

OPCC File No.: 2024-26734

September 09, 2025

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
CERTAIN OFFICERS OF THE VANCOUVER POLICE DEPARTMENT**

**RETIRED JUDGE'S REVIEW AND DECISION
PURSUANT TO S. 117(1) AND S. 117(7) OF THE *POLICE ACT***

TO: Constable [REDACTED]
Constable [REDACTED]
Special Municipal Constable [REDACTED] The Respondent Members

AND TO: The Police Complaint Commissioner

AND TO: Sergeant [REDACTED]
The Investigating Officer

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Introduction, and the Scope of this Review

1. By letter dated August 19, 2025, the Police Complaint Commissioner appointed me, as a retired judge, to review the Final Investigation Report ("FIR") of an investigating officer addressing whether three members of the Vancouver Police Department neglected their duty at the Vancouver Jail ("Jail"), within the meaning of section 77(3)(m)(ii) of the Police Act, RSBC, 1996, c.367 (the "Act"). My appointment was pursuant to section 117(1) of the Act.

2. The investigating officer, at the end of his 67 page FIR, recommended "that the allegation of Neglect of Duty pursuant to section 77(3)(m)(ii) of the Police Act be unsubstantiated." His FIR is dated July 4, 2025.

3. At the conclusion of this review, I am to consider whether the conduct of the three officers appears to constitute misconduct (s.117(9)), or, decide instead, that it does not constitute misconduct. (s.117(10)).

4. In addition to the FIR, I also reviewed, as I am required to, the evidence in the records referred to in the FIR. They include hundreds of pages of material, video recordings of the events in issue, and audio recordings of interviews of the three Respondent members and other witnesses.

5. The events took place at the Jail on February 13, 2024. Ms. [REDACTED] ("Ms. [REDACTED] or the "affected person") was lodged in the Jail overnight as an "H-SIPP" (Hold-State of Intoxication in a Public Place). The three Respondent members dealt with her at the Jail on the morning of February 13, and it is those dealings I need to examine in order to determine whether the Respondents appear to have neglected their duties within the meaning of s.77(3)(m)(ii) of the Act. That provision creates a disciplinary breach of trust from a member neglecting his or her duty, which is neglecting, without good or sufficient cause, to properly and diligently do anything that it is a member's duty to do.

6. There was no complaint arising from these events, and Ms. ■ was not interviewed as part of the investigation. The investigating officer tried repeatedly to locate her in order to interview her, but he was unsuccessful.

7. As the reviewer under s.117 of the Act, I am only to review the FIR and its attachments, in order to "make a decision on the matter" (s.117(1)(b)). As noted earlier, I am to determine whether the conduct in question, "appears to constitute misconduct" (s.117(9)), or to decide instead, "that the conduct does not constitute misconduct" (s.117(10)).

8. I therefore have not heard cross-examination on any of the witness statements that are before me. I have not heard submissions from any party urging me to decide the matter one way or the other. Nor, in this particular case, is there a complainant to hear from (there has been no complaint filed), or a statement from the affected person. (The investigator was unable to make contact with her despite his several attempts to do so.)

9. Confining myself, as I must, to what is in the FIR with its attachments, I can only determine what appears to have taken place, as opposed to being able to make definitive findings of fact after the evidence has been tested in an adversarial process. With that qualification, I set out the facts as they appear from my review of the FIR and its attachments.

The Facts

10. Ms. ■ was brought into custody and lodged in the Jail at about 1:15AM on February 13, 2024. She had been arrested by the Metro Vancouver Transit Police for being intoxicated in a public place.

11. She spent the night in a cell, on the floor, apparently sleeping through the night for the most part.

12. Sometime after 7AM on February 13, Special Municipal Constable ("SMC") ■ ordered that Ms. ■ be brought to the front desk at the Jail so that he could assess her for

release. SMC [REDACTED] was the Acting Supervisor on February 13. He had been a jail guard for over 20 years. He had dealt with more than a thousand SIPPs. He had been advised that Ms. [REDACTED] had been in custody since approximately 1:15AM that morning.

