

**IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367
AND
IN THE MATTER OF CONSTABLE [REDACTED]**

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO: Constable [REDACTED] Member
AND TO: Inspector [REDACTED] Previous Discipline Authority
AND TO: Mr. Stan Lowe Police Complaint Commissioner

Background

On the 30th of July, 2011 Constable [REDACTED] was conducting traffic checks in the [REDACTED] area when she noticed an all terrain vehicle carrying three passengers; none of them was wearing a proper helmet. She pulled the vehicle over and approached the driver, Constable [REDACTED]. She noticed an odour of liquor on his breath and saw that he had an unopened can of beer in his shirt pocket. He was not able to produce his driver's licence. Constable [REDACTED] had Constable [REDACTED] go to where the police car was parked. She followed him and retrieved an approved roadside screening device from that vehicle. In response to a demand, Constable [REDACTED] provided a sample of his breath into an RSD. It registered a "warn." After seeing this Constable [REDACTED] served him with an Immediate Roadside Prohibition under section 215 of the Motor Vehicle Act. She also issued a traffic ticket for failing to have insurance and for failing to produce a driver's licence.

When he reported for work on August 2nd, Constable [REDACTED] advised his supervisor of the events of the weekend. Upon learning of the section 215 IRP, Inspector [REDACTED] contacted the Office of the Police Complaints Commissioner and requested an Order to Investigate. This order was granted on August 4th, 2011 and the investigation was assigned to Sergeant [REDACTED]. The original order set out only one allegation of misconduct; namely,

1) That, on July 30, 2011, Constable [REDACTED], while off duty, received a three-day Immediate Roadside Prohibition from the Sooke RCMP while operating an ATV when his ability to drive was affected by alcohol.

As a result of her inquiries, Sgt [REDACTED] determined that a second count should be added for the purposes of investigation; namely,

2) That, on July 30, 2011, Constable [REDACTED], while off duty, identified himself as a police officer with the intent to gain favourable treatment from RCMP Constable [REDACTED] during a traffic stop in [REDACTED], B.C.

At the conclusion of her investigation, Sergeant [REDACTED] found that the first count against Constable [REDACTED] was substantiated and that the second was unsubstantiated. Her final Investigative Report was delivered to Inspector [REDACTED] and the Police Complaints Commissioner, Stan Lowe, on the 14th of March 2012. Inspector [REDACTED] as the Discipline Authority, endorsed the findings of Sergeant [REDACTED] and issued his Notice of Decision that same day. The Police Complaints Commissioner, upon reviewing the report concluded that there was reason to believe that the Discipline Authority was incorrect in determining that the conduct of the member in relation to the second allegation did not constitute misconduct. Pursuant to section 117 of the Police Act, the writer, a retired judge, was appointed as the new Disciplinary Authority in this matter.

Review of the Available Evidence

[REDACTED] was interviewed on August 18th, 2011. Dealing only with the issue of whether Constable [REDACTED] hoped to receive favourable treatment because he was a police officer she said that when he was asked to identify himself he did not give his name but instead said that he was a cop. She did not believe him. She said that the parties were not the most cooperative. The female passenger was wandering around. A vehicle containing some of Constable [REDACTED]'s family members had come up. She said that after she read the ASD demand Constable [REDACTED] asked what her thoughts were. She said that Constable [REDACTED] said he was a cop a couple of times. He provided a breath sample which registered a "warn" and then asked if she would use discretion. She wrote a ticket for driving without insurance and failing to produce his driver's licence and served it on him. He complained about her giving him the "full pull." He kept saying he was a cop and asking about her discretion. In response to Sergeant [REDACTED]'s questions, the officer identified two particular

incidents where Constable [redacted] referred to the fact that he was a police member. She said once was when she questioned his identity. The second time was when she asked him if he had ever blown into a roadside screening device.

Constable [redacted] was also interviewed on the 18th of August, 2012. He said that he arrived at the scene after the breath test had been conducted. He said that Constable [redacted] was in the police vehicle preparing the IRP. He was present when Constable [redacted] served the traffic ticket and the IRP on Constable [redacted]. He reported that Constable [redacted] kept saying that the road they were on was un-gazetted and that the provisions of the Motor Vehicle Act did not apply. He complained that Constable [redacted] had given him the full pull when it came to the fines when she could have used some discretion. Constable [redacted] did not, in Constable [redacted]'s hearing, mention that he was a police officer.

