

**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**

ADJUDICATOR'S DECISION

To:	(Name Withheld)	(Former Member)
And To:	Chief Constable Dave Jansen, retired New Westminster Police Department	(Former Chief Constable)
And To:	Acting Chief Paul Hyland New Westminster Police Department	(Chief Constable)
And To:	Deputy Chief Fiona Wilson c/o Professional Standards Vancouver Police Department	(Discipline Authority)
And To:	Prabhu Rajan	(Police Complaint Commissioner)

**THERE IS A BAN ON PUBLICATION OF
THE NAMES OF THE WITNESSES IN THIS PROCEEDING
OR ANY INFORMATION THAT WOULD TEND TO IDENTIFY THEM**

1. Overview

[1] The sole issue on this Review on the Record is the adequacy of disciplinary or corrective measures imposed pursuant to Section 126 of the *Police Act* by a Discipline Authority, Deputy Chief Fiona Wilson of the Vancouver Police Department, presiding on a discipline proceeding. As the member has resigned, the matter is proceeding against him as a former member under Section 127 of the *Act*.

[2] The two allegations against the Former Member involve discreditable conduct under Section 77(3)(h) of the *Act*, by comments and behaviour directed toward female employees of his department. The Former Member's name is withheld to preserve the ban on publication of the employees' identities. The misconduct might best be described as inappropriate sexual advances toward subordinates.

[3] After finding the misconduct proven, the Discipline Authority imposed a reduction in rank from sergeant to constable on both allegations, with the ability to compete for promotion after 18 months. The Former Member did not challenge the findings or the sanction.

[4] The Police Complaint Commissioner considered that there was a reasonable basis to believe the Discipline Authority's penalty decision was incorrect, and ordered a review pursuant to Section 138(1)(c)(ii).

[5] For the reasons that follow I have determined that dismissal is required.

2. Legislative Context

[6] The Police Complaint Commissioner may order a review under Section 138(1)(c)(ii) if he has a reasonable basis to believe that the Discipline Authority incorrectly applied Section 126.

[7] Section 126 sets out the range of outcomes and factors for consideration in relation to disciplinary or corrective measures, 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 the member's 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 the member's 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, the member's 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 the member's 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.

[8] Pursuant to Sections 141(9) and (10)(b), the tasks of an adjudicator on a review on the record under Section 138(1)(c)(ii) are to consider the decision of the Discipline Authority on a standard of correctness and determine the appropriate disciplinary or corrective measures. It is essentially a reassessment of the factors enumerated under Sections 126(2) and a reapplication of Section 126(3) to determine whether different measures are appropriate.

[9] The factors contained in Section 126 are made applicable to a former member by Section 127, which reads as follows:

Proposed disciplinary or corrective measures in relation to Former Members

127 (1) After finding that the conduct of a former member is misconduct and hearing submissions, if any, from the former member or the former member's agent or legal counsel, the discipline authority must apply the provisions of section 126 (2) and (3) [*imposition of disciplinary or corrective measures*] in respect of the matter as if the former member had continued to be a member, then determine what disciplinary or corrective measures the discipline authority would have taken under section 126 (1) if the former member had continued to be a member.

(2) The disciplinary or corrective measures determined in accordance with subsection (1) of this section are the disciplinary or corrective measures to be proposed by the discipline authority for the purposes of section 128 (1) (a) [*disciplinary disposition record*].

[10] The materials that form the subject matter of a review on the record are outlined in Section 141(3) and (4). They consist of the final investigation report and attachments, the disciplinary decision, the disciplinary disposition record, the member's service record, and any additional materials admitted under Section 141(4).

[11] The Former Member and the Commissioner are permitted under Sections 141(5) and (6) respectively to make submissions, and the Disciplinary Authority may be invited to do so under Section 141(7). Section 142(3) requires that the review on the record be conducted as soon as practicable after the Commissioner's order is made.

3. History of Proceedings

[12] This matter arose out of an external investigation ordered by the Police Complaint Commissioner under Part 11, Division 3 of the *Police Act* in May 2019, after receiving information from the Former Member's department. At the outset, the matter was accompanied by a criminal investigation, which required the *Police Act* investigation to be suspended for a time. Ultimately criminal charges did not proceed, and the *Police Act* investigation resumed in February 2020.

[13] In October 2020, the Discipline Authority issued her decision under Section 112, finding two allegations apparently substantiated. She proposed a range of penalties up to and including reduction in rank. The matter proceeded to a discipline proceeding on March 8 and 9, 2021. The Discipline Authority issued her Form 3 finding of misconduct on July 30, 2021.

[14] The issue of penalty was delayed for reasons that need not be set out here. The Discipline Authority's Form 4 Disciplinary Disposition Record confirming the disciplinary measures was issued on November 7, 2023. In her appended reasons the Discipline Authority framed her decision as follows:

42. As set out above, pursuant to section 126(1) of the Police Act, the range of corrective and/or disciplinary measures facing [the Former Member] includes discipline up to and including a reduction in rank.

[15] In his submissions at the discipline proceeding, the member's counsel accepted that reduction in rank was appropriate and focused on persuading the disciplinary authority to impose a one-year time limit on the member's ability to apply for promotion. The submissions centred on the monetary effect of the member's suspension combined with the proposed demotion length, and the cases filed by counsel involved reduction in rank or lower measures for discreditable conduct. Dismissal was not discussed, likely due to the range of measures the Disciplinary Authority had identified in the Section 112 notice.

