RR 19-01
OPCC File No. 2017-14260

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367
SECTION 141

AND

IN THE MATTER OF THE REVIEW ON THE RECORD
INTO THE ORDERED INVESTIGATION
AGAINST CONSTABLE TYLER MCCLUSKIE
OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF AJUDICATOR'S DECISION

TO: Constable Tyler McCluskie, #2600, Member
Vancouver Police Department
Professional Standards Section

AND TO: Mr. Kevin Woodall, Counsel for the Member
Coristine Woodall, Barristers & Solicitors

AND TO: Superintendent Michelle Davey, Discipline Authority
Vancouver Police Department
Professional Standards Section

AND TO: Chief Constable Adam Palmer
Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold, Police Complaint Commissioner
Office of the Police Complaint Commissioner

AND TO: Mr. Brad Hickford, Commission Counsel
Office of the Police Complaint Commissioner

A. Overview

[1] This proceeding is a Review on the Record under Section 141 of the *Police Act*, R.S.B.C. 1996. c. 367 ordered by the Police Complaint Commissioner on January 31, 2019, relating to two allegations of discreditable conduct under Part 11 of the *Act* on the part of Constable Tyler McCluskie of the Vancouver Police Department.

[2] In the early morning hours of December 24, 2017, while off-duty, Constable McCluskie was involved in a single motor vehicle, single occupant accident in Delta, B.C.in which his Dodge Ram truck flipped over and landed on its roof. Constable McCluskie twice failed a roadside screening test, and attempted several times over several hours to persuade the attending Delta Police officers not to proceed with the investigation.

[3] The allegations arising from the incident are as follows:

a. Discreditable Conduct, pursuant to section 77(3)(h) of the Police Act by conducting oneself in a manner that the member knows, or ought to know, would bring discredit on the municipal police department, specifically, driving while impaired.

b. Discreditable Conduct, pursuant to section 77(3)(h) of the Police Act by conducting oneself in a manner that the member knows, or ought to know, would bring discredit on the municipal police department, specifically, for his behavior during the Delta Police investigation, which included attempting to obtain special consideration based on being an off-duty police officer.

[4] There is no issue as to whether the allegations have been established. They are admitted by the Member and he has admitted them since the day after the incident, when he advised his officer-in-command that the had [redacted]. With the support of the Vancouver Police Department Support Services Division, Constable McCluskie took

[redacted] He ultimately returned to work under a return to work agreement, which included significant employer-sanctioned terms [redacted]

[5] Following a disciplinary proceeding under Section 124 the Disciplinary Authority recommended on December 21, 2018 that Constable McCluskie receive penalties of a 6-day suspension on the first allegation and an additional 3-day suspension on the second.

[6] In his Notice of a Review on the Record, the Commissioner questioned the adequacy of the penalties on both allegations. Commission Counsel in his submissions on this Review conceded the adequacy of the penalty on the first allegation but submitted that the penalty on the second allegation should be considerably higher, approaching the maximum available suspension of 30 days.

[7] I received written submissions following the Notice and convened with counsel and Constable McCluskie for oral submissions on May 3, 2019. Following the hearing, Member's Counsel kindly provided a copy of Constable McCluskie's return to work terms, which were admitted by consent of counsel under Section 141(4). I am indebted to counsel and the Discipline Authority for their thorough elucidation of the interesting and important issues that arise in this matter.

[8] I have determined that the penalties imposed by the Discipline Authority were not incorrect. What follows are the reasons for my decision, in accordance with Section 141(11).

B. Legislative Framework

[9] Section 126 of the Police Act states:

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.

[10] In relation to the ordering of a review on the record, Section 138(1) provides 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,

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 disciplinary or corrective measures under section 128 (1) *[disciplinary disposition record]*, or

(d) otherwise considers that a public hearing or review on the record is necessary in the public interest.

[11] The conduct of a review on the record is governed by Section 141:

Review on the record

141 (1) In this section and section 143 [public hearing], "disciplinary decision", in relation to a discipline proceeding under section 124 [discipline proceeding], 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].

(2) Subject to section 143 (1) [public hearing], if the police complaint commissioner determines that there are sufficient grounds to arrange a public hearing or review on the record in respect of a disciplinary decision under section 138 [determining whether to arrange public hearing or review on the record] or 139 [reconsideration on new evidence], the police complaint commissioner may appoint an adjudicator under section 142 [appointment of adjudicator for public hearing or review on the record] to conduct a review on the record of the disciplinary decision under this section.

(3) For the purposes of a review on the record under this section, the record of a disciplinary decision consists 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) Despite subsections (2) and (3) of this section and section 137 (2) (a) [circumstance when member or former member concerned is entitled to public hearing], if the adjudicator considers that there are special circumstances and it is necessary and appropriate to do so, the adjudicator may receive evidence that is not part of either of the following:

(a) the record of the disciplinary decision concerned;
(b) the service record of the member or former member concerned.

(5) The member or former member concerned is not compellable at a review on the record under this section, but the member or former member or her or his agent or legal counsel, if any, may make submissions concerning the matters under review.

(6) In addition to the member or former member concerned or her or his agent or legal counsel, the police complaint commissioner or her or his commission counsel may also make submissions concerning the matters under review.

(7) The adjudicator may permit the following persons to make submissions concerning the matters under review:

(a) the complainant, if any, or the complainant's agent or legal counsel;
(b) the discipline authority or the discipline representative.

(8) The adjudicator may permit submissions under subsection (5), (6) or (7) to be oral or written.

(9) In a review proceeding under this section, the standard of review to be applied by an adjudicator to a disciplinary decision is correctness.

(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.

> (11) Within 10 business days after reaching a decision under subsection (10), the adjudicator must provide notice of the decision, together with written reasons, to the following:
>
> (a) the complainant, if any;
> (b) the member or former member whose conduct is the subject of the review;
> (c) a chief constable or chair of the board of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern;
> (d) the discipline authority involved in the matter, if different than a chief constable or chair of the board referred to in paragraph (c);
> (e) the police complaint commissioner.

C. History of the Proceedings

[12] The Commissioner ordered an investigation under Section 93 of the *Police Act* on January 17, 2018. The investigation proceeded and on July 31, 2018 the investigating officer, Sergeant Dave Ballance of the Vancouver Police, issued a Final Investigation Report (FIR). That report was reviewed by discipline authority Inspector Jeff Danroth of the Vancouver Police Department Professional Standards Section and on August 15, 2018 he issued a Notice of Discipline Authority's Decision under Section 112, confirming the two allegations of discreditable conduct.

[13] In his Section 112 Report, Inspector Danroth offered Constable McCluskie a prehearing conference under Section 120 and recommended not more than 5 days' suspension on the impaired driving allegation and not more than two days' suspension on the allegation of seeking preferential treatment.

[14] Constable McCluskie accepted the offer of a prehearing conference. On September 4, 2018 Inspector Danroth issued his Report Confirming the Disciplinary or Corrective Measures Agreed Upon in a Prehearing Conference (Pursuant to S. 120(12) of the Police Act), reflecting agreed penalties of 4 days on the first allegation and one day on the second.

