

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

and

IN THE MATTER OF A DISCIPLINE HEARING UNDER SECTION 124

and

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
SERGEANT ██████████ OF THE VICTORIA POLICE DEPARTMENT

FINDINGS OF DISCIPLINE AUTHORITY

(Section 125(b) *Police Act*)

Name of member involved:

██████████ Sergeant ██████

Police department, designated policing unit or designated law enforcement unit:

Victoria Police Department

Date of discipline proceeding:

May 1, 2023 and submissions made on August 4, 2023.

In relation to each allegation of misconduct against you, my findings are as follows:

Misconduct: Neglect of duty arising under section 77(3)(m)(ii) of the *Police Act*, the particulars of which are that on April 16, 2022 the Member is alleged to have committed a disciplinary breach of public trust, neglect of duty, involving a failure to advise the Complainant of his right to counsel and a refusal to allow the Complainant to retain and instruct counsel without delay contrary to section 10(b) of the *Canadian Charter of Rights and Freedoms, s 8, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11* (the “*Charter*”).

Member’s reply to allegation:

Deny

Discipline Authority findings:

I find the allegation of neglect of duty substantiated.

Findings and reasons:

I. Decision Summary and Overview of Proceedings

1. This is a decision made pursuant to sections 123, 124, and 125 of the *Police Act* relating to certain complaints of misconduct concerning Sergeant [REDACTED] (the "Member"), a member of the Victoria Police Department (the "VicPD").
2. The misconduct is alleged to have taken place on April 16, 2022. Dr. [REDACTED] (the "Complainant") and his wife were visiting Victoria on vacation. The Complainant went out on his own and in the early morning hours he exited a bar on Douglas Street and noticed an individual in distress lying on the sidewalk. The Complainant identified himself as a doctor and tried to assist. Constable [REDACTED] with the VicPD was in the area and after a brief discussion related to assisting the individual, the Constable arrested the Complainant for being intoxicated in a public place. The Complainant was transported to the VicPD cells.
3. The Member was in charge of the cell area on the date in question. Upon arrival, the Complainant repeatedly asked why he was at VicPD cells and requested a phone call. The Member determined that the Complainant was too intoxicated to instruct or understand counsel and denied his request for a telephone call. The Complainant was held in cells for three to four hours before being released in the morning.
4. In the initial Prime report the Member recorded that the Complainant was placed in cells because he was too intoxicated to instruct counsel. During the subsequent investigation the Member included that the Complainant was denied a phone call because he was potentially violent.
5. The Member is alleged to have neglected his duty by failing to advise the Complainant as to the reason for his arrest and by refusing to provide him access to counsel.
6. On April 19, 2022 the Office of the Police Complaint Commissioner (the "OPCC") received a complaint from the Complainant regarding the Member's actions. The OPCC deemed the complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the VicPD to conduct an investigation.
7. Sergeant [REDACTED] was designated to conduct the investigation and VicPD Chief Constable Del Manak delegated the role of Discipline Authority to Inspector [REDACTED] of the VicPD.
8. A Final Investigation Report ("FIR") was submitted to Insp. [REDACTED] on December 7, 2022. On December 12, 2022 Insp. [REDACTED] issued his decision pursuant to section 112 of the *Police Act* identifying one allegation of Abuse of Authority against Cst. [REDACTED] and one allegation of Neglect of Duty against the Member. Insp. [REDACTED] determined that neither of the allegations were substantiated.
9. On January 2, 2023 the Police Complaint Commissioner (the "Commissioner") received a request from the Complainant that he appoint a retired judge to review the FIR pursuant to section 117 of the *Police Act*. Section 117 gives the Commissioner authority to make such an appointment if the Commissioner considers that there is a reasonable basis to believe that the Discipline Authority's decision was incorrect.
10. The Commissioner concluded that Insp. [REDACTED] decision with respect to Cst. [REDACTED] was correct.
11. The Commissioner determined that there was a reasonable basis to believe that the Discipline Authority's decision was incorrect in relation to the allegation of Neglect of Duty against the Member. Specifically, the Commissioner asserted that the Discipline Authority erred in finding that the Member was justified in suspending

the Complainant's right of access to counsel on the basis of a VicPD policy which permits that right to be suspended if someone in custody is violent or if there is a reasonable concern for safety. The Commissioner observed that the objective evidence reflected in the FIR, which included video footage and witness member statements, did not support the suspension of the Complainant's rights on that basis

12. I was appointed Adjudicator in connection with this matter as a result of the Commissioner's Order of January 11, 2022 made in accordance with section 117(4) of the *Police Act*. My task was to determine whether or not the allegation "appeared" to be substantiated.
13. After reviewing the relevant evidence it was my conclusion that the misconduct allegation relating to the Member appeared to be substantiated on the written and video evidence before me.
14. As a result of my decision I became the Discipline Authority concerning the misconduct allegation relating to the Member and heard further evidence concerning the allegations.

