



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: 2018-14290

October 16, 2018

To: [REDACTED] (Complainant)

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

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

And to: The Honourable Judge Mr. Wally Oppal, Q.C. (ret'd) (Retired Judge)  
Retired Judge of the Appeal Court of British Columbia

On [REDACTED], our office received a complaint from [REDACTED] describing his concerns with members of the Vancouver Police Department (VPD). The OPCC determined [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the Vancouver Police Department to conduct an investigation. Based on information received from [REDACTED], pursuant to section 108 of the *Police Act*, an additional allegation of misconduct was identified against [REDACTED] and [REDACTED].

On September 4, 2018, [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On September 17, 2018, [REDACTED] issued his decision pursuant to section 112 in this matter. Specifically, [REDACTED] identified four allegations of misconduct against [REDACTED] and [REDACTED]. He determined that the allegations of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B), 77(3)(a)(ii)(A), and 77(3)(a) of the *Police Act* against [REDACTED] and [REDACTED] did not appear to be substantiated. [REDACTED] did

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Stan T. Lowe  
Police Complaint Commissioner

Fifth Floor, 947 Fort Street  
PO Box 9895 Stn Prov Govt  
Victoria, British Columbia V8W 9T8  
Tel: (250) 356-7458 / Fax: (250) 356-6503

find that the evidence appeared to substantiate the allegation of *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act*.

The OPCC is satisfied that, in relation to allegation #3 for *Abuse of Authority*, the conduct of [REDACTED] is not substantiated. It is also noted that [REDACTED] is not reported to have engaged in knee strikes on [REDACTED]; therefore, [REDACTED] involvement in allegation #2 is limited to her initial physical contact and escort of [REDACTED].

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 (DA) in relation to the other unsubstantiated allegations is incorrect.

### **Allegation #1**

*Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* by in the performance, or purported performance of duties, intentionally or recklessly detaining [REDACTED] without good and sufficient cause.

The evidence from the investigation provided that [REDACTED] and [REDACTED] had been assigned an overtime shift on [REDACTED], at the [REDACTED] and had been contracted to provide a police presence for the event. The members were advised by [REDACTED] security that security guards would deal with most of the problems but police would be requested to intervene in criminal matters or any other matter that security was unable to resolve. Additionally, a Vancouver Police Department Operational Plan Briefing outlined that the objectives included: “*protect lives and reduce the potential for injuries to the public and our members, provide an environment conducive to lawful celebration, provide a highly visible police presence, maintain the public peace, protect property from damage, and expedite the movement of pedestrians and vehicles in a safe manner.*”

The evidence from the investigation appears to reveal that the members conflated their role between acting as private security and their role as police officers. The event at the [REDACTED] appeared to be a profit making enterprise for the VPD. The VPD charge a fee for their services which is higher than their costs for member attendance. The members attended the event based on an organized contract for services to provide a police presence and received direction from the security manager regarding his expectations. This appears inconsistent with the member’s Oath to “*be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors*”.

A security guard approached the members and advised them that [REDACTED] had no wristband and was “*pretty much*” not listening to the security guard. This information provided by the security guard did not appear to include that [REDACTED] was reported to be involved in a criminal matter.

The evidence shows that [REDACTED], reportedly a lower mainland [REDACTED], was a guest in the [REDACTED] that night with his family. The evidence is clear that [REDACTED] was aware that [REDACTED] was a guest in the [REDACTED]. Upon being confronted by [REDACTED] with the fact that he did not have a wristband, [REDACTED] reported that he told [REDACTED] "I am going back to my room". [REDACTED] refused to allow [REDACTED] to leave and grabbed a hold of [REDACTED] arm. It should be noted that the video depicts that [REDACTED] and his group were already proceeding towards the elevator, the direction of their rooms and also the direction from which they entered the area of the festivities. Our office is of the view that any further concerns related to [REDACTED] breaching the peace were speculative in nature and not based on any reasonable assessment of the circumstances. Neither [REDACTED] nor [REDACTED] identified any other specific words, phrases, or threats made by [REDACTED].

