



**HEARING DECISION
JUDGEMENT**

Name: Dawn WILSON

Rank: Police Constable

Badge Number: 9761

Case Number: 2010.26

Hearing Date: 2013.06.07

Hearing Officer: Superintendent R. MCELARY-DOWNER

Prosecutor: Inspector R. HEGEDUS

**Defence Counsel:
Or Representative** Mr. J. MULCAHY

TORONTO POLICE SERVICE DISCIPLINE HEARING
IN THE MATTER OF ONTARIO REGULATION 123/98
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;

AND IN THE MATTER OF
THE TORONTO POLICE SERVICE
AND POLICE CONSTABLE DAWN WILSON, #9761

CHARGES: DISCREDITABLE CONDUCT and UNNECESSARY USE OF FORCE

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

Appearances:

Counsel for the Prosecution: Inspector Rick Hegedus
Toronto Police Service

Counsel for the Defence: Ms. Joanne Mulcahy
Toronto Police Service Association

Hearing Dates: April 2, 4, 5, 29 and May 3, 2013

PREAMBLE

Police Constable Dawn Wilson, (WILSON), #9761 faces two Notices of Hearing which allege she committed discreditable conduct and unnecessary use of force. Both offences are contrary to the Code of Conduct contained in the Schedule to Ontario Regulation 123/98, as amended.

The particulars of the discreditable conduct include:

Being a member of the Toronto Police Service attached to the Toronto Anti Violence Intervention Strategy, Rapid Response Team, she was assigned to uniform duties.

On Monday October 19, 2009 at approximately 6:30 pm, she was on duty when she was observed by T.B., a private citizen, to kick a male party who was in handcuffs and lying on the ground. The male was in the care of other officers that were present prior to her arrival. The male was not struggling or resisting arrest at the time of this action.

In doing so, she committed misconduct in that she did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Toronto Police Service.

The particulars of the unnecessary use of force include:

Being a member of the Toronto Police Service attached to the Toronto Anti Violence Intervention Strategy, Rapid Response Team, she was assigned to uniform duties.

On Monday October 19, 2009 at approximately 6:30 pm, she was on duty when she was observed by T.B., a private citizen, to kick a male party who was in handcuffs and lying on the ground. The male was in the care of other officers that were present prior to her arrival. The male was not struggling or resisting arrest at the time of this action.

In doing so, she committed misconduct in that she did use unnecessary force against a prisoner or other person contacted in the execution of duty.

Plea

WILSON pleaded not guilty to the two counts of misconduct.

Exhibits

Seventy-one exhibits were tendered and can be found listed in APPENDIX 'A' of this decision.

Representation

In this matter, Ms. Joanne Mulcahy represented WILSON and Inspector Rick Hegedus represented the Toronto Police Service (TPS). The public complainant, Ms. Tamara Baptiste was unrepresented.

Decision

On October 19, 2009 Mr. Walker was apprehended by Constables Dunning and Morris following a foot pursuit. Constable Dunning radioed a 'priority call' and WILSON arrived shortly after.

It is prosecution's position WILSON applied force to Mr. Walker, by kicking him twice, and the force was unnecessary and her conduct discreditable because he was handcuffed and not resisting upon her arrival. It is defence's position Mr. Walker was not handcuffed and still resisting when WILSON arrived, therefore the force was necessary.

The focus of this Tribunal is to determine whether clear and convincing evidence exists to find WILSON's conduct rises to the level of misconduct.

Based on the totality of evidence and upon review of the elements of the applicable Code of Conduct offences, the Tribunal found weighty, cogent and reliable evidence which supported prosecution's position that WILSON's force levelled against Mr. Walker was unnecessary. Therefore the Tribunal found the applicable burden of proof – clear and convincing evidence – was met in that WILSON's force was unnecessary and her misconduct could likely bring discredit to the reputation of the TPS.

REASONS FOR DECISION

The Hearing

Prosecution's Case

Inspector Hegedus called four witnesses; Ms. Baptiste, Mr. Walker and Constables Dunning and Morris. Before doing so, he informed the Tribunal the TPS took no issue with the arrest or amount of force used by the first two responding officers.

Witness Ms. Tamara Baptiste:

Ms. Baptiste is the public complainant in this matter. She is thirty-two years old and formerly a resident of Toronto. She is employed in the guest services industry. Her testimony refers to an interaction between the TPS officers and a male, who for the purposes of this decision, I will refer to as Mr. Walker.

On October 19, 2009 Ms. Baptiste was at home standing on her balcony. She resided at 174 John Garland Boulevard, Toronto on the seventh floor in apartment 704. The time was about 6:30 pm, it was daylight and still bright. She noticed Mr. Walker, a dark skinned man with cropped hair and wearing a black shirt, running in a westerly direction along the back side of her building. Two police officers, both Caucasian, were pursuing him on foot, one officer directly behind Mr. Walker and the other lagging behind.

The officer closest to Mr. Walker, stumbled, regained his footing and continued. Mr. Walker made some headway until he came to a fence and stopped suddenly. From where Ms. Baptiste was standing, it appeared like he hit the fence hard with his midsection. The first officer reached Mr. Walker and threw him to the ground on his stomach. The second officer arrived and they placed Mr. Walker's hands to his back and handcuffed him. The officers then placed Mr. Walker on his back and elevated him to either a sitting or kneeling position. The officers appeared to each have an arm around Mr. Walker's arms and they just stayed there without moving for about forty seconds.

Ms. Baptiste heard a female yelling, "Where are you guys?" She then saw a female officer run to the spot where the officers and Mr. Walker were. The officer paused and then kicked Mr. Walker with her right leg. She looked to her right and kicked him again. From Ms. Baptiste's vantage point, it looked like the officer had made contact in the area of Mr. Walker's abdomen. After the female officer had placed her second kick, another male officer arrived.

An additional four officers, all coming from the same direction as the first arrived. Ms. Baptiste described what appeared to be a swarming, with the officers surrounding Mr. Walker and the two officers on the ground. She could see arms and legs swinging but nothing definitive. This lasted for maybe a minute and a half.

Ms. Baptiste ran into her apartment a few times, once to get her glasses because it was getting dark. Each time, she was inside for only a moment. She attempted to record the scene on her phone but all she captured was a dark spot with movement.

The officers and Mr. Walker then left in the same direction they had come. There was one officer on each side of Mr. Walker. It looked like they were almost carrying him because his head was bobbing and feet were dragging.

Ms. Baptiste provided a detailed description of where she first observed Mr. Walker, the route he ran, where he stopped and where her balcony was in relation to all of this. She was aided by a number of photographs which were tendered as Exhibit #3, A to Q. She advised her view was clear and unobstructed.

Ms. Baptiste said the whole event took about forty minutes to an hour. It got dark very fast.

Ms. Baptiste requires glasses for driving and has difficulty seeing distances sharply. She did not see an altercation between the first two officers and male.

Ms. Baptiste said in total there were eight officers, and only one was female. The female had a thick build and dark hair tied in a ponytail. Of the group of male officers, one may have been black or Indian and bald, and the others were of a lighter complexion. Prior to this, she had never observed any of the involved parties before.

