

IN THE MATTER OF THE POLICE ACT, RSBC 1996, c. 267

**AND IN THE MATTER OF THE PUBLIC HEARING
INTO THE COMPLAINT AGAINST
CONSTABLE JOHN GIBBONS OF THE
VANCOUVER POLICE DEPARTMENT**

SUBMISSIONS OF PUBLIC HEARING COUNSEL

DISCIPLINARY OR CORRECTIVE MEASURES

INTRODUCTION

1. On August 12, 2014 Cst. Gibbons was found by the Adjudicator to have abused his authority by intentionally or recklessly using unnecessary force on Mr. Feng. In particular, the force used was punching Mr. Feng three times in the head. The allegation was specified in the Notice of Public Hearing, and the Adjudicator's decision fully sets out the circumstances and reasons for the finding made.
2. At this point, the Adjudicator must determine the appropriate disciplinary or corrective measures pursuant to section 143(9)(b), with reference to section 126.
3. The Adjudicator may also consider making any recommendation he feels is appropriate to the Chief Constable or Board of the police service concerning any change in policy or practice, pursuant to section 143(9)(c), although it is respectfully submitted that no such recommendation is required on the facts of this case.

4. Sections 126 and 143(9) are set out below:

Imposition of disciplinary or corrective measures in relation to members

126 (1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or her or his agent or legal counsel, or from the complainant under section 113 [*complainant's right to make submissions*], the discipline authority must, subject to this section and sections 141 (10) [*review on the record*] and 143 (9) [*public hearing*], propose to take one or more of the following disciplinary or corrective measures in relation to the member:

- (a) dismiss the member;
- (b) reduce the member's rank;
- (c) suspend the member without pay for not more than 30 scheduled working days;
- (d) transfer or reassign the member within the municipal police department;
- (e) require the member to work under close supervision;
- (f) require the member to undertake specified training or retraining;
- (g) require the member to undertake specified counselling or treatment;
- (h) require the member to participate in a specified program or activity;
- (i) reprimand the member in writing;
- (j) reprimand the member verbally;
- (k) give the member advice as to her or his conduct.

(2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,

- (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.

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

143(9) The adjudicator must do the following:

- (a) decide whether any misconduct has been proven;
- (b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126 [*imposition of disciplinary or corrective measures*] or 127 [*proposed disciplinary or corrective measures*];
- (c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

5. Cst. Gibbons has a prior finding of Abuse of Authority from an incident in 2010, which incident is summarized in the letter submitted by Chief Constable Chu on this matter (dated August 21, 2014).
6. It is respectfully submitted that the appropriate disciplinary or corrective measures in this case are:
 - a. A brief suspension (one to two days); and
 - b. Use of force training of the nature described by Chief Constable Chu in the aforementioned letter.
7. I will set out below some general principles and review some cases which are respectfully submitted as being of relevance (though it is trite in matters such as these that each case turns on its unique facts). I have included the cases referred to below for completeness and ease of reference; all are available on the OPCC website. I will then review the

circumstances of this case in light of those general principles (including aggravating and mitigating factors).

8. I anticipate that the submissions of Mr. Woodall will canvass personal circumstances and further details of the character and background of Cst. Gibbons, as well as his acceptance of responsibility in light of the findings made against him.

DISCUSSION – GENERAL PRINCIPLES and PRIOR CASES

9. In considering section 126(3), Adjudicator Pitfield made the following comments:

In my opinion, s. 126(3) is broad enough to require consideration of the effect of any sanction on organizational effectiveness and consideration of public confidence in the administration of police discipline. While the requirement that the discipline authority choose the least onerous disciplinary or corrective measure unless organizational effectiveness or public confidence in the administration of police discipline would be undermined has been removed [it was set out in section 19(3) of the now repealed *Code of Professional Conduct Regulation* to a prior version of the Act], the overriding principle under the Act remains the imposition of a sanction that corrects and educates the member unless it is unworkable or would bring the administration of police discipline into disrepute.

