

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

and

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT

AGAINST CST. [REDACTED] AND CST. [REDACTED]

OF THE VICTORIA POLICE DEPARTMENT

NOTICE OF DECISION

(Section 117 of the *Police Act*)

NOTICE TO: Mr. [REDACTED], Complainant

AND TO: Constable [REDACTED], Member

AND TO: Constable [REDACTED], Member

AND TO: Sergeant [REDACTED]
c/o Victoria Police Department, Professional Services
Division

AND TO: Inspector [REDACTED], Discipline Authority
c/o Victoria Police Department

AND TO: Clayton Peckford, Police Complaint Commissioner

I. DECISION SUMMARY

In this decision I will refer to:

- a. Constable [REDACTED] as Member A;
- b. Constable [REDACTED] as Member B;
- c. Members A and B collectively as the Members;

- d. Mr. [REDACTED] as the Driver;
- e. Mr. [REDACTED] as the Passenger; and
- f. The Driver and Passenger collectively as the Occupants.

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to a complaint of misconduct by the Members alleged to have taken place March 16, 2023 (Incident”).

2. Upon reviewing the Final Investigation Report, the evidence and records referenced in it and the applicable law, I found that there appears to be:

(a) sufficient evidence to substantiate that:

Count 1: The Members, without good and sufficient cause, committed Abuse of Authority by intentionally or recklessly arresting the Occupants contrary to section 77(3)(a)(i)(B) of the *Police Act* (“Act”)

Count 2: The Members, without good and sufficient cause, committed Abuse of Authority by intentionally or recklessly searching the Occupants contrary to section 77(3)(a)(ii)(B) of the Act; and

Count 5: The Members, without good or sufficient cause, committed Neglect of Duty by not promptly and diligently making a record of the Incident; and

(b) insufficient evidence to substantiate that:

Count 3: Member A, without good and sufficient cause, committed Abuse of Authority by searching the vehicle contrary to section 77(3)(m)(ii) of the Act;

Count 4: Member A, without good or sufficient cause, after arresting the Driver committed Neglect of Duty by failing to promptly and diligently warn him of his rights under section 10(b) of the *Charter of Rights* contrary to section 77(3)(m)(ii) Act.

II. HISTORY OF THE COMPLAINT

3. On March 16, 2023 the Members stopped a vehicle, arrested the Occupants for possession of drugs for the purpose of trafficking, searched the vehicle then released the Occupants (“Incident”).
4. Later that day the Passenger filed a written complaint arising out of the Incident against the Members at the Office of the Police Complaint Commissioner.
5. On March 30, 2023 the OPCC issued a Notice of Admissibility of Complaint for:
 - a. Abuse of Authority pursuant to section 77(3)(a) of the *Police Act* which is oppressive conduct towards a member of the public; and
 - b. Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, in the performance or purported performance, of duties, detaining or searching any person without good and sufficient cause.
6. On March 30, 2023 Sergeant [REDACTED] of the Victoria Police Department (VPD), Professional Standards Section (“Investigator”) was assigned to conduct the *Police Act* investigation.
7. On September 21, 2023 Inspector [REDACTED] was delegated the Discipline Authority for this investigation (“Discipline Authority”).
8. The Investigator produced a Final Investigation Report (“FIR”) dated October 31, 2023 in which the Investigator found that the evidence substantiated that the Members good and reasonable cause to arrest and search the Occupants and not document the Incident. Accordingly, the Investigator found that the allegations were not substantiated and dismissed them.
7. On November 15, 2023 the Discipline Authority confirmed the findings and conclusions of the Investigator as set out in the FIR.
8. The Police Complaint Commissioner disagreed with the Discipline Authority and filed a Notice of Appointment of Retired Judge [“Notice”] dated December 12, 2023 to appoint me to review the findings of the FIR.

9. In the Notice the Police Complaint Commissioner stated:

..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 regarding the arrest and search of the occupants and of the vehicle as well as the failure to document the incident.

In my view, the members lacked reasonable grounds to arrest the vehicle occupants for any offence. In my view, the evidence supports that the members relied upon their subjective beliefs which are not objectively reasonable. The search of the vehicle therefore was not lawful. I am also concerned that the apparent inadequate application of the obligations with respect to section 10(b) of the Charter.

