

**REVIEW ON THE RECORD  
DECISION**

**PURSUANT TO SECTION 141 POLICE ACT, R.S.B.C. 1996, c. 267**

In the matter of a Review on the Record into the Ordered Investigation  
concerning

**Special Municipal Constable Leanne Keith**  
of the New Westminster Police Department

To: Special Municipal Constable Leanne Keith, New Westminster Police Department  
And to: Chief Constable D. Jones, New Westminster Police Department  
And to: Mr. Stan T. Lowe, Police Complaint Commissioner  
And to: T. Hoogstraten & D.T. McKnight, Counsel for SMC Keith  
And to: Mr. M. Underhill, Commission Counsel  
And to: Supt. M. Flamand, Discipline Authority, Vancouver Police Department

Review hearing date: July 20, 2018, Vancouver B.C.

Decision date: August 9, 2018

Place: Victoria, B.C.

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**REASONS FOR DECISION:**

**I Overview and History of Proceedings :**

- (1) Following a discipline proceeding, Discipline Authority Supt. Flamand of the Vancouver Police Department (the "Former Discipline Authority") made the following key findings of fact concerning Leanne Keith, (the "Member"), a Special Municipal Constable ("SMC") of the New Westminster Police Department:

- a. On March 24th, 2017 at 23:51 hours, the Member was operating, or had care and control of, a motor vehicle and was stopped at a random check roadblock.
  - b. At the roadblock, a police officer formed reasonable grounds to believe that the Member's ability to operate a motor vehicle was impaired by alcohol and gave the Member a breath demand.
  - c. The Member provided a sample of her breath into an approved screening device and registered a "fail" reading.
  - d. As noted in the Final Investigation Report, a "fail" reading on an approved screening device is indicative of a blood alcohol concentration of 100 mg% or higher.
  - e. The Member was served with a 90-day Immediate Roadside Prohibition under s. 215.43(2) (A) of the Motor Vehicle Act, and her vehicle was impounded for 30 days.
  - f. The Member reported the incident to her supervisor and the Chief Constable upon her return to work. The Office of the Police Complaint Commission (the "OPCC") was subsequently notified of the incident in a timely manner.
  - g. The Member accepted full responsibility for her actions and did not challenge the investigation.
- (2) Taking the foregoing facts into consideration, the Former Discipline Authority determined that on March 24, 2017 the Member committed the Disciplinary Default of Discreditable Conduct pursuant to s. 77(3) (h) of the Police Act. That section provides that discreditable conduct occurs when members, on or off duty, conduct themselves in a manner that they know, or ought to know, would be likely to bring discredit on a municipal police department.
- (3) Submissions were received on an appropriate disciplinary outcome. The Former Discipline Authority determined that the proposed disciplinary measure to be imposed against the Member was a suspension without pay for one scheduled working day (the "Disciplinary Decision").
- (4) In arriving at the one-day suspension decision, the Former Discipline Authority found that the penalty could have been higher had it not been for:
- a. The Member's full acceptance of responsibility for the impaired driving and sincere remorse for her actions;
  - b. Cooperation with the investigation;
  - c. An unblemished employment record before and after her appointment as an SMC;
  - d. The fact that the Member's driving did not result in accidents or injury; and
  - e. The fact that the nature of the Member's employment extends only to very limited and administrative policing duties qualitatively dissimilar from that of regular municipal police constables.

- (5) In reviewing the record of the Disciplinary Decision and associated determinations pursuant to s. 138 of the Police Act, the Police Complaint Commissioner (the "Commissioner") concluded that:
- (a) The Former Disciplinary Authority was correct with respect to her decision as to whether or not misconduct involving the Member had been proven;
  - (b) The Former Discipline Authority erred in her determinations that the discipline penalty applied to the Member could have been higher but for:
    - (i) The limited nature of the Member's duties with respect to policing matters which were determined to be qualitatively dissimilar from that of regular municipal police constables, thereby supporting less stringent disciplinary sanctions; and
    - (ii) The Member's cooperation with the investigation into the impaired driving allegation again supporting less stringent disciplinary sanctions.
  - (c) The Commissioner also expressed the view that the Former Discipline Authority was incorrect in finding that the proper disciplinary sanction with respect to the Member's misconduct was a one-day suspension.
- (6) As a result of the Commissioner's views with respect to the Former Discipline Authority's Discipline Decision, he determined pursuant to ss. 141(2) and 142(2) of the Police Act, that a Review on the Record of the Discipline Decision was necessary in the public interest.
- (7) On April 18, 2018, I was appointed by the Commissioner to conduct this review of the Discipline Decision. Disclosure materials relating to that earlier decision were subsequently provided to the parties by the OPCC.
- (8) At an administrative conference call convened May 28<sup>th</sup>, Commission Counsel and Counsel for the Member confirmed receipt of the disclosure materials and were invited to provide written submissions. By consensus, Counsel also agreed to attend July 20, 2018 for oral submissions. Counsel were also asked to consider whether or not any applications would be made to consider additional evidence and if so, to advise all parties within one week of that such a decision.
- (9) No notice of applications to consider additional evidence was given by any party. As well, I have received confirmation that the Former Discipline Authority has declined the exercise of her right to make submissions with respect to this proceeding.

