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Durham Regional 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 Durham Regional Police Service

And

Detective Constable Craig Willis #3047

**Charge: Discreditable Conduct
Neglect of Duty (Two Counts)**

Before:

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

Appearances:

**Counsel for the Prosecution: Ms. Allison Johnstone
Mr. Ian Johnstone
Durham Regional Police Service**

**Counsel for the Defense: Mr. William Mackenzie
Durham Regional Police Association**

**Counsel for Public Complainant: Ms. Asha James
Mr. Mitch Goldenberg**

Penalty Decision with Reasons:

The Hearing:

Detective Constable Craig Willis # 3047 pled guilty on January 30, 2023 at a Police Act Hearing conducted in Whitby, Ontario and was found guilty of One (1) count of Neglect of Duty pursuant to Section 2 (1) (c) (i) contained in the Schedule to Ontario Regulation 268/10 as amended. The original Notice of Hearing containing the Discreditable Conduct and two counts of Neglect of Duty was withdrawn by the Prosecutor Mr. Ian Johnston on consent of Counsel represented and a new Count of Neglect of Duty was read to the officer Detective Constable Willis who pled guilty to that amended count.

The charge pertains to the investigation of a serious assault which was investigated by Detective Constable Craig Willis where the public complainant suffered a catastrophic injury resulting in the loss of his left eye. The investigation lacked professionalism and credibility below the standards of the Durham Regional Police Service. An agreed statement of facts was submitted to this Hearing by Counsel for the affected parties and marked as Exhibit Three (3).

Agreed Statement of Facts:

On December 28, 2016, at 2:48 am, Mr. Dafonte Miller had an altercation with off duty Toronto Police Service (TPS) Constable Michael Theriault and his brother, Christian Theriault. Mr. Miller was pursued by the Theriault brothers to the side of a house in Whitby, where the Theriault brothers assaulted him. Durham Regional Police Service (DRPS) responded to the scene after numerous 911 calls.

As a result of the assault, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller's lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police.

On March 12, 2021, the OIPRD notified DRPS that they had completed their investigation and concluded that misconduct against Detective Constable Willis had been substantiated.

Detective Constable Willis was working in the Criminal Investigative Unit (CIB) and was electronically assigned carriage of the investigation. At approximately 6:30 a.m., he was briefed about the incident by officers who were in attendance at the scene. Detective Constable Willis indicated he spoke to Constable Gendron about Jim Silverthorn (the homeowner where the incident occurred), and from that conversation decided not to interview him. It was determined through the OIPRD investigation that this conversation could not have happened as Constable Gendron booked off duty that morning at 5:45 a.m., and Detective Constable Willis' notes indicated that he started work at 6:30 a.m. Constable Gendron also advised the OIPRD that she never spoke to Detective Constable Willis about the incident.

Constable McQuoid stated in an interview with OIPRD that he advised Detective Constable Willis of his conversation with the homeowner of where the incident happened, specifically that the homeowner may have kept pipes at the side of his house to hold up his plants. Detective Constable Willis had no record of such information being provided to him. This information was important to determine if the pipe was a weapon of opportunity or had one of the parties involved been armed with it prior to the altercation.

Detective Constable Willis stated to the OIPRD that he could not be certain whether he spoke to a crime analyst about whether there was a pattern of vehicle entries in the area, as he made no notes about the conversation.

Mr. Miller was charged with the theft under \$5000 for taking loose change from John Theriault's vehicle. Detective Constable Willis never took a formal or signed statement from John Theriault, and no follow up was conducted to confirm the amount of money stolen or whether other items were stolen. This was an essential investigative step required to prove the charge.

Mr. Miller was additionally charged with assaulting the Theriault brothers with a weapon. These charges were laid shortly after police arrived on the scene, prior to a full investigation being done.

Detective Constable Willis was aware, as soon as he was assigned the file, that Mr. Miller had suffered an eye injury. He saw the photographs taken by Constable Bowler, one of which was of Mr. Miller's very bloodied face, and others of the blood and other fluids found on the hood of the car at the scene.

Despite the lack of detail about how Mr. Miller came to sustain a serious eye injury, Detective Constable Willis never questioned the narrative provided by the Theriault brothers. Detective Constable Willis took the position that, without Mr. Miller's statement, he did not have sufficient evidence to refute what the Theriault brothers had told him. He did make some efforts to speak to Mr. Miller, both through Mr. Miller directly and then through his mother.

