

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

AND

IN THE MATTER OF A REVIEW OF
ALLEGATIONS OF MISCONDUCT AGAINST

[REDACTED] AND [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF DECISION

TO: [REDACTED]
c/o Vancouver Police Department
Professional Standards Section

AND TO: [REDACTED]

AND TO: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Stan Lowe
Police Complaint Commissioner

AND TO: Inspector Trevor Burmachuk
c/o Vancouver Police Department
Professional Standards Section

INTRODUCTION

1. The incidents that give rise to these proceedings took place on [REDACTED] [REDACTED] in the City of Vancouver. For many people, the [REDACTED] [REDACTED]. In this case, [REDACTED] [REDACTED] and [REDACTED] of the Vancouver Police Department (VPD)

were assigned to attend one such party, at the [REDACTED]. From time to time officers of the VPD are contracted to provide police services for events that normally would not be in their regular course of duties. The apparent lack of a ticket to a [REDACTED] party lead to a dispute that gives rise to these proceedings. This seemingly trivial event resulted in the police detaining [REDACTED]. In so doing they used force to take him into custody. He initiated a complaint under the *Police Act*, R.S.B.C. 1996, c. 367, as amended (the "Act"). His complaint is now before me for consideration, pursuant to s. 117 of the Act.

2. The issue in this review is whether, based on the material before me, the conduct of VPD [REDACTED] and [REDACTED] (the "Members") appears to constitute misconduct. More specifically, there are three allegations of misconduct at issue as a result of the Police Complaint Commissioner's Notice of Appointment:

1. abuse of authority, by intentionally or recklessly **detaining** [REDACTED] without good and sufficient cause (*Police Act*, s. 77(3)(a)(ii)(B));
2. abuse of authority, by intentionally or recklessly **using unnecessary force** on [REDACTED] (s. 77(3)(a)(ii)(A)); and
3. abuse of authority, by **engaging in oppressive conduct** toward [REDACTED] [REDACTED] (s. 77(3)(a)).

3. The first two allegations involve both [REDACTED] and [REDACTED] while the third involves only [REDACTED] (and relates to the officer stating words to the effect that if [REDACTED] did not shut up he would be taken to the drunk tank for the night).

EVIDENCE

4. I have had the opportunity to review the report and records supplied to me in this matter: the 50-page Final Investigation Report ("FIR") prepared by [REDACTED]; surveillance video footage; witness and police statements;

photographs; and the related materials arising in this disciplinary investigation. What follows is an outline of the evidence set out in the record.

5. [REDACTED] is a [REDACTED]. On [REDACTED] he and his family were guests at the [REDACTED] in the City of Vancouver. I will deal more fully with his complaint. He said that after dinner they were in their room which apparently was directly above a party that was in progress on the floor below. He noticed a loud "thumping" sound from below them in the hotel. He called the front desk to learn what was going on, and was told their room was right over the party. He asked if they could go check out the party and was told it was a private party, but they could go down and see what the hotel could do for them. [REDACTED] went with [REDACTED] and [REDACTED] down an elevator, and walked through a lobby area to a person selling tickets. They found it cost \$100/person to get the wristband for entry to the party, and since it was close to midnight and expensive, they decided not to go.

6. The relevant facts are not seriously in dispute. [REDACTED] said that he became separated from others in his group. A security guard grabbed his arm and told him he couldn't be in there without a wristband. He told the guard he knew that and was following his friend. He said he had no intention to go to the party. He told the security guard to "take your hands off me" and said, "don't touch my fucking arm". Next, on his account, he was approached from behind by two police officers and was asked what he was doing. He said he was a hotel guest who had come down to see if he could get into the party. An officer asked where his wristband was and he replied, "I don't have a fucking wristband". The officer said, "you're coming with me", but [REDACTED] replied, "no, I am going back to my room". The officer said, "you don't tell us what to do", and then grabbed his arm tightly. The police believed he was sneaking into the party but [REDACTED] said he was telling them he was staying at the hotel. The male officer began to restrain him, along with the female officer, who grabbed his arm; [REDACTED]

pulled away. He said that the male officer was pinching and grabbing to inflict pain, and kneeling him in the right leg. [REDACTED] said he was told several times to shut up, and if he didn't he would be taken to the drunk tank overnight. [REDACTED] was not drunk but was fuming because he felt he was being arrested for no reason. The police did not advise him that he was under arrest nor did they give him *Charter of Rights* warnings. He said the male officer was fired up, although the female officer was calm. They went together downstairs to a private room where the police checked his name. After that, the police allowed him to return to his room.

