

**Ontario Provincial Police Discipline Hearing
In Accordance with Ontario Regulation 123/90
The Police Services Act, RSO 1990
And Amendments Thereto:**

And

In the Matter of

The Ontario Provincial Police

And

Provincial Constable Stephen WALLER #11977

CHARGE: Discreditable Conduct

ADJUDICATOR: OPP Inspector Paul Kelly

PROSECUTION: OPP Supt. Michael Shard

DEFENCE: Mr. James Girvin, OPPA

REASONS FOR DECISION

Provincial Constable Stephen WALLER #11977 was charged with Discreditable Conduct contrary to section 2 (1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Regulation 123/98, as amended.

Prosecution and defence jointly requested an amendment to the Notice of Hearing to substitute an Agreed Statement of Facts for the "Particulars of Allegations" contained in the Notice of Hearing. I reviewed the Notice of Hearing and the proposed amended wording. I agreed to this amendment and amended the Notice of Hearing accordingly.

Therefore the particulars of the allegations are as follows:

On January 29, 2010 PC Stephen Waller was on duty and assigned to the Port Hope patrol zone, in full uniform and operating a marked OPP SUV.

At approximately 2:13pm he was called by his wife, who was parked in the bus loading zone at their school. The area where she was parked is signed "Buses only 7-9 am & 2-4pm" and "No Admittance - Buses only 7-9 & 2-4pm". His wife had gone to pick up their 2.5 year old son, who was sick. She asked him to assist her in moving the buses so she could get out of the area. PC Waller told her to tell the drivers their son was sick.

About 10 minutes after his wife's first call, she called again and told PC Waller that the drivers said she'll have to wait at least 20 minutes. She also advised that she could see 3 bus drivers smoking in front of their vehicles.

Note: His wife spoke to one bus driver, who told her that the buses can't move, but that she could get out by going over the edge of the curb. That driver advises that PC Waller's wife replied "No, I've already called the police."

PC Waller arrived shortly afterwards, and directed the driver that was in front of his wife's vehicle to move his bus. That bus driver (Driver #1 - 'Ron') later advised Waller that it was not policy to move a bus while children were loading and that they were not allowed to back up in a loading zone. PC Waller again directed Driver #1 to pull the bus forwards, moved his SUV onto the street and activated the lights. Driver #1 pulled forwards and PC Waller's wife left. PC Waller then motioned to the driver to back up, and left the area.

PC Waller returned a few minutes later, intending to have a discussion about helping a distressed female with a crying baby. Driver #1 repeated that they aren't allowed to back up. PC Waller replied with words to the effect " Okay Ron of bus #135 – I'll remember you." PC Waller also asked Driver #1 if he smoked (he doesn't) and "Who does smoke here?"

PC Waller then went to the next bus, and asked Driver #2 if she smokes and then why she didn't help the driver of the van (referring to his wife). Driver #2 replied that the area is signed and only buses are allowed there 2-4 pm. PC Waller replied "How about a little professional courtesy, I can stop and ticket all the smokers ignoring school policy and smoking on school grounds...I don't because we try to work together here." He turned to leave, then came back and pushed her side window open as she was closing it, saying words to the effect " Do you know who I am? I'm a police officer and if I'm having a conversation with you, don't shut your window. You are driving a motor vehicle on the roadway in Ontario and I have the right to speak to you. A little courtesy next time and I will ignore the fact you were smoking on school property."

PC Waller then went to the Driver #3 – who was the driver for PC Waller's children and also the driver that spoke to PC Waller's wife earlier. He asked Driver #3 a number of times why she didn't help his wife. She replied that she had suggested to his wife that she could drive around on the shoulder, and that there was nothing else she could do. PC Waller stated "I look the other way when you're smoking on school property, but maybe next time I won't."

PC Waller then left the school, went home for a period and then went back on patrol in Port Hope. At this point he observed Driver #3 in her bus, and activated his light to stop her — intending to talk more about the incident and "somewhat apologize for my frustration." Driver #3 indicated that she wanted an apology, and he changed his peace making tone and asked why she hadn't helped his wife. Driver #3 repeatedly said it was not her fault.

Plea

Constable Waller entered a plea of guilty to the allegation of misconduct.

