

The following Decision has been edited

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

AND

IN THE MATTER OF CONSTABLE "X"

NOTICE OF DISCIPLINE AUTHORITY'S DECISION
(amended September 31, 2010)

TO: Constable "X", Member West Vancouver Police Department

AND TO: Mr. "JB", Vancouver B.C.

AND TO: Sergeant Paul Skelton, Professional Standards Section,
West Vancouver Police Department

AND TO: Mr. Stan Lowe, Police Complaint Commissioner

Overview

Misconduct is alleged against Constable "X" arising from his arrest of the complainant, Mr. "JB", on June 19, 2009.

The complaint was the subject of an investigation which framed the complaint investigated as follows:

It has been alleged that Cst. "X" used excessive and inappropriate force [punches or palm strikes to the area of the head] when he arrested Mr. "JB" on the night of June 19/20, 2009. The excessive use of force allegations also included the use of his police service dog that also bit Mr. "JB" on his legs during the arrest.

The complaint stems from a police attendance at a domestic dispute in West Vancouver. The police arrived to find the woman owner of a residence outside the residence. Mr. "JB" was inside the residence in the company of his friend, Mr. "S". The door was locked. The woman owner complained that she had been assaulted by Mr. "JB". She gave the police permission to break the front door open in order to allow them to arrest and remove Mr. "JB". The front door was broken open and three West Vancouver Police Department constables, Constables "X", W and B entered the residence. Constable "X" had a police dog on a leash. In the course of arresting Mr. "JB" the police dog bit his legs extensively and he was struck in the head by Constable "X". Mr. "S" was thrown from his chair to the floor by Constable "X" on his way to arresting Mr. "JB".

On June 24, 2009, Sergeant Paul Skelton of the professional Standards Section of the West Vancouver Police Department informed the Police Complaint Commissioner of allegations made by Mr. "JB" of misconduct on the part of Constable "X" and requested an order pursuant to s. 55(3) of the *Police Act* authorizing him to initiate an investigation into the allegations.

On June 25, 2009, the Police Complaint Commissioner responded to Sergeant Skelton ordering an investigation.

Sergeant Skelton completed an investigation report on March 18, 2010 and forwarded it to Inspector Sheila Sullivan of the West Vancouver Police Department recommending disciplinary measures with respect to the two incidents involving Mr. "JB". Sergeant Skelton's investigation report concluded:

Based on all the evidence gathered during the course of this investigation, the disciplinary default of Abuse of Authority has been SUBSTANTIATED on the balance of probabilities, as it relates to Cst. "X" intentionally using unreasonable force during the arrest of Mr. "JB" that was not proportional to the level of resistance Mr. "JB" had displayed.

The disciplinary default of Abuse of Authority has NOT been SUBSTANTIATED on a balance of probabilities, as it relates to Mr. "JB"'s allegations that Cst. "X" punched him in the area of his

face before he threw him to the floor or that Cst. "X" allowed his dog to bite Mr. "JB" while the police were handcuffing him.

On March 24, 2010, Inspector Sullivan found that there was sufficient evidence to conclude that Constable "X" had committed an abuse of authority by deploying his police dog but that the evidence did not establish misconduct by striking Mr. "JB" on the head. Constable "X" was notified of that decision and of the resulting courses of action open to him.

On May 4, 2010, Constable "X" requested that a further investigational step be taken, namely, that an opinion and review be sought from a K-9 trainer/expert concerning the use of a police service dog as an apprehension tool.

On July 16, 2010, on the basis of a report prepared by Constable Rhodes, a senior police service dog handler employed by the Vancouver Police Department, Sergeant Anne Mason Young of the Professional Standards Section of the West Vancouver Police Department prepared a supplementary investigation report and forwarded it to Deputy Chief Constable Jim Almas of the West Vancouver Police Department to consider along with the investigation report already prepared by Sergeant Skelton when making a decision with respect to the allegations against Constable "X".

On August 3, 2010, Deputy Chief Constable Almas prepared a Notice of Decision concluding that no misconduct had been established.

