

**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 MICHAEL J. POTTER, #10415**

**CHARGES: NEGLIGENCE OF DUTY, and  
UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY**

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**DISPOSITION WITH REASONS**

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

**Representation:**

**Counsel for the Prosecution:** Mr. Norm Feaver  
Legal Services Branch, MCSCS and MAG

**Counsel for the Defence:** Mr. Gavin May  
Ontario Provincial Police Association

**Public Complainant:** DC  
**Counsel for Complainant:** Mr. Ted Tichinoff

**Hearing Date:** April 1, 2016

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

## **PART I: OVERVIEW**

### **Background**

On November 16, 2015, Provincial Constable Mike POTTER (PC POTTER) pleaded not guilty to two allegations of misconduct, neglect of duty and unlawful/unnecessary exercise of authority. The edited particulars of the allegations were:

On or about September 4, 2013, while on-duty, PC POTTER was neglectful in his duties as a police officer, including that:

- He failed to report the fact he struck DC on the head with his hand, three or four times, while DC was handcuffed and seated in the rear of the police cruiser by not reporting the truth to his supervisor, not recording it in his notes or in any RMS report.

He knew or ought reasonably to have known that his conduct was inappropriate and neglectful.

On or about September 4, 2013, while on-duty, PC POTTER used unlawful force in controlling a prisoner, DC, in that:

- He struck DC on the head with his hand, three or four times, while DC was handcuffed and seated in the rear of the police cruiser; and,
- The use of force resulted in a facial injury to DC.

He knew or ought reasonably to have known that his conduct was inappropriate.

On December 22, 2015, the tribunal found PC POTTER guilty of both counts. On April 1, 2016, the tribunal reconvened to hear penalty submissions.

### **Decision**

After reviewing and weighing the evidence presented, I order the following sanctions be imposed: PC POTTER be reprimanded for his unnecessary/unlawful use of force and he forfeit sixteen-hours for his neglect of duty. My reasons for this are as follows.

## **PART II: THE HEARING**

### **Exhibits**

The exhibits for this matter are listed in Appendix A. To alleviate unnecessary repetition, all exhibits will be referred to by number without the preface of Appendix A.

## **Representation**

Mr. May represented PC POTTER and Mr. Feaver represented the OPP.

Neither the public complainant nor her counsel attended. In light of their absence, Mr. Feaver advised he had been in communication with DC's counsel. An attempt was made to have DC complete a statement in order to give the tribunal some perspective of how the incident impacted her, but the task was not completed because it was too difficult for her.

## **Positions on sanction**

Mr. Feaver advised the OPP were seeking a forfeiture of forty hours for the unnecessary use of force and twenty-four hours for the neglect of duty. Mr. May recommended the tribunal impose reprimands in both instances. Counsels provided the following submissions in support of their positions:

## **Submissions**

### *By the prosecutor (summary)*

Mr. Feaver filed a Joint Book of Documents and Book of Authorities as exhibits 22 and 23, respectively.

Mr. Feaver asked the tribunal to consider DC's testimony found in exhibit 10, as the public complainant's perspective in this matter. Despite her testimony came two years after the incident, it was evident it still affected her greatly. Mr. Feaver did not think DC could offer anything more than what she said during the hearing.

Mr. Feaver reminded the tribunal the incident involving DC, PC POTTER and PC Belanger occurred in September 2013. An abbreviated hearing for PC POTTER followed the *Belanger* hearing. PC POTTER was consequently found guilty on two counts of misconduct, neglect of duty and unlawful or unnecessary exercise of authority. Prosecution is seeking twenty-four hours for the first count and forty-hours for the second count.

In regard to the unnecessary exercise of authority, PC POTTER struck DC on the head while seated in the cruiser. In the tribunal's decision, there were a few items of interest that are important to the penalty submissions. It found that PC POTTER hit DC hard and fast three to four times. It accepted DC's evidence that she saw white lightning when she was hit which resulted in a black eye. The tribunal found the strikes were administered for punishment based on PC POTTER's words which followed the final strike. Until that point, PCs POTTER and Belanger had applied soft control techniques,

which had been successful. The tribunal did not find the officers faced imminent danger or death, when PC POTTER applied hard control techniques. Because PC POTTER failed to assess the effectiveness of his first strike, the tribunal found the force he applied excessive.

