BY INAPPROPRIATELY TOUCHING TWO WOMEN INSIDE THE [REDACTED]**

*A. The Relevant Evidence*

22. The only available direct evidence in relation to this allegation is the CCTV security video recorded by the [REDACTED]. The file material includes both copies of the actual video as well as a series of stills taken from the video and reproduced in a PDF format.
23. A review of this material shows that Constable [REDACTED] was in close proximity to both [REDACTED] women it is alleged he touched inappropriately. Significantly, there were no statements from either woman. Neither was identified at any time. Neither of them complained of the suggested inappropriate touching to any person in authority at the [REDACTED] or elsewhere.
24. The first of the two interactions is the most troubling. The video shows Constable [REDACTED] walking through the [REDACTED] of the [REDACTED] between what appears to be [REDACTED] and a [REDACTED]. The relevant [REDACTED] is

shaped like a [REDACTED] which caused a narrowing of the carpeted walkway between the [REDACTED] and the [REDACTED]

25. As Constable [REDACTED] approaches the woman in question, she is walking in the opposite direction he is. She appears to be with two other persons. The three of them are walking abreast immediately beside the [REDACTED] as Constable [REDACTED] approaches. When Constable [REDACTED] nears the outermost portion of the [REDACTED], he has to pass between the woman he allegedly inappropriately touched, who is to his left, and another woman who is standing to his right near the [REDACTED], apparently watching the [REDACTED] at the [REDACTED].
26. The space between these women is sufficiently narrow that Constable [REDACTED] appears to need to turn sideways (to his left) to pass between them. As the [REDACTED] women to his left walks past him, he extends his right hand toward the area of her left buttock. She was wearing a long coat that appears to be knee-length.
27. From the stills reduced to PDF form, it appears it is possible Constable [REDACTED] may have touched the [REDACTED] women's left buttock with his right hand. However, watching the actual video at normal speed, the apparent touching is much harder to detect. It appears that Constable [REDACTED] may have stumbled slightly or otherwise lost his balance just before making this motion. After watching the actual video at normal speed a number of times (in my opinion the best evidence), I conclude that it is probable that Constable [REDACTED] either lost his balance (an obvious possibility given his alcohol induced motor skill inadequacy) or he was making some sort of sophomoric gesture by placing his hand near her buttock. I think the former is more likely than the latter. In either scenario it does not appear as if he actually touched the woman at all.
28. This view of the incident is reinforced by the fact that the woman he allegedly touched does not react in any way when his hand is near her buttock or at any point afterward. Common human experience suggests that if the woman had been touched in the manner alleged it is almost certain she would have involuntarily reacted in some way by flinching, pulling away or turning her head toward Constable [REDACTED]. In reviewing the video a number of times, it is clear that she never flinches, turns her head or otherwise gives any indication that she has been touched at all, let alone in the inappropriate fashion alleged.

29. The second incident of alleged inappropriate touching relates to a second [REDACTED] woman who is standing at a second [REDACTED]. The second [REDACTED] woman is standing near her chair as he moves quite close to her and stands behind the right side of her back just off of her right shoulder. Constable [REDACTED] removes his right hand from his right front pants pocket and moves it toward the right side of the [REDACTED] woman, below the level of the [REDACTED] of the [REDACTED]. It is unclear if he touches her. She turns her head and looks at him and then turns back to the action on the [REDACTED].
30. Constable [REDACTED] still close to her, points with his right hand to the [REDACTED] of the [REDACTED] immediately in front of the woman. The [REDACTED] woman then places more [REDACTED] (the [REDACTED] were in front of her). The [REDACTED]. It appears that she [REDACTED] and Constable [REDACTED] puts his right hand on her right shoulder and says something to her.
31. The [REDACTED] woman then sits down in her chair, puts her purse on her lap and starts talking to a man to her left at the [REDACTED]. Constable [REDACTED] whose right hand is back in his pants pocket, is approached by [REDACTED] security personnel and walks away from the [REDACTED] with them.
32. The [REDACTED] woman, who plainly saw the security personnel approach Constable [REDACTED] says nothing to them and apparently continues to [REDACTED].

**B. Decision**

33. In relation to the allegation that Constable [REDACTED] inappropriately touched the first [REDACTED] woman (see paragraphs 22-28 above) I find that no reasonable decision maker could be satisfied on a balance of probabilities that Constable [REDACTED] inappropriately touched her. At its highest, all that can be said is that it is *possible* he attempted to do so but I am not satisfied the evidence could permit any reasonable decision maker to reach even this limited conclusion on a balance of probabilities.
34. With reference to the second [REDACTED] woman at the [REDACTED], I have no hesitation in concluding that no reasonable decision maker could find on any standard of proof that Constable [REDACTED] inappropriately touched her. It is possible

his behaviour could have been annoying, but on the evidence available, it is not possible to conclude that he touched her inappropriately.

35. I am comforted in this view by the fact that the second [REDACTED] woman in question, while clearly aware that [REDACTED] security were dealing with Constable [REDACTED] made no move or effort to complain to them about anything Constable [REDACTED] may have done. While this lack of complaint is not determinative, it is more consistent with an absence of any inappropriate touching by Constable [REDACTED]
36. Based on my review of the record, I find that the evidence available in relation to this allegation appears insufficient to substantiate the allegation.

**SUMMARY OF DECISION**

37. For the above reasons I confirm the decision of the Discipline Authority and find that the evidence does not appear sufficient to substantiate Allegations 1 or 3.
38. Pursuant to s. 117(11) of the *Police Act*, my decision is not open to question or review by a court on any ground. It is final and conclusive.

Dated at the City of Victoria, Province of British Columbia, this 3<sup>rd</sup> day of October, 2014.



Alan E. Filmer QC