[15] On September 25, 2018 Anthony Parker, Investigative Analyst of the Office of the Police Complaints Commissioner, issued a Rejection of Discipline and/or Corrective Measures Following Agreement at a Prehearing Conference, pursuant to s. 120(16) of the Police Act. In his Rejection notice, the Analyst expressed the view in relation to the first allegation that Inspector Danroth did not sufficiently consider the seriousness of the

accident in which the member's truck slid down an embankment and landed on its roof, causing damage resulting in a total loss of the vehicle, and that the member did not accept full responsibility in relation to the role that alcohol played in the accident, in that he described the accident as a momentary lapse of judgement and suggested that it was caused by ice.

[16] In relation to the second allegation the Analyst expressed concern that Inspector Danroth did not adequately consider the full extent of the member's actions in both attempting to obstruct the investigator's efforts to obtain a breath sample, and attempting to persuade the investigating officers, multiple times and over a prolonged period, not to proceed with the investigation, to refrain from filing an immediate roadside prohibition (IRP), and to falsely state that the roadside screening device was broken. The Analyst pointed out that the member's actions in counseling a lie or the destruction of evidence amounted to the criminal offence of obstruction of justice.

[17] The Analyst ordered that the matter proceed to a discipline proceeding under Section 123, conducted by Superintendent Michelle Davey of the Vancouver Police Department as Discipline Authority on December 13, 2018. At the discipline proceeding, Constable McCluskie again admitted the allegations. [redacted]. As noted, on December 21, 2018, Superintendent Davey imposed penalties of 6 days on the first allegation and 3 days on the second.

[18] The Commissioner ordered this Review on the Record under s. 138 on January 31, 2019 on the basis that Superintendent Davey's application of Section 126 was incorrect.

[19] The Commissioner expressed the following concerns about the allegation of seeking special consideration:

> …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 favourable 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.

[20] The Commissioner also observed:

> 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.

D. Submissions

Discipline Authority Submissions

[21] Superintendent Davey was invited to provide submissions in these proceedings under Section 141(7)(b), which she filed on February 28, 2019. Those submissions included the following:

> 2.3 An approach that seeks to correct and educate the member should take precedence in this case, because it is not unworkable, and would not bring the administration of police discipline into disrepute.
>
> 2.4 More than that, an approach that seeks to correct and educate is in my view essential in this matter, because it involves a member with a [redacted]
>
> 2.5 This kind of case is extremely rare. It's a success story. It's exactly the sort of case that a remedial approach is suited for: a police officer took responsibility for his actions, [redacted]
>
> 3.3 The four most important penalty considerations in this case are seriousness of the misconduct; recognizing the seriousness of the misconduct; [redacted]; and parity…
>
> 3.5 Recognizing the seriousness of the misconduct: Early and full admission of misconduct is very mitigating. Cst. McCluskie has taken full responsibility for his actions, from the day of the offence. He told his Sergeant (employer) about the incident, followed by his wife and family.
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> 3.6 [redacted]: What is of particular significance in this case, which makes it different from other cases where police officers have committed the offence of impaired driving, is that Cst. McCluskie is [redacted]. He immediately sought [redacted], and attended on a weekly basis. He is still closely monitored by way of [redacted] He

> is speaking to colleagues about [redacted] in an attempt to prevent this from happening to others. I find these facts to be extremely mitigating in this case, and give credit to Cst. McCluskie for the success in dealing with his [redacted] …
>
> 3.9 Police chiefs across Canada are actively turning their minds and efforts to implementing measures to help employees deal with [redacted]. Efforts have been made to provide employees with places to go and people to turn to within the organization to seek help. That is exactly what Cst. McCluskie did. He turned to his supervisor for help and he got it. He turned to his organization for help and he got it. [redacted]. In my view, punishing him further will not change the fact that Cst. McCluskie acknowledged his [redacted]. That is what makes this case unique and distinct from other impaired driving cases.

Commission Counsel Submissions

[22] In his written submissions, Commission Counsel, Mr. Hickford, stated that he did not take issue with the penalty imposed by the Discipline Authority in relation to the impaired driving offence, accepting that it is within the range, albeit on the low side.

[23] On the other hand, he takes the position that the allegation of seeking preferential treatment occurred over a prolonged time frame, and included an attempt to obstruct justice by interfering with an investigation and counseling other officers to obstruct justice.

[24] Mr. Hickford submits that the Discipline Authority concentrated on the impaired driving behaviour and that she erroneously concluded that the behaviour in relation to seeking a preference was attributable to alcohol consumption. He notes that Superintendent Davey did not mention in either her reasons on the discipline proceeding or her submission on this proceeding that the member's actions in counseling or attempting to have other officers interfere with the investigation amount themselves to the crime of obstruction of justice. This, he says, goes much farther than the typical case of seeking favour based on one's position as a police officer.

[25] Commission Counsel takes the position that Constable McCluskie's behaviour was a prolonged and concerted effort to achieve a specific result, and he questions Superintendent Davey's conclusion that it can be explained by the consumption of

alcohol. He points out that the member's attempts to obtain preference included obstructive behaviour, escalated during the investigation to the point of a demand, and continued over a period in excess of two hours.

[26] Mr. Hickford submits that in emphasizing an approach that corrected and educated the member, the Discipline Authority failed to consider adequately whether a 3-day suspension would bring the administration of police discipline into disrepute. He suggests a penalty closer to the maximum 30 days' suspension. Mr. Hickford submits that none of the cases dealing with seeking a preference come close to the lengthy and concerted behaviour of Constable McCluskie in this case.

Member's Counsel Submissions

[27] Member's Counsel, Mr. Woodall, submits that there is a causal link between the member's [redacted] and his behaviour in seeking preferential treatment at the scene such that at least part of the member's behaviour is non-culpable. He submits that the Discipline Authority's failure to characterize the Member's behaviour as a criminal offence does not mean that she failed to take the seriousness of the conduct into consideration. He points to passages in the Discipline Authority's reasons that indicate she was alive to the serious nature of the attempts to obtain a favour, calling it "egregious," "unacceptable", and "highly inappropriate". He also submits that it is not open to the Commissioner to require that the member's behaviour be characterized as criminal by the Discipline Authority if he has elected not to make a report to Crown Counsel under Section 111 of the *Police Act*.

[28] Mr. Woodall submits that while the Commissioner seeks to emphasize the seriousness of the misconduct over the mitigating factors of the Member's [redacted] and significant efforts at [redacted], this is really just a difference in views as to how the factors should be weighed, and not a reviewable error on the part of the Discipline Authority. He highlights the considerable measures taken by the Member in undertaking [redacted] since the incident, described by the Discipline Authority as a "number of authentic steps."

[29] Member's Counsel submits that the penalty regime in BC is unique in its emphasis on correction and education as opposed to punishment, and suggests that no additional penalty is required in order to correct and educate the member, beyond the

efforts he has made on his own. He points to the fact that Cst. McCluskie's circumstances are widely known in the relevant department and the consequences he has already undertaken and experienced are sufficient to send a message to other members that significant consequences and sanctions will result from such misconduct.

[30] Mr. Woodall refers to two cases in the realm of human rights law, one involving a heavy equipment operator who was addicted to marihuana and violated the employer's zero tolerance policy, and another involving a nurse addicted to narcotics who stole narcotics from his employer. In both cases the tribunal emphasized rehabilitation in recognition of the employee's disability. While the question in each of those cases was whether there was discrimination by the employer who had dismissed the employee, they support a view that rehabilitation should be emphasized over sanctions in the case of a disability giving rise to the misconduct.

