

**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

ONTARIO PROVINCIAL POLICE

AND

PROVINCIAL CONSTABLE J. F., #14520

CHARGE:

DISCREDITABLE CONDUCT

DISPOSITION WITH REASONS

Before: **Detective Superintendent Mike Bickerton**
Ontario Provincial Police

For the Prosecution: **Ms. Hoursa Yazdi / Mr. Jason Kirsh**
Ontario Provincial Police

Counsel for the Defence: **Ms. Connie D'Angelo**
Ontario Provincial Police Association

Hearing Date: **April 24-28, 2023**

This decision is parsed into the following parts:

PART I: OVERVIEW;

PART II: THE HEARING;

PART III: SUBMISSIONS, ANALYSIS and FINDINGS; and,

PART IV: DISPOSITION

Notice to All Persons:

This decision contains personal and/or medical information regarding some of the involved parties. Great care must be taken to ensure that under no circumstances should the personal, intimate, or medical information contained in this decision, the underlying decision, or any exhibits, be made public by anyone, under any circumstances. This direction is being made under the auspices of *Brewer v. Toronto Police Service, 2022 ONCPC 9 (CanLII)* decision which restricted the publication or otherwise making public any such information.

PART I: OVERVIEW

Allegations of Misconduct

Provincial Constable (P/C) J.F. was alleged to have committed Discreditable Conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended. Following a full hearing, P/C J.F. was found guilty on October 26, 2023. The parties agreed to make disposition submissions in writing.

Particulars of Allegations:

On or about July 24, 2021, while on-duty at Stormont, Dundas and Glengarry Detachment it is alleged P/C J.F. committed the following misconduct:

- J.M. and her husband were at the Detachment to provide statements to further an investigation by P/C Spooner into domestic violence allegations.
- When J.M. requested to use the Detachment bathroom facilities P/C J.F. told her words to the effect – she could only use the facility in the cell area.
- P/C J.F. was less than professional in his communication with J.M. and demonstrated

incivility and aggressive behaviour toward her and was seen yelling at J.M. only inches from her face. He was also seen yelling or screaming at J.M. to – shut up or for her to stop yelling. Notwithstanding Covid-19, he was not wearing a face mask (PPE) during this confrontation.

- P/C J.F. told Professional Standards J.M. kept talking over him and he used simple language with her, as authorized under case law.
- J.M. was not under arrest or in custody and rather than use the cell bathroom facilities she indicated she was leaving. P/C J.F. told her words to the effect – She couldn't leave, or she would be charged with obstruction of justice for failure to comply with a police investigation.
- P/C J.F. grabbed her by her shoulder and started to forcefully pull and drag her towards the cell area.
- P/C J.F. twisted her arm and took her to the floor hard using an arm bar technique. J.M. heard a loud crack in her elbow and immediately felt a sharp pain.
- P/C J.F. directed P/C Morneault, who had come out of the interview room with P/C Spooner, to search J.M. notwithstanding J.M. was not under arrest or in custody.
- P/C J.F. again took J.M. to the floor a second time using an arm bar technique.
- Despite applying significant physical force against J.M. twice, P/C J.F. did not arrest her, caution her, advise her of her rights to counsel or initiate charges.
- He knew or reasonably ought to have known he had unnecessarily applied force upon J.M. in an assaultive manner and in the absence of justification or authority.
- When 911 was called to respond to J.M.'s injured arm, they advised it would be some time before they could respond. P/C J.F. failed to take J.M. or make arrangements for her to seek immediate medical attention, and instead he waited for approximately two hours for the ambulance and paramedics to attend the detachment to check on J.M.'s injury.

P/C J.F. knew or reasonably ought to have known that his actions were discreditable conduct.

On October 26th, 2023, following a full hearing, this tribunal found P/C J.F. guilty of Discreditable Conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10 as amended.

Representation

Submissions were made in writing. P/C J.F. was represented by Ms. D'Angelo while Mr. Kirsh represented the OPP. The public complainant was represented by counsel, Ms. Tina Hill and made submissions through the prosecutor.

Positions on Disposition

The prosecution was seeking P/C J.F. forfeit 80 hours, to be worked. Defence counsel proposed the appropriate range was from a reprimand to up to 24 hours.

Decision

After reviewing all the evidence and considering counsel's submissions and those of the public complainant, I order P/C J.F. forfeit 40 hours to be worked at the direction of his Detachment or Unit Commander. This order is being made pursuant to section 85(1)(f) of the *Police Services Act*.

My reasons for the decision are as follows:

PART II: THE HEARING

Exhibits

The exhibits for this matter are listed in Appendix "A" under the heading Disposition. The parties agreed to make submissions electronically. As such documentation is in an electronic format.

Background

The following is excerpted, with edits, from the ¹prosecution submissions. Upon review I have found it to offer a fair and accurate overview of the incident leading to misconduct for the contextual purposes.

On July 24, 2021, J.M. and her former partner were at the Stormont, Dundas and Glengarry Detachment to provide statements as part of a domestic violence investigation. While J.M. was waiting to provide a voluntary statement, she asked to use a washroom. P/C J.F. directed her to use the toilet located in a jail cell. He did not provide any reassurance regarding her privacy or any detailed explanation as to why she was being asked to use a jail cell toilet instead of normal washrooms. P/C J.F. did not consider nor explore any alternative options.

The suggestion of using a toilet in a jail cell understandably caused J.M. to become upset and she became boisterous and quarrelsome. When this occurred, P/C J.F. did not call a supervisor for direction or clarification regarding washroom availability or use for members of the public.

¹ Exhibit 1, Prosecution Written Submissions.

