

2017

Recommended Procedures for S. 117 Decisions

To: All Retired Judges appointed under Section 117(4) of the BC *Police Act*

From: Office of the Police Complaint Commissioner

Date: April 5, 2017

Re: **Recommended Procedures for Section 117 Decisions**

INTRODUCTION

If the Police Complaint Commissioner (“Commissioner”) has determined there is a reasonable basis to believe that a Discipline Authority’s (“DA”) decision to not substantiate an allegation of misconduct against a member or former member (“member”) is incorrect, he or she may appoint a retired judge to review the Final Investigation Report and arrive at their own determination of the allegation.

The purpose of this guide is to establish a procedural framework that will promote an open, fair and timely process. The framework promotes the early identification and potential resolution of contentious and non-contentious issues, which in turn will facilitate a focused and efficient section 117 process. The guide is not intended in any way to fetter the discretion of Adjudicators, but to serve as recommendations as to procedure which have been employed in past section 117s.

DEFINITIONS

<i>Discipline Authority</i>	<p>The Discipline Authority (“DA”) is the Chief Constable of the municipal department with whom the member is employed.</p> <p>The Chief Constable may delegate the position to the Deputy Chief Constable or senior officer with a rank of Inspector or higher.</p> <p>The Chief Constable or the Police Complaint Commissioner may delegate the role of Discipline Authority to the Chief Constable or senior officer of an external police agency, if required in the public interest.</p>
<i>Discipline Authority for the purposes of s.117</i>	<p>A retired judge of the Provincial Court, Supreme Court or the Court of Appeal, selected by the Associate Chief Justice of the Supreme Court and appointed by the Police Complaint Commissioner under section 117(4).</p>
<i>Discipline Representative</i>	<p>If a member’s request to call witnesses at the discipline proceeding is granted, a Discipline Representative is appointed by the DA to present the case at the discipline proceedings.</p>
<i>Final Investigation Report</i>	<p>The report submitted by the investigating officer at the conclusion of the investigation.</p>
<i>Former Member</i>	<p>In relation to a complaint or investigation under Division 3 concerning the conduct of a person who, at the time of the conduct of concern, was a member of a municipal police department but who after that time has retired or resigned and is no longer a member of any municipal police department.</p>
<i>Investigating Officer</i>	<p>The officer appointed to conduct an investigation into allegations of misconduct, pursuant to Division 3 of the <i>Police Act</i>.</p>
<i>Member</i>	<p>A municipal constable, Deputy Chief Constable or Chief Constable, whose conduct is the subject of the Public Hearing.</p>
<i>Misconduct</i>	<p>Conduct as defined by Division 2 of Part 11 of the <i>Police Act</i> that constitutes a disciplinary breach of public trust when committed by a member.</p>
<i>Senior officer</i>	<p>A member of Inspector rank or higher.</p>

APPOINTMENT OF RETIRED JUDGE [ss.117(1) - (5)]

Following notification of a Discipline Authority's decision pursuant to section 112(4), in which it has been determined that the evidence does not support the allegation(s) of misconduct against the member, the Commissioner must review the decision and either confirm the Discipline Authority's decision or, if there is reason to believe it is incorrect, appoint a retired judge to review the file. The Commissioner must make such an appointment within 20 business days of the date of the original Discipline Authority's Notice of Decision.

The Associate Chief Justice of the Supreme Court provides the Office of the Police Complaint Commissioner with a list of retired judges of the Provincial, Supreme and Court of Appeal who are recommended to act as Adjudicators pursuant to the *Police Act*. The Commissioner then appoints one of the recommended retired judges from a set rota, based on availability and a conflicts check. The appointment of the Adjudicator is normally included within the *Notice of Appointment of Retired Judge*, but may if required, be a separate document issued by the Commissioner.

The Commissioner must request the Associate Chief Justice of the Supreme Court to consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and recommend one or more retired judges to act as a new Discipline Authority. The Commissioner then appoints one of the retired judges recommended as the new Discipline Authority pursuant to s.117.

Once a retired judge is appointed, the Commissioner must notify:

- The complainant, if the matter was initiated by an admissible complaint;
- The member or former member whose conduct is the subject of the review;
- The Chief Constable of the department with which the member is employed or with which the former member was employed; and
- The investigating officer.

