



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE
Pursuant to section 117(4) of the *Police Act*

OPCC File 2016-12722
May 23, 2017

To: [REDACTED] (Member)
c/o New Westminster Police Department
Professional Standards Section

And to: Chief Constable David Jones (Discipline Authority)
c/o New Westminster Police Department
Professional Standards Section

And to: The Honourable Judge Ms. Carole Lazar, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

New Westminster Police Professional Standards investigator, [REDACTED],
conducted an investigation into this matter and on [REDACTED], he submitted the Final
Investigation Report to the Discipline Authority.

In the report, [REDACTED] identified the following allegations of misconduct:

1. That on [REDACTED], [REDACTED], committed *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* 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. Specifically, that while off-duty, [REDACTED] operated a motor vehicle while under the influence of alcohol and received an Immediate Roadside Prohibition.
2. That on [REDACTED], [REDACTED], committed *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* 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. Specifically, that while off duty and during a roadside traffic stop for sobriety, [REDACTED] displayed his police badge to the investigating officer.

Stan T. Lowe
Police Complaint Commissioner

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3. That on [REDACTED], [REDACTED], committed *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* 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. Specifically, that while off duty, [REDACTED] interfered with an impaired investigation by lying to the investigating [REDACTED] officer about his consumption of alcohol.

On [REDACTED], [REDACTED], as the Discipline Authority (DA), issued his decision pursuant to section 112 in this matter. Specifically, [REDACTED] determined that allegation #2 and allegation #3 of *Discreditable Conduct* against [REDACTED] did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect in relation to allegation #2 and #3.

A previous OPCC adjudication from retired Supreme Court of BC Judge, Mr. Ian Pitfield, provides guidance in the area of assessing discreditable conduct allegations. Adjudicator Pitfield commented:

In Mancini v. Constable Martin Courage, OCCPS #04-09, the Ontario Civilian Commission on Police Services adopted the following definition of discreditable conduct:

The concept of discreditable conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.

[18] While I am not bound by the view of the Ontario Commission, I do agree that the test was fairly stated in Mancini and appropriate in the context of the Police Act.

In a separate OPCC adjudication also conducted by Adjudicator Pitfield, which was noted by the DA, he provided guidance related to allegation #2 with respect to officers who identify themselves in the course of being investigated. Adjudicator Pitfield commented:

In my opinion, the fact that a member advises an investigating officer that he is a police officer does not of itself amount to discreditable conduct. It can reasonably be expected that persons in the same profession when dealing with an incident that is related to their profession will come to know that each of them is a police officer. In order that identifying oneself as a police officer will amount to discreditable conduct, there must be objective or subjective evidence from which one can conclude that the purpose of identifying oneself as another officer was to gain favourable treatment in the circumstances.

It is possible, but much more likely the exception than the rule, that an officer would explicitly identify himself as a police officer and ask for leniency or favouritism. Were an officer to do so, the statement, which is a subjective statement of intention or purpose, would compel a finding of

misconduct. In other instances, regardless of what was said, the timing and method of disclosure, which constitute objective evidence, may permit one to infer that the officer's purpose in acting as he did was to seek leniency or favouritism from another officer. Such might be the case, for example, should an officer, without saying anything, openly display his police identification immediately whether with or separate from his driver's licence and vehicle registration.

In my respectful view, the DA does not appear to have taken into proper consideration the method of display of the badge nor the timing in which it was displayed. The evidence outlined that [REDACTED], without saying anything substantive, displayed his badge at his waistline for approximately 15 seconds and shortly after providing his driver's license.

Adjudicator Pitfield additionally provided guidance related to allegation #3, which was also noted by the DA, for information officers provide when being the subject of an investigation. Mr. Pitfield commented:

It is likely the case that many ordinary citizens, when asked about the consumption of alcohol at a roadblock will lie about their recent consumption. There is no sanction as regards the lie itself where a member of the general public is concerned. The same cannot be said of police officers subject to the strictures of the Police Act and subject to sanction should they commit a disciplinary breach of public trust defined by s. 77 of the Act to include discreditable conduct.

With good reason, the public places considerable trust in police forces to address and deter driving under the influence of alcohol. Moreover, the public can reasonably expect individual officers to be truthful in their dealings with other officers, whatever the circumstances, and whether on or off duty. It is unlikely that the public would condone the conduct of an officer who lies to another officer for the purpose of avoiding or attempting to avoid the requirement that he or she submit to an ASD test at a roadblock. Knowledge that an officer had engaged in conduct of that kind would be likely to bring discredit upon the police department of which the officer is a member.

The DA does not appear to have taken into proper consideration the reasonableness that [REDACTED] reported to the [REDACTED] member "I had one drink around 2300 hours," while knowing that he had consumed five to six pints of beer, which is a marked difference. As an experienced member, [REDACTED] was entering a roadblock where a primary goal is to check for driver sobriety. [REDACTED] response was a significant material omission, which appears to go beyond what the DA deemed to be "minimizing." Furthermore, [REDACTED] stated:

"I knew that I had consumed the 5 ta' 6 pints of draught beer and that in my experience in conducting impaired driving investigations that that amount of alcohol would likely lead to a form of driving prohibition if I were to be asked to submit any breath samples."

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Ms. Carole Lazar, retired Provincial Court Judge, to review allegation #2 and #3 in this matter and arrive at her own decision based on the evidence.

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Police Act proceedings will continue separately in relation to allegation #1 of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* as the Discipline Authority determined that it appeared to be substantiated.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the Discipline Authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.



Stan T. Lowe
Police Complaint Commissioner

cc: [REDACTED], Professional Standards Investigator
New Westminster Police Board