

**IN THE MATTER OF
ONTARIO REGULATION 123/98
MADE UNDER THE POLICE SERVICES ACT, R.S.O. 1990, C.P.15
AND AMENDMENTS THERETO;**

**AND IN THE MATTER OF
POLICE CONSTABLE SEAN VAN VLYMEN**

AND THE

SARNIA POLICE SERVICE

APPEARANCES:

Mr. H. Reginald Watson
Legal Counsel - for the Sarnia Police Service

Detective Miro Soucek
Sarnia Police Association
Agent - for Constable Sean Van Vlymen

BEFORE:

Superintendent (retired) Robert J. Fitches

Hearing Date: August 11, 2016

Reasons for Decision and Disposition

Allegations

Constable Van Vlymen faces three allegations of misconduct as follows:

1. On or around November 25th, 2015, he checked a civilian, J.M., on police databases because J.M. had befriended Constable Van Vlymen's former girlfriend, A.M.
2. On or around December 11th, 2015, Constable Van Vlymen stopped a civilian, J.M., and issued three tickets to J.M. because he was a friend of Constable Van Vlymen's former girlfriend, A.M., and
3. On or around December 11th, 2015, Constable Van Vlymen detained a civilian, J.M., for the purpose of administering a Roadside Screening Device test despite lacking the grounds to make a demand for the test. The civilian, J.M., had not been drinking.

Hearing

As the result of a complaint lodged by J.M. an investigation was conducted by the Office of the Independent Police Review Director (O.I.P.R.D.). At the conclusion of that investigation, the O.I.P.R.D. ordered that a hearing into the allegations be convened.

On Thursday, August 11th, 2016, at Constable Van Vlymen's first appearance, the officer entered a guilty plea to the three allegations of misconduct. Immediately thereafter, a Statement of Facts, agreed to by all parties (including the complainant, J.M.) was entered as an exhibit.

The Statement of Facts contains the following information:

Constable Van Vlymen has been employed by the Sarnia Police Service (SPS) for approximately four and one half years and has attained the rank of Constable First Class.

From 2013 until early in 2016, the officer had an 'on again, off again' relationship with A.M.

On November 23rd, 2015, A.M. called Constable Van Vlymen as it was his birthday. The officer learned that A.M. was interested in photography and had been introduced by a mutual friend to the complainant, J.M., who is a photographer in Sarnia. J.M. was assisting A.M. in learning photography.

On November 25th, 2015, while off duty, Constable Van Vlymen accessed the Inquiry Services System (ISS) to obtain information regarding J.M. The officer had no work-related reasons to do so. ISS is a web-based Ministry of Transportation (MTO) database which is accessible to police officers through the Internet. From the MTO ISS database an officer can access all drivers' licenses, license photos and

driver records, as well as vehicle information for any vehicle or driver in the province of Ontario. Thus an officer can use ISS to obtain driver and vehicle information, thereby bypassing CPIC.

When Constable Van Vlymen accessed ISS on November 25th, 2015, he obtained the following personal information for J.M.:

- a. Driver's license number;
- b. Driving record;
- c. Vehicle information (make, model, year and colour);
- d. Plate number, and
- e. Photograph

While conducting this ISS online inquiry, the officer also had access to the personal information of 14 other individuals in Ontario with the same name as J.M.

The officer realizes that in improperly accessing ISS on November 25th, 2015, he engaged in a breach of confidentiality.

On December 10th, 2015, A.M. requested that J.M. visit her at the home of her father on Talfourd Street, where she was residing temporarily. When J.M. arrived at approximately 11:00 p.m., he parked his vehicle in front of the house on Talfourd Street facing westbound. Due to his ISS inquiry on November 25th, 2015, Constable Van Vlymen knew the make, model, year and colour of J.M.'s vehicle.

When J.M. arrived at the residence, A.M. was present, as was A.M.'s father and a long-time family friend, D.W., who also was a friend of J.M. J.M. had not met A.M.'s father previously.

The four people spoke about photography for about an hour. At about midnight, D.W. indicated that she had to leave. At the same time, J.M. decided to leave. J.M. and A.M. went outside the house and stood on the porch while A.M. smoked a cigarette. While they were on the porch, an SPS cruiser, driven by Constable Van Vlymen, drove by the house in a westerly direction. The officer is familiar with the house as he had been inside it on at least two occasions previously.

