

**TORONTO POLICE SERVICE DISCIPLINE HEARING**

IN THE MATTER OF ONTARIO REGULATION 268/10  
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990  
AND AMENDMENTS THERETO;

IN THE MATTER OF

**Constable Gino Costabile #3457**

**and**

**Constable Antonio Giannini #99875**

**And the Toronto Police Service**

**Charge: Insubordination**

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**DECISION WITH REASONS**

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|--------------------------|---|
| <b>Before:</b>           | Acting Superintendent Cyril Gillis<br>Durham Regional Police Service            |
| Prosecution              | Inspector Shane Branton, Toronto Police Service                                 |
| Counsel for the Defense: | Ms. Joanne Mulcahy (for Cst. Costabile)<br>Mr. Bryan Badali (for Cst. Giannini) |
| Public Complaint:        | Mr. Simon Owais   |
| Hearing Date:            | October 8, 2019   |

## **PART I: OVERVIEW**

### **Allegations of Misconduct**

1. It is alleged that Constable Gino COSTABILE #3457 (Cst. COSTABILE) and Constable Antonio GIANNINI #99875 (Cst. GIANNINI), both officers being members of the Toronto Police Service, committed the following acts of misconduct contrary to section 80(1)(a) of the *Police Services Act, R. S. O. 1990 c. P. 15*, as amended:

### **Count One: Insubordination**

2. YOU ARE ALLEGED TO HAVE COMMITTED MISCONDUCT IN THAT YOU DID WITHOUT LAWFUL EXCUSE, DISOBEYS, OMITTS OR NEGLECTS TO CARRY OUT ANY LAWFUL ORDER, contrary to Section 2(1)(b)(ii) of the *Schedule Code of Conduct Regulation 268/10*, and therefore, contrary to Section 80(1)(a) of the *Police Services Act, R.S.O. 1990*, as amended.

### **Notice of Hearing**

3. A separate Notice of Hearing for each officer was issued. Both Notices of Hearing contained one count of Insubordination as described above.

### **Plea**

4. Cst. COSTABILE and Cst. GIANNINI appeared before me, Durham Regional Police Acting Superintendent Cyril Gillis, on October 8, 2019 in answer to their Notices of Hearing. Both officers entered a "not guilty" plea to one (1) count of Insubordination. The two officers were tried together.

### **Decision**

5. After analyzing and weighing all of the evidence presented, as the Hearing Officer, I am not satisfied on clear and convincing evidence that the actions of Cst. Costabile and Cst. Giannini amounted to Insubordination. Therefore, I find the officers NOT GUILTY of misconduct and dismiss the charge.

## **PART II: THE HEARING**

### **Exhibits**

6. The Exhibits for this matter are listed as follows:

- Exhibit 1 Designation of Hearing Officer – A/Supt. Barsky, pursuant to s. 94(1), PSA
- Exhibit 2 Designation of Hearing Officer – A/Supt. Hegedus, pursuant to s. 94(1), PSA
- Exhibit 3 Designation of Prosecutor – Insp. Branton, pursuant to s. 82(1)(a), PSA
- Exhibit 4 Designation of Hearing Officer – A/Supt. Gillis, pursuant to s. 94(1), PSA
- Exhibit 5 Agreed Statement of Facts
- Exhibit 6 TPS Governance 15-17 In-Car Camera System
- Exhibit 7 Electronic Copy of Video
- Exhibit 8 Statement of Cst. COSTABILE: Complaint Response
- Exhibit 9 Statement of Cst. GIANNINI: Complaint Response
- Exhibit 10 Duty Book Notes of Cst. COSTABILE
- Exhibit 11 Duty Book Notes of Cst. GIANNINI
- Exhibit 12 Internal Resume Cst. COSTABILE
- Exhibit 13 Internal Resume Cst. GIANNINI
- Exhibit 14 TPS eTicket Evidence / Notes
- Exhibit 15 Photograph of Internal TPS vehicle dash
- Exhibit 16 Respondent Case Book

### **Representation**

7. The Prosecution: Inspector Shane Branton, Toronto Police Service
- Counsel for the Defense: Ms. Joanne Mulcahy (for Cst. COSTABILE)  
Mr. Bryan Badali (for Cst. GIANNINI)
- Public Complainant: Mr. Simon Owais (not present)

### **Agreed Statement of Facts**

8. After Cst. Costabile and Cst. Giannini entered their “not guilty” plea, I was advised by the Prosecutor that an Agreed Statement of Facts would be presented to the Tribunal. The facts of this matter were agreed upon by all parties to this Hearing. The Agreed Statement of Facts, which was filed as Exhibit #5, reads as follows:

*Being members of the Toronto Police Service, attached to 52 Division, Constable Gino COSTABILE (3457) and Constable Antonio GIANNINI (99875) were assigned to uniform duties.*

*On Tuesday, November 7<sup>th</sup>, 2017, they were assigned police vehicle fleet #5241. The vehicle was equipped with the In-Car Camera System (ICCS). The system was tested by Constable GIANNINI at the commencement of the shift and appeared to be working properly at that time. Both officers made notations of this in their memorandum books.*

*Constable GIANNINI was the driver/operator of the police vehicle. Constable COSTABILE was the passenger.*

*While on duty they were westbound on Dundas Street at Huron Street operating marked police vehicle fleet #5241. The ICCS microphones were in the cradle charging.*

*At approximately 10:15 PM, they observed a motor vehicle on Dundas Street West travelling eastbound. They observed that the driver had failed to stop at a red light. Constable GIANNINI activated the emergency lights. The In-Car Camera System was activated. They followed the vehicle observing the vehicle's speed and driving maneuvers which led them to believe that the driver was attempting to evade them. The driver turned onto McCaul Street and then suddenly into the private driveway for the Ontario College of Art and Design.*

*The vehicle had an out-of-country license plates attached.*

*The emergency equipment was activated on the police vehicle to conduct a vehicle stop. The In-Car Camera System (ICCS) was activated automatically. The ICCS microphones were in the charging cradle.*

*They engaged the operator of the motor vehicle in conversation at the vehicle stop. A request was made for identification of the driver. The driver remained in the vehicle.*

*The officers returned to the scout car to carry out their investigation.*

*While in the scout car, the officers turned off the ICCS.*

*Later, during the course of the investigation, the wife of the driver of the vehicle, who identified herself as the registered owner of the vehicle, unexpectedly arrived on scene and approached the officers in their vehicle. Constable COSTABILE had a conversation with this person, who provided information to him.*

## Agreed Statement of Facts Continued

*As a result of investigation, several Provincial Offences Notices were issued to the driver: red light – fail to stop, driver motor vehicle no license, drive motor vehicle with no currently validated permit, and fail to surrender insurance card. A 104 was issued to the driver for fail to stop when signaled or requested to do so by police. A 104 was issued to the registered owner of the vehicle for permit vehicle to be operated without the vehicle being insured.*

*At approximately 00:17 AM on Wednesday, November 8, 2017, the officers cleared from the vehicle stop.*

*Constable COSTABILE and Constable GIANNINI both failed to wear and activate their wireless microphones during the interaction with the vehicle operator.*

## The Relevant Policy

9. The Toronto Police Service Policy that relates to this misconduct hearing is 15-17 In-Car Camera System (ICCS). The applicable portion of the Policy (which was also included in the Notice of Hearing) reads as follows:

### ***Police Officer,***

*7. When assigned to or operating a Service vehicle equipped with an ICCS shall,*

- *operate the ICCS equipment in accordance with the prescribed training*
- *wear the ICCS microphone at all times when the ICCS is activated, utilizing the approved microphone pouch, in accordance with the prescribed training*
- *activate the ICCS to visually and / or audibly record*
  - *all contacts between a police officer and a member of the public where that contact is for the purpose of a police investigation, regardless of whether or not the person is within camera view*
  - *all emergency responses, whether emergency equipment is utilized or not, from initiation to conclusion*
  - *all vehicle pursuits*
  - *all crimes or offences in progress*
  - *crime or collision scenes*

- *any other situation or event where it is believed it would be beneficial to capture video and / or audio evidence of information*

10. The prosecution did not call any witnesses; however, he tendered the following exhibits:

- Exhibit 6 - Document – Policy 15-17 In-Car Camera System
- Exhibit 7 - ICCS Video from police vehicle #5241
- Exhibit 8 – Cst. Costabile Complaint Response
- Exhibit 9 – Cst. Giannini Complaint Response
- Exhibit 10 – Cst. Costabile Duty Notes
- Exhibit 11 – Cst. Giannini Duty Notes
- Exhibit 12 – Cst. Costabile Internal Resume
- Exhibit 13 – Cst. Giannini Internal Resume

### **Witness Testimony**

#### **Defense Witness: Constable Gino Costabile**

11. Ms. Mulcahy called Cst. Gino Costabile to testify. The defense entered Cst. Costabile's eTicket Evidence / Notes as an exhibit (Exhibit 14).

### **Examination in Chief**

12. Cst. Costabile has worked for the Toronto Police Service for 31.5 years. During that time, he has worked at Divisions 14, 22 and 52. On November 7<sup>th</sup>, 2017, he was working in 52 Division - Primary Response, in police uniform. His partner on that day was Cst. Antonio Giannini. They were assigned fully marked patrol vehicle 5241. Cst. Giannini was the driver.
13. On November 7<sup>th</sup>, 2017, Cst. Giannini carried out the initial testing of the In-Car Camera System (ICCS). Cst. Giannini informed Cst. Costabile that the ICCS was (working) "okay" and as a result, Cst. Costabile noted as such in his memo book.

