

**DURHAM REGIONAL POLICE SERVICE DISCIPLINE HEARING  
IN THE MATTER OF ONTARIO REGULATION 268/10**

**MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,  
AND AMENDMENTS THERETO;**

**IN THE MATTER OF**

**DURHAM REGIONAL POLICE SERVICE**

**AND**

**CONSTABLE ANDREW CHMELOSKY, #3252  
CONSTABLE JUSTINE GENDRON, #3687  
CONSTABLE BARBARA ZABDYR, #3291**

**Charges:**

**DISCREDITABLE CONDUCT (CHMELOWSKY)  
NEGLECT OF DUTY & DISCREDITABLE CONDUCT (GENDRON)  
DISCREDITABLE CONDUCT (ZABDYR)**

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**DISPOSITION**

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Before: Superintendent (Ret.) Greg Walton  
Ontario Provincial Police

Counsel for the Prosecution: Mr. Ian Johnstone & Ms. Allison Johnstone

Counsel for Chmelowsky: Mr. William MacKenzie

Counsel for Gendron & Zabdyr: Ms. Joanne Mulcahy

Public Complainant: Mr. Dafonte Miller

Counsel for Mr. Miller: Ms. Asha James & Mr. Mitchell Goldenberg

Hearing Date: August 24, 2023

## **Background**

In a decision dated June 26, 2023 following a contested hearing, I found Constable Chmelowsky and Constable Zabdyr guilty of discreditable conduct and I found Constable Gendron guilty of discreditable conduct and neglect of duty based on clear and convincing evidence. I concluded:

- Constable Chmelowsky demonstrated a pro-police bias by accepting and not questioning the evidence of the Theriault brothers or taking additional steps to investigate how Mr. Miller sustained his injuries.
- Constable Gendron demonstrated a pro-police bias, by accepting and not questioning the evidence proffered by Christian Theriault and by not taking further investigative steps when interviewing him to ascertain how Mr. Miller sustained his injuries.
- Constable Gendron was neglectful and did not promptly and diligently perform her duty when she failed to properly record or document relevant utterances by Jim Silverthorn and failed to take further investigative steps when interviewing Christian Theriault to ascertain how Mr. Miller sustained his injuries.
- Constable Zabdyr demonstrated a pro-police bias, by accepting and not questioning the evidence proffered by the Theriault brothers, by not interviewing witnesses, and by not accepting Mr. Miller's complaint or investigate how he received his injury.

A fourth officer faced fairly similar allegations. In a decision dated February 2, 2023, retired Superintendent Elbers found Detective Constable Craig Willis guilty following his guilty plea to one count of neglect of duty. In that matter Detective Constable Willis was sanctioned 60 hours.

## **Representation and Positions on Penalty**

Mr. Ian Johnstone and Ms. Allison Johnstone represented the Durham Regional Police Service as prosecutors. Mr. Bill MacKenzie represented Constable Chmelowsky. Ms. Joanne Mulcahy represented Constable Gendron and Constable Zabdyr.

Ms. Asha James and Mr. Mitchell Goldenberg represented the public complainant, Mr. Dafonte Miller. Although Mr. Miller attended some of the initial hearing dates, he did not appear at this disposition hearing; instead, he relied upon his counsel to present his position on penalty.

All participants attended in person other than Ms. James who participated virtually. I scheduled oral submissions on penalty to be heard August 24, 2023, knowing that Ms. James would be unavailable to attend in person. I did so because I was uncomfortable adding to the already significant delay between the date of the offence and the final resolution of this hearing process. The only other available hearing dates were at a minimum, several months later. I wish to acknowledge the inconvenience this caused Ms. James and thank her for her participation in this matter.

A joint penalty position of a forfeiture of 60 hours was agreed upon by all counsel as a fitting sanction in relation to Constable Chmelowsky. Counsel for Mr. Miller submitted that the same 60-hour forfeiture as penalty was the most appropriate sanction for all three officers. The prosecution and Ms. Mulcahy took the position that a forfeiture of 32 hours was the most fitting sanction concerning Constable Gendron and Constable Zabdyr.

## **Decision**

The purpose of this disposition hearing is to determine the appropriate sanction for each of the involved officers. Constables Chmelowsky, Gendron, and Zabdyr appeared before this tribunal on separate Notice of Hearings. All three officers were found guilty of discreditable conduct in relation to employing a pro-police bias in respect to the same investigation. The corresponding particulars of allegations and their roles and responsibilities in relation to the incident were different. Constable Gendron was also found guilty of neglect of duty regarding the same incident.

While the penalty factors that I must consider in determining a fitting sanction are the same for each officer, the specifics of each category can be unique to each officer. Consequently, I must consider each of the officers' situation collectively, but also, remain mindful of the unique circumstances that apply to them individually.

I see no reason to deviate from the joint penalty position as proposed by counsel, in fact I find it very fitting; Constable Chmelowsky will be ordered to forfeit 60 hours.

As noted, not all penalty factors are balanced, such as the nature and seriousness of their misconduct given the role of Constable Chmelowsky as the supervisor in charge of the incident in question versus the subordinate roles of Constable Gendron and Constable Zabdyr. Consequently, I do not find it appropriate that they receive a sanction on par with their supervisor. I find that the forfeiture of 32 hours as proposed by the prosecution and Ms. Mulcahy fitting for Constable Zabdyr while a forfeiture of 24 hours is the most appropriate sanction for Constable Gendron. They will be ordered to forfeit 32 hours and 24 hours respectfully.

## Reasons

Exhibit #27 is the Prosecution's Book of Authorities. At tab 1 is the matter of *Williams and Ontario Provincial Police*, 1995, 2 O.P.R. 1047 OCCPS, wherein the Commission stated:

The assertion that Constable Williams can be useful or an asset to the Ontario Provincial Police after a finding of misconduct is argued by his counsel with reference to a number of prior decisions. For this to be the case though, three elements must be considered with reference to these cases: the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police force that would occur should the officer remain on the force.

Neither the prosecution nor Mr. Miller are seeking dismissal in this instance. Nevertheless, the nature and seriousness of the misconduct, the officers' ability to reform or rehabilitate, and the damage to the reputation of the Durham Regional Police Service have been accepted as appropriate considerations in the determination of a fitting sanction in police disciplinary tribunals.

In the matter of *Riley and Brockville Police Service*, 1997 CanLII 22045 (ON CPC), the Commission considered *Williams*, and added:

There are also other factors which can be relevant, either mitigating or aggravating the penalty depending on the particular misconduct in question. They include the officer's employment history and experience, recognition of the seriousness of the transgression, and handicap or other relevant personal circumstances.

Finally, other considerations could include provocation, the need for deterrence and concerns arising from management's approach to the misconduct in question.

When imposing penalty it is also important to take into account prior disciplinary cases dealing with similar types of misconduct. The reason for this is simple. As the Commission stated at page 615 in its decision in *Schofield and Metropolitan Toronto Police*: "consistency in the disciplinary process is often the earmark of fairness. The penalty must be consistent with the facts, and consistent with similar cases that have been dealt with on earlier occasions."