In regard to the second charge, the tribunal found PC POTTER neglectful because he failed to report he struck DC in the head, and that he had no intent to disclose. He failed to mention it in his first duty report and he did not make note of it in his notes. In fairness, PC POTTER conceded persons would not get an immediate understanding of what happened. The tribunal found PC POTTER's mischief with words was a purposeful attempt to avoid reporting his force exceeded that of soft control techniques and an attempt to hide the truth. PC POTTER is an experienced officer who apparently made comprehensive notes in regard to DC so it stands to reason he would have known the importance to include his application of force against DC.

Mr. Feaver submitted that a police officer's fundamental duty to protect the public implicates the public interest factor. The public has an interest civilians are treated according to their *Charter* and that only as much force as necessary is applied. The public also has an interest in PC POTTER's failure to properly maintain his notes. Similarly, the public would have an interest in what happened in the back seat of the cruiser. On a daily basis, it is heard police officers step outside their duty and this incident is along the same lines.

In terms of seriousness of the misconduct, Mr. Feaver pointed to exhibit 23, tab 3, *Stenzel and Durham Regional Police Service*, DRPSHD, October 9, 2012, paragraph 15, which stated:

The Service submits that Cst. Stenzel's exercise of unnecessary force on a civilian is considered a very serious form of misconduct.

The matter involving PC POTTER is very serious. He has worked for the OPP for fifteen years and should have known the soft control techniques were working; they assisted in getting her to the cruiser. It was not like he struck her once to see if it worked – he struck her a number of times. The action of PC POTTER was very heavy handed and as such, should be treated as very serious. He also attempted to hide it from his supervisor. He deliberately did not record it in his notes in an effort to diminish his application, and this ramps up the seriousness of the misconduct.

In terms of recognition, Mr. Feaver submitted PC POTTER had the right to a full answer and defence. The fact a hearing was held should not be considered an aggravating factor. PC POTTER wanted to have the matter heard quickly and this should be noted in his favour. In previous case law the Commission has accepted that untruthful

testimony demonstrates a pattern of untruthfulness on the part of the officer and shows a lack of remorsefulness. This tribunal found PC POTTER's testimony downplayed the degree of force he applied and employed a tactic averse to his training. Mr. Feaver submitted this demonstrated a lack of remorse and should be treated as an aggravating factor.

Mr. Feaver submitted the only instance of provocation was when DC grabbed the knife and the officers disarmed her. The fact she could raise her arms while in the cruiser did not justify the use of force.

Mr. Feaver advised PC POTTER has been employed with the OPP since 2000, almost sixteen years. He pointed to PC POTTER's Career Profile in exhibit 22, tab 4, and suggested it was thin for a senior officer. There were positive entries during his first few years, seven of which were submitted while he was a cadet. In March 2008, PC POTTER was found guilty of several charges and demoted to fourth class constable, which is very aggravating. The vast majority of positive entries are dated, and again they occurred when he was a cadet.

Mr. Feaver pointed to PC POTTER's three Performance, Learning and Development Plans (PLDPs) in exhibit 22, tabs 1 to 3, and submitted there is a certain bi-polar nature to his career. In 2012, PC POTTER met all standards and exceeded in three categories. He was involved in a number of noteworthy occurrences. It would appear his involvement with DC was completely at odds from the positive entries. In 2014, PC POTTER met the performance standard in all categories. As seen in a number of documented incidents, he performed with a certain level of diligence. Provided he steps up in a few areas, it would appear PC POTTER could move to the next rank. The 2015 PLDP indicated PC POTTER can remain calm the vast majority of the time when faced with difficult circumstances. He exceeded the performance standard in two categories and met the standard in all the rest. In February 2016, PC POTTER was the recipient of a positive 233-10 after he demonstrated compassion when a citizen's dog was killed.

