

IN THE MATTER OF THE *POLICE ACT* R.S.B.C. 1996, C. 367
AND
IN THE MATTER OF A PUBLIC HEARING
INTO AN ALLEGATION AGAINST
INSPECTOR JOHN DE HAAS
OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

- To: Inspector John De Haas (Member)
Vancouver Police Department
- And To: Mr. J. J. McIntyre (Counsel for the Member)
- And To: Chief Constable Adam Palmer
Vancouver Police Department
- And To: Chief Constable Dave Jones (External Discipline Authority)
New Westminster Police Department
- And To: Stanley J. Lowe
Police Complaint Commissioner
- And To: Bradley L. Hickford (Public Hearing Counsel)
- And To: Mark G. Underhill (Commission Counsel)

On July 25, 2018 an order was made banning publication of the names of the witnesses called by Public Hearing Counsel in this Public Hearing and of any information that would tend to identify them. The ban does not apply to the name of the subject member.

Overview

[1] The Police Complaint Commissioner issued a Notice of Public Hearing on March 29, 2018 ordering a public hearing into the following allegation against Inspector John De Haas of the Vancouver Police Department:

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 Inspector de Haas slapped a female Special Constable on the right buttock with an open palm at an official Vancouver Police Department event.

[2] The hearing proceeded in Vancouver on July 25, 26, 27 and 30th, 2018. Written submissions were filed by all counsel and the hearing continued on August 27 with oral submissions. The focus at this stage of the proceeding is on whether misconduct has been proven. To summarize, the issues centre on credibility and reliability in relation to the nature of the alleged incident; whether any aspect of the incident constitutes discreditable conduct; and whether, in addition, a communication sent by the Member following the incident constitutes a separate incident of discreditable conduct.

Legislative Framework

[3] The hearing is convened pursuant to the *Police Act*, Section 143, which, as it relates to this stage of the proceeding, provides as follows:

143...

(2) A public hearing is a new hearing concerning conduct of a Member or former Member that was the subject of an investigation or complaint under this Division.

(3) A public hearing is not limited to the evidence and issues that were before a discipline authority in a discipline proceeding.

(4) For the purposes of a public hearing under this section, public hearing counsel must present to the adjudicator the case relative to each allegation of misconduct against the Member or former Member concerned.

...

(10) The adjudicator must do the following:

(a) decide whether any misconduct has been proven...

[4] The nature of the misconduct contained in the allegation is described in Section 77(3)(h) as follows:

77...

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

...

(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...

[5] Section 86(1) of the *Police Act* provides as follows:

(1) A person must not harass, coerce or intimidate any other person in relation to any complaint or report concerning the conduct of a member or former member under this Part.

Summary of Evidence

[6] Due to the publication ban, the witnesses, all of whom were officers with the relevant police department, will be identified only as "Constable A, Constable B," and by successive letters assigned alphabetically according to the order in which they testified. The officer who brought the allegation forward testified as Constable G, but I will refer to her as the Complainant. The following is a summary of her evidence.

[7] The Complainant was a special constable working at the jail at the time of the allegation. Her immediate supervisor was Constable A, who was also a friend. The Member was her commanding officer. At the time of the incident, which occurred on April 4, 2017, the Complainant had worked at the jail with the Member as her officer in charge for five years. She had applied to become a regular constable and was nearing the end of that process but had not heard whether she was accepted.

[8] On the date in question the Complainant was volunteering at a graduation ceremony for special municipal constables being held at a department training facility in an area referred to as the atrium. She had worked a night shift in the jail the night before. She was standing talking to Constables B and C in the atrium area of the facility and had inadvertently put her hands in her pockets. Someone came up from behind her and pulled her hands out of her pockets and said something like, "Don't put your hands in your pockets." She recognized the voice as the Member's. He then "smacked" her right buttocks cheek, which shocked and upset her. The Member said, "Oops, I probably shouldn't have done that." The Complainant said, "No, probably not," and the Member said, "Sorry." The Complainant said, "I'm just going to ignore you now," and turned back to talk to Constables B and C. She remained shocked at what had happened.

[9] The Complainant described the Member's action as all one event, grabbing her forearms to pull out her hands and then a "smack" with an open hand on her right buttock. She said it felt like a spanking, as if she had "been bad." The Complainant recalled that guests were present in the atrium area at the time of the incident.

