

**In the Matter of the Review on the Record into the Ordered Investigation
against Special Municipal Constable Leanne Keith of the New Westminster Police
Department**

SUBMISSIONS OF SPECIAL MUNICIPAL CONSTABLE (“SMC”) LEANNE KEITH

A. INTRODUCTION

1. The Commissioner submits that Superintendent Flamand’s application of section 126 of the Police Act was incorrect. The Commissioner says it was incorrect to consider the limited nature of SMC Keith’s role as a SMC and her cooperation with the roadside and *Police Act* investigations as mitigating factors.

Notice of Review on the Record

2. The Commissioner also says that Superintendent Flamand failed to properly consider the reasons of Justice Pitfield in which he opined as to the range of suspension period for cases involving drinking and driving by police officers.
3. SMC Keith submits that Superintendent Flamand did not err in her application of section 126 of the *Police Act*. It was correct, and necessary pursuant to principles of sentencing both generally and specific to the Police Act, to consider each case on its own particular merits with regard to the unique mitigating circumstances.
4. SMC Keith submits that Superintendent Flamand’s correct application of sentencing principles is instructive and resulted in a finding of an appropriate penalty of a one day suspension.

B. BACKGROUND

5. SMC Keith worked as a civilian employee for the New Westminster Police Department in the area of records and court services. Her duties were, and remain, purely clerical.
6. In 2016, in order to be able to swear informations, SMC Keith became a Special Municipal Constable. Her duties remained the same. She did not apply for the position of an SMC, but rather was required to take on the position in order to swear informations in accordance with Crown policy.
7. Unlike police officers, who retain their powers and authority at all times (on and off duty) SMC Keith only utilizes her authority while at work. She has never been issued a uniform.

Pre Hearing Conference Report p. 2;
Final Investigation Report (“FIR”), pp. 29 and 30.

8. She does not actively enforce impaired driving laws, or otherwise perform duties similar to that of a regular constable.

FIR pp. 30 and 40.

9. On March 24, 2017, SMC Keith was going through a difficult emotional time due to [REDACTED]. She attended a gathering with close friends, where she discussed this difficult memory and became emotional and upset. She had her last glass of wine approximately one hour before departing.

FIR p. 41

FIR p.27

10. On her way home from this event, she was stopped by Constable Fildes at a check stop, where she provided a breath sample that registered a "fail".

11. The facts of that interaction are not in dispute. According to Constable Fildes, her manner was forthright, courteous and honest. She was not uncooperative at all. SMC Keith was not charged criminally. She received a 90 day immediate roadside prohibition and had her vehicle impounded for 30 days.

FIR, p. 16, para. f

12. SMC Keith emailed her supervisor that weekend to apologize and report the incident:

Hi Andrew,

I wanted to call you yesterday but didn't want to ruin your weekend but I do need to talk to you about a very poor judgment call on my part Friday night.

I went to a friend's for a Mary Kay (Makeup) get together, it was very low key and I did have 3 glasses of wine over the period of the night. Two were early between 6-8 but I stupidly had another one about an hour before I left and on my way home I went through a road block. I blew a fail, I honestly thought I was ok to drive, obviously I wasn't and now I've put myself and the department in jeopardy. I'm not making excuses for what I've done but I do want to give you an explanation, and would rather do that in person.

There is more going on in my life that effected my overall wellbeing this weekend which is why I took time off Friday, will explain tomorrow. Some years it doesn't effect me, this year it had a huge impact on me.

I would like to meet first thing Monday morning if that works for you to talk to you, and probably the chief. I'm extremely embarrassed for my actions, and have realized that I need to

go back and see a counsellor for my well-being... Thanks and again I'm so sorry for all of this.

Leanne

FIR, p.33

13. A pre-hearing conference was held on October 17th, 2017 before Chief Constable Dave Jones. The Pre Hearing Conference Report (PHC Report) was provided to Discipline Authority Superintendent Marcie Flamand and formed part of the record of the discipline proceeding held before her on December 14, 2017 (Appendix A to Form 3 - Findings of the Discipline Authority).
14. At both the Pre Hearing Conference and Discipline Proceeding SMC Keith admitted the allegation of operating or having care or control of a motor vehicle while under the influence of alcohol, constituting discreditable conduct.
15. As was noted by Superintendent Flamand in the Decision on Disciplinary/ Corrective Measures, SMC Keith demonstrated genuine remorse throughout the incident itself, the investigation process, the Pre Hearing Conference and the Discipline Proceeding.