In relation to the lack of documentation by the members at the time, the record supports that the failure to document the incident is contrary to VicPD policy. While a report was eventually completed, it was only done so after the issue arose as a result of the complaint that was filed.

In my view, the evidentiary record is fulsome, and the evidence supports a conclusion that the actions of the members support the allegations of *Abuse of Authority* and *Neglect of Duty* and therefore requires further review.

10. This Notice mandates that I review whether the evidence appeared to substantiate a disciplinary breach of trust for:

COUNT 1: arrest of the Occupants;

COUNT 2: search of the Occupants;

COUNT 3: search of the vehicle;

COUNT 4: failure to Member A to inform the Driver of his Charter rights upon arrest; and

COUNT 5: failure of the Members to record the Incident.

III. COUNT 1: ARREST OF THE OCCUPANTS

13. The Members purport to arrest the Occupants for possession of controlled drugs or substances ("Drugs").

14. A lawful arrest required the Members have reasonable grounds to believe that the Occupants possessed Drugs.

15. The Members did not see Drugs in the vehicle or in the personal possession of the Occupants.

16. The Members claimed that their reasonable grounds were:

a. The vehicle entered the roadway from [REDACTED], a place that housed drug users and where drugs were known to have been trafficked;

b. The Driver did not immediately pull over when the emergency equipment was turned on;

c. 10 or more crumpled \$20 bills were loose in the front console;

d. The Driver held the lid of the console down with his elbow;

e. The Driver seemed nervous;

f. A database search showed that the vehicle had been stopped before for investigations linked to drugs; and

g. The Driver had previously been investigated for drugs although he had no drug convictions.

RULING

18. Apart from the vehicle leaving from [REDACTED] there was nothing known to the Members that connected the vehicle or the Occupants to this address.

19. After being signalled to stop the vehicle continued about 250 metres before pulling over.

20. Member B's experience was that people with Drugs sometimes do not immediately stop so they can hide or dispose of Drugs or drug paraphernalia.

21. The vehicle was a convertible with the top down so the actions of the Occupants were visible to the Members. The Members did not comment on seeing the Occupants try to hide or dispose of anything.

22. The amount of money was not unusual or inconsistent with how much a person might have for personal use.

23. Member B noted bills from an ATM were usually flat and uncrumpled whereas crumpled \$20 bills were often used in drug transactions. \$20 bills are commonly used in cash transactions and there are many circumstances not involving drugs that could leave a person with crumpled bills.

24. Member B noted that loose bills in a passenger compartment of an open convertible could easily have blown away. However, he said nothing that tied a casual manner of storing money with possessing Drugs.

25. Member B thought that the Driver may have held down the console lid to hide the money from the police. It also could have been that he was trying to stop the money from blowing away.

26. The database information did not show that Drugs had been found in the vehicle or in the possession of the Driver.

27. There was insufficient evidence on which the Members could reasonably suspect that Drugs were in possession of the Occupants or in the vehicle.

28. I agree with the Investigator that the Members did not have reasonable grounds to arrest the Occupants.

29. Section 77(3)(a)(i) of the Act defines abuse of authority to include “intentionally or recklessly making an arrest without good and sufficient cause.”

30. The Act differentiates between “without reasonable grounds” and “without good and sufficient cause”.

31. The Investigator considered a passage from Complaint of Catherine Crockwell, Nfld., Adj. 26 May 1998, p. 24:

Conduct necessary to establish an offence under Section 3(1)(a), however is qualified by the words “without good and sufficient cause”. An officer not guilty of this offence simply on the basis that his arrest or detention is established to be unlawful. Additionally it must be established that the officer acted without good or sufficient cause.