[16] I will say here that I believe the Discipline Authority considered her hands to be tied by the range of penalties she had outlined at the outset of the discipline proceeding. It must be noted that a Discipline Authority is required at the Section 112 (or Section 117 in the case of a retired judge) stage to specify the range of penalties they are considering, without the benefit of

submissions from the Commissioner or counsel as to the applicable principles or authorities. As a matter of fairness, it might have been reasonable for the Discipline Authority not to exceed that range, but I do not believe the *Act* requires it.

[17] In addition, the passage of time between the Section 112 decision and the determination of appropriate measures at the discipline proceeding was significant; over three years, spanning a time when the legal climate and public attitudes in relation to related misconduct were evolving at a rapid pace. It must be observed, as well, that the Commissioner has no capacity to intervene in relation to penalty prior to ordering a review on the record. In the absence of submissions at the discipline proceeding from anyone other than the member's counsel, there was no opportunity for the Discipline Authority to consider the adequacy of the initial range, the evolution of the law, or the fact that she may not have been constrained to remain within the range of penalties she had previously identified. I say this out of respect for the outstanding quality of the Discipline Authority's conduct of the discipline proceeding and the otherwise unassailable reasoning displayed in her decisions in the matter.

[18] Following the issuance of the penalty decision on November 7, 2023, the Commissioner ordered the review on the record on January 22, 2024. In February 2024, Chief Constable Jansen of the member's department filed an application before me to participate on the review. He indicated he intended to argue in favour of dismissal. At a subsequent case management conference, I set a schedule for submissions in relation to the Chief Constable's application, with the member's submissions due on March 22, 2024.

[19] On March 20, 2024, the member advised that he would be resigning within a few days and would not participate further in the review. On April 19, 2024, I issued a ruling denying the Chief Constable's application to participate but indicating I would accept evidence from him under Section 141(4), relating to the Section 126(3) factors of workability and the effect on the administration of police discipline. He provided an affidavit on May 6, 2024.

[20] The Discipline Authority and the Former Member did not file submissions on the review. For reasons that included a change of counsel, Counsel for the Commissioner's submissions were delayed for a short time, and filed in writing on July 12, 2024.

4. Factual Summary

[21] The Former Member testified at the discipline proceeding in relation to each of the allegations.¹ The Disciplinary Authority carefully compared his testimony with the statements provided by the witnesses and his own statements to the investigator. She accepted the evidence of the witnesses as disclosed in their statements and rejected the Former Member's version of the events, which she noted was inconsistent in many respects as between his statements to the investigator and his testimony.² The investigator in turn, in the final investigation report, had accepted the credibility of the witnesses in relation to each allegation, rejecting the Former Member's explanations or denials in his interview, where they differed.³

[22] I will provide summaries of the incidents as disclosed by their statements and accepted by the investigator and the Discipline Authority. I will describe the incidents chronologically, referring to the four subjects sequentially as "A", "B", "C" and "D," without descriptions of their roles in the department, to preserve their anonymity.

[23] Given his rank and years of service⁴, the Former Member was in each case the superior of the employee, although he did not directly supervise any of them. The interaction with "A" formed the subject matter of the first allegation; and the other three, which came to light during the investigation of the first, comprised the second allegation.

[24] The incident with "A" occurred on [REDACTED] [REDACTED]. "A" had been with the department for about [REDACTED]. She was [REDACTED] to the unit that the Former Member was supervising. The unit attended an after-hours work function in a local establishment. While "A" was seated at a bar stool, the Former Member came close to her and straddled her leg with his crotch over her thigh. He told her she was "hot and beautiful," and determined that she was married. He told her that he was also married but his marriage was "open," and suggested they have a relationship.⁵

¹ Transcript, Discipline Proceeding [DP], March 9, 2021, p. 116 – 139.

² Form 3, Appendix 'A', pp. 11 – 23, pp. 25 – 27

³ Final Investigation Report [FIR], pp. 130 – 147, pp. 150 – 153

⁴ The Former Member's start date with the department was November 18, 2002: Transcript, DP, p. 117, l. 3686

⁵ Form 3, Appendix 'A', p. 11.

[25] "A" responded by laughing awkwardly and decided to leave shortly thereafter, while the Former Member was talking with someone else. As she moved toward the door, the Former Member intercepted her, and squeezed her in a bear hug tightly enough to take her breath away. He placed his right hand on her shoulder and left on her right buttock, squeezed "a handful" of her buttock tightly, and said something to the effect of, "Don't leave, I want to fuck you." "A" pushed away from him and left, again laughing awkwardly due to the uncomfortable nature of the situation. The Former Member texted "A" the next day to ask if she was still "into him."⁶

[26] The Former Member's response when interviewed about this interaction was that "A" engaged in a conversation with him about the condition of her body and first invited him to touch her breasts, which he declined, and then her buttocks.⁷ "A" denied this version of events. In his interview and at the discipline proceeding, the Former Member maintained that the interaction was consensual, although he gave different versions of the conversation.⁸ The Former Member maintained that because "A" consented to the conversation and his actions, and because he did not supervise "A", he did not believe he had violated the department's respectful workplace policy.⁹