C. DISCUSSION

Decision of Superintendent Flamand

16. Although the Commissioner notes that regard to the underlying decision is not required, the Commissioner does not appear to take issue with the findings of Superintendent Flamand other than her consideration of the nature of SMC Keith's duties and her cooperation as mitigating factors, and decision to apply a penalty of a suspension below the 3-7 day range recommended by Justice Pitfield.

[Notice of Review of the Record; submissions of the Commissioner]

17. SMC Keith submits that the considerations and penalty decision of Superintendent Flamand were correct. The principles of discretion in sentencing demonstrated in criminal and administrative law and legislated in section 126 of the *Police Act* require consideration of aggravating and mitigating factors "without limitation" (s. 126(2)).
18. SMC Keith submits it would be incorrect to find a mandatory minimum period of suspension, having regard to the language of the *Police Act* and the common law principles articulated by Superintendent Flamand.

The Statutory Considerations

19. The application of the unlimited factors to be considered pursuant to s. 126(2) of the *Police Act* is important to review in this case, as it is the totality of the mitigating circumstances present that supports the recommended penalty.
20. Section 126(2) requires the DA to consider the aggravating and mitigating circumstances in determining just and appropriate disciplinary or corrective measures.

126 (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,

- (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.

- 21. Corrective dispositions should prevail, where possible: s. 126(3) of the *Police Act*.
- 22. The prospect of rehabilitation also forms part of the analysis of whether the administration of police discipline would fall into disrepute, which is always a consideration related to penalty.

Seriousness of the Misconduct

- 23. There is no doubt that drinking and driving is a very serious issue that poses serious risks to the public. SMC Keith was subject to a 90 day roadside suspension, reflective of our government's important and effective efforts to reduce and sanction drinking and driving.
- 24. As Superintendent Flamand recognized, however, and as is set out in Bulletin 6B referred to by the Commissioner, within this category of serious behavior, there is a range of aggravating conduct. It is therefore notable that criminal charges were not pursued, there was no aggravating driving behavior, no accident and no resultant injuries.

25. SMC Keith submits that unlike in other cases involving police officers, and particularly senior police officers, SMC Keith's role as an essentially clerical worker does not aggravate the seriousness of the misconduct in the same manner as police officers who are responsible for the prevention and enforcement of drinking and driving offences.
26. In Bulletin 6B, the Commissioner cites an excerpt from one Discipline Authority's discussion of this concept:

This is a serious offence. The Constable knew his job was to be ever vigilant at removing that risk to the public. Instead, he put the public at risk with his own poor judgment that night. . . . Drinking and driving is serious misconduct. Members need to conduct themselves in their off-duty time in a way that never endangers the public. Police officers are held to a higher standard than members of the public when it comes to conduct like this.

27. In this case, SMC Keith has never been involved with removing the risk of drinking and driving to the public as she does not patrol or otherwise enforce impaired driving laws.
28. The Office of the Commissioner acknowledges, at paragraph 70 of their submissions, that SMC Keith has not conducted impaired driving investigations or otherwise enforced impaired driving laws.
29. While the FIR notes that SMC Keith is "an active part of the administrative charge-approval process", there is no dispute that the decision to charge rests with Crown Counsel alone. The important role that administrative staff (both civilian and SMCs) play in the policing process, does not elevate their involvement to the level of an officer who is responsible for the protection and punishment of the public through the active enforcement of the law.

Record of Employment

30. Superintendent Flamand recognized SMC Keith's unblemished record of employment as a mitigating factor, and the Commissioner does not appear to take issue with this assessment.

Impact on Member

31. Superintendent Flamand identified SMC Keith's sincere remorse and forthright manner in dealing with the incident as mitigating against the need for a more significant penalty.

Likelihood of Future Misconduct

32. SMC Keith submits that her risk of future misconduct is non-existent. Her sincere remorse, recognition of the need for counselling and admission of misconduct support the identification of this area as a mitigating factor in her case.