The OIPRD found there was sufficient evidence available to Detective Constable Willis to potentially refute the narrative provided by the Theriault brothers. When Mr. Miller was caught in between the houses, Detective Constable Willis failed to consider whether Mr. Miller might have wielded the pipe in self-defence, fearing that the Theriault's had chased him in order to assault him. Detective Constable Willis never appeared to consider whether the force that they used in defending themselves was proportionate to the threat that Mr. Miller posed or whether it was excessive.

There were discrepancies in injuries, yet Detective Constable Willis appeared not to question the narrative provided by the Theriault brothers. The subsequent interview with Christian Theriault was initiated by John Theriault; there was no indication that Detective Constable Willis would have otherwise re-interviewed him at all, notwithstanding that Christian Theriault's original statement did not even address how Mr. Miller came to receive his injuries.

Although Detective Constable Willis listened to the 911 calls, it appears that he did not use them to assist in the investigation, as there were several pieces of valuable information contained in these calls that were not the subject of any further investigation. Detective Constable Willis failed to interview all the 911 callers.

He did not pursue obtaining a medical release from Mr. Miller and consequently never sought a medical opinion about whether the injuries sustained by Mr. Miller were consistent with the version of events provided by the Theriault brothers. The pipe that was seized, which appeared to have blood on it, was never submitted for analysis, nor were any other items from the scene.

Detective Constable Willis was aware that the SIU would not be investigating how Mr. Miller came to sustain his injuries. Therefore, it fell to him to determine whether an offence had been committed. The investigation conducted by Detective Constable Willis was really limited to an investigation of a theft from a vehicle. Apart from some efforts to speak to Mr. Miller - who was accused and therefore had a right to remain silent, Detective Constable Willis did not take any meaningful steps to investigate his injuries or to determine if the force used to cause these injuries was justified and proportionate. He did not meaningfully attempt to obtain Mr. Miller's consent to release his medical records. He did not seek judicial authorization to do so once consent was not forthcoming, nor did he reach out to counsel to obtain the records. He only obtained an additional statement from Christian Theriault after this statement was initiated by John Theriault.

Detective Constable Willis accepted the version of events proffered by the Theriault brothers, notwithstanding that he knew the altercation was a two-on-one; that Constable Theriault had no injuries; and that Christian Theriault did not have any observable injuries.

By failing to properly investigate the incident, Detective Constable Willis was neglectful and did not promptly and diligently perform a duty as a member of the police force.

Findings:

Counsel in this matter, Mr. Ian Johnstone representing the Durham Regional Police Service and Mr. William Mackenzie representing Detective Constable Willis have requested a joint penalty position of forfeiture of sixty (60) hours pursuant to Section 85 (1) (f) of the Police Services Act.

Ms. Asha James, representing the Public Complainant has requested an eighty (80) to one hundred (100) hour forfeiture pursuant to Section 85 (1) (f) of the Police Service Act.

Mr. Johnstone has presented the Tribunal with Exhibits four (4) containing four cases to support his joint position and Exhibit five (5) containing letters of support, performance appraisals and commendations for this officer.

Mr. Mackenzie has presented the Tribunal with Exhibit six (6) containing five cases to support his position on the joint submission for sixty (60) hours forfeiture.

Ms. James has presented the Tribunal with Exhibits seven (7) and eight (8) which were the Reasons of Judgement for the Criminal trial and the Court of Appeal decision in relation to the two male parties which inflicted the assault on the Public Complainant.

I will not recite the cases in their totality, however I have read and considered the cases that I was provided by Counsel. As learned Counsel have stated, there are no cases found which parallel the case that is before me at present. The cases as provided are for guidance to the disposition penalty that Counsel has sought to be appropriate for the finding of guilt on the Neglect of Duty count which was rendered on Monday January 30, 2023.

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 to the reputation of the Police Force that will occur if the 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 Durham Regional Police officers strive to maintain.

The public observes and evaluates the police 24-7. We, as individuals and as a professional organization must be mindful of this fact. Our members, while on or off duty, must conduct themselves in a professional manner at all times.

Mr. Johnstone in his submissions indicated that the cases provided and the exhibits he produced in conjunction with the comments to be made by Mr. Mackenzie supported their joint position of sixty hours.