While J.M. was present at the house, no alcohol was served. None of A.M., her father or D.W. noticed the smell of alcohol or any other signs of impairment in relation to J.M.

Shortly after the SPS cruiser passed the house, J.M. left, entered his vehicle and drove westbound on Talfourd Street. He felt that the officer might be waiting for him and therefore drove carefully.

After passing the house, Constable Van Vlymen parked in a church parking lot located on a cross street close to the house. After J.M. left the house, the officer followed J.M. along Talfourd Street. J.M. then turned right onto Ontario Street and drove five blocks to Wellington Street. J.M. turned left on Wellington Street and was proceeding in a westerly direction toward his apartment. The officer continued to follow J.M. At Vidal Street, J.M. was concerned about the SPS cruiser following him and decided to drive south on Vidal Street toward his mother's house.

Just beyond the intersection of Vidal and Concessions streets, the officer activated his roof lights and stopped J.M. on Brock Street. The distance from A.M.'s father's house to the location of the stop on Brock Street is approximately three kilometres. It took OIPRD investigators seven minutes to travel this route.

Following the stop, Constable Van Vlymen asked J.M. for his license, ownership and insurance. He also asked for J.M.'s current address. J.M. stated that he lived on Front Street, which was not the address that appeared on his license. The officer explained to J.M. that his license needed to show his current address and that address changes were required to be made within six days.

While the officer did not smell any alcohol on J.M.'s breath, he asked if J.M. had been drinking that evening. J.M. had not been drinking.

Despite a lack of grounds, the officer contacted the SPS dispatcher and requested that an officer attend with a roadside screening device.

Subsequently, while J.M. waited in his vehicle, an SPS constable, G.B., arrived with the device and remained at that scene while Constable Van Vlymen administered the roadside breathalyzer test on J.M. Constable Van Vlymen did not advise G.B. that he knew of J.M. or the reason why he knew J.M.

The roadside breathalyzer test registered a reading of zero – meaning that J.M. had no alcohol in his system. J.M. was calm during the traffic stop, including the breath test.

Constable Van Vlymen then instructed J.M. to return to his vehicle and wait. Constable Van Vlymen issued three tickets to J.M. for: an incorrect address on his driver's license; an expired validation tag; and failing to stop for police. After giving the three tickets to J.M., the Constable Van Vlymen and G.B. left the area.

J.M. was upset by the encounter with Constable Van Vlymen and felt that he had been targeted by the officer. Later the same day as the roadside test, J.M. spoke to A.M., A.M.'s father and D.W. to express his concern regarding the officer's conduct.

Shortly thereafter J.M. filed a written complaint with the OIPRD. The OIPRD conducted an investigation that concluded that the officer's actions constituted misconduct. The OIPRD directed that the SPS conduct a hearing pursuant to the provisions of the *Police Services Act*.

The three tickets that were issued to J.M. were subsequently withdrawn by the Crown.

Constable Van Vlymen realizes that he should not have followed and stopped J.M. nor administered a roadside breath test.

Finding

The information contained in *the* Agreed Statement of Facts illustrates very clearly that over a period of more than two weeks, Constable Van Vlymen misconducted himself in a very serious way. The evidence very convincingly shows that three separate incidents of misconduct occurred relative to Constable Van Vlymen's interactions and other dealings regarding J.M.

Based upon the evidence before me, as well as Constable Van Vlymen's plea of guilty, I have no hesitation in finding that Constable Van Vlymen is guilty of three counts of Discreditable Conduct, contrary to the *Police Services Act* (Ont.).

Reasons for Disposition

Evidence and Submissions

There can be no doubt that the conduct in question was completely unacceptable and inappropriate. The protracted nature of the events relating to these allegations of misconduct is such that it makes it quite clear that Constable Van Vlymen's behavior was neither aberrant nor spontaneous. The time between the first incident (accessing ISS) and the second set of incidents (the vehicle stop and roadside screening test) is in excess of two weeks. If the conduct that occurred at the end of November was aberrant or spontaneous, one might presume Constable Van Vlymen would have reconsidered the course action he set out upon and would not have proceeded any further. By failing to alter or cease his course of action, Constable Van Vlymen misconducted himself even further by stopping J.M. for an improper purpose. The officer's decision to have a roadside screening test administered and further, to issue three tickets to the driver, compound this very troubling situation even more.

