

May 12, 2021

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

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT
AGAINST CONSTABLE [REDACTED] [REDACTED] AND CONSTABLE [REDACTED] [REDACTED] OF
THE VANCOUVER POLICE DEPARTMENT

DISCIPLINE AUTHORITY’S FINDINGS AND REASONS UNDER SECTION 125(1)(b)
(Supplement to Form 3)

TO: Constable [REDACTED] [REDACTED] Member
Constable [REDACTED] [REDACTED] Member

AND TO: [REDACTED] [REDACTED]
Counsel for [REDACTED] [REDACTED]

AND TO: [REDACTED] [REDACTED]
Counsel for [REDACTED] [REDACTED]

AND TO: Clayton Pecknold
Police Complaint Commissioner

- I. Discipline Proceeding – the allegation of misconduct against the members.
 - 1. This Discipline Proceeding pursuant to sections 123 to 125 of the Police Act pertains to an allegation of misconduct against Constables [REDACTED] [REDACTED] and [REDACTED] [REDACTED]. The allegation, which is set out below, concerns whether the members recklessly used unnecessary force. The details of the allegation relate to the members arresting Mr. [REDACTED] [REDACTED] for

uttering a threat. During the arrest the members forcefully took Mr. [REDACTED] to the ground and handcuffed him. The altercation was captured on CCTV. [REDACTED] [REDACTED] a friend of Mr. [REDACTED] was present during the incident.

II. History of Proceedings

2. Ms. [REDACTED] filed a complaint with the Office of the Police Complaint Commissioner on April 22, 2019 alleging misconduct against the officers who arrested Mr. [REDACTED]. The Police Complaint Commissioner determined the complaint was admissible. He directed an investigation into the matter after concluding that the conduct of Constable [REDACTED] and Constable [REDACTED] would, if substantiated, constitute misconduct pursuant to section 77(3)(a)(ii)(A) of the Police Act (intentionally or recklessly using unnecessary force on any person). Sergeant [REDACTED] of the Vancouver Police Department was assigned to conduct the investigation.
3. Sergeant [REDACTED] submitted his Final Investigation Report on December 13, 2019 to the Discipline Authority. Sergeant [REDACTED] concluded that the evidence did not prove the alleged misconduct against Constables [REDACTED] and [REDACTED]. He recommended the allegation be deemed unsubstantiated.
4. On December 31, 2019, Inspector [REDACTED] [REDACTED] as the Discipline Authority, issued his decision pursuant to section 112 of the Police Act. Inspector [REDACTED] determined that the evidence in the Final Investigation Report did not appear to substantiate the allegation of recklessly using unnecessary force pursuant to section 77(3)(a)(ii)(A) of the Police Act.
5. The Police Complaint Commissioner reviewed the allegation and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.

6. On January 28, 2020 the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.
7. On February 12, 2020 I decided the evidence appeared sufficient to substantiate the allegation and a Discipline Proceeding was ordered.
8. The Discipline Proceeding convened on March 30, 2020 and has been adjourned from time to time pursuant to section 123(10). The members testified on January 15, 2021. Counsels' submissions were received on March 19 and May 7, 2021.
9. Pursuant to section 125(1) this decision is due by May 21, 2021.

III. The Allegation and the Police Act

10. The allegation of misconduct pursuant to the Police Act that is relevant to this Discipline Proceeding is set out in Section 77(3). "Misconduct" means:

(3) Subject to subsection (4), any conduct described in the following paragraphs constitute a disciplinary breach of public trust, when committed by a member:

- (a)(ii) in the performance, or purported performance, of duties, intentionally or recklessly
 - (A) using unnecessary force on any person

IV. Evidence

11. The records considered in this proceeding consist of the Final Investigation Report and accompanying documents. As well, I have considered the

testimony of Constable [REDACTED] and Constable [REDACTED] I have also viewed the CCTV footage and considered the submissions of counsel.