Ms. Baptiste contacted the OIPRD on line and she was later interviewed by their investigators.

In cross examination, Ms. Baptiste identified her balcony's location in the photographs marked as Exhibits #4 and #5.

Ms. Baptiste agreed with counsel that other than near the chain link fence, the ground level was even. Aided by photographs, she said the top of the chain link fence did not look secure.

She advised she put her glasses on after the final four officers arrived on scene. She knew Mr. Walker was wearing pants, but she was not sure if he had shoes on or a short or long sleeved shirt. She knew all the officers were in uniform.

Ms. Baptiste could not hear what was being said between the officers and Mr. Walker while they were at the chain-link fence, if in fact anything was being said.

Ms. Baptiste described her apartment in relation to the pathway and plaza in a Mapquest satellite map and street map which were tendered as Exhibits #6 and #7. In Exhibit #8, she pointed to where she first observed Mr. Walker running.

Ms. Baptiste advised Mr. Walker's upper body went over the fence, but not his feet. His body hung over and it looked like he got caught on the fence before the officer got there. In Exhibits #9 and #10, she identified where Mr. Walker attempted to climb the chain fence and where he landed after being apprehended.

She agreed the officer used force to get him off the fence. She was not in a position to see what Mr. Walker's legs or feet were doing. She did not see either officer punch the male.

Ms. Baptiste heard the officers respond, "We're over here," when the female officer called out to them.

Ms. Baptiste did not recall seeing Mr. Walker get patted down.

Ms. Baptiste advised she received a conditional discharge for a conviction thirteen days before the Walk incident. She provided the Tribunal with the circumstances surrounding the conviction and charges laid by the Peel Regional Police. She denied her involvement with the court motivated her to complain. Rather, she said her motivation stemmed from several recent police beatings near her home.

Ms. Baptiste drew a diagram of her apartment which was tendered as Exhibit #11. A records check and transcript in regard to Ms. Baptiste's court proceedings were filed as Exhibits #12 and #13.

Witness Constable Andrew Dunning:

On October 19, 2009 Constable Dunning (Dunning) was working the 1500 to 0300 hours shift. He was member of the Toronto Anti Violence Intervention Strategy (TAVIS), Rapid Response Team and paired with Constable Morris (Morris). They were in uniform and in a marked scout car with Morris driving. Other TAVIS members working included, Sergeants Gouthro and Van Schubert, WILSON and Constables Bhandari, Kim, Fuller, Kline and Pargetter. They were assigned to 23 Division, an area we known for violent crime, homicides, guns and drugs.

As Morris turned into the plaza at 1701 Martin Grove, Dunning observed Mr. Walker standing at the far end. They drove to where he was and found him with a drink in his hand and eating while standing under a No Loitering sign.

Mr. Walker verbally identified himself to the officers as Julian Lloyd, born February 25, 1988 with an address of 75 Tandridge. After running some computer searches, the officers exited their cruiser and Dunning told Mr. Walker he thought he was lying. Mr. Walker pushed Dunning in the chest and took off running northbound through the alleyway beside the plaza. He tossed his jacket and at the end of the alley, kicked off one of his shoes, turned and ran eastbound along the fence line.

Dunning, who was closer to Mr. Walker, lunged forward but missed and fell. Morris ran past him and grabbed Mr. Walker as he tried to go over a chain-link fence. Mr. Walker swung his arms about wildly and the officers wrapped their arms around him and got him to the ground. They struggled getting the handcuffs on Mr. Walker because he tucked his arms under his body and kicked his legs about.

Dunning, who was closer to Mr. Walker's head, applied a significant number of strikes to his back, ribs, shoulders and head. Because they were not having success in getting the handcuffs on, Dunning looked

for his radio and saw it had fallen off and was laying slightly up the hill from where they were. He retrieved it and transmitted a priority call that they needed other officers to get Mr. Walker under control.

Other officers arrived including WILSON and they managed to get Mr. Walker under control and handcuffed. The officers walked Mr. Walker to flat ground and Dunning and Constable Kim searched him. Mr. Walker was then led to the scout car.

Mr. Walker admitted he had lied about his name and told the officers he may have cocaine secreted in his rectum. Mr. Walker was transferred to another scout car and Morris took Dunning to the hospital because he had injured his hand.

Dunning said they first started talking to Mr. Walker at approximately 1835 hours. It was the beginning of dusk and got dark very rapidly during the ten to fifteen minute interaction with Mr. Walker. The officers had spoken to Mr. Walker for about four to five minutes before he ran.

Dunning explained the TAVIS units utilized two radio bands, TAC and Divisional. He was on the Divisional band and Morris was on TAC, a band assigned to the TAVIS officers so they could communicate amongst themselves. When they first engaged Mr. Walker, Dunning radioed their location to the other TAVIS units.

Dunning read from his notes, *"The male struggled until after he was handcuffed to the rear. My radio had fallen off and I went back to get it to put over our location so other units could assist us."* Dunning said the notes were an accurate reflection of what happened.

The TAC and Divisional band transmissions were tendered as Exhibits #14 and #15, respectively. Dunning said he made a serious error in his communication when he told dispatch, "Got one in custody" and explained in actual fact Mr. Walker had not yet been handcuffed. He advised that 'in custody' would mean physically restrained but in this case, not handcuffed yet. He said his error in saying "in custody" may have stopped other officers from attending because everything was not all in order.

Dunning said at some point Mr. Walker was handcuffed. There were already several officers present who assisted. How he was handcuffed and by whom, Dunning didn't know.

Dunning identified the ICAD report and it was tendered as Exhibit #16.

Dunning did not know which officer arrived first to assist given his focus was on Mr. Walker.

Dunning identified a number of photographs taken of him by the SOCO (Scenes of Crime Officer) and they were tendered as Exhibit #17, A to M. He also identified Walker's Record of Arrest and the Google map he provided OIPRD, which were filed as Exhibits #18 and #19 respectively.

In cross-examination, Dunning advised he has been a police officer with the TPS since 2000. During his career he has completed assignments with 14, 33 and 51 Divisions, Community Response, Youth and Homicide Bureaus and TAVIS.

Dunning described a number of enlarged photocopied photographs, which were numbered Exhibits #21 to #28.

Dunning identified the TAC Band Summary which was tendered as Exhibit #29 and agreed it was titled, John Garland Way - Assist the PC.

Dunning advised that while he and Morris were talking to Mr. Walker at the plaza, a young boy rode up on a bicycle and gave Mr. Walker a cell phone. Mr. Walker told the officers he was waiting for a taxi. Once Mr. Walker's true identity was known, Dunning learned he was on a Recognizance with a condition not to possess a cell phone. Before Mr. Walker pushed Dunning, he had placed his food and drink on the scout car. Once the foot pursuit began, Dunning yelled commands for Mr. Walker to stop.

Dunning looked at Exhibits #30, A to D and described the ground level near the chain fence. He provided more commentary when viewing the photographs marked as Exhibits #31, A to F, #32 and #33.

