

March 9, 2021

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

AND

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

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
CONSTABLE [REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

DISCIPLINE AUTHORITY’S FINDINGS AND REASONS UNDER SECTION 125(1)(b)

(Supplement to Form 3)

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

AND TO: [REDACTED]
Counsel for [REDACTED]

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

AND TO: [REDACTED]
Discipline Representative Counsel

AND TO: Clayton Pecknold
Police Complaint Commissioner

I. Discipline Proceeding – the allegations of misconduct against the members.

1. This Discipline Proceeding pursuant to sections 123 to 125 of the Police Act pertains to allegations of misconduct against Constables [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. The allegations, which are set out below, concern, firstly, whether Constables [REDACTED], [REDACTED] and [REDACTED] intentionally or recklessly used unnecessary force, and, secondly, whether the members behaved discourteously towards a member of the public. The allegations of misconduct against Constable [REDACTED] concern, firstly, whether the member conducted herself discredibly and, secondly, whether the member intentionally or recklessly damaged property belonging to a member of the public.

II. History of Proceedings

2. This matter arises from a complaint made by [REDACTED] [REDACTED] regarding the circumstances surrounding his detention and arrest by members of the Vancouver Police Department on July 8, 2018. The police were dispatched to attend a call in the [REDACTED] [REDACTED] of [REDACTED] that a male suspect was yelling and threatening to damage vehicles. Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] located the male, later identified as [REDACTED] [REDACTED] and arrested him for Breach of the Peace. Mr. [REDACTED] was forcefully taken into custody and received some injuries. He was treated at hospital and then transported to the Vancouver city jail by police van driver Constable [REDACTED] [REDACTED]
3. Mr. [REDACTED] filed a complaint on October 15, 2018 alleging misconduct against the officers who arrested him. The Police Complaint Commissioner determined the complaint was admissible. He directed an investigation into the matter after concluding that the conduct of Constables [REDACTED], [REDACTED] and [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 ██████████ of the Vancouver Police Department was assigned to conduct the investigation.

4. Sergeant ██████████ considered the evidence and delivered her Final Investigation Report on March 26, 2019. On April 9, 2019, the Police Complaint Commissioner rejected the Final Investigation Report and directed further investigative steps be taken pursuant to section 98(9) of the Police Act to include an additional allegation of misconduct pursuant to section 77(3)(a)(i) (intentionally or recklessly making an arrest without good and sufficient cause).
5. Sergeant ██████████ continued her investigation, which resulted in her identifying two additional allegations of misconduct. The evidence suggested that the conduct of Constables ██████████ and ██████████ would if substantiated constitute misconduct pursuant to section 77(3)(g) (behaving discourteously towards members of the public). As well, the evidence suggested that the conduct of Constable ██████████ would if substantiated constitute misconduct pursuant to section 77(3)(h) (discreditable conduct).
6. On August 12, 2019 Sergeant ██████████ resubmitted her Final Investigation Report. She concluded that the evidence did not prove the alleged misconduct against Constables ██████████, ██████████ and ██████████. She recommended the allegations be deemed unsubstantiated.
7. On August 26, 2019 Inspector ██████████ as the Discipline Authority, issued his decision pursuant to section 112 of the Police Act. Inspector ██████████ assessed four allegations of misconduct and determined that the evidence in the Final Investigation Report did not appear to substantiate the allegations. The allegations considered by Inspector ██████████ were:

1. *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act*, for intentionally or recklessly making an arrest without good or sufficient cause against Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]
 2. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, for intentionally or recklessly using unnecessary force on any person against Constable [REDACTED], Constable [REDACTED] and Constable [REDACTED]
 3. *Discourtesy* pursuant to section 77(3)(g) of the *Police Act*, which is failing to behave with courtesy due in the circumstances towards a member of the public against Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]
 4. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act*, which is when on or off duty, conducting oneself in a manner that the member knows or ought to know, would likely bring discredit on the police department. Specifically, that Constable [REDACTED] dropped or smeared the personal property of Mr. [REDACTED] in his blood at the scene.
8. The Police Complaint Commissioner reviewed the allegations and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
 9. On September 23, 2019 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.

10. On October 31, 2019 I decided the evidence appeared sufficient to substantiate some of the allegations and a Discipline Proceeding was ordered.
11. The Discipline Proceeding convened on December 4, 2019 and was adjourned from time to time pursuant to section 123(10). The members and three civilian witnesses testified on December 14 and 15, 2020 and counsels' submissions were made on March 4, 2021.
12. Pursuant to section 125(1) this decision is due March 17, 2021.

