

February 12, 2020

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

AND

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

NOTICE OF ADJUDICATOR'S DECISION

TO: Ms. [REDACTED] Complainant

AND TO: Constable [REDACTED] Member

Constable [REDACTED] Member

AND TO: Sergeant [REDACTED] Investigating officer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

Introduction

1. This matter arises out of a complaint made by [REDACTED] regarding the circumstances surrounding the arrest of Mr. [REDACTED] on April 22, 2019. Mr. [REDACTED] is a friend of Ms. [REDACTED] and was helping Ms. [REDACTED] renovate her business premises in the [REDACTED] area of Vancouver. Constables [REDACTED] and [REDACTED] were dispatched to attend a 911 call made by Ms. [REDACTED] regarding a

homeless person she said was blocking the door to her business. When the members arrived on scene the homeless man had left. The members and Ms. [REDACTED] and Mr. [REDACTED] discussed the matter. Constable [REDACTED] told them that the situation was not an emergency and that they should not be calling 911. A verbal argument ensued with Ms. [REDACTED] and Mr. [REDACTED] saying they would continue to call 911 and Constable [REDACTED] pointing out that it was a misuse of 911 to make calls of a non-emergency nature. The interaction between Ms. [REDACTED] Mr. [REDACTED] and the members was captured on CCTV although there is no audio recording of what was said. The images recorded on the CCTV show that about 5 minutes after the members arrived on the scene, Mr. [REDACTED] is forcefully taken to the ground and handcuffed by the members. Constable [REDACTED] and Constable [REDACTED] said that just prior to this physical altercation Mr. [REDACTED] said to Constable [REDACTED] "I'm going to fucking rock you". Constable [REDACTED] took this as a threat and told Mr. [REDACTED] he was under arrest for uttering a threat. Constables [REDACTED] and [REDACTED] took hold of Mr. [REDACTED] took him to the ground and handcuffed him.

2. Ms. [REDACTED] filed a complaint with the Office of the Police Complaint Commissioner on April 22, 2019 alleging misconduct against the officers who arrested Mr. [REDACTED]. The Police Complaint Commissioner determined the complaint was admissible. He directed an investigation into the matter after concluding that the conduct of Constable [REDACTED] and Constable [REDACTED] would, if substantiated, constitute misconduct pursuant to section 77(3)(a)(ii)(A) of the Police Act (intentionally or recklessly using force on any person). Sergeant [REDACTED] of the Vancouver Police Department was assigned to conduct the investigation.
3. Sergeant [REDACTED] submitted his Final Investigation Report on December 13, 2019 to the Discipline Authority. Sergeant [REDACTED] concluded that the

evidence did not prove the alleged misconduct against Constables [REDACTED] and [REDACTED]. He recommended the allegation be deemed unsubstantiated.

4. On December 31, 2019, Inspector [REDACTED], as the Discipline Authority, issued his decision pursuant to section 112 of the Police Act. Inspector [REDACTED] determined that the evidence in the Final Investigation Report did not appear to substantiate the allegation of Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act.
5. The Police Complaint Commissioner reviewed the allegation and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
6. On January 28, 2020 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.

Section 117

7. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the Police Complaint Commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the Police Complaint Commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:
 - (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records

- referenced in that report;
- (b) make her or his own decision on the matter;
- (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

Section 117(6) The Police Complaint Commissioner must provide the appointed retired judge with copies of all reports under sections 98, 115 and 132 that may have been filed with the Police Complaint Commissioner before the appointment.

Section 117(7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1)(a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

Section 117(8) Notification under subsection (7) must include:

- (a) a description of the complaint, if any, and any conduct of concern,
- (b) a statement of a complainant's right to make submissions under section 113,
- (c) a list or description of each allegation of misconduct considered by the retired judge,
- (d) if subsection (9) applies, the retired judge's determination as to the following:
 - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective

- measures;
- (ii) whether or not a prehearing conference will be offered to the member or former member under section 120;
- (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and
- (e) if subsection (10) applies, a statement that includes the effect of subsection (11).

