

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367

AND

IN THE MATTER OF [REDACTED]

**NOTICE OF DECISION ON**

**REVIEW OF FINAL INVESTIGATION REPORT**

TO: [REDACTED] New Westminster Police Service  
AND TO: Sergeant Todd Matsumoto, New Westminster Police Service  
AND TO: [REDACTED] Complainant  
AND TO: Mr. Stan Lowe, Police Complaint Commissioner

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***Introduction***

[1] Five complaints were made in relation to the conduct of [REDACTED] when she participated in the arrest of [REDACTED] in New Westminster shortly before 11:00 pm on March 23, 2009. Following an internal investigation by the New Westminster Police Service Professional Standards Office, Deputy Chief Constable Jones, acting as disciplinary authority, concluded that three of the five complaints, namely discreditable conduct associated with entry into a private residence, abuse of authority by intentionally or recklessly making an arrest without good and sufficient cause, and abuse of authority by intentionally or recklessly using unnecessary force in the process of arresting one [REDACTED] had been substantiated.

[2] The discipline authority concluded that two complaints, namely, alleged deceit in relation to two oral statements made by [REDACTED] and alleged

neglect of duty by omitting to complete a use of force report, had not been substantiated.

[3] The Police Complaint Commissioner concluded that the determination in respect of the complaint of deceit was incorrect. Pursuant to s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367, the Commissioner appointed Provincial Court Judge Brian Neal to review the final investigation report and to determine whether the complaint of deceit could be substantiated. Judge Neal considered that it could, and the matter was scheduled to proceed to a disciplinary hearing on May 3, 2011.

[4] On January 31, 2011, [REDACTED] filed a petition in the Supreme Court of British Columbia seeking an order prohibiting Judge Neal from proceeding with the hearing on the basis that he had fettered his discretion by making certain findings of fact adverse to the officer. On March 24, 2011, Judge Neal withdrew from the proceeding.

[5] On March 25, 2011, the Commissioner appointed me, a retired judge of the Supreme Court of British Columbia, to review the final investigation report in relation to the complaint of deceit. The Commissioner expressed no disagreement with respect to the disposition of the complaint alleging a failure to file a use of force report. The final investigation report and all records, transcripts, and video statements referred to therein, were delivered to me on April 5, 2011. As a result, my decision was due not later than 10 business days thereafter, namely on or before April 19, 2011.

### ***Facts***

[6] The statements to which the complaint of deceit relates arose out of events that occurred on March 23, 2009. In the evening on that date, [REDACTED] [REDACTED] assisted by Constables [REDACTED] and [REDACTED] of the New Westminster Police Service, went to the door of [REDACTED] Street in New Westminster to locate and arrest one [REDACTED]. The arrest warrant did not

authorize the officers to enter the premises to search for [REDACTED]. As a result, the officers could only enter with consent of the occupants.

[7] There is no dispute that [REDACTED] stood at the door of the apartment which was in a dead end corner. [REDACTED] could only stand facing the middle of the door or to the left. There was no room to stand to the right. There is some disagreement as to the placement of the other officers at the door. Placement is a relevant factor in assessing who did what at the door.

[8] [REDACTED] says that Constable [REDACTED] was to her left, and Constable [REDACTED] was to the left of Constable [REDACTED]. Constable [REDACTED] states that [REDACTED] was at the left side of the door, Constable [REDACTED] was next in line behind her, and Constable [REDACTED] was at the end of the line. In an initial statement, Constable [REDACTED] said [REDACTED] was to the right of the door, Constable [REDACTED] was to the left of the door, and Constable [REDACTED] was behind Constable [REDACTED]. In a second statement, the officer placed [REDACTED] [REDACTED] in the middle of the door and Constable [REDACTED] to her left. He could not recall whether Constable [REDACTED] was to his left or right.

[1] The evidence would appear to support a finding that [REDACTED] was first in line and beside her to her left or behind her were Constables [REDACTED] and [REDACTED] in that order.

[2] Constable [REDACTED] says that he saw [REDACTED] knock at the door several times. What happened after the knocks on the door remained unanswered is disputed. Constable [REDACTED] says that he had turned his head to report to other officers who were in attendance outside the building. When he turned back to the door, it was in the process of opening. He says he did not see who opened it.