The situation escalated to a point where P/C J.F. and J.M. were yelling at each other such that it interrupted an interview in a nearby room. P/C J.F. seemed to have lost his patience with J.M. and proceeded to arrest J.M. without proper legal grounds to do so. In doing so, P/C J.F. made little if any effort to use proper de-escalation techniques. P/C J.F. used an arm bar technique on J.M. and grounded J.M. A popping sound was heard from J.M.'s arm resulting from the use of force. This incident injured J.M.

There was no imminent threat to public safety during this incident. P/C J.F. did not follow proper arrest procedures as required by the *Charter of Rights and Freedoms* and reflected in OPP Policy. That is, P/C J.F. did not advise J.M. she was under arrest and what offence she was being arrested for. Further, P/C J.F. never advised J.M. of her Right to Counsel and Caution. P/C J.F.'s use of force was unjustified and unnecessary. Further, the use of force was not in accordance with policy and not consistent with his training. As pointed out by defence counsel, I detailed in the underlying *Decision with Reasons*, these events took place during the Covid 19 pandemic. I described significant global impacts of the pandemic and specifically, challenges faced by first responders.

Following a hearing, P/C J.F. was found guilty of misconduct.

Submissions of the parties are appended to this disposition decision. I will not reproduce them in the body of the analysis, per sae, except as they apply to a particular consideration and/or finding. I have reviewed all written submissions of the parties which has taken some time. Defence counsel submitted 368 pages of material and the Prosecution 257. To analyse the material page by page, line by line, is not practicable nor is it necessary.

Analysis

I know through training and experience and as cited in submissions (*Ceyssens*) the following principles are accepted in guiding the determination of an appropriate disposition in police disciplinary matters:

²The first principle is that the disposition should fully accord with the purposes or the police discipline process, which are as follows: the employer's interest in maintaining discipline in the police workplace; the rights of a respondent police officer suspected of misconduct being treated fairly; the public interest, ensuring a high standard conduct in the constabulary, and public confidence in the constabulary; and when members of the public are involved (whether or not they register a formal complaint) the process should ensure that the interests of those individuals are protected.

² Defence Submissions, Paul Ceyssens, *Legal Aspects of Policing* (Earlscourt Legal Press), Inc., 2005)

The second principle which flows from the move towards a more remedial philosophy, as noted above - dictates that a corrective disposition should take precedence over a punitive disposition, where possible.

The third principle is the presumption of the least onerous disposition, which the presumption would be displaced if the public interest or other specified consideration should prevail.

The fourth principle is proportionality requiring that the tribunal consider all applicable mitigating and aggravating considerations, and then weigh those applicable factors appropriately. A detailed discussion of proportionality follows.

The fifth principle is that the law holds police officers' conduct to a higher standard compared to other employees. Court and tribunal decisions have consistently embraced the concept that police officers should be held to a higher standard or behaviour compared to other employees or members of the public. The Ontario Police Commission has stated that the "proper approach to take is to estimate the penalty that might be paid by a civilian with no previous misconduct in his or her record and then to add to that an increase in the penalty because of the fact that this person is a police officer..."

The following analysis is based on evidence available to me, submissions of the public complainant, the prosecution and defence counsel as well as my personal knowledge through training and experience. To assist me in this process, I will rely upon commonly held proportionality considerations relevant to this matter. In my analysis, mitigating and aggravating factors will be balanced and weighed where possible and appropriate. The goal of discipline is not simply to punish but to correct errant behaviour.

In finding the most appropriate sanction, I must strike a balance between the expectations of the community, the standards of the OPP, and fairness to the subject officer and to the public complainant. Again, I am aware the aim of the discipline process includes to correct errant behaviour, deter others from similar misconduct, and uphold public trust.

I am aware of the importance of proportionality in a disposition. In his book *Legal Aspects of Policing*³, Paul Ceysens explained:

It is a "fundamental proposition" that a disposition must be proportionate to the misconduct, "given due regard to those special considerations applicable to service in the police force."

³ Ceysens, Paul. *Legal Aspects of Policing* (Earlscourt Legal Press), Inc., 2005)

Proportionality is arguably the most complex of the five principles that govern the process of crafting an appropriate disposition, and requires three decisions:

- *First, a decision-maker must identify which disposition considerations are relevant to the matter in question.*
- *Second, a decision-maker must determine whether the relevant disposition considerations are mitigating or aggravating or neutral.*
- *Third, the decision-maker must properly balance...the identified relevant considerations in accordance with the factual background of the matter and the competing interests...*

As I conduct my analysis, I must carefully consider the above and weigh all of the relevant disposition factors as they apply to P/C J.F.'s misconduct. I am aware of the view that sanction considerations should include contemplation of corrective measures and not simply focus on punitive outcomes.

I am also aware that in police disciplinary decisions it can be challenging to find past decisions with comparable facts that are directly on point. There are often unique, sometimes subtle considerations that distinguish one matter from another. Consistency has been identified in jurisprudence as the *hallmark of fairness* and similar misconduct should be treated in a similar fashion while recognizing sanctions or dispositions must be tailored to the individual case under consideration.

I will now turn my mind to the commonly held disposition factors that I have found salient to the matter of P/C J.F.

Public Interest

Defence counsel submitted under public interest (excerpts):

The impact of the COVID-19 pandemic was recognized in detail, by the Hearing Officer in the conclusion, to his Decision [at pages 42 – 43], and that while it did not absolve Det. Cst. J.F. from disciplinary accountability, it may serve to mitigate the consequences of his actions.

Analysis: I agree that P/C J.F. should be afforded a degree of empathy and related mitigation as he was faced with difficult circumstances that were considerably outside of the norm. He and many of his colleagues were forced to work long stretches without time off due to the medical and operational challenges presented by the pandemic.

Defence Counsel further submitted:

The fact of a finding of guilt and the imposition of a penalty will result in Det. Cst. J.F. having to face the stigma associated with same, with his colleagues, supervisors, the public, Prosecutors, and ultimately the criminal courts where he routinely testifies.