On September 1, 2010, The Police Complaint Commissioner notified Mr. "JB", Constable "X", Chief Constable Peter Lepine of the West Vancouver Police Department and Deputy Chief Constable Almas that he was of the view that there was a reasonable basis to conclude that Deputy Chief Constable Almas's decision with respect to the two allegations involving Constable "X" was incorrect and that he had appointed the writer as a new disciplinary authority pursuant to s. 117 of the *Police Act*.

S. 117 of the *Police Act* reads, in part as follows:

117. (1) If, on a review of a discipline authority's decision under ... s. 116(4) [*discipline authority to review supplementary*

report and give notice of next steps] that the conduct of a member ... does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
- (b) make her or his own decision in the matter;
- (c) if subsection (9) of this section applies [that is; the retired judge concludes that the conduct of the member appears to constitute misconduct], exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

I received the necessary background materials from the office of the Police Complaint Commissioner on September 7, 2010. I am required by the *Police Act* to provide notice of my decision and the next steps to be taken within 10 business days of receipt of the materials (September 20, 2010).

Sergeant Skelton's Investigation Report

Sergeant Skelton conducted a thorough investigation into the circumstances that led to these complaints. He concluded that Mr. "JB"'s complaint that Constable "X" intentionally used force during the arrest of Mr. "JB" that was not proportional to that justified by the circumstances including hitting Mr. "JB" on the back of the head and allowing his police dog to bite Mr. "JB"'s legs was substantiated.

In my view, the most cogent evidence of what took place at the time of Mr. "JB"'s arrest is that of the three police officers present and a statement made by Mr. "JB" to Mr. B, a paramedic who assisted Mr. "JB" after this incident. Constable M, the fourth officer present at the residence was outside the residence at the time Constable "X" arrested Mr. "JB". Mr. "JB" refused to cooperate in the investigation. Mr. "S"

could not be located to assist. Ms. "K" provided inconsistent statements. I am satisfied that she did not observe the events that took place at the time of the arrest.

All of the important events took place within a few second after the police gained entry to the residence.

The prelude to the entry into Ms. "K"'s residence was a prolonged attempt to obtain Mr. "JB"'s cooperation. Mr. "JB" was 37 years old. He has an extensive criminal record including several assaults. On the police database he is recorded as being mentally unstable, having suicidal tendencies and being violent and anti-police. This information was known to the constables at the time they entered the residence. He was abusive to the police during the lead-up to the forced entry. He refused to talk to officers about the complaint of assault and refused to leave the residence or open the door. He called the police "pigs" and told them to go away.

When the police officers entered the residence, Constable "X" and his police service dog went in first followed by Constables W and B.

Mr. "S" and Mr. "JB" were sitting on stools at the side of an island style kitchen counter in the middle of the kitchen. The counter was approximately 7 feet long and just over two feet wide. As the officers came in Mr. "S" and Mr. "JB" were on the side of the kitchen counter opposite to the officers. Constable "X" directed Mr. "S" to get out of the way as he was between Constable "X" and Mr. "JB" on the constable's path around the left end of the counter. Mr. "S" did not comply and Constable "X" pushed him on the shoulder. Mr. "S" fell to the floor where Constable W attended to handcuffing him.

Constable "X" and the dog continued toward Mr. "JB". Constable B went to the right toward the opposite end of the counter and engaged Mr. "JB" instructing him to show his hands and get on the floor.

Constable "X" and the dog engaged Mr. "JB" and took him to the floor. During the engagement, the dog bit Mr. "JB"'s legs and Constable "X" hit Mr. "JB" on the head. Constable B asked Constable "X" if he could secure Mr. "JB". Constable "X" removed the dog and Constable B handcuffed Mr. "JB".

Later, when Mr. B, the paramedic, was attending to Mr. "JB"'s injuries he heard Mr. "JB" say, in a sarcastic way, to Constable "X", "I'm sorry I kicked your dog".

The recollections of the three officers concerning the events surrounding Mr. "JB"'s apprehension are somewhat at odds concerning the crucial events. Additionally, Constable "X" gave two descriptions of the events; one to his superior immediately after the event, and one to Sergeant Skelton on August 14, 2009. The two descriptions differ markedly.