Dunning advised when they pulled Mr. Walker off the fence, they landed on the ground just west of the chain fence. He yelled commands for Walker to comply. He ran eight to twelve feet up the incline to retrieve his radio. Dunning testified that as he was talking on his radio, he was still issuing strikes to Mr. Walker. In a very short period, other officers showed up including WILSON and Constable Kim. He had a sense they were there but he did not look up given his focus was on Mr. Walker who was still not handcuffed.

Dunning advised he did not raise Mr. Walker up nor were he and Morris on either side of Mr. Walker when WILSON kicked him, as suggested by the other testimony. He and Morris never just sat and waited after Mr. Walker was handcuffed. He stated he never saw WILSON kick Mr. Walker or use excessive force.

The Divisional Band Time printout and transcripts of the TAC and Divisional bands were tendered as Exhibits #34, #35 and #36, respectively. Dunning advised his call sign was TAV60, WILSON and Constable Kim were TAV59 and Constables Bhendari and Kline were TAV58.

Dunning advised Constable Kim is either Chinese or Korean, Constable Bhendari looks East Asian and Constable Fuller is black.

Witness Tyrone Walker:

Mr. Walker is twenty-seven years old and resides in Etobicoke. In 2010 his surname legally changed to Bell. He has no criminal convictions.

On October 19, 2009 he attended the Blue Sky restaurant located in the plaza at John Garland and Martin Grove and ordered some takeout food. The sky was bluish dark and close to nighttime. After getting his food and drink, he walked to the left side of the plaza. He called for his nephew to bring him his Aunt's cell phone and he waited for his cab. That's when a cruiser with two officers came up.

The officer driving looked Asian/Philippino and the passenger was kind of short and Caucasian. They asked him his name and he said, "Why, I'm not doing anything." He then identified himself as Julian. The officers got out of their car and said they didn't believe him. He placed his food and drink on the cruiser and decided he didn't need to hang around, so he took off running down the alley.

The officers took off after him. While running, he started to fall and one of the officers grabbed the back of his coat. While this prevented him from falling, his coat came off in the process. He kept running and one of his shoe's fell off. He turned right at the end of the alley and ran alongside the wooden fence. He came across a chain-link fence, tried to climb over but got hooked on it. One of the officers caught up, pulled him down and he landed face down on the ground with his hoodie over his face. It was just he and the one officer for about thirty seconds before the second one arrived.

Mr. Walker was tired and he could hear the officer was also tired. The officer was resting his weight on him. Mr. Walker told the officer he was done, he was tired and he gave up. He told the officer he couldn't breathe due to the weight on him. The officer told him to give him his hands so he did. The officer handcuffed him and then slid off top of him. He thinks it took about two to three minutes before he was handcuffed.

After he was handcuffed and still face down, Mr. Walker turned his head to the right and got hit twice in the face. He caught another two shots in the face after this, so he stopped turning his head. Someone held him down and he continued to get hit. He just laid there after that. By the sound of the footsteps, two or three more officers arrived. He heard someone say, "Stop hitting him, a car is coming." There was a pause for about twenty-seconds and he didn't get hit. He turned his head to the opposite side. He sensed someone punched at him but missed. He could hear the frustration in their voice, so they grabbed his head and slammed it against the floor. Everything went dizzy after this.

As the officers lifted Mr. Walker up, he saw two to three officers and by the time he was completely standing he could see about four to five. Because his pants had dropped to his knees, he tripped and fell. An officer accused him of spitting blood at him so he got punched. Three to four officers had to help him up the incline and walk after that. One officer was holding him by the hand. He could see the female officer to his left, the same side where he felt jabs to his body, as they walked. Another officer tried to trip him from behind. He was placed in a cruiser where he wiped the dirt and blood from his face.

He was transported to the Division. He was charged with assault police, missing court and breach. He spent two weeks in jail. After he was released, he learned an anonymous person had lodged a complaint against the police and he was interviewed. He did not know the public complainant, Ms. Baptiste.

In cross-examination, Mr. Walker again said he had no criminal convictions. A criminal court transcript was tendered as Exhibit #37, at which time Mr. Walker said he recalled being at City Hall court in 2010 where he pled guilty for failing to attend court and trafficking. He did not think he had a criminal record based on the way his lawyer explained his conditional sentence to him. A copy of his Recognizance was tendered as Exhibit #38.

Mr. Walker agreed he had a three pointed crown tattooed on his forearm but said it had no meaning. He denied he was a member of the Crips. He admitted he had been shot at in the past.

He remembered only giving the officers a first name of Julian and not Julian Lloyd. He denied pushing one of the officers before he took off running. He agreed the officer probably yelled after he started running. He advised only one officer handcuffed him. He agreed the ground inclined toward the chain fence.

Mr. Walker denied that he refused to give the officers his hands and resisted arrest. He said he was not making it up and pointed out to counsel that he didn't even want to be at the Tribunal and he never brought the complaint forth in the first place.

He agreed that when he was paraded before the booking sergeant he made no complaint of injury and explained he just wanted the whole matter over with. He agreed the photographs taken of him at the Division did not show blood. The photographs were tendered as Exhibits #39, #40 and #41. He admitted he told a Detective he ran because there was a warrant for him. In regard to when Mr. Walker said he was bleeding, he explained he had blood in his mouth. He said he never told his lawyer about the incident or that he had been interviewed by OIPRD.

Mr. Walker admitted he had been in rap videos and identified himself in three videos. The videos were filed as Exhibits, #42, #44 and #46. Transcripts relating to each video were tendered as Exhibits #43, #45 and #47.

Mr. Walker stated he did not see the female officer until he was fully standing and had taken a few steps forward. He did not believe she had contact with him while he was on the ground.

When escorted to the scout car, his hands were cuffed from behind and two officers were holding him. As he walked, one officer was tripping him from behind and another was jabbing his side. He could not say for sure if it was the female officer who was jabbing him, but he remembered seeing her on his left, looking her in the face and thinking why is she jabbing me and why is someone trying to trip me.

In re-examination, Mr. Walker agreed the videos shown at the Tribunal are similar to what is shown commercially on internet, CDs and TV. He advised he pled guilty during his court appearance in November 2010. He said he asked his lawyer what the Judge meant by his sentence and he was told, "You get a conditional discharge. So as long as you behave yourself and see your probation officer that is it – otherwise you go to jail."

Witness Morris (Constable Jason Morris):

Morris was assigned to TAVIS and reported for duty on October 19, 2009. He was driving and Dunning was his passenger. Their call sign was TAV60.

At approximately 6:35 pm, Morris and Dunning arrived at the plaza located at 1701 Martin Grove. He drove to the corner where Mr. Walker was standing under a No Loitering sign. Mr. Walker said he was waiting for his cab. He identified himself as Julian Lloyd. A young boy on a bike came by and handed Mr. Walker a cell phone.

Morris and Dunning got out of their car and Dunning told Mr. Walker he knew he was lying about his name. Mr. Walker pushed Dunning, more like a push off, and ran down the alley. Morris and Dunning took after him with Morris a little bit in the lead. Mr. Walker discarded his jacket and made a sharp right turn at the end of the alley and kicked off one of his shoes. Dunning got a bit ahead of Morris and dove to grab Mr. Walker, but missed and fell. Mr. Walker tried to hop a chain fence and Morris grabbed his legs and pulled him down. He was flailing his arms widely so Morris tackled him to the ground. Mr. Walker tried kicking at his shins so he got on top of him and they struggled for maybe five to ten seconds.

