

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING CONCERNING AN ALLEGATION OF
MISCONDUCT AGAINST CONSTABLE [REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT

REASONS FOR DECISION: DISCIPLINARY AND CORRECTIVE MEASURES

TO: Mr. [REDACTED] (the "Complainant")
c/o [REDACTED], Counsel ("Counsel for the Complainant")

AND TO: Constable [REDACTED] (the "Member")
Vancouver Police Department
c/o [REDACTED], Counsel ("Counsel for the Member")

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

AND TO: Sgt. [REDACTED], Investigator (the "Investigator")
c/o Vancouver Police Department
Professional Standards Department

AND TO: Mr. Clayton Pecknold (the "Commissioner")
Police Complaint Commissioner

I Overview :

- (1) Following a disciplinary proceeding, I found that the allegation of misconduct against the Member concerning the inappropriate use of force against the Complainant was substantiated. The allegation concerned the use of force by displaying and deploying a Conductive Energy Weapon against the Complainant during the course of his arrest.
- (2) What follows are my reasons under s. 126 of the *Police Act* in relation to proposed disciplinary or corrective measures to be applied in connection with the substantiated misconduct of the Member, taking into consideration all relevant aggravating and mitigating circumstances.

II History of Proceedings:

- (3) On March 18, 2021 my decision with respect to this matter was delivered, substantiating the allegation of misconduct concerning the Member (the “Discipline Decision”).
- (4) The Discipline Decision sets out in detail the prior history of these proceedings.
- (5) Subsequent to the Discipline Decision, Counsel made application to delay submissions on behalf of the Member with respect to disciplinary and corrective measures. After considering those submissions and other relevant authorities, I concluded in a decision dated March 28, 2021 that a delay of submissions was lawful. Accordingly, submissions from the Member were ordered to be produced by April 19, 2021. Counsel’s submissions specifically negated the need for further oral submissions.
- (6) On April 19, 2021 Counsel submitted submissions on behalf of the Member extending to 77 pages of argument and supporting materials.
- (7) The next stage of the process is to consider the appropriate disciplinary or corrective measures.

III Legislative Framework:

- (8) The key legislative framework governing disciplinary or corrective measures is found in s. 126 of the *Police Act*. That s. provides as follows:

Imposition of disciplinary or corrective measures in relation to members

126 (1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or her or his agent or legal counsel, or from the complainant under s. 113 [complainant's right to make submissions], the discipline authority must, subject to this s. and s.s 141 (10) [review on the record] and 143 (9) [public hearing], propose to take one or more of the following disciplinary or corrective measures in relation to the member:

- (a) dismiss the member;*
- (b) reduce the member's rank;*
- (c) suspend the member without pay for not more than 30 scheduled working days;*
- (d) transfer or reassign the member within the municipal police department;*
- (e) require the member to work under close supervision;*
- (f) require the member to undertake specified training or retraining;*
- (g) require the member to undertake specified counselling or treatment;*
- (h) require the member to participate in a specified program or activity;*
- (i) reprimand the member in writing;*
- (j) reprimand the member verbally;*
- (k) give the member advice as to her or his conduct.*

(2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,

- (a) the seriousness of the misconduct;*
- (b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct;*
- (c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career;*
- (d) the likelihood of future misconduct by the member;*
- (e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence;*
- (f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct;*
- (g) the range of disciplinary or corrective measures taken in similar circumstances; and*
- (h) other aggravating or mitigating factors.*

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

(9) In completing my analysis, I am required to consider all relevant aggravating and mitigating circumstances in order to determine the just and appropriate disciplinary or corrective measures in relation to the misconduct of the Member.

(10) If I determine that one or more disciplinary or corrective measures are necessary, s. 126(3) of the *Police Act* provides that an approach that seeks to correct and educate the Member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

IV Nature of the Misconduct

(11) The key findings of fact relating to the allegations of misconduct concerning the Member as set out in the Discipline Decision are as follows:

