

Thunder Bay Police Service Discipline Hearing
In the Matter of Ontario Regulation 268/10
Made Under the Police Services Act, R.S.O. 1990,

And Amendments thereto:

And

In The Matter Of

The Thunder Bay Police Service

And

Constable Kyle Kehler #755
Constable Kyla Rutherford #791

Charge: Discreditable Conduct

Before:

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

Appearances:

Counsel for the Prosecution: Ms. Holly Walbourne
Thunder Bay Police Service

Counsel for the Defense: Directors Mr. Colin Woods
Mr. Clark McKeever
Thunder Bay Police Association

Penalty Decision with Reasons

The Hearing

Constables Kyle Kehler #755 and Kyla Rutherford #791 pled guilty on Wednesday March 14, 2018 in Thunder Bay, Ontario and were found guilty of one (1) count of Discreditable Conduct pursuant to Section 2 (1) (a) (i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10 as amended. The original charge of Unlawful or Unnecessary Exercise of Authority was amended at the start of the Hearing and agreed upon by the parties involved to a count of Discreditable Conduct.

The charge pertains to Constables Kehler and Rutherford attending at the Shelter House on 420 George Street in Thunder Bay, Ontario on November 24, 2016 for a “mental health call”. Upon attending and observing the male party he began to walk away. The officers followed and the male party turned and raised his hands to his chest. The male party was punched by both officers in the face.

An agreed statement of facts was tendered in this Hearing by Counsel and marked as Exhibit #4.

Charge

- 1. Constable Kehler is charged with one count of Discreditable Conduct.*
- 2. Constable Rutherford is charged with one count of Discreditable Conduct.*
- 3. The charge, for both, is as follows:*

It is alleged that you, while a member of the Thunder Bay Police Service, did commit Misconduct, by DISCREDITABLE CONDUCT, in that you, on or about November 24th, 2016, failed to treat a person equally without discrimination with respect to police services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

This is contrary to Subsection 2 (1) (a) (i) of the Code of Conduct, Regulation 268/10 of the Revised Regulations of Ontario, as amended, contrary to section 80 (1) (a) of the Police Services Act R.S.O. 1990, c. P. 15, as amended.

Facts

4. *On or about November 24th, 2016, in the early morning hours, Constable Kehler and Constable Rutherford were on duty together.*
5. *Constable Kehler and Constable Rutherford were dispatched to the Shelter House at 420 George Street in Thunder Bay, Ontario at 3:23am for a “mental health call”.*
6. *Constable Kehler and Constable Rutherford were advised that the individual who was the subject of the mental health call was schizophrenic and possibly off his medication.*
7. *The individual in question was found outside of the Shelter House, on the street.*
8. *After a lengthy discussion with the individual both Constables voiced their intention to take the individual to the Thunder Bay Regional Health Sciences Centre under the Mental Health Act.*
9. *At this time, the individual refused to go and began walking away from both officers.*
10. *Constable Kehler and Constable Rutherford followed the individual behind the Shelter House building.*
11. *Constable Kehler reached the individual first. The individual then turned towards Constable Kehler and raised his hands to chest height.*
12. *At this time, Constable Kehler reached for the individual, struck him in the face and backed him up against the wall.*
13. *During this altercation Constable Rutherford also struck the individual in the face.*
14. *At that time, the individual fell on the ground where the individual continued to resist the arrest.*
15. *The Officers were able to get the situation under control and transported the individual to the Hospital.*
16. *The individual was taken to the hospital for examination and observation pursuant to the Officer’s authority under the Mental Health Act.*
17. *The Officers left the individual at the hospital.*
18. *The individual was released from the hospital approximately seven (7) hours later.*
19. *Constable Kehler and Constable Rutherford admit to discreditable conduct as outlined in paragraph 3.*

20. *Constable Kehler and Constable Rutherford admit that they discriminated in that they did not treat the individual in question equally as a result of his mental disability.*
21. *Constable Kehler and Constable Rutherford admit that, while not intentionally or even consciously, they did not appropriately take into consideration the individual's state of mind or mental condition.*

