

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bentley v. British Columbia (Police
Complaint Commissioner)*,
2012 BCSC 1186

Date: 20120807
Docket: S110977
Registry: Vancouver

Between:

Craig Bentley and John Grywinski

Petitioners

And

**The Police Complaint Commissioner, and
Chief Constable Bob Rich**

Respondents

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Petitioners:

M.K. Woodall
C. Woodall

Counsel for The Police Complaint
Commissioner:

J.S. Heaney

Place and Date of Chambers Petition:

Vancouver, B.C.
April 13, 2012

Place and Date of Judgment:

Vancouver, B.C.
August 7, 2012

[1] Craig Bentley and John Grywinski have commenced a petition seeking to quash two orders for investigation made by the respondent, the Police Complaint Commissioner (the “Commissioner”), on the basis that the Commissioner lacked jurisdiction to make the orders. The Commissioner takes the position that he had jurisdiction to make the orders in dispute, and that the petition is premature in that the petitioners have not exhausted the remedies available to them under the *Police Act*, R.S.B.C. 1996, c. 367. Alternatively, the Commissioner takes the position that the relief sought by the petitioners should be refused because there had been unreasonable delay in seeking the relief.

[2] The only basis for Chief Constable Bob Rich being a respondent is that he is named as the external discipline authority under one of the orders. The petitioners have no grievance with Chief Constable Rich and he did not appear at the hearing of the petition.

Background

[3] The petitioners are members of the Vancouver Police Department (the “VPD”) and are “municipal constables” within the meaning of the *Police Act*.

[4] The Commissioner holds a statutory office created pursuant to the *Police Act*.

[5] The Commissioner made an Order for Investigation dated May 14, 2009 (the “2009 order”) and an Order for External Investigation and Notice of Extension dated November 12, 2010 (the “2010 order”), directing the investigation of complaints made against the petitioners. The petitioners seek to have the orders quashed. The petitioners take the position that the complaints were dismissed on March 9, 2009, and that the Commissioner had no jurisdiction to make the orders for investigation because he was out of time.

[6] The respondent Chief Constable Rich is the chief constable of the Abbotsford Police Department and the individual designated by the Commissioner to exercise the powers and perform the duties of a discipline authority in the 2010 order.

[7] The complaint arose out of an incident in 2005. At the time, the petitioners were members of the Integrated Gang Task Force. On November 17, 2005, Detective Constable Bentley received information from a confidential source of unknown reliability that an identified man intended to murder a woman who lived at an address he provided. Det. Cst. Bentley reported the information to his supervisor, Staff Sergeant Grywinski. The petitioners decided not to pass this information along to the woman immediately, but to investigate the matter further. On November 22, 2005, Detective Constable Bentley attended at the woman's residence and found the house surrounded by police tape. The woman at the address had been murdered. The identified man was accused of murdering the woman, Tasha Rosette.

[8] On November 7, 2007, the VPD investigated a concern raised by Crown counsel regarding evidence given by Detective Constable Bentley at a preliminary inquiry of two individuals accused of the murder of Tasha Rosette. The VPD obtained transcripts and tasked VPD Inspector Porteous with investigating the matter.

[9] On September 11, 2008, a complaint was made by Simone Rosette, Tasha Rosette's mother. She complained that Detective Constable Bentley and Staff Sergeant Grywinski had failed in their duty by not advising Tasha Rosette of the threat.

[10] On October 1, 2008, Sergeant Ron Bieg of the VPD issued a Notice of Complaint indicating that it was alleged that Detective Constable Bentley had committed the disciplinary default of neglect of duty. The complaint was characterized as one of public trust.

[11] On October 3, 2008, Thomas Steenvoorden, a senior investigative analyst in the Commissioner's office, issued a confirmation of the characterization of the complaint and confirmed it was one of public trust.

[12] On January 15, 2009, Sergeant Bieg issued an amended notice of complaint adding then Sergeant Grywinski. The amended complaint alleged that both petitioners had committed the disciplinary default of neglect of duty contrary to the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98. The complaint was characterized as public trust.

[13] On January 16, 2009, Dave Airey, an investigative analyst in the Commissioner's office, issued an Amended Notice of Complaint adding Staff Sergeant Grywinski.

[14] The complaint was investigated by the RCMP, and reviewed by the professional standards section of the VPD. The RCMP officers involved in the investigation were Inspector Lorne Schwartz, an officer in the RCMP Covert Operations section, and RCMP Superintendent John Robin, the officer in charge of the Integrated Gang Task Force.

[15] On March 2, 2009, Inspector Mario Giardini, the Officer in Charge of the Professional Standards Section of the VPD, sent a letter to the complainant, Simone Rosette, informing her of the summary dismissal of her complaint pursuant to s. 54(1) of the *Police Act* (the "summary dismissal"). In the letter, Inspector Giardini advised Ms. Rosette that if she was not satisfied with the results of the investigation, she could file a request in writing to review the decision within 30 days to the Office of the Commissioner.

