

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

AND

**IN THE MATTER OF A REVIEW ON THE RECORD ORDERED WITH
RESPECT TO SPECIAL MUNICIPAL CONSTABLE RAJDEEP MANN
OF THE VANCOUVER POLICE DEPARTMENT**

NOTICE OF DECISION UNDER SECTION 141(10)

NOTICE TO: Mr. Colin Dowler, Complainant

AND TO: Special Municipal Constable Rajdeep Mann, Member

AND TO: Mr. Kevin Woodall, Counsel for the Member

AND TO: Mr. Mark Underhill, Commission Counsel

AND TO: Chief Constable Adam Palmer

c/o Vancouver Police Department
Professional Standards Section

AND TO: Superintendent Steve Eely, Discipline Authority

c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold, Police Complaint Commissioner

OVERVIEW AND BACKGROUND

1. This is my decision following a review on the record in this matter under s. 141 of the *Police Act*, R.S.B.C. 1996, c. 367 ("*Act*").

2. Special Municipal Constable Rajdeep Mann of the Vancouver Police Department is alleged to have committed a number of disciplinary defaults, namely:

- discourtesy for using offensive language in dealing with the complainant, Mr. Dowler;
- abuse of authority for intentionally or recklessly using unnecessary force on Mr. Dowler;
- discreditable conduct for deleting a video recording from Mr. Dowler's phone; and
- deceit for knowingly making false statements denying that he deleted the recording from Mr. Dowler's phone.

3. The procedural history in this matter is as follows. On December 27, 2017, the Office of the Police Complaint Commissioner received a complaint from Mr. Dowler regarding his treatment by members of the VPD on November 11, 2017. Based on the contents of the Complainant's report, the VPD began an investigation into allegations of abuse of authority against multiple officers, including SMC Mann, and into an allegation of discourtesy against SMC Mann.

4. In brief, the investigation related to Mr. Dowler's arrest by members of the VPD (not SMC Mann) outside the Vogue Theatre in Vancouver; physical force that was used against Mr. Dowler at the VPD jail by members including SMC Mann; and SMC Mann's alleged use of profanity while dealing with Mr. Dowler at the booking counter of the VPD

jail. During this investigation, video evidence from the jail came to light that appeared to show SMC Mann handling Mr. Dowler's cell phone and deleting a recorded video file from the phone. Notably, Mr. Dowler had claimed that he recorded certain interactions between himself and police officers at the booking counter on his phone. SMC Mann was interviewed and questioned about whether he deleted anything from Mr. Dowler's phone. He maintained that he did not and, based on an apparent discrepancy between SMC Mann's statements and the video footage from the jail, allegations of discreditable conduct and deceit were added against SMC Mann for allegedly deleting the recording from Mr. Dowler's phone and then lying about it.

5. In October 2018, the Final Investigation Report was submitted to the Discipline Authority, Inspector Jeff Danroth. Pursuant to ss. 112(2)(d) and (3) of the *Act*, Insp. Danroth determined that the evidence appeared to substantiate allegations of abuse of authority, discourtesy, discreditable conduct, and deceit against SMC Mann.

6. A discipline proceeding was convened in respect of these allegations and, in October 2019, Superintendent Steve Eely, acting as the Discipline Authority in that proceeding, delivered notice that he had determined the allegation of discourtesy against SMC Mann was substantiated while the other allegations were not. Supt. Eely proposed a written reprimand as the disciplinary or corrective measure to be taken for the allegation of discourtesy that was found to be substantiated.

7. On December 17, 2019, Mr. Dowler requested a review on the record or a public hearing pursuant to s. 133(5) of the *Act*. By notice dated January 27, 2020, the Police Complaint Commissioner advised he was arranging a review on the record and appointing me as the Adjudicator.

8. According to s. 141(10) of the *Act*, my role as Adjudicator is to decide, based on the record before me, whether any misconduct has been proven; to determine the appropriate disciplinary or corrective measures to be taken in relation to the member concerned; and to recommend any changes in policy or practice that I consider advisable in respect of the matter.

RECORD OF DISCIPLINARY DECISION

9. The following summary of the evidence is taken from the “record of [the] disciplinary decision” in this matter, as defined in s. 141(3) of the Act.

10. Late on the evening of November 11, 2017, VPD Constables McClelland and Sahota arrested the complainant Mr. Dowler for breach of the peace outside the Vogue Theatre in Vancouver. Cst. Sahota reported that he spoke to a female staff member at the venue, who said Mr. Dowler had been ejected for unruly behaviour and had tried to push his way through staff to get back in. Cst. Sahota also reported that Mr. Dowler appeared to be intoxicated, with a strong smell of liquor on his breath and his eyes glazed over.

11. Mr. Dowler was taken to the Vancouver Jail and booked in, and at approximately 1:22 am he was lodged in a cell. At approximately 2:43 am, he was removed from his cell and taken to a counter to be booked out. The plan at that point was for Mr. Dowler to be released. SMC Mann dealt with Mr. Dowler at the booking counter. CCTV footage taken on security cameras inside the jail captured the ensuing events, but without any audio. The footage is time-stamped.

Interaction with Mr. Dowler at the Booking Counter: 2:44 am to 2:51 am

12. Mr. Dowler and SMC Mann were standing across from each other on opposite sides of the booking counter. The CCTV footage shows that from about 2:44 am to 2:46 am, SMC Mann returned Mr. Dowler’s personal effects such as his shoes, belt, keys, glasses, ID, and other items. These effects had been stored in plastic bags before being returned to Mr. Dowler. One of the items returned to Mr. Dowler was his Apple iPhone cell phone.

13. Mr. Dowler and SMC Mann appeared to speak to each other periodically during this time. Overhead footage from a camera placed directly above the booking counter shows that SMC Mann had a form in front of him on the counter that he was writing on

with a pen. SMC Mann can be seen to be wearing what appear to be latex gloves on both hands. Towards the end of this part of the encounter, Mr. Dowler can be seen gesticulating with his hands while speaking with SMC Mann.

14. In a subsequent interview during the investigation of this matter, Mr. Dowler said that at this point he was upset about having been arrested. Mr. Dowler said that when his phone was returned, he saw several text messages from a friend wondering where he was. Mr. Dowler recalled that he said words to the effect of, "What the fuck?" to SMC Mann to express his concern about his treatment by the police.

15. At approximately 2:46 am in the CCTV footage, another officer, Sergeant Houchen, can be seen approaching the counter and standing next to Mr. Dowler in front of the booking counter. Sgt. Houchen appeared to speak to Mr. Dowler for several minutes, during which he occasionally pointed at SMC Mann while talking to Mr. Dowler.