[10] After she turned back toward the other constables, the Complainant said to them, "Did you see what just happened?" Constable B confirmed that he had seen it, but Constable C did not. The Complainant left the others and went to a nearby room by herself where she texted Constable A and told her what had happened. She was upset and needed the support and advice of a confidante. Screen shots of the texts between them that evening and subsequent to it were filed in evidence. The Complainant admitted the texts were jocular, which she explained by saying she was attempting to make light of the incident. After about 5 or 10 minutes she returned to the atrium to continue her volunteering tasks and to watch the graduation ceremony.

[11] After the ceremony while still at the facility the Complainant told a training officer, Constable D, what had happened. As she was speaking with Constable D, the Member came over to them and said something like, "We almost had a sexual harassment issue." She recalled laughing awkwardly but took it as an acknowledgement of the incident.

[12] The Complainant made notes on the day of the incident, and considered her options over the next few weeks, discussing the incident with her husband, with Constable A and with other superior officers including her union representative. She was concerned about whether a complaint would impact her application to become a regular constable. Ultimately she decided to come forward with a complaint as a matter of duty because of what she considered the seriousness of the incident. She waited until after she heard her application was accepted before she filed the complaint in late April 2017.

[13] Among the texts exchanged between the Complainant and Constable A there was a suggestion by Constable A that perhaps the Member thought the Complainant was a named female civilian employee of the jail. Constable A also suggested that the Complainant could consider using the situation to "get hired." In later texts, before the Complainant decided whether to bring her complaint forward, the Complainant and Constable A exchanged statements to the effect that some people in the department might be happy to see the Member retire.

[14] The Complainant explained that she and Constable A, and others in the jail, had joked together about the nature of the Member's relationship with the civilian employee. She described

an occasion months previous on which she and the Member were alone together in the computer control room. The member saw the civilian employee through a window and remarked, “oh, I like [name].” The Complainant stated as well that the Member had a reputation for flirting with the female guards in the jail.

[15] The Complainant was not aware of policy stating that an officer in uniform should not have their hands in their pockets at a public event but understood that it was not professional.

[16] The Complainant made a duty statement on July 21, 2017 based on her notes from the evening of the incident and was interviewed by the investigator a month later. In the Complainant’s statements she did not use the word “spank,” and when asked whether the action was more like a “tap” or a “forceful slap” she said, “A tap. I guess.” In evidence she explained, essentially, that she felt compelled by the question to pick one of those descriptions. Her best description was that it was a “smack.” She agreed that the contact with her arms was not aggressive, that she told the investigator the smack “did not feel sexual in nature at all,” and that the Member had never before been inappropriate toward her.

[17] Constable A confirmed in her testimony that she had received and engaged in a series of texts with the Complainant on the night of the incident, starting with a text in which the Complainant stated, “omg [the member] just slapped my ass,” followed by, “I’m scarred.” Constable A read the latter as “I’m scared.” She confirmed that they conversed in a jocular fashion via text about the ramifications of the conduct and that she suggested to the complainant that she could use the incident to “get hired.”

[18] When they conversed in person later, the complainant described the actions of the Member as all one act, taking his hands out of her pockets and slapping her. Constable A assisted the complainant with her decision as to what action to take but did not *encourage* her to make a formal complaint.

[19] Constable B confirmed that he was present for the incident and saw what happened, to some extent. He, Constable C, and the Complainant were all volunteers assisting to set up for the graduation ceremony. He recalled that there were no guests present at the time. They were in the atrium, which he described as a glass walled area that is open to the floor below and the floor above, aptly described as a “fish bowl.” Each of the three were in uniform, consisting of a shirt and pants but no jacket.

[20] Constable B's description of the incident was as follows. He saw the Member approach from the elevators. The Complainant had her back to him and was standing with her hands in her pockets. The Member pulled the Complainant's arms out of her pockets by the elbow or forearm area, saying something to the effect of "don't put your hands in your pockets," and then he "smacked her on the butt."

[21] Constable B did not recall which hand the Member used but thought it may have been his left. He described the actions as one consecutive motion. The complainant appeared shocked; her eyes widened, and her face elongated. The Member seemed serious and work-like, but not angry.

[22] Constable B was shocked at this behaviour from a commanding officer. Constable B recalled the Member coming back to the group a few minutes later and saying something like, "I probably shouldn't have done that." Those present laughed awkwardly, and the Member walked away.

