



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF REVIEW ON THE RECORD

Pursuant to section 137(2) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Review on the Record of the Registered Complaint respecting
Constable David Bunderla and Constable Richard O'Rourke of the
South Coast British Columbia Transit Authority Police Service**

OPCC File: 2014-9836

November 18, 2016

To: Constable David Bunderla #111
Constable Richard O'Rourke #250 (Members)
c/o South Coast British Columbia Transit Authority Police Service
Professional Standards Section

And to: Chief Officer Doug LePard (Discipline Authority)
c/o South Coast British Columbia Transit Authority Police Service
Professional Standards Section

WHEREAS:

Investigation

1. On April 25, 2014, the Office of the Police Complaint Commissioner received a registered complaint, in relation to the conduct of South Coast British Columbia Transit Authority Police Service (SCBCTAPS) Constables David Bunderla and Richard O'Rourke, arising from circumstances occurring on July 17th and 18th, 2014, involving the investigation and arrest of the complainant's son. The allegations resulted from allegations that the respondent members did not carry out their duties in an appropriate manner and that they disobeyed orders given to them by a supervisor.
2. SCBCTAPS Professional Standards Investigator, Staff Sergeant Doug Fisher, conducted an investigation into the complainant's allegations and on March 13, 2015, he submitted the Final Investigation Report (FIR) to the Discipline Authority.

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Police Complaint Commissioner

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3. On August 28, 2015, following his review of the FIR, the Discipline Authority notified Constable Bunderla and Constable O'Rourke that a discipline proceeding would be held in relation to the substantiated allegations, namely:
 - That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Neglect of Duty*, section 77(3)(m)(ii), which is neglecting, without good or sufficient cause, to do any of the following; promptly and diligently do anything that is one's duty as a member to do, specifically in relation to failing to continue the arrest of the complainant's son on July 17, 2014.
 - That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Neglect of Duty*, section 77(3)(m)(iii), which is neglecting, without good or sufficient cause, to do any of the following; promptly and diligently obey a lawful order of a supervisor, specifically in relation to failing to obey the lawful order of a supervisor regarding the arrest on July 17, 2014.
 - That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Abuse of Authority*, section 77(3)(a), which is oppressive conduct towards a member of the public, specifically in relation to the unlawful entry and search of the complainant's residence on July 18, 2014.
 - That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Neglect of Duty*, section 77(3)(m)(ii), which is neglecting, without good or sufficient cause, to do any of the following, promptly and diligently do anything that is one's duty as a member to do, specifically in relation to failing to properly execute the arrest of the complainant's son on July 18, 2014.
 - That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Neglect of Duty*, section 77(3)(m)(iii), which is neglecting, without good or sufficient cause, to do any of the following, promptly and diligently obey a lawful order of a supervisor, specifically in relation to failing to obey the lawful order of a supervisor to have the RCMP utilized as a back up to prevent the escape of the complainant's son on July 18, 2014.
4. The following allegations were not substantiated and were previously concluded by this office on April 27, 2015:

That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Abuse of Authority*, section 77(3)(a), which is oppressive conduct towards a member of the public, specifically the sending of an offensive or hurtful message to another person's Facebook account from the complainant's son account on July 18, 2014.

- That Constable Bunderla and Constable O'Rourke are each alleged to have committed the misconduct of *Neglect of Duty*, section 77(3)(m)(iii), which is neglecting, without good or sufficient cause, to do any of the following; promptly and diligently obey a lawful order of a supervisor, specifically in relation to failure to have a dog unit attend to assist in the apprehension.

