

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

**AND**

**IN THE MATTER OF A REVIEW UNDER SECTION 117**

**AND**

**IN THE MATTER OF ALLEGATIONS OF MISCONDUCT**

**AGAINST**

**CONSTABLE [REDACTED]**

**OF THE SURREY POLICE SERVICE**

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**NOTIFICATION OF MISCONDUCT AND NEXT STEPS - SECTION 117(7)**

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TO: Mr. [REDACTED] (Complainant)

AND TO: Constable [REDACTED] (Member)  
c/o Surrey Police Service  
Professional Standards Section

AND TO: Mr. Clayton Pecknold (Commissioner)

AND TO: Sergeant [REDACTED] (Investigator)  
c/o Surrey Police Service  
Professional Standards Section

**1. Introduction**

[1] This complaint arises from an interaction just after midnight on October 24, 2022 between the member, who was off duty, and the complainant, a restaurant security guard. It is alleged that the member behaved in a discreditable fashion and inappropriately identified himself as a police officer.

[2] This is a review under Section 117 of the *Police Act* after a finding of no misconduct at the departmental level, following an investigation into the complaint. Proceedings under Section 117 are not public, therefore I will refer to individuals by descriptive terms in the body of this decision.

[3] The test for the review is defined in Section 117(8)(d): whether the evidence referenced the FIR “appears sufficient to substantiate misconduct and to require the taking of disciplinary or corrective measures.” Under Section 117(8)(c) I am required to consider allegations of misconduct I identify as arising from the materials, which are not confined to those identified in the FIR. The allegations I have identified and considered are set out in Part 3.

[4] For the reasons that follow I have determined that the evidence at this stage appears sufficient to substantiate three allegations of misconduct, and to require the taking of disciplinary or corrective measures. The requirements of Section 117(8) are addressed below under the applicable headings.

## **2. The Complaint and Conduct of Concern [Section 117(8)(a)]**

[5] The following is an overview of the sequence of events. The evidence is reviewed in more depth in Part 4. In his complaint filed the day of the incident the complainant alleged that while the complainant was performing his duties as a security guard preventing people from leaving the establishment he worked at when they had too much to drink, the member identified himself as a police officer, displayed his badge, and was belligerent and disrespectful toward the complainant;.

[6] The complainant had been advised toward the end of the evening by an off-duty manager that the member had been consuming alcohol at the bar and there were concerns that he intended to drive home. The manager asked the complainant to watch the member to make sure he did not drive.

[7] The complainant approached the member as he was leaving the restaurant, after it closed at midnight, and asked how he was getting home. The member stated, “Ya, I’m going to drive,” and continued to leave. The complainant followed the member outside and told him he understood he had been warned by restaurant personnel not to drive as

he was intoxicated. The member then said that he was not going to drive, had called an Uber, and was going to the car to charge his phone.

[8] The complainant advised the member that if he got into his car the complainant would call the police. The member responded that he “was the police.” The complaint told him that he did not believe he was a police officer or that he was not going to drive, since he had said he was going to. The member responded by showing his police badge to the complainant and repeating that he was going to the car to charge his phone.

[9] The complainant continued to follow the member as he walked to his vehicle, advising the member that he could charge his phone inside the restaurant and not to get into his vehicle or he would be drinking and driving and the complainant would have to call the police. The member responded with expletives and comments about the complainant’s authority. The complainant remained nearby, still concerned that the member was intending to drive.

[10] A short time later the member’s fiancée and a friend came out of the restaurant. The fiancée told the complainant that she was the owner of the vehicle, that the member was not going to drive, and that an Uber had been called. Shortly after, the three left in an Uber.

[11] The complaint was found admissible as two potential allegations: discreditable conduct and corrupt practice, and investigated as such. The investigator’s recommendation that the allegations be found not to be substantiated was accepted by the departmental discipline authority.

[12] The Police Complaint Commissioner [“PCC”] reviewed the discipline authority’s decision and issued a Notice of Appointment of Retired Judge [“the Notice”] under Section 117, citing the following bases for his determination that the decision appeared to be incorrect:

... the Discipline Authority erred in failing to consider evidence which corroborated the derogatory comments alleged by the Complainant, and the Member’s admission of demeaning comments and swearing towards the Complainant. Additionally, the Discipline Authority erred in failing to consider whether the Member’s action of displaying his police badge was for other purposes unrelated to the proper performance of duties as a member and not just for personal gain. Finally, the Discipline Authority erred in failing to properly consider the Member’s

adherence to relevant [departmental] policy, as it relates to off-duty conduct and displaying one's badge.

