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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 19, 2010, Constable Wasylyshen was charged with the following disciplinary misconducts:

Count #1

It is alleged that on or about April 16, 2009, in the City of Edmonton, in the Province of Alberta, you were convicted of assaulting 17(1), 17(4) while off-duty on or about December 18, 2005, pursuant to s. 266 of the *Criminal Code of Canada*, thereby contravening an Act of the Parliament of Canada in a manner likely to bring discredit on the reputation of the Police Service contrary to Section 5(2)(e)(i)(a) of the *Police Service Regulation*.

Count #2

It is alleged that on or about April 16, 2009, in the City of Edmonton, in the Province of Alberta, you were convicted of assaulting 17(1), 17(4) while off-duty on or about December 18, 2005, pursuant to s. 266 of the *Criminal Code of Canada*, thereby contravening an Act of the Parliament of Canada in a manner likely to bring discredit on the reputation of the Police Service contrary to Section 5(2)(e)(i)(a) of the *Police Service Regulation*.

Count #3

It is alleged that on or about December 18, 2005, in the City of Edmonton, in the Province of Alberta, you were involved in a physical altercation while off duty, and used threatening language towards 17(1), 17(4) and 17(1), 17(4). Your use of threatening language towards 17(1), 17(4) and 17(1), 17(4) during that altercation constitutes the offence of Discreditable Conduct pursuant to s. 5(2)(e)(viii) of the *Police Service Regulation*.

Count #4

It is alleged that on or about December 18, 2005, in the City of Edmonton, in the Province of Alberta, you struck 17(1), 17(4) in the head with your fist, while off-duty. The striking of 17(1), 17(4) constitutes the offence of Discreditable Conduct pursuant to s. 5(2)(e)(viii) of the *Police Service Regulation*.

Count #5

It is alleged that on or about December 18, 2005, in the City of Edmonton, in the Province of Alberta, you threatened harm 17(1), 17(4) and his family, while off-duty. The threat to harm 17(1), 17(4) and/or his family constitutes the offence of Discreditable Conduct pursuant to s. 5(2)(e)(viii) of the *Police Service Regulation*.

Count #6

It is alleged that on or about December 18, 2005, in the City of Edmonton, in the Province of Alberta, you used abusive and racist language towards a taxi driver, while off-duty. The use of abusive and racist language constitutes the offence of Discreditable Conduct pursuant to s. 5(2)(e)(viii) of the *Police Service Regulation*.

The disciplinary hearing commenced on March 8, 2010. Mr. Derek Cranna was the Presenting Officer and the cited officer was represented by Mr. Robert Hlanden.

The cited officer entered "deny pleas" on the 6 counts contained in the Notice and Record of Disciplinary Proceedings.

The matter was adjourned to May 20, 2010 at which time the Presenting Officer made application to amend the particulars of count #3. This was agreed to by the cited officer.

Exhibits

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 19
4. Agreed Statement of Facts
5. Service Record Summary, Constable Michael Wasylyshen #2138
6. Four Letters of Reference

7. Letter 17(1), 17(4) dated April 15, 2009 Re: Mike Wasylyshen

Evidence

The following agreed statement of facts was then read into the record.

1. On the evening of December 17 and early morning of December 18, 2005, Constable Michael Wasylyshen was off duty, and socializing with other off-duty EPS members in the Old Strathcona area of Edmonton, Alberta.
2. The group had attended a squad Christmas dinner together, and then continued the celebrations at two different bars on or near Whyte Avenue.
3. During the course of the evening Constable Wasylyshen consumed a significant amount of alcohol and became extremely intoxicated.
4. Constable Wasylyshen and others were departing Whyte Avenue at approximately 2:30 a.m. on December 18, 2005. While the group attempted to hail a cab, Constable Wasylyshen noticed another man nearby, 17(1), 17(4), who directed a comment to Constable Wasylyshen.
5. 17(1), 17(4) was a 22-year-old man who was on crutches, having undergone knee surgery approximately 4 days before this incident, unbeknownst to Constable Wasylyshen. He was raising his crutch in his own effort to hail a cab. Constable Wasylyshen perceived that the comment and gestures by 17(1), 17(4) were directed at him.
6. Constable Wasylyshen then proceeded to yell at 17(1), 17(4) using foul and inappropriate language, and called him a cripple.
7. 17(1), 17(4) responded by yelling and swearing at Constable Wasylyshen from across the street.
8. Constable Wasylyshen proceeded to cross the street at an intersection, and upon reaching 17(1), 17(4) a further verbal confrontation continued. Constable Wasylyshen struck 17(1), 17(4) a glancing blow on the left ear with a closed fist, which resulted in redness and swelling but no lasting effects.
9. In his verbal exchanges with 17(1), 17(4) Constable Wasylyshen made statements that, had Constable Wasylyshen been calm and sober when making them, could have been construed as threats to do serious bodily harm to 17(1), 17(4).
10. Constable Wasylyshen's colleagues pulled him away while he and 17(1), 17(4) continued yelling at each other. Constable Wasylyshen made efforts to free himself from his friends.

