

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

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

AND IN THE MATTER OF THE
THE ONTARIO PROVINCIAL POLICE

AND PROVINCIAL CONSTABLE T.A. (TYLER) JOHNSON (13296)

CHARGE: Neglect of Duty

PENALTY DECISION

Hearing Officer: Acting Superintendent Richard Hegedus
Toronto Police Service

Prosecutor: Mr. Christopher Diana

Defence Counsel: Mr. William MacKenzie

Public Complainants: Ms. Pearl Hughes and Mr. Sam Hughes

Hearing Dates: 2018.05.15

File Number: 2531015-0240

Decision Date: 2018.07.31

PENALTY DECISION

PROVINCIAL CONSTABLE T.A. (TYLER) JOHNSON (13296)

DATE: 2018.07.31

REFERENCE: 2531015-0240

Acting Superintendent Richard Hegedus: Before commencing with my penalty decision in this matter, I wish to thank Mr. Christopher Diana, the prosecutor, Ms. Pearl Hughes and Mr. Sam Hughes, the public complainants, and Mr. William MacKenzie, defence counsel, for their arguments and exhibits tendered, all of which have assisted me in reaching my decision.

On May 15, 2018, Provincial Constable T.A. (Tyler) Johnson (13296) pleaded guilty and was found guilty of one count of Neglect of Duty contrary to the *Police Services Act (PSA)*. No witnesses were called by the prosecution, the public complainants, or the defence.

Summary

The Particulars of Allegations in the Notice of Hearing (NOH) are as follows.

On or about August 20, 2012 OPP responded to an ATV collision that resulted in a fatality. The collision occurred in the Township of Dysart within the County of Haliburton. The involved persons J.H. and T.R. were riding on the same ATV at the time of the collision. J.H. died as a result of the injuries he sustained in the collision. You responded to the collision in your role as the primary investigator.

The Independent Police Review Director requested the Peel Regional Police Service to conduct a review of the OPP investigation following the receipt of a public complaint in relation to the initial OPP investigation. As a result of the information the Office of the Independent Police Review Directorate learned, in addition to information received from Peel Regional Police, it is alleged you committed the following misconduct in relation to your duties in this investigation:

- Knowing that there were as many as 13 witnesses who could have been relevant to the investigation, you only interviewed, or had approximately 5 witnesses interviewed.
- No steps were taken to interview the remaining witnesses despite a fatality occurring in this collision, until directed to do so approximately two months later.
- You failed to obtain contact information from all of the witnesses prior to them leaving the scene.
- You indicated you didn't think you could interview witnesses outside of OPP jurisdiction. This was wrong and you sought no direction or advice from a senior member on this point. You just didn't do it, until directed to do so approximately 2 months later.
- Approximately 2 months after the collision, you were directed to re-interview T.R. and other remaining witnesses. You failed to re-interview T.R. as directed.
- Despite identifying inconsistencies in some of the witnesses' statements you failed to follow-up or investigate the possibility of collusion between the parties.

The Agreed Statement of Facts (ASF) (Exhibit 7, Tab 1) and (Exhibit 5) is as follows.

1. Provincial Constable Tyler Johnson was hired by the Ontario Provincial Police ("OPP") on August 30, 2010 and commenced duties at the Haliburton Highlands Detachment on January 10, 2011.

2. On August 20, 2012, P.C. Johnson was dispatched by the Provincial Communications Centre to attend an ATV collision with a metal gate on a trail in the Township of Dysart in the County of Haliburton which resulted in a fatality. There were two individuals on the ATV at the time of the collision. Jake Hughes died at the scene from the impact of the metal gate on the area of his upper chest and neck; Taylor Rivando received only minor injuries.
3. Mr. Hughes and Mr. Rivando were part of a group of eight young people visiting a nearby cottage owned by Mark Oliver.
4. P.C. Johnson was the first officer contacted by the Provincial Communications Centre and the first officer to attend the collision scene. Due to his proximity to the scene and his availability to attend, he was assigned as lead investigator in conjunction with OPP policy at the time. At the time, P.C. Johnson had been an officer for 19 months and had not previously investigated a motor vehicle collision involving a fatality.
5. Following the collision, Mr. Rivando sought assistance. Alastair Mills (a passerby who was providing assistance) and Laura Hayward (one of the group of young people at the cottage) administered first aid to Mr. Hughes for approximately thirty-eight minutes until the arrival of the fire department and paramedics. Following approximately ten minutes of efforts by the fire department to resuscitate Mr. Hughes, such efforts were discontinued and he was declared deceased. P.C. Johnson was the first police officer to arrive at the scene.
6. P.C. Rob Adams arrived on the scene approximately thirty seconds after P.C. Johnson. P.C. Adams was an eighteen year member of the OPP at the time. P.C. Adams attended at the hospital and took a statement from Mr. Rivando

approximately four hours after the collision. Mr. Rivando had been brought to the hospital for precautionary reasons.

7. Subsequent to P.C. Johnson's arrival, P.C. David Neville and P.C. Gary Blackman attended the scene to provide technical assistance with respect to a collision investigation and reconstruction. P.C. Blackman (now retired) was experienced at accident reconstruction. While P.C. Johnson was the lead investigator, he had limited involvement in the technical aspect of the investigation. P.C. Blackman wrote the report.

The Agreed Statement of Facts Continued

8. Sergeant Sandy Adams and Staff Sergeant Chad Bark arrived at the scene. While at the scene, Sergeant Adams instructed P.C. Johnson to obtain statements from all potential witnesses, including the individuals visiting the cottage.
9. P.C. Johnson interviewed four individuals at the scene, including Mr. Mills, Mark Oliver (owner of the cottage and ATV), Jean Chretien (witnessed the ATV on the beach) and Laura Hayward (provided medical assistance to Mr. Hughes). P.C. Johnson was aware that there were other individuals on or around the beach or the cottage who may have had information about this matter but did not take immediate steps to locate or interview them.
10. Mr. Chretien told P.C. Johnson that he was on the beach near the trail where the collision occurred. He observed the ATV driving along the beach. He did not see it stop before it turned up the trail. He indicated his belief that Mr. Rivando was on the back of the ATV but did not clarify the basis of his belief. About thirty seconds later, he was alerted to the collision by Mr. Rivando running out of the trail. He ran up the trail and assisted with efforts to assist Mr. Hughes. Upon

arriving at the scene, he noticed that the ATV had travelled about 15 feet past the barrier gate and had turned the corner. He indicated that his wife, Jennifer Chretien, and his mother-in-law, Maureen Russell, were also on the beach at the same time. P.C. Johnson did not seek to interview Ms. Chretien or Ms. Russell at the time or ask for their contact information. P.C. Johnson felt that the statement of Mr. Chretien would suffice.

11. Mr. Mills told P.C. Johnson that he was returning from the dump with his father when he came across an ATV blocking his way. Upon exiting his vehicle, he observed the ATV was running and saw Mr. Hughes lying unresponsive and bleeding on the road. He returned to his vehicle, asked his father to call 9-1-1 (who also exited the vehicle) and assisted Ms. Hayward with CPR when she arrived shortly thereafter. He observed the ATV as having turned left beyond the gate and being in the middle of the road.

12. Mr. Oliver was the owner of the cottage and ATV. He advised that he had given Mr. Hughes and Mr. Rivando permission to take the ATV and that Mr. Rivando was initially driving the ATV. He attended the scene shortly after the collision. He advised that Mr. Hughes was driving the ATV at the time of the collision but gave no information or explanation about that conclusion. He told P.C. Johnson that when he came to the scene, the ATV was approximately 15 feet past the gate in the middle of the path which turned to the left after the gate, which is consistent with the statements of Mr. Mills and Mr. Chretien. He then moved the ATV off the road to allow room for emergency vehicles. There is no evidence to suggest the ATV had been moved by anyone else prior to that point.

13. Ms. Hayward knew Mr. Hughes from school and was Mr. Rivando's girlfriend at the relevant time. She was on the beach when made aware of the collision. She is trained in CPR and first aid and performed CPR on Mr. Hughes until the arrival

of the fire department. She advised that the last person she saw driving the ATV was Mr. Rivando on the beach but she indicated Mr. Rivando and Mr. Hughes switched positions though she did not see them switch. She conceded that she did not know who was driving at the time of the collision and indicated that Mr. Rivando had told her that Mr. Hughes was driving and that he was worried about what everyone was going to think.