Morris applied a number of distractionary strikes to Mr. Walker's face. Dunning got there very quickly and together they turned Mr. Walker, who was still struggling, onto his stomach. Dunning helped remove Mr. Walker's hands from underneath and eventually they managed to handcuff him using Morris' handcuffs. It took about twenty to thirty seconds to get this done.

He conducted a pat down of Mr. Walker and then radioed for other units to secure their scout car. Morris arrested Mr. Walker and escorted him to his scout car along with another officer, although he couldn't remember who.

Morris advised the distance from the alley to the chain fence was approximately one hundred metres. He estimated the alley to be seventy-five to one hundred metres. He advised the chain fence was approximately five to six feet high and the ground dipped near the chain fence.

No one else other than Dunning and himself handcuffed the male. Once Mr. Walker calmed down and was handcuffed, Morris noticed other officers present, one being WILSON. He did not know when they arrived. He stated he was focused on Mr. Walker and had a little bit of tunnel vision.

When asked if Mr. Walker struggled after he was handcuffed, Morris advised he did a bit when he was stood up, but it was short.

Introduced as Exhibit #48, A to C, were photographs of Morris taken after the incident.

In cross-examination, Morris advised he has been a police officer with the TPS for nine years. He is not Philippino.

Morris advised neither he nor Dunning took Mr. Walker's jacket off him while he ran because they were not close enough. Dunning arrived at the fence very quickly and it took both of them to get Mr. Walker handcuffed. When Morris got to Mr. Walker, his adrenaline was going and he was exhausted. He agreed he had tunnel vision and would not have known if any officer assisted in controlling Mr. Walker's legs or arms.

When the other officers arrived, Mr. Walker was still on the ground on his stomach. He was never placed in a kneeling or sitting position. He said WILSON did not run up and kick Mr. Walker. He did not remember Mr. Walker telling him he couldn't breathe. He did not remember an officer trying to trip Mr. Walker or anyone jabbing him. He did not see any officer strike Mr. Walker after he was handcuffed. Morris also stated no officer said "Stop hitting him".

Defence's Case

WILSON

WILSON has been a police officer since May 2007 with the TPS. On October 19, 2009 she was working the 1700 to 0200 hours shift with the TAVIS, a position she held for eighteen months. Constable Kim was her escort for the shift and they were assigned to patrol 23 Division. Their call number was TAV59. WILSON drove and monitored the TAC band while Kim monitored the Divisional band. She was in uniform and wore her hair pulled back in a bun.

It was after 1826 hours, when she observed Dunning and Morris turn into the John Garland plaza. Shortly thereafter she heard Dunning issue a priority call. He sounded in duress and she thought he said gun. She gunned her car, turned into the John Garland plaza, located Dunning and Morris' vehicle and secured it. In her haste, she forgot to turn off her own vehicle.

She took off running up the alley. She observed a black jacket on the ground and yelled to Constable Kim, who was behind her, to grab it. At the end of the alley, she yelled, "Where are you guys?" When she heard their response, she looked to her right and ran toward the chain fence where Morris, Dunning and Mr. Walker were.

As she got closer, she heard the officers yelling, "Stop resisting, stop resisting, show us your hands." She saw Mr. Walker face down on the ground. There was an officer on each side, either crouched over or kneeling trying to contain Mr. Walker's upper body. It appeared like the officers were still fighting with Mr. Walker and that he was not under control. From where she stood, she couldn't see his arms.

She ran up to Mr. Walker's right side. Initially, she was going to bend down, but Mr. Walker was kicking his feet up. So she took her right foot and pushed Mr. Walker's right arm in toward his back but as she did she fell backwards. She regained her footing, and with her right foot again, got in and pushed his right arm down into his back. She did this because she believed Mr. Walker was not in handcuffs. Her action seemed to help a bit but Mr. Walker kept kicking his legs. She placed her left foot onto his right calf and applied pressure.

WILSON identified Mr. Walker's location in a photograph tendered as Exhibit #49.

At some point, Constable Kim arrived. Mr. Walker was moved to level ground where he was searched. As the officers escorted Mr. Walker back to the scout car, she held onto his left bicep. Morris was on the other side.

WILSON testified she did not kick, trip or jab at Mr. Walker. He had some difficulty walking because his pants were down by his knees and he had only one shoe. While Mr. Walker was on the ground, she did not see any officer give him distractionary strikes.

WILSON said the incident happened very fast. There was a bit of light when the priority call was transmitted, but it was dark by the time everyone cleared.

WILSON testified in regard to the TAC and Divisional radio transmissions. She stated she was on scene with the officers when Morris requested dispatch to have someone secure his vehicle.

In cross-examination, WILSON advised she heard Dunning's priority call but did not hear him say "one in custody".

WILSON did not place the handcuffs on Mr. Walker. When she approached Mr. Walker she couldn't tell where his hands were, whether they were beside or under his body. When she placed her foot on him the second time, it seemed to work. She thought Dunning and Morris may have been close to getting the handcuffs on Mr. Walker at that point.

In re-examination, WILSON stated she believed pushing Mr. Walker's forearm helped.

Witness Inspector Chris Fernandes:

Inspector Fernandes has been a member of the TPS for twenty-six years. In October 2009, he was in charge of the TAVIS unit, where he supervised WILSON. He never observed her on the road, but he always had positive feedback about her. He found the allegations against WILSON out of character.

In cross-examination, Inspector Fernandes would not condone someone kicking another but said he would need a lot more information.

In re-examination, the Inspector advised officers are trained to use their arms and legs to subdue a subject.

Witness Sergeant Kevin Van Schubert:

Sgt. Van Schubert has been a police officer since 1991. Upon promotion he was assigned to TAVIS where he supervised WILSON. Largely because of her excellent work performance, she remained in the unit for eighteen months, approximately twelve months longer than most. She had an excellent

reputation. The allegations against WILSON were out of character, as she is the one known to restore public confidence.

In cross-examination, Sgt. Van Schubert advised he was in the office when the incident occurred.

Witness Constable Mike Kim (Kim):

Kim advised he is Korean Canadian and has been an officer with the TPS since 2007. On October 19, 2009 he was working the nightshift with WILSON. He was not familiar with 23 Division so WILSON drove. He heard Dunning, sounding out of breath, transmit a priority call. WILSON said she knew exactly where Dunning was, so she drove to the plaza and secured the TAV60 vehicle.

WILSON then ran down the alley and yelled back for him to pick up a black jacket on the ground. As she ran eastbound in the field and he saw TPS uniforms ahead who he assumed were Dunning and Morris.

As he got nearer, he heard the officers yelling, "Stop resisting". Kim perceived Mr. Walker was not cooperating, so he dove in, grabbed and secured one of Mr. Walker's legs. Dunning and Morris were near the head and WILSON had her foot on Mr. Walker's leg.

Once Mr. Walker was secured, he was stood up and searched. Mr. Walker seemed exhausted as he was walked back to the plaza. Kim did not see anyone jab Mr. Walker or grab his head and slam it into the ground.

