

## WINDSOR POLICE SERVICE

In The Matter of a Misconduct Hearing under Part V,  
s.68(5) and s.76(9) of the *Police Services Act*, R.S.O. 1990, c. P.15

And in the Matter of a Public Complaint made  
by or on behalf of Mr. Gladson Chinyangwa

And In The Matter of Allegations of Misconduct  
against Constable Kent Rice

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DECISION AND REASONS UPON  
PLEAS OF GUILTY

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Hearing Officer: Staff Inspector Brian Fazackerley,  
Durham Regional Police Service (Retired)  
Prosecutor: Mr. David Amyot, McTague Law Firm LLP  
Defence: Mr. Andrew Bradie, Barrister-at-Law  
Public Complainant: Mr. Gladson Chinyangwa

### Background

[1] PC Rice was named in a s.68(5) Notice of Hearing containing 2 allegations of misconduct, dated December 4, 2012 [Exhibit 8]. He first appeared on January 16, 2013, before Superintendent M. Langlois of the Windsor Police Service ("WPS"). On September 27, 2013, Chief A. Frederick issued a secondary Authorization under s.94(1) naming me as the successor Hearing Officer for the matter. On September 30, 2013, a second Notice of Hearing was issued under s.76(9) describing a further allegation of misconduct against PC Rice [Exhibit 9]. Both Notices were joined in the hearing before me.

[2] The Hearing proceeded through a number of teleconference adjournments while related criminal proceedings and appeals involving the officer progressed. During that time the Office of the Independent Police Review Director ("OIPRD") became involved at my request, and counsel from that office assisted me by providing some procedural information as a non-party, for which I was grateful.

[3] After the criminal proceedings were determined, counsel were able to reach an agreement as to a proposed penalty based upon guilty pleas to count two of the first Notice of Hearing (count one was to be withdrawn by the prosecutor), and to the single count in the second Notice of Hearing. The plea agreement included an Agreed Statement of Facts ("ASF"). This was to be a global penalty since the two allegations pled to are related factually.

[4] The public complainant, Mr. Chinyangwa, was kept apprised of pending dates, and participated in some of the conference telephone hearings leading up to the plea proceeding. He was reminded by me of his right as a party to be represented by counsel. He was given an opportunity to review and comment on the proposed resolution and has signed a letter agreeing to it, as will be more fully described later. He had notice of the date, location and telephone access for the plea proceeding, and a telephone connection was kept open for him to join, but he did not participate.

[5] The penalty being proposed jointly by the parties was an 18 month reduction in rank classification from 1<sup>st</sup> class constable to 2<sup>nd</sup> class constable, followed by automatic reinstatement to 1<sup>st</sup> class constable.

### **The Plea Hearing**

[6] The matter reconvened on Thursday, September 10, 2015, in Windsor for entry of the two guilty pleas. PC Rice thereupon was read the two allegations and pled guilty to them.

[7] Mr. Amyot filed a bound and tabbed Document Brief (Exhibit 11) that included the ASF. At that time Mr. Amyot read into the Record the contents of the ASF and Mr.

Bradie on behalf of his client acknowledged those facts. For convenience I will reproduce the entire ASF:

**COUNT 1 – UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY**

IT IS AGREED that Police Constable Kent RICE's ("PC RICE") actions on February 22, 2012 constituted an Unlawful or Unnecessary Exercise of Authority in that on or about February 22, 2012, PC RICE used unnecessary force against Gladson Chinyangwa during the exercise of PC Rice's duty, constituting an offence against discipline, Unlawful or Unnecessary Exercise of Authority, as prescribed in section 2(1)(g)(ii) of the Code of Conduct, Ontario Regulation 268/10, section 80(1)(a) of the Police Services Act, R.S.O. 1990, c. P.15

**COUNT 2 – DISCREDITABLE CONDUCT**

IT IS AGREED that PC RICE committed Discreditable Conduct in that on or about August 30, 2013 PC RICE was found guilty of the criminal offence of Assault contrary to section 266 of the Criminal Code of Canada, which charge was in relation PC Rice's interaction with Gladson Chinyangwa on February 22, 2012. On June 24, 2015, the Court of Appeal for Ontario upheld the Trial Judge's finding of guilt and imposed a conditional discharge against PC Rice. PC RICE's actions constitute Discreditable Conduct in that he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Windsor Police Service, constituting an offence against discipline, Discreditable Conduct, as prescribed in section 2(1)(a)(ix) of the Code of Conduct of Ontario Regulation 268/10 and section 80(1) of the Police Services Act, R.S.O. 1990, c. P. 15.

**AGREED STATEMENT OF FACTS**

1. PC Rice is a member of the Windsor Police Service ("WPS") and holds the rank of Constable, 1st Class. PC Rice was hired by the WPS on June 13, 1999.
2. PC Rice's Personal Conduct Sheet (Exhibit 1) discloses several commendations in regard to PC Rice's service with the WPS and does not disclose any prior disciplinary matters.

3. The within disciplinary proceedings against PC Rice relate to a call for service on February 22, 2012 and specifically, PC Rice's interaction with Gladson Chinyangwa.

4. On August 30, 2013, PC Rice was found guilty of assault, contrary to s. 266 of the Criminal Code of Canada by Ontario Court of Justice Downie, which charge was in relation to PC Rice's interaction with Gladson Chinyangwa on February 22, 2012.

