

IN THE MATTER OF THE *B.C. POLICE ACT*, [RSBC 1996] c. 376
AND IN THE MATTER OF THE PUBLIC HEARING #2013-05
CONSTABLE TAYLOR ROBINSON of the Vancouver Police Department

Date: November 28, 2014

Registry: Vancouver

Revised Decision of Adjudicator: The Honourable Mr. Wally Oppal

Gabriel M. Somjen

Counsel for the Vancouver Police Union
Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
P.O. Box 48600
Vancouver, BC V7X 1T2

Mark Jette

Counsel for the Public Hearing
Sutherland Jette
Suite 201 – 128 West Pender Street
Vancouver, BC V6B 1R8

Mike Tammen, Q.C.

Counsel for the OPCC
Michael Tammen Law Corporation
506 – 815 Hornby Street
Vancouver, BC V6Z 2E6

Doug King

Counsel for the Complainant Sandy Davidson
Pivot Legal Society
121 Heatley Avenue
Vancouver, BC V6A 3E9

E. David Crossin, Q.C.

Counsel for Cst. Taylor Robinson
Sugden, McFee & Roos LLP
700 – 375 Water Street
Vancouver, BC V6B 5C6

David G. Butcher, Q.C.

Counsel for the VPD
Wilson, Butcher
400 – 744 West Hastings Street
Vancouver, BC V6C 1A5

DATES:

January 9, 2014
February 7, 2014
October 6, 2014
October 17, 2014
November 28, 2014

Case Management Conference
Scheduling Hearing
Disciplinary and Corrective Measures Hearing
Recommendations and Submissions
Decision of Adjudicator

I. INTRODUCTION

[1] Constable Taylor Robinson of the Vancouver Police Department has been found by a disciplinary authority to have committed disciplinary defaults of abuse of authority and neglect of duty and has received a suspension of 1 day on each of the two defaults.

[2] In concluding that the discipline proposed by the Vancouver Police Department was inadequate, the Public Complainant Commission has ordered a hearing under section 138(1)(d) of the *Police Act RSBC 1996, c.267* primarily on the following grounds:

- a) The complaint is serious in nature as the allegations involve a significant breach of public trust;
- b) The conduct has violated, or would likely to violate, a person's dignity, privacy or other rights recognized by law;
- c) It is necessary to examine or 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;
- d) There is a reasonable prospect that a public hearing will assist in determining the truth; and
- e) A public hearing is required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline.

[3] The particulars of the abuse of authority involved an intentional or reckless use of unnecessary force while a neglect of duty involved the failure to assist the complainant after she was pushed to the ground.

[4] At the outset of this hearing, Constable Robinson has admitted the allegations. Thus this hearing is concerned with the adequacy of the decisions regarding the suspensions.

[5] An ancillary issue has arisen regarding the role of Commission Counsel under the Act. Regrettably this issue did not arise until after Commission Counsel had made his submissions regarding disposition.

II. BACKGROUND

The facts are not in dispute. The incident was captured on video from a security camera situated at a nearby hotel. The incident was clearly visible on the video which was played before me. On June 9th, 2010, Ms. Sandy Davidsen, who suffers from cerebral palsy and multiple sclerosis, was walking in an easterly direction on East Hastings street in the City of Vancouver. The video shows Ms. Davidsen who was somewhat unsteady on her feet, to be walking towards the officers. Constable Robinson along with two officers, were walking three abreast in a westerly direction on East Hastings street. It is clear from the video that as Ms. Davidsen and the three officers approached each other, a gap was created between the officers and Ms. Davidsen. As Ms. Davidsen was proceeding between the officers, Constable Robinson turned and pushed Ms. Davidsen. She fell to the ground. Constable Robinson then stated, "Don't touch a police officer's gun." He stood over her momentarily but offered no assistance to her while she was on the ground. Similarly, his two colleagues offered no assistance to Ms. Davidsen. A woman who witnessed the incident challenged Constable Robinson who told her that Ms. Davidsen had grabbed, or attempted to grab at his gun. The officers continued walking in a westerly direction.

