

January 24, 2023

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING UNDER SECTION 124

AND

IN THE MATTER OF AN ALLEGATION OF MISCONDUCT AGAINST

CONSTABLE [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

DISCIPLINE AUTHORITY'S DECISION ON DISCIPLINE OR CORRECTIVE

MEASURES

(Supplement to Form 4)

TO: Constable [REDACTED]

AND TO: [REDACTED]
Counsel for [REDACTED]

AND TO: Clayton Pecknold
Police Complaint Commissioner

I. Introduction

1. On December 6, 2022, I delivered my Findings and Reasons under Section 125(1)(b) of the Police Act. I found that Constable [REDACTED] committed misconduct.

II. The Misconduct

2. The misconduct alleged was that the member committed a disciplinary breach of public trust contrary to Section 77 (3)(a)(ii)(A) of the Police Act on September 12, 2020.
3. In my reasons I found the evidence proved on a balance of probabilities that Constable [REDACTED] intentionally used unnecessary force on a person.
4. At paragraphs 21-25 of the decision I said:
 21. I agree with Ms. [REDACTED] there is no real issue or dispute regarding the circumstances of the investigation Constable [REDACTED] was involved in on September 12, 2020. He was patrolling in the Downtown Eastside with his police service dog [REDACTED] when he located [REDACTED] driving a recently stolen BMW. Constable [REDACTED] with the assistance of other VPD members boxed and pinned the stolen vehicle. He exited his patrol car with his gun drawn and ordered Mr. [REDACTED] to get out of the BMW. When Mr. [REDACTED] did not comply, Constable [REDACTED] put his gun away, got [REDACTED] from the patrol car and approached the BMW. The member continued commanding Mr. [REDACTED] to surrender and warned him if he did not that [REDACTED] would bite him. Constable [REDACTED] opened

the BMW passenger door and showed the dog to Mr. [REDACTED] believing that the appearance of the dog would convince Mr. [REDACTED] to give up. Mr. [REDACTED] instead reached his hand towards the console. Constable [REDACTED] thought Mr. [REDACTED] could be reaching for a weapon or was going to put the vehicle in motion so he deployed [REDACTED] with the command to bite. Mr. [REDACTED] was bitten on the arm and quickly exited out of the driver's door. I am satisfied Mr. [REDACTED] was trying to get away from [REDACTED] Constable [REDACTED] gave [REDACTED] a second command to bite Mr. [REDACTED] Constable [REDACTED] let go of the tension on the leash and [REDACTED] followed Mr. [REDACTED] out the door and bit him on his leg. Constable [REDACTED] with the assistance of the other officers present, took Mr. [REDACTED] into custody. Ms. [REDACTED] submitted that Constable [REDACTED] subjective belief was that the situation posed an imminent risk of harm, and the resultant deployment of K9 [REDACTED] was objectively reasonable and in compliance with the applicable policies, standards and this K9 team's training. Counsel submitted that Constable [REDACTED] actions do not amount to intentional use of unnecessary force against Mr. [REDACTED]

22. Mr. [REDACTED] Discipline Representative counsel, submitted that Mr. [REDACTED] evidence proves that he had placed the stolen vehicle into park, had surrendered and that he had no intention of putting the vehicle in motion. The position of Mr. [REDACTED] is that having surrendered, he posed no risk which would justify the deployment of police service dog [REDACTED] with the bite commands while he was in or out of the car.
23. Ms. [REDACTED] counsel for Constable [REDACTED] in her written submission at paragraphs 63-66 states:

63. Cst. [REDACTED] was engaged in the lawful execution of his duty as a peace officer and intentionally used force on Mr. [REDACTED] via the deployment of K9 [REDACTED]

64. We respectfully submit that Cst. [REDACTED] acted in accordance with his training and the Policing Standards with respect to this deployment. The decision to deploy K9 [REDACTED] was reasonable and proportionate to the risks presented by Mr. [REDACTED]

65. In considering the objective reasonableness of Cst. [REDACTED] subjective belief, it may be tempting to engage in a hindsight second-by-second breakdown of all the circumstances facing Cst. [REDACTED] and K9 [REDACTED] – particularly as one views the video footage. However, such an approach is impermissible if it demands perfection from an officer.

66. Cst. [REDACTED] stands by the deployment of K9 [REDACTED] in this matter. However, if the Adjudicator ultimately concludes that the first deployment (bite on arm inside vehicle), or the second deployment (bite on leg outside vehicle), or both were not objectively reasonable and did constitute an error of lawful authority or judgment, there is no serious blameworthy conduct on the part of Cst. [REDACTED] which would support a finding of misconduct.

