

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

**AND IN THE MATTER OF A POLICE ACT PUBLIC HEARING
INTO ALLEGATIONS AGAINST
CONSTABLE BRIAN HOBBS (THE “MEMBER”),
VANCOUVER POLICE DEPARTMENT**

REASONS FOR DECISION ON DISCIPLINARY OR CORRECTIVE MEASURES

BEFORE: Adjudicator Brian M. Neal Q.C. (rt.)

PUBLIC HEARING COUNSEL: B. HICKFORD

COMMISSION COUNSEL: G. DELBIGIO, Q.C.

COUNSEL FOR THE MEMBER: M.K. WOODALL

I Overview :

- (1) Following a public hearing, I found that the two allegations of misconduct against the Member were substantiated. The allegations concerned the entry by the Member into a residential home without lawful authority followed by the detention and handcuffing of one of the residents of that home.
- (2) What follows are my reasons under s. 126 of the *Police Act* in relation to proposed disciplinary or corrective measures to be applied in connection with the substantiated

misconduct of the Member taking into consideration all relevant aggravated and mitigating circumstances.

II History of Proceedings:

- (3) On May 30, 2018, Part II of my decision with respect to this matter was delivered, substantiating the allegations of misconduct concerning the Member (the “Discipline Decision”).
- (4) The Discipline Decision sets out in detail the prior history of these proceedings.
- (5) The next stage of the process is to consider the appropriate disciplinary or corrective measures.

III Legislative Framework:

- (6) The key legislative framework governing disciplinary or corrective measures is found in s. 126 of the *Police Act*. That section provides as follows:

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 s. 113 [complainant's right to make submissions], the discipline authority must, subject to this s. and s. 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.

- (7) In completing my analysis, I am required to consider all aggravating and mitigating circumstances in order to determine the just and appropriate disciplinary or corrective measures in relation to the misconduct of the Member.
- (8) If I determine that one or more disciplinary or corrective measures are necessary, s. 126(3) of the *Police Act* provides that 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.

IV Nature of the Misconduct

- (9) The key findings of fact relating to the allegations of misconduct concerning the Member as set out in the Discipline Decision are as follows:
- a. The Member is an officer with approximately nine years of policing experience in Greater Vancouver. He has worked the Downtown Eastside, District 3, on general patrol duties and most recently served in an investigative position with the Youth Squad;
 - b. Mr. Fraser (the "Complainant") is a member of the public residing at all material times at a private residence in East Vancouver with his spouse;
 - c. On November 18, 2015 the Member and Cst. Ward were on general patrol in East Vancouver. Cst. Ward was driving a patrol car with the Member in the passenger seat monitoring dispatch communications. Both were dressed in civilian clothing;
 - d. On that date at approximately 5:35 pm, a report was received by Vancouver Police from a member of the public, [REDACTED]. [REDACTED] advised that

some disc jockey musical equipment had been stolen from his home. He reported that he had located an ad for part of the stolen system, a microphone, showing it for sale on Craigslist;

- e. ██████████ had responded to the Craigslist ad and ultimately met the seller at a 7-11 located at the corner of Rupert and East 22nd Avenue in Vancouver. After viewing the microphone, ██████████ told the seller that he was leaving to obtain funds and would return to complete the purchase. In fact, ██████████ contacted police seeking assistance in retrieving his property;
- f. Cst. Ward and the Member received a dispatch to deal with ██████████ report at approximately 5:42 pm. By that time of day, it was dark;
- g. The Member contacted ██████████ and Cst. Ward met with him in response to the dispatch;
- h. Between the two officers, it was decided that the Member would leave the patrol car and walk to the 7-11 to meet the seller instead of ██████████. The goal from the outset was not to make an arrest, but rather to return the equipment to ██████████. The objective, therefore, was a civil recovery, rather than a criminal investigation;
- i. The details concerning the description of the seller were provided in a dispatch received by the two officers. The description of the subject of interest was that of a slender, native Indian male, with a short white beard, approximately six feet tall, between late 30's and early 40's, wearing a dark Helly Hansen jacket and baseball cap carrying a small, black Apex utility case standing outside a 7-11 store at East 22nd Avenue and Rupert Street (the "Suspect Description");
- j. As the Member approached the 7-11, he identified an individual of interest. There is no dispute in the evidence that the individual in question was a slender male wearing a dark hooded jacket and baseball cap waiting outside the 7-11 with a small briefcase (the "Suspect");
- k. From across the street approximately 60 to 70 feet away, the Member noted that almost immediately, the Suspect left the store and started walking away. The Member decided to follow on foot with Cst. Ward on a parallel track in the patrol car. Radio contact was maintained between both officers as the Member followed the Suspect;
- l. The Member knew at the outset of his encounter with the Suspect that the person he saw did not meet many of the elements of the Suspect Description. In particular, from his initial vantage point in the dark some 60-70 feet away from the 7-11 store, the Member could not confirm:
 - (i) that the person he was observing was a "Native Indian" male;