The Agreed Statement of Facts Continued

14. P.C. Johnson did not obtain the contact information for any of the actual or potential witnesses prior to them leaving the scene.

15. P.C. Adams took Mr. Rivando's statement at the hospital. Mr. Rivando stated that he consumed half a beer before taking the ATV. He stated that he was driving the ATV when they left the cottage and switched positions with Mr. Hughes at the end of the beach. He indicated that Mr. Hughes was driving the ATV as it returned along the beach and headed up the trail. He explained that he was riding on the back of the ATV at the time of the accident, did not duck under the bar, hit his helmet on the bar but stayed on the ATV as it passed underneath the bar. He indicated that he was dizzy as a result, but got off the ATV, checked on Mr. Hughes, ran to the beach and called for help and ran further to the cottage to seek assistance from Mr. Oliver.

16. Within several days, based on the interviews, the statement from Mr. Rivando and conversations with P.C. Blackman, P.C. Johnson submitted his general report to his supervisor, Sgt. T. Allore (retired), concluding that Mr. Hughes was driving the ATV at the time of the collision. On or about September 27, 2012, Staff Sergeant Bark (retired) ordered P.C. Johnson to interview more witnesses to follow up on inconsistencies with the statements, including Mr. Rivando. P.C.

Johnson was not aware that he was permitted to leave the detachment area to conduct witness interviews until ordered to do so by Staff Sergeant Bark.

17. Further to the direction of Staff Sergeant Bark, P.C. Johnson, with assistance from P.C. Adams, interviewed a number of witnesses for the first time and conducted second interviews with other witnesses through October 2012. These individuals were interviewed approximately 50-70 days after the incident.
18. P.C. Johnson and P.C. Adams interviewed Mr. Oliver for a second time on October 8, 2012. He categorically stated that Mr. Rivando was in his sight for the entire morning and that Mr. Rivando had not consumed any alcohol. This contradicts Mr. Rivando's evidence about his alcohol consumption. P.C. Johnson did not ask about or follow up on that piece of conflicting evidence. Mr. Oliver indicated that only five minutes passed from the time they left on the ATV to the time Mr. Rivando ran back to the cottage seeking help. He did not see who was driving. He stated that he learned that the boys had switched positions from a conversation with Ms. Hayward.
19. P.C. Johnson and P.C. Adams interviewed Emily Oliver, Mr. Oliver's daughter, for the first time on October 8, 2012. She advised that prior to departing on the ATV, Mr. Rivando had a full bottle of beer which he did not start drinking as he wanted to drive the ATV. Mr. Hughes told her that he had consumed two beers so he would not drive. She told Mr. Hughes to have fun as he had never previously been on an ATV. At the time of the collision, she was on a raft near the shore with Mark Nolle, from which she could see the entire length of the beach. She observed Mr. Rivando driving the ATV down the beach and stopped paying attention. She did not see them switch positions and she did not see Mr. Hughes driving.

20. P.C. Johnson interviewed Jennifer Chretien for the first time on October 9, 2012. Her and Mr. Chretien were not part of the group of young people at Mr. Oliver's cottage and she did not know them. She set up a blanket on the beach in the sand and decided to go for a swim. She left her child with her mother on the beach. As the ATV passed by, she was concerned that it may hit her child. She watched the ATV turn up the trail. It did not stop at that point. She observed a large tattoo on the back of the passenger on the ATV. Mr. Hughes had such a tattoo; Mr. Rivando does not.

The Agreed Statement of Facts Continued

21. P.C. Johnson interviewed Jean Chretien for the second time on October 9, 2012. His recollection was that the ATV went along the beach and then came back before heading up the trail. He indicated that he heard Mr. Rivando tell Mr. Oliver at the scene of the collision that he was not driving and that "I think I ducked". Mr. Rivando then told him that he was not driving. Mr. Chretien indicated that he found this suspicious based on his own understanding and experiences with ATVs. He said that he saw skid marks from the ATV on the other side of the gate.

22. P.C. Johnson and P.C. Adams interviewed Ms. Hayward for a second time on October 9, 2012. She indicated that Mr. Rivando told her that Mr. Hughes was driving. She heard that they switched positions but she did not see the switch.

23. P.C. Johnson and P.C. Adams interviewed Maureen Russell for the first time on October 10, 2012. She is Jennifer Chretien's mother and was on the beach at the time of the incident. She could not provide any useful information about who was driving the ATV.

24. P.C. Johnson and P.C. Adams interviewed Colin Sicoli for the first time on October 10, 2012. Mr. Sicoli was one of a group of friends staying at Mr. Oliver's cottage. He advised that he was told that Mr. Hughes was driving the ATV at the time of the collision. However, he said that he was in a paddleboat close to the shore with three other people at that time (Joseph Cicirone, Siobhan Tumillo and Kiley MacDougal) and never actually saw Mr. Rivando and Mr. Hughes switch positions and did not see Mr. Hughes drive the ATV. On that point, he added: "No one since the incident happened has ever said they saw the switch. All of us were in the state we were in; we were just minding our own business." In his synopsis of the interview on NICHE, P.C. Johnson wrote that Mr. Sicoli stated that Mr. Hughes was driving the ATV at the time of the accident. Mr. Sicoli heard this from others; he did not actually observe this. P.C. Johnson was mistaken in his characterization of that portion of the interview.

25. P.C. Johnson and P.C. Adams interviewed Joseph Cicirone for the first time on October 10, 2012. He was one of a group of friends that was at Mr. Oliver's cottage. He advised that he was walking on the beach and observed the ATV drive by slowly with Mr. Hughes driving and Mr. Rivando as passenger. This is inconsistent with the statement from Ms. Chretien. He did not see them switch positions. Mr. Cicirone advised that he was with Mr. Sicoli at the time – Mr. Sicoli however clearly stated that he did not see Mr. Hughes drive the ATV. Mr. Cicirone stated that as Mr. Rivando and Mr. Hughes drove past them, with Mr. Hughes driving, they said "Hey" to Mr. Cicirone and continued driving. He indicated that Mr. Sicoli saw this interaction. This is inconsistent with all other statements. He stated that Mr. Rivando reached around and squeezed Mr. Hughes chest. This is also inconsistent with all other statements, including Mr. Rivando's statements. He also indicated that Mr. Rivando did not consume any alcohol. P.C. Johnson missed the numerous inconsistencies and

contraindications in Mr. Cicerone's statement and failed to follow up on, or ask about, those inconsistencies and contraindications.

26. P.C. Johnson interviewed Mark Nolle for the first time on October 11, 2012. He was one of a group of friends that was at Mr. Oliver's cottage. He was on a floating raft on the water with Ms. Haywood when the collision occurred. He observed the ATV drive up and down the beach on 3-4 occasions but only saw Mr. Rivando drive the ATV. Contrary to the statement from Mr. Sicoli, he was told by Mr. Sicoli that Mr. Sicoli had witnessed Mr. Hughes and Mr. Rivando switch positions.

27. P.C. Johnson and P.C. Adams interviewed Kiley MacDougall for the first time on October 11, 2012. She was one of a group of friends that was at Mr. Oliver's cottage. She was on the beach at the time of the collision. She indicated that the only person she saw driving the ATV was Mr. Rivando. She heard from others afterwards that they had switched positions but she did not see the switch and she did not observe them drive on to the trail. She was asked by P.C. Johnson whether she was satisfied that Mr. Hughes was driving at the time of the incident. Notwithstanding her lack of personal observation, she replied "Yes". In the Witness Synopsis prepared by P.C. Johnson and filed on Niche, he wrote that Ms. MacDougall was satisfied that Mr. Hughes was the driver of the ATV notwithstanding that she never saw Mr. Hughes drive the ATV and she never saw the switch. She also specifically denied being aware of any drugs at the cottage. This is contradicted by Siobhan Tummillo who specifically identified Ms. MacDougall as being one of the individuals who brought marijuana to the cottage.

The Agreed Statement of Facts Continued

28. P.C. Johnson interviewed Siobhan Tummillo for the first time on October 27, 2012. She was one of a group of friends that was at Mr. Oliver's cottage and was Mr. Hughes' girlfriend at the time. She observed the ATV depart the cottage with Mr. Hughes as passenger and Mr. Rivando as driver. She had no further observations of the ATV. She stated that Mr. Rivando told her that they switched positions and switched helmets (the latter point contradicts Mr. Rivando's statement). In response to leading questions from P.C. Johnson, she stated her belief based on conversations with her friends that Mr. Hughes was driving the ATV at the time of the collision. She admitted that there was marijuana at the cottage and that she believed all of them had used some of it the previous evening, which all other witnesses denied.