[23] Constable B spoke privately with the Complainant about the incident shortly afterward and offered to support her if she chose to complain about it. They told a training supervisor, Constable D, about the incident. As they were talking with her, the Member came up and said something like, "[the Complainant] almost got me on an HR complaint."

[24] Constable B was also not aware of policy about not having hands in pockets while in uniform. He agreed that part of the Complainant was obscured to him by the Member as he stood behind her. He saw the Member's hand motion but could not see whether it actually hit the Complainant's butt. He did not hear anything. He drew the conclusion based on the motion he saw that there was contact.

[25] Constable C was present with Constable A and the Complainant at the time when the incident occurred but was facing away and did not see it. He recalled that it happened as the public were starting to arrive. He heard the Complainant make a noise and looked over to see that she had a startled look and was laughing uncomfortably. In a conversation shortly afterward the Complainant said that the Member had hit or slapped her on the buttocks.

[26] Constable D testified that she received a complaint from the Complainant at the graduation ceremony. She recalled that Constable A and another officer, Constable E, were present with the Complainant while she made the complaint. Constable D could not remember whether the complainant used the word "hit" or "tapped" in describing the contact with her buttocks. She stated something like, "[he] took my hands out of my pockets and hit my ass."

[27] After the ceremony Constable D saw the Member who said there was no food and he was leaving. She did not recall him saying anything about an HR incident. She was not aware of specific training regarding deportment at special events but was aware that officers should not have their hands in their pockets.

[28] Constable E, a regular constable, was at the ceremony to watch a friend graduate. She, Constable E, was a friend of the Complainant. Constable E was about 20 metres away from the Complainant at the time of the incident, facing toward her left backside. She saw that the Complainant had her hands in her pockets. The Member came up behind her, grabbed her wrists, lifted her hands out of her pockets and placed them by her side. She did not see the Member slap the Complainant.

[29] Shortly after that the complainant asked Constable E if she had seen what happened. She confirmed she had seen the Member take her hands out of her pockets. The Complainant told Constable E that the Member had slapped her butt. Constable E recalled that Constable D was present for that conversation but did not recall that Constable B was there. Constable E was aware of departmental policy about officers not having their hands in their pockets, and she concluded that the Member was correcting the Complainant. She could not see the Complainant's right side from where she stood.

[30] Constable F, the Investigator, provided a copy of his final investigation report. He confirmed that the Member had been advised of the *Police Act* investigation by a deputy chief and an inspector on June 7, 2017 and told that he would be transferred out of the jail. The Investigator identified an email sent by the Member on June 9, 2017 to all the inspectors at the police department, entitled, "My punitive transfer and constructive dismissal." In the email, the Member identified the Complainant by name and put forth the following description of the incident:

She was in full uniform with both hands deep into her pockets and looking extremely unprofessional. Irritated, I came to her left side and placed my hands on her forearms and gently lifted her hands out of her pockets. She turned her head towards me. I smiled, tapped her hip and said in a low light-hearted voice words to the effect "we don't put our hands in our pockets in public". I immediately caught where I had inadvertently tapped her and that it could be misconstrued or misrepresented and forthwith added words to the effect "I don't think I should have done that, sorry". I believe she refers to this as the 'apology'. We then chatted socially for a while longer. That is what occurred."

[31] In the email the Member told the recipients to “feel free to disseminate this correspondence as you see fit” adding, “rather than the damaging misinformed rumours that always circulate, I would rather our Members have full information”. He attached a copy of the Police Complaint Commissioner’s Order for External Investigation.

[32] The Investigator asked the Member for a duty statement in connection with the investigation fairly soon after his appointment in June 2017. He found it necessary to follow up several times before receiving it on October 14, 2017. The Member was on medical leave for part or all of that time and was negotiating with the department for assistance with obtaining a lawyer for the investigation. The Member’s description of the incident in his duty statement was verbatim the same as the description in the June 9 email. He added:

I am unaware of any Member of the public expressing concerns over this incident.

Nor do I believe that any Member of the public would perceive the events as bringing discredit to the [department].

[33] The Investigator became aware of the June 9 email fairly early in his investigation, before he received the Member’s duty statement. He had concerns about the email affecting the investigation. He also believed that when the Member was told about the investigation and his transfer, he would have been advised not to speak to anyone about the investigation. The Investigator provided a copy of the Inspector’s notes which contained the notation, “No contact [V]¹ s. 86 explained and reminded.”