24. I agree with Ms. [REDACTED] submission that Constable [REDACTED] initial deployment of [REDACTED] into the stolen vehicle with a command to bite was necessary, reasonable and proportionate to the risk posed by Mr. [REDACTED]. The evidence proves on a balance of probabilities that Mr. [REDACTED] was in possession of a stolen vehicle and that Constable [REDACTED] had reasonable and probable grounds to arrest him. Mr. [REDACTED] was acting erratically, did not surrender either at gunpoint or after being warned that the police dog may bite him. Mr. [REDACTED] was in control of the stolen vehicle and he posed a risk to put the vehicle in motion potentially causing serious injuries to the officers and civilians present. I am satisfied that Constable [REDACTED] acted appropriately in deploying the dog into the vehicle with the command to bite Mr. [REDACTED]

However, I find that Constable [REDACTED] use of force in deploying [REDACTED] a second time after Mr. [REDACTED] exited the BMW was unnecessary. Constable [REDACTED] primary concern that Mr. [REDACTED] could put the vehicle in motion justified the first deployment of [REDACTED] but once Mr. [REDACTED] fled the vehicle he was no longer in care or control and posed no risk to the officers or the public. Mr. [REDACTED] was running from the dog. Constable [REDACTED] was standing by the driver's door, there were other officers in the immediate vicinity and more officers are seen on the video responding to the incident. I am satisfied the police would have had no difficulty apprehending Mr. [REDACTED]. I find that the second deployment of [REDACTED] was not proportionate to the level of risk posed by Mr. [REDACTED] to the member, the suspect and the community at large and did not comply with the requirements and standards set out in the Provincial Policing Standards. In this matter there are two separate deployments of the police dog. Although the second deployment occurs within a few seconds of the first, once Mr. [REDACTED] was out of the vehicle and posing no risk to the officers or the public, Constable [REDACTED] was obliged to minimize as much as reasonably possible the likelihood that [REDACTED] would bite Mr. [REDACTED]. By restraining and controlling [REDACTED] Constable [REDACTED] would have prevented [REDACTED] from biting Mr. [REDACTED] possibly biting another officer or a bystander or running into traffic and getting hit by a car. I find that Constable [REDACTED] should have shortened the dog's leash so that [REDACTED] would not follow Mr. [REDACTED] out of the vehicle (see BCPPS 1.4 Police Service Dogs). There was no objective necessity for [REDACTED] to be deployed a second time given these exigent circumstances. To find that Constable [REDACTED] should have restrained [REDACTED] and not deployed [REDACTED] would not, I am satisfied,

demand perfection from the member. The clear, cogent and convincing evidence proves on a balance of probabilities that Constable [REDACTED] intentionally used unnecessary force in arresting Mr. [REDACTED]

5. The evidence referred to above proves that Constable [REDACTED] intentionally used unnecessary force on a person. The discipline proceeding was adjourned to January 20, 2023 to receive submissions from counsel as to the appropriate discipline or corrective measures.

III. Discipline Hearing January 20, 2023

6. Ms. [REDACTED] counsel for the member, provided her written submission on January 20, 2023. The material filed on behalf of Constable [REDACTED] included performance appraisals, commendations and letters and emails attesting to his good character and strong work ethic.

IV. Position of Counsel

7. Ms. [REDACTED] submits that the appropriate corrective measure is to provide a written reprimand to Constable [REDACTED]. She submits that her client understands the importance of the Police Act investigation of his conduct. She says that the finding of misconduct has had a significant impact on Constable [REDACTED] and there is no reason to expect any future misconduct.

V. Section 126

8. Section 126 of the Police Act governs discipline and corrective measures that the discipline authority must propose for an allegation of misconduct found to be proven. It states:

(1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or her or his agent or legal counsel, or from the complainant under section 113[complainant's right to make submissions], the discipline authority must, subject to this section and sections 141 (10) [review on the record] and 143 (9) [public hearing], propose to take one or more of the following disciplinary or corrective measures in relation to the member:

- (a) dismiss the member;
- (b) reduce the member's rank;
- (c) suspend the member without pay for not more than 30 scheduled working days;
- (d) transfer or reassign the member within the municipal police department;
- (e) require the member to work under close supervision;
- (f) require the member to undertake specified training or retraining;
- (g) require the member to undertake specified counselling or treatment;
- (h) require the member to participate in a specified program or activity;
- (i) reprimand the member in writing;
- (j) reprimand the member verbally;
- (k) give the member advice as to her or his conduct.

(2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department,

including, without limitation,

- (a) the seriousness of the misconduct,
- (b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct,
- (c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career,
- (d) the likelihood of future misconduct by the member,
- (e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
- (f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,
- (g) the range of disciplinary or corrective measures taken in similar circumstances, and
- (h) other aggravating or mitigating factors.

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

VI. Section 126(3) Considerations

9. In imposing the appropriate discipline or corrective measures in this case I must adopt the approach set out in section 126(3) and consider the aggravating and mitigating circumstances in section 126(2). The appropriate outcome should correct and educate the member unless it is unworkable or would bring the administration of police discipline into disrepute.

VII. The Aggravating and Mitigating Circumstances Considered

Seriousness of the misconduct

10. The misconduct of abuse of authority that has been proven in this matter is serious. Constable [REDACTED] second deployment of his police dog was unnecessary and caused an injury to a member of the public. However, I do agree with Ms. [REDACTED] comment that:

“unlike many cases of abuse of authority, this was not a case where the officer used unnecessary force *after* detaining or arresting a subject without the requisite legal authority. Here, there were sufficient grounds for police to arrest [REDACTED] and to take steps to effect that arrest using force – in this case, PSD [REDACTED]. This factor decreases the overall seriousness of the misconduct in our respectful submission.