29. P.C. Johnson interviewed Aaron Zavarella for the first time on October 27, 2012. He was one of a group of friends that was at Mr. Oliver's cottage. Mr. Zavarella said in his interview that he was with Mr. Cicirone and Mr. Sicoli on the beach at the relevant time (which contradicts the statements from Mr. Cicirone and Mr. Sicoli, neither of whom acknowledged Mr. Zavarella's presence). He indicated that Mr. Rivando was initially driving the ATV but he saw them switch positions on the ATV. At first he indicated the switch took place on the beach close to the cottage and subsequently stated that the switch took place close to where the trail begins. Both versions contradict Mr. Rivando's statement that the switch occurred at the end of the beach and contradicted the statements from others who did not see such a switch take place in either area. Mr. Zavarella indicated that he saw Mr. Hughes driving the ATV after the switch. He indicated that he was 100% certain that Mr. Hughes was driving at the time of the collision. Contrary to other witnesses, he indicated that no alcohol was consumed as there was no alcohol on the trip. He also denied the presence of drugs. He stated that

he was told by Mr. Rivando that he was knocked off the ATV on impact, contrary to Mr. Rivando's statement to P.C. Adams.

30. Mr. Zavarella, Mr. Cicirone and Mr. Sicoli all knew Mr. Rivando from school and were friends with him. Mr. Hughes was less well-known to the three of them, though he knew Mr. Sicoli from high school football.

31. There were numerous inconsistencies and conflicting accounts amongst the witnesses. Those inconsistencies should have been apparent to P.C. Johnson and led to further investigative actions. Notwithstanding those inconsistencies, P.C. Johnson did not ask any questions to determine if any of the witnesses were colluding or speaking with other witnesses about the information they wished to convey during their interviews. After completing the interviews, he did not review the statements carefully to determine whether he needed to follow-up on any inconsistencies or seek any necessary clarity.

32. The version of events provided by Mr. Rivando in his only statement to the OPP was contradicted by other witnesses in numerous material respects, including by the witness accounts from witnesses who were not part of the group of young people at Mr. Oliver's cottage. Having completed the above witness interviews, P.C. Johnson was in a good position to conduct a comprehensive interview of Mr. Rivando and ask him to address those inconsistencies.

33. On October 17, 2012, P.C. Johnson contacted Mr. Rivando to advise that he would contact him on October 25 or 26 to arrange an interview time. P.C. Johnson decided not to conduct a further interview with him.

The Agreed Statement of Facts Continued

34. On October 25, 2012, P.C. Johnson attended a meeting with Sergeant Allore, P.C. Blackman, P.C. Neville and Staff Sergeant Bark to discuss this investigation. Staff Sergeant Bark suggested that a polygraph test be offered to Mr. Rivando. There was some discussion that Mr. Rivando was not being entirely truthful. Mr. Rivando was the only surviving witness to the collision. However, no polygraph test was offered to Mr. Rivando and no further interview was conducted.
35. On October 28, 2012, P.C. Johnson called Sam Hughes – the father of the deceased – to advise that the investigation was closed and that it was the opinion of the OPP that Jake Hughes was driving the ATV at the time of the collision with Mr. Rivando as passenger.
36. In November 2012, P.C. Johnson was contacted by a hair stylist, Patricia Dobbs. Her client, Christine Sorenti, told her that the Cicirones were friends of hers and that at least some of the witnesses had been coached by Mr. Oliver to stick to one story and, more importantly, that Mr. Rivando was not the driver of the ATV at the time of the collision. P.C. Johnson did not contact Ms. Sorenti. Instead, he contacted Ms. Dobbs and Mr. Ciceroni by telephone, who reiterated that he saw Mr. Hughes driving the ATV. P.C. Johnson did not contact or interview Ms. Sorenti.
37. On August 22, 2012, the Hughes family received condolence visits from a number of friends, including Mr. Rivando and his father. Mr. Rivando told them that he was the original driver of the ATV and that they had switched positions at the end of the beach. He also told them that when they switched positions, they switched helmets. This was consistent with what Mr. Rivando had allegedly told Ms. Tumillo but was inconsistent with his statement to the OPP and with the

other statements. Such a switch of helmets did not happen, as confirmed by the statements of Mr. Oliver and others. Five additional witnesses to this conversation on August 22, 2012 provided signed statements confirming this statement. The O.P.P. was advised of these statements in January 2013. However, P.C. Johnson took no steps to further investigate this issue or follow up with those witnesses.

38. The interviews described above were not conducted in a timely manner. Due to the passage of time and the potential for witnesses to discuss the events with other witnesses or individuals, the information obtained in those interviews was not as reliable as it would have been if the statements were taken on the day of the incident.

39. The Major Case Management model was not followed during this investigation. Further, there was no investigative plan for the speed, flow and direction of this investigation and there was no organized approach to completing this investigation. There were no investigative meetings or briefings held in order to establish any plans or focus.

40. As an officer with limited experience, P.C. Johnson lacked the training and experience to handle this investigation without assistance. He failed to see out such assistance and it was not provided to him.

Penalty Decision

After an examination of the exhibits, and consideration of the submissions of the prosecutor and defence counsel, I arrive at the following penalty.

The penalty in this matter imposed under Section 85 (1) (f) of the *Police Services Act* will be:

for Neglect of Duty, in that Constable Johnson without lawful excuse, neglected or omitted to perform a duty as member of the Ontario Provincial Police, a forfeiture of 48 hours off.

Specifically, he is required to work an additional 48 hours and this will be completed at the earliest opportunity in consultation and agreement with his Detachment Commander.

Prosecution Submissions

The prosecutor tendered a Case Book in support of his submissions (Exhibit 7) and indicated that he was proposing a penalty jointly with defence counsel of a forfeiture of 48 hours pursuant to Section 85(1)(f) of the *Police Services Act (PSA)*. The prosecutor indicated that the public complainants were seeking a penalty of dismissal. As such, a notice of their intention to seek dismissal had been served upon defence counsel on March 8, 2018 (Exhibit 6).

The prosecutor indicated that the public complainants intended to provide statements in regards to the impact of this event had upon them and there was no objection from the prosecution or defence to them being presented in the Tribunal.

The prosecutor submitted that a penalty of a forfeiture of 48 hours was appropriate and reasonable in the circumstances and it was at the higher range of penalties in regards to the character of the Neglect of Duty in this matter.

The prosecutor drew my attention to three cases which included Bennett and Ottawa Police Service, 2012 OCPC (Exhibit 7, Tab 6), Bromfield and Hamilton Police Service, 2009 OCCPS (Exhibit 7, Tab 7), and Yakimishyn and Peel Regional Police, 2008

OCCPS (Exhibit 7, Tab 8) in order to discuss principles involved in joint penalty submissions.

In *Bennett* the prosecution and defense had put forward a joint penalty of a forfeiture of 24 hours and the Hearing Officer imposed a higher penalty of a forfeiture of 40 hours. The matter was appealed and in its decision the Commission noted:

'The hearing officer must undertake a very careful consideration of those submissions, particularly where there appears to have been an in-depth analysis and presentation of the sentencing factors enumerated in Williams, supra. A joint submission on penalty ought to be accorded significant weight when deciding an appropriate penalty: see Yakimishyn, supra.'

And further

While a hearing officer is not bound by a joint penalty submission, in rejecting such submission the tribunal must provide clear and cogent reasons after a full consideration of the law and the facts: see Gateman and London Police Service (1998) 3 O.P.R. 1282 (OCCPS); Kingston and Halton Regional Police Service (March 24, 2006, OCCPS) and Kleinsteinber and O.P.P. (1996) 2 P.L.R. 389 (OCCPS).

And further

In our view, this does not accord significant weight to the joint submission particularly where the recommended joint penalty proposed falls clearly within the acceptable range of penalties for the relevant misconduct.'

The prosecutor stated that while the public complainants' submissions should be given careful consideration, significant weight should be given to the joint position of the prosecution and defence counsel as discussed in *Bennett*. The prosecutor submitted that the joint position fell within the acceptable range of penalties.

As noted in Kelly and Toronto Police Service, 2005 OCCPS (Exhibit 7, Tab 3), the prosecutor discussed the three elements that needed to be considered in regards to an appropriate penalty and those were the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to reputation of service should the officer remain a member.

