In the matter of the *Police Act*, R.S.A. 2000, c. P-17 and
In the matter of the *Police Service Regulation*, Alta. Reg. 356/1990

And in the matter of Complaints and Disciplinary Proceedings against
Regimental Number 2138 Constable Michael Wasylyshen
Of the Edmonton Police Service

Penalty Decision

Procedural Background

On February 16, 2010, Constable Wasylyshen was charged with the following disciplinary misconducts:

Count #1:

> Unlawful or Unnecessary Exercise of Authority, pursuant to Section 5(1)(i) of the *Police Service Regulation,* as further defined by Section 5(2)(i)(ii) of the *Police Service Regulation;*

Count #2:

> Unlawful or Unnecessary Exercise of Authority, pursuant to Section 5(1)(i) of the *Police Service Regulation,* as further defined by Section 5(2)(i)(ii) of the *Police Service Regulation*;

Count #3:

> Insubordination, pursuant to Section 5(1)(g) of the *Police Service Regulation,* as further defined by Section 5(2)(g)(ii) of the *Police Service Regulation;*

Count #4:

> Insubordination, pursuant to Section 5(1)(g) of the *Police Service Regulation,* as further defined by Section 5(2)(g)(ii) of the *Police Service Regulation;*

Count #5:

> Insubordination, pursuant to Section 5(1)(g) of the *Police Service Regulation,* as further defined by Section 5(2)(g)(ii) of the *Police Service Regulation.*

DETAILS OF ALLEGATIONS:

Count #1:

It is alleged that on or about October 5, 2002, in the City of Edmonton, in the Province of Alberta, you were involved in the arrest of the youth C.D. In the course of arrest you applied an M26 Taser to C.D. up to 8 times, thereby exercising your authority unlawfully or unnecessarily contrary to Section 5(2)(i)(ii) of the *Police Service Regulation.*

Count #2:

It is alleged that on or about October 5, 2002, in the City of Edmonton, in the Province of Alberta, you were involved in the arrest of the youth C.D. In the course of arrest you administered a blow to the back of C.D.'s head, and thereby exercised your authority unlawfully or unnecessarily contrary to Section 5(2)(i)(ii) of the *Police Service Regulation.*

Count #3: Not proven

Count #4:

It is alleged that on or about October 5, 2002, in the City of Edmonton, in the Province of Alberta, you were involved in the arrest of the youth C.D.. You were the officer in charge of the investigation, and required to gather evidence and statements from the other EPS members involved in the arrest of C.D.., but did not do so in a timely manner or at all, thereby committing Insubordination contrary to Section 5(2)(g)(ii) of the *Police Service Regulation.*

Count #5: Not proven

The disciplinary hearing commenced on March 8, 2010. Mr. Derek Cranna was the Presenting Officer representing the Edmonton Police Service (EPS) and the cited officer was represented by counsel, Mr. Robert Hladun.

The cited officer entered "deny pleas" on the 5 counts contained in the Notice and Record of Disciplinary Proceedings.

The matter was set over to August 10th, 2010 then adjourned to November 1, 2010 at which time the hearing proceeded.

On October 9th, 2012, it was found that Counts 1, 2 and 4 were proven; the remaining counts were not proven.

The matter was set over to November 2, 2012 for submission on penalty.

Exhibits

1.	Memorandum from the Chief of Police appointing me as Presiding Officer.
2.	Memorandum from the Chief of Police appointing Mr. Derek Cranna as the Presenting Officer.
3.	Notice and Record of Disciplinary Proceedings dated 2010 February 16
4.	Letter and Revised Decision of the Law Enforcement Review Board dated October 29th, 2010
5.	Binder containing 38 Exhibits
V-1	Two Notices of Attendance to E.F. and the Affidavit of Non Service
V-2	Two Notices of Attendance and the Affidavits of Non Service as to G.H.
V-3	Affidavit of Service for Constable I.J.
V-4	Notice to Attend and Affidavit of Service for Constable K.L.
V-5	Notice to Attend and Affidavit of Service for M.N.
V-6	Notice to Attend and Affidavit of Service to O.P.
6.	Binder of Transcripts
7.	Binder of Transcripts
8.	Google Map of the area
9.	Memorandum to Detective I.I. from Constable Wasylyshen Dated 2003, November 17th
10.	Excerpts from Constable Wasylyshen's Notebook
11.	C.V. of Q.R.
P-1	Service Record Summary – Constable M. Wasylyshen
P-2	Letters of Reference Re: Constable M. Wasylyshen

Evidence

Submissions on Penalty

<u>The Presenting Officer</u>

The Presenting Officer commenced his submissions by providing a copy of Constable Wasylyshen's Service Record Summary which was entered as Exhibit P-1. He then provided a number of authorities he planned to reference throughout his submission.

Mr. Cranna started with a recap of the key factual findings from my decision on this matter.

Relative to the use of force and the analysis that led to the findings, he spoke of the three phase test that was applied. In the first two phases of the test, he stated

that I had found that the officer was required by law to perform an action in the in the administration or enforcement of the law and in the second element, I found that the officer acted on reasonable grounds.