III. Allegations and the Police Act

13. The four allegations of misconduct pursuant to the Police Act that are relevant to this Discipline Proceeding are 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

(e) damage to property of others, which is

(i) when on duty, or off duty but in uniform, intentionally or recklessly damaging any property belonging to a member of the public

(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.

14. Section 125(1)(a) requires me as discipline authority to decide, in relation to each allegation of misconduct, whether the misconduct has been proven. 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.

IV. Evidence

15. The records considered in this proceeding consist of the Final Investigation Report and accompanying documents. As well, I have considered the testimony of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] the four members and the written submissions of counsel.

V. Discussion of the Evidence

16. In the Section 117 decision following my review of the paper record I described the members conduct of concern as follows.

- a) The conduct of concern relating to Constables [REDACTED], [REDACTED] and [REDACTED] arose out of the detention and arrest of [REDACTED] [REDACTED] on July 18, 2018. The members were dispatched to investigate a

complaint that a male, later identified as Mr. [REDACTED] was yelling and arguing with his friend [REDACTED] [REDACTED] Ms. [REDACTED] had thrown Mr. [REDACTED] wallet out of her ninth floor apartment and he was in the parking lot yelling up to her. A neighbor heard Mr. [REDACTED] threaten to damage vehicles if she did not come down and look for the wallet. When the members arrived, Constable [REDACTED] [REDACTED] attempted to speak to Mr. [REDACTED] Mr. [REDACTED] was described by the officer as hostile and aggressive. Mr. [REDACTED] said he did not have to speak to police and turned away from Constable [REDACTED] who then grabbed Mr. [REDACTED] arm. The complainant shook free from the officer's grasp and turned facing Constable [REDACTED] Within seconds Constable [REDACTED] who was joined by Constables [REDACTED] and [REDACTED] was involved in a physical altercation with Mr. [REDACTED] Mr. [REDACTED] was punched and kned several times before being subdued. He was described by the officers as being actively resistant and assaultive. He was eventually taken to the ground, handcuffed and placed in a leg hobble to prevent him from kicking the officers. Mr. [REDACTED] was arrested for breach of the peace. The conduct of concern here is whether the members had good and sufficient cause to arrest Mr. [REDACTED] and whether they used unnecessary force in doing so. The incident attracted neighbours and bystanders who gathered to watch what was happening. Some of these people complained that the members verbally abused and bullied them. This conduct forms the basis of the allegation that Constables [REDACTED], [REDACTED] and [REDACTED] were behaving discourteously towards members of the public.

- b) Constable [REDACTED] arrived on scene as Mr. [REDACTED] was being subdued. She was driving a police wagon and later transported Mr. [REDACTED] to the Vancouver city jail. While Mr. [REDACTED] was being

held on the ground by the male officers a civilian witness observed a female officer wipe Mr. [REDACTED] bloody face with his fanny pack. The pack ended up in a pool of blood. The alleged conduct of concern here is that Constable [REDACTED] wiped Mr. [REDACTED] bloody face with his fanny pack and in doing so conducted herself in a manner that she knew or ought to have known would likely bring discredit to the police department.

17. I have now had the benefit of hearing the testimony of Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] as well as the testimony of [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED]. After reviewing the Final Investigation Report and the records referenced in it and considering the testimony of the witnesses and the members, the following summary represents my findings in relation to the evidence.
- a) [REDACTED] [REDACTED] arrived at [REDACTED] [REDACTED] apartment in the [REDACTED] [REDACTED] of [REDACTED] around 03:00 on July 8, 2018. He had attended a music festival and said he smoked marijuana but denied using any other drugs or alcohol. He could not get into the building and was rattling the door and loudly yelling up to Ms. [REDACTED] to let him in. She eventually did but not before his yelling woke up the apartment manager [REDACTED] [REDACTED] and a neighbour [REDACTED] [REDACTED]. Mr. [REDACTED] asked [REDACTED] to stop and [REDACTED] told him to “fuck off”.
 - b) [REDACTED] [REDACTED] a friend of [REDACTED] [REDACTED] mother, had been staying at Ms. [REDACTED] apartment for a few days. She was awoken around 03:00 or 04:00 by Mr. [REDACTED]. He was outside the apartment building yelling. She said he came upstairs and she heard Ms. [REDACTED] and Mr. [REDACTED] arguing. She left the apartment and walked to the beach then returned around 06:00. It was quiet in the apartment and she went back to sleep. At around 08:30 she

woke up. Mr. [REDACTED] was now downstairs in the parking lot yelling and screaming about “wanting his fucking wallet”. She got dressed and went downstairs to calm him down.