Tape recordings of parts of the interaction between Constable [redacted] and Constable [redacted] commence after Constable [redacted] had read the breath demand but before Constable [redacted] had had a chance to comply with that request. At the beginning of the recorded segment Constable [redacted] was involved in a conversation with [redacted] and was trying to direct her movements. There were voices in the background, presumably from those who were in the truck. Constable [redacted] made some comment that was not clear and Constable [redacted] responded to that. There was some conversation about his dogs being in the truck. Constable [redacted] asked if the people in the truck were [redacted]'s family or his family. Constable [redacted] said it was his dad. Constable [redacted] said, "Oh, okay."

Then, "Just another minute."

It was at this point that Constable [redacted] said, "So what are your thoughts here then? What's your plan?"

Constable [redacted] said they would just take it one step at a time.

When she had prepared the approved screening device, Constable [redacted] asked Constable [redacted] if he had ever blown into one before and he responded by saying that he was a cop. She repeated her question and he said, yes, he had blown into one before. After he had blown a "warn" Constable [redacted] told him she was going to have the ATV towed and Constable [redacted] asked where they would take it. Constable [redacted] said, "to [redacted] Towing." (Assuming that business is located in [redacted] that would be 90 kilometres away.) It was then that Constable [redacted] asked about whether there was not some discretion.

The tapes also evidenced Constable [REDACTED]'s protest when he was served with a ticket for driving without insurance. He argued strenuously that he did not require insurance because he was driving on an un-gazetted road. He did not object to the charge of failing to produce a driver's licence which was on the same ticket but he felt that the second charge was unjustified. Constable [REDACTED] said they had no discretion about the amount of the fine and in his final comment that Constable [REDACTED] had shown very little discretion.

[REDACTED] was interviewed on September 8th, 2012. With respect to the allegation that Constable [REDACTED] identified himself as a police officer with the intent of gaining favourable treatment she provided the following information. She said that when Constable [REDACTED] first approached them she asked Constable [REDACTED] for his driver's licence. When he said he did not have it with him, Constable [REDACTED] asked Ms [REDACTED] if she had hers. She did not. Constable [REDACTED] told Constable [REDACTED] to go and stand by the police cruiser. He did. Constable [REDACTED] joined him there and asked for his name and address. He provided that. Then she searched him. When she had finished patting him down she said to him "How do I know who you are? How do I know you're not lying to me?" Constable [REDACTED] replied "I'm a member, relax. I am listening and doing everything." It was at this time that Constable [REDACTED]'s parents drove up. Discussions ensued between Constable [REDACTED] and Ms [REDACTED] Ms. [REDACTED] went to her in-laws truck to tell them that they were going to be awhile and that they should go on. Once they had left, Constable [REDACTED] had Constable [REDACTED] provide a breath sample. She then began writing up the IRP. It was at this point that the other police officer arrived. Upon closer questioning by Sgt [REDACTED] Ms [REDACTED] recalled that Constable [REDACTED] also mentioned his status as a police officer when he was asked if he had ever taken an ASD test before.

Ms [REDACTED] said that when Constable [REDACTED] came and gave her husband "all of the tickets" he looked at them and said, "You know, you have discretion here and I don't understand where you're coming from". She recalled the "full pull" comment and thought that related to Constable [REDACTED]'s indignation about the driving without insurance count. She did not think he took issue with respect to the IRP or the charge of failing to produce a driver's licence. At no time since this incident has he ever told his wife that he felt that Constable [REDACTED] should have treated him differently because he was a police officer. He continued to complain though, that the driving without insurance charge was not valid. (Sergeant [REDACTED] after lengthy investigation and contact with numerous authorities, believes that Constable [REDACTED] is correct in his understanding on that issue. He disputed the ticket and the case against him was dismissed because Constable [REDACTED] did not attend to give evidence.)