He states that where the Constable fell down is on the third ground, and that is whether or not the force he then used was reasonable and necessary. He adds that the difficulties with the force in this matter are quite serious.

Mr. Cranna then recapped some of my findings in the decision relating to Mr. C.D.'s condition and his ability to comprehend and comply and Constable Wasylyshen's reactions of going to the use of an intermediate weapon, that being the Taser.

He went on to summarize the Taser deployments and then spoke to the injuries sustained by Mr. C.D. as a result of this disproportional use of force which included numerous Taser burn marks to Mr. C.D.'s body.

Mr. Cranna then spoke to the count of Insubordination relating to the failure to gather evidence and statements in a timely manner. It was clear in policy that Constable Wasylyshen was the member i/c case and was responsible for all aspects of reporting and complying with Crown requests through to trial. The constable did not give proper consideration or time to the Crown's requests.

A second issue of significance is that the member-in-charge designation was taken away from Constable Wasylyshen and ultimately handled by Sergeant F.F. who ultimately completed the disclosure requests.

Having concluded his summary of my findings, Mr. Cranna then spoke to the seven principles laid down by the Board with respect to disciplinary goals.

He states that the first purpose the Board articulates is to advance the organizational objective of effective and efficient police services to the community. It is required that we assess what a fair and just sanction is in the circumstances. We are to look to remedial approaches that seek to correct and educate. We are to consider all of the relevant aggravating and mitigating factors.

It is legitimate to look to general deterrence as a goal, both in terms of maintaining discipline and order within the service, but also as an element of public confidence. And consistency in sanctions should be strived for; like instances of misconduct should attract like sanctions.

Mr. Cranna then spoke to the previous good record of the officer and his seniority at the time of the incident which occurred in 2002. At that time Constable Wasylyshen was relatively junior with approximately three and a half years of service. He now has fourteen years.

At the time of the incident he did not have any disciplinary defaults on his file however now; there is a record of disciplinary findings from June 2010 which is comprised three counts of discreditable conduct. Those three counts resulted in guilty pleas from the member, and he was sanctioned with a total of 100 hours of suspension without pay and a reprimand. And all of those matters arose out of an incident that took place in December 2005 which occurred after this incident.

Mr. Cranna then provided a copy of an Ontario matter, *Galassi v. Hamilton Police Service* drawing my attention to paragraphs 31 to 33 where there is a discussion as to the appropriate use of subsequent convictions in these circumstances.

In Galassi they find that it would be an error to rely on the later misconduct to escalate a penalty, to use it as the fulcrum for progressive discipline because it's out of order. It isn't meeting the progressive discipline goals of pyramiding on prior misconduct and imposing heavier sanctions.

He states that what the decision finds is that it is fair to take that proven misconduct into account when you consider what the member's prospects are for rehabilitation and correction. In other words, what degree of specific deterrence is required for this member? And does this prior disciplinary default bear on that discussion? What are the chances for correction and rehabilitation in light of that later misconduct? Mr. Cranna does concede that that misconduct happened seven years ago, even though it was only relatively recently dealt with.

He states that there may be some erosion of consideration for the impact that might have on his current circumstances, but he believes it remains a relevant consideration of one that can be reviewed.

Mr. Cranna states that with the officer’s service at the time that the incident itself, was isolated. There had been no prior defaults; however he suggests that I can take into account that later misconduct in determining whether or not it is, in fact, an aberration in the member's service history.

Speaking to whether or not there was provocation, Mr. Cranna states that it was my finding that there was no meaningful provocation here at all. The constable misread the situation to the extent that his use of force was highly disproportional.

Looking at whether or not the conduct was premeditated or committed at the spur of the moment, again he states that my findings of fact made it clear that this was not a premeditated act by the constable.

Mr. Cranna then went on to speak of the seriousness of the misconduct stating that the seriousness was quite high.

The force must be necessary, it must be reasonable and it must be proportional to the circumstances. Exceeding those boundaries, to any degree, is serious, but there are additional factors here that increase the degree of severity; the application of force to a minor in extremely vulnerable circumstances, passed out in the back of the vehicle, and incapable of responding meaningfully to direction.

The repeated deployment of an intermediate weapon in circumstances that were completely unnecessary; the striking an additional blow to Mr. C.D.'s head; the failure to give Mr. C.D. any meaningful time within which to comply; and the resulting lasting injuries and trauma to Mr. C.D..

Mr. Cranna submits that it is clear that in the context of excessive force cases, this incident falls on the more serious side of that spectrum for those reasons.

He states that we are also to assess the officer's degree of cooperation, frankness, and overall attitude towards the proceedings and in this matter he states there are more problematic issues when it comes to frankness and overall attitude. With respect to candor, he would note the numerous references in my decision to the member's testimony, and particularly my findings respecting the credibility of that testimony relating to his overall recall of the event, the evolution of his testimony over time, and his discredited reliance on officer safety principles.