Prosecution Submissions Continued

The prosecutor submitted that this case involved serious misconduct which was aggravating to penalty. Constable Johnson failed to conduct a proper investigation in this matter. A young man lost his life and the only witness to the collision shifted the blame to the deceased. The prosecutor submitted that the investigating officer should not have accepted statements at face value. The incident warranted a full and comprehensive investigation but the facts reveal that the investigation was not full and comprehensive. That this was a death investigation raised the seriousness of the misconduct.

In Ontario Provincial Police and Clark, 2017 OPPDH (Exhibit 7, Tab 12) a deceased person was found at the side of the road and the investigation was not conducted properly. The OPP adjudicator in that case wrote:

'The serious nature of the incident demanded more than the initial lack of investigation demonstrated by Constable Clark. Constable Clark failed to secure the scene, failed to secure and protect evidence and failed to make thorough

notes of his actions and observations. These allegations are serious enough on their own merit, but when I consider the fact that this was a death investigation, the seriousness of the misconduct is elevated.

And further

I acknowledge Constable Clark did not completely disregard the call for service, but so much more is expected of a lead investigator at a sudden death scene.'

The prosecutor noted that the case involved a serious incident which raised the seriousness level. The prosecutor submitted that a penalty of 48 hours was at the high end for Neglect of Duty in a death investigation but the facts justified that penalty.

The prosecutor submitted that the ability to reform or rehabilitate the officer was a neutral factor in this case and there were no concerns with the officer's ability to reform in future investigations or that this incident was part of a pattern of misconduct. His performance reviews did not suggest that there were any problems with his performance.

In regards to damage to reputation of the police service, the OPP must maintain the trust and confidence of the community it polices. There had been no media attention in this matter but the Tribunal is a public forum and the media regularly requests Notices of Hearing and reviews hearing decisions. This incident has tarnished the reputation of the OPP in the eyes of the Hughes family and others who are aware of this. There must be a proportionate sanction in this matter to ensure the community understands that the OPP takes this type of misconduct seriously.

The prosecutor spoke to Constable Johnson's employment history (Exhibit 7, Tab 18). Constable Johnson has been a police officer for eight years. There is a letter of thanks from July 2013 in his file. He has no prior record of discipline.

The prosecutor reviewed Constable Johnson's Performance, Learning, and Development Plans (PLDP) from August 2013 to August 2014 and noted that he met most and exceeded expectations in three categories. His supervisors commented that he was committed to learning and continued to look for ways to improve, he will assist anyone, and is first to take a call and volunteers for any subsequent call for service. He could often be found at the detachment on his own time getting caught on various tasks. The next level manager concurred with those comments. He observed that Constable Johnson had a strong work ethic and was committed to do good work. (Exhibit 7, Tab 19)

Prosecution Submissions Continued

In the PLDP for the following year there were similar comments. His next level manager noted Constable Johnson was an energetic and hard-working police officer who did work on his own time because he is eager to be on the road and available. He portrays a positive image and promotes the reputation of the OPP and is self-motivated (Exhibit 7, Tab 20).

In the PLDP for August 2015 to August 2016, Constable Johnson received positive comments in regards to the help he provided to a young person who was the victim of crime. His supervisor noted that he assisted anyone who needed help with investigations and volunteered for work out of his assigned area. He coaches other officers and has worked with Special Olympics and a food drive. His next level supervisor noted he had a productive year and made positive comments about his work ethic (Exhibit 7, Tab 21).

In the PLDP for August 2016- to August 2017, His supervisor commented that he coached new recruits and was doing everything right. He was noted to be a strong leader (Exhibit 7, Tab 22).

The prosecutor indicated that Constable Johnson's supervisors were pleased with his performance and there were no concerns other than the incident before the Tribunal. The prosecutor submitted that Constable Johnson's employment history was a mitigating factor and he could continue to be useful police officer and a benefit to the OPP.

In regards to specific and general deterrence, there is a need for Constable Johnson and all OPP members to understand that death investigations need to be treated seriously and that there are consequences to conducting a poor investigation. The prosecutor discussed the effect on police officer and indicated that a forfeiture of 48 hours will have an impact of financial significance.

In regards to recognition of the seriousness of the misconduct, Constable Johnson pleaded guilty to all of the allegations. Generally, a guilty plea is a mitigating factor. The prosecutor referred me to Kobayashi and Waterloo Regional Police Service, 2015 OCPC (Exhibit 7, Tab 5) which discussed a guilty plea as mitigation. In this case, a guilty plea has negated the need for a lengthy hearing and the prosecutor submitted that was worthy of mitigation.

The prosecutor noted there is a strong public interest in ensuring the trust and support of the communities served by the OPP. Death investigations are an area that attracts increased public scrutiny and he brought Neild and Ontario Provincial Police 2018 OCPC; Ontario Provincial Police and Neild, 2016 OPPDH (Exhibit 7, Tab 11) to my

attention where the officer was a supervisor. In regards to the public interest, the Hearing officer in that case noted:

'In the context of public interest, I agree with Mr. Manuel; the public does rely on the OPP, as they would with any police service, to properly investigate deaths. Not only must every stone be turned over in such investigations, but every stone must be seen to be turned over. Fundamental to this is the protection and preservation of the scene and summoning of appropriate resources to assist in the investigation. Sgt. Neild's supervision of the death investigation on the morning of February 8, 2015, fell far short of this. He had a duty to protect the scene, broaden the death investigation and summons investigative expertise once he ruled out a motor vehicle collision, and he did not.'

The prosecutor drew my attention to Mouland and Ontario Provincial Police, 2014 OPPDH (Exhibit 7, Tab 14) to address the public interest. In that case the officer failed to investigate two serious crimes in the span of a month. The Hearing Officer in that case noted:

'At the heart of all police disciplinary matters is the consideration for public interest. The PSA is principled on public safety and protection of property. Police officers in the Province of Ontario take an oath to faithfully discharge their duties – duties which dovetail into the principle of a safe and secure Ontario. The duties are non-exhaustive and include amongst other things, the prevention of crimes and assistance to victims, apprehension of offenders and laying of charges. Owing to the healthy premium the public pays for their policing service, they quite rightly expect a police officer to act in good faith and do his/her duties as outlined in the PSA.'

This brings me to MOULAND's misconduct. His failure to investigate two matters, which were his duty to investigate, fell well below the public's expectations and smacked in the face of a safe and secure Ontario.'

Prosecution Submissions Continued

The prosecutor submitted that the public interest is important to consider in significant investigations and is an aggravating factor but the matter of *Mouland* involved a complete failure to investigate which was different than the matter before me.

There were no issues of handicap or other relevant considerations in this matter.

In regards to consistency of disposition, the prosecutor presented a number of historical cases to demonstrate a range of penalties.

The prosecutor discussed the matter of Dinsdale and Ontario Provincial Police, 2004 OCPC (Exhibit 7, Tab 9) which arose from the officer's failure to investigate a fatal collision involving five deaths. The adjudicator had initially imposed a penalty of a forfeiture of 160 hours for Neglect of Duty. Constable Dinsdale was an experienced officer who had an unblemished record. He had not investigated a fatal collision for several years. He declared his inexperience but did not receive assistance as was promised by his supervisor. There were deficiencies in the investigation but not all were exclusively attributable to Constable Dinsdale. The Commission noted:

'... it is evident that Constable Dinsdale failed to perform basic tasks that he ought to have known were required. A reasonable person would expect that an officer with 25 years of experience at the time would know enough to interview all witnesses, request feedback on his progress and follow up on directives from a Crown Attorney.'

Clearly Constable Dinsdale's conviction of neglect of duty requires a punishment. The punishment should not only befit him and his personal circumstances. It must take into account the systemic failure surrounding this accident investigation...'

At appeal, the OCPC substituted a penalty of a forfeiture of 48 hours. A difference in that matter was that Constable Dinsdale had many years of experience as a police officer.

The case of Naylor and Ontario Provincial Police, 2005 OPPDH (Exhibit 7, Tab 10) involved a fatal motor vehicle collision and neglect of duty. In that case the defence sought a reprimand and the prosecution sought a penalty of 48 hours. The Hearing Officer noted:

'It appears quite obvious that Provincial Constable Naylor is a good and capable young officer who may at times fail to recognize the gravity of a situation from a victim's (or a victim's family's) point of view. The references in his evaluations would indicate that this is not a totally isolated incident. It was also a situation wherein there were multiple examples of neglect throughout the investigation, from investigative shortcomings at the scene and during the immediate follow-up, to failure to honour an undertaking he made to obtain a coroner's report for the family and report back to them. This misconduct, therefore, must not be treated as an isolated incident with only one occurrence.

