OPCC File No. 2019-16234

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

AND

IN THE MATTER OF A REVIEW ON THE RECORD

OF DISCIPLINARY OR CORRECTIVE MEASURES IN RELATION TO

ALLEGATIONS OF DISCREDITABLE CONDUCT AGAINST A MEMBER OF

THE NEW WESTMINSTER POLICE DEPARTMENT

RULING ON AN APPLICATION

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1. Overview

[1] The member faces allegations of discreditable conduct under Section 77 of the *Police Act* in relation to incidents arising within the context of his employment. After this Review on the Record was ordered, the member resigned. The Police Complaint Commissioner has declined to exercise his discretion under Section 153 to cancel the review.

[2] The subject matter of the review is the adequacy of disciplinary or corrective measures proposed pursuant to Section 126 by a discipline authority presiding on a discipline proceeding. The review will proceed under Section 127, which makes Section 126 applicable to a "former member".

[3] The Chief Constable of the former member's department has filed an application requesting to provide submissions on the review. Two other issues have arisen at this stage: whether the Chief Constable's input might better be provided as additional evidence under Section 141(4); and whether the former member's name should continue to be withheld in this public proceeding.

[4] In relation to the application to provide submissions, while Section 141(7) specifically grants an adjudicator authority to permit a discipline authority or a complainant to make submissions concerning the matters under review, it does not contemplate other potential participants or contain any general power to add them. The Chief's counsel nonetheless submits that I have implied authority to permit the Chief's participation, based on principles of "practical necessity," which he rests on the need to address certain police discipline penalty principles derived from a line of cased following *Lévis (City) v. Fraternité des policiers de Lévis Inc.*[1] In support of that need, counsel for the Chief submits that the discipline authority failed to adequately address those principles in her decision, which he says creates a need to have them addressed by the Chief Constable in the review.

[5] In some cases, the member's chief constable or an employee of the member's department is the discipline authority, and thereby the member's employer may gain an opportunity to make submissions in a review on the record. That is not a presumed outcome: it rests on the discretion of the adjudicator. No parameters are provided in the *Act* for the exercise of that discretion. In my experience, an invitation is extended as a courtesy to the discipline authority. It is rarely taken up, but rarely denied.

[6] In this case, the Police Complaint Commissioner exercised his discretion under Section 92 and 93 to appoint a discipline authority from another department to conduct the investigation. That discipline authority has declined the invitation under Section 141(7) to make submissions on the review. The Chief Constable's position is that the combination of that event, the wording of the *Act*, and the legislative context creates a void that must be filled by implied authority to hear from the Chief Constable. The Chief Constable says he is seeking the same standing that the discipline authority would have been provided and is not seeking to provide evidence. He takes no position on the publication of the former member's name but notes that the former member has initiated proceedings in the BC Supreme Court under his name[2] which contain the background to this matter.

[1] 2007 SCC 14
[2] VLC S-S-2110443, November 12, 2021, Vancouver Registry

[7] The application is opposed by the Police Complaint Commissioner on the bases that the *Act* does not expressly provide standing for a chief constable in these circumstances, and that implied authority does not arise from the legislative scheme. The Commissioner submits that the appropriate vehicle for the Chief to provide input is by way of evidence under Section 141(4). He takes no position on the publication of the former member's name.

[8] As indicated, while submissions on the application were pending, the member resigned from the department and withdrew from the proceedings. He accordingly did not provide submissions in relation to the Chief Constable's application, or the other two issues raised.

[9] For the following reasons I have decided that the Chief Constable's application to provide submissions must be denied. He will be invited to apply to provide evidence under Section 141(4) pertaining to the workability of the disciplinary measures proposed by the discipline authority if he chooses to do so. Any such evidence shall be in a form approved by Commission Counsel, with my direction as required.

[10] In relation to the publication of the former member's name, it will continue to be withheld, pending further assessment in connection with the review as to whether the facts disclosed in it combined with the name of the member will tend to identify the persons affected by his conduct, and pending an opportunity to the former member to make submissions on the issue.

2. Implied Authority

[11] It is argued on Chief Constable Jansen's behalf that although Sections 141(6) and 141(7) of the *Police Act* do not expressly provide an adjudicator with authority or discretion to receive submissions from a person who is not enumerated in those provisions, there is implied legal authority for such an opportunity arising by necessary implication. Counsel for the Chief Constable relies on Supreme Court of Canada authority[3] establishing that a statutory tribunal, such as an adjudicator under the *Police Act*, has "all powers that are reasonably necessary to complete its mandate."

[3] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 SCR 1722

[12] As stated earlier, Counsel for the Chief Constable submits that principles relating to the assessment of discipline penalties for police officers arising from authorities following the *Lévis* case[4] were not properly applied by the discipline authority in this case and that as a result, a void is created that must of necessity be filled by submissions from the Chief Constable. Counsel for the Chief's submissions focus on three separate factors derived from the law following *Lévis*: balancing, proportionality, and higher conduct expectation; which he submits the discipline authority failed to consider.

[13] Counsel for the Commissioner submits that the request for a right of participation on this review on the record must be considered within the legislative context and the wording of the sections dealing with reviews on the record and those dealing with public hearings. She points to the specific provision in Section 144(1) allowing an adjudicator to permit a person to participate in a public hearing, with no corresponding such provision in relation to reviews on the record. She points as well to the specificity of the provisions of Section 141 regarding the receipt of submissions on a review on the record, in which no discretion is provided to expand the categories of those who may make submissions. She submits that "the expression of one thing is the exclusion of the other."