- a. The Member is an officer with approximately six years of policing experience in Greater Vancouver. He has worked the Downtown Eastside, District 3, on general patrol duties and other related areas;
- b. The Complainant is a member of the public previously unknown to the Member;
- c. On February 20, 2019 the Member was dispatched to the [REDACTED] Hotel in Vancouver in response to an “*unwanted person on the premises*” complaint made by a member of the public and Hotel management. The Member was at all times a qualified Conductive Energy Weapon (“CEW”) officer and attended at the scene to backup Cst. G who had initially responded to the matter;
- d. Cst. G had spent just over three minutes on scene with the Complainant attempting to have him voluntarily leave, but encountering no success in that particular goal. Cst. G had, however, established some communication with the Complainant, succeeded in having him obey some directions and as well succeeded in diverting the Complainant from his fixation on the receptionist behind the Hotel lobby desk. As such, basic de-escalation efforts had seen some limited success in dealing with the Complainant;
- e. The Member entered the Hotel Lobby with Cst. B and immediately took over dealings with the Complainant. He immediately assessed the Complainant as a risk to subdue and arrest in the context of removing him from the Hotel. There was, however, no urgent need to remove the Complainant as there had been no assaults, property damage or other immediate risks to either the public or officers present;
- f. The Member did not communicate with or debrief Cst. G on her efforts before taking charge of dealings with the Complainant. As well, he withdrew and displayed his CEW in less than thirty seconds after arrival on scene;
- g. The Member discharged his CEW approximately one minute after displaying the weapon. The discharge was only partially effective and as a result, the Member ultimately made five attempts to energize the prongs that had been deployed. Ultimately, the Complainant was hit by the Member with the CEW unit itself;

h. The misconduct found to have taken place contrary to section 77(3)(a)(ii) (A) of the Police Act in the March 18, 2021 Discipline Decision was that of recklessly using significant force against the Complainant contrary to Provincial Standards for the use of CEWs. Specifically, it was determined that:

(i)The Member had not witnessed any acts of violence from the Complainant in relation to persons or property. Although some Officers maintained that pre-assaultive cues were evident, there is no evidence that the Complainant had actually acted to assault anyone or threaten such action;

(ii)The Complainant had retreated away from the four Officers that had ultimately arrived, seeking to put distance between himself and those attempting to enforce his removal;

(iii)The Member had confirmed that there was no apparent urgency to force the removal of the Complainant from the Hotel, and as such no potential immediate risk to life or safety of any person. The only risk that was on the horizon was the risk of increased aggression if the Officers present pressed the issue of immediately handcuffing the Complainant;

(iv)At the point where the CEW was displayed and later discharged by the Member, the Complainant was contained by four Officers in a defined area. There was no urgency to immediately complete the arrest nor imminent risk to anyone;

(v)The Member had not reasonably considered taking time for a risk assessment and the appropriateness of continuing the de-escalation efforts of Cst. G. Such action was required by section 1.3.1 (1) and (2) of the Provincial Standards for CEW use;

(vi)The Member had not conferred with Cst. G on her de-escalation efforts before deciding to intervene and abandon that tact. In fact, the Member had not given any serious consideration to the appropriateness of de-escalation efforts, which may have been appropriate given the possible mental health or medical issues that may have been affecting the Complainant;

(vi) Cst. G had achieved some success with the Complainant in complying with directions to give his name and to move away from Cst. G;

(vii)The Member had not considered the applicability of a potential approach in dealing with the Complainant that was consistent with

emerging mental health or other imminent medical issues before acting in the deployment of his CEW. Other officers present had noted the possibility of such issues affecting the actions of the Complainant;

(viii) The dramatically increased use of “presence” was available once the Member and Csts B and E had joined Cst. G in the lobby; and

(ix) There was no imminent risk of bodily harm from the Complainant absent the potential for such risk if increased force were used by the four Officers present.

V Submissions of Counsel for the Member

- (12) Counsel submits as an overview submission that the circumstances of this case warrant recognition of the principle that correction must take precedence over punishment reflecting the intention of section 126(3) of the *Police Act*.
- (13) Counsel acknowledges the submission of the Complainant that a “significant deterrent disciplinary measure” is required. However, Counsel submits that the process evolving from the initial complaint and subsequent discipline proceeding has clearly had a profound effect on the Member as he has recognized the genuine need to exhaust de-escalation efforts before resorting to the use of force.
- (14) Counsel submits that a reasonable and well informed member of the public would conclude that a reprimand and further training is well within the range of appropriate penalties in this case.
- (15) I will address Counsel’s specific submissions as I review the factors set out in section 126 of the *Police Act*.

VI Aggravating and Mitigating Circumstances

- (16) I will now turn an analysis of the relevant factors set out in s. 126 of the *Police Act*.

