



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF REVIEW ON THE RECORD
Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Review on the Record into the Ordered Investigation against Constable
Tyler McCluskie of the Vancouver Police Department**

OPCC File: 2017-14260
January 31, 2019

To: Constable Tyler McCluskie (#2600) (Member)
c/o Vancouver Police Department
Professional Standards Section

And to: Superintendent Michelle Davey (Discipline Authority)
c/o Vancouver Police Department
Professional Standards Section

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

WHEREAS:

Investigation

1. On December 27, 2017, the Office of the Police Complaint Commissioner (OPCC) received information from the Vancouver Police Department (VPD) regarding an incident which occurred on December 24, 2017, involving Constable Tyler McCluskie. According to the VPD, on December 24, 2017, Emergency Health Services reported a single motor vehicle collision in the 5500 block of Deltaport Way, Delta, BC. Delta Police Constable Cooper attended the scene and observed a Dodge Ram on its roof in the westbound lane. Witnesses stated that they assisted the driver to exit the vehicle. The driver was subsequently identified as off duty Vancouver Police Constable Tyler McCluskie. Constable Cooper noted that Constable McCluskie was unsteady on his feet; his speech was slurred and repetitive; and he had an odour of alcohol emanating from his breath. Based on his observations, at 0135 hours, Constable Cooper read Constable McCluskie the Approved Screening Device (ASD) demand. Constable McCluskie provided a breath sample into the ASD which

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resulted in a “Fail” result. Constable McCluskie was advised of his right to provide a second breath sample and Constable McCluskie provided a second breath sample that again resulted in a “Fail” result.

2. At 0200 hours Constable Cooper served Constable McCluskie with a section 215 *Motor Vehicle Act* (MVA) 24 hour Roadside Prohibition, a 90-day Immediate Roadside Prohibition (IRP) and impounded his vehicle. Constable McCluskie was transported to hospital for examination.
3. On January 17, 2018, after reviewing the information forwarded by the Vancouver Police Department, I ordered an investigation into the conduct of Constable McCluskie pursuant to section 93(1) of the *Police Act*. Vancouver Police Professional Standards investigator, Sergeant Dave Ballance, conducted an investigation into this matter and on July 31, 2018, submitted the Final Investigation Report (FIR) to the Discipline Authority.
4. On August 15, 2018, following his review of the FIR, Inspector Jeff Danroth, as the Discipline Authority substantiated two allegations of *Discreditable Conduct*, pursuant to section 77(3)(h) of the *Police Act*. He determined that Constable McCluskie operated a motor vehicle when his ability to do so was impaired by alcohol and that Constable McCluskie did make attempts to receive special consideration based on his status as an off-duty police constable. Discipline Authority Danroth offered Constable McCluskie a Prehearing Conference (PHC) in the matter setting out a proposed discipline of suspension without pay for not more than five days for registering a fail on the ASD and a suspension without pay for not more than two days for attempting to obtain special consideration.
5. A PHC was held on September 4, 2018, before Inspector Danroth, as the Prehearing Conference Authority. An agreement was reached in which Constable McCluskie admitted to the misconducts of *Discreditable Conduct* and agreed to the imposition of a four day suspension without pay for registering a fail on the ASD and a one day suspension without pay for attempting to obtain special consideration.
6. On September 25, 2018, I released my decision to the parties rejecting the Prehearing Conference Agreement pursuant section 120(16) of the *Police Act*. The basis for my rejection of the Agreement was that the disciplinary and/or corrective measures proposed did not take into account the full seriousness of Constable McCluskie’s actions. Pursuant to section 123 of the *Police Act* the matter was then set for a discipline proceeding.
7. Pursuant to section 123(4) of the *Police Act*, the Discipline Authority presiding over the discipline proceeding must be a Chief Constable, Deputy Chief Constable or senior officer other than the Chief Constable, Deputy Chief Constable or senior officer who acted as the Prehearing Conference Authority.
8. Therefore, pursuant to section 134 of the *Police Act*, Chief Constable Adam Palmer of the VPD delegated the role of the Discipline Authority to Superintendent Michelle Davey of the VPD for the purpose of presiding over a discipline proceeding.

Discipline Proceeding and Proposed Discipline

9. On December 21, 2018, following the discipline proceeding, and after considering the available evidence and submissions, the Discipline Authority made the following determinations in relation to the allegations:

- (i) That on December 24, 2017, Constable Tyler McCluskie, committed the disciplinary default of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on a Municipal Police Department. Specifically, that while off-duty, Constable McCluskie operated a motor vehicle while impaired.

Proposed Disciplinary Measure – Suspension without pay for six (6) days.

- (ii) That on December 24, 2017, Constable Tyler McCluskie, committed the disciplinary default of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on a Municipal Police Department. Specifically, that while off-duty, Constable McCluskie attempted to obtain special consideration based on being an off-duty police officer.

Proposed Disciplinary Measure – Suspension without pay for three (3) days.

10. In arriving at her determination, Superintendent Davey found that:

- a) Constable McCluskie got into a single motor vehicle accident after choosing to drive following the consumption of alcohol at a friend's house.
- b) The accident was very serious, it could have easily involved other vehicles and it is only happenstance that nobody else was hurt.
- c) In relation to seeking favour or special consideration based on being an off-duty police officer, this behaviour is unacceptable and seriously inappropriate.
- d) No record of discipline was presented.
- e) Constable McCluskie has taken full responsibility for his actions and the misconduct and has gone to great lengths to prevent its recurrence. Constable McCluskie feels sickened by his behaviour at the scene and is deeply embarrassed by the incident.