II. Discipline Proceeding-History of Proceedings

15. In accordance with section 117(9) of the *Police Act*, the discipline proceeding process commenced concerning the allegation (the "Discipline Proceeding") and I have assumed the duties of Discipline Authority.
16. This is, therefore, a Discipline Proceeding pursuant to sections 123 – 125 of the *Police Act* relating to an allegation of the misconduct, Neglect of Duty.
17. I determined that a Prehearing Conference pursuant to section 120 of the *Police Act* was not appropriate.
18. The Member did not make an application to call witnesses.
19. The Complainant was provided with a Notice of Discipline Proceeding under section 123(1). That notice satisfied the requirements of Section 113 of the *Police Act*, notifying the Complainant that they had the right to make written or oral submissions to the Discipline Authority in relation to one or more of the following matters – the complaint, the adequacy of the investigation, and/or the disciplinary or corrective measures that would be appropriate.
20. On March 25, 2023 the Complainant provided a written submission.
21. The Proceedings commenced by telephone conference call on March 30, 2023 and were adjourned over to April 28, 2023 at which time the date of May 1, 2023 was confirmed for the calling of evidence. The hearing was commenced May 1, 2023 in Victoria, British Columbia. The submission of the Complainant was marked as an exhibit and the Member provided oral evidence.
22. The FIR, the submissions of the Complainant, and the testimony of the Member comprise the record with respect to these proceedings (the "Record"). The FIR contains extensive video recording of the booking, sally port, and cells areas of the VicPD.

III. Misconduct and the Police Act

23. Section 77 of the *Police Act* sets out the definition of misconduct relevant to the allegations concerning the member. Specifically, subsection 77(1) of the *Police Act* provides, in part, as follows:
 - 77(1) In this part, "misconduct" means
 - (a) conduct that constitutes a public trust offence described in subsection (2), or
 - (b) conduct that constitutes

- (i) an offence under section 86 [offences to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offences to hinder, delay, obstruct or interfere with investigating officer], or
- (ii) a disciplinary breach of public trust described in subsection (3) of this section....

(2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does or would likely

- (a) render a member unfit to perform her or his duties as a member, or
- (b) discredit the reputation of the municipal police department with which the member is employed.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member: ...

(m) **"neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:**

- (i) ...
- (ii) **promptly and diligently do anything that it is one's duty as a member to do;**
- (ii) promptly and diligently obey a lawful order of a supervisor.
[Emphasis added]

24. An important overall limitation to the definition of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

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.

25. Section 77(3)(m) is the relevant section of the *Police Act* for this Discipline Proceeding.

26. This review is, therefore, the examination of all of the evidence submitted related to the above noted allegation of misconduct as qualified by section 77(4).

IV. Burden of Proof

27. The burden of proof lies with the body alleging the misconduct. The standard of proof is on the balance of probabilities. This was clearly stated by the Supreme Court of Canada in *F.H v McDougall*, [2008] 3 S.C.R. 41 at para 49:

[49]... I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

28. The court noted, in paragraph 46, that in order to satisfy the balance of probabilities standard, the evidence must be sufficiently clear, convincing and cogent:

[46].. Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make at decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

V. Position of Counsel for the Member

29. The issue, as framed by counsel for the Member, is whether the Member committed neglect of duty for failing to provide the Complainant with access to counsel. Counsel asserts that the Member's decision to deny access to counsel does not rise above a mere performance issue or mistake to the level of misconduct. Further, if the Member did neglect his duty he nevertheless had good or sufficient cause to do so.

VI. Review of the Record: Evidence

30. Discipline Hearings conducted under the *Police Act* differ somewhat from usual administrative hearings. Only the members charged with the misconduct and the police officer tasked with investigating the allegations normally testify. The members have the option of calling other evidence but the Member elected not to in this case. Counsel represents the Member but there is no prosecuting counsel. Moreover, the thoroughness of the investigation depends almost entirely on the designated investigator who produces the FIR. In this case, the question of the level of impairment of the Complainant was an issue never fully investigated. Nor was the Complainant questioned about the assertions Cst. ██████ made concerning seeing the Complainant in the minutes before he encountered the Complainant outside the Strathcona Hotel.

