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

ADJUDICATOR'S DECISION
REGARDING DISCIPLINARY OR CORRECTIVE MEASURES

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.

Introduction

[1] On August 27, 2018, following a public hearing, I found two allegations of discreditable conduct to have been proven against the Member. These consisted of an incident of unwanted physical contact with a subordinate officer and the workplace dissemination of a communication pertaining to the incident.

[2] The matter was adjourned to September 19, 2018 for submissions relating to the appropriate disciplinary or corrective measures. On September 18, 2018 the Member tendered his resignation to the

relevant department.

Legislative Framework

[3] Section 77(h) of the *Police Act* defines discreditable conduct in the following terms:

> (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:
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> …
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> (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…

[4] Section 126 of the *Act* sets out the range of disciplinary or corrective measures and the factors to be considered:

> **Imposition of disciplinary or corrective measures in relation to members**
> 126 (1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or her or his agent or legal counsel, or from the complainant under section 113 [complainant's right to make submissions], the discipline authority must, subject to this section and sections 141 (10) [review on the record] and 143 (9) [public hearing], propose to take one or more of the following disciplinary or corrective measures in relation to the member:
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> (a) dismiss the member;
> (b) reduce the member's rank;
> (c) suspend the member without pay for not more than 30 scheduled working days;
> (d) transfer or reassign the member within the municipal police department;
> (e) require the member to work under close supervision;
> (f) require the member to undertake specified training or retraining;
> (g) require the member to undertake specified counselling or treatment;
> (h) require the member to participate in a specified program or activity;
> (i) reprimand the member in writing;
> (j) reprimand the member verbally;
> (k) give the member advice as to her or his conduct.
>
> (2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,
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> (a) the seriousness of the misconduct,
> (b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct,
> (c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career,

(d) the likelihood of future misconduct by the member,
(e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
(f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,
(g) the range of disciplinary or corrective measures taken in similar circumstances, and
(h) other aggravating or mitigating factors.

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

[5] Section 127 provides as follows in relation to the application of Section 126 to former members:

Proposed disciplinary or corrective measures in relation to former members
127 (1) After finding that the conduct of a former member is misconduct and hearing submissions, if any, from the former member or her or his agent or legal counsel, the discipline authority must apply the provisions of section 126 (2) and (3) *[imposition of disciplinary or corrective measures]* in respect of the matter as if the former member had continued to be a member, then determine what disciplinary or corrective measures the discipline authority would have taken under section 126 (1) if the former member had continued to be a member.

(2) The disciplinary or corrective measures determined in accordance with subsection (1) of this section are the disciplinary or corrective measures to be proposed by the discipline authority for the purposes of section 128 (1) (a) *[disciplinary disposition record]*.

Submissions

[6] Public Hearing Counsel takes the position that the allegation in relation to sending the email is the more serious, as in addition to failing to set the example demanded by the member's supervisory position, he used his position in an attempt to affect the course of the proceedings, by putting out his version of the events and naming the Complainant. He submits that the Member must have known that behaviour would have a chilling effect on the Complainant's willingness to proceed. Public Hearing Counsel points to the Member's rank and lengthy service as demanding of a higher standard of conduct, while acknowledging that his prior unblemished service record is a mitigating factor. He submits that the allegation of unwanted physical contact with the Complainant merits a lengthy suspension, and the allegation of disseminating the email merits a permanent reduction in rank.

[7] Commission Counsel submits that the appropriate penalty is permanent demotion to the rank of constable, and that the approach prescribed by Section 126(3) of correcting and educating the Member would not be workable and would bring the administration of police discipline into disrepute. Commission Counsel submits that an inspector is expected to exhibit exemplary moral and ethical

standards of integrity, professional conduct and equality. He points to the chilling effect of the email, the power imbalance between the Member and the Complainant at the time of the physical incident, and the Member's lack of credibility and failure to take responsibility for his actions, as aggravating factors. In relation to the Member's service record Commission Counsel says that the Member used it as a shield, as support for his denial that he would have engaged in the alleged physical misconduct. Commission Counsel submits that if the Member's career experience in disciplinary matters did not bring home to him the importance of confidentiality in relation to *Police Act* investigations, and the respectful workplace programs he has taken did not enlighten him to the impropriety of the physical contact, it is unlikely he will learn those things from a corrective penalty such as further training. He submits as well that the misconduct in this case thoroughly violates the core standards expected of senior officers, and therefore a corrective or educative penalty would fail to send the appropriate message of denunciation and deterrence. Commission Counsel refers to Sir Robert Peel's Nine Principles of Law Enforcement, 1829, in support of a conclusion that the Member's failure to recognize that his behaviour would have been disreputable in the eyes of the public and was therefore governed by the *Police Act* is an indication that he lacks the moral character necessary to serve the public as a leader in the police and public service.