Agreed Statement of Facts

A joint submission of an agreed statement of facts was entered as exhibit 7. The agreed facts are as reproduced above in the amended Notice of Hearing.

Finding

Based on the plea and agreed facts Constable Waller was found guilty of Discreditable Conduct.

Submissions on Penalty

Both Superintendent Shard and Mr. Girvin agreed that the appropriate penalty in this case would be the forfeiture of 30 hours pursuant to s. 85(1)(f) of the Police Services Act.

Superintendent Shard submitted that the primary issues in this case were the public interest, the seriousness of the misconduct and the discredit the conduct brings to the Ontario Provincial Police service.

Superintendent Shard identified a number of aggravating factors. He noted that Constable Waller's conduct was not the fair and impartial actions that the public expect and require from police officers performing their duties. That a number of members of the public were directly impacted by Constable Waller's conduct, at a minimum, the several bus drivers involved in this incident as described in the agreed facts.

Superintendent Shard submitted that Constable Waller had confused his police role with his personal interests in responding to an incident involving his wife. He stated that Constable Waller demonstrated an 'emotional investment' in this incident.

Superintendent Shard then outlined what he viewed to be mitigating considerations. He submitted that the conduct appeared to be 'out of character' for Constable Waller and that he had been a member of the OPP since 2006 without being the subject of prior discipline.

Superintendent Shard submitted a Performance, Learning and Development Plan (PLDP) that was entered as exhibit 8. He emphasized that Constable Waller has a positive employment history and noted the positive comments on the PLDP and described Constable Waller as a competent officer citing the comments contained within the PLDP.

Superintendent Shard credited Constable Waller with recognition of the error demonstrated by his misconduct and noted his guilty plea at the first opportunity as evidence of that fact. He also stated that any delays were only due to scheduling and not attributable to Constable Waller not accepting responsibility for his actions.

Superintendent Shard stated that the public complainant involved in this case was not in attendance today but was in agreement with the actions being proposed by prosecution and defence today in their joint submission.

Finally, Superintendent Shard submitted a case for consideration, *Maxwell*, which was marked as exhibit 9. He described some of the factors he found relevant to the present case. He related that in *Maxwell* the subject officer attended a sports event at the request of his wife. The officer attended the venue in uniform and spoke to soccer officials in a manner that was also found to be discreditable. This case resulted in a penalty of 24 hours forfeited. Superintendent Shard described the present case as somewhat more serious and that a penalty in a higher range was appropriate.

Mr. Girvin submitted that Constable Waller would not repeat the same conduct in future and that Constable Waller's intent was always to resolve this incident and take responsibility for his actions.

Mr. Girvin commented on the challenges of officers in smaller communities. He emphasized that Constable Waller was a Scenes of Crime Officer and had a significant responsibility relating to that role.

Mr. Girvin submitted that this was a joint position and that he felt the joint submission on penalty was in the appropriate range.

The Tribunal offered Constable Waller the opportunity to speak to the Tribunal if he wished. He took this opportunity and apologized to the Tribunal and to the OPP for any embarrassment that his actions caused. He did say he disagreed with the statement by the prosecution that his actions were personally motivated. He said that he would have assisted others in the same situation. He did say, however, that he would certainly react differently in future in similar circumstances.

Findings on Penalty

I wish to thank Superintendent Shard and Mr. Girvin for their submissions and thank Constable Waller for his forthright comments.

In determining an appropriate penalty in police disciplinary matters the Tribunal must consider key factors including those raised by prosecution and defence here today: seriousness of the misconduct, public interest and discredit brought to the police service. There are many other relevant factors including specific and general deterrence, consistency of disposition, employment history, and recognition of the seriousness of the misconduct among others.

Superintendent Shard submitted that the public interest is critical in this case as the public expects fair and impartial conduct from police officers. I agree with this submission. It is important that any penalty demonstrates to the public that inappropriate conduct by police officers will attract an appropriate penalty to discourage future similar conduct by officers generally and to protect the public from such conduct.