So to my mind, the time frame is worth mentioning and considering when contemplating the appropriate disposition of these matters. The protracted time frame acts to aggravate the disposition that could be assessed in these matters. For if Constable Van Vlymen had only committed the breach relative to the ISS and had done nothing further, the disposition might well be somewhat less harsh than that to which all parties have agreed. The issue to be determined, however, is whether the

evidence and other information available to me suggest that the agreed-to disposition – a six-month demotion to second class constable - is within the range of what might be considered appropriate.

Before entering into such an analysis, I need to state that virtually the only disposition available to me that would exceed a demotion would be dismissal. So as the first step in determining whether the demotion is adequate, I will briefly turn my mind to whether or not dismissal would be appropriate. For if dismissal would not be appropriate, then a demotion might very well be proper.

Fundamental Presumption

In determining whether or not dismissal is an appropriate disposition, one must begin from the position that the appropriateness of dismissal must be indicated by the evidence and other available information. In my view it would not be appropriate for a decision-maker to begin from the position that dismissal is the most likely disposition and then examine the information and evidence seeking to support such a decision.

One must remain vigilant in assessing whether the evidence indicates that an officer's usefulness as a police officer has been spent. In very rare situations, the specifics of the misconduct might be such that no disposition other than dismissal would be appropriate. In most cases, however, it is necessary for the evidence and other information to move the decision-maker toward dismissal from a neutral position, before such a disposition would be seen as fit and proper.

The Usefulness Test

Over many decades of police disciplinary proceedings, in various appeals and judicial reviews around the issue of dismissal, there has developed what is known as the '*Usefulness Test*'.

This standard for dismissal applies to all police disciplinary cases, and must be applied when determining whether or not an officer's services ought to be terminated.

The *Usefulness Test* emphasizes three factors:

- the nature and seriousness of the conduct,
- the potential for reform or rehabilitation, and
- the damage to the reputation of the police service.

If all three of these factors point toward an officer's termination, then dismissal can be considered. It is not automatic, however and other factors need to be considered. Mitigation can, and frequently does, move the bar to something less than dismissal.

When assessing Constable Van Vlymen's conduct, especially when compared to other serious misconduct that might attract dismissal, there is no doubt in my mind that dismissal would not be an appropriate disposition; it would be unduly harsh and could not be supported by the evidence.

When coupling the seriousness of this misconduct with the officer's post-event conduct, it becomes starkly evident that dismissal would not be appropriate and should not be considered. Such a disposition would not reflect the officer's obvious remorse and could not stand the test of scrutiny. When considering the consistency aspect, dismissal would violate any standards of consistency that one might apply. When considering the *Usefulness Test*, once again, dismissal would not be appropriate and could not be justified in any way.

In my view, since dismissal would not be appropriate, it follows that demotion might well be within the range of what would be deemed to be appropriate in these circumstances.

Assessment of Agreed Disposition

The disposition that has been agreed to by all parties, including the Complainant, is a demotion to Second Class Constable for a period of six months. Constable Van Vlymen's return to First Class Constable will be conditional on a successful evaluation by a supervisor during the six-month demotion period. The Supervisor's evaluation will be presented to the Deputy Chief of Police for approval. Once the Supervisor's evaluation has been approved, the demotion will end and Constable Van Vlymen will be reinstated as First Class Constable; failing which the officer will continue as a Second Class Constable.

Mr. Watson opened his submissions to the tribunal by assuring me that the complainant in these matters has been included in discussions surrounding disposition, he agrees with the statement of facts and the disposition and is aware that he has a right to make submissions.

In essence, Constable Van Vlymen engaged in targeted misconduct and he used police information for his own purposes. These matters relate to a series of events that occurred over a period of 2 ½ weeks; it was not a one-off situation and it is therefore difficult to characterize the misconduct as aberrant.