Mr. Feaver advised he has mixed views in regard to PC POTTER's potential to rehabilitate. Although he has no worries about PC POTTER's ability, he does not know why he committed the misconduct. There are many examples of good performance and his misconduct flies in the face of a very good officer. Mr. Feaver is cautiously optimistic and believes if PC POTTER sticks with his normal diligent nature he will be fine. He just needs to eliminate the blips on the radar that are seen every few years.

Mr. Feaver advised the cases in exhibit 23, namely, *Batista and Ottawa Police Service*, OCCPS, May 8, 2007, *Bonhomme and Timmins Police Service*, TPSHD, December 19,

1997, *Stenzel, Sutton and Barrie Police Service*, OCCPS, July 5, 1982 and *Turgeon and OPP*, OCCPS, November 5, 1999, related to unnecessary use of force misconduct. He compared the cases to the matter at hand in detail and advised the sanctions ranged from reprimand, loss of hours to demotion. He submitted that the forty-hours being sought in PC POTTER's matter is low, but within range of the other matters.

Mr. Feaver reviewed similar neglect of duty cases, namely, *Lloyd and London Police Service*, LPSHD, May 20, 1999, *Pelissero and OPP*, OCCPS, November 5, 1999, and *Watters and OPP*, OCPC, February 1, 2011. In the latter decision on page 19, the Commission addressed the necessity to document injuries. In the cases presented, the penalty ranged from sixteen to twenty-four hours.

Mr. Feaver advised that given the nature of PC POTTER's behaviour, specific deterrence in this matter was important. He tried to hide the truth of the nature of his force after he struck her three times. His words that followed sort of suggested a punishment rather than a behaviour modification. PC POTTER needs to lead by example and this was not leading. He needs to understand his behaviour was unacceptable.

In regard to general deterrence, Mr. Feaver advised PC POTTER's conduct violated policies and training. Taking notes is part of an officer's duty and he failed to and this is unacceptable.

Mr. Feaver was not sure what knowledge the public had of this matter, but it was evident there was awareness in DC's circle. The tribunal found PC POTTER used unnecessary force and caused her a black eye and the purpose was for punishment. He tried to diminish the truth in his notes. The impact on DC was profound and it eroded her trust in police to the point where she has modified her behaviour around police. The incident has had a lasting effect on her.

Mr. Feaver submitted the sanctions he has suggested are more than reasonable.

Submissions by the defence (summary)

Mr. May advised that by way of background, PC POTTER is forty-years old. He is married and has two daughters aged eight and ten. He joined the OPP as a cadet in 1999, and was sworn in as a constable in 2000. The general theme of his career history is he has been diligent in a variety of circumstances. Although his work history has listed some minor concerns, he is a very strong officer who is essentially a second-in-charge (2IC).

Since this process, he has been in the penalty box and told he cannot enter any promotional process. This is similar to the *Batista* case where the officer was removed from his acting sergeant status. Indeed this matter has had a negative impact on PC POTTER.

Mr. May addressed Mr. Feaver's comment that PC POTTER's Career Profile was thin. He suggested this was more a process matter which has been seen in the past where documentation does not reach General Headquarters for filing.

Mr. May submitted he preferred the term dichotomy to bi-polar when discussing an individual's performance. He suggested because this misconduct appears to be out of character for PC POTTER, perhaps the tribunal got the decision wrong. There is a history of three PLPDs which reflect an excellent police officer and the misconduct was not in keeping with the history.

Mr. May pointed to pages 21 and 22 of the tribunal's decision. It found PC POTTER was in a dynamic situation and failed to assess his first strike. Notwithstanding the tribunal accepted PC POTTER made a mistake, he was found guilty for failing to stop. On page 17 of the same decision, the tribunal found DC's testimony believable which was contrary to the finding in the *Belanger* and OPP, OPPHD, September 19, 2015, decision. PC POTTER's misconduct occurred within a fraction of a second, before DC could say the word, 'bastard'.

