

DECISION ON DISCIPLINARY OR CORRECTIVE MEASURES

PURSUANT TO SECTION 126 POLICE ACT, R.S.B.C. 1996, c. 267

In the matter of a Review on the Record into
an ordered investigation concerning

Special Municipal Constable Foster Martin
Formerly of the Victoria Police Department (“VPD”)

To: Former Special Municipal Constable Foster Martin (“SMC Martin”)

And to: Chief Constable D. Manak, Victoria Police Department (“Chief Manak”)

And to: C. Pecknold, Police Complaint Commissioner (the “Commissioner”)

And to: Sgt. L. Hollingsworth Agent and Representative for SMC Martin
(the “Representative”)

And to: M. Underhill, K.C., & E. Ronsley, jointly Counsel to the Commissioner
 (“Counsel to the Commissioner”)

And to: Insp. C. Brown, Vic PD, Discipline Authority (the “Discipline Authority”)

Review on the Record Misconduct Decision date: October 4, 2023
Disciplinary or Corrective Measures Decision date: November 14, 2023

Place: Victoria, B.C.

PART III

Disciplinary or Corrective Measures

Executive Summary

SMC Martin is now a former special municipal constable. In Part II of this decision, it was determined that the Discipline Authority had erred in assessing the misconduct allegations concerning the former member. SMC Martin was found to have Substantiated Misconduct including both Discreditable Conduct and two allegations of Deceit.

In considering the Substantiated Misconduct of the former member in the context of the factors set out in section 126(2) of the *Police Act*, I have determined that the only appropriate disciplinary sanction is the dismissal of SMC Martin.

I Overview

- (1) SMC Martin is now a former member having resigned his position as a special municipal constable subsequent to the hearing with respect to the review of this matter which took place June 26, 2023.
- (2) On October 4, 2023 following a review of the record and consideration of all submissions, I determined that the following allegations of misconduct concerning SMC Martin arising during 2021 and 2022 had been substantiated (the “Misconduct Decision”):
 - (a) *Discreditable Conduct pursuant to section 77(3)(h) of the Police Act for taking a video of himself on duty with a male prisoner in the background purportedly masturbating and sharing it with work colleagues;*
 - (b) *Deceit pursuant to section 77(3)(f)(i)(A) of the Police Act arising from repeated untrue and misleading oral responses given to the Investigator during 2022 in relation to the sharing of the Neighbour Video; and*

- (c) Deceit pursuant to section 77(3)(f)(i)A as a result of repeated untrue and misleading oral responses given by the member to the Investigator during 2022 concerning the taking of the Prisoner Video, and the subsequent sharing of that video with co-workers.

(the “Substantiated Misconduct”)

- (3) Matters were adjourned to receive submissions from Counsel to the Commissioner and the Representative on appropriate disciplinary or corrective measures.
- (4) All defined terms in the Misconduct Decision apply to this component of the review decision relating to SMC Martin.

II Legislative Framework:

- (5) The key legislative framework governing disciplinary or corrective measures in relation to substantiated misconduct is found in s. 126 of the *Police Act*. That section provides as follows:

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 s. 113 [complainant's right to make submissions], the discipline authority must, subject to this s. and s.s 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.

- (6) In completing my analysis, I am required to consider all aggravating and mitigating circumstances in order to determine the just and appropriate disciplinary or corrective measures in relation to the Substantiated Misconduct.
- (7) If I determine that one or more disciplinary or corrective measures are necessary, s. 126(3) of the *Police Act* provides that “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”.

III Nature of the Misconduct

- (8) The key findings of fact relating to the Substantiated Misconduct concerning SMC Martin set out in the Discipline Decision are summarized as follows:
 - (a) In 2021, SMC Martin had commenced work as a Special Municipal Constable with responsibility for the monitoring of prisoners under the jurisdiction of VPD;
 - (b) While employed as a special municipal constable, SMC Martin applied to join the VPD as a police officer;
 - (c) In the course of interviews related to that application in 2021, allegations arose concerning SMC Martin’s taking and sharing of intimate videos with co-workers;
 - (d) Criminal and *Police Act* investigations were commenced to address the allegations arising from the complaint received in relation to SMC Martin;
 - (e) Criminal charges did not arise from the allegations, however, an Investigator acting pursuant to the *Police Act* conducted multiple interviews in relation to the alleged misconduct in 2022, including interviews with SMC Martin;
 - (f) SMC Martin was unequivocal in his initial responses to the Investigator in 2022 denying any possibility that his misconduct may have taken place;
 - (g) SMC Martin subsequently tried to deflect responsibility to others and then denied recalling the incidents in question;