Constable "X"'s first description of the essential events was to Corporal G, the assigned Acting Sergeant, to whom he reported:

He ["JB"] hid behind his buddy ["S"]. His buddy wouldn't move because he was "shitters" so I had to fuckin' throw his buddy across the room and then I just sent the dog and he dragged him out".

In his statement to Sergeant Skelton he said that his police dog "was to be used in order to challenge "JB" and gain compliance".

In the statement he said:

I initially told "S" to move out of the way, with loud verbal commands. "S" just stared at me as I approached. With my right arm I pushed past "S" by pushing with the back of my hand on his right shoulder and (I was advised after) he fell off a stool due to being intoxicated and was detained by Constable W.

He then proceeded to describe the events in detail:

Once I moved past "S", I immediately told "JB" to get on the ground, with PSD held close in front with all of PSD's attention directed at "JB". At this point Cst. W was now dealing with "S" in the back bedroom, out of view of Cst. "X" and "JB" and Cst. B was situated in the front entranceway, which did not have a clear view of "JB" due to "JB"'s position being around the corner from the entrance area. The interactions between me and "JB" were conducted on the back side of the Bar in the kitchen which is approx. four feet high. With "JB" being around the corner and behind the bar, I was the only police officer who had a clear visual

on "JB" or myself, as I was now situated behind the bar. I was dealing with "JB" on my own and was able to observe "JB"'s assaultive cues, where no other officer would have been able to do so from their location in the residence and therefore would not be able to provide an accurate description of what took place or the demeanor of "JB" in dealing with me. I told "JB" twice to get onto the ground; however "JB" refused to do so. "JB" stared me down and maintained a frozen position, with hands open but clenched/stiff and 1000 yard stare directed towards me. "JB" was not complying with police commands and was being resistant to police with these actions. As I was telling "JB" to get onto the ground, "JB" then made an attempt to kick towards PSD with his left leg. Due to PSD being keyed in on "JB" and now being in reach due to the kick, PSD locked onto that leg that made the kick. By kicking the police dog, "JB" demonstrated heightened assaultive cues towards police. In biting "JB", PSD knocked "JB" forward and off his bar stool onto the floor of the kitchen. Due to holding onto the dog harness, I went with PSD as "JB" went to the ground. At this point "JB" and I were completely out of view of Cst. B and Cst. W. Neither Cst. B or Cst. W could observe what was taking place behind the bar area in the kitchen with "JB" and myself, and therefore cannot provide an accurate description of the events that occurred there. Once on the ground, I let go of the dog harness, reassessed the situation, now observing "JB" to be kicking PSD with the right foot, into PSD 's left rib area and the head. I observed at least three kicks from "JB". While kicking the police dog "JB" was yelling (I can't recall what he was yelling) and he was attempting to get up. It appeared to me that "JB" was trying to grab PSD with his arms. I immediately moved to "JB"'s head and shoulder area where I pushed his shoulders and head back down to keep "JB" from getting up and to cease this movement. I felt a high level of resistance from "JB" and I struggled with "JB" on the ground. I recall making several attempts to grab "JB"'s arms and continued to force "JB"'s head to the ground, to keep "JB" from getting up. The initial contact to the back of "JB"'s head was very quick as I rapidly moved up to gain control of "JB", close to that of a palm strike, forcing "JB" back down to the ground. I struggled with "JB" briefly at his head and shoulder area in attempts to prone "JB" out. I used an open hand to force "JB" down on the back of his head, while maintaining a visual and control of PSD . During this struggle, there were no

other officers in view of myself, nor could any other officer clearly see what was taking place. While doing so, I observed PSD release the bite on the left leg, and bite the lower right leg/ankle, which was kicking PSD. PSD locked onto the right leg to stop the fight and ceased the movement on "JB". Once "JB" began to comply, Cst. B approached "JB" and I to obtain a visual. I was able to prone "JB" out on the floor with his hands to his sides as I observed Cst. B moving in to assist with the arrest and told "JB" not to move after this. "JB" had now complied with police commands.

Constable B was in the best position to observe most of the events described by Constable "X". For most of the relevant time he was standing on the other side of the counter (which is only 37.5 inches high and 27 inches across). He described the events as follows:

All the members entered the kitchen area, PC B observed two males sitting in bar stools at an island style counter top in the middle of the kitchen. Both males were sitting facing the front door area, the direction to which the police were walking from. PC B noted that both males were sitting in a calm fashion, and neither appeared to have weapons in their hands. The male on the left side was later identified as "S", and the person on his right was "JB".