Background to the Complaint

31. As I read the Member's written submissions there is no issue taken with the evidence as summarized in my section 117 Notice of Decision. The summaries of the evidence are contained in paragraphs 20 through 37 of that decision and reproduced below:
- *On April 16, 2022, Cst. ██████ was working as a single-person patrol unit for the Victoria Police Department ("VicPD"). He had started his regular 12-hour nightshift on the evening of April 15, 2022. During the same time, Constable ██████ and Constable ██████ were working together as a two-person patrol unit. Additionally, the Member was working as the on-duty jail supervisor in VicPD cells. Working directly with the Member were the on-duty jailers, Special Municipal Constable ("SMC") ██████ and SMC ██████.*
 - *In the early morning hours of April 16, 2022, Cst. ██████ positioned himself in his patrol vehicle across the street and out front of the Strathcona Hotel, located at 919 Douglas Street, Victoria, BC. As part of the Strathcona Hotel, there are a series of establishments that serve liquor and that are contained within the large hotel building including several bars/restaurants and a liquor store. Cst. ██████ had positioned himself in his police vehicle outside these establishments, such that he was able to view the large bar crowd that would typically congregate after the bars closed. The crowd would typically congregate on Douglas Street, directly outside the hotel. This night was consistent with any other usual weekend bar-closing. According to the Complainant and Cst. ██████ the crowd that was congregating outside of the hotel at closing time was quite large.*
 - *In an audio recorded interview with Cst. ██████ conducted on November 7, 2022 by Sgt. ██████ Cst. ██████ stated that he observed a male who he later identified as the Complainant, an hour or so before bar closing time on the street. He said the Complainant was stumbling on the street, kind of doing the "two steps forward, one step back". He noticed what the Complainant was wearing.*
 - *Shortly after bar close, Cst. ██████ noted a male seated on the sidewalk. He was clearly intoxicated and had vomited on himself. However, he was conscious and had some friends with him who were assisting him. In order to ensure this male was okay, Cst. ██████ attended to the male's location*

to assess the situation. During that time, Cst. ██████ noted that the male was conscious, drinking sips of water, and was with some of his friends.

- Cst. ██████ stated that while he was dealing with the intoxicated male, the Complainant came up and identified himself as a paramedic. He said the Complainant was stumbling and his speech was slurred. Based upon his earlier observations of the Complainant he could tell that the Complainant was quite intoxicated by alcohol. He told the Complainant that he was in no shape to be assisting even if he was a paramedic. He said that the Complainant then “changed his tune” and said he was a doctor. Cst. ██████ again told him that he was in no shape to assist and told him to leave. Cst. ██████ maintained that the Complainant continued to try to help and refused to leave. Cst. ██████ said that at one point he took the Complainant by the arm and escorted him away, but the Complainant returned to where the intoxicated male was lying on the sidewalk. Cst. ██████ therefore decided to arrest the Complainant for intoxication in a public place. Cst. ██████ said he informed the Complainant of the reason he was being arrested. The Complainant was immediately handcuffed. Because it was busy at bar close he handed the Complainant off to Cst. ██████ and Cst. ██████ asking them to take the Complainant to cells and to lodge him there until he could sober up and make sound decisions. Cst. ██████ total interaction with the Complainant was approximately two to three minutes. The Complainant was not falling down drunk but was at a “level where you see people start to sway”. That was Cst. ██████ last interaction with the Complainant.
- The Complainant was interviewed by Sgt. ██████ on October 4, 2022. The Complainant is a medical doctor who resides in ██████. He was on vacation with his wife on April 16, 2022 staying at the ██████ Hotel in downtown Victoria. His wife was not feeling well, so, with her agreement, he decided to explore Victoria, a city he had not visited before. He found himself at a bar near their hotel in downtown Victoria. He was just leaving the establishment when he saw someone lying on the sidewalk. As a physician he had seen other individuals in medical distress. He did not intend to provide medical care but wanted to see what was wrong with the person and to ensure that they got medical attention appropriate to their condition. He walked over to the person, crouched down and introduced himself, asking what happened and if the individual needed any help. He was not initially aware of a police presence. There was no ambulance. Before the individual could reply he heard someone behind him say “what are you doing?” He turned around to see a police officer standing behind him. He introduced himself to the officer, told the officer his name, that he was a doctor and that he was not providing medical treatment just speaking with the male to see if he needed any help. He said the police officer responded with “I am sure he wants some drunk guy looking after him”. The Complainant said he was not drunk, was not caring for the male, just speaking to him. The officer responded, “I am sure he does not want that”. Almost immediately the officer told him to stand up and without another word put handcuffs on him and took him to a police car. There were two police officers in the police car. Neither one explained anything to him in terms of what was going on and why he was being arrested. In his statement, the Complainant alleged that there was no conversation with the two officers on the trip to VicPD cells.
- The Complainant said in his interview that he did have alcohol on the night in question but not a lot: perhaps a couple of actual alcohol drinks. He stated that he was not a big drinker. Asked where he would be in terms of the scale of 1 to 10, with 1 being stone cold sober and 10 being passed out drunk, the Complainant indicated he did not know about a scale and could not put a number on it. The Complainant said however he was low: if there were about 200 people on the street that night he would have been in the bottom 5th percentile of intoxication.

