

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

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT AGAINST
[REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF DISCIPLINE AUTHORITY'S DECISION
ON MEMBER'S REQUEST FOR FURTHER INVESTIGATION
Pursuant to Section 132 of the *Police Act*

To: [REDACTED] (Complainant)

And to: [REDACTED] (Member)
c/o Vancouver Police Department
Professional Standards Section

And to: [REDACTED] (Counsel for the Member)

And to: [REDACTED] (Investigating Officer)
% Vancouver Police Department
Professional Standards Section

And to: Chief Constable Adam Palmer (Chief Constable)
% Vancouver Police Department
Professional Standards Section

And to: Mr. Stan Lowe (Police Complaint Commissioner)

Date: October 3, 2017

Introduction

[1] This is a decision following a request by the member through his counsel for further investigation pursuant to either Section 114 or Section 132 of the *Police Act*. I have decided to allow the request.

Nature and Stage of the Proceedings

[2] The member is the subject of a discipline proceeding convened before me in accordance with Section 118 on [REDACTED], and adjourned to [REDACTED] under Section 123(10).

[3] The proceeding pertains to the following allegations:

1. Disciplinary breach of trust by abuse of authority through oppressive conduct, by intentionally or recklessly using unnecessary force in conducting an arrest of the complainant, [REDACTED], on [REDACTED]; specifically, by one or more of the following: forcibly arresting the complainant, placing the complainant on the ground, applying knee strikes, and/or using an arm bar while removing or attempting to remove the complainant's helmet by force, contrary to Section 77(3)(a)(ii)(A) of the Police Act.
2. Disciplinary breach of public trust by intentionally or recklessly damaging property, specifically a motorcycle helmet and/or one or more cell phones, belonging to the complainant, [REDACTED], a member of the public; contrary to Section 77(3)(e) of the Police Act.

[4] The member through his counsel requests that I order further investigation "in the nature of a review of a Use of Force Report from an expert, [REDACTED]". The request has been made in order to have the report admitted before me and considered along with the materials and evidence I am to consider on the discipline proceeding under Section 124(3) in making my determination under Section 125.

Legislative Framework

[5] The relevant sections of the *Police Act* read as follows:

114 (1) Within 10 business days after receiving a copy of the final investigation report referred to in section 112 (1) [*discipline authority to review final investigation report and give early notice of next steps*], the member or former member whose conduct is the subject of the investigation may file with the discipline authority a request for further investigation in accordance with this section.

...

(4) Within 10 business days after receiving the member's or former member's request, the discipline authority must

(a) decide whether to accept or reject the request, and

(b) give notice of that decision, with written reasons, to the member or former member, the police complaint commissioner, the investigating officer and, subject to subsection (6), the complainant, if any.

...

116 (1) Within 10 business days after receiving an investigating officer's supplementary report in respect of the conduct of a member or former member, the discipline authority must

(a) review the supplementary report and the evidence and records referenced in it,

(b) subject to subsection (6), provide

(i) the complainant, if any, with a copy of the supplementary report, and

(ii) the member or former member with a copy of the supplementary report and the evidence and records referenced in it, and

(c) notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

...

124 (1) This section applies when a discipline authority is required to convene a discipline proceeding under section 112 (3) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (3) [*discipline authority to review supplementary report and give notice of next steps*] in respect of the conduct of a member or former member.

...

(3) Only the following records may be considered at a discipline proceeding:

(a) the final investigation report and the evidence and records referenced in it;

(b) any supplementary report, investigation report under section 132 [*adjournment of discipline proceeding for further investigation*] or other separate reports prepared in respect of the investigation, and the evidence and records referenced in them;

(c) any other relevant written records, including, without limitation, a complainant's submissions and transcripts made under section 113 [*complainant's right to make submissions*].

...

