

BRITISH COLUMBIA POLICE COMMISSION
IN THE MATTER OF THE POLICE ACT S.B.C. c.53

IN THE MATTER OF THE APPEAL OF GILBERT J. PELLETIER UNDER
SECTION 65 OF THE *POLICE ACT* TO THE BRITISH COLUMBIA
POLICE COMMISSION

BEFORE CAROLYN ASKEW ,)
MEMBER)
SUSAN BRICE ,)
MEMBER)
JACK LEE,)
MEMBER)

JUNE 27, JULY 24, 25, 1996,
AT VANCOUVER, BRITISH
COLUMBIA

APPEARANCES

Gilbert J. Pelletier On His Own Behalf
Paul Devine Counsel to the Commission
Frank G. Potts Counsel for the B.C. Civil
Liberties Association
George K. Macintosh, Q.C. Counsel for the Vancouver
Police Board
William B. Smart Counsel for Constable Gatto

DECISION

Introduction

Gilbert J. Pelletier ("the complainant") requested a public inquiry into the conduct of Constable Bruno Gatto during an incident which took place on January 18, 1991 at the Blue Eagle restaurant in the City of Vancouver. The Vancouver Police Board ("the disciplinary tribunal") conducted a public inquiry into the complaint in June 1993. A second public inquiry was convened by the disciplinary tribunal in 1995 and on March 22, 1995, the complaint was effectively dismissed. The

complainant applied to this Commission for leave to appeal from the decision of the disciplinary tribunal upholding the decision of the Chief Constable of the Vancouver Police Department not to take disciplinary action against Cst. Gatto.

At the leave hearing on October 12, 1995, convened under Section 64 of the *Police Act*, the British Columbia Civil Liberties Association sought status to intervene in the complainant's application for leave to appeal. The Civil Liberties Association sought to challenge the interpretation given by the Chief Constable of the Vancouver Police Department ("the disciplinary authority") to Section 10(3) and (4) of the Police Discipline Regulations.

The Commission decided it had jurisdiction to grant intervenor status in its reasons dated December 8, 1995. Intervenor status was granted to the Civil Liberties Association for the limited purpose referred to above. The leave application continued on January 11, 1996, and on April 11, 1996, leave was granted to the complainant and a new hearing was ordered into certain aspects of the complaint. This is the decision of the Commission on the merits of the complaint.

Background

The original complaint consisted of four issues which were set out in the leave decision dated April 11, 1996. The issues are set out again here for convenience. Mr. Pelletier complains that on January 18, 1991:

- (a) Cst. Gatto assaulted him;
- (b) Cst. Gatto threw his wallet across the floor causing the loss of money from the wallet;
- (c) On January 19, 1991, Cst. Gatto told Mr. Pelletier that if Mr. Pelletier did not lay a charge against Cst. Gatto, he, Cst. Gatto, would recover Mr. Pelletier's money and threatened that if he did lay a charge, Cst. Gatto would haunt him for the rest of his life; and,
- (d) On February 8, 1991, Cst. Gatto again threatened the complainant.

Cst. Gatto was charged and convicted of assaulting Gilbert J. Pelletier, contrary to Section 266 of the *Criminal Code*, arising from the incident on January 18, 1991. In October of 1992, the conviction was set aside by Mr. Justice Wong of the Supreme Court of British Columbia. Once a decision was made to pursue an assault charge against Cst. Gatto, no internal investigation was conducted into any of the other conduct complained of by Mr. Pelletier. No disciplinary action was taken against Cst. Gatto by the disciplinary authority.

The disciplinary tribunal ruled on June 30, 1993, and confirmed this again in its decision on March 22, 1995, that the facts and circumstances leading to the allegation of assault and the question relating to the wallet were both issues which were dealt with by Justice Wong of the Supreme Court. The disciplinary tribunal ruled that Section 10(3) of the Regulations prevented disciplinary

proceedings with respect to those two matters. The disciplinary tribunal then considered the remaining two issues and dismissed the complaint.

With respect to the two allegations of threatening, leave was refused by this Commission on the ground that notwithstanding the lack of an internal investigation, the thoroughness and fairness of the inquiry satisfied the Commission that all evidence that was available to the complainant and Cst. Gatto had been put before the disciplinary tribunal and considered by it. However, leave to appeal was granted on the following basis:

"We grant leave to appeal and order a new hearing into any separate and distinct issues arising from Constable Gatto's conduct on January 18, 1991, that were not directly considered by the Courts under the *Criminal Code*. Without limiting the parties in the issues to be brought forward at the new hearing, we include all issues that arise from the complaint that Constable Gatto threw Mr. Pelletier's wallet across the room resulting in the loss of money from the wallet and the issue raised by counsel for the B.C. Civil Liberties Association of whether Constable Gatto's written statement to the disciplinary authority dated March 3, 1991 constitutes a default under Section 4(a) of Appendix A of the Regulation."

The remaining issues to be determined are whether Cst. Gatto's conduct concerning the wallet and/or his statement to the disciplinary authority constitute a disciplinary default under the Regulations.

(a) Did Constable Gatto throw Mr. Pelletier's wallet thereby causing the loss of money?