13. In his witness statement, SMC [REDACTED] said that in his experience, SIPPs usually can be released after three or four hours in custody. When he assesses them, he determines whether to release them at the time of the assessment or to give them a little longer in the cell. In the latter case, he reassesses them again later to see if they are fit to care for themselves at that time. (Before SMC [REDACTED] could assess Ms. [REDACTED] her arm was injured, and instead of being assessed, she was given medical treatment. See below.)

14. In the events as they occurred prior to the injury, SMC [REDACTED] directed the Respondent member, SMC [REDACTED] to bring Ms. [REDACTED] from the cell to the front desk for the assessment.

15. SMC [REDACTED] had been hired as a part-time guard in 2006, and became full-time in 2012. In his statement, he estimated that, on each shift, he deals with somewhere between none and 15 SIPPs, and that he has dealt with hundreds if not thousands of SIPPs in his time at the Jail.

16. SMC [REDACTED] believed Ms. [REDACTED] was likely a reasonable candidate for release when SMC [REDACTED] directed him to bring her to the desk. She had been in the cell for at least 6 1/2 hours, and the log notes indicated that she had mostly been sleeping or resting during that time. She had not caused any disturbance. As a matter of law, and of good practice toward those in custody, the guards do not want to detain SIPPs longer than necessary.

17. Because the affected person was female, SMC [REDACTED] decided to have two female guards bring her out from the cell to the front desk for the assessment. The two female guards are the other two Respondent members, Constable [REDACTED] [REDACTED] and Constable [REDACTED].

18. Fortunately, every moment of Ms. ■ being in the custody of the three Respondent members is captured on one or more of the video recordings from the six cameras at the Jail. I had the opportunity to study that video evidence, together with the witness statements from each of the three Respondent members, as well as the witness statements of other officers.

19. Constable ■ had been a jail guard for about nine months as of February, 2024. She estimates that by then, she had dealt with over 100 SIPP's.

20. Constable ■ had been a jail guard for about 18 months. She estimates that she had dealt with several hundred SIPP's.

21. Having reviewed the statements of each of the three Respondent members, and done so with the context afforded by the extensive video evidence, and the witness statements from other officers, I observed nothing that caused me to distrust the Respondents' statements. I recognize that their statements were not tested by cross-examination, or tested against any contrary statement from a complainant, but their testimony, to me, appeared to be both credible and reliable from all that I was able to observe.

22. Ms. ■ appears in the video from the cell to have been sleeping on the cell floor in a fetal position. At 7.52.01 AM, Constable ■ prodded her arm to waken her. At nearly the same time, 7.52.03 AM, Constable ■ entered to help Constable to ■ take Ms. ■ to the front desk for her assessment. SMC ■ was at the door of the cell when the two female Respondents were in the cell.

23. Constable ■ had spoken to Ms. ■ before prodding her on the arm, in order to direct her to stand up. Ms. ■ did not respond to what the Constable had said. But after Constable ■ prodded Ms. ■ Ms. ■ opened her eyes and Constable ■ believes Ms. ■ was paying attention to her at that time.

24. Constable [REDACTED] again told Ms. [REDACTED] to get up. Ms. [REDACTED] instead, pulled the neck of her sweater up over her head. She appeared to want to stay where she was. That is not uncommon for SIPP in a warm cell in the middle of winter.

25. Constable [REDACTED] responded, with the assistance of Constable [REDACTED] by taking hold of one arm, with Constable [REDACTED] taking hold of the other arm, each of them applying a twist lock, to cause Ms. [REDACTED] to stand up when she was resisting the verbal request to do so. A twist lock is a soft hand technique used to get someone up and moving. It is a commonly-used technique, which the two Constables were trained to employ properly.

26. The video shows the Constables starting to raise Ms. [REDACTED] to her feet at 7.52.16 AM. In SMC [REDACTED] statement, he remembers the two Constables getting Ms. [REDACTED] to stand up because they did not want to demean her by dragging her out of the cell.