## II Standard of Review and S. 126

- (10) S. 141 (9) of the Police Act confirms that the standard to be applied in my review of the Disciplinary Decision is correctness. Specifically, my obligation is to determine the appropriate disciplinary or corrective measures to be taken in relation to the Member in accordance with s. 126 which provides as follows:

### 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:*

- (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,*

- (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.*

- (11) In completing my review of the record, I am required to consider all aggravating and mitigating circumstances in order to determine the just and appropriate disciplinary or corrective measures in relation to the misconduct of the Member.
- (12) If I determine that one or more disciplinary or corrective measures are necessary, s. 126(3) of the Police Act provides that 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.

### III **Submissions of Counsel to the Commissioner**

- (13) The submissions of Counsel for the Commissioner can be summarized as follows:

- (a) The Former Discipline Authority was incorrect in finding that:
  - (i) The Member's cooperation with the investigation of her alleged impaired driving matter constituted what was, in effect, a mitigating factor;
  - (ii) The Member should not be penalized in the same manner as regular municipal constables given the fact that the Member's role as an SMC entails limited policing functions; and
- (b) The one-day suspension imposed by the Former Discipline Authority falls short of the appropriate sanction for an act of misconduct involving an impaired driving offence. Counsel submits that in order to meet the objectives of general and specific deterrence, a much longer suspension is required.

- (14) On the issue of the Member's cooperation, Counsel for the Commissioner submits that nothing in the actions of the Member merits consideration as a mitigating factor. Counsel notes that the Member was required by statute to comply with the ASD demand and to cooperate with the investigation into her alleged misconduct.
- (15) With respect to the issues surrounding the nature of the Member's duties and whether or not those have relevance to misconduct sanctions, Counsel for the Commissioner submits that there is nothing at law warranting a different standard for SMCs. Specifically, it is submitted that the appointment of an SMC under ss. 35(2) and (4) of the Police Act includes all of the duties and responsibilities of regular municipal constables without qualification or limitation as to specific assignments. Counsel for the Commissioner maintains that there is no rationale in policy or law warranting application of a different standard of conduct for SMCs such as the Member from those established for regular municipal constables.

- (16) With respect to the appropriate sanction to be imposed concerning the Member's misconduct, Counsel for the Commissioner submits that all municipal constables, including SMCs, must be held to a higher standard of conduct when issues arise concerning impaired driving offences. It is submitted that the public expectation is that all persons holding the authority and responsibilities of municipal constables will conduct themselves at all times in accordance with the law. Counsel for the Commissioner maintains that such standards are necessary to maintain confidence in policing and the administration of police disciplinary processes.
- (17) Counsel noted that courts have long recognized the serious damage impaired driving behaviours can inflict on Canadian society: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46.
- (18) Counsel's submissions also highlighted the increase in sanctions for impaired convictions arising over the last 20 years reflecting a greater public concern with drinking and driving. This has included the recent escalation and expansion of regulatory sanctions in British Columbia designed to deter drinking and driving behaviours outside Criminal Code provisions.
- (19) Counsel for Commissioner also noted that in Ontario, the Provincial Police Commissioner, J.V.N. Hawkes, appears to have taken a strong position with respect to alcohol or drug misconduct in relation to driving. Specifically, it is submitted that the Ontario Commissioner has taken the position that the sanction of dismissal will be seriously considered in each case of impaired driving related police misconduct.
- (20) In British Columbia, Counsel for the Commissioner submits that similar concerns were specifically brought to the attention of all police officers in Bulletin 6B October 20, 2014 issued by the OPCC. In that memo, the Commissioner set out the importance of ensuring that police officers do not operate motor vehicles while impaired and noted a number of factors that could be relevant in assessing the seriousness of any such conduct. Although the Commissioner's bulletin is not binding in terms of discipline proceedings, it does provide a useful summary of cautions that may be relevant to all police officers with respect to their conduct on and off duty when the potential for impaired driving misconduct arises.
- (21) Counsel for the Commissioner maintains that the time has arrived for higher sanctions to be imposed with respect to impaired driving misconduct and behaviours. It is the submission of Counsel for the Commissioner that the proper range for disciplinary sanctions on the facts of this case is greater than the three-day suspension baseline articulated by retired Justice Pitfield in the [REDACTED] discipline proceeding decision dated June 1, 2016. The submission maintains that an increased suspension is required to deter the Member and others from engaging in similar impaired driving misconduct in the future. Specifically, Counsel submits that the Ontario Civilian Provincial Police Commission has imposed lengthy suspensions and demotions up to 18 months to

