

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 AN ALLEGATIONS OF MISCONDUCT
AGAINST SGT. ██████████ OF THE VICTORIA POLICE DEPARTMENT

DISCIPLINE AUTHORITY'S DECISION ON DISCIPLINE OR CORRECTIVE
MEASURES

(Supplement to Form 4)

TO: Sgt. ██████████

AND TO: ██████████, Counsel for the Member

AND TO: Clayton Pecknold, Police Complaint Commissioner

Introduction

1. On August 25, 2023, I delivered my Findings and Reasons under section 125(1)(b) of the *Police Act*. I found that Sgt. ██████████ (the "Member") had committed a disciplinary breach of public trust, Neglect of Duty under section 77(3)(m)(ii) of the *Police Act* involving the failure to advise Dr. ██████████ (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 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the "*Charter*"). I must now propose appropriate disciplinary or corrective measures.

The Misconduct

2. On April 16, 2022 the Complainant and his wife were visiting Victoria on vacation. It was his first visit; his wife was not feeling well so he decided to explore the city on his own. 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 Dave ██████████ with the Victoria

Police Department ("VicPD") was in the area and after a brief discussion related to assisting the individual, Cst. [REDACTED] arrested the Complainant for being intoxicated in a public place. The Complainant was transferred to 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 in 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 his 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. On the basis of my review of the statements of the other VicPD members involved and extensive video which recorded the Complainant while at the VicPD cells I concluded that there was no evidence, other than that of the Member, to suggest that the Complainant was potentially violent. I found that the most troubling aspect of the case was that the Member did not include the assertion that there was a potential for violence in his PRIME report but stated the opinion during his interview with the Investigating Officer after being informed of the registered complaint.
6. At paragraph 79 of the decision, I had this to say:

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.

Position of Counsel

7. Counsel for the Member suggests that the appropriate sanction is "advice as to future conduct". Counsel notes that the Member has been a police officer for nearly 22 years fulfilling a variety of responsible roles with the VicPD. He has no record of misconduct. He has been extensively involved in volunteer activities both in the context of policing and in his personal life.
8. With respect to the issue of whether or not the Member tailored his evidence, Counsel for the Member notes the seriousness of the allegation and that the issue of the PRIME report not containing any suggestion that the Complainant was

violent or *potentially* violent was never put to the Member either by the Investigating Officer or at the Discipline Proceeding. Counsel suggests that the failure to clarify this piece of evidence was an oversight by Counsel.

Section 126

9. Section 126 of the *Police Act* governs discipline and corrective measures that the discipline authority must propose for an allegation of misconduct found to be proven. It states:
 - (1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or her or his agent or legal counsel, or from the complainant under section 113 [complainant's right to make submissions], the discipline authority must, subject to this section and sections 141(10) [review on the record] and 143(9) [public hearing], propose to take one or more of the following disciplinary or corrective measures in relation to the member:
 - (a) dismiss the member;
 - (b) reduce the member's rank;
 - (c) suspend the member without pay for not more than 30 scheduled working days;
 - (d) transfer or reassign the member within the municipal police department;
 - (e) require the member to work under close supervision;
 - (f) require the member to undertake specified training or retraining;
 - (g) require the member to undertake specified counselling or treatment;
 - (h) require the member to participate in a specified program or activity;
 - (i) reprimand the member in writing;
 - (j) reprimand the member verbally;
 - (k) give the member advice as to her or his conduct.
 - (2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,
 - (a) the seriousness of the misconduct,

- (b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct,
 - (c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career,
 - (d) the likelihood of future misconduct by the member,
 - (e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
 - (f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,
 - (g) the range of disciplinary or corrective measures taken in similar circumstances, and
 - (h) other aggravating or mitigating factors.
- (3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

Section 126(3) Considerations

Aggravating and Mitigating Circumstances

a. The seriousness of the misconduct

10. The allegation is serious. Although not all breaches of the *Charter* bring the administration of justice into disrepute the failure to provide the Complainant with his legal rights is a breach of the law and departmental policy. Depriving the Complainant of his freedom in the circumstances of this case is not in my view at the lower end of the scale of seriousness. The Complainant was in a strange city with family who did not know where he was. There appeared to be no effort to determine the Complainant's antecedents before the Member exercised his discretion to incarcerate him without the benefit of a phone call to Counsel or family. The subsequent assertion that he was violent or potentially violent flies in the face of all of the other evidence and is hard to justify in the context of the Members rank and experience.

b. The member's record of employment as a member, including, without limitation his or her service record of discipline, if any, and any other current record concerning past misconduct

11. The Member has been a police officer for more than 22 years. He has an unblemished record, has held a number of important positions within the VicPD, including training and mentoring other officers. I have reviewed his Performance Appraisal Log and agree with Counsel for the Member that he appears to be a compassionate and hard-working police officer. I also note that he has received a number of awards and commendations.

c. The impact of proposed disciplinary or corrective measures on the member and on her or his family and career

12. I acknowledge that the Member has had this matter hanging over his head for 1.5 years and it has clearly been stressful.

d. The likelihood of future misconduct by the member

13. The Member has not committed any misconduct either before or after this incident. From the video of his activity in the cellblock he appears to be a careful and diligent officer. The responsible positions he has held in the past reinforce this conclusion.
14. The Members actions after receipt of the section 117 report under the *Police Act*, specifically advising other officers of the VicPD's potential policy limitations, is also consistent with his Counsel's submissions on this factor.