Case law establishes that the words “good and sufficient cause” is descriptive of behaviour which is done in good faith, behaviour which is not arbitrary, irrational, unreasonable or irrelevant to the duties which rests upon police officers. The phrase, in my view, is broad enough to include an officer acting in good faith but acting under mistake of fact as well as mistake of law. Mistake of law is not a defence to an offence but I have already concluded that Mr. Crockwell’s arrest was unlawful in the first instance. In considering good faith conduct, it makes no difference if the reasons for an officer’s mistaken belief, is prompted by a mistake of fact or a mistake of law. I therefore do not conclude an officer is guilty of acting “without good or sufficient cause: simply because an arrest or detention is determined unlawful.

32. There is no evidence that the Members acted under a mistake of fact or law that led them to arrest the Occupants. It was a mistake if they thought that they had reasonable grounds to arrest but those decisions were not based on a mistake of fact or law.

33. “Good and sufficient cause” is the objective standard of what a reasonable police officer with similar training, knowledge, skills and experience would have done in the same circumstances.

34. An officer with the same experience and training of Member B would have realized there was insufficient evidence to raise a reasonable suspicion that the Occupants possessed Drugs and would not have arrested the Passenger.

35. An arrest in a drug case is so rudimentary to the duties of an officer that Member A would have received training in the requirements needed to for reasonable grounds to arrest for possession of Drugs.

36. An officer with the same training and experience as Member A would have known that more evidence was needed and would not have attested the Driver.

IV. COUNT 2: SEARCH OF THE OCCUPANTS

32. Section 77(3)(a)(ii)(B) of the Act defines abuse of authority to include “intentionally or recklessly searching a person without good and sufficient cause.”

RULING

34. The searches of the Occupants were made incidental or arising from their arrests so their lawfulness depended on the lawfulness of the arrests. The arrests were made without reasonable grounds so the searches were made without reasonable grounds.

35. The same considerations that applied to the arrests apply to the searches of the Occupants.

V. COUNT 3: SEARCH OF THE VEHICLE BY MEMBER A

37. Section 77(3)(a)(i) applies to the search of a person but not a search of a vehicle.

38. The other provisions of the Act that may apply are:

a. sections 77(1)(a) and 77(2)(b) by committing an offence that would discredit the member’s police department; or

b. section 77(3)(m)(i):by committing neglect of duty by not promptly and diligently do anything that it is one’s duty as a member to do.

a. Discreditable Offence

39. The *Charter of Rights and Freedoms* (“Charter”) states:

8. Everyone has the right to be secure against unreasonable search or seizure.

40. Section 24 of the Charter sets out the remedy for an unreasonable search:

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the

circumstances, the admission of it in a proceeding would bring the administration of justice into disrepute.

41. The search of the vehicle by Member A was unreasonable and an infringement of the Driver's and to a lesser extent the Passenger's rights to be free from unreasonable search.

42. The Charter provides a remedy for an unlawful search but does not make it an offence. Accordingly, Member A did not commit a discreditable offence.

b. Neglect of Duty

"neglect of duty", which is neglecting, without good and sufficient cause, to ... promptly and diligently do anything that it is one's duty as a member to do.

43. Section 38 of the Act states that a municipal police officer has:

(a) All of the powers, duties and immunities of a peace officer and constable at common law or under any Act.

44. Section 26(2) of the Act sets out the duties and functions of a municipal police force as:

(a) enforce in the municipality, municipal bylaws, the criminal law and the laws of the Province;

(b) generally maintain law and order in the municipality, and

(c) prevent crime.

45. Section 34 of the Act states:

(2) The municipal Police department...must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the chief constable, under the director's standard or under this Act or any other enactments.

46. There was no evidence of specific duties assigned to Member A by the chief constable regarding the search of vehicles.

47. From the above it appears that the duties of Member A included to:
- (a) Enforce the law;
 - (b) Preserve the peace;
 - (c) Prevent crime and other offences; and
 - (c) Maintain law and order.

RULING

48. The evidence does not appear to substantiate that, in the circumstances, that Member A had a duty to comply with the Charter.

VI. COUNT 4: FAILURE TO GIVE CHARTER WARNING

49. Section 10 of the Charter provides that:

Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right.

50. Member A arrested the Driver but failed to inform him that he had the right to retain and instruct counsel without delay.

RULING

51. The evidence does not appear to substantiate that, in the circumstances, that Member A had a duty to provide the Warning.

