

TORONTO 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

Constable Daniel Smith #10850

And the Toronto Police Service

Charges: Discreditable Conduct & Insubordination

DISPOSITION WITH REASONS

Before:

Inspector Cyril Gillis
Durham Regional Police Service

Prosecution:

Inspector Ronald Khan,
Toronto Police Service

Counsel for the Defence:

Mr. David Butt

Hearing Date:

March 7, 2019

Penalty Decision
Constable Daniel Smith #10850

Before commencing with my disposition with reasons, I wish to thank Mr. David Butt, Defence Counsel and Inspector Ronald Khan of Prosecution Services for their submissions as to penalty, exhibits tendered and all the work that went into the agreed statement of facts. I have taken all into consideration and the information has assisted me in reaching my decision.

PART I: OVERVIEW

Allegations of Misconduct

It is alleged that Constable Daniel SMITH #10850 (“Cst. SMITH”), a member of the Toronto Police Service, committed the following acts of misconduct contrary to section 80(1)(a) of the Police Services Act, R. S. O. 1990 c. P. 15, as amended:

Count One: Discreditable Conduct

It is alleged that Cst. SMITH committed misconduct in that he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Toronto Police Service constituting an offence against discipline; Discreditable Conduct as prescribed in section 2(1) (a) (xi) of the *Code of Conduct, Regulation 268/10*, as amended.

Count Two: Insubordination

It is alleged that Cst. SMITH committed misconduct in that he did without lawful excuse, disobey, omit or neglect to carry out any lawful order constituting an offence against discipline; Insubordination as prescribed in section 2(1) (b) (ii) of the *Code of Conduct, Regulation 268/10*, as amended.

Representation

The Prosecution: Inspector Ronald Khan, Toronto Police Service

Counsel for the Defense: Mr. David Butt

Subject Officer: Constable Daniel SMITH #10850, Toronto Police Service

Plea

On March 7, 2019, Cst. SMITH appeared before me and entered a plea of guilty to one (1) count of Discreditable Conduct and one (1) count of Insubordination. An Agreed Statement of Facts was tendered as Exhibit #6 and read into the record. Those facts substantiated the allegations in the Notice of Hearing and a finding of guilt was registered on both counts.

Decision

After examining and weighing all of the evidence presented, as the Hearing Officer I impose on Constable Daniel SMITH #10850 of the Toronto Police Service:

Count 1: Discreditable Conduct

A penalty of a forfeiture of five days or 40 hours.

Count 2: Insubordination

A penalty of a forfeiture of five days or 40 hours.

The penalties on Count 1 and Count 2 are to be served concurrently, for a total forfeiture of five days or 40 hours.

The penalty is submitted in accordance with section 85(1)(f) of the Police Services Act.

PART II: THE HEARING

Exhibits

The Exhibits for this matter are listed as follows:

- Exhibit 1 Designation of Hearing Officer – Supt. Corrigan, pursuant to s. 94(1), PSA
- Exhibit 2 Designation of Hearing Officer – Supt. Barsky, pursuant to s. 94(1), PSA
- Exhibit 3 Designation of Hearing Officer – A/Supt. Hegedus, pursuant to s. 94(1), PSA
- Exhibit 4 Designation of Hearing Officer – Insp. Gillis, pursuant to s. 94(1), PSA
- Exhibit 5 Designation of Prosecutor – Insp. Khan, pursuant to s. 82(1)(a), PSA
- Exhibit 6 Agreed Statement of Facts

- Exhibit 7 Prosecution Book of Records
Exhibit 8 Prosecution Book of Authorities
Exhibit 9 Electronic Copy of Exhibits 7 and 8

Agreed Statement of Facts

The facts of this matter were substantially agreed upon by the parties to this Tribunal. The Agreed Statement of Facts, filed as Exhibit #6 reads as follows:

Police Constable Daniel Smith has been a member of the Toronto Police Service since May of 2013. At the time of this occurrence, he performed his duties in a uniform capacity at 12 Division.

