

**TORONTO POLICE SERVICE
HEARING OFFICER**

IN THE MATTER OF the *Police Services Act*,
R.S.O. 1990, c. P.15 (as amended)

AND IN THE MATTER OF
Police Constable Babak Andalib-Goortani (#9859)

DECISION ON PENALTY

1. Police Constable Babak Andalib-Goortani (#9859) (“the Officer”) was convicted on September 12, 2013, of the criminal offence of assault with a weapon, while on duty during the G-20 demonstrations in Toronto, on June 26, 2010.
2. As a result he was charged under the *Police Services Act* with misconduct. He pleaded guilty to the *Police Services Act* charge following which submissions were made as to penalty.
3. The Complainant seeks a dismissal of the Officer; the prosecution seeks a one-year demotion to Constable, 4th Class; the defence seeks an Order of forfeiture of 5 days off.
4. The events giving rise to the criminal charge of assault with a weapon occurred on June 26, 2010 at Queen’s Park. A large crowd of demonstrators had assembled. There was extensive violence directed toward the police.

Similar events were happening elsewhere in the downtown core. The attacks on police and property damage during the G-20 were unprecedented, as extensively described in the decisions of the Hearings Officers dealing with various police officers who were charged with misconduct during the G-20 Summit demonstrations.

5. Adam Nobody participated in the demonstration and was arrested. The Officer was part of a team that arrested Mr. Nobody. At the criminal trial of the Officer, the Crown conceded it was a lawful arrest. No issue was raised in this *Police Services Act* hearing to suggest that the arrest was unlawful.

6. The Officer had been assigned to a “mobile team” of 5 or 6 officers to ensure the march on Queen’s Park and any demonstrations were safe for the participants and the general public. Their duties included traffic regulation and searches for hidden caches of weapons. A large crowd estimated at 10,000 people marched on Queen’s Park. When violence broke out, various teams were told to regroup and the Officer’s team was given a different assignment – that of an “arrest team”.

7. The Officer, 3 years on the force, had no training or experience in being part of “an arrest team”.

8. When the team moved to arrest Mr. Nobody, he ran from them but was quickly apprehended by being tackled to the ground. Three or four officers were in the act of arresting him. The Officer was the last to arrive at the arrest scene. By the time the Officer arrived, the other team members, with what is fairly described as overwhelming physical superiority were grappling with him on the ground.

9. The Officer committed the assault by prodding Mr. Nobody with his baton, on one leg and then on the other leg totaling four (4) times.

10. Thus, the assault was “with a weapon”.

11. Botham J. in the Ontario Court of Justice held that none of the blows with the baton were proportionate or necessary in the circumstances. The arrest by the other officers had Mr. Nobody under control. She rejected the Officer’s testimony to the effect that he used his baton because he thought it necessary to assist his fellow officers in getting Mr. Nobody under control. She found that his fellow officers administered several punches and kicks to Mr. Nobody and she did not accept the Officer’s testimony that he did not see these actions by the other officers.

12. A review of the video evidence reveals clearly that the Officer was “the last man in” and that the other officers had Mr. Nobody under control even though he may have been resisting. The evidence reveals, in effect, that the Officer’s use of force was unnecessary.

13. That said, the blows administered by the Officer occurred in the space of a few seconds, were of a fleeting and physically minor nature leaving no bruises and no injury to Mr. Nobody.

14. The Officer appealed his conviction and sentence of 45 days in jail. The conviction was upheld, but the sentence was reduced to time served, 12 months’ probation and 75 hours of community service.

15. In its submissions, the prosecution points to the fact that the Officer was wearing neither his badge number nor his name tag.

16. Further, the Officer did not come forward to identify himself when the media published videos of the event.

17. The prosecution also argues that, as found by Botham J., the actions of the Officer were “unnecessary” and points to her conclusion that the Officer’s testimony concerning his lack of observation about certain aspects of the event was not credible.

18. The other 4 officers on the Officer’s team were charged with disciplinary offences in connection with the arrest. Hearing Officer Cunningham dismissed the charges. He found that the arrest was lawful, Mr. Nobody was resisting arrest and the force used by the officers was justified. In short, they acted lawfully. The decision is under appeal by Mr. Nobody.

19. The defence argues that in the circumstances, the Officer barely stepped over the line.

20. At the time of the G-20, the Officer had been a police officer for 3 years. In that short period he received three commendations on his file, two to do with commendable actions as an officer in dangerous and difficult circumstances and a third to do with his contribution to the Neighbourhood TAVIS Initiative.