[27] "A" later confided in a fellow employee about the experience. She stated that she would decline an assignment to the unit headed by the Former Member due to the incident, although it was a unit in which she had previously expressed an interest.¹⁰

[28] By April 2019, the department had initiated a probe into the Former Member's conduct, and encouraged supervisors to bring forward any matters of concern. "A" came forward about her interaction with the Former Member. The fellow employee in whom "A" had confided spoke with the investigators and confirmed her conversation with "A" about the incident.¹¹

[29] The second incident involved "B," who had been with the department for [REDACTED] when she attended the department's annual mess dinner in [REDACTED] [REDACTED]. After the dinner there

⁶ FIR, p. 14

⁷ FIR, pp. 97 – 98

⁸ FIR, p. 120; Form 3, Appendix 'A', p. 13

⁹ FIR, p. 120; DP, p. 121, ll. 3818 - 3820

¹⁰ FIR, p. 33

¹¹ FIR, p. 9 & 31

¹² Transcript, Interview with ["B"], p. 3, ll. 20 - 22

was a gathering at the home of another member of the department, [REDACTED] [REDACTED] [REDACTED]. The Former Member made an advance toward "B" in a bathroom in the residence, which she later reported to her host; the same individual "A" had confided in. The Former Member pursued a relationship with "B" for some time after that evening. He told her he had an open marriage. "B" was reluctant to engage in a relationship with the Former Member and resisted, unsuccessfully at times.¹³

[30] At the next year's mess dinner, in [REDACTED], the Former Member approached "B" and tried to interrupt a conversation she was engaged in. He then sent her several texts suggesting they leave, get a hotel room, and that he only needed "a couple of hours."¹⁴

[31] The interactions between the Former Member and "B" were complicated by her reluctance as a much junior employee to displease or deny him, and her desire to work in the unit he supervised. The employee to whom "B" complained reported her disclosure in the context of the departmental probe.¹⁵

[32] In his interview the Former Member again stated he did not believe his actions breached workplace policy as they were consensual, and he did not supervise "B".¹⁶ At the discipline proceeding, however, he admitted that his texts at the second dinner were inappropriate and violated workplace policy.¹⁷

[33] The interaction involving the third employee also arose at the [REDACTED] mess dinner. Several attendees went to a bar area after the dinner. The Former Member was seated beside "C". She was described as a very junior officer, and had about [REDACTED] of service by the time of her interview in [REDACTED] [REDACTED]. She didn't really know the Former Member, so she was caught off guard when he asked her about the person she was dating. He told her he had information about that person and asked her to meet him at a separate table. She did so. The

¹³ FIR, pp. 78 – 83

¹⁴ FIR, pp. 71 – 74

¹⁵ FIR, pp. 66, 72, 76

¹⁶ FIR, pp. 107 & 120

¹⁷ DP, p. 131, ll. 4152 - 4156

¹⁸ Transcript, Interview with "C", p. 3

Former Member told her he had an open marriage, and said that he was aware that C's boyfriend was cheating on her.¹⁹

[34] "C" was upset by the conversation and alarmed that the Former Member had acquired personal information about her. She left the table visibly upset and a supervisor followed to check on her wellbeing. "C" explained what had happened. The supervisor told the Former Member he had upset her, and he should leave. He later admonished the Former Member not to discuss personal matters with "C".²⁰

[35] About two weeks later, "C" went with a group of colleagues to a work function at a local pub. As the group started to disperse, the Former Member came and sat next to "C" and attempted to talk to her about having upset her on the prior occasion, while acknowledging that he had been admonished not to talk to her about it. The supervisor observed the Former Member talking to "C" and intervened. The supervisor reported the conduct in connection with the departmental probe.²¹

[36] In his interview, the Former Member said that "C" had brought up the details of her relationship in the first conversation, which she denied.²² Similarly to his comments pertaining to "A" and "B", the Former Member indicated that the conversation was between consenting adults and that he did not work directly with "C", so he had not violated respectful workplace policy.²³

[37] As a result of the interactions, "C" reached the view that she would not feel comfortable working with the Former Member.²⁴

[38] The fourth incident involved "D," [REDACTED] Former Member who also worked in the department. "D" described having had a professional and respectful relationship with the Former Member prior to the incident, which included him and his wife supporting her through a difficult time in her life. [REDACTED]

¹⁹ FIR, pp. 135 – 136

²⁰ FIR, pp. 137 – 138

²¹ FIR, pp. 135 & 138

²² FIR, pp. 138 – 139

²³ FIR, p. 120

²⁴ FIR, p. 59

department. He notes that the department has adopted policies to deal with gender-based harassment, which supervisors in the Former Member's position are required to enforce.

[45] The Chief Constable states:

...it is a serious issue [when] ... a supervisor cannot be relied upon to implement [that] policy... It is also a serious matter ...when a supervisor violates the policy he is expected to implement.

[46] The Chief further articulates that it would create an obstacle for a Chief Constable in his position to comply with prevailing rules about workplace safety if he were required to reinstate a member of the Former Member's rank and stature, with his history. This could place him and his department in legal jeopardy.