- (h) With respect to the sharing of the Prisoner Video SMC Martin changed position at the Discipline Proceeding and admitted taking and sharing the video he originally denied in all respects;
- (i) SMC Martin ultimately changed his position on SMC Cochrane having viewed his Neighbour Video while minimizing and attempting to normalize the incident;
- (j) SMC Martin's conduct throughout, as set out above in relation to his credibility, sought to deny, deflect, minimize and equivocate on matters related to his misconduct; and
- (k) Without doubt, SMC Martin knew that his original complete denials could not be true, yet chose to maintain those responses to the Investigator.

IV Submissions of the parties

- (9) Counsel to the Commissioner provided detailed submissions and authorities in relation to SMC Martin's misconduct (Marked as "D & C Measures # 1").
- (10) The key submission of Counsel is that the only disciplinary or corrective measure that is appropriate on the facts of this case is the dismissal of SMC Martin. That position is advanced by Counsel largely as a result of the argument that the deceitful misconduct of SMC Martin is extremely serious.
- (11) Furthermore, Counsel submits that any measure short of dismissal, would be unworkable, and ultimately bring the administration of police discipline into disrepute.
- (12) The Representative was also asked to provide submissions. No such submissions were received, however, in substitution, the Representative provided a letter from SMC Martin (Marked as "D & C Measure #2").
- (13) SMC Martin's letter does not specifically address the section 126(2) factors. It does, however, address two points.
- (14) First, SMC Martin confirms that it has always been his life's dream to serve as a police officer. Working as a special municipal constable was, for the former member, an important first step in his achieving his goal of serving as a full constable. SMC Martin emphasized that he had come to the application stage of serving as a police officer with long held values, morals and a clear conscience.
- (15) Second, SMC Martin notes that the Substantiated misconduct took place when he was 20 and 21 years of age. The former member maintains that as a result of these proceedings, he has developed overwhelming feelings of guilt, remorse for the likely consequences to a future career in policing and profound embarrassment that he put others at risk as he breached the public's trust in his service.

(16) Finally, SMC Martin confirms that he accepts the final decision concerning his misconduct. However, he expresses serious regret for what has taken place and the strong hope that at some point in the future, he will have the opportunity to prove his maturity and value as a possible police officer.

VI Aggravating and Mitigating Circumstances

(17) I will now turn an analysis of the relevant factors set out in s. 126(2) of the *Police Act*.

(18) As an overview comment, I am not satisfied that the Discipline Authority correctly evaluated and applied the various factors under section 126(2). In large measure this arises from my conclusion that the Deceit allegations had in fact been substantiated warranting a significantly different focus on aggravating and mitigating circumstances.

(i) Seriousness of the Misconduct s. 126(2)(a)

(19) The first substantiated allegation of misconduct relates to discreditable conduct by SMC Martin recording and sharing intimate images of a person in custody with coworkers.

(20) Counsel to the Commissioner submits that these actions were a serious violation of the privacy of the person in custody to whom SMC Martin owed a duty of care.

(21) However, Counsel submits that the two substantiated allegations of misconduct by way of Deceit are even more serious.

(22) The Representative provided no submissions on this point. Although accepting the Misconduct Decision, SMC Martin did not specifically address the issue of seriousness in his letter.

(23) Having reviewed the circumstances relating to the Substantiated Misconduct, I find that:

- (a) The misconduct by way of discreditable conduct was serious, resulting in a clear breach of the duty of care owed to the subject of the recordings by SMC Martin and a breach of public trust;
- (b) Such misconduct was done for the apparent amusement of SMC Martin demonstrating, as Counsel to the Commissioner notes, a disturbing indifference to basic standards of trust, care and professionalism applicable to all officers;

- (c) With respect to the substantiated misconduct by way of Deceit, there can be no doubt that such findings touch on the most serious disciplinary default relating the duties of a sworn officer;
- (d) Misconduct by way of deceit is at the highest level of seriousness because it relates directly to the honesty and integrity of the individual concerned. Those universal duties of honesty and integrity for all sworn officers of the law are not skills acquired through training or experience, rather they are foundational standards from the first day of sworn service for all officers. In this case, SMC Martin clearly demonstrated that he completely lacked those foundational personal standards, resulting in the highest level of serious misconduct;
- (e) SMC Martin demonstrated a casual perspective on basic honesty. His actions were clearly egocentric. Truth, to him, was a flexible concept throughout the investigation and subsequent proceedings;
- (f) The seriousness of this misconduct was exacerbated by SMC Martin's initial denial of his misconduct and his minimization and equivocation with respect to the same throughout the discipline proceedings;
- (g) Finally, the seriousness of SMC Martin's misconduct was further compounded by his attempts to deflect blame and efforts to cast other coworkers as blameworthy to avoid personal responsibility. Those actions by SMC Martin were serious in that they misled a statutory investigator, and undermined the foundations of the police oversight process.