5. Marked as Exhibit 2 to this Agreed Statement of Facts are the Reasons for Judgment by Justice Downie. Justice Downie's Reasons for Judgment are reproduced below and set out the following findings of fact (initials have been used in place of witness or other individual names):

*The accused Mr. Kent Rice is a Windsor police officer who is charged with assaulting Mr. Gladson Chinyangwa who is 20 years of age in a stairwell at an assisted living housing complex at 1101 McDougall Street in Windsor.*

*Cst. Rice and his partner Cst. Anthony Nosella had just finished another call at about two o'clock in the morning along with two other officers, Cst. Michael Rettig and Cst. Shawn Martin when they got a call from their dispatcher. And a follow up on the video computer in their cruisers saying that there had been a fight at 1101 McDougall and that while some of the people had left at least three others were still fighting in an apartment at that address.*

*All four of the officers answered the call since they were all in the district and not very far away and drove in two separate police cruisers to 1101 McDougall. The tenant who had called 911 let them in. They proceeded to unit 104 on the first floor where they could hear yelling thought to be from males and screaming thought to be from females coming from the apartment.*

*Cst. Nosella knocked and a female came, K. N., and let them in with words and various officers had a slightly different recollection as to what the words were but all of them consistent in that it was an indication to go in and do something about the three men that were fighting in the apartment.*

*All four officers entered the apartment to try and get things calmed down. Another female, C. M. was sitting on a bed and seemed to at least a couple of the officers to be*

*stoned or otherwise out of it. The police concentrated on the three males who initially did not even seem to notice them as they were so busy yelling at each other.*

*Once they noticed the police one male, R. B., jumped out an open window into a closed courtyard. Cst. Rice persuaded him to come back as he couldn't get out of the courtyard anyway. Cst. Nosella concentrated on identifying the three males. Cst. Shawn Martin had previous dealings with two of them, R. B. and Gladson Chinyangwa and identified them.*

*Gladson, and here's a point that was at issue yesterday, my notes say Gladson in his evidence then gave his birth date. At one point we were deciding where they had come from. My notes indicated Gladson in his evidence says once they identified him he gave them his birth date.*

*The other man we now know is called S. C. but that wasn't the name he gave to the police. He told them he was Shawn Carter. When the officer checked out that name with dispatch it came back clear, that is to say there was no record or any other problems. However, when asked about the name he spelled Shawne, S-H-A-W-N-E which is not a common way that Shawn is spelled and the officers began to smell a rat and they suspected he was giving them a false name.*

*Cst. Nosella began questioning him further and at that point Gladson Chinyangwa got involved and said things like, "You don't have to answer. They don't have a warrant". Some officers said he went beyond that and referred to "Fucking police" and "A bunch of pigs". They said that he was not being very compliant in trying to assist the investigation and he was interfering with Cst. Nosella's attempt to get the identification of the person who we now know as S. C..*

*Cst. Rice stepped into the situation and took Chinyangwa out of the apartment and down the hall through a door leading to a stairwell. He had him by his jacket collar and an arm, so he was directing him. Now he said Chinyangwa was resisting moderately, not by actively fighting but at one point he seemed to be wanting to pull away. He wasn't moving his feet very much to try and accommodate the walk down the hall.*

*Cst. Rice says that when they got to the door that led to the stairwell area he had to let go of Chinyangwa's arm to open the door and he felt Chinyangwa tense up and Officer*

*Rice said he felt he was going to be hit. So he pushed him through the door and across the six foot width of the stairwell where he fell on the other side of the stairwell to the floor.*

*Chinyangwa said he was being asked who was the third guy in the room when he got pushed through the door to the floor. There was a video camera in the stairwell area that was motion activated. It started when Chinyangwa lands on the floor in the stairwell and we then see Cst. Rice come through the door after him and go over and stand over him. He bends over him and appears to be addressing him. Chinyangwa says he was asking who the third man in the room was. Officer Rice says he was using a hushed tone technique to speak to him to try and get him to come up with a calm response but that that didn't seem to be working.*

*Cst. Rice said Chinyangwa who we see in the video was lying mostly on his back with his shoulder and arm area up against the wall to some extent. He said he appeared to have his fists clenched and when he led us through the video I could see that but whether he's got his fists clenched as if he wants to start a fight or got his fists up to sort of prevent himself from being hit, you can't really tell.*

*Cst. Rice interpreted it as an aggressive action. He says that Chinyangwa "horked" was his word that he made a sound in his throat like he was going to spit and he said that's something that happens to police officers from time to time. So he used an open palm deflection that is say he hit him the face with the palm of his hand knocking his head back.*

*The video, and we see that in the video shows Chinyangwa rolling over onto his side and then stomach, then he appears to be in a totally non aggressive situation at that point. Cst. Rice again speaks to him. He says he told him to get up and on his feet to be handcuffed. He decided he was going to arrest him at that point for breach of the peace pursuant to s. 30 of the Criminal Code.*

*Then within ten seconds of him having hit him in the face with the palm of his hand he kicks him in the rib area. Officer Rice says this was to get him to comply with the request to get up. Chinyangwa then rolls toward the security camera a couple of feet and gets into a partial sitting situation with his back against the wall. Officer Rice then*

*gives him a second kick, he says which was to get him to comply with the request to get up and be handcuffed.*

*I saw nothing in the video after the cuff to the face that as I said could be considered an act of possible aggression by Chinyangwa. The officer says he decided to arrest Chinyangwa for breach of the peace pursuant to s. 30 of the Criminal Code, and he wanted him to stand up and be handcuffed. He said the two kicks were just reasonable force as allowed by s. 25 of the Criminal Code to ensure compliance with his request to stand up and be arrested and handcuffed, and he also says he was edging toward an exit door. He says he wanted to prevent him from suddenly making a break out the back door of the apartment complex through this exit door.*

*In my view Officer Rice used excessive force when he kicked Gladson Chinyangwa two times in the stairwell area. He may well have also used excessive force when he pushed him through the door forcibly across the stairwell area to a point where he lands on the floor on the other side of the stairwell area, but he says that he felt him tense up and I accept that he acted to prevent what he perceived to a potential assault against himself at the time of that movement. So I'm not saying that the push through the door is an assault. It's a reflexive move.*

*The same can be said of the blow to the face of Chinyangwa. Cst. Rice says he thought he was going to be spit upon and that he used the blow to the face to prevent that assault against him, spitting being an assault. I accept the fact that the blow to the face was to ward off a potential spitting attack. However, the two kicks came when I see no threat of any aggressive action on Chinyangwa's part. They can only have been delivered to ensure compliance with a request to get up and be handcuffed and in my view kicking at that point was an excessive use of force that wasn't needed by the situation and I find Cst. Rice guilty of common assault against Gladson Chinyangwa because of the two kicks.*

