



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 2020-18524

May 17, 2021

- To: Constable [REDACTED] (Member)
c/o Vancouver Police Department
Professional Standards Section
- And to: [REDACTED] (External Investigative Agency)
c/o Royal Canadian Mounted Police (RCMP)
Professional Standards Section
- And to: [REDACTED] (External Discipline Authority)
c/o Port Moody Police Department
Professional Standards Section
- And to: The Honourable Judge Mr. David Pendleton, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of
British Columbia
- And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section
- And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board

On October 6, 2020, based on a reportable injury received pursuant to s 89 of the *Police Act* from the Vancouver Police Department (VPD), an investigation into the conduct of Constable [REDACTED] was ordered.

On March 31, 2021, the assigned investigator, RCMP Corporal [REDACTED] submitted the Final Investigation Report to the Discipline Authority, [REDACTED] of Port Moody Police Department.

Clayton Pecknold
Police Complaint Commissioner

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On April 19, 2021, the Discipline Authority issued her decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified one allegation of misconduct against Constable [REDACTED]. She determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constable [REDACTED] did not appear to be substantiated.

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 September 14, 2020, the Office of the Police Complaint Commissioner received information from the Vancouver Police Department (VPD) pursuant to section 89 of the *Police Act* in relation to an incident which occurred on September 12, 2020.

According to the Vancouver Police Department, on September 12, 2020, Constable [REDACTED] and his Police Service Dog (PSD) assisted other VPD officers with conducting a "box and pin" of a stolen motor vehicle.

Within the information received from the VPD, Constable [REDACTED] immediately approached the stolen vehicle and gave the driver commands, telling him he was under arrest, to show his hands, and to step out of the car; the driver did not appear to comply. Constable [REDACTED] reached in through the partially open passenger side window and unlocked the car door and deployed the PSD.

DA Decision

The Discipline Authority noted the central question from the Order was whether the PSD was deployed without the driver having the opportunity to surrender. The Discipline Authority further narrowed the assessment of Constable [REDACTED] conduct at para. 18, stating: "As the essence of this matter relates to whether Mr. [REDACTED] was given an opportunity to surrender prior to deployment of PSD [REDACTED] the details of what happened inside the car are not relevant, as PSD [REDACTED] was at that point, "deployed"."

The Discipline Authority - noted that Mr. [REDACTED] knew he was being followed by the police; that Constable [REDACTED] approached and gave commands; that Constable [REDACTED] noted the driver was emotionally distraught, or angry; receiving no response from the driver Constable [REDACTED] retrieved PSD [REDACTED] and returned to give further commands for a matter of 17 seconds; noting the driver failed during two periods of time to surrender and was non-compliant.

The Discipline Authority considered whether the force was necessary in the circumstances - noting the permissible use of dogs under VPD Policy and the BC Provincial Policing Standards (BCPPS), which allow the use of dogs, intermediate weapons, for someone fleeing and the presence of immediate grounds for a dog bite to effect the arrest; or the person is causing bodily harm, or will imminently do so on reasonable grounds. The Discipline Authority noted that the

driver was non-compliant and in a stolen vehicle that he could have attempted to drive away. The Discipline Authority felt Constable [REDACTED] needed to prevent flight and potential harm to the police and public, which she believes meets the BCPPS threshold; adding that the level of force needs to be reasonable in the circumstances, and not exact, nor the least amount of force required.

The Discipline Authority found that reasonable grounds existed for the arrest of the driver, who was given sufficient notice and opportunity to surrender prior to the deployment of PSD [REDACTED] and that the force used was necessary and reasonable in the circumstances.

OPCC Decision, Section 117 of the *Police Act*

Based on the evidence contained in the Final Investigation Report, I am of the view that the Discipline Authority was incorrect in determining that the deployment of the PSD was reasonable in the circumstances, and that it was consistent with Provincial Standards. I am of the view that the Discipline Authority assessed the officer's conduct too narrowly, including when determining that what happened in the vehicle was not relevant. The entirety of the deployment needs to be assessed, including whether the initial deployment and the manner and duration of the deployment were consistent with Provincial Standards, and reasonable and proportionate in the circumstances.

Importantly, the evidence indicates that the vehicle was contained and immobile. The evidence, including independent video evidence, does not support any attempt by the driver to operate vehicle controls, start the engine or flee the scene. Nor does it support the driver behaving aggressively or Constable [REDACTED] being concerned for his safety, particularly when he leaned into the vehicle to unlock the door. Further, while the respondent member suggests the driver did not comply with direction to get out of the vehicle, I am of the view that the Discipline Authority erred in classifying the driver as "non-complaint" when finding the deployment reasonable, rather than assessing whether the driver's behaviour would justify the use of an intermediate weapon in accordance with the National Use of Force Framework.

Video evidence further depicts that Constable [REDACTED] failed to maintain control of the PSD as required by the Provincial Standards. The video depicts Constable [REDACTED] deploying the PSD through the passenger door and the driver then exits through the driver's door, with the PSD re-engaging the driver as he steps out of the vehicle. While the PSD is engaged, Constable [REDACTED] releases the lead and moves around the vehicle before being able to re-establish control of his PSD, during which the PSD remained in contact with the driver, including while the driver was prone on the ground. Medical evidence indicates the driver received four stitches in his right arm and 30 stitches to his lower left leg.

In my view, the evidence demonstrates that the initial deployment of the PSD was not objectively reasonable and that the deployment was not in accordance with Provincial Standard requirements of proportionality, minimizing PSD bites and maintaining control of the PSD.

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

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Honourable Judge Mr. 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.

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 his decision, we refer him to section 3 of the Limitation Periods (COVID-19) Order.



Clayton Pecknold
Police Complaint Commissioner

cc: Corporal [REDACTED] Royal Canadian Mounted Police
[REDACTED], Acting Registrar