



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 2018-14988

September 23, 2019

To: Mr. [REDACTED] (Complainant)

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

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department Professional Standards Section

And to: The Honourable David Pendleton (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: His Worship Mayor Kennedy Stewart
Chair, Vancouver Police Board
c/o Vancouver Police Board

On July 12, 2018, the Office of the Police Complaint Commissioner (OPCC) received a third party complaint from Ms. [REDACTED] [REDACTED] describing her concerns with members of the Vancouver Police Department (VPD) respecting an incident occurring on July 8, 2018. The OPCC determined Ms. [REDACTED]'s complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the Vancouver Police Department to conduct an investigation.

On October 15, 2018, the third party complaint made by Ms. [REDACTED] was discontinued as the affected person, Mr. [REDACTED] [REDACTED], submitted a registered complaint respecting this incident and became the complainant pursuant to sec. 84 of the *Police Act*.

On March 26, 2019, VPD Sergeant [REDACTED] [REDACTED] completed her investigation and submitted her Final Investigation Report (FIR) to the Discipline Authority and OPCC.

Clayton Pecknold
Police Complaint Commissioner

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On April 9, 2019, after conducting a review of the FIR and the evidentiary materials, I determined that the nature and quality of the investigation into this complaint was not adequate. Interviews of the respondent members did not adequately explore material issues and the investigator did not conduct a proper analysis of the evidence. I rejected the FIR and directed further investigative steps pursuant to sec. 98(9) of the *Police Act* to include the addition of an allegation of *Abuse of Authority* for making an arrest without good or sufficient cause. The investigator completed those steps and resubmitted the FIR on August 12, 2019, to the Discipline Authority and the OPCC.

On August 26, 2019, Inspector [REDACTED], as the Discipline Authority, issued his decision pursuant to sec. 112 of the *Police Act*. Inspector [REDACTED] assessed four allegations of misconduct and determined that the evidence in the FIR did not appear to substantiate the allegations. The allegations considered by Inspector [REDACTED] 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] Constabl [REDACTED] and Constabl [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 Constabl [REDACTED] [REDACTED], Constabl [REDACTED] and Constabl [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.

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

The incident in question occurred in the early morning hours of July 8, 2018. The complainant, [REDACTED] [REDACTED], was involved in an interaction with Constable [REDACTED] and Constable [REDACTED] [REDACTED] who were responding to a call by residents who had heard Mr. [REDACTED] shouting up to an apartment, demanding that the person come down to help him find his wallet, or he would damage cars.

Upon arrival, Constabl [REDACTED] and Constable [REDACTED], who were dressed in plain clothes, engaged Mr [REDACTED]. The evidence demonstrates that Constable [REDACTED] grabbed Mr [REDACTED] and delivered several strikes to Mr. [REDACTED]'s face while taking him into custody. Mr. [REDACTED] was restrained with handcuffs and a hobble, then taken to the VPD jail for breach of the peace.

Based on my review of the evidence in the FIR and the Discipline Authority decision, I am of the view that the Discipline Authority has erred in determining that the members' conduct does not constitute misconduct. In particular, the Discipline Authority erred by affording insufficient weight to the evidence of Ms [REDACTED], who was in the immediate vicinity, as opposed the evidence of Mr. [REDACTED] who was across the street and whose evidence was inconsistent with other witnesses. The Discipline Authority further erred in not sufficiently analyzing the objective reasonableness of the evidence of Constable [REDACTED] and his subjective beliefs regarding his authorities to arrest and use force.

With respect to the arrest of Mr. [REDACTED] Constable [REDACTED] and Constabl [REDACTED] responded to a call that was categorized by dispatch as a "noise complaint" or "possible domestic disturbance". Based on the information available to them upon arrival, there were insufficient grounds for arrest. Constabl [REDACTED] conducted no investigation and did not provide Mr. [REDACTED] ith the information required by section 10 of the Charter. He rapidly initiated physical contact by grabbing Mr. [REDACTED] and delivering several strikes to Mr. [REDACTED]s face/head. The evidence is consistent with an intentional decision to first take physical control of Mr. [REDACTED] before determining the nature of the incident.

Similarly, Constable [REDACTED] s application of force reflects rapid escalation that is inconsistent with de-escalation training generally received by VPD officers. I am of the view that the Discipline Authority was incorrect in determining that Constable [REDACTED] possessed the lawful authority to use force in the circumstances and that the force used was reasonable. Even if the authority to use force had existed, the force Constable [REDACTED] used was excessive.

With respect to the third allegation of *Discourtesy*, I am of the view that the Discipline Authority did not engage in sufficient weighing of the evidence provided by witnesses and respondents, including the lack of clarity of the respondent member's recollection. The Discipline Authority also drew a negative inference about the reliability of witnesses' that in my view is inconsistent with the evidence.

With respect to the fourth allegation of *Discreditable Conduct* for placing the complainant's fanny pack in his own blood, the weighing of the evidence was not sufficiently objective. The Discipline Authority determined that Constable [REDACTED] was the officer who placed the complainant's fanny pack in blood, but concluded her actions in doing so was not misconduct.

I am of the view that the Discipline Authority erred in not providing sufficient reasons and considering whether, in the alternative, Constable [REDACTED] s conduct constituted *Damage to the property of others*, pursuant to section 77(3)(e)(i) of the *Police Act*.

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 David Pendleton, retired Provincial Court Judge, to review this matter and arrive at his 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.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Registrar