He also notes my findings respecting the proven count of insubordination and, what he characterizes as a somewhat cavalier way, in which the member responded or did not respond to the requests of the Crown.

It is his submission that neither frankness nor overall attitude adds any mitigation credit to the member in this case and in fact in those respects, may be somewhat aggravating.

Mr. Cranna then spoke of the delay and rehabilitation in this matter. He says that it is appropriate to consider delay when assessing fair and just sanction.

Mr. Cranna provided a copy of the Alberta Court of Appeal decision in Wachtler, where the court agreed that it would be appropriate to take those factors into account in determining a just penalty. He added that Wachtler, and subsequent cases like it, do not look simply at the overall period of time but what Wachtler does is to apportion the time delay to the appropriate parties. This proceeding is being run by the Chief of Police but the Chief of Police is not responsible for the vast periods of delay that have occurred on this file.

He says that it is fair to say the Chief may have to bear some burden for delay during the initial investigation of this matter but he doesn’t believe that the delay was significant in the circumstances and certainly not long in excess of what

would have been a reasonable time frame to complete the investigation. What happens after that is out of the Chief's hands.

Mr. Cranna then provided a review of the chronology of the time this matter has taken to get to Hearing. He adds that if we are using the appropriate apportionment method, his submission is that the delay here provides only minimal mitigating credit to the member.

He adds that the delay and what that intervening time period has allowed him to do is to continue to work and give him an opportunity to demonstrate that he is a valuable member of the service deserving of a second chance.

Mr. Cranna states that that the constable's rehabilitation process begins in January 2006 and his Service Record Summary shows that since that time, the Constable has taken on progressively more responsible and elite roles within the service. His most recent posting now is with the EPS gang unit, which is another coveted position.

Mr. Cranna then spoke to a number of cases that he describes as being on point and pertinent providing the range of appropriate penalties.

Taking those decisions into consideration, he states that it is the Service's view, the appropriate sanction for the use of force matters, including both one and two, is a sanction of a suspension without pay in the range of 80 to 100 hours. Such a suspension without pay would have the economic consequence of approximately $4,000 to $5,000 in lost pay for the member.

With respect to the insubordination issue and the failure to deal with documents correctly, and in light of those cases, and in light of the context here, the Chief's request and submission is that there be a sanction imposed of 10 to 15 hours of suspension without pay for the insubordination that has been proven.

Counsel for the Cited Officer

Mr. Hladun commenced his submission entering a number of letters of reference from former and current supervisors of Constable Wasylyshen from within the Edmonton Police Service on behalf of Constable Wasylyshen.

Mr. Hladun then provided a Service Summary that had been supplied by Constable Wasylyshen that contained reference to letters of praise and unofficial recognition.

He also states that as a result of this case and the fact that it's gone on as long as it has; Constable Wasylyshen's career has been adversely affected. He has lost promotional opportunities, as well as lateral movement and training opportunities.

As well, he was removed from his current assignment in October 2012, naming this case, due to unusually large amount of media attention as compared to other cases.

Mr. Hladun then spoke about the 68 second timeframe that the Taser deployment occurred in saying there was a proper context that needed to be considered. He states that the evidence of Detective Q.R. was that the training that was given and the deployment in 2002 was a far cry from where it is today 10 years later. The relevance of it is the amount of experience that members of the Edmonton Police Service had at that time, the lack of policy, and how that intermediary weapon was to be employed or used and in what context was new and fresh as opposed to today.

Regarding the count of Insubordination, Mr. Hladun stated that this charge resulted from laying a charge of breach of recognizance. The evidence on the breach was where he was and what he was doing being the drinking. Constable Wasylyshen provided his notes. No other officer present completed notes. Statements from the officers didn't exist.

The requests were made by the defence lawyer, Mr. Engel, and they had to do with peripheral extraneous matters and the Crown counsel embarked upon getting them. Mr. Hladun stated that he didn't know what was missing or what was not provided that result in any sort of difficulties with the trial. The trial proceeded with a voir dire on a charter application. There was no complaint about anything missing. There was no adjournment. There was no delay. He didn't know what was amiss that Sergeant F.F. had to run out and get.

He stated that Mr. Cranna was correct saying there was no provocation; there was a misreading of the situation. Regarding being committed on the spur of the moment, it is obvious on the evidence, it was. It was a misapplication of the Taser over 68 seconds.

Mr. Hladun then spoke about the letters of reference in terms of Constable Wasylyshen's personality and behaviour. He states that this is not a mean spirited person preying on poor defenseless individuals. He describes this as an isolated incident.

Mr. Hladun then spoke of the delay in getting this matter to this point. The delay was subject to argument before this hearing regarding a fundamental justice delay and then a Charter rights application at the Court of Queen's Bench.

Mr. Hladun then spoke of the investigation into Constable Wasylyshen's misconduct and the various levels. The fact that the complaint was reviewed by the Calgary Crown and no charges resulted and the fact that the complaint was not sustained by Acting Chief daCosta.

Ultimately the matter went to the LERB and the Edmonton Police Service was directed to hold this hearing.