- *The Complainant was not questioned about his drinking pattern, what he was drinking, where he was drinking, when he began drinking, and whether prior to entering the establishment he had been drinking. The Complainant was not questioned as to what time he left his hotel nor was he asked on October 4, 2022 or later about Cst. ██████ assertion that he had seen the Complainant on the street appearing intoxicated an hour or so before their encounter.*
- *The Complainant recalled asking to make a phone call and being placed in cells for what he believed was four or five hours. The Complainant's evidence was that he was not in the cell passed out, he was not staggering around or not knowing where he was. He believed the video would show that he was sitting calmly on the bench in the cell other than the occasions where he knocked on the cell door to request a phone call or to let his wife know his whereabouts. At one point after he asked for a phone call someone said something similar to "no one knows where you are right now, think about it". This confirmed his worst fears. At all material times, the Complainant was very worried that his wife did not know where he was. When he was finally released he had approximately 30 missed calls from his wife who was terrified; worried he was dead or in hospital somewhere.*
- *The Complainant did not recall the officer who handcuffed him saying anything about why he was being arrested. He was not quite sure, until he got to the police station, what they were going to do with him. At that point they told him he was going to the drunk tank and that was that.*
- *Cst. ██████ was one of the two officers who transported the Complainant to VicPD cells. He recalled little about the file but watched the video of him escorting the Complainant to the booking room. He remembered that he needed to hold the Complainant who was staggering in his stance and weaving back and forth. He did not recall any conversation. He believed the Complainant to be intoxicated. Cst. ██████ evidence was that if there had been anything significant arising from the encounter he would have made notes.*
- *Cst. ██████ was the other transporting officer. He had just returned to work after suffering a head injury and his memory of the evening in question is "not the best". He remembered that nothing significant happened. He did not remember any signs of intoxication that the Complainant was exhibiting.*
- *SMC ██████ was interviewed November 7, 2022. On April 16, 2022, he was working as a SMC in the VicPD cellblock. He recalled the Complainant being brought into the cellblock by Cst. ██████ He said that the Complainant was a little bit verbal asking "why am I here?". SMC ██████ first saw the Complainant when he was coming inside the sally port. He said the Complainant was "kind of passive". As he was being booked in the Complainant was asking "why are you taking this belt" and "what are you doing to me". SMC ██████ explained to the Complainant that this was part of their job; that they needed to pat him down and itemizes belongings. He recalled asking the Complainant to take his shoes off and again the Complainant was questioning why they needed his shoes to be taken off. SMC ██████ said that the Complainant was verbally kind of resistant but there was no physical action on his part. SMC ██████ could see that the Complainant was a "little bit tipsy". He was "a little bit, not quite like really drunk". The Complainant was not falling down passed out drunk. SMC ██████ believed that the Complainant was impaired; part of it was that the Complainant was intoxicated and the other part was that the Complainant appeared to be thinking that he was wronged in being taken to jail and was repeating himself. SMC ██████ recalled the Complainant knocking on his cell door asking why he was there.*

- SMC [REDACTED] was interviewed November 7, 2022. She reviewed the file and watched some video in order to refresh her memory. Nothing about the event or about the Complainant stood out to her. If there was something abnormal or different she believed she would have recalled it. Her role was to enter the Complainant's information into the computer. Usually if people pound on doors and are really aggressive they will ring a bell for her but she did not recall anything pertinent about the Complainant or anything abnormal.

The Member's Evidence

32. The Member's evidence consists of an audio recorded interview on November 7, 2022 that comprised part of the FIR and oral evidence provided under oath May 1, 2023 at the Discipline Hearing. The Member endorsed and adopted the contents of his Prime report and his audio recorded statement. Below are the key components of his evidence.
33. On April 16, 2022 the Member was working as the supervisor in the VicPD jail. He received a call from Cst. [REDACTED] who told him he was with an intoxicated individual who was inserting himself as Cst. [REDACTED] was trying to render care to another intoxicated person. Cst. [REDACTED] told the Member that the individual was being a little bit obstructive in the police efforts to maintain care for the intoxicated person. The Member was told that the Complainant had identified himself first as a paramedic and then as a doctor. The Complainant was arrested for being in a state of intoxication in a public place because he would not quit being obstructive.
34. In his oral evidence at the Discipline Proceeding the Member clarified that after Cst. [REDACTED] call, "[t]he only information I had at that time was coming from Cst. [REDACTED] that this individual came into the scene, inserted themselves, and said "I'm a paramedic", looking to help, was asked to leave. They came back and said "I'm a doctor, I can help." And that is the only information that I had. There was no fight or anything like that that had taken place."
35. At approximately 2:40 AM the Complainant was escorted into the cell block area at VicPD. The Complainant was well-dressed and handcuffed. The Member's evidence was that the Complainant was listing to the left and not moving straight. His face was red and flushed. He was saying things like "I get a phone call" or "I want a phone call" repeatedly. The Member said that the Complainant was not focusing on what the jail staff had to say. The Member said that the Complainant was being argumentative with jail staff about being in jail in the first place; that he should not be there. He stated that the Complainant, while being processed, was being asked to do certain things and was not listening to what staff had to say. The Member determined that the Complainant was being completely noncompliant and was not listening to what the VicPD officers were instructing him to do. The Member said that at one point the Complainant screamed out "just tell me what you want me to do" and became very short with staff. This allegedly indicated to the Member that the Complainant was becoming aggressive with staff. He determined that the Complainant was not listening to their instructions and in the Member's opinion, wanted to take control of the situation; the Complainant wanted to be heard.
36. In oral evidence at the Discipline Proceeding the Member was asked about his impression of the Complainant. At page 48 of the transcript the Member gave the following evidence:

"Dr. [REDACTED] on the night in question was exercising – I guess exercising his right to be dominant in our conversations. Dr. [REDACTED] had an air of superiority in his conversations. Very demanding in nature. I mean it is not like he said "hey I pay your wages" or anything like that but it was about as close to possibly making [inaudible] feel without actually saying those words.