Constable _____ was interviewed on November 23, 2011. He said that on July 30th, 2011 he was driving an ATV with his wife and three year old son as passengers. He was pulled over and when the officer approached she first commented on the number of people he had on the ATV and the fact that they were not wearing proper helmets. She removed the can of beer from his pocket and told him to go and stand by the police cruiser. She then asked if there was any other liquor in the ATV and Constable _____ said it was his father's vehicle and their might be one in a container on the front of the quad. Constable _____ went over to check that but was having some trouble with the latch. When Constable _____ took a couple of steps toward her intending to assist, she barked at him to return to the car. He did. She got the container open and found it empty. She then approached Constable _____ and ordered that he get his hands out of his pocket. He took them out and placed them on his hips. She was still not satisfied so he held them away from his body. Constable _____ then said she wanted to search him "for officer safety." She proceeded to pat him down. By this time he thought his father had arrived on the scene. He said that Constable _____ seemed very anxious and jumpy and as she was patting him down he mentioned that he was a police officer too and that she could relax. He knew he looked pretty rough and this female officer was alone with him and a number of his associates. He said he was trying to reassure her. He said he mentioned his occupation again when Constable _____ was trying to determine his identity. He had provided his driver's licence number, his name, his address and his date of birth. She was not convinced and asked how she could know he was not lying. At that point he said he was a cop and that he would not lie. Finally he said that he told her he was a member when she asked if he had ever taken an ASD test before. He recalled asking Constable _____ about exercising her discretion when she told him she planned to have _____ towing pick up the ATV. When Constable _____ was served with the ticket and other paperwork he took exception to the charge relating to the lack of insurance. He acknowledges being angry as he tried to argue that point.

Analysis and Conclusion

Did Constable _____ identify himself as a police officer and conduct himself in the manner that he did, with the intent that it would influence the conduct of Constable _____ in granting him leniency or favourable treatment that would not be afforded a citizen who was not a member of a police department? In a decision under section 117 of the Police Act handed down on August 11, 2010 Adjudicator Pitfield said:

The test in respect of discreditable conduct is objective. What is material is not what (the on-duty member) perceived to be the Member's intention. Rather, the material point is the inference one draws with respect to the purpose of the Member's actions having regard for the objective evidence of what was done. Having done so, the question is whether what was

done and the reason for doing it corresponds to the community's expectation regarding the conduct of an off-duty police officer."

Sergeant [redacted] in her role as investigator, found that Constable [redacted]'s evidence was not reliable. I agree with that finding. This traffic incident occurred on the August long weekend which is probably the busiest weekend of the year in outdoor recreation areas like [redacted]. This was one of many traffic stops that Constable [redacted] dealt with over the course of a couple of days. In those circumstances it is not surprising that she has a poor recollection of details and was not able to provide answers when Sergeant [redacted] wrote to her later trying to give her a chance to respond to the stories that had been told by Constable [redacted] and [redacted]. Constable [redacted] had recorded some of the interaction and the fact that her description of events is contradicted by this tape is a further indication that though her evidence was not intended to mislead, it is not accurate.

Constable [redacted] admits that on three occasions he referred to the fact that he was a police officer.

- He said that as Constable [redacted] was searching him he told her to relax, that he was a police officer too. He did this because he sensed that she was feeling unsafe and on edge. He wanted to reassure her that he was not going to hurt her. [redacted] recalled him saying that he would do whatever Constable [redacted] asked him to do, or words to that effect.
- When he gave Constable [redacted] his licence number, his name, his address and his date of birth and she asked why she should believe him, again he said because he was a member and he would not lie.
- When Constable [redacted] asked him if he had ever blown into an ASD before again Constable said he was a cop. She repeated the question and he answered in the affirmative.

With respect to the allegation that Constable [redacted] wanted Constable [redacted] to exercise some discretion in his favour, the tape recorder has captured the two segments of the interaction when all witnesses say mention was made of this discretion:

- Constable [redacted] said that after Constable [redacted] gave his breath sample he asked if she would exercise her discretion. She responded by listing the offences she felt he had committed. Then she told him she was going to have his vehicle towed. The tape recorder was on during this interchange and it is evident that Constable [redacted] is mistaken about this. It was not until she told him that she was going to have the ATV towed to a yard some ninety kilometres away that Constable [redacted] said, "Where's your discretion?"
- Both Constable [redacted] and Constable [redacted] say that when presented with the traffic ticket, Constable [redacted] asked Constable [redacted] to exercise some discretion. Again the tape was running at this juncture and what it captured was Constable [redacted] objecting to

the “full pull” or the overcharging and in particular the charge of driving without insurance which he continued to argue was not a valid charge since the road they were on was un-gazetted. [redacted] interrupted to ask how they were to get back to their camp and there was a brief conversation between her and the officer. Then Constable [redacted] turned her attention to Constable [redacted] again and said, “As far as the, the no insurance, I don’t, I’m not familiar with...” He responded, “We don’t have discretion with the price.” Constable [redacted] continued to argue that motor vehicle insurance was not required on this road. Constable [redacted] said he could take it up with the Justice and at that point, Constable [redacted] said she was showing very little discretion.