[3] In a statement made June 15, 2009, [REDACTED] stated that the door was open a "smidge", which she describes as about an inch, and each time she knocked, it opened further to about four or five inches. She stated that when

no one responded to the knocking, she was able to open the door by giving it a little tap. At that point, an individual came toward the door. She stated that she identified herself as a police officer and asked if she could enter. The individual turned away and walked down a hallway. [REDACTED] construed the silence as consent and she and the other officers entered. Subsequently, one individual was arrested but soon released. [REDACTED] was located in a bedroom in the residence and arrested. Complaints were filed regarding the conduct of the police in entering the premises and effecting the two arrests.

[4] Notes prepared by [REDACTED] at the time state that "members knocked several times but could hear movement inside the suite, door insecure."

[5] On July 8, 2009, Constable [REDACTED] who was in line next to [REDACTED] [REDACTED] said the following with respect to conduct at the door:

We went into the building and then a , we headed to this suite [REDACTED] ...before we knocked we listened and could hear quite a bit of um traffic inside and just people walking around and talking and you know and that so A , we knocked no one answered we could kind of hear people quieting down and sayi ng shh□□□you know be quiet and we don't know who it is. A, knocked again no one answer ed knocked again and at that point a, [REDACTED] tried the door or mm [REDACTED] tried the door. And it was unlocked and she swung it open and there was a, a male standing by the door .

....

I believe the handle was a, a round shaped handle and she □□□yeah she just twisted it, it was unlocked and then she just, saw and I think she was checking to see if there was a chain on it or anything but she just kind of gave it a, a light push.

[6] On July 21, 2009, the investigator, accompanied by another officer, visited the apartment to examine the door. He says that he observed the following:

a) The front door is heavier than interior doors with a self□closing hinge located on the top portion of the door....

b) The door's handle is a cylindrical knob and appeared to be functioning properly. The door is locked by a deadbolt thumb b latch and also appears to be functioning properly....

c) The door could not be propped open without using either the deadbolt or wedging an object between the door and door jamb. Even after lightly closing the door, the door would not stay ajar; the top hinge always forced the door closed.

d) A grey  coloured door stop inside the apartment behind the door. This item could be wedged between the door and jamb

e) The door could not be opened by knocking.

[7] On September 3, 2009, [REDACTED] was advised that the allegation that she had assaulted one of the occupants by placing him in handcuffs and arresting him for alleged obstruction of justice when he refused to disclose the whereabouts of the target, [REDACTED] within the suite was the subject of a criminal investigation.

[8] On December 2, 2009, [REDACTED] was interviewed again. She said she had been required to attend at the [REDACTED] residence twenty, thirty, or forty times in the course of her career as a New Westminster Police Service officer. She reaffirmed that on March 23, 2009, the door was open about an inch or maybe even less than an inch. Because it was open an inch, she pushed it open and said [REDACTED] New West Police'. The following exchange occurred between the investigator and [REDACTED] in the course of that interview:

Sgt. MATSUMOTO: Now you've said door was it was already opened was it?

[REDACTED] Yeah.

Sgt. MATSUMOTO: A, and you said it was about an inch or something like that or just like a

[REDACTED] Yeah and I think as I knocked the first time I may have knocked it just slightly open a little bit more but then I used two fingers and I tapped it open fully open.

[9] Later in the interview, the following exchange occurred:

[REDACTED] But I absolutely did not open that door.

Sgt. MATSUMOTO:   okay now just going on your example from [another unrelated incident] with [REDACTED] it seems to me that that you're saying that if the door was closed you would not have the lawful authority to open it and go in is that right?

[REDACTED] Absolutely.

Sgt. MATSUMOTO: Okay but in what you described here at the [REDACTED] residence a, is that the door was open.

[REDACTED] Yeah.

[10] In other parts of the interview transcript, [REDACTED] appears to repeat her assertion that the door was ajar, not held open by a wedge, and readily moveable in response to her push.

[11] A re-enactment was carried out later in the day on December 2, 2009. The record of the event suggests that [REDACTED] was not able to place the door in the open position she had found it on March 23, 2009, because it kept closing. While she was able to push it open with her thumb and finger, she was required to use her foot to keep it open. When the interview continued after the re-enactment, [REDACTED] reaffirmed her statement that she had not opened the door, but had found it open on March 23, 2009.

[12] On December 17, 2009, the investigator interviewed Mr. [REDACTED] the individual responsible for the maintenance of the apartment building at 1116 Hamilton Street. He advised that all doors to apartments were fire-rated and fitted with self-closing mechanisms. He said that he kept records of all maintenance performed at each apartment. He stated that tenants were not to perform any of their own maintenance and he had no record of any maintenance having been performed at suite [REDACTED] in the relevant time frame.

