



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 2021-19261
April 27, 2022

- To: Ms. [REDACTED] (Complainant)
c/o [REDACTED]
- And to: Constable [REDACTED] (Member)
c/o Vancouver Police Department
Professional Standards Section
- And to: Inspector [REDACTED]
c/o Vancouver Police Department
Professional Standards Section
- And to: The Honourable Elizabeth Arnold-Bailey (ret'd) (Retired Judge)
Retired Judge of the Supreme Court of British Columbia
- And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board

On February 11, 2021, the Office of the Police Complaint Commissioner (OPCC) received a registered complaint from Ms. [REDACTED] (complainant) describing her concerns with members of the Vancouver Police Department (VPD). The OPCC determined that Ms. [REDACTED] complaint was admissible pursuant to Division 3 of the *Police Act* (Act) and directed the VPD to investigate the complaint.

On October 15, 2021, Sergeant [REDACTED] (investigator) of the VPD Professional Standards Section completed his investigation and submitted the Final Investigation Report (FIR) to Inspector [REDACTED] (Discipline Authority) and the OPCC.

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Police Complaint Commissioner

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On October 27, 2021, I rejected the FIR and directed further investigative steps. On December 1, 2021, after receiving the re-submitted FIR, the Discipline Authority rejected the FIR and directed the investigator to undertake additional investigative steps.

On March 29, 2022, the Discipline Authority issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified three allegations of misconduct against Constable [REDACTED] and one allegation of misconduct against Constable [REDACTED]. He determined that one allegation of *Neglect of Duty*, pursuant to section 77(3)(m)(ii) of the Act, did appear to be substantiated against Constable [REDACTED].

However, the Discipline Authority determined that the remaining allegations of *Abuse of Authority* and *Discourtesy*, pursuant to sections 77(3)(a) and 77(3)(g) of the Act, against Constable [REDACTED] did not appear to be substantiated. He also found that the allegation of *Neglect of Duty*, pursuant to section 77(3)(m)(ii) of the Act, against Constable [REDACTED] did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the matter I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the unsubstantiated allegations of misconduct against Constable [REDACTED]. I do not have a reasonable basis to believe the decision is incorrect with respect to Constable [REDACTED].

Background

According to the VPD report, on May 8, 2020, police received a complaint from a resident of E 6th Avenue who reported an unknown male “scoping out” backyards and entering into a residential garage.

The complainant, who self-identifies as a transgender woman, advised that she was out for a walk in the area of Kaslo Street and 7th Avenue when she was approached by two VPD members who asked for her identification. The complainant reported that she provided a piece of government-issued identification with her correct gender identity and current name. Constable [REDACTED] queried the complainant on the police database and then informed her that another name with a different gender marker was associated with her identification.

The complainant alleged that Constable [REDACTED] questioned her in an aggressive tone regarding her expired name (also known as a “deadname”) and previous gender marker. The complainant reported that she told Constable [REDACTED] that the name was associated to her “dead twin brother” in order to convey that this was no longer her name. The complainant further reported that Constable [REDACTED] accused her of lying and asked her for further information to confirm her identity. During this interaction, the complainant stated she was advised that police were investigating a “burglary” in the area.

The complainant then reported that after being questioned for approximately one hour, Constable [REDACTED] told her she was “obstructing justice,” placed her in handcuffs, and yelled at her for being a “liar.”

When additional police members arrived on scene, one of them asked the complainant if she was transgender to which the complainant confirmed that she was. The complainant alleged that Constable [REDACTED] then made comments to her about her gender identity, including “oh, you barely notice, you’re doing a good job” and that he “couldn’t tell.” She also reported that the officers openly discussed her transgender identity in front of her, which made her feel “degraded.”