V. Discussion of the Evidence

12. In my Section 117 decision I described the members conduct of concern as follows.

a) The conduct of concern relating to Constables [REDACTED] and [REDACTED] arose out of the arrest of [REDACTED] [REDACTED] on April 22, 2019. The members were dispatched to investigate a complaint of a homeless man blocking the entrance to a business premise owned by [REDACTED] Ms. [REDACTED] her renovation contractor Mr. [REDACTED] and Constable [REDACTED] got into a verbal disagreement regarding the use and misuse of 911 telephone calls to the police. Mr. [REDACTED] was described by the officers as angry and aggressive. At one point Mr. [REDACTED] turned towards Constable [REDACTED] and said "I'm going to fucking rock you." Constable [REDACTED] believed he had been threatened and told [REDACTED] he was under arrest for uttering a threat. Constable [REDACTED] and Constable [REDACTED] grabbed Mr. [REDACTED] arms, forced him to the ground, and handcuffed him. The conduct of concern here is whether the members recklessly used unnecessary force against Mr. [REDACTED]

13. I have now had the benefit of hearing the testimony of Constables [REDACTED] and [REDACTED] After reviewing the Final Investigation Report and the records referenced in it and considering the testimony of the members, the following represents my findings in relation to the evidence.

a) Constables [REDACTED] and [REDACTED] arrived at Ms. [REDACTED] business in response to her 911 call. They met Ms. [REDACTED] and Mr. [REDACTED] on the

sidewalk outside the business. Ms. [REDACTED] explained to the members her frustrations with homeless people scaring her staff and interfering with her business. She was upset and felt that it had taken the police too long to answer her call. Constable [REDACTED] told her that there was a non-emergency line she should use to report her concern and that she should not use 911, as it is for emergencies only. Ms. [REDACTED] and Mr. [REDACTED] said this was an emergency and that they would continue to call 911.

- b) The CCTV footage visually records the interaction between the members, Ms. [REDACTED] and Mr. [REDACTED]. There is no audio recording of what is said.
- c) The second video shows the four of them engaged in a discussion commencing at 1 minute 28 seconds and ending at 3 minutes 53 seconds. I am satisfied the evidence proves that Constable [REDACTED] was unable to persuade Ms. [REDACTED] and Mr. [REDACTED] that their concerns did not justify them calling 911. Constable [REDACTED] explained to Mr. [REDACTED] that he could be arrested for public mischief and Mr. [REDACTED] said, "alright arrest me now". Constable [REDACTED] said he did not need to arrest Mr. [REDACTED] and walked away towards the police car. Constable [REDACTED] was already at the police car with the door open. It appears that the members were intending to leave. The video shows Constable [REDACTED] walking to the curb then turning and walking back towards Ms. [REDACTED] and Mr. [REDACTED]. I accept Constable [REDACTED] did this because Mr. [REDACTED] said, "fuck you little guy".
- d) The video continues showing Constable [REDACTED] talking to Ms. [REDACTED] and Mr. [REDACTED]. Constable [REDACTED] right hand is raised and his finger points at Mr. [REDACTED]. The member takes three steps toward

Mr. [REDACTED] as Constable [REDACTED] leaves the police car, closes the door and approaches Mr. [REDACTED]. Constable [REDACTED] stands next to Constable [REDACTED] on [REDACTED] left and both members are facing Mr. [REDACTED] about three feet away. Mr. [REDACTED] and Constable [REDACTED] appear to be having an animated conversation. Mr. [REDACTED] is holding a cup of coffee in his right hand and gesturing at Constable [REDACTED] with his finger. At this point the second video ends and the third video continues to record the incident.

- e) As the third video starts Constable [REDACTED] takes three steps and stands next to Mr. [REDACTED]. The parties continue talking as Mr. [REDACTED] takes his left hand out of his pants pocket. Mr. [REDACTED] turns to his right and is face to face with Constable [REDACTED]. His left hand is out and he is holding his coffee in his right hand. Mr. [REDACTED] then turns back towards Constable [REDACTED] with his left hand raised to approximately chest height and is gesturing at Constable [REDACTED]. Mr. [REDACTED] turns again and faces Constable [REDACTED]. Mr. [REDACTED] left hand is down by his side. Constable [REDACTED] is smiling at this point and then his expression suddenly becomes serious.
- f) At 1 minute 4 seconds into the third video, the members and Mr. [REDACTED] become involved in a physical altercation. Constable [REDACTED] grabs Mr. [REDACTED] arm. Mr. [REDACTED] turns and Constable [REDACTED] grabs his other arm. Constable [REDACTED] knocks the coffee cup out of Mr. [REDACTED] hand and grabs him around the head. Mr. [REDACTED] is taken to the ground by the members. Constable [REDACTED] and Constable [REDACTED] are holding his arms. Mr. [REDACTED] stands up briefly and both members force him back down to the ground.
- g) The officers have control of Mr. [REDACTED] hands and Constable [REDACTED] applies handcuffs at approximately 1 minute 56 seconds.

h) Mr. [REDACTED] remains handcuffed and lying on the ground until other police officers arrive and take over at 3 minutes 17 seconds. While Mr. [REDACTED] is on the ground and handcuffed, Constable [REDACTED] is kneeling on his arm. Mr. [REDACTED] does not appear to be actively resisting. At 5 minutes 54 seconds Mr. [REDACTED] is led away by other officers.

