

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

AND IN THE MATTER OF

**THE ONTARIO PROVINCIAL POLICE
AND
PROVINCIAL CONSTABLE DAVID DIONNE, #13490
AND
MR. STEVEN DICK**

CHARGES: NEGLIGENCE OF DUTY (2 COUNTS)

DISPOSITION WITH REASONS

Before: Superintendent Robin D. McElary-Downer
Ontario Provincial Police

Appearances:

Counsel for the Prosecution: Ms. Claudia Brabazon
Legal Services Branch, MCSCS and MAG

Counsel for the Defence: Mr. Vincent Clifford
Ontario Provincial Police Association

Counsel for the Public Complainant: Mr. Robert Houston
Burke-Robertson LLP
Barristers and Solicitors

Hearing Date: January 30, 2017

This decision is parsed into four parts: PART I: OVERVIEW; PART II: THE HEARING; PART III: SUBMISSIONS, ANALYSIS AND FINDINGS; and, PART IV: DISPOSITION.

PART I: OVERVIEW

Allegation of Misconduct

On consent, Provincial Constable David Dionne, (PC DIONNE), #13490, accepted service of a Notice of Hearing dated outside the legislated six month limitation. It alleged that he, without lawful excuse, neglected or omitted to promptly perform a duty as a member of the Ontario Provincial Police (OPP), contrary to section 2(1)(c)(i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The edited particulars state:

Count 1

On or about September 1, 2014, while-on-duty, he was dispatched to attend a 911 call at a private residence:

- He failed to attend the residence during his shift;
- He cleared the call with the dispatcher several hours after being dispatched, despite not having attended the residence.

Count 2

On or about September 1, 2014, while-on-duty, he was dispatched to attend a 911 call at a private residence:

- When he cleared the call with the dispatcher he implied that he had taken some action to confirm there was trouble on the telephone line, which was inaccurate.

Plea / Penalty Positions

On January 30, 2017, PC DIONNE pleaded guilty to both counts and was found guilty.

Mr. Clifford, representing PC DIONNE, and Mr. Houston representing the public complainant and family of the deceased, Ms. M [REDACTED], proffered a joint penalty of a two-year demotion to second class constable. The tribunal was told the family was initially reluctant to join in the penalty submission, but their desire to bring finality to this process persuaded them otherwise. On the other side, Ms. Brabazon, representing the OPP, recommended the demotion consist of a three-year term.

In view of the submissions coupled with the parties' desire to resolve this matter, I accept the partial joint penalty submission and order PC DIONNE be demoted to second class constable for a period of two years.

Before moving to my reasons, I pause to say this to Mr. Dick and the daughter and sisters of the late Ms. K [REDACTED] M [REDACTED], Harriet, Nancy, Lynn and Brenda.

Thank you for bringing forward your concerns to the Office of the Independent Police Review Director surrounding the OPP's response to K [REDACTED]'s 911 call. Commendably, you found the inner strength to do so during your darkest days. Your complaint exposed the OPP's failure to respond; you have now seen us at our worst and know intimately how we let down your loved one when she needed us most. For this I am truly sorry. I can only hope that one day we can prove to you that this moment in time does not define who we really are.

PART II: THE HEARING

Agreed to Facts

On the consent of counsels, I have imported the edited agreed to facts from the earlier decision which resulted in an administrative mistrial.

Count 1

On September 1, 2014, at 4:43 pm, a 911 call was made from a residence in Casselman, Ontario.

At 6:16 pm, PC DIONNE was dispatched to attend the call. He was told by the dispatcher there was no voice contact on the line and that Bell had confirmed there was trouble on the line.

Nine hours later, PC DIONNE was contacted by the OPP dispatch requesting the status of his actions with regard to the 911 call. PC DIONNE cleared the call stating, "Confirmed trouble on line – NFA". However, at no point during his shift, did he attend or make any arrangements to attend the residence, contrary to OPP policy. PC DIONNE did not have any lawful excuse for not having attended the residence during his shift.

