RR 18-01
OPCC File 2015-11249

**IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, C. 367, AS AMENDED**

**AND IN THE MATTER OF A REVIEW ON THE RECORD INTO THE ORDERED INVESTIGATION OF CONSTABLE GEOFFREY YOUNG OF THE DELTA POLICE DEPARTMENT**

BEFORE: Adjudicator Carol Lazar (rt)

COMMISSION COUNSEL: Brock Martland
CONSTABLE YOUNG'S COUNSEL: Kevin Woodall

## SUBMISSIONS OF COMMISSION COUNSEL ON MEMBER'S APPLICATION TO ADDUCE ADDITIONAL EVIDENCE (SECTION 141(4))

1. This is a review on the record pursuant to s. 138 of the BC *Police Act*, R.S.B.C. 1996, c. 367, as amended. Delta Police Department Constable Geoffrey Young (the "Member") has applied to lead additional evidence in this review. These are commission counsel's submissions on that application.

2. Commission counsel respectfully submits that the proposed evidence is not required and does not meet the standard set out in s. 141(4) of the *Police Act*.

3. Reviews on the record are governed by s. 141. They provide a mechanism for a retired judge to review a disciplinary decision, based on a body of evidence already contained in "the record of [the] disciplinary decision", which is defined under s. 141(3) as consisting of:

> (a) the final investigation report of the investigating officer, any supplementary reports or investigation reports under section 132 [*adjournment of discipline*

*proceeding for further investigation*] and all records related to the investigation and the discipline proceeding,

(b) the records referred to in section 128 (1) [*disciplinary disposition record*],

(c) the report referred to in section 133 (1) (a) [*review of discipline proceedings*], and

(d) in the case of a review on the record initiated under section 139 [*reconsideration on new evidence*], any record relating to the new evidence referred to in that section.

4. The *Police Act* provides, as a default, that reviews on the record are restricted to this definition of what "the record" is. It should be noted that in most cases, the record as defined under s. 141(3) will be broad and likely comprehensive in terms of the evidence arising in the course of the police disciplinary proceedings to date. It will, for instance, include the final investigation report, all records referred to in that investigation and report, and all records from the discipline proceeding. These records and reports will include transcripts and/or audio recordings of the discipline proceeding. They will include the prior decisions in the matter.

5. While the *Police Act* sets this default for what the record consists of, it also provides — exceptionally — that the adjudicator may receive other additional evidence. The test, set out in s. 141(4), is whether "the adjudicator considers that there are special circumstances and it is necessary and appropriate to do so".

6. The question in this application is whether the Member has established all three aspects of this test: (1) special circumstances, (2) it is necessary, and (3) it is appropriate.

7. Commission counsel respectfully takes the position that the application must fail. There are no special circumstances here. The evidence in the review is the voluminous evidence set out in the record. That record is already before the adjudicator. It includes the entirety of the evidence led at the discipline proceeding, including both the Member's direct examination by his own counsel, and cross-examination by the discipline representative, lawyer Michael D. Shirreff.[1]

8. Reviews on the record under the *Police Act* are meant to be streamlined and efficient processes, in which the adjudicator receives the body of evidence generated in the course of the investigation and disciplinary process, and makes a determination as to the correct approach to the matter. They are, by name and by nature, paper-based reviews as opposed to retrials or new hearings. The contrast in the Act, of course, is with the "public hearing", which is expressly "not limited to the evidence and issues that were before [the] discipline authority in [the] discipline proceeding" (s. 143(3)). Public hearings are the *Police Act* equivalent of trials, whereas reviews on the record are more analogous to appeals, in terms of what evidence is before the reviewer.[2]

9. The *Police Act* provides that the Police Complaint Commissioner may determine that a matter should proceed to a public hearing rather than a review on the record, based on the criteria set out in s. 143(1). (These include the need for <u>additional</u> evidence beyond the record, and the need for a public hearing "to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline".) In this case, as his Notice of 6 June 2018 provides, the Commissioner did not consider it was necessary for additional evidence to be led (para. 23), and the Member did not seek a public hearing (paras. 17-18).

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[1] On 14 December 2017, the Member's direct examination took place and occupied some 1000 lines of transcripts (pp. 57-85). On 15 December 2017, the Member's cross-examination was some 850 lines (pp. 1-25).

[2] As with appeals, in exceptional circumstances a party will establish the necessity of adducing fresh evidence on appeal, but the vast majority of appeals occur with a shared understanding that the evidentiary record is fixed.

10. In this review, there is a body of evidence that is before the adjudicator. Commission counsel made submissions in writing, in late July, drawing on that evidence, and making arguments about the appropriate discipline to be imposed. The Member is unhappy about those submissions. But rather than responding to them, he seeks to alter or supplement the evidence in the review.