sanction impaired driving misconduct by police officers. Counsel maintains that a similar approach is required in this province to properly denounce and sanction such misconduct.

- (22) On the issue of the Member's prior record of driving suspensions under the Motor Vehicle Act outlined in the Record, Counsel for the Commissioner notes that those earlier matters arose before the Member was appointed as an SMC. As such, although not irrelevant, the Commissioner does not argue that such record should be considered an aggravating factor in considering the appropriate discipline outcome.
- (23) Similarly, noting the apparent inconsistent answers of the Member to questions concerning her pattern of drinking prior to the roadside stop, Counsel for the Commissioner does not advocate that this be treated as an aggravating factor.
- (24) In summary, Counsel for the Commissioner submits that corrective measures alone would be unworkable and bring the administration of police discipline into disrepute. Given the Member's status as an SMC, Counsel notes that a demotion is not available as a disciplinary option. The appropriate discipline sanction sought, therefore, is a suspension from duty significantly greater than those set out in other BC discipline proceedings, including the [REDACTED] matter.

#### **IV Submissions of Counsel for the Member**

- (25) The Member admits that her conduct constituted discreditable conduct and fully acknowledges the importance of deterring impaired driving. However, the key submission of the Member is that her status and role as an SMC is fundamentally different than that of regular municipal constables. It is the Member's submission that she performs today the same substantive duties she performed before being appointed as an SMC, administrative duties that do not involve any direct policing functions. Those duties:
  - (a) Continued the Member's responsibility for reviewing and swearing each new information in accordance with policy established by Crown Counsel;
  - (b) Did not require the Member to wear a uniform; and
  - (c) Did not require the Member to enforce impaired driving laws or otherwise perform duties similar to regular police officers.
- (26) As such, it is submitted that it is not appropriate to hold the Member to the standards of conduct applicable to regular municipal constables under the Police Act. Counsel for the Member therefore maintains that the Former Discipline Authority was correct in concluding that a one-day suspension was appropriate in all of the circumstances.

- (27) Counsel for the Member further submits that it would be incorrect to apply a mandatory minimum period of suspension, similar to that articulated by retired Justice Pitfield. Specifically, it is submitted that each case must be considered on its particular merits having regard to the requirements of s. 126 of the Police Act and the requirement to determine just and appropriate disciplinary or corrective measures.
- (28) With respect to specific aggravating factors, Counsel for the Member notes that the sanction imposed on the Member was a 90-day roadside suspension, not a criminal charge of impaired driving. As such, it is submitted that the investigating officers themselves made a choice based on all of the circumstances not to recommend more serious charges in relation to the Member under the Criminal Code.
- (29) Counsel for the Member also notes that the Member's conduct did not involve dangerous driving, an accident or any injuries.
- (30) With respect to consideration of the Member's record of employment, Counsel notes that both before and after appointment as an SMC, there were no reported issues.
- (31) In terms of the impact of this matter on the Member and her family, Counsel submits that from the outset the Member has acknowledged the seriousness of her misconduct expressing genuine remorse and contrition. Counsel further submits that the likelihood of further misconduct is "non-existent".
- (32) With respect to the issue of cooperation as a mitigating factor, Counsel for the Member submits that the actions of the Member went far beyond what was legally required by law to participate, by providing information in connection with the misconduct investigation. It is submitted that the Member freely acknowledged her misconduct from the outset, immediately advised her immediate supervisor of the roadside stop and thereafter fully and unreservedly cooperated with all aspects of the investigation. It is submitted, therefore, that these actions are appropriately recognized as a material and significant mitigating factor.
- (33) On the issue of the appropriate disciplinary sanction, Counsel for the Member notes that the Former Discipline Authority carefully considered the results of a number of prior dispositions, including retired Justice Pitfield's decision.
- (34) It is submitted that s.126 (2)(g) of the Police Act requires consideration of disciplinary or corrective measures ordered in similar cases. Counsel for the Member notes that the Former Discipline Authority considered such cases with outcomes ranging from a verbal reprimand to a five-day suspension.
- (35) As such, it is submitted that the Former Discipline Authority had before her all the information needed to achieve parity in disciplinary or corrective measures with respect to the Member's misconduct.