Accepting Responsibility

33. Superintendent Flamand identified this factor as “very mitigating”.
34. This is borne out by the record. SMC Keith notified her immediate supervisor the next day, on a weekend, while they were both not working. She met with the Chief Constable as soon as possible. She immediately recognized the serious lapse in judgment and risks posed by her conduct.
35. SMC Keith demonstrated sincere shame and remorse at the roadblock itself, in her email to her supervisor, throughout the *Police Act* investigation interviews, the Pre Hearing Conference, and the Discipline Proceeding.
36. Superintendent Flamand considered that SMC Keith was “fully cooperative throughout the IRP investigation and subsequent internal investigation following the incident” when considering this mitigating statutory factor, and later in her decision when specifically explaining why SMC Keith was not given a more significant suspension.
37. The Commissioner says that it was an error to consider cooperation with the investigation as mitigating because there is a duty to cooperate with an investigation under the *Police Act*.
38. SMC Keith submits that there is a difference between the duty to cooperate with an investigation in terms of participating in interviews and providing evidence as required (which would be a neutral factor), and the very mitigating acts of admitting misconduct and full participation in the PHC.
39. These admissions, and the associated demonstration of remorse and acceptance of responsibility throughout the interview and hearing process, are properly considered in reducing the need for a more significant sanction.
40. Admission of misconduct is not required under the *Act* and is a significant demonstration of mitigating cooperation. SMC Keith was willing to accept any measures assigned by the DA at the Pre Hearing Conference, and had they been accepted by the Commissioner, would have avoided the need for a discipline proceeding by virtue of her cooperation at the PHC.
41. The admission of misconduct is a clear indication of acceptance of responsibility and the desire for rehabilitation. SMC Keith submits that while the weight to be assigned to any particular mitigating factor in any given case is inherently discretionary and fact based, the consideration of cooperation and admission of guilt as requiring some mitigation is required and correct application of a fundamental principle of sentencing.
42. In the Pitfield decision (████████ matter) Justice Pitfield considered the appropriate sanction for failure to co-operate with an impaired driving investigation.
43. In that case, Cst. ██████████ lied to the roadside investigating officer about when he had last consumed alcohol (he said three days ago) and then registered a fail, later admitting he had been drinking beer within a few hours of the stop.

44. Cooperation was clearly accepted as a mitigating factor in that case.

45. Justice Pitfield held:

[22] In my opinion there are some mitigating factors to be considered in this case. After lying at the outset, Const. ██████ cooperated with the investigation in all respects. Const. ██████ accepted the invitation to two prehearing conferences, admitted both defaults, and accepted the result flowing from each prehearing conference thereby acknowledging the wrongdoing and sparing the disciplinary process considerable additional expense.

FIR, p.119

46. SMC Keith similarly cooperated throughout, admitted guilt, and accepted the invitation to and disposition of the Pre Hearing Conference.

47. SMC Keith submits that it cannot be an error, as the Commissioner says, for Superintendent Flamand to have considered this conduct as a mitigating factor in reducing what would have otherwise been a more significant sanction.

Range of disciplinary or corrective measures taken in similar circumstances

48. The *Act* requires a consideration of the range of disciplinary or corrective measures taken in similar circumstances. That was thoroughly undertaken by Superintendent Flamand and summarized in the chart provided in her reasons.

Parity requires consideration of precedent, not adherence to a minimum penalty

49. Section 126(2)(g) is a statutory articulation of the principle of parity, which requires a consideration of similar cases, but not a strict or automatic application of any particular sanction.

50. The Alberta Court of Appeal described the principle:

There is a difference between treating prior sanctioning decisions as binding authority and considering such decisions when assessing whether a sanction achieves fairness and parity. The latter is an accepted, and important, use of such decisions...

Constable A v. Edmonton Police Service, 2017 ABCA 38

51. In other words, no two cases are identical and there must be discretion to adjust the appropriate sanction accordingly, while always having regard for what was done in similar circumstances. The consideration of a range is meant to ensure predictability and consistency, but not to preclude an adjudicator from departing from an existing or recommended range provided reasons for doing so are properly articulated.

52. Discipline and corrective measures in past similar misconduct cases range from verbal reprimands to a five day suspension. Many of these cases involve other

related misconduct, such as attempting to gain favour by identifying as a police officer, which complicates the comparison between cases.

53. The one day suspension arrived at in this case falls within the existing range of recent cases in BC.
54. The cases reviewed also demonstrate that rank and duties of the particular member matter in assigning the appropriate penalty or range.
55. In 2014-11-06, for example, in which an off duty member received a 4 day suspension, Superintendent Flamand noted that the file involved a higher ranking member, arguably requiring greater accountability and penalty.
56. Similarly in 2017-02-03, a three day suspension was received by a higher ranking member assigned to the VPD Professional Standards Section at the time of the roadblock incident.
57. In the Pitfield Decision reviewed above, Justice Pitfield held:

“In my opinion, verbal or written reprimands and minimal suspensions for operating a motor vehicle while off duty and under the influence of alcohol sufficient to result in a "Fail" reading on an ASD are woefully inadequate and the Disciplinary Authority rightly decided the sanction should be greater. In my opinion, given the serious consequences associated with drinking and driving, the important role played by police in reducing the incidence of drinking and driving, and the public expectation that police officers will respect the laws they themselves enforce, suspension should be the rule rather than the exception, the minimum should be not less than 3 days, and the maximum, in the range of 7 to 10 days.”