11. Constable McCluskie was provided a copy of Superintendent Davey's findings in relation to the allegations of misconduct and determinations on appropriate disciplinary and/or corrective measures at the discipline proceeding. Constable McCluskie was informed that if he was aggrieved by either the findings or determinations, he could file a written request with the Police Complaint Commissioner ("the Commissioner") to arrange a Public Hearing or Review on the Record.

12. To date, the OPCC has not received a request for Public Hearing or Review on the Record from Constable McCluskie.

13. Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe: that the Disciplinary Authority's findings under section 125(1) are incorrect; the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or, otherwise considers that a Public Hearing or Review on the Record is necessary in the public interest.

Decision

14. I have reviewed the record of the disciplinary decision, and the associated determinations, pursuant to section 138 of the *Police Act*, I have determined that there is not a reasonable basis to believe that the Discipline Authority's determination as to whether misconduct has been proven are incorrect pursuant to section 125(1) of the *Police Act*.
15. I am of the view, however, that the Discipline Authority's application of section 126 of the *Police Act* in proposing disciplinary measures is incorrect. In particular, I am of the respectful view that Superintendent Davey erred in her determination by not taking into full account the seriousness of Constable McCluskie's actions in attempting to obtain special consideration. Specifically, Superintendent Davey did not properly consider Constable McCluskie's multiple attempts to obtain special consideration with different police members. Had the investigators followed through on Constable McCluskie's pleas for favorable treatment they could have placed themselves in a position of committing a criminal offence as identified by the Supreme Court of Canada in *R v Beaudry*, [2007] 1 S.C.R. 190, 2007 SCC 5.
16. Furthermore, I am of the view that Superintendent Davey may not have properly considered the guidance provided by the Honorable Ian H. Pitfield, retired BC Supreme Court Justice regarding the minimum range for discipline/corrective measures pursuant to the *Police Act* in relation to drinking and driving incidents. Mr. Pitfield found that in the case of an ASD Fail reading, the minimum disciplinary measure should not be less than a 3-day suspension and the maximum in the range of 7 to 10 days (OPCC file 2015-10904).
17. It is apparent in modern day policing that police place a great emphasis on combatting drinking and driving and, as such, would adhere to drinking and driving laws themselves. Considering that this incident also resulted in an accident and given the repeated attempts at obtaining special consideration, it appears as though the discipline/corrective measures proposed by Superintendent Davey may be below the appropriate range as outlined by Mr. Pitfield given the circumstances of this incident in that Constable McCluskie was involved in a single vehicle accident and the seriousness of it.
18. Superintendent Davey noted a number of mitigating factors in her decision including that Constable McCluskie agreed to a Prehearing Conference and admitted to both disciplinary defaults. However, I am of the view that admitting to the disciplinary defaults in a Prehearing Conference, which is required by statute for participating in such a process, does not constitute a mitigating factor.

19. I have also determined that a Review on the Record is necessary in the public interest. In determining that a Review on the Record is necessary in the public interest, I have considered several relevant factors, including but not limited to the following:
- a) The complaint is serious in nature as the allegations involve a significant breach of the public trust;
 - b) The conduct has undermined, or would be likely to undermine, public confidence in the police, the handling of complaints, or the disciplinary process;
 - c) The disciplinary or corrective measures proposed are inappropriate or inadequate.
20. I have determined that at this time, a Public Hearing is not necessary in this particular matter. I'm satisfied that it will not be necessary to examine witnesses or receive evidence that is not currently part of the record of disciplinary decision. Further, I'm satisfied that a Public Hearing is not required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline. I have determined that a Review on the Record is a more effective and efficient means of adjudicative review in these circumstances.
21. Accordingly, pursuant to section 137(2) and 141 of the *Police Act*, I am arranging a Review on the Record. As I have determined that the only reasonable basis to believe that the Discipline Authority was incorrect was in proposing discipline or corrective measures, the Review on the Record will be confined to the issue of disciplinary or corrective measures.
22. Pursuant to section 141(5) of the *Police Act*, Constable McCluskie, or his agent or legal counsel may make submissions concerning the matter under review.
23. Pursuant to section 141(6) of the *Police Act*, the Police Complaint Commissioner or his commission counsel may make submissions concerning the matter under review.
24. Pursuant to section 141(7) (b) of the *Police Act*, the Adjudicator may permit the Discipline Authority to make submissions concerning the matter under review.
25. It is therefore alleged that Constable McCluskie committed the following disciplinary default, pursuant to section 77 of the *Police Act*:
- (i) That on December 24, 2017, Constable McCluskie, committed *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.
 - (ii) That on December 24, 2017, Constable McCluskie, committed *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.

THEREFORE:

26. A Review on the Record is arranged pursuant to section 137(2) and 141 of the *Police Act*.
27. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honorable Carol Baird Ellan, Retired Provincial Court Judge, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

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DATED at the City of Victoria, in the Province of British Columbia, this 31st day of January, 2019.



Stan T. Lowe
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