- (36) Counsel for the Member strongly submits that there is no principle establishing a “minimum” sanction for impaired driving misconduct, nor a legally binding range of sanctions with respect to such matters.
- (37) It is submitted that in the circumstances of the Member’s misconduct, s. 126(3) requires prioritization of rehabilitative measures unless such sanctions are unworkable or would bring the administration of police discipline into disrepute.
- (38) With respect to the Member’s prior driving suspensions, Counsel submits they are irrelevant to the current issues. Specifically, it is submitted that the two prior issues are dated and precede the Member’s appointment as an SMC.
- (39) Similarly, on the apparent inconsistency between the Member’s various reports of her pattern of alcohol consumption before being stopped roadside, Counsel for the Member maintains that those inconsistencies are not relevant but rather a simple misunderstanding of what details were being sought by the investigating officers.
- (40) In summary, taking into consideration all aggravating and mitigating circumstances, Counsel for the Member submits that the one-day suspension previously ordered is just and appropriate.

## **V Aggravating and Mitigating Circumstances**

- (41) I now turn to consideration of the aggravating and mitigating circumstances, as identified in s. 126(2).

### **Seriousness of the Misconduct**

- (42) The Member does not dispute that drinking and driving is a very serious issue that poses significant risks to the public.
- (43) It is also clear that impaired driving behaviours can now attract increasingly harsher sanctions. Criminal Code penalties for impaired driving convictions have increased in response to public concern with respect to drinking and driving behaviours.
- (44) As well, Courts have long recognized the damage impaired driving behaviours can inflict on Canadian society: *R. V Bernshaw, supra* and *Goodwin, supra*.
- (45) In British Columbia, the Legislature has responded to the increasing dangers posed by impaired driving behaviours by escalating the expansion of regulatory sanctions. These

increasingly significant non-criminal sanctions have been designed to deter drinking and driving behaviours outside Criminal Code provisions, often engaging significant roadside suspensions, vehicle impoundments and other consequences.

(46) It is also clear that there is a range of impaired driving behaviours, as acknowledged by the Commissioner in Bulletin 6B issues October 20, 2014. Although the Commissioner's bulletin is not binding in terms of discipline proceedings, it does provide a useful summary of cautions that may be relevant to all police officers with respect to their conduct on and off duty when the potential for impaired driving misconduct arises. These impaired driving behaviours can include; a pattern of impaired driving; registering a fail on a roadside screening device; impaired driving that results in an accident; impaired driving that results in injury; and impaired driving resulting in a criminal conviction. All of these behaviours have significance in considering the just and appropriate discipline measures to be applied where misconduct has been established.

(47) On the facts of this case, I find that the register of a "fail" by the Member when stopped roadside followed by an immediate 90-day roadside suspension together result in the creation of a serious aggravating factor.

(48) Although the Member's actions did not result in demonstrably unsafe driving, an accident, injury or criminal charges, nonetheless the potential for all those results existed the moment the Member decided to drive while impaired. The fact that further injury or damage did not arise is not a mitigating factor, nor does it warrant reduction in the seriousness of the Member's misconduct. As such, I find that it is correct to attach significant weight to the seriousness of the misconduct of the Member in driving while impaired.

(ii) Record of Employment

(49) Neither Counsel allege any issue with the Member's record of employment. The lack of a prior disciplinary record is a clear mitigating factor.

(iii) Impact of Proposed Measures on the Member, Her Family and Her Career

(50) There can be no doubt that the Member has acknowledged the seriousness of these proceedings and the immediate roadside suspension. From the outset, the Member admitted her responsibility for the misconduct and acknowledging the challenge those actions might raise for her superiors, and her career. The Member has expressed genuine remorse for her misconduct and it is clear that she has accepted the one-day suspension ordered by the Former Discipline Authority. There is no evidence that a greater suspension or other corrective action would have a long-term detrimental

influence on the Member's career, although I accept that the Member believes that her duties do not warrant increased sanctions and wishes to avoid such an impact.

(iv) The Likelihood of Future Misconduct by the Member

(51) I find that the Member's genuine acceptance of her responsibility for the misconduct, immediate contrition and lack of prior disciplinary record combine to reduce the likelihood of future misconduct by the Member. Neither counsel takes issue with that conclusion.