16. According to Mr. Dowler and SMC Mann, Sgt. Houchen came over to talk to Mr. Dowler as a result of his (Mr. Dowler's) swearing. Mr. Dowler said Sgt. Houchen told him, among other things, that he should not be swearing at jail staff. Mr. Dowler said he decided to record his interaction with Sgt. Houchen on his phone as a result of some of the other things Sgt. Houchen was saying.

17. It is not disputed that Mr. Dowler in fact began to make a recording of his interactions with the police at this point (the "Recording").

18. Sgt. Houchen provided a report to the investigator in this matter saying he was in his office and could hear Mr. Dowler repeatedly and loudly swearing before he went over to speak with him. Sgt. Houchen said he told Mr. Dowler that his language was inappropriate and abusive and he asked him to be respectful of the staff that was attempting to release him (i.e., SMC Mann). Sgt. Houchen also indicated he believed Mr. Dowler was recording their conversation on his phone.

19. During the interaction between Mr. Dowler and Sgt. Houchen, another officer, SMC Nakamura, is seen in the CCTV footage emerging from a doorway in an area at

the far end of the booking counter and looking in the direction of Mr. Dowler and the other officers. SMC Mann remained behind the counter and appeared in the CCTV footage to be largely silent while the discussion between Mr. Dowler and Sgt. Houchen unfolded.

20. At 2:50:28 am in the CCTV footage, Sgt. Houchen appeared to conclude his discussion with Mr. Dowler and he walked out of view. Mr. Dowler appeared to place his phone on the counter so that it was propped up against a computer monitor with its screen facing Mr. Dowler's side of the counter at this point. He had not touched the screen since he started recording.

21. SMC Mann can then be seen sliding the form he was writing on across the counter in front of Mr. Dowler. He then pointed at the bottom of the form twice, apparently indicating for Mr. Dowler to sign it. Mr. Dowler can be seen pulling the form towards himself and picking up a pen from the counter with his right hand. Mr. Dowler is then seen apparently speaking to SMC Mann as well as pointing at SMC Mann and making other gestures, such as shrugging or hunching his shoulders and putting his hand to his forehead. At various points SMC Mann appeared to be speaking to Mr. Dowler as well.

22. At 2:50:58 am in the CCTV footage, Mr. Dowler can be seen leaning slightly over the counter towards SMC Mann and turning his head so that his ear was toward SMC Mann. He appeared to be saying something to SMC Mann while he did this. At this point SMC Mann turned and walked around the far end of the counter, passed SMC Nakamura, and approached Mr. Dowler. SMC Mann walked up to Mr. Dowler and stood directly to his left, while Mr. Dowler faced the counter and looked down at the form in front of him.

23. In his interview with the investigator, Mr. Dowler said SMC Mann asked him to sign a release form after Sgt. Houchen left the counter. Mr. Dowler said he was trying to read the release form and SMC Mann told him to "fucking sign it." Mr. Dowler said he then asked SMC Mann, "Did you just drop an F-bomb?" and SMC Mann responded,

"Fucking sign it, asshole." Mr. Dowler said he protested that he had just been told not to swear by Sgt. Houchen and now SMC Mann was swearing at him.

24. SMC Mann provided a written duty statement to the investigator in this matter. SMC Mann wrote that, after Sgt. Houchen left the counter, Mr. Dowler was asked to leave the jail but was non-compliant and argumentative. SMC Mann further reported that, when it became clear to him that Mr. Dowler was not going to leave, he decided to use "colourful language" in order to gain compliance. According to SMC Mann, he said words to the effect of "Just fucking sign it and leave, asshole," in a calm voice, referring to the need for Mr. Dowler's signature on the release form before he left. SMC Mann also acknowledged saying these words at the discipline proceeding in this matter. At the discipline proceeding, SMC Mann testified that it was as he came around to the front of the counter that he said "Just fucking sign it and leave, asshole."

25. From my review of the CCTV footage, it appears that approximately 30 seconds passed between the time SMC Mann placed the form in front of Mr. Dowler, and the time SMC Mann came around the end of the counter and stood next to Mr. Dowler. It did not appear to me in reviewing the CCTV footage that Mr. Dowler was actually trying to read the form during most of this time. While he did look down at it a few times, he appeared to continue speaking to SMC Mann after Sgt. Houchen left and did not seem focused on the form. However, as noted, Mr. Dowler did pull the form towards himself, and he picked up a pen. It appeared as though he was ultimately prepared to sign the form but he also had more to say to SMC Mann. Also, as SMC Mann came around the counter and stood next to him, Mr. Dowler did seem to concentrate more on the form by looking straight down at it and away from SMC Mann.

Physical Struggle with Mr. Dowler: 2:51 am to 2:52 am

26. The CCTV footage shows that, within about two seconds of arriving beside Mr. Dowler, SMC Mann suddenly grabbed Mr. Dowler by the left arm while Mr. Dowler was looking down at the form. SMC Nakamura can be seen walking around to the front of the counter after this occurred. SMC Mann then pulled Mr. Dowler away from the

counter, while Mr. Dowler reached toward the counter with his right hand, still holding the pen.

27. The CCTV footage shows Mr. Dowler apparently reaching towards the form on the counter with the pen as SMC Mann pulled him away from the counter. SMC Nakamura positioned herself between Mr. Dowler and the counter and held some of the items on the counter in place as SMC Mann pulled Mr. Dowler away. Another officer, SMC Shum, can be seen coming out of the doorway near the far end of the counter around this point. SMC Mann was behind Mr. Dowler and he appeared to be holding Mr. Dowler's left arm behind his back as he pulled him away from the counter and towards SMC Shum.

28. The CCTV footage then shows that SMC Shum approached and took hold of Mr. Dowler's right arm. SMC Mann continued to physically move Mr. Dowler away from the booking counter. Mr. Dowler appeared to resist and, as he was being directed around a corner in the jail and away from the area of the booking counter, he dropped to one knee. Around the time this was happening, the CCTV footage shows that SMC Nakamura collected a number of items from the booking counter in her hands, including Mr. Dowler's ID and glasses. She also appeared to pick up Mr. Dowler's cell phone, which had remained propped up against a computer monitor. She then followed in the direction Mr. Dowler was being moved by SMC Mann and SMC Shum.

29. SMC Mann told the investigator in this matter, and testified at the discipline proceeding, that since he was attempting to physically remove Mr. Dowler from the jail at this point, he instructed SMC Nakamura to collect Mr. Dowler's effects and follow them outside. However, SMC Mann said that Mr. Dowler refused to be walked out of the jail and at a certain point he went "limp" and became "dead weight". SMC Mann said he realized around this point that it would not be possible to remove Mr. Dowler from the jail and he would have to be returned to a cell until he was suitable for release. SMC Shum also gave a statement and told the investigator that Mr. Dowler was resisting and that he assisted in controlling Mr. Dowler to the ground as he continued to resist.