The matter occurred in 2002 and when discipline is meted out, most often the point of it is to fix some remedial behaviour, to give corrective action or counselling in order to change behaviour.

Mr. Hladun states that already, without this finding, we have a police officer who has done that. He's rehabilitated. He's got absolutely glowing reports and he's a tribute to the City of Edmonton being a police officer with this high standard of work and contribution.

Regarding a penalty, Mr. Hladun asks what I can do to have some effect on something that happened over 10 years ago. If discipline is meant to change his behaviour, his policing, his methods, he's already done that.

He states that in the Criminal Courts, an assault conviction attracts a fine of $150.00 to $500.00 and the suspension without pay being sought by the Presenting Officer would amount to in excess of $5,000.00. He describes the penalty being sought as heavy.

Speaking to the count of Insubordination, Mr. Hladun states that a reprimand would be an appropriate penalty. Regarding the use of force charges, he states that it would be inappropriate to ask for a reprimand and that a minimal suspension would be appropriate.

Discussion

It is my role as the Presiding Officer of this hearing to impose a penalty upon Constable Wasylyshen relative to the charges that have been proven against him.

To assist me in this task, the LERB has provided a statement of principles regarding disciplinary sanctions. These statements of principles, given in Amery v. Young 1993 are the guidelines for imposing discipline in these matters.

1. *The principle purpose of police discipline is to advance the organization objective of effective and efficient police services to the community*.

   It is important that the public have the utmost trust and confidence in its Police Service. Without the support of the community a police service's level of effectiveness is severely hampered. The public must see that the police service is willing to recognize and effectively deal with members who commit disciplinary offences.

Police organizations are ruled based with clear written policies and procedures in place. These policies and procedures are often premised on legislation such as the Criminal Code as well as case law and are in place to ensure that members of the policing organization are fully aware of the requirements of their position and the best practices in carrying out these requirements.

When a member fails to abide by these policies and procedures, whether it is an administrative or operational, the impact on the ability of the organization to deliver effective and efficient policing can be severely jeopardized.

2. *A fair and just sanction in the circumstances is the goal. The public interest must be considered in those cases where it is engaged*.

This matter has attracted significant and ongoing interest from the public over the course of the ten year period. The fact that this was a use of force where a Conducted Energy Weapon was used and the continued controversy into the use of such weapons only heightens the engagement of the public interest. That being said, an appropriate balance must be struck and the sanction that is imposed upon the Constable must meet the overall goals of police discipline. Police discipline is an aspect of the employer/employee relationship and this aspect is often overlooked or misunderstood by the public at large.

3. *In cases where organizational or administrative factors have played significant roles in contributing to the misconduct that contribution must be considered. In those instances organizational policy or procedure should take priority for correction. Any individual discipline imposed in such circumstances must consider the overall context.*

There was an abundance of evidence led during the hearing regarding the policies, procedures and training related to the Taser as was in place in the 2002 timeframe. As well there was evidence as to how these policies, procedures and training have adapted over the years as a result of experience. They are now markedly different.

Constable Wasylyshen took his initial Taser training in 2002, the same year as the incident with Mr. C.D.. At that time there was little to no training on the use of the Taser in Drive Stun Mode. There was evidence that some officers thought the result of using the Taser in stun mode would be similar to when the weapon was used in probe mode. This premise has since been debunked and the Taser in Drive Stun Mode is simply a pain compliance tool that has little effect in gaining compliance.

The sanction of Constable Wasylyshen's misconduct must be viewed in the general context of the time period in which the misconduct occurred.

4. *Both aggravating and mitigating factors should be considered in determining a just sanction or punishment*.

A. *Previous good record of the officer*.

In June 2010, Cst. Wasylyshen was assessed a penalty of two 50 hour suspensions from duty relating misconduct charges of Discreditable Misconduct and a Reprimand on a third count of Discreditable Conduct. The event that led to these charges occurred in December 2005 and the resulting criminal convictions occurred in April 2009.

This current matter occurred in 2002, before the above occurrence however when the above matter was dealt with, this current matter had yet to go to Hearing and was not part of the penalty deliberations

In holding with the premise of progressive discipline, the above noted discipline cannot and will not be taken into consideration as it occurred three years after this incident.

As part of the Cited Officer's submissions on penalty, I was provided his Service Record Summary along with a number of letters of reference.

Having reviewed these letters there is a very common theme, that being that Constable Wasylyshen is a hardworking and dedicated police officer who has some very identifiable and distinctive skills.

The Presenting Officer warns that I should be wary of references provided by friends of Constable Wasylyshen however I note that where there has been a friendship indicated, the friendship started as a work relationship. The supervisors providing the references are all well respected current and former members of the Edmonton Police Service. My experience is that like people attract and can form friendships with people who emulate their values, work ethic and skills.

Constable Wasylyshen has developed as a police officer over the past ten years. His skills have been recognized by his peers and his supervisors. His ever increasing responsibilities in his assignments within the constable rank and in the Acting Detective rank are indicative of this.

This was all being accomplished while under the scrutiny of this disciplinary investigation and proceedings.