[47] The effects on the individuals who were the focus of the Former Member's actions raise additional concerns for the Chief Constable. He notes that two of them have left the department since the investigation was commenced, and a third has indicated that if the Former Member returns to the workplace, she would not be able to continue working there. He provided the content of an email she wrote to him outlining her concerns.

[48] The Chief indicates that in order to ensure that the two remaining employees feel safe with the presence of the Former Member, he would need to ensure that they were separated, but the two worked throughout the building on varying schedules. He could not envision an arrangement that would ensure sufficient separation. His only options would be to second the Former Member or the two employees to another department. He notes that secondments, if available, are at best temporary.

[49] The Chief goes on to specify the difficult logistics that would be created by either of those two options, including the risk of seconding the Former Member to another department, with his disciplinary history, and the absence of precedents pertaining to the secondment of the two employees. He adds that the loss of another one of those two employees would have a particularly significant impact on the department. I will observe that a secondment of the employees would additionally have a complexion of revictimization, as pointed out by the employee who wrote the email to the Chief.

[50] The Chief Constable's final point is that reinstatement of the Former Member might cause other employees to feel unprotected and leave the department.

6. Commissioner's Position

[51] I will start here with the Commissioner's concerns as set out in the Notice of Review on the Record, which provides his reasons for ordering the review. He states as follows:

10. In arriving at the proposed discipline, the Discipline Authority found that the Member's actions were "very serious," "predatory in nature," and amounted to a "high-range level" of misconduct. The Discipline Authority specifically noted that the Member was in a position of authority and the affected persons were vulnerable relative to the Member's position.

11. The Discipline Authority went on to find that the Member only accepted partial responsibility for his actions, and she was not able to determine with any certainty the likelihood to which the Member would commit misconduct in the future.

...

17. ...I have concluded that there is a reasonable basis to believe that the disciplinary or corrective measures proposed do not adequately reflect the seriousness and circumstances of the Member's conduct; namely that the member used his rank and position of power within the NWPD to engage in an ongoing pattern of non-consensual behaviour of a sexual nature towards junior and vulnerable employees of the NWPD which the Discipline Authority described as "predatory" in nature.

18. In addition, in my view the workability of the proposed disciplinary or corrective measures, including their effect on employees of the NWPD, as contemplated by section 126(3) of the Act, was not sufficiently considered.

19. Specifically, the Member in this proceeding is a senior police officer who holds a supervisory rank and leadership role within the NWPD. The proposed disciplinary or corrective measures would potentially allow the Member to re-enter the workplace, notwithstanding the Discipline Authority's findings that the Member used his rank, position, and seniority to "facilitate a pattern of predatory behaviour." This has the potential to bring the administration of police discipline into disrepute as contemplated by section 126(3).

[52] In her comprehensive written submissions on the Review on the Record, Counsel for the Commissioner submits that, in light of the seriousness of the misconduct, when the Section 126(3) factors of workability and effect on the administration of police discipline are considered, dismissal is warranted. In highlighting the seriousness of the misconduct, Counsel notes that

discreditable conduct under the *Police Act* entails conduct that an officer knows or ought to know would be likely to bring discredit on the department. She points to this mental element combined with the fact that the Former Member's discreditable conduct was of a sexual nature, both physically and verbally.

[53] Counsel for the Commissioner also points out the credibility findings in favour of the witnesses and against the Former Member in relation to every incident. She notes that the Discipline Authority described the Former Member's conduct as "indicative of predatory behaviour" and moreover, that the Discipline Authority made findings that he used his rank, position and seniority to facilitate a pattern of predatory behaviour against three officers junior to him in rank and an employee known by him to be vulnerable. Counsel notes the Discipline Authority's finding that engaging subordinates in a pattern of non-consensual behaviour "can never be justified and is likely to bring discredit to the department."

[54] Counsel also referred to some separate allegations against the Former Member that arose during the discipline proceeding. They involved an attempt by the Former Member to obtain character references from employees of the department, one of which was a witness in this matter. This occurred during a time when he was subject to a departmental term of suspension that required him not to contact any female employee of the department.

[55] This sequence of events is outlined in more detail in the Form 4 filed by the Discipline Authority, but it is not the subject of this review. It was or is yet to be dealt with separately, and appears perhaps to have been contributed to by confusion or inattention on the part of the Former Member's counsel. I note that he had a change of counsel amid the relevant events. The facts surrounding that separate allegation are not fully before me and they do not contribute meaningfully to the result in this matter; however, I must note that they also do not detract from the available conclusions, noted below, about the member's lack of insight and respect for boundaries.

[56] Counsel for the Commissioner goes on to observe that while the Discipline Authority mentioned the Section 126(3) factors of workability and effect on the administration of police discipline, she did not address them other than to note the member's submissions that "the monetary and reputational costs of the proceedings to date and the added monetary and

reputational costs of a reduction in rank will fully serve the principal goal of correction and education.” Counsel observes that the Discipline Authority failed in this analysis to address the impact on the administration of police discipline in light of her characterization of the behaviour. Counsel notes as well that the Discipline Authority does not appear to have considered the impact of the Former Member’s return to the workplace on the recipients of his discreditable advances.

[57] Counsel for the Commissioner then moves to a submission that, “The Police Complaint Commissioner maintains that... human rights considerations relating to sex-based employment discrimination inform considerations to be taken into account in considering the application of Section 126(3) of *Police Act*.”