Mr. May referred to his case authorities in exhibit 23, which included, *Kerr and Metropolitan Toronto Police Service*, MTPSHD, June 29, 1981, *Hussain and OPP*, (Notice of Hearing and ASoF), April 10, 2001, *Pearsall and OPP*, OPPHD, November 3, 2008, *Smith and OPP*, OPPHD, May 9, 2013, *Rancourt and OPP*, OPPHD, February 25, 2015, and *Asselin and OPP*, OPPHD, October 11, 2013.

In *Kerr*, the officer was sanctioned thirty-two hours after he struck an accused who made offensive remarks. It did not occur in the heat of the moment as it did in this case.

In *Hussain*, the officer was off-duty when he assisted store security officers with an arrest. The accused, who was handcuffed, was struck in the face by the officer and the officer was convicted criminally of assault. He was sanctioned forty-hours.

The *Pearsall* case involved a more dynamic situation. While attempting to arrest a motorcyclist, the officer pushed the man's head on the trunk of the cruiser, causing the man's tooth to break. The officer was sanctioned twenty-hours.

In *Smith*, the officer kicked an accused in the leg and stepped on his buttocks while other officers were attempting to secure him in leg irons. The officer was charged and convicted criminally of assault and subsequently sanctioned forty-hours.

Mr. May advised it is evident the OPP responds to these types of matters differently. He is even aware of a matter similar to PC POTTER's situation where an officer was dealt with informally.

Mr. May submitted that Constable Batista's loss of his acting sergeant status is similar to PC POTTER's circumstances. As a result of this incident, PC POTTER is in the penalty box. The loss of status was taken into consideration in *Batista* when the reprimand was imposed. The appropriate penalty in this matter should be a reprimand.

Mr. May submitted that in regard to the neglect of duty charge, PC POTTER was found guilty because his notes were not fully completed. He submitted it was his understanding notes were made to refresh one's memory. In *Asselin*, the officer failed to make notes for an entire 193 days and he was assessed forty-hours. Comparatively, in *Rancourt*, the officer failed to make notes for a period of one-hour and he received a reprimand. Because PC POTTER's misconduct was totally out of character, he too should only receive a reprimand for his neglect.

Mr. May advised that although it has been said this matter has had a lasting effect on DC, he asked it be disregarded because of lack of proof.

Prosecutor's reply (summary)

Mr. Feaver submitted the *Batista* case held the position the officer experienced a loss of income. This is not the case in this matter and quite frankly the public would have a difficult time with it.

Mr. Feaver advised that as much as this may have been out of character and occurred within a split second, it is what it is. One cannot ignore what happened within the short period of time and there has to be repercussions. Lastly, the fact DC testified two years after was evidence she relived the incident.

Respondent officer's comments (summary)

PC POTTER advised that while there has been discussion in regard to the impact on DC, the matter has also impacted him. It has been a very stressful and anxious time and made him cautious in how he goes about his work. He is an individual who wears his heart on his sleeve. Although he feels very frustrated, he continues to work proactively.

## PART III: ANALYSIS AND FINDINGS

### Summary of misconduct

PC POTTER's misconduct can be distilled to this: On September 4, 2013, he and PC Belanger arrested and removed DC from her apartment. DC was highly intoxicated and resisted. As the officers struggled to get her into the cruiser, PC POTTER struck DC in the head three to four times resulting in a black eye. PC POTTER was not forthright in reporting his use of force to his supervisor or recording it in his notes or the RMS report. On November 16, 2015, an abbreviated hearing was held where PC POTTER pleaded not guilty, but was found guilty of unnecessary/unlawful use of force and neglect of duty.

The positions on sanctions vary. Defence seeks a reprimand on both counts while the prosecutor seeks a forfeiture of twenty-four and forty-hours for the neglect and unnecessary force, respectively. In determining the most appropriate sanction, I must strike a balance between the expectations of the community, the needs of the organization and fairness to the subject officer. To this end the goals of the discipline process, which include correct errant behaviour, deter others from committing similar misconduct, and reassure the public, must be met. I have identified two key issues to guide me in this decision.