14. Cst. Costabile testified that the ICCS has two mechanisms of recording;
  - i) Video, which consisted of a primary camera that faces out through the front window and a secondary camera which records the rear seat of the police vehicle, and
  - ii) Audio, which consisted of microphones for the driver and passenger when they are out of the vehicle and an interior microphone for the rear seat when a prisoner is in custody or for taking statements.
15. Cst. Costabile confirmed that the complainant, Mr. Owais was never in the police vehicle. In fact, Mr. Owais never exited his vehicle.
16. Cst. Costabile testified that once he and his escort cleared the station or shortly thereafter, he noticed that the microphone batteries were indicating red. This meant that the batteries had depleted on both the driver and passenger microphones. He believed that the microphones were not operational and not ready for use.
17. Ms. Mulcahy showed Cst. Costabile a photograph depicting the interior view of a Toronto police vehicle with an ICCS. Cst. Costabile confirmed that the photograph was a visualization of the interior of a Toronto police vehicle. The picture showed the MWS computer monitor and two microphones that were each in their charging cradle.
18. Cst. Costabile described each of the microphones depicted in the photograph. The microphone positioned in the left cradle had two red lights illuminated; the light in the centre of the cradle was the battery indicator, which was red. Cst. Costabile testified that the red light indicated that the microphone was, "not operational." The smaller red light to the right was the power source indicator for that cradle. Cst. Costabile testified that the red light indicated that the microphone cradle was receiving power. He stated that on November 7, 2017, he observed the two microphone cradle indicators to be red for the battery and red for the power source.
19. Cst. Costabile contrasted his observations with the microphone cradle pictured on the right side of the photograph. That microphone cradle had a green light for the battery and red light for the power source. He testified that on November 7, 2017, neither the left or right microphone cradle showed a green battery indicator.
20. The photograph was made an exhibit – (Exhibit 15).

## Examination in Chief Continued

21. Cst. Costabile testified that he first came into contact with Mr. Owais after pulling him over for a *Highway Traffic Act* offence. At approximately 2215hrs, Cst. Costabile and Cst. Giannini were travelling westbound on Dundas Street West approaching Huron Street. As they were coming to a stop for the red traffic signal, his attention was drawn to an eastbound vehicle which ran the red light. Once the subject vehicle cleared the intersection, Cst. Giannini initiated a u-turn and activated the police emergency lights. He testified that when the emergency lights were activated, the ICCS engages and the video records 30 seconds prior to activation. This action captured the red light offence on video.
22. Cst. Costabile testified that he maintained observations of the subject vehicle as it passed the police vehicle. He believed the driver was trying to evade being stopped by the police. His belief was grounded by the driver's behaviour. The subject vehicle sped up after passing the police car, was in and out of the curb and passing lanes, was widening the gap between the police vehicle. Cst. Giannini had to accelerate over the speed limit to catch up to the subject vehicle. At McCaul Street, the subject vehicle made an aggressive right turn followed by a second aggressive turn into a private commercial driveway for the College of Arts and Design. At that point the subject vehicle had nowhere to go; it was a dead end. The subject vehicle came to a stop. The police vehicle stopped behind the subject vehicle in an offset position. The traffic stop was consistent with a high-risk vehicle stop.
23. Cst. Costabile testified that he considered the traffic stop to be a high-risk traffic stop due to the "totality of the situation." The situation included darkening conditions, the erratic driving behaviour, the out of province license plates, the solo occupant, and the stopping at a dead end, which was not the route he intended to take. Based on the above factors, Cst. Costabile was prepared for "some sort of armed conflict."
24. Once the subject vehicle stopped, Cst. Giannini immediately exited the police vehicle and approached the driver. At the same time, Cst. Costabile communicated their location to the police dispatcher. He also kept a visual observation of the driver and vehicle. Moments later, Cst. Costabile approached the subject vehicle at the driver side. He and Cst. Giannini used flashlights due to the darkness.



25. Cst. Costabile told the driver that the interaction was being recorded and the stop was being made for a red light traffic offence. He requested the driver's documents and vehicle particulars. The driver provided a Saskatchewan driver's license, but was unable to provide proof of insurance or the ownership. The driver told Cst. Costabile that the vehicle was from Virginia and vehicle insurance was not required in that state.
26. During the vehicle stop, a citizen approached and asked Cst. Costabile if the two vehicles could be moved so the citizen could continue to their destination. Cst. Costabile testified that he completed computer checks on the driver and subject vehicle. It should be noted that the driver of the subject vehicle was Mr. Simon Owais. Cst. Costabile directed Mr. Owais to move his vehicle to McCaul Street so that they were not impeding other motorists on the property. Once the vehicles were moved onto McCaul Street, Cst. Costabile continued his investigation from the police vehicle.
27. The investigation confirmed that Mr. Owais was issued an Ontario driver's license; however, it was expired. The investigation also checked the validity of Mr. Owais' claims that the state of Virginia did not require insurance. Additionally, the investigation reviewed Mr. Owais' Saskatchewan driver's license details and the length of time the vehicle was in Ontario. This part of the investigation consisted of phone calls to Border Services to check when the vehicle crossed into Canada from the United States. Cst. Costabile contacted TPS Traffic Services and fellow platoon members who had some experience. He also conducted Google searches on Virginia insurance policies.
28. Cst. Costabile testified that at some point in time, a female approached the passenger side window of the police vehicle. The female identified herself as Mr. Owais' wife. She advised that she was the registered owner of the subject vehicle. Cst. Costabile requested identification from the female. She initially provided a Puerto Rican identification which Cst. Costabile considered unsuitable. The female provided a Virginia driver's license. The photograph and name were consistent. Cst. Costabile requested the insurance documents from the female. She advised that the state of Virginia didn't require insurance and by default, not required to have it in Ontario. The female went to the passenger seat of the subject vehicle.
29. At a later point, the same female returned to the police vehicle with her phone out as if she was recording the interaction. Cst. Costabile testified that the female's demeanour transitioned from pleasant at the first interaction to hostile during the second. Cst. Costabile told the female that she would be receiving a ticket for allowing the operation of a motor vehicle without insurance. He issued a Part 3 Summons to the female.

## Examination in Chief Continued

30. Cst. Costabile issued four Part 1 tickets and one Part 3 summons to Mr. Owais. Cst. Costabile told Mr. Owais that he would have to attend court for the Part 3 Summons and that he had options on the rear of the Part 1 tickets. After receiving the tickets, Mr. Owais and his wife drove away. Cst. Costabile and Cst. Giannini returned to the police station.
31. When asked, Cst. Costabile testified that Mr. Owais was convicted on all of the charges, with the exception of drive motor vehicle - no license. Cst. Costabile confirmed that there were no further ongoing matters with Mr. Owais.
32. Ms. Mulcahy played the recorded police vehicle video for the Tribunal. The video was a total of 7 minutes; from 2215hrs to 2222hrs. Cst. Costabile confirmed that the video was from police vehicle #5241 on November 7, 2017, which captured the initial traffic offence, and stop with Mr. Owais.
33. At 2215 hrs. Cst. Costabile identified Mr. Owais' vehicle running a red light. The vehicle was observed turning right from Dundas Street West onto McCaul Street and another right into a private driveway. This was where Mr. Owais' vehicle came to stop.
34. Cst. Costabile confirmed that the first police officer observed approaching the vehicle was Cst. Giannini and the second officer was himself. There was no audio heard with the video.
35. At 2222 hrs. Cst. Costabile and Cst. Giannini return to their police vehicle and the video stops.
36. When asked why there was no audio, Cst. Costabile stated, "the microphones weren't operational at the time, as I stated in the beginning, the microphones were in the cradles, the cradles were indicating the battery status as red, which is, my understanding they are not ready to be used and operational."
37. When asked why he didn't take the microphone out of the cradle during the traffic stop, Cst. Costabile stated, "No, because of the situation, time of the night, dim lighting, lone occupant, the erratic driving, the attempt to elude us, and the U.S. license plate on the vehicle. I was concerned that this was gonna be an armed sort of conflict, obviously it was a high-risk type take down situation. That in conjunction with the microphone not being charged, is why I didn't remove it from the maintenance cradle. It wasn't operational."

38. Cst. Costabile identified two reasons for not taking out the microphone during the traffic stop. The first reason he described was the scenario. Cst. Costabile referred to the traffic stop as a, "text book college instruction for a high-risk take down. It had all the ingredients of a possible armed conflict." His main concern was officer safety; keeping an eye on his partner and the driver in the motor vehicle. He testified that it wasn't practicable to take out the microphone given the "totality of the situation." The second reason was that microphone batteries were indicating red, which meant to him, they weren't operational, nor ready for use.
39. Cst. Costabile confirmed that his investigation continued back at the police vehicle. While at the vehicle, the officer safety concerns were "de-escalating." The officer safety and risk factors were now diminished after having an opportunity to look in the vehicle and knowing the identity of the driver.
40. Cst. Costabile testified that the investigation into Mr. Owais and his vehicle involved speaking to other officers, including Cst. Giannini. It also involved radio communications with the dispatcher and telephone communications to fellow platoon members, Traffic Services and Border Services.
41. When asked, Cst. Costabile testified that even if the microphones were operational and in use, "we would have turned it off any way because you wouldn't want any of the information, police investigative techniques or discussion amongst police personnel captured."
42. Cst. Costabile confirmed that there was no video footage showing service of the traffic tickets, which occurred about 1 hour and 57 minutes after the initial stop. He stated, "There is no evidentiary value to be obtained by keeping the video running or no public or officer safety issues. The video captured the driving evidence."
43. Cst. Costabile believed he didn't contravene the Toronto Police ICCS Policy 15-17.
44. Ms. Mulcahy asked Cst. Costabile specific questions in relations to the Policy. When required, I have reproduced the specific sections in bold and italics for reference.
45. Referring to Section 3 of the Policy, Cst. Costabile testified that Cst. Giannini conducted the required ICCS checks at the start of their shift.

## Examination in Chief Continued

46. Referring to Section 5

*Police Officer,*

**5. Upon discovery of any malfunctions shall report such forthwith**

- **To the HELP desk**
- **To a supervisory officer**

Cst. Costabile testified that he didn't notify the Help desk or a supervisor because there were no malfunctions of the equipment.

47. Referring Section 6

*Police Officer,*

**6. Upon discovery of any damaged or missing ICCS equipment shall report such to a supervisory officer forthwith.**

Cst. Costabile testified that he didn't believe he was required to report it to a supervisor or the Help desk because the ICCS wasn't malfunctioning. The equipment was operating correctly; the battery was just depleted so much that it needed to be charged to be operational.