The evidence from the investigation outlined that [REDACTED] initially made the decision to physically stop [REDACTED] and remove him from the party as an apprehended breach of the peace. Vancouver Police Policy 1.4.4 defines an apprehended breach of the peace as:

*Police Officers have a common law power of arrest for an "apprehended breach of the peace". This occurs when the police officer has not witnessed a breach of the peace, but the officer believes on reasonable grounds that a breach will take place unless an arrest is effected. Further, the apprehended disturbance or threat must be serious enough to cause a reasonable belief that, if the police do not intervene, a more serious problem will result involving personal injury or damage to property. The apprehended breach of the peace must be imminent and the risk that the breach will occur must be substantial.*

[REDACTED] and [REDACTED] took hold of [REDACTED] and began to escort him to a room where the police members detained him. [REDACTED] stated that [REDACTED] provided some resistance and [REDACTED] was concerned that if [REDACTED] broke free it would result in, or escalate to, a fight, foot pursuit, loud disturbance, or protracted struggle. [REDACTED] told [REDACTED] he was now being arrested for breach of the peace and to put his arms behind his back. There was no evidence of threats of violence nor reasonably founded belief that [REDACTED] would harm anybody or damage property should he be allowed to continue to his room where he was a [REDACTED].

Section 31(1) of the *Criminal Code of Canada* allows a peace officer to arrest a person found committing a breach of the peace:

*Every peace officer who witnesses a breach of the peace and everyone who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.*

Vancouver Police Policy 1.4.4 defines a breach of the peace as:

*A breach of the peace has been defined by the courts as an act or actions which result in actual or threatened harm to someone (also known as having a "tenor of violence"), or where a threat of harm against a person's property occurs when the person who owns the property is present. This recognizes that violence may occur when a person attempts to damage property in the presence of the owner. An arrest for Breach of the Peace under the Criminal Code (Section 31 (1)) should only be used when all other options, such as an arrest for a substantive offence, have been exhausted and the police officer has witnessed the breach.*

Additionally, VPD policy states "Vehement or emotional verbal expression of disagreement with police does not constitute a breach of the peace, if such behaviour does not otherwise create a risk of violence, or damage to property". The evidence does not suggest that [REDACTED] was being vehement or emotional. The evidence suggests that the members acted outside VPD policy as well as outside the law.

It is my concern that the reported objective actions by [REDACTED] do not constitute an apprehended breach of the peace or a breach of the peace. The video footage depicted [REDACTED], [REDACTED], and [REDACTED] all in the same general vicinity of the party which required the purchase and wearing of a wristband. After being escorted to the ticket purchase area by security, [REDACTED] and his group decided to not purchase tickets to the party due to the cost and late hour. It is noted that despite all members of the group not having wristbands, [REDACTED] was the only one approached by security and subsequently dealt with by police. There is no explanation as to why [REDACTED] was singled out.

It is important to note that whatever interaction occurred between [REDACTED] and the security guard, the evidence does not show that the officers were informed of that. The security guard noted he told the police that [REDACTED] was not listening to him and that [REDACTED] had no wristband. There is no indication the security guard informed the officers that he may have been assaulted by [REDACTED]. This evidence considered by the DA appears irrelevant as it could not have formed part of the officer's assessment of [REDACTED] behaviour.

Once the security guard approached [REDACTED], the security guard noted that [REDACTED] grabbed his wrist and twisted it a bit. The DA commented that he felt grounds existed to arrest [REDACTED] for the *Criminal Code* offence of assault on the security guard. However, the DA did not assess [REDACTED] evidence that the security guard grabbed his arm and if that contact could be considered an assault on [REDACTED]. Furthermore, the DA considered this interaction between [REDACTED] and the security guard as part of [REDACTED] display of a tenor of violence. Additionally, the DA noted that in the video footage [REDACTED] can be clearly observed grabbing the wrist of the security guard. In my view, the video does not appear to support that [REDACTED] assaulted the security guard, yet does appear to support that the security guard seems to have initiated physical contact.

assessment of behaviour appears speculative as detained based on what he thought may do. However, provided no further objective grounds in which to support his conclusion that being dismissive and walking away created a risk of violence or damage to property. The evidence does not support that made any threats or even raised his voice and the video footage does not support that acted aggressively when speaking with the members. Additionally, noted that she was not aware of any tenor of violence, just that had disobeyed the direction of the security guard. Furthermore, told police he was going back to his room and a civilian witness noted said he was leaving.

noted that he believed section 35 of the *Criminal Code of Canada* and section 4 of the *BC Trespass Act* also provided authority to remove from the party. stated that she felt a fraud was being committed therefore they had a duty to investigate. However, the evidence does not support that considered any of those options on the night of the incident and it does not appear that canvassed her fraud concerns with anyone. stated that in retrospect, there could be a case made for fraud but at the time that never entered mind, no other criminal offences were considered as breach of the peace was clear to him.