B. *Long Service of the officer.*

Constable Wasylyshen has been a police officer for 14 years. At the time of these offences he had 4 years of service of which 3 ½ was street duty.

C. *Whether or not the misconduct was an isolated incident in the employment history of the Officer***.**

It appears that this is an isolated incident in Constable Wasylyshen's employment history.

D. *The existence or absence of provocation.*

It was my finding that there was no meaningful provocation here at all. The constable misread the situation to the extent that his use of force was highly disproportional.

E. *Whether or not the misconduct was premeditated or was done on the spur of the moment being aberrational in nature*.

I found in my decision into this matter that it is evident that these applications of use of force upon Mr. C.D. were spur of the moment.

I also cannot say that Constable Wasylyshen's failure to comply with policy relating to reporting and providing disclosure could be considered premeditated although he made conscious decisions throughout the time period that led to the failure to meet the required diary dates.

F. *Whether the imposition of a particular penalty will create a special economic hardship for an officer in light of his/her particular circumstances.*

There has been no information to indicate the imposition of a particular penalty would create a special economic hardship.

G. *Evidence that the rules or internal policies of the police service (written or unwritten) have not been uniformly enforced or applied, thus constituting a form of discrimination.*

There is no evidence of this factor.

H. *Evidence indicating that a police officer misunderstood the nature or intent of a given order or directive and as a result disobeyed it.*

Quite to the contrary, Constable Wasylyshen was more aware of the use of guidelines than most officers. He had specific training in a number of Officer Safety Courses and was well versed in the AACP Use of Force Guidelines. With regards to the initial and ongoing reporting requirements and case management responsibilities, all police officers are well versed as they are a daily responsibility.

I. *The seriousness of the misconduct. In circumstances involving a member of the public, the impact or consequence to that person or persons.*

The seriousness of these misconducts cannot be understated. The commission of the offence of Excessive or Unnecessary Use of Force involving the use of a Taser on a 16 year old is offensive.

I heard evidence on the injuries sustained by Mr. C.D. as a result of the Taser use and while Taser burns heal, often times the psychological injuries are long lasting. He testified to ongoing nightmares and other maladies resulting from this use of force. This is an aggravating circumstance.

The public has an expectation that police officers charged with the responsibility of protecting the public will do so in a responsible manner. They understand that there are times when the use of force is necessary but when they become aware of situations where that use of force is gratuitous, their level of support can wane.

J. *Officer cooperation, frankness and overall attitude*

I have no information before me to lead me to believe that the officer did not cooperate with the PSS Investigation into this matter. He provided his explanatory reports when he was requested to do so.

Constable Wasylyshen availed himself to a full hearing into this matter. This is his right and is not in any sense an aggravating factor.

That being said, I made findings in my decision with regards to his testimony and his credibility that caused me concern relating to his recollection of the event and how this recollection changed over time.

His testimony focused on the justification of his actions not only relating to the use of force, but to the failure to provide disclosure in a timely manner.

I am not convinced that Constable Wasylyshen is either remorseful regarding his actions against Mr. C.D.; or accepting of the decision rendered by me in this matter. I have no statements from Constable

Wasylyshen in this regard and when I couple that with his testimony during these proceedings, I cannot come to any other conclusion.

K. *Circumstances of mental or emotional stress or a context of substance addiction or drug dependence. In considering such circumstances the likelihood of future misconduct arising from the same cause or causes is an important factor.*

No information has been led in this regard.

L. *Other mitigating or aggravating factors unique to the personal circumstances of the officer or the misconduct involved.*

A factor specific and unique to this matter is the time lapse from the date of this incident to where we are today. The matter has taken in excess of 10 years to get to this stage. The incident occurred on October 5th 2002 when Constable Wasylyshen was a relatively junior member of the Police Service. He is now a senior member of the Service. The complainant, Mr. C.D. was a 16 year old boy and he is now a 26 year old man.

Delays in police disciplinary proceedings are not unusual with many matters taking three to five years before final resolution but this matter is in a league of its own.

Mr. Cranna submits that the delay is to be apportioned and I fully agree with this submission as some of the delay over the ten year timeframe is attributable to the cited officer, but most of it was not.

The original complaint was submitted on October 6th 2002, one day after the incident and the initial investigation into the allegation occurred between that date and November 21 2002 at which time the EPS recommended the complaint be the subject of a criminal investigation. This criminal investigation took until March 2004 after which the file as forwarded to Alberta Justice for review.

In May of 2005, the Crown advised that no criminal charges were warranted and the EPS directed a Service Investigation into the complaint.

In September 2005 the Service Investigation determined that the complaint is not sustained and that decision is immediately appealed to the LERB by the complainant.

At the LERB, the matter was the subject of several applications and hearings along with two applications to the Court of Appeal by Constable Wasylyshen and other members. In April 2009 there was a Hearing before

the LERB and a decision rendered on August 12, 2009 sending the matter to Disciplinary Hearing. The Hearing then commenced in March 2010.