(24) Overall, I am satisfied that the Substantiated Misconduct is at the highest level of seriousness, and therefore a significant aggravating factor.

(ii) Record of Employment s. 126(2)(b)

(25) The information made available to these proceedings concerning SMC Martin's record of employment confirms that he began work as an auxiliary jailer for VPD July 15, 2021.

(26) There is no material in the Record, either aggravating or mitigating, relevant to consideration of the Substantiated Misconduct.

(iii) Impact of Proposed Measures on Member, His Family and His Career (s. 126(2)(c)

(27) Implicit in the letter provided by SMC Martin is confirmation that the findings of misconduct themselves will have a significant disciplinary effect on the former member for many years, likely foreclosing any efforts to serve as a police officer for a considerable time.

- (28) Counsel to the Commissioner did not specifically address this factor in submissions.
- (29) I find that the potential impact of a dismissal can be very serious for the former member in terms of income, benefits and future employment prospects. A suspension from service without pay would also have a significant effect on the former member's possible future career prospects.
- (30) In all of the circumstances, I find that the impact of a suspension or dismissal from service could have serious consequences for the Member, and are properly raised as a mitigating factor.

(iv) The Likelihood of Future Misconduct by the Member (s.126(2)(d))

- (31) As noted earlier, SMC Martin has resigned from his position as a Special Municipal Constable with the VPD.
- (32) The Record does not disclose that SMC Martin has any prior substantiated misconduct.
- (33) In the decision of the Discipline Authority, at para 23, SMC Martin's age (21), his limited training and lack of mentorship were all noted as mitigating factors. Counsel to the Commissioner submitted that the Discipline Authority misapprehended the significance of these factors in considering appropriate disciplinary measures
- (34) Counsel to the Commissioner specifically submits that:
- (a) There is a basic principle that police must respect the basic dignity and privacy of others, and that such a principle does not vary with the member's age or experience;
 - (b) The public expects that all members, regardless of age and experience, will not record and share intimate videos of others without their consent;
 - (c) SMC Martin's lack of experience should be given little weight as the former member's actions did not arise from an issue in training but rather were contrary to the most basic standards of conduct for police;
 - (d) With respect to the findings relating to deceit, again, Counsel submits that youth and lack of experience have little if any weight. It is submitted that honesty is the most basic requirement for police officers and does not, and should not, require training or expertise; and
 - (e) Finally, Counsel submits that contrary to submissions at the Discipline Proceeding, there can be no different standard with respect to the Substantiated Misconduct

based on alleged differing generational values. The fact that SMC Martin reported that it was common amongst his contemporaries to record and share non-consensual videos of individuals engaged in sexual activity cannot be a basis to vary from the most basic standards of conduct.

(35) SMC Martin's letter indicates that with the passage of time, he has matured, and is embarrassed by the positions he took on the issues of misconduct. It is his hope that with further maturity, there will be no risk of a reoccurrence of such issues.

(36) Other than the letter from SMC Martin, which is itself not evidence, there is no material before me to confirm that the risk of further misconduct is either non-existent or low. Although I accept and have taken into account the former member's thoughts and hopes, the letter remains as the only indicia of hope for the future.

(37) As such, I conclude that there remains a risk of further misconduct if the former member were to resume or take up policing duties. Absent cogent evidence to the contrary, it would not be responsible to ignore the submissions of Counsel to the Commissioner on this factor.

(v) Whether the Member Accepts Responsibility for the Misconduct and is Willing to Take Steps to Prevent its Recurrence (s. 126(2)(e))

(38) SMC Martin did acknowledge and accept the allegation of misconduct relating to discreditable conduct.

(39) As well, the letter provided by SMC Martin did confirm an acceptance of the findings of misconduct.

(40) However, there has never been any formal acknowledgement of the deceit allegations nor of the fact that SMC Martin had deliberately provided untrue and misleading statements to the Investigator throughout the investigation.

