



**HEARING DECISION**  
***SENTENCE***

**Name:** Yi HU

**Rank:** Police Constable

**Badge Number:** 9708

**Case Number:** 2014.15

**Hearing Date:** 2015.07.22

**Hearing Officer:** Superintendent D. PRESTON

**Prosecutor:** Inspector I. STRATFORD

**Defence Counsel:  
Or Representative** Mr. D. BUTT

## SENTENCE

### Police Constable Yi HU (9708)

YEAR: 2015.07.22

**Reference: 15/2014**

**Superintendent Preston:** Before commencing sentencing in this matter, I would like to thank Mr. Butt, defence counsel, Mr. White, counsel for Mr. Shemtov and Inspector Stratford, Service prosecutor, for their submissions and exhibits tendered, all of which have assisted me in reaching my decision.

Police Constable Yi HU, badge number 9708, was found guilty of Discreditable Conduct, contrary to the Police Services Act.

#### Prosecution Submissions

The prosecutor submitted his Book of Records and Book of Authorities (Exhibits 14 & 15) and did not call any witnesses. He outlined the objectives of discipline and identified that the public in general, the employer, the employee and affected citizens have an interest in the outcome of this decision. The prosecutor confined his remarks to the proportionality considerations he felt were most relevant in this case.

The protection of the public is one of the overall objectives of the discipline process and as such, the public interest must be considered in formulating a decision. In the Foreword from the Chief of Police, Standards of Conduct, the Chief stated,

“As a member of the Service, the single most important role you fulfil is maintaining the trust and support of the public. In every interaction with members of the public or co-workers, you must conduct yourself lawfully, professionally and ethically. You must always be able to articulate the reasons and grounds for your actions. Ultimately you are responsible for ensuring that your conduct is above reproach”.

(Exhibit 14, Tab 1)

The public has the right to expect that police officers will conduct themselves in keeping with their Oath of Office. Ignorance of the law or the application of the law is not

acceptable. Constable Hu is an experienced officer who has worked in a busy downtown division. He has received training in the application of the law and in this case, his actions were not reasonable or warranted given the circumstances.

Constable Hu has been found guilty of one count of discreditable conduct and his actions brought discredit to the Service, as any arbitrary detention or unlawful arrest breaches Charter rights. In the course of the arrest, Constable Hu applied force and the public complainant was deprived of his liberty for a period of time. There are times when an honest mistake is made in good faith but ignorance of the law cannot be heavily relied upon by a member. Constable Hu's actions have tarnished the reputation of the Service and the seriousness of the misconduct is an aggravating factor to penalty.

Professional behaviour is the cornerstone of public confidence in the Service. The Service has gone to great lengths to ensure the professional and ethical behaviour of its members, both internally and within the community. The misconduct of Constable Hu is serious and it detracts from the Service's commitment to professionalism. He has received appropriate training and he has performed paid duties at the same location on other occasions. Organizational failure is not a consideration in this case.

There is no indication that Constable Hu cannot be rehabilitated; however, what is troubling to the prosecution is the previous negative entries in his employment record. Progressive discipline is an issue for consideration in this case. Constable Hu has five negative entries between 2013 and 2014. As outlined in *Grbich and Aylmer Police Service*, OCCPS, 2002, the Commission directed that every opportunity should be given to an officer to be rehabilitated and the ability to reform must be considered. From another perspective, the *Law of Dismissal* (Levitt, 1992) highlights the need for graduated penalties. Warnings and suspensions are meant to inform the employee of management's concerns (Exhibit 14, Tab 3). The prosecutor's position is the misconduct of Constable Hu is serious but there has to be a balancing of the opportunity for rehabilitation with progressive discipline.

Constable Hu has been a member of the Service since 2006. He has performed duties in 51 Division and 55 Division in the Primary Response Unit (PRU), Traffic Response Unit (TRU) and the Community Response Unit (CRU), and he is currently assigned to the Divisional Detective Office (DDO). His performance appraisals for the years 2010-2013 represent his time at 51 Division where he received satisfactory ratings in most categories and it was noted that he was progressing well. In his most recent evaluation dated November 2013-November 2014, Constable Hu was ranked satisfactory in most categories and his supervisors acknowledged his work ethic and willingness to be engaged. His staff sergeant stated that Constable Hu was counselled and mentored on a number of occasions with respect to his interpersonal skills, which have improved (Exhibit 14, Tab 5). Constable Hu has several complimentary entries including unit commander awards for professionalism during calls for service, arrests, investigations and community engagement. He has three letters of appreciation for his interaction with the community (Exhibit 14, Tab 6).