27. Holding Ms. [REDACTED] from behind, each Constable holding one of her arms, they walked Ms. [REDACTED] out of the cell door at 7.52.39 AM, and headed her down the hall to the front desk. The brief, initial assessment of both Constables was that Ms. [REDACTED] could have been released at that stage. For example, she appeared to have her balance, to understand Constable [REDACTED] and she did not smell of alcohol.

28. From when she was on her feet in her cell, through her walk toward the front desk, Ms. [REDACTED] appeared some of the time to be resisting the journey. At some moments, she appeared to walk forward. At others, she appeared to stop or slow down, seemingly in order to resist.

29. By the time she was in the vicinity of the front desk, at about 7.53.08 AM, Ms. [REDACTED] appeared to resist by letting her legs go limp, and falling toward the floor. By 7.53.10 AM, she was kneeling on the floor.

30. The two Constables did not let go of Ms. [REDACTED] as she went down because they were concerned that if they did, she would injure herself or possibly strike out at someone.

31. When the Constables were attempting to raise Ms. ■ back up, they heard a popping or snapping sound. Ms. ■ arm was probably injured at that time. (The initial medical assessment at the hospital later that morning was that Ms. ■ had suffered a fracture of her humerus bone in her upper right arm. From the FIR, at page 4, however, it appears that in fact, Ms. ■ did not suffer a broken bone from the events on February 13, 2024. Nonetheless, it appears from the videos and from the statements in the FIR regarding what happened that day, that Ms. ■ suffered some form of injury to her upper right arm.)

32. She appeared then to be in pain. The Constables immediately helped her gently onto the floor (7.53.24 AM) where she could lay immobile. People helped her to sit up at about 7.56 AM. A chair was brought for her at 7.58.40 AM. A sling was fitted for her arm. She was taken to the hospital by stretcher, finally leaving the front desk area at 8.42 AM.

33. The video evidence includes no audio component. What was said must be drawn from what the witnesses said in their statements.

34. The Respondent ■ recalls Ms. ■ in the hall, between the cell and the front desk, speaking in a language other than English, likely an Eastern European language.

35. However, while dealing with Ms. ■ in the cell, Constable ■ ■ had the impression that Ms. ■ could speak English, but was choosing not to. It appeared to Constable ■ that Ms. ■ understood her, but simply did not want to be released.

36. When a SIPP is brought into the Jail, the standard procedure is that if there is a language barrier, it is noted on the booking sheet, and an attempt is made to find a translator, but there was no such notation on the booking sheet for Ms. ■

Legal Analysis

37. The question is whether the Respondent officers at the Jail, on February 13, 2024, appear to have contravened s.77(3)(m)(ii) of the Act. That provision reads as follows:

77 (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

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

(ii) promptly and diligently do anything that it is one's duty as a member to do;

38. Subsection (3), above, refers to subsection (4), which provides:

(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

39. In order for there to be a breach, an intention, or willfulness, to neglect one's duty is not required. Nor does s.77(m)(3)(m)(ii) require recklessness as an ingredient. The assessment called for examines the conduct on a more objective basis, without however ignoring why the officers were doing what they did at each stage. The question is really whether the officers acted reasonably toward Ms. ■ in performing their duties, taking into account the circumstances in which they were operating.

40. A helpful summary of the legal principles to be employed in assessing conduct in the context of s.77(3)(m)(ii) is found in the decision of Retired Judge Frankel, KC, in his decision dated March 31, 2025, in OPCC File 2024 – 25498. He wrote as follows, at paragraph 52 – 57, and I respectfully adopt his summary and analysis:

[52] In the FIR, Sgt. D references several Ontario decisions which stand for the proposition that neglect of duty involves an element of "willfulness in the police officer's neglect or there must be a degree of neglect which would made the matter cross the line from a mere job performance issue to a matter of misconduct": *Hawkes* at para. 30; *G.(P.) v. Ontario (Attorney General)* (1996), 90 O.A.C. 103 (Div. Ct.) at para. 83; *Korchinski v. Office of the Independent Police Review Director*, 2022 ONSC 6074 (Div. Ct) at para. 45. This view is also reflected in Ontario Civilian Police Commission decisions: *Neild v. Ontario Provincial Police*, 2018 ONCPC 1 at para. 18; *Gannon v. Windsor Police Service*, 2024 ONCPC 28 at para. 67. However, the legislative framework in Ontario is different from that in British Columbia.