30. The CCTV footage captured the rest of the struggle between Mr. Dowler and the officers. While Mr. Dowler was on one knee, SMC Shum remained standing and continued to hold Mr. Dowler's right arm by the wrist. SMC Mann went down to one knee himself, behind Mr. Dowler, and appeared to put Mr. Dowler in a headlock briefly before pushing him down so that he was on the ground. The CCTV footage then shows Mr. Dowler lying on his left side as SMC Mann appeared to push his head against the floor. Mr. Dowler's left arm was underneath his body at this point. SMC Shum continued to hold Mr. Dowler's right arm while standing and straddling Mr. Dowler's body. While this was going on, SMC Nakamura put down the items she had collected from the booking counter on a nearby ledge, then walked over to Mr. Dowler and held his legs down.

31. The three officers then attempted to roll Mr. Dowler onto his front side. SMC Mann told the investigator that Mr. Dowler resisted being placed on his stomach. In the CCTV footage, it appears that Mr. Dowler was at least partially rolled onto his stomach, but his left arm remained underneath his body. SMC Shum continued to hold Mr. Dowler by the right arm and placed his knee on Mr. Dowler's lower back after he was rolled onto his front. SMC Nakamura crossed one of Mr. Dowler's legs underneath the other and then placed her knee on the back of his legs.

32. Next the officers rolled Mr. Dowler over again so that he was on his left side. After this occurred, SMC Shum held Mr. Dowler down while SMC Mann then disengaged and removed Mr. Dowler's belt and shoes. While this occurred, Mr. Dowler rolled over slightly onto his back. SMC Shum remained on top of him holding him down, and SMC Nakamura moved up from Mr. Dowler's legs to his torso.

33. A fourth officer, SMC Rankin, arrived after this. He crossed Mr. Dowler's legs and held them down. Two other officers then approached and stood over Mr. Dowler without appearing to touch him. SMC Mann was also standing near Mr. Dowler at this point while SMC Nakamura and SMC Shum were on the ground apparently holding down Mr. Dowler's upper body.

34. After a few seconds, the officers lifted Mr. Dowler off the ground. SMC Mann took hold of Mr. Dowler from behind and led him back towards the booking counter. The CCTV footage then shows SMC Mann leading Mr. Dowler past the booking counter while several other officers followed behind. This part of the footage is time stamped at 2:52:20 am, approximately one minute and twenty seconds after SMC Mann first approached Mr. Dowler and grabbed him by the arm at the booking counter.

35. Ultimately Mr. Dowler was returned to a cell and not released until several hours later.

Handling Mr. Dowler's Phone at the Counter: 2:52 am to 2:55 am

36. As Mr. Dowler was being led away by SMC Mann and others at 2:52 am, SMC Nakamura can be seen in the CCTV footage retrieving Mr. Dowler's effects from the ledge where she had placed them and returning them to the booking counter. SMC Nakamura also picked up Mr. Dowler's shoes and belt from the floor and placed those on the counter as well. After a few seconds, SMC Mann returned and stood behind the counter. SMC Nakamura stood in front of the counter. Two other officers, Acting Sergeant Hall and SMC Dhaliwal, were also standing in the area of the booking the counter.

37. The overhead footage from the camera above the booking counter shows SMC Nakamura putting Mr. Dowler's effects, including his cell phone, into a clear plastic bag. SMC Nakamura then walked a few steps away from the booking counter before returning and removing Mr. Dowler's phone from the plastic bag. The overhead footage shows her holding the phone in her hand and tapping on different parts of the screen a number of times. The screen of Mr. Dowler's phone is visible in SMC Nakamura's hand after this. It is not disputed that the Recording was open and displayed on the phone's screen at this point.

38. At 2:54:14 am, SMC Nakamura can be seen tapping on the bottom-right corner of the screen with her right thumb. After she did this, most of the screen's display

became dimmer, and two light-coloured horizontal bars appeared on the bottom of the screen, one on top of the other. It is not in dispute that this part of the CCTV footage depicts SMC Nakamura tapping on the “delete” button, portrayed by an image or icon of a trashcan, and the two bars that appeared at the bottom of the screen were two buttons, one to confirm the Recording should be deleted (“Delete Video” in red writing) and one to cancel the deletion of the Recording (“Cancel” in blue writing).

39. The CCTV footage shows that SMC Mann was standing behind the counter at this point. A/Sgt. Hall and SMC Dhaliwal were standing next to SMC Nakamura on the other side of the counter. From my review of the CCTV footage, it appears Cst. Mann was speaking to A/Sgt. Hall and not looking at Mr. Dowler's phone when SMC Nakamura hit the “delete” button. It does not appear that he would have had a good view of the phone's screen in SMC Nakamura's hand at this point even if he had looked at the phone.

40. After hitting the “delete” button, SMC Nakamura's thumb hovered over the two bars on the bottom of the phone's screen and she can be seen holding the phone in front of her body while turning towards A/Sgt. Hall and apparently speaking with him. There appeared to be a brief conversation between A/Sgt. Hall and SMCs Nakamura, Mann, and Dhaliwal at this point. After a few seconds, A/Sgt. Hall turned and walked out of view.

41. SMC Nakamura was interviewed twice in the investigation of this matter. She told the investigator that she removed Mr. Dowler's phone from the plastic bag because one of the other officers present, SMC Park, told her it looked like Mr. Dowler was making a recording on the phone. SMC Nakamura said she removed the phone from the bag to check it out and that she stopped the Recording, which was still being made, after she removed the phone from the bag.

42. SMC Nakamura said she asked A/Sgt. Hall what to do about the Recording and he told her any recordings on the phone should not be deleted. SMC Dhaliwal was interviewed and said he also recalled that A/Sgt. Hall's instructions were that any

recordings on the phone should not be deleted. SMC Nakamura was not asked directly about her actions in tapping on the trashcan icon to delete the Recording before the discussion with A/Sgt. Hall.

43. A/Sgt. Hall provided a written duty statement and was interviewed in this matter. He said it was brought to his attention that Mr. Dowler may have been recording events in the jail on his phone. A/Sgt. Hall said he instructed SMC Nakamura to turn the phone off and place it back into the effects bag. According to A/Sgt. Hall, he then went to speak with the senior NCO at the jail, Sgt. Houchen, to confirm this was the correct course of action.

44. Returning to the CCTV evidence, the overhead footage from above the counter shows SMC Mann pointing at the phone with his right hand and apparently gesturing for SMC Nakamura to hand it to him after A/Sgt. Hall walked away from the counter. SMC Nakamura then handed the phone to SMC Mann. This was at 2:54:48 am, according to the CCTV footage time-stamp. SMC Mann then placed the phone face-up on the counter so that it was oriented towards him. Then SMCs Mann, Nakamura, and Dhaliwal all looked down at the phone. SMC Nakamura and SMC Dhaliwal were on the other side of the counter from SMC Mann.