In the matter of *Krug and Ottawa Police Service*, 2003 CanLII 85816 (ON CPC), the Commission clarified the matter further by stating:

This Commission in previous cases has identified various matters that [it] must take into consideration when determining penalty. Paul Ceysens at page 5-129 of "Legal Aspects of Policing"... summarized the factors which may be either

mitigating or aggravating as follows: public interest; seriousness of the misconduct; recognition of the seriousness of the misconduct; employment history; need for deterrence; ability to reform or rehabilitate the officer; damage to the reputation of the police force; handicap and other relevant personal circumstances; effect on police officer and police officer's family; management's approach to misconduct in question; consistency of disposition; financial loss resulting from unpaid interim administrative suspension, and; effective of publicity.

There is no requirement that any one factor be given more weight than another. The seriousness of the offence alone may justify dismissal. Aggravating factors can serve to diminish the weight of any mitigating factors.

In this decision, I will adhere to the Commission's position in *Williams, Riley, and Krug* and address those disposition considerations deemed relevant by counsel. In relation to each of the officers involved, I will determine whether the specific penalty factor is aggravating, mitigating, or neutral, and ultimately, I will determine the appropriate weight to be applied to each factor considered. Before delving into that assessment, I will first address the issue of joint penalty submissions.

In the matter of *Yakimishyn v. Peel Regional Police Service*, CanLII, 2008 (ON CPC) the Commission stated:

... where there is a joint submission on penalty, a hearing officer must also undertake a very careful consideration of the submissions, particularly where there appears to have been an in-depth analysis of the factors enumerated in *Williams and Ontario Provincial Police*, supra. A joint submission on penalty ought to be accorded to significant weight when deciding an appropriate penalty.

In the matter of *Bennett and Ottawa Police Service*, CanLII 2012 (ON CPC), the Commission reiterated its stance in *Yakimishyn* and further stated:

While a hearing officer is not bound by a joint penalty submission, in rejecting such submission the tribunal must provide clear and cogent reasons after a full consideration of the law and the facts...

In this matter, Constable Chmelowsky has agreed to forfeit 60 hours. His employer and the public complainant agree that it is a fitting sanction. Provided that following an analysis of the appropriate penalty factors I deem that 60 hours is within the range of available penalties, I must accept it.

The prosecution and Ms. Mulcahy reminded the tribunal that they agreed on a joint penalty of 32 hours in relation to Constable Gendron and Constable Zabdyr. They submitted I ought to take the same approach and consider it a joint penalty position. The difficulty in deeming this a joint position as per *Yakimishyn* and *Bennett* is that Mr. Miller is not in agreement with the sanction proposed. Mr. Miller held the position that all three officers share equal blame and ought to receive the same penalty. As the public complainant, Mr. Miller is a full participant in this hearing, consequently, I do not find that any proposed sanction by the prosecution and defence counsel would meet the definition of a joint penalty position without the agreement of the public complainant; a joint penalty position would necessitate the agreement of all parties. Therefore, I will conduct an analysis of the respective penalty factors to determine the most fitting sanction.

### Public Interest

In virtually all cases of formal police disciplinary matters, the penalty factor of public interest is deemed to be an aggravating factor because the public has an interest in ensuring police officers maintain an extremely high standard of conduct; obviously, formal misconduct falls short of that benchmark. Public trust is eroded whenever a police officer fails to meet reasonable public expectations. Rightfully so, the public demands that police officers act professionally at all times. The behaviour of the involved officers in this matter has offended public interest.

Exhibit #31 is the Book of Authorities relied upon by Mr. Miller. At tab 2 is the matter of *Chief John Gauthier of the Timmins Police Service*, 2015 ONCPC 19 CanLII wherein the Commission noted:

The people of Ontario expect police to treat everyone fairly. Police services in Ontario should always exemplify the fair administration of justice for all. The public interest requires that conduct be set firmly in the democratic and fundamental principles of equality and justice for all.

I accept the Commission's position in *Gauthier*. The behaviour demonstrated by all three officers in this matter fell well short of what is expected by the public they serve. Police services in Ontario work hard to develop and maintain the public's trust. Once established, public trust is fragile. The misconduct in this matter served to undermine the public's trust in the Durham Regional Police Service. To regain the public's trust, the actions of the Durham Regional Police Service must serve to assure the public that misconduct of this nature will attract an appropriate sanction. The public must have confidence that the Durham Regional Police Service will hold members accountable for misconduct of this nature.

Furthermore, to be successful, police services and their members require the public's trust. The relationship between police services and the public must be based on respect and professionalism, an unachievable objective if the public cannot trust its officers to exhibit strong values such as ethical judgement and professionalism. When an officer breaches the public's trust, the public expects that officer to be held accountable.

At tab 5 of Exhibit #31 is the matter of *R. v. Doering*, 2020 ONSC 5618 CanLII where the Court stated:

It has been recognized that crimes committed by police officers represent a breach of the public trust. It is for this reason that police are “held to a higher standard than would be expected of ordinary citizens,” and “the principles of denunciation and general deterrence become magnified” in the sentencing of police...

The officers are not alleged to have committed a criminal offence in this matter but the notion of police officers being held to a higher standard than civilian members has been recognized in police disciplinary matters such as this.

Ms. James' submissions essentially suggested that the damage done to public trust in this instance is irreparable. I do not agree. Since this matter came to light, there has been a very public criminal proceeding and this transparent *Police Services Act* hearing. In this matter, there was no suggestion that there was collusion amongst the responding officers or between Constable Chmelowsky, Constable Gendron, or Constable Zabdyr with any member of the Theriault family to cover up the fact that Michael Theriault was an off-duty police officer. I merely found that because the officers received information from an off-duty officer, they overlooked obvious evidence and mistakenly accepted his version of the events rather than conducting a proper and thorough investigation. It was serious misconduct but it is not so egregious that it is impossible for the public to accept that the officers can rehabilitate once fittingly sanctioned and to accept that the Durham Regional Police Service can once again be trusted to act ethically and professionally.

I can confidently conclude that if the public were aware of all the circumstances in this case, they would be disappointed in the behaviour of Constable Chmelowsky, Constable Gendron, and Constable Zabdyr. However, a significant sanction will contribute to the process of re-instilling public confidence in the Durham Regional Police Service, knowing the officers have been held accountable for their actions and that the matter was taken seriously by their employer.

Public Interest is an aggravating factor for consideration but I am satisfied that a loss of hours in the range proposed by counsel would satisfactorily address this penalty factor.

## Nature and Seriousness of the Misconduct

Section 1 of the *Police Services Act* states the following:

Police services shall be provided throughout Ontario in accordance with the following principles:

1. The need to ensure the safety and security of all persons and property in Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
3. The need for co-operation between the providers of police services and the communities they serve.
4. The importance of respect for victims of crime and understanding of their needs.
5. The need for sensitivity to the pluralistic, multiracial, and multicultural character of Ontario society.
6. The need to ensure that police forces are representative of the communities they serve.

