

April 16, 2021

DECISION OF ADJUDICATOR

Pursuant to Section 141 of the Police Act, R.S.B.C. 1996, c.367

In the matter of the Review on the Record into the Ordered Investigation against  
a member of the Abbotsford Police Department.

**SECTION 150 ORDER**

Pursuant to section 150 of the Police Act so as to protect the identity of the victim and the children due to the sensitive nature of the allegations, I order that no person who is not a participant or a representative of a participant in these proceedings may access any information or records which are on the record in this matter or in the possession of a participant in an electronic or printed form, and no person may publish any such information, where that information would identify or tend to identify the name of the member, the victim, or the children of the member or the victim, without such information having first been redacted to the satisfaction of the adjudicator.

David Pendleton, Adjudicator

Dated January 11, 2021

TO: Name withheld Member  
c/o Abbotsford Police Department  
Professional Standards Section

AND TO: Chief Constable Michael Serr Discipline Authority  
c/o Abbotsford Police Department  
Professional Standards Section

AND TO: Clayton Pecknold Commissioner  
Police Complaint Commissioner

AND TO: Christopher Considine Q.C. Counsel  
Counsel for the Police Complaint Commissioner

AND TO: Kevin Woodall  
Counsel for the Member Counsel

## I. Introduction

1. In a Notice pursuant to section 138(1) of the Police Act dated June 23, 2020, Police Complaint Commissioner Clayton Pecknold (the Commissioner) ordered a Review on the Record in respect of the Discipline Authority's decision to propose suspending the member without pay following the member admitting to five allegations of misconduct.

## II. History of Proceedings

2. In July 2017, the Office of the Police Complaint Commission received information from the Abbotsford Police Department in relation to a number of incidents involving one of their members, which occurred

between December 30, 2016 and June 2017. On July 27, 2017 former Commissioner Stan Lowe ordered an investigation into the conduct of the member pursuant to section 93(1) of the Police Act.

3. Staff Sergeant Mike Novakowski, of the Abbotsford Police Department conducted an investigation and on August 8, 2019 submitted his Final Investigation Report to the Discipline Authority Deputy Chief Constable Paulette Freill.
4. On August 20, 2019 D.C.C. Freill, following her review of the Final Investigation Report, found that five allegations of misconduct appeared to be substantiated. She offered the member a Prehearing Conference.
5. On September 16, 2019 at the Prehearing Conference the member agreed to a 12-day suspension without pay. On September 24, 2019 the Commissioner rejected the Prehearing Conference agreement and the matter proceeded to a Discipline Proceeding.
6. On April 9, 2020, at the conclusion of the Discipline Proceeding, the Discipline Authority, Chief Constable Michael Serr (the Discipline Authority), made the following determinations in relation to the five allegations of misconduct which the member admitted to:
  - a) That on May 2, 2017, the member committed discreditable conduct by assaulting his estranged spouse.

The Discipline Authority proposed a disciplinary or corrective measure of 2 days suspension without pay.

- b) Between approximately January and May of 2017, the member committed discreditable conduct by placing GPS tracking devices on

two family vehicles driven by his estranged spouse.

The Discipline Authority proposed a disciplinary or corrective measure of 3 days suspension without pay.

- c) Between approximately January and June of 2017, the member committed discreditable conduct by following his estranged spouse and subjecting his spouse to unwanted communication via text, emails, notes and telephone calls and entering the spouse's residence when the spouse was not present.

The Discipline Authority proposed a disciplinary or corrective measure of 1 day suspension without pay.

- d) That on December 30, 2016, the member committed discreditable conduct by identifying himself as a police officer while off duty in order to facilitate access to a third party's security video and obtaining photographs of his spouse from that video.

The Discipline Authority proposed a disciplinary or corrective measure of 5 days suspension without pay.

- e) In approximately February and April 2017, the member committed neglect of duty by accessing a police database for non-duty related reasons.