Ms. Davidsen was assisted to her feet by the witness and was taken to the nearby hotel. At approximately 10:14 p.m. the same evening, after viewing the video, an employee from the hotel called the Vancouver Police Department Communications Centre and reported that Ms. Davidsen had been assaulted by a police officer. The VPD officers attended at the hotel, viewed the video and notified the duty officer and the professional standards section of the VPD.

On June 11th, the professional standards section interviewed Ms. Davidsen wherein she reported that she was assaulted by the officer. It is noteworthy that while there was a complaint of a criminal assault involving one of its officers, no attempt was made by the Vancouver Police Department to notify the Office of the Complaint Commissioner. The police response to the lack of notification was that they were engaged in a quote "informal investigation." I agree with the assessment of the Complaint Commissioner that there is no merit in that explanation. On November 10, 2010 the New Westminster Major Crime Unit recommended to the Criminal Justice Branch that Constable Robinson be charged with assault. The charge was approved however a Stay of Proceedings was entered by the Crown on February 29th, 2012.

This matter has had a lengthy history. I will not go into the reasons for the various adjournments and delays except to say that the elapse in time from the date of the incident of June 9th, 2010 to the present is clearly unacceptable and contrary to the spirit of the Legislation. In his decision to convene a hearing, the Police Complaint Commissioner Stan T. Low has noted, "A delay of 11 months to conduct the one day discipline proceeding and a further 3 months to issue a decision on discipline was entirely unnecessary and unacceptable." I agree with that. On August 16, 2012, a discipline authority was finally appointed. After numerous delays, primarily by a change in counsel, a hearing finally commenced on July 9th, 2013. At the discipline hearing, Constable Robinson denied the allegation of abuse of authority for intentionally or recklessly using unnecessary force on Ms. Davidsen but admitted to the allegation of neglect of duty for failing to assist Ms. Davidsen after she fell to the ground.

On August 20th, 2013 the disciplinary authority issued his decision substantiating both allegations and finally on October 7th, 2013, he proposed a one day suspension on each of the allegations. As I stated earlier, the real issue in this hearing relates to the fitness of the disposition. *The Police Act* has been amended. The amendment is reflected in section 126(1)(c) which states:

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:

(c) suspend the member without pay for not more than 30 scheduled working days.

Thus in addition to the option of dismissal or reduction of rank, the maximum suspension for violations of these disciplinary matters was increased from 5 to 30 days.

Mr. Crossin Q.C., Counsel for Mr. Robinson has argued that, "Having regard to all of the circumstances, the 2 day suspension is appropriate. It is said that at the time of the incident, Constable Robinson had 6 months experience and was placed in the somewhat, challenging downtown eastside. It is also said that for 4 and a half years he has been subject to criticism that in of its self is sufficient punishment." I agree that those are mitigating factors. As well, a mitigating factor that favors Constable Robinson is the time lapse from the date of the incident to the day of the hearing. I accept the submission that Constable Robinson has undergone corrective training and in form of a course in conflict resolution and has expressed remorse.

It is somewhat disturbing that none of the three officers assisted Ms. Davidsen after she was pushed to the ground. In my view, the total suspension of 2 days is not adequate having regard to the aggravating factors. The act of pushing Ms. Davidsen to the ground was callous and reckless. She was clearly vulnerable. The officer took no steps to assist Ms. Davidsen. This is a clear violation of public trust. The disposition of 2 days fails to consider the principle of accountability. An appropriate disposition for each of the two offences is a suspension of 3 days for a total of 6 days.

III. THE ROLE OF THE POLICE COMPLAINT COMMISSIONER

Both the Vancouver Police Department and the Vancouver Police Union have argued that the Act imposes limits on the role of Commission Counsel. It has specifically been argued that Commission Counsel is precluded from making submissions on disposition.