ROLE OF THE RETIRED JUDGE

The role of the retired judge is two-fold. The retired judge must first act in an adjudicative role by conducting a review to determine whether the evidence in relation to the relevant allegation appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective measures. At this stage, the retired judge must determine whether the evidentiary threshold is met to move to the next stage of the process. This is why it is important for the retired judge to make a finding on the "appearance" of misconduct and not whether misconduct has been "proven."

If the retired judge concludes that the allegation of misconduct is not proven, this decision is final and concludes the matter. However, if the retired judge determines that the evidence appears to substantiate the allegation of misconduct against the member, then the retired judge

assumes the role of Discipline Authority for the purpose of discipline proceedings pursuant to Division 3 of the *Police Act* until the matter is concluded. The matter then will move on to the next stage: a Pre-Hearing Conference or a discipline proceeding.

MULTIPLE ALLEGATIONS

In cases where there are multiple allegations of misconduct and the Discipline Authority has delivered a mixed decision, that is, one or more allegations are substantiated and one or more allegations are not substantiated, and if the Commissioner has appointed a retired judge to sit in an adjudicative capacity, he or she will receive the entire investigation for review. However, the retired judge will deliver his or her decision regarding only the previously unsubstantiated allegation(s) where the Commissioner believes the DA was incorrect. The Notice appointing the retired judge will outline which allegations the retired judge must make a determination on.

The retired judge will become the DA only for those allegations that he/she determines there is an appearance of misconduct. The original allegations substantiated by the DA at the police department will remain with them for completion under Division 3 of the *Police Act*. Unfortunately, this process will result in the bifurcation of proceedings where a retired judge will be the DA for a set of allegations and Chief or her/his delegate from the police department will be the DA for a different set of allegations all relating to the same set of facts. This is an unavoidable consequence as a result of the language set out under the *Police Act*. We have sought legislative change in this area.

MATERIALS FOR REVIEW [s.117(6)]

The Commissioner will promptly provide to the retired judge a copy of the following reports with respect to the matter:

- All progress reports and investigation logs filed during the course of the investigation;
- The Final Investigation Report (FIR) that includes:
 - a brief account of the investigative steps taken
 - a complete summary of the relevant evidence
 - a list of all witnesses interviewed during the course of the investigation
 - a list of all records related to the investigation
 - the investigating officer's assessment of the evidence and analysis of the facts.
- Any supplemental Investigation Report(s) (SIR) that may have been filed with the Discipline Authority with respect to the matter under review.
- All records and documents referenced in the FIR or SIR.
- The Notice of Appointment of Retired Judge

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The above-listed documents may be provided in hard copy and/or electronic form, depending on the preference of the retired judge. It is important that there is communication between our office and the retired judge to determine availability of the retired judge as the receipt of these materials will start the clock as to when the decision of the retired judge is due. There are no provisions under the Act to grant extensions for the retired judge to issue their decision.

The s.112 or s.116 Discipline Authority decision will not form part of the disclosure package.

The retired judge may require the investigating officer to provide copies of any document or materials referenced in the report that are not attached.

The retired judge must conduct a review to determine whether the evidence in relation to each allegation of misconduct appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective measures.

NOTICE OF DECISION & NEXT STEPS [ss 117(7) & (8)]

Within 10 business days of receiving and reviewing the above-listed documents, the retired judge must provide:

- The complainant, if the matter was initiated by an admissible complaint;
- The member whose conduct is the subject of the review;
- The investigating officer; and
- The Commissioner

with notice of his or her decision and the next applicable steps. The notification must include:

- A description of the complaint, if any, and any conduct of concern;
- A list or description of each allegation of misconduct considered by the retired judge;
- With respect to each allegation of misconduct considered by the retired judge, whether or not the evidence appears to sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures;
- If it is determined that the conduct does NOT constitute misconduct as defined by the *Police Act*, the notice must include:
 - Notification of the decision with reasons; and
 - A statement advising the decision is not open to question or review by a court on any ground, and that the decision is final and conclusive.
- If the retired judge determines that the conduct appears to constitute misconduct as defined by the *Police Act*, the notice must include:

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- A notification of that decision;
- The range of disciplinary and/or corrective measures being considered;
- Determine in the circumstances whether a prehearing conference should be offered or whether the matter should proceed directly to a discipline proceeding. A prehearing conference must not be offered if the member has requested permission to call witnesses at the discipline proceeding; or the discipline being considered is a reduction in rank or dismissal, unless the Commissioner agrees that to do so would not be contrary to the public interest;
- Notification to the complainant of their right pursuant to section 113 to make submissions, oral or written, with respect to the complaint; the adequacy of the investigation; and the disciplinary or corrective measures that would be appropriate. Submissions received by the complainant are applicable to both prehearing conferences and to discipline proceedings; and
- Notification to the Member of their right pursuant to section 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding. Such a request must be in writing and submitted within 10 business days following receipt of the Notice of Decision.

PREHEARING CONFERENCES [s.120]

A prehearing conference cannot be offered if the evidence against the member or former member is sufficiently serious as to warrant dismissal or a reduction in rank, or if a prehearing conference would be contrary to the public interest.

PREHEARING CONFERENCE AUTHORITY [s.120(1)]

If the retired judge sitting as a DA determines that a prehearing conference should be offered to the member, then the OPCC will appoint a Chief Constable, Deputy or senior officer of an external police department to act as the Prehearing Authority.

COMPLAINANT'S SUBMISSION (at Prehearing Conferences) [ss.120(6)-(9)]

As set out in the earlier Notice of Decision and Next Steps [s.117(8)], the complainant has the right to make submissions, prior to discipline proceeding, including a prehearing conference. If the complainant has not yet exercised his or her right to make a submission, the retired judge as the Discipline Authority must notify the complainant again of their right to make a submission, written or oral, to the Prehearing Conference Authority. Submissions from the complainant must be received within 10 business days of receipt of this notification. Submissions from the complainant form part of the record of proceedings under Division 3.

The Prehearing Conference Authority is to provide copies of the complainant's written submissions, or copies of the transcript of the oral submissions, to:

- The complainant;
- The member;
- The Police Complaint Commissioner;
- The investigating officer; and
- The Discipline Authority (retired judge).

A member may be accompanied at a prehearing conference with their agent or legal counsel.

The Prehearing Conference Authority, when determining the appropriate disciplinary and/or corrective measures, must consider the aggravating and mitigating factors, and principles as set out in section 126.

The Prehearing Conference is a closed door proceeding and is not open to the public, OPCC or complainant.

REPORT FOLLOWING A PREHEARING CONFERENCE [s.120(12)]

If the discipline and/or corrective measures are accepted and approved, within 10 business days the Prehearing Conference Authority must provide a Report Following a Prehearing Conference to the complainant (if any), the member, the Police Complaint Commissioner, the original Discipline Authority and to the retired judge. The report must contain:

- The disciplinary and/or corrective measures accepted and approved for each allegation of misconduct, and the reasons for approving those measures;
- Any recommendations in respect of changes to the policies or practices of the subject department, and the reasons for those recommendations;
- Any noted aggravating and mitigating factors considered; and
- A statement advising that, unless the Police Complaint Commissioner sets aside the resolution reached at the prehearing conference, the resolution is final and conclusive and not open to question or review by a court on any ground.

If no agreement is reached at the prehearing conference, or the Police Complaint Commissioner does not approve the resolution, the matter returns to the retired judge sitting as the Discipline Authority and discipline proceedings are commenced.

MEMBER'S REQUEST FOR WITNESSES AT DISCIPLINE HEARING [s.119]

Pursuant to section 119, a member may request permission to call and examine or cross-examine one or more witnesses at the discipline proceeding. The request must be in writing and filed with the retired judge within 10 business days of receiving the Notice of Decision and Notification of Next Steps. The witness(s) requested must have been listed in the Final Investigation Report or the supplementary report.

The retired judge may grant the member or former member's request if either of the following apply:

- a) The evidence against the member or former member appears sufficient to warrant dismissal or a reduction in rank; or
- b) The retired judge is satisfied that:
 - (i) there is an apparent conflict between the evidence of 2 or more witnesses;
 - (ii) the evidence is material in determining whether the misconduct occurred; and
 - (iii) examination or cross-examination of the witness(s) requested would assist in resolving the conflict.