45. At the 2:54:52 am mark in the overhead footage, SMC Mann can be seen tapping on the lower part of the phone's screen with his right thumb. The display on the phone's screen visibly changed at this point in the jail CCTV footage, such that the Recording was no longer visible. While it is disputed whether he intended to do so, it is common ground that SMC Mann tapped on the button confirming the Recording should be deleted at this point, and this had the effect of confirming the two-step deletion process that SMC Nakamura had initiated.

46. A subsequent forensic examination of Mr. Dowler's iPhone in August 2018 revealed no evidence of a recorded video file from the jail in November 2017. According to the Final Investigation Report in this matter, once a photograph or video has been

deleted from an iPhone, the file appears in the phone's "Recently Deleted" folder for 30 days, after which it is permanently removed from the device.

47. The CCTV footage shows that SMCs Mann, Nakamura, and Dhaliwal continued to look down at the phone after SMC Mann confirmed the deletion of the Recording. After about four seconds, SMC Mann used his right thumb to swipe across the surface of the screen a few times, and some thumbnail images appeared on the screen.

48. After tapping on the phone's screen a few more times and apparently looking down at the phone for several seconds, SMC Mann appeared to press the "home" key on the front of the phone with his thumb, then he picked up the phone and appeared to press on the right outer edge of the phone with his right index finger. After each of these actions, the display on the phone's screen changed. At the end of these actions, the time stamp on the overhead camera footage was 2:55:16 am, and the screen of the phone showed "2:55" against a green or turquoise background. SMC Mann then placed the phone on the counter in front of SMC Nakamura. SMC Nakamura picked up the phone and placed it in the plastic bag with the rest of Mr. Dowler's effects. Shortly after this A/Sgt. Hall returned to the counter. SMC Nakamura then took the bag and sealed it.

49. In her interviews in this matter, SMC Nakamura said the Recording was still on Mr. Dowler's phone when she handed it to SMC Mann. She said SMC Mann asked her to pass him the phone and he did not say why. She said it looked like the Recording was then deleted and, at a certain point while he was operating the phone, SMC Mann said he wanted to see if their faces were on it or if Mr. Dowler had taken any photos of their faces (presumably referring to himself and the other jail guards).

50. SMC Dhaliwal said in his interview that he did not know why SMC Nakamura handed the phone to SMC Mann and he did not know whether a recording was deleted.

51. In his interview, A/Sgt. Hall said that after he instructed SMC Nakamura to turn off the phone, he went and spoke to Sgt. Houchen who was the senior jail NCO. According to A/Sgt. Hall, Sgt. Houchen agreed with him that the phone should simply be

turned off. A/Sgt. Hall said that when he returned to the counter and saw SMC Nakamura holding the effects bag with the phone inside, he did not know the Recording had been deleted.

SMC Mann's Statements about the Phone

52. SMC Mann was interviewed twice in this matter after providing his initial written duty statement. He also gave evidence at the discipline proceeding before Supt. Eely.

53. In his first interview, on June 20, 2018, SMC Mann said that SMC Nakamura had noticed there appeared to be a recording on Mr. Dowler's phone, and he became concerned that he and the other jail staff may have been recorded or photographed. He indicated he was concerned Mr. Dowler might post his image on social media. SMC Mann said he asked SMC Nakamura for the phone but denied making this request with the intention to delete anything from the phone. He said he wanted to see if there was an image or video of himself on the phone. He said that if he had found a video of himself or other jail staff on the phone, he would have spoken to his NCO about it.

54. SMC Mann was asked if he saw any videos on the phone and he responded, "I don't know if I was in a right – I don't know if I was in an image gallery or a video gallery. I, I don't know how to operate the phone so, uh, it appeared to be an image gallery I think, but – no." He said he looked through the phone and did not see any images of himself or other jail personnel.

55. When asked directly whether he deleted any video from the phone, SMC Mann said he had not. He was asked whether A/Sgt. Hall or anyone else said not to touch the phone or not to delete anything from it, and he said no.

56. SMC Mann was interviewed again on September 17, 2018 (the "Second Interview"). During this interview, parts of the overhead CCTV footage from the jail booking counter were played and SMC Mann was asked to comment on the footage and explain the events depicted. SMC Mann said he could not recall what was being

said when he, A/Sgt. Hall, and SMCs Nakamura and Dhaliwal were standing around the counter talking while SMC Nakamura was holding Mr. Dowler's phone. He said he believed they discussed the possibility that there might be a video or image of the jail on the phone, and "that was a cause of concern." He said that when he asked SMC Nakamura for the phone, he wanted to know if there was an image or video of the jail or of himself or another guard. He said that if there had been such an image or video, he would have spoken to his NCO about it. He said he did not intend to delete anything from the phone; he only intended to make inquiries about what was on it.

57. During the Second Interview, the specific part of the CCTV footage depicting SMC Mann confirming the deletion of the Recording was brought to his attention. SMC Mann was asked whether he deleted the Recording. He responded, "No. I believe I was going back and see if uh – I was trying to view the gallery. And I – my intent was to go back by operating the phone." He said he then looked at some images in the phone's gallery to see if there were any images of the jail, himself, or another guard. He said he saw a blurry image on the phone that he believed was the counter or the ceiling of the jail. He said that after he saw this image he intended to go to the phone's home page and then lock the phone. He said he thought he completed these actions, but he was not sure how to operate the phone.

58. SMC Mann was asked if he owned a phone and he said he did. He said that at the time of the incident he owned a Motorola phone, and at the time of the interview he owned a Samsung phone. He said he had never owned an iPhone.

59. In his evidence at the discipline proceeding on July 17, 2019, SMC Mann accepted that he had in fact deleted the Recording. However, SMC Mann said he did not intentionally delete the Recording. He said he was not aware he had deleted the Recording when he was interviewed on June 20 and September 17, 2018.

60. SMC Mann testified that he did not receive his own copy of the jail CCTV footage before his interviews in the investigation, although he was permitted to view the footage prior to the interviews. He said he and the agent who accompanied him to the interviews

looked at the footage for five or ten minutes before he was interviewed. SMC Mann testified that it was only when his counsel was provided with a copy of the CCTV footage and he was able to review the footage carefully with his counsel that he realized he had in fact deleted the Recording from Mr. Dowler's phone. This was after his two interviews but before the discipline proceeding.

61. SMC Mann testified at the discipline proceeding that he did not see SMC Nakamura press the trashcan icon on Mr. Dowler's phone in "real time." He said he asked SMC Nakamura for the phone because he wanted to look at the gallery. He said he knew at the time, from his experience working in the jail, that the screen of the phone would be visible to the overhead CCTV camera when he placed the phone face-up on the counter in front of him. He said that after he received the phone from SMC Nakamura, he "just pressed a button" and "it went to a gallery." He indicated he looked at the gallery and did not see anything concerning, and then he "went to a home screen and... locked the phone and... returned the phone back to Officer Nakamura."