Discipline Proceeding and Proposed Discipline

5. On August 9, 2016, after considering the available evidence, witness testimony and submissions, the Discipline Authority made the following determinations:
 - That Constable Bunderla and Constable O'Rourke did NOT commit the misconduct of *Neglect of Duty*, section 77(3)(m)(ii), which is neglecting, without good or sufficient cause, to do any of the following; promptly and diligently do anything that is one's duty as a member to do, specifically in relation to failing to continue the arrest of the complainant's son on July 17, 2014.
 - That Constable Bunderla did NOT commit the misconduct of *Abuse of Authority*, section 77(3)(a), which is oppressive conduct towards a member of the public, specifically in relation to the unlawful entry and search of the complainant's residence on July 18, 2014.
 - That Constable O'Rourke committed the misconduct of *Abuse of Authority*, section 77(3)(a), which is oppressive conduct towards a member of the public, specifically in relation to the unlawful entry and search of the complainant's residence on July 18, 2014.
 - That Constable Bunderla and Constable O'Rourke each committed the misconduct of *Neglect of Duty*, section 77(3)(m)(ii) which is neglecting, without good or sufficient cause, to promptly and diligently do anything that is one's duty as a member to do, specifically in relation to failing to properly execute the arrest of the complainant's son on July 18, 2014.
 - That Constable Bunderla and Constable O'Rourke each committed the misconduct of *Neglect of Duty*, section 77(3)(m)(iii) which is neglecting, without good or sufficient cause, to promptly and diligently obey a lawful order of a supervisor, specifically in relation to failing to obey the lawful order of a supervisor to have the RCMP utilized as a back up to prevent the escape of the complainant's son on July 18, 2014.
6. The Discipline Authority made the following recommendations in relation to Disciplinary or Corrective measures:
 - Regarding the proven allegation of *Abuse of Authority* - sec. 77(3)(a) - Unlawful entry of the complainant's residence, the recommended penalty for Constable O'Rourke is **Written Reprimand**.

- Regarding the proven allegation of *Neglect of Duty* – sec. 77(3)(m)(ii) - Failure to properly execute an arrest, the recommended penalty for Constable Bunderla and Constable O'Rourke is **Written Reprimand**.
- Regarding the proven allegation of *Neglect of Duty* – sec. 77(3)(m)(ii) - Failure to promptly and diligently obey a lawful order of a supervisor, the recommended penalty for Constable Bunderla and Constable O'Rourke is a **Four (4) Day Suspension without Pay**.

REQUEST FOR REVIEW ON THE RECORD

7. On October 5, 2016, Constables Bunderla and O'Rourke submitted a request for a *Review on the Record*, pursuant to section 141, stating that there is a reasonable basis to find under section 138(1)(c)(i) that the decision of the Discipline Authority was arrived at incorrectly through an incomplete written decision which the members believe raises a precedent that members given direction must adhere to absolute obedience without the Discipline Authority giving consideration that lawful authority and good faith may be absent. Additionally, the members believe the penalty issued was excessive for the circumstances and did not follow the principles set out in the *Police Act* to favour corrective over punitive measures.
8. Constables Bunderla and O'Rourke also submitted in their request that the Discipline Authority's refusal to expand the scope of investigation resulted in a flaw in the FIR, which resulted in a substantiation of the allegations. This submission relates to the evidence provided by two police witnesses from the Vancouver Police Department who detained the complainant's son until the arrival of the respondent members. These police witnesses provided testimony at the discipline proceeding, and the discipline authority determined the allegation was not proven.

DECISION

9. Pursuant to section 138(1) of the *Police Act*, the Police Complaint Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe the following: 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 the Commissioner considers that a Review on the Record or Public Hearing is necessary in the public interest.
10. I have reviewed the record of the disciplinary decision, the associated determinations and the request for a Review on the Record by the members. I have determined that there is not a reasonable basis to believe that the Discipline Authority's determinations as to whether misconduct has been proven are incorrect pursuant to section 125(1) of the *Police Act*.