c) [REDACTED] [REDACTED] and [REDACTED] [REDACTED] were in a relationship in July 2018. She did not go to the concert with him but let him into the building that morning. She and Mr. [REDACTED] got into an argument about a photograph she found on his telephone. She was upset and threw his wallet out the window when he was sleeping. When [REDACTED] discovered his wallet was gone he went downstairs to the parking lot to look for it. He was angry, upset and yelled up to Ms. [REDACTED] to come down and locate the wallet. This occurred somewhere between 08:30 and 09:00. The commotion Mr. [REDACTED] was causing woke several neighbours including [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED]

d) Mr. [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] were interviewed and gave statements. They described Mr. [REDACTED] as aggressive. He was screaming and threatening to damage cars in the parking lot unless Ms. [REDACTED] came down to help him find the wallet. Mr. [REDACTED] spoke to Mr. [REDACTED] from his apartment and told him to stop yelling. Mr. [REDACTED] told him to “come down here” which Mr. [REDACTED] took as a threat. Mr. [REDACTED] called 911 at 09:10 to report what was happening in the parking lot.

e) Sergeant [REDACTED] interviewed [REDACTED] [REDACTED] on April 17, 2019 some nine months after the incident. Ms. [REDACTED] also gave a statement to Constable [REDACTED] in the parking lot after Mr. [REDACTED] was arrested. Ms. [REDACTED] testified at this hearing. Ms. [REDACTED] confirmed that Mr. [REDACTED] arrived at her apartment and went to sleep. She found some information on his telephone and became upset. She threw

his shoes and wallet out the window, then woke him up and confronted him. She and Mr. [REDACTED] argued and she told him she threw his wallet out the window. Ms. [REDACTED] confirmed he went downstairs to look for the wallet and that he was yelling very loudly and making a scene. On July 8, 2018 she spoke to Constable [REDACTED] and told him that Mr. [REDACTED] was in the parking lot speaking to her on his telephone as the police were arriving. She told Constable [REDACTED] that Mr. [REDACTED] said he was going to walk over to the parking lot to cause a scene with the police and make her watch and feel responsible for it. She also told Constable [REDACTED] that she and Mr. [REDACTED] took caps of ecstasy. Ms. [REDACTED] testified she did not want to go down to the parking lot because Mr. [REDACTED] was in such a state that she could not calm him down. She asked Ms. [REDACTED] to go down. Ms. [REDACTED] eventually went downstairs and saw Mr. [REDACTED] on the ground, handcuffed and surrounded by police officers. She did not see the physical altercation between Mr. [REDACTED] and the police.

- f) As a result of Mr. [REDACTED] 911 call, the Vancouver Police Department dispatched officers around 09:14. Constables [REDACTED] and [REDACTED] who were in plain clothes and in an unmarked police car, arrived first. Constable [REDACTED] was driving. Constable [REDACTED] and his partner Constable [REDACTED] arrived shortly thereafter. They were in police uniform and driving a marked police car. Constable [REDACTED] exited the police car and approached Mr. [REDACTED] in the parking lot. Ms. [REDACTED] was standing nearby. Ms. [REDACTED] testified that she was standing about five feet from [REDACTED] when an East Indian guy (Constable [REDACTED], who she realized was an undercover cop, ran by her and grabbed Mr. [REDACTED] and repeatedly punched him. She said it happened very quickly, that neither Mr. [REDACTED] nor Constable [REDACTED] said anything to each

other and that the guy did not identify himself as a police officer until after he started punching Mr. [REDACTED]. It is clear from the evidence that the three people present at the start of the altercation were Mr. [REDACTED], Ms. [REDACTED] and Constable [REDACTED]. Constable [REDACTED] was parking the police car and did not arrive until after the start of the physical altercation. I have listened carefully to the evidence of these three witnesses and I am satisfied that the recollections of Ms. [REDACTED] regarding what occurred just prior to the physical altercation are not accurate and that her evidence on this point is not reliable.