[53] The neglect-of-duty provision considered in these Ontario cases was in a *Code of Conduct* enacted by regulation made pursuant to the former *Police Services Act*,

R.S.O. 1990, c. P. 15. Although this regulation went through a number of iterations before being repealed on April 1, 2024, the portion relevant to the present discussion remained essentially unchanged. It read (as set out in para. 19 of *Hawkes*, O. Reg. 123/98 General):

- 2(1) Any chief of police or other police officer misconducts if he or she engages in,
 - (c) Neglect of duty, in that he or she,
 - (i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of a police force,

[54] This wording mirrored that found in the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98, made pursuant to the *PA*, until the current s. 77(3)(m)(ii) was enacted by the *Police (Misconduct, Complaints, Investigations, Discipline and Proceedings) Amendment Act, 2009*, S.B.C. 2009, c. 28, s. 10. A side-by-side comparison of the former and current *PA* neglect-of-duty provisions is helpful:

<u>Previous Provisions</u>	<u>Current Provisions</u>
<p>s. 4(1) In this Code, disciplinary default means</p> <p>(b) neglect of duty.</p> <p>s. 6. For the purposes of section 4(1)(b), a police officer commits the disciplinary default of neglect of duty if</p> <p>(a) the police officer, <u>without lawful excuse</u> fails to promptly and diligently</p> <p>(ii) perform his or her duties as a police officer,</p> <p>s. 17 Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer <u>intentionally or recklessly</u> committed the act or omission constituting the disciplinary default.</p> <p>[Emphasis added.]</p>	<p>s. 77(1) In this Part, "misconduct" means</p> <p>(b) conduct that constitutes</p> <p>(ii) a disciplinary breach of trust described is subsection (3) of this section</p> <p>(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of trust, when committed by a member</p> <p>(m) "neglect of duty", which is neglecting, <u>without good or sufficient cause</u>, to do any of the following:</p> <p>(ii) promptly and diligently do anything that it is one's duty as a member to do;</p> <p>[Emphasis added.]</p>

As can be seen, the amendments replaced "without lawful excuse" with "without good or sufficient cause", and removed the requirement that an officer have acted "intentionally or recklessly". However, the requirement to have acted "intentionally or recklessly" was

retained for other types of misconduct: e.g., "abuse of authority" (s. 77(3)(a)(i), (ii)); "damage to police property" (s. 77(3)(d)(i)); "damage to property of others" (s. 77(3)(e)(i)).

[55] The effect of the amendments in relation to neglect of duty was discussed by former Police Complaint Commissioner Lowe in his decision in OPCC File No. 2011-6912 (February 20, 2013) at p. 4:

The changes to the *Police Act* in 2010 removed the mental requirement of "intentionally or recklessly" in the Misconduct of Neglect of Duty. This removal of mental requirement resulted in a commensurate change from the requirement of "without lawful excuse" to "without good or sufficient cause." This removal of the requirement for proof of a subjective mental state and the moderation to the standard of "without good or sufficient cause" is consistent with a legislative focus on an objective standard of reasonableness in determining whether or not a neglect of duty constitutes misconduct.

In my view, the use of the term "good or sufficient cause" broadens the basis upon which a Neglect of Duty may be excused from misconduct beyond its legislative predecessor "lawful excuse".