- ***In the Matter of Cst. Page (Part II)*** (PH 2012-03, April 17, 2013) at para. 6

10. In that same case, Adjudicator Pitfield ultimately imposed a three day suspension for the Abuse of Authority misconduct. At the time, the maximum suspension available was five days.

- ***Cst. Page (Part II)*** at para. 15

11. The facts relevant to the Abuse of Authority allegation were that Cst. Page had attended at a store where a Mr. Kerr had been detained for

shoplifting. Ultimately, Cst. Page handcuffed Mr. Kerr. Matters proceeded without incident up to a point (the interaction was captured on a digital audio-visual machine). A summary of the incident commences at paragraph 3, and concludes at paragraph 10:

Const. Page's voice was calm, as were his actions, up to the point at which he asked Kerr where his cell phone "was at". His tone of voice changed markedly at that point. He became verbally aggressive with Kerr as he warned him about obstruction. Immediately after Kerr said in a raised voice "you're asking me double questions" Const. Page grabbed Kerr who was seated on the bench, pulled him up, turned him around, placed him in a combination arm and head lock, and pushed him forward into the wall. The impact with which Kerr's right shoulder hit the wall openly fractured the drywall at the point of contact.

- ***In the Matter of Cst. Page (Part I)*** (PH 2012-03, February 25, 2013) at para. 10

12. At paragraph 9, the Adjudicator noted that Mr. Kerr did not file a complaint, but the matter proceeded at the instance of a more senior officer. Cst. Page ultimately plead guilty to assault, and received a conditional discharge with one year of probation. The assault was "not of the most severe kind", and Mr. Kerr did not require medical attention. Cst. Page had no prior disciplinary defaults over a five year police career. Though he denied he had used excessive force, he did plead guilty to assault when he was charged in the criminal court. Adjudicator Pitfield concluded:

[14] I have noted that while in no way excusable, the assault of Mr. Kerr in this case was moderate in nature. It resulted from the unnecessary, unjustified and excessive use of force to control Mr. Kerr in order that he could be moved to a police vehicle and then transported to a detention centre. The assault resulted from the officer's sudden and unexplained loss of temper.

- ***Cst. Page (Part II)***, see para. 9 (para. 14 excerpt is above)

13. In a matter involving Cst. Bowser of the Victoria Police Department, the officer was one of several present at an incident outside a nightclub. Adjudicator Casson summarized the video evidence at paragraph 4 of his

Reasons, which included Cst. Bowser dealing with a Mr. Archer. During the course of getting Mr. Archer to a position on the ground where he could handcuff him, another officer (Cst. Robinson) tackled Mr. Archer and was struggling with him when, after warning him to put his hand behind his back "or it's going to go bad for you", Cst. Bowser used a "hard forceful kick to the left side of Archer's exposed upper torso". Shortly after, as he was trying to handcuff Mr. Archer, Cst. Bowser kneed Mr. Archer in the back twice.

- ***In the Matter of Cst. Bowser*** (PH 2012-01, April 2013) at para. 4

14. At paragraph 5, the Adjudicator again cited from his earlier Reasons, noted that Cst. Bowser did not intervene to stop the unnecessary use of force by Cst. Robinson, but instead escalated the force by delivering foot and knee strikes "to vulnerable parts of Archer's body". In imposing the joint submission urged by public hearing counsel and counsel for Cst. Bowser (counsel for the complainant sought more harsh measures) the Adjudicator noted both the nature of the force used and the vulnerable areas impacted. He also noted that: Cst. Bowser had no history of misconduct in his fifteen year career; Mr. Archer suffered no injury; Cst. Bowser accepted the decision on his liability; and several aspects of personal impact of the matter on Cst. Bowser and his family. In all the circumstances, he imposed a 2 day suspension (again, the maximum suspension at that time was 5 days). He also imposed 6 hours training in use of force, with an emphasis on de-escalation training and assessment to address any potential anger management issues.