PC B observed CPL [acting] "X" walk around the left side of the counter and grab "S" by his right shoulder and throw him to the ground. PC B walked around the front of the counter (north side), in an attempt to approach "JB" from the right side. PC B instructed "JB" to get down on the ground and show his hands. PC B noted that "JB" was passive resistant as he was just sitting there, was not displaying any assaultive cues (clenching fist, lowering chin, staring deeply at police), fighting with police, was not saying anything, but still had not followed commands to get on the ground.

PC B did not feel "JB" was an escape risk because he was just sitting there, so he stood back across the counter to give further police commands. PC B then observed CPL "X" throw "JB" to the ground which had him now laying to the side of the counter, at CPL "X"'s feet. PC B stood about three feet away from "JB" near

his head, but did not get any closer as CPL "X" had his police dog at "JB"'s feet.

PC B observed CPL "X" deliver two strikes to the back of "JB"'s head, PC B could not see if these were open or closed fist punches. PC B noted that "JB" had both his hands to his right side as he was lying partial on his side. PC B instructed "JB" to put his arms out to his side.

At this point PC B noted that the police service dog was biting "JB"'s ankles and pulling him back slightly. PC B could not see if "JB" was fighting with the police service dog, but observed that his hands were flat to his side, and not moving.

PC B also noted that "JB" was not saying anything, and remained very quiet. PC B then asked CPL "X" if he could move in to secure handcuffs on "JB". CPL "X" pulled his dog back, and gave the ok to apply handcuffs. PC B applied handcuffs and noted that "JB" did not resist the technique, and allowed his arm to be moved into the handcuffing position (straight up in the air, in the natural range of motion).

In an interview with Sergeant Skelton on June 22, 2009, Constable B indicated, in Sergeant Skelton's words:

... that he had a clear view of the incident the whole time and the only area that would have been blocked from his vision would have been Mr. "JB"'s feet for a few seconds.

The third officer present was Constable W. He described the events as follows:

"X" and his PSD were the first units into the house, followed by W. "JB" and the other male, later identified as "S", were in the kitchen area behind a kitchen island. "S" was sitting on a chair with his arms straight up in the air. "JB" was standing to "S"'s left. "X" with his barking PSD, walked into the kitchen area, and loudly directed "S" to get out of the way; however, "S" just sat on his chair with his arms in the air. "X", while walking past "S" grabbed him in the shoulder area and threw him to the floor, then continued towards "JB".

W immediately attended to "S" who was lying face down on the floor. W handcuffed "S" and told him to stay on the floor. It was immediately apparent to W that "S" was highly intoxicated. Due to the time spent hand-cuffing "S", W did not see "X"'s first contact with "JB". Once W was satisfied that "S" was not going to get off the floor he walked towards the area where "X" and "JB" were. W could see that "JB" was lying on the floor, with "X" and his PSD at his feet, and B at his head. W could see that the PSD was engaged with "JB"'s legs, and appeared to be biting them. "JB" was lying on the floor and he did not appear to be resisting against the PSD.

After a period of time that W would approximate at 10 seconds, "X" called off his PSD and B hand-cuffed "JB"

Constable W described the state of the police service dog before the entry into the residence:

"X" was holding his PSD by the collar at the window. The PSD was barking very loudly and aggressively at "JB" through the window. W could hear "X" talking to his PSD "Are you going to get him? Are you going to bite him?"

The Law

The standard of proof of misconduct is proof on a balance of probabilities. In *F.H. v. McDougall* 2008 SCC 53 at para. 49, Mr. Justice Rothstein, who delivered the judgment of the Court, said:

In the result, I would affirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

Misconduct is defined in s. 77 of the *Police Act*. The relevant portions of s. 77 read as follows:

77 (1) In this Part, "**misconduct**" means

...
(b) conduct that constitutes

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

...

(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:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

...

(ii) in the performance or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person, or

...