Where I see issues outside of the control of Constable Wasylyshen relate to the amount of time the EPS took to conduct the Criminal Investigation. This lasted almost 18 months and while I am very cognizant of the limitations on resources and investigative roadblocks, this is still an unacceptable amount of time.

Next is the delay with Alberta Justice and the Crowns' review and resulting recommendations. This file sat at Alberta Justice for 14 months before a decision was rendered. There is no excuse for this in any way, shape or form. The review of the investigative file would take at most a day or two and while I appreciate the work load that the Crown's Officer carries there must also be priorities and a review on such files should be one of them.

There is an irony here that has not gone unnoticed. One of the charges that Constable Wasylyshen has had proven against him is founded in his failure to provide the Crown with timely disclosure despite repeated requests from the Prosecutor. Apparently timely responses to investigative files regarding police officers were not the norm for Alberta Justice in 2004 and 2005 either.

I also believe that the Service Investigation into the complaint that lasted from May 2005 to September 2005 was excessive in time. While there would be some procedural matters and additional statements required, the vast majority of the investigation would have been completed in the Criminal Investigation. Again, this is not time that could be apportioned to Constable Wasylyshen.

So, where does this lead? Constable Wasylyshen has ridden the emotional rollercoaster of this complaint for over 10 years.

If this was a criminal matter, it would have been dismissed as a charter breach for the unreasonable delay but this is not the case.

I am convinced that Constable's Wasylyshen's career has been adversely affected by this investigation and process which is only now coming to a close. I have heard submissions that he has lost lateral movement opportunities, lost training opportunities as well as having been pulled out of the promotional process. A member with 14 years of service with the skill set of Constable Wasylyshen is in normal circumstances, very promotable.

I've also been given tangible information that Constable Wasylyshen was removed from his latest assignment, that being a coveted spot in the Gang Unit; this being a direct result of this matter.

Mr. Cranna raised an interesting point that on one level, the delay has benefitted Constable Wasylyshen. During the period of time from 2006 to present, he has progressively demonstrated his skills and competence proving himself to be an effective police officer. If this matter had been adjudicated prior to December 2005; with the subsequent discipline relating to an event in 2005, there would have been a significantly different outcome on Constable Wasylyshen's career.

Constable Wasylyshen has also grown as a person in the 10 year time frame. He is now married and a father and has matured as a person.

6. *Deterrence of other police officers and maintenance of public respect of the police are legitimate goals in the context of police discipline.*

Speaking to the specific deterrence for Constable Wasylyshen, I believe that this goal has been achieved outside of this decision. Constable Wasylyshen has experienced ongoing consequences as a result of this incident, each of them acting as a reminder of his actions.

As a general deterrence, police officers must be aware that there are boundaries that must not be crossed. Reasonableness and proportionality in the application of force must be second nature for a police officer. When officers act in a manner without being reasonable or proportionate, there will be consequences.

The public is entitled to this expectation and it is proper for the policing organization to seek and maintain the public's respect of its disciplinary processes.

7. *Consistency in disciplinary sanctions should be strived for. Like instances of misconduct should attract like sanctions*.

Mr. Cranna provided a number of Edmonton Police Service disciplinary decisions relating to the Use of Force involving the deployment of a Taser or OC Spray. Additionally he provided another EPS decision on an Insubordination matter relating to the mishandling of exhibits and inefficient reporting.

In the K.K. case, the Constable responded to a disturbance at a local bar, approached the complainant who was under control, and deployed the Taser. In the time period between the occurrence and the hearing, the Constable suffered a financial loss due to the lack of acting time. This was

assessed as a mitigating factor and the member was suspended without pay for a period of 30 hours.

The L.L. matter, was an incident in 2005 where the complainant attended at a police station seeking assistance having had just been assaulted. The constable instead, kicked and pepper sprayed the complainant. As a result, the Constable was suspended without pay for a period of 60 hours.

In the M.M. matter, in 2003 the officer responded to a lower end hotel where he came across two people who were passed out. The constable applied the Taser to both individuals in circumstances that were inappropriate and as a result was suspended without pay for a period of 90 hours.

Another case provided is the 2009 matter involving Constable's N.N. and O.O.. This was an incident where the officers mistakenly identified the complainant as the instigator of a noisy party that was turning dangerous. They pulled him off an apartment building elevator and delivered a series of blows to him in an effort to restrain him and put him under arrest. There was no use of intermediate weapons and the penalty imposed was a suspension without pay of 10 hours.

The last decision referenced was the P.P. decision arising out of a 2006 matter. This was an instance where the member had improperly handled exhibits on investigated files, and he had failed to provide timely or complete reporting with respect to arrests that he had made. In this case the member had also taken immediate responsibility for his defaults. He entered an early guilty plea. He had no disciplinary record. He had a number of commendations and letters of support and taking all those factors into account, a penalty of suspension without pay of 20 hours was imposed.

While these matter and the associated penalties are somewhat relevant to my considerations, they can only advise me as to what has been deemed appropriate to the specific circumstances of those particular incidents. The circumstances of each incident are always different. The circumstances of the individual's officers are always unique as are they of the complainant.