Penalty

22. *The appropriate penalty for Constable Kehler is to be:*
 - a. *Forfeiture of eight (8) hours (1 day) forfeiture of time to be worked by the officer and,*
 - b. *An approved mental health training course.*
23. *The appropriate penalty for Constable Rutherford is to be:*
 - a. *Forfeiture of eight (8) hours (1 day) forfeiture of time to be worked by the officer and,*
 - b. *An approved mental health training course.*

FINDINGS:

Ms. Holly Walbourne representing the Thunder Bay Police Service, Mr. Colin Woods representing Constable Kyle Kehler and Mr. Clark Mc Kever representing Constable Kyla Rutherford have proposed a joint submission of forfeiture of eight (8) hours pursuant to Section 85 (1) (f) of the Police Services Act and in addition an approved Mental Health Training course for both officers.

Counsel has provided two cases marked as Exhibit #5 and Exhibit #6 to assist me in determining an appropriate disposition to support their position on this case. I will not recite the cases; however, I have read and considered the cases provided by Counsel. The Gauthier case from Timmins is recent however is not similar to this case. The principles of disposition may be utilized to support the position offered by Counsel. The Andrews case from Midland again is similar however it is dated. Andrews was also a Sergeant and again the principals are similar for disposition.

As Counsel has stated, the cases submitted do not resemble the case before me today, they do assist the Tribunal in offering guidance and assistance in choosing the appropriate disposition.

In Ontario, Legal Aspects of Policing (pages 6-14) provides that a police officer commits an offence against discipline by acting "in a disorderly manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force".

The most recent application of the test for discreditable conduct in Ontario confirms that the test is “primarily an objective one” and that the conduct must be measured against the “reasonable expectations of the community”.

The Ontario Civilian Commission on Police Services has articulated the following approach regarding the meaning of “likely” to bring discredit upon the reputation of the police force:

The measure used to determine whether conduct has been discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge.

Ms. Walbourne made submissions to the Tribunal to support the joint position on disposition. She indicated to the Tribunal that she had made several attempts to contact the complainant since December without success. She had dealt with the complainant prior to this date. She advised that the third party who lodged the complaint was satisfied with the Prosecutors position on penalty. She submitted that police officers hold a higher standard than the public and this type of behaviour cannot be taken lightly by the Service. She advises the officers responded appropriately however when the party raised his hands the officers acted quickly and believed they acted in good faith. They believed the person to be acting in an aggressive manner. This was one occurrence and was not indicative of the officers’ conduct on a normal basis. The actions of the raised fists heightened the actions conducted by the officers. A message must be sent to the officers of this Service that this conduct will not be condoned by the Service and will not be taken lightly. She submits that the officers have shown remorse and they pled guilty in an expeditious manner.

Mr. McKeever representing Constable Rutherford also made submissions to the Tribunal in support of the joint position on disposition. He advised the Tribunal that Rutherford was a two (2) year member of the Service. He advised the Tribunal that the area in question was an area that police officers attend quite regularly. It is a high crime area and officers are aware of this location. He submitted that Constable Rutherford would agree to further training and would learn from this occurrence. The officer did assist in taking the party for treatment after the altercation. Constable Rutherford is a junior member of the Service and she wishes to move forward with her career and is a well-respected member of the Service and the Tribunal will not see her again.

Constable Rutherford was given the opportunity to address the Tribunal. She apologized for her conduct and advised the Tribunal she has learned from her indiscretion.

Mr. Woods representing Constable Kehler also made submissions to the Tribunal in support of the joint position on disposition. He advised the tribunal that Kehler was a six (6) year member of the Service. Constable Kehler has no previous discipline history with the Service. He is not a heavy handed officer. He submits this process has been stressful for this officer and he has taken ownership for his actions. He submits that Kehler would benefit from extra training in this area of mental health. Constable Kehler is active in the community and volunteers as a coach in sports in the community and the school environment.

Constable Kehler was given an opportunity to address the Tribunal. Constable Kehler declined this opportunity.

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

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

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

I must be guided by the OCCPS decision of Schofield and Metropolitan Police Service.

“Consistency in the disciplinary process is often the benchmark of principles. The penalty must be consistent with the facts, and consistent with similar cases that have been dealt with on earlier occasions

In determining disposition, I must give due consideration for the public interest. It is common knowledge that the public holds Police Officers in a position of high trust. It is therefore extremely important that the Thunder Bay Police Service demonstrate that members will be held to that standard.