### **3. Allegations Considered [Section 117(8)(c)]**

[13] The allegations that I have identified and considered are the two considered by the investigator and an additional one arising from the existence of departmental policy pertaining to the production of badges by police officers. In the Notice, as set out above, the PCC highlighted the failure of the investigator to consider whether the member had adhered to relevant departmental policy. If the member's conduct represents a departure from that policy, it could constitute neglect of duty. Accordingly, I have considered the following three allegations.

- (1) That on October 24, 2022, Constable ██████ committed discreditable conduct, pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department;
- (2) That on October 24, 2022, Constable ██████ committed corrupt practice, pursuant to section 77(3)(c)(iii) of the *Police Act*, which is using or attempting to use one's position as a member for personal gain or other purposes unrelated to the proper performance of duties as a member; and
- (3) That on October 24, 2022, Constable ██████ committed neglect of duty, pursuant to Section 77(3)(m), by failing to comply with departmental policy prohibiting the production of his badge when off duty.

### **4. Does the Evidence Appear Sufficient to Substantiate the Allegations? [Section 117(8)(d)(i)]**

#### **A. Review of the Evidence and Materials**

##### **i. The Complainant**

[14] The complainant's submitted statement may be summarized as follows. His manager had pointed out the member and his two companions, who were at the bar in the restaurant and appeared intoxicated. The manager had heard the member say that he was going to drive home.

[15] The complainant watched the member start to leave the restaurant and followed him to ask how he was getting home. The member said he was “going to drive”, so the complainant attempted to engage him further in conversation. The member ignored him and left the restaurant.

[16] The complainant followed, saying “excuse me” loudly, and the member turned around. The complainant advised him that he had been informed that the member was intoxicated and that if he got into a vehicle the complainant would have to call the police. The member responded by saying “I am the police.” The complainant commented that the member should know he couldn’t drive home. The member said he was not driving, an Uber was on the way, and showed the complainant his Uber app indicating a driver’s imminent arrival.

[17] The member walked toward the parking lot and the complainant followed him. The member asked why he was following him and the complainant asked why he was going to the parking lot. The member said he was going to charge his cell phone. The complainant said he could use the chargers in the restaurant and if he got into his car with his keys he could be considered to be drinking and driving, and that as a police officer he should know that.

[18] The complainant told the member that he did not know if he could believe the member was not going to drive or if he was in fact a police officer. In response the member showed his badge and continued toward his car, with the complainant continuing to challenge him. The member responded by challenging the complainant’s authority to follow him into the parking lot. The complainant replied that his authority extended to the parking lot and there was no need for the member to get into a car.

[19] The complainant said there was five or ten minutes of back and forth like this. The complainant explained that he had experience with other patrons saying they were not going to drive and getting into cars and driving away. He described the member as heavily intoxicated and apparently not understanding what the complainant was saying to him. When the member reached the car he used a key fob to open it but did not get in. The complainant stood by and according to the complainant’s statement, the member said, “This isn’t security’s job, you are a fucking idiot. Do you want to compare jobs? Do you know what I’ve been through? Fuck off, go back inside.”

[20] The complainant responded by saying it was his job to make sure people got home safely and he was going to wait there until the Uber arrived. At this point the member's companions arrived at the vehicle and "joined the argument." The male companion said they had a right to be in the parking lot, and the complainant said they did, but it was his duty to make sure the member did not drive away while intoxicated. Shortly after that an Uber arrived and the three left in it. The complainant went back inside, where his manager confirmed that the member was a police officer.

[21] The complainant was disappointed that the member had become intoxicated and belligerent and had showed his badge while in the conflict, rather than cooperating with security, as he expected of a police officer.

[22] In his interview with the investigator, the complainant added the following details. His main duty as security is looking out for patrons who are intoxicated and should not be driving home. The manager had told him that the member had said he was going to drive home while he was sitting at the bar, and his companions had replied that they should all take an Uber.

[23] It was about 20 minutes later that the member started out toward the door. The complainant asked how he was getting home and he said he was driving, and "blew" through the doors. The complainant followed, stated he was security and that he understood the member had been warned that he should not drive home. The member responded that he was not going to drive home and he was going to the car to charge his cell phone. The complainant said there were chargers inside the restaurant he could use and that if he got in his car the complainant would have to call the police. The member stated, "That is funny, I am the police".

[24] The complainant said he did not believe the member was going to the car to charge his phone as he had already said he was going to drive, and he did not believe he was a police officer. The member responded by showing his badge. The complainant urged the member to come inside to charge his phone and the member said it was not the complainant's job to follow him outside. The complainant disagreed and continued to follow the member toward the car, telling him if he got in it, he would need to call the police and take a photo of his licence plate. The member became agitated, angry, and belligerent, but he did not get into his car.