48. Referring to Section 7

*Police Officer,*

**7. When assigned to or operating a Service vehicle equipped with an ICCS shall**

- **Operate the ICCS equipment in accordance with the prescribed training**

Cst. Costabile confirmed that he completed the Canadian Police Knowledge Network ICCS training on May 17, 2009. The only other training he received was a brief discussion in the parking lot on the use and activation of the ICCS. In regards to the microphones, he was only told to, "take it out and carry with you. Once you pull it out it will turn on automatically". He was never trained on how to use the microphones.

- **Wear the ICCS microphone at all times when the ICCS is activated, utilizing the approved microphone pouch, in accordance with the prescribed training**

Cst. Costabile testified that he was never issued an approved microphone pouch. He elaborated by telling the tribunal that the approved pouch was to work in conjunction with external body armour; he wore internal body armour. Additionally, there was no microphone pouch designed for members who wore internal body armour.

- **Activate the ICCS to visually and/or audibly record**
  - **All contacts between a police officer and a member of the public where that contact is for the purpose of a police investigation, regardless of whether or not the person is within camera view**

Cst. Costabile testified that the policy gave officers the option to record visually and / or audibly. He complied with the policy because they visually recorded the incident and the policy gave him the option to record audibly. He believed he didn't contravene this section because the policy offers a choice to audibly record. He further stated, "although they offer a choice in the policy, we had no choice as the audio portion wasn't available to us and further there was nothing to be obtained through an investigative perspective of the audio". Moreover, there was no requirement in the policy to capture video or audio for the service of tickets.

- **All emergency responses, whether emergency equipment is utilized or not, from initiation to conclusion**

Cst. Costabile testified that the emergency issue had concluded. This traffic stop was not an emergency response - it was a vehicle stop for a *Highway Traffic Act* infraction. Activating the emergency equipment does not mean emergency response.

- **All crimes or offences in progress**

Cst. Costabile testified that the offences were captured on video. The audio wouldn't have captured any of the offences.

- **Crime and collision scenes**

This situation was not a crime or collision scene.

- **When practicable all statements not taken inside a service facility (Although this section was canvassed, it was not included in the November 2017 In-Car Camera Policy)**

Cst. Costabile testified that he wasn't looking to capture a statement from Mr. Owais; he just needed the documents. Although Mr. Owais made utterances, no written statements were taken. It also wasn't practicable as the microphones weren't operational.

## Examination in Chief Continued

- ***Any other situation or event where it is believed it would be beneficial to capture video and/or audio evidence or information***

Cst. Costabile testified that he complied with the policy by recording the traffic stop with video. He asserts that the policy offers police officers an option to record audibly. There was nothing to be captured from the audio for evidentiary purposes. Again Cst. Costabile reiterate that he couldn't record audibly because the microphones were not operational.

- ***Ensure that the ICCS is not activated during,***
  - ***Investigative discussions or enquires between police personnel***
  - ***Situations that reveal police investigative techniques***

Cst. Costabile testified that, "Had it (microphone) been on, I would have turned it off because we had discussions amongst ourselves in the car and phone calls were made to other police personnel and agencies". These discussions and techniques took place while in the police vehicle.

49. Referring to Section 8,

***Police Officer,***

***8. As soon as practicable, when the ICCS is activated, shall advise the person that they are being visually and/or audibly recorded***

Cst. Costabile testified that he told Mr. Owais the stop was being recorded.

50. Referring to Section 10,

***Police Officer,***

***10. When the ICCS is activated, shall not deactivate until the incident has concluded or, except when***

- ***the officer no longer reasonably believes that the collection of audio/video media would support officer or public safety, and/or benefit the investigation***
- ***directed to do so by a supervisor***

Cst. Costabile testified, "No, there was no need to collect anything else. Like I said, the public and our safety was no longer a concern and there was nothing to be captured evidentiary". Cst. Costabile believed that the recording of serving tickets would not have benefitted the investigation.

51. Referring to Section 11

**Police Officer,**

**11. When it is necessary to deactivate the ICCS or mute audio recording during an investigation or incident shall**

- **where reasonably possible, before deactivating or muting the audio, record a brief audible statement indicating the reason**
- **note the reason for the decision in the memorandum book, and when directed to do so by a supervisor, note the supervisor's badge number**

52. Cst. Costabile testified, "No, it wasn't my belief that we had to make any notes when we turned it off and record that in our book". Cst. Costabile believed Section 11 didn't apply to Section 7.

53. Cst. Costabile testified that the reason he didn't make any notes about the microphones charging was because it was an "everyday thing". The charging of the microphone battery is a "standard thing that happens, it isn't malfunctioning."

54. Cst. Costabile testified that on November 7, 2017, he followed the Policy. He was not acting rebelliously. He believed that if he was in contravention of the ICCS policy, he had a lawful excuse.

**Cross Examination by Insp. Branton**

55. Under cross-examination, Cst. Costabile agreed that the Toronto Police Service has been using the ICCS for 11 years and that he completed the required training on May 17, 2009.

56. Cst. Costabile testified that the additional 5-minute In-Car Camera training discussion that took place in the parking lot included how to activate the ICCS, specifically that it can be initiated by turning it on with the emergency equipment, depressing the air horn, prolonged press of the actual horn, or by pressing the camera itself. The discussion also included the activation of the rear seat camera.

57. Cst. Costabile confirmed that if an officer was wearing a microphone and the emergency equipment was activated, the microphone would automatically activate. He further confirmed that the microphones would activate both inside or outside of the police vehicle and that the microphones could be remotely activated without the emergency lights on.

58. Cst. Costabile confirmed his notebook entries. Cst. Costabile testified that Cst. Giannini tested the ICCS and that he had an independent recollection because "I know that on each and every occasion, officer Giannini does the ICCS testing." Cst. Costabile stated that the meaning of "ICC OK" was that the ICCS, "functions, nothing broken, it was operating when tested compliant."
59. Cst. Costabile testified that he didn't take any additional action when he observed the red lights on the microphone charging cradle because, "it's a matter of the battery being allowed to sit and obtain a charge in its cradle."
60. When asked if the microphone battery required a full battery to work. Cst. Costabile responded, "I wouldn't be able to tell you. I can tell you, until the green light goes on, it's my understanding that the system, the microphone portion is not operational." His understanding was that unless there was a green light on the charging cradle, he can't use it. Cst. Costabile used his cell phone as an example; "if the battery is completely drained, it doesn't mean the phone is broken. It just needs to be charged."
61. When challenged on his cell phone example, Cst. Costabile stated that he couldn't use his cell phone unless it was 100% charged. He stated, "Correct and I can give you an example of that, my cell phone will indicate that there is battery life in it, but when I use one of the applications i.e. video or using the camera, it will tell me there is not enough power to use that app. So it's not fully operational, correct." Cst. Costabile qualified his understanding of the microphone battery by stating, "Green means system operational, red means not operational."
62. Cst. Costabile testified that the initial ICCS tests were conducted at 1700 hrs. Immediately after getting into the police vehicle, he noticed the red lights on the microphone charging cradle. Cst. Costabile believed the microphones just needed a battery charge. At 2215 hrs. the incident with Mr. Owais commenced. Cst. Costabile stated that the microphone batteries were still red. He asserted that although the batteries were in the charging cradle for 5 hours, the police car was not continuously running for those 5 hours. The police car needs to be on for the charger to work.
63. Cst. Costabile stated he and Cst. Giannini did not have any discussion about using one of the microphones and leaving the other one on the charger.
64. When asked why the microphones worked during the initial testing, but moments later they did not, Cst. Costabile responded, "There might have been enough juice for him to carry out the test, but it was my belief that there wasn't enough power to operate those microphones."



### **Cross Examination by Insp. Branton Continued**

65. Cst. Costabile confirmed that the ICCS is a piece of equipment used to enhance police officer and public safety.
66. When asked about his description of the vehicle stop, Cst. Costabile confirmed that he believed the stop was a high-risk take down. Insp. Branton played the video and challenged Cst. Costabile assessment. Cst. Costabile stated that once the vehicle was stopped, he was able to conduct an assessment of the situation, specifically the driver wasn't making any overt moves. As a result, he was in "de-escalation" mode, even before making contact with the driver.
67. Cst. Costabile confirmed that he could have grabbed a microphone before exiting the police vehicle; however, that wasn't his focus at that point.
68. Cst. Costabile confirmed that his notes were silent on the operational status of the microphones. He stated, "Right, cause it doesn't make up part of the offence that the driver committed. There is no reason for that." Cst. Costabile confirmed that the ICCS is provided as part of disclosure for Provincial Offence Notices. He stated that the In-Car Camera was functional and operational; it was the microphone that wasn't operational. The video captured the traffic offence, the audio wouldn't have assisted.
69. Cst. Costabile believed that the conversation with Mr. Owais had no evidentiary value to the charge". When asked if the conversation with Mr. Owais' wife resulted in an offence notice being issued, he stated that she voluntarily provided the details and that there was no reason to record it. Cst. Costabile confirmed that it was his responsibility to collect the best evidence; he stated that in this specific case, an audio record with Mr. Owais or his spouse would have no benefit.
70. Cst. Costabile confirmed that this interaction with Mr. Owais resulted in a complaint and that the allegation was unsubstantiated. Cst. Costabile stated that Mr. Owais alleged that the officers didn't spend more than 30 seconds speaking to him and that the video clearly depicted over 2 minutes of conversation.
71. Cst. Costabile denied that an audio recording of a conversation with a member of the public would have beneficial value; even where there was a misrepresentation or discrepancy of what was said. He didn't believe audio would have any relevant evidence for court.

