

York Regional Police Service Discipline Hearing
In the Matter of Ontario Regulation 268/10
Made Under the Police Services Act, R.S.O. 1990,
And Amendments thereto:

And

In The Matter Of

The York Regional Police Service

And

Constable Ernest Carmichael # 1950

Charge: Unnecessary Force against a Prisoner

Before:

Superintendent (Retired) M.P.B. Elbers
Ontario Provincial Police Adjudicator

Appearances:

Counsel for the Prosecution: Mr. Jason Fraser
York Regional Police Service

Counsel for the Defence: Mr. William MacKenzie
York Regional Police Association

Public Complainant: Ms. Paula Horsak (Self represented)

Penalty Decision with Reasons:

The Hearing:

Constable Ernest Carmichael # 1950 pled guilty on Thursday July 03, 2014 in Aurora, Ontario and was found guilty of One (1) Count of Unnecessary Force against a Prisoner pursuant to Section 2 (1) (g) (ii) contained in Schedule to Ontario Regulation 268/10 as amended.

The charge pertains to an incident that occurred on April 21, 2013 in York Region while Constable Carmichael was working with his platoon on an evening shift. Constable Carmichael had responded to a radio call from fellow officers who were requesting assistance at the Horsak residence where an incident had terminated at this residence. During the arrest of an individual at this residence, Constable Carmichael kicked the individual two or three times in the head with his police boots.

Exhibit # 3, an Agreed Statement of Fact was filed at the Hearing.

- 1. Constable Ernest Carmichael #1950 has been a member of the York Regional Police since April of 2009. He has held the rank of First Class Constable since August of 2012.*
- 2. On April 21, 2013 at approximately 9:45 p.m., members of York Regional Police attended the public complainant's residence to investigate an impaired driving complaint regarding her son. Her son had pulled into the driveway a few minutes earlier.*
- 3. The public complainant's husband went to his front door and saw two uniformed police officers talking to his son. Mr. Horsak stepped outside and told the officers he wanted them off his property, as he believed they did not have cause to be there.*
- 4. The officers told Mr. Horsak that his son was under arrest and was going to be charged with impaired driving. Mr. Horsak replied that his son had just come home and was not impaired, and again told the officers to get off his property.*
- 5. While this conversation was taking place, the son ran inside the house. The two officers followed the public complainant's son inside the home. The son then ran upstairs and locked himself inside a bathroom. The officers remained just inside the entrance of the house.*
- 6. Mr. Horsak told the officers to get out of his house and again to get off his property. The police did not leave the home and instead used their portable radios to request the attendance of more officers at the scene.*
- 7. Four more police officers, including PC Carmichael, arrived at the home a short while later and also entered the residence. Mr. Horsak pushed one of the officers, not PC Carmichael, on the chest to try to keep him from moving further into the house. A struggle ensued and two officers, PC Ron Peever #696 and PC Mark Kowalchuk #1823, took Mr. Horsak to the floor.*

8. *Mr. Horsak ended up face-down on the floor in a prone position. One officer attempted to gain control of Mr. Horsak's left arm while another officer attempted to gain control of his right arm, which were both under his body, in an attempt to handcuff him. According to Mr. Horsak, his arms are chronically susceptible to being dislocated, and he was trying to prevent this from occurring. However, he did not tell this to the police officers.*
9. *While the two officers were attempting to subdue Mr. Horsak on the floor, PC Carmichael approached him and kicked him in the head two or three times. The officers were eventually able to place Mr. Horsak in handcuffs, then escorted him out of the house and placed him in the back of a police cruiser.*
10. *On May, 20 2014, PC Carmichael appeared before the Honourable Justice Armstrong in the Ontario Court of Justice (Criminal Court). At that time, he entered a plea of guilty to the charge of assault contrary to section 255 of the Criminal Code of Canada. PC Carmichael received a conditional discharge and was placed on probation for a period of 12 months subject to terms, including:*
 - a. *That he not associate or communicate directly or indirectly with Mr. Horsak except as may be required in the course of his duties as a police officer; and*
 - b. *That he perform 100 hours of community service by April 15, 2015.*

Counsel in this matter, Mr. Jason Fraser, representing the York Regional Police Service has requested a demotion from First Class Constable to Second Class Constable for a period of Nine (9) to twelve (12) months. Mr. William MacKenzie, representing Constable Carmichael has requested a demotion from six (6) to nine (9) months from First Class Constable to Second Class Constable pursuant to section 85 (1) (c) of the Police Services Act. Ms. Horsak was in agreement with the position of Mr. Fraser and I will elaborate on her position later in this decision.

