



Office of the
Police Complaint Commissioner

British Columbia, Canada

PH: 2016-01
OPCC File: 2011-6657/2012-8138

NOTICE OF PUBLIC HEARING

Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Public Hearing into the Complaint against
Constable Edgar Diaz of the South Coast BC Transportation Authority Police Service**

- To: Mr. Charles Riby-Williams (Complainant)
- And to: Constable Edgar Diaz (#151) (Member)
David Butcher, Q.C. – Counsel
- And to: Chief Constable Dave Jones (External Discipline Authority)
c/o New Westminster Police Department
Professional Standards Section
- And to: Chief Officer Doug Lepard
c/o South Coast BC Transportation Authority Police Service
Professional Standards Section

WHEREAS:

Investigation

1. On August 18, 2011, the Office of the Police Complaint Commissioner (OPCC) received information from the South Coast BC Transportation Authority Police Service (SCBCTAPS), requesting this office order an investigation into an August 10, 2011, altercation that Constable Diaz and former Constable Hughes had with Mr. Riby-Williams.
2. SCBCTAPS Police Professional Standards investigator, Staff Sergeant Kent Harrison, conducted an investigation into allegations of *Abuse of Authority* against both Constable Diaz and former Constable Hughes. On September 10, 2012, Inspector MacDonald as Discipline Authority, made a finding in relation to the allegations against Constable Diaz and former Constable Hughes.

Stan T. Lowe
Police Complaint Commissioner

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3. On November 23, 2012, in order to address concerns with Inspector MacDonald's decision, the Police Complaint Commissioner ordered an external investigation to be conducted by the New Westminster Police Department (NWPD). Sergeant Andrew Perry of NWPD was assigned as the external investigating officer. In addition, the Police Complaint Commissioner appointed Chief Constable Jones of the NWPD to perform the duties of Discipline Authority with respect to all matters related to the actions of Constable Diaz and former Constable Hughes.
4. On July 22, 2013, after completing the investigation, Sergeant Andrew Perry submitted the Final Investigation Report to Chief Constable Jones. On July 26, 2013, Chief Constable Jones determined that the evidence appeared to substantiate four allegations of *Abuse of Authority* against former Constable Hughes. Chief Constable Jones also determined that the following two allegations against Constable Diaz appeared to be substantiated:
 - (i) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority*, contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.
 - (ii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority*, contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly issued Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause.Chief Constable Jones also determined that some allegations against Constable Diaz and Constable Hughes did not appear to be substantiated.
5. On August 26, 2013, after reviewing Chief Constable Jones' decision, the Police Complaint Commissioner determined that there was a reasonable basis to believe that Chief Constable Jones' findings were incorrect with respect to the allegations that he determined did not appear to be substantiated. As a result, pursuant to section 117(4) of the *Police Act*, the Police Complaint Commissioner appointed Honourable retired Supreme Court Justice Ian H. Pitfield, as a retired judge to review the unsubstantiated allegations and arrive at his own decision.
6. On October 9, 2013, retired Judge Pitfield completed his review recommending that the evidence appeared to substantiate allegations against both former Constable Hughes and Constable Diaz.

7. At that point, the allegations in relation to this matter became bifurcated, thereby proceeding separately and independently of each other. Chief Constable Jones retained the allegations that he determined appeared to be substantiated by the evidence and retired Judge Pitfield became Discipline Authority with respect to the allegations that he determined appeared to be substantiated.
8. On January 15, 2014, Chief Constable Jones issued the Disciplinary Disposition Record with respect to former Constable Hughes, pursuant to section 133 of the *Police Act*. Those allegations have been concluded by this office.
9. On January 23, 2014, the Police Complaint Commissioner suspended this matter pursuant to section 179(4) of the *Police Act* after the NWPD advised they would be recommending criminal charges against Constable Diaz and former Constable Hughes.
10. On June 29, 2016, the Office of the Police Complaint Commissioner lifted the suspension of this matter after the NWPD advised that Crown Counsel had entered a stay of proceedings against former Constable Hughes, and that Constable Diaz pleaded guilty to assault causing bodily harm on May 31, 2016. Constable Diaz was sentenced to 12 months' probation on June 24, 2016.
11. The allegations before Discipline Authority Pitfield remain ongoing. A discipline proceeding has been convened and the Registrar is currently attempting to arrange further dates with the Discipline Authority and counsel to proceed with witness testimony.

Discipline Proceeding and Proposed Discipline

12. On September 19, 2016, following the discipline proceeding held by Chief Constable Jones, and after considering the available evidence and submissions, Chief Constable Jones made the following determinations in relation to the allegations:
 - (i) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia Constable Diaz **committed** the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.

Proposed Disciplinary Measure – Suspension from duty, without pay for five (5) working days, based on a 10.5 hour shift, and training on use of force techniques and policy applications.
 - (ii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia Constable Diaz **did NOT commit** the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* by intentionally or issuing Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause.