Adjournment of discipline proceeding for further investigation

132 (1) At any time before or during a discipline proceeding, the discipline authority may adjourn the proceeding for up to 30 business days if the discipline authority considers that further investigation into the conduct of a member or former member that is the subject of the discipline proceeding, or into the circumstances surrounding that conduct, is necessary in the public interest.

(2) In ordering an adjournment under subsection (1), the discipline authority may direct the investigating officer to investigate further any aspect of the conduct of the member or former member or the circumstances surrounding that conduct.

- (3) If a direction is issued under subsection (2), the investigating officer must
- (a) comply with the direction within 15 business days after the direction is issued,
 - (b) prepare an investigation report on the matter, including all of the following in relation to the investigation conducted under this section:
 - (i) a brief account of the investigative steps taken;
 - (ii) a complete summary of the relevant evidence;
 - (iii) a list of all witnesses interviewed by the investigating officer;
 - (iv) a list of all records related to the investigation;
 - (v) the investigating officer's assessment of the evidence and analysis of the facts, and
 - (c) file the investigation report with the discipline authority and the police complaint commissioner within 20 business days after the direction is issued.
- (4) The investigating officer must make available to the discipline authority and the police complaint commissioner all of the evidence and the records referenced in the investigation report.
- (5) Within 5 business days after receiving the investigation report, the discipline authority must, subject to subsection (6), provide
- (a) the complainant, if any, with a copy of the investigation report, and
 - (b) the member or former member with a copy of the investigation report and the evidence and records referenced in it.

Timing of the Request and Procedural Considerations

[6] The first issue that arises on the application is procedural. Further investigation may be requested by the member under Section 114(1) within 10 business days after receiving the final investigation report, which according to the Commissioner's Notice under Section 117 in this matter (<https://opcc.bc.ca/wp-content/uploads/2017/06/11867-2017-06-29-Review-on-the-Record.pdf>) would have been [REDACTED]. Section 114(4) also provides that the discipline authority must provide a decision in relation to the request "within 10 business days".

[7] Counsel for the member cited authority for the proposition that the timelines set out in the *Police Act* are directory and not mandatory: *Bowyer v. Police Complaint Commissioner and Pitfield* File No. S110641 (Vancouver Registry). Whether or not the timelines in Section 114 are strictly mandatory, it is clear that they are designed to ensure that an order for further investigation under the section is made before the expiry of the 40-day period for commencement of a discipline proceeding under section 118. In this case after his review of the final investigation report under Section 112 decision, the original disciplinary authority did not find any allegations to be substantiated. The timelines set out in Section 114

are of course directed to requests for further investigation where the investigating officer has made a finding of substantiation. Such request will not be made where the allegations do not proceed at that stage. Here, an intervening Section 117 review has resulted in a discipline proceeding, the Section 114 timelines have long passed, and the section is simply not applicable, as I see it.

[8] The alternate section relied upon by counsel for the member, Section 132, provides for a request for further investigation before or during the disciplinary proceeding and is clearly applicable in terms of timing, to this matter.

[9] Whether “further investigation” is in fact required where the member seeks only to introduce materials, beyond the record, that he wishes to have the discipline authority consider can be answered by the fact that where section 114 does not apply, such as where the matter has proceeded under Section 117 as in this case (and subject to my comments below about Section 124(3), section 132 may be the only mechanism by which potentially relevant additional materials can be submitted to a discipline authority.

[10] Section 124(3)(c) may permit me to receive the subject report without following the mechanism under Section 132 of an order for a supplementary investigation. However, out of an abundance of fairness and in case the investigating officer in this matter wished to provide comment regarding the contents of the proffered report, I will consider the application under the Section 132 criteria.

Section 132 Considerations

[11] The question under section 132 is whether an adjournment for further investigation is “necessary in the public interest.” To my mind two questions arise out of that requirement: whether the material the member seeks to introduce has potential relevance to the matter under consideration in the proceeding, and whether if so, it is contrary to the public interest for any reason to delay the proceedings in connection with the making of such an order.