Constable Chmelowsky, Constable Gendron and Constable Zabdyr disregarded the importance of safeguarding Mr. Miller's fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*, offended the community they serve, and ignored their responsibility to respect victims of crime and understand their needs.

Ms. James submitted victim impact statements for my consideration suggesting that they put the seriousness of misconduct into greater perspective. Ms. Mulcahy submitted the Ontario Superior Court of Justice matter of *McDonough et al. and the Queen*, June 2, 2006. In *McDonough*, Justice Durno considered the matter of non-victims submitting statements to the court and determined it could be deemed appropriate in certain circumstances. Justice Durno added:

... the statement is to address the harm done by and loss suffered as a result of the commission of the offence...

... The following should not appear in victim impact statements:

- Criticism of the offender, which has the potential to tilt the adversary system and risks the appearance of revenge motivation...
- Any comments that amount to "offender bashing." Since vengeance plays no role in sentencing, any comments directed at "getting the accused back" must be excluded..



- Assertions as to the facts of the offence...
- Recommendations as to the severity of the punishment...
- Statements addressed to the offender...

In *McDonough*, Justice Durno cited the matter of *R. v. Gabriel* (1999), 137 C.C.C. (3d) O.J. No. 2579:

The victim impact statement serves a number of purposes including reflecting the nature of the offence including the seriousness of the offence which helps the court in imposing proportionate punishment; victim reparation and a promotion or acknowledgement by the offender of the harm done to the victim, the repute of the administration of justice as it permits victims to be heard on the relevant issues, and parity of identity, addressing the fact that in many sentencing hearings much is heard about the offender, and appropriately so, but the statements permit the court to know the individuality of the victim and the impact of the crime on the survivors thereby achieving a balanced understanding of the consequences of the crime in the context of the victim's personal circumstances...

When considering the victim impact statements provided for my consideration, I will focus on the information that relates to the harm done by and loss suffered as a result of the misconduct and the seriousness of the misconduct.

Ms. James submitted a letter drafted by Kingsley Gilliam on behalf of the Black Action Defense Committee Inc. Based on the criteria outlined in *McDonough* and *Gabriel*, I am unable to rely on its content as it pertains to this particular penalty factor.

Exhibit #28 is the victim impact statement of Dafonte Miller. In part, Mr. Miller stated:

That night has created a devastating and lasting impact on my life. I now look at police differently. As a young black man, I have often heard stories of police abusing their power, but I had never experienced it like I did on December 28, 2016. The actions and inactions of the Durham police officers at the scene, and their bias towards Michael Theriault, made a terrible and devastating situation even worse. This nightmare certainly has made me feel different about the Durham Regional Police Service. If something happens, I now ask, should I even contact the Durham Regional Police Service? Will they treat me differently? Do I trust them? Should I trust them?

Since December 28, 2016, I have become withdrawn and have isolated myself from my friends and family. The ordeal has robbed me of the simple joys of life, I have not been able to gain meaningful employment or go back to school...

I understand that the officers would like to put this incident behind them and serve their penalty, but they should know that I could never put the night of December 28, 2016, behind me. It will forever be a part of my story and define who I am..

In her letter, Leisa Lewis, the mother of Dafonte Miller stated:

The responding Durham police officers... played a large role in this event that can only be described as a mother's worst nightmare. It pains me to the core that the very system that should have protected him, the police officers, failed to do so. Instead, their misconduct very nearly allowed this brutal assault by Michael Theriault to go unnoticed. I am disappointed and resentful that the Durham police treated my son's pain and suffering with such disregard.

...you always believe that when your worst fears are unfolding in real time and your son is being profiled as a criminal, that police will do their job fairly and impartially... Their actions and inaction will impact my view of the police for the rest of my life. Would I call the Durham Regional Police Service if me or any of my children are in trouble? This event will always come to mind if I am ever in that position.

After my son's assault and interaction with the Durham Regional Police Service and the criminal justice system, Dafonte's physical pain was evident, but the emotional scars ran deep. He was afraid, anxious, and disconnected from everything around him. Our home became heavy with grief, and we all struggled to find the right words or actions to help him heal.

... the swift acceptance of Michael Theriault's version of events without investigating Dafonte's injuries deeply hurt our faith in policing as an institution of the criminal justice system. Dafonte's life was forever changed, and the nightmares and sleepless nights we now face are a constant reminder of the pain he endures.

I find the statements from Mr. Miller and Ms. Lewis compelling. The fact that they will be dealing with the impact from this experience to varying degrees for the remainder of their lives speaks to the seriousness of the misconduct. Ms. Mulcahy and the prosecution submitted that this incident has also had a profound impact on the involved officers; this too speaks to the gravity of the matter.

Ms. James and Mr. Goldenberg acknowledged that there was no evidence suggesting that the involved officers are racist but submitted racial undertones that exist in this matter ought to be a consideration because of the optics; the public sees that it was a white off-duty police officer who arrested and assaulted Mr. Miller and that the responding white

police officers immediately accepted that officer's version of events while ignoring evidence and discounting Mr. Miller's claim of being attacked and assaulted. While I accept that this was how the event unfolded, there was no evidence presented that the misconduct was in any way related to Mr. Miller's race, in fact, the evidence was clear that the misconduct was a direct result of a pro-police bias. Therefore, I will not consider racial discrimination as a factor. As an aside, I note that Constable Zabdyr immigrated to Canada from Poland and Constable Gendron is Indigenous.

The prosecution submitted a number of cases in support of their assertion that rank can act as an aggravating factor for consideration. In the matter of *Fright and Hamilton Police Service*, 2002 CanLII 76734 (ON CPC) the Commission noted:

The applicant urges us to find that the only individuals responsible to ensure that the reports are filed are the officers who attended the scene. We cannot accept that proposition. Supervisors must supervise. The buck stops there. We find that there is a clear and unequivocal policy in place with respect to this issue. Supervisors have a duty to ensure that complete signed reports are filed. This did not occur.

Ms. James submitted the factual circumstances are so analogous for each officer, it ought to be reflected in an identical disposition. I disagree. The officers had different roles. Constable Chmelowsky was an acting sergeant at the time. The seriousness of his misconduct would be deemed greater if he held the rank of sergeant or higher but nonetheless, he was the supervisor. He was in charge of the scene, responsible for ensuring the incident was thoroughly and properly investigated, and responsible for the actions of his subordinates. Constable Chmelowsky's role as supervisor in charge caused a significant disparity in investigative responsibilities and consequently, it elevates the seriousness of his misconduct. I find that this circumstance alone can warrant a considerable disparity in sanctions between him and his subordinates.