[25] The complainant said that the member said disrespectful things to him like, “What are you, like 18 years old and make \$20.00 an hour?” “Get the fuck back inside, your duties don’t pertain out here, you’re a rent a cop, security cop.” The complainant said he felt a bit demeaned and upset by the member’s treatment of him, like his job was worthless and he should not be there doing it.

[26] The complainant believed the member’s level of intoxication affected his ability to understand why the complainant needed to do what he was doing. He added:

I guess I could have handled myself better, once we got into an argument and things were said back and forth ... I think when he was demeaning me as a security guard and when he showed me the badge, I said ‘wow, you should have been the shittiest police officer for treating me this way’. So I regret saying that, I was upset and shouldn’t have engaged.

## ii. The Member

[27] In the member’s statement to the investigator he said that he and his two companions had been at a ██████████ in Langley before attending a brewery and then the restaurant, where they went for drinks, around 10 p.m. It had been a long day for the member as he was dealing with some family stuff. The bartender was making them his custom drinks and they were socializing and having fun.

[28] Around midnight they paid their bills. The member’s male companion intended to take an Uber to ██████████ and the member intended to take one to ██████████. After he paid his tab he went to charge his phone in the car, as it was almost dead and he needed it for the Uber.

[29] As he left, the complainant followed him and asked if he was going to drive, to which he responded, sarcastically, “Yeah, man, like I’m going to drive?” He said there was “no way he was going to drive” and that he felt that it was an “obvious statement in his mind that he was not going to drive... that he was just joking and being sarcastic.” He then left and as he was walking away, the complainant grabbed his attention, so he turned around, and the complainant asked him, “Hey, are you actually going to drive?”

[30] The member realized that the complainant believed he was going to drive. The member said he remained calm and tried to reassure the complainant by saying, “Listen man, honestly, I am not going to drive, I promise you, I am not going to drive, I have to

charge my phone, I am going to my car to make sure there is nothing in there because we are going to leave it here and we were going home in an Uber.”

[31] He told the complainant that he was joking, being sarcastic, and he was just going to the car to charge his phone. He did not feel that the complainant believed him, and the complainant told him that if he got into the car, he would legally be drinking and driving. The member responded that he understood completely; that he was actually a cop; and that he knew the rules for drinking and driving. He said he had no plan of drinking and driving, that he was a police officer, and that he just needed to charge his phone, as he had an Uber coming.

[32] The member stated that the complainant still did not believe him, so he showed him the Uber app on his phone to confirm that he had an Uber coming. He reminded the complainant that he needed to charge his phone to get home. The complainant challenged the member, saying, “First, you tell me you’re going to drive, then you tell me that you’re not going to drive.” At this time, the member said, he felt that the complainant did not believe anything he was saying or doing and things were escalating.

[33] The member felt that there was not an answer that the complainant would accept unless he tried to “ease his nerves,” so the member then showed the complainant “a portion” of his police badge. He stated that he did this to reassure the complainant and to point out that he was not lying to him. He continued toward the car, as he still needed to charge his phone. The complainant followed him, and the member got upset.

[34] The member said he understood what care and control was and that he was only going to charge his phone and was not going to put the keys in the ignition. He told the complainant that he just needed to go, he was having a long day due to personal issues, he was being responsible by getting a ride home and what he was doing was not wrong. The member said he was caught off guard as the complainant was not believing what he was saying; they were going back and forth, exchanging words. The member could not remember everything he said but he did tell the complainant to “fuck off”.

[35] The member’s companions came out of the bar and asked what was going on. The complainant advised them that the member was trying to drink and drive, and the member’s female companion stated that was impossible as the car was hers and no one was driving as they had Ubers coming. The member perceived that the complainant still



did not believe anyone. The member described the complainant as extremely aggressive, extremely hostile, very agitated and standing very close to the member, escalating the situation.

[36] The member felt that “as a patron of the bar all he was doing was leaving the establishment and going home and for some reason he had a 3rd party employee up in his face and causing a scene that did not need to be caused.” He felt attacked.

[37] The member admitted to having 5 or 6 beers at the [REDACTED], a couple of beers at the brewery, and five or 6 drinks at the restaurant. He noted that his phone died and his Uber request was cancelled, so he got in the Uber called by his companions.

[38] In later questioning by the investigator, the member stated that he believed the complainant was trying to educate him on the rules of drinking and driving. His response that he knew the rules because he was a police officer was intended as a “bonding moment.” He believed the complainant was heightened and was targeting him when he left the restaurant. The member denied showing his badge to gain any advantage; rather it was to reassure the complainant that he knew the rules and to confirm that he did not intend to drive. After that, when the complainant still did not appear to believe he was not going to drive, the member became upset.