And further

The protracted nature of Provincial Constable Naylor's neglect also needs to be considered. The fact that there were several aspects to the neglect over a considerable period of time, even after there was an awareness that the family

was disenchanted with the quality of the work that was done by the O.P.P. is, in my view, an aggravating factor.'

In that case the penalty imposed was a forfeiture of 24 hours.

Prosecution Submissions continued

The case of Neild and Ontario Provincial Police 2018 OCPC (Exhibit 7, Tab 11) involved Neglect of Duty in a death investigation. On appeal, the OCPC upheld all allegations of Neglect of Duty.

'I give significant weight to Sgt. NEILD's employment history and the observations of his supervisor. His negligence, while in my view was significant, was not conducive to the typical manner in which he carried out his duties. It appears to me the misconduct was isolated and sourced to his mistaken assumption the victim died of natural causes.'

A penalty of 24 hours was imposed.

In Clark and Ontario Provincial Police, 2017 OPPDH (Exhibit 7, Tab 12) the constable was assigned as the lead investigator in an investigation of a person found at the roadside. He failed to conduct a proper investigation and make thorough notes. He was assessed a penalty of a reprimand. A difference in that case was that the constable was working under a supervisor and in the matter before the Tribunal, the lead investigator Constable Johnson was on his own.

In Clark and Ontario Provincial Police 2016 OPPDH (Exhibit 7, Tab 13) the facts were different but the Constable was dispatched to a call for an unconscious person who was on the ground and breathing sporadically. Paramedics at the scene received information from witnesses that the person had been the victim of an assault. The officer stood by

as paramedics transported the person to hospital but he took no investigative steps and did not follow policy in regards to the investigation. That case involved a complete failure to investigate as opposed to the matter before the Tribunal. The sanction was a forfeiture of 60 hours.

In Mouland and Ontario Provincial Police 2014 OPPDH (Exhibit 7, Tab 14) there was a complete failure to investigate two serious crimes. Notwithstanding the seriousness of the neglect, after a joint submission, the officer was assessed a penalty of a forfeiture of 40 hours and the adjudicator made it clear that the proposed penalty was on the low end.

In Smith and Ontario Provincial Police 2017 OPPDH (Exhibit 7, Tab 15), the officer failed to properly investigate nine incidents over a number years. There were many occasions where the officer neglected to perform his duties. The officer pleaded guilty to Neglect of Duty and was assessed a penalty of a forfeiture of 112 hours.

In Maggrah and Ontario Provincial Police, 2017 OPPDH (Exhibit 7, Tab 16) and Bettcher and Ontario Provincial Police 2016 OPPDH (Exhibit 7, Tab 17) the penalties imposed were 90 hours and 80 hours respectively. Those were cases involving domestic violence and sexual assault of a minor. The fact circumstances were different than the matter before the Tribunal but even in those cases, the penalties fell short of a forfeiture of 100 hours.

Prosecution Submissions Continued

The prosecutor submitted that the joint position in this matter of a forfeiture of 48 hours was at the high end of the range and was appropriate in these circumstances. This involved a serious Neglect of Duty but even in cases where there was a complete failure to investigate, in one case there was a joint submission for a penalty of 40 hours. In this

case, the proposed penalty of 48 hours was not an insignificant penalty and will remain on Constable Johnson's record.

The prosecutor addressed the test for dismissal as was being requested by the public complainants. In the matter of Favretto and Ontario Provincial Police February 13, 2012 OCCPS; Ontario (Provincial Police) v. Favretto [2004] O.J. No. 4248 (C.A.) (Exhibit 7, Tab 2) the Commission noted:

'A penalty must be tailored to both punish and deter while not causing undue or excessive hardship. The penalty of dismissal is the ultimate penalty. It should be reserved for the most serious offences committed by a police officer where there is no hope for rehabilitation, there are no significant mitigating factors and where the police officer is of no further value to the police service or the community in general.

Again, dismissal is the ultimate penalty and will generally only be justified where it has been established that the officer is not fit to remain an employee. Dismissal should be reserved for the most egregious offences which nullify the usefulness of the officer and cause serious damage to the reputation of the police service.

Therefore, the key question which we need to consider is whether or not Constable Favretto can be rehabilitated and reformed to the extent that he can be an asset to the OPP and the general community as a police officer.'

The prosecutor submitted that the test for dismissal had not been made out on these facts.

Public Complainant Submissions – Ms. Pearl Hughes

A memorial video slideshow about the deceased was presented by the public complainants on consent of the other parties.

Ms. Pearl Hughes submitted that her son was being blamed for causing the ATV accident that resulted in his death. She stated that Constable Johnson was supposed to give answers to the family of the deceased and had not done so. He ignored their calls and letters in which they requested help in understanding his reasons for closing the case so quickly. In this case there had been too much focus on Constable Johnson's lack of experience. During the investigation he could have asked questions of his peers especially since this was his first fatality investigation. The OIPRD assigned the Peel Regional Police Service (PRPS) to conduct a detailed investigation and they determined that Jake Hughes was not the driver of the ATV. The pathologist also confirmed that based on the injuries he had been trapped in the rear cargo seat. That was ignored by Constable Johnson.

Due to Constable Johnson's neglect, the family has suffered. Jake Hughes' brother and sister are withdrawn and both struggle with living their lives after losing their brother. Ms. Hughes can no longer work at her job of 25 years because of the trauma of the loss. She has nightmares and has lost weight.

If Constable Johnson had not failed at doing his job, the public complainants would never have had to read about what their son had gone through. The public complainants assumed Constable Johnson would do his job but he ignored all the witness statements and physical evidence as the lead investigator. Thousands of dollars had been spent on the subsequent investigation because of Constable Johnson's negligence.

Based on all of the circumstances the public complainants were requesting the penalty of dismissal.

Public Complainant Submissions – Mr. Sam Hughes

Mr Sam Hughes submitted that the OPP approached Constable Johnson's actions as a training issue. The OPP are trained more than any other police force in Ontario. Policing is a career involving continuous learning and calls attended on a day to day basis are different from those done on a previous day. A veteran officer will seek assistance on a type of call they are not familiar with and he questioned why Constable Johnson hadn't sought assistance.

The public relied on the police to take control of a situation, gather the appropriate information, and determine what the outcome. Constable Johnson failed to do this. He was the lead officer and it was his responsibility to conduct an analysis before handing in the report. He ignored and failed in his responsibility to take control of the case. Mr. Hughes submitted that if Constable Johnson had waited for all the data to be received and had read it all he would have seen the inconsistencies. He had all the pieces of the puzzle but decided not to put them together. Constable Johnson ignored direct orders from his supervisors to re-interview witnesses. If Constable Johnson had done his job as required and in keeping with public expectations, the outcome would have been different.

Mr. Hughes had to explain to Constable Johnson that the owner of the ATV had no insurance and explain the Off Road Vehicles Act because the property had to belong to the owner to be exempt. Only then did Constable Johnson lay a charge.

Based on the seriousness of his lack of action and the public expectation, forfeiting hours or being assigned training as a disciplinary outcome is not acceptable. The public

would be outraged to find out their hard-earned dollars were being spent on mediocre policing. Mr. Hughes submitted that Constable Johnson should be dismissed because he did not have the drive or ability to seek out the truth and be an effective police officer.

Defence Submissions

Defence counsel acknowledged that the Hughes family had suffered a terrible loss. He submitted that based on their impact statements they were looking to blame Constable Johnson for their loss however this was an employment hearing. Counsel didn't take issue with their request to provide a victim impact statement or play the memorial video. He was sensitive to what they're going through. However there was no provision in the *PSA* for a victim impact statement.

Counsel submitted that the context of these proceedings needed to be considered. This was an OIPRD directed hearing. It arose when the public complainants became upset with the OPP investigation, review, and report. That report found no conduct issues with Constable Johnson. The family then requested a review and after a review, the PRPS investigated the matter.

A number of officers were involved at the time and it was not just Constable Johnson's case as a number of police officers were involved in the fatal collision investigation. When the OIPRD reviewed the PRPS investigation, they identified some misconduct on the part of Constable Johnson and on the part of some others who are not before this tribunal. The conduct they identified is found in the NOH. Those particulars were read to Constable Johnson and he has accepted responsibility that he was neglectful with respect to those points. The prosecutor had reviewed all witness statements in order to draft a NOH in a difficult case.