(i) Seriousness of the Misconduct s. 126(2)(a)

- (17) The Member's misconduct was serious in that it not only resulted in injuries to the Complainant, but also overlooked the very real likelihood that the incident in question was due to mental, medical or other physical health issues affecting the Complainant. The misconduct not only resulted in a forced and highly physical take down of the Complainant, but also his hospitalization.
- (18) There was no urgency for any of the actions taken by the Member and no reasonable basis not to follow the dictates of the Provincial Standards in terms of considering de-escalation and lesser use of force options. As well, the Member failed to consult with the initial officer of scene, Cst. G, to understand the challenges posed by the Complainant and the progress that had been made with de-escalation efforts.
- (19) The Member's actions were not a simple error in judgment in the heat of an evolving criminal investigation. In entering the Hotel lobby, failing to consult Cst. G and taking charge of dealings with the Complainant, the Member acted in a manner that was reckless as to his legal authority to deploy his CEW. Furthermore, the Member's actions were not taken for good and sufficient cause as no immediate urgency to act existed.
- (20) Although the Member's actions were not malicious, they were reckless and resulted in a failure to consider the circumstances of the Complainant as well as Officer safety.
- (21) Counsel submits that the Member "*acknowledges that the use of a CEW could be considered to increase the seriousness over cases dealing only with empty-handed tactics*" (submissions, para 15) Counsel also advises that the Member accepts the findings concerning the use of force in the Discipline Decision and acknowledges the impact of the incident of the Complainant.
- (22) The submission is made, however, that the Member acted without malice towards the Complainant and the force applied to the Complainant was only as much as necessary to control him.
- (23) I can certainly agree that the Member acted without malice towards the Complainant. However, I cannot agree that the force applied was "*only as much as necessary to control the Complainant*". The force used was excessive and at the time it was used, was not necessary.

(24) I find that such use of force in deploying and discharging the CEW was an important element of the seriousness of the Member's misconduct as such use of force escalated events without justification.

(25) As noted in the Discipline Decision, there are concerning parallels with the circumstances of Mr. Dziekanski considered in the Braidwood Inquiry referenced in the Discipline Decision. It is not only pre-assaultive cues that have relevance in the exercise of policing discretion, other cues, such as possible mental health, addiction or medical issues can also have significant importance in decision making. Failing to adequately take such matters into consideration is a clear aggravating factor.

(26) The seriousness of Member misconduct has a direct correlation to public confidence in policing and the police discipline process. I am satisfied that members of the public made aware of the Member's misconduct in this case would be concerned and consider that the transgressions in using the CEW were serious indeed.

(27) As a result, the cumulative effect of the Member's misconduct clearly demonstrated serious blameworthy conduct, a significant aggravating factor.

(ii) Record of Employment s. 126(2)(b)

(28) The information made available to these proceedings concerning the Member's record of employment was outlined in the Final Investigation Report. It was also amplified by submissions of Counsel.

(29) The Member is an officer with approximately six years of experience on general patrol with the Vancouver Police Department. There is no report of a prior substantiated complaint of misconduct before, or after, the incident giving rise to these proceedings.

(30) I'm advised that the Member does not have a Service Record of Discipline. As such, this factor serves it mitigation of the appropriate disciplinary outcome.

(iii) Impact of Proposed Measures on Member, His Family and His Career (s. 126(2)(c))

(31) Counsel submits that the proceedings arising from the initial complaint in this matter have had a profoundly negative impact on the Member's professional and personal life.

- (32) Specifically, Counsel submits that the Member *“has begun to second guess his decisions and actions when dealing with calls involving both regular citizens and dangerous criminals. He knows that being trepidatious on the job is actually dangerous to himself and others, and so he has recently sought out resources to assist in mental health”*.
- (33) Counsel also notes that the Member’s sleep quality is poor with constant replaying of the events surrounding the Complainant and how it might have unfolded differently.
- (34) Counsel notes that any financial penalty resulting from a suspension could have major implications for the Member and his family.
- (35) It is clear, therefore, that the discipline process itself has had a profound effect on the Member and his family. It is also clear that an outcome resulting in a financial penalty to the Member would seriously affect his family given their current circumstances, which I consider relevant as a mitigating factor.

(iv) The Likelihood of Future Misconduct by the Member (s.126(2)(d)

- (36) I find that the likelihood of future misconduct by the Member is minimal.
- (37) The Member has been made aware of the issues arising from acting prematurely in the use of a CEW. Counsel advises that since the incident in question the Member has taken additional training in the use of CEW’s and as well, crisis intervention and de-escalation (“CID”) techniques. As part of those processes, the Member has worked with VPD use of force trainers to incorporate his experience in the ongoing education programs.
- (38) I am confident that with an appropriate element of further training, future misconduct is not likely to take place. As such, these considerations are an important mitigating factor.

(v) Whether the Member Accepts Responsibility for the Misconduct and is Willing to Take Steps to Prevent its Recurrence (s. 126(2)(e)

- (39) The submissions of Counsel for the Member confirm that the Member acknowledges the seriousness of the misconduct that took place. He appears to have now taken responsibility for the misconduct found to be substantiated and already taken further CID training to address the findings in the section 117 and Discipline decisions.
- (40) I am satisfied that there is evidence before me that the Member is willing to take steps to prevent recurrence of the misconduct in issue. Again, this is a mitigating factor.