- (ii) that the person had a short white beard;
 - (iii) that the person had light skin;
 - (iv) that the person was wearing a Helly Hansen jacket;
 - (iv) that the person was carrying an Apex utility case; or
 - (v) any facial features or details of the person in question other than a general perception that the person might be slender;
- m. As a result of a concern over a possible loss of visual contact while the Suspect walked away, the officers jointly decided to amend their plan and detain the Suspect;
 - n. The Member followed as the Suspect disappeared down a dark alley between 25th and 26th Avenues travelling east towards Cassiar Street. At this point both Cst. Ward and the Member had lost sight of the Suspect;
 - o. Approximately five minutes after losing sight of the Suspect, the Member had explored the alley and was unable to locate the person of interest. Cst. Ward had confirmed that the Suspect did not exit the alley at Cassiar, or appear on either East 25th or 26th Avenues;
 - p. The Member settled on two residences as the most likely residences for the Suspect to have entered: 3390 and 3398 East 25th Avenue. He did so by eliminating other homes with closed rear yard access and in conversation with a Telus worker in the back yard of 3398;
 - q. The Member and Cst. Ward were in constant contact by radio concerning developments, and jointly concluded that 3390 was the most likely target of their investigation. Cst. Ward remained in his police car, and the Member approached the rear door of the Complainant's two-story home at 3390;
 - r. The rear entry to 3390 had no unique characteristics which might identify the same as a separate suite, such as mailboxes, multiple doorbells or a distinct address. Indeed, the Member made no observations of anything concerning the rear entry of the Complainant's home other than the fact that the door lay at the bottom of a short flight of stairs with a doorbell and adjacent exterior light;
 - s. At that point, Cst. Ward, positioned immediately in front of 3390, noticed a female exit the home and move to a car. He decided to engage the female in conversation concerning the home and its residents. Cst. Ward learned that the woman was Ms. Dunnett, and that she resided at 3390 with her husband. The Member was apprised of this development and updated as the discussion continued. During this process, the Member made a radio request for uniformed backup before he knocked on the rear door;

- t. The Member was specifically advised that Ms. Dunnett resided at 3390 with her husband and that they had access to the full home;
- u. Throughout this time, the Complainant was downstairs at 3390 working on his computer. He had left the back door unlocked as he had been back and forth to his truck parked in the carport that day;
- v. Notwithstanding the advice from Cst. Ward, the Member knocked on the rear door and rang the adjacent doorbell;
- w. There was no immediate response and as such, the Member next tried the rear door handle. He found that it was unlocked. The Member then opened the door and entered a darkened area that was obviously a laundry room with a finished floor. Another interior door lay approximately seven feet away, light emanating below the door from the room beyond. The exterior door was left partially open to the lane area;
- x. Almost immediately after the Member entered the laundry room he was confronted by a male entering through the interior door. The male, the Complainant, was light skinned, slender and approximately 40 years of age. He did not, however, have a beard nor was there any apparent indication of the "Native Indian" ancestry mentioned in the Suspect description. Furthermore, The Complainant was not wearing a Helly-Hansen Jacket, nor any of the other clothes observed on the Suspect and he was not carrying a black Apex utility case;
- y. With the arrival of this stranger in his home, the Complainant was shocked and afraid. He acknowledged that the stranger in plain clothes, the Member, flashed something resembling a badge and began to explain that he was searching for a suspect. Almost immediately the Complainant demanded to know why the Member was in the house. At the same time, the Member continued to attempt to explain that he was a police officer searching for stolen property and following a suspect last seen in the alley;
- z. The Complainant did not match the Suspect Description on several important points, particularly "Native Indian" ancestry and a white beard. The Member was immediately aware of those facts. The Complainant also did not meet the limited characteristics of the Suspect observed by the Member. Specifically, the Complainant had no Helly Hansen jacket or baseball cap, nor he was carrying a black case;
- aa. The Complainant told the Member that he had been home all night, which conflicted in part with information that had been relayed from Cst. Ward arising from Ms. Dunnett;
- bb. The Complainant continued to demand an explanation from the Member as to why he was in the home. The parties were talking over each other at several points;

- cc. As the encounter continued, the Member very quickly decided to end the discussion and informed the Complainant that he was “under arrest for being combative”. The Complainant had not raised his hands or physically threatened the Member in any way prior to his detention.
- dd. The Member turned the Complainant around and placed handcuffs on his wrists;
- ee. The handcuffs stopped the Complainant’s demands for an explanation from the Member and immediately thereafter, Cst. Ward and Cst. Birzneck arrived in the laundry room;
- ff. Cst. Birzneck was tasked with taking care of the Complainant as Ms. Dunnett came down the stairs and into the laundry area fully opening the interior door. Beyond the door could be seen a lit room with furniture, a desk and a black case at the end of a couch;
- gg. The case observed by the Member in the Complainant’s basement was black, but patently made of a different material and narrower than that observed with the Suspect. The Member knew that the case was qualitatively different from that described by [REDACTED] and that observed with the Suspect;
- hh. Cst. Ward and the Member moved to enter the basement area beyond the interior door leading from the laundry room in order to examine and search the black case. Neither officer had permission to enter any of these areas or search the briefcase;
- ii. Cst. Ward and the Member walked over to the briefcase, quickly looked inside and determined that it was not the case they were seeking;
- jj. Both officers then returned to the laundry room. The Member next asked the Complainant, still in handcuffs, for identification. The Complainant asked Ms. Dunnett to retrieve his driver’s license which she did, and then passed to the same to the Member;
- kk. The Member gave the Complainant’s driver’s license to Cst. Birzneck who then returned to his patrol car to check the identification. Cst. Birzneck returned and very shortly thereafter the Complainant was released from handcuffs by the Member. The Complainant’s driver’s license was returned to him;
- ll. The Member attempted an explanation for what had taken place and offered an apology, however, the Complainant did not want to hear further from any of the officers and insisted they leave immediately, which they did;
- mm. Subsequent to the search of 3390, Cst. Ward and the Member attended to the adjacent residence at 3398 East 25th Avenue. The officers knocked on the rear door, were told it was a suited residence, obtained permission to enter a common area, and knocked on a residence door. At that location the

officers found both the Suspect and the briefcase which had been seen by the Member. The microphone was voluntarily surrendered to police for return to [REDACTED]; and

nn. The Complainant called in a complaint to Vancouver Police concerning the entry to his home shortly after the officers left.