62. Later in the discipline proceeding, SMC Mann was asked by his counsel about the part of the CCTV footage depicting his actions after SMC Nakamura handed him the phone. The transcript of this part of the discipline proceeding reads as follows:

Q: At 02:54:45, uh, you point at the phone and it appears now that Nakamura's handing you the phone, is that correct?

A: Correct

Q: Did you know that it was primed to delete with the push of one button when she handed it to you?

A: No.

Q: Now, we see it before you, you have positioned it on the counter, directly below the [overhead] camera. Is that correct?

A: Correct.

Q: Were you aware that the [overhead] camera would show you, show the phone in precisely the manner where you've put it, directly in the middle of the frame under the [overhead] camera?

A: Yes.

Q: All right. And you see, um, Cst. Nakamura's watching what you're doing?

A: Yes.

Q: And Cst. Dhaliwal's watching what you're doing?

A: Yes.

Q: And you hit a single button there. Correct?

A: Correct.

Q: And the video disappeared.

A: Yes.

Q: And we, we know that the buttons on the screen are delete and cancel. What would you, what did you think would happen if you hit the cancel button?

A: Either it'd go back to the f-, the gallery or...

Q: Okay.

A: ...just...

Q: Okay.

A: ... (unintelligible)...

Q: Pardon me? (Unintelligible)...

A: Probably go back to the gallery.

Q: Okay.

A: Yeah.

Q: Um, and what button did you intend to hit?

A: The cancel button.

Q: All right. And did anything come up to tell you that, in fact, you deleted the video as opposed to going back to the gallery[?]

A: No, there was no animation whatsoever.

Q: And then we see, um, the screen automatically goes to, uh, another screen.

A: Yes.

Q: And we're gonna see you doing something. With the screen that it went, and you see a screen with a bunch of little pictures on it.

A: Correct.

Q: Um, is that the, what you call, what you call the thumbnail gallery?

A: Yes, and that was my intention, to go into...

Q: Okay. And you said this a couple of times. What, what were you checking for? What do you think might be in that photo gallery?

A: Uh, any, um, images of the jail facility, the jail personnel, or other prisoners.

63. SMC Mann was not cross-examined at the discipline proceeding, although Supt. Eely did ask him some clarifying questions during his testimony. Toward the end of SMC Mann's evidence, Supt Eely asked him:

Q: Um, you do, I guess, concede you pressed delete and it's your evidence that you intended to press cancel and get to the gallery, which...

A: Yeah.

Q: ... is what you fall upon, just...

A: Yeah. Yes.

Q: And are, are there any statements made through this process that contradict that current version? To your knowledge?

A: No.

LAW

Standard of Review & Standard of Proof

64. Under s. 141(9) of the *Act*, the standard of review to be applied in a review on the record is correctness. This standard of review was discussed by the majority in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 54:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: [*Dunsmuir v. New Brunswick*, 2008 SCC 9], at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

65. The majority in *Dunsmuir* wrote as follows at para. 50:

[50] ... When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

66. The standard of proof for allegations of misconduct under the *Act* is the balance of probabilities, which requires "evidence that is sufficiently clear, convincing and cogent" to establish an alleged disciplinary default: see the decision of Adjudicator Carol Baird Ellan in *The Matter of Cst. Batiuk*, RR 15-02, at p. 1, citing the March 9, 2012 decision of Adjudicator Ian H. Pitfield in *The Matter of Cst. Dickhout*, PH 10-03, at para. 37.

67. Under this standard of proof, I must "scrutinize the relevant evidence to determine whether it is more likely than not" that each alleged instance of misconduct occurred: *F.H. v. McDougall*, 2008 SCC 53, at para. 49.

Elements of Alleged Misconduct

68. The misconduct alleged against SMC Mann is set out in the following provisions in s. 77 of the *Act*:

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

...

(b) conduct that constitutes

...

- (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,

...

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

(A) using unnecessary force on any person...

...

- (f) "deceit", which is any of the following:

- (i) in the capacity of a member, making or procuring the making of

(A) any oral or written statement

...

that, to the member's knowledge, is false or misleading;

...

(g) "discourtesy", which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member;

(h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department ...

...

- (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.

69. Unlike many other disciplinary breaches of public trust under s. 77(3) of the *Act*, the language in s. 77(3)(g) defining "discourtesy" does not refer to the member's state of mind. The provision appears to contemplate an objective standard of conduct intended to ensure members act with appropriate restraint and professionalism towards members

of the public. In my view, then, this type of misconduct will be established where a member of a municipal police department, while acting in the performance of duties, behaves towards a member of the public in a manner that reasonable and informed people would consider to be inordinately rude, disrespectful, or otherwise lacking in civility, having regard to the situation in which the behaviour occurred.

70. This interpretation is consistent with the approach taken by the parties and the previous discipline authorities in relation to this allegation. I find it is also consistent with a reading of the words used in s. 77(3)(g) in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act* and the intention of the legislature in defining various forms of misconduct under the *Act* to govern the conduct of municipal police officers: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

71. Regarding the allegation of abuse of authority for intentionally or recklessly using unnecessary force contrary to s. 77(3)(a)(ii)(A) of the *Act*, I adopt the framework applied by Adjudicator Carol Baird Ellan in *The Matter of Cst. Tiwana*, PH 14-02.

72. Under this framework, unnecessary force will be made out where:

- The officer's use of force was objectively unnecessary, and
 - i. The officer did not subjectively believe the force was necessary;
 - ii. The officer subjectively believed the force was excessive; or
 - iii. The officer subjectively believed the force was necessary and not excessive, but this belief was not reasonable.

73. Also relevant to this allegation is s. 25(1)(b) of the *Criminal Code*, which provides "every one who is required or authorized by law to do anything in the administration or enforcement of the law... as a peace officer... is, if he acts on reasonable grounds,

justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.”

74. As Fleming J. explained in *Akintoye v. White*, 2017 BCSC 1094, at para. 97, s. 25(1) of the *Criminal Code* “is not a source of extra police powers”, but rather “it operates to justify the use of force when a police officer’s conduct is permitted pursuant to a separate statutory or common law power.” At para. 101, Fleming J. noted that a “modified objective test is applied to assess the reasonableness of a police officer’s belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.” Citing *R. v. Nasogaluak*, 2010 SCC 6, Fleming J. further explained, at para. 100, that “the degree of ‘allowable’ force is constrained by the principles of proportionality, necessity and reasonableness”. At para. 102, Fleming J. cited *Crampton v. Walton*, 2005 ABCA 81 for the proposition that “[a]lthough entitled to be wrong in judging the degree of force required, an officer must act reasonably”.