Constable Hu has five negative entries in his employment record. In August 2013, he was assessed eight hours for parking his vehicle in a prohibited area while at a paid duty. He left a piece of police equipment visible in the vehicle and interfered with a parking officer who was going to tow his personal vehicle. In August 2013, he was assessed eight hours for failing to utilize the in-car camera system. In January 2014, he was assessed four hours for being late for a paid duty. In January 2014 he was assessed twelve hours for not complying with the paid-duty hour limitation by performing 19 hours of paid duties within a 24 hour period. In May 2014, Constable Hu was assessed 80 hours at the unit level for issuing provincial offence notices to a tow-truck driver that proved contrary to the evidence. Although there are a number of complimentary entries, his disciplinary record shows a continued pattern of misconduct over a short period of time which supports the need for progressive discipline. The totality of his employment record is an aggravating factor as the negative entries over a short period time are troubling.

With respect to specific deterrence, any penalty must send a clear message to Constable Hu that any reappearance in this Tribunal will not be tolerated and it will bring severe consequences. Given Constable Hu's disciplinary history, the penalty must resonate with the officer that his behaviour must change. The message must outline to all members the expectations of the Service and the fact that they will be held accountable for their actions for any misconduct of a similar nature.

The prosecutor's position includes a forfeiture of days off. This will have an impact on Constable Hu but any penalty imposed is the result of the officer's own actions and the responsibility and consequences fall squarely on his shoulders.

Constable Hu's actions have had an impact on the reputation of the Service. A member of the public was impacted as a result of Constable Hu's actions. Should these actions become known to the general public, they would bring discredit to the reputation of the Service and impact the trust that the community has in the Service. This is an aggravating factor.

The prosecutor referred to the case of Schofield and Metropolitan Toronto Police, OPC, 1984 to reaffirm that "consistency in the discipline process is often the earmark of fairness." He further submitted the cases of Ardiles and Toronto Police Service, 2014, Wong & Begbie and Toronto Police Service, 2014, Vogelzang and Ontario Provincial Police, OCPC, 2013, Wowchuk & Bernst and Thunder Bay Police Service, 2012, Wowchuk & Bernst and Thunder Bay Police Service, OCPC, 2013, Lord and Ottawa Police Service, OCPC, 2011, Blowes-Aybar and Toronto Police Service, OCCPS, 2003 and Sylvester and Toronto Police Service, 2005 (Exhibit 15, Tabs B-I). The cases provided by the prosecutor relate to a breach of the Code of Conduct, specifically to affecting an arrest. They may be framed differently but the facts of the cases are on point with the actions of Constable Hu.

The case of Ardiles stems from the officer's actions during the G-20 summit. Constable Ardiles made an arrest which was deemed to be unlawful. The officer received a

reprimand. The case of Wong & Begbie also stems from the G-20 summit time period. Constable Wong effected an arrest which was found to be unlawful and he received a one-day suspension (currently under appeal). The significant difference in both cases is that Constables Ardiles and Wong had unblemished employment records where Constable Hu has five negative entries. In Vogelzang, the officer was charged with unlawful or unnecessary exercise of authority. The officer arrested a driver for an HTA offence where the grounds to arrest were deemed to be unlawful. Constable Vogelzang had one negative entry in his employment record for discreditable conduct. The officer received a forfeiture of three days which was upheld upon appeal.

In Wowchuk & Bernst, both officers were members of the drug squad. They made an unlawful arrest during which the complainant received minor injuries. Sergeant Wowchuck received a forfeiture of eight hours and remedial training and Constable Bernst received a reprimand and remedial training. In Lord, the officer arrested a male based on boundary restrictions and the arrested party was strip-searched behind a building which was open to the public. Constable Lord was found not guilty in the tribunal and the decision was overturned by OCPC. The officer received a forfeiture of eight days. Constable Lord had seven negative entries on his employment record.

In Blowes-Aybar, the officer was enforcing the Provincial Offences Act (POA) and made an arrest pursuant to the Liquor Licence Act (LLA) where the requisite grounds were not met. The Commission decided a four-day suspension was appropriate in this matter. Constable Blowes-Aybar had negative entries on his employment record.

In Sylvester, the officer had a number of negative entries on his employment record. He appeared before the Tribunal as a result of being late for work. Given his previous discipline record, dismissal was a factor for consideration. The Hearing Officer stated,

"specific and general deterrence requires that Police Constable Sylvester and all officers understand the importance of obeying the rules of professional conduct. Police officers understand that they are held to a higher standard and are expected to be reliable and on time. Self-discipline and reliability are fundamental requirements of the public office that a police officer holds. Progressive punishment is a live issue for this

tribunal to consider, and I've considered it. In the context of this case, it's application could mean a minimum of two rank demotion for being 15-20 minutes late for work...progressive punishment is a valid necessity within the discipline process but to be administered correctly, the Hearing Officer must also consider its proportionality of the present offence committed. While it's clear to me that Constable Sylvester is exhausting the leniency previously afforded him, all future misconduct infractions will require the Hearings Officer to consider demotion or dismissal as the appropriate penalty....This misconduct should not be elevated to being more than it is, being late for work, and wanting to get to work".  
Superintendent Neale Tweedy

This case was presented as balancing rehabilitation and the seriousness of a first offence versus previous negative entries and the need for progressive discipline as this concept is a live issue for the Tribunal to consider.