In Williams and the Ontario Provincial Police, the Commission identified three key elements a Hearing Officer must take into account when imposing a penalty. These include: the nature of the seriousness of the misconduct, the ability to reform or rehabilitate the officer and the damage to the reputation of the Police Force that will occur if the officer remained on the force.

Mr. Fraser has tendered Exhibit #4, a Prosecution Brief of Authorities containing four cases for the Tribunal to consider in determining an appropriate disposition. The cases provided by the Prosecution are the Krug, Venables, Turgeon and Thomas decisions. Mr. MacKenzie offered a recent York case, however it has not been released by the Hearing Officer of that Tribunal at the time of this Disposition Hearing.

Mr. Fraser has stated in his submission that Constable Carmichael is a member of the York Regional Police Service assigned to Two District Patrol. Mr. Fraser advised the Tribunal that Constable Carmichael was not acting in a lawful and professional manner on April 21, 2013. He utilized excessive force and was charged criminally as a result of his actions. He noted that the use of force was not only excessive; this act was a kicking motion to the individuals head which he struck two or three times.

Mr. Fraser advised the Tribunal that Constable Carmichael has recognized the seriousness of this transgression by pleading guilty to this Police Act Misconduct count and also at his Criminal trial. Mr. Fraser noted that Carmichael must learn to comply with the York Regional Police Service policies and procedures and his conduct will not be tolerated by this Service.

Mr. Fraser commented on the cases he submitted to the Tribunal for consideration in this Disposition Hearing. He advised the Tribunal that excessive use of force runs the ``gamit`` for disposition consideration. Venables is the high water mark. This person was handcuffed, under arrest and seated in the rear of a police cruiser when he was struck and was verbally berated. The officer was dismissed from the Service. In the Turgeon matter the officer showed no remorse and in the Thomas matter the officer was demoted for twelve months.

Ms. Horsak, the Public Complainant addressed the Tribunal. She advised that she has been a resident of Canada for forty (40) years and married to her husband for almost forty years. She advised watching her husband being kicked by a police officer she has lost her trust in a police officer. She advised that while looking at the Mission and Vision statement of the York Regional Police Service that Constable Michaels did not adhere to its shared values. She commented that there was no respect shown to her husband by this officer on that fateful day. Ms. Horsak stated she was a Federal employee for thirty years with the Immigration Department. She stated that they accept refugees from other countries that are persecuted and she compared this incident with the freedom and democracy that this country stands for. She also read her victim impact statement that was read into the criminal court sentencing for Constable Carmichael to this Tribunal.

Mr. MacKenzie, representing Constable Carmichael, relayed to the Tribunal a recent case from York Regional Police that has not been reported to date. It was in reference to an officer being demoted for nine months from First Class Constable to Second Class Constable for striking his wife while off duty in the head during a domestic violence situation. Mr. MacKenzie advised the Tribunal that this officer also pled guilty at the PSA Hearing and the criminal matter. He stated that he sees this situation more serious than the Carmichael matter. He stated that he acknowledges that Carmichael did use excessive force; however Carmichael has been held accountable and was expeditious in both the criminal proceedings and this PSA matter to resolve this issue. He comments that Carmichael is a young officer and was pumped with adrenaline when he attended the Horsak residence. He advised that Mr. Horsak was not seriously injured and this should mitigate the disposition. He commented the demotion would have a serious impact on the officer due to the loss of pay at the lower rank.

Accountability, ethical behaviour and conduct are at a standard much higher than the public we serve. It is generally known and an accepted fact that the law requires a higher standard of conduct with police officers in their private lives than the ordinary citizen.

Credibility, honesty, integrity are characteristics that are earned. As one elevates him / herself through the ranks of this organization those characteristics are more revered and treasured. It helps to create the professional image and excellence that the York Regional police officers strive to maintain.

Disposition Considerations:

A number of issues must be considered in Police Act disciplinary matters.