On December 25th, 2016, the complainant called police for a domestic-related incident as he needed assistance with the civilian witness, who was intoxicated and knocking on his door, refusing to leave.

The complainant had recently ended his relationship with the civilian witness and wished her to be removed from his residence, located within the boundary of 12 Division.

Cst. SMITH along with his partner Cst. Sarah Richards (#10537), responded to the complainant's call for service. The complainant spoke with Cst. SMITH, while Cst. Richards spoke with the civilian witness. The civilian witness was removed from the premise by the officers.

Cst. SMITH checked police databases on January 3, May 20 and July 5, 2017. These checks were not for official police business.

A few months later (date unknown) the complainant received a call from Cst. SMITH, enquiring about the whereabouts of the civilian witness. He stated that he was conducting a separate investigation involving the civilian witness.

On September 22nd, 2017, the civilian witness received text messages on her personal cell phone from Cst. SMITH wishing to date her.

The following day (after the text messages) the complainant and civilian witness attended 12 Division in order to file a complaint.

Positions on Penalty

Prosecution – Inspector Ronald Khan

Defence – Mr. David Butt

The prosecution and defence have submitted a joint position on penalty. Their position is a forfeiture of five days or 40 hours on each count, to be served concurrently. Additionally, Insp. Khan advised the Tribunal that this matter was an OIPRD-directed hearing. The prosecutor consulted with the complainant with regard to the agreed statement of facts and the proposed disposition. The complainant was aware of this hearing and was not present.

Submissions by Prosecution

Cases to consider submitted by the Prosecution (Exhibit 8)

Tab A.....Bright vs. Konkle Board of Enquiry 1996
Tab B.....Nosworthy and the Toronto Police Service 2005
Tab C.....Grbich and the Aylmer Police Service OCCPS 2002
Tab D.....Carson and the Pembroke Police Service OCCPS 2001
Tab E.....Andrews and the Midland Police Service OCCPS 2003
Tab F.....Schofield and the Metropolitan Toronto Police OPC1984
Tab G.....Hampel and the Toronto Police Service OCCPS 2008
Tab H.....Al-Khatib and the Toronto Police Service 2010
Tab I.....Khan and the Toronto Police Service 2016
Tab J.....Swartz and the Toronto Police Service 2008

The prosecutor began by reminding the Tribunal that the objectives of discipline are to correct unacceptable behaviour, to deter others from similar behaviour, and to assure the public the police are under control.

The prosecutor directed the Tribunal to Ceyssens Legal Aspect of Policing (Exhibit 7, Tab 1) which identified the fifteen (15) considerations that apply to the process of determining an appropriate disposition. The prosecution considered all fifteen; however, only relied on the relevant factors: Public Interest; Seriousness of the Misconduct; Recognition of the Seriousness of the Misconduct; Potential to Reform or Rehabilitate; Specific and General Deterrence; Employment History; Consistency of Disposition and Damage to the Reputation of the Police Force.

The prosecutor commenced by addressing the public interest. The prosecutor stated that Cst. SMITH's actions breached the public's trust in the police. The prosecutor pointed to the 1996 Board of Inquiry decision in Bright vs Konkle and Niagara Regional Police Service, (Exhibit 8, Tab A) where the Board noted:

“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 its police officers are honest and truthful, and that, absent

extenuating circumstances, they will not be officers any longer if they breach this trust”.

The prosecutor referred to section 43(1)(d) of the Ontario Police Services Act (Exhibit 7, Tab 2) which notes, “good moral character” as one of the hiring criteria for Ontario police officers.

The prosecutor referred to the Toronto Police Service – Standards of Conduct (Exhibit 7, Tab 3) which stated:

“Toronto Police Service members are held to a higher standard of conduct than other citizens. Not only an expectation from the community, this standard is an expectation we place upon ourselves. This higher standard of behavior is necessary to preserve the integrity of the Service”.