72. Cst. Costabile believed the rationale for the ICCS was for the protection of officers, public, and the collection of evidence. He stated that he collected all the evidence that he was required to.
73. When asked if he told Mr. Owais he was being recorded, Cst. Costabile confirmed that he didn't specify audio or video, just that the interaction was being recorded.
74. Cst. Costabile asserted that the microphone batteries weren't charging continuously from the start of his shift until the traffic stop. The battery charge condition was a normal occurrence for a battery device; he identified the same issues with a cell phone, cordless drill, cordless light, and a shaver. He specifically identified his trimmer as an example; the trimmer only worked when the red battery light turned off. Cst. Costabile said he never uses any of the above listed products unless they were 100% charged. He stated that he wasn't aware of the microphone operating when it has less than 100% charged.
75. Cst. Costabile confirmed that the video recording commenced at 2215 hrs. and the video stopped recording at 2222 hrs. Although he didn't remember who shut off the video, Cst. Costabile said that he would take responsibility for turning it off. Cst. Costabile confirmed he wasn't directed to turn the video off by a supervisor. He believed that recording the entire duration of the traffic stop would not benefit the investigation.
76. Cst. Costabile confirmed that he never received an approved microphone pouch from the Service and he never asked for one. Cst. Costabile advised that the pouch is designed to work with external vests; it wasn't designed to attach to shirt fabric. Cst. Costabile testified that he uses the microphone by carrying it in his hand and that he uses it regularly.
77. Cst. Costabile testified that he was aware of Section 11 of the policy which provides direction to a police officer who finds it's necessary to deactivate the ICCS or mute the audio. Cst. Costabile asserted that the video was turned off because there was, "Nothing of beneficial value to capture in term of evidence by keeping the camera rolling for that extended period of time."

### **Cross Examination by Mr. Badali**

78. Under cross examination by Mr. Badali, Cst. Costabile testified that it was a risk to wear a microphone if it's not fully charged.

79. Once the subject vehicle was stopped, Cst. Costabile confirmed that Cst. Giannini immediately stepped out of the police vehicle to establish control and engage the driver.
80. Cst. Costabile confirmed that the policy doesn't speak to using the ICCS when there is a potential for an allegation of misconduct.
81. Cst. Costabile confirmed that in Section 7 of the policy, it doesn't simply state to activate the ICCS for all contacts between a police officer and a member of the public. The policy had a limitation for when the contact is for the purpose of a police investigation. Cst. Costabile testified that when Ms. Owais approached the police vehicle, he didn't know it was for a police investigation.
82. Cst. Costabile confirmed that the ICCS policy provides officers with discretion for when they no longer reasonably believe that the collection of audio/video media would support officer or public safety, and / or benefit the investigation. He believed that while he was conducting his investigative checks, nothing of evidentiary value would be captured by leaving the ICCS recording. It would essentially record a motionless vehicle.

### **Reply by Ms. Mulcahy**

83. Under reply, Cst. Costabile asserted that the police vehicle wasn't continuously running for 5 hours prior to the traffic stop with Mr. Owais. He stated that prior to the stop he was at an arrest and Cst. Giannini had a SOCO duty to perform. Although 5 hours had elapsed between the start of shift and the traffic stop, the microphones weren't charging for that period of time.

### **Defense Witness: Constable Antonio Giannini**

84. Mr. Badali called Cst. Antonio Giannini to testify.

### **Examination in Chief**

85. Cst. Antonio Giannini has been a member of the Toronto Police Service since 2000. His career started as a court officer and in May 2013, he became a police officer. Once he completed his training at the Ontario Police College, Cst. Giannini was assigned to 52 Division in a primary response capacity.

86. Cst. Giannini confirmed that he received training on the ICCS in April 2013 as outlined in his internal resume. That training included a practical exercise with a police vehicle. The training Sergeant explained the working of the camera system and the various ways to turn the ICCS on. During his first week of training, his training officer provided training on the testing procedure. He did not receive any instruction on the meaning of the microphone indicator lights.
87. On November 7, 2017, Cst. Giannini was working the evening shift with his partner, Cst. Costabile. They were assigned police vehicle #5241. At 1716 hrs. Cst. Giannini conducted the initial tests of the ICCS and microphones; the ICCS appeared to be working and the microphones were connected to the system. The initial tests were recorded. Once the testing was done, the microphones were returned to the charging cradle. Cst. Giannini told Cst. Costabile that the ICCS system was working.
88. Cst. Giannini advised that there have been times when the microphones weren't operational due to the battery charge. In those instances, the microphones were placed into the charging cradle to replenish its battery. A red light on the battery charge indicates that the microphone battery is charging. Cst. Giannini didn't know if the microphone was operable when a red indicator light was on. He had no conversation with Cst. Costabile about the meaning of the red light. It was his understanding that the vehicle had to be running in order for the charger to work.
89. Cst. Costabile testified that the police car was running for about a total of 30 to 40 minutes between 1700 hrs. and 2215 hrs.
90. In relation to the incident with Mr. Owais at 2215 hrs., Cst. Giannini observed the subject vehicle was driving at a high rate of speed, trying to evade police, moving from the curb lane to passing lane while passing other vehicles, making a quick maneuver into the alley, the hour of the night, the out-of-town license plates, and not pulling over when the police emergency lights were activated; this was not normal behaviour from a motorist. Cst. Giannini believed that Mr. Owais was trying to get away from the police and that he had no reasonable explanation for turning into the alley.
91. Cst. Giannini testified that he had no opportunity to activate the microphone; he was focused on the subject vehicle, the oncoming vehicles, the cars pulling over, pedestrians, and cyclists. His main attention was on driving safely. Cst. Giannini stated that he couldn't comply with Section 7 of the policy which required him to wear the ICCS microphone at all times when the ICCS was activated. He did however activate the ICCS.

## Examination in Chief Continued

92. When the subject vehicle finally stopped in the alley, Cst. Giannini believed that the driver was going to either run from the vehicle, turn around and come back out to McCaul St. or open fire if he had a weapon. Cst. Giannini's goal was to "neutralize the situation" and to be able to react to the subject's actions. Once stopped, he immediately exited the police vehicle. He assessed the vehicle for any dangers – observed the number of occupants, observe the driver looking back, his hands were on the stirring wheel, he wasn't shuffling around and "he didn't have a look of someone who was going to attack." Cst. Giannini did not approach the subject vehicle in a "casual" manner. He made his approached by cutting across the police vehicle. If the driver pulled a weapon Cst. Giannini could use the subject vehicle as cover. He also approached from the rear driver side to check the backseat for other occupants.
93. Based on the circumstances, Cst. Giannini believed he didn't have the time to check the microphone battery status before using it at the traffic stop. His focus was the subject vehicle and its driver. In order for Cst. Giannini to use the microphone, he would have to conduct another test to make sure it was working. He described the traffic stop as "unusual."
94. Once contact was made with Mr. Owais, Cst. Costabile took over the traffic stop. Cst. Giannini spoke to Mr. Owais for only seconds. He continued the investigation by checking the valid tag and the passenger side of the vehicle.
95. Once back in the police vehicle, Cst. Giannini deactivated the ICCS by turning off the video. He did so because he was continuing the investigation and would be speaking about it with other members; he didn't want the rear microphones picking up the conversation. He believed he was following the policy by deactivating it when there was no more "reasonable expectation of officer safety, public safety as well as no evidentiary value." He believed there would be no evidentiary value of recording a stationary vehicle.
96. Additionally, Cst. Giannini believed that there was no evidentiary value of recording the service of tickets. He felt the investigation was already concluded.

### **Cross Examination by Insp. Branton**

97. Under cross examination, Cst. Giannini confirmed that he passed the ICCS training in 2013. He didn't remember completing an e-Learning component of the training. He remembers being trained by his training officer Shane Murphy. In relation to Murphy's training, Cst. Giannini stated, "He explained to do the test at the beginning of the shift, to use the mics when the camera is on, traffic stops, that's what he explained, showed me how to do the test and then traffic stops to use your microphone". This training took place while working at 52 Division. He worked with a training officer for 10 weeks. During the training, Murphy never told Cst. Giannini to leave the microphone in the charger and only take it out when it's convenient. The training was clear, use the microphone and camera during vehicle stops. It was Cst. Giannini's practice to use both the microphone and camera during vehicle stops.
98. Cst. Giannini testified that if he had a work-related questions, he would ask a supervisor or coach officer. At no time in his career has a supervisor told him he was using the ICCS improperly.
99. Cst. Giannini testified that there have been times in the past where the microphone batteries were dead and that he noted it. He didn't note it on November 7, 2017, because dead batteries don't constitute a malfunction, they just need to be charged. On previous occasions, the batteries had completely no power. Cst. Giannini would report a malfunction if the camera or microphones didn't record or if the charging cradle lights were flashing. On this occasion, he placed the microphones in the charger and light went red, which meant it was charging.
100. When asked why he put the microphones back in the charger after testing it, Cst. Giannini stated, "cause they had to charge; there was no obligation for me to keep it on me at all times."
101. Cst. Giannini testified that the microphones are automatically activated when the ICCS is turned on. The microphones could record conversations of officers inside the vehicle and could capture valuable information. Cst. Giannini was asked if he thinks the microphones were designed to be worn so they automatically come on when the ICCS is activated. He said "it makes sense". Microphones that are sitting in the cradle will not activate. He believed the microphone in the rear seat would activate when the ICCS is turned on.

102. Cst. Giannini had no conversation about the microphone battery indicator being red. It was his practice to charge up the microphone batteries at the start of shift because he didn't know to what extent the mics were used during the previous shift. Cst. Giannini admitted that he could have told a supervisor; however, this was not something that he would tell a supervisor. The mics weren't malfunctioning; they just need to be charged.
103. Insp. Branton asked Cst. Giannini if he made any commands to the driver before approaching the vehicle. Cst. Giannini responded no, he could see the driver's hands on the steering wheel, his demeanour was not aggressive and as a result, his vigilance was reduced. His assessment was made within moments of approaching the vehicle.
104. Cst. Giannini believed that an audio recording of his conversation with Mr. Owais wouldn't have evidentiary value. He said that Mr. Owais' charges were moving violations so any verbal conversation wouldn't have assisted. He also agreed with Insp. Branton that he couldn't predict what the value of the conversation could be when he didn't know what charges were going to be laid.
105. Insp. Branton suggested that that Cst. Giannini had audio and video available to him, but he chose not to use the audio. Cst. Giannini responded with, "Wasn't out of choice not to use it, the circumstances there, I didn't have an opportunity to grab the microphone, test it, and hope that it worked." Cst. Giannini had no conversation with Cst. Costabile about putting one of the microphones on and leaving the other one in the charger. Cst. Giannini said he didn't make a conscience choice not use the microphone.
106. Insp. Branton questioned Cst. Giannini's decision to let Mr. Owais move the vehicle even though he was being investigated for driving without a license and no insurance. He confirmed that Mr. Owais had a Saskatchewan driver's license and the vehicle was only moved 15 metres.
107. Insp. Branton question Cst. Giannini's decision to not activate the ICCS when the tickets were being issued. Cst. Giannini said he didn't think about it and the investigation was over. He believed there was no evidentiary value in recording the service of tickets.
108. Cst. Giannini agreed with the ICCS rationale as listed in the policy. He didn't set out to not use the microphone; he was trying to keep the integrity of the battery by making sure it was charged. He was preoccupied with the traffic stop.
109. Cst. Giannini testified that he wasn't familiar with ICCS policy on muting the microphones.

