



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE
Pursuant to section 117(4) of the *Police Act*

OPCC File: 2017-13493
February 13, 2018

To: [REDACTED] (Complainant)

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

And to: Chief Constable Adam Palmer (Discipline Authority)
c/o Vancouver Police Department
Professional Standards Section

And to: The Honourable Judge Carole Lazar (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

On [REDACTED], our office received a complaint from [REDACTED] describing [REDACTED] concerns with members of the Vancouver Police Department. The OPCC determined [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the Vancouver Police Department (VPD) to conduct an investigation.

On [REDACTED], Vancouver Police Professional Standards Investigator, [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On [REDACTED], [REDACTED], as the Discipline Authority (DA) issued his decision pursuant to section 112 in this matter. Specifically, [REDACTED] identified the following four allegation of misconduct involving [REDACTED] and [REDACTED]:

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Police Complaint Commissioner

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1. That on [REDACTED], [REDACTED] and [REDACTED], committed *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, by intentionally or recklessly arresting [REDACTED] without good and sufficient cause.
2. That on [REDACTED], [REDACTED] and [REDACTED], committed *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* by engaging in oppressive conduct towards a member of the public in relation to the handcuffing of [REDACTED].
3. That on [REDACTED], [REDACTED], committed *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* by neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do in relation to failing to inform [REDACTED] of the reason for [REDACTED] arrest.
4. That on [REDACTED], [REDACTED] and [REDACTED], committed *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* by neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do in relation to failing to provide medical assistance to [REDACTED] and to provide [REDACTED] with adequate clothing.

[REDACTED] determined that all four allegations involving [REDACTED], [REDACTED], [REDACTED] and [REDACTED] did not appear to be substantiated. The OPCC is satisfied that the allegations relating to the handcuffing, the failure to inform [REDACTED] of the reasons for [REDACTED] arrest, and the failure to provide medical assistance and adequate clothing to [REDACTED] to be not substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect in relation to the arrest of [REDACTED].

I am of the view that the DA erred in determining that [REDACTED] and [REDACTED] had the necessary grounds to arrest [REDACTED] for breach of the peace and that there was good and sufficient cause to do so. Based on a review of the evidence, the grounds provided by the members in support of the breach of the peace arrest were speculative, lacked an objective basis, and failed to consider material pieces of evidence from [REDACTED].

An officer's subjective beliefs regarding their grounds for arrest must be assessed objectively when considering whether his or her conduct constitutes misconduct. In a recent section 117 decision, we have received guidance from retired Court of Appeal Judge, Mr. Wally Oppal, Q.C. in relation to the use of the word "reckless" in section 77:

"...the use in the *Police Act* of the word "reckless" (in the s. 77 subsection at issue here) is consistent with the fact that *Police Act* disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer's personal intention or "good faith;" rather it also involves an objective question as to the reasonableness of what the officer believed and did. While

an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable." (Paragraph 24 in his decision from OPCC File Number 2016-11505.)

In this case, the Discipline Authority does not appear to consider whether there was an objective basis in evidence to support [REDACTED] subjective belief that [REDACTED] may become involved in, or be a victim of criminal activity, or interfere with the investigation that was occurring at the [REDACTED]. In addition, the DA does not seem to place weight on the evidence provided by [REDACTED] or [REDACTED], [REDACTED], in terms of [REDACTED] rationale in striking the trunk of [REDACTED] vehicle and the information that [REDACTED] provided to [REDACTED] and [REDACTED] about this action at the time of [REDACTED] arrest.

In addition, it appears that the Discipline Authority did not apply the appropriate tests for intoxication and for breach of peace as grounds warranting [REDACTED] arrest and detention. Despite [REDACTED] denial of intoxication and [REDACTED] deportment on video tape, there was no objective evidence which supports a level of intoxication contemplated in *Besse v. Thom*, 1979 CanLII 633 (BC CA) which would warrant [REDACTED] arrest and detention.

Furthermore, the Discipline Authority was incorrect in his finding that [REDACTED] could be arrested and detained for a breach of the peace, as [REDACTED] conduct did not display a tenor of violence or suggest [REDACTED] was causing a disturbance which required police intervention. Even on [REDACTED] own evidence, there was no objective basis to support his speculative concerns that [REDACTED] had "punched the vehicle" and posed a realistic risk of interfering with or obstructing the ongoing investigation at the establishment.

While [REDACTED] may have been vocal in [REDACTED] disagreement with being arrested, the Vancouver Police Department's *Breach of the Peace Policy* states that "vehement or emotional expression of disagreement with the police does not constitute breach of the peace, if such behavior does not otherwise create a risk of violence, or damage to property"; the DA does not appear to reconcile VPD's policy in this regard with the evidence of the members.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing the Honorable Carole Lazar, retired Provincial Court Judge, to review the matter and arrive at her own decision based on the evidence.

Pursuant to section 117(9) of the *Police Act*, if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the Discipline Authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not

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constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive. Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be **February 15, 2018**.



Stan T. Lowe
Police Complaint Commissioner

cc: 