(vi) The Degree to Which the Municipal Police Department's Policies, Standing Orders or Internal Procedures, or the Actions of the Member's Supervisor, Contributed to the Misconduct (s. 126(2)(f))

- (41) Counsel submits that the Member initially felt that his training supported the course of action he took in dealing with the Complainant. That training focused heavily on the National Use of Force matrix, although it did include training in CID matters.
- (42) There is no evidence before me of any specific department policies, standing orders, internal procedures or actions of the Member's supervisors that might have contributed to the acts of misconduct which are the subject of these proceedings.
- (43) However, the Member's own position appears to confirm that he acted in dealing with the Complainant as he was trained to do. If in fact that is the case, some consideration must be given to a possible need for refinement in training to ensure that the issues raised by Justice Braidwood are properly considered before CEWs are displayed or discharged.
- (44) As noted in the Discipline Decision, simply because the National Use of Force matrix provides the flexibility to use a certain degree of force, such is not always appropriate given the circumstances of the subject before an officer. Mental health, severe addiction medical and other personal issues may well require policies that give a high priority to proper consideration of such cues and use of CID techniques before using force. Such is clearly contemplated by the Provincial Policing Standards, however, the practical application of such direction may require refinement.

(vii) The Range of Disciplinary or Corrective Measures Taken in Similar Circumstances s. 126(2)(g)

- (45) Counsel for the Member submitted a limited survey of earlier disciplinary decisions arising under the *Police Act* relating to similar acts of misconduct.
- (46) A review of the range of disciplinary or corrective measures taken in similar circumstances is important to ensure that some degree of parity is applied to members dealing with misconduct sanctions in similar circumstances.
- (47) As is often the case, the detail associated with these decisions that is available for review is very limited. As such, I cannot find a great deal of assistance in considering the decisions advanced for my review.

(viii) Other Aggravating or Mitigating Factors

(48) I find that it is relevant to consider the following as other mitigating circumstances:

- (a) The Member was a credible witness in describing the evolution of events, his involvement with the Complainant and his justification for acting as he did;
- (b) The Member was clear in accepting the results of the Discipline Decision and has already embarked on training to help fill the potential gaps in his skill sets; and
- (c) The Member was not acting maliciously when dealing with the Complainant, rather he was reckless acting in what he believed to be the correct course of action to protect his colleagues. The fact that he was incorrect in coming to that decision does not mean he was acting in bad faith.

(49) Finally, I consider it relevant as an aggravating factor that the strong and clear cautions of Justice Braidwood to policing agencies in dealing with individuals with possible mental health, severe drug reactions or other impairments did not result in the Member seriously considering something other than a near immediate use of a CEW to complete an arrest. There was no immediate risk posed by the Complainant and no evident urgency to secure his prompt removal from the hotel lobby. There were no weapons brandished by the Complainant and no assaults had taken place which might have raised concerns over the need for an immediate take down of the Complainant through the use of a CEW.

(50) Clearly, the Member's priority was protection of his colleagues in completing an arrest. The condition and possible needs of the Complainant were, at a minimum, secondary to the need for the use of force and not given serious consideration by the Member.

(51) The Braidwood Commission provided its recommendations more than 10 years ago and it appears that at least in this case, CID techniques did not take the prominence that was recommended in dealing with distraught individuals for officers such as the Member. This cumulative failure on the part of the Member is a significant aggravating factor.

IX Analysis

(52) Section 126(3) of the *Police Act* provides that if I consider that one or more disciplinary or corrective measures are necessary, I should prioritize an approach that seeks to correct and educate the Member, unless it is unworkable or would bring the administration of police discipline into disrepute.

(53) I have specifically considered the position of the Complainant on appropriate disciplinary outcomes. I am not satisfied, however, that in the circumstances of this case and this officer a suspension of any duration serves any useful outcome, nor is any other punitive measure appropriate.

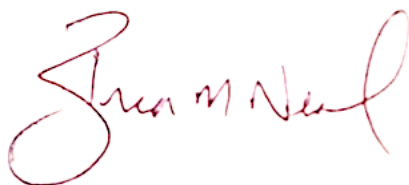
- (54) The goal here must be to ensure that similar circumstances giving rise to the substantiated misconduct allegations are not repeated. In that regard as noted above, I am satisfied that the Member will not repeat such misconduct, and as a direct result of his efforts, there is the real possibility that future training may provide other officers with the opportunity to reflect on the use of CID techniques before using force.
- (55) Having considered all of the foregoing, including the aggravating and mitigating factors noted above, as well as the evidence adduced during the Discipline Proceeding process, I am satisfied that the focus of this decision must be to sanction the Member's use of force and to educate the Member on the issues arising from this matter. Such an approach would not, I find, bring the administration of police discipline into disrepute but would achieve correction of the Member's conduct.