E. Standard of Review

[31] Section 141(9) sets the standard of review to be applied as that of "correctness." Counsel differed in their submissions as to how that standard should operate in a penalty review as opposed to a decision about whether misconduct has been established. In relation to the latter, it appears to be settled that the adjudicator's role is to consider the entirety of the evidence disclosed by the record, afresh, rather than scrutinizing the reasons of the prior decision-maker(s). For that reason, there is less deference to the discipline authority than might be the case if the application of the standard called only for a review of the decision: *Dunsmuir v. New Brunswick*[1].

[32] Mr. Woodall submitted that the test applicable to a decision on penalty should be the same as that applied by appellate courts on sentence appeals: "whether the decision is so marked a departure from what could reasonably be considered fit and proper that it can be said to be incorrect." Mr. Woodall distinguished between appeals on a question of law, on which there might be one "correct" answer, versus matters of penalty, on which there might be a range. He submitted that the question in relation to a penalty review should be whether the penalty imposed was within the applicable range.

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[1] 2008 SCC 9 (CanLII), followed in OPCC RR 15 – 02 (Batiuk); RR 15 – 01(Gomes), & RR 18 – 02 (Young)

[33] Mr. Woodall referred to the following passage in the case of *R. v. M. (L.)*[2]:

> Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference.

[34] Mr. Hickford submitted that the test is the same as that in relation to misconduct: a fresh consideration of the correct penalty based on the facts reflected by the record. He submitted that it is not open to adjudicators to conclude that while they may have decided differently, they would not interfere with the penalty, because it is within the applicable range, or out of deference to the discipline authority.

[35] The prescribed standard under Section 141(9) in relation to all matters for review, whether misconduct or penalty, is correctness. It is not open to me to deviate from that standard and adopt a new standard that is not consistent with the legally accepted meaning of the correctness standard. Within that constraint, the issue becomes whether the correctness standard, in relation to penalty, entails deference to the findings or analysis of the discipline authority.

[36] The wording of Section 141(9) must in my view be considered in light of the conditions under which a review may be ordered by the Commissioner under Section 138(1)(c).

[37] In relation to a review of a misconduct finding, Section 138(1)(c)(i) provides that the Commissioner must consider that there is a reasonable basis to believe that "the finding is incorrect." With respect to a review of penalty, Section 138(1)(c)(ii) requires the Commissioner to consider that there is a reasonable basis to believe "the discipline authority has incorrectly applied Section 126 … in proposing disciplinary or corrective measures". There would appear to be room for an argument that the application of the correctness standard prescribed in Section 141(9) may differ in relation to penalty from that applicable in relation to misconduct.

[38] In a recent decision of the BC Court of Appeal, *Strother v. Law Society of BC*[3], a court review of a lawyer misconduct decision by a review panel, Savage J.A. observed the following in relation to the correctness standard:

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[2] 2008 SCC 31
[3] 2018 BCCA 481

> [29] As a preliminary matter, the Review Panel considered the standard of review to be applied by a review board in as.47 proceeding. Relying on *Harding v. Law Society of British Columbia*, 2017 BCCA 171, and *Vlug v. Law Society of British Columbia*, 2017 BCCA 172, the Review Panel concluded that it would review the Hearing Panel's decision on a correctness standard but would show deference to the Hearing Panel's findings of fact and assessments of credibility where it had the benefit of hearing *viva voce* testimony. The correctness standard allows a review board to substitute its own view of whether the applicant's conduct constituted professional misconduct and whether the penalty imposed was appropriate.

[39] A standard of "correctness with deference" has been applied in Ontario in appeals of Review Committee decisions relating to misconduct of physicians[4] and engineers[5]. In these decisions, the courts have referred to the fact that the particular review committees are specialized tribunals with expertise in the field in which the misconduct arose. Notably, these cases deal with the scope of review by a court of the decision of an administrative tribunal, not the scope of review by a tribunal itself, which is the question we are concerned with here.

[40] In the police discipline sphere, Alberta has adopted a standard of deference in relation to administrative reviews at the Police Board level of penalty decisions made by presiding officers: *Plimmer v. Calgary (City) Police Service*[6]. The Alberta Court of Appeal decided that deference should apply in a review on the record under the Alberta legislation, but also commented:

> [34] Even in cases of full rehearing on appeal, the fact of a rehearing alone may not compel the conclusion that no deference is due. Economy and efficiency may militate against a clean slate approach to the determination of the issue of punishment because a standard of review requiring no deference could render the hearing before the presiding officer meaningless.

[41] In considering the relative expertise of the Board and the presiding officer on an issue of penalty, the court stated:

> [28] In some instances, the operation of the police service, public safety and public confidence may not be compromised by the conduct in question, and the presiding officer may choose to impose a punishment which allows the offending officer to continue his duties with the service. In other circumstances, the presiding officer's experience in maintaining discipline within the service and

[4] College of Physicians and Surgeons of Ontario v. Peirovy, 2018 ONCA 420 (CanLII)
[5] Professional Engineers Ontario v. Ikpong, 2019 ONSC 1966 (CanLII)
[6] 2004 ABCA 175 (CanLII)

> fostering public safety and confidence, his experience in the effectiveness of certain punishments in promoting discipline and correcting behaviour, and his knowledge of the requirements of safe police practices, may lead him to conclude that the conduct in question requires the dismissal of the offending officer.
>
> [29] Such discretionary choices are squarely within the knowledge, experience and skill of the presiding officer. It is no doubt for these reasons that the *Act* directs that the chief or a senior officer must conduct the hearing.
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> [30] The Board, on the other hand, has less relative expertise on a question relating to appropriate punishment. The *Act* does not require the membership of the Board to include persons with experience in police service. Although the Board acquires experience in discipline issues through the hearing process, its members are not involved in the day-to-day issues of discipline, safety and public confidence that face the chief. It is of some significance that the Board, in arguing for a standard of reasonableness, acknowledged the greater relative expertise of the chief or his designate.

[42] The above comments may be apt in considering the relative expertise of a senior officer on a discipline proceeding and an adjudicator sitting on a review under the BC *Police Act*.

[43] Under the BC legislation, the matter of relative expertise may be engaged in connection with assessments of whether conduct may be considered discreditable under Section 77(3)(h). In the matter under review here, Sergeant Ballance made the following observations about the need for deference in that context:

> **17…**Although the law has traditionally emphasized the role of [the] "reasonable person" in assessing what will likely bring discredit, there is a recent and very useful Federal Court judgment (*Elhatton v Canada (Attorney General)* 2013 FC 71) that emphasizes the importance of a Chief Constable's opinion in assessing the extent to which particular behavior will likely discredit the reputation of the police force. In that judgment, the court reasoned as follows:
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> > The Commissioner has vast experience in assessing the exigencies of policing, including the appropriate use of force and what behavior in officers' personal and professional lives may reflect on the professionalism of the RCMP. It is the Commissioner who is accountable for the reputation of the RCMP - not the Court. Thus, in assessing whether behavior constitutes disgraceful conduct, for example, the Court would invariably approach the Commissioner's decision with the Supreme Court of Canada's instructions in *Dunsmuir v New Brunswick*, 2008 SCC 9 ... at paragraph 48 as a guiding principle:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.