In reviewing the misconduct of Neglect of Duty as set out in s. 77(3)(m)(ii) of the *Act*, the statutory elements should be applied are as follows:

1. The determination of whether a duty exists in the circumstances, and if so, the nature of the duty;
2. Whether or not the conduct of the Officer constitutes neglect of that duty; and, if so,
3. Whether there exists good or sufficient cause to excuse the neglect.
 - Good or sufficient cause: objective standard of what a reasonable police officer with similar training, knowledge, skills and experience would have done in the same circumstances.
 - The spectrum of performance spans from when a member clearly takes no action, and fails to perform any aspect of their required duties, through to level in which a member performs their required duties in an exemplary fashion. The difficulty in determining whether misconduct has occurred lies in the middle of the spectrum and

must be resolved through the application of the objective standard of reasonableness in terms of the Officer's conduct.

[Emphasis added by Mr. Frankel]

[56] Commissioner Lowe's analysis was cited with approval in OPPC File No. 2021-19627 (February 25, 2024). After referring to the change having shifted the focus to an objective standard of reasonableness, Arbitrator Hoy stated:

67. Whether the breach in question amounts to neglect of duty requires the application of what the objective standard of reasonableness might be as there are a multitude of officer performance circumstances that may attract analysis. Both advertent and inadvertent conduct can result in findings of negligence but it is to be determined on the yardstick of objective reasonableness.

[57] Also germane is Arbitrator Oppal's decision in OPPC File No. 2022-22059 (September 29, 2023), wherein he said this with respect to s. 77(3)(m)(ii) of the PA:

20.

The section creates a disciplinary breach of trust known as "neglect of duty". Whereas other types of police misconduct may involve deliberate and intentional conduct — an obvious example being an officer's excessive use of force — by definition "neglect of duty" will generally involve inaction. It is the failure to do something that an officer was under a legal duty to do. There are three essential elements that constitute neglect of duty. First, there must be a duty to do some positive act, that is to say an officer was under a duty to take certain actions. Second, there must be evidence establishing that the officer neglected that prescribed duty. Third, and this is relevant in this case, there must be evidence of no good cause or insufficient cause that provides an explanation for the failure to execute that duty. That is to say, *actus reus* has been proven.

[Emphasis added by Mr. Frankel]

At para. 22, he noted that the element of "willfulness" referred to *Hawkes* and *G.(P.)* is not required in British Columbia because the wording of s. 77(3)(m)(ii) is different from the Ontario *Code of Conduct*.

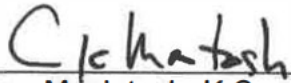
Summary and Conclusions

41. In summary, what the FIR and its attachments show is that, for the most part, Ms. ■ had been sleeping and resting in the cell for about 6 1/2 hours. In the experience of SMC ■ that meant that an intoxication assessment was called for, in part, so as to not detain Ms. ■ longer than was necessary. He and SMC ■ called on Constables ■ and ■ to bring Ms. ■ from the cell to the front desk. When the two Constables went to the cell to get Ms. ■ it appeared to them that she did not want to leave, although she appeared to be in a condition to be assessed and released. The Constables believed she was steady on her feet, but resisting from time to time en route to the front desk. That is not inconsistent with the video evidence. After Ms. ■ had collapsed to the floor near the front desk, her upper right arm was accidentally injured when the Constables attempted to raise her. After that, instead of the intended assessment by SMC ■ Ms. ■ was taken to hospital for medical treatment.

42. From those circumstances, I do not see evidence that the Respondents neglected their duties. SMC ■ after speaking with SMC ■ reasonably believed it was time to assess Ms. ■ for her release. The two Respondent officers he assigned to bring Ms. ■ to the front desk were of the same view from their brief, initial assessment of her. The reluctance of Ms. ■ to be part of the process led to Constables ■ and ■ attempting to raise her from the floor near the front desk when the injury unfortunately occurred.

43. I conclude, pursuant to section 117(10) of the Act, that the conduct of the three Respondents does not constitute misconduct. Pursuant to section 117(8)(e), and section 117(11), I add that my Decision is not open to question or review by a court on any ground, and is final and conclusive.

Dated at Vancouver, British Columbia this 09th Day of September 2025.


George Macintosh, K.C.

Retired Judge of the Supreme Court of British Columbia