1. Excessive use of force by a police officer is a very serious matter, one which is not tolerated nor condoned. In this matter, DC received a facial injury as a result of PC POTTER striking her head. In light of the nature of misconduct and intolerance for such, coupled with the resulting facial injury, would a reprimand fail to achieve the goals of discipline?
2. Should the neglect of duty draw the same consideration accorded to the excessive force sanction? Is there an explanation for why or why not?

To resolve these issues, I will apply a number of commonly held considerations.

### *Public interest*

Public interest is relevant in this matter. Police officers are granted extraordinary powers to use force; but, the powers are not limitless. As such, police undergo extensive training in regard to the type and application of force to be used pending the circumstances. As a police officer since 2000, PC POTTER has been the subject of such training. The public grant that police officers need to exercise force when necessary, but expect them to do so with restraint, and to never exceed their authority.

The public also expects police officers to be forthcoming in regard to their duties and

gtheir application of force. This tribunal found PC POTTER was not. He applied enough force against DC to cause her to see 'white lightning' and be left with a black eye. The public would find PC POTTER's lack of transparency concerning.

The public must be confident the OPP does not tolerate misconduct of PC POTTER's nature and will hold him accountable for his transgressions. I find the public interest an aggravating factor.

### *Seriousness of the misconduct*

Any time excessive force is applied by a police officer the matter is viewed very seriously. In this case, I had the benefit of viewing all evidence and hearing the testimony from key witnesses, DC, PC Belanger and PC POTTER. To say I felt like I had a front row seat to the incident with a clear view of the circumstances as they unfolded is an understatement. Armed with this knowledge, I believe I am in the best position to determine where on the index of seriousness PC POTTER's excessive force lands.

In my decision dated December 22, 2015, I found the arrest and removal of DC a significant challenge for PCs POTTER and Belanger. It seemed from the point they handcuffed her, the struggle was on to get her out of her apartment and into the cruiser. Their use of soft physical control techniques was effective despite DC's combative and resistive behaviour. PC POTTER's deviation – the three to four strikes to the head may have been short lived, but nonetheless they were deemed excessive – and thus very serious.

The facts which help mitigate the seriousness of his unnecessary force, however, are:

- There was no pause in the struggle before PC POTTER struck DC about the head; it came after a prolonged and difficult struggle and happened in the heat of the moment.
- His fatal error that evening was narrowed to his failure to *Assess-Plan and Act* after his first strike.
- Other than this instant of excessive force, there was no evidence to suggest PC POTTER mishandled, or more to the point, manhandled, DC. In fact, the evidence pointed the other way.<sup>1</sup>

Based on these points, I find PC POTTER's misconduct was akin to a momentary lapse in judgment. I found no early indicators that he was wanting to apply excessive force

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<sup>1</sup> Exhibit 31: Transcript of Mr. Hans Traimer's interview

and none afterward. PC POTTER's conduct was unquestionably inexcusable, but nonetheless these findings mitigate the serious nature of such.

PC POTTER's neglect of duty is tied directly to his unnecessary use of force. The tribunal determined he had no intent to divulge the degree of force applied against DC, as evidenced in his comments to his supervisor, his lack of notes and no notation in the RMS report, and first duty report. Specific to an officer's duty to record such detail in his notebook, the Commission stated in *Lloyd*:

In previous decisions the Commission has noted the importance of maintaining an accurate notebook. In Cristiano and Metropolitan Police Service (February 4, 1997) we stated at page 2:

The purpose of an officer's notebook is to provide a clear creditable record of the officer's activities and observations of various matters which may be of vital use later to refresh his or her memory. Misstatements such as in this case only serve to undermine the usefulness and credibility of an officer's notebook for all officers.<sup>2</sup>

The excerpt makes reference to misstatements and points to the importance of recording vital information in one's notes. Striking an individual in the head while they are handcuffed, unequivocally meets the criteria of vital information. Despite the numerous opportunities for PC POTTER to come forward, he did not. In my view, the seriousness of this matter elevated when he failed to own up and report to his Sergeant and make record in his notes, RMS report and his first duty report, the degree of force he applied against DC. This is an aggravating circumstance and it will be weighed accordingly.