> 18. A result of the *Elhatton* judgment, a retired judge, or an adjudicator, or the Court of Appeal should defer to Chief Constable Palmer (or his delegate's) opinion concerning the likely effect on VPD's reputation of particular behavior.

[44] I note that the question of whether the discipline authority has applied Section 126(3) incorrectly entails a consideration of whether the recommended penalty might bring the administration of police discipline into disrepute; arguably a similar question to the issue of whether conduct is discreditable from a public perspective.

[45] The issue of whether deference applies on a standard of correctness, albeit in a different legislative context, was considered by Gomery J. in the BC Supreme Court case of *Technical Safety BC v. BC Frozen Foods Ltd.*,[7] dealing with a review of a decision of the Safety Standards Appeal Board. Justice Gomery noted as follows:

> [42] Judicial deference to administrative tribunals such as the Board is a principle of administrative law. Where deference to the point of a standard of patent unreasonableness is not required by s. 58 of the ATA, the courts still refrain from intervening unless the decision under review or under appeal is simply "unreasonable"; *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII). ***There is no such principle mandating deference by a supervising tribunal to the administrative decision-makers it oversees. The supervising tribunal must construe the statute and determine what it requires***; *City Centre Equities Inc. v. Regina* (City), 2018 SKCA 43 (CanLII) at paras. 38-59. Subject always to legislative requirements, it is a consequence of the principle of judicial deference that the courts generally refrain from directing an administrative tribunal that itself sits on appeal as to how it shall carry out its appellate functions. (Emphasis added.)

[46] Gomery J. reviewed a number of cases in which the relevant Board had imported considerations of reasonableness and deference into the correctness standard it had previously adopted. He observed:

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[1] [7] 2019 BCSC 716

> [54] On its face, the notion of "deference … given on a standard of correctness" is difficult to understand. If the idea is that a penalty amount will be considered as "correct" so long as it falls within a range of reasonable outcomes, not unusually high or unusually low, then it is not really a correctness standard, because the Board is committed not to tinker with amounts falling within the range, even if the amount is not precisely what the Board would have chosen.

[47] The *Technical Safety* case appears to maintain that the standard of correctness as described in *Dunsmuir*, in relation to penalty, may be a fresh consideration by the reviewer, not an assessment of reasonableness, or fitness. It also makes it clear, however, that at the outset the matter is one of statutory interpretation.

[48] It would seem reasonable to conclude, firstly, that if the Commissioner is restricted under Section 138(2)(c)(ii) to considering whether Section 126 has been misapplied, the adjudicator will be similarly restricted. It is not a blanket question of whether the discipline authority's decision is correct. Considering the question of correctness in this context in light of the above case law regarding reviews of penalty decisions and relative expertise, I do not see it as requiring an unaltered application of the *Dunsmuir* standard of fresh consideration.

[49] In addition, the nature of a review on the record, which often does not entail testimony or credibility findings, performed by a retired judge without experience in police administration, suggests that in relation to matters under review in which a senior police officer might be considered to have relative expertise, or in relation to findings based on evidence, deference might be afforded. To some extent, the assessment of the applicable standard will depend upon the question that is engaged on the ordered review.

[50] Deference would arguably apply to many of the provisions of Section 126(1), such as the effect of a particular penalty like demotion, reassignment or reduction in rank, when considered in light of Section 126(3), which requires an assessment of the workability of a penalty and its likely effect on the administration of police discipline. It may also apply to the assessment of some of the factors enumerated under Section 126(2), such as the effect on a member's career and the influence of departmental policies on the misconduct.

[51] Considering the purpose of the BC *Police Act*, which includes as an important aim the external oversight of internal police disciplinary processes, the issue of whether a proposed penalty emphasizing correction and education as prescribed by Section 126(3)

might be said to bring the administration of police discipline into disrepute, in relation to the public perception of the penalty, is an area in which an adjudicator might be equally or better equipped to make the assessment.

[52] In the final analysis, my view is that the applicable standard may vary depending upon which aspect of Section 126 is in question. The further the required analysis moves from considerations of internal policing administration issues and the more the public interest is engaged, the less likely deference will be required.

[53] The stated terms of the Review in this matter are whether the Discipline Authority failed to impose a penalty within the range applied in similar cases, in relation to the first allegation; and whether she incorrectly assessed the seriousness of the misconduct, on the second. The latter question entails a review of some of the other factors under Section 126(2) and their weight as compared with the seriousness of the misconduct, and also a review of the application of Section 126(3) from a public perception perspective. Some of these issues may be subject to deference to the Discipline Authority and others may fall to me to assess afresh.

[54] In relation to the first allegation (consistently with the position taken by Mr. Hickford) I would not see any room for an argument that I should "tinker" with the penalty even if they would have reached a slightly different conclusion as to where in the applicable range the penalty should have fallen. The question raised by the Commissioner on that allegation is essentially one of fitness. The issue of effect on the administration of police discipline is wrapped up in that question, to my mind; i.e. a penalty that is outside the range might arguably bring the administration of police discipline into disrepute, but one within the range arguably would not. It follows that I agree with Mr. Woodall, that the analysis in such a matter should be more in the nature of a sentence appeal than a rehearing; and with Mr. Hickford, that if the penalty is within the range, that is the end of the matter.

[55] Accordingly I will limit my review to the penalty on the second allegation, and confine it to a consideration of whether the Discipline Authority incorrectly assessed the seriousness of the misconduct under Section 126(1)(a), whether she incorrectly assessed or weighed several other Section 126(2) factors that relate to the matter; and whether she incorrectly applied Section 126(3).

F. Analysis

Section 126(2)(a) - Did the Discipline Authority Assess the Seriousness of the Misconduct Incorrectly?

[56] In considering Superintendent Davey's assessment of the seriousness of the misconduct, I will briefly review the facts in relation to the conduct of seeking special consideration that were available to her. Those came from the Final Investigation Report as well as the testimony of Constable McCluskie at the discipline proceeding.

[57] The officer who attended and investigated at the scene, Constable Robert Cooper of the Delta Police, based on his notes,[8] observed that Constable McCluskie appeared to be impaired, read the roadside screening demand to him, observed him feign difficulty with providing the first sample by blowing insufficiently, blowing out of the side of this mouth, placing a piece of paper in his mouth. He noted that Constable McCluskie appeared to be affronted by the demand, and that he stated to those present that he was a member of the VPD gang squad. Constable Cooper also observed that Constable McCluskie made numerous requests to be taken home, to call a duty officer from the VPD, that he called him "bro," and that after being taken into an ambulance he used the paramedic's cell phone to call Constable Cooper and ask him not to submit the papers.

[58] In his interview with the investigator, Constable Cooper confirmed his perception that Constable McCluskie was deliberately failing to comply with the roadside screening demand, and seeking preferential treatment, repeatedly.[9] He also stated that he received a second call from the same number that Constable McCluskie had used to call him the first time, but he declined to answer it.

