IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1966, c. 367

AND

IN THE MATTER OF CONSTABLE "MEMBER"

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO:	Constable "Member"	Member
AND TO:	Sergeant "PSS Investigator"	Investigating Officer
AND TO:	Inspector "Previous DA"	Previous Discipline Authority
AND TO:	Mr. Stan Lowe	Police Complaint Commissioner

The Alleged Discreditable Conduct:

Two incidents of misconduct under s. 77(3)(h) of the *Police Act* were alleged against Constable "Member" ("the Member"):

> Count 1: On July 12, 2012, he operated his personal vehicle while under the influence of alcohol and received an Immediate Roadside Prohibition ("IRP") when he registered a "warn" after blowing into an Alcohol Screening Device ("ASD").
>
> Count 2: On July 12, 2012, he identified himself as a police officer and asked for lesser enforcement, specifically a s. 215 *Motor Vehicle Act* suspension, as opposed to an IRP.

The Count 1 allegation has been substantiated by the Discipline Authority and I am only to determine whether the evidence substantiates the Count 2 allegation.

Background:

I will set out the evidence as summarized by Sergeant "PSS Investigator" in his Final Investigative Report. On July 27, 2012, the Police Complaint Commissioner, Mr. Stan Lowe, ("the Commissioner") ordered an investigation into the off-duty actions of the Member at the request of the Vancouver Police Department (VPD) Professional Standards Section. This order related to the Member's operation of a motor vehicle while under the influence of alcohol, and identified the potential misconduct as "discreditable conduct." That was the subject of the Count 1 allegation.

On January 18, 2013, the Commissioner amended his original order to include the second "discreditable conduct" allegation, relating to the Member's self-identification as a police officer and request for less onerous enforcement.

The incident occurred on July 22, 2012, just before 4 a.m. when Constable "Officer #1" observed a driver making an illegal U-turn at the south end of the Lion's Gate Bridge away from an impaired driving road block that police members of the West Vancouver Police Department ("WVPD") had set up on the north end of the bridge.

Constable "Officer #1" of the WVPD followed the vehicle and conducted a vehicle stop on the Stanley Park Causeway. The driver admitted drinking earlier that evening. After speaking with the driver, Constable "Officer #1" formed the opinion that he had consumed alcohol. He administered two ASD breath tests and in both cases, the driver, Constable "Member", blew a "warn".

During their interaction, Constable "Officer #1" began to explain to the Member how the ASD worked and to provide instructions to him. The Member responded that he was familiar with the device because he was a police officer. Later, on two separate occasions, he asked Constable "Officer #1" if he could be issued a 24 Hour Roadside Prohibition under S. 215 of the Motor Vehicle Act ("MVA") instead of a 3 Day Automatic Roadside Driving Prohibition, commonly referred to as an IRP under S. 215.41 of the MVA. He was subsequently issued an IRP, his car was towed, and he left the area in a taxi along with the passenger that was in the vehicle with him at the time of the stop. Constable "Officer #1" stated that the Member was polite throughout the incident.

Sergeant "Previous PSS Investigator" was initially assigned this file and completed several steps in the investigation. On January 18, 2013, Sergeant "PSS Investigator" took conduct of, and completed, the investigation. He submitted his Final Investigative Report on May 3, 2013. On May 17, 2013, the

Commissioner determined that there were deficiencies in the Report's compliance with the reporting requirements contained in section 98(5) of the *Police Act* and directed further investigative steps. Sergeant "PSS Investigator" complied with that direction. He then recommended that the discreditable conduct alleged in Count 1 be substantiated but that alleged in Count 2 not be substantiated.

The scope of the review and my jurisdiction:

On June 19, 2013, Inspector "Previous DA", the Discipline Authority in relation to the allegations in Counts 1 and 2, issued his decision pursuant to s. 112 of the *Police Act*. He substantiated the allegations in Count 1 and found the allegations in Count 2 to be unsubstantiated.

Pursuant to s. 117(1) of the *Police Act*, the Commissioner reviewed the allegations individually, and the alleged conduct in its entirety, and concluded that there was a reasonable basis to believe that the decision of the Discipline Authority with respect to Count 2 was incorrect. Accordingly, pursuant to s. 117(4) of the *Police Act*, and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, he appointed me on July 17, 2013 as a retired judge of the Supreme Court of British Columbia to be the Retired Judge to conduct a review of this matter and arrive at my own conclusion based on the evidence on the record. The responsibilities of a

Retired Judge appointed for this purpose are enumerated in s. 117(1) of the *Police Act*:

> (a) review the investigating officer's report and the evidence and records referenced therein;
> (b) make her or his own decision on the matter; and
> (c) if the retired judge concludes that the conduct in question appears to constitute misconduct, she or he becomes discipline authority in respect of the matter and must convene a discipline proceeding.