When the allegations are examined, they relate to the failure to properly interview witnesses. Constable Johnson accepted responsibility for not having fully interviewed

every witness who was on the scene in a timely fashion. That's what he is to be disciplined for.

The case of *Kobayashi* spoke to what value a victim impact statement brings. It was not meant to serve as a principle of sentencing. It should have no impact on the penalty decision.

Constable Johnson has seven and a half years policing experience today and no discipline history. At the time of this incident he was an officer for one year and seven months as a Third Class Constable. It was OPP's policy at that time in 2012 that directed that the lead investigator for any incident was based on proximity and availability to attend a scene.

Defence counsel submitted I could bring my own experiences in considering this decision. In the Greater Toronto Area a Third Class Constable would not be assigned as the lead investigator in a fatal collision. There are teams that deal specifically with motor vehicle fatalities. In this case Constable Johnson was assigned to be the lead investigator having never investigated a fatality before. The next officer, who had 18 years of experience, arrived approximately 30 seconds later but he was not assigned as the lead investigator. That officer was not before the tribunal. Two other experienced officers arrived minutes later and they assisted at the scene. At that point in time there were three experienced officers in addition to Constable Johnson. As noted in the ASF, he interviewed all witnesses at the scene where the accident occurred.

As Constable Johnson began to investigate, he deferred to the experience and expertise of an accident reconstructionist and others. His report was submitted with input from others in the field. The report reflected a collective understanding and opinion of what happened at that scene, not just that of Constable Johnson.

Defence Submissions Continued

Defence counsel indicated that in the days following, Constable Johnson continued with his other duties. He didn't just have one case to investigate. Over the next weeks, there were resource issues with respect to his ability to investigate this matter. There was some misunderstanding regarding his authorization to leave the area to continue his investigation which was noted in one of his performance evaluations. He returned to work and had to take other calls and continue other duties. It was not his only investigation.

There is reference in the ASF to the Major Case Management model not being followed. Constable Johnson didn't know what that was. No supervisors explained it to him, directed him to use it, or instituted it.

Paragraph 40 in the ASF summarizes what happened. As an officer with limited experience, he lacked the training and experience to handle this investigation without assistance and it was not provided to him. Counsel submitted that that was a fair statement. Constable Johnson accepts that he should have sought more assistance but he was not only tasked with this investigation.

In regards to the principles of damage to reputation of the service, there was not a lot of media publicity. The misconduct was identified in a PRPS report that the OIPRD reviewed and compiled as the NOH.

Constable Johnson's performance evaluations have been shown to the family. There were two prior ones from November 2011 and August 2012 (Exhibit 8) which were from the time of incident and the time following from August 2012 to August 2013 (Exhibit 9).

In the supervisor comments section in the November 2011 to August 2012 evaluation, it was noted that Constable Johnson was becoming more acquainted with the area and

his job function. He was also interested in developing his interview skills. As part of the evaluation, his supervisor commented that several times over the past year Constable Johnson had to carry a large day to day workload due to a shortage of platoon strength. The supervisor knew he wanted more control over his investigative follow up and enforcement opportunities. There was a notation that his reports were progressing well and would have more detail as he gained more experience.

His Staff Sergeant commented that he was enthusiastic, dedicated, and was willing to learn. He was appreciative of opportunities to investigate complex incidents. In regards to this case, he investigated a complex fatal collision in August 2012 that required extensive follow-up. The Staff Sergeant observed him on numerous occasions on his time-off working on the file.

Defence counsel indicated that the evaluation was prepared after the fatal incident involving Jake Hughes and demonstrated how he was viewed by senior staff. It brought some context to what was going on in August 2012.

The evaluation of August 2012 to August 2013 the supervisor's comments highlighted that Constable Johnson was still relatively new to policing. The misconduct occurred in 2012 and it was now 2018. The tribunal has had the benefit of seeing Constable Johnson's progression from 2012 to now as described in his performance appraisals. Constable Johnson accepted responsibility for the neglect in his investigation six years ago when he was a Third Class Constable. Defence counsel submitted that one of the most mitigating factors was acceptance of responsibility.

Defence counsel addressed the issues of consistency of disposition and progressive discipline. There had been no previous disciplinary history and it was clear from the case that the joint penalty proposal was on the high end for this type of neglect. Counsel

submitted that it was a reasonable penalty position. Counsel also concurred with the prosecutor in regards to joint submissions.

Defence counsel had instructions from Constable Johnson to accept this penalty. This matter had been ongoing for a lengthy period of time. Constable Johnson has had to answer to his own employer, to the PRPS investigation, and now to the OIPRD directed hearing. He accepted responsibility for not conducting a more thorough investigation, most notably in the area of witness interviews.

Defence counsel reiterated that this had not been a one-person investigation. There were others who were integral in coming to the decision. Constable Johnson expected to be punished reasonably and fairly. Defence counsel submitted that all of the case law supported a joint penalty submission of 48 hours.

Prosecution Reply

As a factual matter, it was the prosecutor's understanding that Constable Johnson did not interview Mr. Mills' father who was present at the scene.

Public Complainant Reply

Ms Hughes indicated that Kathleen Mills and her 10 year old son were also at the scene and were not interviewed.

Analysis and Decision

The public expects that police officers will perform their duties diligently and in keeping with procedural requirements at all times. The public trust is dependent on police officers performing those duties in a thorough and professional manner. Police officers are entrusted with significant authority and with that authority is a commensurate

responsibility to ensure that their conduct is in keeping with the requirements of their position. That responsibility is heightened by the seriousness of an investigation. Police officers are accountable for their actions and are held to a higher standard than the general public. It is now in the public interest to hold Constable Johnson accountable for his actions and impose an appropriate penalty.

This matter concerned an investigation into the death of a person who was involved in a vehicle collision. Though Constable Johnston had no involvement in the collision itself, he was expected to take charge as the lead investigator when he arrived at the scene. With that designation, he became responsible for ensuring that a full and thorough investigation into the circumstances of the fatal collision was completed. There were a number of steps that Constable Johnson should have taken during the course of the investigation which would have made it more fulsome and increased the potential for a supportable outcome. Because all investigative avenues were not followed, opportunities to preserve evidence or conduct timely and thorough witness interviews were lost. The seriousness of the misconduct was compounded because of the impact that Constable Johnson's neglect had on the trust placed in him by the public, and more specifically, the Hughes family. The fact that this matter involved neglect in an investigation into a death elevated the seriousness thereof and is an aggravating factor.

Constable Johnson has recognized the seriousness of his misconduct in this matter and has accepted responsibility. He has pleaded guilty and he has not tried to shift the blame elsewhere. As well, Constable Johnson did not object to the inclusion of the video memorial presentation and victim impact statements by the public complainants. That speaks to his recognition of the seriousness of the misconduct.

In the time since this occurrence he has taken steps to improve his job performance by delivering a higher level of customer service, working beyond what is required of him, working on his own time to complete assignments, and seeking additional training. All of those actions demonstrate that Constable Johnson has recognized the seriousness of

his misconduct and has taken steps to preclude him becoming involved in similar misconduct in the future. Those are mitigating factors.

Analysis and Decision Continued

Nothing has been brought to my attention in regards to the issues of provocation, disability, or relevant personal circumstances.

This matter has had an ongoing effect on Constable Johnson. It began with the investigation into the concerns of the Hughes family of the initial OPP investigation and continued with the subsequent complaint process through the OIPRD and these tribunal proceedings.

Any penalty I impose will continue to have an effect on the officer. He will forfeit a number of hours and be required to work on his time off until the penalty is satisfied. Finally, he will have a finding of guilt under the PSA.

Nothing has been brought to my attention in regards to any negative publicity in this matter but there has been damage to the reputation of the OPP as a result of this event. The initial damage to the reputation of the police service was in the eyes of the public complainants and has been ongoing since their lack of satisfaction with the initial OPP investigation, and in particular with Constable Johnson. That damage continued to occur any time they spoke to other members of the public about their experiences. Once this decision is posted on the OIPRD website, there will be further damage to the reputation of the OPP.

There appears to have been a systemic factor in the organizational context which had some bearing on this event. When the fatal collision occurred in 2012, OPP procedures dictated that the first officer on scene was assigned primary responsibility for the investigation. In this case it was a junior officer who was assigned responsibility for a

serious investigation. Due to the nature of policing in remote areas, that requirement was understandable because the first officer on scene might have been the only officer to attend. In this case however, there were other officers who were more qualified to assume the responsibility for the investigation and ensure it was completed in a thorough manner.

