

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 a complaint and disciplinary proceedings against
Regimental Number 1870 Constable Ahmed ALKAROUT
Regimental Number 2357 Constable Shane FAULKNER

COPY

Decision

Procedural background

On January 27, 2009, Constable Alkarout was charged with the following disciplinary misconducts:

Count #1

It is alleged that on or about April 10, 2005, in the City of Edmonton, in the Province of Alberta, you authored a police Member Witness Form, which was false and misleading, thereby committing Deceit contrary to Section 5(2)(d)(i) of the Police Service Regulation.

Count #2

It is alleged that on or about March 29, 2006, in the City of Edmonton, in the Province of Alberta, you provided inaccurate testimony at the Preliminary Hearing of R. v. Faulkner, thereby committing Deceit contrary to Section 5(2)(d)(ii) of the Police Service Regulation.

On the same date, Constable Faulkner was charged with the following three counts of disciplinary misconduct:

Count #1

It is alleged that on or about December 30, 2004, in the City of Edmonton, in the Province of Alberta, you kicked Archie Waskahat in the ribs while he was in handcuffs and lying on the ground, thereby committing Unlawful

or Unnecessary Exercise of Authority contrary to Section 5(2)(i)(i) of the Police Service Regulation.

Count #2

It is alleged that on or about December 30, 2004, in the City of Edmonton, in the Province of Alberta, you destroyed a camera owned by Priscella PAUL, without her consent, thereby committing Discreditable Conduct contrary to Section 5(2)(e)(viii) of the Police Service Regulation.

Count #3

It is alleged that on or about December 30, 2004, in the City of Edmonton, in the Province of Alberta, you failed to record your involvement with Archie WASKAHAT or Priscella PAUL, until you were requested to do so several months after the incident, thereby committing Insubordination contrary to Section 5(2)(g)(ii) of the Police Service Regulation.

A joint disciplinary hearing began on March 26, 2009. Mr. Craig Boyer acted as the Presenting Officer. Mr. Alex Pringle, Q. C. acted for Constable Faulkner. Mr. Michael Chwok, Q. C. acted for Constable Alkarout. Both officers denied the charges. When the hearing resumed on May 14, 2009, an agreed statement of facts was read into the record (reproduced below). The following exhibits were submitted:

- 1A. Notice and Record of Disciplinary Proceedings issued to Constable Alkarout
- 1B. Notice and Record of Disciplinary Proceedings issued to Constable Faulkner
- 2A. A memorandum over the signature of the Chief of Police appointing me the Presiding Officer at the hearing involving Constable Alkarout
- 2B. A memorandum over the signature of the Chief of Police appointing me the Presiding Officer at the hearing involving Constable Faulkner
- 3A. A memorandum over the signature of the Chief of Police appointing Mr. Boyer the Presenting Officer at the hearing involving Constable Alkarout
- 3B. A memorandum over the signature of the Chief of Police appointing Mr. Boyer the Presenting Officer at the hearing involving Constable Faulkner
4. A book of exhibits containing above enumerated notices and memoranda as well as several other reports and members' witness form
14. Agreed statement of facts
15. Constable Faulkner's Service Record Summary
16. Performance Review and Development Forms from 2004/2005 and 2007/2008 for Constable Faulkner

Evidence

The following agreed statement of facts was read into the record:

1. *Constable Ahmed Alkarout, Registration No.: 1870, was on duty on December 30, 2004 as a member of the Patrol Services Bureau of the downtown division of the Edmonton Police Service.*
2. *Constable Shane Faulkner, Registration No.: 2357, was on duty on December 30, 2004 as a member of the Patrol Services Bureau of the downtown division of the Edmonton Police Service.*
3. *In December of 2004, Constable Ahmed Alkarout had been a member of the Edmonton Police for ten years.*
4. *In December of 2004, Constable Shane Faulkner had been a member of the Edmonton Police for two years.*
5. *Priscilla Paul died on August 15, 2006.*

Before the first witness was called, Mr. Boyer advised that Mr. Waskahat died just days before the hearing. Evidence from two of the most important witnesses therefore was no longer available. Notwithstanding that this considerably weakened the Service's case against the two officers, Constable Faulkner entered a guilty plea to counts No. 2 and 3 (destruction of Ms. Paul's camera and failure to submit a report detailing his involvement with Mr. Waskahat in a timely manner).