Mr. Mackenzie further elaborated that Detective Constable Willis is a dedicated officer with the Durham Regional Police Service. He indicated that the officer has continued to work since the investigation was ongoing and towards the Hearing date. The officer has impeccable Performance Reviews with most of the areas marked as Exceeds. He is now working in the Homicide Unit. Mackenzie advised that the day of this occurrence the office was short staffed. He submitted that the Public Complainant was in hospital and Willis did not receive a statement from him. He advised the officer was formally given the file on January 8, 2017 and upon reaching out for a statement he learned that the Complainant had legal counsel. Willis has no prior discipline and sixty hours forfeiture of hours is appropriate and jointly submitted.

Ms. James wished the Tribunal to review the criminal reasons and Court of Appeal reasons. She submitted this case has the ‘Perception of racial overtones’ and it must be addressed. The judges also commented on this in the criminal trial. She submitted the only reason this officer was before the Tribunal today was due the fact that her office was involved and raised issues with the investigation and lack thereof. It is true that the Toronto Police Service and Durham Regional Police Service did not contact the SIU. She also was critical of the actions of Willis on that day and the subsequent follow up investigation. Ms. James submits the appropriate disposition should be in the eighty to one hundred hour forfeiture of hours.

In *Legal Aspects of Policing* at pages 6-87, the author (Paul Ceysens) states the following in relation to guidance in Neglect of Duty counts:

In Ontario, a peace officer commits Neglect of Duty when he or she “without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force.”

The leading judicial decision concerning failure to promptly and diligently discharge duty is *P.G. v. Police Complaints Commissioner* (1996) 90 O.A.C. 103 (Div. Court). This case considered the provisions of the Ontario scheme as stated above.

In P.G., the Divisional Court ruled that either of two situations **is required** in order to establish neglect of duty:

1. “there was some element of willfulness” in the police officer’s neglect; or
2. “there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct”.

The Ontario Civilian Commission on Police Services as it was known at that time has ruled that the employer must establish that the police officer was required to perform a duty, and that he or she failed to perform this duty because of neglect, or did not perform the duty in a prompt and diligent manner. If these two burdens are established, the police officer bears the burden of establishing lawful excuse.

In considering a proper disposition the Tribunal must consider a number of issues. The Disposition should agree with the purpose of affecting a proper discipline process where it meets the standard for the Service in employing discipline in the workplace and the responsibility to treat the respondent officer fairly and also the actions incurred if a complainant is involved to assist in their reconciliation of the matter.

The overall purpose of the discipline process is to apply corrective measures to correct improper behaviour according to the standards of the discipline process and that of the affected Police Service in accordance with their policies and procedures that all officers are to adhere to in their policing duties.

Through disciplinary jurisprudence, a number of mitigating and aggravating considerations have emerged that affect disposition.

These include:

- Public interest.
- Seriousness of misconduct.
- Recognition of the seriousness of the misconduct.
- Handicap or other relevant personal circumstances.
- Provocation.
- Procedural fairness considerations.
- Employment history.
- Potential to reform or rehabilitate the police officer.
- Effect on police officer and police officer’s family.
- Consistency of disposition.
- Specific and general deterrence.
- Employer approach to misconduct in question.
- Damage to the reputation of the police force.

Not all of these factors are relevant to the present case before the Tribunal.

Many of these factors stem from the decision of Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (OCCPS)

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.”

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 Durham Regional Police Service.

Aggravating Factors

a. Public Interest

It is common knowledge that the public holds police officer's in a position of high trust and accountability.

You are accountable for your actions and any deviance from those actions, the Durham Regional Police Service will hold you accountable. This is what the public expects of the management of this Police Service.

Members of the Durham Regional Police Service are expected to investigate criminal, provincial and Highway Traffic Act offences activity in a professional and thorough manner. General Policies, Orders and Directives of the Service are expected to be adhered to forthwith as policy dictates. In this case, we have a member of the public which was directly affected by Detective Constable Willis's actions. The actions and conduct of this officer cannot be overlooked as his inaction and lack of professionalism on this day was critical to the Public Complainant and his 911 call. Detective Constable Willis is an experienced and highly respected officer of the Durham Regional Police Service. This type of investigation where it involved officers from a police service whom were off duty at the time of the occurrence can have the effect on the officer that is conducting the investigation to have what may be described as “tunnel vision”. This is what I believe Willis projected on this day with the less than a professional investigation that this officer is known to perform. 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 Durham Regional Police Service.