*I want to make some comments as to the credibility of the witnesses in this trial. Cst. Rice has had 14 months to think over what happened that night and I'm sure he has gone over the events in his mind more than a hundred times. He rationalizes what happened that night. I have accepted his evidence that he felt threatened with a potential assault as he pushed Chinyangwa through the door to the floor on the other*

*side of the stairwell and again when he cuffed him in the face to prevent what he perceived to be a spitting attack. On the other hand, his omission of a second kick when he's doing his report is an odd omission.*

*With respect to Chinyangwa, he got caught being forgetful or lying several times during his testimony at this trial. He denied having identified S. C. to the officers and yet I accept their evidence that he was in fact the one who identified him as at least S. C. and then they found out that he was S. C..*

*He seemed somewhat confused and he talked about why his friends had assaulted him earlier before the police arrived and at one other time he told police when he was being interviewed about this case that he was in fact being kicked at the time when he was in handcuffs and we can see clearly from the video that he wasn't handcuffed at the time that the two kicks were applied.*

*He also told us he thought K. N. was only a date at that particular point in time and she became a girlfriend months later whereas it would seem that she was pregnant by him as at that time. I'm satisfied that at some point though he was being asked to identify S. C. by Cst. Rice.*

*In the end we have varying stories. We have certain angles from Cst. Rice. We have certain angles from Gladson Chinyangwa but the video is its own tie breaker as it were. The video camera is making its own story and the story there points to an assault in my view with the kicks. So the question now becomes what do we do about sentence.*

6. Marked as Exhibit 3 to this Agreed Statement of Facts is the video recording of the PC Rice's physical altercation with Gladson Chinyangwa.

7. Justice Downie imposed a suspended sentence with probation terms on PC Rice.

8. Justice Downie's decision was appealed to the Superior Court of Justice before Justice T.A. Heeney. On May 30, 2014, Justice Heeney granted the appeal and entered an acquittal in favour of PC Rice. Marked as Exhibit 4 to this Agreed Statement of Facts is the transcript of Justice Heeney's decision dated May 30, 2014.



9. Justice Heeney's decision was appealed to the Court of Appeal for Ontario. On June 24, 2015, the Court of Appeal upheld Justice Downie's decision; however the Court of Appeal set aside the suspended sentence imposed by Justice Downie and issued a conditional discharge against PC Rice with respect to his finding of guilt on the charge of Assault. Marked as Exhibit 5 to this Agreed Statement of Facts is Endorsement of the Court of Appeal for Ontario dated June 24, 2015.

10. PC Rice has accepted responsibility and has apologized for his actions. Marked as Exhibit 6 to this Agreed Statement of Facts is PC Rice's written apology to Gladson Chinyangwa.

11. PC Rice acknowledges that his actions have discredited the reputation of the WPS.

12. Gladson Chinyangwa has participated in these disciplinary proceedings as a public complainant. On July 15, 2015, Mr. Chinyangwa confirmed his consent and agreement to a proposed plea resolution of the within disciplinary proceedings against PC Rice. Marked as Exhibit 7 to this Agreed Statement of Facts is Gladson Chinyangwa's signed consent to the proposed plea resolution for the within proceedings.

13. Based these facts, PC Rice pleads guilty to the count of Unlawful or Unnecessary Exercise of Authority in that on or about February 22, 2012, PC Rice used unnecessary force against Gladson Chinyangwa during the exercise of PC Rice's duty, constituting an offence against discipline, Unlawful or Unnecessary Exercise of Authority, as prescribed in section 2(1)(g)(ii) of the Code of Conduct, Ontario Regulation 268/10, section 80(1)(a) of the Police Services Act, R.S.O. 1990, c. P.15.

14. Based these facts, PC Rice pleads guilty to the count of Discreditable Conduct, in that he was found guilty of the criminal offence of Assault contrary to section 266 of the Criminal Code of Canada, in relation to his interaction with Gladson Chinyangwa on February 22, 2012. PC Rice therefore acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Windsor Police Service, constituting an offence against discipline, Discreditable Conduct, as prescribed in section 2(1)(a)(ix) of the Code of Conduct of Ontario Regulation 268/10 and section 80(1) of the Police Services Act, R.S.O. 1990, c. P. 15. **[End of ASF]**

[8] There were no police notes or occurrence reports put into evidence to expand on the factual findings made by Downie J. I did, however, carefully review the video (ASF Exhibit 3) and I will take the opportunity now to describe what I saw.

[9] The camera was a static, ceiling level installation showing a landing at the bottom of the fire stairs in the apartment building. To the right is the door from the apartment hallway and there is a wall opposite about 2 ½ meters across. The lowest flight of stairs is straight ahead, but an exit door to the outside cannot be seen and presumably is directly under the camera. There was ample space in this landing area for two men to keep more than a meter of space between them quite comfortably.

[10] The recording starts at 02:18:47 on Feb 22, 2012, according to the time stamp. There is no sound recorded. At first Mr. Chinyangwa is lying on his left side with his head near the floor and his back sideways against the wall opposite the doorway. He was oriented consistently with having fallen or been pushed down while entering through the door. PC Rice is walking through the door and moves across to stand with his feet within ½ meter of Mr. Chinyangwa's face. Chinyangwa's hands and arms are raised in front of his face toward PC Rice. PC Rice is in full winter uniform kit with leather gloves, toque and waist parka with use of force options accessible.

[11] PC Rice bends at the waist with hands on his knees and speaks to Mr. Chinyangwa from less than a meter above his face. In this orientation Mr. Chinyangwa could have struck out quickly, with his hands, or right knee or foot, and made contact with PC Rice. He made no such movement. He was still for about 8 seconds when PC Rice suddenly lunged downwards, placing his left hand on the wall to steady himself, and struck Mr. Chinyangwa's face with his right hand. At this Chinyangwa drew his hands back toward his own face defensively. This was consistent with the finding made by Downie J. that Chinyangwa had taken steps preparatory to spitting up at PC Rice and PC Rice had reacted by striking him in the face to ward this off.