[34] The Investigator interviewed the Member on November 9, 2017. The Member’s description of the incident in that interview was admittedly “virtually identical” to his duty statement and the June 9 email, including his statement, “I immediately caught where I had inadvertently tapped her...”

[35] The investigator provided a copy of the Member’s training records which included two dates, one in September 1996 and the other in May 2001 on which the Member had received

¹ The entry consisted of a “v” with a circle around it.

workplace harassment training, and a third date, October 2013 on which he received respectful workplace training.

[36] The Member testified as follows. He was the most senior member of the department, and his 40-year anniversary as a police officer was the day after his testimony. His career included a year and a half as a discipline authority in *Police Act* investigations, of which he had conducted about 120, a handful of which were external investigations. In relation to the incident, the Member recalled that members of the public were already present. He saw the Complainant socializing with other constables, with her hands in her front pockets. She looked quite relaxed and not professional. The Member became irritated that a Member of his staff would not be exhibiting a professional demeanour at a public event and believed he had to deal with it right away. He walked up to her left side, gently grabbed her forearms, pulled her hands out of her pockets, and placed them at her sides. He recalled that she seemed relaxed as if she was not taking him seriously, and he leaned in to her right as she turned toward him. He stated something like “we don’t have our hands in our pockets in public.”

[37] The Member said that as he spoke, he realized that he tapped the Complainant on the hip on her right side, an inch or two below the belt. He said this was an unconscious motion and he felt it was inappropriate. He said something like, “I should not have done that, sorry.” He then disengaged. The Member said that he had consciously decided not to “dress down” the Constable or “make a big deal”.

[38] In the Member’s duty statement, as in the June 9 email, he stated that he and the Complainant had “chatted socially” after the incident. In his interview with the Investigator he made similar comments, as follows:

“...and we chatted socially for awhile, how long I don’t know, five, ten minutes...” (p. 2, l. 38)

“...we talked for five, ten minutes...” (p. 4, l. 6)

[39] Again, when asked by the Investigator, “Do you think she was okay with that contact, everything from the forearms to the tap?” the Member answered:

“Well we talked for five, ten minutes very socially and it was fine ... nothing was ever expressed to me...” (p. 5, l. 31)

[40] The Investigator asked what observation the Member made of any facial expressions [of the Complainant after the incident], and the Member answered:

“She seemed fine, that’s why we chatted for ten minutes, five, ten minutes yeah.” (p. 8, ll. 21 – 24)

[41] The Investigator read the Complainant’s statement to the Member, in which she stated that she had said to him, after the incident, “okay, I’m just going to ignore you now.” The Member’s response to the Investigator was, “She certainly didn’t ignore me, we had a conversation for five, ten minutes.” The Investigator asked what they had talked about, and the Member stated, “I believe we talked about the event comin’ up and I don’t know just small talk yeah.” (p. 9, ll. 5 – 19)

[42] The Member told the Investigator that when he said “sorry” to the Complainant it was intended as an explanation, not an apology, in order that the Complainant not misconstrue his actions, and that if he had believed the Complainant was upset, he would have “gone to an apology.” The Member pointed out that he was the one who had raised the touch as an issue, that “she didn’t raise like she didn’t say oh right...” and that he raised it “because I felt that that was not a good place to touch somebody, it was inappropriate.” (p. 9, ll. 43 – 61, p. 10, l. 3-4)

[43] Later in the interview, the investigator asked the Member whether in his mind he considered his actions a violation of departmental policy on respectful workplaces, and he stated:

Perhaps along with all this training in that split second I realized ya know there was such value in the policy and in the training to make me realize in that split second that I didn’t want an employee to misunderstand or misconstrue what had happened, didn’t need the complaint, I didn’t need the, do I actually even respond, maybe it meant nothing to her, I still based on all of this wanted to make it correct in a split second, not ... misunderstood.

... Because it was inadvertent, there was no wilfulness, no gross negligence, no intent, no disregard, in fact I felt my action was because it was inadvertent as a part of that contextual event, that to me to step up and to ensure that this employee didn’t misunderstand, misconstrue what had occurred.

... I made it as right as I could and from our chit chat afterwards I felt that she had either not taken it wrong even to begin with, I don’t know if she had or hadn’t ... but ... as part of you don’t stand that way in public yeah. (p. 16, ll. 53 – 61, p. 17, ll. 2 – 12)

[44] The Member told the Investigator that his purpose in sending the June 9 email was as follows:

Because this is a labour issue and human rights issue, it doesn't fit the Police Act, the union owns those grievances, I was transferred... inappropriately contrary to labour law and these are the people, my peers who make those decisions... funding grievances ...