V Submissions of Public Hearing Counsel

- (10) Public Hearing Counsel submits that the actions of the Member reflect serious blameworthy conduct not justified or explained by mistake of law, misunderstanding of police authority or lack of training.
- (11) It is submitted by Public Hearing Counsel that the emphasis in these proceedings should be on disciplinary outcomes rather than corrective measures, such as further training.
- (12) Specifically, Public Hearing Counsel submits that many of the matters identified in the Discipline Decision concerning the Member's misconduct and testimony highlight serious aggravating factors relevant to the s. 126 analysis. The aggravating factors noted by Public Hearing Counsel include:
- (a) The fact that the Member's evidence was found to be less than forthright and lacking credibility;
 - (b) The fact that the Member was found to have recklessly entered the basement of the Complainant's home acting impetuously, and without good faith grounds to do so;
 - (c) The fact that the Member's illegal entry into the Complainant's home was a very serious breach of the Complainant's rights;
 - (d) The fact that the Member detained and handcuffed the Complainant in the basement of his home knowing that he did not have grounds to do so; and
 - (e) The fact that the Member undertook these acts when he was engaged in a civil recovery, as opposed to a criminal investigation.
- (13) It is the submission of Public Hearing Counsel that the foregoing speaks to serious blameworthy conduct on the part of the Member supporting the need for disciplinary sanctions, rather than corrective measures.
- (14) With respect to the service record of discipline disclosed by the Vancouver Police Department concerning the Member (set out below), Public Hearing Counsel submits that the materials are relevant to discipline considerations in these proceedings.
- (15) Public Hearing Counsel therefore maintains that an appropriate disciplinary disposition would be a suspension without pay in the range of 14 to 30 scheduled working days. It is also submitted that serious consideration should be given to demotion of the Member.

VI Submissions of Commission Counsel

(16) Commission Counsel takes the position that the actions of the Member were serious warranting consideration of both disciplinary and corrective measures.

(17) In particular, Commission Counsel notes the following as particularly relevant aggravating circumstances:

- (a) The Member has had approximately nine years of service and therefore, any misconduct cannot be explained by a lack of experience;
- (b) The circumstances that caused the Member to become involved were not urgent, they did not constitute an emergency, they did not engage the safety or physical wellbeing of any person, they did not unfold quickly such that a split-second decision was required, and, the dollar value of the microphone in issue was minimal;
- (c) On important issues the testimony of the Member was found to be “less than forthright”. In particular, at several points the Member’s evidence was found to be selective, equivocal and unreliable in his recounting of events at times exaggerating or minimizing his involvement in the developments that took place;
- (d) The Member’s explanation concerning the basis for entry into the Complainant’s home had no “ring of truth”. Counsel submits that such a finding is an aggravating factor because where a witness is intentionally less than forthright in testimony, those actions may interfere with the Adjudicator’s ability to make findings of fact and in turn, undermine public confidence in the effectiveness of the public hearing process itself;
- (e) The Member had no reasonable and probable grounds to arrest the Complainant and, at best, had a suspicion such grounds might exist;
- (f) The Member was primarily involved in a civil recovery of property, not an urgent criminal investigation;
- (g) The Member’s assumption that the rear door of the Complainant’s home was a public door to internal suites was both “objectively and subjectively” unreasonable;
- (h) There was nothing whatsoever that would abrogate the fundamental rights of a home’s occupant to security of the home from unreasonable entry and search as guaranteed by s. 8 of the Charter of Rights and Freedoms;
- (i) A private home, as distinct from a public or commercial space, attracts special protection in law;

- (j) When the Member first saw the Complainant inside the residence, he could not be sure that that individual was in fact the suspect he had been following. The Member acknowledged that at that point he had no grounds to arrest the Complainant and yet did so and immediately placed the Complainant in handcuffs. Such arrest was made without lawful authority;
 - (k) No reasonable officer with the Member's training and experience could objectively conclude that reasonable and probable grounds existed to arrest the Complainant, or indeed the Suspect, prior to entry into the Complainant's home; and
 - (l) The expanded entry into and search of the Complainant's residence was made without consent or a warrant. The entry and search by the Member were made without reasonable and probable grounds. Such actions were taken impulsively without due consideration of all relevant facts.
- (18) Counsel further submits that the job of a police officer is often challenging, however, in discharging their duties, officers are expected to maintain and uphold the law. This includes respecting and protecting the rights enshrined in the *Charter of Rights and Freedoms*. Indeed, it is submitted, public trust in the institution of policing rests upon the premise that police officers will conduct themselves in this manner.
- (19) It is submitted that where an officer acts outside of these professional duties and responsibilities, disciplinary and corrective measures can be used to restore public trust.
- (20) Counsel submits that disciplinary measures that do not reflect the seriousness of misconduct, may undermine, rather than restore, public confidence that may have been lost as result of police misconduct.
- (21) In the present case, Counsel submits that the Complainant had done nothing wrong and had every right to expect that he would be able to enjoy the peace and comfort of his home without unlawful interruption. There was no law, policy or exigent circumstances that could justify the Member's urgent entry into and search of the Complainant's home. Nor was there any authority for the Complainant to be arrested and handcuffed in his home.
- (22) It is submitted that the misconduct of the Member was not a momentary lapse, nor limited to a single act. Rather, the actions were reckless. Furthermore, it is submitted that such actions were not undertaken in good faith by an experienced member in pursuit of a legitimate policing obligation or duty.
- (23) With respect to the service record of discipline concerning the Member disclosed by the Vancouver Police Department, Commission Counsel submits that consideration of the same is appropriate and indeed required by virtue of s. 126 (2) (b) of the *Police Act*. It is submitted that the records have direct relevance to consideration of corrective or disciplinary sanctions and as well in relation to the likelihood of similar future misconduct by the Member.

(24) Commission Counsel submits that to properly denounce the misconduct of the Member, and deter future misconduct, a significant suspension without pay should be imposed as a disciplinary sanction. It is also submitted that corrective measures are also required that would see the Member work only under close supervision for a defined period of time.

VII Submissions of Counsel for the Member

(25) The submissions of Counsel for the Member outline a justification for the imposition of a written reprimand to the Member.

(26) Specifically, it is submitted that appropriate disciplinary or corrective measures to be imposed should give weight to s. 126(3) of the *Police Act* which, noted above, provides as follows:

(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.

