

March 19, 2019

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

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT

AGAINST [REDACTED] OF THE VANCOUVER POLICE

DEPARTMENT

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT

AGAINST [REDACTED] OF THE VANCOUVER POLICE

DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO: [REDACTED] Complainant

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

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

AND TO: [REDACTED] Investigating officer
c/o Delta Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold Acting Police Complaint Commissioner

Introduction

1. This matter arises from a complaint made by [REDACTED]. [REDACTED] [REDACTED] called 911 on [REDACTED] to turn himself in for two Break and Enters he claimed to have committed earlier that day. Members of the Vancouver Police Department [REDACTED], [REDACTED], [REDACTED] and [REDACTED], investigated [REDACTED]'s claims and concluded there were insufficient grounds to arrest him for Breaking and Entering. [REDACTED] was acting strangely and it appeared to the members he may have mental health issues; however, [REDACTED] and [REDACTED] decided he would not be taken into custody pursuant to the Mental Health Act and he was released. Later that same day [REDACTED] broke into a woman's home in [REDACTED] and sexually assaulted her. He was arrested, convicted and sentenced to serve an indefinite term.
2. The [REDACTED] [REDACTED] filed a complaint on [REDACTED] alleging the Vancouver Police Department members failed to take appropriate action regarding [REDACTED] on [REDACTED]. She stated the police should have detained him because he admitted to two breaking and enterings, was wanted on an [REDACTED] arrest warrant and was exhibiting erratic behaviour. She felt his cry for help was ignored.
3. The Police Complaint Commissioner determined the complaint was admissible. On [REDACTED] [REDACTED] he directed an investigation into the matter after concluding that the conduct of [REDACTED] would if substantiated, constitute misconduct pursuant to section 77(3)(m)(ii) of the Police Act (Neglect of Duty). [REDACTED] of the Vancouver Police Department was assigned to conduct the investigation.

4. On [REDACTED] an Amended Order For Investigation was made. [REDACTED] determined that [REDACTED] participated in the investigation of [REDACTED]. The Commissioner reviewed the information and was of the opinion that conduct alleged against [REDACTED], if substantiated, would constitute misconduct pursuant to section 77(3)(m)(ii) of the Police Act. [REDACTED] continued to investigate the complaints of neglect of duty against [REDACTED] and [REDACTED] throughout the fall of [REDACTED]. The Commissioner made orders extending the investigation on [REDACTED] and [REDACTED] and [REDACTED].
5. [REDACTED] the Police Complaint Commissioner ordered the investigation amended to include [REDACTED] and [REDACTED] of the Vancouver Police Department. The commissioner was of the opinion that conduct alleged against [REDACTED] and [REDACTED], both of whom had been involved in the investigation of [REDACTED] on [REDACTED] would, if substantiated, constitute misconduct pursuant to section 77(3)(m)(ii) of the Police Act (Neglect of Duty) and section 77(3)(f)(i)(A) of the Police Act (Deceit). The Commissioner also ordered an External Investigation be conducted by the Delta Police Department and he designated an External Discipline Authority from the New Westminster Police Department. [REDACTED] of the Delta Police Department took over the investigation and New Westminister [REDACTED] became the Discipline Authority. On [REDACTED] the investigation was extended for the 4th time to [REDACTED].
6. On [REDACTED] [REDACTED] completed the Final Investigation Report. He concluded the evidence did not prove [REDACTED] and [REDACTED] committed the misconduct of [REDACTED].

Neglect of Duty for failing to promptly and diligently do anything it is one's duty as a member to do. He recommended that the allegations of Neglect of Duty were unsubstantiated. ██████████ concluded the evidence did not prove ██████████ and ██████████ committed the misconduct of Deceit by providing a false or misleading oral or written statement. He recommended the allegations of Deceit were unsubstantiated.

7. On ██████████ the external Discipline Authority ██████████ issued his decision pursuant to section 112 of the Police Act. With regard to ██████████ and ██████████ he determined they neglected their duty by failing to attend the areas identified as possible locations where a Break and Enter may have been committed. ██████████ determined that the allegation of Deceit against the two officers did not constitute misconduct pursuant to Section 112(4). The Police Complaint Commissioner reviewed ██████████' decisions and considered that there was a reasonable basis to believe that the decision regarding deceit was incorrect.
8. On ██████████ the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.