The caller, Ms. M [REDACTED], was found deceased two days later when a neighbour called the OPP concerned for her well-being.

Count 2

Specific to the facts in relation to count 2, I accept counsels' submissions that PC DIONNE failed in his lawful duty to communicate to the dispatcher he had not attended the 911 call, nor did anything to confirm or negate there had been 'trouble on the line'.

PART III: SUBMISSIONS, ANALYSIS AND FINDINGS

Overview

The facts of PC DIONNE's misconduct are not in dispute. What is not agreed upon is the sanction. The public complainant and officer have joined in a penalty submission of a two-year demotion. On the other side, the OPP has sought a three-year demotion.

My task is to ensure the disposition imposed fully accords with the governing principles of an appropriate sanction. In doing so, the goals of the discipline process, which include, correct errant behavior, deter others from similar misconduct, and uphold public trust, must be met. To guide me in reaching this determination, I have identified this key issue:

Issue

While all five principles governing the determination of a sanction must be considered, I turn my eye to the one which specifically speaks to the need to protect the interests of the public complainant. In this matter, the public complainant has joined the officer in proffering a sanction. How much deference ought I apply to this partial joint penalty submission? Does it take into account the employer's interest in maintaining discipline and the public's interest in ensuring a high standard of conduct is maintained in the constabulary? Are there other considerations in play that persuade me to accept it, if it fails on these fronts?

Coupled with the parties' submissions, I will rely on the commonly held disposition factors to guide me through this issue.

Public Interest

Submissions

Ms. Brabazon submitted the public interest favours officers who respond promptly and take 911 calls seriously.

Analysis and finding

The public unfailingly knows when they call 911, it is given priority status and a police officer, paramedic or firefighter shall be activated. When the call-taker cannot determine the nature of the emergency, the call is directed to police who in every instance are expected to attend, even in cases of highly probable errant pocket-dials. Responding to emergencies is a core function for officers – one that police train for and execute with professionalism, urgency and immediacy. This is why PC DIONNE's negligence is so jaw-dropping; he did none of this despite the nature of the call.

The public's trust and confidence in police is fragile at the best of times and this incident unquestionably will tear away what thread-bare support exists. To rebuild this, the public must see the OPP has the will and capacity to hold PC DIONNE accountable for his misconduct in a meaningful way. A severe sanction is one way to achieve this.

I find the public interest an aggravating factor.

Seriousness of the misconduct

Submissions

Mr. Clifford advised PC DIONNE acknowledges he had a duty to perform and he neglected to do so. Whatever else happened to the 911 call before he was dispatched serves as no excuse for his failure to act.

Ms. Brabazon submitted this is a case of serious misconduct, one that has had significant impact on a number of parties, not the least of which being K [REDACTED]'s family who have been present for the entire proceedings.

Analysis and finding

PC DIONNE's misconduct lands at the high end of the spectrum. Without excuse, an officer must respond to 911 calls without fail. It is a core function of every police service to do so as legislated in the Adequacy and Effectiveness of Police Services standards. There it states police officers shall respond to emergency calls for service 24 hours a day.¹ Further, the OPP policy provides unequivocal direction to all that a uniform member shall respond forthwith to a 911 dispatch, regardless of a possible network malfunction, and proceed to the location, treating the incident as an emergency until proven otherwise.² PC DIONNE's failure to attend the call without lawful excuse is an aggravating factor.

PC DIONNE's negligence is aggravated by the fact he failed to disclose to the dispatcher nine hours later he did not attend the call. Albeit I am uncertain whether it would have changed the tragic outcome, it was nonetheless his opportunity to mitigate his wrong, and do the right thing for the right reasons. His lack of courage to provide dispatch an accurate account of his inaction perpetuated and exacerbated his earlier negligence.