### **Cross Examination by Ms. Mulcahy**

110. Cst. Giannini believed that a better practice for the use of the ICCS microphones would be for the Service to issue a fresh battery at the start of shift, a practice similar to the issue of radios.
111. During his training on the ICCS, no mechanical or engineering specifications were provided.
112. Cst. Giannini confirmed that there was no conversation between him and Cst. Costabile about not wearing the microphones.
113. On November 7, 2017, Cst. Giannini made a judgment call. The policy allowed for officers to use their own judgment. He wasn't trying to manipulate the system or act nefarious.
114. There was nothing in the Policy that directs a police officer to use the ICCS for the service of tickets. Nor was there a definition for a malfunction.
115. Cst. Giannini believed the policy was to wear the microphones when the ICCS was activated. If the microphones were not charged, they were to go in the cradle to charge. There was no contravention with charging the microphone batteries when the ICCS was not activated.
116. Cst. Giannini testified that the microphone pouch was designed to work with the external vest system. On November 7, 2017, Cst. Giannini wore an internal police vest. There was no way to attach the microphone or pouch to the internal vest. There has been no communication from the Service about only wearing an external vest. The decision to wear an internal or external vest lies with the individual officer.
117. Cst. Giannini believes that he complied with the ICCS policy. The policy provides options for officers in terms of the language it uses, specifically the use of video and / or audio. The policy is also explicit when it states that an officer is not to activate the ICCS during investigative discussions or inquiries between police personnel.



## Reply by Mr. Badali

118. During reply, Cst. Giannini confirmed that the police vehicles are constantly in use throughout the 24-hour period. The only time the microphones can charge is when they are sitting in the charging cradle and the vehicle is running. He testified that at some point during a shift the battery would need to be charged.

## Submissions of the Defense

### Ms. Mulcahy

119. Ms. Mulcahy reminded the Tribunal that the burden of proof is on the prosecutor and threshold of that burden is clear and convincing evidence. She asserts that the burden has not been met. To reinforce her assertion, Ms. Mulcahy submitted a book of authorities consisting of 16 cases (Exhibit 16).

In Penner v. Niagara (Regional Police Services Board) [2013] S.C.J. No. 19 and Ottawa (City) Police Service v. Ottawa (City) Police Service [2016] O.J. No. 2431 (C.A.) the courts confirmed the standard of proof in a *PSA* hearings is clear and convincing evidence.

In Allan v. Munroe (Ont. Board of Inquiry – 1994) the Board identified the standard of “clear and convincing evidence” as “weighty, cogent and reliable evidence”.

120. Ms. Mulcahy submitted that the requirements to prove a charge of insubordination were:

- There must be an order given.
- The order must be lawful.
- The prosecutor must prove that the order is clear and unequivocal. She asserts that the evidence provided by Cst. Costabile and Cst. Giannini showed that the policy is not clear and unequivocal.
- Proof that the order has been disobeyed. She asserts that a fair reading of the policy shows that the order was not disobeyed. Any ambiguity must go in the favour of the officer.
- That there was no lawful excuse to the disobedient behaviour. She asserts that Cst. Costabile and Cst. Giannini had a lawful excuse.

121. Ms. Mulcahy submitted seven cases to support the basic principles of a charge of insubordination.

122. In Murray and Toronto Police Service (1984) O.P.R. 616, - It was held that to constitute insubordination, “an order must be clear and unequivocal.”
123. In Pollack v. Hill and Cowley (Board of Inquiry- 1991), although the case involved a charge of neglect of duty, the same principles can be applied to insubordination. The Board stated, “The officers cannot be held to a standard of ensuring – in the sense of guaranteeing - that the wiretap authorization would not be breached. There may be a kind of neglect of supervisory duty which would be relevant considerations of performance evaluations but not serious enough to constitute misconduct”.
124. In P.G. v. Ontario (Attorney General) [1996] O.J. No. 1298 – The officer was charged with corrupt practices and neglect of duty. He was found guilty of both charges but upon appeal, the charges were quashed. The court stated, “Accepting the Board's finding of inadvertence, on this record, the only logical conclusion is that the appellant had made an honest mistake – he did what he undertook to do but did it imperfectly.” This conclusion declares that an honest mistake provides a defense to a charge.
125. In Blowes-Aybar and Toronto Police Service (OCCPC – 2003). The Commission accepted the findings in Constable P.G. and found the reasoning to be “binding and persuasive”. An honest mistake is a defense to a charge.
126. In Rowe and Sault Ste. Marie Police Service (OCCPS – 2003) The Commission refers to Blowes-Aybar and Toronto Police Service and P.G. v. Ontario (Attorney General). They found that the principle of lawful excuse is a defense to a charge and that an honest mistake provides an answer to a charge.
127. In Licop and Toronto Police Service (2006) the officer was charged with insubordination for not following a Crime Stoppers policy. At page 17, the Hearing Officer stated, “the charge of insubordination is specific; the behaviour must be disobedient and rebellious, and further beyond a performance issue or honest mistake in conduct.”
128. In Hawkes and McNeilly [2016] O.J. No 5397 (Div. Ct.) The court stated, “to constitute neglect of duty, the impugned conduct must include an element of willfulness in the police officer’s neglect or there must be a degree of neglect which would make the matter cross the line from a mere job performance issue to a matter of misconduct.”
129. In Kaye and the Toronto Police Service (1986) O.P.R. 697. The Commission quashed a conviction of insubordination as the policy was not clear and unequivocal.

130. In Austin and Toronto Police Service (2009), the police officer was charged with discreditable conduct. Finding the officer not guilty, the Hearing Officer stated, "It is a general rule that any ambiguity in legislation or regulation must favour the defendant."

### **Submissions of the Defense Continued**

131. In Howard and Toronto Police Service (2010) the police officer was charged with insubordination, neglect and deceit. In finding that there were inconsistencies in the Toronto Police procedure, the Hearing Officer stated, "It is a general rule that any ambiguity in regulation and legislation must be weighted in favour of the officer."

132. In Hallam v. College of Physicians and Surgeons of Ontario (1993) 61 O.A.C. 143 (Div. Ct.) and Hansen and Toronto Police Service (1994), the principle of an error in judgment is not misconduct.

133. In Golomb v. College of Physicians and Surgeons (1976) 12 O.R.(2d) 73 (Div.Ct.) the court set out the law that Hearing Officers are bound by the parameters of the Notice of Hearing.

134. Ms. Mulcahy asserted that ICCS Policy 15-17 is not clear and unequivocal. The officers complied with it to the best of their abilities. However, if the policy was found to be clear and unequivocal, Cst. Costabile and Cst. Giannini had a lawful excuse not to comply with it. Ms. Mulcahy points to Section 2 of the ICCS Policy, which sets out seven definitions. Missing from that section was "malfunction."

135. The factors that detract from professional misconduct are that the officers conducted the initial tests at the beginning of the shift and that the video was activated to capture the offence and traffic stop.

136. The insubordination as listed in the Notice of Hearing is strictly to deal with the interaction with Mr. Owais. It does not relate to the interaction with Ms. Owais.

137. Cst. Costabile couldn't wear the microphone as described by the Policy because he was never given an approved pouch. The Policy doesn't provide a provision for officers who choose to wear the internal vest.

138. There was no evidence that the training required officers to wear the approved pouch at all times when the ICCS was activated. An officer can't charge the microphone and wear it at the same time. They are caught in a dilemma where they have to choose one. To find that the policy was clear and convincing is fundamentally unfair as the Service did

not issue Cst. Costabile an approved pouch nor a mechanism to attach it to the equipment that was issued (internal vest).

139. The Policy clearly sets out the direction to officers; activate the ICCS to visually and / or audibly record. They cannot be found guilty on clear and convincing evidence when they visually record but don't audibly record it. The policy on November 7, 2017 clearly gave them the option to audibly record. On the face of the policy, Cst. Costabile and Cst. Giannini did not contravene the policy. Any ambiguity must go in the favour of the officer.
140. If the Policy is deemed to be clear and unequivocal, the facts as set out in the evidence must be considered. The circumstances provided in evidence from Cst. Costabile and Cst. Giannini was that the driver was trying to elude police. Based on his behaviour, the officer had to make a choice about the using the microphones. Do they give up one of their hands to hold the microphone which may or may not work, or do they engage the driver with an urgent response. Cst. Costabile made a judgment call not to use the microphone because he knew it was charging and not operational. This is not a situation of professional misconduct.
141. The perception that the microphones had been charging for 5 hours was clearly dispelled by the officers. The microphones only charge when the vehicle is on. Cst. Giannini testified that the vehicle was only on for about 20 minutes during that 5-hour window.
142. The idea that the service of tickets is still the "investigation" as outlined in the policy is unclear. The officers believed their investigation was over before they issued the tickets. It was again a judgment call by the officers.
143. The officer followed the policy under each of the conditions listed under the "Activate the ICCS to visually and / or audibly record." They activated the emergency light to stop the subject vehicle. As a result, the video activated and recorded the offence and stop. The Policy gave the officers the options to and / or record audibly. If they were required to audibly record, the policy wording would have just said "and." The service of tickets cannot be said to be an emergency response.
144. The section related to vehicle pursuits was not related.
145. Under the section of "All crimes and offences", the officers video recorded the offences and complied with the policy.
146. Under the section of "Crime and collision scenes", this was not a crime scene nor a collision scene.