Constable Zabdyr was aware that Mr. Miller complained about being attacked by the Theriault brothers. She informed Constable Chmelowsky before she left the scene that Mr. Miller complained about being attacked. This is both mitigating and aggravating for her; she felt it necessary to inform her supervisor and she included the extent of his injuries in her report so she was transparent about that, but she failed to properly follow up on this investigative avenue despite having plenty of time to do so at the hospital. While her misconduct was confined to one shift, it extended over several hours; she dismissed Mr. Miller's initial complaint at the scene and ignored his additional complaint to the paramedics that he had been assaulted, then made no, or at best, a feeble effort to follow-up. Furthermore, she failed to make note of the fact Mr. Miller told her that he had been assaulted including being struck with a weapon.

Constable Gendron was also aware that Mr. Miller had sustained a significant facial injury that required immediate medical attention and hospitalization. She knew it was serious because she was told to hold off on any investigative measures pending the notification of the Special Investigations Unit (SIU). Subsequently, Constable Gendron accepted the version of events presented by the Theriault brothers, thereby failing to follow the evidence which was clear and obviously suggesting otherwise. Constable Gendron did not know how Mr. Miller suffered his injury yet she made no effort to investigate what could only have been deemed a concerning and worrisome facial wound despite being at the scene for an extended time.

Constable Chmelowsky was the acting sergeant at the time, responsible for overall supervision of the incident. There is no suggestion he was not aware of his supervisory responsibilities. He made the requisite notification to the duty inspector and took charge of the scene assigning tasks and responsibilities accordingly.

Constable Gendron was an officer with limited experience. Constable Chmelowsky would have known this or ought to have been aware of it; it is the supervisor's job to know what their subordinates' capabilities are prior to assigning particular responsibilities. He of course would have expected Constable Gendron to be able to take a witness statement. However, the evidence which was available to him was clear, making it obvious that more than a witness statement about the alleged theft was required; the Theriault brothers needed to be questioned about how Mr. Miller was injured, yet he never provided this direction to his subordinates. Constable Chmelowsky was aware that Mr. Miller's injuries were serious and that Mr. Miller alleged he had been attacked, yet he provided no direction to his subordinates for that avenue to be investigated.

I find Constable Gendron's and Constable Zabdyr's misconduct serious, but less so than that of Constable Chmelowsky because of his supervisory position. His role was similar to that of Detective Constable Willis in the sense that at respective times, they both held overall carriage of the investigation and then failed to ensure that the matter was thoroughly and properly investigated, in Constable Chmelowsky's instance, due to a pro-police bias. The fact that the joint penalty position proposed by counsel regarding Constable Chmelowsky aligns to the sanction imposed in the *Willis* matter is reasonable.

The misconduct in question is a serious departure of what the public expects from police officers in their community and what the Durham Regional Police Service expects from their members; the officers did not follow the evidence, instead they accepted the word of an off-duty police officer. The misconduct is serious but it is void of deceitful behaviour. Furthermore, the officers made appropriate notifications, submitted reports, secured the scene, conducted interviews, and made no attempt to conceal Mr. Miller's injuries.

The penalty factor of Nature and Seriousness of the Misconduct is an aggravating feature for consideration for each of the officers, but to varying degrees.

### Damage to the Reputation of the Employer

Damage to the reputation of an employer in police disciplinary tribunals is a standard disposition consideration. Hearing officers are permitted to place themselves in the position of a reasonable person in the community for the purpose of assessing the degree to which the conduct of an officer has brought harm to the reputation of the respective police service.

I was not provided specific examples of media articles but I accept the prosecution's submission that this matter has received significant media attention which portrayed the Durham Regional Police Service in a negative light. I did not accept Mr. Gilliam's statement for the purpose of seriousness of misconduct, but it does provide some insight into the damage done to the reputation of the Durham Regional Police Service. Understandably, I expect that the public would have difficulty separating the assault of Mr. Miller by Mr. Theriault with the misconduct that this hearing addressed. Regardless, I find that if a reasonable person from the community was fully informed of the circumstances that gave rise to this matter, they would determine that the officers' behaviour damaged the reputation of the Durham Regional Police Service.

Police services work diligently to develop and maintain a strong and positive public image. Behaviour of this nature can only serve to damage and tarnish that reputation. As noted by Ms. James, as a direct result of the officers' behaviour in this matter, some members of the public may never have the ability to view the Durham Regional Police Service in the same light again.

I find that the Damage to the Reputation of the Durham Regional Police Service is an aggravating factor, all the more so for Constable Chmelowsky because the public expects supervisors to supervise; he was on scene and failed to provide the level of expertise expected of a supervisor.

### Recognition of the Seriousness of the Misconduct

Constable Chmelowsky, Constable Gendron, and Constable Zabdyr entered not guilty pleas. This cannot be considered an aggravating feature; the officers have the right to defend themselves, they simply cannot receive mitigation consideration that would normally accompany a guilty plea. However, they must receive some mitigation consideration because on the first day of the scheduled 10-day hearing, counsel

submitted voluminous documentary evidence from previous interviews and testimony which ensured *viva voce* evidence was not required and saved considerable hearing time; witnesses including Mr. Miller were not subjected to further cross-examination. Also, at the commencement of the proceeding the officers acknowledged that certain information particularized in the Notice of Hearings was factual.

Neither Constable Chmelowsky nor Constable Zabdyr apologized directly to the tribunal but through their counsel, they acknowledged recognition of their misconduct.

Exhibit #33 is a Book of Materials relied upon by Constable Zabdyr. At tab D is a letter outlining Constable Zabdyr's personal and professional background. In part, Constable Zabdyr stated:

This incident has caused me extreme stress in my personal life and work. I can't sleep at night, I have anxiety, I get physically sick every time I have to deal with this matter.... I acknowledge that this incident has damaged the reputation of the Durham Regional Police Service.

In a letter of support, Constable Zabdyr's supervisor Sergeant Deanna Hollister noted:

I have spoken to Constable Zabdyr about this hearing prior to and after her finding of guilt. I cannot even begin to explain the amount of stress this incident has caused to her and the effect it has had on her family... I can unequivocally say that Constable Zabdyr would do things differently if ever involved in an incident like this. People are not perfect, she recognizes her role in this event, she deeply regrets how this incident has affected the community and it's trust of the Durham Regional Police Service.

I am satisfied that Constable Zabdyr has an understanding and a recognition of the seriousness of her misconduct.

It was noted by counsel and observed by this tribunal during the course of the hearing that Constable Gendron was often visibly upset and emotional. Exhibit #32 is Ms. Mulcahy's Book of Materials to be relied upon by Constable Gendron. At tab H is a letter drafted by Constable Gendron addressed to Mr. Miller, the Miller family, Durham Regional Police Service, and the community. In part, Constable Gendron stated:

I wanted to take this chance to express how sorry I am for the outcome of this incident. I know that no apology will make up for the catastrophic injury that Mr. Miller has suffered or the impact this has had on him, his family, and the community as a whole. I am truly sorry for the pain that this has caused and for the impact it has had on everyone involved including my police service....



