OPCC File No. 2014-9836
January 22, 2018

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

AND

IN THE MATTER OF Constable David Bunderla and Constable Richard O'Rourke

SOUTH COAST BRITISH COLUMBIA TRANSIT
AUTHORITY POLICE SERVICE

Review on the Record pursuant to s. 141 of the *Police Act*

REASONS

TO:	Complainant, Ms. Maria Lopez
TO:	Constable David Bunderla #111
TO:	Constable Richard O'Rourke #250
AND TO:	Mr. Kevin Woodwall, Counsel for Constables Bunderla and O'Rourke
AND TO:	Mr. Bradley Hickford, Commission Counsel
AND TO:	Mr. Doug LePard, Chief Officer (SCBCTAPS)
AND TO:	Mr. Stan T. Lowe, Police Complaint Commissioner

INTRODUCTION

1. This is a review on the record pursuant to the *Police Act*, R.S.B.C. 1996, c. 367, ss. 141 and 137(2). The review relates to disciplinary or corrective measures imposed by a discipline authority on September 21, 2016.

2. Constable Bunderla and Constable O'Rourke are officers of the South Coast British Columbia Transit Authority Police Service (SCBCTAPS). Based on events that took place on

July 17th and 18th, 2014 in Vancouver and White Rock, both officers were charged with committing offences of misconduct under the *Police Act.* The misconduct involved a failure to arrest a man contrary to the instructions of a senior officer, a failure to follow an order to have RCMP officers as backup or cover during an investigation and unlawful entry and search. I will review the evidence in more detail in due course.

3. After a discipline hearing that took four separate days from October 2015 to March 2016, the discipline authority found three separate offences of misconduct and recommended disciplinary or corrective measures that included a written reprimand for each of two violations and a four-day suspension without pay on the third.

BACKGROUND

4. The circumstances which give rise to these proceedings relate to a police investigation of Sebastian Lopez, the son of the complainant, Maria Lopez. Sebastian Lopez is alleged to have criminally harassed a young woman A. S. who was a passenger on the public transit system. On June 30, 2014, the young woman reported to the police that she had been followed by a man approximately 20 times over the past year. The incidents took place late at night. On July 17, 2014, while riding the Canada Line, she said she saw the man in question. She called the police. As a result of her complaint, officers of both the SCBCTAPS and the Vancouver Police Department (VPD) attended at the Cambie Street station. After speaking to A.S., the police detained Sebastian Lopez. One of the officers who attended, Constable O'Rourke, recognised Mr. Lopez. The officers were told by police radio that Mr. Lopez had touched A.S. in a non-sexual manner. The officers were also told that Mr. Lopez had been watching the complainant at night at a park-and-ride parking lot in Surrey. As a result of the detention, the police searched their database and found that Mr. Lopez had been identified as a risk for violence, contagious diseases, suicide and escape. As well he was on a recognizance on a charge of sexual assault.

5. A radio exchange took place between SCBCTAPS Acting Sergeant Bill Emerslund, who was the supervisor, and Constable Bunderla. There is a conflict in the evidence as to the ensuing phone conversation between them that took place. It is clear however that there was an obvious difference of opinion as to whether or not the police had reasonable and probable grounds to arrest and detain Mr. Lopez. Acting Sergeant Emerslund believed there were grounds to arrest

and charge Mr. Lopez with criminal harassment. On the other hand, Constable O'Rourke said he did not believe they had reasonable and probable grounds to arrest Mr. Lopez. As a result they released him. Acting Sergeant Emerslund was surprised at the release. There is some confusion as to whether Constable Bunderla and Constable O'Rourke even understood that they had been ordered to arrest Mr. Lopez that night.

6. On the following day, July 18, 2014, Constables O'Rourke and Bunderla were brought into the office. They were to go to White Rock and arrest Mr. Lopez. Acting Sergeant Emerslund told them that other officers had interviewed the young woman and they believed there were sufficient grounds to arrest Mr. Lopez.

7. It appears that the thinking was that because they had failed to follow the instructions of Acting Sergeant Emerslund on the previous day, they were sent to White Rock to redeem themselves for the failure to arrest and detain Mr. Lopez. While the officers were sent to White Rock in order to arrest Mr. Lopez, they were not given any additional information relating to reasonable and probable grounds. Thus they were not offered the opportunity to form their own assessment of reasonable and probable grounds to arrest, but instead were asked to rely on what a superior officer had concluded. They were simply told that other officers had interviewed the complainant and concluded there was sufficient information to justify an arrest. I pause hear to note that the aforementioned evidence does not constitute any of the alleged misconduct findings that are before me on this review. It is nevertheless relevant because it forms a part of the narrative.