(27) Counsel for the Member submits that the Member has acknowledged that he had made a mistake in both entering the Complainant's home and arresting the Complainant. Counsel also notes that during testimony the Member confirmed that he had attempted to apologize for these actions shortly before leaving the Complainant's home, but had been rebuffed.

(28) Counsel for the Member also acknowledges that both the acts of entering a private residence and handcuffing a resident of that home without lawful authority are serious matters in terms of police misconduct. The submission, however, is that not all serious acts of misconduct warrant the imposition of disciplinary sanctions as opposed to corrective action.

(29) In the present case, Counsel for the Member notes that the Member was not found to be acting maliciously or with violence, beyond the act of handcuffing the Complainant.

(30) It is further noted that although not engaged in a criminal investigation, nonetheless the Member was discharging what he understood to be his duty to assist in a civil recovery.

(31) Counsel for the Member also submits that *"there is no suggestion whatever that the Member was motivated by malice or bad faith."*

(32) In such circumstances, Counsel for the Member submits that the weight of prior *Police Act* decisions concerning abuse of authority misconduct of this nature supports the imposition of corrective measures such as reprimands and training, as opposed to suspensions or other disciplinary sanctions.

- (33) In that regard, Counsel for the Member has assembled and included in submissions an extensive set of prior reported decisions dealing with the subject of disciplinary breaches of trust relating to “abuse of authority”.
- (34) Counsel for the Member specifically relies on *Wilson and Sidhu*, a *Police Act* public hearing number P.H. 09-02. In that case, following a public hearing, two officers were found to have committed abuse of authority by entering a dwelling house without consent to effect the arrest of youth inside the home, and a second allegation of abuse of authority by effecting the arrest of the youth without lawful authority. During the entry the members pushed the youth’s mother aside, causing her to fall to the ground. The youth was in his bedroom. The police officers forced their way into the bedroom, resulting in some damage to a door frame. Retired Justice Singh, serving as Adjudicator, imposed the disciplinary or corrective measures of training and counselling.
- (35) Counsel for the Member submits that the only prior reported abuse of authority decisions involving suspensions related to cases where considerable violence took place. Counsel submits that those cases are distinguishable from the misconduct at issue in this case.
- (36) In the present case, Counsel for the Member submits that the Member was simply trying to find a quick and creative solution to a problem; namely, locating the possessor of stolen property, and trying to convince that person to return it voluntarily.
- (37) Further, it is submitted that the Member’s error was based on a belief about the nature of multi-suite homes in the relevant neighborhood, and his powers to enter them without warrant. Counsel submits that the Member has already learned the lesson that he may not enter such a home without permission or a warrant, so there is no need for further training in that regard.
- (38) It is further submitted that if training were ordered, that would extend the time before the Member’s record could be expunged, eliminating the need to report this matter in any further *McNeil* disclosure requests.
- (39) In such circumstances, Counsel for the Member submits that a written reprimand alone is required to address the appropriate corrective action and to meet the objections of s. 126(3) of the *Police Act*.
- (40) In replying to the other submissions, Counsel for Member notes that:
- (a) There are no reported decisions referenced by Public Hearing Counsel and Commission Counsel which would substantiate a 14 to 30 day suspension;
 - (b) The finding that a police officer has violated the rights of a citizen, even seriously, does not, by itself, dictate that the police officer should be punished instead of correction;
 - (c) Significant suspensions have not been ordered in other decisions unless there was significant violence, or some other unusual and serious aggravating factor not present in this case; and

- (d) This is not a case where further training would be a beneficial corrective measure.

VIII Aggravating and Mitigating Circumstances

(42) I will now turn an analysis of the relevant factors set out in s. 126 of the *Police Act*.

(i) Seriousness of the Misconduct s. 126(2)(a)

- (43) The Member's misconduct was serious, and acknowledged by the Member to be so. The misconduct not only resulted in both an unauthorized entry to a private home, but also the detention and handcuffing of one of the two residents and an unlawful search of part of that home. There was no basis in law for any of these serious actions by the Member.
- (44) The Member's actions were not a simple error in judgment in the heat of an evolving criminal investigation. In entering the Complainant's home, detaining and handcuffing the Complainant and searching part of the basement of that home, the Member acted impulsively, reckless as to his legal authority to act as he did. Furthermore, the Member's actions were not taken for good and sufficient cause.
- (45) Although the Member's actions were not malicious, I cannot agree with the submission of Counsel for the Member denying any suggestion that the Member acted in bad faith. These were deliberate, and profoundly intrusive acts of the Member abusing his status as a police officer and the rights of the Complainant. In the Discipline Decision, I specifically found that the Member did not act in good faith.
- (46) I also cannot agree that the Member's use of force lacks relevance in considering the seriousness of the misconduct. Although the use of force in handcuffing and securing the Complainant was at the lower end of the scale, it took place with a complete lack of authority and compounded the misconduct by entering the Complainant's home. I find that such use of force beyond the illegal entry was another element of the seriousness of the Member's misconduct as it escalated events without justification.
- (47) As noted in the Discipline Decision, there are few rights considered more important in law than the right to be free from unlawful intrusion of the state in one's own home. As a result, the cumulative result of the Member's misconduct clearly demonstrated serious blameworthy conduct, a significant aggravating factor.

(48) The seriousness of member misconduct has a direct correlation to public confidence in policing and the police discipline process. There can be no doubt that members of the public aware of the Member's misconduct in this case would be greatly concerned and consider the transgressions serious indeed.

(49) I find, therefore, that the seriousness of the Member's misconduct was, therefore, at the upper end of the spectrum.

(ii) Record of Employment s. 126(2)(b)

(50) The initial information made available to these proceedings concerning the Member's record of employment was limited to the fact that the Member was an officer with approximately nine years of experience on general patrol with the Vancouver Police Department.