The members' record of employment

11. Constable [REDACTED] has no service record of discipline. The material filed on his behalf proves he is a highly motivated, diligent and dedicated police officer. He is a valued member of the VPD Strike Force team and the Canine Unit.
12. He has received numerous accolades and three commendations during his fifteen years working as a police officer. The evidence proves his superior officers support him. I find that Constable [REDACTED] record of employment is a significant mitigating consideration.

The impact of the proposed disciplinary or corrective measures

13. Counsel's submission is that a suspension without pay would impose a significant hardship on Constable [REDACTED]. I accept that a suspension without pay would be a financial hardship for the member. Ms. [REDACTED] also submits that to require Constable [REDACTED] to retrain is unnecessary. The evidence establishes that Constable [REDACTED] now trains and instructs police officers and police service dogs for the VPD Canine Unit. His C.V.s and the letters from Sgt. [REDACTED] and Sgt. [REDACTED] outline his leadership role in the VPD Canine Unit as well as his involvement in police dog related matters outside of the VPD. Ms. [REDACTED] submits that he understands the requirements and regulations set out in the VPD Policy and the Provincial Policing Standards regarding the use of police dogs and therefore does not need retraining. I am satisfied that Constable [REDACTED] has demonstrated his commitment to improve his understanding and his skills as a police dog trainer and handler. To require the member to undertake specified training or retraining is not a necessary corrective measure.

Whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence

14. Constable [REDACTED] has indicated that he understands the importance of the Police Act investigation. He has discussed my decision within the Canine Unit and with his superiors and it appears that he will use this ruling for the benefit of members of the Canine Unit. I accept that he will take steps to prevent a recurrence of the misconduct.

The likelihood of future misconduct

15. Ms. [REDACTED] submits that there is no reason to expect any future

misconduct on Constable [REDACTED] part. She says these proceedings have had a significant effect on him and that he should be considered of good character. The material filed in support of Constable [REDACTED] attest to his strength of character, his dedication to his work, and his strong desire to continue to serve and protect the public. The misconduct appears to be an isolated incident and I am satisfied that it is unlikely that Constable [REDACTED] will misconduct himself in the future.

Whether the Vancouver Police Department contributed to the misconduct

16. I do not find this to be a relevant consideration.

The range of disciplinary or corrective measures taken in similar circumstances

17. I have reviewed the authorities cited in Ms. [REDACTED] written submission. The misconduct referred to in those cases involved police dogs biting and injuring members of the public. In those incidents the officers failed to follow the appropriate procedures and regulations regarding the use of their police service dogs. In three of the five cases the details and the circumstances of the misconduct are difficult to determine; however, I am satisfied that the circumstances involving Constable [REDACTED] use of his police dog are distinguishable from the misconduct proven in the other two cases. In the decision OPCC 2013-8561 the suspect was not provided the opportunity to surrender before the police dog was deployed. In OPCC File 2009-4718 it was determined that the suspect did not pose an immediate danger to the officers that would otherwise have justified deploying the police dog. In the matter involving Constable [REDACTED] the evidence proves that prior to [REDACTED] first deployment Mr. [REDACTED] posed an immediate danger to the police and the public. As well, Constable [REDACTED] identified himself, gave Mr. [REDACTED] opportunities to

surrender and warned him that the dog would bite. Although I found that the second deployment of [REDACTED] was an unnecessary use of force and is serious, I am satisfied that Constable [REDACTED] misconduct is no more serious than the authorities referred to above. The decision of the Discipline Authority in each of those cases was to propose a written reprimand to the member. I agree with Ms. [REDACTED] that a written reprimand here is within the range of appropriate discipline or corrective measures.

Other aggravating and mitigating circumstances

18. There are no other aggravating circumstances apart from the seriousness of the misconduct.
19. The significant mitigating circumstances are the member's record of employment, his contributions to the community and his dedication to his police duties. As well, the misconduct of Constable [REDACTED] appears to be an isolated incident and out of character. It is unlikely that the member will misconduct himself in the future.

VIII. Conclusion

20. As I said in my section 117 decision, the disciplinary or corrective measures that could apply in this case are suspension without pay, retraining and advice as to conduct. Section 126(3) requires me to give precedence to an approach that seeks to correct and educate unless it is unworkable or would bring the administration of police discipline into disrepute.
21. Ms. [REDACTED] submits that I should not suspend Constable [REDACTED] without pay. She submits that an approach that seeks to correct and educate the member should take precedence and that I should impose a written

reprimand.

22. After considering the material filed on behalf of Constable [REDACTED] and having regard to the factors set out in section 126(2), I am satisfied that it is appropriate to correct and educate Constable [REDACTED] and to do so would be workable and would not bring the administration of police justice into disrepute. I propose the following sanction:

- a) Reprimand the member in writing.

January 24, 2023.

David Pendleton

David Pendleton
Adjudicator