- ***Cst. Bowser*** at paras. 5 and 18 to 28

15. A further case of Abuse of Authority involved the use of a "Taser" to effect an arrest at a SkyTrain station. In that case, Cst. Dickhout was attempting to issue a violation ticket to a Mr. Lypchuk, who attempted to leave the scene. Cst. Dickhout and Cst. Chartrand chased Mr. Lypchuk, stopping

him on a stairway. As Mr. Lypchuk was “reluctantly responding to commands”, Cst. Dickhout discharged the Taser. His rationale for doing so (that Mr. Lypchuk may attempt to assault Cst. Chartrand) was not accepted by the Adjudicator, who concluded Cst. Dickhout did not believe that, but that even if he did, it was an unreasonable belief in the circumstances.

- ***In the Matter of Cst. Dickhout*** (PH 2010-03, April 26, 2012) at para. 3

16. After reviewing the factors required by the Act, Adjudicator Pitfield acceded to the joint submission of counsel for a two day suspension (again, the maximum available suspension at the time was five days). In so doing, the Adjudicator noted various factors, including: Mr. Lypchuk did not complain, and the matter had a rather unusual and long process; Cst. Dickhout had been a police officer for approximately 38 years with no disciplinary record; the personal impact upon Cst. Dickhout in the circumstances; Cst. Dickhout’s acceptance of responsibility and his “positive and enlightened view” of the discipline process; that this occurred in 2007, when the Taser was in its early days of use, and well prior to the incident involving Mr. Dziekanski; and that though the incident was “regrettable”, it was not misconduct “of the most serious kind”.

- ***Cst. Dickhout***, paras. 5 to 12

17. Adjudicator Hutchison, in the case of Cst. Smith of the Victoria Police Department, dealt with an Abuse of Authority complaint in which he found that although a “takedown” in cells of a handcuffed prisoner was necessary, Cst. Smith had used unnecessary force in so doing. In reaching that conclusion, the Adjudicator noted that Cst. Smith was aware of the concrete floor and the likelihood of injury to the prisoner in handcuffs; that the actions of Mr. McKay justified the takedown; that a “soft” takedown was warranted, though that did not take place; that Cst. Smith’s reaction from Mr. McKay grabbing his fingers was instinctive and

not in keeping with his training or his otherwise professional demeanour; and that Cst. Smith had acted “instinctively and without much forethought in the course of a “split second”. It appears the injury to Mr. McKay was substantially more severe than the present circumstances.

- ***In the Matter of Cst. Smith (Part I)*** (PH 2008-01, January 28, 2009), pages 22 to 25

18. At the subsequent hearing for Cst. Smith, the Adjudicator ultimately imposed a three day suspension without pay (again, the maximum suspension at the time being five days) and six hours retraining in takedown techniques (on Cst. Smith’s own time). Commission Counsel had sought a reduction in rank; counsel for Cst. Smith sought a two day suspension, along with retraining and related measures (see page 4). The Adjudicator noted that Cst. Smith had no prior record of discipline in the five years he had been an officer before this incident occurred in 2004. The Adjudicator had agreed with the proposition put by counsel for Cst. Smith that any Abuse of Authority is “serious”, but that the circumstances admit of “a range conduct that serves to increase the seriousness of a particular breach” and that the conduct and injuries suffered by Mr. McKay represented seriousness at the “mid range” (page 7).

- ***In the Matter of Cst. Smith (Part Two)*** (PH 2008-01, undated)

CIRCUMSTANCES OF THIS CASE

19. As noted above, the cases referred to above, or which may be referred to by counsel for Cst. Gibbons, are but a guide. Each case turns on its unique facts and circumstances.

20. The findings made in this matter are clearly and concisely set out in the decision issued August 12, 2014, and I will make reference to them only briefly in these submissions.

