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THE MATTER OF
CONSTABLE PATRICK ALDEN # 1472
OF THE OTTAWA POLICE SERVICE

Constable Patrick Alden badge # 1472

It is alleged that you committed the following acts of misconduct contrary to the *Police Services Act, R.S.O. 1990 c. P. 15*, as amended:

Count # 1 Insubordination:

You are alleged to have committed the offence of Insubordination in that on or about January 25, 2011 you engaged in a an off-duty traffic stop in violation of Ottawa Police Service Traffic Stops and Vehicle Searches policy #8.10, thereby constituting an offence against discipline as prescribed in section 2 (1) (b) (ii) of the prescribed Code of Conduct, Ontario Regulation 268/10 as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Count #2 Discreditable Conduct:

You are alleged to have committed the offence of discreditable Conduct in that on or about January 27, 2011 you did without lawful excuse, act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police service by conducting an investigation while in a position of conflict of interest with respect to Ms. Kendra Banks thereby constituting an offence against discipline as prescribed under section 2 (1) (a) (xi) of the prescribed Code of Conduct, Ontario Regulation 268/10 as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Disposition

It is my intention to summarize the evidence provided by the witnesses in this hearing in as succinct a manner as possible while providing a thorough rationale for each of my decisions.

Two witnesses testified in this hearing over 2 days, Ms Kendra Banks, the complainant and Constable Patrick Alden, each provided their version of the events as they perceived them to have occurred. As stated in *Carmichael and Ontario Provincial Police (21 May, 1998, O.C.C.P.S.)* the burden of proof in this case is that of 'clear and convincing' evidence. There must be "weighty, cogent and reliable evidence upon which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct."

Incident Background

I will begin describing the event as perceived by the two involved persons. Constable Patrick Alden and Ms. Kendra Banks were both driving on Hazeldean Road on the morning of January 25th, 2011. Ms Banks vehicle (2005 Sebring) was in the furthest right lane approaching a merge to the left, as her lane was coming to an end due to construction. Constable Alden was off-duty travelling in his personal pickup truck, in the only available travel lane, when he testified he noted the Sebring trying to merge. Constable Alden indicated that he had already moved beyond the front of the Sebring so accelerated hard to avoid a collision. Ms Banks indicated that she perceived that the truck driver had purposefully blocked her merging and reacted by giving the driver the 'finger'. Ms Banks was questioned as to whether this was "road rage" and she responded by saying it was not because she had not thrown anything.

Constable Alden provided descriptions for the manoeuvres he was required to make to avoid a collision. These versions were included as part of the Book of Documents #2 entered as Exhibit # 8.

In Constable Alden's original Investigative Action report dated 2011-Jan-27 17:49 he indicated "Cst Alden sounded the horn and was forced into the left turn lane to avoid a collision."

In his taped interview with PSS from March 11, 2011 Constable Alden indicated (page 4) "I saw it (the Banks vehicle) starting to merge into my lane because their lane ended. I sounded my horn. They didn't stop, they continued and I had to make evasive manoeuvres to avoid being hit." And page 5, "Uh, I was still shaken up that I was almost forced...I was forced off the road, luckily that there was an opening for me to take." And at page 6, "The driver's window was open, identified myself as a police officer, said that she forced me off the road." And at page 25 of the same interview transcript, "If I continued following her, she's already forced me off the road."

As part of Constable Alden's testimony he indicated that these were merely expressions and not inaccurate descriptions of the impact that Ms Banks' driving had had on his driving.

Constable Alden then testified that Ms Banks' poor driving continued with her following him too closely and then accelerating quickly into the left turn lane in front of him. The incident continued with Constable Alden and Ms Banks proceeding to the left turn lane where Constable Alden's vehicle was positioned behind Ms Banks' and both stopped for a red light.

It was at this point that Constable Alden stated he decided to approach Ms Banks' driver door so that he could confirm the driver's identity for offences under the Highway Traffic Act. Constable Alden indicated in cross-examination that as he approached Ms Banks' vehicle that he

checked the interior and noted there were two children also present. He went on to say that he always checks the interior as it is "an officer safety thing." Constable Alden said that since he was not in uniform he immediately identified himself as a police officer with his OPS badge.