Section 117

9. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the

police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
 - (b) make her or his own decision on the matter;
 - (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.
- (6) The police complaint commissioner must provide the retired judge appointed with copies of all reports under sections 98, 115 and 132 that may have been filed with the police complaint commissioner before the appointment.
- (7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1) (a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.
- (8) Notification under subsection (7) must include
- (a) a description of the complaint, if any, and any conduct of concern,
 - (b) a statement of a complainant's right to make submissions under section 113,
 - (c) a list or description of each allegation of misconduct considered

by the retired judge,

(d) if subsection (9) applies, the retired judge's determination as to the following:

(i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation

and require the taking of disciplinary or corrective measures;

(ii) whether or not a prehearing conference will be offered to the member or former member under section 120;

(iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and

(e) if subsection (10) applies, a statement that includes the effect of subsection (11).

(9) If, on review of the investigating officer's report and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.

(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

10. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the

member appears to constitute misconduct. The law is clear that, because the adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the member, rather, it is to assess only whether it appears to constitute misconduct.

11. The review is a paper based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make "her or his own decision on the matter."

Reports and Material Considered

12. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.
 - (a) Final Investigation Report of [REDACTED] and attachments described as: registered complaint, progress reports, OPCC notices, civilian statements, members statements, supporting documents, and legislation/case law.
 - (b) Additionally, I have considered the Notice of Appointment of Retired Judge dated [REDACTED] and the relevant case law and statutory authority.

Section 117(8)(a) Description of the Complaint and Conduct of Concern

13. The conduct of concern relating to [REDACTED] and [REDACTED] arose out of the investigation of [REDACTED] claim he committed two Break and Enters on [REDACTED]. [REDACTED] was detained for investigative purposes by [REDACTED] and [REDACTED]. [REDACTED] told the officers he had committed two break and enters earlier that day in the [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] area. During the

investigation [REDACTED] who was the acting supervisor requested [REDACTED] and [REDACTED] attend to the area of [REDACTED] and [REDACTED] in [REDACTED] to look for possible break ins. [REDACTED] and [REDACTED] agreed to drive their patrol car to the area, but this never happened. [REDACTED] was eventually released by [REDACTED] and [REDACTED] because there were insufficient grounds for an arrest. There was no report of any break ins at the time, no evidence of a crime scene and, although [REDACTED] was acting strangely, the officers had no grounds to detain him pursuant to the Mental Health Act. Several hours after his release [REDACTED] committed a very serious break and enter and sexual assault for which he received an indefinite jail sentence.

14. Two years later on [REDACTED] [REDACTED] [REDACTED] complained to the Police Complaint Commissioner that the police had ignored [REDACTED] cry for help. The Commission investigation commenced in [REDACTED] and concluded in [REDACTED]. In the course of the investigation [REDACTED] [REDACTED] and [REDACTED] submitted written duty statements wherein they stated they attended the area of [REDACTED] and [REDACTED] and did not find any break and enter.

In his duty statement dated [REDACTED] [REDACTED] wrote:

“I do recall attending the area of [REDACTED] and [REDACTED] with [REDACTED] to check if any Break and Enters had been committed to a [REDACTED] store in the area. I did not locate a [REDACTED] store that appeared to have been broken into in the area”

In his duty statement dated [REDACTED] [REDACTED] wrote:

“[REDACTED] and I were requested to attend the area of [REDACTED] and [REDACTED] in [REDACTED] to check

whether a Break and Enter and been committed to a [REDACTED] store. According to the male that [REDACTED] was speaking to, he reported that he committed a Break and Enter to a [REDACTED] store that was on the west side of [REDACTED] in the area of [REDACTED].

I do not recall if it was [REDACTED] or [REDACTED] who made this request to attend the above location.

I recall attending the area of [REDACTED] and [REDACTED] [REDACTED] to check if there were any Break and Enters to a [REDACTED] store in the area. I did not locate a [REDACTED] store that appeared to have been the subject of a Break and Enter.”

15. On [REDACTED] the original Commission investigating officer [REDACTED] [REDACTED] of the Vancouver Police Department (he was replaced by [REDACTED] of the Delta Police Department after the Police Complaint Commissioner determined it was in the public interest to appoint and External Investigator) interviewed [REDACTED] and [REDACTED]. In their interviews both officers told [REDACTED] they drove to the area to look for evidence of any break ins.

In his telephone interview [REDACTED] said:

- Do you recall what, if any, instructions you were provided specifically?
- Uh, essentially to check the area around, uh, [REDACTED], uh, and B [REDACTED], I believe or [REDACTED] and [REDACTED], uh, to see if there'd been any, uh, uh, businesses that had been B&E'd, um, as it had been claimed by the, uh, the accused there.
- Okay. So do you remember him saying both of those locations, [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] or just one or the other?