It was obvious to me that there was a differential and Dr. [REDACTED] was making that obvious. And forgive me, I did not know Dr. [REDACTED] was a doctor until later on in these proceedings."

37. The Member indicated that he was making operational decisions, including decisions about access to counsel at the material time. Although access to counsel is codified under the *Charter* and protects the right of those under arrest to retain and instruct counsel in private without delay, the Member noted there is a caveat to that. In making these decisions, one of the things police look to are their operational policies.
38. The Member's evidence was that specifically, under VicPD policies 44 and 49 (Jail Operations and Prisoner Care Policy), which comprise part of the Record, there has to be a reason as to why there would be a delay in access to counsel that must be articulated and recorded. In the Member's view at the material time, there was a potential for violence from the Complainant. The Complainant was not listening to what the police instructions were. The Member concluded that the Complainant would not be able to understand the instruction from counsel if he were in contact with counsel. The Member decided to get the Complainant into his cell as quickly as possible. As they walked to the cellblock the body language the Member observed from the Complainant was in line with the indicia of impairment: hands down, looking for balance, swaying from side to side. The Member's evidence was that as they reached the entrance of the cell the Complainant put his hands up to refuse to go into the cell which indicated to the Member that the Complainant was actively resisting. The Member concluded that the Complainant was not listening to the Member's directions. The Complainant was continually interrupting officers and saying that he wants a phone call, that he demands a phone call, that he knows his rights to get a phone call.
39. The Member noted that throughout his time in cells, the Complainant continually knocked on the cell door disturbing other prisoners. The Member viewed the Complainant as totally non-compliant and belligerent. The Complainant ignored instructions and just kept saying "I get a phone call" and "I should not be here". In terms of the Complainant indicating that he wanted to make a phone call, regardless of whether he was saying he wanted to call a lawyer or his wife, the Member had made the decision that he was suspending the Complainant's right to call a lawyer based on what he had observed about the Complainant's behaviour and on his experience as a police officer.
40. In oral evidence at the Discipline Proceeding the Member noted that he had approximately 21 years of experience as a police officer and had never been subjected to a discipline proceeding. He outlined his extensive experience and noted that he had also been in Corrections prior to becoming a police officer. At the time of the subject incident he was the jail sergeant and had been an acting sergeant for approximately one year.
41. The call from Cst. [REDACTED] was a heads up to notify the Member that a prisoner was being brought into the booking area which was otherwise not occupied. The Member, as the jail sergeant, noted the circumstances around the arrest and did an assessment of the validity of the arrest and who he would be dealing with. For this kind of an incident the level of intoxication has to make the accused a danger to himself or someone else. It is not the Member's responsibility to ensure that *Charter* rights are read or indeed to read *Charter* rights to an accused. The transporting officers will fill out a prisoner intake form which will include the reasons for arrest and whether the accused required or declined a referral to a lawyer. The Member would sign off on the form. The prisoner intake form is completed before the accused is taken into the cellblock. In this case the Member believed the Complainant had been read his *Charter* rights because he kept asking for a phone call. The Complainant also kept repeating that he should not be there.
42. The Member recalled being with the Complainant for approximately three minutes with actual conversation totalling 22-30 seconds or so. It was during that brief period of time that the Member made a decision that the Complainant would not receive a phone call to access counsel. During his brief encounter with the Complainant, the Member believed the Complainant was non-compliant. Based on his observations he had concluded that the Complainant was intoxicated. When the Complainant said "just tell me what you want me to do", the Member believed the tenor of the

Complainant's voice had changed and based upon the change in voice concluded that there was a potential for violence. Although the Complainant was not obviously violent or fighting the Member concluded there was a potential for violence or grounds to believe that the Complainant could become violent. He decided to get the Complainant secured as quickly as possible. He believed the Complainant to be manifesting an air of superiority and testified that the Complainant was exercising his right to be dominant.

43. The Member testified that he was taking the "protective" approach. He understood that the Complainant had a right to counsel without delay and that that means immediately. When he received the section 117 Notice of Decision he concluded that the question of whether or not he had committed a disciplinary offence had already been decided. On that basis he decided to do his own research in terms of Victoria Police Department Policy. He provided evidence that in the four years from 2018 to 2022, 12 of 20 arrests for public intoxication involved a decision not to provide the accused access to counsel. The Member believes that the denial of the right to counsel was a common practice. On that basis he contacted watch commanders to give them a heads up based on the section 117 Notice of Decision he had received.
44. At 4:13 AM that same day the Member completed a Prime report of his encounter with the Complainant. He noted that the Complainant kept demanding a phone call as it was his "right to have a phone call". The Member attempted to explain that the Complainant's access to counsel would be delayed until he was sober enough to understand the advice of counsel. There was no mention in the Prime report that the Complainant was violent or that there was a reasonable concern for safety such as a belief that the Complainant will become violent.

