



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2019-17122

August 24, 2020

To: Ms. [REDACTED] (Complainant)

And to: Constable [REDACTED] (Member)
c/o Victoria Police Department
Professional Standards Section

And to: Inspector [REDACTED]
c/o Victoria Police Department
Professional Standards Section

And to: The Honourable Judge Carole Lazar, (ret'd) (Retired Judge)
Retired Judge of the British Columbia Provincial Court

And to: Her Worship Mayor Barb Desjardins
Lead Co-Chair, c/o Victoria and Esquimalt Police Board

On November 26, 2019, our office received a complaint from Ms. [REDACTED] describing her concerns with a member of the Victoria Police Department (VicPD). The OPCC determined Ms. [REDACTED] s complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the VicPD to conduct an investigation.

On July 9, 2020, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On July 23, 2020, Inspector [REDACTED] issued his decision pursuant to section 112 in this matter. Specifically, Inspector [REDACTED] identified four allegations of misconduct against Constable [REDACTED]. He determined that the allegations of *Abuse of Authority*, *Neglect of Duty*, and *Discourtesy* against Constable [REDACTED] did not appear to be substantiated.

On August 8, 2020, Ms. [REDACTED] advised the OPCC that she disagreed with Inspector [REDACTED] s decision and requested that I exercise my authority to appoint a retired judge to review the matter.

Clayton Pecknold
Police Complaint Commissioner

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Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

Background

On November 22, 2019, Ms. [REDACTED] reported that her vehicle was stopped by VicPD Constable [REDACTED] on Bear Mountain Parkway in Langford. Ms. [REDACTED] was in the company of her six-year-old son and her husband Mr. [REDACTED] who was driving the vehicle. Mr. [REDACTED] presented his Chinese driver's licence and translation documents to Constable [REDACTED], who indicated he was not able to discern whether the driver's licence was genuine. Ms. [REDACTED] alleged that Constable [REDACTED] made rude and discriminatory remarks, including that Chinese people are prone to fabricate their driver's licences. Mr. [REDACTED] was issued a violation ticket for driving without a valid driver's licence and was allowed to drive away to their residence that was five minutes up the road.

DA Decision

On July 23, 2020, the Discipline Authority issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified and considered several allegations of misconduct against Constable [REDACTED]

The Discipline Authority found that the evidence did not support that Constable [REDACTED] made the comments alleged by Ms. [REDACTED] regarding Chinese persons being prone to fabricate their driver's licences. The Discipline Authority noted that Constable [REDACTED] had no independent recollection of the traffic stop and that he denied he would ever make that comment to anyone. The Discipline Authority stated that English was not Ms. [REDACTED]'s first language and that she was unsure exactly what Constable [REDACTED] had said to her in regard to Mr. [REDACTED]'s licence. He also concluded that her 911 call immediately following the traffic stop did not mention Constable [REDACTED] referring to fabricated licences. The Discipline Authority further commented that Constable [REDACTED] may have shared his Insurance Corporation of British Columbia (ICBC) training with her that referenced the apparent prevalence of fraudulent Chinese driver's licences.

The Discipline Authority determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(iii) of the *Police Act* for using profane, abusive, or insulting language to any person that tends to demean or show disrespect to the person on the basis of that person's race to Ms. [REDACTED] did not appear to be substantiated.

With respect to the allegation of *Discourtesy* pursuant to section 77(3)(g) of the *Police Act*, the Discipline Authority found that the evidence did not support that Constable [REDACTED] said to Mr. [REDACTED] "Chinese are liars" and told Ms. [REDACTED] to "fuck off."

The Discipline Authority considered whether Constable [REDACTED]'s conduct of allowing Mr. [REDACTED] to drive away after being issued a violation ticket for not possessing a valid driver's licence would amount to *Neglect of Duty* pursuant to s.77(3)(m)(ii) of the *Police Act*. The Discipline Authority found that Constable [REDACTED] allowed Mr. [REDACTED] to drive home after issuing him the

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ticket, which was a proper use of police discretion given that Mr. [REDACTED] was not an inexperienced driver, had not consumed any alcohol, was in the company of his wife and young son, and was a short distance from his residence. The Discipline Authority concluded that that the allegation of *Neglect of Duty* was not substantiated.

Finally, the Discipline Authority found that Constable [REDACTED] did not commit *Neglect of Duty* pursuant to s.77(3)(m)(ii) of the *Police Act* by failing to take adequate notes of the incident. Though the Discipline Authority expressed concerns that Constable [REDACTED] was unable to independently remember any of the events after reviewing his notes, Constable [REDACTED]' hand-written notes and police report were found to have contained sufficient detail and were not so inadequate as to constitute misconduct.

OPCC Decision, Section 117 of the Police Act

The Discipline Authority appears to have disproportionately given Constable [REDACTED] evidence more weight despite his lack of independent memory of the events. More concerning is that a witness officer interviewed during the investigation who was partnered with Constable [REDACTED] had some independent memory of other events around the same time. The gaps in the evidentiary record left by Constable [REDACTED] inability to recall the incident were resolved in the member's favour by the Discipline Authority's interpretation and justifications of Constable [REDACTED] actions not founded objectively upon the evidence.

Further, the evidence of Ms. [REDACTED] and Mr. [REDACTED] are internally and externally consistent with each other regarding Constable [REDACTED] demeanor. The DA appears to have inappropriately given less weight to their evidence based on minor gaps in their statements and their comprehension of the English language. For example, Mr. [REDACTED] was confident that he heard Constable [REDACTED] tell him "Chinese are all liars" while standing right next to him. However, the Discipline Authority found this evidence was not clear, convincing, and cogent to ground the misconduct because Mr. [REDACTED] s English was not strong and Ms. [REDACTED] did not make specific reference to it in her evidence. Ms. [REDACTED]'s evidence was consistent regarding Constable [REDACTED]' repeated statements that most Chinese driver's licences are fake, which would further corroborate the tenor of the interaction during the incident.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing The Honourable Judge Carole Lazar, retired Provincial Court Judge, to review this matter and arrive at her own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter

pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.

Take Notice: That on April 8, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order No. MO98, the Limitation Periods (COVID-19) Order, pursuant to section 10(1) of the *Emergency Programs Act*. That Order is in effect from the date of the Order until the end of the state of emergency the Provincial Government of British Columbia declared on March 18, 2020, in response to the COVID-19 pandemic. Should the appointed Retired Judge require further time to issue her decision, we refer her to section 3 of the Limitation Periods (COVID-19) Order.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Registrar