[59] Acting Sergeant Erin Gray attended the scene as the supervising officer, upon request of the investigators after they became aware that Constable McCluskie was an off-duty member. In her Duty Statement, Sergeant Gray stated[10]:

> Immediately after being told and shown the FAIL and then accepted his right to a second test, Mr. MCCLUSKIE requested to speak to A/Sgt. GRAY outside. Mr. MCCLUKSIE was not listening and stated he needed to speak with A/Sgt. GRAY prior to continuing. Mr. MCCLUSKIE asked to speak in private and went to the

[8] FIR, pp. 28 – 29
[9] FIR, pp. 29 – 32
[10] FIR, p. 34

> rear of the ambulance. Mr. MCCLUSKIE stated that he knew A/Sgt. GRAY was the road boss and he wanted her to make this go away. Mr. MCCLUSKIE asked A/Sgt. GRAY to tell her members that the ASD must be broken and to drive him home. A/Sgt. GRAY told Mr. MCCLUSKIE that she could not do that. A/Sgt. GRAY said she knew this was an unfortunate circumstance and that it was tough position for everyone involved. A/Sgt. GRAY further stated that what was done, was done; that he would have to deal with his consequences but that he would get through it. Mr. MCCLUSKIE then told A/Sgt. GRAY that he would help A/Sgt. GRAY out if the roles were reversed. A/Sgt. GRAY advised that she would expect him to treat her that same way the police were treating him.

[60] Sergeant Gray's notes state as follows[11]:

> After he requested/said he wanted the second test, he asked to speak with me. • He knew I was the road boss and he wanted me to make this go away, he asked me to tell my guys that he ASD must be broken and to drive him home. • I told him I could not do that, that this was an unfortunate circumstance and a tough position for everyone involved. • I told him that what is done is done and he will have to deal with the consequences but that he will get through it. • He told me he would help me out if the roles were reversed, and I told him I would expect him to treat me like I'm treating him.

[61] In her interview with the investigator[12], Sergeant Gray stated that Constable McCluskie said to her, "this needs to go away …you need to make this go away, you're going to tell your members that the ASD is broken, it's a mistake and then you're going to drive me home. She characterized this as "more of a demand".

[62] Constable McCluskie provided a Duty Statement, in which he stated[13]:

> Shortly after midnight, nearly two hours after my last drink, I made the decision to drive myself home. It was cold on this evening, below zero degrees celsius, and the road was icy with very minimal lighting, if any. I hadn't eaten much throughout the evening and decided at the last minute to make a turn off from Hwy 17 onto Deltaport Way, where there is no lighting, with the intention of going to get some food. As I was proceeding on the off ramp on to Deltaport Way, I hit a patch of ice and subsequently hit a median curb that was curved with the roadway. This caused my vehicle, a 2015 Dodge Ram, to slide towards the right side of the road sliding down a sloped embankment and caused my vehicle to roll onto its roof.

[63] Notably Constable McCluskie made no mention in his Duty Statement of his requests of the attending officers not to process the paperwork in relation to the roadside

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[11] FIR, p. 36
[12] FIR, Exhibit, Grey Transcript, p. 5, ll.3 – 7.
[13] FIR, pp.17-18

screening test. When questioned about that behaviour in his interview with the investigator, Constable McCluskie stated:

> I am really embarrassed going back to these questions, I feel sick to my stomach that this is the type of behavior that I would have exhibited. I do not recall this at all. My recollection is that I was cooperative and would not' have caused any issue. I accept full responsibility that day, [redacted] I have apologized to the Chief; I have apologized to my co-workers, my team, my boss, my family. I am extremely embarrassed by this and I do not deny any of it. There was specifics that I don't recall, it's because, I honestly, just don't recall them and I honestly sick to my stomach of what sounds like occurred that night.[14]

[64] In his testimony at the discipline proceeding, Constable McCluskie described his experience with memory loss and selective memory attributable [redacted], and accepted the other officers' description of his behaviour in connection with the impaired driving investigation. He stated that he knew he had let a lot of people down, that he was sickened and disgusted by his behaviour, and that he wished he could apologize to everyone involved for what happened. He said that before the accident he would not have believed he was capable of acting that way and that his behaviour during the investigation was one of the reasons that he remains [redacted] that he realizes, in his [redacted] he was at a very low point, and he does not want to go back to that. [15]

[65] Based on the Final Investigation Report, the Findings of Fact set out by Discipline Authority Inspector Danroth in the Section 112 Report in relation to the second allegation were as follows:

> 16. Throughout the collision investigation and subsequent impaired investigation, Constable McCluskie repeatedly asked to be driven home and to be able to contact the on-duty Vancouver Police Duty Officer.
>
> 17. When Acting Sergeant Gray first arrived on-scene, Constable McCluskie asked her to have the police take him home and forget about this incident.
>
> 18. At 01:35 hours, Constable Cooper asked Constable McCluskie when he finished his last drink and he replied, "I've had nothing today". Constable Cooper believed that this was an obvious lie and that it was a flippant answer based on the time of day.

[14] Constable McCluskie Interview Transcript, p.6
[15] Discipline Proceeding Transcript, pp 12 – 13

> 19. Constable Cooper confirmed that Constable McCluskie had nothing in his mouth and read him the ASD breath demand. Constable McCluskie responded by grabbing a paper bag from the ambulance shelf, tearing off a piece of paper bag and chewing on it. Acting Sergeant Gray immediately asked him to spit it out which Constable McCluskie did.
>
> 20. In the first breath sample, Constable McCluskie had three failed attempts due to "low flow" and it was apparent to Constable Cooper that he was purposely not providing a proper sample. Constable Cooper was eventually successful in obtaining two samples.
>
> 21. At one point, Constable McCluskie asked to speak to Acting Sergeant Gray privately and demanded that she make this go away and he told her that she was going to tell her members that the ASD was broken, and that they should just drive him home. In the same conversation, Constable McCluskie also told the Acting Sergeant that if the roles were reversed he would do this for her.
>
> 22. While he was on the way to the hospital in the ambulance, Constable McCluskie had the BCAS paramedics call dispatch and ask Constable Cooper to call him. Constable Cooper returned this call and during the ensuing conversation, Constable McCluskie asked Constable Cooper to not to go ahead with the IRP and to not submit the papers.

[66] In her Disciplinary Disposition Record Reasons[16], Superintendent Davey summarized the facts in relation to the second allegation as follows:

> Cst. McCluskie engaged in behaviour at the scene that was considered by one of the investigating officers as obstructive. He gave inaccurate answers to questions, he put a foreign object (paper) into his mouth after the investigating officer cleared his mouth prior to presenting the approved screening device. He tampered with the straw when he was asked to blow in the approved screening device by blocking the hole, which produced low flow volume. He did blow in two separate screening devices and blew "fail" both times. He was issued an immediate roadside suspension, and a 30-day vehicle impoundment.
>
> In the course of the investigation, Cst. McCluskie identified himself as a police officer to the Delta officers on scene investigating the accident. He sought favour, as part of his role as a police officer and asked that the investigating officers not proceed with the suspension, and just drive him home. He engaged in some obstructive behaviour, such as inaccurately answering questions. He was ultimately taken to the hospital to be examined for any injuries.
>
> The following day, Constable McCluskie [redacted]. He was off work for

[16] Appendix A to Form 4

> a significant amount of time, and sustained significant financial losses due to this incident. [redacted]

[67] I will observe that in her summary of the facts, Superintendent Davey did not highlight the specific fact that Constable McCluskie attempted to persuade Acting Sergeant Gray to report that the screening device had broken and to decide not to file the paperwork pertaining to his fail results, or the prolonged period over which Constable McCluskie persisted in his attempts to persuade Constable Cooper not to proceed.. She made no mention of the fact that Constable McCluskie called Constable Cooper from the ambulance at least once to ask him not to proceed, and probably a second time.