Neither party agrees whether Ms Banks was wearing a seatbelt. Constable Alden indicated he could have laid this charge as well but did not. Clearly he decided to utilize the discretion afforded him as a police officer in relation to this traffic charge. Ms Banks' explanation that she had removed her seatbelt when she saw Constable Alden is plausible. Since no charge was laid against Ms Banks for the seatbelt infraction, it becomes a moot point.

Ms Banks testified that Constable Alden said that "one of his buddies would come and pay her a visit". Constable Alden testified that "one of my buddies would deal with it."Based on the similar vernacular I am led to believe that Constable Alden had said one of his co-workers would handle the subsequent laying of a charge.

Both Ms Banks and Constable Alden testified that Ms Banks immediately began using profane language and demanding to know if Constable Alden was on duty. Constable Alden responded that he was on duty 24 hours a day. After a few seconds Constable Alden returned to his own vehicle where he wrote the licence plate of Ms Banks' vehicle on a scrap of paper and left the scene to continue with his personal business.

On the 27th of January, 2011 upon returning to duty at 1600 hrs, Constable Alden generated an Investigative Action report, queried the vehicle and owner on the police computer databases from the scrap of paper he had noted it on the 25th, drafted tickets and spoke to a fellow officer about his plans to attend the residence to lay the charge. Constable Alden indicated that it was at this time where he learned Ms Banks was a suspended driver. He also indicated he

had looked at the policies and believed he was on "safe ground." Constable Alden indicated he asked another officer to accompany him but that officer did not participate in the decision making for the visit to Ms Banks' residence. Constable Alden was not able to say whether he had consulted with his Sergeant about his off-duty event or his plans for that evening.

Constable Alden indicated he then went to Ms Banks house accompanied by another officer (each in separate vehicles) where he proceeded to serve Ms Banks with a Careless Driving charge and a notice of drivers licence suspension. He also said he asked for her driver's licence but Ms Banks had said it was in her purse and not at her residence. Once again Ms Banks was belligerent and admits to being very angry for what she considered being overcharged and for Constable Alden's apparent personal use of his authority. She also indicated that she would have been more comfortable if a female officer had been in attendance. Constable Alden responded in a calm manner by his own and Ms Banks accounts.

Ms Banks indicated she made a complaint to the Office of the Independent Police Review Director (OIPRD) the next day (Exhibit # 6 Book of Documents Tab 1).

In reviewing the evidence of the two witnesses I have employed in my assessment of the witnesses' credibility, what is described as the *O' Halloran test* from *Faryna v Chorny*, (1952) 2 D.L.R. 354 (B.C.C.A.) and it has served as a guide throughout this disposition.

In the case of *Faryna vs. Chorny*, (1952) 2 D.L.R. 354 (B.C.C.A.) Justice O'Halloran stated:

"If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

On reflection it becomes axiomatic that the appearance of telling the truth is but one of the elements that enters into the credibility of the evidence of a

witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors is combined to produce what is called credibility...

At the conclusion of the hearing Defence made application to re-open the hearing based on becoming aware of potential evidence. The Defence position was that the Ottawa Police Service had assigned an Inspector (Pat Flanagan) to oversee the "Traffic Stop Race-Based Data Collection Project and it was a Defence supposition that the project might contain an organizational definition for "traffic stop".

Based on the four principles as outlined in *R. v. Palmer [1980], 1, S.C.R. 759 at 775* (S.C.C.) the application was allowed. Defence counsel offered to meet with the proposed witness and evaluate the possible evidence. On October 30th, 2012 an email addressed to this Hearing Officer from Defence and copied to the Prosecutor indicated that the interview of Inspector Pat Flanagan had taken place and "as a result of information received during that interview I will not be calling him as a witness, nor will I be making further submissions."

The prosecution was provided an opportunity to make additional submission but declined.

Analysis of Interaction

Ms Banks' evidence was presented in a candid manner including occasions when she had used profanity in their interactions. Constable Alden provided details of the incident including that he had been shaken up by what he described as a near collision.

Ms Banks testified initially and also indicated in her original OIPRD complaint that having two police officers attend her home made her feel intimidated and unsafe. Based on her self-described argumentative behaviour and use of profanity on the 25th of January incident, as

well as her responses to cross-examination that she was mad and/or upset on the 27th; this behaviour does not reflect someone who is intimidated or feeling unsafe. This evidence does speak positively to Constable Alden having remained calm but does not obviate his duty to follow policies of the Ottawa Police Service.

