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 SCOPE OF REVIEW

1. This is a review on the record pursuant to s. 138 of the *Police Act*, R.S.B.C. 1996, c. 367, as amended. The case involves 11 allegations of misconduct by Constable Geoffrey Young of the Delta Police Department (the "Member"), which are before Retired Judge Carol Lazar as adjudicator.

1. Introduction

2. The Member has brought an application, and made submissions, with respect to the scope of the review on the record. He argues that this review (and indeed every review) requires a reconsideration of both (1) whether or not misconduct has been proven, and (2) the appropriate disciplinary or corrective measures ("sanctions").

3. These are commission counsel's submissions in response. We say that the Police Complaint Commissioner ("PCC") was entitled to order a review on the record that is restricted to the question of sanctions. When that occurs, as here, there is no obligation on the adjudicator to re-evaluate misconduct issues, and indeed, the PCC's

order restricts the review. This is so as a matter of statutory interpretation and it accords with common sense.

4. Constable Young acknowledges that his application runs contrary to the decision of Retired Justice Wally Oppal, QC, as adjudicator in the concluded review on the record involving SCBCTAPS Constables Bunderla and O'Rourke (RR 16-04). In a decision issued on 18 April 2017, Adjudicator Oppal agreed that the PCC could limit a review on the record to the issue of sanctions.

5. Our position is that the reasoning and analysis in *Bunderla* are persuasive, if not strictly controlling in the *Police Act* setting. Even leaving that decision aside, on principles of statutory interpretation, coupled with logic and practicality, the Member's argument must fail.

2. Facts

6. This review involves an officer who, on 10 occasions over seven months, forged medical prescriptions and (until the last date) successfully relied on those forged prescriptions to obtain painkiller drugs. It also involves a deliberate dishonest story the Member gave to the RCMP when they investigated the matter.

7. The details of the matter are set out in the Final Investigation Report, the Further Investigation Report, and the decisions of the discipline authority, West Vancouver Police Department Chief Constable Len Goerke. Of note, the Member did not dispute the facts set out in the Final Investigation Report, "including altering prescriptions and lying to RCMP officers": Form 3 Findings of Discipline Authority dated 9 April 2018 ("DA Misconduct Decision"), at para. 39.

8. Upon the conclusion of the discipline proceeding, the Member had the right to request a public hearing or review on the record, pursuant to s. 136. As noted in the PCC's Notice of Review on the Record (6 June 2018), at paras. 17-18, the Member did not request a public hearing or review on the record.

9. As the Notice specifies, the PCC concluded that the discipline authority's findings on misconduct could not be said to be incorrect (para. 20), but that the sanctions imposed were the product of an incorrect application of s. 126 (para. 21). Furthermore, the PCC concluded that a review on the record on the sanctions issue was in the public interest (para. 22).

3. Analysis

10. As noted above, the Member's counsel is re-arguing the same issue adjudicated by Mr. Oppal in the *Bunderla* case. The principle of "judicial comity" may not translate exactly to the *Police Act* setting. But our submission is that Adjudicator Oppal — with his lengthy experience in police discipline matters, as author of the seminal 1994 *Closing the Gap* commission of inquiry report — gave a considered decision. It is persuasive. It should be followed. We will not repeat Adjudicator Oppal's analysis here, but we recommend it.

11. The well-established approach to statutory interpretation is set out in the case of *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, by Justice Iacobucci at para. 21:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

12. In his argument, the Member fixates on s. 141(10) of the *Police Act*, and reads it in isolation. He asserts that the provision must be read so as to include the word "and"

— even though the provision does not use the word “and”. Instead (unhelpfully), the provision at issue does not use any term — not “and”, not “or”, and not “and/or”. In our submission, when read on its own, there is an obvious ambiguity to the three items listed under s. 141(10) and whether they are conjunctive or disjunctive.

13. The provision reads as follows:

> 141(10) After a review of a disciplinary decision under this section, the adjudicator must do the following:
>
> > (a) decide whether any misconduct has been proven;
> >
> > (b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126 [*imposition of disciplinary or corrective measures*] or 127 [*proposed disciplinary or corrective measures*];
> >
> > (c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

14. The ambiguity arises on the face of the words of this provision — that is, on their grammatical and ordinary sense. (Is the Legislature saying that the adjudicator must do whichever of the three that apply in the circumstances, as seems logical, or that the adjudicator must always do all three things?)

15. If there is ambiguity, a court must turn to the principles of statutory interpretation to determine how to interpret the provision.

16. Even if there is no ambiguity, a court must still consider the purpose and scheme of the statute and the overall context. This point was made by Professor Ruth Sullivan, in *Statutory Interpretation* (3rd Ed., 2016), at p. 60:

> The presumption in favour of ordinary meaning does not prevent interpreters from looking at other indicators of legislative intent. On the contrary, they are obliged to do so. …

> Courts may and indeed should reject ordinary meaning when contextual factors suggest that some other meaning was intended.