Testimony of Constable Jody Ponto

Constable Ponto has been with the Edmonton Police Service for 12 years. On December 30, 2004, he was performing the duties of acting Sergeant. He was partnered with Constable Jody Vegh. Early in the evening on that date, the two officers responded to Grand hotel to look into an allegation that Mr. Waskahat was selling drugs. After they escorted him outside, he began yelling at the top of his lungs and posturing wildly. The Constables chose not do anything more with Mr. Waskahat and attended to other duties. At about 7:15 p.m., the Constables went to York hotel. Mrs. Waskahat, Mr. Waskahat's mother, was at the front door. Constable Vegh knew that she was wanted on a warrant. However, after the Constable advised her that she was under arrest, Mr. Waskahat objected saying that, since his mother was an elder, she could not be arrested. When he began actively interfering with Constable Vegh's attempts to effect the arrest, Constable Ponto grabbed Mr. Waskahat by the arm and pushed him away. Mr. Waskahat then took his jacket off, flung it away and advanced on the Constable with his fists clenched. Constable Ponto told him to desist,

... and then I just grabbed onto his arms, I said Look, this is – you know, again, you're making matters worse, just go away. You know, it will be a quick warrant, we might even be able to PTA her [release on a Promise To Appear}, I don't know what I said, and we can get you – you can just leave the area. (p. 20)

Considering Mr. Waskahat's size, 5'10", weight, about 200 lbs, and apparent strength, Constable Ponto knew that, if a fight began, it would be very difficult. There was some pushing between the two on the sidewalk, followed by the Constable taking Mr. Waskahat to the ground. As this happened and the struggle continued on the ground,

Constable Vegh came by and delivered a baton strike to Mr. Waskahat's leg to help Constable Ponto, and then went in the hotel to catch up with Mrs. Waskahat. This was not safe; the York hotel is an establishment with dangerous clientele. Constable Ponto stopped trying to control Mr. Waskahat and followed Constable Vegh into the hotel to help him.

And so I was maybe, I don't know, 10 feet into the door, I'm not sure how far in, but Mr. Waskahat had just followed me in again and just screaming. And so he started coming at us again because he can still see, you know, that Constable Vegh is still trying to put handcuffs on his mother. Constable Vegh again then left Ms. Waskahat, came over, assisted with me putting handcuffs on Mr. Waskahat, and Jody - Constable Vegh told him that he was under arrest for obstruction at that point. (p. 23)

The two Constables pushed Mr. Waskahat against the nearest wall. They managed to place the handcuffs on one wrist, but had great difficulty completing the task. However, when the second clasp came around, it caught Constable Ponto on his hand, causing a bleeding scratch. With the handcuffing completed, Constable Vegh helped escorting Mr. Waskahat outside. At the door, Mr. Waskahat turned around and spat in Constable Vegh's face. Constable Ponto and Mr. Waskahat nevertheless proceeded to the patrol car. It was at that moment that Mrs. Waskahat came tumbling out of the hotel. Constable Vegh was still trying to handcuff her. Mr. Waskahat became enraged.

And so he started kicking at the car, kicking at the front fender. I'm just trying to hold on to him. He's kind of - seemed to be elevating himself, kicking on the car, lifting himself up, pushing back on me, and I tried to - he kicked the front fender once, he kicked the door, I think twice, and I was trying to get him under control. It wasn't happening. (p. 25)

The Constable succeeded pushing Mr. Waskahat to the ground, but he kept on ... *bouncing around underneath* (p. 26) the Constable. Constable Faulkner came to assist and seemed to deliver a kick in Mr. Waskahat side. As to the effect the kick had, the Constable explained as follows:

Q: What was Archie's reaction to that particular kick?

A: He ceased and desisted at that point as far as any struggling and stuff was concerned.

Q: You think that kick itself is it reasonable to conclude convinced him to cease and desist?

A: It could have been part and parcel of everything as far as me on top of him trying to control him along with that. Yeah, I imagine some kind of pain compliance, yeah, changed his mind otherwise, for sure. (p. 33)

After the struggle ceased, and Mr. Waskahat was stood up, Constable Ponto noticed that he (the Constable) was injured.

... I looked at my hand and I made a remark Oh, you know, my handcuffs bit me. It wasn't to anybody in general. It was just an observation. I was just talking out loud and, you know, I noted that. We have to think about maybe exposure or something from this fella. (p. 27)

Later, when he was clarifying his previous answers, the Constable also said this:

Q: Okay. Was the skin broken?