1. Public Interest

It is important to consider the public interest. It is common knowledge that the public holds police in a position of high trust and accountability. Constable Carmichael was found guilty of Unlawful or Unnecessary Force against a Prisoner. At the time of their indiscretion Constable Carmichael was a junior member of the service. I believe he was “*pumped up*” at the time of his attendance on the call to assist officers at a residence where an arrest was taking place. This does not mitigate the issue of striking the male individual in the head. The kicking of an individual in the head area at any time is a serious action and is further complicated when the strikes happen more than once. A member of any police service must show and exude professionalism at all times. When occurrences get complicated or use of force is a necessary option police officers must control their emotions and be leaders in their field. That is what the community expects and demands from their police officers. I am not sure as to how extensive the injuries, if any were received to the male party. The evidence is a little conflicted at this point, however I can say that one strike to the head is one strike to many and the unknown damage that can be caused or received is long lasting. It is therefore extremely important that the York Regional Police Service demonstrate that members will be held to that standard.

2. Seriousness of the Misconduct

Any deceptive or aberrant behaviour displayed by a police officer in any police service is serious.

The public confidence in the police is one of an expectation that the law will be upheld.

Constable Carmichael’s conduct was unprofessional and he abused his authority. Other York Regional police officers performed a necessary arrest which culminated in injury to the complainant’s husband. The injuries were not serious; however they certainly could have been as a result of Carmichael’s actions. I am not totally sure whether Carmichael had to engage at all, but we know he did and it was the wrong force to utilize to assist his fellow officers. As I stated in my decision, when an arrest is necessary and an individual’s right to freedom has been removed, however briefly, that matter is serious. The arrest of the complainant’s husband may have been necessary; the footwork of Constable Carmichael was not. Mr. Horsak was assaulted and Constable Carmichael faced that charge in criminal court as well.

This is a significant action against him by the York Regional Police Service.

3. Recognition of the Seriousness of the Misconduct

The action of Constable Carmichael has affected his career. I believe Constable Carmichael understands that today. Mr. MacKenzie has indicated that this was an isolated incident in this officer's career; however I believe that this officer sees clearly how his actions and lack of professionalism have dictated the shortcomings that bring him before me today. The public observes and evaluates the Police 24-7. We, as individuals and as a professional organization must be mindful of this fact. Our members, while on patrol and off duty, must conduct themselves in a professional manner at all times.

4. Employment History

Constable Carmichael is a junior member of the York Regional Police Service. He had four years of service at the time of this indiscretion. Counsel for both parties have relayed to the Tribunal that Constable Carmichael has no prior discipline issue and has received some accolades for his work in uniform patrol.

The totality of work performance acts as a mitigating factor in my decision.

5. Need for Deterrence

It is necessary to consider general deterrence for all members. The penalty must reflect that the York Regional Police Service will not tolerate unacceptable behaviour. The rule of an investigation is to provide the Community with investigations that provide the utmost of policing excellence, diligence and thoroughness. A quality investigation is warranted. Nothing less can be accepted or tolerated.

There must be specific deterrence for members to send a message that individuals will be held accountable for their conduct. Constable Carmichael must correct his use of force options as this will not be the first or the last time that he deals with a situation as he faced on April 21, 2013. He is a young officer who has many years of police duty to look forward to in his career. He will gain that experience and I am positive that he will not conduct himself as he did last April. We learn from our mistakes and I trust that Constable Carmichael has learned as well. While considering the mitigating factors of positive work record performed by this officer the York Regional Police Service must deliver a penalty that not only prevents a recurrence, but also adequately protects the public.

General deterrence in this situation offers the Adjudicator in this matter the opportunity to remind all members of this organization that an arrest of an individual is a significant action against that person and it cannot and should not be exercised with any unnecessary force and especially strikes with the feet to the head area.

6. Ability to Reform or Rehabilitate the Officer

Constable Carmichael acted in a manner that is clearly unacceptable of a Police Officer. Unnecessary use of Force against a Prisoner is a serious offence that cannot be tolerated in this organization. The possibility of recurrence or whether or not this matter is an isolated instance as Defense Counsel has suggested must clearly be examined.

Short of dismissal, it is unknown to this Tribunal or the York Regional Police Service whether this conduct will continue by this officer. As Mr. Fraser stated in his submissions this was a dynamic situation. It still does not excuse the behavior, however, this officer has pled guilty at both the criminal proceedings and this Police Act matter and I believe this shows the willingness of this officer to accept his indiscretion swiftly and move on with his career. The proposed penalty submissions submitted by Counsel in this matter suggest to me that this officer can be rehabilitated with an appropriate disposition penalty.