- g) I accept the evidence of Constable [REDACTED] that was corroborated by Constable [REDACTED] that he walked, rather than ran, up to Mr. [REDACTED]. Constable [REDACTED] identified himself as a police officer and said that he wanted to talk to him. Ms. [REDACTED] said that there was no conversation. In fact, Mr. [REDACTED] testified he and Constable [REDACTED] did speak to each other. Mr. [REDACTED] said that the "regular guy" approached him in the parking lot and asked what he was doing. Mr. [REDACTED] told Constable [REDACTED] he was looking for his wallet. Constable [REDACTED] testified Mr. [REDACTED] walked away and said, "I don't have to talk to you where is my wallet". Constable [REDACTED] said he needed to speak to Mr. [REDACTED] and he grabbed Mr. [REDACTED] in the upper shoulder area in an attempt to turn him around. Mr. [REDACTED] agreed that he was grabbed and that he turned to face Constable [REDACTED]. Mr. [REDACTED] testified that the officer did not identify himself as police; however, I accept Constable [REDACTED] evidence that he did identify himself and I am satisfied Mr. [REDACTED] knew the police were there to investigate. Ms. [REDACTED] said the officer ran up to Mr. [REDACTED] and just started punching him. The evidence of Constable [REDACTED] and Mr.

██████ proves that Ms. ██████ recollections about what happened at the start of the altercation are not reliable.

- h) Mr. ██████ testified that when he turned around he was punched several times. Constable ██████ testified that Mr. ██████ turned and faced him in a bladed fighter's stance with his fists raised in the air. Constable ██████ was interviewed by Sergeant ██████ and told her that he believed that Mr. ██████ was going to assault him. He said:

B Okay. So, I guess what I'm trying to get at, I suppose, I'm trying to figure out, so once you grab him and then he squares off with you, what happens? How, how does, how does the, the fight start?

D Well, he squares off with me.

B Okay.

D Um, I have no time to get into a, you know, big verbal de-escalation situation. I, I don't need to get punched first.

B Mm-hmm.

D If I'm punched first, then I put other, my partners at risk and other members of the public at risk, so...

B Okay.

D Um, that is him saying that he needs to fight, that he, sorry, that he wants to fight. And that's me being like, okay, I need to do my job and act here before he acts on me.

B Okay. And then so tell me then how it is that you, what action did you take?

D I believe I punched him.

B Okay. And do you know where?

D I believe in the head.

B Okay.

D Yeah.

B And tell me what was the purpose of punching him in the head?

D Well, I needed to subdue this male, and I've been trained wherever the head goes, the male goes. And I wanted to gain control of this guy. He'd been resistant since the point, um, since I pulled up on scene, and I needed to deal with him. I didn't want him to get away, so I punched him.

B Okay. And then what, what happened after that first punch?

D After the first punch, he, the fight was on. He just continued to resist.

B Okay.

D And I struggled getting him into handcuffs.

B Okay.

D I couldn't get him into handcuffs at this point.

B And how was he resisting?

D He was fighting back. He was pulling away. He was refusing to give up his arms...

B Okay.

D ...and continued to be assaultive towards me.

B Was he punching?

D I believe so.

B Okay. Do you recall any other actions that he was doing?

D (No audible response)

B You said he was assaultive. How was he assaultive?

D Well, he was refusing to give up his hands.

B Mm-hmm.

D Um, and getting in a fight with me. Pushing away.
Trying to get away.

B If, if you look at the National Use of Force Scale,
where does he sort of fall in for you as, as far as his
demeanour, uh, before the fight?

D He was actively resistant.

i) Mr. ██████ provided a statement in a telephone interview with Sergeant ██████ on February 4, 2019. He also testified at the Discipline Proceeding on December 14, 2020. He said he was in the parking lot looking for his wallet. He said he was upset, very angry and yelling but he did not recall saying he would damage vehicles. The evidence of the neighbours as well as Ms. ██████ and Ms. ██████ proves that Mr. ██████ was threatening to damage vehicles. He denied taking drugs but admitted smoking marijuana and he could not recall how much sleep he had had. The evidence proves that he would not have had much sleep.

j) Mr. ██████ was asked to describe what happened after he was grabbed by Constable ██████ He said:

Q I suggest to you what actually happened is, you knew that he was police.

A Nope.

Q You turned around to walk away and he grabbed you by the arm to prevent you from walking away because he wanted to talk to you.

A Oh, that's how it's handled? You just grab someone by their body and say, "Hey let me speak to you?" How long is guy trained for his job? Like, let's be real here.

Q Okay, but that's what happened, you took offense to the fact that he grabbed you by the arm and said he wanted to talk to you, right?