21. As well, he rescued an elderly man who was trapped during a flood, no doubt saving the man from serious injury or death.

22. Beyond his service to the community through police work, the Officer was one of a group of volunteers committed to bringing relief where there is

pain and suffering. In October 2010, his group drove 18 donated ambulances from Toronto to a poor village in El Salvador.

23. This proceeding and the criminal conviction in 2013 have wreaked havoc on the life of this Officer. He has been on desk duty since the fall of 2010. He lost his marriage. He lost his house. He has suffered depression, requiring therapy. His wider family has been severely impacted emotionally, and has suffered great stress.

24. More than 60 letters of support were filed attesting to his good character, his responsibility, his reliability, his devotion to his career, his community involvement. These letters were from members of the community, members of the Toronto Police Service, and his family. These letters cannot be ignored when considering the question of penalty.

25. The officer has no previous discipline history.

The Law

26. The cases reflect features of police discipline cases that bear consideration, including the need for general deterrence; conduct of officers requires a higher standard than ordinary citizens; and the damage improper conduct causes to the public perception of the police – bringing discredit to the police force and impairing of public confidence.

27. The prosecution argues that the offence committed here is inherently serious, which has in some cases resulted in dismissal.

28. For ease of reference the cases and materials brought to my attention by counsel are listed in Schedules A and B attached to this Decision.

29. Not surprisingly, the penalties imposed in the referenced cases vary quite widely, depending on the circumstances. I distinguish the prosecution cases as follows:

30. In *Ferry*, a demotion for two months, Constable Ferry made an unlawful arrest after losing his temper. He created a ruse of being bitten by the complainant. His testimony in one part, was described as “absurd”. The conduct was not momentary. He had a troubling history of two incidents of misconduct.

31. In *Groot*, a penalty of dismissal, the Constable assaulted a prisoner while in custody causing significant injuries. He had a prior discipline history.

32. In *Venerables*, a penalty of dismissal, the Constable attacked a man in the back of a cruiser causing significant injuries. The attack was racially charged.

33. In *Weller*, a penalty of dismissal, the Constable assaulted the complainant while arresting him, causing significant and permanent injuries. He gave false evidence at the hearing and created false notes of the event.

34. In *Thomas*, a penalty of one year’s rank reduction, there was an unlawful arrest, unlawful use of force, serious force applied and serious injuries.

35. In *Batorski*, an old case (1982) a penalty of 9 months' rank reduction, although the Constable's assault on another officer (he pushed the officer against some lockers) was described as trivial, it was done in anger and to intimidate the other officer.

36. In *Clayton*, a penalty of demotion from 1st Class to 2nd Class Constable, the complainant asked why she was being given two parking tickets. She was kicked to the ground, handcuffed and sat upon, all in the presence of her daughter.

37. In *King*, a dismissal, the Constable's conduct was "outrageous, insulting and shameful." The Constable "has shown that he does not have the self-discipline or self-control necessary to effectively perform his duties as a police officer."

38. In *Batista*, a reprimand, the Complainant was participating in a demonstration. He was placed in handcuffs, but was not co-operating. Batista tasered him, other officers dragged him 50 – 60 feet towards a cruiser where Batista tasered him a second time. The Hearings Officer took into account the fact that Batista had been administratively demoted with a pay loss of \$10,000.00.

39. In *Anderson*, a penalty of a forfeiture of 5 days' pay, the Constable assaulted a trespasser, with a weapon.

40. None of the foregoing cases convince me that a one-year demotion to Constable 4th Class is appropriate in the present case.

41. Turning to the cases referenced by the defence, the following involved criminal convictions for assault or assault causing bodily harm, and resulted

in penalties of 2 to 5 days off, forfeited: *Ward, Mills, Roy, Walker, Flis, Racette, Smith, Zarafonitis, Kellock and Partridge.*

42. Concerning the Officer's failure to have worn his badge number or name tag, he was administratively disciplined for that failure. In my view it would be inappropriate to consider that failure as an aggravating circumstance in this case. See: *Monahan and Hampel.*

43. Similarly, his failure to come forward to identify himself is explained, at least to a large degree, by the fact that when photos were published in the media, he was on his charitable trip to El Salvador.

44. Concerning Botham J.'s findings on his credibility, those findings were not of the egregious nature found in other cases such as *Ferry* and *Groot* and ought not to be an aggravating factor. The fact remains that this assault, assuredly wrongful, as submitted by the defence was barely over the line of wrongfulness.