75. In this regard, I also respectfully adopt the comments of Adjudicator Ian H. Pitfield in his decision in *The Matter of Cst. Dickhout*, Part 1, indexed at PH 2010-3 (dated March 9, 2012), where he said at page 13:

The adjudicator must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the amount of force required was reasonable and is not to be answered by reference to what others might have done in similar circumstances.

76. Finally with respect to the allegation of abuse of authority, I am also guided by the remarks of Affleck J. at para. 36 of *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970; and Myers J. at para. 46 of *Lowe v. Diebolt*, 2013 BCSC 1092, to the effect that a finding of “intentional or reckless” misconduct under the *Act* requires a seriously blameworthy state of mind on the part of the officer, beyond a simple mistake of legal authority.

77. The test for discreditable conduct under s. 77(3)(h) of the *Act* involves two elements, as explained by the Hon. Wally Oppal, QC at pp. 4-5 of his decision under s. 117 of the *Act* in OPCC File 2018-14498 dated April 4, 2019. The first element is whether the member's conduct would "tend to damage the reputation of the municipal police department to which the member belongs in the eyes of reasonable and informed members of the public". The second element is whether the member was "subjectively aware... their conduct would have this tendency", or whether "that tendency was objectively obvious."

78. The test for deceit under s. 77(3)(f)(i)(A) of the *Act* was explained by Adjudicator William B. Smart, QC in his July 30, 2014 decision in *The Matter of Cst. Charters*, PH 14-01, at para. 35:

35. 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. It is not enough to prove that what was said or written by the member is false or misleading. The member must know it is false or misleading; otherwise, the member does not have the requisite mental state or intention required to ground a finding of deceit.

DISCUSSION

Discourtesy

79. SMC Mann admits he said words to the effect of, "Just fucking sign it and leave, asshole," in an attempt to get Mr. Dowler to sign his release papers and leave the jail. Supt. Eely found that SMC Mann's "use of inappropriate language appears to be the result of frustration on the part of SMC Mann and cannot be justified in the circumstances."

80. Through his counsel, SMC Mann submits these words were not inappropriate, because Mr. Dowler was refusing to leave the jail after being provided ample opportunity to do so and some form of escalation in the interaction was required to get

him to leave. SMC Mann further submits that Mr. Dowler was swearing at him and thus would not have been surprised or offended by SMC Mann's own use of profanity in return.

81. I find it is significant, however, that SMC Mann said these words to Mr. Dowler shortly after Sgt. Houchen had apparently chided Mr. Dowler at some length for swearing at SMC Mann. Supt. Eely similarly made note of this in his decision. It may be that Mr. Dowler was using foul language, and continued to do so after Sgt. Houchen spoke with him, but I do not believe this excuses SMC Mann's conduct.

82. Police officers are expected to behave professionally and with appropriate restraint, even if the people they are dealing with do not behave similarly. Of course, there will be circumstances where it is acceptable for the police to swear when dealing with members of the public in the course of their duties. I do not propose to outline those circumstances here. Each situation is unique.

83. In this situation, the CCTV footage and the accounts of the various witnesses establish that Mr. Dowler was complaining and venting at SMC Mann while he was being booked out of the jail, and this included swearing. The release form was placed in front of Mr. Dowler for about 30 seconds before SMC Mann told him to "fucking sign it" and called him an "asshole." Even if Mr. Dowler largely ignored the form and continued to use profanity in speaking to SMC Mann after Sgt. Houchen left, I find the circumstances did not warrant the lack of civility that SMC Mann displayed toward him.

84. I find SMC Mann's conduct, mainly in referring to Mr. Dowler as an "asshole," would be considered by reasonable and informed members of the public to be unduly rude and disrespectful having regard to the entire circumstances. These circumstances include the fact that the form Mr. Dowler was being asked to sign had only been given to him half a minute earlier. I do not accept that this was enough time for SMC Mann to reasonably conclude that Mr. Dowler was refusing to leave the jail, particularly given Mr. Dowler's body language in pulling the form towards himself and picking up a pen from the counter.

85. Even if it was SMC Mann's impression that Mr. Dowler was refusing to leave or was taking an unacceptably long time doing so, there were other means of communication he could have employed in order to firmly tell Mr. Dowler to sign the form and leave the jail.

86. I agree with Supt. Eely that there was nothing in the circumstances that justified SMC Mann's disrespectful language. To the contrary, the circumstances here included the fact that a senior officer had just told Mr. Dowler to stop swearing at SMC Mann because it was inappropriate and abusive. In that context, for SMC Mann to speak to Mr. Dowler the way he did would equally be seen as inappropriately discourteous.

87. I find the allegation of discourtesy has been proven.

Abuse of Authority by Intentionally or Recklessly Using Unnecessary Force

88. SMC Mann submits that his use of force against Mr. Dowler as described above was necessary and was not excessive. He submits that Mr. Dowler was refusing to leave the jail, and thus he was required to and did use appropriate force to try to remove him. Further, he submits that once Mr. Dowler became resistant it was no longer possible to remove him from the jail, and the degree of force used in gaining control of him and returning him to a cell was not excessive.

89. Supt. Eely accepted that SMC Mann honestly believed he had the authority to use force against Mr. Dowler, and found that "the low level of force applied was not oppressive, reckless or unnecessary." Supt. Eely reasoned that while there may have been other options available to SMC Mann in the circumstances, his conduct did not involve a "seriously blameworthy element" such that a finding of misconduct should be made.

90. As discussed above in relation to the allegation of discourtesy, I do not accept that it was reasonable for SMC Mann to conclude so quickly that Mr. Dowler was

refusing to leave the jail. SMC Mann submits it is not only the amount of time it took to discharge Mr. Dowler that is relevant, but also what was happening during that time. SMC Mann submits the use of force was justified in part by Mr. Dowler's continued verbal abuse after Sgt. Houchen left the counter.

91. In my respectful view, just as the circumstances did not justify SMC Mann's use of discourteous language, they also did not justify the use of force to remove Mr. Dowler from the booking counter seconds later.

92. Again, after Sgt. Houchen left the counter and Mr. Dowler was given the form to sign, roughly half a minute went by before SMC Mann came around to the front of the counter. While he did not sign the form right away and instead continued talking to SMC Mann, and continued swearing, Mr. Dowler did pull the form towards himself, and he picked up a pen. He did not ignore or refuse to accept the form.

93. In the seconds before SMC Mann actually grabbed him, Mr. Dowler's body language suggested he was about to sign the form, possibly to avoid what appeared to be the impending use of force by SMC Mann. At the moment SMC Mann grabbed his arm, Mr. Dowler was standing still and looking down at the form on the counter, holding the pen in his right hand. SMC Mann then grabbed him by the arm and pulled him away from the counter. As this happened, Mr. Dowler reached out toward the form with the pen in an apparent attempt to sign it.