(41) SMC Martin has resigned from his position and as such, taken steps to prevent recurrence of the misconduct in issue.

(42) Beyond that, however, I am not satisfied that there is evidence before me of the practical steps SMC Martin would be prepared to take to change his attitude and values if he were to apply for another sworn officer position at some later date.

(43) The actions of SMC Martin in recording and sharing videos of intensely intimate and personal third party acts were repeated and reported by the former member himself to be part of his normal activities at home and elsewhere.

- (44) Although SMC Martin did express remorse for the Prisoner Video, it is not at all clear that he understood why such actions were wrong as he consistently minimized and equivocated on the scope, nature and importance of such issues.
- (45) As well, the issues surrounding SMC Martin's honesty remain unresolved.
- (46) These circumstances collectively raise a further significant aggravating factor with respect to the misconduct in issue.

(vi) 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
(s. 126(2)(f))

- (47) There is no evidence of any relevant department policies, standing orders, internal procedures or actions of SMC Martin's Supervisor that might have contributed to the acts of misconduct which are the subject of these proceedings.

(vii) The Range of Disciplinary or Corrective Measures Taken in Similar Circumstances s. 126(2)(g)

- (48) A review of the range of disciplinary or corrective measures taken in similar circumstances is important to ensure that some degree of parity is applied to members dealing with misconduct sanctions in similar circumstances.
- (49) Counsel to the Commissioner submits that the weight of authority justifies the dismissal of the Member.
- (50) The specific submissions of Counsel to the Commissioner on the relevant authorities are as follows:
- (a) With respect to discreditable conduct, Counsel notes that there are few recorded local disciplinary decisions;
 - (b) Counsel does rely on an Ontario decision, *Orser v Ontario Provincial Police* 2018 ONCPC 7 which ultimately saw the dismissal of the member. In that case the member also engaged in the recording of intimate situations without consent and shared those images with coworkers. Although the circumstances were, in part, distinguishable, Counsel submits that SMC recorded his Prisoner Video on duty and in circumstances where he had a duty of care towards the prisoner in question;

- (c) With respect to the substantiated misconduct of deceit, Counsel submits that adjudicators under the Police Act have consistently held that the appropriate range of disciplinary and corrective measures includes suspension, a reduction in rank or dismissal: *Review on the Record – Steen OPCC 2018-14638; Public Hearing – Page OPCC PH2012-03*; and
- (d) Counsel further submits that deceit is the most serious disciplinary default that can be committed by an officer and the dismissal will always be a sanction to be considered in such cases.

(51) As noted, there were no submissions on behalf of the Member on this factor.

(52) Considering all of the foregoing I conclude that, although a lengthy suspension may, in appropriate circumstances of serious misconduct, be the correct choice of disciplinary outcome, the facts must warrant that conclusion.

(53) I am also satisfied that although dismissal is a rare disciplinary sanction, it is properly within the range of cases evidencing the most serious misconduct resulting in a high risk to public confidence in police discipline proceedings, and of course, a loss in confidence in the officer concerned.

(viii) Other Aggravating or Mitigating Factors

(54) I find that it is relevant to consider the following as other aggravating circumstances:

- (a) SMC Martin was found to be a not credible witness in these proceedings; and
- (b) While the age, training and experience of SMC Martin may have some mitigating impact on the discreditable conduct issue, there can be no mitigating impact of those factors in terms of the two findings of misconduct by way of deceit. As Counsel to the Commissioner has argued:

“The requirement for police to respect basic privacy and dignity rights of others does not vary based on the members age. To hold otherwise would be antithetical to the primary objective of police oversight: protecting the public, The public expects that all members, regardless of age, will not record and share intimate videos of others without their consent.”

And further

“SMC Martin’s youth and lack of experience should similarly be given little if any weight with respect to Deceit. Honesty is the most basic of requirements for all police members, and is not something that requires particular training or expertise. As the Adjudicator stated, “there can be

no doubt that truth is not iterative. Facts are not flexible or negotiable, particularly from the perspective of an officer with policing responsibilities.”
(Counsel to the Commissioner submissions-October 20, 2023, paras 26 &27)