7. [REDACTED] made a complaint about the VPD officers' conduct soon afterward. He said the officer was "hot headed" and seemed not to know that hotel guests could come down the elevator into the party area. He said he was bruised from the incident but did not seek any medical treatment. [REDACTED] provided photos showing visible bruising to his right inner bicep, and to his right outer thigh.

[REDACTED]

8. Under the disciplinary process set out in the *Police Act* the officers are required to provide statements and did so. In his statement [REDACTED] set out the ground rules pursuant to their attendance. He said that the two VPD members were told that the security guards would deal with most of the problems, but that the officers would be requested to intervene in criminal matters or any situations security could not resolve. He was approached by a security guard who pointed out [REDACTED] and said the man had ignored his request to obtain a wristband. The security guard said "he tried to stop this guy, he does not have a wristband, he just walked right past me, he is ignoring me, can you do something about it?". [REDACTED] then approached [REDACTED], who stated he did not have a wristband and did not require one because he was a hotel guest. [REDACTED] said he was not welcome without a wristband and that he would have to leave the party, however, he said he would

assist him to locate someone from the hotel to discuss getting a wristband. [REDACTED] responded by turning away and walking deeper into the party. (The officer wanted him to go "the way he entered" which "looks like a proper entrance for a party".) This, coupled with his dismissive attitude, led the officer to physically stop [REDACTED] to remove him from the party. He did so based on "an apprehended breach of the peace", believing "a more serious problem such as personal injury or damage to property would result if I ignored my duty to keep the peace and abdicated that responsibility to security staff who were clearly uncomfortable resolving this disturbance on their own".

9. [REDACTED] said he took hold of [REDACTED] forearm and told him to go with him to an exit. [REDACTED] briefly pulled his arm away but stopped resisting as [REDACTED] turned in toward him and used his other hand to take hold of his upper arm. [REDACTED] then took hold of his other arm and the two officers escorted him toward the exit. After a few steps, [REDACTED] [REDACTED] said, the man stopped, tensed his body, and pulled his arms in, which the officer believed was an attempt to break out of their grip. [REDACTED] told him he was now being arrested for breach of the peace and put his arms behind his back. He remained tense with his arms in front, ignoring the direction to put his arms behind his back. The officer tried to pull his arms behind his back but could not. [REDACTED] used two or three knee strikes on [REDACTED] [REDACTED] upper leg, to regain control and get [REDACTED] to put his hands behind his back. He did so and was handcuffed.

10. Once handcuffed, [REDACTED] said that [REDACTED] became more compliant. They went to the lobby with him. A woman from [REDACTED] group came up to say she was a lawyer and she told [REDACTED] to be cooperative. The officers went into a private room with security staff and [REDACTED], where his identification was checked. They had a conversation and [REDACTED] determined that he could be released without being taken into custody, if he would agree to return to his hotel room and stay there. [REDACTED] did

not recall saying comments to the effect that if [REDACTED] kept talking he'd go to jail for the rest of the night.

[REDACTED]

11. [REDACTED], likewise, gave a statement and was interviewed about the incident. She heard the security guard say to [REDACTED] that the male refused to leave, despite not having a wristband (ticket), and as a result she felt she had reasonable grounds to believe he may be committing fraud. ([REDACTED], as noted, articulated his basis for detention as being an apprehended breach of the peace, and said that in retrospect "there could be a case for fraud but at the time that never entered my mind". Conversely, [REDACTED] said that she also thought afterward of a breach of the peace, but that she learned he was a hotel patron.) [REDACTED] came up to [REDACTED] but [REDACTED] had a hard time hearing their discussion because of the noise level and because she had an earpiece plug in her ear. After a brief discussion, [REDACTED] walked away, "towards the party". [REDACTED] moved from her position as cover, to assist her partner as he was taking hold of [REDACTED]. She controlled his left arm using both her hands on his bicep. He began actively resisting so her partner used knee strikes to the man's right thigh, and she believed both officers were giving commands to stop resisting. He was then handcuffed and walked out of the party, to a room where they had a conversation with him. [REDACTED] did not observe the man to be overtly intoxicated but said his demeanour was initially aggressive and hostile with her partner. [REDACTED] was asked if she heard [REDACTED] say something to the effect of "keep talking and you're going to jail for the rest of the night", and said it "sounds familiar".

Security guard [REDACTED]

12. Hotel security guard [REDACTED] said he approached a man who did not have a wristband, having been told by radio about him. Just as he was about to get his attention the man grabbed his wrist and twisted it a bit. [REDACTED]

said he had to have a wristband to be on the premises. The man got upset and walked off. [REDACTED] said he waved down police because the man was not listening to him. He said to the police, "He is pretty much not listening to me" and "he has no wristband". He watched the man get aggressive and resist arrest by the police. The police grabbed his arm and used a knee strike to the leg, to get handcuffs on. He thought he heard the officer say, if he keeps talking he is going to jail for the night.