This principle was aptly addressed by Superintendent Logar of the Edmonton Police Service in his decision on a matter involving Constable Q.Q. dated September 14. 2006 at page 42 where he stated:

"It's the facts that create a particular fit punishment; and to rely blindly on penalty matrices or precedents most often, and I am quite convinced that I'm correct on this, would lead to an inappropriate punishment that could

well go against the interests of the members and could actually bring the reputation of the disciplinary process into disrepute."

Needless to say, while the goal of consistency in attracting like sanctions is desirable, given the wide ranging facts and circumstances of the individuals involved in disciplinary matters, the sanctions provided in other cases can be seen as no more than rough guideline.

Discussion re Penalty

In **Count No.1** it was proven that Constable Wasylyshen used his Taser during the arrest of C.D. in a manner that was unreasonable and disproportionate given the circumstances. The application of the Taser with 8 trigger depressions in a 68 second timeframe without providing reasonable time for compliance is unacceptable and frankly an embarrassment to policing.

Of the three counts that were proven against Constable Wasylyshen, this by far is the most serious and as such will garner the most comment.

The Taser as a tool is a benefit to policing as well as to the public when it is used in accordance with the law and police policy.

However when it is shown that the Taser was used inappropriately, it can also be a lightning rod for controversy that results in harsh criticism and a lack of confidence in the police in general. When we ask the public to support the police in our efforts to serve them, the public must have confidence in everything that we do.

In Amery v Young, the decision of the LERB that provided the Disciplinary Objectives, at page 7 it states:

"In regard to police discipline it must also be mentioned at the outset that a police officer, unlike an employee in the private sector, occupies a special status as a public office holder. With that office comes unique and extraordinary powers and the obligation to use those powers within the confines of the law. Of primary concern, in relation to the public interest, are powers of arrest, detention, search, the use of force, and charging authority. It may be particularly so that an abuse of these powers invites a loss of public trust which in turn may tend to generally damage the reputation of a police service. Those involved in the disciplinary investigation process or in the imposition of disciplinary sanctions must accordingly be mindful of the extraordinary public interest that is engaged in circumstances of misconduct involving these powers."

This passage is very applicable to the matter before me. Constable Wasylyshen abused the powers of his office and did not meet his obligation to use his powers within the confines of the law.

Section 17(1) of the *Police Service Regulation* provides the punishments available for proven allegations of police misconduct. These penalties range from reprimand to dismissal.

I am aware that there are members of the public and some special interest groups that believe that Constable Wasylyshen should be dismissed as a result of this misconduct.

For such a penalty to be imposed and to stand the rigors of appeal it must be shown that the continued employment of the officer is wholly incompatible with the continuation of the employee relationship.

Taking several passages from Ceyssens Legal Aspects of Policing at pages 5-239 and 5-240:

> "*Dismissal represents one of the two ultimate dispositions in police discipline proceedings and a review of the case law in most jurisdictions reveals a considerable chance on the part of appeal or reviewing tribunals to uphold a penalty of dismissal imposed by a presiding officer."*
>
> *"For the purposes of Ontario legislation, the Supreme Court of Canada has endorsed the judgment of the Ontario Court of Appeal that a police employer seeking to dismiss a police officer must establish that the police officer is not fit to remain an employee."*
>
> *"The Ontario Civilian Commission on Police Services has stated that dismissal should be reserved for the most serious offences involving no hope for rehabilitation or significant mitigating factors, and where the police officer is of no further value to the employer or the community."*
>
> *"The Federal Court has examined dismissal by asking whether the respondent police officer had "demonstrated a level of trustworthiness necessary to continue his employment".*

In the LERB case of Lingl case on page 12 it states:

> *"To support disciplinary dismissal the offending conduct whether on or off-duty must be of such a serious nature that it demonstrates that the officer's action is so reprehensible considering all of the circumstances that it is wholly incompatible with the continuation of the employee relationship. The test to be considered is whether or not the officer's misconduct, misconducts, or pattern or history of misconduct is of such a nature that he or she is no longer fit or suitable to hold the public office of*

police officer and to perform the duties and responsibilities of that position."

As previously stated Constable Wasylyshen has proven unequivocally that he has rehabilitated himself and is a contributing and valued member of the Edmonton Police Service. As well he benefits significantly from the previously mentioned mitigating circumstances.

Taking this information as a whole and applying the above noted requirements to substantiate dismissal as a penalty for this misconduct, such a penalty is not only unwarranted but not defensible.

If this matter had been adjudicated at an earlier and more reasonable time, Constable Wasylyshen would not have benefitted from many of these mitigating circumstances. While I do not believe that the matter ever rose to the point that dismissal would have been warranted, a significant penalty far in excess of the penalties offered by Mr. Cranna or Mr. Hladun would have been imposed.

A reduction in seniority in rank and the corresponding pay loss would have been the likely outcome.

I must again state how serious this particular misconduct is and as such, the penalty must still be significant.