A Someone grabbed me by the arm, yeah, it's not going to go the way you want it.

Mr. [REDACTED] also said:

Q Okay, the guy with the baseball hat grabbed you by the arm and you decided it was not going to go the way he wanted, right?

A Well, I'm not going to just let someone grab me.

Q You were going to fight back?

A No, because I didn't fight back. I didn't --

Q But you wanted to.

A It doesn't matter what I wanted or what I did. What happened is what happened. And you already know what happened.

Mr. [REDACTED] was asked during cross examination to explain what he meant when he told Sergeant [REDACTED] that he was about to retaliate. He said:

Q If we go back onto page 3 of 21, when I asked you a moment ago, "And the people started grabbing me and I was about to retaliate," _this is line 13 on page 21, when people started grabbing you and you were about to retaliate what you meant was I was going to start swinging punches at them, right?

A Like Joe Blow across the street grabbed me and wanted to do that or the guy that we're speaking about?

Q We're not talking about a hypothetical here, sir, we're talking about this actual incident when those --

A Yeah, yeah, you're right, I definitely wanted to, definitely. But, I didn't. I did the right thing, right?

Q Okay.

A I did the right thing, right?

Q Well, sir, going to page 18 --

A I think I did. Pretty sure.

Q The retaliate you meant was you were going to throw punches, but they got you to the ground and hit you before you could throw any punches at them, right?

A No, I see what you're trying to do, you're trying to see if this guy is trying to self-defence for his case, I get that. I get that he wants to say that -- you know, behind wants all that to happen for him in a good sense, but you know what, that didn't play out that way. He pulled over, grabbed me, beat me up, cops helped him, as they do, end of the story. And yeah I would have, I would have done all that if it wasn't a cop, but it was a cop so I did the right thing. He assaulted me because what, he thinks that I was going to throw a punch? I didn't throw any punches. I covered myself. Maybe because I went like this, and he's maybe aware of boxing, what, I put my hands up to cover my face, I'm not going to go and grab him, like.

Q But you were trying to throw punches.

A Nope.

Q You wanted to throw punches.

A No. No. No, no, no, no. Mentally for sure I wanted to throw punches, physically definitely not.

I am satisfied this evidence proves that when Mr. [REDACTED] turned to face Constable [REDACTED] he adopted a boxing stance with his hands up which is consistent with Constable [REDACTED] evidence. I accept that Mr. [REDACTED] did not punch the member and that Constable [REDACTED] punched him several times before Constables [REDACTED] and [REDACTED] arrived.

- k) Constable [REDACTED] testified that he went to assist his partner Constable [REDACTED] who was fighting with Mr. [REDACTED]. Constable [REDACTED] arrived and joined the fray and the three officers eventually subdued Mr. [REDACTED]. All three of the members said Mr. [REDACTED] was assaultive and actively resisted their efforts to control him. The members punched and kned Mr. [REDACTED] during the altercation. Mr. [REDACTED] was handcuffed with plastic ties but continued to kick at the officers. He was placed in a leg hobble. He had a facial injury and was bleeding.
- l) After the altercation, Mr. [REDACTED] was driven to the hospital, treated there and then driven to the Vancouver City jail by police wagon driver [REDACTED]. When Constable [REDACTED] first arrived at the parking lot she found Mr. [REDACTED] on the ground, handcuffed and bleeding. She said her job was to collect any of Mr. [REDACTED] property and to transport him to jail. Constable [REDACTED] testified she picked up a fanny pack and placed it in a clear plastic property bag. Mr. [REDACTED] did not recall having a fanny pack; however, Constable [REDACTED] [REDACTED] vice and Constable [REDACTED] all testified that there was a fanny pack at the scene and I accept the evidence proves that it belonged to Mr. [REDACTED]. Constable [REDACTED] could not recall which police officer handled the pack.

18. As I said in my section 117 decision, the altercation in the parking lot happened very quickly and the members were reacting to a fast-moving, dynamic situation. Having heard the testimony of the witnesses, it is clear that the incident was emotionally upsetting for everyone. The witnesses' subjective perceptions of what occurred are different and I will deal with these matters in the Analysis below.