(51) Subsequent to Discipline Decision, the Vancouver Police Department forwarded a synopsis of the Member's service record of discipline. At the hearing of submissions of disciplinary or corrective measures on July 25th 2018, counsel were asked to address the summary nature of the record provided in light of s. 180 of the *Police Act*. Ultimately, I was advised that more detailed materials were available setting out the circumstances of each service record of discipline entry. These additional materials were marked as exhibits 24 to 26 inclusive.

(52) Exhibit 25 sets out a lengthy decision dated December 14, 2017 from Adjudicator Baird Ellan in a discipline proceeding concerning the Member. The allegations of misconduct considered in that decision took place in May of 2016 and were summarized as follows:

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; 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 S. 77(3)(a)(ii)(A) of the Police Act.

2. Disciplinary breach of trust by intentionally or recklessly damaging property, specifically a motorcycle helmet and one or more cell phones, belonging to the complainant, a member of the public, contrary to S. 77(3)(e) of the Police Act.

(53) The May 2016 misconduct allegations arose subsequent to the matters considered in these proceedings, which took place November 18, 2015.

(54) In considering the May 2016 misconduct allegations, Adjudicator Baird Ellan found as follows:

[75] This case turns on the member's credibility, and I do not accept either his stated assessment of the degree of resistance exhibited by the complainant or his denial of recklessness in relation to the complainant's property.

[76] In relation to the allegation under S. 77(3)(a), it is not a question on which the expert opinion is of any assistance. That kind of opinion can assist on the issue of whether, given a certain level of resistance, the degree of force was objectively reasonable. Here, the question is an evidentiary one: do the facts support a conclusion of active resistance? I find they do not.

[77] In relation to the allegation under S. 77(3)(e), I find the necessary mental element of recklessness to be supported by the video evidence, which is consistent with what I have found to be the member's attitude of reckless or intentional over-reaction to the circumstances.

[78] I find both allegations to have been established.

- (55) Adjudicator Baird Ellan ordered that the Member receive a written reprimand, training and counseling in relation to the substantiated May 2016 misconduct allegations.
- (56) The second entry on the Member's service record of discipline relates to a 2015 finding of misconduct by neglect of duty. The incident appears to have arisen in connection with a traffic matter. That substantiated allegation of misconduct characterized by neglect of duty resulted in an order for training.
- (57) I am satisfied that the 2015 entry on the Member's service record of discipline has limited relevance to these proceedings.
- (58) However, Adjudicator Baird Ellan's conclusions with respect to the May 2016 matter are strikingly similar to those in this case and are relevant for the following reasons:
- (a) Although the May 2016 incident took place subsequent to the issues of concern in these proceedings, the pattern again finds the Member to be acting recklessly;
 - (b) The Member's credibility was again found to be in issue with respect to his version of events and the nature of his actions;
 - (c) The Member is again found to be in conflict with the rights of a member of the public
- (59) I have noted Counsel for the Member's concern that that the service record of discipline is not relevant to the current matter. However, s. 126(2) (b) requires a consideration of the Member's record. There is no legislative qualification to that obligation limiting consideration only to conduct which preceded the misconduct in issue.
- (60) Counsel for the Member argues for the application of the "progressive discipline" principle: if a person is punished once, but goes on to commit misconduct after that first punishment, then there is a need to increase the severity of the discipline to make the message clear. Consistent with this, Counsel emphasizes that this is a situation involving employment-law discipline and not a criminal sentencing.
- (61) Specifically, Counsel for the Member submits that when the additional misconduct involves an incident that occurred later in time, and nobody at the time told the officer

concerned that his conduct was wrong, then any inference that such officer would be likely to commit misconduct in the future would not be supported or grounded in logic. The submission is that after discipline an officer would then know that he must alter his approach; but that before such discipline, he did could not know.

- (62) In addressing this issue, Commission Counsel argued that one of the considerations identified in s. 126(2)(d) is “the likelihood of future misconduct by the member”. He says that additional misconduct speaks to the likelihood of future misconduct. The inference is that a person who has engaged in other misconduct will be more likely to commit misconduct again in the future.
- (63) I understand the import of the argument advanced by Counsel for the Member. I agree that a police officer who has been disciplined should ordinarily be expected to learn a lesson from the imposition of disciplinary or corrective measures.
- (64) However, the effect of this argument is limited in the present case. Here, I have additional misconduct occurring both before and after the two matters I must address. And while I am prepared to proceed optimistically on the basis that the officer recently learned some lessons from his “additional misconduct” proceedings, that does not go so far as to entitle him to be treated now as a member with an unblemished record.
- (65) Section 126(2) of the *Police Act* sets out a list of factors that must be considered. The list is not exhaustive, but as I read the provision, it mandates that an adjudicator must consider all the listed circumstances to the extent they arise in a given case. I am bound by the *Police Act*, specifically s. 126(2)(b), to take account of the member’s service record of discipline. Common sense and logic support the relevance of an officer’s full disciplinary history. The decision-maker should have full information about the particular officer facing discipline. To make the point plain, there is a world of difference between an officer with a lengthy career without any other misconduct findings, and an officer with many serious misconduct findings in a short period. I do not classify the Member in the latter category, but nor can I treat him as an officer with an unblemished history.
- (66) I am likewise bound by s. 126(2)(d), to consider “the likelihood of future misconduct by the member”. It is true that the Member was not disciplined until recently, and some of the misconduct occurred after the case before me. But when it comes to assessing the prospect of future misconduct, I see it as inescapable and logical that I would consider the fact that the Member engaged in other instances of misconduct. Indeed, the additional misconduct occurred relatively close-in-time to the matter before me. As I consider the matter, it means that I cannot simply dismiss the matter before me as a one-time isolated incident. The contrary appears to be the case. I must consider that the Member was cavalier about his use of police powers, not only on this occasion but in the other matters as well.
- (67) Put differently, as I consider s. 126(2)(d), what matters most is the fact of other misconduct findings, not the simply the timing of the imposition of discipline for those matters.