[12] PC Rice then resumes the same posture in the same position speaking downwards to Mr. Chinyangwa, whose hands now remain drawn in front of his face. Ten seconds after the face strike, PC Rice straightens up and delivers a right legged toe

strike to Mr. Chinyangwa's midsection, which was exposed with his hands still being up in front of his face. At this Chinyangwa draws his arms down to cover his midsection, defensively. Within five seconds Chinyangwa rolls rightward onto his stomach, hands now under him still on his midsection, and physically rolls onto the top of PC Rice's left toe. PC Rice doesn't move his feet but maintains his posture, bent over with hands on knees speaking downward, now to the back of Mr. Chinyangwa's head.

[13] Mr. Chinyangwa stays on his stomach then sits up partially against the wall, now about 20 seconds since the toe strike to his midsection. PC Rice is standing straight up and steps into a position inches from Chinyangwa, who is now sitting with his left leg bent at the knee nearer to PC Rice, and his right leg straight out toward the door. PC Rice continues to talk downward to Chinyangwa while standing straight. Chinyangwa rolls to his right, leaning away from PC Rice, and now straightens his left leg flat on the floor, slightly raising and exposing his buttocks.

[14] Twenty-six seconds after the toe strike to his midsection, PC Rice quickly delivers a right legged toe strike to Mr. Chinyangwa's buttocks. This strike is a bit harder than the first and causes Chinyangwa to roll over onto his right side with his head and shoulders away from PC Rice toward the camera and his elbows pulled close into his ribs. At this PC Rice walks around Chinyangwa past the door and toward the camera, repositioning himself over Chinyangwa's face and head and continuing to talk. Handcuffs are clearly visible in the officer's gloved right hand. Mr. Chinyangwa sits up moving his face and head away from PC Rice.

[15] Thirty seconds after the second kick, Mr. Chinyangwa stands up on his own, facing the camera. PC Rice moves toward Chinyangwa and faces him from about ½ meter away. It can now be seen that PC Rice is taller and physically larger than Mr. Chinyangwa. As PC Rice continues to talk, Chinyangwa backs into the wall and PC Rice moves forward still facing him from ½ meter away. Forty-five seconds after standing up, Mr. Chinyangwa turns to face the wall and PC Rice reaches to take his left arm back to handcuff him.

[16] Mr. Chinyangwa appears to change his mind and turns around again then walks away from PC Rice toward the camera and out of view beneath it. PC Rice walks toward him and the camera, and is seen talking to him at length, still with the handcuffs in his gloved right hand. After almost a full minute Chinyangwa turns around and is handcuffed behind his back. Ten seconds later PC Rice escorts Chinyangwa out the door back into the hallway and out of view. The total elapsed time from the beginning of the recording was 3:25 min.

[17] There was no training record submitted in evidence for PC Rice. I was advised that, since he was reinstated from suspension on May 30, 2014, he has completed the WPS use of force requalification. I am prepared to assume he had been current in use of force training and had met standard prior to February 22, 2012, in compliance with the Act.

[18] Based on the video, I find that PC Rice throughout his interaction with Mr. Chinyangwa on the landing was never concerned that he was at risk of physical attack, other than the brief spitting issue as aforementioned. His continued positioning of himself in such close proximity to Chinyangwa, not affording himself a reactionary gap, compels this conclusion. Downie J. has found as a fact that Chinyangwa was non-aggressive after the face strike to fend off the spitting, which I readily agree with, and that PC Rice had then decided to arrest Chinyangwa for breach of peace. PC Rice's espoused intention then was to convince Chinyangwa to stand back up to be handcuffed. PC Rice's allusion to use of hushed-tone tactical communication to keep things calm, which might explain his close proximity to Chinyangwa, also belies any apprehension by him that there was any risk to officer safety.

[19] While resisting arrest by assault is a crime<sup>1</sup>, there is no legal obligation on a person who is being arrested to voluntarily place himself in an optimal or more advantageous physical position to facilitate handcuffing. A police officer arresting someone's liberty in the name of the law clearly may use reasonable force to handcuff and transport the prisoner, and the measure of needed force may well be less if the prisoner voluntarily responds to reasonable requests to reposition himself.

[20] But recourse to use of physical force in the nature of pain compliance, in order to impel a passive or otherwise non-threatening arrestee to stand to be handcuffed more conveniently, simply is neither necessary nor lawful. Reasonable alternatives evident to me here include physically lifting the smaller arrestee to his feet, before or after handcuffing him, or using one's portable radio to get one of the other three officers on scene nearby to come briefly and assist with this task. Where there is a reasonably apprehended risk to officer safety and commands to show one's hands are disobeyed, for instance, that is a different matter. But that is not this case.

[21] Based on the ASF and the further facts I am able to find after viewing the video [Exhibit 3 to the ASF], I find PC Rice guilty of both allegations to which he has pled, and convictions are to be registered in his employment file. Count one on Exhibit 8 is hereby marked withdrawn.

### **Evidence on Disposition**

[22] After entering his pleas, PC Rice stood and read aloud on the Record the contents of ASF Exhibit 6, an undated letter of apology. Mr. Amyot indicated that he had read the letter to Mr. Chinyangwa when meeting with him in July, 2015. Reference to a forthcoming formal apology is made in the letter from Mr. Amyot to Mr. Chinyangwa, dated July 15, 2015 [ASF Exhibit 7], which Mr. Chinyangwa signed

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<sup>1</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.270(1)(b)

indicating his consent to the proposed resolution. Unfortunately Mr. Chinyangwa was not present at the Hearing to hear his apology from PC Rice directly.

[23] The letter of apology was read aloud as follows:

Attention: Gladson Chinyangwa

Dear Sir:

I want to take this opportunity to apologize for my conduct in the early morning hours of February 22, 2012.

The conflict in which we were engaged arose as a result of my efforts to arrest you.

During the course of that exercise, I administered two kicks to your body which kicks have been found to have been an excessive use of force and have resulted in me having been found guilty of a criminal offence.

I was not motivated by malice towards you and I was not attempting to cause you personal injury.

That being said, having viewed the video recording which captured the event, I accept that the force which I used was excessive in the circumstances.

I am truly sorry if I caused you any physical injury, discomfort, pain or suffering.

I am also sorry if the publicity surrounding this matter has caused you any humiliation or embarrassment.