VI. The law

19. Section 125(1)(a) requires me as Discipline Authority to decide, in relation to each 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)
20. Counsel for the members rely on the decisions in *R. v. Nasogalauk*, *Anderson v. Smith*, *Breen v. Saunders* and *Levesque v. Zanibbi*. I have considered those authorities and I am satisfied that the legal principles expressed therein are applicable to this Discipline Proceeding. I agree the police should not be judged against a standard of perfection (*Nasogalauk*), that consideration must be given to the circumstances as they existed at the time (*Anderson v. Smith*) and that it is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force which might successfully achieve their objective (*Levesque v. Zanibbi*).
21. I am satisfied that, while the subjective beliefs of the members must be considered, the allegations of misconduct in section 77(3)(a)(ii)(A) and (3)(e) must 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

Discourtesy Allegation

22. Mr. [REDACTED] and Ms. [REDACTED] counsel for the members, in their written and oral submissions argued that there is no clear, cogent and convincing evidence that proves beyond a reasonable doubt that Constables [REDACTED] and [REDACTED] were discourteous. Mr. [REDACTED] the Discipline Representative, also submitted the evidence fails to sufficiently prove this allegation.
23. Having considered the record and Ms. [REDACTED] testimony, I have concerns regarding her reliability and credibility. She said she was crying and frantic and I accept the incident would have been very upsetting. I am

satisfied that her recollections of the incident are, for the most part, unreliable. She was confused as to which of the members she dealt with. She testified she spoke with an Asian plain clothed officer named [REDACTED] and that [REDACTED] told her to “shut the fuck up”. I accept the evidence of Constable [REDACTED] [REDACTED] and Constable [REDACTED] [REDACTED] that it was Constable [REDACTED] and not Constable [REDACTED] she spoke to. I found both Constables [REDACTED] and [REDACTED] to be careful, thoughtful witnesses. Both officers said that they did not recall telling Ms. [REDACTED] to shut up and they said that they do not use that kind of language.

24. Constable [REDACTED] interviewed Ms. [REDACTED] after the incident. He took notes of their conversation typing them into his notepad. He said he needed to clarify whether a domestic assault had occurred and he specifically recalled Ms. [REDACTED] telling him that she and Mr. [REDACTED] had taken caps of ecstasy the previous night and that Mr. [REDACTED] had telephoned her from the parking lot saying he was going to cause a scene with the police. Constable [REDACTED] testified that Ms. [REDACTED] was not concerned about her safety and she had no apparent injuries although she was very emotional. Ms. [REDACTED] was asked in cross examination whether she and Mr. [REDACTED] were drug users. She denied ever telling the police Mr. [REDACTED] had taken ecstasy that night or that they had both consumed ecstasy. However, in an interview with Sergeant [REDACTED] in April 2019 she confirmed having a discussion about ecstasy with a police officer on July 8, 2018. It appears that Ms. [REDACTED] is not being forthright in regard to her and Mr. [REDACTED] use of drugs on July 8, 2018.
25. None of the members recall using profanity or being rude in their dealings with Ms. [REDACTED] or Ms. [REDACTED]. Ms. [REDACTED] said that the East Indian officer (Constable [REDACTED]) came up to her and appeared “amped up”. She could not recall the exact words he said to her. She did recall he said he had been working all night and that he had children. Constable [REDACTED]

█████ said that he had not worked that night, that this dispatch was the first call on his day shift which started at 06:45 and that he did not have any children. He had no reason, he said, to have told Ms. █████ any of this. As I said earlier, Ms. █████ description of how the altercation between Constable █████ and Mr. █████ started is not accurate. I find that the events leading up to the arrival of the police as well as the altercation in the parking lot were traumatic and upsetting and have impacted the memories and recollections of Ms. █████ and Ms. █████ I am satisfied the evidence does not support the allegation that Constable █████ was rude to Ms. █████ nor does the evidence support the allegation that Constables █████ and █████ were rude to Ms. █████ I agree with counsel that the evidence does not prove on a balance of probabilities that the members were discourteous.

Discreditable Conduct and Damaging Property Allegation

26. Ms. █████ counsel for Constable █████ submitted that the evidence does not prove that her client conducted herself discreditably in her dealings with Mr. █████ or that she damaged his property. Mr. █████ Discipline Representative counsel, agreed that the evidence does not prove this allegation of misconduct. Constable █████ testified that she picked up a fanny pack at the scene and put it in a property bag. Constable █████ was interviewed by Sergeant █████ and described seeing a blue fanny pack at the scene. Constable █████ said the fanny pack got blood on it because a member wiped Mr. █████ face with it and put it in a pool of blood on the ground. She could not recall which member did this. Constable █████ denied wiping Mr. █████ face with a bloodied fanny pack. █████ █████ was not questioned about the fanny pack at this hearing; however, she did tell Sergeant █████ in April 2019 that a female cop picked up Mr. █████ fanny pack and “rubbed it in his blood, right in front of his face as he was pinned to the ground”. I find the evidence