11. I am satisfied that the Discipline Authority correctly determined that the allegation of *Neglect of Duty* for failure to complete the arrest on July 17, 2014, was not proven on the basis of the reasons provided. That allegation is hereby concluded and this office will take no further action with respect to that allegation.
12. Constable Bunderla and Constable O'Rourke have submitted that the allegation of *Neglect of Duty* for failure to comply with a lawful order should not be substantiated because they had concerns about the lawfulness of the direction. Upon review of the evidence, I note that these concerns were not raised by either of the members at the time the direction was made. Nor did they take steps to request the direction to be reassigned as a result of their concerns. I am satisfied, on the basis of the reasons provided, that the Discipline Authority correctly determined Constables Bunderla and O'Rourke neglected their duty to comply with a lawful order of their supervisor.
13. Similarly, I am satisfied on the basis of the reasons provided, that the Discipline Authority correctly determined Constables Bunderla and O'Rourke neglected their duty to properly execute the arrest of the complainant's son on July 18, 2014. The Discipline Authority noted that the officers neglected to comply with standard procedures of covering a potential escape route and did not have sufficient resources present for a person who was suicidal and an escape risk. These actions were deemed to be a disregard for basic procedures that placed the public at risk.
14. The Discipline Authority found that Constable O'Rourke's entry into the residence was unlawful and that Constable O'Rourke's conduct in the circumstances was reckless. It is also important to note that Constable O'Rourke did not raise as a defense in the discipline proceeding any evidence that supported the consideration of the doctrine of good faith.
15. I am satisfied, on the basis of the reasons provided, the Discipline Authority correctly determined that Constable O'Rourke committed *Abuse of Authority* when he entered the complainant's residence without permission and without lawful authority, but Constable Bunderla did not commit *Abuse of Authority* because the evidence indicates that he did not enter the residence.
16. In proposing disciplinary and corrective measures pursuant to section 128, the Discipline Authority examined section 126(3) of the *Police Act* which requires an approach that seeks to correct and educate a member, unless doing so would be unworkable, or would bring the administration of police discipline into disrepute. However, the Discipline Authority emphasized 'general deterrence' in arriving at discipline/corrective measures for both *Neglect of Duty* - failure to abide by a lawful order and *Abuse of Authority*. The Discipline Authority did not provide an explanation as to why general deterrence would negate an approach to correct and educate a member, or why this approach was unworkable.

17. Having reviewed the evidence related to this matter, I am of the view that an arguable case can be made that the proposed discipline measure for *Abuse of Authority* is inadequate and the corrective measure for the *Neglect of Duty* – failure to comply with a lawful order is inappropriate in the circumstances.
18. In regard to the finding of *Neglect of Duty* - failure to comply with a lawful order, the Discipline Authority is proposing a disciplinary measure of a 4 day suspension period. I am of the view that an arguable case can be made that this proposed disposition is beyond the range of appropriate outcomes with respect to the circumstances.
19. In regard to the finding of Abuse of Authority – unlawful entry into the complainant's residence, an arguable case can be made that the corrective measure of a written reprimand given the circumstances is inadequate in terms of an approach to correct and educate the member pursuant to 126(3) of the Act. The Charter breach in this case, unlawful entry into a private dwelling, is a serious violation of privacy. I am concerned that a written reprimand will not satisfy the educational component necessary to prevent a similar incident from occurring in the future.
20. For the foregoing reasons, pursuant to section 138(1)(d) of the Police Act, I have determined that a Review on the Record is necessary in the public interest. In particular, I am of the view that pursuant to section 138(2)(d)(ii) of the Police Act an arguable case can be made that the disciplinary/corrective measures proposed in this matter are both inappropriate and inadequate.
21. I am satisfied that it will not be necessary to examine witnesses or receive evidence that is not currently part of the record of disciplinary decision. Furthermore, I am satisfied that a Public Hearing is not required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline. I have determined that a Review on the Record is a more effective and efficient means of adjudicative review in all the circumstances. I note that pursuant to section 141(4) of the *Police Act*, in “special circumstances,” an adjudicator has the discretion to receive evidence outside of what is contemplated as the focus of the Review.
22. Accordingly, pursuant to sections 137(2) and 141 of the *Police Act*, I am arranging a Review on the Record on the sole matter of the appropriateness of the proposed disciplinary and corrective measures proposed by the Discipline Authority in this matter.
23. Pursuant to section 141(9), the standard of review to be applied by the Adjudicator to a disciplinary decision is correctness.
24. Pursuant to section 141(5) the *Police Act*, Constables Bunderla and O'Rourke, or their agent or legal counsel, may make submissions concerning the matter under review.
25. Pursuant to section 141(6) of the *Police Act*, the Police Complaint Commissioner or his commission counsel may make submissions concerning the matter under review. I hereby advise that I have retained commission counsel, who will make submissions on my behalf concerning the matter under review.

26. Pursuant to section 141(7)(b) the Adjudicator may permit the Discipline Authority or Discipline Representative to make submissions concerning the matters under review.

THEREFORE:

A Review on the Record is arranged pursuant to section 137(2) and 141 of the *Police Act*. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Wally Oppal, Q.C., retired British Columbia Court of Appeal Justice, has been appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*.

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 18th day of November, 2016.



Stan T. Lowe
Police Complaint Commissioner