- (68) While the sanctions imposed by Adjudicator Baird Ellan may not be directly relevant in relation to a progressive discipline process, I find that those records are relevant to the likelihood of future misconduct of the Member. On the facts before me in the record, the Member is found to be acting recklessly using force in a conflict with a member of the public less six months after the incident with the Complainant. And again, the Member is found to be less than credible in his evidence before Adjudicator Baird Ellan.
- (69) I find, therefore, that the Member's service record of discipline is an aggravating factor in considering the appropriate disposition. Having said that, I have given this factor only intermediate significance as an aggravating factor in assessing the appropriate sanctions in this case.

(iii) Impact of Proposed Measures on Member, His Family and His Career (s. 126(2)(c))

- (56) There are no specific submissions before me with respect to the impact of proposed measures on the Member's family or his career.
- (57) The sole submission relating to this consideration is that fact that it has taken almost two and a half years to bring this matter to conclusion. In that regard, it is acknowledged that the history of these proceedings is complex. However, some of the responsibility for delay rests with the Member as the various applications brought on his behalf were heard and determined.

(iv) The Likelihood of Future Misconduct by the Member (s.126(2)(d))

- (58) As noted earlier, the likelihood of future misconduct by the Member is a matter of serious concern.
- (59) The misconduct errors made by Member in this case by entering a private home, arresting and handcuffing the Complainant and searching part of the Complainant's home was not a momentary lapse, as in the case of ██████ (OPCC File No-2013-8522). Rather, the actions of the Member in this case were sustained, reckless and increasingly invasive of the Complainant's rights.
- (60) In the May 2016 matter before Adjudicator Baird Ellan, a similar pattern is seen. The Member's actions were found to be reckless and his varying attempts to justify his actions were found to lack credibility.
- (61) Coming so soon after the November 2015 incident, the May incident raises a real concern the Member's general approach to policing.
- (62) The cumulative effect of the Member's service record of discipline and the details of both the November 2015 and May 2016 incidents raise a serious concern as the likelihood of further future misconduct by the Member. When the lack of insight

demonstrated by the Member's evasive and equivocating testimony describing his actions is also considered, there arises an inescapable conclusion that the likelihood of the Member's future misconduct is high.

(63) Based on my assessment of the facts set out in paragraphs 29 to 31 of the Disciplinary Proceeding Decision, I conclude that the likelihood of future misconduct of a similar nature is high. As such, this a further important aggravating factor in considering the Member's misconduct.

(v) Whether the Member Accepts Responsibility for the Misconduct and is Willing to Take Steps to Prevent its Recurrence (s. 126(2)(e))

(64) The submissions of Counsel for the Member confirm that the Member acknowledges the seriousness of the misconduct that took place. He appears to have now taken responsibility for the misconduct found to be substantiated.

(65) However, throughout the Member's equivocating evidence and in submissions, considerable weight was placed on the Member's belief that he had the right to act as he did. Indeed, during testimony, the Member opined that in retrospect, he wished he had considered "fresh or hot pursuit" as a justification for his entry to the Complainant's home as he had been told by others that such might apply. As noted in the Discipline Decision, I dismissed "fresh" or "hot" pursuit as a legal basis for the Member's actions.

(66) I am not satisfied that there is evidence before me that the Member is willing to take steps to prevent recurrence of the misconduct in issue. Indeed, the submission from Counsel for the Member is that no further training is required.

(67) With respect, I find that such a position does not protect the public by ensuring that the underlying gaps in the Member's judgment and training are addressed.

(68) Adjudicator Baird Ellan came to a similar conclusion by ordering training for the Member with respect to the May 2016 misconduct. That training was designed to cover training in use of force with an emphasis on situation assessment and reassessment, and de-escalation techniques; anger management counseling with an emphasis on regulation of emotions.

(69) In the current case, the training gaps arising from the evidence relate to the Member's understanding of basic Charter rights, training with respect to search and seizure powers, training on the law relating to the entry into a private residence, training on an officer's powers of arrest and circumstances where a warrant is required prior to entry into a residence

(70) I find that there is nothing before me to confirm in practical terms that the Member is willing to take steps to prevent reoccurrence of the misconduct arising in this case by

addressing the training gaps noted. These circumstances raise a further aggravating factor with respect to the misconduct in issue.

(vi) 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 (s. 126(2)(f))

(71) There is no evidence before of any relevant department policies, standing orders, internal procedures or actions of the Member's Supervisor that might have contributed to the acts of misconduct which are the subject of these proceedings.

(vii) The Range of Disciplinary or Corrective Measures Taken in Similar Circumstances (s. 126(2)(g))

(72) As noted earlier, Counsel for the Member submitted an extensive survey of earlier disciplinary decisions arising under the *Police Act* relating to the disciplinary default of abuse of authority. No additional decisions were referenced in submissions of either Public Hearing Counsel or Commission Counsel.

(73) A review of the range of disciplinary or corrective measures taken in similar circumstances is important to ensure that some degree of parity is applied to members dealing with misconduct sanctions in similar circumstances.

(74) The survey of decisions covers the period from 2003 to the present. The decisions confirm that there are several cases where a person's rights were violated, but little or no violence was used, resulting in disciplinary or corrective measures consisting of reprimands and training, not suspensions.

(75) Even where force has been used, the disciplinary or corrective measures often do not include suspensions.

(76) In this regard Counsel for the Member has relied, in part, on the recent [REDACTED] decision, OPCC file 2013-8522. Being familiar with the facts of that case, I can simply comment that it is completely distinguishable from the circumstances surrounding the Member. In [REDACTED] there was a momentary lapse by a member with an otherwise exemplary record of service and no likelihood of further misconduct. Such are not the facts of this case.

(77) The decisions of most relevance are found in page two to six of the summary prepared by Counsel for the Member. I will address each of those and their relevance to the current proceedings.