The Discipline Authority proposed a disciplinary or corrective measure of 5 days suspension without pay.

- 7. On June 23, 2020, the Commissioner, after reviewing the record of the disciplinary decision concluded that the Discipline Authority correctly determined that the alleged misconduct had been proven. However, the Commissioner determined that the Discipline Authority incorrectly applied section 126 of the Police Act in proposing disciplinary or corrective measures.


- 8. On June 23, 2020, I was appointed to preside as Adjudicator on this Review on the Record pursuant to section 142(2) of the Police Act.

III. The circumstances of the misconduct

- 9. The circumstances of the misconduct are set out in the Record. Briefly summarized they are as follows:

- a) That on May 2, 2017, the member committed discreditable conduct by assaulting his estranged spouse. The member was charged with and pleaded guilty to assault. At his sentencing on [REDACTED] the Honorable Judge [REDACTED] summarized the assault as follows:

[REDACTED]

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- b) Between January and May of 2017, the member committed discreditable conduct by placing GPS tracking devices on two family vehicles driven by his estranged spouse. On January 10, 2017 the member's spouse found a GPS tracker fixed under the passenger seat of the vehicle she was driving. This was reported to Staff Sergeant Thompson of the Abbotsford Police Department. He spoke to the member who was then placed on leave for approximately six weeks. Despite having been cautioned and placed on leave, the member put a second GPS tracker on his spouse's vehicle. This tracker had been placed there for a couple of months before she discovered it on May 19, 2017. The member accessed the tracker periodically to insert fresh batteries and the evidence obtained from the App history showed that he monitored his wife's movements a total of 99 days.
- c) Between approximately January and June of 2017, the member committed discreditable conduct by following his estranged spouse and subjecting her to unwanted communication via text, emails, notes and telephone calls and entering the spouse's residence when she was not present. The member admitted sending the texts and other electronic communications. Her lawyer sent the member a letter directing him to stop sending inappropriate text messages and advising that a protection order would be sought if he did not stop.
- d) That on December 30, 2016, the member committed discreditable conduct by identifying himself as a police officer while off duty in order to facilitate access to a third party's security video and obtaining photographs of his spouse from that video.
- e) In approximately February and April 2017, the member committed

neglect of duty by accessing a police database for non-duty related reasons. On February 27 and April 24 the member accessed the database and made inquiries with respect to his spouse. He was not carrying out assigned police duties and he admitted his conduct contravened Abbotsford Police Department policy.

#### IV. The Record

10. For the purposes of this Review on the Record, I have been provided with and considered the record of the disciplinary decision pursuant to section 141(3). As well, I have considered the oral and written submissions of counsel and the authorities relied on by them.

#### V. The Law

11. The standard of review to be applied by an adjudicator in a Review on the Record is to consider if the disciplinary decision of the Discipline Authority meets the test of correctness pursuant to section 141(9). That standard was defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 50 as follows:

“As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect to jurisdictional and some other questions of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.”

The burden of proof is the balance of probabilities, which requires evidence that is sufficiently clear, convincing and cogent.

## VI. The Decision of the Discipline Authority

12. The decision of the Discipline Authority is contained in Appendix A of Form 4. At the Discipline Proceeding the member admitted to five allegations of misconduct. The Discipline Authority described the misconduct as follows:

“In November 2016, Constable \_\_\_\_\_ and Ms. \_\_\_\_\_ agreed to separate. The five substantiated allegations all stem from the marital break-up and the fact that Constable \_\_\_\_\_ wanted to save his marriage and was fixated on what his estranged wife was doing and who she may be seeing. The five substantiated allegations span over a seven-month period and were a cause of significant concern and stress for his estranged wife, Ms. \_\_\_\_\_.

13. I am satisfied that the Discipline Authority understood his role and obligation to consider all the relevant aggravating and mitigating factors (section 126(2) of the Police Act) when determining appropriate disciplinary or corrective measures. Starting at paragraph 9 and through to paragraph 73 he carefully and thoroughly considered the Final Investigation Report and the evidence and relevant reports before proposing disciplinary or corrective measures totaling 16 days suspension without pay for the five allegations of misconduct.



