

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

AND

IN THE MATTER OF [REDACTED] AND [REDACTED]
[REDACTED]

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO: [REDACTED] Complainant
AND TO: [REDACTED]
[REDACTED] Members
AND TO: [REDACTED] Investigator
AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

The circumstances that gave rise to the complaint:

On the 7th of December, 2018, [REDACTED] was visiting Vancouver for a [REDACTED] conference. He was staying at the [REDACTED] Hotel on Burrard Street. That evening he went out to dinner and then stopped in at a local club. At about 2:30 AM on the morning of December 8th, he was crossing the street on his way back to his hotel when he came to the attention of [REDACTED] and [REDACTED]. They say he was wandering across the intersection and was not within the marked crosswalk so they tried to get his attention. [REDACTED] honked the horn of his cruiser. [REDACTED] gave him the finger. The two officers exited their vehicle and attempted to detain [REDACTED] for having committed an offence under the Motor Vehicle Act and for possibly being intoxicated in a public place contrary to provisions of the Liquor Control and Licensing Act. [REDACTED] body language suggested to the officers that he might become assaultive so the officers apprehended a breach of the peace and grabbed hold of him. He struggled and at one point brought his elbow back suddenly in what [REDACTED] interpreted as an attempt to strike him. The members then took [REDACTED] to the ground where they hoped to gain control of him and apply handcuffs. Since they were not

immediately successful and [REDACTED] continued to struggle, [REDACTED] struck him with an open-handed slap to the face. When that did not achieve the desired level of compliance, he struck him three more time with a closed fist.

When [REDACTED] was finally handcuffed, [REDACTED] asked him to provide his name. When he did not receive an answer, he looked in the card folder that had been removed from [REDACTED] pocket and found his personal identification. By this time, the backup [REDACTED] had requested had arrived on the scene and after [REDACTED] had consulted with his supervisor, [REDACTED] [REDACTED] was transported to the police lockup where he spent the rest of the night. When he was released at about 6:00 in the morning, [REDACTED] says there was \$30.00 missing from his personal effects.

The complaint and resulting investigation:

On December 10, 2018, [REDACTED] filed a complaint with the Office of the Police Complaint Commissioner. On January 3, 2019, [REDACTED] of the Vancouver Police Department Professional Standards Section was assigned to investigate the allegations. [REDACTED] identified and investigated three potential misconducts by [REDACTED] and [REDACTED]. These were:

1. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by, in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person
2. *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest without good or sufficient cause
3. *Neglect of Duty* pursuant to section 77(3)(m)(i) of the *Police Act* by neglecting, without good or sufficient cause, to properly account for money or property received in one's capacity as a member.

After conducting his investigation, [REDACTED] concluded that none of these allegations of misconduct appeared to have been substantiated. He delivered his Final Investigative Report to the Discipline Authority, [REDACTED] on July 15th, 2019. On August 9th, 2019, [REDACTED] reached the same conclusion and issued his decision pursuant to section 112 of the Police Act. Upon receiving the decision of the discipline authority and reviewing the evidence in its entirety, the Police Complaint Commissioner was of the view that there was a reasonable basis to believe that the decision of the discipline

authority was incorrect with respect to the allegations that the officers had abused their authority by intentionally or recklessly making an arrest without good and proper authority and that they had abused their authority by intentionally or recklessly using unnecessary force on [REDACTED]. Pursuant to Section 117(4) of the Police Act, the Commissioner appointed me, as a retired Provincial Court Judge, to review this matter and arrive at my own conclusions. It is my responsibility pursuant to section 117(8)(c) to list and/or describe each allegation of misconduct considered in my decision. I am not constrained by the list or description of the allegations as articulated by the Discipline Authority. With this final direction in mind, I will add to the matters to be considered a third allegation, namely:

3. Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* pertaining to the failure to advise [REDACTED] of his rights under Section 10(b) of the *Canadian Charter of Rights and Freedom*

Analysis:

It seems most logical to deal with the three allegations of misconduct in a chronological order since the possibility of using force does not arise until the officers decide that an individual is to be detained or arrested. Similarly, the requirement to advise the person of his right to counsel is not triggered until there is a detention. I will begin then with the second allegation. Did [REDACTED] and [REDACTED] abuse their authority by intentionally or recklessly making an arrest without good or sufficient cause?

The complainant and the members provide very different stories about what happened during this transaction. The members say that their attention was drawn to [REDACTED] because he was jaywalking. The complainant says he was in the crosswalk. The complainant also says that he was originally approached by a single officer and that this officer began throwing punches at him while he was still standing. [REDACTED] and [REDACTED] say their first physical contact with the complainant occurred when they each grabbed one of his arms. They then decided it would be easier to apply handcuffs if he were on the ground. They say that once they had him down, he continued to struggle and that it was then that blows were used. On the basis of the record provided, I am not able to assess the credibility of the parties or find that either set of recollections has been proven on a balance of probabilities. Since in these disciplinary proceedings it is the police members, not the complainant, who face possible sanctions, I will give them the

benefit of the doubt and assume without finding that their version of events is the correct one.

It was [REDACTED] as the senior officer, who decided that they needed to stop [REDACTED] because he was wandering across the street outside of the marked crosswalk and because he appeared to be intoxicated. He believed that [REDACTED] had committed offences contrary to the Motor Vehicle Act by jaywalking and under the Liquor Control and Licensing Act by being intoxicated in public. He believed that as a police officer he had a duty to check on [REDACTED] well being and he also needed to identify him so that he could issue a ticket for the MVA infraction.