FIR Evidence – Charter & Complainant Conduct

45. There is no dispute about the fact that Cst. ██████ arrested and handcuffed the Complainant for being intoxicated in a public place. The bar was closing down and Cst. ██████ decided to turn the Complainant over to Constables ██████ and ██████ for transportation to VicPD cells. He did not read the Complainant his *Charter* rights nor is it clear if he ever told the Complainant why he was being handcuffed and arrested.
46. Csts. ██████ and ██████ transported the Complainant to the cellblock. There was little conversation and neither Constable read the Complainant his *Charter* rights. Cst. ██████ did apparently confirm the Complainant's identity since he recorded in the booking form the Complainant's name and the fact that he possessed a ██████ driver's license. He did not write down the driver's license number nor did he record the Complainant's address. The Complainant was not questioned about where he lived, whether he was a resident of Victoria or a visitor.
47. There was almost no evidence that upon reaching the VicPD cells that the Complainant was read his *Charter* rights. There was a "Yes" checkbox ticked in the Prisoner Intake Record, comprising part of the Prime report, indicating that the Complainant was advised of Charter Rights, however the evidence does not indicate who advised him of same.
48. Evidence in the FIR, including the Prime report and the Detention/Release Report (within the Prime report) contradict the oral evidence of the Member regarding the Complainant's actions at the material times. The Complainant is noted as being "co-operative" in the Detention/Release Report and there is no mention of any aggression or potential violence in the Prime report which was made contemporaneously with the Complainant's detention.

The Video

49. Provided in the FIR is an extensive video capturing the Complainant's time at VicPD headquarters. Although the video does not have an audio component it accurately records the arrival of the Complainant at the police station, his removal from the police vehicle, his escort by the transporting members into the booking area, his encounter with the Member in the booking area, his escort to cells, and the entire time he was in cells.
50. I have reviewed the video numerous times. I am confident that it accurately records what occurred.
51. The video depicts the Complainant moving in an intoxicated matter but does not corroborate that he was non-compliant or showing outward signs of potential violence. The video does not indicate that the Complainant was so intoxicated as to have lost any motor function. The Complainant was able to comply with officers as he was booked and reasonably follow directions – even if he may have been unhappy with doing so.

VII. The Law

52. The law with respect to section 10(b) of the *Charter* is well established. In *R v Suberu*, 2009 SCC 3 the Supreme Court of Canada outlined the following interpretation:

[40] As with “detention”, any interpretation of the phrase “without delay” must be consistent with a purposive understanding of the Charter provision in which it occurs. As this Court noted in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, at pp. 641-42, and in *R. v. Bartle*, 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173, the purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.

[41] **A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected.** In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase “without delay” must be interpreted as “immediately”. If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

[42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill defined threshold for the application of the right to counsel must be **avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words “without delay” mean “immediately” for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.**

[Emphasis added]

53. In *R v. Rover*, 2018 ONCA 745 the Ontario Court of Appeal confirmed that “concerns of a general or non-specific nature, applicable to virtually any search, cannot justify denying access to counsel until a search warrant is executed. The police must actually turn their mind to the specific circumstances of the case, and they must have reasonable grounds to justify the delay. That justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Even when such circumstances exist, the police must take reasonable steps to minimize the delay.”
54. The Supreme Court of Canada reiterated the importance of 10(b) rights in *R. v. Taylor*, 2014 SCC 50, paras. 24-25;

[24] The duty to inform a detained person of his or her right to counsel arises “immediately” upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee’s request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (*R. v. Luong* (2000), 2000 ABCA 301 (CanLII), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

[25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights *and* facilitate access to those rights where requested, both without delay. This includes “allowing [the detainee] upon his request to use the telephone for that purpose if one is available” (*Manninen*, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see *Brownridge v. The Queen*, 1972 CanLII 17 (SCC), [1972] S.C.R. 926, at pp. 952-53).

55. Pursuant to the Record, VicPD operational policies and procedures with respect to Jail Operations and Prisoner Care provides:

49.3 The right to counsel may be suspended if:

49.3.1 the prisoner is violent;

49.3.2 there is a reasonable concern for safety such as a belief that the prisoner will become violent;

49.3.3 the prisoner is not diligent in exercising their right to counsel;

or 49.3.4 there is an ongoing investigation and such access may interfere or compromise that investigation, and in which case any delay shall be documented by the investigating members.

Neglect of Duty

56. I am satisfied that counsel for the Member set out accurately the essential elements of the misconduct offence of Neglect of Duty in her submissions.
57. I must find (i) a duty existed, (ii) the respondent police officer neglected or omitted to promptly and diligently discharge the relevant duty, and (iii) there is no "lawful excuse" (read: good or sufficient cause) for the failure: *Hawkes v. McNeilly* 2016 ONSC 6402.
58. Neglect of Duty must be more than just a mistake or error of judgement; to constitute neglect of duty, the conduct must include an element of wilfulness in the police officers neglect or there must be a degree of neglect which would make the matter cross the line from a mere job performance issue to a matter of misconduct. The context in which a police officer's discretion or judgement is exercised must be carefully examined to see whether or not the exercise of that discretion was warranted: *Dickinson v. Ontario Provincial Police*, 2018 ONCPC 20.
59. I also accept that breaches of the *Charter* are not necessarily disciplinary offences. There must be a serious blameworthy element and not simply a mistake of legal authority.