Section 117(9) If, on review of the investigating officer's report and the evidence and records referenced in them, the appointed retired judge considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.

Section 117(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

8. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the member appears to constitute misconduct. The law is clear that, because the adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the member; rather, it is to assess only whether it appears to constitute misconduct.

9. The review is a paper-based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make “her or his own decision on the matter.”

Reports and Material Considered

10. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.
 - (a) Final Investigation Report of Sergeant [REDACTED] and attachments described as: registered complaint, progress reports, OPCC notices, civilian statements, members’ statements, supporting documents, video and legislation/ police policy/ case law.
 - (b) Additionally, I have considered the Notice of Appointment of Retired Judge dated January 28, 2020, and the relevant case law and statutory authority.

Section 117(8)(a) Description of the Complaint and Conduct of Concern

11. The conduct of concern relating to Constables [REDACTED] and [REDACTED] arose out of the arrest of [REDACTED] [REDACTED] on April 22, 2019. The members were dispatched to investigate a complaint of a homeless man blocking the entrance to a business premise owned by [REDACTED] [REDACTED] Ms. [REDACTED] and her renovation contractor Mr. [REDACTED] and Constable [REDACTED] got into a verbal disagreement regarding the use and misuse of 911 telephone calls to the police. Mr. [REDACTED] was described by the officers as animated, angry and aggressive. At one point Mr. [REDACTED] turned towards Constable [REDACTED] and said “I’m going to fucking rock you.” Constable [REDACTED] believed he had been threatened and told [REDACTED] he was under arrest for uttering a threat. Constable [REDACTED] and Constable [REDACTED] grabbed Mr. [REDACTED] arms, forced him to the ground, and handcuffed him. The conduct of concern here is

whether the members intentionally or recklessly used unnecessary force against Mr. [REDACTED]

Section 117(8)(c) - Allegations of Misconduct Considered

12. Having reviewed the evidence referenced in the Final Investigation Report, I identify the following allegation of misconduct against Constable [REDACTED] and Constable [REDACTED] that could appear to be substantiated:

1. Abuse of authority by intentionally or recklessly using unnecessary force on Mr. [REDACTED] contrary to section 77(3)(a)(ii)(A) of the Police Act.

13. I am mindful of the limitation to the definitions of misconduct in Section 77 found in Section 77(4):

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

Section 117(8)(d)(i) Whether the Evidence Appears Sufficient to Substantiate the Allegation

14. Sergeant [REDACTED] as part of his investigation, reviewed the formal OPCC complaint of Ms. [REDACTED] and the statement she gave to Constable [REDACTED] at the scene. As well, he interviewed her on July 25, 2019. He considered the general occurrence statements of Constables [REDACTED] and [REDACTED]. He interviewed Constable [REDACTED] on September 11 and November 6 and Constable [REDACTED] on August 29 and December 3, 2019. This material is

referred to in his Final Investigation Report and forms part of the record forwarded to me by the Commissioner.

15. Upon a review of the Record I am satisfied the following circumstances are not in dispute:

- a) Constables [REDACTED] and [REDACTED] arrived at Ms. [REDACTED] business in response to her 911 call. They met Ms. [REDACTED] and Mr. [REDACTED] on the sidewalk outside the business.
- b) The second video shows the four of them engaged in a discussion commencing at 1 minute 28 seconds on the video and ending at 3 minutes 53 seconds. At one point the members appear to be leaving the area. Constable [REDACTED] walks to the police car and opens the door while Constable [REDACTED] walks toward the curb heading to the police car. As Constable [REDACTED] gets to the curb, he turns and walks back towards Ms. [REDACTED] and Mr. [REDACTED]
- c) The video shows Constable [REDACTED] talking to Ms. [REDACTED] and Mr. [REDACTED]. His right hand is raised and his finger points at Mr. [REDACTED]. The officer takes three steps toward Mr. [REDACTED] as Constable [REDACTED] leaves the police car, closes the door and approaches Mr. [REDACTED]. Constable [REDACTED] stands next to Constable [REDACTED] on [REDACTED] left and both members are facing Mr. [REDACTED] about three feet away. Mr. [REDACTED] and Constable [REDACTED] appear to be having an animated conversation. Mr. [REDACTED] is holding a cup of coffee in his right hand and gesturing at Constable [REDACTED] with his finger. At this point the second video ends and the third video continues to record the incident.