In cross-examination, Kim advised that as soon as he rounded the corner from the alley he could see specks of uniform of where the officers were. He was about ten to twenty seconds behind WILSON. Because he heard Dunning saying "Stop resisting" he naturally assumed Mr. Walker was not under control.

In re-examination, Kim agreed that he told the OIPRD he thought Mr. Walker was not handcuffed when he first arrived.

Witness Constable Mark Zettler (Zettler):

Zettler has been with the TPS for ten years. On October 19, 2009 he was working in the Detective Office when Mr. Walker was brought in. Mr. Walker told him he ran because there was a warrant for his arrest and he didn't want to go to jail. He did not observe any injuries on Mr. Walker.

Ms. Mulcahy tendered Exhibit #50, an Analysis of Images and Site Measurements report.

Witness Constable Ian Kosher

Constable Kosher, a police officer with the Peel Regional Police Service testified in regard to a criminal incident he investigated in October 2008 in Brampton, where he charged Ms. Baptiste. During his investigation, he found she had a number of aliases and possessed other identifications.

Submissions

By the Defense

Ms. Mulcahy filed Exhibits #51 to #70, inclusive during closing submissions. Other than the first being a TPS policy, the remaining exhibits were case law. I will only refer to a few of the cases.

Ms. Mulcahy submitted prosecution failed to present a clear and convincing case. She pointed to the alleged time of the misconduct and advised 6:30 pm had not been proven. As well, it had not been proven Mr. Walker was handcuffed at the time of the alleged misconduct.

Ms. Mulcahy pointed to *Munro & Allen & Niagara Regional Police Service*, Board of Inquiry PC55/93, Exhibit #53, a case which outlined the meaning of clear and convincing. She pointed to *Bernstein and the College of Physicians and Surgeons of Ontario*, 15 O.R. (2nd) 447, Exhibit #54, and suggested when the evidence is fragile and against a person with a good reputation, a conviction cannot be registered. She called Ms. Baptiste's evidence fragile and pointed to a number of reasons why her testimony should not be accepted.

Ms. Mulcahy directed the Tribunal to *Wills v. Kingston Police Service*, 2003, Exhibit #56, a case where an officer threw a man to the ground after he was handcuffed. In that matter, the Hearing Officer found the officer not guilty of misconduct.

Ms. Mulcahy submitted Dunning's evidence be taken into consideration as it gave insight into the mindset of the officers working in a bad area. Dunning's testimony proved Mr. Walker's evidence was unreliable and pointed to the testimony in regard to the jacket, the shoe and cell phones. She advised Mr. Walker's evidence confirmed Dunning's in that commands to 'stop resisting' and 'show hands' were given.

Ms. Mulcahy submitted Mr. Walker had no credibility or reliability and this was proven through the number of lies he told Dunning and the conflicts between their testimonies. She laid out a number of reasons why not to accept Mr. Walker's testimony.

Mr. Mulcahy referred to Morris' evidence in which he testified Mr. Walker kept his hands under his body while they were handcuffing him. Morris had his head down and didn't see WILSON until after the handcuffs went on.

Ms. Mulcahy advised that WILSON testified in a frank and forthright manner. Her evidence was uncontroverted. WILSON was lured into the commands - stop resisting, stop resisting – so she stepped in and did her job. WILSON saw a struggle; saw Mr. Walker kicking his legs and believed Mr. Walker was not in handcuffs. WILSON used her feet which was reasonable use of force. She submitted Kim corroborated WILSON's evidence.

Ms. Mulcahy submitted it is incumbent on this Tribunal to take into consideration WILSON's good character. She acted in good faith and there has been no clear and convincing evidence to support a finding of guilty.

By the Prosecution

Inspector Hegedus tendered a number of cases in a Book of Authorities filed as Exhibit #71. He spoke of the primary test of discreditable conduct and pointed to *Girard & Delaney, Board of Inquiry*, (1995) and *Courage v. Niagara Regional Police Service*, OCCPS 04-09. He stated the Hearing Officer can put herself in the shoes of the community to determine what their reasonable expectations are.

Inspector Hegedus submitted the evidence of Constable Kosher revealed no new information and asked it be given the appropriate weight. The evidence of Constable Zettler, Sgt. Van Schubert and Inspector Fernandes was forthright and credible, but it was after the fact and should bear no weight on the incident itself.

He pointed to Kim's testimony, who said he was ten to twenty seconds behind WILSON. Kim testified Mr. Walker was really out of breath when he walked back to the scout car and this supported Mr. Walker's evidence he had difficulty breathing when he was held by Dunning and Morris.

Inspector Hegedus pointed to the lapse in time from the point Dunning reported "one in custody" to when WILSON arrived. Dunning testified Mr. Walker was not handcuffed when he made the radio transmission but then agreed his notes, which reflected Mr. Walker was handcuffed were accurate.

Inspector Hegedus reviewed the evidence of Mr. Walker and submitted his life style did not represent a model citizen. He suggested Mr. Walker's evidence in regard to his criminal record could be attributed to a lack of sophistication, given he did not lie or attempt to minimize his convictions. He submitted Mr. Walker was credible. Once he went to the ground, he was no longer clear on events because he was face down, exhausted and could not see out of one of his eyes.

Inspector Hegedus submitted Ms. Baptiste was credible and unbiased. She could not identify the officers nor did she make any attempt to do so. She did not embellish her evidence to try to make it better over her statement. Her evidence was consistent with much of the other witnesses, including WILSON.

Inspector Hegedus reviewed WILSON's testimony. Her sequence of evidence corroborated Ms. Baptiste's testimony. He submitted I not accept WILSON's evidence that Mr. Walker was not compliant when she arrived. He submitted WILSON placing her foot on Mr. Walker did not explain how it would have helped to handcuff Mr. Walker.

Inspector Hegedus submitted the radio transmissions provide an indisputable sequence of events. He submitted prosecution does not dispute the distance from Ms. Baptiste's balcony to where Mr. Walker was apprehended and suggested it equated to half the length of a football field. He submitted Ms. Baptiste's view was clear and unobstructed.

Inspector Hegedus submitted based on the evidence, both charges have been proven but asked if a finding of guilty be made, it be done so on only one charge due to the similar facts in both Notices of Hearing.

Defence's Response

Ms. Mulcahy agreed with prosecution's submission in regard to the Notices of Hearing.

By the Public Complainant

Ms. Baptiste was not present for the closing submissions.

Analysis

The Tribunal thanks prosecution, defence and the public complainant for the manner in which they presented the case. I heard from numerous witnesses and received several exhibits all of which have been closely examined and considered.

After reviewing this matter, I can safely say much of the evidence that led to the foot pursuit and after Mr. Walker was placed in a scout car was fairly straight forward. It is what happened in between – the point when Mr. Walker was apprehended at the fence to when he was led to the scout car – which is most challenging and requires my greatest care and attention. This evidence is in dispute and essentially comes down to the police version and the civilian version. To assist me, I have narrowed my analysis down to three key questions, which will be articulated shortly.

