



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2020-17320

June 30, 2021

- To: Sergeant [REDACTED] [REDACTED] [REDACTED] (Member)
c/o Oak Bay Police Department
Professional Standards Section
- And to: Inspector [REDACTED] (External Investigative Agency
c/o Vancouver Police Department External Discipline Authority)
Professional Standards Section
- And to: The Honourable Judge Carole Lazar, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of
British Columbia
- And to: Chief Constable Ray Bernoties
c/o Oak Bay Police Department
Professional Standards Section
- And to: His Worship Mayor Kevin Murdoch
Chair, c/o Oak Bay Police Board

On January 13, 2020, the Office of the Police Complaint Commissioner (OPCC) received information from the OBPD in relation to an incident which occurred on January 10, 2020.

Based on the information received, I ordered that Sergeant [REDACTED]'s conduct be investigated externally pursuant to section 93(1)(b)(ii) of the *Police Act* to determine whether the conduct constituted misconduct, specifically *Discreditable Conduct*, pursuant to section 77(3)(h) of the *Police Act*. Central Saanich Police Service Professional Standards investigator, Sergeant [REDACTED] [REDACTED] was named as the investigator.

During the investigation, the OPCC identified an additional area that required further assessment. Accordingly, on October 21, 2020, I issued a Direction for Investigative Steps and

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Police Complaint Commissioner

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directed the investigator to add and investigate an additional allegation of *Deceit* pursuant to section 77(3)(f)(i)(A) of the *Police Act* against Sergeant ██████

On November 18, 2020, the OPCC received the Final Investigation Report (FIR).

On December 2, 2020, I rejected the FIR and directed that further investigative steps be undertaken. I also determined that it was necessary in the public interest that this matter be investigated by a different external police force. Accordingly, pursuant to section 93(1)(b)(ii) of the *Police Act*, I appointed the Vancouver Police Department (VPD) to conduct further investigation.

Additionally, I determined that, pursuant to section 135(1) of the *Police Act*, it was necessary in the public interest to designate Chief Constable Adam Palmer of the VPD to exercise the powers and duties of the Discipline Authority for the purposes of all provisions under Division 3.

On May 21, 2021, VPD Professional Standards investigator, Sergeant ██████ ██████ completed his investigation and submitted the final FIR to the Discipline Authority.

Background

According to the OBPD, on January 10, 2020, Sergeant ██████ attended the OBPD while off-duty, and was present in the office while preparing for ██████ OBPD Constable ██████ who was on-duty at the time, noted that Sergeant ██████ vehicle was parked at the department and, during an interaction, she detected the smell of alcohol emanating from him. Constable ██████ formed the opinion that she could not let Sergeant ██████ drive and upon informing him of her opinion obtained his vehicle keys voluntarily. Sergeant ██████ was then detained for a criminal impaired driving investigation.

The evidence obtained through the *Police Act* investigation indicates that, upon attendance to the OBPD, the member parked his vehicle askew behind the department. The evidence further supports that he exhibited signs of impairment, including a strong odor of alcohol, and other indicia of impairment. Specifically, while interacting with the member, Constable ██████ noted a “pungent smell of liquor” coming from the member and noted that the member had slurred and slowed speech, slow and delayed movements, and had moments of unsteadiness on his feet.

During the *Police Act* investigation, Sergeant ██████ admitted to driving to the OBPD on the evening in question after having consumed alcohol and two prescription medications. He was apparently aware that one of his prescribed medications causes drowsiness and contains a warning not to operate heavy machinery. An expert opinion obtained through the investigation indicates that persons taking this medication should be warned about the potential impairment of mental alertness or physical coordination; the opinion indicates this may decrease the ability to perform tasks such as operating a motor vehicle, and that mixing this medication with alcohol can cause severe side effects. With respect to Sergeant ██████ other prescribed medication, the expert report indicates that alcohol use should be avoided or limited.

DA Decision

On June 3, 2021, the Discipline Authority, Inspector █████ issued his decision pursuant to section 112 in this matter. Specifically, Inspector █████ identified two allegations of misconduct against Sergeant █████. He determined that the allegations of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* and *Deceit* pursuant to section 77(f)(i)(A) of the *Police Act* did not appear to be substantiated.

With respect to the allegation of *Discreditable Conduct*, the Discipline Authority determined that Sergeant █████ was not impaired by alcohol while driving and displayed common symptoms caused by the side effects of his prescribed medication. The Discipline Authority concluded that he could find nothing in the member's behaviour, words, or actions that would lead a dispassionate, reasonable, and fully apprised person to believe that the member's actions did, or likely would, bring discredit to the OBPD.

With respect to the allegation of *Deceit*, the Discipline Authority found that there is no evidence that Sergeant █████ intentionally or knowingly lied to police investigators. Rather, he concluded that any discrepancies in his account appear to be the result of memory, as opposed to deception.

OPCC Decision, Section 117 of the *Police Act*

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

In relation to the allegation of *Discreditable Conduct*, I am of the view that the Discipline Authority erred in failing to adequately assess all of the available evidence as to whether Sergeant █████ was impaired by the prescription medication that he had ingested and, or, the mixture of the prescription medication and the alcohol he admitted to consuming. Several witness officers interviewed during the course of the investigation provided evidence of indicia of impairment which supports Sergeant █████ being in an impaired state while operating a motor vehicle. Further, during the *Police Act* investigation Sergeant █████ admitted to having operated his motor vehicle after having consumed alcohol and prescription medications.

With respect to Sergeant █████ operation of a motor vehicle after having consumed prescription medications and alcohol, while exhibiting signs of impairment, the Discipline Authority identified the correct test for *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act*. In *Mancini v. Constable Martin Courage*, OCCPS #04-09, the Ontario Civilian Commission on Police Services adopted the following definition of *Discreditable Conduct*:

The concept of Discreditable Conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.

While I am not bound by the view of the Ontario Commission, I do agree that the test was fairly stated in *Mancini* and appropriate in the context of the *Police Act* in this province. The above test has been consistently applied by Discipline Authorities and adjudicators to assess allegations of *Discreditable Conduct*.

It is my view that while the Discipline Authority did reference *Mancini* in his assessment, he did not reach the correct outcome based on that test. Specifically, I have a reasonable basis to believe that the decision of the Discipline Authority was incorrect in his determination that, when measured against the reasonable expectations of the community, Sergeant [REDACTED] conduct did not constitute *Discreditable Conduct*.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Carole Lazar, retired Provincial Court Judge, to review this matter and arrive at her own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED] [REDACTED] Acting Registrar

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