Security guard [REDACTED]

13. [REDACTED] was also working at the [REDACTED]. He came on scene after [REDACTED] was already detained, and followed them down the stairs.

[REDACTED]

14. [REDACTED] was with [REDACTED] group and had been out to dinner with him earlier. His evidence and evidence of other members of [REDACTED] group generally corroborate [REDACTED] version of the facts. Four of them went down the elevator to learn about getting into the party. Security took them to a table which had tickets. They decided they were not interested in the party. [REDACTED] noticed security coming up to [REDACTED], and then calling over a police officer. There was obviously some tension. It was noisy and [REDACTED] could not hear the conversation between his friend and the officer. [REDACTED] said they were walking toward where the elevator was, but the police told [REDACTED] he had to go through the back way. Suddenly they wanted to handcuff [REDACTED]. He was not being combative but was challenging them, saying "what are you doing". The officer kneed [REDACTED] in the leg, and escorted him away. [REDACTED] was limping afterwards.

[REDACTED]

15. [REDACTED] wife, [REDACTED], said that it was super loud in their hotel room, so they decided to go down to see if they could join the party. They went to the ticket person but they would not offer any discount so they decided not to get

tickets. She and [REDACTED] walked around together and then saw her husband talking to the police or security; it looked a little aggressive. She went back to the elevator but [REDACTED] came back, and by then [REDACTED] was being taken downstairs by the police. She said the officer was a young guy who was trying to show off and show some muscle. [REDACTED] said she and her husband were not intoxicated. She did not see the police using force on her husband.

[REDACTED]

16. The [REDACTED] security manager, [REDACTED], saw the two VPD Members with [REDACTED] after they had handcuffed him. He offered them a quiet place to speak with the man, and took them into a business centre room which was empty. [REDACTED] was initially aggressive and argumentative, but then shifted to saying he understood the police were doing their job. The police asked [REDACTED] if he was comfortable with [REDACTED] remaining on the property, and he said yes, provided he is not disruptive. The police escorted him to the lobby area where his companions were, and released him.

[REDACTED]

17. [REDACTED] was a hotel manager who spoke to [REDACTED] after the incident. [REDACTED] was unhappy about how the police handled things. He said he had contacted the party organizer to ask about attending the event; he was told tickets could be purchased on the convention level.

The hotel video

18. Mounted hotel video cameras captured much but not all of the interaction between [REDACTED] and the VPD Members. The cameras recorded the images but not sound. [REDACTED] and his group can be seen coming into the party area from the elevators, making their way to a table where it appears tickets are being sold, walking around, and then interacting with security and police. The interaction with security guard [REDACTED] is short-lived, and shows [REDACTED]

stopping [REDACTED] from walking forward, and turning him back. As [REDACTED] walks the other way, he turns to his left, past the Members. He appears to be going back to the elevators area he came from initially. [REDACTED] appears to speak briefly with [REDACTED]. Then, in a different video clip (Video C), the officer and [REDACTED] are speaking. [REDACTED] points to where he wants to go. He begins to walk away from the officer; the officer grabs his right arm and [REDACTED] pulls it away. [REDACTED] grabs his left arm. The two officers begin to move him the other way, but [REDACTED] grabs the door frame. [REDACTED] is out of the camera's view, and one can see only [REDACTED] left arm in the video. When they re-appear, [REDACTED] hands are behind his back, and he is then handcuffed and escorted downstairs.

APPLICABLE LAW

19. The *Police Act* states that I am to assess whether “the conduct of the member... appears to constitute misconduct” (*per s. 117(9)*), based on a review of the report, evidence and records supplied to me. In this context I do not to hear live witnesses nor consider additional evidence or submissions from the participants. Instead, I merely conduct a paper-based review.

20. As I read s. 117 and more generally Part 11, Division 3 of the *Police Act*, I am not sitting on appeal from any previous finding that a misconduct allegation was not substantiated. My focus is not on the correctness of an earlier finding, but rather I am to reach my own conclusion about whether the materials support a finding of apparent misconduct. I note that s. 117(1)(b) says that the retired judge conducting the review is to “make her or his own decision on the matter”. Recognizing the limitations of a paper-based review, I have made my own assessment of whether the police conduct here “appears to constitute misconduct”.