The Prosecutor elicited from Constable Alden that he had previously conducted traffic stops where he had not asked for identification from the driver or identified himself. These pre-emptive questions prohibited Defence from hypothesizing that since no identification was demanded then no traffic stop had occurred.

Constable Alden indicated in his PSS interview at page 6, "The driver's window was open, identified myself as a police officer, said that she forced me off the road." Ms. Banks testified she had her window rolled up and opened it when Constable Alden put his badge against the window. If one looks at the preponderance of possibilities and likelihood it would seem to make sense that Ms. Banks' window was closed considering this event took place at the end of January in the city of Ottawa and she had two young children in her vehicle.

The definition of stopping submitted by Defence in submissions (Exhibit #10) speaks to the act of stopping a vehicle by a driver as in halting. The clause that Defence has highlighted for this tribunal is that the stop is related to directions from police or a traffic signal but when the definition of "stop or stopping" is read in its entirety it is clear the separate clauses are part of the exceptions to the prohibition of stopping. It is my conclusion that the section provided does not define a "police traffic stop".

Defence submitted that the color of the traffic control signal (red light) was the deciding factor for Ms Banks remaining at the intersection as the Highway Traffic Act prohibits

proceeding until the light is green (Exhibit # 9), however the Prosecution elicited from Ms Banks that she would not have left if the light had turned green because of the police authority she perceived from Constable Alden. It is my conclusion that the interaction was of such short duration that the color of the light would not have mattered as Constable Alden was basically at Ms Bank's vehicle by the time she noted his approach and he departed shortly thereafter. Therefore in relation to whether it was the traffic light or the authority of a police officer that kept her from leaving it is of no evidentiary value, although it does speak to the state of mind of Ms Banks.

It is this tribunal's position that a "police traffic stop" to a reasonable person would be when a police officer becomes involved in some type of investigation, either criminal or other breach of legislation involving a motor vehicle. This is a common sense definition and not one drawn specifically from legislation.

I have concluded that Constable Alden engaged in a traffic stop while he was off-duty. There are a number of factors that have led me to this finding. They are that Constable Alden engaged his powers as a police officer by utilizing his police badge for identification and that he documented the licence plate on a scrap of paper, which he utilized in his subsequent investigation. He also testified that he approached Ms Banks' vehicle to confirm her identity related to the offence of improper lane change. The identification of alleged offenders is a fundamental aspect of an investigation and I conclude that Constable Alden had undertaken this step to further investigate the traffic offences.

I turn now to the policy which Constable Alden described in re-examination as "gospel" as opposed to *Training Moments* which only serve as a "guide". I fully support this assertion and

since I have already deemed the Banks' stop to have met the criteria for a traffic stop, it is Policy # 8.10 *Traffic Stops and Vehicle Searches* which is applicable to this situation. I would add that while *Training Moments* are not mandatory they do provide another medium for delivery of important Police Service messages and in this instance additional context for the policy and subsequently Constable Alden's frame of reference. Constable Alden indicated he had viewed the *Training Moment* and it states that minus exigent circumstances an off duty officer is required to defer to assuming the role of a witness. This information should have formed part of Constable Alden's informed decision making for this incident.

It is my view that Constable Alden let his personal and self-described emotional involvement negatively affect his decision making. This is exacerbated when two days after the original traffic stop he carries through with laying the charge of Careless Driving on Ms Banks. I have also noted that in the continuum of traffic offences Careless Driving is a more serious offence than, for instance "Unsafe lane change" which seemed more applicable in this instance based on most of Constable Alden's explanations.

Constable Alden testified that he was aware of the Office of the Chief master distribution message from September 9, 2010 (Exhibit 6, Tab # 5) that stipulated that an Ontario Civilian Commission on Policing Services (OCCPS) "*decision had serious implications for personnel acting in an off duty capacity and as a result Policy 8.1 was amended.*" Constable Alden also testified that he had viewed the Training Moment as expected by the same Chief's message.