- d) As the third video starts Constable [REDACTED] takes three steps and stands next to Mr. [REDACTED]. The parties continue their animated conversation as Mr. [REDACTED] takes his left hand out of his pants pocket. Mr. [REDACTED] turns to his right and is face to face with Constable [REDACTED]. His left hand is out and he is holding his coffee in his right hand. Mr. [REDACTED] then turns back towards Constable [REDACTED] with his left hand raised to approximately chest height and is gesturing at Constable [REDACTED]. Mr. [REDACTED] turns again and faces Constable [REDACTED]. Mr. [REDACTED] left hand is down by his side.
- e) At 1 minute 4 seconds into the third video, the members and Mr. [REDACTED] become involved in a physical altercation. Constable [REDACTED] grabs Mr. [REDACTED] right arm. Mr. [REDACTED] turns and Constable [REDACTED] grabs his left arm. Constable [REDACTED] knocks the coffee cup out of Mr. [REDACTED] right hand and grabs him by the head. Mr. [REDACTED] is taken to the ground by the members. Constable [REDACTED] has Mr. [REDACTED] by the right arm and Constable [REDACTED] has hold of his left hand. Mr. [REDACTED] stands up briefly and both members force him back down to the ground.
- f) The officers have control of Mr. [REDACTED] hands and Constable [REDACTED] applies handcuffs at approximately 1 minute 56 seconds.
- g) Mr. [REDACTED] remains handcuffed and lying on the ground until other police officers arrive and take over at 3 minutes 17 seconds. While Mr. [REDACTED] is on the ground and handcuffed, Constable [REDACTED] is kneeling on his arm. Mr. [REDACTED] does not appear to be actively resisting. At 5 minutes 54 seconds Mr. [REDACTED] is lead away by other officers.

h) Mr. [REDACTED] was arrested and charged with uttering a threat to Constable [REDACTED]. The Crown did not proceed with the charge and a Stay of Proceeding was entered in July 2019.

16. In their police statements made at the time of the incident and in their subsequent interviews with Sergeant [REDACTED] both members stated that Mr. [REDACTED] was arrested because he uttered a threat to Constable [REDACTED]. They said that when Mr. [REDACTED] turned towards Constable [REDACTED] (as seen on the video at 1 minute 4 seconds) he said, "I'm going to fucking rock you".

17. Constable [REDACTED] stated to Sergeant [REDACTED]

"He was holding a coffee in his hand, he was emotional and angry just all the things he was saying to us and what he just stated to me. He made me believe he was about to potentially punch me in the face or throw the coffee at me when he stated that to me. So I told him he was under arrest for uttering threats, so I grabbed his arm to arrest him."

18. Ms. [REDACTED] gave a statement to Constable [REDACTED] on April 22, 2019. Sergeant [REDACTED] also interviewed her on July 25, 2019. In both statements she told the officers that Mr. [REDACTED] said words to the effect, "skinny guy, I could rock you" just before Constables [REDACTED] and [REDACTED] arrested him.

19. Constable [REDACTED] and Constable [REDACTED] were asked by Sergeant [REDACTED] why they felt it was necessary in arresting Mr. [REDACTED] to forcefully take him to the ground. Constable [REDACTED] said:

"So I told him he was under arrest for uttering threats, so I grabbed his arm to arrest him. At that time he turned his body away and that time my partner grabbed his other arm. While we were doing that he

kept turtling and trying to tuck his arms into his body. So my partner and I pushed him to the ground to gain control of him, cause it was difficult to gain control of him while standing up. Mr. [REDACTED] was pushed to the ground and that's when I applied handcuffs."