- Uh, definitely the, the, uh, [REDACTED] area.
- Okay
- And then, um, yeah, that one specifically.
- Do you, do f-, do you actually remember physically driving over there and having a look?
- Yeah, I understand that there is, you know, um, you know, GPS records, and stuff that shows us going, uh, over that, that area to check. So, uh, you know, I, I do recall going over there, but, um, again, just with it being three years that's passed now, it, uh, you know, I couldn't tell you anymore sort of specifics of the night. You know, vaguely driving to the area to check.
- Okay. Um, and so in relation to that check and going over to that area, uh, what do you recall specifically doing, like in, in, like describe what you have, would've done in relation to that check if you can recall the details.
- Yeah, I mean, I can't recall specifics. I mean, certainly had we, had we found, um, you know, a business in that area that had been, uh B&E'd, then there would've been, you know, we would've acted accordingly and a report taken. But, uh, uh, I don't recall discovering anything that would've been consistent with what the, uh, you know, accused claimed that he had done in that area.
- Okay. So from you recol-, from that answer, from your recollection, you did not find B&E at [REDACTED] and [REDACTED], [REDACTED]?
- Yeah, that's correct.
- Um, do you remember getting out of the car and physically walking and checking the stores in that area? Do, was it driving? W , was it just observations? Do you, do you remember any of the details?

- Yeah, no, I, I can't remember specifically, uh, that, uh, those, the finer details.

In his interview [REDACTED] said:

- Um, we were informed that the person that, uh, [REDACTED] and [REDACTED] were dealing with, um, had stated that he had been involved with a break and enter in the area of [REDACTED] and [REDACTED] in [REDACTED]. And it was requested of us to go over into that area and to see if we could see anything that was associated to a break and enter, if there was any, any evidence of a break and enter. Uh, I believe it was a [REDACTED] store that was referred to. Um, so we went into that area and looked to see if we could see any [REDACTED] stores that had any evidence that, uh, they were involved in a break and enter.
- Um, so s-, on that particular bit of information there, what, what did you do exactly like, uh, in rel-, to try and locate these B&Es?
- Uh, we drove the area. Um, I believe that we may have seen a couple furniture stores. I, I can't really remember, uh, specifically what we did. I just remember driving into the area, looking up and down the area that we were requested to go to, to see if we could, uh, you know, if there was any damage to any of these, uh, businesses, any evidence that we could see as to whether or not there was a break and enter.

16. The Global Positioning Satellite data (the GPS data) recovered from the patrol car driven by [REDACTED] and [REDACTED] revealed that the vehicle was never driven in the area. The officers alleged failure to investigate possible crime scenes forms the basis for the allegation of

Neglect of Duty. [REDACTED], as the External Discipline Authority, is dealing with that matter.

17. [REDACTED] and [REDACTED]s written duty statements and interviews wherein they say they drove around looking for possible break and enters forms the basis for the allegation of Deceit. [REDACTED] determined the allegation of Deceit did not appear to be substantiated.

Section 117(8)(c) Allegation of Misconduct Considered

18. Having reviewed the evidence in the Final Investigation Report, I identify the following allegation of misconduct against [REDACTED] that could appear to be substantiated.

1. Deceit by providing an oral or written statement that, to the members knowledge, is false or misleading contrary to section 77(3)(f)(i)(A) of the Police Act.

19. Having reviewed the evidence in the Final Investigation Report, I identify the following allegation of misconduct against [REDACTED] that could appear to be substantiated.

1. Deceit by providing an oral or written statement that, to the members knowledge, is false or misleading contrary to section 77(3)(f)(i)(A) of the Police Act.

Section 117(8)(d)(i) Whether the Evidence Appears Sufficient to Substantiate the Allegation of Deceit against [REDACTED] and [REDACTED]

20. In their duty statements and later in their interviews both [REDACTED] and [REDACTED] said that on [REDACTED] they were requested to look for evidence of any break and enters in the [REDACTED] and

██████████ area. They had vague recollections regarding some of the details such as whether it was ██████████ or ██████████ who asked them, whether the request was made by telephone or via the communication equipment in the police vehicles, what specific instructions they were given, what they did when they got to the area and how and to whom they communicated the results of their search. What is clear from the evidence and the reports is they said they drove there, looked for any signs of possible break and enters and reported not finding any. It is also clear from the GPS data that ██████████ and ██████████ did not drive to the area on ██████████.