[8] With respect to the Member's resignation, Commission Counsel submits that it has no effect on the appropriate penalty, and furthermore that it should not be taken at face value in light of its timing and likely lack of impact on him.

[9] Counsel for the Member cites the Member's unblemished 40-year service record and points to his involvement in designing the current system for responding to complaints under the *Police Act.* He submits that it was the Member's knowledge of the difference between internal processes relating to personnel matters and *Police Act* processes relating to matters involving the public that led to his conclusion that there were other, internal, means of addressing the complaint, and that this does not amount to an attitude of disrespect for the current process. Counsel for the Member notes that the physical incident was brief, disciplinary and not sexual, and that the Member's motive was concern for the perception of the public. He submits that there is no likelihood of a recurrence, that the experience of having the allegations substantiated and being disbelieved has irretrievably tarnished the Member's reputation, and he will be unable to rehabilitate it because he is at the end of his career. Counsel for the Member points to the fact that no similar cases have been cited, and that those in which demotion was imposed dealt with criminal breaches of the public trust and/or members with prior incidents of misconduct. He submits that deterrence of other officers does not demand demotion.

[10] Counsel for the Member also argues that it was necessary for the Member to disclose enough details in the workplace email to inform the officer union Members as to how to vote on his grievance, and that the absence of notice within these proceedings that the email should be considered a separate

allegation of misconduct precluded the Member from calling evidence regarding his reasons for disseminating it. Finally, he submits that the Member did not intend to cause the Complainant discomfort or harm and notes that he apologized immediately. Counsel suggests a suspension for up to 30 days is a sufficient penalty.

[11] Commission Counsel replies to the suggestion of prejudice arising from the timing of the second allegation by saying that he provided notice of that allegation in August before the matter completed.

Aggravating and Mitigating Circumstances

(a) Seriousness of the Misconduct

[12] I found that the Member committed discreditable conduct when he physically disciplined the Complainant by removing her hands from her pockets, and smacking or slapping her on the buttocks. I also found that the Member committed discreditable conduct by disseminating an email within the department in which he identified and contradicted the Complainant when he knew there was a *Police Act* investigation pertaining to her complaint.

[13] The Member is an Inspector and he was the Complainant's supervisor at the time of the incident. He should have exemplified a high standard of conduct. I find that his remarks immediately after the incident show that he recognized that slapping the Complainant's buttocks fell below that standard. His subsequent conduct and characterization of the incident however show firstly that he did not recognize he had also violated the department's conduct standards by the unwanted physical contact of pulling the Complainant's arms out of her pockets; and secondly, that he did not acknowledge either the seriousness of the slap or its impact on the Complainant. Member's counsel notes the brevity of the incident, and points out the Member's apology and lack of intention to cause harm or discomfort to the Complainant.

[14] The totality of the incident might be described as an "upbraiding," had it not crossed the line into the sphere of unwanted physical contact. While not obviously sexual in nature, the Complainant herself observed that it would not likely have been visited upon a male colleague. I agree that the Member took physical liberties with the Complainant's person that it seems doubtful he would have taken with a male subordinate. As I observed in my earlier reasons, physical discipline in the workplace is a thing of the distant past. The incident took place in front of other subordinate officers, within an event to which the public were invited, whether or not members of the public were actually present. The experience must have been humiliating, and it is difficult to conclude that it was not intended to be.

[15] Despite the Member's immediate apology, by sending the email falsely characterizing the nature and extent of his subsequent interaction with the Complainant [and by implication her level of "consent' to the incident] the Member compounded matters instead of mitigating them. The email was sent to all

inspectors in the department with an invitation to disseminate it as they saw fit. I acknowledge that the Member asserts that he was precluded by the sequence of events in this proceeding from calling evidence to establish the "necessity of providing sufficient information" for the members of the union to vote on whether to support the Member in his grievance. I question, however, whether the method he employed to do so, sending an email to a wide audience of superior officers with an invitation to disseminate it, could have been his only alternative. In light of the Member's duties under Section 86, one would have expected at very least some vigilance on his part as to whether the Complainant might receive the email, instead of an invitation to disseminate it, with no restrictions.