Yours very truly,

Kent Rice

[24] No actual evidence of media reports or other public awareness of the matter was tendered at the Hearing. On September 14, 2015, while this decision was on reserve, I performed a Google internet search for "Windsor police video kick suspect 2012." The first item returned was titled "Windsor police officer punches, kicks man on floor – YouTube," with subtext "Published on Jun 6, 2012 - Watch this video, obtained by The Windsor Star, of a Windsor police officer striking and kicking a man in the hallway of a McDougall Avenue apartment building." The entire video is there. There are 24 public comments that have been uploaded in response, all negative, including one but only one that notes that Mr. Chinyangwa is black and saying "so much racism." PC Rice is white.

[25] The next item returned was similar, "Published on Jun 17, 2012 - CBC news article June 7, 2012 - Police officer's alleged assault caught on video," with a link to the

same video. There are 56 public comments, mostly negative with a number indicating racial themes but at least one denying it.

[26] There were a number of other media items covering the various stages of PC Rice's criminal proceedings. This quick exercise was sufficient to allow me to find, as Mr. Amyot later submitted, that there had been substantial media coverage of this matter that negatively impacted the reputation of the WPS.

[27] Mr. Bradie indicated PC Rice was 43 years old, had been married for 19 years and had two children. He had been with WPS since 1999, after serving with the Canada Border Services Agency from 1993 to 1998.

[28] Mr. Bradie tendered a bound volume containing 133 pages of character and reference letters arranged under four tabs on behalf of PC Rice [Exhibit 13]. Tab 1 was letters from community contacts, Tab 2 was letters from serving or former police officer co-workers, Tab 3 was letters from other professional and long term acquaintances as well as family contacts, and Tab 4 was PC Rice's Personal Conduct Sheet and examples of work history reports, commendations and letters of gratitude from citizens contacted in the course of duty. There were no formal supervisory performance assessments put into evidence.

[29] Notable examples of PC Rice's positive achievements set out in these letters include:

- 10 years of volunteering at Gordon McGregor Public School delivering the VIP program, organizing student trips, assisting with homework and athletics, and in one case purchasing new shoes for a disadvantaged student athlete who went on to win athletic recognition at the Essex County level;
- Known to have been a mentor for a number of years to a young man who is developmentally challenged and brings him to hockey league games to assist on the bench. This relationship was mentioned by at least four different writers;
- Acts as a minor league hockey coach;

- Provided a personal gift of used children's clothing to a disadvantaged single mother of two toddlers encountered while on duty;
- Inspired a visible minority fellow police officer of the Muslim faith by showing interest in Muslim culture, compassion to youth and demonstrating integrity as a police officer; is a respected senior constable and coach officer;
- Demonstrated compassion toward and ensured the safety of victims of violence during calls for service;
- A fellow officer of African-Canadian descent who has known PC Rice over 20 years says he has never seen PC Rice show disrespect to a member of a minority group;
- Stops his cruiser to push a motorist out of a snowbank, then abandons his warm restaurant meal to assist a family sitting nearby with counselling their youngster on a path away from trouble;
- Took the time to search for and retrieve the contents of a found purse and return it to its owner without making an official matter out of it – later acknowledged only when the owner of the purse came in to ensure his work was recognized;

[30] There are dozens of different authors represented in these letters, ranging from old family friends to co-workers to medical professionals. Most wrote expressly acknowledging their awareness of the outcome of PC Rice's criminal trial, many actually addressing their letter directly to Downie J. The letters are replete with general ascriptions of high moral character, compassion, work ethic and dedication to community volunteerism. Many writers state specifically that PC Rice is a dedicated family man, would never knowingly inflict harm on anyone, and that this situation is completely out of character for him.

[31] Tab 4 contains many examples of supervisory and management recognition for exemplary performance and teamwork by PC Rice. A number of citizens have written in over time to express their gratitude to PC Rice, often because he had gone the extra mile to resolve their issue.



[32] I find based on the evidence that PC Rice has had no disciplinary or formal corrective history during his 15 years as a police officer. He has shown an inclination to serve his community through volunteerism and has impressed his co-workers and supervisors as an investigator, team player, coach officer and mentor who maintains a calm and professional demeanour and is driven to be thorough and effective. I accept that he has not shown any overt racist inclination in his personal or professional life, and that his criminal use of unnecessary physical force on Mr. Chinyangwa in this instance was an aberration and out of character for him.

### **Prosecution Submissions**

[33] Mr. Amyot began by setting out the purposes for PSA Part V disposition proceedings:

- To maintain discipline in the police force while ensuring the police officer is treated fairly and recognizing the public interest in maintaining a high level of confidence in the police;
- The disposition philosophy is a corrective one;
- The lowest of possible dispositions should be used where possible;
- There must be proportionality of disposition to the offence
- There is a higher standard of behaviour for police officers.

[34] Referring to the well-known list of sentencing principles found in the *Williams*<sup>2</sup> case, he then made specific submissions only upon those he considered relevant in this case.

[35] Mr. Amyot submitted that the proposed 18 month demotion accords with the public interest by recognizing the high standard of conduct expected of police officers.

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<sup>2</sup> *Williams and Ontario Provincial Police* (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

He noted that the complainant had participated in these proceedings and that he, Mr. Amyot, had met personally with the complainant to discuss the proposed ASF and joint submission on disposition. After having a week to consider it, the complainant had signed off in agreement. The 18 month demotion, representing an approximate \$14K loss of salary, signifies that PC Rice is being held responsible for his actions.

[36] As to seriousness of the misconduct, Mr. Amyot submitted that both of the allegations pled to were serious misconduct. It is serious any time a police officer is found guilty of a criminal offence. Whether this was deliberate versus an isolated occurrence may aggravate or mitigate disposition accordingly. Mr. Amyot cited the *Carson*<sup>3</sup> case for this proposition. Here he acknowledged this was an isolated act which was less serious.

[37] In terms of effect on the victim, Mr. Amyot noted there were no reported injuries by Mr. Chinyangwa, and he had not directly complained, the superintendent of the building having complained after discovering the video footage. The victim had participated in these proceedings and, while there was some negative effect, he had moved on. He cited the case of *Brudlo*<sup>4</sup>.