[39] The member did not feel that he disrespected the complainant; rather, that he was the victim and was unnecessarily attacked. He believed he should be able to leave the bar and get his ride home. He admitted that he called the complainant a “fucking idiot” and did not deny that he said his duties did not apply in the parking lot. He did not deny suggesting that the complainant was 18 years old but did not recall calling him a rent-a-cop or saying that he made \$20 an hour. He did not threaten the complainant nor did he recall anyone else doing that.

[40] The member felt disrespected and was extremely stressed and angry the next day. He recalled asking the complainant to sit there and watch him charge his phone. He did not recall the complainant asking him to come inside to charge his phone. He believed the restaurant was closed, and he wanted to vape, charge his phone, and wait outside for his friends. He said no one was aggressive or made any threats towards the complainant.

[41] The member acknowledged attending a *Police Act* PowerPoint presentation in September 2021 and reading departmental policy in reference to Employee Badges and Identification.

### iii. Restaurant Employees

[42] The restaurant manager in his interview stated that he finished his shift at midnight and was sitting at the bar. He observed the member at the bar, he believed with several females. He had noticed during the evening that the member's bar bill was high. It was his perception that the member had joked about driving home but then he and the group confirmed to the bartender that they would take Ubers. He asked the complainant to make sure the member didn't drive.

[43] As the doors closed at midnight, this witness heard the member say he was "going to leave right now and ... he can't see me leave." [It is not clear who "he" refers to.] The women he was with told the member they had all had too much to drink, and should call an Uber. It was at this point that the bartender intervened and warned them not to drive, and the women said the member was just playing around and they would Uber. He heard the bartender ask the member if he intended to drive home and the member said he was only messing around and they would take an Uber. This witness noticed signs of intoxication on the member.

[44] The bartender in his interview said the member's group had arrived between 8:30 and 9:00 p.m. and stayed a couple of hours. They told him they had already been drinking and had been at a [REDACTED]. He served them and they remained well behaved and did not appear drunk. They settled their bill and he made sure they had a ride home. One of them may have joked about driving home. The bartender advised the complainant to make sure they didn't drive. He stated that he did not overserve them and he did not notice signs of intoxication on the member.

[45] Another employee from the restaurant saw the complainant in the parking lot urging the member not to drive. He overheard remarks by the member to the effect of, "you only make x amount of dollars per hour, is it worth your time to get knocked out" and that's when [the complainant] was telling him to "relax and calm down sir". He said the complainant "did not engage". The witness then turned the corner to his car and did not hear anything further. He reiterated that he heard heated conversation between the

complainant and the member, with the member saying something like, “is it worth getting knocked out over 16 an hour.”

#### **iv. Member’s Companions**

[46] The member’s female companion in her interview stated that the member had taken her keys to go and charge his vape. She went outside to see him talking to the complainant, and the member told her the complainant thought he was going to drive. She told the complainant it was her car and that the member would not be leaving with it. She said they had ordered an Uber, but the complainant seemed to not believe them. The Uber arrived and they left. She said that she told the complainant he seemed to want to get punched in the face, and he invited her to punch him. She perceived that the complainant was trying to continue the conversation and was on a “power trip,” although no one intended to drive. She heard the complainant talking about filing a complaint against the member for not being an “outstanding” police officer.

[47] The female companion was interviewed again, and stated that she did not recall the member saying he was going to drive that night, and that he always has his badge in his wallet but she did not see him show it to anyone that night.

[48] The member’s male companion, in his interview, stated that they had attended the restaurant after the [REDACTED], having decided not to drive home, and at last call he ordered an Uber for everyone. He went to the restroom and when he got outside he observed that the member and his fiancée were in a confrontation with the complainant. The fiancée told him the complainant was trying to say that the member was going to drive, so he told the complainant they had an Uber coming. He understood that the member was at the car charging his vape. His perception was that the complainant was agitated and unprofessional. He showed him the Uber app on his own phone, but the complainant was not listening. He commented that the complainant was saying a police officer should know better, was out of line, and was “poking,” and that any reasonable person would get angry at the type of things he said. The member did not like that and yelled some things back. He did not hear the member say he was going to drive at any point and they told the bartender they were not going to drive.

[49] The male companion was re-interviewed, during which he stated that he was aware there was some conversation about the member being a cop after the Uber had

arrived. He was not aware during the exchange in the parking lot that the member said he was a police officer; and believed it only came up to assure the complainant that the member was not going to drink and drive.