The *Training Moment* was played for this tribunal and a CD copy was entered as Exhibit #7 along with a transcript (Exhibit #6, Tab 6). The transcript was acknowledged as not being a perfect transcription but very close and its overall content was agreed to by both counsel. As I

have stipulated the *Training Moment* is not compulsory but it does offer insight into the reasons for the changes in policy related to off duty traffic stops and what an officer should consider when becoming involved off duty. The *Training Moment* concludes that should anyone have questions they should speak to their supervisor. Constable Alden could not recall whether he had spoken to his Sergeant but did testify that the peer Constable he had engaged to assist would have told him if he was "out of line".

The *Traffic Stops and Vehicle Searches* policy highlights that traffic stops have "*been shown to be one of the most potentially dangerous situations police officers find themselves in.*" Constable Alden spoke to this very danger when he said he always looks at the interior of a vehicle when approaching as it was an "officer safety thing." Although I did not note whether he specifically used the words traffic stop, I did draw that conclusion, as his officer safety response came on the heels of asserting that these observations were made when approaching a vehicle. I also noted that until Constable Alden was at the Banks' vehicle he said he was unaware of the gender of the driver. Constable Alden's purported concern for officer safety seems at odds with his willingness to approach a vehicle with no use of force options, no means of communication and no identifying signs that he was a police officer, except his wallet badge.

Policy #8.10 speaks specifically to Traffic Offences Observed by Off Duty Officer and says: "The officer should not attempt a traffic stop while off duty unless exigent circumstances exist". Constable Alden testified no exigent circumstances existed although he also testified that he did not believe he had conducted a traffic stop. The policy offers further direction where it states: *When a traffic offence is observed by an off duty officer, the officer should consider him/herself a witness and report the offence by calling the Communication Center or making a report for follow-up.*

Constable Alden did not report the incident to the Communications Center and said he had a cell phone but did not call. In re-examination Constable Alden said he is under no obligation to use his own phone since his phone records could then become available for subsequent disclosure. It concerns me that if Constable Alden truly believed that the driver presented such a danger that he had to carry through with an off-duty traffic investigation that he chose not call the Communications Center regarding an erratic driver in a vehicle with two small children, after the driver left the scene in what can be described as a very angry state.

Constable Alden testified that he interpreted the further direction of "*making a report for follow-up*" as similar terminology to "*creating a follow up call*". He asserts this despite having indicated that he watched the training moment and understood the policy. Constable Alden wants this tribunal to believe that if he breached the policy it is only because the wording of the policy is not clear. I disagree as common sense should dictate that a police officer who was personally involved and "shaken up" by alleged bad driving should not investigate their own incident. Constable Alden was a witness and should have remained a witness and not assumed the role of investigator.

Subsequent Follow-up & Conflict of Interest

As per the *Statutory Powers Procedures Act*, (R.S.O.1990, c.S.22, s.16 (b)) I have taken note of technical facts within my specialized knowledge related to access to Ministry of Transportation photos and processes for traffic complaints specific to the Ottawa Police Service.

The Defence asserts that Constable Alden was the only person that could identify Ms Banks so he was obliged to attend her residence on January 27th to confirm her identity. During cross-examination this tribunal was directed to page 6 of Constable Alden's interview with PSS

Sergeant Garvey. In that interview Constable Alden stated "There was an in-house picture that confirmed her identity." There are methods of developing photo line-ups utilizing these photographs for identification purposes. In addition as the Superintendent responsible for Collision Investigations I am aware that the Ministry of Transportation (MTO) has given police services a limited number of software licences to access MTO photographs, alternatively other methods of identification could have been utilized as is done on a daily basis with any other investigation involving a witness. It is not acceptable police investigative practice to identify alleged offenders by having the involved witness conduct a one-on-one identification.

Based on the fact there was no collision and no other extenuating factors this driving incident is the type that would regularly be entered into a District Traffic officer queue for follow-up to the driver. The Traffic Officer could then assess all relevant factors and employ her/his discretion on whether charges were warranted from an unbiased and impartial perspective. My previous experience as the Inspector in charge of District Traffic informs me that based on the lack of collision and no other extenuating factors a warning would have been the likely result of the alleged driving behaviour. The amount of human resources required for a defensible identification of the offender would also be a driving force in this decision.

Constable Alden was presented with his "Ticket Offences Search report" from January 2011 (Exhibit #8, Tab 3) and for the entire month the only tickets he issued were to Ms Banks. This evidence did not carry much weight due to its lack of context or sufficient comparators.