[16] On March 10, 2009, Sergeant Bieg sent Mr. Steenvoorden a copy of the summary dismissal by email. Sergeant Bieg indicated that he did not have time to scan the whole file or copy the interview DVD to send to him, but that if supporting documentation was required he would provide copies by March 23, 2009.

[17] Under the provisions of the *Police Act* in force, the VPD had 10 days within which to advise the complainant and the Commissioner after making a summary dismissal decision. The Complainant had 30 days after receiving the written notice to apply to the Commissioner for a review of the decision. The Commissioner had

30 days to review the decision and either confirm the decision or order the Discipline Authority to investigate the complaint. Thirty days from when the written Summary Dismissal was received by the Commissioner was April 9, 2009. At any time, the Commissioner could order the Discipline Authority to investigate the complaint if new information came to his attention that required an investigation.

[18] On March 13, 2009, Mr. Steenvoorden sent an email to Sergeant Bieg requesting the investigative package.

[19] On March 23, 2009, Sergeant Bieg responded that he was unable to fulfil the request at that time because of limited resources. In the email, Sergeant Bieg indicated that he would provide his candid thoughts on the matter, and point to factors not articulated in Inspector Giardini's letter, but that he was bogged down and could not provide that information in a paper form.

[20] On April 1, 2009, Sergeant Bieg sent some of the information to Mr. Steenvoorden. The materials did not contain any reference to the internal investigation carried out by Inspector Porteous as a result of the concerns raised by Crown counsel about Detective Constable Bentley's evidence at the preliminary inquiry.

[21] On April 6, 2009, Sergeant Bieg sent the rest of the file to Mr. Steenvoorden, but did not send the results of Inspector Porteous' investigation.

[22] On April 8, 2009, Sergeant Bieg advised Mr. Steenvoorden that the letter sent to the complainant advising her of the summary dismissal decision sat unclaimed at the post office for 3½ weeks and had been returned to the VPD.

[23] Mr. Steenvoorden deposes that on April 30, 2009, he advised Inspector Giardini that based on what the VPD had provided to the Commissioner, a confirmation of the summary dismissal would likely not be forthcoming. According to Mr. Steenvoorden, Inspector Giardini stated to him that he accepted this, and that despite Sergeant Bieg's previous advice, Inspector Porteous had not done an extensive investigation into Constable Bentley's conduct.

[24] On April 30, 2009, Mr. Steenvoorden completed his review and recommended that the complaint be returned to the VPD for investigation.

[25] On May 14, 2009, an Order for Investigation was issued to the VPD by the Commissioner to investigate the complaint.

[26] The heading of the 2009 order states it is “Pursuant to ss. 54(6)(a)(ii) and 55(3) of the *Police Act*, R.S.B.C. 1996, c. 367.” The order states in part:

Upon receiving the Discipline Authority’s letter dismissing the allegations against Detective Bentley and Staff Sergeant Grywinski, my office requested a copy of the investigation conducted by the Professional Standards investigator. Following a review of the materials provided and further discussions with the investigator, it was discovered that documentation gathered in a separate “Code of Conduct” investigation conducted by Inspector Porteous of the Vancouver Police Department was not provided to the Professional Standards Section to assist in their Police Act investigation.

According to section 54 of the Police Act, as Police Complaint Commissioner, I may either confirm the Discipline Authority’s decision to summarily dismiss the allegations, or, if I find that it is in the public interest, I may set aside the summary dismissal and order a public trust investigation be conducted into the alleged misconduct.

Based on my review of the available evidence to date, in my opinion, it is in the public interest that a full and complete Police Act investigation be conducted into the above-noted allegations against Detective Constable Bentley and Staff Sergeant Grywinski. Therefore, pursuant to sections 54(6)(a)(ii) and 55(3) of the Police Act, I order that the alleged professional misconduct be investigated in order to allow the Professional Standards Section of the Vancouver Police Department to review Inspector Porteous’ investigation and any other documentation not accessed by the Professional Standards Section in their original investigation. In addition to the above described misconducts alleged, I also order that the investigating officer may investigate any other potential disciplinary defaults that have been identified during the investigation into this incident.

A Public Trust complaint investigated pursuant to Division 4 of the Police Act must be completed within six (6) months. Unless the circumstances of this investigation warrant an extension, the investigation limitation period is scheduled to expire on November 14, 2009.

[27] On November 12, 2009, Sergeant Bieg requested a six-month extension to complete the investigation. On November 13, 2009, Mr. Steenvoorden issued a Notice of Extension extending the investigation to May 14, 2010.

