

CANADA
PROVINCE OF BRITISH COLUMBIA

IN THE MATTER OF THE *POLICE ACT*, RSBC 1996, c.367 (as amended)

**AND IN THE MATTER OF THE PUBLIC HEARING
INTO THE COMPLAINT AGAINST
CONSTABLE WILLIAM FOSTER
OF THE VICTORIA POLICE DEPARTMENT**

FINDINGS OF THE HONOURABLE PETER J. MILLWARD, QC
March 28, 2002

Constable William Foster is a member of the Victoria Police Department and is an experienced officer with 21 years' seniority. His record as an officer is without blemish, save for complaints arising out of an incident involving an attempted suicide in the Municipality of Esquimalt on September 19, 2000. The complaints were dealt with in Discipline Proceedings on July 3 and August 21, 2001, conducted by Deputy Chief Constable G. Varley, of the Victoria Police Department, as the Discipline Authority.

The Discipline Authority found with respect to Count 1 - Neglect of Duty, contrary to Section 6(a)(ii) of the *Code of Professional Conduct*, that the default alleged was proven; and that with respect to Count 3 – Discreditable Conduct, contrary to section 5(a)(ii) of the *Code of Professional Conduct*, that the default alleged was proven, and that the other two counts were not proven to be made out. Constable Foster filed a request for a public hearing under the ***Police Act***, and a hearing was held on March 28, 2002.

Evidence at the hearing included a Statement of Facts, agreed to by counsel for Constable Foster and counsel for the Commissioner, and the testimony of Constable Foster. At the conclusion of Constable Foster's testimony, counsel for the Commissioner took the position that there was no evidence to support the allegation in Count 3 of Discreditable Conduct and the finding of the Discipline Authority on that issue is therefore set aside.

On the evidence, I find that:

1. Constable Foster, then Acting Corporal with the Forensic Unit of the Victoria Police Department, was on duty from 08:00 hours to 19:00 hours on September 18, 2000.

2. Constable Foster was called out from his home to attend an arson investigation at the request of the Esquimalt Police Department shortly after midnight on the early morning of September 19. Having completed his work at the arson scene, he attended at a residence where a young man had suffered a gun shot wound. Upon his arrival at that residence, he was told by A/Sgt. Dibden of the Esquimalt Police Department that the matter was a suicide attempt and his services were not required. He returned home, to bed.

3. After returning home, Constable Foster received a call from one Detective Parks of Esquimalt, requesting that he return to the scene to take photographs. He arrived back at the scene at 02:25 hours and took the required photographs. He observed that the scene was not contained, and that access was not restricted, all of which was inconsistent with the practice at a location designated as a crime scene. He again returned home.

4. The officer investigating the attempted suicide requested the Victoria Police Department forensic unit to attend the victim at Victoria General Hospital, take photographs and conduct a gun shot residue (GSR) test. As a result of the request Constable Foster arrived at the hospital at 12:45 on September 19, where he met Nurse McCallum who was attending the victim, who was located in a private intensive care room with members of his family.

5. The family members were asked to leave the room so that Constable Foster could take photographs and conduct a test on the victim's hands. It is not clear whether Nurse McCallum and Constable Foster discussed whether the victim's hands had been cleaned, although it is common ground that the hands were not "bagged". The nurse noted that family members had been holding the victim's hands. Constable Foster believed that the victim's hands had been washed. He had no recollection of the family members at the hospital.

6. On September 20, 2000, investigator Detective Parks received a report prepared by Constable Foster, stating:

"Attended VGH and obtained samples using the Gun Shot Residue Kit from victims right and left hands. Photographs of the victims hands, bruise on the right hip and track marks in arms were taken."

7. In furtherance of the investigation into the shooting of the victim, Constable Foster was asked to forward the results of the GSR test to the investigating officers. Constable Foster then stated that he did not conduct the test, explaining

that the VGH nurses had told him the victim's hands had been cleaned, and that in Foster's opinion the GSR test would be useless.

8. The officer then supervising the investigation, one Sergeant Trump, spoke to Constable Foster pointing out that Constable Foster's report of September 20, 2000 noted that a GSR report had been done. Constable Foster retorted that the report was wrong and said that he must have written that report before attending at the Hospital ????. He told Sergeant Trump nothing about having done the test for practice.