I am sorry that this has happened, I am sorry that Mr. Miller suffered an injury like he did, I am sorry that I may have made my police service look bad in the eyes of the community and I am sorry if this has caused people to question my police service or lose faith in it. I can only hope that given the opportunity I can make it up to everyone involved by being the best police officer I can, by standing up for what is right and I hope that the work I have done in the community since this incident has shown that I am willing, able, and attempting to serve the community to the best of my ability. I hope that after this hearing is complete, Mr. Miller and his family are able to have some peace and move forward in their road to recovery and healing.

At tab G of Exhibit #32 is a two-page letter addressed to me, authored by Constable Gendron. She provided an overview of her background and explained how she realized her goal of becoming a police officer and then being assigned to the Human Trafficking Unit for the past two years. In part, she stated:

Being awarded this position [Human Trafficking Unit] was more important to me than anyone could ever imagine. The last two years working in this unit has been the most rewarding and challenging of my life...

Not everyone in life loves their job, but I legitimately loved my job. As a result of being found guilty in the *Police Services Act* proceedings I have been told I will be moved out of my position in the Human Trafficking Unit in September and will be returning to the road to patrol in Oshawa. Losing this position has had a profound effect on me and no matter how many times people tell me, "it will be okay," I am not okay. This transfer is devastating to me because I worked all of my career to get into that unit and I wanted to help other victims like me...

It is obvious that I have regrets and remorse in this matter. I have acknowledged the mistakes I made. It has significantly and drastically affected my life, personally, emotionally, financially, and has lasting impacts in my career. I am truly sorry for all the people this has affected including Mr. Miller, his family, my police service, the community, and my family.

It is clear to me that Constable Gendron has a strong understanding of how her conduct has impacted Mr. Miller, the public, and the community she polices.

Ms. Mulcahy submitted and the prosecution confirmed that Constable Gendron has been informed she will be transferred as a direct result of this disciplinary hearing, specifically, the guilty findings of misconduct because the crown attorney associated to the Human Trafficking Unit expressed concern about a *McNeil* issue.

In certain instances, crown attorneys must disclose to defence counsel matters of internal police discipline. Such matters have the potential to have a detrimental impact on criminal investigations and subsequent court proceedings if the Court finds that the disciplinary matter adversely affects the officer's credibility and/or reliability.

For much of my career, I investigated or supervised criminal matters, often involving major cases and/or organized crime. I understand that Constable Gendron's misconduct/*McNeil* issue has the potential to render her a less effective employee, but I do not accept that it damages her integrity to such a degree that a trier of fact could not accept her evidence as being credible or reliable. While the following notation pre-dates this *McNeil* disclosure obligation, I note that in her 2020 Performance Management Plan, her supervisor stated:

In October 2019 Constable Gendron testified in a high-profile case with a lot of media attention. During her testimony she demonstrated great professionalism, even during the intense media coverage and public scrutiny. She represented the Durham Regional Police Service in a positive and professional manner.

Constable Gendron did not try to deceive investigators, the Court, or this tribunal. The misconduct occurred early in Constable Gendron's career, over six years ago. Numerous character letters submitted on her behalf reviewed her exemplary behaviour over the course of her career. As will be noted under the heading of Employment History to follow, Constable Gendron has been an excellent employee since this incident.

While there may be information that the crown attorney is relying upon unbeknownst to me, I do not have concern about Constable Gendron addressing the *McNeil* issue in court, in fact, I commend Constable Gendron for not only persevering in her employment since this misconduct, but for excelling while dealing with this adversity; it speaks to her recognition of the seriousness of her misconduct, her ability to rehabilitate, and the matter of specific deterrence.

Similarly, Constable Chmelowsky is no longer permitted to serve as an acting sergeant because of my guilty finding in this hearing. Durham Regional Police Service Policy states that he is ineligible for even applying for promotion for two years from the date of his guilty finding. I understand why such policy exists, but I question why it must be absolute? This misconduct matter dates back to 2016. The involved officers are not solely responsible for the inordinate delay yet they are penalized for the consequence.

Constable Chmelowsky was serving as an acting sergeant after the offence date and prior to his guilty finding. He is to be commended for his commitment to his career, his community, and his employer by continuing to work as an acting supervisor while dealing with this matter; often, officers facing disciplinary matters take less arduous paths while



awaiting their *Police Services Act* hearing. It seems unreasonable to me to conclude that suddenly he is no longer useful to the Durham Regional Police Service in an acting sergeant capacity especially when his positive Employment History (to follow) is considered. In his most recent Performance Evaluation Form found in Exhibit #37, Constable Chmelowsky expressed an interest in promotion.

Mr. MacKenzie submitted Constable Chmelowsky recognizes the seriousness of his misconduct. He noted that had the Notice of Hearing been worded slightly differently without the reference to a pro-police bias, the matter may have been resolved without hearing.

I am satisfied that the officers are aware of the seriousness of this misconduct and it is a mitigating feature for consideration.

### Employment History

I often find an officer's employment history telling, it can provide insight into whether the misconduct in question is isolated or part of the officer's general practice. In this instance, all three officers have positive employment histories with no previous police disciplinary matters.

As noted in Constable Chmelowsky's most recent Performance Evaluations found in Exhibit #37, he has been a productive officer and an asset to the Durham Regional Police. Commentary from within his evaluations includes:

- Constable Chmelowsky has a wealth of experience and knowledge. He is often relied upon to coach and mentor junior officers.... Constable Chmelowsky was used as an acting sergeant several times this year and made sound decisions at various calls.
- Comprehensive knowledge of lawful authorities.
- Constable Chmelowsky has demonstrated his ability to identify a problem and then arrive at a solution through the collection of evidence and facts and then applying his past experiences. This level of competence comes through years of experience and Constable Chmelowsky is one of the more experienced patrol officers in Central Western Division.
- Constable Chmelowsky is experienced enough that his work does not need to be double checked to ensure it meets the standards set out by the directives and policies of the Durham Regional Police Service.

Exhibit #33 contains Constable Zabdyr's annual performance reviews from 2014 to 2022. They are all positive. In part, her supervisors stated:

- Constable Zabdyr is professional and represents policing and the Durham Regional Police Service in a positive light. She is a team player and fits in well and is a respected member of her platoon.
- Constable Zabdyr holds herself to a high ethical standard and represents the Durham Regional Police Service in a positive way.
- Constable Zabdyr holds herself to a high standard of professionalism.
- Constable Zabdyr is dedicated to providing quality police service to members of the community.
- Constable Zabdyr not only builds trust and rapport with her colleagues but also clients. She is able to speak with members in the community and build trust and rapport.
- Constable Zabdyr's ethical and integrity standards are in line with the expectations of the Durham Regional Police Service. She is particularly passionate about diversity and respect for people of various backgrounds.

Exhibit #33 also contains 18 correspondences recognizing acknowledging Constable Zabdyr's work ethic, professionalism, and other positive attributes and two letters of support. Sergeant Deanna Hollister, in part, noted:

Constable Zabdyr is a thoughtful, dedicated officer who contributes to the shift in a significant way.... What is most impressive for Constable Zabdyr is her work ethic. After 20 years of frontline policing she can be relied upon to clear for calls when units are busy and do her part...