52. The same considerations that applied to the search of the vehicle apply to this allegation.

VII. COUNT 5: FAILURE TO DOCUMENT THE INCIDENT

53. Victoria Police Department Policy AF170 stipulates that:

3.1 General Occurrence (GO) report must be submitted where:

3.1.1 Reason to believe an offence has been committed;

3.1.2 An arrest

54. Section 77(3) of the Act stipulates:

[A]ny of the conduct described in the following paragraphs constitutes a disciplinary breach of a public trust, when committed by a member:

(m) “neglect of duty”, which is neglecting, without good and sufficient cause, to do any of the following:

(ii) promptly and diligently do anything that it is one’s duty to do;

55. The Members appear to have believed that an offence had been committed and arrested the Occupants on March 16, 2023.

56. They did not file a CO until April 17, 2023. This appears to be a contravention of their duty under section 77(3)(m)(i).

57. Member B explained that he did not believe that a GO was warranted as:

a. Nothing of interest to police/intelligence was obtained from this investigation, and

b. The Members had extensive PRIME history and generating another prime report of no police value would push older file (sic) of value out of police mdt.

RULING

58. The Members did not promptly file a CO on the Incident. This lapse was not unintentional as Member B appears to have consciously decided not to comply at the time of the Incident.

59. The Incident linked the Occupants to each other, to the vehicle, the drug house at [REDACTED], cash, and a machete. Those were connections that do not appear to have been made in the existing PRIME information.

60. The Incident was also significant as it was an occasion that the Members arrested and searched two men without finding incriminating evidence. A failure to file a CO would leave this undocumented.

61. It appears that the Members did not have had good and sufficient cause to ignore the Policy.

VIII. CONCLUSION

62. Pursuant to section 117(9) of the Act on review of the Investigator's report and the evidence and records referenced in them the conduct of the Members appears to constitute misconduct pursuant to:

COUNT 1: section 77(3)(a)(i) of the Act for arresting the Occupants;

COUNT 2: section 77(3)(a)(ii)(B) of the Act for searching the Occupants; and

COUNT 5: pursuant to section 77(3)(m)(ii) of the Act for failing promptly and diligently documenting the Incident.

63. Pursuant to section 117(10) of the Act on review of the report, the evidence and records the conduct of Member A did not constitute misconduct for:

COUNT 3: searching the vehicle; and

COUNT 4: failing to give the Charter warning to the Driver.

64. The decisions on the misconduct matters that are not substantiated are final and conclusive.

IX. NEXT STEPS

65. This is notification to the parties of the next steps in this proceeding.

66. Pursuant to section 120 of the Act I offer the Members a prehearing conference respecting the misconduct allegations that appear to be substantiated.

67. I direct the Members to advise the Registrar within 5 days once a decision has been made whether to accept this offer of a prehearing conference.

68. The disciplinary and corrective measures which I would consider appropriate in this case are:

- a. verbal or written reprimand; and/or
- b. to require the members to take training or retraining in the Charter requirements for arrest and search in a charge under the *Controlled Drugs and Substances Act*.

69. If the members accept a prehearing conference then pursuant to section 113 of the Act:

- a. the Complainant has the right to make oral or written submissions, or both, to the prehearing conference authority regarding the disciplinary or corrective measures that would be appropriate. This must be done within 10 business days of receipt of this notice.
- b. the members have the right make submissions to the prehearing conference authority. This must be done within 10 business days of receipt of this notice.

70. If this matter proceeds to Disciplinary Hearing then:

- a. the Complainant has the right to make submissions; and
- b. the Members may request permission to question witnesses pursuant to section 119 of the Act. Such requests must be made within 10 business days of receipt of this Notification.

71. A disciplinary proceeding concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this Decision. That date will be March 12, 2024.

72. A pre-discipline proceeding conference call will be convened by telephone at 9:00am on February 13, 2024 with the Members or counsel on their behalf. At that time dates will be canvassed that are convenient to commence the disciplinary hearing. The Registrar will advise the parties of the conference call details.



M. G. Takahashi, P.C.J. (ret.)
Date: January 16, 2024