Analysis: This statement is accurate at least in theory; however, I consider the factors identified as an unfortunate consequence of the misconduct committed by the officer that, on their own, do not result in nor constitute significant mitigation in my view.

The entire disciplinary process, from investigation through to the hearing process, the penalty imposed, as well as the associated corollary consequences, will all serve to demonstrate to the public and other officers that they will be held accountable for their actions when deemed inappropriate.

Analysis: I do not disagree with this submission with the stipulation that without appropriate and meaningful outcomes in the form of dispositions, the police discipline process would lose credibility and adversely effect public trust. In this case, the process itself does not amount to significant mitigation although it was considered.

The prosecution submitted *the Public Interest is a significant concern in this case and is strongly aggravating* and provided their accompanying rationale.

Finding:

Public interest is a key consideration in every police discipline matter. Police officers are held to a high standard of conduct. When an officer falls short of the expectations in regard to respect, composure, legal obligations, and professionalism, it serves to significantly undermine confidence in the service.

As the prosecution pointed out, in this case, P/C J.F. did not have sufficient grounds for arrest, he did not follow proper arrest procedures as required by statute and as reflected in the OPP policy, he did not advise J.M. of her rights as protected and guaranteed under the Charter of Rights and Freedoms, and he used force that was not justified resulting in injuries to J.M.

The public would expect an officer with P/C J.F.'s tenure, training, police, and academic education, to have known his obligations with respect to the law, the *Charter of Rights and Freedoms*, and with respect to his personal deportment and controlling emotions.

Notwithstanding J.M.'s behaviour, and to be clear it did not warrant the reaction of P/C J.F., the people in the communities we serve would likely be shocked and disappointed that an officer behaved in such a manner including the degree of physicality involved in his interaction with J.M.

Members of the public would expect that their attendance at a police detachment to assist or cooperate with a police investigation will not result in being arrested and injured by the very officers sworn to protect them, as suggested by the prosecution.

Echoing the hearing officer in ⁴*Hearnden*, “*the standard to which police are held accountable by the community has never been higher. The public expects police officers to demonstrate patience, professionalism, and a measured response.*” These descriptors do not at all characterize the encounter between P/C J.F. and J.M. This tribunal must appropriately address the need to demonstrate confidence in the police disciplinary process.

P/C J.F.’s behaviour resulted in physical and emotional harm to J.M. which she describes as persisting until present.

The breach against the Public Interest and Public Trust is significantly aggravating and considerably weighty.

Nature and Seriousness of the Misconduct.

Defence counsel submitted that P/C J.F.’s behaviour was not motivated by malice or being mean spirited and occurred during the Covid 19 pandemic. Defence counsel pointed out that, following his grounding of J.M. causing her arm to pop, P/C J.F. could be seen consoling her. The fact that any person consoles another after taking them to the ground without justification, then attempts to comfort the person they just injured does not result in mitigation in my view. There are any number of reasons why P/C J.F. may have helped J.M. but the fact that he did, does not weigh heavily with respect to relief from consequences for his actions that put her there. In fairness, for whatever his reasons, the evidence was clear that P/C J.F. did offer assistance to J.M. after she was injured.

The fact that P/C J.F. believed he was acting in good faith, as submitted by defence counsel, does not sway me with respect to a disposition. Understanding that there are objective and subjective aspects to a police officer’s decisions if the conduct is both honestly and reasonably arrived upon. If an officer’s subjective belief was not objectively reasonable, good faith can be neutralized. In this case, P/C J.F. had no grounds to arrest J.M. and acted as described following her arrest. I cannot consider his belief he was acting in good faith markedly influential with respect to disciplinary outcomes.

On pages 5, 6, and 7 of the Defence Penalty Submissions, there are several bullet points outlining the circumstances surrounding P/C J.F. never advising J.M. of her Right to Counsel and Caution. While every bullet may be true and accurate, none excuse P/C J.F.’s failing to do

⁴ Defence Book of Authorities; Ontario Provincial Police and P.C. S.C. (Scott) Hearnden, August 13th, 2021,

so. He had a legal obligation to do these things as required by the *Canadian Charter of Rights and Freedoms* and he did not.

When an officer acts out on mistaken beliefs and flawed grounds, physically takes a person to the ground, and continues to commit misconduct through acts and omissions there is no other conclusion than this was very serious misconduct. To reiterate, P/C J.F. did not have grounds for arrest, he did not follow proper arrest procedures as required by statute and as reflected in OPP policy, he did not advise J.M. of her rights as protected and guaranteed under the *Charter of Rights and Freedoms*, and he used force that was not justified resulting in injuries J.M.

The nature and seriousness of the misconduct is significantly aggravating and equally weighty.

Recognition of the Seriousness of the Misconduct

P/C J.F., as was pointed out in submissions, has the right to defend himself against the allegations of misconduct. Under these circumstances it can go against a person's interest to explicitly acknowledge the seriousness of their misconduct. I agree that this is a neutral factor.

I was somewhat taken aback when, in putting forth his defence, P/C J.F. seemed to continue being of the belief that he had grounds to arrest J.M. under the described circumstances. I would hope that an officer with P/C J.F.'s formal (academic) and police training and education would, with the benefit of hindsight, be able to see this. It may be possible that P/C J.F. has since come to this realization. That was not borne out in this hearing, but this is for naught, and I consider it moot as PC J.F., as stated, had every right to put forth a defence and not to acknowledge anything that could go against his interest.

Recognition of the seriousness of the misconduct is a neutral factor.

Damage to the Reputation of the OPP

When considering damage to the reputation of the OPP I consider if actual damage has occurred, or if damage will reasonably and expectedly result should the facts of this misconduct become more widely known. I find both are present in this case.