Later in the same interview with Sergeant [REDACTED] Constable [REDACTED] said:

"When I grabbed his, before I grabbed his arm I told him he was under arrest for uttering threats. I then grabbed his arm and he turned away from me, which made it more difficult to grab his arm. So I moved to the left side of his body and my partner moved to the right side, why we were trying to gain control he was pulling away from us trying to tuck his arms under his body. So at that time we decided it would better to push him to the ground in order to prevent him from moving his body so we could put handcuffs on him. I told Mr. [REDACTED] to stop resisting while we were trying to gain control of him".

Constable [REDACTED] explained to Sergeant [REDACTED] why he felt it was necessary to use physical force to arrest Mr. [REDACTED] Constable [REDACTED] said:

"As we were engaging in a conversation Mr. [REDACTED] turns over to my partner and says "I'm going to fucking rock you". In my opinion that's essentially someone saying I'm going to hurt you or knock you out, which I took as a threat and my partner took as a threat. Furthermore, prior to that Mr. [REDACTED] had already said to me "fuck you, little guy" which he means has no fear of the authority as me as a police officer. Even though we were just there to help them. He was yelling, he was animated and challenging everything I said to him. I felt he could of easily turned to my partner and punched him. At that point my partner advised he was under arrest for uttering threats, my partner

took hold of Mr. [REDACTED] I tried to grab the other side. I guess Mr. [REDACTED] moved, I didn't know if he was trying to run, but I took that as not a normal response for someone who is told they are under arrest. I've had an experience in my career where I told someone they were under arrest and they twitched I took them to the ground. This person stood up and kneed me in the face and punching me, hitting with elbows till other officers got there. I was injured that time so I did not want that to happen again, so in my training and my experience when somebody is going to potentially assault you and if they are going to resist you the safest place for everybody is if that person goes on the ground. That way we don't have to hit them anymore we don't have to use means of force and it takes away their ability to explode into punches, kick me, knee me, elbow me and we can effect a safe and lawful arrest."

20. In the Final Investigation Report, the investigating officer carefully analyzed the issue of whether the members used unnecessary force against Mr. [REDACTED] Sergeant [REDACTED] considered the case law, the Vancouver Police Department's use of force policy and the National Use of Force Model. He reviewed the members' conduct having regard to section 25(1) of the Criminal Code and he concluded that Constables [REDACTED] and [REDACTED] were acting in the lawful execution of their duties, that they acted on reasonable grounds to believe force was necessary and that they used no more force than was necessary.
21. In OPCC File No. 2016-11867 Adjudicator Carol Baird Ellan reviews the test to be considered under section 25. At paragraph 32 she states:

"The investigating officer considered the member's actions from the point of view of whether the arrest complied with Section 25(1) of the

Criminal Code. In the recent case of *Akintoye v White*, 2017 BCSC 1094 Fleming J. considered the test under Section 25. She stated:

[97] Section 25(1) is not a source of extra police powers. Instead it operates to justify the use of force when a police officer's conduct is permitted pursuant to a separate statutory or common law power.

[98] The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements described in *Chartier v. Graves*, [2001] O.J. No. 634 at para. 54(S.C.), as follows:

1. the officer's conduct was required or authorized by law in administering or enforcing the law;
2. he or she acted on reasonable grounds in using force: and
3. he or she did not use unnecessary force.

[99] The third requirement focuses on the level or degree of force used.

[100] In *R v. Nasogaluak*, 2010 SCC 6 (CanLII), the Supreme Court of Canada specified the degree of "allowable" force is constrained by the principles of proportionality, necessity and reasonableness, cautioning: "courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences" (at para. 32).

[101] A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer's belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.

[102] Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used "with exactitude". Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (*Crampton v. Walton*, 2005 ABCA 81 (CanLII) at para.22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (*Bencsetler v. Vancouver (City)*, 2015 BCSC 1422

(CanLII) at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.”