11. Using a cell phone, 17(1), 17(4) telephoned two friends, 17(1), 17(4) and 17(1), 17(4) who immediately joined 17(1), 17(4) at the scene. The three then crossed the street away from Constable Wasylyshen while the parties continued to exchange obscenities.
12. Constable Wasylyshen broke away from his friends and crossed the street, where further blows were exchanged, and then Constable Wasylyshen was thrown to the ground and punched several times by 17(1), 17(4) friends.
13. This altercation occurred near a 7-11 store on Whyte Avenue. Two plain-clothed Loss Prevention Officers working at the store, 17(1), 17(4) and 17(1), 17(4), saw the incident and moved to break it up.
14. As the Loss Prevention Officers separated the combatants, Constable Wasylyshen swore at them. He made statements to 17(1), 17(4) that could have been construed as a threat to damage his property, had Constable Wasylyshen been calm and sober when making them. During this time, Constable Wasylyshen did not know whether the Loss Prevention Officers were there to disperse the parties or cause harm to him.
15. While the melee was still in progress, Constable Wasylyshen struck 17(1), 17(4) a glancing blow on the side of his face that did not cause lasting injury.
16. On July 17, 2007, Constable Wasylyshen was charged with two counts of assault under s. 266 of the *Criminal Code of Canada* for striking 17(1), 17(4) and striking 17(1), 17(4) during the altercation.
17. On April 16, 2009, Constable Wasylyshen entered guilty pleas to those two counts of assault in the Provincial Court of Alberta, and was thereby convicted of those offences.
18. Constable Wasylyshen was sentenced to pay a fine of \$250.00 for each conviction.

The facts were admitted by the cited officer and the cited officer then changed his plea on counts 1, 2, and 3 to guilty (admit).

The Presenting Officer subsequently withdrew counts 4, 5 and 6.

Accordingly with the agreed statement of facts and the admit plea, counts 1, 2 and 3 were found to be proven.

Submissions on Penalty

The Presenting Officer

The Presenting Officer provided a book of authorities for reference during his submission. He also provided a copy of Constable Wasylyshen's service record. The record was reviewed by the cited officer and several additions were made.


Mr. Cranna spoke to *Amery v Young* being one of the cases referenced in his book of authorities. Speaking to aggravating and mitigating circumstances, he states that Constable Wasylyshen has been a member of the Edmonton Police Service for eleven and a half years and has a clean service record. Mr. Cranna characterizes this misconduct as an isolated incident given his clean service record. Regarding the existence or absence of provocation, he states that in Wasylyshen's level of intoxication he may have perceived some provocation, in retrospect, there likely was none. Also, he states on the facts presented, there was no premeditation involved.

Speaking to the seriousness of the misconduct, Mr. Cranna speaks to the impacts that such charges has on the integrity and reputation of the Edmonton Police Service. While the assaults were minor in nature, they did result in criminal convictions and speak to the issue judgment that the officer lacked. The matter was highly publicized, reflecting poorly on the Edmonton Police Service and it certainly impacted Constable Wasylyshen and his reputation in the community.

Mr. Cranna adds that there were no long lasting impacts on the citizens involved in this matter. The assaults were minor in nature and the persons involved did not file any complaints. The complaint was generated internally after a report on the matter was filed.

Throughout this matter, Constable Wasylyshen has demonstrated a willingness to deal with the matters. He pled guilty in Provincial Court and has done so in this hearing thus preventing what would have likely been a complicated and protracted hearing.

17(1), 17(4)



Mr. Cranna then went through several of the cases in his book of authorities. Several dealt with members who had misconduct charges relating to criminal convictions and how their particular mitigating circumstances played a part in the penalty they received. Mr. Cranna offered the Edmonton Police Service matter of

"Toner" as being the most analogous to the fact in this matter. Constable Toner was convicted of impaired driving and had prior discipline on his service record. 17(1), 17(4)

In this instance he received a combined penalty of 120 hours suspension without pay and forfeiture of hours.

Mr. Cranna closed his submission with a recommendation penalty that on each of counts one and two, Constable Wasylyshen be subject to a suspension without pay of 50 hours. On the third count, a reprimand be imposed.