11. The fundamental difficulty is this: the Member is not saying that the evidence is wrong. Instead he is saying, "I don't like the way you have characterized this evidence".[3] There is a world of difference between these two things. If there were a prospect of incorrect evidence (akin to a wrongful-conviction scenario), it would be necessary to receive supplementary evidence to ensure the integrity of the proceedings. But in a case where there is simply unhappiness about the way another participant has characterized facts — facts that are not disputed — that is nothing more than unhappiness.

12. In litigation, it is routine that once evidence is led, the parties argue and disagree about what it means and how it should be interpreted. A disagreement about the legal effect of facts differs from a disagreement over what those facts are. Arguments about the legal effect of facts are the stuff of lawyers' submissions, and are not properly part of a witness's testimony. Does the barroom brawler's punch amount to a vicious attack (as the Crown says), or a justified and proportionate step taken in self-defence (as defence says)? The evidence of the punch is what it is. Some witnesses saw it and it was caught on video. But the parties take very different views of the legal characterization of that evidence. This is a normal part of litigation. And that is all that is occurring here.

[3] He is not saying "I committed no criminal act", but rather wants to say, "I don't think I am like a common criminal".

13. It is telling that the Member's complaint does not identify even one factual inaccuracy in commission counsel's argument.[4] Rather, he takes issue with characterizations, such as that the Member is a "common criminal",[5] a person of bad character, and lacking in moral compass. As noted, the disagreement now unfolding is one that involves different inferences and different arguments. But it does not involve any different facts. The officer would like to personally respond to arguments, but there is no assertion that the evidence in the record is wrong. As such, it is not appropriate that the Member testify in this review on the record.

14. In this case, for the adjudicator to discharge her duties, it is not necessary for additional evidence to be received. The Member has been vague and imprecise about exactly what evidence he would give, if permitted to testify. Presumably he would say he is not a common criminal, and does not lack in character or moral compass. The adjudicative process is not likely to be qualitatively improved by such self-serving answers. Similarly, cross-examination on these assertions is not likely to assist the decision-making process (however effective). This is not the sort of evidence that is necessary or appropriate for a review on the record.

15. The Member complains about a lack of fairness based on a theory that there was some "failure to confront" him with particular propositions, when he was cross-examined at his discipline proceeding by the discipline representative. He refers to the principle in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) to argue that — out of fairness to him as a witness — he must have an opportunity to respond to characterizations of his conduct, not only by way of his counsel's submissions, but also through his own additional *viva voce* evidence. First of all, the core of the principle in *Browne v. Dunn* is that a factual witness must be given an opportunity to respond to a different factual narrative or an

[4] Commission counsel's submissions on discipline included over three pages reciting the facts of the case. Nowhere in his submission of 5 September 2018 does the Member argue any fact is misleading or wrong. His disagreement is exclusively with the characterization of settled facts.

[5] Recall what the Member admitted he had done, that he was charged criminally by Crown counsel, and that he admitted criminal liability in order to obtain diversion of his case.

allegation that he is lying. It is not a rule that every witness must be given the chance, while in the witness stand, to respond to every characterization made in closing submissions. Second, this *Browne v. Dunn* argument is out of place in the *Police Act* setting. There is no right for an officer to have every conceivable theory or characterization put to him in cross-examination, for the process to be procedurally fair. When an officer has testified and been found to have misconducted himself, he is not entitled to take the stand again in the course of a review on the record, obtaining a "Mulligan" and attempting to improve on his evidence. While the provisions governing discipline proceedings provide for a discipline representative to ask questions of witnesses (s. 124(8)), there is no requirement that a discipline representative at that stage must anticipate every potential legal characterization of the evidence, and then put it to the officer. Ultimately, what matters from a police officer's testimony in a misconduct process is his or her factual evidence: it is about the facts of the case, rather than the officer's personal responses to legal characterizations of his course of conduct. (Those responses, of course, can be made by counsel through submissions.)

16. Moreover, the Member's counsel, Mr. Woodall, was there throughout that discipline proceeding. He could and did ask questions and lead any evidence he felt was necessary to address the misconduct allegations. Having made decisions on what evidence to lead, in the context of a disciplinary process that could have serious implications for the Member's career, the Member cannot now complain that he was prevented from leading some imprecise additional evidence. There is no unfairness in this for the Member; he had ample opportunity to address the serious allegations being made against him, and he did so.

17. The Member had the opportunity to request a public hearing, at which *viva voce* evidence would be led. Although he did not avail himself of that opportunity, he may make such a request now if he wishes. The Commissioner will seriously consider any such request.

18. For these reasons, commission counsel respectfully submits that this application under s. 141(4) should be denied. The review should occur based on the record already available, including the lengthy transcripts of the Member's evidence which are part of the record. The Member may argue for whatever characterizations and conclusions he wishes, based on the evidentiary record. But this is not a case in which special circumstances make it necessary and appropriate to let him take the stand again, merely to give personal responses to a legal characterization of his conduct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF SEPTEMBER, 2018,

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Brock Martland