[58] While acknowledging that the *Police Act* does not address the human rights aspects of workplace harassment, and that the Discipline Authority did not refer to them, Counsel urges that the conduct in this matter falls squarely within the parameters of sexual harassment and assault, and therefore constitutes sex-based discrimination under human rights legislation and employment law pertaining to wrongful dismissal. She points out that the aspects of seriousness of the conduct and feasibility of return to work in light of workplace safety concerns have been considered in such cases as *Cho v. Café La Foret Ltd.*, 2023 BCCA 354 and *Calgary (City) v. Canadian Union of Public Employees Local 37*, 2019 ABCA 388.

[59] Counsel for the Commissioner urges that the law in this area be imported into these *Police Act* proceedings because the actions of the Former Member constitute human rights violations and, if the *Police Act* dictates a lesser measure than dismissal, human rights law would require dismissal and would take precedence. The Commissioner’s submissions thereafter canvass cases in the employment law and human rights spheres, which Counsel says support dismissal.

[60] Counsel then addresses the case law dealing with police discipline, noting that the cases endorse the highest standard of moral character when considering police misconduct: *Montréal (City) v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48. Counsel concedes that dismissal is the most serious form of discipline and does not allow of education or correction, but submits that it applies in cases of serious misconduct involving a

high risk to public confidence in relation to police discipline and the member, and serves to denounce conduct and deter others. She highlights the recent low tolerance and scrutiny of sexual harassment matters in the workplace; in particular, in policing spheres, as referred to by the Chief Constable in his affidavit.

[61] The Commissioner's Counsel cites several OPCC cases involving similar police misconduct matters in which dismissal was imposed. She notes that the decisions cited by counsel for the Former Member on the discipline proceeding did not include those that resulted in dismissal. I will refer further to Counsel's submissions in relation to the Section 126(2) factors, and to the cases decided under the *Police Act*, under the applicable headings below.

7. Framework for Analysis

[62] As I stated in the ruling relating to the Chief Constable's request for standing to make submissions in this matter, I am not convinced that it is necessary or desirable to import into *Police Act* disciplinary matters the full panoply of employment and human rights related concerns arising from workplace sexual harassment.

[63] My view is that, if a police misconduct allegation of discreditable conduct meets the definition of workplace sexual harassment, it constitutes serious misconduct, and the issue of what disciplinary or corrective measures flow from it may be fully addressed by the provisions of Section 126 of the *Police Act* and precedents derived from it.

[64] I see no need to import another layer of analysis as to whether employment or human rights law dictates or overrides a particular response under the *Police Act*, although those cases may serve as a backdrop in assessing the potential effect on public confidence in the administration of police discipline. Equally, the evolving body of law relating to workplace harassment and the responsibility of employers to provide safe workplaces as it relates to wrongful dismissal and human rights law may provide a lens through which to view the feasibility of a return to work versus dismissal. However, I observe that the comparatively higher standards in the sphere of police discipline may mean that any penalty dictated under the *Police Act* will match or exceed that dictated by the human rights or employment spheres.

[65] Accordingly, while it may be helpful as a reference point to understand that sexual predators are, as a rule, dismissed within employment and human rights contexts, the legislative scheme in relation to police discipline arguably provides full guidance as to how to assess the relevant penalty. The question will entail a factual analysis in every case, against the factors set out in Section 126(2) and the overriding principle contained in Section 126(3).

[66] I am also of the view that even if it is open to me as an adjudicator acting within the administrative scheme of the *Police Act* to import a body of law that is derived from a different administrative sphere or scheme, at very least, as a matter of fairness and balance, I would prefer that expansion not be made without the benefit of submissions from counsel acting on behalf of a member, as well as from the Commissioner.

[67] In any event, as interesting as a digression into the field of human rights and employment standards may be, as I will demonstrate, my view of this matter is that dismissal is amply justified: by the facts, the legislative scheme under the *Police Act*, and the surrounding context; whether considered through an employment, human rights, or policing lens.

[68] I will proceed to an analysis of the factors prescribed by the *Police Act*.

8. Section 126(2) Factors

a. Seriousness of the Misconduct

[69] There are two allegations in this matter, involving four individuals who were the recipients of inappropriate sexual conduct on the part of the Former Member. In relation to “A”, the incident amounted to what can only be characterized as an aggressive sexual assault. In relation to “B”, there was a persistent and prolonged course of conduct involving the Former Member taking advantage of a subordinate; overriding her will and better judgement over a period of a year. The incident with “C”, although not overtly sexual in nature, has a clear complexion of grooming; and the attempt at contact after being firmly advised not to do so by a superior officer indicates a complete lack of respect for boundaries and the recipient’s sensibilities. For “D”, the Former Member was aware of her emotional fragility, and dismissed and diminished it in an effort to override her resistance and extract consent.

[70] For each of these incidents separately the behaviour might be considered predatory. Taken collectively, in the context of interactions with women in the workforce, I agree with the Discipline Authority that the four experiences of these individuals and the context in which they occurred easily amount to a pattern of predation. It cannot go without observation that three of the incidents involved sequential, arguably serial, interactions with three different women on the same evening.