(52) As noted earlier in this decision, during oral submissions both Counsel were asked to address the two prior driving prohibitions noted on the Member's driving record. One such prohibition took place June 2, 2001, for 24 hours, the other April 11, 2012 for 30 days. As noted, Member's Counsel took the position that those records were not relevant to these proceedings as they predated the Member's employment as an SMC. Commission Counsel indicated that he had no instructions on the issue and suggested that at best, the existence of such a prior driving record was a neutral factor.

(53) I have considered the Member's driving record in the context of the likelihood of her future misconduct. I find that notwithstanding the submissions of counsel, I cannot totally exclude consideration of the two prior driving prohibitions. The Member has now accumulated three driving prohibitions, each with increasing sanctions. The most recent matter was an immediate roadside prohibition for a total of 90 days. This is not a case of a one-time, isolated error on the part of a driver.

(54) While the existence of the prior sanctions may not be an issue with respect to disciplinary sanctions, it would be incorrect to exclude their relevance when considering corrective measures. There is no specific evidence before me that the Member's impaired driving behaviours have been resolved, although I accept that her intentions clearly support that goal. Hence, although remote, the potential exists for further misconduct if circumstances arise allowing the Member to repeat past impaired driving behaviours.

(55) In light of this, I find that it is correct to take the likelihood of future misconduct into account when considering just and appropriate corrective measures. I also find that unless the Member's apparent issues with impaired driving behaviours are addressed through appropriate counselling, there remains a risk that the Member may yet again approach a roadside screening stop while impaired.

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

- (56) I am satisfied that the Member has indeed fully accepted responsibility for her misconduct. Her contrition is genuine and was immediately made known to all concerned at an unusually early stage of the process.
- (57) I further find that the Member's submission, that her actions evidenced cooperation beyond the participation required by statute, has merit. The Member was obliged by law to identify herself when stopped at the roadblock, to complete an approved screening device test on demand, to prepare a duty statement and to submit to interviews, if sought, concerning the matter. The Member complied with all of those obligations without hesitation. But the Member did more than that. The Member immediately advised her supervisor of the incident that had taken place, providing a full description of the relevant events. Finally, the Member admitted the facts of her misconduct from the outset and is clearly contrite. Her approach went well beyond a basic level of cooperation by proactively taking responsibility for her misconduct.
- (58) In my view, the actions of the Member were clear evidence of cooperation that merits consideration as a mitigating factor in the determination of this matter. It would be hard to articulate what further actions the Member could have taken to merit acknowledgment of her cooperative attitude. Cooperation is a relevant mitigating factor because it serves to confirm the Member's insight into the misconduct that took place and assists the administration of justice in concluding the relevant disciplinary proceedings in a timely manner.
- (59) In my view it is correct to acknowledge cooperation of the Member in this case as a mitigating factor in considering a just and appropriate disciplinary sanction.
- (60) As to whether or not the Member is willing to take steps to prevent reoccurrence of the misconduct considered in these proceedings, it appears from the Member's alternate submissions that there is an openness to such action. What is not in evidence are specifics as to the actions the Member has taken, or plans to take, to reach that goal. One clear demonstrative act to attain that goal would have been the completion of counselling and education on impaired driving behaviours, but again, there is no evidence in that regard. However, the apparent willingness of the Member to consider such measures is a positive factor. It is correct to consider that position as a mitigating factor.

(vi) 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

- (61) There is no evidence before me of any municipal police department policies, standing orders, internal procedures or actions of the Member's supervisor that may have contributed to the misconduct.

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

- (62) An important factor under s. 126 (2) is the consideration of the range of disciplinary or corrective measures taken in similar circumstances under s. 126 (2) (g). Although none of those other decisions are binding in these proceedings, nonetheless they offer useful guidance in achieving a just and appropriate outcome.

- (63) In OPCC 17-13143, retired Chief Judge Baird Ellen noted the importance of considering all of the facts and circumstances of a case, and not automatically imposing a set sanction or minimum penalty. I agree with that view. No two cases are the same. There must always be discretion to determine the appropriate sanction based on the particular facts of each case and the circumstances of the member concerned, while having due regard for what was done in similar circumstances.

- (64) The spectrum of similar cases in British Columbia was carefully considered here by the Former Discipline Authority in the Disciplinary Decision. Although few details are available with respect to those earlier decisions, the sanctions imposed range from a verbal reprimand in December, 2010 to a five-day suspension in September, 2013. Several of the cases involving sanctions at the higher end involved officers who had attempted to make use of their police officer status to receive more favourable treatment, or who were facing criminal charges for impaired driving.