The prosecutor submitted that the integrity of the police is always under scrutiny. When police officers are found to have contravened the laws which they have taken an oath to uphold, it impacts the integrity of the police service.

On four separate occasions, Cst. SMITH conducted queries on the Toronto Police Service internal confidential telecommunication systems, unrelated to any official police business. The prosecutor referred to section 1.19 of the Toronto Police Service Governance – Standards of Conduct (Exhibit 7, Tab 10) which noted:

Use of Computers and Telecommunications

Members shall:

- (a) Use Service telecommunication systems and equipment only for police business.

Submissions by Prosecution Continued

Cst. SMITH breached this Standard of Conduct. Members of the public know that police officers have access to confidential information. They expect that police officers will only access this confidential information for official police business and not for personal interest. The prosecutor referred to Nosworthy and the Toronto Police Service (Exhibit 8, Tab B) where the Hearing Officer noted:

“CPIC violations are viewed as serious misconducts, a violation of public privacy rights and a breach of contract with the RCMP. It is a critical law enforcement tool and it is in the public interest that CPIC violations be policed with an intolerant and unequivocal approach. Those who violate the rules will be held accountable, public trust demands it.”

The prosecutor referred to Grbich and the Aylmer Police Service (Exhibit 8, Tab C) where it was noted:

- *“The misuse of the CPIC system for personal or any other unauthorized reason can be a serious violation of a person’s right to privacy”. It further stated, “A police officer is a professional who is looked upon by the public as a person they can rely upon and trust. When a police officer breaks the rules and violates the public trust, they must be held accountable”.*

Outlining the seriousness of the misconduct consideration, the prosecutor directed the tribunal to the Toronto Police Core Values, which were introduced on 19 January 2018 (Exhibit 7, Tab 4). The prosecutor relied on two of the stated Core Values:

To Do the Right Thing – by acting professionally, with integrity, and without prejudice, even in the most challenging circumstances, when no one is watching, and on and off duty, holding others accountable to the same standards; challenging any inappropriate behavior, and asking ourselves, have I lived up to my words and values?

The prosecutor commented that Cst. SMITH’s actions didn’t live up to his words or values.

Reflect and Grow – by recognizing that we do not have all the answers; seeking and acting on input and feedback from the communities and our colleagues; acknowledging and learning from our mistakes and successes; and asking ourselves, what else can I do to improve?

The prosecutor commented that Cst. SMITH acknowledged his mistake by pleading guilty and therefore seeking to improve himself.

The prosecutor directed the tribunal to Cst. SMITH’s Affirmation / Oath of Office (Exhibit 7, Tab 5), which was affirmed / sworn on May 13, 2013. As a constable, Daniel SMITH affirmed / swore to discharge his policing duties faithfully, impartially and according to law. The prosecutor commented that public trust in policing is paramount and that all actions by police officers must be able to withstand public scrutiny in order to maintain that trust. The public trust that police officers will uphold their oath of office. Cst. SMITH’s actions broke the public trust and were contrary to the needs of the Toronto Police Service. The misconduct involved sending an unprofessional message to a civilian witness and accessing the Toronto Police data bases for personal reasons.

Highlighting the recognition of the seriousness of the misconduct, the prosecutor relied on two previous decisions to emphasize a consideration where Cst. SMITH deserved mitigation. In Grbich and the Aylmer Police Service (Exhibit 8, Tab C), the Commission relied upon a decision in Williams and OPP (1995, OCCPS) which identified three key

elements to be taken into consideration when determining an appropriate penalty; 1) the nature and seriousness of the misconduct, 2) the ability to reform or rehabilitate the officer, and 3) the damage to the reputation of the police force. Moreover, the Commission identified three additional considerations that may be relevant; 1) employment history and experience, 2) recognition of the seriousness of the transgression, and 3) handicap or other relevant personal circumstances. The prosecutor commented that recognizing the seriousness of the misconduct is vital in the ability to reform or rehabilitate the officer. Cst. SMITH's guilty plea demonstrates remorse and acceptance of responsibility.