[28] On May 12, 2010, Sergeant Bieg provided an email progress report to Mr. Steenvoorden and sought an additional six-month extension for the investigation. In his letter, Sergeant Bieg indicated that one of the purposes of the extension was to allow the Chief Constable of the VPD the opportunity to request documents from the senior management of RCMP E-division that Sergeant Bieg had requested but that had been refused or not provided. A notice extending the investigation until November 14, 2010, was issued on May 13, 2010.

[29] On September 27, 2010, Sergeant Bieg sent Mr. Steenvoorden an email advising him that he still had not completed his review of the RCMP files, and that he also intended to interview Detective Constable Bentley, Staff Sergeant Grywinski and another officer before completing his investigation and submitting his final investigation report.

[30] In a November 1, 2010 email to Mr. Steenvoorden, Inspector deHass advised that he would be unlikely to complete his review of the draft final investigation report by the November 14, 2010 deadline.

[31] On November 8, 2010, Sergeant Bieg requested a further 60-day extension of the investigation on behalf of the VPD.

[32] On November 10, 2010, Mr. Steenvoorden provided the Commissioner with an assessment of the VPD's request for the extension, including the fact that he could not determine if anyone was actively investigating the allegations regarding Detective Constable Bentley's testimony at the preliminary inquiry. Mr. Steenvoorden recommended it would be in the public's interest for the Commissioner to reassign the investigation to an external department.

[33] On November 12, 2010, the Commissioner issued an Order for External Investigation appointing the respondent Chief Constable Rich as the discipline authority and issued a notice extending the deadline to February 14, 2011.

[34] On February 14, 2011, the petition was commenced seeking orders including an order quashing the 2010 order. An amended petition was filed in April 2012, seeking that the 2009 order also be quashed.

[35] On January 25, 2012, the petitioners' interlocutory application for records and the cross-examination of Mr. Steenvoorden was dismissed on the basis that the application was premature (*Bentley v. British Columbia (Police Complaint Commissioner)*, 2012 BCSC 106).

Analysis

[36] For the following reasons I am dismissing the petition. The petitioners' main argument is that the decision to dismiss a complaint summarily under former ss. 54(2) and (7) of the *Police Act* is final and no investigation or further investigation may be undertaken except as prescribed under s. 54.

[37] The relevant portions of the *Police Act* in force at the time of the complaint provided:

54 (2) Subject to this section, a public trust complaint that has been summarily dismissed under subsection (1) must not be investigated or further investigated under this Division, but nothing in this subsection prevents further action being taken in relation to any internal discipline component or service or policy component of the complaint.

...

(4) A complainant may apply to the police complaint commissioner for a review of the decision of a discipline authority to summarily dismiss his or her complaint under this section.

(5) An application for a review under subsection (4) must be filed with the police complaint commissioner within 30 days after the date of the notice provided under subsection (3).

(6) Whether or not an application for a review is filed with the police complaint commissioner in relation to a public trust complaint that is summarily dismissed under this section, the police complaint commissioner must, within 30 days after the date of the notice provided under subsection (3) ,

(a) examine the discipline authority's decision and the reasons for the summary dismissal and either

(i) confirm the discipline authority's decision, or

(ii) if the police complaint commissioner concludes that it is in the public interest to investigate the complaint, order the

discipline authority to conduct an investigation into the complaint, and

(b) notify in writing the discipline authority, the complainant and the respondent of the outcome of the police complaint commissioner's examination under paragraph (a).

(7) The decision of a discipline authority to summarily dismiss a public trust complaint is final and the complaint is deemed to have been dismissed unless

(a) an application for review is received by the police complaint commissioner under subsection (5), or

(b) the police complaint commission makes an order under subsection (6)(a)(ii);

(8) Whether or not, within the time required by this section, an application for review is received under subsection (5) or an order is made under subsection (6)(a)(ii), the police complaint commissioner may at any time order a discipline authority to investigate a public trust complaint that has been summarily dismissed if new information is received that, in the opinion of the police complaint commissioner, requires an investigation.

(9) On receiving new information and ordering a discipline authority to investigate a public trust complaint under subsection (8), the police commissioner must notify in writing the discipline authority, the complainant and the respondent of the nature of the new information and the reasons for ordering the investigation.

...

55(3) Despite any other provision in this Act, the police complaint commissioner may order an investigation in the conduct of a municipal constable, chief constable or deputy chief constable, whether or not a record of complaint has been lodged.

[38] The Complainant did not seek a review of the decision to summarily dismiss the complaint pursuant to s. 56(4). The petitioners say that the two procedures available to the Commissioner to order an investigation after he received the notice of the summary dismissal on March 10, 2009, were pursuant to s. 54(6), that it is in the public interest, and pursuant to s. 54(8), that new information was received. The petitioners say that the May 2009 order was out of time under s. 54(6) because the Commissioner did not order the investigation within 30 days after the notice of the summary dismissal was provided to him.