(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

Police conduct when making an arrest is governed by s. 25 of the *Criminal Code of Canada*. The relevant portion of s. 25 (1) reads:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(2) as a peace officer ...

...

Is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as necessary for that purpose.

It is my responsibility to review the investigating officer's report and the evidence and records referenced in the report and make my own decision concerning the allegations of misconduct: *Police Act* s. 117.

Analysis

The events as described by Constables W and B do not justify the use of force in the arrest of Mr. "JB". He posed no immediate danger to the officers although he had been extremely verbally abusive to them in the time leading up to the entry into residence. He was sitting (or standing according to Constable W's recollection) motionless at the kitchen counter. He did not have a weapon. There was no immediate need for force to effect Mr. "JB"'s arrest.

Constable "X"'s avowed purpose in using the police dog was to ensure compliance on the part of Mr. "JB". That purpose did not require an immediate engagement of the dog with Mr. "JB".

The evidence of Constable "X" in his report to Corporal G shortly after the arrest described the situation as one in which Constable "X" proceeded immediately to a use of force to effect the arrest.

In his statement to Sergeant Skelton some weeks later, Constable "X" described in detail a much more prolonged series of events leading up to the use of force. This version of events is improbable given his early resort to force against Mr. "S". Both of the other constables describe Constable "X" grabbing Mr. "S" by the shoulder and throwing him to the floor.

Constable "X" takes great pains to state what the other Constables could and could not see. It is unlikely that he would have been able to keep track of the locations of the other two constables and their lines of sight given the intense engagement that he describes with Mr. "JB".

His description of the events and his assertion that Constable B was unable to observe the events closely does not accord with the physical surroundings. Constable B was separated from Constable "X" only by the kitchen island which is approximately the height of a standard kitchen counter and slightly over two feet wide.

Additionally, it is clear that Constable "X" brought his police service dog very close to Mr. "JB" shortly after entering the residence. Constable "X" prepared the dog by heightening its aggressive instincts before the officers proceeded into the residence.

The available evidence indicates that other reasonable courses of action were available to Constable "X" that would not have engaged his police dog and caused injury to Mr. "JB". In his investigation report, Sergeant Skelton suggested that Constable "X" should have stood back holding the police service dog as a display of force and allowed the other two officers to arrest Mr. "JB".

Result

Applying a balance of probabilities analysis to the evidence, I conclude that conduct of Constable "X" appears to constitute misconduct. The force used by Constable "X" to effect the arrest of Mr. "JB" was excessive in the circumstances and constitutes "unnecessary force" within the meaning of s. 77 of the *Police Act*.

Notice of Next Steps

Pursuant to s. 117 of the *Police Act*, I provide notice to Constable "X" that for the reasons set out above, his conduct in applying force to Mr. "JB" by permitting his police service dog to bite Mr. "JB"'s legs and by striking Mr. "JB" in the head constitute misconduct and requires the taking of disciplinary or corrective measures.

A prehearing conference will be offered to Constable "X".

I do not consider that the evidence against Constable "X" is sufficient to warrant dismissal or a reduction in rank.

Constable "X" has the right pursuant to s. 119 of the *Police Act* to request permission to call, examine or cross-examine witnesses at the disciplinary hearing, provided such request is submitted in writing within 10 business days following receipt of notice of this decision.

The range of disciplinary or corrective measures being considered include:

- requiring Constable “X” to undertake refresher training regarding officer safety and tactical considerations when encountering a resistant suspect, and
- requiring Constable “X” to undertake police service dog handler recertification training
- a written reprimand

In light of my finding, I am required to convene a disciplinary hearing within 40 business days of the date of this decision (November 12, 2010) if the matter is not resolved by the prehearing conference.

Dated at Vancouver, British Columbia this 15th day of September, 2010.
(amended September 31, 2010, p. 13)

“Bruce M. Preston”

Hon. Bruce M. Preston, Discipline Authority

A prehearing conference was held on November 8, 2010, at which time the officer accepted responsibility for his actions and agreed to:

- Undertake ongoing refresher training regarding officer safety and tactical consideration when encountering resistant subjects;
- Undertake ongoing recertification training in the handling of a police service dog; and
- A Verbal Reprimand.

The resolution reached was reviewed by the OPCC and confirmed.