14. Constable [REDACTED] testified at the Discipline Proceeding. He confirmed he and Constable [REDACTED] were standing on the sidewalk and that Constable [REDACTED] was explaining to Ms. [REDACTED] and Mr. [REDACTED] about the proper use of 911 calls. He describes Mr. [REDACTED] as very angry and agitated and he heard Mr. [REDACTED] call Constable [REDACTED] a "fucking little guy". Constable [REDACTED] said he left the three standing on the sidewalk and walked back to the police car. The video then shows him leaving the police car and rejoining the group where he stands next to Mr. [REDACTED]. Constable [REDACTED] said Mr. [REDACTED] was agitated and getting more angry. Constable [REDACTED] felt Constable [REDACTED] needed cover and that he should be in a position to "gain control of Mr. [REDACTED] if he was to strike out".
15. Constable [REDACTED] agreed the video shows that he was smiling. He explained that this facial expression does occur when he is in an anxious situation. Constable [REDACTED] testified that Mr. [REDACTED] directed his attention away from Constable [REDACTED] turned his head towards Constable [REDACTED] and said, "I'm going to fucking rock you". The video shows Constable [REDACTED] smile disappear and very quickly he grabs hold of Mr. [REDACTED]. Constable [REDACTED] testified he believed Mr. [REDACTED] was about to assault him. He said that just before he grabbed Mr. [REDACTED] he told him he was under arrest for uttering a threat. Constable [REDACTED] testified he took hold of Mr. [REDACTED] hand to affect the arrest and prevent Mr. [REDACTED] from assaulting him.

16. Constable █████ testified at the Discipline Proceeding. He described his efforts to explain to Ms. █ and Mr. █████ about the use and misuse of 911 calls. Constable █████ said Mr. █████ said, “fuck you” to him at least once and on several occasions called him “little guy”. Constable █████ had never experienced a member of the public describe him as a little guy. He said he felt Mr. █████ was trying to “size me up implying he would win in a fight”. At one point Constable █████ asked Mr. █████ if Mr. █████ was trying to pick a fight with him. Mr. █████ did not respond other than to say that he was not scared of Constable █████ Constable █████ testified he was talking to Ms. █ and could hear that Constable █████ and Mr. █████ were speaking to each other. He did not hear what they were saying until he heard Mr. █████ say “I’m going to fucking rock you”. He described Mr. █████ tone of voice as angry and aggressive. Constable █████ said he was shocked and thought Mr. █████ meant to immediately assault his partner. Constable █████ said he heard Constable █████ telling Mr. █████ he was under arrest and saw Constable █████ grabbing Mr. █████ hand. Constable █████ said he grabbed Mr. █████ and the two officers took him to the ground and handcuffed him.
17. The video shows the members struggling to gain control of Mr. █████ and then taking him to the sidewalk. At one point Mr. █████ stands up and the officers again take him down. The members do not deliver any blows, strikes or leg sweeps in the course of arresting Mr. █████ The video also shows that Mr. █████ did not strike out at Constable █████ raise his fists or adopt a fighter’s stance prior to being grabbed by the members.

VI. The Law

18. Section 125(1)(a) requires me as Discipline Authority to decide, in relation to the allegation of misconduct, whether the misconduct has been proven.

This Police Act hearing is a civil process. The applicable case law establishes that the standard of proof is a balance of probabilities, and the question is whether there is clear, cogent and convincing evidence establishing that the actions of the officer amount to misconduct. (F. H. McDougall (2008) SCC 53)

19. Counsel for the members referred to and I have considered the decisions in R. v Nasogalauk, Constable Lobel and Constable Hoang O.P.P.C. File No. 2016-11766 and Adjudicator Lazar decision on Constable D. and Constable W. (referred to at p. 10 of their written submission).
20. As well, I have considered the decision of Adjudicator Carol Baird Ellan in O.P.P.C. File No. 2016-11867. At paragraph 32 she states:

“The investigating officer considered the member’s actions from the point of view of whether the arrest complied with Section 25(1) of the Criminal Code. In the recent case of Akintoye v White. 2017 BCSC 1094 Fleming J. considered the test under Section 25. She stated:

[97] Section 25(1) is not a source of extra police powers. Instead 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.