Facts

On January 18, 1991, at approximately 7:00 o'clock in the evening, the complainant was sitting at a counter in the Blue Eagle restaurant when Cst. Gatto and Cst. Ruschke entered the cafe. Cst. Gatto testified that he noticed a person named Steve Balog, whom he knew to be a drug trafficker, and three other males sitting at the counter. After speaking to some patrons who were seated at a table, Cst. Gatto said he approached the counter and asked the person he later knew to be the complainant for his name. The complainant gave his name and Cst. Gatto recalled that at the commencement of his shift he had seen a warrant for a person named Pelletier. Cst. Gatto said he continued the conversation with the complainant to determine if he was the person named in the warrant. At some point he asked the complainant if he had any drugs on him and the complainant replied that he had. Cst. Gatto searched the right front pant-pocket, with the consent of Mr. Pelletier, and removed approximately 10 Ritalin tablets from the pocket.

At that point, Cst. Gatto testified, he advised the complainant that he was under arrest for possession for the purposes of trafficking Ritalin. Almost immediately, Cst. Gatto went into the complainant's left front pant-pocket and removed a quantity of money consisting of several twenty dollar bills and some five dollar bills. Cst. Gatto said he looked at the money and estimated it at approximately \$300.00. Cst. Gatto testified that he told the complainant that he believed the money was drug

money, quickly searched the remaining pockets of the complainant, and handed the money back to Mr. Pelletier. While Cst. Gatto was searching him, the complainant testified that he told the officer that he had a prescription for the Ritalin in his wallet and pulled out his wallet.

Mr. Pelletier testified that the money was in his wallet and that Cst. Gatto grabbed the wallet from his hand, opened it up, removed some papers and the money, and threw both the papers and the money to the floor saying "this is all drug money". The complainant says that the wallet contained \$350.00, consisting of seven fifty dollar bills.

Cst. Ruschke testified that after Mr. Pelletier was asked his name by Cst. Gatto, he stood up to obtain his wallet to show identification. Cst. Ruschke said that while the complainant was getting his wallet, Cst. Gatto searched him and found the Ritalin tablets, and several twenty dollar and five dollar bills in his pockets. Cst. Ruschke said that Cst. Gatto placed all the items from Mr. Pelletier's pockets on the restaurant counter.

Both officers testified that when Mr. Pelletier began to look through his wallet for the prescription, he turned his back to Cst. Gatto. Cst. Gatto became concerned as to what the complainant was doing and by the fact that he could not see the complainant's hands. He asked the complainant to turn around, then forcibly turned him around, and a struggle ensued. Cst. Gatto put the complainant in a headlock position and walked the complainant to the washroom at the rear of the restaurant to search him more thoroughly. The struggle between Mr. Pelletier and Cst. Gatto and allegations of assault by the officer in the washroom were the subject of the criminal trial.

Cst. Ruschke testified that as the other officer and the complainant moved away from the counter, the complainant swept the contents of his pocket from the counter to the floor. Cst. Gatto said that as he took a firm hold of the complainant's left arm and spun him around, he swiped at his left hand which contained the money and the money went to the ground.

Cst. Ruschke said she moved toward the rear of the restaurant when Cst. Gatto and the complainant did and stood with her back to the closed door of the washroom while Cst. Gatto and the complainant were inside. She positioned herself in this location to ensure that no one entered the washroom and interfered with Cst. Gatto's search. She testified that she did not have a clear view of the counter or the money. Within a very short period of time, both officers and the complainant returned to the counter area and all parties immediately noticed that the large bills were missing from the floor. Cst. Ruschke testified that as she was walking back to the counter she saw the back of one of the males who had been sitting at the counter with Mr. Pelletier as that person left the restaurant. Within a few minutes, both officers left the restaurant after having said to the complainant that they would try to get his money returned. No individual responsible for taking the money was located, nor was the money ever recovered.

Mr. Pelletier was not charged with any offence as a result of being in possession of the Ritalin tablets.

In addition to the oral testimony at this hearing, we have carefully reviewed the transcript of the evidence given at the criminal trial before His Honour Judge J.B. Paradis, Provincial Court of British Columbia, as to the events in the restaurant. We are satisfied that no separate and distinct issues have arisen with respect to any alleged assault of Mr. Pelletier that were not considered by the Courts under the *Criminal Code*.

Decision

Having considered all the evidence before us, we are satisfied that Cst. Gatto did not throw Mr. Pelletier's wallet across the floor of the restaurant thereby causing the loss of the money. The complainant stated that his purpose in bringing the complaint was to show the police that it is wrong to approach a person as Cst. Gatto did unless the person is committing a crime and that he was not accusing the officer of taking the money. We accept the testimony of Cst. Gatto that the money was knocked by him from the complainant's hand in the course of Cst. Gatto's effort to gain control of Mr. Pelletier. In reaching this conclusion, we prefer the testimony of Cst. Gatto to that of the complainant because we do not find the complainant to be credible in this matter. On several matters of fact, the complainant greatly exaggerated his account of the conduct of Cst. Gatto. On other matters of fact, the complainant was unable to satisfactorily explain the contradictions between his written statement of complaint and his oral testimony.