14. The issue in this Review on the Record is whether the Discipline Authority correctly applied section 126 of the Police Act in proposing disciplinary or corrective measures. The Discipline Authority described the misconduct as follows:

“As noted previously, there are five substantiated allegations which all have a nexus to the marital breakup and involve intimate partner violence and controlling/harassing behavior. This is extremely serious in nature especially for a police officer who understands the impacts of his actions. Furthermore, this was not a single emotional incident, but rather a sustained series of actions that occurred over more than six months. Therefore, when assessing the seriousness of the misconduct, I believe it is important to consider the totality of the five allegations as well as each allegation separately.”

The Discipline Authority also said:

“Any of these allegations, taken separately, would be considered serious. However, assessing them collectively and in the context of intimate partner violence paints an even more troubling picture.”

15. I am satisfied the Discipline Authority correctly characterized the misconduct as serious.

## VII. Submissions of Counsel

16. Mr. Considine, counsel for the Commissioner, submitted that the member’s conduct warrants very serious disciplinary or corrective measures and that the member should be dismissed from the Abbotsford Police Department.

17. In his written submission, Mr. Considine referred to each of the factors that must be considered pursuant to section 126(2). He emphasized the importance of the following factors:

- a) The seriousness of the misconduct.

He submitted:

“ The actions of Constable \_\_\_\_\_ were on a sustained basis over approximately six months from December 2016 to June 2017. They were planned, deliberate and sustained. He improperly went to his estranged wife’s vehicle on a near weekly basis to replace the tracker battery, notwithstanding being told to not do so by one of his superior officers is very disturbing and showed a complete disregard for his position as a police officer. The misrepresentations to the staff at the \_\_\_\_\_ in Maple Ridge and the misuse of his badge were all highly improper and purely motivated by personal reasons as part of the controlling behavior in the intimate partner violence. It is vital that the public confidence in police officers be maintained. The effect of sustained deliberate discreditable conduct over approximately six months by Constable \_\_\_\_\_ is a significant barrier to maintaining public confidence in policing and the justice system in British Columbia which reflects the seriousness of his misconduct. His overall misconduct was described by Chief Constable Serr as “extremely serious” when looking at the totality of the misconduct and intimate partner violence of which Constable \_\_\_\_\_ was aware.”

- b) The likelihood of future misconduct by the member.

He submitted:

“It has been noted that Constable \_\_\_\_\_ was being treated by a psychologist at the time of this sustained misconduct between December 2016 and June 2017 for an unrelated PTSD arising from his duties attending a tragic matter. However Chief Constable Serr expressed the concern that the treatment had not prevented the misconduct which had occurred over six months on a sustained basis.”

- c) Whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence.

After citing Judge [REDACTED]’s comment that it is very unlikely that the member will reoffend, counsel submitted:

“Constable \_\_\_\_\_ did admit his misconduct and that the pre-existing PTSD did not cause the overall misconduct. Chief Constable Serr found that the PTSD contributed to the member’s behavior, but evidenced concern that treatment had not prevented any of the misconduct. Chief Constable Serr found that Constable \_\_\_\_\_ plead guilty at the criminal proceedings and cooperated with the criminal investigation. Although he did not specifically find deceit, the Chief Constable did find that Constable \_\_\_\_\_ appeared to minimize his misconduct.”

- d) The range of disciplinary or corrective measures taken in similar circumstances.

After referring to a number of police misconduct cases from other provinces where the officer was dismissed, he submitted:

“the Canadian national trend is to take a strong stand against intimate partner violence and other police conduct in order to maintain public confidence in police officers. In appropriate circumstances dismissal has occurred. ”

- e) Other aggravating or mitigating factors.