94. Unsurprisingly, Mr. Dowler resisted when he was suddenly grabbed and pulled away from the counter, before he had retrieved all of his belongings. Unfortunately, the result was the further application of force by SMC Mann and the other officers during the ensuing struggle that I have described above.

95. At no point was Mr. Dowler exhibiting signs of physical aggression towards SMC Mann or any other officers. He was venting and swearing, but he was not acting violently or making any threats. On my review of the CCTV footage and the witness accounts in the record, he did not do anything that would objectively suggest that he

would not leave the jail in a reasonable period of time. The amount of time he continued to talk to SMC Mann after being asked to sign the form, approximately 30 seconds, was not so long that it was reasonably necessary to resort to using physical force to remove him from the jail. (For purposes of this decision I assume, without necessarily deciding, that the police may be lawfully justified in using force to remove former detainees from jail who refuse to leave.) Nor did Mr. Dowler's continued use of profanity in speaking to SMC Mann during this brief period justify the use of force in the circumstances.

96. I find that SMC Mann's use of force against Mr. Dowler in grabbing his arm and pulling him away from the counter was objectively unnecessary.

97. I am unable to find that SMC Mann did not subjectively believe his use of force was necessary, or that he subjectively believed it was excessive. However, I find that his subjective belief that it was necessary to use force was not reasonable. I also find that SMC Mann's conduct involved a seriously blameworthy state of mind, beyond a simple mistake about his legal authority to use force in the circumstances. In my view, SMC Mann resorted to using force against Mr. Dowler much too quickly and without adequate regard to whether it was warranted in the circumstances. SMC Mann needlessly and precipitously escalated the situation. His conduct went beyond a mere mistake of legal authority; it was a rash and unreasonable use of force. I find it has been proven that SMC Mann committed abuse of authority by recklessly using unnecessary force on Mr. Dowler, contrary to s. 77(3)(a)(ii) of the *Act*.

Discreditable Conduct

98. SMC Mann submits there is not sufficiently clear, cogent, and convincing evidence that he intended to delete the Recording from Mr. Dowler's phone. He submits his testimony that he deleted the Recording accidentally should be accepted as true. He notes that he knowingly placed Mr. Dowler's phone directly under the camera above the counter; that he was wearing a glove when he tapped on the phone's screen; and that the "Delete Video" and "Cancel" buttons were very close to one another.

99. Supt. Eely found the evidence did not establish on a balance of probabilities that SMC Mann intended to delete the Recording from the phone. He noted that the phone was “primed” to delete the Recording, since SMC Nakamura had already pressed the trashcan icon. Supt. Eely found this created less suspicion than if SMC Mann had completed both steps required to delete the Recording, by pressing the trashcan icon and then the “Delete Video” button. He found it unlikely that SMC Mann would intentionally delete content from the phone after placing it in direct view of a camera. He also found that SMC Mann’s brief inspection of the iPhone’s gallery after hitting the “Delete Video” button was consistent with his evidence that he intended to check the phone’s contents, but not necessarily to delete anything. Ultimately, Supt. Eely found it “entirely feasible that the deletion of the video was an unintentional act on SMC Mann’s part.”

100. After careful consideration, while I am not without suspicion, I find it has not been proven on a balance of probabilities that SMC Mann intentionally deleted the Recording from Mr. Dowler’s phone. I agree with Supt. Eely that it is at least feasible that it was an accident. In the end, based on the record before me, I am left unable to decide whether it is more likely that the deletion was intentional or accidental. I do not consider that the evidence is sufficiently clear, convincing, and cogent for me to find it more likely than not that SMC Mann intended to delete the Recording.

101. SMC Mann gave sworn testimony that he did not intend to delete the Recording, and I give that due consideration and weight, while appreciating that his evidence was not subject to cross-examination. I find that SMC Mann gave an account of his subjective thinking and perceptions when he handled the phone that was at least plausible. His evidence was that he wanted to check to see if there were any images of the jail or its staff, including himself, on the phone, and if there had been he would have asked his NCO what to do about it.

102. He testified that he intended to hit the “Cancel” button to navigate back to the gallery after he received the phone from SMC Nakamura. I accept as relevant the fact that the “Delete Video” and “Cancel” buttons were very close to one another. Even

without a glove on, it is certainly conceivable that someone intending to press the “Cancel” button could inadvertently press the “Delete Video” button.

103. In fact he hit the “Delete Video” button, but when he did so there was no animation or graphic indicating a file had been deleted. The display on the screen behind the “Cancel” and “Delete Video” buttons on the phone did change, but not in a way that made it obvious anything had been deleted. SMC Mann had not seen the display on the screen before SMC Nakamura gave him the phone. I accept it is possible that SMC Mann’s lack of familiarity with iPhones may have contributed to a failure to recognize that the file that had previously been open was deleted, rather than simply being closed after the deletion was cancelled as he said he intended.

104. I have considered the arguments presented by counsel on behalf of the Police Complaint Commissioner, who urges a finding that SMC Mann intentionally deleted the Recording.

105. Counsel submits that SMC Mann’s claim during his first interview that he did not see a video when SMC Nakamura handed him the phone is inconsistent with the CCTV footage, which shows the phone was open to a screen with a play button clearly visible along with the “Delete Video” and “Cancel” buttons.

106. It is true that there appeared to be a play button visible on the screen when SMC Mann received the phone from SMC Nakamura. However, SMC Mann was asked this question in his first interview, several months after the events in question, and after having only a brief opportunity to review the CCTV footage. The CCTV footage does not depict the screen of the phone with particular clarity, and the relevant part of the CCTV footage was not presented to SMC Mann during this interview so that he could focus on it specifically. Also, it is clear from the CCTV footage that SMC Mann only looked at the phone for a few seconds before tapping on the screen, and he did not actually play the Recording.

107. Counsel argues that SMC Mann's conduct in asking for the phone from SMC Nakamura after A/Sgt. Hall instructed her that the phone's contents should not be deleted was inherently suspicious; and SMC Mann's statements about whether he heard A/Sgt. Hall's instruction in this regard were internally inconsistent.

108. I agree that SMC Mann's conduct in asking for the phone from SMC Nakamura after A/Sgt. Hall left the counter was suspicious. However, SMC Mann explained he had a concern that his image or other sensitive images may have been on the phone, and he wanted to make inquiries. I find that explanation, and his claim that he did not intend to delete any content when he asked for the phone, to be plausible.

109. I do not consider that the alleged inconsistencies in SMC Mann's statements about A/Sgt. Hall's instructions are significant. In his first interview, SMC Mann was asked whether he ever heard A/Sgt. Hall, an NCO, or anyone else ever say not to touch the phone or not to delete anything, and his response was "no." In the Second Interview, he was asked if he heard Sgt. Hall say anything like, "Don't delete video," and his response was "no." He was then asked, "Don't recall, or he didn't say it?" and he responded, "I don't recall." No such follow-up question was asked in the first interview.

