



Prior to commencing sentencing in this matter, I would like to thank Mr. David Butt, Defence Counsel, and Acting Inspector Shane Branton, the Service Prosecutor, for their submissions and exhibits tendered, all of which have assisted me in reaching my decision.

## **SUMMARY**

As a result of an initial OIPRD complaint Constable Clarke was charged with one count of Discreditable Conduct and one count of Insubordination. After a full Hearing, on December 06, 2018, Constable Paul Clarke #3332 was found guilty of one count of Insubordination contrary to the *Police Services Act*. The charge of Discreditable Conduct was dismissed.

### **Statement of Particulars:**

Being a member of the Toronto Police Service, attached to 52 Division, you were assigned to uniform duties.

On Wednesday, April 27<sup>th</sup>, 2016, you were working the evening shift and assigned to scout car 5212. You did not, as required, check at the beginning of your shift the In-Car Camera System (ICCS) to ensure it was operating properly.

Your actions were in contravention of Toronto Police Service Procedure 15-17, In-Car Camera System.

On this date, while on duty, you attended the area of James Street and Queen Street West, in the City of Toronto, where you engaged with a member of the public.

You activated the ICCS to capture the incident but did not properly activate the audio recording. As a result, the ICCS did not capture the audio of the incident.

In so doing, you committed misconduct in that you did without lawful excuse, disobey, omit or neglect to carry out any lawful order.

## **JOINT DISPOSITION**

On February 26, 2019 the Hearing was reconvened. Defence counsel and the Service Prosecutor presented a joint submission for disposition. The submission was for a forfeiture of 2 days (16 hours) for the Insubordination.

### **Prosecution:**

Inspector Branton:

The Service Prosecutor advised that he did reach out to the Public Complainant's counsel in this matter, as it was an OIPRD directed hearing, and was advised that they would not be making any submissions as to penalty. They were also provided the option of submitting a letter for entry as an exhibit however this too was declined.

The Prosecution outlined the objectives of discipline in a Police Tribunal, which are well documented and are summarized as follows:

1. Specific deterrence, to correct unacceptable behaviour,
2. General deterrence, to prevent others from similar behaviour,
3. To assure the public that the police are under control.

Ultimately, the purpose of police discipline is to maintain the public's trust so that the police may adequately and effectively go about their duties in keeping the public safe. This is a much more attainable goal when the public is working in a partnership with the police.

Prosecution then identified the considerations identified in *Krug v. Ottawa*, that he would be addressing:

1. Public Interest;
2. Seriousness of the Misconduct;
3. Recognition of the Misconduct;
4. Employment History;
5. Potential to Rehabilitate;

6. Consistency of Discipline;
7. Specific and General Deterrence; and
8. Damage to the Reputation of the Service;

Public Interest:

Prosecution identified a paragraph from the following decision – *Konkle v. Niagara Police Service* (1997 – page 13) which states: “*Good character in a police officer is essential to both the public’s trust in the officer, and to a police service’s ability to utilize that officer. The public has the right to trust that its police officers are honest and truthful, and that, absent extenuating circumstances, they will not be officers any longer if they breach this trust.*”. This statement is consistent with that of the criteria involved when being appointed as a police officer as stipulated in the *Police Services Act*, Section 43(1)(d) which states “is of good moral character and habits”.

Prosecution addresses the identified Standard of Conduct as outlined by their previous Chief, William Blair under their Service Governance, which gives clear direction to all Toronto Police Service (TPS) members, that compliance with Directives and Procedures are vital, as is their integrity with an understanding that they are held to a higher standard.

Prosecution identified that as per TPS Routine Orders pertaining to In-Car- Camera (ICCS) there was and is still a requirement to ensure the equipment is operational and functioning properly and that as stated in Routine Order 2018.12.27-1278 “*Any constable found not in compliance with Procedure 15-17 will receive a minimum penalty of 8 hours. This penalty increases to a minimum of 16 hours for a supervisor.*”

In summation as to public interest, the Prosecution stated that Constable Clarke’s misconduct which was not excessive, it could have been easily preventable, and that he did acknowledge his actions and culpability during the Hearing.