- The final incident which made Constable [redacted] uncomfortable was when Constable [redacted] asked her what her thoughts were and what she planned. She thought he asked this immediately after she had made the breath demand. This was not the case. The tape which Constable [redacted] said she had turned on right after reading the demand evidenced a considerable amount of activity and confusion before Constable [redacted] posed this question. Constable [redacted] could be heard giving directions to [redacted] and possibly the occupants of the truck that had arrived on the scene. She had discussions with Constable [redacted] about the parties in the truck. Then she said, “Just another minute.” That is when Constable [redacted] asked his question. Taken in context, Constable [redacted]’s explanation that he wanted to know what was happening because he was anxious to get on with it is entirely plausible.

Constable [redacted] estimated that her interaction with Constable [redacted] took place over the course of twenty to twenty-five minutes. The three occasions where Constable [redacted] identified himself as a police officer occurred fairly early in that time period. In my view he was justified in making reference to his status as a member on each of these occasions. He said he thought from her actions that Constable [redacted] was feeling unsafe and on edge. She confirmed that she was afraid she was going to lose control of the situation, that she was getting “strange vibes” off Constable [redacted] and that she thought it might turn into a “gong show.” Her anxiety was evident in her manner and tone of voice as reported by Constable [redacted] and Ms. [redacted] and as heard on the tape recording. In these circumstances Constable [redacted]’s explanation that he identified himself as a fellow officer to offer her some reassurance is credible.

I adopt Sergeant [redacted]’ reasoning in finding that Constable [redacted] had provided his name, address, date of birth and driver’s licence number and that Constable [redacted] then asked why she should believe him. Constable [redacted] seemed to feel repeating the fact that he was a police officer

would increase his credibility. It was also another piece of identification evidence that might have been of assistance had Constable [redacted] believed him and followed up on it.

Finally Constable [redacted] when asked if he had ever blown into a roadside screening device before, responded by saying he was a police officer. In as much as a simple “yes” could well have been interpreted as an admission that he had been investigated for impaired driving before, it is not surprising that he would want to make it clear that his past experience related to his work and not some prior misconduct.

The first time that Constable [redacted] raised the issue of discretion was when Constable [redacted] said she was going to have the ATV towed by [redacted] Towing. Given the circumstances of this case and the distance involved, would this have been a reasonable decision? Probably not. I cannot, on a balance of probabilities, find that this reference to the fact that Constable [redacted] should exercise some discretion referred to, or was related to Constable [redacted]’s earlier identification of himself as a police officer. His final comment when he said that Constable [redacted] was showing very little discretion again sounded more like the complaint of an aggrieved citizen who has been unable to persuade an officer that he I is being wrongly charged. This comment is made at the very end of the investigation and does not appear to be connected in any way with the earlier mention of Constable [redacted]’s profession.

Constable [redacted] thought that Constable [redacted] might have told her he was a police officer because he was hoping for some special favour though she acknowledged that this was a subjective view and that his behaviour was open to interpretation. Constable [redacted] said that was never his intent. An objective analysis of the actions and words of Constable [redacted] during this incident fails to establish, on a balance of probabilities, that Constable [redacted] identified himself as a police officer with the intent to gain favourable treatment from RCMP Constable [redacted]. I find that count two is unsubstantiated.

Pursuant to section 117(11) of the Police Act this decision

- (a) is not open to question or review by a court on any ground, and
- (b) is final and conclusive.

This matter is referred back to Inspector [redacted] as the Discipline Authority who has jurisdiction over the substantiated count one.

Dated at Surrey, British Columbia this 4th day of April, 2012.

Hon. Carole D. Lazar, Discipline Authority