8. As the officers drove to White Rock, they were ordered by Acting Sergeant Emerslund on the radio to notify the White Rock RCMP that they would be attending at the Lopez residence in order to effect an arrest and to arrange for backup or cover in the event that the same was needed. In spite of being told to contact the RCMP, the officers failed to do so before attending at the apartment.

9. The officers attended at the residence. They were buzzed in. Constable O'Rourke called out to Mr. Lopez and told him that the police were there to arrest him for criminal harassment. Apparently Mr. Lopez was calling a lawyer. Constable O'Rourke then entered the apartment in order to find Mr. Lopez. By that time, Mr. Lopez had left the apartment by another exit.

Constable Bunderla did not enter the apartment. There was a conflict in the evidence as to whether or not Constable O'Rourke had been invited in by Michelle Tung, another occupant of the apartment. At the discipline hearing, he gave two reasons for entering the apartment. First he said he was given permission by the occupant, Ms. Tung and second, he said there were exigent circumstances because he was concerned about Ms. Lopez's safety. The discipline authority rejected those explanations, reasoning that there was no information indicating a risk of self-harm or exigent circumstances. Moreover this was not a case of "fresh pursuit". It is common ground that the officers had no warrant.

10. On the RCMP backup point, the discipline authority wrote, at p. 31:

> This attempted arrest was carried out without covering a potential escape route which is standard procedure for even the most inexperienced police officers. The officers were unable to cover both the patio door and have sufficient resources to cover each other at the front door.

11. On April 25, 2015, Sebastian Lopez's mother, Maria Lopez, the occupant of the premises that were entered into by the police, filed a complaint with the Police Complaint Commissioner. As a result Staff Sergeant Doug Fisher of the SCBCTAPS conducted an investigation. He submitted his final investigation report (FIR) on March 13, 2015. And he added an addendum to that report on May 4, 2015 and finally, on July 29, 2015, he provided his Supplemental Investigation Report.

12. As a consequence of staff Sergeant Fisher's FIR, Inspector Brian MacDonald convened discipline proceedings on October 15, 2015. The hearing was adjourned to February 11 and 12, 2016 and again to March 23, 2016. On August 9, 2016, Inspector Macdonald made findings. He rejected the officers' explanations of the complaints and made the following three findings of misconduct:

1. Constable O'Rourke committed "abuse of authority" contrary to s. 77(3)(a), which is oppressive conduct toward a officer of the public, by virtue of his unlawful entry and search of the complainant's residence on July 18, 2014.

2. Both Constable Bunderla and Constable O'Rourke committed "neglect of duty" contrary to s. 77(3)(m)(ii), by neglecting without good or sufficient cause, to promptly and diligently do anything that it is one's duty as an officer to do, by virtue of their failure to properly execute the arrest of the complainant's son on July 18, 2014.

3. Both Constable Bunderla and Constable O'Rourke committed "neglect of duty" contrary to s. 77(3)(m)(iii), by neglecting without good or sufficient cause, to promptly and diligently obey a lawful order of a supervisor, in particular by not having RCMP backup to prevent the escape of the complainant's son on July 18, 2014.

13. On September 21, 2016, the discipline authority recommended the following disciplinary or corrective measures:

1. On the first complaint of abuse of authority and unlawful entry and search, the recommended measure was a written reprimand;

2. On the second complaint of neglect of duty by failure to properly execute the arrest, the recommended measure was a reprimand; and

3. On the third complaint of failing to diligently obey a lawful order of a supervisor and in particular not having the RCMP backup, the recommended measure was a four-day suspension without pay.

14. On November 18, 2016, the Office of the Police Complaint Commissioner ordered a notice of review on the record. Thus, it is my duty to conduct the review pursuant to s. 141 of the *Police Act*. The formal record and materials were provided to me on December 19, 2016. However, in January 2017, counsel for the officers raised an issue relating to the scope of the review. Counsel for the officers argued that the review should consider the correctness of the misconduct findings made by the discipline authority. In other words, counsel took issue with the findings of misconduct. Counsel filed written submissions.