7. Damage to the Reputation of the Force

The Conduct exhibited by this officer while on duty in York Region will cause damage to the reputation of the York Regional Police Service.

It is unknown to me to what the extent of publicity or the knowledge of the events is to the residents of York Region. The officer was subject to a Special Investigations Unit criminal investigation which culminated in an attendance in criminal court in Newmarket, Ontario. To some degree it does not matter as the incident has affected all involved and has caused damage to the organization.

It is our commitment and the Public's expectation that we the York Regional Police Service conduct ourselves 24-7, three hundred and sixty five days of the year with a degree of professionalism and commitment for policing excellence. Nothing less is acceptable.

8. Handicap and Other Relevant Person Circumstances

There are no considerations before this Tribunal that are apparent or give cause for consideration.

9. Effect on the Police Officer's Family

There is no doubt that Constable Carmichael will suffer from the penalty disposition to be imposed. Dismissal, Demotion, forfeiture of hours will have an impact on Constable Carmichael. I have given this situation serious consideration in determining an appropriate disposition.

10. Management Approach for Misconduct

The York Regional Police Service has a clearly defined Performance Management Program and Disciplinary Process. Due to the serious nature of this misconduct, while on duty, I have not given undue consideration for this issue. The York Regional Police Service does not condone or accept this type of behaviour from its officers.

11. Provocation

There are no considerations before the Tribunal that are apparent or give cause for consideration. I am aware of the comments made by Ms. Horsak in her submissions to the Tribunal. The irony that I faced with her submissions was that she was stating issues that were not contained in the agreed statement of fact which she approved prior to the commencement of the Hearing.

12. Procedural Fairness Considerations

There are no considerations before this Tribunal that are apparent or give cause for consideration.

13. Consistency of Penalty

I have considered the five (5) cases presented to me by Counsel. As I communicated earlier in this disposition the cases presented to me are not on point, however they were instructive for disposition considerations.

In Schofield vs. Metro Toronto Police (1994) the Commission stated:

“Consistency in the discipline process is often the earmark of fairness. The penalty must be consistent with the facts and consistent with similar cases that have been dealt with in earlier occasions.”

I agree with Counsel when they state that dispositions may range from dismissal to demotion. The cases provided are not representative of this case. I am trying to understand the analogy made by Mr. MacKenzie in relation to the domestic assault case of a York Officer who pled guilty at his criminal trial and at his Police Act Hearing for striking his wife in the face while off duty and receiving a nine months demotion. I agree with Mr. Fraser when he commented that an on duty police officer committing this act is more aggravating than a domestic assault occurring while off duty. I do not condone off duty domestic violence. I also do not condone an officer while on duty and attending an occurrence where officers require assistance, and the help this officer provides is striking the arrested person two or three times in the head. It may have been a dynamic situation, however two officers were attempting to control the male party and Carmichael attends and kicks the male party in the head two or three times. The damage that could have occurred is frightening. I am advised there were minor injuries; however I believe you also have to consider where that action may have ended in the long term. In my mind this creates a more aggravating factor than the Oakey matter which was the case Mr. MacKenzie related to the Tribunal. I agree that this officer is a junior officer and he has held himself accountable by pleading guilty at both proceedings.

I am also of the belief that Constable Carmichael might also require some remedial training to assist in focusing his energy in a more positive direction when engaged in his professional duties as a police officer.

I believe this officer has learned a great deal from this entire process and must consider this element in my disposition considerations.

The disposition of this matter must reflect the serious nature of Constable Carmichael's actions.

If it were not for the positive work performance and the immediate pleas to accept responsibility the disposition would have been more severe.

Striving for consistency in a disposition is a balancing act, involving a number of considerations that speak to the specifics of the misconduct, the environment in which the misconduct occurred, the action or inaction of the management of the service and other issues.

Disposition:

In light of the seriousness of these allegations and bearing in mind all the evidence placed before me, Constable Ernest Carmichael #1950 will be demoted from his position of First Class Constable to Second Class Constable immediately for a period of nine (9) months and will return to First Class Constable upon the completion of the nine months at the Second Class Constable level pursuant to Section 85 (1) (c) of the Police Services Act.

Further, you will receive remedial training with the Policies of the York Regional Police Service as it relates to Use of Force and any other Policies as required and deemed necessary by your immediate supervisor in consultation with Senior Command of the York Regional Police Service.

**M.P.B. Elbers, Superintendent
(Retired)**

**July 25, 2014
Date**