[REDACTED] was subject to detention as soon as [REDACTED] ordered him to stop. I find that this detention met the requirements set out by the court in the Mann decision.

Although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52.

Unfortunately, the subsequent action of the officers did not seem aimed at advancing the legal purposes that [REDACTED] said were the reasons for the stop. Neither officer asked [REDACTED] to identify himself until he was handcuffed on the ground. At no point did they ask any questions or note any observations that might be relevant to the complainant's well being. Instead they confronted him, asking why he didn't stop, why he jaywalked, why he gave them the finger. The officers' aggressive approach led [REDACTED] to conclude that they were likely to hit him. [REDACTED] and [REDACTED] described the complainant's body language as threatening. In the circumstances, it was more likely to have been a defensive posture. He did not approach them or make any verbal threats. He had apparently puffed up his chest and his fists were clenched at his sides. Thrusting both hands into his pockets is more consistent with him trying to rein in his defensive stance than with any act of aggression.

There had been no breach of the peace up to this time, so presumably when [REDACTED] said that he arrested [REDACTED] for a breach of the peace he did so on the basis of an

apprehended breach of the peace. Vancouver Police Policy 1.4.4 accurately reflects the law in its definition of an apprehended breach of the peace. It states:

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

Did [REDACTED] and [REDACTED] believe on reasonable grounds that a breach would take place unless [REDACTED] was arrested? The fact that the complainant had thrust his hands into his pockets would have eliminated any fear that the officers had that he planned to strike or grab one of them. Any remaining apprehension would be based on a belief that [REDACTED] was reaching for something he could use as a weapon yet when interviewed, [REDACTED] specifically stated that he did not believe that [REDACTED] had a weapon in his pocket. [REDACTED] said he was unsure of what [REDACTED] was doing, and did not know what was in his pockets so he grabbed onto his right arm. In these circumstances, the officers did not have a reasonable belief that, if not arrested, the complainant would cause personal injury or damage to property so no arrest was authorized by law and the allegation that [REDACTED] and [REDACTED] abused their authority pursuant to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest without good or sufficient cause appears to be substantiated.

Turning then to the first allegation, did [REDACTED] and [REDACTED] abuse their authority by intentionally or recklessly using unnecessary force on the complainant?

Since the officers did not have sufficient grounds to arrest, it follows that any use of force that followed would not be "necessary". I adopt the reasoning of Mr. Wally Oppal, Q.C. in OPCC S.117 review (2015-11505) where he stated:

While there are express protections in the Criminal Code for a police officer's use of force, they apply only when the officer is proceeding lawfully and is acting on reasonable grounds. Where there is an absence of objectively reasonable grounds and the officer is not proceeding lawfully, those powers do not support the use of force.

Accordingly, I find that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by, in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person appears to be substantiated.

Finally, I note that there is no evidence that [REDACTED] was ever advised of his rights under section 10 of the Charter or Rights and Freedoms. That section provides that:

Everyone has the right on arrest or detention

- a. to be informed promptly of the reasons therefor;
- b. to retain and instruct counsel without delay and to be informed of that right; and
- c. to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

There is a duty on the officers effecting an arrest to advise the detainee of these rights.

The police duty to inform an individual of his or her s.10 (b) *Charter* right to retain and instruct counsel is triggered at the outset of an investigative detention. The concerns regarding compelled self-incrimination and the interference with liberty that s.10 (b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, the police have the obligation to inform the detainee of his or her right to counsel. (*R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460)

I find then that the allegation of Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* pertaining the failure to advise [REDACTED] of his rights under the Canadian Charter of Rights and Freedom appears to be substantiated.

Notice of Next Steps

As required by s. 117(8) of the *Police Act*, I hereby provide notice to [REDACTED] and [REDACTED] as follows:

- (a) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that on December 8th, 2018, [REDACTED] and [REDACTED] used unnecessary force on [REDACTED] which constitutes misconduct and requires the taking of disciplinary or corrective measures.
- (b) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that on December 8th, 2018,

██████████ and ██████████ intentionally or recklessly made an arrest without good or sufficient cause which constitutes misconduct and requires the taking of disciplinary or corrective measures.

- (c) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that December 8th, 2018, ██████████ ██████████ and ██████████ failed to provide ██████████ with his rights under Section 10(b) of the *Charter* which constitutes misconduct and requires the taking of disciplinary or corrective measures.
- (d) A prehearing conference will be offered to ██████████ and ██████████ ██████████.
- (e) ██████████ and ██████████ have the right pursuant to s.119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.
- (f) The range of disciplinary or corrective measures being considered include:
 - i. Reprimanding ██████████ and ██████████ ██████████ in writing;
 - ii. Reprimanding ██████████ and ██████████ ██████████ verbally; and
 - iii. Giving ██████████ and ██████████ ██████████ advice as to their conduct

I hereby notify ██████████, the complainant in this instance, of his right pursuant to s. 113(1) of the *Police Act* to make submissions at the discipline proceeding with respect to the complaint, the adequacy of the investigation, or the disciplinary or corrective measures that would be appropriate.

Dated at Surrey, British Columbia this 12th day of September, 2019.

Carole Lazar, Discipline Authority