After referring to the factors set out by the Discipline Authority in Appendix A Form 4 at paragraphs 44-56, he submitted:

“Of particular note is Constable \_\_\_\_\_ knew what he was doing was wrong and amounted to intimate partner violence. He was fully aware of his own Police Department policies. He made no effort to stop his misconduct for many months even though he had been warned by his superior and a lawyer.”

18. Mr. Considine submitted that a corrective approach to disciplining the member would be unworkable and would bring the administration of justice into disrepute. He argued that a 16-day suspension without pay in no way reflects appropriate discipline given the member’s conduct. He said the primary goal in this review is the maintenance of public confidence in light of the misconduct. In conclusion, Mr. Considine submitted:

“ultimately, the oversight process under the Police Act, as with oversight processes which apply to other members of the justice system, is designed to ensure public confidence in policing, police officers and police departments in British Columbia. Public confidence is essential to maintaining an impartial and fair justice system. The willful misconduct by Constable \_\_\_ when one considers all the section 126 factors, cannot be condoned and must merit dismissal in order to retain public confidence.”

19. Mr. Woodall, counsel for the member, submitted that the decision of the Discipline Authority to suspend the member without pay for 16 days should be confirmed. He argued that the Discipline Authority correctly considered and applied the factors set out in section 126 of the Police Act.
20. Mr. Woodall urged me to adopt an approach that takes into consideration the member’s preexisting mental illness, in this case, the member’s PTSD. Counsel submitted that the Commissioner is ignoring PTSD as a mental illness and is not acknowledging that it is an important mitigating factor to be considered when addressing misconduct. I note that Mr. Considine, on behalf of the Commissioner, acknowledged that PTSD was a mental illness but he submitted that the illness in this case did not cause or contribute to the misconduct.
21. The evidence at the Discipline Proceeding proved that the member had acquired PTSD as a result of service to the community as a police officer. Mr. Woodall relied on the evidence of the member’s treating psychologist Dr. [REDACTED] and argued that there was a substantial connection between the PTSD and the misconduct.

22. In his written submission, Mr. Woodall also referred to the factors to be considered in section 126. It is unnecessary in my view to go through his submissions regarding each of these factors given that he says the Discipline Authority correctly understood and applied them in proposing discipline.
23. Mr. Woodall submitted that the authorities relied on by the Commissioner are distinguishable because they are from other Canadian jurisdictions that have no legislative equivalent of section 126(3) of the Police Act and in none of the cases was mental illness a factor.
24. Mr. Woodall also argued that dismissing the member in the circumstances of this case would amount to discrimination contrary to the British Columbia Human Rights Code. He submitted:

“It is therefore submitted that the principles enunciated in s. 13 of the Human Rights Code apply to discipline under the Police Act. It is unlawful to order that a police officer be dismissed because of conduct that is substantially related to a mental illness, unless the employer has made proper efforts to accommodate the mental illness and the police officer has failed to take steps to address his mental illness.”

Mr. Considine, in his reply, submitted that the B.C. Human Rights Code has no application under the Police Act nor does an adjudicator have the jurisdiction to apply the Human Rights Code in proceedings under the Police Act. For the reasons that are set out hereafter in the Analysis section of my decision, I am satisfied it is unnecessary for me to decide whether the B.C. Human Rights Code applies to this Review on the Record.

25. Mr. Woodall submitted that there is an overwhelming connection between the member's PTSD and the misconduct. In conclusion, he argued that the member's mental illness should be a very significant mitigating factor. He argued that the member's violence would not be condoned by suspending him without pay and that to dismiss the member would bring the administration of police discipline into disrepute.