A: I believe it was. I believe it was on the back of my right hand – I think my right hand.

Q: Can you be absolutely sure today that you weren't bitten by Mr. Waskahat?

A: Not 100 percent. I'm – like I say, I'm pretty sure I wasn't bitten, but, as I said, it was pretty stressful situation at that time. I ... (p. 30)

...

A: ... but it was after Constable Faulkner was able to help me get him under control, we were able to stand him up, and then at that time I was able to assess, you know, what – maybe my own injuries and stuff, what had happened, and it was at that point I said, Oh, jeez, I think my handcuffs bit me because I had felt it earlier when we were putting him in handcuffs. I'd felt it earlier and the, again, made that observation afterwards. (p. 31)

Since the altercation happened immediately northeast of police headquarters, Constables Vegh and Ponto walked Mr. Waskahat to the downtown division offices. As they placed him in the holding cells and began to put his property into a bag, Mr. Waskahat again spat in Constable Vegh's face. Because of this, two other Constables had to place a spit net over Mr. Waskahat's head.

Testimony of Constable Ahmed Alkarout

Constable Alkarout has been with the Edmonton Police Service for about 15 years. On December 30, 2004, he was in Downtown division patrol. On that night, Constable Faulkner was his partner. At about 7:20 p.m., he was in police headquarters when he heard a very brief transmission on the police radio. It sounded like an officer was in some type of a struggle. The radio was traced to Constable Ponto who confirmed that, a short time ago, he had been in a fight, but that everything was now fine. About five minutes later, when Constable Alkarout and Constable Faulkner were leaving the underground parkade at police headquarters, Constable Ponto was just exiting the hotel with Mr. Waskahat.

As we were crossing [the street], Constable Ponto's walking to his vehicle with the accused who at this point was now thrashing around, bucking around, flashing around wildly. To me it looked like he was trying to get away.

I observed him kick the vehicle, the front of the vehicle one or two times. Constable Faulkner pulled the vehicle forward. (p. 42)

As he exited the patrol car, Constable Alkarout noticed Constable Vegh crashing through the front door of the York hotel. His arms were stretched out as if he was trying to hold on to someone. It turned out that Constable Vegh was trying to control Ms. Waskahat. Constable Alkarout helped Constable Vegh accomplish the task.

But at this point I could hear over my right Archie Waskahat yelling and screaming Leave her alone you fucking pigs, and he was enraged, kicking the car, you could hear the thumping. I presume him kicking – the thumping of metal repeatedly kicking the vehicle.

We secured Martha, she was handcuffed, I left her in the custody of Constable Vegh, and I ran over to assist. At that point, I could see that Archie Waskahat was taken to the ground, Faulkner – Constable Faulkner was on one side and TA Sergeant Ponto was on the other side. He was in a prone position face down, but he was still wiggling and fighting and yelling and screaming.

At that point, we went to grab – to pick him up and I observed Ponto, Constable Ponto, jump up and grab his hand, and I asked him what's wrong. He says He bit me, he bit me. Quickly referenced his hand. I believe it was his right hand. Referenced his hand and I could observe a fresh – it was an abrasion and a scrape. I've been bit before, so it was consistent. There was a slight tear in the skin I would say probably about an inch, inch and a half long, and I said You better get that checked out. He said I'll take care of it later. Obviously he is upset, very stressed. (pp. 43, 44)

After the incident was concluded, Constable Alkarout returned to other duties. He did not prepare any reports until April 10, 2005 (over three months later) when the staff from the court liaison section requested that he submit a police witness form. The last four lines in that report read as follows:

There was a look of discomfort on TA Sergeant Ponto's face. TA Sergeant Ponto showed me the top of his hand and stated that he was bit by Archie Waskahat. TA Sergeant Ponto's hand was covered in saliva and there was a small abrasion with a slight break in the skin. (Exhibit 7, pp. 46, 47 of the transcript)

Constable Alkarout recounted the relevant events in the same way he testified at a preliminary inquiry on March 6, 2000.