[38] In terms of recognition by PC Rice of the seriousness of the misconduct, Mr. Amyot again cited *Carson*<sup>5</sup> as a reference case. PC Rice's pleas of guilt and written letter of apology are mitigating factors.

[39] Mr. Amyot noted that Mr. Chinyangwa's not having been fully cooperative with PC Rice might amount to some provocation. It was noted that Downie J. had found the push through the door and face slap to ward off spitting to have been justified. Mr.

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<sup>3</sup> *Carson and Pembroke Police* (2001), 3 O.P.R. 1479 (O.C.C.P.S.)

<sup>4</sup> *Brudlo and Toronto Police Service*, O.C.C.P.S., 23 November 2005

<sup>5</sup> Fn3, *supra*

Amyot further noted, however, that there was no finding that the two kicks were the result of provocation.

[40] Regarding employment history, Mr. Amyot submitted that PC Rice's 15 years of service with a clean record was a mitigating factor.

[41] In terms of potential for rehabilitation of the officer, Mr. Amyot submitted that the opportunity must be considered as part of a corrective disposition. He cited the case of *Andrews*<sup>6</sup> for this proposition.

[42] Mr. Amyot submitted the proposed disposition posed no undue hardship on the officer and his family.

[43] In terms of consistency of penalty, Mr. Amyot cited *Gulliver*<sup>7</sup> (demotion to 4<sup>th</sup> class with regular yearly progression), *Kyle*<sup>8</sup> (demotion from S/Sgt to sergeant with requirement to requalify for S/Sgt), and *Venables*<sup>9</sup> (dismissal) for my consideration. Mr. Amyot submitted that seriousness here was in the range of the *Gulliver* and *Kyle* decisions.

[44] As to damage to the reputation of the police service, Mr. Amyot submitted there had been media coverage of the criminal proceedings and that the video had been made available publicly.

[45] Mr. Amyot indicated that the OIPRD had been afforded the opportunity to review the proposed ASF and joint submission on disposition, and had indicated by e-mail that they had no issue with it.

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<sup>6</sup> *Andrews and Midland Police*, O.C.C.P.S., 1 May 2003

<sup>7</sup> *Gulliver and Brantford Police*, O.C.C.P.S., 15 July 1997

<sup>8</sup> *Kyle and York Regional Police*, O.C.C.P.S., 11 March 2003

<sup>9</sup> *Venables and York Regional Police*, O.C.C.P.S., 03 October 2008

## **Defence Submissions**

[46] Mr. Bradie filed Exhibit 13, the character and reference letters, and submitted his client was an exemplary family man, husband and father, as well as an exemplary police officer.

[47] He noted this was a police officer engaged in the lawful execution of his duties in a highly charged situation, attended by alcohol and drug use and a non-compliant and verbally abusive subject. He submitted a lawful arrest was being made under s.30 of the *Criminal Code* when the two excessive leg strikes were administered. Mr. Bradie submitted the effect on the victim was non-existent apart from gaining his compliance with the direction to stand up.

[48] It was further submitted that the issue of excessive force was “arguable” as evidenced by three levels of argument in the criminal courts over 3 ½ years. That process was stressful on his client, who was suspended from the date of his arrest to May 30, 2014, and then confined to administrative duties.

[49] Mr. Bradie took me through some of the letters, concluding that PC Rice is a police officer who does more than is expected and has accumulated a clearly positive balance sheet in life. He submitted that PC Rice cannot be defined by this event, which was an aberration.

[50] Mr. Bradie noted PC Rice had pled guilty and spared the possible need for a lengthy contested Part V hearing.

[51] Mr. Bradie indicated that he joined in the submission that an 18 month demotion from 1<sup>st</sup> to 2<sup>nd</sup> class constable was reasonable.

## **Relevant Cases and Considerations**

[52] Before I can assess whether the proposed disposition is a fit one for PC Rice, I must review the law and then apply it to the facts as I find them. This includes determination of aggravating and mitigating factors. I am grateful to counsel for providing me with cases to consider.

### The Thirteen Factors

[53] The Commission set out a list of factors to be considered in determining a disposition in discipline cases which has become well established in *Krug and Ottawa Police Service*, (January 21, 2003, OCCPS) at pp.12-13. These are:

1. Public interest;
2. Seriousness of the misconduct;
3. Recognition of the seriousness of the misconduct;
4. Employment history;
5. Need for deterrence;
6. Ability to reform or rehabilitate the police officer;
7. Damage to the reputation of the police force;
8. Handicap and other relevant personal circumstances;
9. Effect on police officer and police officer's family;
10. Management approach to misconduct in question;
11. Consistency of disposition;
12. Financial loss resulting from unpaid interim administrative suspension;
13. Effect of publicity.

There is no requirement that any one factor be given more weight than another. The seriousness of the offence alone may justify dismissal. Aggravating factors can serve to diminish the weight of any mitigating factors.

[54] Public interest is very relevant in this case. Police officers are held to a higher standard: See, e.g., *Guenette*<sup>10</sup> and *Reilly*<sup>11</sup>. There is a reasonable public expectation that its police officers will obey the law. In committing a criminal act by using excessive force PC Rice has fallen short of this expectation.

This matter began with a publicly available video featuring a uniformed police officer kicking a smaller suspect who was on the floor. There was some public reaction to this which was generally negative, and included a few suggestions of racial bias. This hearing process, however, has allowed the issues to be canvassed in a transparent setting that included participation of the victim. On all of the evidence I accept PC

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<sup>10</sup> *Guenette and Ottawa-Carleton Regional Police*, O.C.C.P.S., 18 December 1998

<sup>11</sup> *Reilly and Brockville Police*, O.C.C.P.S., 12 May 1997

Rice's statement in his apology that he was not motivated by malice and was not trying to cause personal injury. I further find no evidence of racial bias actuating PC Rice's conduct. While this goes some distance in mitigating my concerns related to public interest, it nonetheless remains an aggravating factor.

[55] I find this misconduct to have been serious in a number of ways. First, PC Rice will be the subject of *McNeil*<sup>12</sup> disclosures going forward in relation to the criminal finding and the two misconduct findings. While I can't speculate on what if any impact this may have on criminal prosecutions in which he is a police witness, he will certainly be open to possible cross-examination on these findings in certain situations in a public court. This was not the case prior to this event.