[45] In his testimony at the public hearing, the Member said that while he thought he and the Complainant had spoken after the incident, he recalled now that it must have been someone else he was talking to. He explained this by saying that he attended many such functions, and he had pieced the events back together after he received the investigation report and related file.

[46] In relation to the comment that the Complainant and Constable C recalled the Member making about a "sexual harassment" or "HR" issue, the Member stated that he did not believe that took place and did not know why he would say something like that as he had no concern that there was any issue.

[47] The Member denied that he had "slapped" the Complainant and said that hearing that allegation for the first time he was very disturbed as he considered it to be an allegation of sexual misconduct. He was surprised to hear the Complainant state in evidence that she felt it was disciplinary. He said that if he had slapped her, he would have held himself accountable, as the only other option "is to lie."

[48] The Member denied being flirtatious with the civilian jail employee or jail staff. He considered it his responsibility to ensure that the workplace was respectful.

[49] The Member admitted that when he wrote the June 9 email he was aware there was an OPCC investigation and at the time he considered it to be an allegation of sexual harassment. He denied that the email could be considered an obstruction of justice; it was a letter of truth to his peers. He agreed that if the allegation was criminal he would have taken legal advice before putting it out. He did not believe that the matter was appropriately dealt with under the *Police Act* and considered that since the Police Commissioner had named the Complainant in the Order for External Investigation, it was a matter of public record. He denied that it was inappropriate to send the email to all Inspectors and invite them to disseminate it as they saw fit, stating that he relied on their professional status and that if he wanted it shared publicly he would have called a reporter.

[50] The Member stated that he did not want rumours out there damaging him and his reputation; he wanted the inspectors to know the truth and deal with the two labour issues that arose out of the situation.

[51] During his interview, the Member was shown the texts between the Complainant and Constable A about the civilian employee and he responded, “[Constable A] is gay so why [she] would say maybe he thought you were [name] sounds a little sexist to me ... we don’t need all of [Constable A]’s ... fantasies shared this way ... I found it very offensive...”

[52] When asked in cross-examination by Public Hearing Counsel about the Complainant’s possible motive for being untruthful about the incident he said he believed she had been influenced by the #metoo movement and “upped her ante”. He agreed that he had stated six or more times that he and the Complainant chatted after the incident but maintained that he must have been mistaken when he said that.

[53] In cross-examination by Commission Counsel the Member denied that he had delayed in providing his duty statement because of his view that the matter was not properly dealt with under the *Police Act* but reiterated his view that because the incident had not involved an interaction with members of the public, it was a labour issue rather than a *Police Act* issue. He noted that the Complainant had initially taken the position that it was sexual harassment but had later described it as disciplinary. He demonstrated with his index finger how he believed he had tapped the Complainant on the hip. He did not recall making the comment about the civilian employee in the computer control room. In relation to his comments about Constable A the Member said she was projecting her own troubled issues into the situation. He confirmed that he had served as a discipline authority under the *Police Act* and understood the requirements of confidentiality in relation to investigations. He thought there was nothing barring him from sending the June 9 email and sharing the Order for External Investigation because the Complainant was named in the Order.

Submissions

[54] Public Hearing Counsel’s submissions focused on credibility and reliability, as well as motive for truthfulness. He provided an overview of the evidence and submitted that the Complainant’s evidence was genuine and forthright. He made the points that the Complainant did not waver significantly in her testimony as compared with her statements and pointed to the supportive evidence of the other officers who were present in relation to the Member’s actions and the Complainant’s demeanour, as well as the Complainant’s consistent behaviour after the incident. He contrasted this with the Member’s significant inconsistencies in relation to chatting

to the Complainant after the incident, and his apparent disrespect for the investigative process. He highlighted the fact that even on the Member's version of the events, there was no explanation for him having physical contact with the Complainant as opposed to speaking with her discreetly. He pointed to the Member's derogatory remarks about Constable A in response to the texts, which the Member admitted was a visceral response, and submitted that the Member had a similar visceral response to the Complainant's lack of composure on the night of the incident. Public Hearing Counsel pointed to the June 9 email and the Member's evidence in relation to it as an indication of the Member's disregard for the process and for his duty of integrity in relation to the investigation. He submitted that the email constituted a separate incident of misconduct.