With respect, I disagree. The provisions of the *Police Act* are clear. The relevant portions of the Act that deal with the role of Commission Counsel reads as follows:

Public Hearing

- 143** (4) For the purposes of a public hearing under this section, public hearing counsel must present to the adjudicator the case relative to each allegation of misconduct against the member or former member concerned.
- (5) Public hearing counsel, the member or former member concerned, or her or his agent or 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.
- (6) The adjudicator may
- (a) receive and accept information that the adjudicator considers relevant, necessary and appropriate, whether or not the information would be admissible in any court, and
 - (b) without limiting section 145 [*powers respecting participants*], exclude anything unduly repetitious. (emphasize added)

In arguing that the role of Commission Counsel is restrictive, Counsel have relied on *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 and *Lowe v. Diebolt*, 2014 BCCA 280.

Counsel have also relied on the following comments from Madam Justice Newbury at page 94 wherein she stated:

"The PCC thus has what is often described as a "gatekeeper" or "supervisory" role that does not involve deciding complaints on their merits, but ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the Act."

In *Lowe, supra* at paragraph 67, Mr. Justice Groberman made the following comment:

"His role, under the statute, is to ensure that the complaints against the police are dealt with in accordance with the statutory regime. He has a strong interest in ensuring that the procedures set out in the statute are respected, and in ensuring that his own directives are followed. He is not given a role in the substantive disposition of complaints, and, as a neutral party in the administrative regime, can have no legitimate interest in the outcome of a complaint proceeding. Indeed, as I have noted, the Court had sufficient doubts as to the interest of the Commissioner in this matter as to require submissions on his standing."

These cases merely reiterate the intent of the Legislature which placed the Commissioner as an independent officer of the Legislature in the role of a gatekeeper who has a duty to ensure that the principles of justice and fairness are complied with. While he may not have any interest in the outcome of a complaint in absence of a statutory provision, he is not precluded from full participatory status. It is not dissimilar to the role played by Crown Counsel who must ensure that all relevant evidence either for or against the Crown must be led in a criminal case to ensure a fair trial. Under our system the Crown has

no interest in the outcome of a case, however the Crown is not precluded from making submissions to the trier of fact as to what is an appropriate disposition of a case. It is illogical to conclude that while Commission Counsel is entitled to cross examine witnesses, he or she is somehow precluded from making submissions on the final outcome of the case. Of course, in any event, had the Legislature intended to preclude Commission Counsel from making submissions, it clearly would have stated so in clear terms. The argument may be moot because Counsel has already made submissions with respect to the outcome. I have concluded however that there is no merit to the argument that Counsel is precluded from making submissions on the outcome of a complaint. The final outcome of the case is not determined by Commission Counsel but by the Adjudicator. In reaching this decision and also comforted by the decision of Adjudicator Carol Baird Ellan wherein she states:

"I agree however with Mr. Tammen's submission that the commissioner always has an interest in whether a case has been properly dealt with, and that the Act, in particular section 138, imposes a duty on him to take certain actions if certain circumstances are found, or believed to exist. The Commissioner is clearly required to take action if he is of the view that misconduct has occurred and that it has not been properly dealt with, including where he believes a reviewer or adjudicator has not properly dealt with it."

I take particular note of the fact that this incident took place in the downtown eastside which has been a particularly challenging place for the police. It is for that reason that I briefly entertained at Counsels request, to make recommendations to the police relating to the downtown eastside. Matters of policy require thorough discussion which was not available in this hearing in the shortness of time. Chief Constable Chu has filed a letter relating to the steps taken by the department in the downtown eastside. I am grateful for the assistance offered by the Chief Constable Chu, however I do not think that I ought to make any recommendations in the absence of a careful examination of the evidence relating to recommendations. As well, before any serious recommendations are made regarding policy, there needs to be relevant input from all stakeholders.

III. Conclusion

The appropriate disposition for each of the two offences is a suspension of three days for a total of six days.