This type of behavior is not tolerable to the community residents of the Region of Durham or the Durham Regional Police Service.

b. Seriousness of the Misconduct

Seriousness of the misconduct is a fundamental consideration. Detective Constable Willis's conduct certainly can be considered as serious misconduct. As a police officer, one of Detective Constable Willis's primary duties is to project a positive image of the Durham Regional Police Service and investigate occurrences in a positive and professional manner. Detective Constable Willis as described by Mr. Johnstone and Mr. Mackenzie in this Police Services Act proceeding agreed that his conduct was serious. There was absolutely no reason to not investigate this criminal occurrence with integrity and professionalism that this officer was known for to conduct on a regular basis. This officer cannot rely on being short staffed to explain the frailties of this investigation. The positive note from this is that Detective Constable Willis wished to deal with this occurrence as expeditiously as possible.

c. Need for Deterrence

It is necessary to consider general deterrence for all members. The penalty must reflect that the Durham Regional Police Service will not tolerate unacceptable behaviour. The guidance rule for a Police Service in my mind is to provide the Community and to the Public Complainant with investigations that provide the utmost of policing excellence, diligence and thoroughness. A quality investigation is warranted. Nothing less can be accepted or tolerated.

There must be specific deterrence for members to send a message that individuals will be held accountable for their conduct while considering the mitigating factors of positive work record performed by this officer, the Durham Regional Police Service must deliver a penalty that not only prevents a recurrence, but also adequately protects the public.

General deterrence in this situation offers the Adjudicator in this matter the opportunity to remind all members of this organization that thorough, professional police investigations are an expectation of the management of this Service and is an expectation of the citizens of this community. Police officers, on or off duty, must do their part to assist and ensure the compliance of this expectation.

d. Damage to the Reputation of the Police Service

The credibility of the Durham Regional Police Service as police agency is of paramount importance. The credibility of officers that ignore the laws of the land, ignore the policies of the Service, speak or conduct themselves disparagingly towards persons they have interacted within a police situation, conduct unprofessional and incompetent investigations in haste without thinking of the repercussions can damage the Service. 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 and acting in accordance with the policies and procedures of the Durham Regional Police Service.

There was extensive media coverage over the years on this occurrence which does not place the Service in a positive light to the community that it polices.

e. Management Approach to Misconduct

The Durham Regional Police Service is a Professional and disciplined organization. The Durham Regional Police Service considers the actions of Detective Constable Willis to be serious in nature for this Service. The misconduct is serious in nature and was conducted by a senior member of the Service. Due to the serious nature of this misconduct, while on duty, I have not given undue consideration for this issue. The Durham Regional Police Service does not condone or accept this type of behaviour from its officers. There is truly no flexibility in this manner in which management of the Durham Regional Police Service could approach or condone this type of behaviour by a member of their Service.

Mitigating Factors

f. Recognition of Seriousness of Misconduct

Pleading guilty to disciplinary allegations constitutes recognition of the seriousness of the misconduct, which is a mitigating factor for the Tribunal to consider.

Detective Constable Willis through his guilty plea to the disciplinary charge of Neglect of Duty demonstrates his recognition of the seriousness of his misconduct.

His guilty plea and cooperation in this proceeding demonstrate his recognition of the seriousness of his misconduct and are mitigating factors in consideration of an appropriate penalty.

It is my hope that this officer sees clearly how his actions and lack of professionalism has dictated the shortcomings that bring him before me today.

g. Employment History

Consideration of an officer's employment history is a standard factor to consider. It can serve as both a mitigating and aggravating factor. Detective Constable Willis as previously stated does not have any prior discipline on record. He has served for twenty two (22) years now with the Service. His length of service and lack of discipline on record all serve as mitigating factors in this file. His letters of support, commendations and Performance Evaluations contained in Exhibit #5 outlines an officer that is a dedicated, diligent and thorough investigator which has taken him to the Major Homicide Unit of this Service since this incident has taken place. He is considered a mentor and leader within this organization.

I cannot understand considering the positive and excellent documentation of this officer's investigative skills and leadership why he conducted himself the way he did on the day in question with the Public Complainant. It certainly appears to be a huge anomaly and I believe sincerely that this officer has learned from his indiscretion.

h. Ability to Reform or Rehabilitate the Officer

An officer's potential to rehabilitate is an important consideration. As already indicated, Corrective Dispositions should prevail, where possible. Police Service Act case law has held that unless the offence is so egregious and unmitigated, the opportunity to reform should be a significant consideration.