147. Under the section “any other situation or event where it is believed it would be beneficial to capture video and / or audio evidence or information. Again, this is left to the officer's discretion. The witnesses testified that they believed it wouldn't benefit the investigation.

### **Submissions of the Defense Continued**

148. The policy also speaks to situations when officers are to ensure ICCS is not activated. They complied with the policy by ensuring their investigative discussions between police personnel were not captured by the audio.

149. Ms. Mulcahy suggested that Sections 10 and 11 were unrelated to the mandatory requirement section of ensuring the ICCS was not activated.

150. The witness evidence was not contradicted. Both witnesses believed that the audio recording would not benefit the investigation. There is no training or documents to show that they should have used the microphones even though they were charging.

151. Ms. Mulcahy asserted that the prosecution has not met the test of clear and convincing evidence and the Notice of Hearing should be dismissed.

### **Mr. Badali**

152. Mr. Badali accepted Ms. Mulcahy's submissions and adopts them entirely.

153. Mr. Badali directed the Tribunal to read the Policy carefully. It didn't mandate officers to wear the ICCS microphone at all times; only when the ICCS was activated. The reason for this wording is due to the issue with charging the battery. At some point during an officer's shift they would need to charge the microphones. The evidence was that these police vehicles were constantly being used during the various shifts. The nature of battery operated devices is that they will require charging. There was no evidence brought forward on the technical aspects of how the microphones work.

154. The notion that officers are required to wear the ICCS microphones at all times is not only contrary to the Policy, but also contrary to common sense. Some officers will need to have their microphones in the charging cradle. Cst. Giannini testified that he has had microphone batteries die on him. To suggest that PC Giannini did something inappropriate by not wearing the microphone at all times is simply unfair.

155. The Policy gives officers a choice to visually and / or audibly record the situation. The options are to use video, audio or both. The policy also identifies the purpose as being for a "police investigation"; however, the policy is silent on what defines a police investigation. When does it start? When does it end? It's a discretionary call.
156. The prosecutor suggested that Cst. Costabile and Cst. Giannini should have activated the ICCS when they were issuing the tickets. They both testified that the investigation was already concluded and that it wouldn't further the investigation.
157. The Policy gives officers a considerable amount of discretion. By way of example, the last bullet point under activate the ICCS to visually and / or audibly record any other situation or event where it is believed it would be beneficial to capture video and / or audio evidence or information. The policy doesn't say "reasonably believed." It's a subjective belief by the officers. The policy is ambiguous; some sections afford officers discretion while others impose strict guidelines.
158. Mr. Badali submitted that Cst. Giannini was both a credible and reliable witness. He provided a reasonable explanation as to why he didn't activate his microphone during the stop with Mr. Owais. He had experienced battery issues with the microphones in the past and knew they don't have a significant opportunity to recharge. Cst. Giannini was only in the police vehicle for a short amount of time before the interaction with Mr. Owais. Cst. Giannini initiated the traffic stop, but because of Mr. Owais' behaviour, the stop was significantly concerning. The stop had all the warning signs of a dangerous encounter. Cst. Giannini immediately stepped out of the police car and engaged Mr. Owais. His duty was to take control of the situation.
159. Once back in the police vehicle, there was no reasonable benefit to video record a stationary vehicle for 2 hours. All of the evidence was already captured. In fact, the policy mandates that the ICCS doesn't capture investigative discussions.
160. Mr. Badali submitted that both Cst. Giannini and Cst. Costabile had a lawful excuse and the evidence doesn't support a finding of professional misconduct on clear and convincing evidence.

## Submissions of the Prosecution

161. The Service Prosecutor commenced his submissions by submitting two cases for consideration.

Mancini and Courage (Niagara Regional Police Service) OCPC (2004). The prosecutor relied on the Commission statement on page 23, *“Also, it is not necessary in order to sustain a finding of discreditable conduct to prove each and every allegation contained in a Statement of Particulars or that there be ongoing offensive behaviour. If a Hearing Officer finds that any one or more of the allegations is proven, then the Hearing Officer can find discreditable conduct.”*

Orr and the York Regional Police Service OCCPS (2001). In the decision, the Commission set out the essential components for insubordination. The Commission stated, *“the essential components of insubordination include whether the Appellant: 1) received an order, 2) which was lawful, 3) which he disobeyed and if so, 4) did he have a lawful excuse for so?”*

162. The Prosecutor told the Tribunal that Cst. Costabile and Cst. Giannini were given an order, the order was clear, the order was lawful and they disobeyed the order. They were both clearly aware of the Policy to activate their microphones when the ICCS was on. They had no lawful excuse for not complying with the order.

163. Listed in Exhibit 6 was the rationale for the Toronto Police In-Car Camera System. It included:

- Enhance public trust and police legitimacy;
- Enhance public and police officer safety;
- Enhance the commitment to bias-free service delivery by officers to the public;
- Protect officers from unwarranted accusations of misconduct;
- Provide improved evidence for investigation, judicial and oversight purposes; and
- Provide information as to the effectiveness of Service procedures and training.

164. Both officers testified that they were aware of the general rationale and supported it. The prosecutor submitted that any investigation that involves the police is a police investigation.

## **Submissions of the Prosecution Continued**

165. Page 3 of the ICCS Policy provided direction to police officers. The equipment is supposed to be tested at the beginning of the shift. Cst. Giannini tested the equipment and found it to be working properly. The officers didn't touch the equipment for the rest of their shift. They didn't even try to record because they saw a red light on. They activated the In-Car Camera, but didn't bother to grab their microphones and attempt to record the conversation. The prosecutor submits it's an equipment malfunction.
166. The officers tested the equipment at the start of their shift, they complied with that portion of the Policy. However, they selectively complied with some portions that were convenient for them. They made notes about testing the equipment, again complying with the Policy.
167. The Prosecutor agreed that the Policy was silent on the definition of malfunction. He submitted that if the equipment is not able to be used, it's a malfunction. Common sense dictates that if the equipment doesn't work, it's a malfunction and that officers should do something about it and that something was to call the help desk or a supervisor. The help desk is a 24-hour service. They log the call as a record. Cst. Giannini testified that he was at the station and could have notified a supervisor; they chose not to do that.
168. The Prosecutor submitted that the ICCS was either malfunctioning or damaged. Cst. Costabile and Cst. Giannini testified they are not technically trained. They were required to do something forthwith, like notify a supervisor.
169. The Prosecutor submitted that the officers were operating a vehicle equipped with an ICCS. They were to operate the ICCS equipment in accordance with the prescribed training. Both officers testified that they received the e-training as listed in their internal resumes. Cst. Costabile had his training 9 years earlier and could have asked for assistance during those 9 years. Cst. Giannini received additional training from his training officer. He testified that his training officer told him to wear the microphone and activate it during traffic stops.
170. The Prosecutor submitted that the case law supports the notion that not everything has to be in the policy. The reason for not including every intricacy is because it's unrealistic; the police would have volumes and volumes of policies. The policy is clear when officers shall do things.



171. The Prosecutor submitted that there is no confusion with the second point, which says, “wear the ICCS microphone at all times when the ICCS is activated, utilizing the approved microphone pouch, in accordance with the prescribed training.” For 9 years Cst. Costabile has been using the ICCS without an approved pouch. Based on his own testimony, he’s managed to use the microphones without the pouch. Both officers have never raised the lack of an issued pouch to their supervisors. The prosecutor submits that part of the onus is on the officers to report missing, damaged or malfunctioning equipment.
172. The Prosecutor submitted that if the ICCS was activated and the microphones were on the officers, the microphones would automatically activate. However, they can be shut off or muted for private conversations relating investigative purposes. That is why the policy was worded as it is.
173. The Prosecutor submitted that a police investigation is any investigation involving the police. Mr. Owais was stopped for 1 hour and 57 minutes. The Policy doesn’t define what a police investigation is or when one starts or stops. The prosecutor submits that the investigation is complete when the tickets are turned over to the individual. Explaining the tickets and options may elicit a response for the individual, which may have evidentiary value. How can the officers determine there would be no evidentiary value when they approached the first and second time?
174. The prosecution submitted that this situation was an emergency response. The prosecution acknowledges that Cst. Giannini had a number of other things that he was focused on; however, Cst. Costabile could have easily grabbed his microphone and clipped it on.
175. The Prosecutor acknowledged that this was not a vehicle pursuit.
176. The Prosecutor submitted that throughout the 2-hour investigation, there were initial offences observed, there was additional information received from the occupant of the vehicle which resulted in additional charges and conversations with a third party which also resulted in charges.
177. The Prosecutor agreed that this was not a crime of collision scene.

## **Submissions of the Prosecution Continued**

178. The Prosecutor submitted that this was a situation that was captured by, “Any other situation or event where it is believed it would be beneficial to capture video and / or audio evidence of information.” This purpose could have been related to the Policy rationale as explained. The idea behind the audio recording is to reestablish public trust and confidence.
179. Further down the Policy, it says, “ensure the ICCS is not activated during investigative discussions or enquiries between police personnel.” There was no audio captured and video doesn’t capture conversations or show investigative techniques. Nobody can predict the future; nobody predicted Ms. Owais was going to show up or that the vehicle was going to be moved.
180. The Policy reads, “when the ICCS is activated, shall not deactivate until the incident has concluded.” The prosecutor submitted that the investigation is concluded when the tickets are handed over. A person who was stopped for almost 2 hours may have concerns as to why they were stopped for so long. This stop only has 7 minutes of video.
181. The exceptions to deactivate are: When the officer no longer reasonably believes that that collection of audio / video media would support officer or public safety, and / or benefit the investigation. How can they predict what public safety event can take place or benefit the investigation? An example would be if there was a discrepancy of what was said, then you could just play the audio.
182. The Prosecutor submitted that no supervisor was on scene and there was no evidence of direction by a supervisor to deactivate.
183. The Policy allowed for muting the audio for investigative conversations. All they had to do was record a brief explanation before muting. They believed the investigation was over and there were no officer safety concerns. Officer safety concerns are always being evaluated. It’s not something that can be predicted.
184. The prosecutor submitted that the Policy was clear when it’s to be activated; it was a choice by the officers not to activate it. Every time they exited the police vehicle they made a choice not to take the microphone with them. They made the choice over and over again; it wasn’t a one-off situation. They chose not to use the technology that was available to them.