Her actions that night do not reflect who she is as an officer, and who she has proven herself to be as an officer since the incident. She continues to work hard, to contribute to the well-being and morale of her shift....

Retired Staff Sergeant Krishanthakumar Ganeshan is Constable Gendron's former supervisor. In part, he commented:

Constable Zabdyr is a respectful, kind, loving, compassionate, reliable, dependable, and caring individual.... Constable Zabdyr is respectful to everyone she deals with while at work...

Exhibit #32 contains Constable Gendron's Performance Evaluations from 2016 to 2022. They are all very positive and in part, her supervisors noted:

- Constable Gendron's previous work experience as a jail guard is clearly an asset to her, and she brings a maturity that is rarely seen in new hires. Constable Gendron is doing an excellent job, especially given her short time in policing.

- Constable Gendron has an excellent work ethic. Her workload and statistics are above average in all areas.... Constable Gendron is exceeding the expectations for an officer of 1.5 years experience.
- Constable Gendron's commitment to the Durham Regional Police Service has been displayed on a daily basis and has been recognized by her supervisors.... Constable Gendron is early into her policing career yet works with the confidence and ability of an officer with years more experience.... She is a highflyer on her platoon... She appears to have high moral obligation to do a good job and put the public's needs first and foremost during her duties.
- Constable Gendron's work ethic, investigative mind and common-sense approach to policing will make her an asset to a CRU or investigative unit in the future.
- Constable Gendron is a professional, positive, and productive member of our platoon. Her performance in 2019 has been excellent and her statistics illustrate her dedication and strong work ethic.
- Throughout 2019, Constable Gendron has had another successful year and continues to develop as a professional police officer at a rate surpassing expectation.... Constable Gendron is a mature officer and has great work ethic which is noticed by her leadership team and her colleagues.
- Although Constable Gendron came to the Human Trafficking Unit directly from the patrol with no previous investigative experience, her intelligence, strong work ethic and communication skills have quickly carried over to her transitioning into this role with ease.

Exhibit #32 also contains 15 correspondences recognizing Constable Gendron's strong work performance and seven letters of support. Detective Price supervised Constable Gendron at the commencement of her career and since January 2021 in the Human Trafficking Unit. Detective Price raved about her dedication and difficult case load. In part, he stated:

Constable Gendron was selected by our Warrant Liaison Unit to assist, instruct, and review warrants offered by officers who are learning how to prepare these documents - documents that heavily rely on the utilization of detailed reports and accurately articulated information. Her selection for this process was a direct reflection of her ability to accurately prepare detailed affidavits that are full, frank, and fair...

The Children at Risk of Exploitation (CARE) team unfortunately will have a large void to fill moving forward without Constable Gendron. While a member can be replaced, I fear Constable Gendron's dedication to at risk youth, the prime focus of the CARE team, will be irreplaceable.

Madison Smith is a member of the Human Trafficking Unit and has worked with Constable Gendron since January 2021. Ms. Smith, in part, stated:

Being a part of CARE means you are working with some of the most vulnerable, troubled, under privileged, and dependent youth. Constable Gendron has irrefutably been responsible for some of the most difficult, challenging, and troubled youth, and subsequently cases that have been involved with the CARE team. Fortunately, Constable Gendron is one of the most dedicated, hard working, and determined officers that I have worked with and this has made her a perfect fit for this specialized unit....

Detective Constable Jordan Bint worked with Constable Gendron when she started her career and for a short time in the Human Trafficking Unit. In part, he stated:

I know Constable Gendron to be a professional, compassionate, honest, and ethical person and police officer. I have also witnessed Constable Gendron treat others fairly regardless of their background.

Retired Staff Sergeant Krishanthakumar Ganeshan and Richard Nash of the Durham Children's Aid Society also wrote glowing letters of support for Constable Gendron.

I find it particularly noteworthy that not only were the officers productive and valuable to their employer prior to this incident, they remained just as committed post-offence.

I find Employment History to be a significant mitigating feature.

#### Ability to Reform or Rehabilitate

Exhibit #38 is a character letter written by Sergeant Deanna Hollister in support of Constable Chmelowsky. In part Sergeant Hollister stated:

Constable Chmelowsky is a dedicated officer and has continued to report for duty despite the enormous stress this hearing has placed on him.... Despite the stress, he has come to work, helped his coworkers, and maintained a positive attitude.

Constable Chmelowsky has remarked that he wished he could go back in time and how he would do things differently. He regrets how this incident has affected the police service and public. Constable Chmelowsky was allowed to continue in his role as an acting sergeant until his recent conviction and was responsible for conducting a yearly performance evaluation for an officer. His performance in a supervisory role was satisfactory and he completed all required tasks.

...Constable Chmelowsky has continued to work hard, assisting fellow officers before and since this incident. He has indicated remorse for this incident and that if he could change what happened he would. Officers are not perfect, Constable Chmelowsky is not perfect, he has taken this incident and become a better officer from it.

In Constable Zabdyr's 2016 and 2020 Performance Management Plans, her supervisors noted:

- One of her strengths is that she has the ability to hear constructive criticism and accept and learn from it.
- One of Constable Zabdyr's best qualities is her ability to accept feedback and immediately put it into practical use.

In Constable Gendron's 2021 Performance Management Plan, her supervisor noted:

- In July 2021 Constable Gendron was notified of charges and a *McNeil* notification as a result of a previous incident from patrol. Constable Gendron handled this news with professionalism and positivity; ultimately not allowing this negative cloud to affect her daily duties as a Human Traffic Unit officer. She took it upon herself to speak directly with the dedicated Human Trafficking Unit crown attorney to identify roles and responsibilities she could continue to undertake to ensure investigations were minimally affected by this current challenge. The initiative and attitude she demonstrated during this situation is a testament to the dedication she exhibits as a member of the Durham Regional Police Service and her ability to effectively serve as a member of Durham Regional Police Service and as her supervisor I have no reservations about her continuing in this role.

In his letter of support, Detective Price noted:

I have witnessed the stress and toll this trial has taken on her both professionally and personally. Constable Gendron is an extremely proud police officer, someone who takes her role very seriously and is truly dedicated to helping others. Although she has been burdened by these stresses, she has willingly moved forward, operated in a positive light, and continued to support others while at times feeling unsupported by the very service she represents. I believe this not only speaks to her dedication, but also her professionalism...

I am aware that Constable Gendron has been convicted of neglect regarding her note taking and demonstrating a pro police bias. As her supervisor, if this was an issue when she only had 11 months of service, it is certainly not an issue at this time and not one I have witnessed in the past three years while working directly with her.

As Constable Gendron continues to move forward from this, I can without hesitation state that I would openly welcome her to any unit or team I am involved in, both professionally and personally. She has developed exceptionally since this incident and has been subject to immeasurable amounts of stress due to the length of which this process has taken to resolve.