I agree with counsel, PC DIONNE's negligence has had a significant impact on many, in particular the family of Ms. M [REDACTED], who have unfailingly attended every day of these

¹ Ontario Regulation 3/99, section 4(1), Adequacy and Effectiveness of Police Services, *Police Services Act*

² OPP Police Orders, Chapter 2, section 2.1.1

proceedings. To this day, they still do not know why PC DIONNE failed to respond to the 911 dispatch, nor know what transpired between him and PC Cuning two days later. I encourage him to find the courage to give a true account of this for the sake of the family who so deservedly have a right to know. The public and OPP expect nothing less than honesty and forthrightness from its sworn officers.

In weighing these issues, I find the seriousness of PC DIONNE's misconduct aggravating.

Recognition of the seriousness of the misconduct

Submissions

Mr. Clifford advised PC DIONNE is aware of the impact his failure has had on the family of the deceased and his employer. He is embarrassed by his conduct and it is not consistent with who he has strived to be. It is Mr. Clifford's respectful opinion that PC DIONNE is advancing the penalty, a position which he believes is entirely reasonable given all the circumstances of this proceeding.

Ms. Brabazon acknowledged the seriousness of the misconduct has been recognized by the officer today through his counsel, Mr. Clifford.

PC DIONNE addressed the family at the conclusion of the proceeding and issued a heartfelt apology for his role in failing to respond to the 911 call.

Analysis and finding

I am left with no doubt PC DIONNE recognizes the gravity of his misconduct. He pled guilty to two counts of misconduct and agreed to a stiff sanction, one which the OPP had offered in an earlier process. Evident to me throughout these proceedings is the heavy weight of shame he carries on his shoulders.

This particular discipline proceeding has had its share of unprecedented problems and without the commendable efforts of all parties, I was not confident a resolution would be found to the satisfaction of all. It was through no fault of any one in this particular proceeding that an administrative mistrial had to be declared because of the unprincipled manner in which PC DIONNE's former counsel conducted himself in the earlier proceeding.

I lay the above out to make two findings which in my view are significantly mitigating. As soon as the administrative mistrial trial was declared, PC DIONNE willingly accepted the late service of a new Notice of Hearing. Had he chosen otherwise, this proceeding could

not have moved forward. Next, although he was entitled to seek my recusal on the grounds of 'perceived' bias, he chose not to exercise this right. PC DIONNE's choices today are indicative of one who has accepted responsibility and is prepared to be held accountable. Further, his choices prevented the family from further grief and allowed them to at last bring finality to this matter.

PC DIONNE's recognition carries significant favourable weight in my view.

Rehabilitation of officer

Submissions

Mr. Clifford advised PC DIONNE was dealing with issues which were impacting him personally. He advised he offered this information not as an excuse, but rather insight into who PC DIONNE is as an officer.

Analysis and finding

Before an officer can rehabilitate, they must recognize and take ownership of their misconduct. PC DIONNE has done so.

Mr. Clifford was kind enough to share detail surrounding PC DIONNE's health and well-being. It struck me PC DIONNE is doing everything humanly possible to return to front-line policing. I wish him well and hope that by putting this process behind him he can stand straighter and move forward with dignity.

I find this a weighty mitigating factor.

Employment history

Submissions

Mr. Clifford tendered three employment related records: An RCMP Performance Log, dated September 30, 2010³; a Performance, Learning and Development Plan, dated August 14, 2014⁴; and, a General Information Form, dated March 29, 2016⁵.

He advised PC DIONNE served out west as an RCMP constable for six years before he was hired by the OPP in 2011. The officer is 32 years old, in a common-law relationship and enjoys the support of a very close family.

³ Exhibit 3: RCMP Performance Log, September 30, 2010

⁴ Exhibit 4: Performance, Learning and Development Plan, August 14, 2014

⁵ Exhibit 5: General Information Form, March 29, 2016

Mr. Clifford shared detail in regard to the triggers that led PC DIONNE to his current state of health and assured the tribunal the officer is working hard to return to active duty. He now has the appropriate support mechanisms in place to achieve this. Again, he shared this information only as a backdrop, and not as an excuse for PC DIONNE's negligence.