[39] The petitioners submit that the time limit for the Commissioner to order further investigation pursuant to s. 54(6) expired on April 9, 2009. Nevertheless on May 14,

2009, the Commissioner purported to order further investigation in the public interest, citing s. 54(6) and not citing s. 54(8) or providing the required notice under s. 54(9). The petitioners argue that it is not open to the Commissioner to rely on s. 54(8) because it was not cited on the face of the 2009 order and proper notice under s. 54(9) was not given.

[40] The petitioners further submit that:

1. It is the Commissioner who must form the opinion and he cannot rely on the recommendations made by an employee in his office; i.e. Mr. Steenvoorden;
2. There must be new information and it is implicit that the information must concern the merits of the complaint; and
3. The information must require investigation. If the Commissioner receives new information that does not materially add to the information that the discipline authority already had, it could not reasonably be said that the new information requires investigation, even if it is “new” in some sense.

[41] In my view, the petitioners’ argument is overly technical. The body of the 2009 order makes it clear that the Commissioner received information that material had not been received and reviewed in the investigation leading up to the summary dismissal. The petitioners argue that it is clear the Commissioner considered this information to be noteworthy, but there is no evidence that he formed an opinion that it was new information that required investigation in the sense he would be justified in invoking s. 54(8).

[42] In my opinion, the fact that the 2009 order says on its face that it is pursuant to s. 54(6)(a)(ii) and 55(3), is not determinative. The 2009 order states that the reason the summary dismissal was not confirmed by the Commissioner is that the investigation was incomplete in his view. The email correspondence which follows makes it clear that the “new information” refers to the fact that not all of the

information that was available to the Professional Standards Branch in their *Police Act* investigation was accurate.

[43] The petitioners argue that there is a distinction between being advised in the 2009 order simply that there was new information that had not been received, versus being told that the Commissioner had considered new information that there was information that had not been considered in the original investigation. In my view, this distinction, if it is one, does not assist them. As set out in the order, the “new information” relied upon by the Commissioner is that the original investigation was flawed because all of the relevant information was not available for consideration.

[44] The petitioners rely on *Florkow v. British Columbia (Police Complaint Commissioner)*, 2012 BCSC 126, for the proposition that because the 2009 order did not refer to s. 54(8), the Commissioner cannot rely on it now.

[45] However, the facts of *Florkow* are distinguishable. As noted at para. 5, the issue before the court was a very narrow one, specifically whether s. 143(1)(b) of the *Police Act* establishes a general discretionary authority in the Commissioner to initiate a public hearing.

[46] In this case, the arguments are much broader. The petitioners challenge the facts on which the Commissioner founds his jurisdiction, i.e. did he receive the new information and was it really new information that required investigation.

[47] As stated above, the petitioners attack the 2009 order on the grounds that the Commissioner did not have the jurisdiction to make that order because he did not comply with the 30-day time limit set out in s. 54(6), and that s. 54(8) does not apply as there was no new information that came to light.

[48] In my view, that argument cannot succeed. It is apparent on the face of the 2009 order that the Commissioner had received new information, i.e. that not all of the information had been considered before the matter was dismissed summarily by the VPD’s Professional Standards Section. The failure to cite s. 54(8) on the face of the 2009 order is an irregularity.

[49] This is not a case where the petitioners are caught by surprise or can point to any prejudice. The face of the 2009 order makes it clear that the Commissioner is ordering an investigation because all the information was not considered. The fact that the petitioners did not commence a petition until after the 2010 order for an external investigation was made, and allowed the investigation to proceed for 19 months before commencing a petition, is indicative of the fact that they were well aware of the reason for the 2009 order and were content with it.

[50] Finally, the petitioners have not provided any authority for their argument that the Commissioner is not entitled to rely on the recommendations of his staff. It is clear from the 2009 order that the Commissioner has reviewed the information and is of the opinion that it is necessary to issue an order continuing the investigation to “review Inspector Porteous’ investigation and any other documentation not accessed by the Professional Standards Section in their original investigation.” The Commissioner notes earlier in the 2009 order that:

Following a review of the materials provided and further discussions with the investigator, it was discovered that documentation gathered in a separate “Code of Conduct” investigation conducted by Inspector Porteous of the Vancouver police Department was not provided to the Professional Standards Section to assist in their Police Act investigation.

[51] In the circumstances, I have concluded that the Commissioner has complied with the *Police Act* and had the authority to make the 2009 order pursuant to s. 54(8).

[52] The basis for the petitioners’ argument that the 2010 order should be quashed is that the Commissioner did not have the authority to make the 2009 order. Having found that the Commissioner had the authority to make the 2009 order, the petitioners’ arguments regarding the 2010 order must fail.

[53] Accordingly, I am dismissing the petition. The parties are at liberty to speak to the issue of costs.

“Gerow J.”