13. Mr. Riby-Williams and Constable Diaz were provided a copy of Chief Constable Jones' findings in relation to each allegation of misconduct and determinations on appropriate disciplinary or corrective measures at the discipline proceeding. Mr. Riby-Williams and Constable Diaz were informed that if they were aggrieved by either the findings or determinations they could file a written request with the Police Complaint Commissioner to arrange a Public Hearing, or Review on the Record.
14. To date, the OPCC has not received a request for a Public Hearing or Review on the Record from either Mr. Riby-Williams or Constable Diaz.
15. Based on a review of the discipline proceeding, it is apparent that the Discipline Authority did not have the benefit of testimony from key witnesses, including Mr. Riby-Williams and former Constable Hughes; only the *Police Act* investigator, Sergeant Perry, and Constable Diaz provided evidence at this proceeding. Pursuant to the *Police Act*, unless the member whose conduct is the subject of the proceeding initiates a request to call witnesses to testify in the proceeding, there is no other mechanism to allow for the participation of material witnesses. In my view, the accountability of the process and the ability to search for the truth in this proceeding have been hampered.
16. At the conclusion of the evidence, Constable Diaz's counsel submitted that Constable Diaz mistakenly believed that he had the authority to issue a violation ticket, but that his actions did not constitute misconduct because the requisite element of intent had not been established based on the evidence. Constable Diaz's counsel cited the following cases as support for this position: *Lowe v. Diebolt*, 2013 BCSC 1092; *The Royal Newfoundland Constabulary Public Complaints Commissioner vs. Constable Moss*, (2000) RNCPC; and a 2010 BC *Police Act* decision by retired Judge Carol Lazar pursuant to section 117, cited as *X. v. Y.*
17. Pursuant to section 125 of the *Police Act*, Chief Constable Jones found that the allegation of *Abuse of Authority* for the issuance of the ticket for Drunk in a Public Place was not proven, adopting the submission that Constable Diaz's ignorance of the law did not constitute misconduct. Chief Constable Jones wrote:

"In order to substantiate this allegation it would be key to find that Constable Diaz either knew he had no grounds to issue the violation ticket and instead issued the ticket, either out of frustration or other misguided intentions, as that would clearly constitute misconduct. Equally, if Constable Diaz did not get the advice from Constable Hughes regarding his observations about Mr. Riby-Williams, and the possible offence of Drunkenness in Public Place, then his (Constable Diaz's) actions in issuing the ticket may have been seen as being reckless and/or intentional."
18. In my respectful view, Chief Constable Jones' interpretation of Part 11 of the *Police Act* and the test that he applied in this matter was incorrect. Additionally, I am of the view that Chief Constable Jones' determination that Constable Diaz's conduct did not constitute *Abuse of Authority* is incorrect.

19. Regarding the substantiated allegation of *Abuse of Authority* for unnecessary force, Chief Constable Jones gave careful consideration to aggravating and mitigating factors; however, it is my view that the disciplinary/corrective measures imposed are not commensurate with the seriousness of the conduct or the injury caused to Mr. Riby-Williams and are, therefore, inadequate in the circumstances.
20. Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe: that the Disciplinary Authority's findings under section 125(1) are incorrect; the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or, if the Commissioner considers that a Public Hearing is necessary in the public interest.

Decision

21. Having reviewed the investigation, the discipline proceeding and associated determinations, pursuant to section 138 of the *Police Act*, I have determined that a Public Hearing is required as I consider there is a reasonable basis to believe that the Discipline Authority's findings under section 125(1) are incorrect. Furthermore, I have determined that a Public Hearing is necessary in the public interest. In determining that a Public Hearing is necessary in the public interest, I have considered several relevant factors, including but not limited to the following:
 - a) The complaint is serious in nature as the allegations involve a significant breach of the public trust;
 - b) An arguable case can be made that the Discipline Authority's interpretation or application of Part 11 of the *Police Act* was incorrect;
 - c) The disciplinary or corrective measures proposed are inappropriate or inadequate;
 - d) It is necessary to examine and cross-examine witnesses and receive evidence that was not part of the record at the discipline proceeding, in order to ensure that procedural fairness and accountability is maintained; and
 - e) There is a reasonable prospect that a Public Hearing will assist in determining the truth.
22. It is therefore alleged that Constable Diaz committed the following disciplinary defaults, pursuant to section 77 of the *Police Act*:
 - (i) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.

- (ii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly issued Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place, contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause.
23. Pursuant to section 143(3) of the *Police Act*, the Public Hearing is not limited to the evidence and issues that were before the Discipline Authority in the discipline proceeding.
24. Pursuant to section 143(5) of the *Police Act*, Public Hearing counsel, Constable Diaz, or her or his legal counsel and commission counsel may:
- a) call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the discipline proceeding;
 - b) examine or cross-examine witnesses;
 - c) introduce into evidence any record or report concerning the matter; and
 - d) make oral or written submissions, or both, after all of the evidence is called.
25. Pursuant to section 143(7) of the *Police Act*, Mr. Riby-Williams, or her or his agent or legal counsel, may make oral or written submissions, or both, after all of the evidence is called.
26. I am mindful of the potential for inconsistent findings and outcomes based on the continued bifurcation of these proceedings. However, the BC Supreme Court in *British Columbia (Police Complaint Commissioner v. Bowyer*, 2012 BCSC 1018, ruled on the issue of bifurcation, stating at paragraph 91: "The possibility of bifurcation, delay, and the possibility of inconsistent findings and outcomes arise from the wording of the legislation. Given the clear wording of the *Act*, such possible outcomes cannot be avoided."

THEREFORE:

27. A Public Hearing is arranged pursuant to section 137(1) and 143(1) of the *Police Act*.
28. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Ronald McKinnon, retired Supreme Court Judge, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*. Dates for the Public Hearing have not yet been determined. The Public Hearing will commence at the earliest practicable date.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

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DATED at the City of Victoria, in the Province of British Columbia, this 29th day of November, 2016.

A handwritten signature in black ink, appearing to read "Stan T. Lowe", enclosed in a thin black rectangular border.

Stan T. Lowe
Police Complaint Commissioner