Submissions by Prosecution Continued

In supporting his position, the prosecutor referred to Carson and the Pembroke Police Service (Exhibit 8, Tab D) where the Commission noted:

"We have no doubt that a guilty plea should be recognized as a mitigating factor and taken into account along with other factors in determining an appropriate penalty".

Highlighting Cst. SMITH's employment history, the prosecutor directed the Tribunal to (Exhibit 7, Tab 6) – Ontario Police Services Act, fully annotated by Ceysens and Childs. On page 350, under Factor #7 – a summary on the Employment History consideration is provided. The prosecutor listed two specific points:

- 1) Employment history represents an important disposition factor in all cases. Employment history, as a mitigating or aggravating consideration, closely relates to the disposition consideration of rehabilitation potential.
- 2) Employment history will aggravate a disposition in cases that involve a number of recent findings of misconduct particularly when the acts are close in time.

The prosecutor directed the tribunal to (Exhibit 7, Tab 7), which was a summary employment file delineating Complimentary Activity and Conduct Issues for Cst. SMITH. The summary listed nine (9) unrelated complimentary actions from 2013 to 2018 and seven (7) letters of appreciation. There were no conduct issues listed. The sixteen (16) specific complimentary activity details were listed at (Exhibit 7, Tab 8).

The prosecutor directed the Tribunal to (Exhibit 7, Tab 9) – Cst. SMITH's Uniform Performance Appraisals for the last five years – 2013 to 2018. The prosecutor submitted that Cst. SMITH's appraisals speak to his individual potential; however, Cst. SMITH needed to work on his focus and reliability.

Highlighting Cst. SMITH's potential to reform and rehabilitate, the prosecutor directed the Tribunal to (Exhibit 8, Tab C) – Grbich and the Aylmer Police Service. The Commission in the *Grbich* decision noted:

“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. Unless the offence is egregious and unmitigated, the opportunity to reform must be a key consideration”.

Additionally, the prosecutor directed the Tribunal to (Exhibit 8, Tab E) – Andrews and the Midland Police Service 2002 OCCPS. The Commission in the *Andrews* decision noted:

“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 employment record. Unless the officer is beyond rehabilitation (in which case 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”.

The prosecutor submitted that Cst. SMITH has an unblemished record and he can be reformed. Cst. SMITH has it in him to be a productive member of the Toronto Police Service. His letters of appreciation, awards and his performance appraisals all speak to his ability to reform and move forward. The Toronto Police Service, the community and Cst. SMITH himself have invested a great deal of time and effort into Cst. SMITH. The appropriateness of any penalty is a balancing act to correct Cst. SMITH's behavior and to deter others, without causing undue hardship. The penalty must also be consistent with similar cases.

Highlighting the consistency of disposition, the prosecution reminded the Tribunal that consistency in the discipline process is often the earmark of fairness. It is one of the basic principles in determining the disposition of penalty. The prosecutor referred to (Exhibit 8, Tab F), Schofield and Metropolitan Toronto Police (1984) to support his position.

The prosecutor submitted six cases to the tribunal to justify the proposed penalty. Mr. David Butt confirmed that the prosecution's cases support the range and position on penalty. The six cases include:

Nosworthy and the Toronto Police Service 2005 – (Exhibit 8, Tab B)

Grbich and the Aylmer Police Service 2002 OCCPS – (Exhibit 8, Tab C)

Hampel and the Toronto Police Service 2008 OCCPS - (Exhibit 8, Tab G).

Al-Khatib and the Toronto Police Service 2010 - (Exhibit 8, Tab H).

Khan and the Toronto Police Service 2016 - (Exhibit 8, Tab I).

Swartz and the Toronto Police Service 2008 - (Exhibit 8, Tab J).