[50] In a further follow-up interview, the male companion stated that he did not hear the member say he was going to drive at any point, and the plan was always for them to take an Uber. He called an Uber and did not know the member had also called one.

#### **v. Additional Evidence**

[51] The evidence in the FIR includes a screenshot of the cancellation of the member's Uber request made at 12:21 a.m., due to an inability to contact the member.

[52] There is closed circuit video coverage of some of the actions of the member and the complainant, including a shot that has been reduced to a still photo, depicting the member showing the complainant an open wallet or billfold with what appears to be a badge fully visible on one side.

[53] The investigator reviewed parts of the member's training and the department's policy relating to the production of badges. He summarized the training the member received as follows:

...the training presentation given to [the member's] onboarding class by members of the Professional Standards Section (PSS) of the [department]... covered the following topics directly related to [the] incident:

- i) Definition of Corrupt practice: Using or attempting to use one's position as a member for personal gain;
- ii) Corrupt practice statement: Keep your badge in your pocket unless you plan to put yourself on duty...

[54] In addition, the investigator provided the following excerpt from the department's policy manual:

...section AD 4.12: Employees are prohibited from producing their Badge or ID Card for any purpose other than identifying themselves as [a department employee] during the lawful execution of their duties, or otherwise performing official [department] business (e.g., an Employee must not produce their Badge or ID Card to avoid legal citation or sanction pursuant to any federal, provincial or municipal statute, regulation or by-law).

## B. Analysis

[55] As earlier observed, Section 117(8)(d)(i) requires an assessment of whether the evidence “appears sufficient to substantiate the allegation(s) and require the taking of disciplinary or corrective measures.”

[56] The threshold is lower than proof of misconduct, which is required at a discipline proceeding. Because Section 117(9) designates the Section 117 reviewer as the discipline authority for the purposes of a discipline proceeding, at the Section 117 stage the reviewer must be careful not draw premature conclusions that misconduct has been proven.<sup>1</sup>

[57] The review is therefore an assessment of the evidence that falls somewhere between “apparent” misconduct and “proven” misconduct; specifically, whether the evidence “appears sufficient to substantiate” misconduct. While that test may entail some weighing or assessment of the evidence, in particular where there are conflicts, the analysis should not contain any assumptions that the evidence will be interpreted a certain way at a discipline proceeding, where the discipline authority may have the benefit of evidence or submissions on behalf of the member.

[58] The confusion created by the wording of Section 117(8)(d)(i) has been the subject of judicial comment in the past<sup>2</sup>, and I will observe here that while there is no onus on the member, the preliminary conclusion required by the section about the “apparent sufficiency” of the evidence is open to challenge at a discipline proceeding in whatever fashion the member may see fit to challenge it, and the discipline authority, despite being the person who has found the evidence apparently sufficient, must approach the discipline proceeding with an open mind about the outcome.

[59] I will proceed to assess the evidence as summarized above with the Section 117(8)(d)(i) test, the case law, and those observations in mind.

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<sup>1</sup> Scott v. British Columbia (The Police Complaint Commissioner), 2016 BCSC 1970, <https://canlii.ca/t/gvcbr>, paragraph 39.

<sup>2</sup> Supra.

**i. Discreditable Conduct, Section 77(3)(h)**

[60] Under Section 77(3)(h), discreditable conduct is defined as conducting oneself in a manner that the member knows or ought to know would be likely to bring discredit on the municipal police department, whether on or off duty. Past cases have included showing a badge to gain favour under this paragraph, but more recently it has been dealt with under Section 77(3)(c) as corrupt practice<sup>3</sup>, and as explained below, I will consider it under that heading.

[61] Although this is not a review of the investigating officer's decision *per se*, it is instructive to consider the basis on which he concluded that the conduct of the member was not discreditable conduct, particularly given that there are not a lot of conflicts in the evidence.

... Based on [the member's] mindset, his perspective and evidence that he had no intention to drive, ...he may not have subjectively known or ought to have known that his actions would bring discredit to the [department] ... as during his interaction, [the member] was defending himself, while being personally attacked, and at the same time providing answers and attempting to satisfy [the complainant's] concerns.

[62] I note that in another Section 117 Decision, OPCC No. 2019-15763<sup>4</sup>, referred to by the investigator, Retired Justice Oppal found that the fact that a domestic dispute involved two people, each with some apparent blameworthy conduct, did not remove the member's conduct from the application of the *Police Act*. The issue of potential provocation by the other participant had been considered by the investigator, in reliance on statements similar to those made here by the member's male companion, to the effect that the member was "driven over the edge." Retired Justice Oppal considered the participation of the other individual, blameworthy or not, to be unrelated to the issue to be decided. The member's conduct over the course of the evening, considered objectively, was found in that case to cumulatively support a finding of discreditable conduct.