The Oath of Office contained in the *Police Services Act* (O. Reg. 144/91) stipulates that duties of a police officer shall be carried out faithfully, impartially and according to law. This expectation of impartiality and fairness is highly valued by the community and the police

service. Undertaking an investigation of an incident where the officer is personally involved is in direct contrast with this expectation of impartiality and common sense would indicate one should remove themselves and allow someone else to assess the situation so there is no perception of bias. Ms Banks testified and similar words were corroborated by Constable Alden that “one of his buddies” would visit her. These facts support the position that Constable Alden had some knowledge that he should not be the one investigating this incident. Ms Banks testified that she did not expect Constable Alden to arrive at her house and felt he was using his badge to scare her. Ms Banks testimony supports a conclusion that her perception was that Constable Alden’s behaviour was not impartial. It is my conclusion that Constable Alden was seeking personal retribution for Ms Banks disrespecting him by using profanity when he spoke to her on the 25th of January.

Constable Alden’s attendance at the Banks’ residence on the 27th of January occurred two days after the original incident when he would have had time to utilize critical thinking to assess his ongoing involvement in the investigation. He also admitted that he reviewed the policy upon return to work and he felt he was acting appropriately. It is my view that if he decided to review the policy there must have been some consideration related to the appropriateness of attendance. This would have been the time he should have consulted his Sergeant rather than relying on a peer to tell him if he was “out of line” which is what he testified he relied upon.

The defence submitted that *Lance Humphries v. Cst. Kelly and Durham Regional Police Services OCCPS Appeal Decision August 26, 2003* is applicable because in that hearing the Hearing Officer concluded that because someone has a pre-existing knowledge of a witness, to the extent that existed in that case they did not have to excuse themselves from the investigation.

“Given the above, the Hearing Officer concluded that: “In my opinion, the threshold of reasonable apprehension of bias has not been met. Requiring police officers to excuse themselves from an investigation simply because they know a witness to the extent that existed in this case is unreasonable. In my opinion an objective person considering all of the circumstances would not conclude that there was a reasonable apprehension of bias”.

I disagree with the Defence reliance on this decision because the officer in the *Humphries* case only had a passing knowledge of a witness (played hockey and had the odd beer with the person) and the officer was not personally impacted by the person’s behaviour as is the case in the instance before this tribunal.

I noted that Constable Alden offered a number of slightly different descriptions of Ms Banks’ driving and its impact on him and his vehicle. Each version has slightly different connotations and I have concluded that Constable Alden was increasing the severity of his required evasive driving response in order to justify in hindsight his decision to having become involved in the subsequent investigation of Ms Banks.

I have accepted the evidence of Ms Banks that she felt Constable Alden was abusing his position by investigating the traffic offence. Notwithstanding that I believe Ms Banks would not have been pleased if any police officer had attended her residence, she and every member of the public have the right to expect OPS members to conduct themselves in a fair and impartial manner.

The test for the offence of Discreditable Conduct is well enunciated in the decision of Girard v Delaney (1995) 2 PLR 337 (Board of Inquiry), and page 349 as follows:

- 1. The test is primarily an objective one.*
- 2. The Board must measure the conduct of the officer by the reasonable expectations of the community.*

3. *In determining the reasonable expectations of the community, the Board may use its own judgement, 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 apprised of the circumstances of the case.*
4. *In applying the standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.*
5. *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 his discretion.*

Public trust is essential for police to fulfill their mandate and the public must believe that police officers will perform those duties impartially and without bias or favour to anyone including themselves. An actual or perceived conflict of interest of an investigating officer can have a negative effect on the community's confidence in the fairness of any subsequent outcome and should be avoided if at all possible. It is my conclusion that a reasonable person becoming aware of this incident would have expected that a police officer who was personally involved in an investigation should and would remove themselves from any subsequent follow-up as a matter of common sense to ensure the perception of impartiality.

It is my conclusion that Constable Alden has breached the Ottawa Police Service Traffic Stops and Vehicle Searches policy #8.10 by engaging in a an off-duty traffic stop on January 25th 2011 without meeting any of the defined exceptions.

I also find that Constable Alden acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police service by conducting an investigation while in a position of conflict of interest with respect to Ms. Kendra Banks on January 27th 2011.

I find Constable Alden GUILTY of both counts as outlined.

Joe Stein