It is my view that even on the officers own evidence, it is deficient in establishing a reasonable basis to detain and the officers had no grounds to detain and arrest for a breach of the peace. Therefore, the DA's decision to unsubstantiate the allegation appears incorrect.

## **Allegation #2**

*Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, by, in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on .

As it remains our concern that the officers did not have sufficient grounds to detain and arrest , it follows that any use of force that followed would not be "necessary". In a previous OPCC S.117 review (2015-11505), Mr. Wally Oppal, Q.C., commented on the use of force that he found rested on a faulty premise. Mr. Oppal stated "*While there are express protections in the Criminal Code for a police officer's use of force, they apply only when the officer is proceeding lawfully and is acting on reasonable grounds. Where there is an absence of objectively reasonable grounds and the officer is not proceeding lawfully, those powers do not support the use of force*".

Pursuant to section 34 of the *Criminal Code of Canada*, is not guilty of an offence if is defending himself from a use or threat of force and his actions are reasonable in the circumstances. resistance in this circumstance appeared reasonable as he indicated he was going back to his room. There is insufficient support on the record to suggest that should not have been free to depart the festivities to his room.

Furthermore, if it is determined that the detention and arrest of [REDACTED] is considered to be lawful, it is our respectful view that the use of knee strikes by [REDACTED] to gain control of [REDACTED] were disproportionate and not necessary nor reasonable in the circumstances. The evidence supports that [REDACTED] displayed very limited resistance to [REDACTED] and there is a distinct lack of other lesser force options being considered, employed, or exhausted - including no attempts at de-escalation and no significant efforts made with other verbal commands.

Therefore, it is my view that the force used on [REDACTED] was not necessary nor reasonable in the circumstances. As such, the DA's decision to unsubstantiate the allegation appears incorrect.

### **Allegation #3**

*Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* by engaging in oppressive conduct towards [REDACTED].

The DA correctly noted that the principles of administrative law dictate that the standard of proof in misconduct allegations is a civil standard that is commonly referred to as a balance of probabilities. Therefore, the DA must decide whether it is more likely than not that a misconduct occurred.

In relation to this allegation, [REDACTED] reported that [REDACTED] told him several times to shut up and if he did not shut up he would be taken to the drunk tank for the night. [REDACTED] stated that he advised [REDACTED] that if [REDACTED] agreed to go to his [REDACTED] room and remain there for the evening he would avoid a trip to jail as a breach of the peace. When [REDACTED] was asked if she heard [REDACTED] state "keep talking and you're going to jail for the rest of the night" [REDACTED] replied "sounds familiar". In follow-up, [REDACTED] stated that she did not recall exactly what words were spoken by [REDACTED] but it was something to that effect. The security guard was also asked if he heard the comment being made and he replied "I can't say for sure but **I think so**" (emphasis added).

Based on VPD policy that speaks to vehement and emotional verbal expression of disagreement, it is noted that even if [REDACTED] had been vehement and emotional his actions do not appear to qualify for a breach of peace arrest as he made no apparent threats of violence or damage to property. Any threat to take him to jail for talking is not consistent with VPD policy and is further indicative of the manner in which [REDACTED] was dealing with [REDACTED].

In this respect, based on the evidence from [REDACTED], the security guard, and [REDACTED] there is a reasonable basis to believe that the decision of the DA is incorrect. In arriving at this determination our office does not suggest that [REDACTED] is being deceptive in his version of the discussion, however, our office maintains that, whatever the exact words or phrasing used, the message was clear and oppressive in nature. This was a poor attempt at de-escalation, in fact that is what the discussion amounted to in the member's mind.

The fourth allegation of *Neglect of Duty* for not completing a police General Occurrence (GO) report or a Subject Behaviour Officer Response (SBOR) report was determined by the DA to appear to be substantiated. This allegation is proceeding through the disciplinary process and any discipline that results from that matter will be brought to the attention of the new DA for this matter if consideration of the totality principle is warranted.

Considering there was no GO nor an SBOR completed for this incident, it is further noted that the officer's notes for this incident did not contain any substantive reference to it. This lack of documentation is consistent with the officers acting as private security and an agent of the [REDACTED], not as an agent of the Crown.

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 Mr. Wally Oppal, Q.C., retired BC Court of Appeal Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the members 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 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 within the next 10 business days.



Stan T. Lowe  
Police Complaint Commissioner

cc: [REDACTED]

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