58. SMC Keith is not a police officer and does not enforce drinking and driving laws. The range identified by Justice Pitfield is not squarely applicable to her position, given the emphasis placed on the role of police officers in enforcing drinking and driving laws in determining the appropriateness of the range.

Proportionality precludes the application of automatic minimum dispositions

59. The application of a “minimum sentence” in these circumstances would further be inconsistent with the governing principle of proportionality. Absent a statutorily mandated minimum sentence, adjudicators are required to be able consider unique mitigating circumstances that could reduce a usual penalty, if available.
60. In OPCC 17-13143, retired judge and adjudicator Carol Baird-Allen noted the importance of considering all the facts and circumstances of a case and not automatically imposing the usual discipline or corrective measure that was imposed for similar misconduct.

“The measure imposed in the relevant cases for this type of misconduct is primarily suspension, under section 126(1)(c),

but in my view in this case some of the (lesser) measures set out in paragraphs 126(1)(d) through (k) might properly be considered.”

61. SMC Keith submits that in light of the governing principles of parity and proportionality, Superintendent Flamand was correct to identify a one day suspension as appropriate, in the context of her clear explanation of the application of unique mitigating factors in relation to the range of existing penalties in BC.

Other Mitigating Factors: Nature of Employment

62. The Commissioner submits that it was incorrect to consider the nature of SMC Keith’s employment as a basis for a more lenient sanction than would have been appropriate for a police officer.
63. SMC Keith submits that this consideration was entirely correct. The relative duties, powers, rank and responsibility of a particular individual are key sentencing considerations as they relate closely to two important principles: moral blameworthiness and the public perception of the administration of police discipline.
64. SMC Keith became a SMC in July of 2016. Prior to that she was performing the same role in NWPD Court Services, as a civilian, since 2013. The primary role of Court Services personnel at the NWPD is to coordinate police court files and attachments for crown counsel, upload the police court file to JUSTIN and swear the charge information on these files before a Justice of the Peace.
65. In July of 2016, SMC Keith was required to take an oath and become a SMC in order to retain her current position in Court Services. The oath of office sworn by SMC Keith and that sworn by police officers highlights some of the basic differences in the commitments and duties associated with those positions.

(PHC Report; Exhibits 8 and 9 to Discipline Proceeding)

66. Just as not all police officers are treated similarly due to differences in rank, experience and other personal factors, not all SMCs are the same. In another case, it may not be appropriate to consider the designation of an individual as an SMC as mitigating because the role of some SMCs is much more akin to that of a police officer.
67. Some SMC’s wear uniforms that identify them as SMC’s of a particular police department or city (Community Safety Officers at the VPD, Jail Guards at the VPD, Commercial Vehicle Inspectors at the NWPD) and are visible to the public every day.
68. Some issue Violation Tickets and enforce various laws, some use force if necessary and some work side by side with municipal constables in the community. Some are required to drive as a part of their duties and carry badges identifying them as SMCs.
69. In contrast, SMC Keith’s role is purely clerical. She does not wear a uniform, is not visible in the eyes of the public, does not carry a badge, is not trained in using force or required to do so, is not required to drive as a part of her duties, she does not

enforce the law and, unlike police officers, she does not carry any duties or powers off duty.

70. SMC Keith's limited role was identical to the role she had been performing as a civilian for years. Accordingly, the amount of discredit SMC Keith causes to the reputation of a police department as a result of this off-duty conduct is significantly less than that of police officers or SMCs with roles more akin to police officers.
71. Increased penalties for police officers for drinking and driving offences reflects the increased moral blameworthiness of misconduct by an individual who is tasked with preventing and sanctioning such misconduct by the general public. That blameworthiness, and the associated reputational damage to the police force, increases with interaction with the public, rank and responsibility. SMC Keith is at the lowest end of that spectrum.

REHABILITATION FOCUS

72. 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: S.126(3).
73. SMC Keith submits that in all the circumstances the proposed sanction of a one day suspension was correct.
74. In the alternative, SMC Keith submits that if further corrective measures are deemed appropriate, pursuant to this section, it is not necessary to increase the length of suspension but rather to first consider the appropriateness of educational measures such as mandated counselling. SMC Keith has recognized at the outset the gravity of her actions, and the benefit of counselling to address both the underlying emotional personal circumstances and the events leading to this review.

All of which is respectfully submitted.

July 16, 2018

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SMC Keith