### Seriousness of the Misconduct:

Prosecution essentially outlined that Constable Clarke did not live up to the expectations of the Toronto Police Service as set out in the identified TPS core values. Further, that although Constable Clarke has had the requisite training (April 2009) he knowingly did not check or utilize the ICCS during the incident that brought this matter before a tribunal.

### Recognition of the Misconduct:

Prosecution presented *Grbich v. Aylmer* (2002) where the Commission referenced three key elements that need to be taken into consideration when determining mitigating or aggravating factors on penalty depending on the particulars of the misconduct:

- Employment history and experience
- Recognition of the seriousness of the transgression, and
- Handicap or other relevant personal circumstances.

In this particular incident, as will be identified in Constable Clarke's employment history, it has been positive. In relation to recognition of the seriousness of the transgression, Constable Clarke admitted in his testimony during the Hearing that he had not tested or checked the ICCS at the start of shift and as was noted in the written decision, had it been tested, checked and utilized properly this whole complaint and Hearing may have been averted.

### Employment History:

As noted in recognition of misconduct, Constable Clarke's employment history has been a positive one during his career. He has had 30 commendations added to his file for all of the positive work he has done.

His latest Performance Appraisal identifies that Constable Clarke is a senior member of the platoon who performs his job consistently on a daily basis. As noted by his Unit Commander: *"PC Clarke is a very reliable member of TPS and has shown to be trustworthy, good customer service"*.

As per *Grbich v. Aylmer*, this is a mitigating factor.

#### Potential to Rehabilitate:

Prosecution identifies that one of the essential factors or goals in discipline is the correction of unacceptable behaviour. As identified in *Grbich v. Aylmer* (page 10) which states: “On the question of rehabilitation, every attempt should be made to consider whether or not rehabilitation is possible. A police service and the community in which it is situated makes a significant investment in each police officer.”

Further, as identified in *Andrews v. Midland (2002)* page 18, “...the Commission believes that unless the offence is so egregious and unmitigated the opportunity to reform should be a significant consideration.” and “The Commission believes that rehabilitation is a key factor to be taken into consideration when a penalty is imposed, especially, when the officer has a prior unblemished record. Unless the officer is beyond rehabilitation (in which he would be a candidate for dismissal) the door should be kept open for the officer to be rehabilitated. The penalty should be tailored to provide him with the opportunity to do so.”

In review of cases and Constable Clarke’s employment history and all other relevant factors, the recommended joint penalty of 16 hours is consistent and supportive.

#### Consistency of Disposition:

Prosecution identified two cases, *Buckle v. OPP (2005)* and *Schofield v. Metropolitan Toronto Police (1984)* where it was pointed out by the Commission that “consistency in disciplinary matters is the hallmark of fairness”

Defence counsel, Mr. Butt, then conceded that all of cases provided by the Prosecution (Book of Authorities – Exhibit #24) support the joint penalty of 2 days (16 hours) and that there would be no further requirement to provide a detailed review of each case.

### Specific and General Deterrence:

Prosecution identified that this incident is a direct contravention of TPS Routine Orders and Procedures, resulting in a strong message that needs to be sent not only to Constable Clarke but to the Service as a whole. As identified in *Andrews v. Midland*, “...the penalties imposed for misconduct must be strong enough to send a clear message to other officers that such conduct or any conduct of this nature will not be tolerated.”

Prosecution advised that upon completion of this Hearing and the submission as to penalty decision, all decisions relating to this matter will be placed on the TPS internal internet for viewing as well as on the OIPRD website for members of the public to access and review.

### Damage to the Reputation of the Service:

Fortunately, in this circumstance, although it was an OIPRD complaint and directed Hearing, no media or public scrutiny was brought onto the TPS. This does not alleviate or lessen the consequences of the misconduct.

