



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 2021-20286
December 29, 2022

To: Constable [REDACTED] (Members)
Constable [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 Brent Hoy, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: His Worship Mayor Ken Sim
Chair, c/o Vancouver Police Board

On December 8, 2021, based on information provided by the Vancouver Police Department (VPD) and a request to order an investigation into the matter, I ordered an investigation into the conduct of Constables [REDACTED] and [REDACTED]. VPD Professional Standards investigator Sergeant [REDACTED] investigated this matter.

On November 16, 2022, Sergeant [REDACTED] completed his investigation and submitted the FIR, following additional directed investigative steps by this office, to the Discipline Authority.

On November 30, 2022, Inspector [REDACTED], as Discipline Authority, issued a decision pursuant to section 112 of the Act in the matter. Specifically, she identified one allegation of misconduct against Constables [REDACTED] and [REDACTED] specifically *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act*.

The Discipline Authority determined that the allegation of *Abuse of Authority* was not substantiated against each respondent member.

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

Pursuant to section 117(1) of the *Police Act*, based upon my review of all the available evidence, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the *Abuse of Authority* allegation and use of force used by both Members.

Background

According to the information received by the OPCC, VPD officers responded to a 911 report regarding a group of males reported to be damaging property and carrying cricket bats. When police arrived on scene the males fled, and the affected person was pursued on foot by police. The affected person dropped the bat during the pursuit following a less-lethal shotgun beanbag deployment. Video footage of the arrest and the Members' use of force is contained within the evidentiary record.

During the incident, a less lethal shotgun was used by Constable [REDACTED] to deploy four beanbag rounds towards the affected person. Video footage depicts the affected person's hands raised in the air when he was struck by a beanbag deployment and when the affected person was lying on the ground.

Video footage also appears to indicate that Constable [REDACTED] foot contacted the affected person's head area during the arrest and handcuffing. After the affected person is secured with handcuffs, the respondent Members forcefully moved him into the hood and front panel of a nearby police vehicle.

Additionally, there were no hand-written notes produced by either respondent member in relation to this incident.

Discipline Authority Decision

The Discipline Authority determined that the affected person was arrestable and that the Members had a duty to respond to the 911 call. The Discipline Authority determined that the member appropriately deployed the beanbag shotgun rounds as lesser force would not have been effective or appropriate in the circumstances, considering that the affected person was a "high risk suspect" who was actively resisting police, and that the member believed he was alone leading up to the handcuffing of the affected person. Furthermore, the Discipline Authority opined that the member might not have seen the affected person put his hands up due to tunnel vision or a lack of visibility.

In addressing the force allegation in relation to Constable [REDACTED] foot contacting the head area of the affected person, the Discipline Authority determined that the member's actions appeared to be that of someone who was unsteady on their feet and that his actions were not intentional or reckless.

With regard to the force used to move the affected person over the hood of the police vehicle, the Discipline Authority found that there was no evidence to support that Constable [REDACTED] intentionally pushed the affected person into the vehicle hood and "even if the way Constable [REDACTED] was holding the affected person contributed to the forward movement there was no intent and therefore no misconduct."

The Discipline Authority did not make a determination or consider any allegation of misconduct in relation to the Members' lack of hand-written notes.

OPCC Decision, Section 117 of the *Police Act*

Based on a review of all of the available evidence, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the determination that the force used by police was reasonable and proportional. In particular, the video evidence supports that the affected person had dropped the bat, had stopped running, and was facing police with his arms and hands in the air, and did not appear to be displaying resistance to police when he was struck by a less lethal shotgun round. The subjective grounds provided by the member that the affected person continued to be actively resistant do not, in my view, render the deployment of the less lethal shotgun objectively reasonable in these circumstances.

In addition, it appears there may have been insufficient consideration given to further attempts at dialogue and de-escalation before using an intermediate weapon to gain compliance at various points during the interaction, particularly at the times when the affected person had his hands in the air and while on the ground. Furthermore, I have concerns with the necessity of what appears to be additional force used by police after the affected person was in custody and handcuffed.

The entirety of the interaction with the affected person, including the lack of any hand-written notes of the incident needs to be assessed in the context of their training, VPD and provincial policy, as well as the legal justification supporting the arrest and use of force employed at various points in the interaction.

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 Brent Hoy, retired Provincial 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], Vancouver Police Department