Where, as here, there are multiple allegations of misconduct and the Discipline Authority has delivered a mixed decision, the retired judge sitting in an adjudicative capacity receives the entire complaint for review but must deliver a decision regarding only the previously unsubstantiated allegation.

I received the materials in the evening of July 19. Notification of my decision must be provided within 10 business days of that date or no later than August 2, 2013.

The Issue:

The issue before me is whether the allegation of discreditable conduct alleged in Count 2 is substantiated on a balance of probabilities.

At the heart of this review is whether the Member advised Constable "Officer #1" that he was a police officer and asked for leniency or treatment that would not be afforded to a citizen who was not a police officer.

What is discreditable conduct?

Section 77(1) of the *Police Act* defines misconduct to include a disciplinary breach of public trust. Section 77(3) sets out conduct which constitutes a disciplinary breach of public trust, including

> (h) 'discreditable conduct', 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....

The concept of discreditable conduct encompasses a wide range of behaviour. The test to be applied is an objective one; the conduct in question is to be measured against the reasonable expectation of the community. The standard of proof of misconduct is proof on a balance of probabilities.

In his *Police Act* decision of August 11, 2010, the Hon. Ian H. Pitfield, a retired judge of the Supreme Court of BC, agreed with the following definition of discreditable conduct articulated in *Mancini v. Constable Martin Courage*, OCCPS #04-09 by the Ontario Civilian Commission on Police Services:

> 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.

While retired judges in B.C. are not bound by the rulings of the Ontario Commission, I agree with Mr. Pitfield that the test was fairly stated in *Mancini* and is appropriate in the context of the *Police Act*. The issues of impaired driving, the appropriate penalties for impaired driving, and the conduct of off-duty police officers are of significant concern to the community.

In his decision, Mr. Pitfield reviewed an unsubstantiated allegation of misconduct where a member of the VPD was alleged to have displayed his police badge in order to gain favour from an RCMP Corporal while stopped at a sobriety roadblock. He concluded that the allegation was substantiated. In that case, the Corporal had noticed the member's police badge displayed in an open wallet in plain view on the member's lap before he asked for production of a driver's licence. The Corporal told the Investigator that he "took exception to such an initial display of his off-duty status." Otherwise, the member was professional throughout and did not try to dissuade the Corporal from administering the roadside test or ask for any favours. The member had made a statement that he always displayed his police badge whenever he was stopped by other officers while off duty. "He did so in order to put the officer at ease and to assure the officer he was not dealing with a threat." Mr. Pitfield found that explanation to be facile and unreliable. He noted that the Corporal's subjective reaction to member displaying his badge was irrelevant and attached no weight to the Corporal's opinion. However, he concluded that the member had displayed his badge for the specific purpose of gaining favourable treatment from the Corporal. Such conduct did not meet community's expectations regarding the conduct of off duty police officers.

The Investigation:

The Member gave a written statement on September 14th 2012. He said that he had turned around on the bridge because he saw several police vehicles with flashing red and blue lights on and thought the bridge was closed off at the north end, "possibly from a motor vehicle accident." It "did not occur to him" that it would be a roadblock. In my opinion, it would occur to any driver, particularly one who had consumed alcohol that night, that the flashing lights of the police car could indicate a roadblock for the purpose of checking for inebriated drivers.

The Member said that when the arresting officer asked him if he was familiar with the ASD device, "it came up in conversation that I was a police officer." The Member said that he did not in any way bring this up in an attempt to try and get special treatment for being a police officer. I consider it significant that in his written statement, the Member made no reference to the fact that he later asked for a 24 hour suspension instead of a 3 day IRP.

On January 4, 2013, Sergeant "Previous PSS Investigator" interviewed the Member. At that time, he agreed that he had told Constable "Officer #1" that he had made the U-turn because he had got a text from some girls and he and his passenger were going back to meet them. He told Sergeant "Previous PSS Investigator" that he had made the U-turn for both reasons - the text and the fact he thought the bridge was closed. He said that when he asked if he was able to receive a "215" (a 24 hour suspension under s. 215 of the MVA), he

asked the question for information purposes and not as an attempt to gain favour. He could not recall if he had asked the question twice.