I am unaware if this matter received much "mainstream" media attention to this point, however, J.M. has posted the facts and circumstances on social media forums and sites she maintained. There were indicators that others had seen the posts and had commented negatively regarding P/C J.F.'s behaviour. Hospital staff and other members of the community are aware of the circumstances. This is a public tribunal and decisions are available to the public. This matter originated with the Office of the Independent Police Review Director (OIPRD) who are known to

post decisions on their public facing website.

I cannot envision a scenario where the public would condone or excuse the behaviours carried out by P/C J.F. I cannot envision or imagine a scenario where, should this matter become more widely known to the public, that a negative view of the OPP would not be the result.

Police services including the OPP work hard to establish and maintain trust and confidence in the communities we serve. It can take years to establish trust in a community and instances such as the misconduct of P/C J.F. can serve to undermine the trust, faith, and confidence that may have been held by the community.

Damage to the reputation of the OPP has occurred and is likely to be amplified should this matter become more widely known. This was an aggravating weighty factor in my deliberations.

Employment History/Potential to Reform and Rehabilitate

P/C J.F. has been an exemplary officer consistently performing at or above prescribed standards. I do not consider, as pointed out by the prosecution, that his most recent evaluation that was slightly below previous achievements, as significant. In fact, in the evaluation identified by the prosecutor, P/C J.F. achieved ratings of meeting performance standards in 17 categories and 3 categories where he exceeded performance standards. This is not, in my view, indicative of a performance issue or concern.

Overall P/C J.F.'s performance and contributions are notable, indeed his achievements and entries reflected in his personnel file are among the finest, most positive, and prolific I have seen in approaching 4 decades of policing.

Defence counsel's considerable submissions and accompanying letters of referral paint a clear and positive picture of a valued employee. I need not address all documentation individually except to point out, again, P/C J.F. is a high performing employee whose efforts have been recognized by his colleagues and by the communities he has served.

In letters and documentation provided, his supervisors and managers also pointed out that despite this disciplinary process, P/C J.F. has continued to attend work and to perform in a positive and productive manner.

Past behaviour is the best predictor of future behaviour. P/C J.F.'s past performance bodes well for his ability to reform and rehabilitate from this misconduct, to learn from the experience, and ultimately to put it behind him. Although no one can be certain, an officer with P/C J.F.'s abilities, education, and past performance is typically unlikely to repeat similar behaviour as depicted in

this misconduct in the future.

P/C J.F.'s impressive past performance, the continued support he enjoys of his peers, supervisors, managers, and, most importantly, the community, are all significantly mitigating and weighty as is his ability to reform from this misconduct.

Handicap or other Relevant Circumstances

In 2019, prior to the incident leading to misconduct committed by P/C J.F., he was involved in a number of incidents including one particularly violent incident which led to a work-related medical diagnosis. The prosecution pointed out that no medical evidence was called identifying a nexus between the illness and misconduct. While this is true, I am also aware through training and experience as a senior police officer and a long-time member of the peer support team, the nature and underlying cause of the illness can inform future behaviour. The illness can, in some persons, create hypersensitivity and vigilance with respect to personal safety, for example. While no specific medical evidence was called, the material provided by defence counsel leads me to infer that P/C J.F.'s diagnosis may well have contributed to his behaviour on the evening in question. This, in no way, excuses P/C J.F.'s behaviour, but it does provide some insight into why he behaved the way he did and presented, at the time, in a manner where he appeared to lose his patience.

J.M. also outlined a number of medical and/or addiction challenges she has faced prior to and following this incident. Similarly, although I have acknowledged J.M.'s behaviour was confrontational, part of her reaction, as depicted in detail in the underlying decision, could be attributable to the situational context of being asked to use a washroom in a cell when she was, at the time, voluntarily at the detachment ostensibly as a witness. Other aspects of her boisterousness may have been, at least in part, due to her medical challenges.

Notwithstanding J.M.'s behaviour and P/C J.F.'s medical diagnosis, the police are expected to act professionally and maintain their composure at an expected degree that is higher than what could be expected of a citizen, as outlined in submissions. Again, P/C J.F.'s behaviours and decisions leading to misconduct do not provide an excuse or justification for his misconduct. They do, however, provide plausible insight as to why he may have behaved in the manner which he did.

Likewise, J.M.'s medical challenges, while not specifically medically addressed in evidence, may provide some insight into her reaction and behaviour on the evening in question. Her reaction was understandable to a degree and did not warrant nor was it deserving of the actions taken by P/C J.F.

For reasons stated as it relates to his misconduct, I afford a degree of mitigation of moderate weight to P/C J.F. due to his medical challenges.

Affect on the Officer and His Family

Defence counsel outlined in detail, the affect of this process upon P/C J.F. and his family. The stress and related angst caused by the disciplinary process is understandable. His career has been adversely impacted by the existence of this disciplinary matter. Documentation provided (statements from supervisors and managers) do outline some negative impacts on P/C J.F.'s career and the fact that opportunities have been limited as a result of this disciplinary matter.

I mean not to minimize the affects disciplinary proceedings have had on P/C J.F. and his family. As outlined elsewhere, the affects are created through the behaviour and ultimate misconduct of the officer and the need for police officer to be held accountable.

I am understanding and empathetic in this regard but, with respect to the misconduct, I find the effect to be slightly mitigating but not to the point of tipping the scales of this decision in a significant manner.

The 40 hours disposition will have an impact on P/C J.F. It is comparable to one week's pay or working one week without pay. I do not view this as insurmountable to a point of offering notable mitigation.

Systemic Failure and Organizational Context.

Defence counsel proposed that OPP staffing levels at the time of the misconduct exacerbated by the Covid 19 pandemic resulted in P/C J.F. working overtime on the night of the incident. Defence counsel cited a December 2021 Auditor General's report which identified significant levels of understaffing within the OPP.