Submissions by Prosecution Continued

Highlighting specific and general deterrence, the prosecution directed the Tribunal to *Andrews* where the Commission noted:

“He was also correct that 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.”

And further that the penalty imposed must be:

“sufficient to punish and deter while not causing undo excessive hardship while demonstrating reoccurrence will not be tolerated.”

The prosecutor submitted that the proposed five-day penalty disposition will meet the stated objectives. Additionally, when the penalty decision is made, a summary will be posted on the TPS intranet, where all officers will have access to it.

Highlighting the damage to the reputation of the police service, the prosecutor submitted that each and every time one of its police officers breaches an oath of office, the reputation of the police service suffers. The police service must be vigilant in protecting its reputation to preserve the public's trust. Tolerance for police misconduct is at an all-time low. The prosecutor is unaware of any media coverage for this incident; regardless, the public must be reassured that the police are being held accountable for their misconduct.

The prosecutor submitted that the appropriate penalty for Cst. SMITH's misconduct is a forfeiture of five days on each count to be served concurrently. To support this position, the prosecutor advised that Cst. SMITH pleaded guilty at the earliest opportunity, the penalty will send a clear message to Cst. SMITH and to other officers, the penalty is consistent with similar cases, and it doesn't cause Cst. SMITH any undue hardship.

Defence – Mr. David Butt

Submissions by Defence

Cases to consider submitted by the Defence

The defence did not submit any cases for consideration. Mr. David Butt conceded that the cases submitted by the prosecutor supported the range and position on penalty.

The defence began by confirming their position as a joint submission on penalty. The defence conceded all of the prosecutor's submissions; however, he wanted to provide further information.

The defence confirmed that CPIC breaches were one of the most common matters heard at the tribunal. As a result, there is a substantial amount of case law which will ultimately dictate the outcome. The defence submitted that CPIC breaches fell into two separate distinct categories:

- 1) CPIC breaches used to obstruct the course of justice (leaks to criminal actors),
- 2) CPIC breaches for personal reasons.

The defence conceded that both were serious misconducts; however, there was a significant difference in the degree of moral turpitude. The first category was the more serious misconduct. The defence submitted that the second category was more common because we are all humans with emotions and outside relationships and some have trouble separating personal and professional considerations. The reality is that CPIC breaches for personal reasons are seen as less serious than breaches that offend the administration of justice. The joint submission on penalty for the CPIC breach for personal reasons is within the case law range.

The defence submitted that the key question with respect to penalty is what did Cst. SMITH do after he was charged with the misconduct? Cst. SMITH pleaded guilty at the earliest opportunity. It was never Cst. SMITH's intention to fight these charges; he always maintained that he made a mistake and that he will accept the consequences. The defence submitted that the most important step in correcting behavior is recognizing that there is behavior to correct. Cst. SMITH is on the right path to rehabilitation.

Mr. Butt used a common quote to predict Cst. SMITH's future prospects, "the best predictor of future behavior is past behavior." Cst. SMITH's personnel file is filled with complimentary activity and no conduct issues (Exhibit 7, Tab 7). The lack of any conduct issues and the abundance of complimentary activity is a good indication that Cst. SMITH will be rehabilitated.

The defence invited the Tribunal to accept the proposed joint penalty as it is fixed within the case law range, the officer has acknowledged his wrongdoing and his past employment history shows that Cst. SMITH has a strong prospect of rehabilitation.

Submissions by Defence Continued

The defence reminded the Tribunal of the case law surrounding the acceptance of a joint submission. The defence identified the leading case on joint submissions as R. vs. Anthony-Cook 2016 SCC 43. The defence submitted that a hearing officer has an independent discretion and is not bound by what the parties say; however, they should give serious consideration to the joint position. The hearing officer should not depart from the joint position unless it's so "unhinged" that it would bring the administration of justice into disrepute. The defence submitted that the Supreme Court of Canada set the standard as a high threshold. The proposed 5-day penalty is not an unhinged position.