21. This incident occurred in a time span of approximately forty seconds. The Abuse of Authority which was found to be misconduct was Cst. Gibbons entering the vehicle and punching Mr. Feng in the head three times. The first punch was, in Cst. Gibbons' own estimation, "9.5 out of 10"; the next two punches were less forceful, but apparently only because Cst. Gibbons broke his own hand with the first punch.
22. As set out in the earlier Reasons, the force of the blows split Mr. Feng's scalp in a three centimeter cut which required medical attention. Mr. Feng testified about the immediate and longer term aftermath of the punches. The nature and extent of the injuries are a relevant consideration at this stage.
23. In his Reasons, the Adjudicator noted that the decision to break the window seemed "somewhat excessive", but that such conduct in these circumstances did not rise to the level of misconduct. However, the immediate entry to the vehicle and repeated punches to Mr. Feng's head were an Abuse of Authority.
24. With regard to the factors enumerated in section 126(2), and using the same alphabetical sequence:
- a. Though this is not the most serious misconduct, as noted in *Smith* any Abuse of Authority is serious. This is particularly so given the finding by the Adjudicator that the situation "did not require the use of any force" by Cst. Gibbons:
 - i. there were three punches, the first of which was essentially as hard as Cst. Gibbons could administer. The successive punches were only less severe because of the injury to Cst. Gibbons' hand, not out of any concern about minimizing the use of force on Mr. Feng. Indeed, the intent was to "stun" Mr. Feng;

- ii. the punches clearly injured Mr. Feng, and he testified both in regard to his immediate injuries and the length of time he suffered the physical manifestations of the punches;
 - iii. as set out in the earlier Reasons, the actions of Cst. Gibbons created an extremely dangerous situation for Cst. Gibbons, his partner and other persons in the area if the vehicle had gone out of control. This was a busy intersection on a busy Friday, just before 6:00 pm.
- b. Cst. Gibbons does have a disciplinary record, unlike the officers in the cases cited above. That record is also for Abuse of Authority in relation to an unlawful, non-private strip search in 2010. In that case he was given a written reprimand and additional training. A similar disposition is suggested by Chief Constable Chu this time.
- c. The impact of a short suspension and the further training suggested will have minimal impact on Cst. Gibbons' family and career. That is not to suggest there is no impact, but it is not a situation akin to some of the financial, promotional or personal consequences set out in some of the cases above.
- d. The comments of Chief Constable Chu make it clear that Cst. Gibbons is a valued officer, and that he operates with a self-motivated and proactive zeal can be a valuable quality. However, with respect, such zeal must be tempered and balanced to fit the circumstances. Despite the earlier written reprimand and additional training from the 2010 matter, Cst. Gibbons has again failed to strike that balance. It is submitted that the measures suggested will decrease the likelihood of future misconduct.
- e. Counsel for Cst. Gibbons will no doubt elaborate upon Cst. Gibbons' acceptance of responsibility and his willingness to take steps to prevent a further recurrence of misconduct.
- f. It does not seem that any VPD policy contributed to the decision to use force in this case. Cst. Gibbons' rationale for the need to "stun"

Mr. Feng and prevent the possibility of him fleeing, in the context of VPD non-pursuit policy, was noted in the Reasons. With respect, it cannot be said that the policy contributed to the excessive use of force in these circumstances.

- g. I have addressed other cases which, in my respectful submission, bear some relevance to the matter at hand.
- h. The aggravating factors have been set out. With regard to other mitigating factors, it must be noted that the use of force by Cst. Gibbons was a spontaneous decision arising on the spur of the moment. I expect counsel for Cst. Gibbons will likely address other mitigating factors in his submissions.

CONCLUSION

25. Taking all the required factors into consideration, and in the particular circumstances of this case, it is respectfully submitted that the following disciplinary or corrective measures are appropriate:

- a. Suspension without pay for one to two scheduled working days (one working day is equal to an eleven hour shift);
- b. A requirement to undertake the following specified training or retraining: additional training from use of force experts in the Vancouver Police Department Force Options Training Unit on:
 - i. the law regarding use of force;
 - ii. appropriate situation assessment and de-escalation techniques; and
 - iii. best practices when use of force is required.

RESPECTFULLY SUBMITTED THIS 15TH DAY OF SEPTEMBER, 2014.



Joseph M. Doyle
Public Hearing Counsel