As noted in the ASF at paragraph 39, the Major Case Management (MCM) model was not followed. There is no evidence before me that Constable Johnson had received MCM training prior to the occurrence and thus he could not be expected to follow the model. Further, at paragraph 40 it was noted that he lacked the training and experience to conduct the investigation. He failed to seek appropriate assistance and it was also not provided to him (Exhibit 5). Those issues might have been addressed by an alternate investigative structure.

At the time, Constable Johnson was a junior officer who had approximately 19 months of service with the OPP. He had never investigated a traffic fatality and that responsibility was beyond the scope of his experience. He did not have the requisite training to perform well in that capacity. Traffic fatality investigations are often very complex. Because of inexperience and lack of training, the investigation was not fulsome and some interviews were not conducted well or in a timely fashion.

Despite issues involving inexperience or lack of training, it was still incumbent on Constable Johnson to be diligent in seeking adequate support and assistance from those who had more experience as well as to do his utmost to provide a thorough investigative response to the occurrence. The circumstances surrounding the investigation provide context but do not excuse the conduct of Constable Johnson.

Constable Johnson has had the benefit of all procedural fairness considerations. He was served with a NOH detailing the allegations against him and requisite notice

regarding the possible penalty of demotion or dismissal. He was provided with disclosure that allowed him to know the case to be met. He has been granted adjournments as necessary. He has had the benefit of experienced counsel throughout these proceedings. He has had the opportunity to make full answer and defence.

Analysis and Decision Continued

I reviewed Constable Johnson's employment history. He commenced with the OPP on August 30, 2010 and has been a Constable at the Haliburton Highlands Detachment since January 10, 2011.

In addition to the information defence counsel presented, the supervisors in Constable Johnson's first PLDP from November 7, 2011 to August 30, 2012 commented that Constable Johnson communicated well with the public and had received a number of e-mails and letters from complainants expressing their appreciation in the way he treated them (Exhibit 8).

In the PLDP dated August 30, 2012 to August 30, 2013, additional supervisor comments noted that Constable Johnson had received internal recognition for good arrests and proactive policing as well as noting he accepted criticism well and learned from his experiences (Exhibit 9). He received thanks from a member of the public for his caring and professionalism at a medical call on July 9, 2013 (Exhibit 7, Tab 18).

In addition to the information provided by the prosecutor from Constable Johnson's evaluations, in his PLDP dated August 30, 2013 to August 30, 2014, his supervisors noted that he spent a large amount of time on investigations and crown briefs, that he asked for direction and researched the submissions of others, and his workload often became extensive (Exhibit 7, Tab 19).

In the PLDP for August 30, 2014 to August 30, 2015, there were similar positive observations from his supervisors. It was also noted that he was committed to learning,

had had participated in numerous safety initiatives, and had coached two recruits (Exhibit 7, Tab 20).

In the PLDP for August 30, 2015 to August 30, 2016, his supervisors further described circumstances where he provided service to the victim of a robbery while he was on his days off, and volunteered his time to the community (Exhibit 7, Tab 21).

In the PLDP for the period of August 30, 2016 to August 30 2017, his supervisors further described an officer who was working beyond expectations (Exhibit 7, Tab 22).

Constable Johnson has no previous disciplinary history and it would appear that this was an isolated event. His positive employment history is a mitigating factor.

As discussed in *Favretto*, a key question to be considered is whether the officer can be reformed or rehabilitated. One measure of the potential to reform or rehabilitate an officer is the manner in which that officer dealt with the events post-misconduct.

On occasion, officers facing allegations of misconduct have exhibited reductions in performance or negative attitudes. That is not the case here. I noted an improvement in Constable Johnson's performance evaluations from the time of the matter before the Tribunal to his most recent PLDP. It is clear to me from his performance evaluations that Constable Johnson has learned from his misconduct and has progressed from not doing what was expected of him to working beyond expectations, working on his own time, working to help other officers, volunteering for calls for service, and providing positive service to the community. He demonstrated the ability to improve his performance over the intervening years and the opportunity must be provided to him to continue to do so.

Past performance is often also an indicator of future performance. In this case, there has been nothing to indicate that his good performance will not continue. Constable

Johnson has accepted responsibility for his misconduct. His acceptance of responsibility and good performance since these events demonstrate that Constable Johnson has taken positive steps towards rehabilitation and that he has the potential to continue to be useful to the OPP.

The manner in which a person deals with adversity is also an indicator of what can be expected of them in the future. Constable Johnson became the subject of an investigative review and public complaint and a number of allegations were made against him resulting in these proceedings. A review of his annual PLDPs for the period of 2012 to 2017 indicated that he did not display any negative behaviour but consistently worked to improve.

Analysis and Decision Continued

The Commission quoted the original Hearing Officer in Bovell and Toronto Police Service, 2012 OCPC (Exhibit 7, Tab 4) when it discussed an officer's suitability to continue to be a police officer after committing serious misconduct:

'...when I assess his potential to rehabilitate or reform, such mitigation does not offset the overwhelmingly aggravating factors found in the Notices of Hearing and Agreed Statement of Facts. In my considered opinion, to permit Constable Bovell to continue to serve as a police officer would represent unacceptable risk to both the Service and the public.'

In this case Constable Johnson has demonstrated the potential to reform or be rehabilitated contrary to the case of *Bovell*. I saw nothing to indicate that Constable Johnson has not exhibited the potential to reform or be rehabilitated and nothing to indicate that his positive performance would not continue. Constable Johnson has no previous disciplinary history. His acknowledgement of responsibility through his guilty plea, his employment history, and his positive performance demonstrate that potential.

Specific deterrence has been addressed in this case. Constable Johnson has been the subject of a lengthy investigative process and has had to answer repeatedly for his actions. He has accepted responsibility for his neglect and pleaded guilty in the Tribunal knowing he will be assessed a penalty. Finally, he will have a finding of guilt under the *PSA* which will remain on his record. Through this process deterrence specific to Constable Johnson has been addressed.

General deterrence will be addressed when this hearing decision and penalty are posted on the OIPRD website. That will be available for all members of the public as well as police services to review.

Another factor I must consider is consistency of disposition and I note that a penalty must be consistent with previous penalties in similar circumstances. A number of historical cases were presented by the prosecutor in conjunction with defence counsel to illustrate an appropriate range of penalties. Those cases involving neglect on the part of the officers during investigations of fatal motor vehicle collisions were *Dinsdale, Naylor, Neild, and Clark 2017*. I found them to provide the most assistance and though the fact circumstances were not identical, there were many similarities which allowed comparisons to the matter before me.

The matter of *Dinsdale* bore the most similarities to the matter before me. In that case, the officer was assigned to a fatal collision as the lead investigator. There were five deaths in the collision. The officer had many years of police service but he declared that he lacked experience in fatal collision investigations. He was assured that he would receive assistance in the investigation but that did not occur. During the investigation the officer failed to interview all witnesses and failed to follow up on and submit a number of documents as required. The officer was originally assessed a penalty of a forfeiture of 160 hours. That penalty was appealed to OCPC and a penalty of a forfeiture of 48 hours was substituted. The officer had had no disciplinary history and

approximately 25 years of service at the time of the events as opposed to the limited service of Constable Johnson.

The circumstances of the original investigation were not described in *Naylor*, however the officer failed to complete reports, take appropriate statements, and communicate with the family of the deceased in a traffic fatality investigation. The officer had approximately seven years of service and no disciplinary history. The officer was assessed a penalty of a forfeiture of 32 hours.

In *Neild*, the officer was a sergeant who failed to properly supervise an investigation into a fatality which may have resulted from a motor vehicle collision. Among other shortcomings, he failed to secure the scene, request expert assistance, and ensure potential witnesses were interviewed. His neglect resulted in a lack of investigation into the circumstances surrounding a deceased person who had been found on the roadway. Though he was not the lead investigator, he was the supervisor responsible for ensuring a proper investigation took place. He had no disciplinary history and a positive employment record. He was assessed a penalty of a forfeiture of 24 hours.

Analysis and Decision Continued

The matter of *Clark 2017* involved the same circumstances as the matter of *Neild*. Constable Clark was under the supervision of Sergeant Neild and he failed to secure the scene, protect evidence, and make thorough notes. He had approximately 20 years of policing experience and though no disciplinary history was identified, there had been past performance shortcomings on his part. He was assessed a penalty of a reprimand.