Members of the TPS cannot choose which Routine Orders or Procedures they are going to follow. In order to maintain and keep the public trust, which has a direct correlation to the reputation of the police service our members must abide by all set orders and Procedures.

### Summary:

Prosecution advises that in the totality of the circumstances as it pertains to the misconduct of Constable Clarke in the use, or lack thereof, of the ICCS the joint penalty of 2 days' forfeiture is consistent with the issues at hand and case law.

## Defence Submission:

Mr. David Butt

Defence acknowledge and concede that they are supportive of the 2-day joint penalty submission in relation to this matter and that the identified cases by the Prosecution are appropriate. Defence also state they recognize that had the ICCS been checked and properly working, there is a possibility that we may not have even had to have the Hearing, as the initial complaint could have conceivably been unsubstantiated.

Constable Clarke was acquitted of the original complaint however as a result of the fulsome investigation he ends up with a disciplinary finding, that in isolation would not have been taken to a tribunal. As a result, Constable Clarke now has to deal with McNeil consequences.

Constable Clarke is approaching the 30-year mark of his career and has been presented as having a positive employment history. Constable Clarke's misconduct is not "inherently morally egregious" however he does accept full responsibility.

It should be noted, that Constable Clarke was not the only officer in the car that day as he did have a partner – Constable Costabile- and was not the driver. Although nobody is perfect, they are supposed to be a team, yet ultimately Constable Clarke accepts responsibility for the misconduct regarding the ICCS.

Ultimately, this joint penalty is at the lower end of the range, is reasonable and acceptable as to appropriateness for this misconduct. Defence identifies, that as it is identified in the Supreme Court decisions of *R. vs Cook* (2016) there are benefits to joint submissions and that the acceptance of this suggested penalty, would be representative of "reasonable and informed persons aware of all relevant circumstances" and be beneficial to the public interest.

The acceptance of a joint submission encourages the reduction of Hearing time, acceptance of responsibility, allows for honest conversation between counsel and clients, provided beneficial outcomes and allows for and encourages more joint positions.

Constable Clarke:

Constable Clarke was given the opportunity to address the Tribunal, which he did.

Constable Clarke thanked the Prosecution for being fair and appreciated the Prosecutions positive comments during the penalty submission. Constable Clarke apologized for the Tribunal having to be convened and that he has learned from his mistakes, and in fact has since made a point of ensuring he does check his ICCS prior to initiating his daily duties.

Decision:

I would like to thank both Prosecution and Defence for their submissions and exhibits throughout this whole proceeding. Their input and commentary have greatly assisted me in reaching my decision as to the joint penalty submission.

It is unfortunate that, as Defence stated, had it only been the ICCS misconduct under review this may have been dealt with informally, however as it was a directed Hearing by the OIPRD, it did not allow for that.

I would be remiss, if I did not express the importance of all Police Service members properly utilizing their ICCS. By ensuring the ICCS is operating and functioning properly it improves officer safety, reduces liability to the Police Service (corroborates a civilian complaint or vindicates an untrue version of events), provides transparency to the community, improves conviction rates with evidence captured and can be utilized as a training tool.

I have reviewed all the case law provided by the Prosecution and conceded to by Defence, along with the TPS Routine Orders and Procedures and Constable Clarke's employment history including his latest performance appraisal.

In my review and in consideration of the joint penalty submission, I believe there is a significant benefit to the recommended penalty and that there is no need or requirement for independent discretion on my part. The recommended joint penalty is strong enough to send a clear message to Constable Clarke and other officers that such conduct or any conduct of this nature will not be tolerated.

Therefore, as a result of finding Constable Clarke guilty of insubordination as it relates to not properly testing, checking or utilizing the assigned ICCS, I am agreeable to the 2-day penalty forfeiture.



Graeme Turl  
Superintendent  
York Regional Police.

Dated: April 3, 2019