- (65) There is a significant challenge facing adjudicators in discharging their obligations under s. 126(2)(g) of the Police Act. The available record of "disciplinary or corrective measures taken in similar circumstances" is limited in both scope and content. In the Disciplinary Decision, the Former Discipline Authority apparently had access to a number of records, but the specifics of the misconduct, aggravating and mitigating circumstances, circumstances of the member concerned and rationale for each decision were not published. Justice W. Davies in the 2009 Frank Paul Inquiry report noted a similar challenge at page 131 of the Interim Report when commenting on prior discipline decision making:

*"While section 19(4) of the Code of Professional Conduct Regulation gives some guidance as to the aggravating and mitigating circumstances that must be considered in determining just and appropriate*

*disciplinary or corrective measures, it would have been helpful if the officers had some record of previous decisions (within the department and across the province) in comparable cases, to give them a sense of what was appropriate and to achieve some degree of consistency."*

(66) A more comprehensive public record of prior decisions in police misconduct cases would greatly assist fairness in assessing member misconduct in similar circumstances. Legislative reform in this area would merit consideration to allow adjudicators to properly discharge their duties under s. 126 (2) (g). In the absence of such reform, however, I have, of necessity, proceeded on the limited information set out in the record before me.

(67) In a s. 117 Police Act decision, 2015-06-25, retired Justice Pitfield set out a recommended range for officers registering a "fail" on an approved screening device. Justice Pitfield said at paragraph 18 of his decision:

*'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."*

(68) It is acknowledged that since the reforms to the Police Act arising from the 2007 Wood Report, potential sanctions for police misconduct have expanded to include a 30 day scheduled working day suspension. As a result, the potential exists for significant sanctions to be imposed for impaired driving behaviours in the appropriate circumstances.

(69) Conceivably, the remedy of dismissal (ss. 126 (1) (a) of the Police Act) could also be applied to impaired driving behaviours. Both such sanctions would obviously be applied only in the most serious of circumstances with the most egregious and aggravating misconduct.

(70) In this Province, however, the history of reported prior disciplinary sanctions does not indicate that circumstances have arisen warranting such measures in any impaired driving allegations involving members.

(71) The existing range of sanctions considered by the Former Discipline Authority, although not binding on my analysis, nonetheless have relevance to my review of this matter as indicators of local conditions and related circumstances. Consideration of such decisions also assists in determining overall fairness and parity with respect to the imposition of discipline sanctions between members.

(72) The current range of misconduct sanctions for impaired driving behaviours serves as one of many factors under s. 126(2) that must be considered in determining just and appropriate

discipline measures. As noted, no single factor or decision is determinative. I am satisfied, however, that a full review of all of the available s. 126(2)(g) decisions is useful and has direct relevance to the Member's misconduct as I consider parity between the Member and others facing similar misconduct proceedings.

- (73) As noted earlier, Ontario's Provincial Police Commissioner has apparently taken a strong position on increased sanctions for alcohol or drug police misconduct in relation to driving. The Ontario Commissioner's position is that the sanction of dismissal will be seriously considered in each such case. However, beyond some limited public materials included in the Commissioner's submissions, there is no substantive evidence before these proceedings detailing how the Ontario position has relevance and application to policing in British Columbia. At one level, the Ontario memo appears to be akin to a prosecution service directive for dealing with certain types of cases. To the extent that analogy holds, there is no evidence before me to suggest that such prosecution policy would be binding on an Ontario adjudicator reviewing misconduct allegations.
- (74) I am not satisfied that it would be correct to rely on the apparent position of authorities in another Province to justify a marked departure from the range on sanctions previously applied under the BC Police Act. In the absence of substantive evidence on that subject, it would not be correct to entertain a new policy analysis of the need for significantly increased sanctions in the range suggested by Commission Counsel.
- (75) In considering this issue, it is also important to note that the recent regulatory changes in this province have expanded the range and scope of administrative sanctions for impaired driving giving police more flexibility in determining how to approach impaired driving behaviours. The 90-day immediate roadside suspension applied to the Member was a significant administrative penalty, although it is acknowledged that there is no evidence that impaired driving charges under the Criminal Code were ever recommended by the investigating officer dealing with the Member.

(viii) Other Aggravating or Mitigating Factors

- (76) The status of the Member as an SMC was a key feature of the Disciplinary Decision. The Member's SMC status mitigated the discipline measures that were ultimately ordered by the Former Discipline Authority. The issue of the Member's status as an SMC was also a key aspect of the Commissioner's decision to order a Review on the Record of the Disciplinary Decision.
- (77) Although the status of a member is not a specific mitigating factor under s. 126 (2), I find that it is important to review and consider the specific nature of the Member's duties and obligations as an SMC and the relationship of the same to the s. 126 analysis.