IX Analysis

- (55) As noted above, section 126(3) of the *Police Act* provides that if I consider that one or more disciplinary or corrective measures are necessary, I should prioritize an approach that seeks to correct and educate the member, unless it is unworkable or would bring the administration of police discipline into disrepute.
- (56) Having considered all of the foregoing, including the aggravating and mitigating factors noted above and the evidence adduced during the review process, I am satisfied that the focus of this decision must be to denounce the serious misconduct of SMC Martin in no uncertain terms and serve as a deterrence to others.
- (57) In circumstances where the evidence establishes a single act of discreditable misconduct or deceit in the context of an otherwise honourable and diligent record of performance, a suspension or demotion may be an appropriate disposition.
- (58) However, where the facts show a consistent pattern of deceit by way of evasiveness, deception and misconduct, those approaches to discipline and correction run the risk of bringing the process itself and respect for the administration of justice generally into disrepute.
- (59) On the facts of this case, I find that the only method of accomplishing the appropriate result is through disciplinary sanctions.
- (60) I am also satisfied that an approach that seeks to correct or educate the Member would clearly bring the administration of police discipline into disrepute. It would do so because such an approach would not provide the appropriate denunciation of the Member’s actions or address the very high likelihood of a loss of public trust in the Member, and the administration of police discipline.
- (61) Furthermore, correction or education on an issue as fundamental as honesty is manifestly inappropriate. As noted above, honesty and truthfulness are foundational character traits, essential for service as a sworn officer of the law. Public confidence in the administration of justice would be severely challenged if those foundational values were seen to be matters requiring education for those seeking policing roles.

(62) Furthermore, in terms of possible correction or education, it is noteworthy that almost two years have elapsed since the misconduct took place and there is no evidence that SMC Martin has taken the initiative to address any further training or education in the areas of his discreditable misconduct. In these circumstances, I am satisfied that correction or education would have no benefit.

(63) In the circumstances of this case, therefore, prospects for member rehabilitation must be a distant secondary objective.

(64) In terms of sanctions related to the Substantiated Misconduct I find that a reduction in rank is not possible in the circumstances of a special municipal constable, and even if it were, would prove to be an inadequate sanction for SMC Martin's misconduct as issues of continued trust in the values and actions of the former member would remain.

(65) The same issue arises when considering a suspension of any length. SMC Martin has, of course, resigned, and as such, a suspension is not applicable, nor appropriate in the circumstances of enduring and sustained deceit.

(66) In any event, at the end of either such options, the issue of trust and truthfulness would remain unresolved. The former member's role as a trusted officer of the law would be unquestionably and irreparably compromised in such circumstances.

(67) Given the seriousness of the Substantiated Misconduct, no other disciplinary or corrective measures are appropriate.

(68) It is my finding that a reasonable person, aware of all of the circumstances of the SMC Martin's misconduct, and all other relevant factors, would conclude that a failure to dismiss the Member would unquestionably undermine public confidence in the administration of police discipline.

(69) I find that there is an unequivocal public expectation that officers of the law will discharge their duties consistent with public trust in their performance, lawfully and honestly. SMC Martin has proven his inability to do so.

(70) I would add to that an observation that public expectations with respect to the lawful conduct of sworn officers of the law extends not only to on duty actions, but conduct off duty as well. Anything less would clearly reduce public trust in policing.

(71) Considering all of the foregoing, I have concluded that the only correct disciplinary sanction that adequately addresses the facts of this case is the dismissal of SMC Martin. I come to that conclusion acknowledging that:

- (a) The dismissal of SMC Martin from service as a special municipal constable will unquestionably have serious and enduring consequences for the him and his family;
- (b) The Substantiated Misconduct of SMC Martin, and in particular the multiple acts of deceit, were extremely serious and completely inconsistent with reasonable public expectations of an officer of the law, on or off duty;
- (c) SMC Martin has shown some understanding of the issues arising from the Substantiated Misconduct, but beyond a letter, nothing further supports the true depth of those convictions; and
- (d) Any reasonable person considering the circumstances relevant to this Review, would conclude that SMC Martin's Substantiated Misconduct, and attitudes to the various core issues raised by those findings, have resulted in a fundamental loss of trust and confidence in SMC Martin's ability to serve as a special municipal constable, or indeed any officer of the law.

X Conclusion and Orders

(72) Having considered the evidence and submissions of the parties, I am satisfied that the Discipline Authority erred in evaluating and determining the appropriate disciplinary or corrective measures that might be applicable to SMC Martin.

(73) Given the foregoing aggravating and mitigating circumstances, I have determined, pursuant to sections 141(10), 126(1) (a) and 127 of the *Police Act*, that SMC Martin must be dismissed in relation to the Substantiated Misconduct.

Brian M. Neal

Brian M. Neal K.C. (rt)
Adjudicator
Victoria, B.C.