I need not delineate details of the report except to acknowledge the staffing level pressures in the OPP at the time, and to a degree until present, remain valid and live issues. There are many reasons we find ourselves where we (the OPP) are with respect to staffing shortages. These pressures are felt by police services throughout Ontario and indeed Canada. I know firsthand OPP senior leadership has continued to consider increasing staffing levels as a top priority and this remains a work in progress. This reality has been created by a number of factors, but the primary contributors are budgetary constraints and recruitment challenges. Increased cost of policing and governmental fiscal restraint has made finding solutions possible, but results remain incremental.

During the height of the Covid 19 pandemic the staffing pressures were increased significantly as officers, support staff and their families fell ill with the virus requiring others, like P/C J.F., to work overtime to cover shortages for which we should all feel a sense of deep gratitude.

Defence counsel pointed out that the policy regarding the use of washrooms at the detachment during the pandemic contributed to the situation leading to misconduct. I agree that there were unique considerations and constraints in place at the time related to the pandemic that, contextually, contributed to the confrontation. With that said, I addressed this in the underling decision, P/C J.F. had possible alternatives he could have suggested regarding J.M.'s need for a washroom, rather than taking the actions he did without exploring available options in consultation with supervisors.

I do not conclude any of the factors identified constitute "systemic failures" as I find this would be a broad interpretation, without submissions, as to what actually constitutes a systemic failure. I have found the "organizational context" and/or situation which the OPP and P/C J.F. found themselves in at the time, as described, certainly contributed to contextual circumstances leading to conflict and ultimately misconduct. I found the circumstances, in totality are mitigating and moderately weighty.

Deterrence

Specific deterrence is a significant factor in this case. P/C J.F. did not follow his training, OPP Policy, and steps required by law within the *Charter of Rights and Freedoms*. As stated, there are no circumstances that excuse a police officer from informing an arrested person of their right to counsel for an indefinite period. Even if the arrest had been proper and supported within the law, as pointed out by the prosecution, the failure to inform J.M. of her right to counsel could have negatively impacted the prosecution of an offence if one had been committed. P/C J.F. needs to understand that his actions were improper and are not tolerable.

Defence counsel pointed out the length of the disciplinary process and the impacts on P/C J.F. I have previously addressed this. With respect, I do not agree that these factors render the need for specific deterrence neutral. P/C J.F. needs to understand and appreciate that his decisions and resulting behaviour were unsupported in law and in OPP policy, and that he will be held accountable accordingly.

I find, as suggested by the prosecution, general deterrence is also an important factor in this case. The OPP needs to ensure that its members understand violating an individual's *Charter* rights will be taken very seriously and will result in disciplinary consequences. In order to maintain public trust and public confidence the OPP must take appropriate actions, including discipline to allay community concerns and to send a clear message to all officers that similar

behaviour will be met with responsive discipline.

I understand defence counsel's submissions that this process in entirety will serve to address deterrence to a degree, in fact I expect that it will. It is for that reason that I find the need for deterrence mildly aggravating of limited weight. The need for deterrence remains significant but will or at least should be significantly addressed by the finding of guilt and this disposition.

Provocation

Defence counsel suggested J.M.'s behaviour should be considered as provocative and therefore mitigating. Counsel further questioned the reference to J.M. as a witness.

With respect to the second point, there is no question J.M. was at the detachment voluntarily to provide a statement to assist the police in making a determination regarding an incident that had occurred earlier. She was not under arrest or being detained at the time she initially attended the detachment. While semantics may create some debate, it is my view that J.M. was, leading up to the misconduct, for all intents and purposes, a witness.

J.M. became upset, loud, and argumentative by her own admission, after being asked or told to use a toilet in a jail cell. While J.M. was being difficult, her behaviour did not necessitate her arrest, the physical force applied to her person, or her being denied her rights under the *Charter*.

It is understandable that P/C J.F. may have been annoyed or off-put by J.M.'s behaviour, however it (her behaviour) did not rise to the level of provocation where P/C J.F.'s reaction could be justified. Police officers are expected to remain composed and to attempt to deescalate when faced with similar behaviour. P/C J.F. did not employ de-escalation techniques consistent with his training.

I consider provocation to be a neutral factor.

Consistency of Disposition

Submissions, jurisprudence, and based on my experience, arriving at an appropriate disposition to meet the goals of discipline often present unique challenges. It has been described as being as much an art as it is a science. There are no tables, charts, formulae, or other tools available to a hearing officer that will enable perfection in arriving at an appropriate sanction. In this matter I consider a range of dispositions for discreditable conduct to be from a reprimand up to demotion, and in the most serious of cases, dismissal can result. A broad range indeed. In the matter of P/C J.F., I considered the proposals of the parties within the delineated submitted ranges, from reprimand to 80 hours.

The importance of consistency, recognized as the earmark of fairness, cannot be overstated, and similar misconduct should attract similar sanctions. The task is considering and weighing the uniqueness of matters under consideration that distinguish one case from another. My decision must be reasonable given all the information available to me, with attention to the specific factors of P/C J.F.'s misconduct. Misconduct dispositions for similar offences with similar behaviours can result in a varying range of outcomes.

I will now consider the case submissions of the parties. I have reviewed all submissions. If I did not specifically list or discuss a case it is because I did not find it particularly helpful or to have warranted further analysis.

Prosecution Case Submission Analysis

Horton and Ontario Provincial Police, 2015 ONCPC 16 (CanLII)

In *Horton*, the underlying facts are completely disanalogous. *Horton* took woodchips from a school without permission while off duty. Being found guilty of discreditable conduct he was demoted. The conviction and disposition were upheld on appeal. As mentioned above, demotion is within the range of dispositions for discreditable conduct .