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<sup>3</sup> OPCC No. 2017-13143-03, Section 117 Decision, para.

<sup>4</sup> OPCC File No. 2019-15763, at page 7.

[63] There is evidence in the FIR and materials, as outlined above, to support a finding that the member here exhibited intoxication, joked in a manner that created concerns for more than one employee that he might try to drive home, and while resisting the efforts of the complainant to ensure he did not assume care and control of a motor vehicle, swore at him and made disparaging and demeaning remarks about his employment, age, and wage level.

[64] Even setting aside the member's having identified himself as a police officer (discussed below), that sequence of events, if established, would objectively appear to support a characterization of conduct unbecoming a police officer.

[65] Discreditable conduct of course includes the additional element of the officer's knowing or being reckless as to whether his conduct is likely to bring discredit on the department. The investigator observed that the member did not appear to know that his conduct might discredit the department because he did not intend to drive and he was being personally attacked by the complainant. I believe the analysis needs to go further than that. The element of knowledge of discredit pertains to whether the member recognized both that his conduct was discreditable, and that it was likely to be attributed to him as a police officer, although the latter factor would appear to be satisfied in this matter by the fact that he identified himself as such.

[66] The second aspect in relation to the member's mental state, however, and I believe the aspect that the investigator was considering, is whether the member also had apparent knowledge of the discreditable nature of his conduct. As I have indicated, I do not believe it is an answer to say that he believed he was under attack. He admittedly swore at the complainant and challenged his authority. Although there is some conflict on the evidence, disparaging comments appear to have been overheard by a restaurant employee, and the member did not deny some of the remarks about the complainant's job that the complainant attributed to him.

[67] It would appear there is therefore evidence to support that the member swore and made demeaning remarks to the complainant, comparing his office to the complainant's, in what could be considered a condescending way, while the complainant apparently believed he was acting within his authority. Whether or not the member believed the complainant was exceeding his authority, as discussed below, his apparent

(and admitted) treatment of the complainant, objectively considered, could be characterized as unjustified and unnecessarily demeaning.

[68] In the case referred to above, Retired Justice Oppal posed the question, “what conclusions would reasonable people in the community draw from an objective analysis of the evidence?” In this matter, the question, similarly, will be whether the conduct, considered cumulatively and objectively, amounted to behaviour that the member knew or ought to have known could bring discredit to the department. At this stage, it appears that there is evidence to support an affirmative answer to that question.

#### **a. Use of Office as Discreditable Conduct**

[69] In a prior matter referred to by the investigator, I considered whether improper use of office should be dealt with as discreditable conduct or as corrupt practice under Section 77(3)(c)(iii)<sup>5</sup>. The cases in which it has been characterized as discreditable conduct import an additional analysis of whether the member intended to gain an advantage, which is not an element included in the language of Section 77(3)(h). As a result they also engage in less analysis of the member’s understanding of the likely result, although that is an element of discreditable conduct.

[70] My view is that the analysis required under Section 77(3)(c)(iii) more aptly fits this type of misconduct and more precisely identifies for an officer the exact nature of the conduct that engages the section. Accordingly, while I consider the fact that the member identified himself as a police officer in the course of his interaction with the complainant to be a factor contributing to the discreditable nature of his conduct, I will consider the member’s use of his office and production of his badge as a separate allegation of corrupt practice, and subsequently, neglect of duty.

#### **ii. Corrupt Practice, Section 77(3)(c)(iii)**

[71] The misconduct of use of position or production of a badge, when considered under Section 77(3)(c)(iii), entails “using or attempting to use one’s position as a member for personal gain or other purposes unrelated to the proper performance of

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<sup>5</sup> OPCC No. 2017-13143-03, *Supra*, Footnote 3, at paragraph 50.



duties as a member”. The focus in the initial part of the section is on the intention of the officer to gain an advantage, although an actual advantage need not be proven. It is sufficient if the conduct appears to be an attempt to obtain favour by virtue of one’s office.

[72] As pointed out in the Notice, the section also includes “attempting to use one’s position as a member... for purposes unrelated to the proper performance of duties as a member”, arguably something less than seeking favour.

[73] In relation to the application of the section to the member’s conduct, the investigator stated:

In considering the conduct and circumstances leading to ...showing ...his police badge, ... there was no evidence that [he] did so for the purpose of gaining any preferential treatment and only showed his badge as [the complainant] did not believe he was a member. Furthermore, in the absence of gaining preferential treatment, ... [the] actions of showing his badge would not bring discredit to the [department].