In this instance, any sanction that I impose is strictly punitive. The sanction would have nothing to contribute towards rehabilitation or being corrective in nature seeking to educate as it is clear I am dealing with a different police officer and person that was the one who committed this misconduct.

I have considered the submissions of both the Presenting Officer and the Cited Officer and one this count they both suggest that a suspension without pay is warranted albeit at opposite ends of the spectrum.

I believe that such a sanction is appropriate in this instance and taking all of the facts and factors into consideration, I hold that the maximum amount of hours is the most appropriate penalty.

In relation to count No. 1, it is my order that Constable Wasylyshen be suspended from duty without pay for a period of 80 hours, that being the maximum allowed under Section 17(1)(c) of the *Police Service Regulation*.

In **Count No. 2** it was proven that during the arrest of Mr. C.D., Constable Wasylyshen administered a blow to Mr. C.D.'s head by means of a head stun. This blow caused an injury below Mr. C.D.'s eye. In my decision I found that this use of force was deemed to be proven misconduct due to the fact that any force used subsequent to the unlawful use of the Taser was also

excessive. This particular use of force occurred in the heat of the moment during what Constable Wasylyshen believed was the attempted escape of Mr. C.D.. This was not a flagrant action as was the case with the application of the Taser but still one that inflicted injury and in the totality of the circumstances again unwarranted.

Again, the Presenting Officer and the Cited Officer agree that a suspension without pay would be an appropriate penalty for this count. I am of the same opinion. Without minimizing the seriousness of this aspect of the incident, this particular use of force is by no means comparable to the use of force in count one and therefore will attract a lesser penalty.

In relation to count No.2, it is my order that Constable Wasylyshen be suspended from duty without pay for a period of 20 hours.

In **Count No. 4** it was proven that Constable Wasylyshen being the member i/c case and responsible for gathering evidence and statements from the other EPS members involved in the arrest of C.D., did not do so in a timely manner.

Proper reporting and case management is a pillar of policing responsibilities. As police, we are tasked with the responsibility of investigating offences, collecting evidence and taking statements from all parties and upon laying charges, managing that case through to its conclusion in court.

Our partners in the Crown Prosecutors Office have an equally important role in this process, ensuring a successful prosecution of the accused. Police officer's often complain that the Prosecutor's do not understand policing, the constraints faced and the often unrealistic pressures on time and resources; well the Crown says the same things about the police and rightfully so.

Therefore when a Prosecutor finds it necessary to request additional information from the investigator, it should not be questioned and the request should be fulfilled and does so within the required time frames.

In submission, the cited officer stated that the request made by the Crown on behalf of Mr. C.D.'s counsel had to do with peripheral extraneous matters. Well the fact is the Crown saw the need to provide this information to Mr. C.D.'s Counsel and therefore any question on that is put to rest.

He also questioned what was provided that was not provided by Constable Wasylyshen and one item I can think of would be the "Control Tactics Report." In my decision I was quite clear that I did not believe that Constable Wasylyshen took these Prosecutor's requests seriously and felt that he would get to them when he could. They certainly were not a priority to him. I'm still not sure that he realized his inaction and inattention was as serious as it was.

There is no question that the “administrative” side of policing does not provide the adrenalin rush that being out on the street does but it is equally as important.

I believe that Constable Wasylyshen has matured as a police officer enough to now understand the importance of this aspect of policing having been involved in more and more serious and complicated investigations. But, there are many police officers who still do not give this aspect of their work the priority it requires.

The general deterrence aspect of this sanction must be significant and unfortunately must be emphasized; this time on the shoulders of Constable Wasylyshen.

The Presenting Officer suggests that a suspension without pay in the range of 10-15 hours would be an appropriate penalty and the cited officer suggests that no more than a reprimand is warranted.

Little discussion has been given to the impact that Constable Wasylyshen’s misconduct had on other parties and the work it created for them. The additional work for the Crown, the Court Services Unit and all those individuals that were drawn into dealing with the failure to comply with the requests in a timely manner are aggravating factors.

Accordingly, I reject the suggestion that a reprimand is sufficient in this matter and I believe that a 10-15 hour suspension without pay is a bit too lenient.

In relation to count No.4, it is my order that Constable Wasylyshen be suspended from duty without pay for a period of 20 hours.

ORDER

1. In relation to count No. 1, it is my order that Constable Wasylyshen be suspended from duty without pay for a period of 80 hours.

2. In relation to count No.2, it is my order that Constable Wasylyshen be suspended from duty without pay for a period of 20 hours.

3. In relation to count No.4, it is my order that Constable Wasylyshen be suspended from duty without pay for a period of 20 hours.

Constable Wasylyshen suspension without pay is for a total of 120 hours with this being the financial equivalent of approximately $5,500.00. He will begin to serve the suspension commencing with the first pay period in December 2012, and will serve no less than 10 hours in each pay period.

Original Signed

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Paul Manuel, Inspector (Ret'd.)
Presiding Officer

Presenting Officer: Mr. Derek Cranna
Counsel for the Cited Officer: Mr. M. Hladun

Issued at the City of Edmonton, November 5, 2012