Hrycyschyn and Ontario Provincial Police, 1993 CanLII 14134 (ON CPC)

The underlying facts in this matter are disanalogous. The officer was demoted.

Sergeant Randy Blakely (Quinte West Police Service) 2004 CanLII 77195 (ON CPC)

Many of the underlying factors are dissimilar to the matter before this tribunal. It did involve an officer depriving a person in custody of their *Charter* rights for 27 hours and 45 minutes. The officer was reprimanded, then demoted on appeal, and on further appeal the reprimand was reinstated. There were underlying factors offering mitigation not present in P/C J.F.'s case.

Suleiman v. Ottawa Police Services and Lord, 2011 ONCPC 10

This was a matter involving an unlawful arrest and subsequent improper strip search. The prosecution suggestion this matter was less serious because it did not involve the use of force as in the matter involving P/C J.F. In my view a strip search is a form of use of force. Although the facts are not directly on point, I find guidance in the reasons stated by ONCPC.

In this matter the officer was assessed 64 hours to be worked following what the ONCPC described as a joint submission on disposition. Unlike P/C J.F. who has an exemplary

employment history, Officer *Lord* had several prior disciplinary issues. This suggests that 64 hours should be considered at the high end of my considerations.

At paragraph 43 ONCPC wrote:

“The Canadian Charter of Rights and Freedoms guarantees the right of Canadians to be free from unlawful search, seizure, and detention. These fundamental protections are the foundation of a truly democratic society and form the basis of policing law and regulation. Without important safeguards such as these, liberty from the excesses of policing cannot be ensured.”

These sentiments are instructive and can be applied to the matter of P/C J.F.

OPP v Hearnden, May 12, 2021

Hearnden bore the closest similarities to the matter before this tribunal. The officer carried out an unlawful arrest and applied a degree of force to the complainant. A second officer who came to the aid of *P/C Hearden* applied force causing injury to the complainant. *Hearnden* was found criminally guilty of assault. He pled guilty to the aspect of discreditable conduct related to having been found guilty of an indicatable criminal offence. He was assessed probation and community service as a result of the criminal conviction and 30 hours for the disciplinary matter. The disciplinary disposition followed a guilty plea and joint submission on sanction. *Hearnden* did apparently advise the complainant of their rights and ultimately released the complainant on the roadside without charges.

The distinctions include that *Hearnden* did not actually injure the complainant. The force he used was mainly focused on removing the complainant from his car. While the Court ruled the arrest was unjustified, it was a more dynamic incident that took place on the side of a major highway. The officer was held accountable in criminal court as well as in the disciplinary tribunal.

P/C J.F. was in a more controlled environment under different circumstances. I find his behaviour was more serious in that his arrest was unjustified and, in addition, he failed to ever advise J.M. of her Right to Counsel or Caution. His physical actions caused injuries to J.M. J.M. also remained in police custody following the arrest but was never charged with the offence P/C J.F. arrested her for. P/C J.F. arguably escalated the situation and certainly did not deescalate in accordance with his training. He could be heard and seen shouting at J.M. at times.

In the *Hearnden* matter the complainant was refusing to speak with the officer and closed his car door to the officer. The complainant was actively non-compliant or cooperative. J.M. was primarily loud and argumentative, but her actions were not as overt as the complainant in *Hearnden*. P/C J.F. was not subjected to a criminal trial, and I am not suggesting that he should

have been, nor was he subjected to the related consequences of being found guilty in Criminal Court, where *P/C Hearnden* was. I contemplate the finding of guilt in Court vis-à-vis an added layer of accountability to the community to be considered when comparing the two matters. In essence, from the perspective of a community member, *P/C Hearnden's* accountability was two-fold and much more severe, in totality, than what will be faced by P/C J.F.

Vogelzang v. Ontario Provincial Police, 2013 ONCPC 2

Vogelzang was found guilty of unnecessary use of force for improperly arresting the complainant. Again, in this case the officer released the subject on the side of the road. While the arrest was deemed improper it seems, although not explicitly addressed, the complainant was advised of his right to counsel etc. The roadside situation in *Vogelzang* was again more dynamic than what was faced by P/C J.F. *Vogelzang* was assessed 24 hours.

Sgt. Rose and Sgt. Ferry, 2016 CanLII 84144 (ON CPC)

This matter involved two Sergeants and discipline related to unnecessary use of force and improper arrest. The underlying facts are dissimilar. One officer was demoted, and the other was reprimanded.

Defence Case Submission Analysis

Batista v. Smith and Ottawa Police Service, 2007 ONCPC 6

This case involved a subject who was apparently resistant to police. This was not the case with J.M., at least not to a comparable level. *Batista's* conviction and reprimand was related to the use of a "taser" at least twice, on the complainant. Due to many other factors disanalogous to the matter before this tribunal, the officer's conviction and resulting reprimand were upheld. I do not find this case particularly assistive.

Sgt. Elliott and the Niagara Regional Police, October 11, 2016

The matter of Sgt. Elliott resolved with a guilty plea and joint submission on penalty. I am aware that a tribunal, as in a Court, should consider joint submissions unless doing so would result in bringing the administration of justice into disrepute. I further know that prosecutors and defence counsel have discussions, the content and subject matter which, properly, may not come before a tribunal nor be reflected in decisions that follow.

I do not find the underlying facts and circumstances to be closely comparable to the matter of P/C J.F. The circumstances and person(s) involved and their behaviours in the *Sgt. Elliott*

incident were more complex and dynamic than those facing P/C J.F.

Sgt. Elliott was assessed 24 hours to be preformed as community service.