[55] Commission Counsel also focused on credibility and pointed out that the Member's description and demonstration of the "tap" on the hip as distinct from the buttocks was unnatural in the context and also inconsistent with the Member's immediate apology. He submitted that there was a stark contrast between the evidence of the constables who were present and that of the Member. He pointed to the text exchange as a human and real exchange, supportive of what actually happened, making light of a difficult situation. Commission Counsel also submitted that the Complainant clearly had no motive to lie and was in fact reluctant to complain about the incident due to her employment status. The Member, on the other hand, testified rigidly and artificially, resisting natural suggestions such as concern about his reputation, whether he considered the Complainant to be attractive, and so on. He contrasts the Member's condemnation of flirtatious behaviour in the workplace with his denial that the conduct alleged against him was properly dealt with under the Police Act. Commission Counsel pointed to the department's Respectful Workplace Policy prohibiting unwanted touching of "a person's body" and submitted that all of the Member's conduct in connection with the incident constituted discreditable conduct. He says not only was the smack to the Complainant's buttocks inappropriate, but so was the physical removal of her hands from her pockets. He pointed to other cases dealing with workplace misconduct and harassment and the effect of those issues on public confidence. In addition, Commission Counsel also submitted that the Member's dissemination of the June 9 email was a separate incident of extremely serious misconduct in the nature of interference with an investigation and possibly, obstruction of justice. He noted that the Member agreed that his reputation or career were top of mind when he sent it. He says if the email had been sent in the

context of a criminal investigation it would have been obstruction of justice. It was done for self-protection, he says, when he knew the Complainant was applying to be a regular constable, and made the complaint public within the department. He expressed concern about the chilling effect on junior officers if an Inspector sends out a complaint to 27 of his senior colleagues.

[56] Counsel for the Member submitted that the case was about perception, the Complainant's perception of the contact, the Member's perception, and most importantly, the public's perception. He highlighted the facts that were not in dispute, including the characterization of the atrium as a fishbowl and the events preceding the incident, including the Member's removing the Complainant's hands from her pockets and placing them at her side. He submitted that it was established that members of the public were present at the time that the Member corrected the Complainant in this fashion. He submitted that if the Member's contact with the Complainant after the removal of her hands from her pockets was inadvertent tap, it was not discreditable conduct. He noted that the Member agreed that if he had intentionally contacted the Complainant it would be discreditable conduct. He denies that it was intentional, other than removing the hands while correcting a default in department. He noted that the Complainant stated in her interview that she did not consider the contact sexual in nature but that the contact had taken on more sinister tones in the Complainant's description at the hearing of it as a "spanking". He submitted that with members of the public present that was highly unlikely and that it was supportive of the Member's explanation for not speaking to her instead. He pointed to the Complainant's having accepted the description of the incident as a "tap" suggested to her during her interview. Counsel for the Member pointed to the inconsistencies between the evidence of the officers who were present on the night of the incident. He submitted that Constable E did not take issue with the conduct she observed. He said that Constable A was unreliable, given that he could not say which hand was used, whether it was open or closed, nor did he see any contact or hear the Member's remark. He submitted that he perhaps only heard about the slap from the Complainant, did not see it. He points to the texts by the Complainant and suggests that they were flippant but committed the Complainant to a version of events that she had to maintain. He submitted that the Complainant's evidence about other behaviour by the Member is problematic and notes that other witnesses were not asked about that, in particular the remark in the computer control room. He submitted as well that the Complainant was motivated by concern about the effect of her lack of composure on her outstanding application to become a regular constable

and also that the texts displayed malice toward the Member. He points to the Member's willingness to admit he was wrong about the subsequent conversation with the Complainant. Counsel for the Member submitted that the public would not be shocked by physical correction of the Complainant and that unless the slap was intentional there is no misconduct. He submitted that this was not a strike in anger or out of a perverse motive. It was unintentional, and the Member believed it should have been dealt with in-house for that reason. That, he says, does not make him contemptuous of the *Police Act* process. In relation to the June 9 email, he submitted that it was sent in the context of a request for the collective bargaining unit to grieve the Member's transfer and was not an attempt to discourage a witness. The details were provided to assist the members in how to vote on the issue of grievance. He notes that the Member stated in the email that the incident as described was "roughly correct." He concluded by stating that the public would not be scandalized by either the actions or the email.

[57] In reply Public Hearing Counsel took issue with the use of the term scandalized which he submitted is not the test under Section 77(3)(h), rather it is whether the conduct would be likely to bring discredit to the department.