Analysis and findings

I have read PC DIONNE's employment records with interest. They describe a top drawer officer who is extremely conscientious and takes great care and pride in his duties. In the past, he has been relied upon to serve as his platoon's second-in-charge. In relation to his employment history, it struck me how incredibly out of character his misconduct was, one that I trust has baffled even PC DIONNE.

I find PC DIONNE's employment history mitigating.

Deterrence

Submissions

Mr. Clifford advised a reduction in rank for a two-year period equates to approximately \$32,000.

Analysis and findings

Specific deterrence is necessary in this matter. PC DIONNE needs to understand that while the magnitude of his failure to respond to the 911 call was in itself incredibly serious, it was trumped by his failure to give an accurate account of his inaction to the dispatcher. Despite what mistakes are made, the OPP expects, as does the public, that officers will always be forthright in admitting such in order that immediate steps can be taken to rectify.

This decision illustrates the far-reaching implications of police officer's negligence to perform a basic core function. It is a tragic case of neglect, one that will no doubt leave many uniform and civilian employees sick at heart. The need for general deterrence will be best served by posting this decision on the OPP's intranet site.

Consistency

Submissions

Ms. Brabazon tendered three cases: *Harmer and Sarnia City Police Force*, OCCPS 81-02, March 5, 1981⁶; *Andrus and Metropolitan Toronto Police*, OCCPS 85-12⁷; and, *Stitt*

⁶ Exhibit 6, Tab a: *Harmer and Sarnia City Police Force*, OCCPS 81-02, March 5, 1981

and York Regional Police Service, OCCPS, February 28, 1997⁸.

Analysis and findings

Although dated, the cases share some similarities. In *Harmer*, the officer took double the amount of time to respond to call for service, despite its 'urgent' classification. He was demoted for five months. *Andrus* on the other hand refused to attend a bank robbery call because he was in the middle of getting his hair cut. He received a six-month sanction. *Stitt*, who was sleeping in his cruiser, failed to respond to a break-in when a citizen woke him up to report it. He was demoted for six months.

Twenty-years have passed since these incidents were reported. Since then, police accountability to the public has substantially grown, while the public trust and confidence in police has diminished. To this end, I find counsels' submissions for a lengthy demotion fitting in light of the circumstances of this matter.

Systemic failure and organizational/institutional context

Submissions

Mr. Houston advised it was the family's desire from the onset that the circumstances surrounding the 911 call be examined in a public inquiry. In July 2016, the Regional Coroner informed them he would not hold an inquest, although it appears this decision may be under review.

He submitted the OPP's investigation into why the call-taker did not forward the 911 call to the OPP when first received was not helpful to the family since much of the investigative report was redacted. The family unfortunately is still left with many unanswered questions.

Analysis and findings

The focus of this proceeding concentrated on PC DIONNE's failure to respond to the 911 call and failure to be forthright with the dispatcher. Notwithstanding, the tribunal is aware the 911 call sat in 'someone's queue' for over 90 minutes before it was dispatched. I conclude that in addition to PC DIONNE's negligence, a second failure in the system likely existed, one which was outside his control.

Further, when the call was finally dispatched, it struck me how unnecessary it was to communicate to PC DIONNE there was 'trouble on the line'. With respect, I found this

⁷ Exhibit 6, Tab b: *Andrus and Metropolitan Toronto Police*, OCCPS 85-12

⁸ Exhibit 6, Tab c: *Stitt and York Regional Police Service*, OCCPS, February 28, 1997

arbitrary information and while it did not alleviate the officer's duty to respond, it nonetheless had the potential to lessen in the officer's mind the urgency of the call. More to the point, other than a volley of guesses, no one in the first hearing could tell me with certainty what 'trouble on the line' really meant.

Although PC DIONNE must shoulder the full weight of his misconduct, I take into consideration these other troubling issues.

Procedural Fairness

Submissions

Mr. Houston advised that before the first hearing began in May 2016, he understood that the OPP sought a two-year demotion, provided the officer pled guilty, and a three-year demotion if he pled not guilty, but was found guilty.