The matters of *Clark 2016*, *Mouland*, *Smith*, *Maggrah*, and *Bettcher* did not involve fatal motor vehicle collisions but still involved neglect on the part of the officers during other types of serious investigations. Those cases included a number of similarities in the

areas of neglect that allowed comparisons to the matter before me. The penalties in those cases ranged from forfeitures of 40 to 112 hours.

In the matter of *Bennett*, a Hearing Officer rejected a joint submission and imposed a higher penalty than was sought by the parties. The matter was appealed to the OCPC. In its decision, the Commission discussed the need for a Hearing Officer to give careful consideration to a joint penalty submission and accord an appropriate one significant weight, especially when the proposed penalty fell within an acceptable range.

In the matter of *Bromfield* the Commission also addressed the issue of a joint penalty submission and noted:

'In the cases where there has been a joint submission on penalty, the Hearing Officer is not obliged to accept such submissions. However, as the Commission noted in Kelly and Toronto Police Service (16 May, 2005, O.C.C.P.S.) at page 9, "when a hearing officer elects not to do so they must ensure that principles of fairness are respected and provide clear reasons that are based on a sound factual foundation and take into account the relevant sentencing factors."

I am mindful that the prosecutor and defence counsel proposed what has been termed a joint penalty submission. However, without all of the parties proposing the same penalty, it cannot be said that the penalty position is a joint one. The public complainants proposed a significantly different penalty, seeking the dismissal of Constable Johnson.

In their submissions, the public complainants discussed the impact this event has had on them and their families. When I review the facts in this matter and the circumstances of this event it is clear that the Hughes family has suffered a terrible loss. I empathize with Mrs. and Mr. Hughes and know that they will always grieve over the tragic death of

their son. I am truly saddened by their loss. No parent should have to endure the death of a child.

Despite the tragic circumstances, the penalty I impose must be appropriate to the circumstances of the misconduct of Constable Johnson and in keeping with the particulars in the NOH and ASF. I am mindful that the matter before me involves one count of Neglect of Duty as particularized in the NOH and I am bound by what is contained therein.

I considered the penalty proposed by the public complainants in conjunction with the historical cases provided to me. A penalty must be fair and in keeping with the factors governing an appropriate disposition. The penalty sought by the public complainants is not a reasonable one in these circumstances. As discussed by the Commission and supported by the Divisional Court in the matter of *Favretto*:

'The penalty of dismissal is the ultimate penalty. It should be reserved for the most serious offences committed by a police officer where there is no hope for rehabilitation, there are no significant mitigating factors and where the police officer is of no further value to the police service or the community in general.'

When examining the actions of Constable Johnson, it is evident that the factors required for dismissal as discussed in *Favretto* have not been met. Constable Johnson was called to the scene of a motor vehicle fatality after the fact. His neglect in this case had no connection to the death but involved his neglect in the subsequent investigation.

Analysis and Decision Continued

As the Commission noted in *Kelly*:

'As this Commission has stated in previous decisions any penalty must be tailored to both punish and deter while not causing undue or excessive hardship and yet be sufficient to demonstrate that any reoccurrence will not be tolerated. This is the balancing act that must be achieved. Although it is important that the penalty be consistent with other similar cases we recognize that each situation is different and as a result there will be a spectrum of penalties.'

I thank the prosecutor and defence counsel for consenting to the memorial video and the victim impact statements that were provided by the public complainants. As was discussed by the Commission in *Kobayashi*, there is no mechanism in the *PSA* for the presentation of a victim impact statement. Though the video and statements presented by the public complainants were largely not in the form of general penalty submissions, they described the impact on the family and provided perspective on their experiences since this event on August 20, 2012.

In *Kobayashi* and *Bovell* the officers incurred penalties of dismissal which were appropriate in those cases due to the significant aggravating factors involved. Those particular aggravating factors are not present in this matter. As such, dismissal is not warranted in this case as it would be unduly harsh and punitive.

I have reviewed the mitigating and aggravating factors and considered the submissions of the public complainants, defence counsel, and the prosecutor. I have given careful consideration to the penalty proposed by the public complainants and have noted previously why I do not accept it. An examination of the factors involved in this matter demonstrated to me that the penalty position of the prosecutor and defence counsel is within the range of penalties available to me and is consistent with previous penalties in other similar cases. The penalty I impose will address the misconduct of Constable Johnson as well the relevant disposition factors. I accept the penalty position of the prosecutor and defence counsel and find there is no compelling reason for me to vary it.

The penalty in this matter, imposed under Section 85 (1) (f) of the *Police Services Act*, will be:

for Neglect of Duty, in that Constable Johnson without lawful excuse, neglected or omitted to perform a duty as member of the Ontario Provincial Police, a forfeiture of 48 hours off.

Specifically, he is required to work an additional 48 hours and this will be completed at the earliest opportunity in consultation and agreement with his Detachment Commander.

A handwritten signature in black ink, appearing to read 'R. Hegedus', enclosed within a large, loopy circular flourish.

Richard Hegedus
Acting Superintendent
Hearing Officer

Dated and released electronically: July 31, 2018

Appendix 'A'

List of Exhibits

Provincial Constable T.A. Tyler Johnson #13296

Request from OPP for TPS Adjudicator November 28, 2017 (Exhibit 1)

Delegation Hearing Officer A/Supt. Hegedus (Exhibit 2)

Designation Prosecutor Mr. Chris Diana (Exhibit 3)

TPS Letter of approval re. Adjudicator January 3, 2018 (Exhibit 4)

Agreed Statement of Facts (Exhibit 5) and (Exhibit 7, Tab 1)

Notice Pursuant to s 85(4) PSA (Exhibit 6)

Prosecution Case Book (Exhibit 6)

Agreed Statement of Facts (Exhibit 7, Tab 1)

Favretto and Ontario Provincial Police February 13, 2012 OCCPS; Ontario (Provincial Police) v. Favretto [2004] O.J. No. 4248 (C.A.) (Exhibit 7, Tab 2)

Kelly and Toronto Police Service, 2005 OCCPS (Exhibit 7, Tab 3)

Bovell and Toronto Police Service, 2012 OCPC (Exhibit 7, Tab 4)

Kobayashi and Waterloo Regional Police Service, 2015 OCPC (Exhibit 7, Tab 5)

Bennett and Ottawa Police Service, 2012 OCPC (Exhibit 7, Tab 6)

Bromfield and Hamilton Police Service, 2009 OCCPS (Exhibit 7, Tab 7)

Yakimishyn and Peel Regional Police, 2008 OCCPS (Exhibit 7, Tab 8)

Dinsdale and Ontario Provincial Police, 2004 OCPC (Exhibit 7, Tab 9)

Naylor and Ontario Provincial Police, 2005 OPPDH (Exhibit 7, Tab 10)

Neild and Ontario Provincial Police 2018 OCPC; Ontario Provincial Police and Neild, 2016 OPPDH (Exhibit 7, Tab 11)

Clark and Ontario Provincial Police, 2017 OPPDH (Exhibit 7, Tab 12)

Clark and Ontario Provincial Police, 2016 OPPDH (Exhibit 7, Tab 13)

Mouland and Ontario Provincial Police, 2014 OPPDH (Exhibit 7, Tab 14)

Smith and Ontario Provincial Police, 2017 OPPDH (Exhibit 7, Tab 15)

Maggrah and Ontario Provincial Police, 2017 OPPDH (Exhibit 7, Tab 16)

Bettcher and Ontario Provincial Police, 2016 OPPDH (Exhibit 7, Tab 17)

PC Johnson# 13296 Career Profile (Exhibit 7, Tab 18)

PC Johnson# 13296 Performance, Learning, and Development Plan, December 17, 2014 (Exhibit 7, Tab 19)

PC Johnson# 13296 Performance, Learning, and Development Plan, December 2015 (Exhibit 7, Tab 20)

PC Johnson# 13296 Performance, Learning, and Development Plan, March 19, 2017(Exhibit 7, Tab 21)

PC Johnson# 13296 Performance, Learning, and Development Plan, October 8, 2017 (Exhibit 7, Tab 22)

PC Johnson# 13296 Performance, Learning, and Development Plan, November 28, 2012 (Exhibit 8)

PC Johnson# 13296 Performance, Learning, and Development Plan, September 10, 2013 (Exhibit 9)