[16] The initial incident showed that the Member was oblivious to the Complainant's sensibilities and the standards of officer decorum. He crossed well over the line into over-familiarity by engaging in unwanted and humiliating physical contact in a public setting. The Member's subsequent actions demonstrated that not only was he oblivious to the Complainant's sensibilities, but he was prepared to intentionally disregard them by publicly challenging her reaction in an effort to save himself. I agree with counsel that the dissemination of the email within the workplace is serious misconduct which compounds and arguably overshadows the initial incident.

[17] The overall conduct fell well below the applicable ethical standards and I characterize it as high on the scale of seriousness.

(b) The Member's Record of Employment

[18] The Member has served over 40 years with the department. His service record is unblemished in that time, and he has served in many different roles and ranks, in all corners of the city. This is clearly a mitigating factor. Despite suggestions in the evidence that the Member was known to "flirt" within the department, this incident can be considered to be isolated in the sense that I have been made aware of no prior complaints. Despite the Member's later behaviour, I am able to conclude that the physical incident was an uncharacteristic lapse on his part.

(c) Impact of Proposed Measures on the Member, His Family and Career

[19] At the time of the incident, the Member was on the verge of retirement. He has since resigned, stating (through his counsel), "the adjudicator's findings as to his credibility would make it impossible for him to function as a police officer at any rank. He has always prided himself on being truthful and is distressed as to how his actions have been perceived and is devastated both personally and professionally by the outcome. In consequence and for the good of the force he has been proud to serve, he has tendered his resignation…"

[20] Under Section 127 I am required to consider the Section 126 factors as if the member remained a member. Nonetheless, it is clear that the experience of having the allegations found to have been proven and having been disbelieved in his characterization of the incident has significantly impacted the Member's employment status and willingness to continue as a member. Had he not resigned, I would find the potential impact of the measures proposed by counsel, of a lengthy suspension and permanent demotion, to be considerable.

(d) The Likelihood of Future Misconduct by the Member

[21] While the Member has since the incident minimized and/or negated the seriousness of his misconduct, that is not necessarily fatal to a finding that he is unlikely to exhibit such conduct in the future. There have been no prior such incidents alleged against him. Having the experience of a discipline proceeding and subsequent public hearing will have enlightened him to the level of disapprobation arising from this type of misconduct. Moreover, the Member's vehement denial of misconduct, misguided as it was, indicates to me that he is strongly disposed against future incidents of misconduct on his part.

(e) Whether the Member Accepts Responsibility for the Misconduct and is Willing to Take Steps to Prevent its Recurrence

[22] Given the Member's persistent denial of wrongdoing, in the absence of his resignation I would have had concerns about whether he could be said to have taken responsibility for his actions or demonstrated willingness to take steps to prevent recurrence. The Member maintained through the end of the public hearing that his only transgression was inadvertent physical contact; a version of the evidence that I rejected. In addition, he sought to confine the nature of the incident to a workplace conflict; denying that it was potentially misconduct under the *Police Act*, despite his experience in disciplinary matters and what should have been an obvious possibility that the Complainant's version would be preferred.

[23] As I noted in my earlier reasons, it is alarming that an experienced superior officer could fail to recognize the potentially discreditable nature of the conduct about which the original allegation was concerned. His counsel has sought to explain this attitude as an attempt to categorize the incident as internal based on the Member's knowledge of the premises of the *Police Act*; however, it should have been clear to him by the time of the public hearing that those familiar with the disciplinary process and standards did not consider the conduct to be confined

to a conflict in the workplace. Instead of acknowledging that fact he continued to challenge it. The Member has now had the additional experience of a public hearing in which still other professionals involved in the disciplinary process have characterized the physical misconduct as a serious breach of public trust under the *Act*, and yet his only expressed regret is at having been disbelieved. The fact of his resignation may obviate concern about future misconduct within the department but it does not necessarily demonstrate acceptance of responsibility.

[24] While I do not consider the Member to be contemptuous of the process, there is no room at this point for a suggestion that the matter was strictly internal or should have been dealt with another way. The Member's continued failure to acknowledge or at least recognize the discreditable nature of his misconduct raises concerns about his ability to accept responsibility.

(f) The Degree to Which the Municipal Police Department's Policies, Standing Orders or Internal Procedures, or the Actions of the Member's Supervisor, Contributed to the Misconduct

[25] This consideration is not a factor in this matter.