17. To understand what s. 141(10) means, this tribunal must step back from a narrow examination of the words of that one provision, especially given how ambiguous they are. The adjudicator should consider what process is underway, how that process came to be initiated, and how the provision is to be understood in light of the purpose and scheme of the Act as a whole.

18. First of all, the provision is the tenth subsection within s. 141 of the *Police Act*. Section 141 sets the procedure for a review on the record. It provides in subsection (1) that the "disciplinary decision" at issue "means any of the matters described in section 133(1)(a)(i) to (iv) [*review of discipline proceedings*], including any further reasons provided under section 128(3) [*disciplinary disposition record*]" (emphasis added). Turning then to what is included in s. 133(1)(a)(i) to (iv), it becomes clear that the list includes findings on misconduct as well as sanction.

19. The use of the words "any of the matters" in s. 141(1) is important. In addressing what a review on the record is, the Legislature specifies that the review is to consider a "disciplinary decision" dealing with "any of" the issues including misconduct and sanctions. Had the Legislature intended to require that every review on the record would include a review of both misconduct and sanctions, it would have used the words "all of the matters". It did not.

20. Next, s. 141 permits the appointment of an adjudicator for the review (subs. (2)), and specifies what is included in the record (subs. (3)). It provides a mechanism to supplement that record and sets a test for the adjudicator for permitting additional evidence (subs. (4)). It spells out who may make submissions and participate in the review (subs. (5)-(7)) and how (subs. (8)). Then, in s. 141(9), the Act specifies a correctness standard "to be applied by an adjudicator to a disciplinary decision" (emphasis added). Again, the formulation is to refer to "a", that is, one, disciplinary decision. The Act does not refer to the standard for review of "both" disciplinary

decisions arising in a given case. It anticipates a single disciplinary decision, that is, either misconduct or sanctions.

21. It is after these provisions that s. 141(10) appears. Significantly, the provision starts with the word “After”. It identifies what the adjudicator must do, after the review is completed. And that obviously depends on what the adjudicator had before her or him in the review.

22. To understand what the adjudicator must do in a review on the record, of course, one must ask, what is a review on the record, and how can it come about? This requires a broader contextual reading of Part 11 of the *Police Act*.

23. Following a discipline proceeding, there are two ways in which a matter may proceed to a review on the record. First, a complainant or member can make a written request to the PCC, under s. 136.[1] Second, the PCC has the power to initiate a review on the record under s. 138. He may do so in any one of three situations, as set out in s. 138(1)(c) and (d). The full provision reads as follows:

> 138(1) On
>
> > (a) receiving a request under section 136 in circumstances other than those described in section 137 (1) [*circumstances when member or former member concerned is entitled to public hearing*], or
> >
> > (b) the police complaint commissioner's own initiative if the limitation period established for making the request under section 136 (1) [*time limit for requesting public hearing or review on the record*] has expired,
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> the police complaint commissioner must arrange a public hearing or review on the record if the police complaint commissioner
>
> > (c) considers that there is a reasonable basis to believe that
> >
> > > (i) the discipline authority's findings under section 125 (1) (a) [*conclusion of discipline proceeding*] are incorrect, or
> > >
> > > (ii) the discipline authority has incorrectly applied section 126 [*imposition of disciplinary or corrective measures*] in proposing

[1] And there are certain situations where the member has a right to go to public hearing: s. 137(1).

> disciplinary or corrective measures under section 128 (1) [*disciplinary disposition record*], or
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> (d) otherwise considers that a public hearing or review on the record is necessary in the public interest.[2] [Emphasis added.]

24. There are, therefore, three situations in which the PCC can order a review on the record. First, under s. 138(1)(c)(i), if he disagrees with the finding on misconduct. Second, under s. 138(1)(c)(ii), if he disagrees with the sanctions imposed. Third, under s. 138(1)(d), if he concludes that the public interest requires the review.

25. Of signal importance is the disjunctive "or" in this provision. The PCC can order a hearing on misconduct or on sanctions. The very existence of a review on the record requires the PCC to make an order initiating the review, and the Act gives him the ability to determine what sort of review it will be.

26. Only the PCC can order a review on the record. The member or complainant may request it, but it is only the PCC who may initiate a review.

27. And if the PCC does not order a review on the record, there is no review on the record. It comes into existence only because of the PCC's s. 138 order.

28. This does not depart from the PCC's role as a "gatekeeper" under the *Police Act*. It does not put him in the position of investigating matters, nor being a final decision-maker who passes judgment on misconduct or sanctions. Instead, he has here, as elsewhere in the Act, a power to trigger certain processes. But just as the PCC may decide that one allegation should be deemed inadmissible and another permitted to proceed, the PCC may decide what review on the record is ordered and on what basis. When this occurs, it follows by necessary implication that the adjudicator will undertake only the review that has been properly authorized by the PCC's s. 138(1) order.