[12] The task of a discipline authority in connection with the discipline proceeding is defined by Section 125(1)(a) as: “make a finding in relation to each allegation of misconduct against the member or former member as to whether the misconduct has been proven.” In relation to the first allegation in this matter, that finding will entail an assessment of whether the member’s use of force was excessive.

[13] The member through his counsel submits that the question of proportionality of force is one on which expert evidence is appropriate, and may be required. He wishes to have me assess the member’s use of force in light of the expert’s report regarding acceptable tactics in policing and standards of

conduct set out in the model used for national police training.

[14] As I have stated, I think the test at this stage should be potential relevance. It would not be appropriate to make a determination that the materials will in fact prove to be persuasive on the issue, following a full consideration on the discipline proceeding. On that point, potential relevance, I note that the investigating officer considered the application of Section 25 of the Criminal Code to the allegations. The test under that section has been described as “a subjective-objective or modified objective test,”... “to assess the reasonableness of a police officer’s belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.”: *Akintoye v White*, 2017 BCSC 1094 Fleming J.. para. 101.

[15] While it would not be proper for a disciplinary authority to rely upon an expert’s opinion in relation to the very issue that must be considered on the discipline proceeding, evidence from an expert in the field of policing standards for use of force tactics could be instructive on the question of reasonableness as defined by the cases. It is significant that case law in the criminal sphere has repeatedly pointed out that the question of reasonableness in relation to an officer’s conduct should be considered from the perspective of an officer with same the level of training and experience, not from a lay perspective: See, for instance, *R. v. Pompeo*, 2014 BCCA 317. I have on a prior occasion adopted that viewpoint in relation to proceedings under the *Police Act*:

https://opcc.bc.ca/wp-content/uploads/2017/04/2014-02_Adjudicator_Baird_Ellan_Decision.pdf

[16] In that case, I expressed the view that expert evidence may be required in order for an adjudicator to properly perform the task of analyzing the reasonableness of an officer’s actions from the perspective of an officer with the same level of training and experience. I remain of the view that such evidence may at least be helpful, if not essential, in correctly applying the standards outlined by the case law in relation to use of force.

[17] In terms of the public interest, given that the report has already been prepared, the length of adjournment required will likely not be much longer than the 20-day period provided for in Section 123(10). The matter has been adjourned once under that section and is scheduled to reconvene on [REDACTED], but only in order to fix a date for the hearing of evidence. Accordingly, it is likely that very little additional delay will be caused by a request that the investigating officer review the report and be invited to comment on it. The potential relevance of the evidence outweighs any possible prejudice to the public interest caused by the slight additional delay.

Decision and Next Steps

[18] Accordingly, pursuant to Section 132, the proceedings will be adjourned from [REDACTED] to a date within 30 business days ([REDACTED] or sooner) in order that the investigating officer, [REDACTED], may “investigate further” by considering the report provided by the member’s expert, and preparing an investigation report on it. From my perspective [REDACTED] additional investigation report will be sufficient if it includes a copy of [REDACTED] report, and any comments that [REDACTED] sees fit to make about it. It must be filed within 20 business days of this direction, therefore by [REDACTED].

[19] Following receipt of the further investigation report I am required within 5 days to provide the complainant and the member with a copy, redacted as necessary to protect the privacy of any individuals. Within 5 business days of receiving their copies, the complainant and the member may apply for disclosure of any redacted information.

[20] The *Act* does not provide for a further right to make submissions on the part of the complainant.

[21] Apart from the disclosure requirements, the *Act* provides only that the further investigation report and related materials will be considered in the proceeding as part of the materials described in Section 124(3).

[22] The timelines in relation to a further investigation under Section 132 and the outcome of the investigation are sufficiently defined that in my view it would be appropriate for the hearing dates to be fixed at the appearance on [REDACTED].

Dated at Vancouver, British Columbia the [REDACTED] day of [REDACTED].



Carol Baird Ellan
Retired Provincial Court Judge