



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 2022-21618

January 06, 2023

- To: Ms. [REDACTED] and Ms. [REDACTED] (Complainants)
c/o Mr. [REDACTED]
[REDACTED] Law Corporation
- And to: Constable [REDACTED] (Members)
Constable [REDACTED]
Former Constable [REDACTED]
Former Sergeant [REDACTED]
c/o Vancouver Police Department
Professional Standards Section
- And to: Inspector [REDACTED]
c/o Vancouver Police Department
Professional Standards Section
- And to: The Honourable Judge Elizabeth Arnold-Bailey, (ret'd) (Retired Judge)
Retired Judge of the Supreme Court of British Columbia
- And to: His Worship Mayor Ken Sim
Chair, c/o Vancouver Police Board

On April 10, 2022, our office received a complaint from Ms. [REDACTED] and Ms. [REDACTED], via their counsel [REDACTED] describing their concerns with members of the Vancouver Police Department (VPD). The OPCC determined the complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the VPD to conduct an investigation.

On November 22, 2022, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report (FIR) to the Discipline Authority.
On December 6, 2022, Inspector [REDACTED] as the Discipline Authority, issued his decision pursuant to section 112 in this matter. Specifically, Inspector [REDACTED] identified six allegations

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of misconduct against Constables [REDACTED] [REDACTED] [REDACTED] former Constable [REDACTED] and former Sergeant [REDACTED].

Count 1 - *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* for intentionally or recklessly making an arrest without good and sufficient cause;

Count 2 - *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* for intentionally or recklessly searching Ms. [REDACTED] and Ms. [REDACTED] without good and sufficient cause;

Count 3 - *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* for intentionally or recklessly using unnecessary force on Ms. [REDACTED] and Ms. [REDACTED]

Count 4 - *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* for failing to provide medical care to Ms. [REDACTED]

Count 5 - *Discourtesy* pursuant to section 77(3)(g) of the *Police Act* for failing to act with courtesy towards Ms. [REDACTED] and Ms. [REDACTED]

Count 6 - *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* specifically to former Sergeant [REDACTED] for failing to submit the required documentation following the use of OC spray.

The Discipline Authority determined that five of the allegations, counts one through five, against all respondent members did not appear to be substantiated. However, the Discipline Authority determined that count six, in relation to former Sergeant [REDACTED] was substantiated. Therefore, this allegation does not form part of the basis of this review as it will be subject to a separate discipline proceeding.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations 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 in relation to four of the unsubstantiated allegations, specifically, counts one through four as against Constables [REDACTED] [REDACTED] former Constable [REDACTED] and former Sergeant [REDACTED].

I do not consider that the decision of the Discipline Authority is incorrect in relation to the conduct of Constable [REDACTED] nor do I consider the Discipline Authority's decision is incorrect in relation to the allegation of *Discourtesy*.

Background

On April 4, 2022, Constable [REDACTED] of the VPD Gang Crime Unit observed a black Mercedes with no front license plate speeding and weaving in and out of traffic. Constable [REDACTED] according to his evidence, attempted to stop the vehicle for *Motor Vehicle Act* offences. When Constable [REDACTED] activated his emergency equipment the black Mercedes drove away at an apparent high rate of speed. Within a few minutes, Constable [REDACTED] located a black Mercedes approximately

two kilometers away parked in the driveway of a residence. Constable [REDACTED] blocked the black Mercedes with his police vehicle.

The driver's seat was unoccupied and Ms. [REDACTED] and her 13-year-old daughter, Ms. [REDACTED] were occupying passenger seats inside the vehicle.

According to Constable [REDACTED] evidence he instructed Ms. [REDACTED] to exit the vehicle several times. Ms. [REDACTED] and her daughter did not comply. Ms. [REDACTED] video recorded herself repeatedly asking VPD members what she was being arrested for, and advising members she had a child in the vehicle.

Constable [REDACTED] called for assistance and several VPD members attended his location. Constable [REDACTED] advised VPD members that Ms. [REDACTED] and Ms. [REDACTED] were arrestable for *Obstruction*, and the driver, who was no longer at the scene, was arrestable for *Dangerous Operation of a Motor Vehicle*. Constable [REDACTED] displayed a bean bag shot gun; however, did not discharge it. Former Sergeant [REDACTED] deployed Oleoresin Capsicum (OC) spray into the interior of the vehicle.

When Ms. [REDACTED] exited the vehicle after being OC sprayed, Constable [REDACTED] evidence is that Ms. [REDACTED] punched her on the face. Constable [REDACTED] applied force, restrained Ms. [REDACTED] to the ground and handcuffed her.