Final arguments

Submissions relative to the matters involving Constable Alkarout

Presenting Officer Mr. Waskahat could not testify. His version of events therefore remains unsaid. Constable Ponto said that he did not recall being bitten, but did say that the event was very stressful. Constable Alkarout not only put in his report that Mr. Waskahat bit Constable Ponto, he also testified to the same effect at the preliminary inquiry. The question then becomes, was his mistake of the sort to constitute a disciplinary misconduct? Several decisions in the context of discipline of various professions stand for the proposition that not every mistake amounts to misconduct. A mental element has to be present as well. An error does not automatically become negligence. The evidence at the hearing disclosed that there was an aggressive struggle with Mr. Waskahat, that Constable Ponto sustained injury to his hand, and that Constable Ponto then talked about the injury using the word bite or biting. In all fairness, then, it is necessary to point out that Constable Alkarout may well have been in error, that he misinterpreted what he heard when he wrote the report and then testified in court. If the testimony showed the mental intent to deceive or was openly negligent to the issue of truth, the two disciplinary misconducts stand proven. If that is not the case, neither charge has been proven.

Counsel for Constable Alkarout No submission was required.

Submissions relative to the matters involving Constable Faulkner

Presenting Officer

What can be said about Constable Faulkner's kicking Mr. Waskahat? To begin with, in the *Yum* case (*R. v. Yum*, 2001 ABCA 80 (CanLII)) our Court of Appeal held that, in some circumstances a kick can be reasonable. Other case law suggests that police officers should not be expected to weigh use of force with the degree of nicety that can be done only after the fact and with the benefit hindsight. In this case, Constable Ponto described how difficult Mr. Waskahat had been: he was aggressive, he clearly did not want to see his mother arrested, and he struggled with the police. When Mr. Waskahat physical size and the location of the incident are also taken into account, it is not possible to argue convincingly that Constable Faulkner used force disproportionate to the need. Since Mr. Waskahat could not testify, the evidence on the count of excessive use of force comes up short.

As far as the second count, destruction of the camera, is concerned, the presenting officer offered the following. Shortly after Mr. Waskahat was walked to police headquarters,

Constable Alkarout learned that a person from the second floor in York hotel took photographs of the police activities at the hotel. He and Constable Faulkner found the person and returned to police headquarters with a camera (a cheap disposable model) that supposedly contained the photographs. Constable Faulkner offered it to Constable Ponto, but the Constable would not accept it. Constable Faulkner then stepped on the camera, destroying it. He threw what was left in the garbage. The person who took photographs did not testify. She died in 2006. Based on the transcripts from the previous court testimony it is not clear if the camera did indeed record anything relevant to these proceedings.

Counsel for Constable Faulkner

Since Constable Faulkner entered a guilty plea to counts No. 2 and 3, submissions relative to the facts were not necessary.

Submissions relative to penalty

Presenting Officer

Amery v. Young (Law Enforcement Review Board 07-93) sets out seven factors that are to be considered in arriving at a just and fair penalty: discipline should be in the public interest, disposition should be fair and just, where organizational factors played a role in the commission of the misconduct, that should be considered, corrective or educational dispositions should take precedence over punishment, consideration should be given to aggravating and mitigating factors, general and specific deterrence are important, and finally, there should be consistency in sanctions.

When the seven factors are applied to the case at hand, the following can be said. The public certainly has every right to expect police officers to handle the seized property in a responsible way and, in doing so, making proper records in accordance with the policy of the Service. The requested penalty should convey to the Constable that his conduct did not measure up to an acceptable standard. It should impose a financial cost and be placed on the Constable's record. Organizational and administrative factors played no role in the commission of these two misconducts. Reprimand in the penalty for count No. 2 is suggested for its corrective and educational role. Finally, since no other decisions arose out of similar facts, consistency cannot be given its due weight.

The Service seeks a reprimand and 10 hours of suspension without pay for count No. 2 (destruction of the camera) and 20 hours of suspension without pay for count No. 3 (failing to document the Constable's involvement with Mr. Waskahat and Ms. Paull).

Counsel for the Constable

Constable Faulkner has been with the Service for six years. Prior to coming to Edmonton, he was a police officer with the Camrose Police Service for three years. After

the incident at issue here, he was transferred to Communications section and has been there ever since. His performance reviews have been very positive which would suggest that he approached his new work with an excellent attitude that has persisted throughout his entire stay in Communications section. Constable Faulkner has maintained the highest standard in physical fitness and has actually run in the Vancouver marathon. He is currently finishing his first year of piano instruction at the Grant MacEwan college and has also passed all the requirements for a designation of 'coastal skipper' under the International Sailing and Power Academy.

From the perspective of the appropriateness of the penalty, it should be noted that the failure to report the use of force misconduct ought to fall close to the disposition in the Hudec matter. When it comes to the destruction of the camera, the Constable acknowledges that what he did was stupid and that he deserves to be sanctioned for that.