On February 6, 2013, Sergeant "PSS Investigator" interviewed the Member with respect to the allegation in Count 2. Referring to police records, the Member said he had given 37 roadside prohibitions under s. 215 between 2005 and 2010. Since 2010, when the IRP was introduced, he had given 5 roadside suspensions. One was a 24 hour s. 215 suspension and one was a 90 day IRP. He did not recall what the other 3 suspensions were.

The Member was asked what his understanding was at the time of the incident as to when a s. 215 suspension was appropriate and when an IRP was appropriate. He said that if a person blew a "fail" in the ASD then the option of a s. 215 suspension was not available. It a person blew a "warn" the officer had the discretion to give a s. 215 suspension or a 3 day IRP. He referred to a recent incident where he had given a s. 215 suspension instead of an IRP. He said that when he was stopped by Const. "Officer #1", he believed that a s. 215 suspension was appropriate.

Sergeant "Previous PSS Investigator" interviewed Constable "Officer #1" on November 6, 2012. Constable "Officer #1" said that when he held out the ASD device to the Member, the latter responded "yah, I am a member." After he had blown two "warns", Constable "Officer #1" said "ok, I am going to give you

a 3 day IRP." The Member said "can't you just give me a 24 hour?" and Constable "Officer #1" responded "No, I am sorry. I don't want to lose my job." After the Member asked what happened with an IRP, and Constable "Officer #1" explained the process, the Member again asked if he could be given a s. 215 suspension. Constable "Officer #1" said that the Member was polite and cooperative throughout the whole process and appeared very casual and calm in the circumstances. When the Member had shown his identification, he kept his wallet closed so that his badge was not visible.

On December 10, 2012, Sergeant "Previous PSS Investigator" asked Constable "Officer #1" to elaborate on the request that the Member had made with respect to being issued a s. 215 driving suspension instead of an IRP. Constable "Officer #1" responded:

> *It was my perception that Cst "Member" was simply asking if that was a form of resolution we could proceed with. I did not feel he was being corrupt, but just simply asking if the 215 was an option. I would compare this conversation to that of when I issue a motorist with a violation ticket for speeding, and that person asks me if I could just give them a warning instead of the speeding ticket. I do not have that much information on the matter as this was a brief conversation, but I was not left with the feeling that I was being pressured or harassed on the issue.*

On January 30th, 2012, Sergeant "PSS Investigator" asked Constable "Officer #1" to clarify the circumstances surrounding the Member identifying himself as a police officer. Constable "Officer #1" responded:

> *Upon reading the Approved Screening Device (ASD) demand to Cst "Member" I produced the device and held it in front of Cst "Member"'s face region. I began to recite the ASD breath sample instructions from a*

memorized script, but after I was only a couple words in Cst "Member" identified himself as a police officer. Cst "Member" simply commented "ya I'm a member". Cst "Member" made this comment using a low tone and was not overt in the manner in which he spoke, it was done very casually. It was my perception that Cst "Member" was just informing me that he knew the procedure, and I did not have to go through the police routine of explaining the process of how to provide a breath sample. This is a long script, whereby I usually say; "I will hold the device, you will have to seal your lips around the white plastic tube, and create a tight seal. Then you will have to blow as hard as you can, long and continuous, until I tell you to stop". In some cases, if there is any confusion, I usually also provide a demonstration, using the device and a separate mouth piece. I formed the perception that Cst "Member" was just informing me that he knew the procedure because of the tone he used and also because of the timing in which he choose to inform me he was a member (when the device was held up). Had Cst "Member" used a cocky, or forceful tone, or advised me earlier in the investigation that he was a police officer, I would have felt he was attempting to influence the investigation. In any event, I conducted the investigation as per my training and not pursuant to the employment of the driver.

On January 18, 2013, Sergeant "Previous PSS Investigator" sent an email to "Agent" at the Police Union (VPU):

> Can I please get the directive that you sent out to VPU members regarding what to do when stopped or pulled over during a traffic stop while off duty, whether or not to identify yourself as a police officer or not, and the date that that directive was issued.

On May 17, 2013, the Commissioner directed Sergeant "PSS Investigator" to investigate that email and any other related emails, responses, or resulting information. Sergeant "Previous PSS Investigator" advised that he had received a phone call from the VPU after sending the email. They informed him that the VPU had not issued such a directive to the membership.