After examining all of the cases and considering the mitigating and aggravating factors, the prosecutor stated that a forfeiture of eight to eleven days was appropriate. Such a disposition would correct Constable Hu's behaviour, deter other members of the Service from similar behaviour and it would assure the public that the police are under control.

### **Mr. White's Submissions**

Counsel for Mr. Shemtov adopted the submissions made by the prosecutor. Mr. White focused on the public interest, nature and seriousness of the misconduct, employment history, potential to reform and specific and general deterrence. Weighing these considerations, Mr. Shemtov submitted that Constable Hu should receive a forfeiture of eleven days or a period of suspension as determined by the Tribunal.

With respect to the public interest, this Tribunal found that Constable Hu made an unlawful arrest, having exceeded his authority under the Municipal By-law and the HTA. This action resulted in personal injuries to Mr. Shemtov and deprived him of his liberty. The Tribunal found that, when an officer makes an unlawful arrest of a member of the community, it negatively affects the reputation of the Toronto Police Service. Constable Hu's conduct undermined the public trust and the penalty must send a message to the public that officers who act outside of the law will face appropriate sanctions.

Constable Hu's actions deprived Mr. Shemtov of his fundamental right to liberty and security of the person. In Wowchuk & Bernst, the tribunal recognized that when an arrest is unnecessary and involves an individual's right to freedom, which was removed however briefly, it is a serious matter. There was a finding that Constable Hu's arrest on a traffic infraction was a significant Charter breach and the arrest was beyond a mistake. When an arrest is unnecessary or unlawful and an individual's right to freedom has been removed, however briefly, that matter is serious. Mr. Shemtov was physically removed from his vehicle and taken to the ground, where he received three distractionary strikes.

The aggravating factor is Constable Hu's negative disciplinary record as outlined by the prosecutor. Constable Hu exceeded his authority which resulted in multiple injuries to Mr. Shemtov. Mr. White referred to the medical reports (Exhibit 6) which supports injuries to Mr. Shemtov. This included the emergency report which indicated that he attended the hospital for injuries to his face, right ribs, left elbow and left knee. He also complained of vomiting and blurred vision. The exhibit also contained the record of a bone scan which indicated "mild activity in the mid to distal sternum which is nonspecific and possibly due to trauma or a fraction".

This Tribunal found that Constable Hu's use of force was reasonable given the circumstances but Mr. Shemtov would not have sustained multiple injuries but for the unlawful arrest. The consequences as a result of the arrest of Mr. Shemtov are an aggravating factor for consideration.

Constable Hu has been a member of the Service for over eight years and he has a good employment record. He has received satisfactory and excellent grades for his skills, professionalism and commitment to hard work. Constable Hu testified he has been trained on arrest procedures and traffic details. This included training on powers of arrest in his basic constable course, traffic generalist course, provincial offences course and general investigative training. Conversely, Constable Hu has a number of negative entries in his discipline record. He acted unlawfully while on traffic duty notwithstanding



his training and his eight years of experience. This should be considered an aggravating factor to penalty.

Constable Hu's record shows he has made positive contributions to the Service as demonstrated through his awards and letters of public appreciation. The Tribunal should balance Constable Hu's past contributions with the seriousness of the offence as the Commission did in Blowes-Aybar. In that case, the officer made an unlawful arrest and the suspect spent a night in jail. There was no evidence of any injury.

In Vogelzang, the Commission upheld the tribunal's finding that the penalty should serve as a reminder that officers must continually stay abreast of their arrest authorities. A suspension would underscore this principle and serve the purpose of general deterrence. Specific deterrence is a relevant consideration. A penalty of 80 hours, similar to that which Constable Hu previously received at the unit level, would not be sufficient to deter repeated behaviour for this misconduct. A suspension would also reassure the public that officers cannot make unlawful arrests and cause injuries to persons involved in minor traffic infractions.

The law holds police officers to a higher standard of behaviour than members of the public. Constable Hu is an experienced officer entrusted to complete his duties lawfully. He abused his authority in arresting Mr. Shemtov just as he abused his authority in another traffic incident in January 2013. Constable Hu has a good, but not exemplary, employment record. These factors make Constable Hu's actions on October 2013 more serious and should be considered as aggravating factors.