(78) As noted above, in the *Wilson and Singh* case (*supra*), two officers were found to have committed abuse of authority by entering a dwelling house without consent to effect

the arrest of youth inside the home, and a second allegation of abuse of authority by effecting the arrest of the youth without lawful authority. During the entry the members pushed the youth's mother aside, causing her to fall to the ground. The youth was in his bedroom. The police officers forced their way into the bedroom, resulting in some damage to a door frame. Retired Justice Singh, as Adjudicator, imposed the disciplinary or corrective measures of training and counselling. Counsel for the Member submits this decision is highly relevant.

(79) Although some elements of the *Wilson / Singh* case are similar to the misconduct in this case, there are some material differences:

- (a) There was never any doubt as to the identity of the person officers Wilson and Singh were dealing with. This was not a furtive search in the dark for a missing suspect, both officers had had a long and difficult encounter with the youth ultimately arrested. Matters had de-escalated somewhat as the young person was brought home, but escalated again as the young man began yelling threats from his bedroom window. The youth was confrontational, uncooperative, rude, belligerent and physically resistant. No such equivalency exists on the facts of this case. While the Complainant did confront the Member found in his basement, he did not do so with physical resistance, belligerence or rudeness. The Complainant simply wanted an explanation for the Member's presence in his home and wanted him gone as soon as possible. As such, the officers in the *Wilson/Singh* case were dealing with a higher prospect for violence than the Member;
- (b) Unlike the Complainant in the present case, there were apparent grounds to charge the youth in the *Wilson/Singh* case, although there were no grounds to arrest or enter the youth's home without permission;
- (c) There was a higher degree of violence in the *Wilson/Singh* case as contrasted with these proceedings as the officers concerned entered the home in question and effected an arrest on a resistant youth. Indeed, the youth concerned required two stitches over his eye as a result of the arrest, although Adjudicator Singh did not find that the allegation of abuse of authority by using excessive force was substantiated;
- (d) Neither officers Wilson or Singh had a record of disciplinary default, and no other allegations had arisen in the two and half years since the first incident had occurred. There were several letters of reference entered into the proceedings concerning officer Singh attesting to his exemplary service. Again, those are not the facts of this case;
- (e) In *Wilson/Singh*, both officers were willing to take corrective measures to address their disciplinary defaults. One of the officers concerned had not completed his use of force training before the incident in question took place, and was clear in his wish to complete that work. In the present case,

the Member is adamant that no further training is required, a conclusion I cannot agree with;

- (f) In the *Wilson/Singh* case, Commission Counsel and Counsel for the Member agreed that corrective measures should be the priority. In the result, no reprimand was issued and corrective measures of training and counselling were ordered. There is no such consensus between counsel on the misconduct relating to the Member;
- (g) Adjudicator Singh concluded in the *Wilson/Singh* case that there was no likelihood of further misconduct by either officer. Again, I cannot conclude that such is the case with respect to the Member. Not only did significant misconduct arise six months after the incident with the Complainant, I have also found that the prospects for future misconduct by the Member are a serious concern.

(80) The *Wilson/Singh* case therefore does have some degree of relevance, but the distinctions with the current proceedings are significant.

(81) The next decision noted by Counsel for the Member is OPCC file 2010-5900. The facts noted are very limited and relate to officers entering a residence without consent or a warrant, searching and seizing marijuana plants. In that case, a verbal reprimand was issued. With limited facts, this case is of marginal relevance.

(82) In OPCC file 2006-3287 police officers again entered a home without authority and stood by as two siblings of the homeowner seized property in connection with a civil matter. The material differences between that case and the current proceedings are as follows:

- (a) The officers concerned were acting on the mistaken belief that the family members in question had authority to enter the home in question and remove family property. They were not making a unilateral decision to enter a home, detain the homeowner and then search the premises;
- (b) The officers concerned admitted the disciplinary defaults of abuse of authority;
- (c) The Discipline Authority found that the officers concerned simply misunderstood their lawful authority;
- (d) Both officers accepted the disciplinary measure of a verbal reprimand

(83) OPCC File no 2005-2975 is a case where two police officers entered into a hotel room on three occasions without authority. The room was occupied as a residence by the complainant. The officers in question had apparently been regularly conducting "room checks" under the mistaken belief that they had authority to do so. Only one misconduct allegation was substantiated. The material differences between the substantiated allegation and the facts of this case are as follows:

- (a) The entry by officers was limited to pushing a door open. There was no further material entry, arrest of the occupant or search of the premises;
- (b) The OPCC concluded that the Vancouver Police Department prior training and supervision of officers with respect to such entries had been inadequate. There is no evidence of such a lapse in these proceedings, other than the Member's assertion that he believed certain homes might be suited and that entry was therefore allowed;

(84) In OPCC file 2006-3557 a complainant alleged that police had improperly entered a rental suite resulting in the discovery of a marijuana grow operation. This case is completely distinguishable because entry took place on the authority of a search warrant. Although the warrant was subsequently found to be flawed, the misconduct lay with a failure to properly complete the search warrant application. The corrective approach taken in dealing with the officer's misconduct has no relevance to the facts of this case.

(85) The remaining decisions noted in the materials provided by Counsel for the Member focus on wrongful arrest, detention and search. As noted earlier, the sanctions ordered range from reprimands and training to limited suspensions at the higher end of misconduct. Elements of each of those cases have some application to these proceedings, and I have reviewed them all. However, no individual decision captures the spectrum of factors relevant to these proceedings nor the circumstances of the Member's misconduct.