<u>The Legislation</u>:

24 hour suspensions are authorized under section 215 of the *Motor Vehicle Act*:

> (2) A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by alcohol,
>
> > (a) request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the travelled portion of the highway or industrial road,
> >
> > (b) serve the driver with a notice of driving prohibition, and
> >
> > (c) if the driver is in possession of a driver's licence, request the driver to surrender that licence.
>
> (5) Unless the prohibition from driving a motor vehicle is terminated under subsection (6) or (8), the driver is automatically prohibited from driving a motor vehicle for a period of 24 hours from the time the peace officer served the driver with a notice of driving prohibition under subsection (2) or (3).

Legislation regarding Immediate Roadside Prohibitions following the use of an ASD (IRPs) was introduced in 2010. Section 215.41(2) contains the following definitions:

> **"fail"** means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood;
>
> **"warn"** means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood.

Section 215.41 (3.1) provides:

If, at any time or place on a highway or industrial road,

(a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers **a warn or a fail**, and

(b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, **must**,

(c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and

(d) subject to section 215.42, serve on the driver a notice of driving prohibition. [emphasis added]

Section 215.43(1) sets out the prohibition imposed when the driver registers a "warn" on the ASD:

(1) **If a person is served with a notice of driving prohibition under section 215.41 in circumstances where an approved screening device registers a warn, the person is prohibited from driving for**

(a) 3 days, in the case of a first prohibition,

(b) 7 days, in the case of a second prohibition, or

(c) 30 days, in the case of a subsequent prohibition. [emphasis added]

After the legislation regarding IRPs was introduced, a directive was issued by the Office of the Superintendent of Motor Vehicles that all members

who issued IRPs needed to be trained. However, that training did not become a requirement of the VPD.

VPD Policies and Procedures and Training:

One of the issues that Sergeants "Previous PSS Investigator" and "PSS Investigator" investigated was the training that the Member had received with respect to the circumstances that determine when it is appropriate to give a driver a s. 215 suspension as opposed to an IRP. On January 16, 2013, Sergeant "Previous PSS Investigator" obtained the Member's In-Service and SAP training records and reviewed them. Sergeant "PSS Investigator" also reviewed them and concluded that "they do not indicate that [the Member] had any IRP training." In January 2013, Constable "Officer #3" of VPD Traffic Services advised Sergeant "Previous PSS Investigator" that the Member was on a list, indicating that he had received IRP training sometime in 2010. The training lasted 1-1.5 hours and there was no examination at the end of the training.

VPD maintains a Document Management System, entitled "Power DMS" to ensure members are aware of, and comply with, new policies and Training Bulletins. The Member signed off on viewing "new Immediate Driving Prohibition (IRP) Procedures" on June 26, 2012. Enclosed in the material was an ASD Test Matrix which showed that a "warn" on the first ASD test and a "warn" on the second ASD test would result in a "warn IRP." The IRP form itself which is filled in by the member when a driver blows a "warn" contains

differing prohibition periods - 3 days, 7 days, and 90 days - depending upon whether this is a first, second or third (or more) prohibition. The information given to the member to complete the reason for the prohibition on the IRP form is "If ASD result is WARN, check "3 DAYS WARN" ...

Although s. 215.41 of the MVA clearly appears to mandate that if the ASD registers a "warn", the police officer **must** serve a notice of driving prohibition, Constable "Officer #3" stated that copies of s. 215.41 were not given to the members at training or subsequent on-line training. Nevertheless, Constable "Officer #3" stated that issuing an IRP "WARN" (a three day driving prohibition and other penalties) is the only avenue available to members when dealing with drivers in that range of impairment; the member has no discretion to issue a 24 hour suspension.

The VPD policy regarding s. 215 24 hour prohibitions and the IRP Program was updated on October 19, 2011 in the VPD Regulations and Procedure Manual. The "215 Prohibition" Policy is described in s. 1.10.6 (i):

> *When conducting impaired driving investigations, members may proceed by way of criminal charges, issue a prohibition under the Motor Vehicle Act (MVA) or both. When issuing a 24-hour prohibition for alcohol, members shall only issue either a 24 hour prohibition or an Immediate Roadside Prohibition (IRP).*

The "IRP Program" Policy is described in s. 1.10.6 (x):

The Immediate Roadside Prohibition (IRP) program prohibits drivers who register a WARN or FAIL on an Approved Screening Device(ASD) or refuse to provide a breath sample on an ASD upon a lawful demand. An IRP cannot be combined with a 215 MVA 24-hour suspension or criminal charges. Members must be trained in the IRP program before using this enforcement tool and the Office of the Superintendent of Motor Vehicles maintains a database of trained police personnel.