21. In the Final Investigation Report ██████████ after a complete and careful analysis of all the evidence concluded at page 49:

“With respect to the allegation of Deceit for ██████████ and ██████████ ██████████ ██████████ has concluded that based on the recollection of events subsequent to the passage of time which plausibly is cross contaminated with the attendance to an unrelated file over the preceding three years mixed with the misinterpretation of GPS data created a situation where ██████████ and ██████████ validated themselves as having attended the areas to check for a BNE as reported by ██████████ when in fact they had not. For these reasons ██████████ and ██████████ respective and collective recall accuracy to this incident is very plausible honest mistake or at most reckless attention to detail but not an intentional act to deceive.”

22. Pursuant to section 117 and the case law, I am required to review the material delivered by the Commissioner and make my own decision whether or not the conduct of the member appears to constitute misconduct. In this case it has been helpful to consider a chronology of the events leading up to the preparation and release of ██████████ and

█ s █ duty statements and their █ interviews.

23. On █ the Police Complaint Commission ordered an investigation regarding alleged misconduct of █. █ is the assigned investigator and opened a file on █. Throughout the fall of █ he filed Progress Reports detailing the investigative steps taken and the documents and reports he ordered.
24. On █ the Investigation was expanded to include alleged misconduct on the part of █. Duty statements were ordered from the officers. On █ █ was interviewed by █. █ of the Vancouver Police Union was present in the interview room.
25. By mid December █ was discussing with the Office of the Police Complaint Commission Analyst █ his need to obtain additional investigative material including duty statements from █ and █. He put this information into a letter to the Commissioner requesting an extension of the investigation. The Commissioner ordered an extension. There is a question at what point in time did █ and █ become aware they were providing statements in a Police Act investigation of alleged misconduct by two of their colleagues regarding an incident in which they participated. In their statement they provided information that appears to be false. A few months later when interviewed on █ they provided the same information.
26. The relevant case law and authorities including Geske and Hamilton Police, OCCPS, 3 July 2003 and Ceysens "Legal Aspects of Policing"

summarize what is necessary to establish a disciplinary breach of public trust by a member by deceit. Adjudicator William Smart Q.C. in an OPCC decision dated July 30, 2014 in describing the disciplinary default of deceit said:

“There is both a conduct element and a fault element to the disciplinary default of deceit. The conduct element is that the statement must be false or misleading. The fault element is that the member must know the statement is false or misleading. The member must know the statement is false or misleading; otherwise, the member does not have the requisite mental state or intention required to ground a finding of deceit.”

27. False, inaccurate or misleading information can find its way into a police officer's notes, statements, and reports for a variety of reasons. The officer may be mistaken or confused, be unable to accurately recall a situation, be misled by others, or he or she may be negligent, reckless or deceitful.
28. In the case of [REDACTED] the concern of the Complainant was whether the officers involved neglected their duty and whether if they had done their duty the crime he committed within hours of his release might have been prevented.
29. In a Police Act Neglect of Duty investigation involving allegedly false information being provided by an officer there may be a suggestion that the officer provided the information with the intention of protecting herself or himself or other officers from criticism or complaints regarding their role in the investigation.
30. With regard to [REDACTED] and [REDACTED] the Final Investigation Report concluded the alleged false information was simply an honest

mistake of recalling their involvement. The officers recollections may be effected by the passage of time, by, as they said, the countless other investigations of a similar nature, by the lack of any notes made of the investigation, and, to an extent, the misinformation regarding the GPS data.

31. After considering all of the evidence and the reports, it appears there may be questions whether the alleged false information provided was a result of an honest mistake or was intended to deceive.
32. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the material and evidence contained in the report, I consider the conduct of [REDACTED] and [REDACTED] appears to constitute misconduct pursuant to section 77(3)(f)(i)A of the Police Act. The evidence appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures.

Next Steps

33. After considering all of the evidence in the Final Investigation Report and as required by section 117(7) of the Police Act, I hereby notify the Members, the Complainant, the Investigator and the Commissioner of the following decisions and rights, namely that:
 - a. I have determined that the evidence referred to in the Final Investigation Report appears sufficient to substantiate the misconduct allegation of Deceit.
 - b. The Complainant has the right pursuant to section 113 of the Police Act to make submissions at the discipline proceeding.

- c. I have determined that the range of disciplinary or corrective measures being considered include disciplinary action to:
 - i. Dismiss the member;
 - ii. Reduce the member's rank;
 - iii. Suspend the member without pay for not more than 30 scheduled working days
 - d. The members pursuant to section 119(1) may file with the discipline authority a request to call one or more witnesses listed in the Final Investigation Report.
32. Pursuant to section 118 of the Police Act a discipline authority required to convene a discipline proceeding must convene the discipline proceeding within 40 business days unless the Police Complaint Commissioner grants one or more extensions.

David Pendleton

David Pendleton
Adjudicator
March 19, 2019