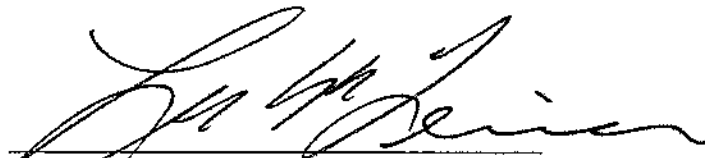
Conclusion

45. The Officer's three years of a commendable record on the force have been followed by five years of turmoil – living with these proceedings hanging over his head for five years; the strain of a criminal proceeding followed by a criminal conviction, appeal and penalty; his marriage break-up; his limited employment activity in a desk job for a large part of that period; the effect on his health.

46. The Officer has already paid too large a price for his misdeed.

47. In my view, a penalty of forfeiture of 5 days' pay is the appropriate penalty and I so find.

Dated at Toronto, this 5th day of November, 2015.

A handwritten signature in black ink, appearing to read "Lee K. Ferrier". The signature is written in a cursive style with a horizontal line underneath it.

The Honourable Lee K. Ferrier, Q.C.

SCHEDULE "A" – PROSECUTION CASES

Toronto Police Service v Ferry, June 1, 2015, Reasons of Ferrier J. on penalty
Groot v. Peel Regional Police, (2002) 3 OPR 1558 (OCCPS)
Venables v. York Regional Police, No. 08-08 (OCCPS)
Neely v. Weller [1987] OJ No 1966 (Div Ct) aff'g (1985) 1 PLR 230 (Police
Complaints Board)
Lane v. Rukavina, 17 November 1995 (Board of Inquiry)
Thomas v. Ontario (Police Complaints Commissioner) [1994] OJ No 2731 (Div Ct)
Batorski v. Niagara Regional Police (1982) 2 OPR 569 (OPC)
Tansek v. Clayton, 5 May 1992 (Board of Inquiry)
King v. Metropolitan Toronto Police (1992) 2 OPR 923 (OCCPS)
Smith v. Batista and Ottawa Police, No. 07-06 (OCCPS)
Anderson v. Kellock, 28 June 1984 (Police Complaints Board)
Ceyskens and Childs, *Ontario Police Services Act Fully Annotated*, 5th Edition 2013-
2014
Ontario Civilian Commission on Police Services v. Browne et al., [2001] 56 O.R. (3d) 673
Wood v. Schaeffer, [2013] 3 R.C.S. 1053



SCHEDULE "B" – DEFENCE CASES

Ceyssens, Legal Aspects of Policing, p. 5-247-248

PC Clint Nowlin (OPP-2009)

Constable Paulo Batista (OCCOPS - 2007)

Detective Neal Ward (Toronto Police Service Court - 1999)

Police Constable John Mills, Police Constable Dwight Stoneman (Board of Inquiry - 1987)

Police Constable Brian Roy (Toronto Police Service Court - 1994)

Police Constable Joseph Kerr (1981) O.P.R. 508

Police Constable William Walker (Toronto Police Service Court - 2007)

Sergeant Albert Flis and Police Constable Pietro Grande (Toronto Police Service Court-2008)

Police Constable Allan Racette (Toronto Police Service Court- 2011)

Provincial Constable Tracey Smith (OPP Service Court-2013)

Constable Paul Zarafonitis (Niagara Regional Police Service Court-2014)

Police Constable Vincent Couce (Halton Regional Police Service Court - 1997)

Police Constable Stewart Kellock (Board of Inquiry - 1984)

Constable Christopher Partridge (Durham Regional Police-1998)

PC Picknell (OCCOPS-1993)

Sergeant Douglas Rose (Toronto Police Service Court, 2015)

Golomb and College of Physicians and Surgeons of Ontario, (1976), 12 O.R. (2d) 73

R. v. Ghorvei, (1999) 138, C.C.C. (3d) 340

R. v. Kozy, (1990) 58, C.C.C. (3d) 500

Police Constable Paul A. Lock (O.P.P. Board of Inquiry, January 17, 1995)

Hampel v. Toronto Police Service, [2009] O.J. No. 1463

Police Constable Scott Hampel, (Ontario Civilian Commission on Police Services, August 14, 2008)

Staff Sergeant James Daryl Monaghan (Ontario Civilian Commission on Police Services, May 1, 2003)