Ms. [REDACTED] was physically restrained by former Constable [REDACTED] when Ms. [REDACTED] moved towards her daughter being arrested, and was brought to the ground on her knees where she was handcuffed.

Ms. [REDACTED] received medical treatment for the OC spray. Ms. [REDACTED] suffered a black eye, bruising to the head was not provided medical aid at the scene.

Both Ms. [REDACTED] and Ms. [REDACTED] were arrested for 'resisting arrest' and 'assaulting a police officer'.

Constable [REDACTED] searched the vehicle and located two cell phones, Canadian currency in various denominations, and a half-kilogram of cannabis in the trunk.

The complainants alleged that VPD members arrested them without lawful authority, used excessive force during the arrest, used derogatory language toward Ms. [REDACTED] and Ms. [REDACTED] and failed to provide medical aid to Ms. [REDACTED] as a result of being OC sprayed.

DA Decision

The Discipline Authority determined there was lawful authority to arrest the driver for criminal code offences. The Discipline Authority concluded that "any interference by any persons which inhibited police from seizing or otherwise gaining access to the Mercedes would constitute an offence of *Obstruction*".

The Discipline Authority further found that the force used by the respondent members was reasonable, necessary, and was not reckless.

The Discipline Authority found that Constable [REDACTED] was forthcoming about the fact she did not have Ms. [REDACTED] treated at the scene, and took steps to ensure that Ms. [REDACTED] was going to receive some form of medical treatment and discussed this with paramedics.

The Discipline Authority found that a search of Ms. [REDACTED] and Ms. [REDACTED] was necessary to establish identity, for evidence related to the offences, and for officer safety.

OPCC Decision, Section 117 of the Police Act

I have reviewed the Discipline Authority's decision and I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect in relation to counts one through four of the unsubstantiated allegations.

There are concerns with the Discipline Authority's analysis on the issue of whether or not the arrest of Ms. [REDACTED] and Ms. [REDACTED] was oppressive. Oppressive conduct includes whether or not the arrest was recklessly made without good or sufficient cause. The Discipline Authority failed to consider that Constable [REDACTED] did not establish that the black Mercedes he located was the same black Mercedes that sped away from him before he instructed Ms. [REDACTED] and Ms. [REDACTED] to exit the vehicle and arrested them.

Even if the vehicle located by Constable [REDACTED] was the correct vehicle, Ms. [REDACTED] and Ms. [REDACTED] were passengers and the driver had fled. The Discipline Authority did not adequately consider the essential elements of *Obstruction*, specifically, whether or not the Obstruction warning was given prior to the arrest, Ms. [REDACTED] reason for refusing to exit the vehicle, and whether or not her reasons for not exiting amounted to a willfull obstruction of Constable [REDACTED]

I have a reasonable basis to believe that the Discipline Authority was incorrect in finding that the deployment of OC spray by former Sergeant [REDACTED] was reasonable and necessary, especially given the presence of a child within the vehicle. The evidence reasonably supports a finding that Ms. [REDACTED] and Ms. [REDACTED] were displaying at most passive resistance by refusing to exit the vehicle and there is no evidence that Ms. [REDACTED] nor Ms. [REDACTED] had or were accessing a weapon. Therefore, the threshold for the use of an intermediate weapon such as OC spray, was not in my view met.

In addition, the Discipline Authority did not sufficiently consider that at least one member was close enough to hear Ms. [REDACTED] state that there was a child in the vehicle. Constable [REDACTED] provided evidence that he was 25 feet away from the vehicle and could hear Ms. [REDACTED] say her daughter was in the vehicle.

I also have a reasonable basis to believe that the Discipline Authority is incorrect in finding that the use of force by Constable [REDACTED] and former Constable [REDACTED] was reasonable and necessary, especially given my view that grounds to arrest Ms. [REDACTED] and Ms. [REDACTED] did

not exist. The evidence can reasonably support a finding that the force used was excessive and disproportionate to the behaviors faced by the members.

I also have a reasonable basis to believe that the Discipline Authority was incorrect when he determined that Constable [REDACTED] was not neglectful when she did not provide Ms. [REDACTED] access to medical treatment. The evidence reasonably supports a finding that when Constable [REDACTED] became aware that Ms. [REDACTED] was a young person, had been OC sprayed, and was not going to jail, she did not take reasonable and appropriate steps to ensure medical assistance was received.

Finally, as there is evidence to support a finding that the arrests were unlawful, I am of the opinion that any subsequent search of Ms. [REDACTED] Ms. [REDACTED] and the vehicle was unreasonable.

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 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
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cc: [REDACTED], Registrar
Sergeant [REDACTED], Vancouver Police Department