Cst. Gatto's testimony varied somewhat from his testimony before Judge Paradis and there are some internal inconsistencies. However, his overall testimony was consistent and some of the inconsistencies can be attributed to the passage of time. Cst. Gatto exhibited concern for the property of the complainant; however, he was focused on restraining the complainant and completing his investigation. We do not believe it would be reasonable to hold Cst. Gatto responsible for the conduct of persons who remained at the counter while he searched Mr. Pelletier in the washroom.

We reviewed the testimony of Cst. Ruschke and we are satisfied that she is mistaken in her recollection of the location of the money. The mistake likely arises from the fact that Cst. Ruschke was focused on ensuring the situation in the restaurant did not deteriorate further, not on the money. We do not believe it would be reasonable to hold Cst. Ruschke responsible for the loss of the money either.

We approve the decision of the disciplinary tribunal not to take disciplinary action against Cst. Bruno Gatto for his conduct with respect to the loss of money by the complainant on January 18, 1991.

- (b) **Does Constable Gatto's statement to the disciplinary authority constitute a default under the Regulations?**

Facts

Cst. Gatto testified with respect to his written statement of March 3, 1991 that he had no intention to mislead the internal investigating officer or anyone else as to his conduct on January 18, 1991.

He said that he read or had read to him Mr. Pelletier's complaint letter dated February 11, 1991 prior to making his statement. He said he did not have legal advice prior to making his statement and believed when he made his statement that the statement could be made available to Crown counsel. A few weeks later, Cst. Gatto said Sergeant (now Inspector) Forbes contacted him and asked him if he hit Mr. Pelletier, to which he responded that he did.

Sgt. Kenneth Winn gave evidence as the officer who had responsibility for the investigation of Mr. Pelletier's complaint. Inspector Forbes also testified that he initiated the investigation of the complaint before turning it over to Sgt. Winn. Inspector Forbes said that he did not recall asking Cst. Gatto if he had struck the complainant and had no note of such a conversation. He testified that there is some uncertainty amongst members of the Police Department as to whether reports made by police officers in response to a request from the Internal Investigation section are admissible as evidence against the officer.

Decision

We are satisfied from the evidence that Cst. Gatto did not make a false or inaccurate statement to the disciplinary authority on March 3, 1991. Further, we accept without reservation that Cst. Gatto took seriously his response to the request of the Internal Investigation section for an account of his activities.

(c) Interpretation of Police (Discipline) Regulation Section 10(3) and (4)

In the leave decision of April 11, 1996, we adopted the submission of the British Columbia Civil Liberties Association that the disciplinary authority and the disciplinary tribunal misinterpreted Section 10(3) and (4) of the Regulations by not making a distinction between the words "arising out of the same facts and circumstances" in subsection (3) and the words "separate and distinct issues" in subsection (4). These provisions state:

"10.(3)Where a member has been prosecuted in respect of an offence punishable on indictment or on summary conviction and has been acquitted, no disciplinary proceedings shall be taken under this regulation arising out of the same facts and circumstances"

" (4) Subsection (3) does not apply where the disciplinary proceedings relate to separate and distinct issues from those tried in the criminal proceedings."

This error resulted in the disciplinary authority not conducting any investigation into the complaint of Gilbert Pelletier notwithstanding that several issues were raised in the complaint that were "separate and distinct" from the issue of assault contrary to the *Criminal Code*.

At this hearing, counsel for the Vancouver Police Board and for the Civil Liberties Association participated to the limited extent of making further submission on the earlier ruling. We were

advised by counsel that the policy of the Vancouver Police Department has changed with regard to its application of the Regulation.

That the distinction between the subsections is important is aptly illustrated by the facts of this case. Mr. Pelletier's complaint consisted of four actions by Cst. Gatto: assault, loss of property, and two incidents of threatening. Each of these actions if established in evidence would likely give rise to discipline under the Regulations. As a result of the practice of the disciplinary authority that no internal investigation would be conducted if criminal charges arose from the incident, no elements of Mr. Pelletier's complaint were ever addressed. It ought to have been clear, and we understand that it is now clear, to the disciplinary authority that the complaint raised separate and distinct issues that warranted investigation under the Regulations. Regulation 10(3) protects an officer from being disciplined, say for discreditable conduct, for engaging in the conduct that gave rise to a criminal charge, say assault. Regulation 10(4) preserves the right of the disciplinary authority to discipline an officer, say for discreditable conduct, which occurred at the same time but is not included within a charge of assault.

We agree with counsel for the Civil Liberties Association that we should not attempt to delineate all the circumstances under which an officer might properly be disciplined notwithstanding the existence of a criminal charge. The relationship between the subsections is better left to be determined on a case-by-case basis, at least until disciplinary authorities and disciplinary tribunals have an opportunity to review their interpretation of the Regulation in accordance with this decision.

Dated at Vancouver, British Columbia this 16th day of October, 1996.

"Carolyn Askew"
Carolyn Askew, Member, BCPC

"Jack Lee"
Jack Lee, Member, BCPC

"Susan Brice"
Susan Brice, Member, BCPC