ANALYSIS AND DISCUSSION

21. The misconduct allegations in this case arise under three subsections of s. 77 of the *Police Act*, which provides:

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

(a) conduct that constitutes a public trust offence described in subsection (2), or

(b) conduct that constitutes

(i) an offence under section 86 [*offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complainf*] or 106 [*offence to hinder, delay, obstruct or interfere with investigating officer*], or

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

...

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

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

(i) intentionally or recklessly making an arrest without good and sufficient cause,

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

(A) using unnecessary force on any person, or

(B) detaining or searching any person without good and sufficient cause ...

22. Section 77 of the Act goes on to state, in subs. (4): "It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work."

23. I will deal with the three allegations in this case — improper detention, improper use of force, and oppressive conduct — in turn.

1. Allegation of improper detention

24. The *Police Act* describes this misconduct as arising when an officer, in the performance or purported performance of duties, "intentionally or recklessly" detains a person "without good and sufficient cause". It is trite that the police

cannot detain people without lawful authority. The question, for disciplinary purposes, is whether the officer had a “good and sufficient cause” to effect the detention.

25. In this case, there is no ambiguity that the Members were acting in the course of their duties, nor that they did indeed detain [REDACTED]. What must be resolved in this review is whether it appears that one or both officers acted “without good and sufficient cause”.

26. As noted in my review of the facts, the two officers gave different reasons for detaining [REDACTED]: [REDACTED] said it was for an apprehended breach of the peace, while [REDACTED] said it was in relation to a fraud investigation. I will consider each officer’s position in turn.

27. VPD Policy defines a breach of the peace as involving “a reasonable belief that if the police do not intervene, violence, or damage to property will result”. The policy speaks of “actual or threatened harm to someone”, “a tenor of violence”, or (in the case of an “apprehended breach of the peace”) where the officer “believes on reasonable grounds that a breach will take place unless an arrest is effected” (emphasis added). The policy also notes:

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.

In addition, *Criminal Code* s. 31(1) gives peace officers the power to arrest a person who breaches the peace.

28. From my review of the evidence, I am unable to find that there was a proper basis to categorize [REDACTED] conduct as amounting to an apprehended or actual breach of the peace. There is no doubt that [REDACTED] was being assertive and even argumentative, in insisting he was a hotel guest and should be allowed to go back the way he came. [REDACTED] found

him to be difficult and condescending. But his attitude on its own does not support a conclusion he would present a risk of violence or destroying property. He had been stopped by police, he had an explanation for what he was doing, and it was speculative to think that he would become violent or destroy property if not detained. On reviewing the video, it appears that when [REDACTED] grabbed [REDACTED] arm, he pulled it back, but in an instinctive way. He did not throw a punch or run or become combative. This reaction, standing alone, does not appear to support the conclusion he was about to be violent. The police, as they dealt with [REDACTED], had only a short bit of information from the security guard, that [REDACTED] had no wristband and was not listening. This was not enough to support any actual or imminent breach of the peace. In any event it was not the business of the police, absent of any criminal behavior, to concern themselves with [REDACTED] not having a ticket.

29. I would add that [REDACTED] the more senior VPD member, did not characterize this as a breach of the peace situation. That is telling. She was right there and was dealing with the same situation, yet she did not reach that conclusion. She may or may not be the mythical doppelganger that Madam Justice Southin described in *Berntt v. Vancouver (City)*, 1999 BCCA 345, at para. 24; see also *R. v. Pompeo*, 2014 BCCA 317, at paras. 40-41. But her take on the situation, as an officer who was there alongside her partner, is, in my view, instructive.

30. [REDACTED] contention that this was a fraud investigation is based on the notion that [REDACTED] was deliberately sneaking into a party without having purchased a ticket. However the evidence does not support the premise upon which [REDACTED] opinion was based. [REDACTED] was upfront about not having a ticket or wristband. The information available to police at that time was minimal, simply what security had told them, which was that the man did not have a wristband and was not listening. Moreover, on [REDACTED] own account, she did not hear what was being said between [REDACTED] and [REDACTED]

██████████. To meet the standard for a lawful detention in *R. v. Mann*, 2004 SCC 52, she needed more information than she had. She had the barest of information at that time, and it fell short of establishing a reasonable suspicion that he was connected to a crime under investigation, and that his detention was necessary for that investigation. This was not a “good and sufficient” basis to detain ██████████. Having said that, I would be quick to note that ██████████ ██████████ role in this incident was very much secondary to her partner’s. He was the one who engaged with ██████████, made the decision to detain him, and first applied force to take custody of him. Her conduct was secondary and it is understandable that her impulse was to support her partner. However, my view is that she ought to have paused to ascertain what the proper basis was to detain a man who was making it clear he was a hotel guest who wanted to go back the way he came.