The defence submitted that the value of a joint submission on penalty is that respondent officers own the outcome. In this case, Cst. SMITH accepted the proposed 5-day penalty rather than having it forced upon him.

Lastly, the defence invited the Tribunal to share Cst. SMITH's penalty decision as soon as it was ready; the reasons could be sent at a later date. This practice would allow Cst. SMITH to begin working off his penalty sooner rather than later.

Cst. SMITH addressed the tribunal by apologizing for the discredit caused to the Toronto Police Service and the policing profession as a whole. Cst. SMITH stated that this experience has been a humbling one and he assured the tribunal that he would never be in front of it again.

PART III: ANALYSIS AND FINDINGS FOR DISPOSITION

I would like to start my discussions on penalty by first outlining the objectives of discipline. These objectives are to:

- Correct unacceptable behavior
- Deter others from similar behavior
- Assure the public that the police are under control

Analysis of the Issues:

The extent of informative detail before the Tribunal is limited to what is listed in the Agreed Statement of Facts, and submissions made by the prosecution and defence. I have reviewed all of the information and evidence that was submitted.

The facts in the matter are not in dispute. In the prosecutor's submissions, which were conceded by the defence, Insp. Khan referred to the Commission case law and specifically the number of factors to be considered when determining the appropriate penalty. The case of *Williams* highlights three important elements to be considered by the Tribunal, which are the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and damage to the reputation of the Police Service. Not mentioned but equally important is the case of *Krug and the Ottawa Police Service* (OCCPS, January 21, 2003) which addresses the aggravating and mitigating factors to be considered when determining the penalty, and that there is no requirement that any one factor be given more weight than another. The factors that I find relevant to focus on in assessing the misconduct of Cst. SMITH are as follows:

- Public Interest
- Seriousness of the Misconduct
- Recognition of the Seriousness of the Misconduct
- Employment History
- Potential to Reform or Rehabilitate the Police Officer
- Damage to the Reputation of the Police Service
- Specific and General Deterrence
- Consistency of Disposition

The public expectations of police organizations and specifically the behaviour of police officers must reflect accountability, integrity, professionalism, and transparency. The behaviour of Cst. SMITH undermined the values, confidence, support, and trust of the public. The public's trust in the police is a fundamental principle in providing community safety.

Public Interest

Police officers are expected to be law abiding and professional; integrity is a core characteristic of the profession. In *Bright vs Konkle and Niagara Regional Police Service*, the Board noted:

- *“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 its police officers are honest and truthful, and that, absent extenuating circumstances, they will not be police officers any longer if they breach this trust”*

The public is entitled to expect a high ethical standard of conduct from police officers at all times. Cst. SMITH broke the trust placed in him by the public, the police service and his colleagues.

The Tribunal must address Cst. SMITH's actions with an appropriate sanction. This is an aggravating consideration for disposition.

Seriousness of the Misconduct

CPIC breaches are serious misconduct. I agree with the defence position that there are two distinct categories of CPIC breaches – those committed for a personal purpose and those committed for a nefarious purpose. In each case, it's serious misconduct; the second category being more severe. Cst. SMITH accessed the private CPIC information on four occasions for his own personal purpose, unrelated to his policing duties.

Compounding the CPIC breach was that Cst. SMITH attempted to locate the whereabouts of the civilian witness by not only asking the original complainant, but also by telling the complainant that he was conducting a separate investigation involving the civilian witness.

Cst. SMITH's behaviour was not a momentary lapse in judgment. The actions he took occurred over a 9-month period (January 2017 to September 2017). Cst. SMITH used his position as a police officer for a personal purpose. There is an expectation from the public, and our policing community that appropriate sanctions will be imposed on those who commit serious misconduct. This is an aggravating consideration for disposition.