[74] I believe the analysis needs to start earlier in the sequence of events, at the time when the member identified himself as a police officer, in response to the complainant’s statement that he would need to call the police if the member got into his vehicle. The member’s explanation for doing so was that he was attempting to convince the complainant that he was less likely to drive because he was a police officer, and to lend credence to his assertion that he was only going to the car to charge his phone.

[75] Viewed in its plainest form as an apparent attempt by the member to get the complainant “off his back,” it is nonetheless difficult to interpret the provision of that information at that stage as appropriate. The member appeared to be involved in a confrontation by a person in authority who was attempting to prevent him from going to a car in the parking lot. The member may not have intended to drive, and it may be that he believed the complainant did not have authority to do what he was doing. Questions arise in relation to that issue that are not addressed by the evidence, such as how the member might expect to charge his cell phone without putting himself at risk of being in care and control of the vehicle. However, the legitimacy of his intentions or the authority of the complainant are not the issue at this stage of the analysis.

[76] The issue, in relation to the earlier portion of the section, is whether the member's apparent purpose in identifying himself amounted to an attempt to gain more favourable treatment from the complainant, by persuading him that the member ought to be permitted to proceed unimpeded. In this respect, one view of the evidence might be that he was attempting to use his office to obtain different treatment from what the complainant would have afforded any other member of the public.

[77] Assuming for a moment that the member was "within his rights" in seeking to charge his cell phone (or a vape) at the vehicle, and that this actions would not have entailed the assumption of care and control of the vehicle, the question remains whether that would entitle the member to challenge the complainant's authority by "pulling rank," as he appears to have done. If he did not expect the fact of his office to have some kind of effect on the behaviour of the complainant, there would appear to have been no purpose in providing that information, or confirming it with his badge. The element of favour may arise simply from that.

[78] However, as earlier observed, the section also captures the use of position for purposes "unrelated to the proper performance of duties as a member." That wording appears not to require any gaining of advantage, essentially banning the use of one's office for any unrelated purpose. It appears that the member had no police duties at the time of the incident. He did not suggest that he was putting himself on duty, or detaining the complainant.

[79] Even if the complainant was acting outside his authority, the section appears to make it inappropriate for the member to use his position as a police officer, while off duty, even in what he may believe to be a justified attempt to have the complainant disengage. That would appear to be a purpose unrelated to his duties.

[80] Moreover, the evidence at this stage could support a view that the complainant was not acting outside his authority in preventing the member from proceeding to a vehicle with the key fob, even for the stated purpose of charging his phone. The complainant believed that the member's equivocal statements created a risk that he would drive, and also that his getting into the vehicle, even for that purpose, could have

put him in care and control<sup>6</sup>. I note that neither the member's understanding of the law relating to care and control, nor the training provided to the member in that respect, were addressed in the FIR, and it may be that the member will want to say more about that in due course. However, at this stage, although little turns on it, it appears that the evidence supports the complainant's view of the extent of his duty.

[81] I note that the training the member received pertaining to the description of corrupt practice, as described above, refers to personal gain and does not apparently capture the production of a badge for "other purposes unrelated to the proper performance of duties as a member." However, the statement that follows, not to produce a badge unless "you intend to put yourself on duty" pretty plainly suggests that there is no off-duty situation in which a badge might properly be displayed, regardless of the intention of personal gain. The member's knowledge of this might be supported by his assertion that he only showed a "portion" of his badge to the complainant, an assertion that I note appears to be at odds with the video evidence.

[82] I am aware that there are exceptions in the case of IIO investigations, but that is not an issue that arises here. The evidence here, including the member's statement, supports a view that he understood he should not identify himself as a police officer or produce his badge outside of the conduct of his duties. It remains open to him to refute that he held that understanding. Considered at this stage of the matter, the evidence and related materials appear sufficient to substantiate corrupt practice under Section 77(3)(c)(iii).

### **iii. Neglect of Duty**

[83] Pursuant to Section 77(3)(m), neglect of duty is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do.

[84] In the prior case referred to, OPCC No. 2017-13143-03,<sup>7</sup> I observed that the department involved in that case did not apparently provide guidance to members as to

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<sup>6</sup> R. v. Boudreau, 2012 SCC 56 (CanLII).

<sup>7</sup> Footnote 3

the circumstances under which it was inappropriate to display a badge or identify oneself as an officer. In this matter, the department has a precise policy, and the member acknowledged being aware of it.

[85] As noted, the policy prohibits employees “from producing their Badge or ID Card for any purpose other than identifying themselves as [a department employee] *during the lawful execution of their duties, or otherwise performing official [department] business.*” [Emphasis added.] That passage is followed by examples of inappropriate behaviour which involve attempting to avoid legal consequences.