Mulville and Azaryev and the York Regional Police. 2007 ONCPC 6

The finding on appeal:

The appeals of the findings of Unlawful or Unnecessary Arrest are dismissed. The appeal by P.C. Mulville of the finding of Discreditable Conduct is allowed. The penalty for the Unlawful or Unnecessary Arrest is varied from forfeiture of 12 hours to a reprimand with training in arrest powers for P.C. Mulville and from a reprimand to training in arrest powers for P.C. Azaryev. Our reasons follow.

The underlying factors in this matter were more complex than those faced by P/C J.F. This case involved a large house party with unruly attendees and multiple calls to the location. It also involved legal issues like “hot pursuit” and the illegal entry into a residence not present in the matter of P/C J.F.

Constable Kyle Kehler , Constable Kyla Rutherford

This matter involved officers interacting with a person suffering from mental health challenges. Shortly into their interactions, a physical confrontation began during which both officers punched the person in the face before taking them to the hospital under the *Mental Health Act*.

This matter resolved with guilty pleas and agreed statement of facts and joint submission on penalty. The disposition was 8 hours and a training component. Given the facts I suggest the officers were quite fortunate to receive the disposition they did. With that said, I again acknowledge that prior to arriving at resolutions and joint disposition submissions, the parties have discussions during which issues are often addressed that are never heard in the tribunal. This could involve issues like, for example, a witness’s reluctance, inability, or refusal to testify or similar circumstances.

The specific underlying facts are not closely analogous to the matter of P/C J.F.

Peel Regional Police and Constable Joel Mazzotta, decision dated June 2018, before Superintendent Colleen Fawcett, Peel Regional Police, Hearing Officer.

This was an off-duty incident and was not sufficiently analogous to be of assistance.

Police Constable Mathew Keating and the Sault Ste Marie Police Service, decision dated August 2020, before Deputy Chief (Retired) Terence Kelly, York Regional Police, Hearing Officer.

This matter involved some generally analogous behaviour. In the first count (discreditable conduct) in addition to verbal interactions and physical gestures that were inappropriate the officer was described to have:

...while at the station, Constable Keating forcefully pulled Mr. Mitchell to his feet and escorted him to the cells with more force than was reasonably necessary, As a trained police officer, Constable Keating ought to have responded more effectively rather than aggravating the situation. The totality of Constable Keating's interaction with Mr. Mitchell at the police station was unprofessional and overly aggressive.

This behaviour was less serious than P/C J.F. physically taking J.M. to the floor.

The second count for neglect of duty related to the officer failing to advise the complainant of their right to counsel and caution.

This matter (*Keating*) was again resolved by way of guilty plea and joint submission on disposition. The officer was assessed 24 hours.

I repeat the caveat outlined above regarding matters resolved by way of guilty plea with joint disposition submissions. There are many factors that may have influenced the parties to resolve as they did, that are quite appropriately not known or made known publicly or to the tribunal. I am not dismissive of the disposition as one being available to me. I am, however, cautious not to consider myself bound by matters resolved in such a manner for reasons stated.

Ontario Provincial Police and P.C. S.C. (Scott) Hearnden, decision dated August 13th, 2021, before Superintendent Lisa Taylor, Ontario Provincial Police.

This matter is addressed above.

Finding

Arriving at a disposition presents challenges as described elsewhere. My goal is to arrive at a disposition that adequately addresses public trust and community expectations, the needs of the employer, and the interests of the complainant, while being fair and consistent to P/C J.F. While no cases are exactly on point, I find *P/C Hearnden*, who received 30 hours in addition to a criminal disposition, bares comparable factors as does *Suleiman* who received 64 hours. The

distinctions are outlined above. I find that this range is reasonably applicable to the misconduct of P/C J.F.

I landed on 40 hours in this case as, when considering *Hearnden*, the officer pled guilty to a different aspect of discreditable conduct, it was a guilty plea with a joint submission on disposition, there was a second officer involved with officer *Hearnden* who actually applied the force causing injury to the complainant, and Officer *Hearnden* was additionally held accountable in Court. P/C J.F. acted alone until after J.M. was taken to the ground, for the most part. P/C J.F. failed to properly arrest J.M. and never advised her of her Rights, a circumstance not apparently present or raised in the matter of officer *Hearnden*. In *Suleiman* officer *Lord* had an employment history blemished by prior discipline, an issue not present with P/C J.F. In fact, P/C J.F.'s excellent employment history afforded mitigation.

Having established the range and ultimate disposition above, I have considered the seriousness of the misconduct, public interest, and damage to the reputation to the OPP amongst other factors, but found the misconduct significantly mitigated by the context and P/C J.F.'s strong employment record, coupled with his medical diagnosis. This leads me to find that a slightly stronger sanction than that of P/C *Hearnden* is warranted but does not rise to the level of *Suleiman* (officer *Lord*). In careful consideration of all the circumstances I am satisfied that this will serve as an appropriate deterrence, while also meeting the goals of discipline.

Statement of Complainant, J.M.

The following was provided by the complainant through the prosecutor. It is not evidence and is not, on its own, assigned weight per sae. The complainant is a party to these proceedings. Although I do not consider the complainant dispassionate toward P/C J.F., understandably so, nevertheless, J.M.'s voice should be heard.