VIII. Analysis and the Factors to be Considered in Section 126(2)

26. Section 126(3) requires that an adjudicator or discipline authority give "precedence to an approach that seeks to correct and educate....unless it is unworkable or would bring the administration of police discipline into disrepute." The Commissioner submits that the member should be dismissed. In his decision, *In The Matter Of The Public Hearing into the Complaint Against Constable #369 Adam Page*, Adjudicator Pitfield said:

"Dismissal is the most severe of the permitted sanctions. It neither corrects nor educates the member. It punishes by terminating the member's employment. Therefore, in the context of the abuse of authority by way of assault of a civilian, I must decide whether the imposition of a lesser sanction directed at correcting or educating the officer would undermine organizational effectiveness, or public confidence in the administration of police discipline. If not, then a lesser sanction should be considered provided the sanction that is selected does not undermine public confidence in the administration of police discipline.

No mandatory minimum sanction is attached to any disciplinary default. Similarly, there is nothing that deems any

particular assault to undermine organizational effectiveness or public confidence in the administration of police discipline. Rather, as so well stated by Adjudicator Clancy *In the Matter of Constables Gemmel and Kojima*, PH 2004-01, the question to be considered is whether a reasonable man or woman aware of all the relevant circumstances would regard the omission to impose a sanction of dismissal in the circumstances of the assault would undermine public confidence in the administration of police discipline, and whether, from the Abbotsford Police Department's perspective the omission would undermine organizational effectiveness."

27. The evidence proves that the member is [REDACTED] years old and a [REDACTED] constable with the Abbotsford Police Department. He was a member of the [REDACTED] from [REDACTED] until he joined the Abbotsford Police Department in July [REDACTED]. He has acquired various specializations including Field Training Officer, Drug Recognition Expert and Qualified Breathalyzer Technician. He and his wife married in [REDACTED] and separated in [REDACTED] [REDACTED]. They have [REDACTED] children. In [REDACTED] [REDACTED] the couple divorced.
28. The Record reveals the member has one prior substantiated incident of misconduct in [REDACTED] for which he received a written reprimand and training. I do not consider this incident of any real significance in this review. Mr. Woodall provided several letters of support written by friends and co-workers that were filed as exhibits at the member's sentencing hearing. The authors of these letters described the member as a caring and devoted father, a good friend and a well respected police officer. The member has a good record of employment.



29. A question that arises from my review of the evidence is why the member, who is an experienced [REDACTED] year veteran, who is considered by his friends and his co-workers to be a hard working, dedicated police officer and a man of good character, who recognized he needed help and sought treatment for PTSD, would, in a span of six months, commit serious misconduct. The period of time when the misconduct occurred is, in my opinion, an anomaly and was, as the Discipline Authority found, connected to the break-up of his marriage.
30. The Discipline Authority correctly considered whether the member accepted responsibility for the misconduct and was willing to take steps to prevent its recurrence. He also considered the likelihood of future misconduct by the member. In the circumstances of this review I find these factors overlap and it is appropriate to consider them together. I am satisfied the evidence proves that the member has accepted responsibility for the misconduct. He pleaded guilty to assaulting his wife and admitted committing the allegations of misconduct. He abided by his bail conditions, completed the terms of a one-year probation order and continued seeing his psychologist. Judge [REDACTED] found that it was very unlikely that the member would re-offend. The Discipline Authority concluded that the likelihood for future misconduct is low. It has been nearly four years since the last incident of misconduct occurred. The breakdown of the marriage, the separation from his family and the divorce proceedings were difficult for the member. Fortunately, there have been no further incidents of violence in the past four years. The member has accepted that his marriage is over and he has behaved appropriately since. I find there is little likelihood of future misconduct.
31. The Discipline Authority correctly concluded there is no evidence that the Abbotsford Police Department contributed to the member's conduct. I am

also satisfied that the Discipline Authority considered the factors relating to the member's record of employment, the impact of the proposed disciplinary or corrective measures and other aggravating or mitigating factors based on his interpretation and understanding of the evidence he accepted.

32. I agree with his finding that the conduct of the member was serious. The member committed one act of physical violence (the assault) that involved

[REDACTED]

The other acts of misconduct, which I would describe as psychological violence, were planned and sustained over six months. Taken together and occurring in the context of a marriage breakdown, they are serious.