22. Section 117(1)(a) and (b) of the Police Act requires me to consider Sergeant ██████ report and the evidence and records and then make my own decision on the matter. I agree with the comments of the Adjudicator Baird Ellan in OPCC 2016-11867 where she said:

“While my task is not to review his decision, rather to consider the issues and reach my own conclusion, I find it instructive to consider the matter from the perspective of a trained officer, particularly in assessing the reasonableness of the member’s response from a policing perspective. In doing so I nonetheless bear in mind that the test has an objective component”

23. The evidence and the records would appear to support the members’ subjective belief that they needed to gain control of Mr. ██████ whom they described as challenging, extremely emotional and angry. Constable ██████ said he and Constable ██████ grabbed Mr. ██████ arms. They pushed him to the ground because they felt it would be difficult to gain control of him while standing up. Both officers denied delivering any hand strikes or blows.
24. The members subjective beliefs regarding their use of force are not however determinative of the matter. Sergeant ██████ attempted on several occasions to interview Mr. ██████ Mr. ██████ did not respond to the requests. Ms. ██████ did cooperate with the investigation. Sergeant ██████ interviewed her and she told him that prior to Mr. ██████ being taken to the ground that he and the members had exchanged words. In her formal complaint and her interview with Constable ██████ she recalled Mr. ██████

saying to the members “oh, ok little guys just leave” and that Constable [REDACTED] said, “little guy huh well you’re a skinny guy”. Mr. [REDACTED] then said, “I’m skinny but I bet I can rock both of you.” Ms. [REDACTED] said the members acted like he was resisting but it was clear that he wasn’t. In her complaint to the OPCC she wrote, “they did not ask him to turn around and properly get handcuffed...he did not resist...they did not need to take him down”.

25. In my view, it is important to consider that the altercation in front of Ms. [REDACTED] business happened very quickly. The video shows Ms. [REDACTED] joining the two officers and Mr. [REDACTED] at 1 minute 28 seconds. From that point until Mr. [REDACTED] is taken to the ground (a period of approximately 3 minutes 30 seconds) the video shows the four people standing and having what is described as an animated conversation. Constable [REDACTED] and Mr. [REDACTED] are facing each other and appear to be talking. Nothing untoward appears to be happening and then suddenly the members physically take hold of Mr. [REDACTED] and force him to the ground. I accept that the incident would have been emotionally upsetting for everyone involved. It is not surprising then that the members’ and Ms. [REDACTED] subjective impressions of what occurred are different. Those perceptions may eventually be resolved following an assessment of the credibility and reliability of their testimony.
26. While the subjective beliefs of the members must be considered, this allegation of misconduct 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.

27. After a consideration of the evidence, it appears there are questions as to whether it was objectively reasonable for Constable [REDACTED] and Constable [REDACTED] to conclude that Mr. [REDACTED] posed a threat serious enough to justify the force used upon Mr. [REDACTED]. The evidence objectively considered raises questions whether the members recklessly used unnecessary force in controlling and subduing Mr. [REDACTED].
28. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence, I find the evidence appears sufficient to substantiate the allegation that Constables [REDACTED] and [REDACTED] recklessly used unnecessary force.

Conclusion and Next Steps

29. After reviewing the Final Investigation Report and the evidence and records I am satisfied that the conduct of the members appears to constitute misconduct.
30. I hereby notify the relevant parties of the next steps pursuant to sections 117(7) and (8) of the Police Act.

- a) The complainant has the right pursuant to section 113 of the Police Act to make submissions at the discipline proceeding.
 - b) I have determined that the range of disciplinary or corrective measures being considered for Constables [REDACTED] and [REDACTED] includes:
 - i. Suspend the member without pay for not more than 30 scheduled working days.
 - ii. Require the member to undertake specified training or retraining.
 - iii. Verbal or written reprimand.
31. Considering the factors in section 120 of the Police Act, I am willing to offer the members a prehearing conference.
32. The members may, pursuant to section 119(1) file with the discipline authority a request to call and examine or cross-examine one or more witnesses listed in the Final Investigation Report. Such a request must be made within 10 business days of this notification.

Dated at Victoria British Columbia

February 12, 2020

David Pendleton

David Pendleton

Adjudicator