regarding these allegations is confusing and unclear. Mr. [REDACTED] said he did not recall having a fanny pack and Ms. [REDACTED] and Constables [REDACTED] [REDACTED] and [REDACTED] did not see one at the scene. Constable [REDACTED] saw a police officer wiping Mr. [REDACTED] face with a fanny pack. Constable [REDACTED] said that she did not wipe Mr. [REDACTED] face with a fanny pack. Constable [REDACTED] was very clear on this and was not challenged on cross examination. I found Constable [REDACTED] to be a credible and reliable witness. She was careful and thoughtful and did her best to recall the incident that happened two and a half years ago and in which she had a very minor role and took no notes. Ms. [REDACTED] said she saw a female officer wiping Mr. [REDACTED] face. A logical inference that might be drawn from her evidence is that this officer was Constable [REDACTED]. However, I am not satisfied, for the reasons previously discussed, that Ms. [REDACTED] recollections are reliable enough for me to conclude on a balance of probabilities that it was Constable [REDACTED]. The evidence does not clearly and convincingly prove that Constable [REDACTED] did anything with Mr. [REDACTED] fanny pack that would be considered discreditable or that she damaged Mr. [REDACTED] property.

Unnecessary Use of Force Allegation

27. Ms. [REDACTED] counsel for Constables [REDACTED] and [REDACTED] submitted that her clients use of force in controlling and subduing Mr. [REDACTED] was reasonable and necessary. Counsel submitted that her clients, who arrived after the altercation had started, were obliged to assist Constable [REDACTED] to separate him and Mr. [REDACTED] to prevent injuries and to ensure that there would be no further breaches of the peace. Ms. [REDACTED] argued that the punches and knee strikes delivered by Constables [REDACTED] and [REDACTED] were not excessive.

28. Mr. [REDACTED] Discipline Representative counsel, agreed with Ms. [REDACTED] that Constables [REDACTED] and [REDACTED] did not misconduct themselves. He submitted that once the physical altercation was under way, Constables [REDACTED] and [REDACTED] had a duty to separate Constable [REDACTED] and Mr. [REDACTED] and that the force they used was not excessive. Section 77(4) of the Police Act provides that it is not a disciplinary breach of trust for a member to engage in conduct that is necessary in the proper performance of authorized police work. I agree with counsel that Constables [REDACTED] and [REDACTED] were obliged to intercede in the altercation as part of their police duties. They used reasonable force to control and subdue Mr. [REDACTED] who was actively resisting. The evidence does not prove that Constables [REDACTED] and [REDACTED] recklessly used unnecessary force in arresting Mr. [REDACTED]
29. Mr. [REDACTED] counsel for Constable [REDACTED] submitted that the member was justified in detaining Mr. [REDACTED] to carry out an investigation. Counsel submitted that Constable [REDACTED] use of force, in this case grabbing Mr. [REDACTED] arm and turning him around, was reasonable and justified. Counsel said the evidence proves that when Mr. [REDACTED] turned to face Constable [REDACTED] he adopted a fighter's stance, that Constable [REDACTED] was justified in punching Mr. [REDACTED] and that the force used was reasonable. With regard to the actions of Constable [REDACTED] Mr. [REDACTED] submitted that the member was not justified in detaining Mr. [REDACTED] that the punches he delivered were not justified or necessary and were excessive.
30. Constable [REDACTED] testified at the Discipline Proceeding. He said he was relaxed and calm that Sunday morning and that he had vacation time coming up. The information he received from the police radio dispatch was that an argument between a male and a female had occurred and a male was threatening to damage vehicle windows. He said he had no expectation he would end up in a fight. His intention was to talk to the

male and get his side of the story. Constable [REDACTED] said because he was in plain clothes it was important he identify himself as a police officer. He saw a male matching the description in the parking lot and approached the individual. He stated there was no advantage to not identify himself as a police officer and that it was important to let the person know he was police. Constable [REDACTED] testified he told Mr. [REDACTED] that he wanted to speak to him. Mr. [REDACTED] was walking away and said, "I don't have to talk to you where is my wallet". Constable [REDACTED] said he had no idea about any wallet. Constable [REDACTED] said he needed to talk to Mr. [REDACTED] so he grabbed him in the upper shoulder area and tried to turn him around. Mr. [REDACTED] pulled away and turned to face him.