#### *Recognition of the seriousness of the misconduct*

PC POTTER was entitled to a full answer and defence and I credit him and Mr. May for their approach to this abbreviated hearing. It saved the need of DC testifying again. Aside from this fact, there was no sign of remorse. While I accept he was entitled to explain his version of events, I found it nonetheless disappointing there was no expression of remorse or recognition after he was found guilty. This is not deserving of mitigation.

#### *Employment history*

PC POTTER has been a sworn officer with the OPP since August 2000, with prior service as a cadet. As a cadet, he was the recipient of seven positive entries on his

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<sup>2</sup> Exhibit 23, tab 4: *Lloyd and London Police Service*, LPSHD, May 20, 1999, page 12

career profile<sup>3</sup>, compared to the two since he was sworn in. I agree with Mr. Feaver that PC POTTER's profile was thin.

In 2008, PC POTTER was demoted to fourth class constable after he was found guilty of insubordination, neglect of duty and discreditable conduct, in which he then had to progress through the classifications again in the normal manner. Based on the sanction imposed, I infer the nature of his misconduct had been extremely serious, and thus it serves as an aggravating factor in this consideration. PC POTTER transferred to the Hawkesbury Detachment in May 2008 and returned to Temiskaning in June 2012.

I have reviewed PC POTTER's PLDPs<sup>4</sup> and find them overall to be very satisfactory. He has been a coach officer, and currently is an intoxilyzer technician and a scenes of crime officer. He served occasionally as a 2IC of his platoon in the absence of his peer. Mr. May confirmed PC POTTER is now a fulltime 2IC. In these three PLDPs, he has exceeded the performance standard on five occasions and met the standard in all other areas.

PC POTTER's most recent PLDPs reflected a competent and confident officer, one who is calm in stressful situations and forthright. The findings of guilty in this matter leave me to infer his misconduct was out of character.

His positive performance ratings since 2011 have neutralized an otherwise aggravating career history seen as a result of his 2008 demotion.

*Ability to reform or rehabilitate the police officer*

With no sign of recognition or remorse, it is difficult to gauge one's ability to reform. I rely on PC POTTER's PLDPs when I say it appears he has not allowed this incident to impair his diligent work and contribution to the safety and security of others in a meaningful way. He has the support of his supervisors to move forward and lead his peers. That said, leading is one thing, and leading by example is another; it is up to PC POTTER to determine which route he wants to take. I am hopeful this is the last time PC POTTER comes before the tribunal and on a go forward basis, he can stay on a positive course.

I find this neither a mitigating or aggravating circumstance.

*Need for deterrence*

I distilled PC POTTER's excessive use of force down to his failure to *Assess-Plan and*

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<sup>3</sup> Exhibit 22, tab 4: Career Profile

<sup>4</sup> Exhibit 22, tabs 1, 2 & 3: Performance, Learning and Development Plans, 2012, 2014 & 2015

*Act.* I found it was out of character and occurred in the heat of the moment. It was a mistake in judgment; one that he has been now held accountable for in the public eye. I am not convinced a sanction in terms of hours would serve any further purpose.

On the other hand, I find PC POTTER's neglect of duty – his failure to be forthright and disclose – a very avoidable breach of conduct, one which was not done in the heat of the moment. A sanction in terms of hours will send a clear message to PC POTTER that forthrightness trumps in every instance – it is not negotiable and not just when it is convenient.

This same message needs to be conveyed to all members in the strongest of terms.

I find the need for deterrence an aggravating factor.

#### *Damage to the OPP's reputation*

The OPP substantiated DC's complaint which had been originally filed with the Office of the Independent Police Review Director (OIPRD). DC's circle of family, friends and physician are aware of this incident. It happened in the small town of Cobalt, in the District of Temiskaning where PC POTTER is stationed. In my view, the damage to the OPP's reputation is apparent.

I find this an aggravating factor.

#### *Consistency of penalty*

I have reviewed the historical cases and found they adequately addressed both elements of the misconducts. The sanction ranged between a reprimand to demotion for unnecessary use of force and ten to forty-hours for neglect of duty. In regard to PC POTTER's excessive force, I found no case truly on point to the circumstances that surrounded this September 14, 2013, incident. Notwithstanding, *Pearsall* and *Batista* were helpful.