Within five business days of the request, the retired judge must provide his/her decision, with reasons, to the member, Police Complaint Commissioner and the investigator.

DISCIPLINE PROCEEDINGS [ss.123 – 125]

A discipline proceeding must be convened within 40 business days from the date of the retired judge's Notice of Decision and Next Steps. The Police Complaint Commissioner may grant an extension if the circumstances are exceptional and an extension is necessary to ensure a just determination and/or is in the public interest.

The discipline proceeding may be held in any location determined by the retired judge, and the proceeding must be transcribed or electronically recorded. The transcription or recording must be considered to be correct and constitute part of the record of the proceeding. The discipline proceeding is not open to the public. Legal counsel may be appointed by the OPCC to assist the retired judge with the conduct of a discipline proceeding.

If a member's request to call witnesses has been granted, the retired judge must appoint a member or legal counsel to present the case at the discipline proceedings. This individual is hereinafter referred to as the discipline representative.

At least 15 business days before the discipline proceeding, notice of the discipline proceeding, in the prescribed form [Form 2 of the *Police Act (Part 11) Forms Regulation*], must be served on:

- the member, and
- each witness to be called at the proceeding.

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This form must be delivered to the following parties at least 15 business days prior to the convening of the discipline proceeding:

- The complainant (if any),
- The Police Complaint Commissioner,
- The discipline representative, if any; and
- The investigating officer.

Notice of the discipline proceeding to the complainant must also include a statement advising the complainant of his/her right to make oral or written submissions regarding the complaint, the adequacy of the investigation and appropriate disciplinary or corrective measures.

WITNESSES [ss.121 & 122]

If witnesses are approved to be called at the proceeding, notices to appear in the prescribed form [Form 1 of the Police Act (Part 11) Forms Regulation] must be served on those witnesses named in the request requiring the witness to appear at the discipline proceeding. On request of the discipline representative, the DA may service a notice to appear on any other witness listed in the FIR.

The DA must forward copies of the notices to appear to the member or former member (or their agent/legal counsel), the discipline representative, and the police complaint commissioner.

A DA may apply to the Supreme Court for an order directing a witness comply with a notice to appear served on a witness pursuant to section 121 of the *Police Act*.

Fees and expenses reasonably and necessarily incurred by a witness required to give evidence at the discipline proceeding will be paid by the OPCC.

ATTENDANCE AT A DISCIPLINE PROCEEDING [ss.123(7)-(9)]

The following individuals must attend the discipline proceeding at the location, date and time specified in the notice:

- The member whose conduct is the subject of the discipline proceedings,
- The investigating officer,
- Witness(s) served with a notice to appear.

The following individuals may attend the discipline proceedings:

- The Police Complaint Commissioner or designated OPCC staff member;
- The member's agent and/or legal counsel;

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- The discipline representative (if any appointed); and
- Legal counsel for the retired judge (if any retained).

Discipline proceedings are not open to the public. Each allegation of misconduct against the member not resolved at an earlier prehearing conference must be read to the member and the member asked to admit or deny each of those allegations.

EVIDENCE TO BE CONSIDERED [s.124(3)]

The only records that may be considered at the discipline proceedings are:

- The Final Investigation Report, including the evidence and records referenced therein;
- Any supplementary report or other separate reports prepared in respect of the investigation, including the evidence and records referenced therein; and
- Any other relevant written records, including without limitation a complainant's submission.

Only the following individuals may be called to give evidence at the discipline proceeding:

- The investigating officer; and
- Witness(s) served with a notice to appear.

All testimony must be taken on oath administered by the Registrar. All witnesses in a discipline proceeding have the same immunities as a witness who appears before a court and are considered to have objected to any questions that may incriminate the witness in a criminal proceeding or establish liability in a civil proceeding.

COMPELLABILITY OF THE MEMBER [s.124 (9)]

The member is not compellable at a discipline proceeding, but may give evidence if he/she chooses to do so. An adverse inference may be drawn from the member's failure to testify. The member, or their agent or legal counsel, may make submissions concerning:

- The complaint;
- The adequacy of the investigation; and
- The appropriate disciplinary and/or corrective measures.