Counsel for the Cited Officer

Mr. Hladun commenced his submission entering four letters of reference from senior ranking members within the Edmonton Police Service on behalf of Constable Wasylyshen. 17(1), 17(4)

He states that this matter occurred when Constable Wasylyshen was off-duty, late at night, with other off-duty members. He became obviously intoxicated and that is really what is the crux of this matter is the fact that his good judgment and his control were off simply because he drank too much.

17(1), 17(4)

Nr. Hladun states that 17(1), 17(4) the other person initially involved in the matter did not know that Constable Wasylyshen was a police officer. When asked if he wanted to press charges he said no. There was no serious harm done to anyone and involved an incident where everyone had consumed alcohol.

Upon being charged, Constable Wasylyshen dealt with the matters quickly taking full responsibility for his actions.

At the conclusion of the court matters, Constable Wasylyshen made a public apology to the media.

Mr. Hladun then read the four letters of reference into the record and provided comment on these letters.

He then spoke about the Toner and Lingl cases which were referred to by Mr. Cranna.

Discussion

The prevailing case that provides assistance in this type of misconduct is Girard v. Delaney (1995), 2 P.L.R. 337 (Ont. Bd. Inq.) This case deals with the test to be applied when determining whether particular conduct on the part of a police officer is likely to bring discredit to the reputation of a police service.

Page 339 of that decision states:

- A. The test is primarily an objective one.
- B. The board must measure the conduct of the officer by the reasonable expectations of the community.
- C. In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully appraised of the circumstances of the case.
- D. In applying this standard the Board should consider not only the immediate facts surrounding the case but also any applicable rules and regulations in force at the time.
- E. Because of the objective nature of the test, the subjective element of good faith (referred to in the Shockness case) is an appropriate consideration where the officer is required by the circumstances to exercise discretion.

The above points allow me, in absence of evidence to use my judgment as to what the community expectations are relative to the harm that Constable Wasylyshen's actions may have caused to the reputation of the Edmonton Police Service. I will do this as I apply the appropriate principles in determining penalty.

It is my role as the Presiding Officer of this hearing to impose a penalty upon Constable Wasylyshen relative to the charges of Discreditable Conduct.

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. I will address those principles that I believe are relevant in this matter.

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.

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.*

In these instances, the members of the public involved did not initiate the service investigations. There was however significant media coverage of the matter and the criminal convictions registered against Constable Wasylyshen. The public is rightfully concerned when members of its police service commit and are convicted of criminal offences.

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 is no indication that organizational or administrative factors played a role in this misconduct.

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

A. *Previous good record of the officer.*

There are no records of discipline on Constable Wasylyshen's service record.

B. *Long Service of the officer.*

Constable Wasylyshen has been a police officer for 11 ½ years. At the time of these offences he had just over 7 years service.

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

It is evident that these acts were spur of the moment. Constable Wasylyshen did not know the other individuals involved in this incident.

- E. *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.

- F. *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. Constable Wasylyshen committed the criminal acts of assault which resulted in criminal convictions. This is something that we do not expect of those people charged with the responsibility of enforcing the law.