Analysis & Conclusion

[58] The case clearly turns on credibility. As pointed out by Public Hearing Counsel the standard of proof is on a balance of probabilities in a matter of this nature. Counsel for the Member has noted that the Complainant described the incident very similarly to the way in which the Member described it, with the exception of the nature of the Member's contact with the Complainant after removing her hands from her pockets. There, they differ as to whether it was a tap on the hip or a smack on the buttock. I reject the suggestion that the Complainant herself adopted the description of it as a tap. She selected that word when faced with a choice between a hard slap and a tap. Her description of the action as a smack or a slap was otherwise consistent throughout.

[59] The others present, Constables B and C, provide supportive evidence that there was more than an inadvertent tap to the Complainant's hip. Constable B perceived a more overt type of motion than that described by the Member, while admittedly not seeing the contact. He stated that the motion he saw was consistent with a smack or a slap, and his immediate reaction of being "very shocked" was consistent with the type of contact he says he perceived. Constable C

confirms the Complainant's immediate reaction, which was more consistent with a deliberate slap or smack than an inadvertent tap.

[60] The inconsistencies in the evidence of the three regarding where they were standing, whether members of the public were present, which hand the Member used and other slight discrepancies are no more than would be expected in the circumstances. In addition as pointed out by Public Hearing Counsel, Constables B and C did not make notes of the incident until they provided their duty statements a few months later. The minor discrepancies or inconsistencies do not detract from the witnesses' credibility in my view.

[61] The evidence of the witnesses who were present regarding both the context and the aftermath of the incident confirms that neither the Complainant nor Constable B perceived that the contact was inadvertent or equivocal. They both acted consistently with having observed or experienced a deliberate slap. Constable C observed the Complainant's shocked reaction. In addition, the Complainant made several open complaints to those present and appeared upset, after complaining via text to her friend and superior, Constable A. I find those actions to be more consistent with genuine upset than with some ulterior motive related to malice toward the Member or concern for her employment. The texts and subsequent behaviour provide a backdrop that has an air of genuineness about the complaint. In addition, I accept that the Complainant was reluctant to bring the incident forward but did so out of a sense of duty because of its seriousness. I find no inconsistency between her initial characterization of the incident and her subsequent description of it as having felt disciplinary in nature.

[62] In addition, Constable B and the Complainant both describe what is essentially a subsequent admission on the part of the Member when he observed the Complainant speaking with Constable D. The difference in wording is not surprising. The gist is the same. The obvious implication is that by this remark the Member was attempting to diffuse what he perceived as a potentially significant issue. That is not consistent with an inadvertent tap. It may be somewhat surprising that Constable D did not recall that remark, but perhaps she did not perceive it at the time. That remark is not only supportive of the Complainant's version of the incident, but it is consistent with the Member's own evidence about having "caught" himself immediately after the contact and making the statement, "I probably shouldn't have done that, sorry."

[63] I agree with Commission Counsel that the minor and ordinary discrepancies among the constables who were present may be contrasted with the Member's description of the incident,

which remained the same, verbatim, from the June 9 email, through his October duty statement, to his November interview, including his use of the awkward and unlikely phrase, “I immediately caught where I had inadvertently tapped her.” It is notable that the Member made these statements before becoming aware of the other officers’ descriptions of the incident. Also notable is the fact that after becoming aware of those, the Member resiled from his repeated assertions that he and the Complainant had engaged in social conversation for several minutes after the incident. This alleged conversation was the underpinning for the Member’s assertion that the Complainant had apparently taken no offence, in support of his characterization of the contact as inadvertent. He abandoned this aspect of his story only after it became apparent it could not be sustained. I note that he and the Complainant knew each other well. They had occupied the same workplace for five years. It is not credible that the Member would be mistaken, in these circumstances, about who he was talking with after the incident. I am satisfied that his statements about the subsequent conversation were no more than self-serving contrivance.

[64] In addition, I find the Member’s description of the nature of the contact as an inadvertent tapping of the hip to be disingenuous and unnatural. As stated, I find it to be inconsistent with his immediate apology and subsequent remark. The Member’s attempt to deny that he made an apology is a tortured reconstruction. His statement in the June 9 email that he believed this was what the Complainant referred to as “the apology” was itself disingenuous. The Member clearly realized that he had acted inappropriately. He said as much, while attempting at the same time to deny it. The Member’s version of events and subsequent characterizations of the incident are simply not credible.