[71] The conduct is exacerbated by the fact that in relation to three of the recipients, there was physical contact; in at least two, a clear assault. Although the Former Member attempted to rely on consent in each of the cases, I must observe that, with respect to "A," he far overstepped the bounds of what he could reasonably have interpreted on that single occasion to be consent; and with respect to "B", the behaviour was outside the realm where consent could reasonably be assumed, given their respective roles. Moreover, when the Former Member perceived outright resistance by "B" and "D," he overtly attempted to overcome it.

[72] In relation to "C", the Former Member's assertion of a conversation between adults is a mischaracterization of the intrusive nature of his approach to her, and, as noted, he persisted in seeking out and speaking with her after having clearly upset her, despite the prior intervention and admonishment of a supervisor. And finally, in the interaction with "D," the Former Member's personal knowledge of her frailty indicates a total disregard of her wishes and a willingness to use her weakness in his favour.

[73] To my observation, the Former Member appears to have been either oblivious to social boundaries, or contemptuous of them. Here I refer to the ordinary social boundaries that would apply, even outside a professional context. Those boundaries should have been drawn much more starkly in the workplace context, not blatantly disregarded. It is telling that the Former Member admitted to much of the alleged behaviour, while asserting consent and tailoring the facts. This simply confirms that he believed sexual contact with subordinates would have been acceptable if it was consensual. Even a passing familiarity with respectful workplace policy should have completely disabused him of that notion.

[74] Counsel for the Commissioner emphasizes that the Former Member's supervisory role or superior stature in the department in relation to all of the recipients adds to the seriousness of the

misconduct, and that submission is unassailable. It was not just his obvious willingness to overcome resistance, but the additional and aggravating factor that his role facilitated that.

[75] I will consider the Former Member's failure to recognize the published workplace guidelines further below, but will say here that even in the face of the suggestions by the investigator that he was offending workplace guidelines, he denied or distinguished them, except in his single admission in relation to "B".

[76] As noted by the Chief Constable, far from exemplifying the values he was expected as a superior officer to uphold, he repeatedly violated them. His treatment of every one of these women was despicable, devoid of respect, and demonstrated a total unwillingness or inability to perceive or respect the potential effects on them of his actions.

[77] The effects on the recipients are properly considered under this factor. All of them were affected to one degree or another, not just emotionally, but in their path of employment, either because of the superior or supervisory role that the Former Member played in relation to them or because of the emotional effects of the interactions on them. Each of them expressed a desire not to work with the Former Member when interviewed by the investigators. After the decision on the discipline proceeding, one of them articulated an inability to continue in her employment if the Former Member continued to be employed there. Two others left the department at some point before this review. Although it is said their departures cannot be directly linked with the allegations or outcome of the discipline proceeding, the timing cannot be disregarded, nor can the fact that none of them except "A" felt comfortable reporting the interactions.

b. The Member's Record of Employment

[78] The Discipline Authority noted that the member has one prior entry on his service record of discipline, for unrelated conduct, in 2014. The nature of that entry is not apparent on the materials, but in any event it is clear it did not figure into the measures imposed.

[79] As highlighted by Counsel for the Commissioner, the Former Member has had repeated training in respectful conduct in the workplace, which she submits makes it "inconceivable" that he did not recognize that his conduct violated "one of the basic expectations of a respectful workplace," and is therefore an aggravating factor.

[80] The Former Member has had commendations and promotions, and he presented character references from colleagues at the discipline proceeding, one of which expressed the view that the allegations were out of character. Commission Counsel makes the point that while laudable, these commendations do not outweigh the nature of the conduct.

[81] I would add that for any of his colleagues who took his behaviour to be out of character, it is clear they cannot have been aware of the whole course of conduct on the Former Member's part, and such a perspective highlights the fact that behaviour of this kind is often confined to unobserved interactions with those least likely to confront it.

c. The Impact of the Proposed Measures on the Member's Career

[82] Clearly, dismissal will end the member's career. He has elected to end it himself, but the factor is to be considered under Section 127 as if he had not done that. Clearly the effect would be significant. Having not had submissions from the member, I am unaware of whether dismissal would have a greater effect on the employment benefits available to him than resignation, but I do not consider that to be a determinative factor. Given the potential effects on the employees of reinstating the member in his prior position, as outlined by the Chief Constable and discussed below, I cannot see that a significantly detrimental effect on his career or the benefits he might derive from it would tip the scales in favour of any measure short of dismissal.

[83] The factors considered on this issue by the Discipline Authority: the effect on the member's income of suspension and on his reputation of the disciplinary process; are inevitable effects of serious misconduct that dictates dismissal, and would not in themselves militate in favour of a lesser measure at the expense of safety in the workplace of the recipients of his misconduct, and other employees.

d. The Likelihood of Future Misconduct

[84] Counsel for the Commissioner takes issue with the Discipline Authority's conclusion that the Former Member would be "more mindful of his behaviour in the future," saying there was no reason to have confidence that would be the case. Counsel notes his apparent inability to demonstrate the policies he learned in his prior courses on respectful workplace practices, and notes the persistence of his conduct despite admonishments to desist or refrain.