(78) The analysis with respect to this issue must begin with consideration of the Member's status as a Special Municipal Constable, or SMC. SMC's are appointed under s. 35 of the Police Act. Two subsections of particular relevance are as follows:

35 (2) *A special municipal constable must assist the municipal police department in the performance of its duties.*

(4) *Subject to the restrictions the municipal police board specifies in the appointment, a special municipal constable has, while carrying out the duties of his or her appointment, the powers, duties and immunities of a municipal constable.*

(79) There is no evidence before me of any restrictions with respect to the Member's appointment made by the New Westminster Municipal Police Board. As such, there are no legislative distinctions between the authority and responsibilities of SMCs such as the Member and other municipal constables.

(80) On August 1, 2016 a regulation was published pursuant to s. 184 of the Police Act dealing specifically with SMCs. Regulation 42/2016 provides in s. 2 that the provisions of Part 11 [Misconduct, Complaints, Investigation, Discipline and Proceedings] apply in relation to an SMC.

(81) As such, SMCs and other municipal constables are both subject to the same complaint and discipline processes set out in Part 11 of the Police Act.

(82) There is no issue that the range of roles performed by municipal constables varies greatly from management and administration to active law enforcement. There is, however, no justification in law for recognizing a differing standard of conduct between such officers or SMCs.

(83) I cannot find, therefore, that there is any legislative basis to consider the actions of the Member on the basis that they must be seen differently because of her specific tasks or duties. Upon appointment as an SMC, the Member accepted a duty to the public equivalent to municipal constables, requiring compliance with the law and defined standards of conduct for police officers at all times, whether on duty or off.

(84) As such, I find that it is incorrect to ignore the legislative foundation for the Member's duties as an SMC when considering compliance with standards of conduct and the application of Part 11 of the Police Act.

(85) The next part of my analysis of the Member's role is to consider her specific duties as an SMC in order to determine whether or not there is any policy or administrative rationale to accord the Member differing responsibility for her misconduct.



- (86) The evidence in the Disciplinary Decision confirms that the Member's primary role is to serve as a Court Liaison Officer, a role she performed before being appointed as an SMC. As part of her duties, the Member reads police files, ensures that the information Crown Counsel needs to consider is complete, and liaises with the relevant investigating officers if there are missing documents. The Member also submits completed files to Crown Counsel for charge approval. Once approved, the Member attends to the Court registry and swears a charging document known as an information as the Informant.
- (87) The Record also confirms that the Member has never worn, or been issued, a police uniform in connection with her duties. Nor has she otherwise investigated alleged breaches of the law or enforced the law.
- (88) In summary, therefore, the Member's duties are substantially administrative and similar to the non-law enforcement related duties of other members. It is acknowledged that the Member is not uniformed.
- (89) However, I find that the lack of a uniform is not determinative of the Member's responsibilities. The Member performs a key role in the initiation of criminal proceedings by processing and swearing relevant documents. As such, to the court registry staff, the public and other members of the law enforcement community, the Member is the administrative face of the exercise of prosecutorial discretion in commencing criminal processes. In performing that assignment, there is no evidence before me that the lack of a uniform or direct law enforcement duties creates a lesser duty to the public for the SMC.
- (90) The range of roles performed by municipal constables is, of course, extremely broad. The key roles are, of course, related to the core law enforcement duties of police officers. This generally includes investigating allegations of criminal misconduct and, where appropriate, enforcing the law through arrest and charge functions.
- (91) Related member duties can also include management and administrative tasks, technical services, community relations and even ceremonial roles. Throughout, all municipal constables, including SMCs, share the same core legal authority and responsibility to protect and serve the public.
- (92) The public expectation is that all persons holding the authority and responsibilities of municipal constables, including SMCs, will conduct themselves at all times in accordance with the law. Indeed, that commitment is reflected in the oath taken by officers such as the Member, committing to "faithfully, honestly and impartially perform" the duties of Special Municipal Constable.