29. For the ambiguous s. 141(10) language to allow an adjudicator to revisit misconduct findings that were never the subject of the PCC's order for a review on the

[2] The Act goes on to set out considerations for the PCC's assessment of the "public interest": s. 138(2).

record, would be to let the tail wag the dog. It would give an extraordinary and unprecedented power to a decision-maker to expand the breadth of his or her inquiry to consider evidence and issues that were not referred for review. Such an outcome would create uncertainty and unfairness, because the participants in the review on the record would need to address the entirety of the whole case in every situation, even where misconduct (or sanction) was not in issue. This would be akin to requiring a court of appeal to consider the correctness of the verdict (and all of the trial evidence, issues and rulings), in each and every sentence appeal. That would place an onerous burden on the court, for no sound reason.

30. To step further back from the *Police Act* provisions, one must consider the overall context of the province's régime for police complaints. Many complaints about police officers are made, but only a small fraction make their way to any sort of adjudicative process.[3] For example, in the last quarter of 2017, the Office of the PCC concluded 167 public-trust allegations, with only five per cent substantiated, and with not even one case referred for a public hearing or review on the record.[4]

31. Reviews on the record (and public hearings) are expensive and are used sparingly. They are publicly funded. The PCC takes care to refer matters for such a review process only where necessary.

32. The PCC's gatekeeper function reflects a legislative choice to empower him to make decisions on which rare cases should move to a public hearing or review on the record. When he makes a decision to initiate a review on the record, he is given the power under s. 138(1) to do so to address an incorrect finding on misconduct or sanction. When one considers what is to occur in a review on the record, one must look back to what review on the record was ordered, and whether it addresses misconduct or sanctions.

[3] The Office of the PCC maintains statistics recording this information; see: https://opcc.bc.ca/reports/statistics/

[4] https://opcc.bc.ca/wp-content/uploads/2018/02/2017-2018-3rd-Quarter-Stats-Oct-1-to-Dec-31.pdf , at pp. 8 and 11.

33. Although analogies to the criminal law are inexact, it is akin to a Crown decision on what charges to list on an indictment or information: however interesting other issues may be, the trial will be restricted to those charges properly before the Court. This is not a matter of depriving a trial judge of jurisdiction; instead, the judge's jurisdiction derives from the charging document, because that document defines what is to be addressed in the prosecution. Similarly, the PCC's order for a review on the record addresses whether the review deals with misconduct or sanctions, and as such, defines what is and is not at issue in the review on the record.

34. This approach achieves the purpose and objectives of the *Police Act*. It supports a careful and surgical approach to employing the resource-intensive review on the record, to deal only with those rare cases where the PCC determines it is necessary, and then only on the disciplinary decision that is at issue.

35. A contrary approach, as sought by the Member, would allow for a straightforward dispute over the proper sanction to be transformed into a lengthy "retrial" of misconduct findings that the PCC did not identify as being incorrect, and that did not give rise to a public-interest basis for a review on the record. In other words, rather than a narrow review on the record focusing on the s. 126 considerations and the appropriate sanction, the matter could devolve into a protracted, detailed and expensive reconsideration of every factual and legal issue arising in the misconduct allegations. This would be inefficient and would run contrary to the public interest.

36. The facts of this case illustrate the point. This review on the record, as directed by the PCC's s. 138 order, is restricted to the sanctions question. Even that issue has some complexity to it. But because the review is restricted to that issue, the parties will make submissions on the s. 126 considerations and the adjudicator will determine what sanctions are just and appropriate. But if the Member is correct and the review must address the entirety of the case, this process transforms itself into an entirely different beast. The spectre is that counsel and the adjudicator will need to wade through the fine details of the investigation and the specifics of repeated misconduct arising over seven months. This would hijack the case. It would transform a straightforward matter into an unduly complicated one, for no good reason.

37. This is especially so where the Member, though he now says there should be a review dealing with misconduct, could not even be bothered to request such a review as he was entitled to do under s. 136.

38. And it is somewhat surreal that the Adjudicator in this case could be asked to revisit findings of misconduct, when the Member admitted to criminal conduct in obtaining diversion of his *Criminal Code* charges. It seems absurd that despite that admission, the Final Investigation Report, the DA's decisions, and him not taking issue with the facts, that he could now be permitted to argue in this review that there was no *Police Act* misconduct.

39. To conclude, the Member's application plucks out s. 141(10) and argues for the insertion of the word "and" when that word is not there. It is far from an unavoidable ordinary or grammatical meaning to the provision. When one applies the principles of statutory interpretation and considers the scheme and object of the Act, it is clear that this application must fail. This review is restricted to the question of sanctions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF JULY, 2018,

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Brock Martland