Finally, it should be recalled that this incident happened a long time ago. Constable Faulkner was under considerable stress for a long period of time as the allegations against him wound their way through the criminal and then the disciplinary process as well. More significantly, however, all problems are now behind him.

Disposition and order

I gave an oral decision immediately after the hearing was concluded. The hearing was formally concluded then. These reasons will therefore recount what I said at that time, albeit with minor changes.

Proceedings against Constable Alkarout

Constable Alkarout faced two counts of disciplinary misconduct. He is alleged to have (1) authored a police Member Witness Form that was false and misleading and (2) to have provided inaccurate testimony at the Preliminary Hearing of R. v. Faulkner.

As the presenting officer very appropriately and fairly pointed out, the evidence against Constable Alkarout simply did not measure up to the necessary standard of proof. To point out the obvious, see the pages above, the circumstances surrounding Mr. Waskahat's apprehension were so dynamic and stressful that it would not be surprising in the least if Constable Alkarout simply misheard what Constable Ponto said in relation to the injury to his hand. In the absence of any evidence whatever that Constable Alkarout turned a deliberately blind eye to what Constable Ponto said or that he gave a deliberately false account of that, I find that, as in other cases in the past, a simple error does not amount to a misconduct. See, for example, *Cardinal v. Nowlan* (Law Enforcement Review Board 0042 -- 03) where the Board considered whether an error in the correspondence to the complainant amounted to a disciplinary misconduct:

The Board finds that the statements made by S/Sgt. Nowlan were incorrect, but were errors without the intention to deceive or mislead.

There was certainly nothing in the statements that caused the appellant difficulty in preventing him from doing or carrying out his intention in regard to an appeal. The Board is of the opinion there was no deceit on the part of S/Sgt. Nowlan and that he is not guilty of discreditable conduct or neglect of his duty. To imply such a high duty upon an officer under the circumstances is, in the opinion of the Board, not warranted. (p. 2)

Nothing in the evidence against Constable Alkarout established (even on the slimnest of balances of probabilities) that the Constable did anything more than make an innocent mistake.

The two counts of misconduct against Constable Alkarout have not been proven.

Proceedings against Constable Faulkner

In the absence of Mr. Waskahat, the evidence relative to count No. 1 (unlawful or unnecessary exercise of authority) was entirely insufficient to find this count proven.

The Constable entered a guilty plea to counts No. 2 and 3. The first of these two counts arose out of a destruction of a small disposable camera belonging to Ms. Paul. The second was perfected because the Constable failed to submit the required reports detailing his contact with Mr. Waskahat and Ms. Paul.

As I said in my oral decision, Count No. 2 is the more serious of the two. Police officers quite simply cannot assume the right to dispose of property belonging to others as they see fit. If property has been seized for evidentiary reasons, it is to be processed in accordance with all relevant policies and approved practices. Similarly, if the property has come into police custody for other reasons and through other means, the duty of care the police must exercise *vis-à-vis* that property is high indeed until that property has been lawfully disposed of. Neither of these two alternatives contemplates unnecessary destruction. While it would appear that Constable Faulkner does not need the type of punishment that would amount to a sharp individual deterrent, members at large do need to be reminded that the same misconduct ought not to happen again.

For this count, Constable Faulkner will be suspended without pay for 20 hours.

Count No. 3 should attract the punishment that was meted out in other similar cases. At the end of a somewhat recent disciplinary decision, Constable Hudec was handed a suspension of 5 hours without pay for failing to submit a use of force report. In that case, as well as in this, it is necessary to point out that police officers need to document their contacts with citizens (especially if such contacts involved use of force). There is a legion of reasons for this. Accountability and court-related purposes are just two.

For this count, Constable Faulkner will be suspended without pay for 5 hours.

I should conclude by pointing out that the punishment reflected Constable Faulkner's guilty plea, excellent work performance following December 2004, and no need for a strong individual deterrence.

Mark Logar
Superintendent
Hearing Officer

A handwritten signature in black ink, appearing to read 'M. Logar', written over a faint, illegible stamp or background.

Presenting Officer
Counsel for Constable Alkarout
Counsel for Constable Faulkner

Mr. Craig Boyer
Mr. Michael Chwok, Q.C.
Mr. Alex Pringle, Q.C.

Issued in the City of Edmonton, July 7, 2009