31. I would add that the confrontation between ██████████ and police can be understood with the benefit of hindsight as arising from a misunderstanding about how he would return to his hotel room. ██████████ sought to do so by going back the way he came into the party, to the elevators. The police, seemingly, did not appreciate he could depart that way, and incorrectly thought he was trying to go deeper into the party. Unfortunately, it seems that there may have been some bravado on the part of both men, which led to the detention and use of force in this case.

32. For these reasons, I conclude that the Members appear to have misconducted themselves through an improper detention of ██████████.

2. Allegation of improper use of force

33. As with the allegation of improper detention, the Act speaks of this misconduct as occurring when an officer “intentionally or recklessly” uses “unnecessary force” on a person. Having concluded that the Members appear to have lacked a proper basis to detain ██████████, it is not difficult to conclude that

they were not in a position to employ physical force against him. For the same reasons they lacked a basis to detain the man, they likewise did not have a basis to use force against him. While one could conceive of a situation in which the police were justified in using force, despite lacking grounds to detain, this is not such a situation.

34. To draw from an earlier decision I rendered in a review on the record under the *Police Act* (OPCC File No. 2016-11505, at para. 27):

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.

35. I would add, again, that [REDACTED] use of force was minimal: she held on to [REDACTED] left arm. It was far less than the force used by [REDACTED] [REDACTED]. I would also say that although [REDACTED] employed knee strikes and a grip that left bruises, these uses of physical force may well have been justified had this been a lawful arrest or detention. But in the absence of a proper basis to detain [REDACTED], these applications of force were "unnecessary" within the meaning of *Police Act* s. 77(3)(a)(ii)(A). I conclude that this allegation is made out against both Members.

3. Allegation of oppressive conduct

36. The "oppressive conduct" delict is one that is not spelled out in the *Police Act*; s. 77(3)(a) simply refers to "oppressive conduct towards a member of the public". In this case, the allegation is that [REDACTED] (alone) engaged in oppressive conduct, in stating a few times to [REDACTED] that if he continued to speak or argue, he would spend the night in jail.

37. [REDACTED] was dealing with a man who was argumentative and vocal. It was [REDACTED], approaching midnight, and the officer felt that hotel

security staff were unable to deal with [REDACTED]. [REDACTED] was, in this context, sharp in threatening [REDACTED] that he could spend the night in jail. While not a model of professionalism or courtesy, it is my view that these words do not rise to the level of being “oppressive conduct” in this case. The *Concise Oxford Dictionary* defines “oppression” as connoting “prolonged harsh or cruel treatment or control”, “mental distress”, and “the state of being oppressed”. These words do not qualify as oppressive conduct.

38. Before concluding my discussion of this case, I would add a comment on the role that the VPD Members were charged with undertaking on [REDACTED] [REDACTED]. As the Police Complaint Commissioner’s s. 117 Notice of Appointment observes, at p. 2, it appears the VPD contracts its officers to support private security at functions such as this. In so doing the Department puts its officers in the position of having both ordinary police duties, and also being somewhat answerable to the property manager or security staff. The situation is fraught with potential conflict. The wisdom of having officers do this type of contract work is a topic far beyond my narrow task here, but I suggest it is something worth examining. The lesson from a case like this is that police officers must take care not to rely too quickly on what security staff tell them. They are there as police officers, with overarching public duties and responsibilities under the law. When confronted with a situation, they must do more than take a security guard’s indication as giving them valid legal grounds to detain or use force on someone. They remain police officers, not agents of the security staff. They must bring their own considered judgment to bear in executing any police powers.

CONCLUSION AND NEXT STEPS

39. I make a finding, pursuant to s. 117(9) of the *Police Act*, that the Members' conduct appears to constitute misconduct, both under ss. 77(3)(a)(ii)(A) and (B). I do not find the third allegation of "oppressive conduct" by [REDACTED] to appear to be substantiated on the record before me. I hereby notify the relevant parties of the next steps, pursuant to ss. 117(7) and (8).

40. I am prepared to offer a prehearing conference to the Members, under s. 120 of the Act. The range of disciplinary or corrective measures I am considering includes "advice as to conduct"; a verbal or written reprimand; or requiring specified training (as set out under ss. 126(1)(k), (j), (i), and (f)).

41. Pursuant to s. 113, the complainant [REDACTED] has the right to make submissions at a discipline proceeding.

42. At the discipline proceeding, the Members have the right pursuant to s. 119 to request permission to call and examine or cross-examine witnesses, provided such request is made in writing and is made within 10 days of receipt of this notice of decision.


The Honourable Wally Oppal, Q.C.

This 31st day of October, 2018.