(g) The Range of Disciplinary or Corrective Measures Taken in Similar Circumstances

[26] No cases were cited by counsel; however, I have had occasion to consider the following authorities that may have some relevance to the matter at hand.

[27] In a recent OPCC matter, No. 15-11048, Retired Supreme Court Justice Ian Pitfield as discipline authority considered the appropriate penalty for a high-ranking officer who committed three incidents of workplace harassment, of which two were in the nature of unwanted physical contact. In the absence of prior entries on the officer's service record, Justice Pitfield determined that the appropriate penalty was 30 days suspension on each allegation, concurrent, with training in harassment and sensitivity.

[28] It is not without relevance that, according to the Notice of Public Hearing[1] in this matter, the discipline authority proposed a penalty of 5 days' suspension, without pay, based on an 8-hour work day. In light of the Member's request for a review, I assume that he did not serve any of that suspension, but if he had, in the absence of the resignation it should have been deducted from any suspension proposed in this proceeding.

[29] As a matter of interest, I note that in a U.K. police discipline case an officer who slapped

[1] https://opcc.bc.ca/wp-content/uploads/2018/04/13492-2018-03-29-Notice-of-Public-Hearing-s137-Member-Request.pdf

a colleague on the buttocks received a "final written warning[2]". There was no suggestion of a superior-subordinate relationship or the presence of witnesses.

[30] As a matter of perhaps marginal interest, a general survey of internet articles and forums on workplace harassment demonstrates that the penalties for unwanted physical contact with a subordinate in the nature of a slap on the buttocks can range from reprimand to dismissal. I make this observation only to assist in putting the nature of the conduct at issue here into a public context and to compare the measures proposed here with other outcomes.

(h) Other Aggravating or Mitigating Factors

[31] I find no additional aggravating or mitigating factors in this case.

Final Analysis and Conclusion

[32] Section 126(3) directs that an approach seeking to correct and educate the member is to be favoured unless it would be either unworkable, or inconsistent with the administration of police discipline. In an OPCC Public Hearing matter, Page, OPCC No. PH 12-03, Retired Justice Pitfield observed, "In my opinion, s. 126(3) is broad enough to require consideration of the effect of any sanction on organizational effectiveness and consideration of its effect on public confidence in the administration of police discipline." He observed that "the overriding principle under the Act remains the imposition of a sanction that corrects and educates the member unless it is unworkable or would bring the administration of police discipline into disrepute." In performing his analysis in Page, Justice Pitfield suggested the effect of a particular sanction on the administration of police discipline be considered from the viewpoint of a reasonable member of the public.

[33] I am not convinced in all the circumstances that an approach short of demotion would have been unworkable or bring the administration of police discipline into disrepute. I am also not satisfied that the measure of "permanent" demotion is available under the *Act*. In the case of a more junior officer, that measure might itself be unworkable for the department, as it would tie the authorities' hands in relation to future promotions.

[34] In the final analysis, the initial incident was a brief, ill-considered overstepping of the bounds of familiarity between a superior officer and a subordinate. Clearly it was compounded by the officer's subsequent attempts to minimize the incident and save his career. While the sending of the email was unfortunate and itself ill-considered, it does not indicate to me that the Member would have been beyond

[2] https://www.thesun.co.uk/news/3311938/policeman-gets-final-written-warning-after-repeatedly-slapping-colleagues-bum-and-saying-she-had-a-nice-tight-arse/

rehabilitation while maintaining his rank as Inspector, or that an informed, reasonable member of the public would demand he be relegated to traffic or patrol duties. The Member's workplace training in matters of respect and harassment was dated, and it is clear from almost daily reports of harassment in the media that the public's views on such matters have changed significantly in recent years, becoming progressively less tolerant.

[35] While I have observed that physical discipline in the workplace is a thing of the distant past, it may not be surprising that an officer with a 40-year unblemished career failed to keep up with changing standards and went several steps over a line which may not have been as stark at earlier stages of his career. I would have thought the benefit of correction and education could have been afforded to the Member, with appropriate reassignment, but without demotion. I say this particularly in mind of the outcome in the harassment matter decided by Justice Pitfield.

[36] My conclusion is that the appropriate disciplinary or corrective action on these allegations would be a 30-day suspension without pay, concurrent on each allegation, reassignment, and retraining in harassment, sensitivity, respectful conduct in the workplace, and current ethical standards.

Dated at Vancouver, British Columbia, this 19th day of September, 2018.

Carol Baird Ellan, Retired Provincial Court Judge
Adjudicator