15. On April 18, 2017, I issued my reasons and concluded that the review on the record is confined only to the issue of sanctions (the appropriate disciplinary or corrective measures), and not to any reconsideration of any findings of misconduct. The matter was further delayed because counsel for the officers made an application for an order for my recusal. The application was based upon a reasonable apprehension of bias. Again, that necessarily involved a further delay, as counsel for the officers and commission counsel filed written arguments and made oral submissions. On November 21, 2017, I dismissed the application for an order of recusal.

THE LAW

16. The law is not in dispute. Section 141(9) makes it clear that in a review on the record, the appropriate standard is one of correctness. Moreover, the review on the record in this case is confined to the issue of sanctions and not to the issue of misconduct. Counsel for the officers has made a strong argument relating to the findings of misconduct made by the discipline authority, but I take this to mean that it is done so in the context of the review focusing on sanctions; in other words, the argument dealing with misconduct was really made in mitigation of the sanctions. I recognise the officers feel strongly that there was no misconduct and therefore seek the most minimal form of sanctions. I want to reemphasize that in this process my sole focus is on the correctness of the sanctions and not on the correctness of the findings of misconduct. I am bound to accept the discipline authority's findings of misconduct, and my focus is on the sanctions alone.

17. In determining what sanctions are appropriate, the Act is of assistance in that it provides a non-exhaustive list of aggravating and mitigating circumstances which ought to be taken into consideration as to the appropriate disciplinary or corrective measures. Section 126(2) lists these factors as follows:

> (a) the seriousness of the misconduct,
> (b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct,
> (c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career,
> (d) the likelihood of future misconduct by the member,
> (e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
> (f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,
> (g) the range of disciplinary or corrective measures taken in similar circumstances, and
> (h) other aggravating or mitigating factors.

18. As well, the spirit of the Act favours "an approach that seeks to correct and educate the member", as long as that approach is workable and does not bring the administration of police discipline into disrepute: s. 126(3).

ANALYSIS

19. Determining whether the sanctions are corrective measures, it should be noted that neither officer has any record of misconduct. While Constable Bunderla had two negative performance logs, and Constable O'Rourke had one, the logs were considered by the discipline authority to be of little or no significance. Both officers have been recognised for good performance on a number of occasions. In determining the correctness of the recommended sanctions, it is necessary to consider the impact that any suspension without pay would have on the officer and his family. Constable Bunderla is a primary income earner in his family. Constable O'Rourke faces particular financial pressures. However, I tend to think that the fact misconduct has been found is in itself what has the largest impact on their careers, rather than the particular choice of sanction (given that there is no contemplation of a more serious sanction such as dismissal or reduction in rank).

20. The fact that both officers have gone through a prolonged *Police Act* process, is a factor that can never be underestimated. In September 2016, the discipline authority concluded that the officers had both learned from the process and that he would be surprised if they were to repeat such behaviour. I agree and would say that the prolonged process since that time has only strengthened that conclusion.

21. There seems to be no doubt at least from submissions made through counsel that the officers remain sceptical about the advice given to them by their supervisor and the way in which the events unfolded. I find the officers had a legitimate difference of opinion about some aspects of this matter and there is considerable merit to their position. I have no doubt that they have learned from this experience and I am sure that all parties appreciate the need for clear communications and the need for a very clear expression of any disagreement, along with respectful discussion of the issue should such an situation arise again. The *Police Act* contemplates possibilities where actions of a supervisor or departmental policies may contribute to misconduct. s. 126(2)(f). While the supervisors were not the cause of the misconduct, with great respect I think it may have been ill-advised to send the same two officers to arrest Mr. Lopez, all while monitoring the call by radio. There is no doubt that the officers knew they were under intense scrutiny. Thus, the dynamic was far from optimal and could have been avoided.

First misconduct finding: abuse of authority by Constable O'Rourke, unlawful entry and search of a residence, July 18, 2014

22. I will now deal with each finding of misconduct separately. In dealing with Constable O'Rourke, the most serious of the allegations is the entry into a private residence without permission and without a warrant. The discipline authority impose a written reprimand. Commission counsel argues that a written reprimand is both inappropriate and inadequate. He recommends that the officers should be required to engage in specified training. It is of note that commission counsel does not seek a suspension or a punitive type of remedy. Constable O'Rourke through counsel has argued that he really committed no misconduct and that had his judgment being adhered to, he would not have even made any attempt to arrest Mr. Lopez. Accordingly, he has argued that he should be given the least punitive measure possible.