### **Defence Counsel Submission**

In Sylvester, the Commission stated, "progressive punishment is a valid necessity within the discipline process, but to be administered correctly the Hearing Officer must also consider it's proportionality to the seriousness of the present offence committed". Proportionality to the offence in this case exerts downward pressure on the penalty

under consideration and it is necessary to find the balance to determine an appropriate penalty.

Proportionality in this case is important just as a disproportionate penalty would simply be wrong. Proportionality is the overarching goal to be achieved and there is no discretion to depart from a proportional penalty. The credibility findings were favourable to all defence witnesses and not favourable to Mr. Shemtov. In the reasons provided, the Tribunal found that Constable Hu's actions were not a deliberate abuse of power but an error in judgement. It was found that Constable Hu exercised restraint by giving Mr. Shemtov five opportunities to comply before entering into the arrest. It was also found that Constable Hu was engaged in a difficult task which was not made easier by Mr. Shemtov. In reviewing the evidence of a civilian witness, it was found that Constable Hu demonstrated patience and the witnesses supported the point that there was a proportional use of force. The witness supported that, after the arrest, Constable Hu was pleasant and helpful. It was also found that these mitigating factors did not excuse Constable Hu's behaviour but any consideration would be more appropriately applied at the penalty phase. Collectively, these mitigating factors exert downward pressure. It was an error in judgement in difficult circumstances that crossed the line.

Defence counsel asserted that, in fairness, any reliance on injury cannot be considered as an aggravating factor. The prosecutor placed no reliance on evidence of injury in his submission. Mr. Shemtov is not a credible witness with respect to his injuries and the procedural fairness requirement that defence counsel be given a fair opportunity to challenge what is being relied upon as an aggravating feature on penalty has not been provided; therefore, no weight should be given to any suggestion of injury.

Defence counsel stated there are significant mitigating factors and coupled with recent decisions from this Tribunal, the range is a reprimand to a forfeiture of eight days. The case of Lord should be considered an 'outlier' with respect to penalty as the officer had seven negative entries on his record and he conducted a strip search in a public place. This type of action is far removed from an error in judgement in difficult circumstances.

In the case of Constable Hu, there was no media attention and the public reaction from witnesses was that his actions were not perceived at the time as reflecting adversely on the Service, albeit they did not have the whole picture. The witnesses stated he was polite, used restraint and only used reasonable force. Based on the facts of the case and the preponderance of the case law, setting aside the outliers, the range is a reprimand to four days. Progressive discipline does not necessarily mean an escalation from the previous penalty when you look at the overarching need for proportionality. In reviewing Constable Hu's employment record, he received eight hours for his first two negative entries. In his third entry, he received a penalty of four hours as the case warranted such a reduction. The concept of proportionality was also considered in the case of Sylvester. Any upward pressure would take the penalty to the top of the range with respect to consistency.

Specific deterrence is not an issue in this case. Defence counsel submitted a letter from Constable Hu's unit commander, Superintendent Yuen, which states that since 2014, Constable Hu has been an exemplary officer and a top performer. He has a strong work ethic and is well-liked by his supervisors. He has a positive attitude, is professional and provides quality service internally and externally. Superintendent Yuen also stated that Constable Hu is quick on his feet with sensible reactions in all the circumstances. The unit commander was confident that Constable Hu has learned from his past mistakes and was confident in stating Constable Hu was capable of handling any situation with thoughtfulness and maturity in the future (Exhibit 16). There is no need for specific deterrence. Constable Hu has already internalized the lessons of this Tribunal and has demonstrated that he has learned and improved his performance. Broadly speaking, his performance appraisals are in the satisfactory range and his unit commander now refers to his performance as exemplary. The objectives of discipline have been achieved. Constable Hu has heard what the Tribunal has stated and he has 'upped his game' so there is no need to exert upward pressure on the appropriate range for reasons of specific deterrence.

Additionally, there is a significant increase in the impact of the penalty by virtue of the fact the case has proceeded before the Tribunal. As a result of progressive discipline, there was no option but to put Constable Hu through the significant additional strain of a full PSA hearing with the public attention it attracts and with the future consequences that are inherent in a post-McNeil regime. An exemplary, dedicated and committed officer has been put through the rigours of the discipline process which is part of the penalty and is part of learning.

With respect to McNeil issues, the impact will not be insignificant. This is a finding of a wrongful arrest which will become an issue in cross examination yet it is framed as an error of judgement during difficult circumstances. Constable Hu has to bear the significant additional weight of a McNeil report in every case. One cannot underestimate the impact of going through a Tribunal process for what the on-site supervisor at the time viewed as a training issue. That is a function of progressive discipline and that bears important consideration for disposition. In all of the circumstances we have an offence which would otherwise be in the low end of the range. By virtue of progressive discipline, the penalty is appropriately pushed to the top end, being three to four days, for similar circumstances.