Analysis:

In his conclusion, Sergeant "PSS Investigator" framed the issue alleged in Count 2 as: "By identifying himself as a police officer did [the Member] attempt to obtain preferential treatment (requesting a 215-24 hour roadside prohibition as opposed to a 3 Day (IRP) during this event?)" With respect, that wording subtly but significantly misstates the allegation which is that the Member "identified himself as a police officer and asked for the lesser enforcement...."

I accept the evidence of the Member and Constable "Officer #1" that the Member only identified himself as a member when Constable "Officer #1" entered into an explanation of how to use the ASD. I find that his intent was to advise Constable "Officer #1" that he was familiar with and knew how to operate the device.

However, the Member's two requests for a s. 215 suspension instead of an IRP does constitute discreditable conduct in the circumstances. I do not find his statement that he believed Constable "Officer #1" had the discretion to issue either an IRP or a s. 215 suspension where a "warn" was registered on the

ASD to be credible. Given the evidence with respect to the information available to the VPD members and the Member's training in particular, I find that he knew that a driver who registered two "warns" in the ASD must be given an IRP. The fact that the Member asked Constable "Officer #1" "what happened with an IRP" does not lead me to conclude that the Member was unfamiliar with IRP procedures. It is true that he had never issued a 3-day IRP to a driver who blew a "warn". However, in his interview with Sergeant "PSS Investigator", he reviewed his police records that indicated that he had previously given an IRP with a 90-day suspension.

The MVA legislation providing s. 215 suspensions still exists but any discretion ends when the ASD is utilized and a "warn" reading is registered; then, the officer must issue an IRP. In view of the materials available to The Member, including the "New Immediate Driving Prohibition (IRP) Procedures" that he signed off on in June 2012, it is irrelevant that copies of the actual MVA sections 215.41 and 215.43 were not supplied to the members.

It is particularly significant that Constable "Officer #1" responded to the Member's first request for leniency: "no, I am sorry. I do not want to lose my job." He was simply stating what the Member must have known: that he had no discretion to give a s. 215 suspension. I reject the Member's evidence in his statement to Sergeant "Previous PSS Investigator" that he made the request "for information purposes" and not as an attempt to gain favour. Even if he had

asked the first question for information purposes, that cannot be an excuse for the second request. While the Member was unclear as to whether he had made one or two requests, I have no hesitation accepting Constable "Officer #1"'s statement that there were two requests.

After Constable "Officer #1" indicated that he was afraid he would lose his job if he did not give the Member an IRP, it was wholly inappropriate to make a second request for leniency.

Conclusion:

The test for discreditable conduct is objective. Accordingly, Constable "Officer #1"'s subjective opinion that the Member's actions did not constitute corruption, pressure, or harassment is not relevant to an objective determination of whether the Member's actions were discreditable.

The objective evidence makes it clear that after he had identified himself as a police officer, the Member attempted to pressure Constable "Officer #1" to give him a lenient or more favourable penalty than would be accorded to an ordinary citizen. The community expects that off-duty police officers who break the law will be given the same treatment and the same penalties as ordinary citizens.

Accordingly, I conclude that the evidence is sufficient to substantiate the allegation of discreditable conduct in relation to Count 2 and requires the taking of disciplinary or corrective measures.

Next steps to be taken:

As required by s. 117(8) of the *Police Act*, I hereby provide notice to Constable "Member", the Commissioner, and Sergeant "PSS Investigator" as follows:

(a) For the reasons set forth herein, the evidence referenced in the final investigation report appears sufficient to substantiate the allegation in Count 2 that on July 22, 2012, Constable "Member" identified himself as a police officer and asked for the lesser enforcement of a s. 215 Motor Vehicle Act suspension, as opposed to an IRP, and requires the taking of disciplinary or corrective measures.

(b) A prehearing conference will be offered to Constable "Member".

(c) In light of my findings, I am required to convene a disciplinary hearing within 40 business days of receiving this decision if the matter is not resolved at a prehearing conference.

(d) Constable "Member" has the right pursuant to s. 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this Notice of Decision.

(e) The range of disciplinary or corrective measures being considered includes:

a. Suspending Constable "Member" for a period of time without pay;
b. Requiring Constable "Member" to undertake or retake training in police and community morality and ethics;
c. Reprimanding Constable "Member" in writing;
d. Reprimanding Constable "Member" verbally; and
d. Giving Constable "Member" advice as to his conduct.

Dated at North Vancouver, British Columbia, this 30th day of July, 2013

Hon. Marion J. Allan, Discipline Authority