VIII. Analysis

The Arrest

60. Section 74 of the *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19 provides:
- 74 (1)A person who is intoxicated must not be or remain in a public place.
(2)A peace officer may arrest, without a warrant, a person whom the peace officer believes on reasonable grounds is contravening subsection (1).
61. A number of cases have dealt with the meaning of the word intoxicated. A very useful and thorough review of the law can be found in *Besse v. Thom* [1979] B.C.J. No. 2082, a decision of Mr. Justice Hinds. After thoroughly reviewing the case law Justice Hinds held that in determining the appropriate meaning of the phrase intoxication reference must be had to the legislation in which it is found. At paragraph 25 he had this to say:
- [25] It appears that the intention of the Legislature can be determined by considering the combined effect of s. 48 of the *Liquor Control and Licensing Act* and s. 64A of the *Summary Convictions Act*. In my view, a peace officer may arrest without warrant a person found in a public place who, by reason of the consumption of alcohol, is in such a condition as to be a danger to himself or others or to be causing a disturbance.
- [26] I have also considered the definition of the word "intoxicate" in the Shorter Oxford English Dictionary, where the word is defined, inter alia, as follows: "To stupify or render unconscious or delirious, madden with a drug or alcoholic liquor; to inebriate, make drunk."
- [27] As a result of the foregoing analysis of authorities, the British Columbia legislation and the foregoing definition in the Shorter Oxford English Dictionary, I conclude that the word "intoxicated" when used in s. 48 of the *Liquor Control and Licensing Act* means the condition of being stupified or drunk from the consumption of alcohol or a drug to such a marked degree that the person is a danger to himself or others or is causing a disturbance.
62. In my view, the circumstances surrounding the arrest were marginal to begin with. The evidence did not indicate that the Complainant was a danger to himself or others nor was he causing a disturbance other than to attempt to assist the individual in distress. Cst. ██████ spent less than two minutes with the Complainant before arresting him. There is no suggestion that other than dealing with the individual in

distress that there was anything else going on in the street at pub closure time that would have been hindered by the Complainant's presence.

63. The Member's discretion therefore was exercised in the context of the arrest of a person purporting to be a doctor who attempted to assist a distressed individual. Upon arrival at VicPD headquarters, the Complainant continued to assert his right to a phone call and continued to seek an explanation as to why he had been arrested. In this context the Complainant's concerns appear fully justified.

The Duty

64. It is uncontroversial that the Member did indeed have duty to provide the Complainant with access to counsel without delay pursuant to section 10(b) of the *Charter*. Further, it is accepted that this obligatory access was not provided.

Was the member's exercise of discretion either reckless or objectively unreasonable?

65. Counsel for the Member argues that the Member did not make a mistake or error in his judgement. Further, counsel suggests that if I conclude that the Member did make a mistake or error in judgement than the error should be deemed a mere performance issue and that there is not the requisite "serious blameworthiness" to elevate it to misconduct under the *Police Act*.
66. The Member is an experienced police officer operating in a supervisory role as a sergeant in charge of the jail. The Complainant repeatedly asserted his right to access a lawyer. That right is a constitutional right enshrined in the *Charter* and the Member was well aware of his obligation under the law to provide access to a lawyer.
67. I reject the argument that the Member's refusal to allow the Complainant to make a phone call was a mere error in judgement. The Member knew of his obligation to record his refusal to allow the Complainant to access counsel and did so in his Prime report made the same morning. He did not record any concerns pertaining to violence at that time. He applied his mind to the issue and in recording his rationale did not record a reason either acceptable in law or in policy.
68. I do not accept the explanation that it had become accepted policy within the VicPD to refuse access to counsel for individuals arrested for intoxication in a public place, or that such a policy would be justified pursuant to the law.

Did the Member have a good or sufficient reason to refuse access to counsel?

69. The context in which a police officer's discretion or judgement is exercised must be closely examined to see whether the exercise of that discretion is justified.
70. In this case the Member asserts that the reasons for refusing access to counsel was that:
- a. he felt the Complainant was capable of violence due to the verbal aggression and,
 - b. the Complainant was too intoxicated to understand counsel.
71. There is nothing in any of the witness statements to suggest that the Complainant was aggressive or potentially violent throughout the incident. What triggered his arrest, according to Cst. ██████ was the Complainant's attempt as a physician to help an individual obviously in distress.
72. It is exceedingly difficult to reach any conclusion as to the state of the Complainant's intoxication. Critical questions were never asked or investigated by the designated investigating officer. The various witnesses report varying observations with respect to the Complainant's intoxication. Cst. ██████ asserted that the Complainant was not falling down drunk but was at a level where he would see people start to sway. Cst. ██████ stated that the Complainant was staggering in stance and weaving

back-and-forth. He also noted that if there had been anything significant he would have made notes. The video shows Cst. [REDACTED] with one hand on the Complainant's arm and the Complainant weaving slightly. Cst. [REDACTED] did not recall anything significant with respect to impairment. SMC [REDACTED] noted that the Complainant was "kind of passive", a little verbal asking why he was there. SMC [REDACTED] said the Complainant was "a little bit tipsy", "not quite like really drunk". SMC [REDACTED] did not recall anything significant about the event or the Complainant. The Complainant asserts that although he had been drinking he was at the lower end of the intoxication scale.