The public must be confident that the police will strive to set the example for those in the community. Anything short of this will be seen as a contradiction and serve no other purpose but to undermine the efforts of all serving officers and the explicit goals of the Thunder Bay Police Service. It is the communities’ expectations and that of the management of the Thunder Bay Police Service that a police officer will behave accordingly and follow the policies and procedures of the Thunder Bay Police Service.

I feel relatively confident that from this experience and pleading guilty at the earliest opportunity Constables Kehler and Rutherford have learned from their indiscretion and that they are fully prepared to take responsibility for their actions. I believe this also sends a strong message to all police officers that you must consider your actions and behave accordingly.

I believe that Constable Kehler and Rutherford understand and recognize the seriousness of their misconduct. I believe today, they understand how their actions on November 24, 2016 have affected their careers today.

The Thunder Bay Police Service must send the message to all members that conduct displayed and portrayed by Constables Kehler and Rutherford cannot be tolerated. Further, there must also be specific deterrence for Constables Kehler and Rutherford to send the message that this type of behavior is unacceptable. I believe their acceptance to a Mental Health training program would be a huge benefit to these officers as well as any other officers from the Service that will take this training to assist them in conducting their investigations and occurrences that may put them in contact with persons that have mental health issues.

They have shown remorse in part by pleading Guilty to this Discreditable Conduct count to this Tribunal. This action has prevented a potential lengthy Hearing and the calling of numerous witnesses at a Hearing.

General deterrence in this situation offers the Adjudicator in this matter the opportunity to remind all members of this organization that policing is serious business. You must as a police officer strive daily to complete your duties as a sworn police officer in a diligent and professional manner. You are accountable for your actions and any deviance from those actions, the Thunder Bay Police Service will hold you accountable. This is what the public expects of the management of this Police Service.

Short of dismissal, it is unknown to this Tribunal or to the Thunder Bay Police Service whether this conduct will continue by these officers.

The credibility of the Thunder Bay Police Service as police agency is of paramount importance. This is particularly damaging to the remaining members of this Service who are out doing their jobs in a proper manner and meeting the public. Further, I am not aware if this incident was reported in the media. If it was reported it would have resulted in further embarrassment to the Thunder Bay Police Service.

The proposed joint penalty submission submitted by Counsel in this matter suggests to me that these officers can be rehabilitated and once again be useful to this proud organization.

The Thunder Bay Police Service will not tolerate unacceptable behaviour by its members. The rank structure within the Thunder Bay Police Service is the backbone of the organization. It must be respected. The proposed joint submission as submitted I believe sends a message to the organization and its members.

Constables Kehler and Rutherford, I commend you for attending your Hearing in Thunder Bay on March 14, 2018 with Association representation as your Counsel. It was obvious to me that you wished to put this situation behind you. I will take into consideration your forthright manner in assessing the appropriate disposition.

The Thunder Bay Police Service will not tolerate unacceptable behaviour from its members and views this misconduct as serious. A penalty must be imposed to protect the interest of the public we serve and send a message to the organization and its members.

The proposed penalty, as submitted jointly by Counsel I believe sends a message to the organization and its members.

I may have been more inclined to administer a more stringent penalty if it were not for the positive comments and observations relayed to me by Counsel and your Association representatives and the supporting documentation that was presented by them jointly.

I have considered the submissions by Counsel and the Association representatives, the agreed statement of facts and the joint penalty submission agreed to by Counsel, Association representatives, Constable Kehler and Constable Rutherford.

Disposition:

In light of the seriousness of this allegation and bearing in mind all the evidence before me, Constables Kyle Kehler #755 and Kyla Rutherford #791 will forfeit eight (8) hours pursuant to Section 85 (1) (f) of the Police Services Act. This means you will each have to work on your annual leave days or rest days until the prescribed hours are met. This will be completed in consultation with your supervisory staff at your work location. I believe that this can be completed within two (2) months from today's date.

In addition, both officers will attend an approved Mental Health Training session which will be conducted in Thunder Bay in the month of March.

A handwritten signature in blue ink, appearing to read 'M.P.B. Elbers', with a horizontal line underneath it.

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

March 21, 2018