"I was instructed to write a single page statement on an event that was so catastrophic to my life, that I could write a whole book detailing the affects that this single night had on my life. I have been greatly impacted by the actions of Constable J.F., a member of the Ontario Provincial Police who was supposed to protect me. He assaulted me and improperly handled a domestic violence occurrence, charging me with obstruction and assault on a police officer instead of charging my husband with assault. After the assault by the police, and a charge was put on me, everyone in my life turned their backs on me. My reputation with anyone around me was completely tarnished. Nobody trusted me, or knew what to expect from me, nor did anyone want to help me. Family turned against me, my church community turned on me. I spent the next few years being homeless, and still remain so. I felt like I had no protection from my ex, who was stalking me, because I was too afraid to call the police. I felt like I couldn't call the police on my husband because of the possibility of being assaulted and/or charged again by them. I was

nervous living in the town of Pembroke as they also have an Ontario Provincial Police station, and I didn't know how connected the two detachments were. The physical ramifications of the police brutality is far reaching and makes day to day life extremely difficult. I have muscle damage and scar tissue throughout my entire left arm and left side of my torso, causing the nerves to be compressed and causing a huge amount of pain with any sudden, shrill, or sharp vibration, such as the door slamming shut, my child running across the floor, someone banging on the table I am at, anyone kicking the table I sit at. When someone hugs me or pats my back or shoulder it hurts. Any kind of embrace hurts. It also hurts to lay on my left side of my body, which had always been my preferred sleeping position. I am not able to clap my hands since the incident as it sends a sharp shooting pain throughout my left arm, left shoulder, and left side of torso. It hurts to open a door, grip a coffee mug, put something on a shelf, open the garbage bin lid to throw trash away. Not being able to clap my hands has caused me to be distanced from my AA support groups because I feel like such a jerk for not being able to clap with everybody else, which happens several times each meeting. I am a relatively young person at 35, I still have so much life ahead of me and I have to spend it in pain because of police brutality. I want to be able to play sports recreationally. I can't play volleyball, baseball, tennis, basketball, football, or even swim, because of my now handicap left arm. It was an important part to my recovery from addictions that I learn to do healthy activities such as sports in order to help me stay sober. Every movement I make is felt with a sharp and shrill pain, like a tooth ache that has a root exposed. That feeling is deep in my arm and in my rib cage. I also seize up in intense pain and I am unable to move until I take Pregabalin to release the nerves. I take this nerve blocker Pregabalin 4 times a day, at 75 mg each time. If I don't take this medication I am unable to function as the pain and stiffness is too much for my body to move. I wake up in pain. I go to bed in pain. Every action with or towards my left arm is excruciatingly painful. Even just sitting here typing this I have a sharp pain on my left side with every key stroke. Any work that I would have done to provide for myself and my children I am unable to do such as waitressing, carnival work, pressure washing & painting work, massage & dancing work, florist work, bakery work, security work because of my injuries. My children are so young and they deserve a fit, healthy mom that can play catch or tag with them. Instead they get a constant reminder of "Watch out for mommys sore arm". I hate that I am limited in mobility. I hate that I am in chronic pain. I want my life back. I feel like this officer robbed me of my life because everyday since has been a struggle to survive and cope with the pain. To this day I do not trust the OPP and do not feel safe in any location."

No medical evidence was called specifically addressing the nature and extent of the injuries and other harms identified by J.M. As stated in the underlying decision, the evidence was perfectly clear. She was taken to the ground in an arm bar like maneuver by P/C J.F. Her arm audibly made a popping sound and J.M. was injured.

Conclusion

At the time of the incident leading to the misconduct the Province of Ontario, like most of the rest of the world, was in the height of the throes of the global Covid 19 pandemic. Police officers, emergency responders, and front-line medical staff were required to attend work, “on the front lines” to continue to meet community health and safety needs. The OPP, already faced with staffing pressures, was forced to have police and support staff work overtime to cover for co-workers who themselves had fallen ill or were isolated and quarantined due to exposure or the infection of a family member. On the evening in question, P/C J.F. was working overtime to cover for staffing shortages. In addition, P/C J.F. had a pre-existing, work related illness. These were difficult and challenging times for all of us, and P/C J.F. was not insulated from the extraordinary demands placed on all members of the community, and particularly emergency responders and health care workers. This was the backdrop on the evening in question and has afforded mitigation to P/C J.F. with respect to this disposition.

This misconduct finding should not, in any manner, define P/C J.F. It was the result of a constellation of factors leading to poor decisions and regrettable actions on his part. He has, however, enjoyed a stellar career to this point and there is no reason he should not continue to do so. I am confident he will learn from this experience and am highly doubtful he will repeat similar misconduct in the future.

J.M. encountered the police following an Intimate Partner Violence incident between her and her then partner. J.M. too had pre-existing medical conditions and was recovering or had recovered from addiction. Following the incident, she was asked and agreed to accompany officers back to the detachment so that further information could be garnered to determine what had occurred between she and her partner. She was not under arrest nor detained. She volunteered to come in. When she asked P/C J.F. to use the washroom, she was directed to use a toilet in a jail cell. J.M. was understandably disinclined to do so and things, as described in detail above, digressed from there.

J.M., by her own description became loud and argumentative. Her behaviour interrupted an ongoing interview but there was no evidence whatsoever that she intended to do so i.e. interrupt or obstruct. What followed was an improper arrest, J.M. being physically taken to the ground and being injured, and not being advised of her right to counsel or caution. None of this should have happened to her; full stop. It is understandable that J.M.’s opinion of the OPP is certainly considerably less than favourable, and it is genuinely regrettable that she no longer trusts the OPP.

On behalf of the OPP, I sincerely apologize to J.M. for what she experienced on July 24, 2021. I sincerely hope that she can continue to physically and emotionally heal and begin to put this matter behind her.

PART IV: DISPOSITION

I order P/C J.F. to forfeit 40 hours to be worked at the direction of his Detachment or Unit Commander. This order is being made pursuant to section 85(1)(f) of the *Police Services Act*.



Mike Bickerton
Detective Superintendent
OPP Adjudicator

Date electronically delivered: March 21, 2024

Disposition; Appendix “A”

1. Prosecution Written Submissions
2. Prosecution Book of Documents
3. Prosecution Book of Authorities
4. Prosecution Reply to Defence Submissions
5. Defence Penalty Submissions
6. Defence Supporting Materials
7. Defence Book of Authorities.