[14] I agree that the reasonable inference from the inclusion of that provision for public hearings and the specificity of Sections 141(6) and (7) is that the legislators made a considered decision not to provide a discretion to expand the participants or accept additional submissions for the purpose of reviews on the record.

[15] The procedural context in this matter is also relevant. I note that the investigation emanated from a request by the department to the Commissioner for an ordered investigation pursuant to Section 93(1). The discipline authority in her Report under Section 112 makes the point that the matter proceeded under Division 3 of Part 11 of the Police Act, and not under Division 6, which deals with internal discipline matters. The process under Division 6 gives the member's department more control over decisions about the member's employment.

[4] See footnote 1.

[16] The request by the department for an ordered investigation under Section 93 left it open to the Commissioner to appoint an external disciplinary authority, which is specifically contemplated by section 93(1)(a) and section 93(1)(b)(ii) of the Police Act. The decision to make that request therefore essentially entailed acceptance that the opportunity for the department to participate in the investigation and its outcome as the member's employer might be foreclosed. In making that observation I intend no assessment of whether the matter should have proceeded under one division or the other; only that if the department or the Chief had wished to retain greater control over the outcome it could have proceeded under Division 6.

[17] One factor in the Commissioner's decision to exercise his decision to appoint an external discipline authority might have been to remove any possible taint or conflict arising from leaving the investigation with the originating agency, who was the employer of the member. A decision at this point permitting that "prosecutor" of the disciplinary action to participate in submissions regarding the appropriate penalty, including those outlined by Counsel for the Chief in his submissions, could arguably be seen as adversarial and unfair, given the role of the Commissioner and the contents of the Notice of Review on the Record, in which the Commissioner questions the correctness of the decision of the discipline authority.

[18] Further, as pointed out by Commission Counsel, many of the general principles advanced (or sought to be advanced) by the Chief are available to the Commissioner to make. The addition of submissions by the Chief Constable as to the merits of the proposed penalty would add another adversarial voice, advanced by an agency whose interest in the outcome is clear from the positions taken in the submissions and the fact that they initiated the investigation. That might offend the rule against multiple prosecutors, although I acknowledge that topic has not been explored on the application. In any event, I am confident that the Commissioner will advance the factors relevant to disciplinary or corrective action that arise under Section 126 and related case law, including those that arise from *Lévis*, as they may apply in this context.

[19] Finally, I note that much of the focus of the Chief's Counsel's submissions was on police penalty factors within an employment and labour law context, and less on the factors of disciplinary or corrective measures enumerated in the *Police Act*. While the submissions were helpful and interesting, I do not take the cases cited as overriding what the statute requires, and

constrains, me to consider, in the detailed and specific provisions of Section 126. I am concerned that adding a layer of employment law principles to the scheme of police discipline under Division 3 of the *Act*, which is already well-defined by Section 126 and cases arising under it, may unduly complicate what is otherwise a straightforward proceeding.

[20] The legislative context, purposes of the *Police Act*, procedural history, and nature of the submissions that the Chief seeks to make in this matter all persuade me that I have no authority to permit the Chief Constable to make submissions under Section 141(7), or that if I do, it should not be exercised.

3. Evidence under Section 141(4)

[21] In a previous case[5], I considered a statement by a chief constable regarding the workability of proposed corrective measures for a sergeant in a police department. Workability is a factor specifically included in Section 126(3). The statement in the prior case was admitted by consent of Commission Counsel. In this matter, Counsel for the Commissioner has offered to review any proposed such statement and consider whether it might be admitted under Section 141(4).

[22] I am of the view that if the Chief Constable has input in the nature of evidence pertaining to the workability of the measures proposed by the external disciplinary authority, those might be properly admitted under Section 141(4). Although the Chief Constable has indicated he does not intend to tender such evidence, I will leave it open to him to apply to do so. In the prior case, evidence pertaining to the potential effect on the administration of police discipline was also admitted, and I would be prepared to consider it in this case, as long as it fell short of adversarial submissions.

4. Ban on Publication

[23] There is a ban on publication of the name of the persons affected by the conduct of the former member or any evidence that would tend to identify them. I will at this time continue the ban on publication of the former member's name out of an abundance of caution, not yet being in

[5] ROR 16-03 DECISION.pdf

a position to assess whether an articulation of the former member's actions in connection with the review might tend to identify those affected.

[24] I note as well that I have not received submissions from counsel for the former member on this point, despite having extended an invitation to her to consider whether those will be provided. It appears that she has not yet had an opportunity to obtain instructions and respond to that.

[25] It is my view that the interests of the former member may yet be engaged in the decision relating to publication, and as well in the review, and I would prefer to provide his counsel with an opportunity to confirm that he had elected not to participate, despite the Commissioner's decision to proceed with the review.

5. Conclusion

[26] The Chief Constable's application to provide submissions is denied. He will be invited to provide evidence pertaining to workability and effect on the administration of police discipline under Section 141(4) in a form agreed to by Commission Counsel and counsel for the former member if so instructed. That evidence should be tendered in writing no later than April 30, 2024. I will provide direction on its format as required. The ban on publication of the witnesses' names and any information that may tend to identify them continues. At this time, that ban will continue to pertain to the former member's name.

Reasons delivered this 19th day of April, 2024.

Carol Baird Ellan, K.C., Retired Provincial Court Judge
Adjudicator