### **Mr. White Reply**

Mr. White asserted that the evidence of the bone scan was in the medical record and it was available to every party so the parties were put on notice that injury was a factor for consideration.

### **Analysis and Decision**

The public must have faith that officers have the requisite knowledge, skills and ability to fulfil their duties. Officers must have training on all legislative changes as well as the knowledge and confidence to exert their authorities depending on the scenarios they face. In essence, the public must have clear expectations that officers will perform their assigned duties diligently and according to law. Police officers are empowered by law

with extraordinary powers of arrest and detention and must be prudent in their application of the law.

Constable Hu is an experienced officer with over eight years of police experience in a busy division. He has accepted and completed paid duties in addition to his regular work and has worked at this very location on prior occasions. Constable Hu's training record indicates that he has received all of the required training to fulfil his duties with respect to traffic enforcement, municipal by-laws and Criminal Code offences. As stated in my judgement, I agree that Constable Hu was engaged in a difficult task which was not made easier by the actions of Mr. Shemtov but officers have to assess every situation as it unfolds, understand the limitations of their authorities and use the least intrusive action possible to mitigate the situation. Constable Hu failed to exercise good judgement in this situation which is an aggravating factor. I agree with defence counsel that Constable Hu's actions were not a deliberate abuse of power or authority but as articulated, I do find that Constable Hu's actions went beyond a mistake and they impacted the reputation of the Service.

It is important that I address the dialogue with respect to injuries to Mr. Shemtov. His testimony with respect to any injuries was conflicting and not supported by medical evidence. An x-ray of his chest, left elbow, left knee and facial bones showed a 'normal examination'. An ultrasound of his kidneys and spleen were within normal range without evidence of traumatic abnormality. These areas were explored as part of the hearing. A bone scan report stated "mild activity in the mid to distal sternum is nonspecific, possibly due to trauma/fracture, but this finding could also be due to an anatomic variant of sternal segmentation/fusion". Further, the physician's notes were illegible. I cannot attribute the results of the bone scan specifically to a trauma as the results came back as non-specific and it leaves me with many questions. There is no indication whether or not the 'mild activity' is new or old or is attributed to his anatomical makeup or is the result of this specific interaction.

During the hearing, Mr. White elected to call no evidence but made reference to the medical reports during his closing submissions. As the results of the bone scan specifically were not referenced during the hearing, neither the prosecutor nor defence counsel were given the opportunity to explore this specific report. As part of my judgement, I read the legible parts of the medical reports. Without having had this specific report raised during the hearing and the opportunity for a discussion involving all parties, or the benefit of testimony from a medical expert to interpret the results, I am not in the position to make a finding with respect to this specific report. To do so would be contrary to procedural fairness as it would be an assumption on my part. As this scan was not discussed during the hearing, it would also be contrary to procedural fairness to rely on it as part of the sentencing hearing. The report invites me to make a medical finding and I do not have a medical background to make such a decision. As a result, I am left with the fact that Mr. Shemtov provided contradictory evidence with respect to the extent of any injuries he may/may not have received and the medical reports discussed do not support any injuries.

I have reviewed Mr. Shemtov's complaint to the OIPRD (Exhibit 4) which outlined that his doctor believed he had a skull and cheek bone fracture. Mr. Shemtov stated that when he wrote the complaint, a fracture meant a bruise. The medical reports do not support any fracture. I have reviewed the photograph of Mr. Shemtov (Exhibit 7) which shows a minor abrasion on his left cheek near his nose. I am cognizant, as highlighted by Mr. White, that Mr. Shemtov would not have incurred this abrasion if not for the unlawful arrest.

When an unlawful arrest is made, a person's liberty is taken away and, however brief, this forms serious misconduct. Although Mr. Shemtov was not co-operative on the night of October 12, 2013, there were other methods available to Constable Hu to try and resolve the issue which were not explored. Constable Hu was focused on his assigned duty and he did exercise a great degree of restraint; however, he crossed the line in making the arrest and, in totality, this is an aggravating factor. Constable Hu exercised his right to a hearing and a finding of guilt was registered. I am confident that, after

reading the judgement, that Constable Hu understands the seriousness of the misconduct and the proper application of the law with respect to this scenario. It was raised that Constable Hu's supervisor believed this was a training issue at the time. To be clear, his supervisor made this assessment based on what he was told by Constable Hu and the OIC at 52 Division where Mr. Shemtov was taken subsequent to his arrest.