In *Pearsall*, a struggle ensued after the officer arrested a man at his doorstep and the struggle carried on to the cruiser. During the body search, the officer pressed the man's head down too hard onto the trunk of the cruiser causing a tooth to chip. I find there is a likeness to this matter: The struggle with DC started at the house and continued to the cruiser, without pause or break for the officer. The striking occurred after she was pulled across the seat and extended her foot through the partition. The striking, as pushing down the man's head, happened in the heat of the moment. PC Pearsall was sanctioned sixteen-hours. The aggravating circumstance in *Pearsall* which was not

present here was other options may have been available to the officer other than affecting the arrest.

In *Batista*, the hearing officer found the officer's unnecessary use of the taser on a defiant, but passive resistive protestor, happened in the heat of the moment and was out of character for the officer<sup>5</sup>. I made similar findings here. Acting Sergeant Batista received a reprimand and lost his acting sergeant status. Unlike him, PC POTTER has not suffered from a financial loss.

The remaining use of force cases were not helpful as they lacked similar evidence of the dynamics and challenges faced by PCs POTTER and Belanger when they arrested DC.

Specific to the neglect of duty, I found four of the five cases helpful, largely because they established the range in sanction. Although the *Asselin*<sup>6</sup> matter involved gross negligence in notetaking, it was not comparable to an officer failing to report/note excessive force against an individual.

In *Pelissero*<sup>7</sup>, the officer was sanctioned twenty-four hours for not making a report that he seized a pair of gloves. In *Lloyd*<sup>8</sup>, the officer's demotion was replaced with sixteen-hours upon appeal. Constable Lloyd failed to document in his notebook the times he dropped by to check on an individual's well-being. *Rancourt*<sup>9</sup> is a case where a sergeant received a reprimand for failing to take notes in reference to a conversation he had with one of his officers. In *Watters*<sup>10</sup>, the officer was sanctioned twenty-four hours upon appeal because he failed to document the complaint of injury from an individual who was incarcerated.

In light of the circumstances of this matter, it is my view a reprimand for excessive use of force would not be unreasonable. In terms of the neglect of duty, a sanction in the range of sixteen to twenty-four hours would be fitting.

### *Key issues*

I now turn to the key issues for further guidance.

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<sup>5</sup> Exhibit 23, tab 1: *Batista and Ottawa Police Service*, OCCPS, May 8, 2007, page 13

<sup>6</sup> Exhibit 24, tab 6: *Asselin and OPP*, OPPHD, October 11, 2013

<sup>7</sup> Exhibit 23, tab 5: *Pelissero and OPP*, OCCPS, November 5, 1999

<sup>8</sup> Exhibit 23, tab 4: *Lloyd and London Police Service*, LPSHD, May 20, 1999

<sup>9</sup> Exhibit 24, tab 5: *Rancourt and OPP*, OPPHD, February 25, 2015, page 8

<sup>10</sup> Exhibit 23, tab 8: *Watters and OPP*, OCPC, February 1, 2011

1. Excessive use of force by a police officer is a very serious matter, one which is not tolerated nor condoned. In this matter, DC received a facial injury as a result of PC POTTER striking her head. In light of the nature of misconduct and intolerance for such, coupled with the resulting facial injury, would a reprimand fail to achieve the goals of discipline?

I will start by saying any finding of misconduct against an officer in a police discipline tribunal is viewed seriously. This incident began as a public complaint to the OIPRD, who directed the matter to the OPP to investigate. The OPP substantiated the allegations and a formal hearing was held. On both counts PC POTTER was found guilty and his misconduct will now be a matter of public record.

During PC Belanger's hearing where the key witnesses testified, I found no trace of evidence that PC POTTER set out purposely to cause harm to DC; I saw no evidence he was an officer who preferred muscle over talk; and, I saw no evidence that excessive force came naturally to him. To DC's credit, she said she was strong and could be a handful. Despite the combined strength of PC POTTER and Belanger, there was no question in my mind DC tested the officers' fortitude in her removal and placement into the cruiser. It was not until the end that PC POTTER resorted to excessive force – and while his action was inexcusable, I can appreciate it came in the heat of the moment after a trying struggle.