Owing to some significant disparities in evidence, it is important to note I will rely on the ‘*O’Halloran test*’ for guidance as I analyze and give weight and make findings of fact. Essentially the test is this:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say “I believe him because I judge him to be telling the truth” is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind. *Faryna v. Chorney*, [1951] B.C.J No. 152 (C.A.),

The allegations

WILSON faces two allegations of misconduct; discreditable conduct and unnecessary use of force. The allegations bear the same particulars, in that on October 19, 2009 at approximately 6:30 pm, while on duty WILSON was observed by Ms. Baptiste to kick Mr. Walker, who was in handcuffs and lying on the ground. Mr. Walker was in the care of Morris and Dunning prior to WILSON’s arrival and he was not struggling or resisting arrest at the time.

Contrary to Ms. Mulcahy’s submission, I am more than satisfied and convinced the time of day, being that of approximately 6:30 pm, was clearly established by several witnesses and need not be analyzed further.

The incident leading to the allegations of misconduct

After wading through all evidence, I have distilled the incident that led to the allegations of misconduct down to the following:

The principal witnesses include Ms. Baptiste, who was standing on her seventh floor balcony, the arrestee – Mr. Walker, officers Dunning and Morris who were partnered with the call sign TAV60, and WILSON and Kim who were partnered with the call sign TAV59.

The incident began when Dunning and Morris spoke with Mr. Walker at a plaza in regard to loitering. It was approximately 6:30 pm and dusk. After a brief exchange, Mr. Walker pushed Dunning and took off running. Both officers pursued him on foot. Mr. Walker ran down an alley where he discarded his jacket and one of his shoes. Whether he purposely discarded these items is debatable and not something I can determine with certainty.

At the end of the alley, Mr. Walker turned right and ran along the back of Ms. Baptiste's apartment building. He came to a chain-link fence and as he tried to climb over he got hung up. Morris grabbed Mr. Walker and tackled him to the ground. Dunning who had fallen behind caught up and assisted. A struggle to some degree ensued and Mr. Walker ended up on his stomach. At some point, Mr. Walker was handcuffed and at some point, Dunning issued a priority call on his radio.

WILSON and Kim were in the immediate vicinity and responded to Dunning's call. They located the officers' scout car in the plaza, secured it and took off down the alley in search of their colleagues. WILSON was the first to locate Dunning, Morris and Mr. Walker, who were still on the ground near the chain fence. With her foot, WILSON applied force to Mr. Walker. Kim, who stopped to pick up Mr. Walker's jacket in the alley, arrived ten to twenty seconds later.

Ms. Baptiste witnessed the foot pursuit and apprehension of Mr. Walker. She witnessed WILSON's arrival and saw her swing her foot twice in the direction of Mr. Walker. Ms. Baptiste watched as Kim and additional officers arrived.

With WILSON and Morris on each side, Mr. Walker was escorted in handcuffs back to the plaza where the scout cars were parked.

By in large, the above-noted facts are not in dispute. What remains in contention and serves central to the allegation of misconduct is whether Mr. Walker was handcuffed before WILSON arrived, was he resisting upon her arrival and was the force she levelled against him unnecessary?

If I were to accept Ms. Baptiste and Mr. Walker's testimony, I would find that WILSON arrived after Mr. Walker was handcuffed and her force applied was unnecessary because he was not resisting. If I accept the evidence of the officers I would find to the contrary. To help me determine what actually happened, I have asked myself three key questions:

- 1. Was Mr. Walker handcuffed before or after WILSON arrived?*
- 2. Was Mr. Walker resisting / struggling with Dunning and Morris at the time WILSON arrived?*
- 3. Was the force WILSON levelled against Mr. Walker unnecessary?*

I will deal with the questions in the order presented.

- 1. Was Mr. Walker handcuffed before or after WILSON arrived?*

The witness testimony in regard to this question is clearly at odds. Ms. Baptiste testified Mr. Walker was handcuffed before WILSON arrived. Mr. Walker couldn't say when WILSON arrived but said after he was handcuffed by one officer, which took about two to three minutes, he heard other officers arrive. Morris testified Mr. Walker was handcuffed within a minute of being tackled and it took both he Dunning to do so. Dunning testified he wasn't sure who handcuffed Mr. Walker but was adamant it did not occur until after he transmitted his priority call. Both WILSON and Kim first testified they believed Mr. Walker wasn't handcuffed and then became surer he was in fact not handcuffed after further questioning from counsel. The one consistency I found in view of all the testimony was there was no consistency.

Defence counsel spent considerable effort during the Tribunal to discredit the testimony of Mr. Walker and Ms. Baptiste. Up front, I accept Mr. Walker leads a less than model life style and acknowledge his criminal past and contempt for police. I also acknowledge Ms. Baptiste's brush with the judicial system just days before this incident. While both witnesses were clearly uncomfortable at times, they testified about their personal situations in a forthright and frank manner, the same manner in which they articulated the events as they saw, heard and felt on October 19, 2009. At no point did they lead me to believe their evidence was embellished; to their credit, they stopped short of this even though the opportunities were presented.

That being, I have had to reconcile in my mind how Ms. Baptiste could see certain things and not others. Such as, she saw Mr. Walker get handcuffed, but did not see the officers strike him. She thought he was seated or kneeling when in fact he was face down on the ground. I am convinced the time of day, terrain, distance and her slight vision impairment factored into her honest but sometimes mistaken belief about some events, especially when the officers and Mr. Walker were close quartered and level with the ground. Mr. Walker, too, was not clear on some points and I attribute this to his position on the ground. Despite this, Mr. Walker's and Ms. Baptiste's evidence was confirmed by other evidence and for the most part their version was in harmony with the preponderance of the probabilities – it fit, it was weighty and it carried a ring of truth.

On the other hand, I cannot say the same about some of the police witnesses. I turn to Dunning in particular, whose testimony I found completely discreditable. I agree with Inspector Hegedus and found the radio transmissions provided an indisputable sequence of events. I accept Dunning's notes to be an accurate account of the incident. In the face of this reliable evidence, I found Dunning clearly attempted to mislead this Tribunal in his testimony.

I turn my mind to the radio transmissions. At 6:35:01 pm on the TAC band¹, Dunning advised the units of the following:

Dunning: 60 speaking with one in John Garland Plaza. All in order.

Six minutes later, at 6:41:06 pm, the following communications, which lasted over a period of two and one quarter minutes, were transmitted over the Divisional band²:

Dunning: (Static)Priority.....

Dispatch: (Static) Ya TAV unit go ahead.

Dunning: Back of John Garland way a male ran from us – got one in custody but we

¹ Exhibit #36

² Exhibit #35

Dispatch: Back of John Garland Way

Dunning: We need another, (heavy breathing)

Dunning: (heavy breathing) K sorry, calm down now, got one in custody, our vehicle is unsecured in front of John Garland plaza, we need someone to go there first, secure our vehicle.

Transmission inaudible

Dispatch: What's your call sign TAV?

Dunning: TAV 60

Traffic 23 / Unknown Female officer: (Static) Traffic 23 Bravo on the way.