In her letter of support, Ms. Smith noted:

Though she was convicted of neglect regarding her note taking, at a time when she had been a police officer for less than one year, Constable Gendron put together some of the most detailed, accurate, and articulate notes and reports....

Constable Gendron is undeniably remorseful over the situation, not just because of the impact it has had on her life, but for the impact it has had on the lives of the individuals involved in the incident.

Patricia Mercurio is a child protection worker who has worked with Constable Gendron in the CARE team for the past two years. In part, she stated:

Constable Gendron has a huge sense of ethics and morality... She is honest and compelled to advocate for anyone who cannot advocate for themselves...

This situation has tormented her.... she has never lost sight of who she is and has never lost sight of what she needed to do to improve herself to the best that she can be. Constable Gendron doesn't shy away from work or her devotion to helping anyone in need. Constable Gendron is a leader and I am honored to call her my colleague.

Raleigh Bint is a civilian member of the Durham Regional Police who worked with Constable Gendron and has known her for six years. She stated:

Constable Gendron is one of the hardest working, ethical, considerate, and honest people that I know. By no means is this incident a reflection of who she is. I had conversations with Constable Gendron about these allegations and know that she is remorseful. I know Constable Gendron has taken this matter seriously and made changes since the incident, especially now that she is an experienced officer. I have also witnessed how difficult these proceedings have been on her mental health and well-being.

I am more than satisfied that each of the officers can rehabilitate, in fact, I would suggest they already have. I would be very surprised if Constable Chmelowsky, Constable Gendron, or Constable Zabdyr ever found themselves before another tribunal.

I find Ability to Reform or Rehabilitate a mitigating factor.

### Specific and General Deterrence

Counsel for Constables Gendron, Zabdyr, and Chmelowsky submitted that there is not a need for the sanction to address specific deterrence; that has already been satisfied given the numerous interviews, proceedings, and media coverage over the past six years. I agree that it is most unlikely that the officers will commit misconduct of this nature in the future. In her background letter, Constable Zabdyr stated:

Since the incident took place, I often double check my decisions with my sergeant at work as a way of making sure I am making the right decision on calls, to make sure no mistakes are made.

In her letter to the tribunal, Constable Gendron stated:

There are things in my life that I wish I could take back or change but the night of this incident probably tops the list. I am not trying to be dramatic about it, but that night changed many people's lives especially Mr. Miller's. I have cooperated with the process and know that 6.5 years later I can say I am not the same police officer I was that night. I have learned to be a better interviewer. I have learned to make better notes. I have learned to be a better investigator. I speak up for myself, not let myself be pressured into doing something just because I'm told or directed to do it....

I take responsibility for my actions. I acknowledge I could have done better to the SIU, to the courts, to the OIPRD and to this tribunal. I can guarantee that if this same set of circumstances were to happen today the outcome would be vastly different. I am not the same young naive, inexperienced officer I was....

As noted earlier, Sergeant Hollister noted that Constable Chmelowsky has learned from this incident and has expressed remorse. I am satisfied that the sanction imposed need not address specific deterrence. However, the officers must understand that if they were to commit similar misconduct in the future, it would likely result in a more severe penalty.

As for general deterrence, the sanctions discussed in this matter are significant enough to satisfy this penalty principle. Along with the media attention this matter has received, I am satisfied that members of the Durham Regional Police Service have been alerted that misconduct of this nature will not be tolerated and will result in a significant sanction.

The matter of General Deterrence is an aggravating feature while the issue of Specific Deterrence is a neural factor.



### Effect on Police Officer and their Family

In his letter of support, Detective Constable Bint noted:

I am aware this matter before the Tribunal has been stressful and difficult for Constable Gendron emotionally. I know Constable Gendron would take an allegation of any kind seriously and be extremely remorseful for any potential allegation. I have had many conversations with Constable Gendron about how these proceedings have negatively affected her mental health, sleep, and professional aspirations.

Constable Zabdyr has been seeing a psychologist since 2015. Dr. Sean O'Brien commented:

Unfortunately, Constable Zabdyr's recent involvement with the police discipline process has fuelled heightened stress and anxiety. She has recently presented with symptoms of an adjustment disorder with mixed anxiety and depressed mood. Prominent symptoms include depressed and anxious mood states, anxious ruminations, and psychological symptoms of stress bracket IE gastrointestinal upset, and accelerated heart rate, muscle tension, facial flushing, sweating, and sleep disturbance.

I have little doubt that this matter has taken an emotional toll on all three officers for an extended period of time; that is unlikely to change despite the conclusion of this *Police Services Act* matter. Much like Mr. Miller and his mother, this incident will continue to take a toll on many lives.

I am convinced that this *Police Services Act* hearing and the media attention received because of this incident has had a negative impact on the involved officers and their families. Not every police disciplinary tribunal receives the same amount of media attention; this particular matter more than most.

The fact that Constable Gendron has been or will be transferred from the Human Trafficking Unit as an outcome of this misconduct from 2016 will result in an eight percent drop in pay. As a result of this incident, Constable Chmelowsky will no longer be eligible to act in the rank of sergeant nor will he be eligible for promotion for at least two years. The guilty finding has had a financial impact on these officers separate and apart from any sanction imposed in this disposition decision. It will have a negative impact on them and their families.

The Effect on Police Officer and their Family is a mitigating factor for my consideration.



### Consistency of Penalty

Ms. James submitted the matter of *Orser and Ontario Provincial Police*, 2018 ONCPC 7 CanLII wherein the Commission noted:

We also note that the presence of cases involving lesser penalties is not determinative. As the Commission has previously observed, assessments of appropriate penalties are not only fact specific, they may shift and evolve over time. Consistency of penalty should not be applied in a way that results in penalties being frozen in time. Responses to misconduct should bear some connection to societal norms.

While I agree with the Commission's position, I do not find that this particular analysis is assistive in my assessment. The misconduct in question occurred in 2016. I must consider sanctions that were appropriate at that time and I have determined that racial undertones is not a feature for my consideration. Furthermore, pro-police bias is unique to this matter; there are no other police disciplinary matters from Ontario that mirror the facts related to this incident.

In the matter of *Sakalo and Ontario Provincial Police*, 2022 ONCPC 3 CanLII, the officer failed to ensure a subordinate officer conducted a thorough and proper fatal motor vehicle collision investigation resulting in the loss of criminal proceedings. The Commission upheld a forfeiture of 48 hours.

The prosecution submitted the matter of *Ontario Provincial Police and Neild*, November 3, 2016, wherein the officer was ordered to forfeit 24 hours for failing to supervise a death investigation and summons the appropriate resources.

In *Turgeon and Ontario Provincial Police and G.C.*, 2012 ONCPC 11 CanLII, the Commission confirmed the forfeiture of 40 hours for misconduct associated to failing to thoroughly and properly investigate a domestic occurrence and to file the necessary paperwork.

In *Dickinson and Ontario Provincial Police*, 2018 ONCPC 20 CanLII, the officer was ordered to forfeit 35 hours for discounting information available and ultimately, failing to conduct a thorough investigation into concern for two vulnerable and marginalized women.