(viii) Other Aggravating or Mitigating Factors

(86) I find that it is relevant to consider the following as other aggravating circumstances:

- (a) The Member was not found to be a credible witness in describing the evolution of events, his involvement with the Complainant and his justification for acting as he did. The Member's testimony did little to enhance public confidence in policing;
- (b) The Member was found not to be acting in good faith by entering the Complainant's home, arresting and handcuffing the Complainant or by searching the basement of the Complainant's home. Acting in this manner again raises serious concerns for public confidence in the discharge of policing authority;
- (c) The Member continued to attempt to justify his actions in his testimony in cross examination by referencing a possible application of the "fresh" or "hot" pursuit principles. Even after several days of testimony at the Public Hearing, the Member apparently remained convinced that an argument could be made to support his entry to the Complainant's home on that basis. This demonstrates a clear gap in the Member's training with respect to such matters and raises a concern as to his training in this area;

- (d) Six months after the incident with the Complainant, the Member was again found to have substantiated allegations of misconduct involving abuse of authority. As noted, I accept that there had been no determination in these proceedings at the time of the most recent misconduct. However, it is an aggravating factor that further similar reckless and abusive conduct took place so soon after the first incident. Clearly, the Member continued to have, and continues to have, unresolved issues with respect to the performance of his policing duties.

IX Analysis

(87) Section 126(3) of the *Police Act* provides that if I consider that one or more disciplinary or corrective measures are necessary, I should prioritize an approach that seeks to correct and educate the Member, unless it is unworkable or would bring the administration of police discipline into disrepute.

(88) Having considered all of the foregoing including the aggravating and mitigating factors noted above and the evidence adduced during the Public Hearing process, I am satisfied that the focus of this decision must be to denounce the conduct of the Member and, as well, to correct and re- train the Member.

(89) Absent the direction provided in s. 126(3), the lengthy suspensions recommended by Public Hearing Counsel and Commission Counsel may have been worthy of consideration. The Member's misconduct was serious. It was serious because of the casual and impulsive actions of the Member in entering a private home. It was also serious because the Member clearly misapprehended his authority as an officer to arrest and handcuff the homeowner in question.

(90) As reckless acts of misconduct, the actions of the Member were inexcusable and must be denounced. However, it is also relevant that the Member did not act with violence and has apologized for the misconduct which took place.

(91) It is clear to me that some confusion remains both in terms of the Member's understanding of his right to enter private homes, and his power to arrest and detain individuals. With that in mind, appropriate education or re-training on both areas of misconduct also appears warranted.

(92) Having considered the foregoing and direction provided by s. 126(3) of the *Police Act*, however, I am satisfied that both a disciplinary sanction and corrective measures are required. Corrective measures alone cannot be the priority because doing so would, I find, bring the administration of police discipline into disrepute. The priority must be to denounce and discipline the Member.

(93) I find that a demotion is not warranted on the facts of this case. The misconduct of the Member was serious; however, the totality of the aggravating and mitigating circumstances does not warrant the significant step up in consequences a demotion would entail. As well,

the decisions of officers in similar circumstances do not support demotion when the issue of parity is considered.

(94) I also find that the written reprimand suggested by Counsel for the Member would inadequately sanction the Member's actions. Again, the matters in issue are serious and a written reprimand in the context of the Member's service record of discipline and other factors is totally inadequate to denounce his conduct.

(95) Considering all of the foregoing, I have concluded that a suspension is required to appropriately denounce the Member's actions and provide a clear condemnation of the Member's conduct leaving no doubt as to expectations with respect to his future service as a police officer.

(96) The length of suspension must be established taking into consideration parity with other similar cases. It must also adequately address the aggravating and mitigating factors noted above. I am not satisfied that the lengthy suspension sought by Public Hearing Counsel or Commission Counsel is warranted on the facts of this case. The absence of other decisions taking a similar approach is telling. This is not the case to extend the range of suspensions set out in the summary of cases provided to this hearing as there was no substantial violence involved, nor were the Member's actions intentionally malicious. What is required is a meaningful suspension, at the lower end of the range, to ensure that the Member understands, and accepts, the seriousness of his misconduct and that the public interest is served.

(97) Corrective measures are also required to ensure that there is no further likelihood of misconduct on the part of the Member.

X Conclusion and Orders

(98) Given the foregoing, the Member will be suspended without pay for two scheduled working days concurrent on both substantiated allegations.

(99) I am satisfied that such a suspension is required to denounce the Member's misconduct in the context of the aggravating and mitigating circumstances noted above.

(100) With respect to corrective measures, I find that contrary to submissions received, measures are needed to address apparent gaps in the Member's understanding of his role and responsibilities as a police officer. I have determined that three orders are required:

(a) An order that the Member work under close supervision for a term of one year, s. 126(1)(e);

(b) An order for re-education and re-training of the Member with respect to:

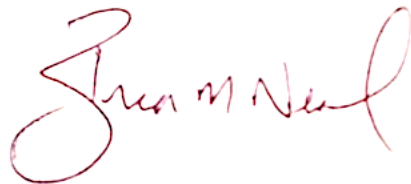
(i) An officer's duties with respect to ss. 8 and 9 of the *Charter or Rights and Freedoms*, and

(ii)The law relating to search and seizure, entry into a private residence, and the circumstances when a warrant is required to enter a home; s.126(1) (f)

(c)Finally, it is unclear to me that the Complainant appreciates the Member's expressed contrition with respect the misconduct that took place. The proffered apology as the Member was leaving the Complainant's residence was interrupted as police were directed to leave immediately. Also, the Complainant has not had the benefit of hearing directly from the Member as he apologized in testimony for that which took place. In all the circumstances, the public interest and confidence in the administration of justice concerning policing matters would be enhanced by the Member completing and delivering to the Complainant a written apology for the misconduct that took place. The corrective measures will therefore include an order for the Member to provide such an apology in writing to the Complainant within 30 days. (s.126(1)h)

(101) All corrective measures will be concurrent on both substantiated allegations of misconduct. The corrective measures will be undertaken under the supervision of, and completed to the satisfaction of, the Professional Standards Section of the Vancouver Police Department and the OPCC.

(102) In conclusion, I am satisfied that the disciplinary and corrective measures ordered will assist in ensuring that the Member performs his role in policing without further default. I am also hopeful that the measures taken will reinforce confidence in the administration of justice relating to police discipline matters.



Brian M. Neal Q.C. (rt)
August 30, 2018,
Victoria, B.C.