



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 2023-23260
November 14, 2023

To: [REDACTED] and [REDACTED] (Complainant)

And to: Constable [REDACTED] (Member)
c/o Surrey Police Service
Professional Standards Section

And to: Chief Constable Norm Lipinski
c/o Surrey Police Service
Professional Standards Section

And to: The Honourable Judge David Frankel (Retired Judge)
Retired Judge of the British Columbia Court of Appeal

And to: Her Worship Mayor Brenda Locke
Chair, c/o Surrey Police Board

On January 27, 2023, our office received a complaint from [REDACTED] and [REDACTED] describing their concerns with members of the Surrey Police Service (SPS) in relation to force used on them, the search of their vehicle, and referring to a complainant as a “fucking Muslim”. The OPCC determined [REDACTED] and [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the SPS to conduct an investigation.

Based on information received from Sergeant [REDACTED], the investigator, pursuant to section 108 of the *Police Act*, an additional allegation of *Abuse of Authority* was identified against Constable [REDACTED] in relation to additional comments made.

On September 28, 2023, Sergeant [REDACTED] completed her investigation and submitted the Final Investigation Report (FIR) to the Discipline Authority.

On October 16, 2023, Inspector [REDACTED], as the Discipline Authority, issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified four allegations of misconduct against Constable [REDACTED], Constable [REDACTED], Constable [REDACTED] and Constable [REDACTED].

Clayton Pecknold
Police Complaint Commissioner

5th Floor, 947 Fort Street
PO Box 9895 Stn Prov Govt
Victoria, British Columbia V8W 9T8
Tel: (250) 356-7458 Fax: (250) 356-6503

Toll Free 1 877-999-8707 # Website: www.opcc.bc.ca

He determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* did not appear to be substantiated; the allegation of *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* did not appear to be substantiated; and the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(iii) of the *Police Act* did not appear to be substantiated.

In addition, the Discipline Authority determined the *Abuse of Authority* allegation specific to Constable [REDACTED] was to be assessed and analysed as *Discourtesy* pursuant to section 77(3)(g) of the *Police Act*. The Discipline Authority determined the allegation did not appear to be substantiated with regard to Constable [REDACTED] and the alleged comments, “enough of this shit” and “you almost jumped on his fucking back, are you retarded” that were made to [REDACTED].

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 with respect to the conduct of Constable [REDACTED]. I do not have a reasonable basis to believe the Discipline Authority is incorrect with respect to the conduct of Constables [REDACTED] and [REDACTED]. Therefore, pursuant to section 112(5)(b) the decision of the Discipline Authority with respect to these members is final and conclusive.

Background

On January 27, 2023, SPS members stopped a vehicle that was being driven by [REDACTED]. [REDACTED] and their son were passengers. [REDACTED] reportedly refused to provide his driver’s licence to both Constable [REDACTED] and Constable [REDACTED] and argued that he didn’t have to provide his driver’s licence.

Constable [REDACTED] cautioned [REDACTED] multiple times about obstructing and that he would be arrested if he continued to refuse to provide his driver’s licence or properly identify himself.

Constable [REDACTED] arrested [REDACTED] for obstruction and, while effecting the arrest, Constable [REDACTED] used a measure of force to remove [REDACTED] from the vehicle and then escorted him to the hood of the police vehicle and attempted to apply handcuffs.

[REDACTED] exited the front passenger seat of the vehicle and was subsequently arrested as she reportedly ran up behind Constable [REDACTED] and Constable [REDACTED] with an unknown black object in her raised hand.

As a result of the stop, the complainants were arrested which involved officers using force. [REDACTED] was placed in the backseat of a police vehicle while [REDACTED] was allowed to stay near the vehicle with her son. A number of additional officers attended the scene.

The complainants alleged that during a traffic stop police used excessive force to arrest them; unlawfully searched their vehicle; took property belonging to them; and called the driver of the vehicle “a fucking Muslim”.

Discipline Authority’s Decision

The Discipline Authority determined in part, with regard to the complainants’ arrest, that the arrests of [REDACTED] and [REDACTED] under the circumstances for obstruction were lawful and subjectively and objectively reasonable.

With regard to the force used by members, the Discipline Authority determined that it appeared on a balance of probabilities that Constable [REDACTED] and Constable [REDACTED] were in the lawful execution of their duties, were acting on reasonable grounds under the circumstances, and used no more force than was reasonably necessary to affect the arrests.

The Discipline Authority also found, based on the totality of the available evidence, that the evidence did not appear to support that any of the members uttered the words “they are fucking Muslim”. In addition, the Discipline Authority determined that there was no substantive evidence that supported that any of the members, seized, removed, or stole any personal items (money, jewellery) from the vehicle.

Furthermore, the Discipline Authority advised that while the choice of words used by Constable [REDACTED] particularly the use of the slang “retarded” which is now less and less socially accepted, was “unfortunate”. However, after considering Constable [REDACTED] explanation, the totality of the available evidence and the circumstances of the entire traffic stop, the Discipline Authority did not find that the language directed at [REDACTED] at this moment was intended to be “purposefully insulting, offensive, or discourteous”.

Request for Appointment of a Retired Judge

On October 19, 2023, I received a request from the Complainants that I appoint a retired judge to review the FIR pursuant to section 117 of the Act and make their own decision in the matter. Section 117 gives me authority to make such an appointment if I consider that there is a reasonable basis to believe the Discipline Authority’s decision is incorrect. A number of reasons were offered in support of their request that can be summarized as follows:

1. [REDACTED] maintains the position that the force used by police during their arrest was excessive and unnecessary.
2. [REDACTED] maintains the claim that the respondent members used derogatory language when speaking to him.
3. [REDACTED] is of the opinion that Constable [REDACTED] used discourteous language during his interaction with [REDACTED].

OPCC Decision, Section 117 of the *Police Act*

The evidentiary record appears to support that the respondent members were engaged in the lawful execution of their duties pertaining to the traffic stop. The evidence suggests that the driver did not produce his driver’s licence as directed by the member and required by law. Furthermore, the evidence does not support that the force used on the complainants was unnecessary or unreasonable in the circumstances. The evidence is not clear and cogent with regard to the respondent members calling the driver “A fucking Muslim”.

However, based on a review of all available evidence, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the determination that comments made by Constable [REDACTED] toward [REDACTED] were not misconduct.

In my view, the evidence supports a conclusion that the comments are either *Discourtesy* or an *Abuse of Authority* and were not due in the circumstances and therefore requires further review. The evidentiary record is fulsome and contains audio/video of the exchange.

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 David Frankel retired British Columbia Appeal Court Judge, to review this matter and arrive at his 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
Police Complaint Commissioner

cc: [REDACTED], Registrar
Sergeant [REDACTED], Surrey Police Service
Inspector [REDACTED], Surrey Police Service