



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: 2023-23240

December 4, 2024

To: Ms. [REDACTED] (Complainant)

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

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

And to: The Honourable Elizabeth Arnold Bailey (ret'd) (Retired Judge)
Retired Justice of the British Columbia Supreme Court

And to: Mr. Frank Chong
Chair, c/o Vancouver Police Board

On January 23, 2023, our office received a complaint from the late Ms. [REDACTED] describing her concerns with members of the Vancouver Police Department. The OPCC determined Ms. [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the Vancouver Police Department (VPD) to conduct an investigation.

On May 2, 2023, an investigation was initiated into an allegation of *Abuse of Authority* for unnecessary force in relation to the arrest of Ms. [REDACTED] against Constable [REDACTED] Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]. On April 30, 2024, pursuant to section 108 of the *Police Act*, an allegation of *Neglect of Duty* was identified against Constable [REDACTED] and Constable [REDACTED] for failing to complete Subject Behaviour/Officer Response Reports (SBOR Reports). Additionally, on September 17, 2024, pursuant to section 108 of the *Police Act*, an allegation of *Abuse of Authority* was identified against then Special Municipal Constable [REDACTED] [REDACTED] (now Constable) in relation to a use of force that occurred within the VPD jail.

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Police Complaint Commissioner

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On October 21, 2024, the Investigating Officer, Sergeant ██████ completed his investigation and submitted the Final Investigation Report to Inspector ██████, the Discipline Authority.

On November 5, 2024, the Discipline Authority issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority made the following determinations with respect to the three allegations of misconduct identified above:

- i. The allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constable ██████ Constable ██████ Constable ██████ and Constable ██████ did not appear to be substantiated.
- ii. The allegation of *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* against Constable ██████ and Constable ██████ did not appear to be substantiated.
- iii. The allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constable ██████ did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation 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 allegation of *Abuse of Authority* against Constable ██████

Background

Vancouver Police Department (VPD) members attended the residence of Ms. ██████ on January 18, 2023, in response to allegations of her brandishing a knife and threatening to kill one of her neighbours. VPD members interviewed witnesses and reviewed Closed Circuit Television (CCTV) video. They located Ms. ██████ in a neighbour's suite and executed an arrest after Ms. ██████ came into the hallway. During the arrest, Constable ██████ had his firearm out of the holster and held at his leg, pointed to the ground, in what is referred to as the low ready position and Constable ██████ displayed her Conducted Energy Weapon (CEW). The VPD members then took Ms. ██████ to the Vancouver Jail.

At Vancouver Jail, Special Municipal Constables (SMCs) searched Ms. ██████ and began escorting her to a cell, at which point Ms. ██████ went limp. Jail video depicts that two SMCs had control of Ms. ██████ limbs and were escorting her to the cell. While that occurred, Constable ██████ grasped Ms. ██████ hair and appears to have pulled Ms. ██████ by the hair to her cell. Constable ██████ when interviewed, stated that he was trying to prevent Ms. ██████ from turning around and spitting. Moreover, Constable ██████ stated that "based on the video, it did not look like I was pulling on her hair, it looked like I was simply guiding her to the cell, and to break her balance and to keep moving her forward."

Discipline Authority's Decision

The Discipline Authority found no clear, convincing, and cogent evidence that the respondent officers used unnecessary force during the arrest of Ms. ██████ The Discipline Authority

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notes that the use of force during arrest did not involve strikes and suggests that it followed the National Use of Force Framework appropriately, beginning with presence and communication and progressing only to soft physical control, despite Ms. [REDACTED] being perceived as potentially posing a threat of grievous bodily harm or death.

With respect to the *Neglect of Duty* allegation, the Discipline Authority relied on Ontario and Newfoundland case law to conclude that because Constable [REDACTED] and Constable [REDACTED] were neither reckless nor deliberate in their neglect to complete SBOR Reports, they had good or sufficient cause to excuse the neglect.

The Discipline Authority, having turned his attention to the *Abuse of Authority* allegation against Constable [REDACTED] noted the reasons that Constable [REDACTED] provided for his grip on Ms. [REDACTED] hair and noted that Constable [REDACTED] could not reasonably have held onto anything else instead to accomplish his stated goals – guiding Ms. [REDACTED] to her cell and preventing her from spitting. The Discipline Authority stated that Constable [REDACTED] explanation was reasonable. Despite questioning whether Constable [REDACTED] application of force was necessary, the Discipline Authority found that it was not reckless and concluded on the balance of probabilities that Constable [REDACTED] did not abuse his authority.

OPCC Decision, Section 117 of the *Police Act*

I have reviewed the Discipline Authority's decision. I do not have a reasonable basis to believe that the decision is incorrect with respect to the allegation of *Abuse of Authority* for force used during the arrest of Ms. [REDACTED]. The decision of the *Discipline Authority* regarding the allegation of *Abuse of Authority* for force used during the arrest of Ms. [REDACTED] against Constable [REDACTED], Constable [REDACTED], Constable [REDACTED] and Constable [REDACTED] is final and conclusive under section 112(5).