110. I do not find that SMC Mann's evidence changed, only that it was clarified in the Second Interview. At the discipline proceeding, SMC Mann gave evidence to the effect that he was distracted during the conversation between himself, A/Sgt. Hall, and SMCs Nakamura and Dhaliwal. I do not consider this to be inconsistent with his earlier statements regarding the discussion with A/Sgt. Hall.

111. Commission counsel notes that SMC Mann said during his interviews that he did not know how to operate the phone, yet the CCTV footage shows he was able to easily perform functions such as navigating to the home screen and locking the phone. Also, SMC Mann said he asked SMC Nakamura for the phone because she was having difficulty operating it, when the CCTV footage shows SMC Nakamura apparently operating the phone without difficulty.

112. I do not view these inconsistencies between SMC Mann's statements and the CCTV footage to be material. SMC Mann briefly mentioned that he and SMC Nakamura had difficulty operating the phone during his explanation of why he asked for the phone and what he remembered seeing when SMC Nakamura handed it to him. The substance of his explanation was that he wanted to see if there were any worrisome images on the phone, and that when he received the phone he went to a gallery to look for the same. He did not explain what he meant when he said he and SMC Nakamura had difficulty operating the phone. It was not the focus of his explanation.

113. Commission counsel argues against SMC Mann's submission that his decision to place the phone face-up on the counter demonstrates he had nothing to hide, since he failed to mention anything about handling the phone in his written duty statement at the beginning of the investigation in this matter. However, it should be noted that SMC Mann's handling of Mr. Dowler's phone was not in issue when he wrote his duty statement. At the time SMC Mann wrote this statement, the allegations against him related only to discourtesy and abuse of authority. In this context, his omission of any mention of Mr. Dowler's phone in the statement does not undermine his later submission that he would not have intentionally deleted the Recording in plain view of the camera.

114. Commission counsel submits that the "underlying premise" of SMC Mann's assertion that he accidentally deleted the Recording is that he handled the phone in an "unintentional and careless manner at the time of the deletion such that the consequences of his actions would be unknown to him." Commission counsel submits this proposition is inconsistent with SMC Mann's seemingly deliberate handling of the phone in the CCTV footage, and his evidence that he knowingly positioned the phone so that it would be visible to the camera above the counter.

115. I do not agree that there is a significant inconsistency in this respect. SMC Mann says that he inadvertently pressed the wrong button while trying to press "Cancel." He did not claim that the fact of his tapping on the screen itself was an accident, or that he was not looking at the screen when he tapped on it. As mentioned, the two buttons on

the screen were in close proximity, and it is possible that someone meaning to press one button could have accidentally pressed the other.

116. Finally, Commission counsel notes that, during the Second Interview, when SMC Mann was shown the CCTV footage of himself deleting the Recording, he maintained he did not delete it rather than admitting the possibility that he deleted it accidentally. It is submitted that this undermines his later position that he did delete the Recording, but only inadvertently.

117. SMC Mann was simply asked during the Second Interview, apparently as the relevant portion of the CCTV footage was played to him, "Did you delete the video?" SMC Mann's exact response was, "No. I believe I was going back and see if uh – I was trying to view the gallery. And I – my intent was to go back by operating the phone."

118. While the first part of his response was "no," his overall answer was not overly emphatic or insistent. He discussed his subjective intentions and perceptions. He said he "believed" he was "going back," and this was his "intent." He said he was "trying to view the gallery." He was not asked specifically during this interview or the earlier interview if he thought it was possible that he accidentally deleted the Recording. His statements were made in the context of an investigation into an allegation that he intentionally deleted the Recording from Mr. Dowler's phone. In these circumstances, I do not find that SMC Mann's denial substantially undermines the credibility of his later assertion that he deleted the Recording accidentally.

119. Despite the thorough submissions presented on behalf of the Police Complaint Commissioner, I am unable to find the allegation that SMC Mann deliberately deleted the Recording has been proven to the requisite standard. I find the allegation of discreditable conduct has not been proven.

Deceit

120. It follows from the foregoing analysis that I also find the allegation of deceit against SMC Mann has not been proven. I cannot conclude it is more likely than not that

SMC Mann knew his statements were false when he denied deleting the Recording from Mr. Dowler's phone during his interviews in the investigation in this matter.

121. Counsel on behalf of the Police Complaint Commissioner notes that in his interviews, before SMC Mann had a chance to review the evidence against him with his counsel, he repeatedly denied that he deleted the Recording. Counsel submits that SMC Mann must have known these denials were false, especially after the relevant part of the CCTV footage was presented to him in the Second Interview. It was suggested that SMC Mann tailored his evidence at the discipline proceeding to fit the facts disclosed in the Final Investigation Report and underlying material, particularly the CCTV footage, which show that he did delete the Recording from Mr. Dowler's phone. Commission counsel submits that the change in SMC Mann's position regarding whether he deleted the Recording was "more consistent with an eleventh hour attempt to avoid liability for his conduct than an honest version of the events from that night."

122. Commission counsel appears to fault SMC Mann for not accepting that he may have accidentally deleted the Recording in the Second Interview, but then accepting this possibility at the discipline proceeding, when the same CCTV footage was before him at both times. In my view this sequence was understandable. First, as I have discussed, SMC Mann's denial during the Second Interview was nuanced, and he did not specifically deny the possibility that he accidentally deleted the Recording. That possibility was not put to him. Second, I do not consider there to be anything improper in the circumstances of this case with SMC Mann modifying his position, if that is what he did, after having the benefit of time to review the CCTV footage carefully, in the context of all the other evidence, with his counsel. The modification, if any, was slight, and could arise equally from an honest attempt to reconcile his memory with the CCTV footage and other evidence as from a dishonest attempt to avoid a finding of misconduct.

123. I have concluded that the evidence does not satisfy me on a balance of probabilities that SMC Mann intentionally deleted the Recording. I have also explained

why I do not find that SMC Mann's credibility is substantially undermined by his denial of having deleted the Recording during the Second Interview, when the relevant CCTV footage was presented to him. Ultimately, I cannot say it is more likely that SMC Mann was lying when he denied deleting the Recording than it is that he was mistaken and honestly believed he had not deleted it. Accordingly, I find the allegation of deceit has not been proven.

CONCLUSION

124. I find the allegations of discourtesy and abuse of authority against SMC Mann have been proven. Pursuant to s. 141(10)(b) and (c) of the Act, I must now determine the appropriate disciplinary or corrective measures to be taken in accordance with s. 126; and recommend any changes in policy or practice that i consider advisable.

125. Commission Counsel may make submissions on the issues on or before July 8, 2021. Counsel for SMC Mann to respond on or before July 23, 2021.

Dated at North Vancouver, B.C. this 23 day of June, 2021


Ronald McKinnon
Adjudicator