Ms. Brabazon advised the OPP's proposed two-year demotion was contingent on the officer's early plea in the first hearing. This did not happen and the officer had the benefit of a full hearing. In light of the procedural anomalies of the first hearing and resultant mistrial, it is the OPP's position that PC DIONNE has now been given the benefit of a reduced charge; the deceit charge downgraded to the neglect of duty charge. In light of this, the officer has been afforded the necessary fairness.

Analysis and findings

I respect the OPP's principled position in relation to the sanction and cannot argue that PC DIONNE's guilty plea has come late in the day and he has benefited from the reduced charge of neglect of duty. Notwithstanding, I cannot ignore how far the parties have moved to salvage a proceeding dirtied by the unprincipled conduct of PC DIONNE's former counsel. Commendably, they collectively found a way to move forward despite this unprecedented irregularity. Yes, PC DIONNE did not plead guilty at the first opportunity and yes, I believe he has benefited from a lesser charge. That said, had it not been for his cooperation today, this matter would not have been resolved, and the cost and emotional damage to the family would have only deepened. This weighs heavily in favour of PC DIONNE.

Response to Issue

The need to protect the family's interests in this matter is paramount in my view. They not only experienced the tragic loss of their loved one, but they suffered emotionally and financially in pursuit of the truth. They joined with the officer in an agreed to sanction, illustrating to me their strong desire to bring finality to this proceeding. Had they not

done so, I would not land on the two-year demotion in light of the serious nature of his misconduct.

I note in the first proceeding, the OPP proposed a two-year demotion if the officer had pled guilty. Although the circumstances have changed, it is the same penalty now being proposed by the family and officer. Although this proceeding lacked the immediacy the OPP hoped for, and a guilty plea in the first instance, it tells me it was acceptable to the Service at one point in time. This illustrates to me a two-year demotion was originally in the acceptable range and thus meets the OPP's interest in maintaining discipline.

This leaves me to determine the most difficult piece and that is the public's interest. By virtue of imposing a lengthy demotion of two or three years, the public will see the OPP holds its officer to a high standard of conduct. This may satisfy most, but until others really know why PC DIONNE did not attend the call and what transpired between him and PC Cuning afterward, I suspect there will be always be some who will speculate if he is fit for continued employment as a police officer. I cannot therefore say for certain if a demotion will entirely satisfy the public's interest.

This being the case, I again turn my mind to the procedural anomalies and irregularities which resulted in the earlier mistrial. Had it not been for PC DIONNE doing the right thing and accepting late notice of the new charges and pleading guilty, this matter would not have been resolved. In my view, these extraordinary steps illustrate PC DIONNE has the moral fortitude to do what is right in an effort to regain the public's trust in him.

For all these reasons, I am convinced justice will best be served by accepting and imposing the family's and officer's proposed sanction.

PART IV: DISPOSITION

I have found PC DIONNE guilty of two counts of neglect of duty based on clear and convincing evidence. I am satisfied the family and officer's joint penalty submission is reasonable in view of all the circumstances that plagued this proceeding.

Effective immediately, I order PC DIONNE be demoted from first class to second class constable for a period of two years, pursuant to section 85(1)(c) of the *Police Services Act*. At the conclusion of this term, he will be reinstated to first class constable.



Robin D. McElary-Downer
Superintendent, OPP Adjudicator

Date electronically delivered: February 14, 2017

APPENDIX A

Exhibit 1: Adjudicator's delegation

Exhibit 2: Prosecutor's designation

Exhibit 3: RCMP Performance Log, September 30, 2010

Exhibit 4: Performance, Learning and Development Plan, August 14, 2014

Exhibit 5: General Information Form, March 29, 2016

Exhibit 6: Book of Authorities

Tab a: *Harmer and Sarnia City Police Force*, OCCPS 81-02, March 5, 1981

Tab b: *Andrus and Metropolitan Toronto Police*, OCCPS 85-12

Tab c: *Stitt and York Regional Police Service*, OCCPS, February 28, 1997