Dispatch: 10-4 if you can see the car at the front of at the plaza and then somebody to see TAV60

Transmission inaudible

Kim: TAV 59 (very static / can hear running)

Dispatch: TAV 59 and again you did say everything was in order but you need someone to secure your car and somebody to see you there?

Dunning: (Static / heavy breathing) Sorry, I know I'm out of breath. Can you slow everyone down?

Dispatch: Okay so slow down but make your way over.

Transmission inaudible

Dunning: Slow everyone down. (Unclear Dunning is speaking but it overlaps over the dispatch).

Unknown Sergeant: 23S1 send me that call please dispatch.

Dispatch: And again Traffic 23 Bravo - if you could secure the vehicle at the front.

Unknown Female Officer: 10-4.

Unknown Male Officer: (Cuts out) 8 call.

Dispatch: Call sign?

Bhandari: TAV 58. Uh, traffic can disregard we secured TAV 60 and TAV 59,

Dispatch: TAV 58 10-4.

Dispatch: When somebody gets to see 60 if they can let me know.

Traffic 23 / Unknown Female officer: Traffic 23 Bravo 10-4 on that.

WILSON: TAV 59 is on scene with 60. All in order dispatch. One in custody. (Dunning heard in the background saying one.)

Thirty-eight seconds after Dunning first initiated his priority call, Morris transmitted similar information of the TAC band³:

Morris: Uh TAV 60 we uh got one in custody we need someone to go uh to John Garland Plaza to secure our vehicle.

Another thirty seconds passed by before WILSON reported on the TAC band⁴ she was on scene. According to WILSON, she was on scene at the time Morris made his transmission but I found no reliable evidence to support this. Interestingly, I noted the pitch of WILSON's voice was very consistent with someone who had just stopped running, when she reported on the TAC band that she was on scene. Regardless, of whether she was or not, I rely on Dunning's transmission as the first signal all is okay.

In the noted transmissions, Dunning reports on two occasions he had one in custody and directs the responders to slow down. He also directs the dispatcher to have the responders attend the plaza first to secure his scout car.

I find these transmissions unequivocally indicate Mr. Walker was handcuffed at the time Dunning issued his priority call, and could mean nothing else. The term, 'in custody' is universally recognized by police as meaning a suspect is caught, controlled and restrained. This is consistent with the Merriam-Webster Dictionary definition of 'custody' which is defined as "Immediate charge and control (as over a ward or a suspect) exercised by a person or an authority".

I reject Dunning's explanation that he really didn't mean Mr. Walker was handcuffed when he said "in custody". It is entirely inconsistent and outside the realm of possibilities an officer of Dunning's experience or any police officer for that matter would make such a mistake. Even if I were to accept he used the term 'in custody' in error, it remains inconceivable Dunning would tell units to slow down and tend to an unsecured cruiser first, had his partner been on the ground struggling to get handcuffs on a suspect.

Dunning testified he wasn't sure if other officers, aside from Morris, were present when he issued his priority call. I am at a loss to know or understand how he may have thought other officers could have been present. Nonetheless, I accept WILSON and Kim's testimony that they were not present with Dunning when he issued his priority call. They were indeed on patrol and in the vicinity, but not on the

³ Exhibit #36

⁴ Exhibit #36

scene. Further evidence to support this finding is the TAC band transmission⁵, where WILSON did not report being on scene until one minute and seventeen seconds after Dunning first issued his priority call.

Dunning could not remember which officers handcuffed Mr. Walker. Morris, on the other hand never wavered from his testimony that it was he and Dunning, and only them, who handcuffed Mr. Walker. I accept Morris' testimony over Dunning's and found it consistent with Ms. Baptiste's observations and similar to Mr. Walker's testimony.

I found WILSON and Kim's testimony evasive with respect to whether Mr. Walker was handcuffed or not.

I therefore conclude and find as a fact Mr. Walker was handcuffed prior to WILSON arriving on scene.

2. *Was Mr. Walker resisting / struggling with Dunning and Morris at the time WILSON arrived?*

It is more than reasonable to accept a suspect may continue to resist and or struggle with officers after they have been restrained in handcuffs. Although Ms. Baptiste did not see it, I am more than satisfied that a struggle of some degree occurred between the officers and Mr. Walker before he was handcuffed. However the evidence is clear, that once he was restrained and the handcuffs applied, Mr. Walker stopped resisting.

I found Dunning's notes helpful and instructive in this regard:

"The male struggled until after he was handcuffed to the rear. My radio had fallen off and I went back to get it to put over our location so other units could assist us."

I turn to the testimony of Morris and found it confirmed Dunning's notes. In chief, he testified Mr. Walker calmed down after he was handcuffed. When asked in cross-examination if Mr. Walker struggled after he was handcuffed, he said when the officers stood him up he did a bit. I conclude and I'm convinced, based on Morris' response, Mr. Walker did not resist or struggle once he was handcuffed and still on the ground.

I found Mr. Walker's testimony consistent with Morris'. He said he did not resist after he was handcuffed but when he stood up, there was a physical altercation – he got punched after he stumbled toward an officer. Both of these points corroborate Morris' testimony that something happened after Mr. Walker stood up, but he did not resist on the ground after being handcuffed.

I found WILSON's testimony contradictory and evasive. Her credibility and reliability were shaken in regard to my finding with respect to the handcuffs, and I found her testimony in regard to this issue much the same. When she arrived, she testified it "appeared" like the officers and Mr. Walker were still fighting. In the next breath, she was firm in saying Mr. Walker was not under control. She said she "believed" he was not in handcuffs and then changed this to being sure, then changed again to saying the officers might have been close to putting the handcuffs on. She said she could not see Mr. Walker's arms, but managed to use her foot to push his forearm into his back.

As I further consider WILSON's testimony, I fast forward momentarily to when Mr. Walker was escorted to the scout car. As I said earlier, I have accepted much of Mr. Walker's testimony having found his

⁵ Exhibit #36

detail in regard to what he saw, did and heard credible. That being, I believed Mr. Walker when he said someone was trying to trip him and someone was jabbing him while he was escorted from the field.

While I can attribute Mr. Walker's low riding pants to his honest belief that he was being tripped, I cannot say the same for the jabbing. WILSON held Mr. Walker's left bicep as she escorted him, the same side Mr. Walker said the jabs were coming from. WILSON, who was in the best position to see and feel any disruption to her prisoner, saw nothing. I found it difficult to accept an officer, tasked with the duty to escort and physically hold onto a prisoner, would be so unaware. Her testimony illustrates her lack of reliability and credibility.

I found Kim's testimony less than helpful. Other than he confirmed WILSON's foot was on Mr. Walker's leg, his testimony offered limited evidentiary value. His terminology such as 'my perception, I believe, I naturally presumed' and 'I sensed' was consistent with an individual who arrived after the fact.

Both WILSON and Kim testified that as they approached, they heard the commands "Stop resisting". I really cannot say with certainty whether this happened or not. Ms. Baptiste did not hear anything although her distance may have prevented this. If either Morris or Dunning were in fact saying it, I can say with certainty I have found no justifiable reason since there is reliable and weighty evidence Mr. Walker did not struggle after being handcuffed.