31. Constable [REDACTED] testified that Mr. [REDACTED] was in a bladed stance with his fists raised, his legs offset and his knees bent. Constable [REDACTED] said Mr. [REDACTED] was actively resistant and demonstrated assaultive behavior. He said, "I believed he wanted to fight and would punch me. My instinctive reaction was to deliver a punch". Constable [REDACTED] said he was by himself, had no cover and did not want to get hit first. Constable [REDACTED] delivered a series of punches before Constables [REDACTED] and [REDACTED] arrived and helped him control Mr. [REDACTED]
32. Mr. [REDACTED] argued that Mr. [REDACTED] was not arrestable and had not committed any offences prior to his encounter with Constable [REDACTED]. Mr. [REDACTED] did not punch Constable [REDACTED] and counsel submitted that the member was not justified in using force and that the force used was excessive.
33. In my October 2019 section 117 decision I said that Mr. [REDACTED] was properly detained for investigative purposes. After hearing the testimony of the witnesses and considering all of the evidence I am satisfied that that decision is correct and that Constable [REDACTED] had proper grounds and

was justified in detaining Mr. ██████████ Constable ██████████ was justified in using force, in this case taking Mr. ██████████ by the shoulder, to stop him from leaving so they could talk. The force used was minimal. I accept Constable ██████████ evidence that he identified himself as a police officer when he approached Mr. ██████████ I am also satisfied that Mr. ██████████ knew the police had arrived at the parking lot. His telephone call to Ms. ██████████ is further proof he knew the police were there. The evidence proves that when Mr. ██████████ turned to face Constable ██████████ he adopted a fighter's stance. Mr. ██████████ acknowledged that he had his hands up but the suggestion was he was adopting a defensive posture. Mr. ██████████ said that he was not going to just let someone grab him and if someone did "it's not going to go the way you want it". Mr. ██████████ also said, "mentally for sure I wanted to throw punches, physically definitely not". Again, his telephone call to Ms. ██████████ where he tells her he is going to cause a scene with the police, is consistent with and further proof of Mr. ██████████ intention to engage the police and make a scene.

34. I accept that Constable ██████████ believed Mr. ██████████ was about to assault him. Constable ██████████ said that there was no time to or option for him to verbally deescalate or retreat. Constable ██████████ intentionally punched Mr. ██████████ I find that the member's subjective belief that he needed to use force to be justified and reasonable. The issue is whether objectively the member was reckless in using force and whether the force was excessive.
35. Section 25 of the Criminal Code authorized Constable ██████████ when acting within the lawful execution of his duties to use force provided he acted on reasonable grounds and the force he used was necessary for that purpose. I am satisfied that the evidence proves that Constable ██████████ was acting in the lawful execution of his duties on July 8, 2018. He was investigating a complaint and he had grounds to detain Mr. ██████████ for those investigative purposes. When viewed objectively, his use of force in

grabbing Mr. [REDACTED] was reasonable and justified. Mr. [REDACTED] was described by several witnesses as angry, aggressive and threatening. When he turned to face Constable [REDACTED] the member believed Mr. [REDACTED] intended to assault him. I accept that Constable [REDACTED] training and understanding of the National Use of Force Model would lead him to believe that Mr. [REDACTED] behavior was actively resistant and assaultive, that there was no option to deescalate and that his force options were limited to empty hand strikes given the circumstances. Again, when viewed objectively, I am satisfied that the punches he delivered were reasonable and were not excessive. The authorities relied on by counsel for the members that were referred to earlier 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. Mr. [REDACTED] continued to actively resist Constables [REDACTED], [REDACTED] and [REDACTED] and I find that the force the members used was reasonable and not excessive. After he stopped resisting and was handcuffed the members did not use any further force. The evidence does not prove that Constable [REDACTED] recklessly used unnecessary force in arresting Mr. [REDACTED]

VIII. Conclusion

36. The evidence does not prove on a balance of probabilities that Constables [REDACTED], [REDACTED] and [REDACTED] recklessly used unnecessary force to arrest Mr. [REDACTED]
37. The evidence does not prove on a balance of probabilities that Constables [REDACTED], [REDACTED] and [REDACTED] were discourteous.
38. The evidence does not prove on a balance of probabilities that Constable [REDACTED] acted discredibly nor did she damage property.

David Pendleton

David Pendleton

Adjudicator

March 9, 2021