[68] In her assessment of the seriousness of the misconduct, Superintendent Davey stated[17]:

> …regarding the misconduct related to Cst. McCluskie seeking favour or special consideration based on being an off-duty police officer. He identified himself as an offduty Vancouver Police officer. On several occasions, with different officers at the scene of the accident, he tried to have the police investigating the accident take him home and forget about the incident. He tried to thwart the investigation by not blowing into the approved screening device properly, by putting a foreign object (paper) into his mouth before being asked to blow, by not answering questions accurately. This is all behaviour that can be explained by being under the influence of alcohol and Cst. McCluskie admits to that, however it is still egregious.
>
> ***He counselled an Acting supervisor to tell the other members that the approved screening device was broken, and that they should just drive him home. This behaviour is unacceptable and in Cst. McCluskie's own words, he said that he feels sick about it.***
>
> The behaviour Cst. McCluskie displayed that night put the Delta police officers in a terrible position to have to do their jobs conducting an impaired driving investigation under challenging circumstances – a job that Cst. McCluskie himself has likely conducted on many occasions. I find Cst. McCluskie's behaviour at the scene in this case to be seriously inappropriate. I acknowledge that he has taken full responsibility for his behaviour at the scene and feels sickened by it.

[69] In her conclusion with respect to penalty, the discipline authority stated:

> This is very serious behaviour, where one of the officers at the scene investigating the impaired driving incident felt aggrieved and believed Cst. McCluskie was obstructing the investigation. This particular incident should be considered at the

[17] Disciplinary Disposition Record, p. 5

> high end of the range due to its seriousness. It is on the basis of this evidence that I impose a penalty of 3 days' suspension without pay for the second allegation of Cst. McCluskie using his position as a police officer, while off-duty, to obtain special consideration.

[70] While Superintendent Davey made the highlighted observation and characterized Constable McCluskie's behaviour as inappropriate, the issues raised by the Commissioner and his Counsel are that she focused on the impaired driving aspect, she erroneously dismissed the seeking preference behaviour as attributable to alcohol, she did not acknowledge the concern that the Analyst had expressed in his Rejection Notice, that this behaviour amounted to counseling a criminal offence, and that she failed to recognize that if the investigating officers had followed through on the member's request for preferential treatment, they could have placed themselves in the position of committing a criminal offence.

[71] In relation to the latter concern I will observe this would be true in every case in which an officer seeks preferential treatment based on his or her office and an investigator affords it for that reason. It does not appear to be a factor unique to this case such that a failure to articulate it constitutes an error on the part of the Discipline Authority. The larger issues are whether Superintendent Davey minimized the behaviour as alcohol-related and was inattentive to the full extent of it, including the time frame over which it occurred.

[72] It must be noted that Constable McCluskie's behaviour goes way further than the simple "badging" that occurs in many of the cases, in itself an act of discreditable conduct. In this case, Constable McCluskie identified himself as a police officer, identified his department, stated that he was a member of the gang squad at least once if not twice, asked two separate officers more than once each not to process his immediate roadside prohibition, suggested that the Delta duty officer destroy the readings and report falsely that the screening device was broken, and he persisted over a two-hour period in his efforts to persuade the investigating officer not to report the breath test results.

[73] Badging is a simply an implied attempt to gain preferential treatment. I understand that the Vancouver Police have a protocol around when it is appropriate for an

officer even to identify himself, when he is the subject of an investigation, including specific wording that the officer is required to state in order to make it clear he is not seeking preference. There was none of that protocol present in this incident, and nothing subtle about Constable McCluskie's behaviour. This was an outright and persistent request, including a suggestion that the duty officer destroy evidence and lie.

[74] Although Constable McCluskie has no recollection of his behaviour, it is clear from the cases dealing with the criminal offence of obstruction of justice that drunkenness does not negate the mental component of the offence. Nor is it advanced as a defence here, rather as mitigation or explanation of Constable McCluskie's lack of judgement on the evening in question.

[75] One must certainly question any attempt to characterize the protracted pattern of conduct as a mere lapse in judgement. This was more in the nature of a concerted, albeit ill-considered, campaign. The specificity of Constable McCluskie's requests, and the precision of some of his other recollections about the evening in question, taken with his self-described level of impairment, all militate against a conclusion that he was acting against his better judgement, at the time. He was acting in blatant self-interest and survival mode.

[76] However, in considering the issue of whether it is incorrect to characterize Constable McCluskie's behaviour on the date of the incident as "explained by being under the influence of alcohol" I do not believe Superintendent Davey was suggesting Constable McCluskie did not know what he was doing.

[77] Mr. Woodall argued that the Commissioner cannot assert that the member was impaired, in relation to the first allegation, and maintain that alcohol was not a factor on the second. The question to my mind, again, is analogous to the question of the criminal intent required for the offence of obstruction. The offence is one of general intent for which drunkenness is not a defence. Constable McCluskie's lack of memory or drunkenness do not detract from the facts and the apparent deliberation of his actions.

[78] Nonetheless, I will observe that Constable McCluskie's behaviour was confined within the context of a night on which he was not only impaired by alcohol, but in the throes of a [redacted]. He was a person with a [redacted] that clouded his judgement and created a measure of desperation.

[79] In stating that the behaviour might be explained by being under the influence of alcohol, Superintendent Davey appears simply to have been stating that she did not believe that Constable McCluskie would have behaved in that fashion, were he not both impaired, and [redacted].

[80] Constable McCluskie's reaction to that behaviour when confronted with it on the investigation, after regaining his sobriety, is consistent with that observation, and to my mind more salient in relation to his moral character and the characterization of his misconduct on the date of the incident than are the details, duration or apparent deliberation of his misconduct.

[81] Superintendent Davey assessed his reaction as genuine, and considered the behaviour within the context of [redacted], and I would not interfere with those findings.

Did the Discipline Authority Apply Sections 126(2)(d) & (e) Correctly?

[82] These factors are the likelihood of future misconduct, and whether the member has taken responsibility for his misconduct. They encompass the member's attitude to the misconduct and the circumstances that gave rise to it. In a case involving [redacted], they import considerations of [redacted], as pointed out by Mr. Woodall, and acknowledged by the Discipline Authority, in this case.