[85] I agree with Counsel that the evidence demonstrates a significant likelihood of future similar misconduct. The Former Member's responses to the investigator in each case demonstrated a lack of insight, and, again, it must be noted that the Former Member behaved in a serially inappropriate manner on a single evening with three separate women. In relation to "D", his advance came after being taken to task by a superior about upsetting "C," and after failing in a bid to get "B" to go to a hotel with him. That sequence of events, and his approach of "C" on a subsequent occasion, amply demonstrate a lack of insight and an inability to understand or curtail his discreditable behaviour.

[86] The Former Member's response to the discipline process, including the behaviour in relation to character references that forms the subject of the separate allegations, and his lack of participation in this review, are also suggestive of a lack of insight or motivation to rehabilitate himself.

e. The Member's Acceptance of Responsibility

[87] In one sense, perhaps, the resignation may represent a full acceptance of responsibility, but it must be noted that up to and including the outcome of the discipline proceeding, the Former Member was largely denying the incidents and had not provided any material indicating that he accepted responsibility for his misconduct. In addition, Section 127 requires that the factors under Section 126(2) and (3) be considered as if the Former Member had continued to be a member, so his resignation has no application.

[88] The Former Member appears to have continued to minimize his actions through to the end of the discipline proceeding, although I do note that he did not challenge the outcome.

[89] Counsel for the Commissioner points to the Former Member's apparent lack of contrition and notes that there is no suggestion that the Former Member expressed any interest in apologizing to any of the recipients. I will add that his withdrawal from the discipline process after it became apparent to him that the department was seeking dismissal indicates that he had no interest in reparation after the result appeared inevitable.

f. The Effect of Departmental Policies

[90] It appears from the materials that departmental policies provide guidance related to respectful workplace conduct and do not facilitate or endorse the kinds of departures from that policy that the Former Member engaged in here. I do note that the Discipline Authority did not have a copy of the policy that was in place at the time of the incidents at issue here, but I am able to conclude from the observations of the Chief Constable, fellow members, and the investigator that the policies were well known within the department and the industry, and that on any view of the Former Member's conduct, it violated those policies.

[91] As noted by Counsel for the Commissioner, these policies and the fact that the Former Member received training in relation to them serve only to highlight the deficiencies in his adherence to them, and his unwillingness or inability to enforce them as a superior officer, if called upon to do so.

g. The Range of Measures in Similar Cases

[92] I have reviewed and considered the OPCC cases cited by Counsel for the Commissioner in her written submissions. All resulted in dismissal for similar circumstances, and, in some cases, fewer and less serious incidents.

[93] The references in Counsel's submissions are to case summaries in the OPCC Annual Reports for the relevant years, and neither the cases nor the excerpts are readily referenced here by hyperlink, so I have included them as an Appendix to these reasons, along with Counsel's comments about them. These cases span the period during which the incidents in this matter were occurring. It is notable that in one of them, included in the 2019 – 2020 Annual Report³⁰, the Discipline Authority took notice of "the growing trend within all workplaces, and within society in general, [to recognize] the impact of inappropriate sexualized actions."

[94] As noted by Counsel for the Commissioner, the cases cited by counsel for the Former Member at the discipline proceeding have less relevance, both because dismissal was not being considered at that time, and because they are less similar in their circumstances. For the sake of

³⁰ OPCC Nos. 2018-15342 & 2018-14524, 2019-2020 Annual Report, pp. 29-30

completeness, Counsel for the Commissioner referred to OPCC public hearing case No. 18-01,³¹ over which I presided, and which resulted in a 30-day suspension of an Inspector. That case may easily be distinguished on the basis that it related to a single incident which did not involve sexualized behaviour. It consisted of a smack on the buttock in what was described as an “upbraiding ... [which] crossed the line into the sphere of unwanted physical contact... not likely [to] have been visited upon a male colleague.”

[95] It is abundantly clear that recent cases similar to this one have consistently resulted in dismissal.

[96] Counsel for the Commissioner also referred to a number of recent RCMP discipline decisions and articles that emphasize the need for sound denunciation of sexual misconduct and sexualized interactions within the field of policing. I do not believe it can be argued otherwise in this day and age. Counsel notes that the Phase 2 Final Report on the review of RCMP's Conduct Measure Guide³² includes consideration of adopting presumptive dismissal in serious sexual misconduct cases.

[97] Whether presumptive or not, the comprehensive survey of cases and authorities provided by Counsel serves to highlight the seriousness with which sexualized conduct in the workplace of the type that occurred in this matter must be approached; in particular, within the sphere of policing; and to amply justify dismissal.

9. Section 126(3)

[98] This section addresses the need to consider whether, given the applicability of more than one measure under Section 126(1), an approach that seeks to correct or educate the member would be unworkable or bring the administration of police discipline into disrepute.

[99] Counsel for the Commissioner has made thorough submissions on this issue, and it is, simply, the crux of the matter. If there were any justification for a measure that seeks to correct or educate the Former Member, and involves reinstatement; in a case such as this, this factor

³¹ https://opcc.bc.ca/wp-content/uploads/2018/04/13492-2018-09-19_Adjudicators-Disciplinary-Corrective-Masures_d...pdf

³² <https://www.rcmp-grc.gc.ca/en/final-report-the-review-the-rcmps-conduct-measures-guide>

militates against it. It is clear from the materials filed by the Chief Constable that any measure contemplating reinstatement at any point would be unworkable. The only other question is whether the Former Member might be seconded to another department in order to address his correction and education, but the nature of the misconduct and the conclusions in relation to the risk of future misconduct make that suggestion frankly irresponsible.