185. On the 7-minute video, there was no audio captured on it. The prosecution submitted that the microphone was designed to capture the audio when the emergency lights were activated.
186. In relation to Cst. Costabile's complaint response (Exhibit 8), there was no indication why he was not using the microphone. There was a dispute as to what was said. If he was using the microphone like he was supposed to, there would be no dispute as to what was said. Cst Costabile said in his report that Mr. Owais was being misleading. If we had the audio recording, there would be no dispute. That audio would be excellent evidence before a court. Had they used their microphones and muted them, they could have activated it when Ms. Owais arrived at their car.
187. The Prosecutor submitted that telephone calls and computer checks are not real police techniques or secrets.
188. The Prosecutor submitted that a complete video would have shown Ms. Owais' change in demeanour, as stated in Cst. Costabile's report.
189. The Prosecution submitted that Cst. Giannini conducted the initial tests and found it operational. Then they discovered that it was able to function but wasn't operational. They should have done something about it.
190. In his report, Cst. Costabile listed his justification for not having his audio and turning off the video. The prosecution can use the same reason for turning them on. Cst. Giannini said he never had any discussion about the microphones. Neither of them says, let's put one on so we can capture some of it. Then they can show they were trying to comply with the Policy. Cst. Costabile testified that the ICCS is provided as disclosure for provincial offences. There was only 7 minutes of video. The traffic stop was not done until the tickets were issued.
191. The Prosecutor submitted that Cst. Costabile's testimony, on why he didn't activate the microphone, was self-serving. He saw the red lights, he didn't talk to his partner about it, and he didn't do anything or even try. His testimony that the battery needs to be 100 % charged before it can be used is unbelievable. Cst. Giannini just tested it and it worked and then it's not working. The policy is clear, when you activate the ICCS, you must wear your microphone.
192. The Prosecutor submitted that little weight should be given to the officers' testimony that conversations between the police and members of the public have no evidentiary value.

## **Submissions of the Prosecution Continued**

193. It was a choice not to use the microphones. The traffic stop was initially described as a potential shoot out. Cst. Giannini immediately exited the vehicle, then magically the danger was gone. The prosecution submits that the approach taken by the officers was not in line with the training. The traffic stop assessment changed from extreme to calm.
194. In relation to Orr and York Regional Police, a lawful policy is required. There was a lawful policy. Both officers received training, there was ample opportunity for them to ask questions. If they don't have a piece of equipment, the supervisor will get it. The onus is on the officer to comply with the policy. The policy was clear when it's to be deactivated. They received the training. Cst. Costabile testified that his actions weren't rebellious, if they were, he would have turned off the camera. That's what they did.
195. The Prosecutor submitted that the Policy was clear, and the officers violated the policy. There was clear and convincing evidence to support a finding of misconduct. The prosecutor invited the Hearing Officer to draw upon his own experiences.

## **Reply by Ms. Mulcahy**

196. Ms. Mulcahy asserted that the Hearing Officer cannot draw upon his own experiences as the Prosecutor suggested. Additionally, the Hearing Officer is not to look in hind sight, but to step in the shoes of the officers and review the judgment they made at the time.
197. Ms. Mulcahy submitted that the Prosecutor confirmed the ICCS Policy doesn't speak to the intricacies. As a result, she assesses the Policy has a lack of clarity. Moreover, the Prosecutor acknowledged that the Policy doesn't contain a definition for malfunction.
198. Cst. Costabile's description of the microphones being functioning but not operational was reasonable. Just because the device is charging doesn't make it a malfunction. She suggests that the help desk would be inundated with calls about depleted batteries. The only response would be to put the battery in the charger. There was no evidence of the equipment being damaged.
199. There is no evidence about the training, other than what the officers testified to. It also assumes that the training, policy and equipment was the same in 2009.

200. Ms. Mulcahy submitted that the Prosecutor acknowledged that the Policy does not speak to when an investigation starts and stops. There was no definition in the Policy.
201. The Prosecutor suggested that Cst. Costabile could have grabbed the microphone and clipped it on. The evidence from the officer was that based on the equipment given by the Service, he had no ability to clip it on. The officer wore an internal vest.
202. The Policy doesn't say you shall activate the ICCS to warrant against unwanted complaints. That was not one of the considerations listed under what is beneficial.
203. The officers didn't reasonably believe that they were to record the service of the traffic tickets.
204. Ms. Mulcahy submitted that paragraph 7 is not subject to paragraph 11. An example of poor drafting.
205. The Prosecutor referred to Paragraph 14, which talks about privileged information. It speaks to Policy 04-35 on Confidential Source Management. This situation is not about investigative techniques.
206. The Prosecutor suggested that the officers didn't use their microphones for the entire shift. They are not charged with that. The Notice of Hearing is specific to the traffic stop, not what they did before the traffic stop.
207. Ms. Mulcahy reminded the Tribunal that Exhibit 8 was submitted, but there was no cross on it.
208. With regards to any reference to Ms. Owais, the officers are not charged with anything to do with her interaction.
209. The Prosecutor submitted that Cst. Costabile's reasons for not wearing the microphone were self-serving. Cst. Costabile is entitled to a presumption of innocence. A lawful excuse doesn't make it self-serving.
210. The Prosecution tendered no evidence about the training, except for filing the resumes. There was no evidence or training materials to say the officers did not follow their training in regard to the microphones or what to do if they are charging.

## Reply by Mr. Badali

211. Mr. Badali reminded the Tribunal that the officers are charged with failing to activate their microphones at a specific traffic stop. The submissions from the Prosecution on the others areas of the Policy was irrelevant.
212. In relation to notifying a supervisor of a depleted battery, what would the supervisor do? There was no evidence of replacement microphones being available. They would have been told to put the microphones in the cradle to charge.
213. He questioned why the policy allowed for any discretion at all. It did because it wanted officers to use their discretion and exercise judgment. Exercising judgment is not professional misconduct.

## PART III: ANALYSIS AND FINDINGS FOR DECISION

### Analysis of the Issues:

220. The extent of informative detail before the Tribunal is limited to what is listed in the Agreed Statement of Facts, witness testimony, documentary exhibits, video, case law and submissions made by the Prosecution and Defense. I have reviewed all of the information and evidence that was submitted.

### Insubordination:

221. The offence of Insubordination is made out when it is proven on a clear and convincing standard that an officer did without lawful excuse, disobeys, omits or neglects to carry out any lawful order, contrary to Section 2(1)(b)(ii) of the Schedule Code of Conduct of Ontario Regulations 268/10 and therefore, contrary to Section 80(1)(a) of the Police Services Act, R.S.O. 1990, as amended.
222. As stated in Allan v. Munro (1994) Ont. Board of Inquiry, clear and convincing evidence is defined as, "weighty, cogent and reliable evidence upon which the trier of fact, acting with care and caution, can come to a fair and reliable conclusion that the officer is guilty of misconduct."

223. In this case, the Prosecutor must prove on clear and convincing evidence, on November 7, 2017, Cst. Costabile and Cst. Giannini, without lawful excuse, disobeyed, omitted or neglected to carry out a lawful order when they failed to activate their wireless microphones during the interaction with Mr. Owais.
224. There was no dispute that Cst. Costabile and Cst. Giannini did not wear or activate their ICCS microphones during the traffic stop. There was no argument that the ICCS Policy was in fact an Order. Similarly, there was no argument that the Policy was unlawful. The issues before me are twofold:
- i. Was the ICCS Policy 15-17 (as dated on November 7, 2017) clear and unequivocal?
  - ii. Did the officers have a lawful excuse for not following the Policy?

#### **The Law:**

226. The Order Must Be Clear and Unequivocal:

In Murray and Toronto Police Service (O.P.C.) 2 OPR, 616, the Commission stated, *“to constitute Insubordination, an order must be clear and unequivocal.”*

In Austin and Toronto Police Service – 2009, the Hearing Officer stated, *“It is a general rule that any ambiguity in legislation or regulation must favour the defendant.”*

In Howard and Toronto Police Service – 2010, the Hearing Officer stated, *“I did reference this procedure and I concur with defense counsel there are inconsistencies in the procedure. As it is a general rule that any ambiguity in regulation and legislation must be weighted in favour of the officer, I have afforded Constable Howard that benefit.”*

227. Lawful Excuse:

In Rowe and Sault Ste. Marie Police Service, OCCPS - (2003), the Commission stated, *“it has been held that an honest mistake provides an answer to the charge. We feel those principles are worthy of consideration here, as set down by the Divisional Court in P.G. v. Ontario (Attorney General) [1996] O.J. No 1298.”*

*“Insubordinate is defined by the Oxford Dictionary as disobedient and rebellious.”*

*“He (Constable Rowe) held an honest belief in this regard, accordingly had a lawful excuse.”*

## The Law Continued:

In Licop and Toronto Police Service (2006), the Hearing Officer referenced Rowe and Sault Ste. Marie Police Service, OCCPS – (2003) when it stated, *“I note that the issue of lawful excuse extends beyond a lawful reason, to honest mistake”*

*“In the case before me, if it were found, that Police Constable Licop thought he had the authority to disseminate the tip in the manner in which he did, but in fact he did not, and he was honestly mistaken, then he would be not guilty of the offence.”*

*“Additionally, I note that adjudicators have been reluctant to convict officers of misconduct, if the neglect to carry out a duty or similarly to obey an order, is a performance issue which may fall short of misconduct.”*

In Pollack v. Hill, (Board of Inquiry, 1992), the Board stated, *“A finding of a breach of the Code of Offences is a serious finding against an individual officer which may result in major penalties under the police complaints legislation. Therefore, we will not find officers guilty of neglect of duty to supervise, unless there was some element of willfulness in their neglect or unless there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct.”*

In P.G. v. Ontario (Attorney General) Div. Ct. 1996, O’Driscoll J. stated, *“Accepting the Board’s finding of inadvertence, on this record, the only logical conclusion is that the appellant made an honest mistake – he did what he undertook to do but did it imperfectly.”*

*“Even assuming that the appellant had some kind of a duty in this case (which I have already found that he did not), without deciding the parameters of s. 1(c)(i), on this record, I am prepared to say that an honest mistake provides an answer to the charge.”*

In Blowes-Aybar and Toronto Police (OCCPS (2003)), the Commission found the reasoning provided in P.G. v. Ontario (Attorney General) to be, *“binding and persuasive”*.