[65] Moreover, while the Member has gone to lengths to minimize the nature of the contact following his removal of the Complainant’s hands from her pockets, I agree with Counsel that the physical contact encompassed in that prior act is itself inappropriate. The departmental policy plainly prohibits “unwanted touching.” Physical discipline in the workplace is a thing of the distant past. The Member’s explanation that he decided not to simply speak to the Complainant so as not to make a big deal out of her lack of comportment is not credible. Physical intervention by a superior officer in that context, in the presence of peers and, likely, members of the public, would have been -- and was -- a much bigger “deal”.

[66] The fact that the Member felt justified in physically intervening as he admittedly did, and that he maintains it was appropriate, is far more consistent with the Complainant's description of the entire incident than it is with that of the Member. The Member's subsequent attempts to characterize his actions as first justified, then inadvertent, and nonetheless professional throughout, were self-serving and revisionist. His assertion that the incident was simply a labour issue as opposed to a *Police Act* issue demonstrates an attitude of retroactive self-justification. I agree with Commission Counsel that if he truly did not recognize that the incident as described by the Complainant and Constable B was *Police Act* misconduct, that would be highly disturbing.

[67] I agree as well that the sending of the June 9 email was highly ill-considered. I must consider that it took place in the context of the Member's having just learned of the fact that the incident was to be investigated under the *Police Act*. One might expect some frantic attempts at self-preservation. However, it cannot be overlooked that the Member himself had served as a discipline authority on many *Police Act* investigations, had attended three workplace conduct training sessions, and had, according to the Inspector's notes, been reminded of his obligations not to interfere with witnesses under Section 86 of the *Police Act*.

[68] Despite the fact that the Complainant had apparently been named in the Order for External Investigation, the Member ought to have known that disseminating the June 9 email to Investigators and inviting them to share it among members could only have had a chilling effect on the willingness of a named complainant to pursue a complaint. If the email was *intended* to have that effect it would be an obstruction of justice and a violation of Section 86.

[69] Even if the June 9 email was not an intentional attempt to dissuade the Complainant, given that the Member had been reminded of his obligations under Section 86, he ought to have been alive to the possibility that objectively considered it could have that effect. The Member's description of the incident in the email was a challenge to the veracity of the Complainant's version of events, and essentially a contradiction of her complaint. It was a version of the events that I have rejected. On the view I take of the evidence, it must be taken to have been deliberately untruthful and intentionally contradictory of the Complainant's version, despite his comment that it was "roughly correct."

[70] The Member with his level of experience and knowledge of the context ought to have known the potential impact of the email on those involved in the incident. Even if the primary

purpose was not to challenge the Complainant and other witnesses, he should have anticipated it could have that effect. If it is not obstruction of justice, I agree that it comes close, and in my view it establishes discreditable conduct.

[71] The Member has taken the position that because his actions did not occur in a public sphere, and/or were not interactions with members of the public, they are not properly *Police Act* matters. By inference, the suggestion is that a member cannot be taken to have known or ought to have known that his actions would likely bring discredit to his department where they do not occur in a public context. This is the implication of the final remarks in the Member's duty statement.

[72] This argument cannot prevail. It is akin to an argument that if a member's actions, however dishonourable, do not become known to the public they cannot be discreditable. The element of intent in relation to the nature of discreditable conduct is an objective one: if the behaviour is of a nature that, if known to the public, would be considered dishonourable, it is discreditable.

[73] The test is whether the public would consider the behaviour likely to bring discredit on the department. Clearly disrespectful workplace interactions of the type at issue here engage the provisions of Section 77(3)(h).

[74] I find that the Member committed discreditable conduct under Section 77(3)(h) of the *Police Act* in physically disciplining the Complainant by removing her hands from her pockets, and also by smacking or slapping her on the buttocks, conduct which he knew or ought to have known would likely bring discredit on his department.

[75] I also find that the Member committed discreditable conduct by disseminating an email in which he identified and contradicted the Complainant when he knew there was a *Police Act* investigation pertaining to her complaint, conduct which he knew or ought to have known would likely bring discredit on his department.

[76] The matter will proceed under Section 143(9) to a consideration of the appropriate disciplinary or corrective measures in accordance with Section 126.

Dated at Vancouver this 27th day of August, 2018.

“ORIGINAL SIGNED BY”

Carol Baird Ellan, Retired Provincial Court Judge