[100] Moreover, to tie the hands of the department, or any other department, in favour of the member's education or correction would be untenable in light of their obligations to maintain a safe workplace for both the recipients and future employees; particularly in light of the conclusions in relation to the likelihood of future misconduct and acceptance of responsibility discussed above. In light of those two factors, redeployment of this officer in any fashion would amount to negligence. To require reinstatement or secondment in any form would place the department in certain civil jeopardy if another similar event should occur.

[101] In relation to the effect on the administration of police discipline, I agree with the Chief Constable and Counsel for the Commissioner that confidence in the officer has been irreparably eroded, and confidence in the administration of police discipline would be irreparably damaged if, in the current climate and in light of the available facts, this officer was permitted to resume his duties in any setting that placed him in proximity to female subordinates or colleagues.

[102] When the effect on the administration of police discipline is considered against the backdrop of the evolution of employment law and human rights approaches to sexualized conduct in the workplace, it become very clear that Section 126(3) forecloses any consideration of an approach short of dismissal in a case with hallmarks such as this one.

10. Conclusion

[103] My conclusion is that no measure short of dismissal is appropriate in this matter. As I have said, I believe the Discipline Authority was operating without the benefit of the Commissioner's input on behalf of the public interest, and under the erroneous assumption that she was bound by the range of penalties she had articulated at the outset of the discipline process. I am confident that she would have arrived at a different decision with full input. With the

benefit of able submissions on behalf of the Commissioner and the evidence of the Chief Constable at this stage of the process, the correct outcome is abundantly clear.

Reasons delivered this 25th day of July, 2024.

A handwritten signature in black ink, appearing to read 'C Baird Ellan', followed by a period.

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

APPENDIX A

- (1) [OPCC File Nos. 2018-15342 and 14524](#): the substantiated allegations were that (a) the member (who later resigned) grabbed a woman's buttocks on two occasions while off-duty, (b) pushed a woman at a party against the wall and grabbed her buttocks while trying to kiss her, (c) touched a woman at a party while she was asleep, even after she told him to stop, and (d) touched a woman inappropriately at a party without her consent. The disciplinary authority in that case observed that "the growing trend within all workplaces and within society in general" to recognize "the impact of inappropriate sexualized actions".⁷
- (2) [OPCC File No. 2016-11515](#): the member was dismissed when he breached the department's respectful workplace policy by inappropriately touching a female officer in the workplace and, after being told to stop, repeated the unwanted contact.⁸
- (3) [OPCC File No. 2016-11756](#) (Vancouver Police Department): the member was dismissed for engaging in sexual contact with two youths involved in a police investigation.⁹
- (4) [OPCC File No. 2020-17355](#) (Vancouver Police Department): the member (who retired in the interim) was dismissed after inappropriately touching a victim at a social event with colleagues.¹⁰
- (5) [OPCC File No. 2018-15342](#) (Vancouver Police Department): the member was dismissed for inappropriate touching of two female members (four allegations of discreditable conduct were substantiated).¹¹ The Discipline Authority determined the allegations were not minor, were sexual in nature and considered to be a "physical violation of each of the victims". The member did not accept responsibility for his inappropriate misconduct. The Discipline Authority observed the case represented a "growing trend within all workplaces and within society in general about the impact of inappropriate sexualized actions".

⁷ <https://opcc.bc.ca/wp-content/uploads/2020/12/2019-2020-Substantiated-Allegation-Summaries.pdf>

⁸ <https://opcc.bc.ca/wp-content/uploads/2017/11/2016-2017-OPCC-Annual-Report.pdf> (in substantiated allegation summaries)

⁹ <https://opcc.bc.ca/wp-content/uploads/2023/11/2022-2023-Substantiated-Allegation-Summaries.pdf>

¹⁰ https://opcc.bc.ca/wp-content/uploads/2023/02/2022-11-10-2021-2022-Substantiated-Allegation-Summaries_FINAL.pdf

¹¹ <https://opcc.bc.ca/wp-content/uploads/2020/12/2019-2020-Annual-Report.pdf>

- (6) [OPCC File No. 2018-14566](#) (Delta Police Department): the member was dismissed because he had engaged in inappropriate sexual communications via social media and texts with a woman who was interested in employment as a police officer.¹²
- (7) [OPCC File No. 2021-19619](#): the member (who retired in the interim) engaged in unwanted contact with his former partner which was described as harassment and stalking.¹³
- (8) [OPCC File No. 2017-13726](#): the member was dismissed for pinning a woman to the ground, attempting to kiss her and touch her without her consent.¹⁴

¹² <https://opcc.bc.ca/wp-content/uploads/2019/08/14566-2019-Aug-27-Media-Release.pdf> and <https://opcc.bc.ca/wp-content/uploads/2020/12/2019-2020-Annual-Report.pdf>

¹³ <https://opcc.bc.ca/wp-content/uploads/2023/11/2022-2023-Substantiated-Allegation-Summaries.pdf>

¹⁴ <https://opcc.bc.ca/wp-content/uploads/2020/12/2019-2020-Substantiated-Allegation-Summaries.pdf>