228. In this case, the Notice of Hearing specifically identified the insubordinate behaviour as:

*You and your escort both failed to activate your wireless microphones during the interaction with the vehicle operator.*

*Your actions were in contravention of Toronto Police Service Procedure 15-17, In-Car Camera System. Specifically;*



- *Police Officer when assigned to a Service vehicle that is equipped with an ICCS shall;*
  - *wear the ICCS microphone at all times when the ICCs is activated, utilizing the approved microphone pouch, in accordance with the prescribed training*
  - *activate the ICCS to visually and / or audibly record all contacts between a police officer and a member of the public where that contact is for the purpose of a police investigation, regardless of whether or not the person is within camera view, all emergency responses, whether emergency equipment is utilized or not, from initiation to conclusion.*
    - *All vehicle pursuits*
    - *All crimes or offences in progress*
    - *Crime and collision scenes*
    - *When practicable, all statement not taken inside a Service facility*
    - *Any other situation or event where it is believed it would be beneficial to capture video and / or audio evidence or information*

229. Ms. Mulcahy raised the issue that the Notice of Hearing was not consistently set out as stated in the ICCS Policy. I have reviewed both the Notice of Hearing and the ICCS Policy and found them to be somewhat inconsistent, specifically;

- i. The Notice of Hearing is missing the first bullet point under Section 7 which states:
  - *operate the ICCS equipment in accordance with the prescribed training.*

I note that the only reference to “prescribed training” in the Notice of Hearing is in the second bullet, which is specifically related to wearing the microphone with the approved microphone pouch.

- ii. The Notice of Hearing is missing the word “operating” as stated in the Policy. The Policy reads, “*Police Officer, when assigned to or operating a Service vehicle equipped with an ICCS shall.*”
- iii. The Notice of Hearing bullet point, which states, “*when practicable, all statements not taken inside a Service facility*” is not listed within the Policy.

### Analysis of the Issues Continued:

- iv. The Notice of Hearing bullet points are not set out in the same manner as the Policy. Some of the evidence that was contemplated during the witness testimony focused on when an investigation commenced and concluded. The only similar language in the Policy is found at, *“Activate the ICCS to visually and / or audibly record all emergency responses, whether emergency equipment is utilized or not, from initiation to conclusion.”* The Policy is very specific that the “initiation to conclusion” is related to emergency responses only. The manner the Notice of Hearing is drafted appears as though the “initiation to conclusion” is included in “all contacts” as well. It does not.

230. It appears the Notice of Hearing was carelessly drafted. Although the Policy was made an exhibit, the specific details are not exactly as listed in the Notice of Hearing. In order for the respondent officers to have a fair process, the Prosecutor must prove the allegations as listed in the Notice of Hearing. As a result, I have disregarded the complete sentences in bullet point #1 and #3 (above), I will not consider the word “operating” as listed in #2 (above), and I will not consider the “all contacts” bullet point to include “from initiation to conclusion”.

231. In their evidence, both officers testified that they believed they complied with the ICCS Policy. They supported their belief by pointing to Sec. 7 of the Policy, which gave them an option to capture the contact either by video, audio or both. They captured the contact on video. The Policy states:

*Police Officer*

*When assigned to (or operating) a Service vehicle equipped with an ICCS shall,*

- *Wear the ICCS microphone at all times when the ICCS is activated, utilizing the approved microphone pouch, in accordance with the prescribed training.*
- *Activate the ICCS to visually and / or audibly record.*

232. Based on the wording, I find the first bullet point to be clear and unequivocal. Officers are to wear the microphones at all times when the ICCS is activated. That doesn't mean, wear it at all times; it is only when the ICCS is activated. It is also very specific about utilizing an approved microphone pouch. Cst. Costabile testified that he was never issued an approved pouch and never raised the issue with his supervisors. Moreover, both officers testified that they wore internal body armour, which was incompatible with the microphone and pouch. Their evidence was uncontroverted.

233. What I find troubling is that for 9 years, Cst. Costabile was not using a piece of equipment that he was required to use. More troubling was that none of his supervisors have ever raised the issue with him. Coincidentally, Cst. Giannini testified that none of his supervisors have ever had any issue with the way he used the ICCS.
234. It was the uncontroverted evidence of the officers that members of the Toronto Police Service are issued an internal and external body armour vest and that the member determines which one to wear. If it is true that the officers have the choice in body armour and that the microphones and / or approved pouch are incompatible with the internal body armour, how are officers then supposed to follow the Policy? The officers testified that they carry the microphone in their hand during interactions. Again, the Policy says to wear it, but there is no means for internal vest wearing members to clip it on. The Policy is inconsistent with the equipment issued by the Service. If the prescribed training speaks to the manner of how an officer is to wear the microphone, no evidence of that was presented.
235. I have already determined that bullet 1 of the Policy is clear and unequivocal; however, finding the officers guilty of not wearing a microphone that is incompatible with the equipment issued is fundamentally unfair. I find that that the officers had a lawful excuse based on the microphones not being compatible with their issued equipment. It is gaps like these that the Policy should speak to.
236. The second bullet point to, “activate the ICCS to visually and / or audible record” was described by the officers as an “option”. They specifically pointed to the “and / or” to support their belief. I reviewed the bullet point from the position of a reasonable person. A reasonable person would agree that the Policy gives the officers an option to video record, audio record or both. Without qualifying the “and / or” in the Policy, officers are left on their own to determine its meaning. With the exception of the coach officer telling the officers to wear the microphones during traffic stops, there was no evidence brought forward to controvert the officers’ opinion. Even when I consider the other sections of the Policy, I find the bullet point to be ambiguous.

### **Analysis of the Issues Continued:**

237. When the rationale of the Policy is considered, it makes sense that the spirit of the Policy is to video and audio together – a practice that would show the community the police are committed to maintaining the public’s trust. The rationale speaks to the abundant benefits of capturing this type of evidence. The video alone doesn’t tell the complete story. Had the officers activated even one of their microphones, this complaint and or process may have been avoided.
238. The evidence presented by the officers also contained two additional reasons for not complying with the ICCS Policy. The first reason was that microphones were not operational due to the battery indicator light being red. The only evidence before me was uncontroverted. Cst. Costabile stated that a red battery indicator light meant that the battery required a charge to be operational and that it could not be used until the light turned green. The troubling aspect of his testimony was his belief that the microphone had to be 100% charged to be operational. He even offered an example using his cell phone. Cell phones work down to the last drop of battery, and yes it is true that some applications won’t work when the battery is less than 10%. That’s a far cry from 100% charged. I gave little weight to his example. Moreover, no evidence was introduced on the technical aspects of the microphones, battery charging or on the ICCS training.
239. I found the officers’ evidence on the microphone use to be persuasive. The ICCS equipped police vehicles have two microphones in them. The vehicles could be in constant use by three separate shifts, over a 24-hour period. The only time the microphones have an opportunity to charge is when they are sitting in the charging cradle and the vehicle is on. Presumably the microphones would require a charge at some point during a shift and in many cases that will be at the start.
240. The officers testified that the microphone batteries required a charge. The charging cradle indicated a red light, which meant the batteries were charging. A green light would indicate that the charge was full. While charging the batteries, the officers observed a traffic offence and decided to stop the vehicle. In a regular traffic stop, they might have remembered to grab or attach their microphones. A regular traffic stop would have afforded them time to consider and plan. In this situation, Mr. Owais’ driving behaviour dictated a different officer response. The uncontroverted evidence was that Mr. Owais was trying to evade a police stop, and he had reasons for doing so – he just blew a red light and he was operating a vehicle with no insurance. I find that Mr. Owais’ driving behaviour was the genesis for the officers’ belief that this traffic stop was “unusual”. Such a situation would lead any officer to heighten their vigilance at a final stop. This was not a high-risk take-down as described by Cst. Costabile. A high-risk

take-down involves weapons drawn and commands to the occupants. Neither happened in this situation. Nevertheless, it was a situation that had heightened vigilance and required fastidious care. Given the situation, it is understandable why Cst. Giannini and Cst. Costabile failed to wear and activate their microphones during this stop. Some deference must be afforded to them. Given the situation as presented, it can only be described as an oversight based on the circumstances. This is not professional misconduct, but merely an honest mistake. It was neither willfully disobedient nor rebellious.

241. I have already decided that the actions of the officers do not amount to professional misconduct. However, I feel it necessary to address the issue of an equipment malfunction, as described in the Policy. The officers testified that it was their belief that a depleted microphone battery was not a malfunction. Their reasoning was that the battery just needed a charge to function properly. A malfunction would suggest that the equipment is not working as it normally would. It does not necessarily mean it is defective or broken, just that it is not working as normal. If the officers believed that it is a normal practice for the microphone batteries to be charged, then their reasoning has merit. This may be a situation where the Policy should define a malfunction. Without a definition, a malfunction is ambiguous.

242. Based on the forgoing reasons, it is my finding that the prosecution has not met the standard of clear and convincing evidence to prove the allegations of Insubordination.

#### **PART IV: DECISION**

**243. After analyzing and weighing all of the evidence presented, as the Hearing Officer, I am not satisfied on clear and convincing evidence that the actions of Cst. Costabile and Cst. Giannini amounted to Insubordination. Therefore, I find the officers NOT GUILTY of misconduct and dismiss the charge.**



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Cyril Gillis #948, A/Superintendent  
Durham Regional Police – Hearing Officer  
28 November 2019