In *Ontario Provincial Police and Avarell*, July 16, 2020, the officer was ordered to forfeit 24 hours for failing to conduct a proper and thorough domestic occurrence.

Ms. Mulcahy submitted additional cases in support of the joint submission between her and the prosecution that 32 hours is fitting. Sanctions ranged from reprimand to a forfeiture of 30 hours for essentially, conducting negligent investigations.

Mr. Goldenberg submitted the matter of *Peel Regional Police and Trlaja*, February 24, 2021, where the officer was ordered to forfeit 160 hours. I do not find the facts similar enough for the matter to provide guidance. The officer verbally berated a person he had arrested and acted so aggressively that his employer sought termination in the matter.

In the matter of *Durham Regional Police Service and Stenzel*, October 9, 2012, the officer was ordered to forfeit 96 hours for physically assaulting a civilian. I do not find the matter helpful; the facts being too disparate.

In *North Bay Police Service and Carleton*, November 27, 2020, the officer was ordered to forfeit 64 hours for failing to conduct a thorough and proper sexual assault investigation.

Of the cases submitted, obviously, the matter of *Durham Regional Police Service and Willis*, February 2, 2023 is most on point. Detective Constable Willis took carriage of the investigation from the responding uniformed officers. He failed to take essential investigative steps required to prove the charge of theft against Mr. Miller. He never questioned the narrative provided by the Theriault brothers about how Mr. Miller sustained his serious facial injury. Detective Constable Willis was aware of the severity of Mr. Miller's injury but he did not consider whether the force the Theriault brothers used was proportionate to the threat that Mr. Miller posed or whether it was excessive. Similar to that of Constable Gendron, Constable Zabdyr, and Constable Chmelowsky, Detective Constable Willis accepted the version of events proffered by the Theriault brothers notwithstanding that he knew the altercation was a two on one, that Michael Theriault had no injuries, and that Christian Theriault did not have any observable injuries. Detective Constable Willis was found guilty after pleading guilty to one count of neglect of duty resulting in a sanction of 60 hours.

The *Willis* matter illustrates that the forfeiture of 60 hours for Constable Chmelowsky's misconduct is reasonable considering the similar supervisory responsibilities. For the reasons I've previously articulated, I find that it also illustrates that a sanction of 60 hours is excessive for the officers who were in subordinate positions to that of Constable Chmelowsky and Detective Constable Willis.

I accept that the totality of the cases suggest that the 32 hours proposed by the prosecution and Ms. Mulcahy is in the range of available penalties for misconduct of this nature but as noted, I do not consider their submission a joint position.

## Conclusion

Constable Chmelowsky was Constable Gendron's and Constable Zabdyr's supervisor, he was on scene, actively engaged in the call for service, and provided direction. It is my position that his sanction ought to be greater than that of his subordinates. His supervisory position and his misconduct is comparable to that of Detective Constable Willis. Consequently, not only do I see no reason to deviate from the joint penalty submission of a forfeiture of 60 hours, I find it very fitting.

The prosecution and Ms. Mulcahy jointly submitted that 32 hours was the appropriate penalty for both Constable Gendron and Constable Zabdyr while Mr. Miller submitted that 60 hours was the most fitting penalty.

It is the significant disparity in responsibility that separates Constable Chmeloswky's misconduct from that of his subordinates. The sanctions imposed must reflect that disparity.

I find that 32 hours is a fitting sanction for Constable Zabdyr. It is consistent with other cases that share some similarities in terms of neglect of duty while considering all mitigating and aggravating features.

Despite the fact that the seriousness of misconduct associated to Constable Gendron's behaviour is on par with that of Constable Zabdyr, I find the following mitigating features allow for a more lenient sanction: Constable Gendron's impressive employment history since this incident in accordance with her Annual Performance Forms and as indicated in the numerous letters of support; her sincere letters of apology addressed to this tribunal and to Mr. Miller demonstrate her significant remorse; and the loss of pay associated to her transfer from the Human Trafficking Unit as a direct result of this misconduct. For these reasons, I find that a forfeiture of 24 hours effectively addresses the penalty factors.

In the annotated *Police Services Act*, Mr. Ceyssens lists five foundation principles based on applicable jurisprudence that govern the process of crafting an appropriate disposition. He states:

The first principle is that the disposition should fully accord with the purposes of the police discipline process, which are as follows:

The employer's interest in maintaining discipline in the workplace; the rights of a respondent police officer suspected of misconduct being treated fairly; the public interest: ensuring a high standard of conduct in the constabulary, and public confidence in the constabulary...

The second principle which flows from the move towards a more remedial philosophy, as noted above, dictates that a corrective disposition should take precedence over a punitive disposition, where possible.

The third principle is the presumption of the least onerous disposition, which presumption would be displaced if the public interest or other specified considerations should prevail.

The fourth principle is proportionality, requiring that the tribunal consider all applicable mitigating and aggravating considerations, and then weigh those applicable factors appropriately.

The fifth principle is that the law holds police officers conduct to a higher standard, compared to other employees...

I find that the penalties imposed are in accordance with the above noted principles; they are the least onerous sanctions available when all aggravating and mitigating penalty factors are considered including the public's and Mr. Miller's interests.

## **Disposition**

On August 24, 2023, I ordered Constable Chmelowsky to forfeit 60 hours with written reasons to follow which are contained in this decision. I find the joint penalty proposed by counsel fitting; it meet the goals of the discipline process of striking a balance between community expectations, fairness to Constable Chmelowsky and the needs of the Durham Regional Police Service.

I order Constable Chmelowsky to forfeit 60 hours pursuant to section 85 (1)(f) of the *Police Services Act*. Constable Chmelowsky will attend his place of employment on either rest days or annual leave days to work the prescribed hours until 60 hours have been accomplished. This will be undertaken in consultation with his Divisional Commander.

I find that the subordinate officers ought to receive a less severe sanction than that of their immediate supervisor. I find that the sanction proposed by the prosecution and by Ms. Mulchay of a loss of 32 hours fitting as it relates to Constable Zabdyr. However, because of the mitigating features that apply to Constable Gendron, I find that a forfeiture of 24 hours more appropriate. The sanctions imposed strike a balance between community expectations, fairness to the officers, and the needs of their employer.

I order Constable Gendron to forfeit 24 hours pursuant to section 85 (1)(e) of the *Police Services Act*. Constable Gendron will attend her place of employment on either rest days or annual leave days to work the prescribed hours until 24 hours have been accomplished. This will be undertaken in consultation with her Divisional Commander.

I order Constable Zabdyr to forfeit 32 hours pursuant to section 85 (1)(f) of the *Police Services Act*. Constable Zabdyr will attend her place of employment on either rest days or annual leave days to work the prescribed hours until 32 hours have been accomplished. This will be undertaken in consultation with her Divisional Commander.



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Greg Walton  
Superintendent (Ret.)  
Ontario Provincial Police  
Adjudicator

Date electronically delivered: September 08, 2023