73. Nonetheless, it is clear that the Complainant had consumed alcohol.
74. While the investigation did not adequately canvas the details of the Complainant's intoxication at the material times, this missing information was not critical to my ultimate decision based on the other evidence of the Member and that contained in the Record.
75. Although the video does not contain audio it records over three hours of the Complainant while in police custody. There is nothing in the video to suggest that the Complainant was overly intoxicated. Three hours of video of the Complainant in cells do not show any activity consistent with significant impairment. Moreover, the video clearly depicts the Complainant following instructions to remove his sweater, lean against the wall so that his belt could be removed, sit on the bench so his shoes could be removed, and follow the officers without restraint to the cell area. The brief walk down the hall shows the Complainant on his own and does not indicate any lack of balance. It does not show the Complainant totally non-compliant as asserted by the Member.
76. I have reviewed what the Member suggests was the Complainant's resistance to being placed into the cell. The video does not disclose any active resistance although it is clear that the Complainant was reluctant to be placed into the cell without an explanation as to why he had been arrested nor provided with his call. It is important to remember that the involvement of the Member with the Complainant was at most three minutes including at most 20 to 30 seconds of conversation. No inquiries had been made as to who the Complainant was, whether or not in fact he was a doctor, where he lived, whether he was a visitor or whether he had family or others waiting for him. On the evidence of the Member the decision to place the Complainant in cells and deny access to counsel was made almost immediately.
77. Significantly, the Detention/Release Report records the Complainant as "cooperative" and the Prime report records no concerns about violence or aggression on the part of the Complainant.
78. I note that the Member made the following observation about the Complainant:

"Dr. [REDACTED] on the night in question was exercising – I guess exercising his right to be dominant in our conversations. Dr. [REDACTED] had an air of superiority in his conversations. Very demanding in nature. I mean it is not like he said "hey I pay your wages" or anything like that but it was about as close to possibly making [inaudible] feel without actually saying those words. It was obvious to me that there was a differential and Dr. [REDACTED] was making that obvious. And forgive me, I did not know Dr. [REDACTED] was a doctor until later on in these proceedings."
79. In my view, the most troubling aspect of this matter is the fact that the Member did not record in his Prime report any suggestion that his decision to refuse access to counsel was because of a concern that the Complainant was capable of violence due to his verbal aggression. The Member is experienced, clearly understands procedure and process, and was well aware not only of the *Charter* obligation to provide access to counsel but his department's policy. I have concluded that the Member, after reviewing the complaint, realized that his stated explanation for refusing to provide access to counsel did not accord with his obligations under the *Charter* nor with his department's policy and consequently tailored his explanation when interviewed. I have no doubt that if in fact the Member had concluded that the

Complainant was aggressive or violent, or *potentially* aggressive or violent, he would have recorded that in his Prime statement.

- 80. The obligation to provide an arrested and detained individual with their section 10(b) rights under the *Charter* can only be suspended in very special circumstances and must be justified. As the Ontario Court of Appeal in *R. v Rover (supra)* stated:

That justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Even when such circumstances exist, the police must take reasonable steps to minimize the delay.


- 81. I have concluded that the Member’s decision to deny the Complainant’s access to counsel was not done for good or sufficient cause. The Member’s subjective opinion that the Complainant would not be able to understand any legal advice provided is not, in law, a justification for refusing access to counsel. Moreover, it does not accord with the evidence of the other witnesses nor of the video. I am not satisfied on the record that the Complainant was so intoxicated as to be unable to communicate with counsel nor from a careful review of the record am I satisfied that there was any suggestion that the Complainant was aggressive or potentially violent or that an immediate placement in cells was necessary as a “protective” measure.

- 82. I have concluded that the allegation of misconduct is substantiated.

IX. Has the Allegation of Misconduct Been Established

- 83. I find that the allegation of neglect of duty under 77(3)(m)(ii) of the *Police Act* has been established on a balance of probabilities.

- 84. Pursuant to section 125(1)(d) of the *Police Act*, I invite submissions from the Member as to appropriate disciplinary or corrective measures in relation to my findings to be received within 10 business days after receiving the within findings.



Signature of discipline authority
Judge John (Jim) James Threlfall (rt.)

Date: August 25, 2023

I acknowledge service of this form:

Signature of
Sergeant [REDACTED], Badge [REDACTED]

Date: _____, 2023