I believe that the Discipline Authority erred in not finding an appearance of substantiation for the allegation of *Neglect of Duty* against Constable [REDACTED] and Constable [REDACTED] and applied the incorrect legal framework, inappropriately importing an intentionality requirement. However, I will take no further action with respect to that allegation. The members who failed to complete SBOR Reports have acknowledged their errors and stated that they now understand their duties and have been submitting such reports in similar circumstances. On the basis that the *Police Act* aims to correct and educate members where appropriate, and the fact Constable [REDACTED] and Constable [REDACTED] have corrected their behaviour, there is not a public interest, in this instance, in pursuing a review with respect to the allegation of *Neglect of Duty*. Therefore, the decision of the Discipline Authority with respect to the allegation of *Neglect of Duty* against Constable [REDACTED] and Constable [REDACTED] is final and conclusive under section 112(5).

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 unsubstantiated allegation of *Abuse of Authority* against Constable [REDACTED].

The Discipline Authority's decision leaves open the key question under section 77(3)(a)(ii)(A) of whether the force used was "unnecessary force." The Discipline Authority states that he questions whether Constable [REDACTED] application of force was necessary but does not provide any

further analysis. Furthermore, there is a reasonable basis to believe that the Discipline Authority erred in concluding that Constable █████ explanation was reasonable given his experience working in the Vancouver Jail. Constable █████ rationale for why he grasped Ms. █████ hair is not sufficiently borne out by the video evidence that Constable █████ relied on as he indicated he had no independent recollection. There is no objective evidence that Ms. █████ was a spitting risk, nor did Constable █████ provide any reason to believe that Ms. █████ presented more of a spitting risk than the average detainee. It appears that the Discipline Authority accepted Constable █████ emphasis on his past experience in the absence of objective evidence to support the application of force in these circumstances. Furthermore, based on a review of the video evidence, holding Ms. █████ hair from the position he is in would appear to provide little objective ability to control against being spat on or prevent Ms. █████ from turning around. Additionally, I understand the VPD jail has spit hoods which are meant to be utilized in circumstances where individuals in custody are spitting.

The Discipline Authority's decision also does not address the degree of movement of Ms. █████ head shown in the video, which appears to be commensurate to the movement of Constable █████ left hand, such that force appears to be applied beyond what would be necessary to keep Ms. █████ moving forward. The two SMCs who have Ms. █████ by the limbs also appear to have sufficient control of Ms. █████ without Constable █████ involvement.

I consider that the Discipline Authority's application of the test under section 77(3)(a)(ii)(A) was incorrect. The Discipline Authority states that although he questions whether Constable █████ application of force was necessary, he does not find that it was reckless. The Discipline Authority's decision does not provide reasons why Constable █████ was not reckless in the relevant sense – reckless with respect to the application of unnecessary force.

To conclude, the video evidence suggests that Constable █████ pulled Ms. █████ by the hair and provides no reason to perceive the use of force as necessary in the circumstances.

Appointment of a Retired Judge

Section 117(1) provides that the Commissioner may appoint a retired judge to review the investigating officer's report, and the evidence and records referenced in that report, and make a decision on the matter. An appointment under section 117(1) must be made pursuant to section 177.2 of the Act.

Section 177.2 of the Act, in turn, requires the Commissioner to request the Associate Chief Justice of the Supreme Court of British Columbia to consult with retired judges of the Provincial Court, Supreme Court and Court of Appeal and recommend retired judges who the Commissioner may include on a list of potential adjudicators. Appointments under the Act are to be made in accordance with published procedures established under section 177.2(3).

On June 13, 2024, I published the OPCC's appointment procedures under section 177.2(3) of the Act (Appointment Procedures) and the list of retired judges who may be appointed for the purposes of sections 117, 135 and 142.

In accordance with the Appointment Procedures, I have appointed Elizabeth Arnold Bailey, retired British Columbia Supreme Court Justice, to review this matter and arrive at their own decision based on the evidence. I have considered the factors as set out in the Appointment Procedures, namely:

- a) the provision under which the appointment is being made;
- b) the current workloads of the various retired judges;
- c) the complexity of the matter and any prior experience with the *Police Act*; and
- d) any specific expertise or experience of a retired judge with respect to a particular issue or sensitivity associated with the matter

Retired Judge Arnold Bailey has confirmed their availability to review this matter and reported no conflicts.

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.



Prabhu Rajan
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cc: [REDACTED], Registrar.
Sergeant [REDACTED], Investigator, Vancouver Police Department.
Inspector [REDACTED], Discipline Authority, Vancouver Police Department.

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