23. Our constitution and our jurisprudence have long recognized the sanctity of the home. The *Canadian Charter of Rights and Freedoms* ensures the right to be free from unreasonable search and seizure. As noted by Mr. Justice Binnie in *R. v. Tessling*, 2004 SCC 67, at para. 22, the notion that every home is a person's castle is ancient. It was articulated in a case dating to the same year as *Othello* was first performed: *Seymane's Case* (1604), 5 Co. Rep. 91a at p. 91b: "That the home of every one is to him his castle and fortress, as well for his defence against injury and violence, as for his repose."

24. In determining the appropriateness of any corrective measure I take particular note of the fact that Constable O'Rourke had been dispatched to arrest a suspect after refusing to arrest him the day before. He was ordered to do so without any warrant or without any additional information. He was simply told that he had an obligation to arrest the man. Constable O'Rourke was in a difficult position because he would be criticized if he did not arrest Mr. Lopez. He felt he was between a proverbial rock and a hard place.

25. It should also be noted that his colleague, Constable Bunderla, did not even enter the apartment, even as cover for Constable O'Rourke. Obviously, Constable Bunderla had a different view as to the propriety of entering the apartment. An intrusive entry into a personal residence, without lawful authority, is no trifling matter. Having said that, he was not inside at

any length nor did he conduct any real search. The circumstances here are unusual. I fully agree with commission counsel that the sanctions should focus on measures to educate and improve an officer's performance, rather than to impose punitive measures. Accordingly, I conclude the appropriate sanction is that he be required to undertake specified training pursuant to s. 126(1)(f). The sanction is more serious than a reprimand. But in my view it is appropriate in the circumstances and will no doubt be a deterrent as to future such conduct.

26. Pursuant to s. 181(2) of the Act, the Chief Officer is to take every reasonable step to ensure that this training takes place. To make this order effective, I ask that the Chief Officer ensure that course work or training modules of at least ten hours be provided, by those with expertise on the law relating to entering and searching homes and buildings and the *Charter* protection against unreasonable search and seizure. I ask that the Chief Officer report to the Office of the Police Complaint Commissioner to confirm the details of this training once it has been completed.

Second misconduct finding: neglect of duty by both Members, failing to properly execute arrest, July 18, 2014

27. It appears that the reason for attending at the White Rock apartment on July 18, 2014 was that these two officers had previously failed to arrest Mr. Lopez as ordered and had to correct their mistake. They did not notify the RCMP in advance as ordered and in fact the suspect left through the back door. In the whole of the circumstances I agree that the sanction of a written reprimand was appropriate and I would impose that measure.

Third misconduct finding: neglect of duty by both Members, not having RCMP backup, July 18, 2014

28. On this finding of misconduct the discipline authority imposed a four-day suspension without pay on both officers. The discipline authority concluded that this was a very serious matter because there was a failure to obey a lawful order which is a direct attack on the ability of a force to react to circumstances, and it impairs police discipline. Commission counsel has argued that the sanction is not keeping with precedent cases, and that a more appropriate remedy would range from a written reprimand to a two-day suspension without pay.

29. I agree that the failure to follow a superior officer's order is a serious matter. Any disregard for such directions may amount to insubordination or disobedience. In this instance, I am more sympathetic to the officers' position. I think the actions here are more in the category of an oversight as opposed to a willful refusal to follow an order. The order was less clear at that time. The radio call "get an RCMP member from out there to come cover for you" because of a potential dispute. In retrospect, it became a failure because Mr. Lopez in fact got away. There is no doubt that the general deterrence of other officers' misconduct is a valid consideration, however, in my view in the whole of the circumstances it does not warrant increasing the sanction to a four-day suspension. Based on the whole of the circumstances I am of the view that a written reprimand is an appropriate sanction for this misconduct.

30. I would be remiss if I did not comment on the inordinate length of time it took to finally conclude this matter. These events took place in July 2014. It has been said many times that if the police complaint process is to be effective and fair, not only to officers but to the administration of justice, it must be resolved within a reasonable period of time. I wish to emphasize the adverse effect the lengthy process has on officers who must live with a so-called cloud of the disciplinary process hanging over their heads while the legal process unfolds in a somewhat casual manner. It goes without saying that unreasonable delays bring the administration of justice in disrepute. The hallmark of a fair civilian oversight system is a fair and just result within a reasonable period of time.

The Honourable Wally Oppal, Q.C.
This 22nd day of January, 2018