X Conclusion and Orders

- (56) Policing is a most challenging career. Officers are required to make assessments and decisions to enforce the law while protecting the public and themselves with little time for reflection or analysis. Reviews, such as this process, have the luxury of months to consider that might have occurred in minutes. The consequences of mistakes are, at times, very severe.
- (57) However, officers are also provided extraordinary powers and authority to act in service of the law. Training in developing appropriate decision making and analysis skills is critically important. Justice Braidwood provided extensive guidance on the navigation of use of force decisions involving distraught individuals. Those recommendations were incorporated into the Provincial Policing Standards, and subsequent training for officers throughout the Province.
- (58) As noted, in the circumstances of this case, I am satisfied that recognition of the extreme challenges of policing requires an outcome that both sanctions the misconduct that took place, but also focuses on supporting the Member with re-education and training.
- (59) Given the foregoing, in accordance with section 128 of the Police Act, I propose that the Member receive a written reprimand addressing the substantiated misconduct. It is also proposed that the Member engage in further education to enhance and reinforce his skills in situation analysis, de-escalation techniques and the awareness of issues associated with individuals struggling with addiction and mental health challenges. In reaching that conclusion I have considered the training that has already been completed by the Member. I remain convinced that further similar training has high value in supporting and educating the Member in the exercise of his various duties.

(60) These corrective measures will be undertaken under the supervision of, and completed to the satisfaction of, the Professional Standards Branch of the Vancouver Police Department and the OPCC.

(61) In conclusion, I am satisfied that the disciplinary and corrective measures proposed will assist in ensuring that the Member performs his role in policing without further default. I am also hopeful that the measures taken will reinforce confidence in the administration of justice relating to police discipline matters.



Brian M. Neal Q.C. (rt)
April 23, 2021
Victoria, B.C.

(Form 4)

Name of member/former member involved: **Constable** [REDACTED] (the "Member")

Police department, designated policing unit or designated law enforcement unit:

Vancouver Police Department

Date of discipline proceeding: February 19, 2021

In relation to the allegation of misconduct found to be proven, the following disciplinary or corrective measures are proposed:

Misconduct:

Abuse of authority in using unnecessary force on a person, section 77(3)(a)(ii)(A) of the *Police Act*, substantiated

Aggravating/mitigating factors:

See Reasons above

Disciplinary/corrective measures:

Concurrent on both matters:

- (1) A written reprimand;
- (2) An order for re-education and re-training of the Member in:
 - (i) Situational awareness,
 - (ii) CID techniques, and
 - (iii) Awareness of issues associated with individuals struggling with addiction and mental health challenges

TAKE NOTICE:

If you are aggrieved by the disposition of your case, you may file with the police complaint commissioner a written request for a public hearing or review on the record. The police complaint commissioner must receive the request within 20 business days after you receive the discipline authority's report of the discipline proceeding under section 133 (1) (a) of the Police Act. Unless a public hearing or review on the record is arranged by the Police Complaint Commissioner, the findings and reasons set out in Form 3 and the determination as to appropriate disciplinary or corrective measures set out in this Form 4 in respect of the matter are final and conclusive and not open to question or review by a court on any ground.

Dated this 23rd day of April 2021

Brian M. Neal Q.C.(rt),

Discipline Authority

FOR FURTHER INFORMATION, CONTACT THE OFFICE OF THE POLICE COMPLAINT COMMISSIONER AS FOLLOWS:

Office of the Police Complaint Commissioner 5th Floor, 947 Fort Street, PO Box 9895, Stn. Prov. Govt., Victoria BC
V8W 9T8
Ph. 250-356-7458

Police Act (BC)

133(6) Unless a public hearing or review on the record is arranged by the police complaint commissioner, the findings referred to in subsection (1) (a) (i) and the determination as to appropriate disciplinary or corrective measures recorded in the disposition record in respect of the matter are final and conclusive and not open to question or review by a court on any ground.

136 (1) A written request for a public hearing or review on the record, from a complainant or member or former member described in section 133 (5) [*review of discipline proceedings*], must be received by the police complaint commissioner within 20 business days after the complainant or member or former member, as the case may be, receives the report referred to in section 133 (1) (a).