Discipline Authority’s Decision

On March 29, 2022, the Discipline Authority issued his decision. Having reviewed the evidence, the Discipline Authority determined that the *Abuse of Authority* allegation against Constable [REDACTED] did not appear to be substantiated. Specifically, the Discipline Authority found that Constable [REDACTED] lawfully detained the complainant in relation to a Break and Enter investigation, noting that the complainant “generally” matched the reported suspect description and was in the area around the time that the alleged Break and Enter occurred. In addition, the Discipline Authority determined it was reasonable for Constable [REDACTED] to place the complainant under arrest for *Obstruction of Justice*.

In regard to the handcuffing of the complainant, the Discipline Authority found that the complainant was handcuffed for officer safety as part of the investigative detention. The Discipline Authority agreed with the analysis of the investigator who submitted that Constable [REDACTED] was in compliance with VPD policy in handcuffing the complainant to protect the police and to prevent escape.

With respect to the *Discourtesy* allegation, the Discipline Authority found that Constable [REDACTED] was not intentionally discourteous in questioning the complainant regarding the associated “deadname” and that there was a divergence in the evidence between the complainant and the police officers with the respect to the alleged aggressive questioning and comments made by the Constable [REDACTED]

Finally, the Discipline Authority found that the *Neglect of Duty* allegation against Constable [REDACTED] appeared to be substantiated, citing that he failed to advise the complainant of her right to counsel when she was detained for a Break and Enter investigation.

Request for Appointment of a Retired Judge

On April 12, 2022, I received a request from the complainant’s legal representative that I appoint a retired judge to review the FIR pursuant to section 117 of the Act and make his or her own decision in the matter. Section 117 gives me authority to make such an appointment if I consider that there is a reasonable basis to believe the Discipline Authority’s decision is incorrect. A number of reasons were offered in support of their request that can be summarized as follows:

1. The complainant did not sufficiently match the description of the suspect (Caucasian male, mid 20s, medium build, red jacket, and baseball cap) as she was a woman wearing work out pants, ankle weights, and a brown-orange cardigan.

2. Handcuffs were applied to the complainant despite there being no risk to the safety of anybody or of the complainant fleeing; she was incorrectly classified as “passive resistant” as she complied with the officers’ requests by providing identification and was not struggling or trying to flee.
3. The complainant was held by Constable [REDACTED] even after the actual suspect was questioned and had been released, which was relayed over the radio to Constable [REDACTED]

OPCC Decision, Section 117 of the *Police Act*

After review of the Discipline Authority’s decision, I am of the view that the Discipline Authority appears to have erred in not adequately and independently assessing all of the available evidence as to whether Constable [REDACTED] appears to have committed *Abuse of Authority* in detaining, arresting, and handcuffing the complainant.

In regard to the initial detention, I am of the view that the Discipline Authority did not sufficiently consider whether Constable [REDACTED] objectively had reasonable grounds to suspect that the complainant was associated to the Break and Enter investigation, specifically in light of the fact that the complainant did not match a number of the reported suspect descriptors, including the suspect’s gender and age. Additionally, the Discipline Authority did not assess the validity of the complainant’s continued detention once Constable [REDACTED] was notified via radio broadcasts that other officers had located a male who was later determined to be the correct suspect.

With respect to the handcuffing of the complainant, it does not appear that the Discipline Authority adequately considered whether Constable [REDACTED] decision to apply handcuffs was objectively reasonable on the basis of officer safety concerns. Specifically, it does not appear that the Discipline Authority sufficiently accounted for the complainant’s evidence that she demonstrated “continued unaggressive cooperation,” and the evidence from Constable [REDACTED] who described the complainant as “really calm” and that the conversation with the complainant was “friendly.”

Finally, the Discipline Authority appears to have not sufficiently analyzed whether Constable [REDACTED] objectively formed reasonable grounds to believe that the complainant was arrestable for *Obstruction of Justice*. The evidentiary record is consistent that the complainant provided Constable [REDACTED] with a piece of identification (BC Services Card), which included her full legal name and correct gender identity, and answered the officers’ questions to confirm her identity, though she acknowledged that she was not comfortable speaking about the origin of the “deadname” that Constable [REDACTED] located in the police database.

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 Honourable Judge Elizabeth Arnold-Bailey, retired Supreme 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.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Registrar