[86] In relation to the application of the policy, the investigator found that the member only produced his badge “to satisfy [the complainant’s] questioning as [he] did not believe that [the member] was [a] member.” He concluded:

By doing so, ... [the member] did not have the intent to “avoid any legal citation or sanction pursuant to any federal, provincial or municipal statute, regulation or by law”, in this case being the notion of drinking and driving and using his position to be provided preferential treatment or favours from [the complainant].

[87] I believe the investigator’s analysis unduly restricts the behaviour to that directed at gaining a legal advantage, whereas in the preceding passages that are emphasized above, the department appears to have broadly prohibited the identification of oneself as a police officer in any exchange with a member of the public, when off duty. There is no suggestion that the policy is only engaged by situations in which favourable treatment might be anticipated. In this respect it appears to track the language of the final passage in the Section 77(3)(c)(iii) definition of corrupt practice.

[88] The wording pertaining to avoidance of legal citation or sanctions, preceded by “e.g.” provides only examples of more obvious ways in which the policy might be engaged, and indeed, would also amount to corrupt practice. The wording prior to that is more general, and the use of the word “prohibited” appears to indicate that there are no, or very few, circumstances in which a member should identify themselves as such when off duty.

[89] Taken with the admonishment provided in the training to “keep your badge in your pocket unless you plan to put yourself on duty,” it appears clear that the training members receive is simply not to produce their badges while off duty.

[90] It appears, in this respect, that the policy is no less stringent than the *Police Act* requirement that the purpose be related to the proper performance of the member's duties, and for the same reasons, production in these circumstances appears to be outside the policy, with or without a specific purpose of gaining favour. It would appear on the evidence that the member was not in the "lawful execution of ... duties," as required by the policy.

[91] Finally, as earlier noted, the evidence may support a view that the complainant was acting within his authority and that therefore, the inference of an attempt to gain legal favour may be available.

[92] At this stage of the proceedings, the FIR and records referenced in it appear to substantiate the misconduct of neglect of duty by failing to adhere to departmental standards pertaining to the production of a badge.

#### **5. Next Steps [Sections 117(7), (8)(e), (9) and (10)]**

[93] The member will be offered a prehearing conference under Section 120. At this stage the range of disciplinary or corrective measures I am considering, based on case summaries from the OPCC website include a suspension of one or two days, training in ethical standards related to conduct while off-duty, counseling in substance management, a written apology, and a written reprimand.

[94] For the assistance of a prehearing conference authority, if the member has no disciplinary record and accepts responsibility at a prehearing conference, I would consider that a finding of discreditable conduct and neglect of duty would suffice (without the corrupt practice allegation), and that the measures set out above, but without a suspension, would be sufficient.

[95] If the member declines a prehearing conference, a discipline proceeding must be convened within 40 business days from the date of this Notification. The member may file a request under Section 119 to call witnesses at the discipline proceeding within 10 business days of receipt of this Notification.

[96] Notifications of the proceeding must be sent by 15 business days prior to the hearing date, therefore by August 24, 2023. If the member does not accept the offer of a

prehearing conference by that date or apply for an extension, the offer of a prehearing conference is withdrawn and the discipline proceeding will be convened by teleconference at 9:00 a.m. on September 15, 2023.

#### **6. Complainant's Right to Make Submissions [Section 117(8)(b)]**

[97] The complainant will receive a copy of this Notification. This section is directed toward notifying him of the next steps and his right to make submissions. Section 113(1) the *Police Act* provides as follows:

(1) At any time after receiving a copy of the final investigation report in this matter but at least 10 business days before the date of any discipline proceeding, or, if a prehearing conference is to be held, within 10 business days after receiving notice under Section 120(6), the complainant may make written or oral submissions, or both, to the discipline authority or the prehearing conference authority, as the case may be, in relation to one or more of the following matters:

- (a) the complaint;
- (b) the adequacy of the investigation;
- (c) the disciplinary or corrective measures that would be appropriate.

[98] The complainant should be aware that the matter will either be resolved at a prehearing conference or proceed to a discipline proceeding. The interrelation of Sections 113 and 120 in this matter means that it is open to the complainant to make submissions any time prior to the deadline provided in Section 120(6), or if the member does not accept a prehearing conference, by August 31, 2023 (10 days prior to the commencement of the discipline proceeding). The complainant may file written submissions through the registrar of the OPCC and may also request an opportunity to provide submissions orally.

DATED at Sechelt, British Columbia, this 19<sup>th</sup> day of July, 2023.



Carol Baird Ellan  
Retired Provincial Court Judge  
Discipline Authority