[56] Secondly I find that PC Rice's reasoning, that Mr. Chinyangwa's passive and non-aggressive failure to stand up to be handcuffed when requested somehow entitled him to use force in order to convince him to do so, was misinformed. PC Rice misconstrued both his authority and the scope of Mr. Chinyangwa's legal obligations.

[57] There is in the Record a report of an arrest for break and enter from the night of November 24, 2008, (Occ#2008-74186) found at p.114 under Tab 4 of Exhibit 13 (PC Rice's work history). This report reveals a prior use of force by PC Rice which I think is worthy of note for comparison. The report is authored by PC Rice's partner that night:

As officers approached I could see that the male was getting onto a bicycle that had been left in the alley. PC RICE and I entered the alley and identified ourselves as Windsor Police officers. I shouted at the male to get off the bicycle and lay on the ground. The male did not comply with my demands. PC RICE and I grabbed a hold of the male as he attempted to pedal away from officers. The male was brought to the ground and repeatedly told to stop resisting and put his hands behind his back. The male tucked both hands under his torso and would not remove them. PC RICE delivered several knee strikes to the legs of the male causing him to release his hands from underneath his body. At approx 2244hrs I placed the male under arrest for Break and

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<sup>12</sup> [2009] 1 SCR 66, 2009 SCC 3

Enter and resist arrest.

[58] This was an actively resistant suspect in circumstances where a reasonable apprehension of risk to officer safety existed regarding the suspect's failure to show his hands when directed. The use of controlled knee strikes to the fleshy side and back of the legs as a pain compliance method is accepted use of force practice in my experience. The need to ensure the suspect did not have a weapon secreted beneath him was obvious.

[59] With Mr. Chinyangwa there was ample light to see, ample space to keep a safer distance and ample time to determine if he was a threat, which he was not. His hands were clearly visible. Backup officers were nearby. The use of the toe of a police boot thrust into the unprotected abdomen of a floored suspect as pain compliance is not accepted use of force practice in my experience. It seems obvious that internal organs could have been damaged and that such a maneuver might be difficult to control from a power measurement perspective. With the swiftness of this move as seen on the video, PC Rice was fortunate there was no serious injury done to Mr. Chinyangwa in my view.

[60] Kicking a suspect in the fleshy buttocks with the toe of a police boot as pain compliance is also not accepted practice to my knowledge, and it further strikes me as somewhat degrading to the suspect.

[61] While I have accepted that PC Rice did not act maliciously, with racial bias or in an attempt to do harm, seriousness of the misconduct is still an aggravating factor.

[62] PC Rice has recognized the seriousness of his misconduct by pleading guilty before this Tribunal and apologizing to Mr. Chinyangwa. This is a mitigating factor on disposition.

[63] PC Rice's employment history is very positive and there are no disciplinary or corrective entries. The number of supervisors and co-workers who wrote positively of his work ethic and habits, some including clear examples, is very impressive. This is a mitigating factor on disposition.

[64] The need for deterrence, both specific and general, is an operating factor in my view. Specific deterrence is somewhat neutralized by PC Rice's apology and his acceptance therein that his use of force was excessive in the circumstances. But PC Rice must be aware of the limits to his authority to use force to bring about compliance with requests or directions in relation to acts that a person is legally at liberty to do or refrain from doing.

[65] Similarly as to general deterrence, every police officer in a uniform wears boots and almost all will come into situations where subject/suspect compliance with directions is in issue. Every officer must respect the liberties of persons they are in contact with to do or refrain from doing certain acts, when such is neither unlawful *per se* nor presents an actionable threat to officer or public safety. When considering intervention by force, officers must endeavour to use their training to effect compliance with a lawful police purpose using appropriate force options calculated and measured to not exceed what is reasonable.

[66] In the 1989 case of *Burgess*<sup>13</sup>, the Commission had interpreted the word "unnecessary" under the same head of misconduct as follows:

The word "unnecessary" as used in the section in question might mean "not absolutely essential" or it might mean "unreasonable under the circumstances". ... We find that the word "unnecessary" as used in the section, does not mean "not absolutely essential" but rather means something closer to "unreasonable under the circumstances" considering other options that were in fact available.

[68] In this case Mr. Chinyangwa was stirring the pot with his acquaintances in the apartment by inciting them to not cooperate and he was rightly removed from the investigation scene by PC Rice. PC Rice pushed him to the floor of the landing, justifiably as found by Downie J. But PC Rice then decided to arrest Chinyangwa for breach of peace, and took the questionable position that Chinyangwa was then

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<sup>13</sup> *Burgess and St. Thomas Police Service* (1989), O.P.R. 822 (O.P.C.) at pp. 826-27



somehow obliged to regain a standing position, unassisted and on demand, in order to be handcuffed. This was the context in which he twice kicked Chinyangwa, who ultimately did stand up. All officers need to be deterred from engaging in similar such excesses.

[69] Need for deterrence aggravates disposition in this case.

[70] There is ample evidence in the Record that PC Rice is readily able to be rehabilitated and move forward from this event. His reputation and work history are very favourable and disclose an inclination on his part to succeed and excel in his work. This is a mitigating factor in disposition.

[71] There is substantial evidence that the reputation of the WPS was adversely affected, in the eyes of reasonable persons in the community, by what occurred here and the publicity it received through media and the internet. Three and one half years out, we have a police officer who has been found guilty of criminal assault and two allegations of misconduct. My findings that there was no role played by racial bias or malice on PC Rice's part, and the victim's ultimate acceptance of the resolution, may or may not restore some of what has been lost. This factor aggravates disposition.

[72] The final relevant consideration is consistency of disposition with other similar cases. I have searched diligently but have been unable to find more than a few cases that are close.