[83] After observing in relation to Section 126(2)(b) that Constable McCluskie had no prior disciplinary record, Superintendent Davey noted as follows in relation to paragraphs (d) and (e):

> d) the likelihood of future misconduct by the member:

> I had the benefit of listening to Cst. McCluskie testify during the Discipline Proceeding. I found his testimony to be sincere and I am of the view that he has taken complete responsibility for his actions in this incident. Not only has he accepted responsibility and admitted to the defaults, [redacted] regardless of whether he is at home, work or travelling. He is required to maintain this regimen for two more years. [redacted].
>
> Cst. McCluskie also has extensive support of his family. First his wife, who has stayed by his side to help him through this difficult year, [redacted] Second, his parents, who have also remained entirely supportive of Cst. McCluskie [redacted]. [redacted] since the date of this incident. I am satisfied that Cst. McCluskie has a well-established monitoring plan to keep him on track and extensive personal support to [redacted] I think the likelihood of Cst. McCluskie engaging in behaviour or misconduct of this particular nature in the future is extremely low.

e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence:

> Cst. McCluskie has taken full responsibility for his actions, and the misconduct, and has gone to great lengths to prevent its recurrence. He immediately took responsibility for his actions the day after the incident by informing his supervisor [redacted] He continues to be [redacted] While these conditions are a stipulation of an agreement he has with Human Resources, he accepts this as part of his plan to health. [redacted] He has surrounded himself with support – from his wife to his parents to his current supervisor and work partner. He has shared with all of them his struggles and leans on them for support. In my view, he has mitigated to the absolute best of his capability the likelihood of this type of incident occurring again in his life.

[84] In his submissions, Member's Counsel has summarized Constable McCluskie's testimony about his background and development of [redacted] as follows:

> 10. [redacted]
>
> 11. Cst. McCluskie was not a heavy drinker in his youth. However, during university, and later during his time as a Vancouver Police Department member, he gradually increased his social drinking. [redacted]
>
> 12. [redacted]
>
> 13. In July 2017, Cst. McCluskie was in a serious motor vehicle accident while at work. He was injured and off work for ten weeks. He was likely affected psychologically as well as physically but, like many police officers, he tried to "tough it out". He did not admit to himself or others how deeply he had been affected by the accident.
>
> 14. [redacted]
>
> 15. [redacted]
>
> 16. [redacted]
>
> 17. [redacted], Cst. McCluskie has voluntarily subjected himself to an extremely [redacted]
>
> 18. [redacted]

[redacted]

19. The financial impact on Cst. McCluskie has been enormous. The damage to his truck, payments to ICBC for damage to the roadway, the cost of getting his drivers licence back, lost overtime opportunities, significantly exceed $30,000.

20. The intensive monitoring will continue two or three more years. [redacted]

[85] As I have stated, Superintendent Davey assessed Constable McCluskie's description of his experience with [redacted] In doing so, she had the benefit of hearing testimony from Constable McCluskie. In assessing the Member's acceptance of responsibility and likelihood of future misconduct, she was in the best position to decide.

[86] Another factor relating to the Member's attitude toward the misconduct is the fact that he admitted it from an early point in the proceedings. While the Commissioner considered that the Discipline Authority erroneously referred to the Member's admission of the allegations in the prehearing conference as a mitigating circumstance, noting that the admission is a prerequisite to entering into an agreement with respect to penalty, in my view this is not a bar to treating the admissions as mitigation or concluding that they are relevant to the factors in question. Firstly, it is notable that the admission of the allegations preceded the offer of a prehearing conference, in the sense that the Member accepted full responsibility as early as the day after the incident. Secondly, in criminal proceedings, a guilty plea is always considered to be mitigating, though it may be a prerequisite to obtaining a plea bargain or joint submission.

[87] It is therefore not without relevance in this assessment that the Member fully admitted responsibility from the outset, and accepted the penalties imposed on him, firstly at the prehearing conference; secondly, following the Section 112 findings, and thirdly; following the disciplinary proceeding.

[88] The question to my mind is whether such issues pertaining to the Member's response and insight into the misconduct might serve to take a penalty outside the otherwise applicable range, and whether a decision to reduce a penalty below that range,

in order to emphasize education and correction efforts already undertaken by the officer might bring the administration of police discipline into disrepute. I will consider these issues in the section dealing with Section 126(3) after considering the matter of similar cases.

Did the Discipline Authority Apply Section 126(2)(g) Incorrectly?

[89] My view is that how the penalty compares with those imposed in similar cases is one of the primary factors bearing on the later issue under Section 126(3) of whether a penalty brings the administration of police discipline into disrepute. This factor was considered thoroughly by Superintendent Davey in her Reasons under the heading of "parity". The question engages issues of fitness, as I have already noted, and a finding that the penalty is within the range imposed in similar cases may in some cases be a complete answer to the issue of impact under Section 126(3). The question is also one with respect to which an adjudicator is equally equipped to perform the assessment but deference may be applicable, in that if the penalty is within a defined range, the adjudicator arguably should not "tinker" with it.

[90] Superintendent Davey reviewed a number of cases of seeking preference, which she found to define a range of penalty from reprimand to 3 days' suspension. Commission Counsel provided a survey of cases in his submissions, but submitted that none of the prior cases capture the prolonged and aggravated nature of the conduct in this case.

[91] I agree with Commission Counsel that the facts do not align with any of the prior cases, particularly given the component of counseling an obstruction of justice. The closest case would appear to be that of *McLaughlin*[18], on which I presided, in which the suspension pertaining to the allegation of seeking a preference agreed upon by counsel was 2 days, although I opined that 5 would not have been inappropriate. The officer in that case identified herself as a police officer during an impaired driving investigation, and asked the investigator to just take her licence, call a tow truck, and drive her home. The case lacked the features of the repeated requests over a lengthy period, and of the

[18] RR 16-03

member suggesting, or demanding, deceit, from the investigating officer. That officer had a prior alcohol related incident. In terms of mitigating factors, they included some demonstrated insight on the part of the officer, some medical evidence, and some efforts to "curtail" her alcohol consumption after the incident.

[92] In the absence of a body of salient authorities dictating a particular range of penalty this factor becomes less significant in relation to others under Section 126(2), and arguably makes the analysis under Section 126(3) more significant. In addition, even were a range defined by cases in which there was not the factor of [redacted] they would fall to be considered in light of cases in which [redacted] are significant factors. Because those factors bear as well on the perception or impact of the penalty, those cases will be considered in more depth in the following section.

Did the Discipline Authority Apply Section 126(3) Incorrectly?

[93] In her Reasons on the Discipline Disposition Record, Superintendent Davey stated as follows:

> I am mindful that Section 126(3) of the Police Act dictates that when I consider disciplinary or corrective measures, an approach that seeks to correct and educate Cst. McCluskie takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.
>
> I also acknowledge the need for the disposition of this matter to ensure public confidence in a high standard of conduct by the Vancouver Police Department (VPD), the maintenance of professional discipline in the VPD and the fair treatment of Cst. McCluskie.

[94] In her submissions on this Review, as set out above, Superintendent Davey elaborated on the need to emphasize correction and education, particularly in the context of [redacted], and she prioritized both parity and [redacted] as factors, along with the seriousness of the misconduct and the attitude of the Member.

[95] As I have stated, the question in considering the application of Section 126(3) under the applicable standard of review is in my view whether imposing a penalty that might otherwise be below the defined range, in order to recognize and encourage

[redacted], might be considered to bring the administration of police discipline into disrepute.

[96] The test of impact under Section 126(3) is objective and assumes a reasonable, perhaps even dispassionate, observer informed of all the circumstances. It does not bow to public outrage, which often tends not to be fully informed, or dispassionate. It is for this reason that the fact that a penalty that falls in the applicable range might be a complete answer to the question of impact.