I now take myself back to the question, *Was Mr. Walker resisting / struggling with Dunning and Morris at the time WILSON arrived?* I am satisfied based on the totality of the evidence, Mr. Walker was not struggling or resisting upon WILSON's arrival.

3. Was the force WILSON levelled against Mr. Walker necessary?

The Code of Conduct states an officer commits misconduct if he or she "uses any unnecessary force against a prisoner or other person contacted in the execution of duty".

WILSON admittedly applied pressure to Mr. Walker's arm with her foot and then stepped on his leg. Ms. Baptiste testified WILSON kicked Mr. Walker twice. Regardless of whether it was a kick or pressure to the arm with a foot, this Tribunal is satisfied and finds clear and convincing evidence WILSON applied force to Mr. Walker while he was on the ground. Based on an analysis of all evidence, there was no justifiable reason for the applied force, since Mr. Walker was already handcuffed and not resisting upon WILSON's arrival.

I found WILSON's testimony in regard to what she saw and didn't see and why and how she applied force to Mr. Walker in the manner that she did disconnected. It was self-serving and not to be believed. I am convinced there was no mistaken or honest belief on her part that Mr. Walker was resisting and not handcuffed. If force was being applied to Mr. Walker after he was handcuffed, and I have found no justification for this, it was WILSON's duty to step in and stop it – not join in.

I find as a fact the force WILSON leveled against Mr. Walker was unnecessary.

Evidence of Good Character

I heard evidence of good character in regard to WILSON from Inspector Fernandes and Sgt. Van Schubert. Both said the allegations of misconduct were out of character. The insight I gained in regard to her performance as a TAVIS member was very positive.

I am very much aware and respect WILSON's immediate desire to come to the aid her of colleagues. That being, sometimes good officers act out of character and use poor judgment. I believe this was the case when she committed the impropriety against Mr. Walker.

FINDING

I have carefully considered the facts presented in this matter and conclude there is clear and convincing evidence to support a finding of guilty of unlawful or unnecessary exercise of authority in that the use of force WILSON levelled against Mr. Walker was unnecessary, contrary to section 2(1) (g)(ii) of the Code of Conduct contained in the Schedule to Ontario Reg. 123/98.

Specific to the allegation of discreditable conduct, I will withdraw this charge at the next appearance due to the nature of duplicity.



Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Date decision electronically delivered: June 7, 2013

APPENDIX 'A'
Exhibits – WILSON

- 1 Letter of Designation - Supt. McElary-Downer
- 2 Letter of Designation - Insp. R. Hegedus
- 3 Photographs A-Q
- 4 Photograph Exhibit 3G
- 5 Photograph Exhibit 3H
- 6 MapQuest of 174 John Garland
- 7 Google Map
- 8 Photograph Exhibit 3L
- 9 Photograph Exhibit 3N
- 10 Photograph Exhibit 3I
- 11 Diagram of T. Baptiste's apartment
- 12 Records Check – Ms. Baptiste
- 13 Criminal Court transcript
- 14 CD Tactical band
- 15 CD Divisional band
- 16 ICAD
- 17 Photographs A-M
- 18 Record of Arrest - Tyrone Walker
- 19 Google Map - Dunning
- 20 Photograph of John Garland Plaza
- 21 Photograph of John Garland Plaza - focused
- 22 Photograph of Blue Sky sign
- 23 Photograph of John Garland Plaza No Loitering sign
- 24 Photograph of John Garland Plaza right side
- 25 Photograph of John Garland alleyway
- 26 Photograph of alleyway
- 27 Photograph of pathway
- 28 Photograph of paved pathway
- 29 TAC Band times
- 30A Photograph of incline/decline
- 30B Photograph of top of fence
- 30C Photograph of chain-link fence
- 30D Photograph show chain-link fence decline/slope
- 31A Photograph - route
- 31B Photograph - gully
- 31C Photograph - gully
- 31D Photograph - gully
- 31E Photograph - gully
- 31F Photograph
- 32A Photograph of chain-link fence
- 32B Photograph facing south east
- 32C Photograph of John Garland Plaza
- 33A Photograph - Dunning

APPENDIX 'A'
Exhibits – WILSON

- 33B Photograph - Dunning
- 34 Division band printout
- 35 Transcript - Divisional
- 36 Transcript - TAC band
- 37 Transcript - Mr. Walker
- 38 Recognizance
- 39 Photograph of Mr. Walker
- 40 Photograph of Mr. Walker
- 41 Photograph of Mr. Walker
- 42 Video - Going In
- 43 Transcript of Video
- 44 Video - One Two
- 45 Transcript of Video One Two
- 46 Video - No Games out here
- 47 Transcript of Video No Games Out Here
- 48A Photograph of Morris
- 48B Photograph of Morris
- 48C Photograph of Morris
- 49 Exhibit 30A Photo – WILSON re Mr. Walker
- 50 Analysis of Images and Site Measurements report
- 51 TPS Policy
- 52 *Penner v. Niagara (Regional Police Services Board)* [2013] S.C.J. No. 19
- 53 *Munro & Allen & Niagara Regional Police Service, Board of Inquiry PC55/93*
- 54 *Bernstein and the College of Physicians and Surgeons of Ontario*, 15 O.R. (2nd) 447
- 55 *McCormick v. Greater Sudbury (City) Police Service*, [2010] O.J. No. 793
- 56 *Wills v. Kingston Police Service*, 2003
- 57 *R. V. Elmosri*, 23 C.C.C. (3d) 1985
- 58 *Laufers v. Toronto (Metropolitan Police Force)*, (Ont. Div. Ct.) [1992] O.J. No. 2222
- 59 *R v. Thistlethwaite*, Ontario Court Of Justice, March 28, 2002
- 60 *Gemmiti v. Peterborough Community Police Service*, March 20, 1998
- 61 *Conroy & Pheby v. Toronto Police Service*, 1995
- 62 *Lindsay v. Trepasso*, (Div. Ct) Subury (Appeal)33
- 63 *Schoneau v. Brymer*, [1990] S.J. No. 667
- 64 *Levesque v. Sudbury Regional Police Force*, [1992] O.J. no. 512
- 65 *Shockness v. Peel Regional Police Service*, Board of Inquiry, PC006/94
- 66 *Shaw & McGuigan v. Ontario Provincial Police*, Ontario Police Commission, (1979)
- 67 *Brown v. Haldimond-Norfolk Police Force*, Ontario Police Commission, (1987)
- 68 *Cuncic v. Hamilton-Wentworth Regional Police*, Board of Inquiry (1992)
- 69 *Whitney v. Ontario Provincial Police*, [2007] O.J. No. 2668
- 70 *Monaghan v. Toronto (City) Police Service* , [2005] O.J. No. 1396

APPENDIX 'A'
Exhibits – WILSON

71 Book of Authorities

Tab A – *Girard & Delaney, Board of Inquiry*, (1995)

Tab B – *Courage v. Niagara Regional Police Service*, OCCPS 04-09

Tab C – *R. v. W. (D.)*, [1991] 1 S.C.R.

Tab D – *R. v. Khanna*, 2011 ONSC 4320

Tab E – *R. v. R.E.M.* [2008], 3 R.C.S.