[73] PC *Gulliver*<sup>14</sup> (a 1997 case provided by Mr. Amyot) was a 10 year veteran of the Brantford Police when he committed and unprovoked and vicious off duty assault on a contractor, based on a mistaken belief the contractor had stolen from his personal residence. He was found guilty of two crimes receiving fines, and then was dismissed

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<sup>14</sup> See Fn7, *supra*

from the force at his misconduct hearing. On appeal the Commission noted he had suffered some alcohol dependency and stress issues, had pled guilty in criminal court and at the tribunal, had an unblemished service record, and had provided an unqualified written apology to the victim shortly after the event. It was also noted that co-workers and supervisors felt this was an isolated incident out of character for this officer. Finding that the cumulative mitigating factors had not been given enough weight by the Hearing Officer, the Commission reinstated Gulliver, demoting him all the way back to 4<sup>th</sup> class constable, the lowest status short of dismissal.

[74] Acting Sergeant *Batista*<sup>15</sup> of the Ottawa Police (in a 2007 case) was carrying a *Taser* at a protest event in Ottawa when he was summoned to a scene where a handcuffed prisoner had deliberately fallen limp to the ground. The prisoner was failing to cooperate in terms of walking to the cruiser so he could be transported. Upon Batista's arrival the prisoner uttered expletives to officers and tried verbally to incite the crowd. Batista tasered the handcuffed prisoner, who then remained limp and was dragged the remaining 60 feet to a waiting cruiser.

[75] The prisoner complained and became a public complainant. At the hearing the question was whether the prisoner had been actively resistant or likely to become so. Other officers described him as being only passively resistant, which was accepted by the Tribunal. According to the Commission on appeal, "[t]he Hearing Officer ... found that the handcuffed Smith, lying more or less motionless on the ground, surrounded by officers did not constitute an imminent danger or threat."<sup>16</sup> The Hearing Officer found Batista guilty of using unnecessary or unreasonable force.

[76] As found by the Commission on appeal:

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<sup>15</sup> *Batista and Smith and Ottawa Police Service, O.C.C.P.S., 08 May 2007*

<sup>16</sup> *Ibid.*, at p.3

The Hearing Officer stated that he found that Constable Batista did not use the Taser in a gratuitous manner or with the intention of hurting Mr. Smith. Rather, the Hearing Officer concluded that Constable Batista's use of the Taser was inappropriate, based on a flawed decision, constituted an error of judgment and was the "wrong method in the circumstances".

The Hearing Officer noted the evidence before him that Constable Batista was an outstanding police officer with an excellent reputation with his co-workers. This included a discipline free employment history. The Hearing Officer found that it was obvious that Constable Batista was a solid, highly qualified police officer who could continue to provide a high level of service to his community.

[77] There had been video produced in that matter as well. On this the Hearing Officer commented as follows:

Acting Sergeant Batista arrived at Mr. Smith's location sometime after Mr. Smith began yelling loudly about the TASER. Mr. Smith is depicted quite clearly on the videotape at this time. Try as I might while viewing this tape during this time frame, I was unable to see anything that Acting Sergeant Batista could possibly have taken as active resistance. There is virtually no movement visible and the only action that Mr. Smith was involved in was yelling and using course language. This does not, based on what I have heard from the experts...amount to active resistance.

[78] Batista having been found guilty automatically lost his acting sergeant privileges, amounting to \$10K per year in pay. Given that fact, the Hearing Officer assessed a reprimand as the disposition. As part of the appeal to the Commission, the public complainant appealed the reprimand as being too lenient.

[79] On the disposition appeal the Commission noted as follows:

The Hearing Officer however, was also of the view that the seriousness of the conduct in question was mitigated somewhat by a "lack of malice" on Constable Batista's part and the fact that his actions occurred "in the heat of the moment" and "were out of character".

The Hearing officer noted Constable Batista's excellent employment history and generally good reputation reflected in the testimony and letters offered on his behalf by both coworkers and supervisors. He properly noted the mitigating nature of such evidence. ...

To my mind the Hearing Officer's comments on these matters were open to him on the evidence and both fair and proper.

[80] As to deterrence, the Commission stated the following:

The Hearing Officer also stated that given that he felt that Constable Batista's actions were an error or honest mistake that specific deterrence was not a factor. Further, he

went on to observe that the obvious negative impacts of these events on Constable Batista "can and must act as a deterrence to others who find themselves in similar situations. But once again, when an honest mistake is made, deterrence does not, in my view, become an issue."

On this later point, the Hearing Officer might have expressed himself better. Police officers are authorized by law, equipped and trained to use force. The improper use of force is conduct that must be deterred.

[81] It is noted that PC Batista pled not guilty at his misconduct hearing and fought vigorously for acquittal. He was not, however, the subject of any criminal charge.

[82] The Commission upheld the reprimand and denied the disposition appeal, noting as follows:

As the Hearing Officer properly noted, as a consequence of his conviction on this disciplinary matter, Constable Batista forfeited his Acting Sergeant status. Effectively this constituted a demotion. This clearly has negatively affected his career. As well, it has had a significant monetary consequence.

The combined loss of rank, salary and reprimand taken together represent a serious consequence that addresses any considerations that might arise with respect to general deterrence.

[83] While PC Rice was charged and found guilty criminally, unlike PC Batista, he did plead guilty in this Hearing and is entitled to the mitigation that comes with that, also unlike PC Batista. I find there are a good many similarities between these two cases, both involving on duty use of force intended to impel a passively resistant prisoner to get with the program and enable his detention to be continued without further delay or inconvenience. That Smith was already handcuffed while Chinyangwa was about to be is a distinction without a great difference in my view. Both officers lacked malice, acted out of character, had positive work histories and good reputations.

### **Disposition in This Case**

[84] Based on the foregoing analysis, I accept the proposed joint submission on penalty. I find it amply accords with the principles of Part V penalty assessment as set out above. The combined loss of rank and approximately \$14,000.00 in salary reflect the seriousness of PC Rice's guilt of criminal assault and two misconduct convictions. PC Rice will be reduced in rank classification from 1<sup>st</sup> class to 2<sup>nd</sup> class constable for 18 months as soon as it is administratively practicable to do so. He will automatically revert to 1<sup>st</sup> class constable status at the end of those 18 months.

Dated at Windsor this 18<sup>th</sup> day of September, 2015.

A handwritten signature in black ink, appearing to read 'B. Fazackerley', with a stylized flourish at the end.

Brian Fazackerley, S/Insp. (Ret)