The principles of provocation and handicap were not raised during the hearing and I find that Constable Hu and Mr. Shemtov were both afforded every degree of procedural fairness. They both had the benefit of experienced counsel and they were well represented.

Constable Hu was sworn in as a police constable in May 2007. As noted, he has performed duties in the PRU in 51 Division and spent time in the CRU and TRU. He is currently assigned to the divisional detective office in 55 Division. Prior to this event, he completed the General Investigators-blended course (2011), General Investigators Training—Part 1 (2011) through the Canadian Police Knowledge Network (CPKN), Provincial Statutes Course (2010), Traffic Generalist Course (2007) and his recruit training at the Toronto Police College (TPC) and the Ontario Police College (OPC). He has also attended the In-Service Training Program annually as required where methods of de-escalation are continually emphasized (Exhibit 14, Tab 4).

Constable Hu's evaluations for the period of 2010-2014 were submitted (Exhibit 14, Tab 5). For the period of January 12, 2010 to November 21, 2010, his supervisor noted that he was self-motivated and had a positive attitude with respect to learning. These sentiments were echoed by his staff sergeant and his unit commander. In his evaluation for the period of November 21, 2010 to November 21, 2011, the narrative described Constable Hu as an officer who required minimal assistance with collision investigations and was open minded to receiving assistance when required. He was able to adapt well to various details. His staff sergeant described his maturity, professionalism, and described him as an officer who demonstrated good common sense. He further stated that Constable Hu accepted responsibility and direction with a

positive attitude and treated the public and members of the Service with courtesy and respect. His unit commander highlighted his self-discipline, confidence and competence in discharging his duties.

In Constable Hu's evaluation for the period of November 22, 2011 to November 22, 2012, the comments of his supervisor mirrored his earlier evaluations. His staff sergeant referred to his professionalism and diligence in his duties and described Constable Hu as an officer who followed the core values and took pride in being a member of the Service. In his evaluation for the period of November 22, 2012 to November 22, 2013, his supervisor stated that his primary focus appeared to be paid duties and he lacked the understanding of certain TPS rules and procedures. His supervisor also stated that, at times, he had problems working in a team environment and with officer safety situations but he continued to try and improve these situations. His unit commander commented that he has the potential to contribute at a higher level.

Constable Hu's most recent evaluation covers the period of November 22, 2013 to November 6, 2014 when he transferred to 55 Division. His supervisor commented that Constable Hu is a hardworking, self-motivated officer who takes pride in his work. He has shown a marked improvement with his understanding and knowledge with respect to procedures and expectations of the Service. He takes constructive criticism from his supervisors. His staff sergeant stated, "there is no question that he is one of the hardest working, self-motivated officers on B platoon...he consistently applies himself and takes extreme pride in being a police officer". Constable Hu was counselled and mentored on occasion about his interpersonal and communication skills but has made noticeable improvement in this area, in addition to his adherence to procedures and expectations of the Service.

Constable Hu has 16 commendations ranging from arrests for serious criminal offences, attending community events, representing the Service in a positive manner, his work as a Scenes of Crime Officer (SOCO) and maintaining his fitness pin. He has also received three letters from the public as a result of presentations he made to community



groups on behalf of the Service. It is obvious that Constable Hu does not hesitate to get involved and participate at many levels within the organization and this contribution is acknowledged.

Unfortunately, Constable Hu appears before the Tribunal with five negative entries in his employment file over a very short period of time. The negative entries are summarized below:

- January 14, 2013 performed a paid duty when he parked his personal vehicle in contravention of a posted parking bylaw with his police issued vest clearly visible to the public. He attempted to intervene when another member of the Service was in the process of towing his vehicle  
**Penalty:** Forfeiture of 8 hours at the unit level
- January 17, 2013 Constable Hu failed to activate the audio component of the in-car camera equipment as required  
**Penalty:** Forfeiture of 8 hours at the unit level
- April 28, 2013 Constable Hu was late for a paid duty  
**Penalty:** Forfeiture of 4 hours at the unit level
- November 28, 2013 Constable Hu exceeded the paid-duty hour limitation by performing 19 hours of paid duties in a 24 hour period  
**Penalty:** Forfeiture of 10 hours at the unit level
- January 17, 2013 (adjudicated on April 20, 2014) Constable Hu issued a number of Provincial Offence Notices (PON's) to a tow truck driver. One of the alleged infractions was determined not to be supported by evidence.  
**Penalty:** Forfeiture of 80 hours at the unit level

Constable Hu has had some highs and lows within his career. He has demonstrated that he is more than capable of performing at a high level, as evidenced by the positive comments in his evaluations and his commendations. He has also demonstrated that he does not consistently work at a high level and his focus on performing paid duties continues to haunt him. Constable Hu has shown an improvement in his work performance and I encourage him to keep looking forward. I have kept the positive aspects of his employment history in perspective but also find that the negative entries are aggravating factors.