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

15. Counsel for the Member suggested that in his oral evidence the Member took responsibility for his actions. The statement the Member provided to Sgt. [REDACTED] Investigating Officer, when questioned about the incident was an exhaustive effort to justify his actions. There was no suggestion in that statement that the Member was prepared to accept responsibility for his actions. I do acknowledge that during the Discipline Hearing the Member did say he would accept responsibility. Had the Member admitted or even suggested that he may have made a mistake or error in judgement it is unlikely that the matter would have come to this.
16. During the Discipline Hearing the Member testified that when he received the Section 117 decision he concluded that he had been convicted of the offence of neglect of duty and took positive steps to notify fellow watch commanders of the decision and the necessity to ensure that an accused's *Charter* rights were provided.

17. Although it is somewhat late in the day I accept that the Member has now accepted responsibility and that he is willing to take steps to prevent a recurrence.
- f. **The degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct**
18. In oral evidence at the Disciplinary Hearing the Member testified that he researched the issue of whether or not persons arrested for intoxication in a public place were provided with their *Charter* rights. He provided evidence that, pulling files at random, 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.
19. There is no question that departmental policy is clear on the need to provide *Charter* rights but current practice in the VicPD, particularly in the case of public intoxication, appears to be inconsistent and the actions of the Member in the current case appear to be, at least partly, attributable to what he considered to be common procedure within the VicPD.
- g. **The range of disciplinary or corrective measures taken in similar circumstances**
20. I have reviewed the summary of disciplinary or corrective measures taken in similar circumstances provided by Counsel for the Member and confirmed the completeness of those summaries. I agree with Counsel that the brief summaries are of limited assistance and note that a number of the cases were corrective measures taken at prehearing conferences. In my view the range is from advice as to future conduct to written reprimand.
- h. **Other aggravating or mitigating factors**
Mitigating factors
21. The most significant mitigating factor is the Member's long record of service without prior or subsequent misconduct. It is also important that the Member, upon receipt of the section 117 Decision took proactive measures to notify other department heads of the decision and the need to respect the *Charter* and the obligations contained therein.
Aggravating factors
22. Counsel for the Member noted my comments at paragraph 63 of my decision where I suggested that there was a broader context surrounding the arrest of the Complainant that the Member should have considered. Counsel argues that the fact that the Complainant was a doctor attempting to help an individual in distress does not make the Complainant any different from any other individual who was

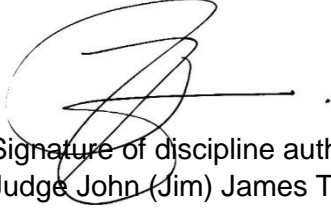
intoxicated, not listening to police, interfering, and preventing the police from doing their work. Counsel argues that from the Member's perspective the Complainant continued to act in a similar fashion as what was described to him by Cst. [REDACTED] and was dealt with accordingly.

23. In the Member's statement to the Investigating Officer he went to great lengths to explain all of the factors considered upon receiving the call from the arresting officer. In my view there is a significant difference between what the Complainant was apparently doing in this case and other cases where arrests for public intoxication are alleged. There was never any suggestion of violence or potential violence.
24. In my view the most important and significant aggravating factor consists of the Member's shift in position once he learned of the complaint. There had been no suggestion that the Complainant had been violent and none of the other witnesses reported that he had been violent. The video did not depict any violence. The subsequent suggestion by the Member that there was a potential for violence that occasioned his decision to ignore his requirements to provide immediate access to counsel pursuant to the *Charter* only occurred after the Member became aware of the complaint.
25. While it is acknowledged that the question of this discrepancy was not specifically put to the Member at the Discipline Proceeding, in my view the Record speaks for itself on this point. The Member's evidence as to the Complainant's violence (or potential violence) shifted to fall within VicPD policy only after he learned of the complaint. The Member's initial PRIME report was more consistent with the impartial objective evidence available to me in the FIR.
26. The Member has a record as a conscientious and diligent police officer. I have no hesitation in concluding that had the Complainant been violent or potentially violent the Member would have recorded that fact in the PRIME report he filed immediately after the incident.
27. Counsel for the Member suggests that it would be unfair to the Member to find that the neglect of duty itself is more aggravated as a result of the credibility finding. In my view the conduct of the Member, not only with the Complainant but subsequently as this matter was investigated, is relevant in terms of the appropriate disciplinary measures necessary.

Conclusion

28. Section 126(3) of the *Police Act* requires me to give precedence to an approach that seeks to correct and educate unless it is unworkable or would bring the administration of police discipline into disrepute.

29. After considering the evidence, the material filed and the options available I propose that the most appropriate approach, bearing in mind section 126(3), is a Written Reprimand. I am satisfied that the Member has learned a painful lesson. I do not believe that the Member will engage in any future misconduct. I view this incident as a one-off, an error in judgement in an otherwise stellar career.

A handwritten signature in black ink, appearing to be 'J. Threlfall', written over a horizontal line.

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

Date: September 26, 2023