



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: 2022-21634

July 18, 2023

To: Mr. [REDACTED] (Complainant)

And to: Constable [REDACTED] (Members)
Constable [REDACTED]
c/o Central Saanich Police Service
Professional Standards Section

And to: Chief Constable Ian Lawson
c/o Central Saanich Police Service
Professional Standards Section

And to: The Honourable Judge James Threlfall, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of
British Columbia

And to: His Worship Mayor Ryan Windsor
Chair, c/o Central Saanich Police Service Police Board

On April 11, 2022, our office received a complaint from Mr. [REDACTED] describing his concerns with members of the Central Saanich Police Service (CSPS). The OPCC determined Mr. [REDACTED] ("complainant") complaint to be admissible pursuant to Division 3 of the *Police Act* ("Act") and directed the CSPS to conduct an investigation.

On March 3, 2023, I directed that the matter should be investigated externally. Saanich Police Department (SPD) Chief Constable Dean Duthie appointed SPD Sergeant [REDACTED] as the Investigating Officer. In addition, I designated Chief Constable Dean Duthie of the SPD to act as the external Discipline Authority pursuant to section 135(1) of the Act. Subsequently, Chief Constable Dean Duthie delegated SPD Inspector [REDACTED] to act as the Discipline Authority pursuant to section 134.

Clayton Pecknold
Police Complaint Commissioner

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On June 5, 2023, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report (FIR) to the Discipline Authority.

On June 19, 2023, the Discipline Authority issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified 13 allegations of misconduct against the members including nine allegations of *Abuse of Authority*, three allegations of *Neglect of Duty*, and one allegation of *Deceit*.

The Discipline Authority determined that none of the allegations were substantiated.

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 allegations against Constable [REDACTED] and Constable [REDACTED]. I do not have a reasonable basis to believe the decision is incorrect with respect to Sergeant [REDACTED], Constable [REDACTED] and Constable [REDACTED].

Background

Briefly, the complainant, who self-identifies as black, called the CSPA on March 30, 2022, to report an assault against him by his friend's daughter. The complainant alleged that the attending officers failed to investigate his report of assault, including by failing to obtain a statement from him, and instead arresting him for obstruction for filming his interaction with police. Police records indicate that the complainant's Charter rights were not provided until approximately one hour and twenty-five minutes after his arrest, during which time he remained in the police vehicle in handcuffs. The complainant further reported that he was not provided access to counsel, as requested, and that prior to being released from the scene, he was advised that he would go to jail if he did not sign the Undertaking for release.

Additionally, the complainant alleged that the members' conduct throughout the interaction was motivated by his race and specified that members made racial comments, including stating to his wife "Don't you dare play the race card", accusing him of being an "illegal immigrant", and contacting immigration.

Discipline Authority's Decision

Having reviewed the evidence, the Discipline Authority determined the *Neglect of Duty* allegation against Constable [REDACTED] for failing to adequately investigate the complainant's assault allegation, did not appear to be substantiated. The Discipline Authority noted that this duty was satisfied by the investigative steps taken, including speaking to witnesses on scene and reviewing available video of the alleged assault, and that not obtaining a statement from the complainant was a reasonable exercise of investigative discretion.

The Discipline Authority also determined that an additional allegation for failing to provide the complainant with his Charter rights and to document this in his police notebook, did not appear to be substantiated. The Discipline Authority determined that good or sufficient cause existed for this neglect, referencing Constable [REDACTED] evidence, that he forgot to provide Charter rights as he was overwhelmed by the dynamic scene.

The Discipline Authority determined the *Neglect of Duty* allegation against Constable [REDACTED] for failing to provide the complainant with access to counsel as requested, did not appear to be substantiated. The Discipline Authority determined that the video evidence was not clear whether the complainant wanted immediate access to counsel. While noting that Constable [REDACTED] did have a duty to provide access to counsel immediately the Discipline Authority referenced Constable [REDACTED] evidence that it was his understanding that the complainant wanted to speak to his own lawyer later.

With respect to the allegation of *Abuse of Authority* against Constable [REDACTED] in relation to the manner in which the complainant was released from custody, the Discipline Authority found that while not a model for professional policing, Constable [REDACTED] conduct in advising the complainant he would go to jail if he did not sign the Undertaking did not amount to misconduct. The Discipline Authority referenced as factors in his assessment the absence of a threatening tone, the intent to release the complainant, the absence of evidence of any prolonged harsh treatment, and evidence of some attempt to explain the Undertaking.

Finally, the Discipline Authority found the remaining allegations did not appear to be substantiated against the respondent members.

Request for Appointment of a Retired Judge

On June 20, 2023, I received a request from the complainant that I appoint a retired judge to review the FIR pursuant to section 117 of the Act and make his or her 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 the complainant's request, including that they disagreed with the Discipline Authority's assessment of the video evidence and the divergences in the statements of the complainant, respondent members, and witnesses. The complainant also submitted that the members' interactions with him were racially motivated, including the inquiries made with immigration and the immediate assessment of him as the aggressor.

OPCC Decision, Section 117 of the *Police Act*

After review of the Discipline Authority's decision, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the failure to properly investigate the complainant's report of an assault, the detention including the provision and documentation of Charter rights to the complainant, and the manner in which the complainant was released from custody when his questions were not appropriately answered and he was instead threatened to be taken to jail if he did not sign the Undertaking for release. I also have concerns relating to the members' actions with reference to the complainant's race and immigration status.

The complainant initially called police to report that he was assaulted, however the evidence demonstrates that he was never interviewed on-scene and his version of the incident was never collected by Constable [REDACTED]

In my view, the Discipline Authority has not effectively considered that it was the complainant who reported the assault and that there was sufficient time to have obtained a statement from him and that the relevant departmental policy requires that a statement be obtained in these circumstances.

Once the complainant was arrested, the evidence also supports that Constable [REDACTED] then failed to provide the complainant with his Charter rights. The available evidence supports a significant delay in the complainant being provided his Charter rights during which time he remained detained in the police vehicle in handcuffs. Additionally, the evidentiary record supports that the complainant made a request to Constable [REDACTED] to speak to a lawyer. The evidence supports that there was no impediment to the complainant being given the opportunity to speak with a lawyer immediately after making the request to do so.

When the complainant was eventually released by Constable [REDACTED] the evidence supports that there was a discussion between them about signing the Undertaking, or going to jail. The evidence also supports that the complainant was not familiar with Canadian laws, had never been arrested before, and was reasonably seeking clarification in terms of the effect of signing the documents. In these circumstances, I do disagree with the Discipline Authority that the actions of the Member do not cross the threshold of misconduct.

Finally, the Discipline Authority has not adequately assessed the members' actions during the incident that appear to have referenced the complainant's race and immigration status. These actions include advising the complainant's Wife not to "play the race card" and calling the Canada Border Services Agency to confirm the complainant's immigration status in absence of a reasonable basis to do so.

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 The Honourable Judge James Threlfall, 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], Saanich Police Department
Inspector [REDACTED], Saanich Police Department