9. On January 4, 2001, the officer in charge of the Victoria Police Department Forensics Department, Sergeant Bruce, told Constable Foster of concerns about the report of September 20, 2000. Constable Foster then stated that on arrival at the hospital he had found the victim's hands had been washed and had not been bagged, but that he had then done a test "for practice" and had then discarded the results as of no value.

10. Prior to January 4, 2001, Sergeant Bruce had asked Constable Foster for a further report on his, Constable Foster's, investigation. The further, or second, report was received by Sergeant Bruce on January 5, 2001. The report states in part:

"Det Parks contacted me requesting I attend Victoria General to photograph the victim and obtain samples from the victims hands using the Gun shot residue kit. I attended and found the victim had been cleaned up, including the hands. No samples were obtained. ..."

In this connection, reference is made to Tab 4 of Exhibit 3 at the hearing, under the heading "Gunshot Residue Kit Information Sheet.", and the subheading "Policy Regarding Use."

The examination of a gunshot residue kit is very time consuming. Only those kits which may provide evidence that cannot be determined by other means will be examined. The need for analysis and the priority of each kit must be determined by the forensic examiner and investigator and will depend on the circumstances surrounding the occurrence.

It is imperative that the sample be obtained as soon as possible. If a sample is later deemed unsuitable for forensic evaluation it can then be destroyed.

The question to be determined at this inquiry is whether the finding of the Discipline Authority that Constable Foster had committed the disciplinary default of Neglect of Duty, contrary to Section 6(a)(ii) of the Code of Professional Conduct, has been proved on the civil standard of proof.

The *Findings of Discipline Authority*, Form 3, forwarded to me by counsel for the Commission and for Constable Foster, state simply that the Discipline Authority's findings with respect to Count 1 – Discipline Default: Neglect of Duty, contrary to Section 6(a)(ii) of the Code of Professional Conduct, are that the discipline default has been proven. The specific default which Foster has been found to have committed is not set out in the Authority's Form 4, Disposition Record. There are, however, references made under the heading of "mitigating and aggravating factors". Under mitigating factors is included:

"Constable Foster believed that he was dealing with an apparent suicide and may have determined that a lesser level of technical skill and care were required."

Under aggravating factors is included:

"Reports relating to this event are sloppy and neglectful at best and do not accurately represent the detail that would be expected of an experienced member who is a skilled and trained Forensic Technician. Should this incident have been a homicide, this and all other Forensic evidence and procedures would have been brought into question."

And again:

"This event has called Constable Foster's credibility into question and has necessitated a review of his work within the Forensic Identification Section to ascertain if similar issues exist."

The report of September 19, 2000, states that Constable Foster obtained samples using the GSR kit from the victim's right and left hands. On the credible evidence before me at the hearing it is clear that the report is accurate as to the obtaining of samples. The defect in the report is that it fails to state that the testing was done as a practice procedure and that the results were discarded. The second report states that no samples were obtained. That is also accurate insofar as no samples, which, in the opinion of Constable Foster as forensic examiner and investigator, were deemed suitable for forensic evaluation, were taken. The defect in the second report is that it fails to report that a practice test was done and fails to set out the reasons why a suitable sample could not be taken.

The two reports, taken together and without further explanation, are contradictory. Does the filing of the contradictory reports constitute neglect of duty? The dictionary defines neglect as "ignoring or paying no attention to, or to disregard. To fail to care for or give proper attention to." I find that Constable Foster's conduct throughout was not neglectful of his duty but was simply lacking in completing appropriate attention to detail in reporting his activities. I find no

element of wilfulness in Constable Foster's failure to report in full detail, nor any element of intentional misconduct.

With respect to the Discipline Authority, I conclude that a more careful inquiry into the circumstances under which the two reports were prepared and filed would have disposed of the matter as one requiring only comment on the necessity of completing reporting, and awareness of the need to eliminate obvious contradictions in reporting.

I find that the alleged Discipline Default of Neglect of Duty has not been made out on the evidence and I direct that the discipline proposed by the Discipline Authority not be imposed.

"Peter J. Millward, Q.C."