The Agreed Statement of Facts, Exhibit 7, identifies the actions of Constable Waller in this matter. Several areas of this evidence are of significant concern such as statements by Constable Waller to several members of the public (bus drivers) which amount to threats relating to future enforcement action e.g., "Okay Ron of bus #135 -- I'll remember you." "How about a little professional courtesy, I can stop and ticket all the smokers ignoring school policy and smoking on school grounds...I don't because we try to work together." "A little courtesy next time and I will ignore the fact you were smoking on school property." "I look the other way when you're smoking on school property, but maybe next time I won't." Following these statements Constable Waller states to one bus driver "Do you know who I am? I'm a police officer and if I'm having a conversation with you, don't shut your window. You are driving a motor vehicle on the roadway in Ontario and I have the right to speak to you." (Exhibit 7) This suggests clearly to the public that if they do not do as Constable Waller directs that in future he will be specifically looking for them in case they do not obey the law. This brings his enforcement action to a personal level that is inappropriate and portrays to the public a biased and unfair application of the powers of the office of police constable.

Further, Constable Waller had achieved his objective of causing a bus to move which enabled his wife to drive away. He further persisted, however, in pursuing the matter. Sometime after the original incident while operating his cruiser on patrol Constable Waller saw one of the involved buses being operated. He activated his emergency equipment and caused the bus to stop so that he could continue to discuss the previous incident with the driver (Exhibit 7). I view his persistent conduct in this matter to be an aggravating factor with regard to the seriousness of the misconduct.

Superintendent Shard submitted that damage to OPP reputation is a relevant issue. I agree that the conduct of Constable Waller could indeed harm the reputation of the OPP. Constable Waller's Performance, Learning and Development Plan (PLDP) Exhibit 8, states that one of the OPP's, and by extension, Constable Waller's Key Commitments is to "Build trusting relationships with the public, peers, partners and stakeholders by performing in a professional way." (p4). Police are granted reasonable discretion in the application of their authority to take enforcement action, Constable Waller's conduct in this incident could only negatively affect the public trust by his inappropriate and disproportionate application of his authority in this incident.

Superintendent Shard further submitted that the PLDP reflects a positive work year with the designation of "Fully Effective". It is also noted that Constable Waller is a Scenes of Crime Officer and a Breath Technician. This PLDP supports the submission of both the prosecution and defence that Constable Waller has generally been a competent officer.

Constable Waller has been an OPP member since 2006. This positive PLDP together with the fact that he has had no prior discipline with a good employment record is a significant mitigating factor.

Superintendent Shard and Mr. Girvin submitted that the conduct of Constable Waller is "out of character" based on the employment record and therefore the considerations of specific deterrence and rehabilitation are not of primary concern in this case. The evidence supports this submission.

Constable Waller, in his comments to the Tribunal, acknowledged responsibility for his conduct and pled guilty at the earliest opportunity. I consider these to be mitigating facts.

During Constable Waller's comments to the Tribunal he indicated that he would not act the same in future and I accept his sincere apology expressing regret. I would caution Constable Waller that in responding to an incident involving a family member or other person where a conflict of interest may be perceived that he consider allowing someone else to deal with the incident. Policing action must not only be fair but must be perceived to be fair. We do not always have other options but where there is one we ought to consciously consider it. I believe that a reasonable person viewing this incident could come to the conclusion that you indeed had an emotional investment in this case as Superintendent Shard submitted. This does not diminish Constable Waller's comment that he was "helping a distressed female with a crying baby." (Exhibit7). I do not find fault with his instinct to help in this situation but with the actions he decided to take to provide that help.

With regard to the public interest, the prosecution submitted that the public complainant, although not in attendance today, is aware of the agreed submission on disposition and is satisfied with this position. It is very important that the public sees that serious misconduct in cases such as this is not sanctioned by the OPP.

Superintendent Shard submitted one case, *Maxwell*, Exhibit 9, for consideration. I have reviewed it and as Superintendent Shard noted it is not directly analogous in many respects and therefore I cannot give it a great deal of weight.

I accept that Constable Waller is generally a competent, contributing member of the OPP and I expect that he will return to work wiser for this incident and continue to serve the community for many years to come.

I accept the joint submission on penalty as one that will send a clear message to all officers that the conduct in this case is not acceptable.

Disposition

Based on the evidence and submissions, I accept the joint penalty position. Provincial Constable Waller will forfeit 30 hours, specifically he will be required, in agreement with his supervisor, to work an additional 30 hours, pursuant to section 85(1)(f) of the *Police Services Act*, RSO 1990.


Paul Kelly
Inspector,
Adjudicator

19 April 2011
Date