Officer's Recognition of the Seriousness of Misconduct

Cst. SMITH entered a guilty plea at the Tribunal. This demonstrates his acceptance of responsibility, recognition of the seriousness of the misconduct, and speaks to rehabilitative prospects. Cst. SMITH's acceptance of guilt appeared to be genuine. In his own words, Cst. SMITH apologized for bringing discredit to the Toronto Police Service and the policing profession. He further stated that the tribunal would never see him again. Cst. SMITH's guilty plea validates his appreciation of the seriousness of his conduct, which speaks to the likelihood of his rehabilitation. This is a mitigating consideration for disposition.

Employment History

Cst. SMITH has been a police officer with the Toronto Police Service since May 2013 – almost six years. At the time of his misconduct, he had just over three and a half years of service.

Cst. SMITH's personnel file has sixteen (16) documents for complimentary activity and zero conduct issues. Seven of the complimentary actions relate to letters of appreciation, eight are commendations for teamwork and one for Officer of the Month. In two of the commendations, Cst. SMITH was recognized for selfless acts that put his own life in danger. The first incident occurred on July 8, 2013 when the area of Eglinton Avenue and Black Creek Drive experienced torrential flooding. Vehicles were being submerged in rushing water. Occupants in two separate vehicles needed to be rescued. Cst. SMITH and two other officers tethered themselves and put their own lives at risk to save the occupants of these vehicles. The second incident occurred on July 18, 2014 when a construction worker jumped into an unprotected ditch and the walls began to cave in. The construction worker was being buried in sand. When Cst. SMITH and his partner arrived, they jumped into the ditch and attempted to dig out the construction worker with their bare hands. Cst. Smith and his partner had to be ordered out of the ditch for their own safety. Unfortunately, the construction worker perished. Cst. SMITH put his own life on the line to save someone he didn't even know. These two incidents speak to Cst. SMITH's character.

I have reviewed the five performance appraisals submitted by the prosecutor (Exhibit 7, Tab 9). There was a marked departure from his appraisal covering May 2014 to 2015 compared to the ones that were more recent. That appraisal was extremely positive with mostly "superior" and "exceeds" ratings. The four most current performance appraisals show ratings that were more average. His supervisors generally wanted Cst. SMITH to focus on his reliability and work output. The totality of his employment history is a mitigating consideration for disposition.

Potential to Reform or Rehabilitate the Police Officer

By all accounts, Cst. SMITH has a positive work history with almost six years of policing service. Cst. SMITH has an unblemished employment record. He has dealt with this Tribunal misconduct by way of a guilty plea, at the earliest opportunity. Cst. SMITH also provided a personal apology at the hearing; I recognized the remorse and sincerity in his words. I also subscribe to the defence reference, "the best predictor of future behaviour is past behaviour." In his almost six years of policing, this will be his first blemish. Cst. SMITH understands and appreciates the nature of his actions. His potential to rehabilitate is promising. This is a mitigating consideration for disposition.

Damage to Reputation of the Police Service

The damage to the reputation of the Toronto Police Service is a vital consideration in the determination of a disposition. Policing by consent and with public trust is crucial to the organization's ability to function as a public institution. Cst. SMITH's actions compromised the trust that the public places on the police. Police agencies must

ensure visible accountability in all aspects of service delivery and member conduct. As the police, we are accountable to all citizens in everything we do.

Cst. SMITH swore an oath of office to discharge his police duties according to law. As a result of the breach of duty, Cst. SMITH has undermined the credibility, reputation and the Core Values of the Toronto Police Service. Although there was no media attention in relation to this case, this does not prevent the media from reporting on it in the future. The misconduct hearing is a public process and the media may request details in the future. This has the potential to cause further damage to the reputation of the Service. .

Specific and General Deterrence

The balance to be reached in addressing specific and general deterrence is to ensure that any penalty imposed not be overly punitive, while sending a clear message to Constable SMITH, the public and throughout the Service that such misconduct is viewed seriously and those who commit misconduct will be held accountable.