[97] This issue of the application of Section 126(3) in a case of [redacted] arose in the case of *Young*, OPCC No. 15-11249, RR 18-02, cited by Mr. Woodall. The Adjudicator, Retired Judge C. Lazar, rejected Commission Counsel's submission that dismissal was appropriate for the officer, [redacted] The officer had falsified a number of prescriptions; primarily, the adjudicator found, in order to avoid withdrawal symptoms. He initially lied to the RCMP when his offences came to light. The officer was charged criminally and also faced allegations of discreditable conduct. Soon after his misconduct was detected [redacted].

[98] Once his employers became aware of the officer's situation, as in this case, they reacted compassionately and assisted him to obtain [redacted]. The discipline authority had imposed a reprimand [redacted] and monitoring on the prescription allegations, and a 4-day suspension on the deceit allegation. The officer had returned to work by the time of the review on the record, with the support of his department, several of whom attended court.

[99] In applying Section 126(3) and assessing the effect of those penalties on the administration of police discipline, Adjudicator Lazar observed:

> In the case of *R. v. Collins*, [1987] 1 S.C.R. 265, the court set forth the standard which should be applied when trying to determine whether a decision will bring the administration of justice into disrepute. In that case, Dickson C.J. said:
>
> > Since the concept of disrepute involves some element of community views, the test should be put figuratively in terms of the reasonable

> person: would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case.

[100] Adjudicator Lazar concluded as follows:

> It is my view that our hypothetical "reasonable person fully apprised of the circumstances of the case" would be moved to ask, "What would I do if one day I woke up and found I was a drug addict." I am not suggesting that the inevitable answer would be to falsify prescriptions but these would be totally uncharted waters. What would you do? Would you have any idea of where to turn for help? Would admitting you were addicted jeopardize your marriage, your job or your standing in the community? If you had the strength to quit on your own, how could you weather the withdrawal period without those around you knowing about it? Would there be a legal way to get enough drugs to ease yourself off? Could you afford a treatment centre? How would you arrange to get the time required to attend?
>
> It would be a nightmarish situation, and I am sure it was that for Young back in 2015. It would be neither fair nor reasonable to ignore the rest of his 41 years and judge his character based on his behaviour during that seven-month period.
>
> Young has been welcomed back to work. His Sergeant and two of his squad mates attended court with him for this hearing. Crown counsel dealt with the criminal charges in a compassionate way. Our provincial government has launched a class action lawsuit [against] forty manufacturers of opioids alleging negligence and corruption in the way they marketed their product. The general public is well aware of the crisis that has been created and, in my view, would not… lose respect for a police disciplinary process that failed to dismiss an otherwise good officer who found himself in the position that Young did.

[101] In these respects to my mind the *Young* case is the closest to this one in terms of the facts. The conduct was equally serious if not more so, involving multiple allegations, and criminal charges. Contrasted with Young's multiple occasions of altering prescriptions, McCluskie's transgressions occurred on a single occasion. Constable McCluskie's behaviour clearly involved some deliberation, as did Young's, but as with Young's it was driven by a disease that had taken hold of him.

[102] I really do not see a significant distinction between the criminal acts of altering prescriptions to feed, and mask, an addiction and making desperate and prolix entreaties to "mask" an impaired driving offence. Through his alcoholic haze Constable McCluskie

no doubt saw his career circling the drain, and spent the duration of the incident desperately clutching at straws in an effort to gain control of his circumstances. Clearly by the next morning he had come to his senses. He quickly owned up, sought help, [redacted], and submitted himself to strict monitoring. As described by Constable McCluskie, those steps he has taken since the incident, continues to take, and will continue for some time yet to take, fairly pale in comparison to whatever penalty might additionally be imposed through the disciplinary process. Notably as well, Constable McCluskie has engaged in mentoring other officers who come to him for advice regarding [redacted], so that the consequences and measures that he has undergone are becoming well-known in the department.

[103] In some cases, the path of the proceedings has some bearing on the assessment of penalty and in particular on the impact of the proposed penalty on the administration of police discipline from a public perspective. For instance, in the case decided by Adjudicator Pitfield already referred to, the proceedings had been bifurcated and necessitated analysis of the totality of the penalty in light of that bifurcation. Adjudicator Pitfield tempered the penalty he imposed in light of that.

[104] To some extent the course of the proceedings is simply a function of the scheme of the *Police Act* and the duty of the Commissioner to uphold the public interest. However, it must be noted that at each level in this case, the Commissioner took issue with a penalty that the applicable discipline authority, mindful of the relevant factors and after careful consideration, considered appropriate. The protracted nature of the process permitted (or dictated) by the provisions of the *Police Act* might lend themselves to a fairness analysis, in a case such as this where the Member has accepted responsibility from the outset.

[105] Member's Counsel referred to the Member's having submitted in good faith to these various proceedings. It was intervention on the part of the Police Commissioner on the grounds of public interest that took the proceedings to each next level and continued disciplinary scrutiny of the Member for over a year from the date of the allegations. Moreover, it was only at the final level of review on the record, in the submissions of

Commission Counsel, that the Member learned he was in jeopardy of a significant increase in the length of suspension and consequent potential loss of pay.

[106] I do not intend by this observation to be critical of the role of either the Commissioner or Commission Counsel, who have a solemn duty to uphold the public interest under the *Act*; only to suggest that the process itself in this case has served as a consequence that might be considered in connection with the analysis under Section 126(3). I will note as well that to his credit, despite the ongoing stress and uncertainty created by the successive reviews of his behaviour, the Member has apparently not succumbed to a relapse or even a misstep, which to my mind is indicative of the genuineness of his efforts, and predictive of his future success.

[107] Having objectively considered the allegation of seeking preferential treatment within the context of the circumstances in which Constable McCluskie found himself on the date of the incident, [redacted], I am unable to conclude that the penalty imposed by the disciplinary authority would bring the administration of police discipline into disrepute. I am comforted in this conclusion by the prior decisions of the officers at the previous levels of scrutiny in this matter, all of whom appear to have been mindful of the relevant facts, and in particular by the view of the Discipline Authority, who had the benefit of seeing Constable McCluskie testify and assessing his genuineness.

[108] While mindful of my role as adjudicator in relation to Section 126(3), of ensuring that the public interest is represented by an objective consideration of matters that have to this point been considered internally, I am of the view that a finding that a proposed penalty would bring the administration of policing into disrepute should not be made lightly where experienced and senior officers have brought their judgement to bear on the matter and decided that a suspension at the lower end of the range will suffice. Whether deference is applicable on this particular aspect of the analysis, unless the perspective of these senior officers appears to be clearly incorrect for an articulable reason such as error or contrary authority, I agree with Member's Counsel that their weighing of the relevant

factors under Section 126 and in particular, Section 126(3), should not be lightly dispensed with.

[109] In any event, I am satisfied that the Discipline Authority did not incorrectly apply Section 126 in deciding on a penalty of 3 days on the allegation of seeking preferential treatment. I considered whether it might be accompanied by conditions mirroring those in the Member's return to work agreement; however, I consider those terms to be more aptly applied on the impaired driving misconduct, as they were in the *McLaughlin* case, and in any event, they need not be reiterated in this context. In a future case where such measures have not been imposed by the employer, they might be appropriate as part of the penalty imposed under the *Act*.

[110] DATED at Vancouver, British Columbia, the 17th day of May, 2019.

Sincerely,

Carol Baird Ellan, Retired Judge
Adjudicator