- (93) I find that as a matter of sound public policy, all members, including SMCs, must be held to a high standard of conduct to preserve public confidence in policing. There can be no varying standard based on duties of any member if we are to maintain confidence in the administration of justice and policing. It is conceivable, of course, that individual cases of misconduct may trigger consideration of more serious aggravating factors, but the core duty of all members cannot be eroded by assignment.
- (94) If a member is sworn to uphold the law, it matters not whether the member's duties are high profile, or administrative. There is no rational basis to distinguish between policing roles in something as basic as compliance with the law.
- (95) Where the misconduct is serious, as in impaired driving behaviours, there is also no rational basis to minimize or distinguish the significance of such misconduct between policing roles. The public expects, and has every right expect, that all members will comply fully with the law, on and off duty.
- (96) I find that the absence of any particular impaired driving behaviour noted in Bulletin 6B does not warrant a reduction in discipline measures by reducing the seriousness of the relevant misconduct. Rather, factors such as an accident, injury or an impaired driving conviction might well increase the seriousness of the impaired driving behaviour. As such, although there is indeed a range of aggravating impaired driving behaviour, all impaired driving behaviours are inherently dangerous and are serious aggravating factors in misconduct proceedings.
- (97) In summary on this issue, therefore, I find that:
- (a) It is incorrect to analyze the Member's misconduct from the perspective that there is any diminished responsibility as a result of either the relevant legislation, or the specific role performed by the Member as an SMC:
  - (b) The Member's specific duties and assignments do not establish a lesser standard of conduct relative to other municipal constables; and
  - (c) There is no principled reason why the Member's role as an SMC should be considered as a mitigating factor in considering just and appropriate disciplinary sanctions.

## **VI Analysis and Conclusion**

- (98) My role in this Review on the Record is to determine what disciplinary or corrective measures are correct, considering the record before me, the submissions of the parties and, of course, the analysis of the Former Discipline Authority.

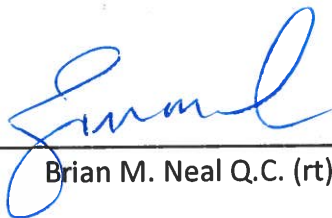
- (99) Having completed that review, I find that the disciplinary measures ordered by the Former Discipline Authority were incorrect. I further find that the correct, just and appropriate discipline to impose in this case is:
- (a) a requirement for Member to complete counselling with respect to alcohol impaired driving behaviours, and
  - (b) a suspension of two of the Member's scheduled working days.
- (100) The requirement to complete counselling should be undertaken within six months by way of a program or course of not less than five hours duration satisfactory to the New Westminster Police Department Professional Standards Branch and the Commissioner.
- (101) In determining the correct sanction to be engaged, I have of course taken note of s. 126(3) of the Police Act. S. 126(3) provides that if I consider that one or more disciplinary or corrective measures are necessary, I should prioritize an approach that seeks to correct and educate the Member, unless it is unworkable or would bring the administration of police discipline into disrepute.
- (102) Having considered all of the foregoing, and the evidence adduced during the Discipline Proceeding, I am satisfied that the corrective measure of counselling is required to ensure that there is no likelihood of the Member repeating past misconduct with respect to impaired driving behaviours. I appreciate that the risk of such misconduct is low, but given the two prior driving prohibitions, now joined by a third, it is not non-existent.
- (103) I find, therefore, that the corrective measure of counselling with respect to impaired driving behaviours is warranted for the Member.
- (104) I cannot find, however, that a corrective measure alone is sufficient to address the Member's misconduct. An order for counselling measures alone would not address the need for clear disciplinary consequences to sanction and denounce the Member's impaired driving behaviour.
- (105) I find that the imposition of corrective measures alone would bring the administration of police discipline into disrepute by effectively minimizing the seriousness of the impaired driving misconduct.
- (106) Taking into consideration all of the foregoing aggravating and mitigating factors, I am satisfied that the objective in this case must be to ensure that there can be no doubt as to the seriousness of the Member's misconduct.

(107) Considering the range of sanctions applied in generally similar circumstances, I am satisfied that the correct disciplinary sanction to be applied in conjunction with the above noted corrective measure is a suspension without pay for two working days. I find that a two-day suspension:

- (a) Is a strong confirmation of the seriousness of impaired driving behaviours;
- (b) Is within the range of similar sanctions for impaired driving behaviours, particularly when combined with corrective measures;
- (c) Acknowledges:
  - (i) the cooperation of the Member in the discipline proceeding which extended to a full, early admission of culpability and,
  - (ii) the Member's lack of a prior record of misconduct; and
- (d) Reinforces the importance of strict compliance with laws governing impaired driving behaviours by all members, regardless of their specific assignments.

(108) I confirm that I am satisfied that the combined disciplinary and corrective measures ordered will result in just and appropriate sanctions for the Member's misconduct.

(109) Finally, I have no recommendations to make pursuant to s. 141(10) (c) of the Police Act.



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Brian M. Neal Q.C. (rt)

August 9, 2018