### ***Analysis***

[13] My task, having considered the final investigation report and the statements and documents relating thereto, is to determine whether it appears that the statements made by [REDACTED] on June 15, and December 2, 2009, in relation to the state of the door, constitute misconduct because they were false or misleading.

[14] The investigator framed the question in the context of s. 77(3)(f)(i)(A) of the *Police Act*. In another decision addressing the character of alleged misconduct in the period preceding the amendment of the *Police Act* effective March 31, 2010, I stated my view that conduct occurring before April 1, 2010 that is alleged to constitute misconduct must be assessed by reference to the definition of misconduct as it stood at the date of the alleged misconduct. While it is true that the process to be followed in dealing with allegations of misconduct, whenever alleged to have occurred, is that provided by the *Police Act* as amended effective April 1, 2010, the amended *Act* cannot be construed to have retroactively made that which was not misconduct at any time before amendment actionable misconduct subject to disciplinary proceedings under the *Act*.

[15] In this case, there does not appear to be any material difference in the substance of misconduct involving deceit in making an oral statement whether the statement is alleged to have been made before, or on or after, April 1, 2010.

[16] Before the *Police Act* was amended, misconduct was assessed by reference to the *Police Code of Professional Conduct Regulation*, B.C. Reg. 205/98, which provided as follows in relation to deceit:

7 For the purposes of [identifying a disciplinary default], a police officer commits the disciplinary default of deceit if

(a) the police officer makes or signs a false, misleading or inaccurate oral or written statement or entry in any official document or record

[17] The regulation was replaced by legislation when the *Act* was amended in 2010. Section 77(3)(f)(i)(A) now provides as follows:

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

...

(f) "deceit", which is any of the following:

(i) in the capacity of a member, making or procuring the making of

(A) any oral or written statement

....

that, to the member's knowledge, is false or misleading.

[18] In my view, the statements made by [REDACTED] on June 15, and December 2, 2009 appear to constitute misconduct because they appear to be false or misleading within the meaning of s. 7(a) of the *Code of Professional Conduct Regulation*.

[19] The ultimate determination regarding [REDACTED] conduct depends upon an assessment of her credibility. The officer stands firmly behind her statement that the door was open when she first approached it. It appears that her statement that the door was open, however little, is material to [REDACTED] claim that she entered the apartment believing that she had the right to do so because the door was open and the conduct of one or more applicants constituted consent to entry. In her interview on December 2, 2009, [REDACTED] acknowledged that she was aware that if the door had been closed, opening it and entering would have been unlawful. The disciplinary authority has concluded that [REDACTED] conduct in entering the [REDACTED] apartment appears to have been unlawful as entry occurred without the consent of any occupant. [REDACTED] statements that the door was ajar may be associated with her assertion that entry to the apartment was lawful.

[20] [REDACTED] statements that the door was ajar appear to be contradicted by the statement of Constable [REDACTED] who stood next to her and who says that he saw [REDACTED] turn the door knob and open the door.

[21] The objective evidence appears to contradict the statements made by [REDACTED]. The door and its closing mechanism were inspected by the



internal investigator and another officer, the maintenance records appear to contain no record of any repair having been made to any part of the [REDACTED] apartment, and [REDACTED] was unable to manage the door at the time of re-enactment in a manner that could be regarded as consistent with her description of the door as she says she found it on March 23, 2009. The objective evidence appears to support a finding that the door to the apartment was not ajar when [REDACTED] approached it on March 23, 2009.

[22] Unless the reliability of the objective evidence is undermined in some way, it appears that it should be preferred to the subjective statements made by [REDACTED] regarding the state of the door as she found it. It appears that the officer's statements should be regarded as false or misleading with the result that the complaint of deceit should be substantiated.

***Notice of Next Steps***

[23] As required by s. 117(8) of the *Police Act*, I hereby provide notice to [REDACTED] as follows:

- (a) For the reasons set forth herein, the evidence referenced in the final investigation report appears sufficient to substantiate the allegation that [REDACTED] committed the disciplinary default of deceit within the meaning of the *Code of Professional Conduct Regulation* on June 15 and December 2, 2009 by stating that the door to [REDACTED] Street, New Westminster, was open when she attended the residence on March 23, 2009, which statements were false or misleading;
- (b) A prehearing conference will be offered to [REDACTED]
- (c) [REDACTED] has the right, pursuant to s. 119 of the *Police Act*, to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision; and

- (d) The disciplinary or corrective measure being considered is suspending [REDACTED] without pay for not more than thirty (30) days.

Dated at Vancouver, British Columbia this "18th" day of April, 2011.

"Ian H. Pitfield"

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Hon. Ian H. Pitfield, Retired Judge