I offer no excuse for PC POTTER's behaviour, but I find the unique circumstances which led up to the striking warrant some mitigation in terms of sanction. I further reiterate the excessive force was narrowed to PC POTTER's failure to *Assess-Plan and Act*. A reprimand carries the stigma of a guilty finding and is significant in the context of police discipline. I trust it will not offend the public's confidence given the manner in which this matter has been treated.

I find a sanction in terms of a reprimand will achieve the goals of discipline.

2. Should the neglect of duty draw the same consideration accorded to the excessive force sanction? Is there an explanation for why or why not?

The neglect of duty did not occur in the heat of moment, but rather at the detachment. In the comfort of the office, PC POTTER told his supervisor he used soft hand techniques. This did not accurately reflect the degree of force he applied. His notebook entries contained no information in terms of the force he applied against DC, nor did his RMS report. In his first duty report, he failed to disclose he used force. PC POTTER had a duty to record and report his excessive force – it was relevant and vital

information pertaining to the arrest of DC. There was no excuse for not performing this duty. For this reason, I view PC POTTER's negligence differently than his excessive force. My initial inclination leaned toward a twenty-four hour sanction, similar to that imposed in *Watters*. That said, I have given weight to the fact this was an abbreviated hearing, one which consequently saved DC from having to testify again.

#### **PART IV: DISPOSITION**

PC POTTER pleaded not guilty, but was found guilty of unlawful or unnecessary exercise of authority and neglect of duty. Having weighed the mitigating and aggravating circumstances, I have reached what I consider to be a fair and balanced sanction.

1. Unnecessary/unlawful use of force: I order PC POTTER receive a reprimand at the earliest opportunity, pursuant to section 85(7)(a) of the *PSA*, RSO. 1990.
2. Neglect of duty: I order PC POTTER forfeit sixteen-hours at the earliest opportunity, pursuant to Section 85(1)(f) of the *PSA*. By this, he will work the time during his regularly scheduled time off, in consultation and upon approval of his Detachment Commander.



Robin D. McElary-Downer  
Superintendent  
OPP Adjudicator

Decision electronically delivered: May 3, 2016

## APPENDIX A

### Exhibit 22: Joint Book of Documents

- Tab 1: Performance, Learning and Development Plan, 2012
- Tab 2: Performance, Learning and Development Plan, 2014
- Tab 3: Performance, Learning and Development Plan, 2015
- Tab 4: Career Profile
- Tab 5: 233-10, 2016

### Exhibit 23: Book of Authorities

- Tab 1: *Batista and Ottawa Police Service*, OCCPS, May 8, 2007
- Tab 2: *Bonhomme and Timmins Police Service*, TPSHD, December 19, 1997
- Tab 3: *Stenzel and Durham Regional Police Service*, DRPSHD, October 9, 2012
- Tab 4: *Lloyd and London Police Service*, LPSHD, May 20, 1999
- Tab 5: *Pelissero and OPP*, OCCPS, November 5, 1999
- Tab 6: *Sutton and Barrie Police Service*, OCCPS, July 5, 1982
- Tab 7: *Turgeon and OPP*, OCCPS, November 5, 1999
- Tab 8: *Watters and OPP*, OCPC, February 1, 2011

### Exhibit 24: Book of Authorities

- Tab 1: *Kerr and Metropolitan Toronto Police Service*, MTPSHD, June 29, 1981
- Tab 2: *Hussain and OPP*, (Notice of Hearing and ASoF), April 10, 2001
- Tab 3: *Pearsall and OPP*, OPPHD, November 3, 2008
- Tab 4: *Smith and OPP*, OPPHD, May 9, 2013
- Tab 5: *Rancourt and OPP*, OPPHD, February 25, 2015
- Tab 6: *Asselin and OPP*, OPPHD, October 11, 2013