In this case, specific deterrence is likely an objective which has already been met. Cst. SMITH has already indicated that he fully appreciates and accepts responsibility for the seriousness of his actions and is willing to accept an appropriate penalty as a result. The proposed five day penalty is a noteworthy penalty; it's within the range for similar misconduct. Cst. SMITH must also be aware that an increased sanction will be sought if he commits similar misconduct in the future. In addressing general deterrence, a formal hearing process and subsequent summary posting of the disposition will send a clear message throughout the Police Service that this misconduct is viewed seriously.

Consistency of Disposition

In *Schofield*, the Ontario Police Commission noted:

“Consistency in the discipline process is often the earmark of fairness. The penalty must be consistent with similar cases that have been dealt with on earlier occasions.”

The penalty in this case must be consistent with sanctions imposed in previous cases with similar circumstances. It is my responsibility to ascertain the appropriate range of penalties available to the Tribunal based on the cases provided by the prosecution and supported by the defence. Additionally, I must apply the appropriate weight to each of the relevant disposition considerations and identify where in the range Cst. SMITH sits, based on the pertinent penalty principles.

I have read all the cases submitted by the prosecutor, which were supported by defence. This is a case where there are no exact comparator decisions. Many of the cases involve comparable elements. The submitted cases do provide good direction as

to the range of penalty as well as aggravating and mitigations factors. The decisions were helpful in confirming that the nature of this misconduct was serious and the proposed five day penalty was within the range.

In *Nosworthy* the officer pleaded guilty to one count of neglect of duty for conducting six CPIC queries over a 2-hour period. The CPIC queries were not for official police business. Sgt. Nosworthy received a penalty of a forfeiture of two days or 16 hours.

In *Grbich* the officer was found guilty of one count of discreditable conduct for a CPIC breach. On the first CPIC breach, the hearing officer issued a penalty of a five day suspension. On appeal, the Commission concluded that the five-day suspension was fair and appropriate.

In *Hampel* the officer was found guilty of one count of insubordination for a CPIC breach not for official police business. Cst. Hampel received a penalty of seven days or 56 hours. Upon appeal, the Commission reduced the penalty to three days or 24 hours.

In *Al-Khatib* the officer pleaded guilty to one count of insubordination for a CPIC breach not for official police business. Cst. Al-Khatib received a penalty of five days or 40 hours.

In *Khan* the officer pleaded guilty to one count of insubordination and one count of discreditable conduct. Cst. Khan detained a citizen after a traffic stop and demanded the citizen's send him a text message. Cst. Khan sent a text message to the complainant. CSt. Khan failed to activate his microphone. Cst. Khan received a total penalty of eight days or 64 hours.

In *Swartz* the officer pleaded guilty of one count of discreditable conduct for failing to properly process a found laptop computer. Cst. Swartz received a penalty of 12 days or 96 hours.

I have considered the submission by the prosecution and defence. I have examined the exhibits, reviewed the historical cases provided and have considered the mitigating and aggravating factors. I am aware that I am not bound by the joint submission on penalty, but on the totality of the evidence before me, I have no compelling reason to depart from the joint submission of the prosecutor and defence.

PART IV: DISPOSITION

Penalty

For the noted reasons, as the Hearing Officer I impose on Constable Daniel SMITH #10850 of the Toronto Police Service:

Count 1: Discreditable Conduct

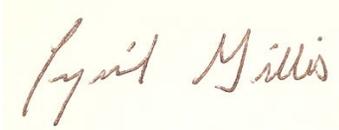
A penalty of a forfeiture of five days or 40 hours.

Count 2: Insubordination

A penalty of a forfeiture of five days or 40 hours.

The penalties on Count 1 and Count 2 are to be served concurrently, for a total forfeiture of five days or 40 hours.

The penalty is submitted in accordance with section 85(1)(f) of the Police Services Act.

A handwritten signature in brown ink on a light yellow background. The signature reads "Cyril Gillis" in a cursive script.

Cyril Gillis #948, Inspector
Durham Regional Police Service
9 April 2019