The ability for an officer to reform or rehabilitate is related to his or her employment history. The negative aspects of Constable Hu's employment history are isolated to a two-year period and can, for the most part, be summarized as a sense of entitlement with respect to how he performs paid duties. This comment is in direct relation to his first finding of misconduct where he parked illegally coupled with his effort to identify his personal vehicle as belonging to a police officer followed by his intervention when a fellow Service member tried to have it towed. This comment is also attributable to his disregard of the paid-duty hour limitations. I find that the most recent negative entry of issuing tickets to a tow truck driver for an offence that was not supported by the evidence is disturbing. Constable Hu has exhausted the leniency available to him at the unit level and he now finds himself in a formal police tribunal, the results of which have a more significant impact personally and professionally.

In the case before the Tribunal, I found that Constable Hu exercised good restraint in providing at least five opportunities to Mr. Shemtov to move his vehicle prior to affecting the arrest. Constable Hu made a mistake and crossed the line with respect to the powers afforded to him through legislation and this misconduct must be kept in perspective. It is viewed as an error in the application of the law balanced with the consequences incurred by a member of the community with respect to his liberty being removed. I find no reason as to why Constable Hu cannot be reformed, but he must also take pause and understand the position he finds himself in now that he has gone through a full PSA hearing. It is my expectation that I will not see Constable Hu in this Tribunal again, but that decision lies with the judgement exercised by Constable Hu in the future.

There is no doubt that this decision will impact Constable Hu but any impact is the result of his own actions. Any forfeiture of days/hours must now be worked without pay as opposed to the opportunity to have the time deducted from a lieu bank. This impact should be a deterrent to Constable Hu as any future appearances in this Tribunal will result in more stringent penalties. Progressive punishment is a live issue for consideration and I will speak to this point shortly. I do not wish to make the misconduct

bigger than it is, nor will I minimize the impact to Mr. Shemtov. Constable Hu must conduct a degree of introspection to help define what his future will look like. There has been no systemic failure in this case as the Service has done its due diligence by ensuring that Constable Hu has received the requisite training required to handle arrest scenarios and use proper judgement, including de-escalation. This training was delivered in a variety of ways over a number of years.

This penalty provides direction to all members that they must remain current in their authorities and any subsequent changes. It should also serve as a reminder to all members that an arrest of an individual is a significant action against that person and should not be performed casually or without the proper evidentiary foundation.

The prosecutor presented seven cases to support his position of a forfeiture of eight to eleven days off. The case of Constable Ardiles occurred during the time of the G20 summit meetings where, as noted in the decision, Toronto was experiencing widespread rioting, looting and unprecedented violence. As a result, officers were on high alert with respect to repeated civil unrest. It was within this context that the complainant was stopped as he was wearing a bandana/handkerchief and was subsequently arrested. He was released shortly thereafter and Constable Ardiles was found guilty of making an unlawful or unnecessary arrest. The officer received a reprimand.

The case of Wong and Begbie also occurred during the time of the G20 summit meetings. The Hearing Officer found that the testimony of Constable Wong "offended common sense" and there was no "air of reality" as to his involvement with the complainant. He was found guilty of making an unlawful or unnecessary arrest and received a one-day suspension. The charges against Constable Begbie were dismissed. The complainant in this matter was detained for approximately 26 hours. This case is also under appeal.

The similarities in the Ardiles and Wong & Begbie cases when compared to the case of Constable Hu are the type of misconduct each officer faced and the fact that a person's liberty was taken away for differing periods of time. What is distinguishable is the context within which the arrest was made in each scenario as well as the difference in the instruction given to or understood by the involved officers in the G20 matters with respect to their powers of arrest and the threat to public safety. Constable Hu wanted to fulfil his duty to ensure the ACC square was cleared of vehicles. I find these cases are not sufficiently instructive to make a proper comparison. Having said that, Constable Ardiles and Constable Wong had unblemished employment records according to the prosecutor.

The case of Vogelzang, the complainant was stopped for driving 'all over the road'. He was deemed to be agitated and was subsequently arrested for breach of the peace. The complainant was handcuffed and seated in the rear of the police vehicle while a search of his personal vehicle occurred. Constable Vogelzang released the complainant and no traffic infraction was issued. The officer was found guilty in a police tribunal of making an unlawful or unnecessary arrest. The officer had one negative entry on his employment record for discreditable conduct and he received a forfeiture of three days which was upheld on appeal. The similarities include the unlawful arrest and detention of a member of the public for a short period of time. The difference includes the number of negative entries ascribed to Constable Hu while noting this was Constable Vogelzang's second tribunal finding of guilt.