- G. *Officer cooperation, frankness and overall attitude*

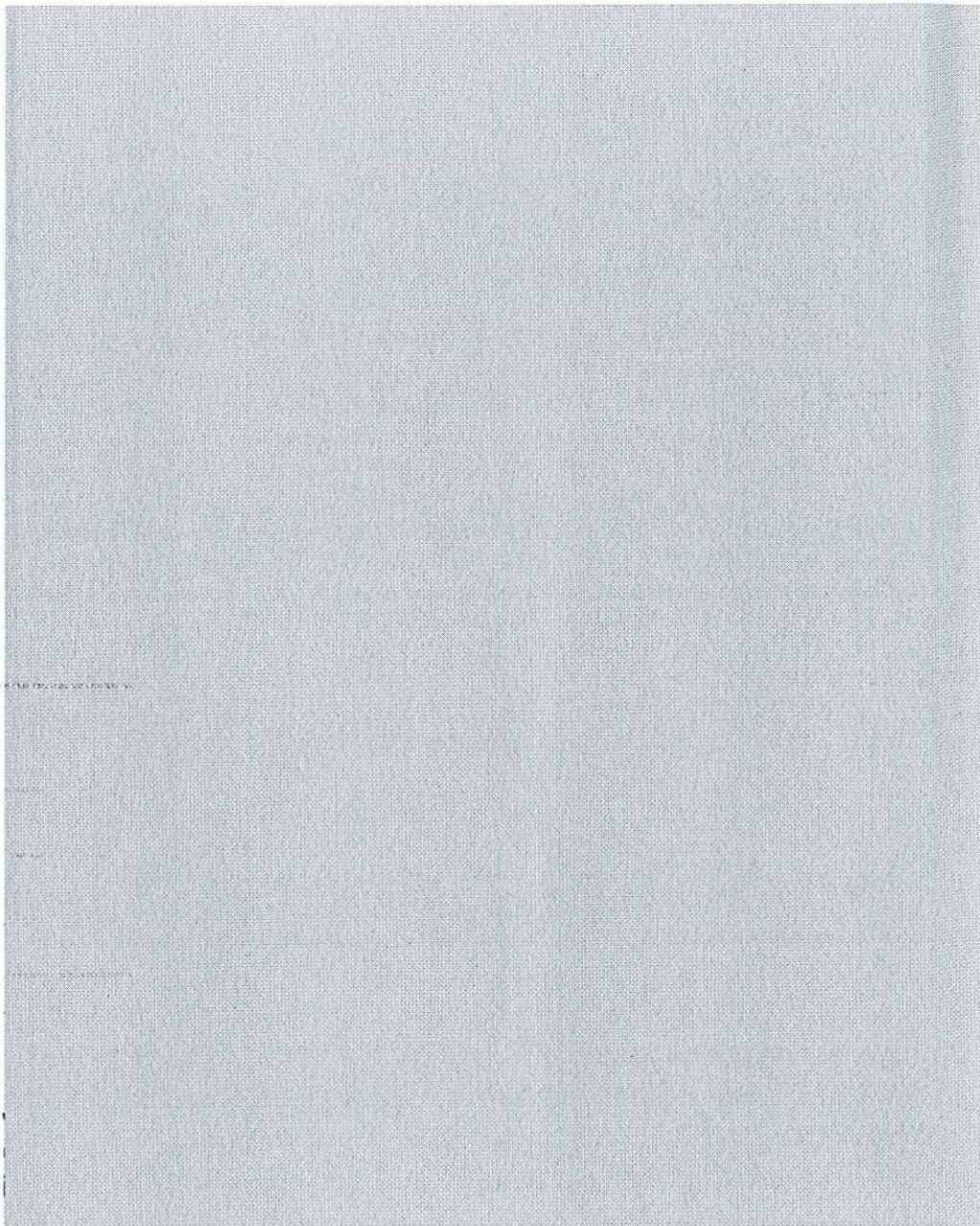
17(1), 17(4)

In dealing with the criminal charges he faced, he pled guilty in provincial court. He has cooperated with the Professional Standards Section investigators, and in his disciplinary hearing, he has entered admit pleas.

I believe that he has expressed genuine remorse for his actions. He did so in a public forum at the conclusion of his criminal proceedings and his statement during this hearing was heartfelt and believable. I don't believe he did this because he knew he needed to, but because he wanted to and he knew it was the right thing to do.

- H. *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.*

17(1), 17(4)



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

Police Officers must be aware that their off-duty conduct may attract disciplinary sanctions. In instances where they commit criminal acts, the respect of the public must be acknowledged and taken into consideration when assessing penalty.

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

There are very few cases analogous to the facts in this matter. When I look at cases where police officers have been convicted of assault, most involve cases of on-duty excessive use of force. The range of penalties varies from forfeiture of pay or reduction in rank to dismissal. This is also the case where members have been convicted of other criminal offences. A recent case in the Edmonton Police Service was referenced by the presenting officer. EPS vs Toner was a decision by Superintendent Logar of where a member of the EPS was charged and convicted of impaired driving. Upon admitting the charge in the Disciplinary Hearing a penalty of 80 hours suspension and a forfeiture of 40 hours of accumulated time were imposed.

Penalty

It is quite apparent that this type of misconduct can shake the public's confidence in its police service. Unlike an allegation of an on-duty excessive use of force which has resulted in a criminal charge and conviction, an assault conviction resulting from in essence an escalating argument fueled by alcohol cannot be rationally explained.

The Presenting Officer and the defence have submitted a joint position on penalty being 50 hours suspension without pay on each of counts 1 and 2. On count 3 they recommend a reprimand.

17(1), 17(4)

In addition he has accepted responsibility for his actions and is genuinely remorseful.

While one of the main purposes of police discipline is rehabilitation, I do not see this being necessary in this instance. He has successfully worked towards this on his own. However there must be a consequence for Constable Wasylyshen's actions and there must be an aspect of general deterrence.

I am satisfied that the penalty recommended by the Presenting Officer and the defence is appropriate and meets these disciplinary goals.

ORDER

1. On counts #1 and #2, Constable Wasylyshen shall be suspended without pay for a period of 50 hours each for a total of 100 hours.
2. On count #3, Constable Wasylyshen shall receive a reprimand.

Paul Manuel, Inspector
Presiding Officer



Presenting Officer:
Counsel for the Cited Officer:

Issued at the City of Edmonton
June 1, 2010

Mr. Derek Cranna
Mr. M. Hladun