33. The Commissioner submits that the intimate partner violence was premeditated, planned and sustained over six months. His position is the misconduct warrants dismissal. To do anything less than dismiss the member, he says, would essentially condone the misconduct, would bring the credibility of the police and justice system into disrepute, would undermine public trust and public confidence, and would bring the administration of police discipline into disrepute.

34. With respect, I disagree that dismissal is necessary. As mentioned previously, I find that the six-month period during which the member committed misconduct to be an anomaly. The misconduct occurred during the member's marriage breakdown when he was experiencing a good deal of stress. The member did not say that his PTSD caused the misconduct. At paragraph 38, the Discipline Authority discussed the member's PTSD. He said:

“I accept Dr. [REDACTED]’s opinion that the post-traumatic injury sustained while on duty impacted Constable \_\_\_\_\_ mood and behavior and affected his judgment. I accept that the PTSD likely contributed to or exacerbated Constable \_\_\_\_\_ emotional responses and spontaneous outbursts.”

I agree with the Discipline Authority and I am prepared to accept that during this stressful time the PTSD made it more difficult for the member to control his emotions and to act appropriately. The member’s PTSD is a mitigating factor to be considered.

35. I am satisfied that a reasonable person, aware of all of the relevant circumstances in this case, including that the member has a [REDACTED] year career of public service which was marred by a six-month period of misconduct during which he was dealing with PTSD and struggling to make sense of his marriage breaking down, would not conclude that failing to dismiss the member would bring the administration of police discipline into disrepute.
36. I agree with the Discipline Authority that suspensions without pay are the appropriate disciplinary and corrective measures to impose. Where I disagree with the Discipline Authority and where I find that he was not correct was his proposal to suspend the member for only 16 days. The appropriate disciplinary and corrective measures are to suspend the member without pay for longer periods than proposed by the Discipline Authority given the seriousness of the misconduct. Lengthier suspensions without pay will have a very significant financial impact on the member, will denounce the misconduct and send a message that this misconduct will not be condoned and will maintain public confidence in the administration of police discipline.

37. I have considered the authorities provided by counsel. I find that the circumstances of this case are unique and I am satisfied the cases referred to by both counsel do not assist me in this Review on the Record. The cases are distinguishable on their facts or engage a consideration of provincial legislation unlike the Police Act.
38. The Discipline Authority discussed the aggravating and mitigating circumstances he considered relevant in paragraphs 44 to 56 of Appendix A. I agree with his assessment of the factors; however, I find that the proposed length of the suspensions was not correct. The Police Act provides for a suspension without pay for not more than 30 days. The member's misconduct involved intimate partner violence which occurred during the break up of his marriage. The assault of his wife was serious. The planned and sustained use of the GPS tracker and the unwanted communications, occurring after the member was placed on leave and warned by a superior officer and a lawyer, as well as his accessing the CCTV footage and police database are serious acts of misconduct.

#### IX. Conclusion

39. Pursuant to section 141(10)(b) and (c) I determine that the appropriate disciplinary or corrective measures are the following:
- a) Discreditable Conduct - Assault on his spouse - 15 days suspension without pay
  - b) Discreditable Conduct - GPS tracker - 15 days suspension without pay

- c) Discreditable Conduct - Unwanted communications - 15 days suspension without pay
- d) Discreditable Conduct - Viewing CCTV - 15 days suspension without pay
- (e) Neglect of Duty - Accessing database - 15 days suspension without pay

Each act of misconduct is separate and distinct and justifies a suspension without pay. The suspensions will run consecutively. The cumulative result of 75 days of suspension without pay is reasonable, appropriate and not disproportionate. Given the outcome of this Review on the Record, it is unnecessary to consider Mr. Woodall's submission regarding the Human Rights Code.

- 40. I have no recommendations to make to the chief constable or the police department concerning changes in policy or practice.

*David Pendleton*

David Pendleton

Adjudicator

April 16, 2021