Prior the traffic stop, the officer followed the complainant for approximately 3 miles. Although there were no grounds to do so, Constable Van Vlymen detained the complainant for a period of time while awaiting the arrival of the roadside testing device. When the device arrived, Constable Van Vlymen neglected to tell the arriving officer that he (Van Vlymen) knew the complainant and/or how he knew the complainant.

Paul Ceyskens text, Legal Aspects of Policing was commended to me; particularly several passages contained in pages 6-74 through 6-76. While the seriousness of breaching the confidentiality provisions of CPIC (and by extension, ISS) can attract significant sanctions up to and including dismissal, the '*range of dispositions in these sorts of cases varies widely, including dispositions at the very low end of the spectrum*'.

In the end, a disposition must accord with the purposes of the process; purposes which include officer interest, employer interest and public interest. The use of the least onerous disposition is encouraged, but that position can be displaced if the public interest is significant.

Mr. Watson next moved me through the disposition considerations, as in Krug. While I wholeheartedly subscribe to each of these considerations, I shall only refer to those which have a significant impact on the matters now before me.

The Public Interest is always in play in matters such as these. Where misconduct erodes the public's confidence in the police, such an impact can be looked upon as aggravating the situation. The fact that Constable Van Vlymen targeted a member of the public speaks volumes as to whether the Public Interest is an important factor. It most certainly is.

When considering the officer's recognition of the seriousness of the misconduct, Constable Van Vlymen's actions after the fact illustrate very clearly that he does recognize the seriousness of his actions, has entered a guilty plea at the first opportunity and has agreed to a not-insignificant penalty. The jurisprudence around this point is unwavering. Pleading guilty is a major mitigating factor. Pleading guilty at the first opportunity further mitigates the penalty in that it reduces in a significant way the financial and other costs associated with prosecuting matters such as these.

Assessing an officer's potential for reform or rehabilitation connects directly to remorse. At the risk of becoming repetitive, Constable Van Vlymen's response to the complaint leaves no doubt in my mind that he is remorseful and that the likelihood of rehabilitation and/or reform is extremely high.

One cannot look upon a six-month demotion as being insignificant. The financial, psychological and emotional costs associated with such a penalty are severe. For not only is there a measurable impact on the officer's pay, there are untold and subtle costs to the person within the workplace and among his peers. This must all be considered when attempting to assess such a disposition.

The Sarnia Police Association President, Detective Miro Soucek also made submissions to the tribunal. It was reiterated that Constable Van Vlymen has taken the first opportunity to deal with these matters and in spite of these issues hanging over his head for some time now, he has remained proactive and professional in his duties. Constable Van Vlymen realizes his mistakes and continues to move forward in a positive fashion.

The Complainant was present in the hearing room throughout the hearing. When he was asked if he had any comments or submissions to make before the tribunal, the complainant indicated that he did not. When asked if he was satisfied with the proceedings and disposition he indicated that he was.

Summary

As stated previously, Constable Van Vlymen acted in a completely unprofessional manner on a number of different occasions over a period of 2 ½ weeks. The protracted nature of the misconduct must be taken into consideration.

Once these matters came to light, Constable Van Vlymen seems to have immediately recognized the errors he had committed, recognized that he was wrong and showed very clearly that he was remorseful for his misconduct. He has entered a guilty plea on the first day that it was possible to do so. He has agreed to a penalty that is very significant.

During the course of the investigation and negotiations leading up to this hearing, the police service has included the Complainant in the process. Those members of the police service who were involved in these matters and I suspect Mr. Watson, ought to be commended for the very professional and proactive manner in which these matters were handled. I would be remiss if I didn't also recognize the role that the Association has no doubt played in bringing these matters to a speedy and reasonable resolution. One can only hope that the complainant has had some of his faith in the police service renewed through this process.

Disposition

Constable Sean Van Vlymen is hereby demoted from Constable First Class to Constable Second Class for a period of six (6) months.

Constable Van Vlymen's return to First Class Constable will be conditional upon a satisfactory evaluation by a Supervisor during the period of demotion. The Supervisor's evaluation will be submitted to the Deputy Chief of Police for approval. Until such time as the Deputy Chief of Police approves Constable Van Vlymen's evaluation, he shall remain as Constable Second Class.



R.J. (Robert) Fitches
Superintendent (ret'd)

August 29, 2016