In Wowchuk and Bernst, the officers made an unlawful or unnecessary arrest of a member of the public while involved in a drug investigation. The complainant's personal freedom was removed, however briefly, until he was released unconditionally. Both officers had unblemished employment records and the decision and penalty were upheld on appeal. The differences include that both officers rushed their decision to stop the first car to exit a laneway where suspected drug activity may have occurred. Constable Hu did not rush into his decision to make the arrest, albeit unlawful, as he demonstrated a degree of restraint in moving forward. Nonetheless, a member of the

public was negatively impacted by his actions. Another difference involves the complimentary employment record of Wowchuk and Bernst in comparison to the five negative entries of Constable Hu. In this case, Sergeant Wowchuk received a forfeiture of eight hours and Constable Bernst received a reprimand. Both officers received remedial training on Service policies.

In Lord, the Hearing Officer acquitted Constable Lord of one count of unlawful or unnecessary exercise of authority and one count of insubordination as a result of an unlawful arrest and field strip search. These findings were overturned by the Commission, which substituted a forfeiture of eight days. Constable Lord had a troubling disciplinary history, having been convicted of seven charges of misconduct. Reflecting back on the concept of progressive discipline and balancing a good employment record with a negative discipline record, it must be noted that Constable Lord was assessed a penalty of twelve days just prior to the incident that gave rise to this appeal.

In Blowes-Aybar, the officer was charged with making an unlawful or unnecessary arrest when he stopped a cyclist and charged him with a LLA infraction. The case was appealed to the Commission where the finding of misconduct was upheld and the penalty was varied as the Hearing Officer erred in considering misconduct which post-dated the offence. In determining an appropriate penalty, the Commission noted that this was the first offence for the officer, considering the timing of other misconduct. They directed that a four-day suspension was appropriate.

In Sylvester, the officer was approximately 15 minutes late for duty. Based on Constable Sylvester's negative employment record, progressive discipline was a live issue for the tribunal. The Hearing Officer noted that the misconduct should not be elevated to be more than it was at the time, an officer who was late for work and was unable to notify the Officer in Charge. If progressive discipline was held to the strictest of meanings, the officer would have received a two-rank demotion for being 15 minutes late for work. He was ultimately assessed a forfeiture of three days.

Constable Hu's actions have negatively impacted the reputation of the Service, especially in the eyes of Mr. Shemtov, as he was unlawfully detained and was unable to continue with his work that evening. He has actively participated in the hearing. Any time a member of the public is unlawfully arrested and detained, it does not bode well for the reputation of the Service.

It was raised that Constable Hu abused his authority in arresting Mr. Shemtov just as he abused his authority in a traffic incident in January 2013. The information contained in the uniform disciplinary report for the January 17, 2013 event was scant. He issued tickets to a tow truck driver for alleged infractions, one of which was not supported by the ICC videotape. Without further information, I will not refer to this incident as an abuse of authority.

The purpose of the discipline process is to provide an avenue for police management to correct and control errant behaviour in order to maintain acceptable standards of conduct by serving members.

As stated by the Commission in Blowes-Aybar, "an unlawful or unnecessary arrest is a serious matter to the complainant and to society as a whole". I agree with this conclusion and it is unfortunate that Mr. Shemtov had to go through this experience. I am in agreement that progressive discipline does not necessarily mean an escalation from a previous penalty and that, at times, it must be kept in mind that there is a significant impact by virtue of the case having proceeded before the tribunal and a penalty assessed at this level. This case most certainly involves the balancing of the opportunity for rehabilitation with the concept of progressive discipline, given the negative aspects of Constable Hu's employment record, as well as a balancing of the seriousness of the misconduct with the opportunity for rehabilitation, given the positive aspects of Constable Hu's employment record.

I agree that Constable Hu's actions were not a deliberate abuse of power and his intent to arrest Mr. Shemtov was not borne from malice. At the same time, this was a

significant Charter breach and Mr. Shemtov's liberty was taken away which has impacted the public interest and the reputation of the Service. It is within these points that I must find the balance with respect to an appropriate penalty.

I have considered the submissions of both parties, reviewed the exhibits and weighed the mitigating and aggravating factors in determining an appropriate penalty.

The penalty in this matter will be imposed under sections 85 (1) (f).

1. A forfeiture of 8 (eight) days or (64) sixty-four hours off.
2. Police Constable Hu will attend remedial training on his powers of arrest as directed by the Unit Commander, Toronto Police College



Debra Preston  
Superintendent  
Hearing Officer

Dated and Released Electronically: July 22, 2015