FAILURE TO ATTEND [s.130]

If the subject member fails to attend, the retired judge may:

- proceed in the absence of the member;
- draw an adverse inference from that failure to attend; and

- make any finding and propose any disciplinary or corrective measure deemed appropriate.

Witnesses other than the member may be accompanied by one other person while giving evidence, if requested.

ADJOURNMENT OF DISCIPLINE PROCEEDINGS [ss.132& 123(10)]

The retired judge, at any time before or during a discipline proceeding, may adjourn the proceeding for up to 30 business days if he/she considers that further investigation is necessary.

The discipline proceeding may also be adjourned for up to 20 business days on the retired judge's own initiative or upon the request of the member, the investigating officer, discipline representative or witness who is served with notice to appear, if it is in the public interest.

FINDINGS OF DISCIPLINE AUTHORITY [s.125] (Form 3)

Within 10 business days following the conclusion of the discipline proceeding, the retired judge must:

- serve the member, and
- provide the Police Complaint Commissioner with a copy of his or her written decision.

The decision must be in the prescribed form as set out in Form 3 of the *Police Act (Part 11) Forms Regulation*, and include a finding in relation to each allegation against the member as to whether the misconduct has been proven, with reasons.

The retired judge must also invite and consider submissions with respect to disciplinary or corrective measures from the member or their agent or legal counsel. Although the legislation does not provide a time limit in which to make these submissions, it is recommended that the retired judge include a date by which the submissions are expected.

DISCIPLINARY DISPOSITION RECORD [s.128] (Form 4)

Within 10 business days of hearing submissions of the member, the retired judge must then determine one or more disciplinary or corrective measures as set out under section 126, in relation to each substantiated allegation of misconduct. In arriving at the appropriate measure(s), the retired judge must consider:

- Submissions received from the member;
- Submissions received previously from the complainant (s.113); and
- Aggravating and mitigating circumstances, as set out under section 126(2).

The proposed disciplinary and/or corrective measures proposed, with reasons, must be contained in the prescribed Form 4 as set out in the *Police Act (Part 11) Forms Regulation*. A

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copy must be served on the member, and a copy provided to the Police Complaint Commissioner together with a complete unedited record of the discipline proceeding. The retired judge must also notify the member of their right to request a Public Hearing or Review on the Record.

REVIEW OF DISCIPLINE PROCEEDINGS [s.133]

Within 10 business days of the date of the Disciplinary Disposition Record, the retired judge must then provide to:

- The complainant (if any);
- The member; and
- The Police Complaint Commissioner

a copy of a report that contains:

- The findings with respect to each allegation of misconduct, with reasons;
- The disciplinary and/or corrective measures proposed for each substantiated allegation of misconduct, with reasons including the mitigating and aggravating factors considered;
- Recommendations, if any, regarding the department's policies in respect of the complaint, with reasons; and
- Notification to the complainant, if any, and member of his or her right to, within 20 business days after receipt of the report, make a written request to the Police Complaint Commissioner to arrange for either a Review on the Record or Public Hearing into the matter.

Unless the Police Complaint Commissioner arranges a Review on the Record or a Public Hearing into the complaint, the retired judge's decision is final and conclusive and not open to question or review by a court on any ground.

The Police Complaint Commissioner will ensure that the Chief Constable of the department with which the member or former member is/was employed receives copies of the retired judge's:

- "Findings of Discipline Authority" pursuant to section 125(b) (Form 3);
- "Disciplinary Disposition Record" pursuant to section 128(1)(b) (Form 4); and
- "Review of Discipline Proceedings" pursuant to section 133(1)(a).

The Chief Constable is to ensure that the disciplinary and/or corrective measures set out in the Disciplinary Disposition Record" are taken and the admissible complaint and disposition is recorded on the member's Service Record of Discipline.

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PUBLICATION OF REASONS FOR DECISION BY ADJUDICATORS

Unless special circumstances exist, all *Notices of Appointment of Retired Judge* and Reasons for Decision by Adjudicators will be accessible to the public and published on the Office of the Police Complaint Commissioner's website. Member and complainant identity and 3rd party information will be redacted from all Notices and Decisions prior to posting to the OPCC website.