By pleading guilty it must be viewed that Detective Constable Willis is accepting responsibility for his actions and as such, the Durham Regional Police Service acknowledges that the potential to rehabilitate exists and he should be given the opportunity to reform

The proposed penalty submissions submitted by Counsel in this matter suggest to me that this officer can be rehabilitated with an appropriate disposition penalty.

i. Effect on the Police Officer and his Family

There is no doubt that Detective Constable Willis and his family will suffer from the penalty position to be imposed on this officer by this Tribunal.

A penalty such as dismissal, demotion or forfeiture of hours will have a significant impact on the career of Detective Constable Willis. I have given this situation serious consideration in determining an appropriate disposition.

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.*

I have considered the ten (10) cases presented to me by Counsel. As I communicated earlier in this disposition the cases presented to me are not on point, however they were instructive for disposition considerations.

Detective Constable Willis is a well- respected investigator within the ranks of the Durham Regional Police Service. As I have stated earlier in this disposition the character and talent of this officer on the investigation and lack thereof on the night in question is mind boggling.

It would appear by all counts this is not the officer that is known to the Police Service. I do not know if “tunnel vision” was in play on the night in question due to the fact an off duty police officer from another police service was involved in this incident. If it **WAS** it should not have played a role in how the officer conducted his investigation. I believe he has learned a great deal from this occurrence and I also believe that this officer will not appear before this Tribunal again with this type of behaviour.

The comments made by Ms. James in relation to racial bias are one that I must address. She did comment that she does not believe that a racial bias existed however there is the Perception that a racial bias existed. I am aware of the comments made by the judiciary in the criminal process. Those comments were made in relation to the criminal investigation in relation to the charged persons. Ms. James representing the Public Complainant wishes the Tribunal to consider a higher disposition than what was presented jointly by Counsel representing the Service and Detective Constable Willis as a result of her submission to the Tribunal.

In this Police Service Act case I must deal with the parameters of the Notice of Hearing. In the Agreed Statement of Fact and the new Notice of Hearing which Detective Constable Willis pled guilty to on January 30, 2023 there is no mention whatsoever that Detective Constable Willis acted inappropriately due the Public Complainant being a Person of Colour.

The Tribunal must deal with the facts at hand and the elements to meet in making a finding of guilt which I have copied and note once more:

*In P.G., the Divisional Court ruled that either of two situations is **required** in order to establish neglect of duty:*

1. *“there was some element of willfulness” in the police officer’s neglect; or*
2. *“there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct”.*

Detective Constable Willis conducted a substandard investigation and was not thorough or diligent in his duties on that night and he has pled guilty for that Neglect of Duty. He has shown remorse in part by pleading Guilty to this charge to this Tribunal. This action has prevented a potential lengthy Hearing and the calling of numerous witnesses at a Hearing.

The Durham Regional Police Service views this misconduct as serious and is cognizant that a penalty must be imposed to protect the interest of the public we serve. Detective Constable Willis as a senior member of this organization, you have conducted yourself with a total lack of professionalism, judgment and courtesy, which is expected of all members of the Durham Regional Police Service.

I commend you for attending your Hearing in Whitby, Ontario January 30, 2023 with your Counsel and pleading Guilty to the misconduct charges.

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.

Striving for consistency in a disposition is a balancing act, involving a number of considerations that speak to the specifics of the misconduct, the environment in which the misconduct occurred, the action or inaction of the management of the service and other issues.

The Durham Regional Police Service through its community invests a great deal into hiring, training and equipping the men and women to whom they entrust their protection. The community and the Police Service have a right to expect that when their officers are on duty, they will be performing at a high level of competence and perform their duties in a professional manner.

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.

I have considered the submissions by Counsel, the agreed statement of facts and the joint penalty submission agreed to by Counsel.

Disposition:

In light of the seriousness of these allegations and bearing in mind all the evidence placed before me, Detective Constable Willis #3047 will forfeit sixty (60) hours pursuant to Section 85 (1) (f) of the Police Services Act.

This means you will attend your office on either rest days or annual leave days and work the prescribed hours until sixty (60) hours have been accomplished. The timeline to complete these hours will be issued by your Divisional Commander. I would recommend six months to complete.

M.P.B. Elbers, Superintendent

February 02, 2023