[98] The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements described in Chartier v. Graves. [2001] O.J. No. 634 at para. 54(S.C.), as follows:

1. the officer’s conduct was required or authorized by law in administering or enforcing the law;
2. he or she acted on reasonable grounds in using force: and
3. he or she did not use unnecessary force.

[99] The third requirement focuses on the level or degree of force used.

[100] In R v. Nasogaluak, 2010 SCC 6 (CanLII), the Supreme Court of Canada specified the degree of “allowable” force is

constrained by the principles of proportionality, necessity and reasonableness, cautioning: “courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences” (at para. 32).

[101] A subjective-objective or 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.

21. I am satisfied that, while the subjective beliefs of the members must be considered, the allegation of misconduct in section 77(3)(a)(ii)(A) must also be assessed objectively to determine whether what the members believed and did was reasonable. In OPCC File No. 2016-11505 the Adjudicator discussed the meaning of recklessness in the context of the Police Act. He said:

I would add that the use in the Police Act of the word “reckless” (in both of the s. 77 subsections at issue here) is consistent with the fact the Police Act disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer’s personal intention of “good faith”, rather it also involves an objective question as to the reasonableness of what the officer believed and did. While an officer’s subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable.

VII. Analysis

22. I have listened carefully to the testimony of the members. Both gave thoughtful and straightforward evidence of their interactions with Ms. [REDACTED] and Mr. [REDACTED]. Their testimony was credible, reliable and consistent with their earlier statements. Mr. [REDACTED] did not cooperate with Sergeant [REDACTED] investigation nor did he provide a statement. Although Ms. [REDACTED] recalls that Mr. [REDACTED] said to Constable [REDACTED] "I bet I can rock you", I prefer the evidence and the recollections of the members that Mr. [REDACTED] said "I'm going to fucking rock you".
23. I am satisfied the evidence proves that Constable [REDACTED] had reasonable and probable grounds to arrest Mr. [REDACTED] for committing a criminal offence of uttering a threat. Mr. [REDACTED] threatened to assault Constable [REDACTED] and I accept that Constable [REDACTED] had a duty to and was justified in arresting Mr. [REDACTED].
24. Constable [REDACTED] referred to his understanding of the National Use of Force Model which provides police officers with knowledge and training to assess threats. He testified that Mr. [REDACTED] threat was pre-assaultive, meaning an assault could imminently occur. Section 25 of the Criminal Code authorizes Constable [REDACTED] when acting within the lawful execution of his duties, to use force provided he acts on reasonable grounds and the force he uses is necessary for that purpose. Constable [REDACTED] said that there was no option to deescalate because there was a threat of an imminent assault. I agree with Sergeant [REDACTED] conclusion that Constable [REDACTED] force option was to use physical control, which he did. When viewed objectively, I am satisfied that taking hold of and restraining Mr. [REDACTED] arms was reasonable and was not excessive. The authorities establish that police actions should not be judged against a standard of perfection and officers are not required to use only the least amount of force to successfully achieve their objective. Constable [REDACTED] subjectively believed he needed to use force to arrest Mr. [REDACTED] to gain control of him and

prevent Mr. [REDACTED] from assaulting him. Constable [REDACTED] heard his partner advise Mr. [REDACTED] he was under arrest and he stepped in to assist in the arrest. I accept that Constable [REDACTED] subjectively believed he needed to use force to control and arrest Mr. [REDACTED] and to prevent him from assaulting his partner.

25. Viewed objectively, the members were not reckless in using the force they did to arrest Mr. [REDACTED] after he threatened to assault Constable [REDACTED]. I find the force used by the members was reasonable and not excessive.

VIII. Conclusion

26. The evidence does not prove on a balance of probabilities that Constable [REDACTED] and Constable [REDACTED] recklessly used unnecessary force on Mr. [REDACTED].

David Pendleton

David Pendleton

Adjudicator

May 12, 2021