

In the matter of the Police Act, R.S.A. 2000, c. P-17 and
in the matter of the Police Service Regulation, Alta. Reg. 356/1990

And in the matter of Complaints and Disciplinary Proceedings against
[REDACTED]
of the Calgary Police Service

Penalty Decision

Summary of Proceedings

On October 5th, 2020 [REDACTED] was charged with six (6) counts of disciplinary misconduct. He made his first appearance on November 24th, 2020 at which time he reserved his plea on all counts.

On November 26th, 2020, [REDACTED] entered an “admit” plea to count #2.

Counts 1, 3, 4, 5 and 6 have been withdrawn.

The remaining count as amended and contained in the Agreed Statement of Facts (ASF) are as follows:

Count #2:

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the *Police Service Regulation*, as further defined by section 5(2)(i)(ii) of the *Police Service Regulation* as by applying inappropriate force in circumstances in which force is used, in that on or about the 18th day of June, 2018, at or near the City of Calgary, Province of Alberta, [REDACTED] while at the scene of a robbery, used excessive and unnecessary force in the detention of [REDACTED] and made inappropriate remarks or comments to [REDACTED].

The full Agreed Statement of Facts was read into the record and entered as Exhibit #7. The facts contained in Exhibit #7 were admitted to by [REDACTED].

With the admit plea and the admission to the contents of the Agreed Statement of Facts which supported the charge, I found the charge of Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the *Police Service Regulations*, as further defined by section 5(2)(i)(ii) of the *Police Service Regulation* to have been proven on a balance of probabilities. [REDACTED] was found guilty of the misconduct.

The parties made submissions on penalty and the matter was set over to December 17th, 2020 for the decision.

Evidence

Exhibits:

- Exhibit 1 Notice and Record of Disciplinary Hearing.
- Exhibit 3 Presiding Officer Appointment Memo.
- Exhibit 6 Presenting Officer Appointment Memo.
- Exhibit 7 Agreed Statement of Facts.

Note: The exhibit numbers in the matter are not sequential. A second officer has been charged and the matters were originally heard jointly. The remaining exhibits refer to the other officer only.

Facts as per the “Agreed Statement of Facts”

1. On 2018 June 18 at approximately 4:35 AM. [REDACTED] [REDACTED] I were cleaning the [REDACTED] when two unknown males broke into the premise and committed a robbery. During the offence, the unknown males deployed pepper spray/bear spray into the face and eyes of [REDACTED]. They further assaulted [REDACTED] by striking him in the face with a bottle.
2. [REDACTED] left the building and were located by an uninvolved individual, [REDACTED], who contacted Calgary 911 to report the robbery. Several officers were dispatched to attend, including [REDACTED] [REDACTED] [REDACTED] also attended the scene.
3. The initial interaction between attending officers and [REDACTED] was unproductive with [REDACTED] refusing to engage with the officers. [REDACTED] declined to provide a statement in relation to the robbery in the [REDACTED].
4. [REDACTED] saw [REDACTED] outside the [REDACTED] [REDACTED] was yelling at [REDACTED] and demanding cigarettes. [REDACTED] cleared the premises to ensure there was no one inside or that he himself would be exposed to pepper spray. After returning to the parking lot, [REDACTED] saw [REDACTED] speaking to [REDACTED] who was yelling and belligerent. [REDACTED] noticed people from other buildings opening blinds to see what the disturbance was. [REDACTED] then assisted with [REDACTED] while under the care of EMS. [REDACTED] did not hear what was said to [REDACTED] but saw him being taken to the ground by [REDACTED].
5. The surrounding area of the [REDACTED] is primarily residential. Statements from [REDACTED] [REDACTED] and four of the members involved say that [REDACTED] was yelling and

swearing for several minutes and refused to stop. Given the time of day (5:00 a.m.) [REDACTED] concluded that [REDACTED] was causing a disturbance.

6. [REDACTED] told [REDACTED] that if he did not stop yelling, he would be arrested for breach of the peace and causing a disturbance. When [REDACTED] did not comply, [REDACTED] took [REDACTED] to the ground with the assistance of [REDACTED]. [REDACTED] applied a strike to [REDACTED], placed his knee on [REDACTED] and told him to “shut up”.
7. Surveillance video of the parking lot area at the [REDACTED] shows [REDACTED] standing alone beside a dark-coloured sport utility vehicle. [REDACTED] approach and speak directly to him for several minutes. [REDACTED] takes hold of [REDACTED] right arm and moves it to behind his back. [REDACTED] begins to pull away from [REDACTED]. With [REDACTED] on [REDACTED] right side and [REDACTED] on the left side he is forced to the ground. Dressed only in summer shorts, [REDACTED] lands on his knees. [REDACTED] then places his left knee on [REDACTED] upper body area and applies one strike to his head with his left hand.
8. [REDACTED] was never handcuffed but was physically restrained for a short period of time before being allowed to get up.
9. [REDACTED] who was assisting [REDACTED] with her decontamination of pepper spray with EMS heard [REDACTED] swearing and yelling while speaking to [REDACTED] and [REDACTED] and observed [REDACTED] physically restrain [REDACTED].
10. [REDACTED] was injured, perhaps disoriented, possibly temporarily blinded from being pepper sprayed and not in the way of the officers. Even if uncooperative and difficult to deal with, [REDACTED] was the victim of a violent robbery, not a suspected offender.
11. On 2018 June 18 [REDACTED] visited the [REDACTED]. [REDACTED] The Medical Records Summary noted bruising to his right periorbital, scalp tenderness, shoulder contusion and abrasions to both knees.
12. On 2018 June 18 [REDACTED] contacted Professional Standards. A subsequent criminal investigation was completed with the Edmonton Crown Prosecutor’s Office reviewing the file. It was the recommendation of the Edmonton Crown Prosecutor’s Office on 2019 October 10 that no charges under the criminal code be laid upon [REDACTED].
13. The following exhibits form part of this Agreed Statement of Facts:
 - 1) PEAKS Behavioural Events;
 - 2) 2018 PEAKS Annual Assessment;
 - 3) 2017 PEAKS Annual Assessment;

- 4) 2015 PEAKS Annual Assessment;
- 5) 2014 PEAKS Annual Assessment;
- 6) 2012 PEAKS Annual Assessment.

Submissions of the Presenting Officer

Ms. Campbell advised that [REDACTED] has been a member of the Calgary Police Service since [REDACTED] and currently holds the rank Senior Constable Level II.

She advised his last three performance assessments on file speak to him being a well-rounded officer, with a good work ethic. His supervisors have stated he possesses investigative abilities and is a team player and informal leader, he is also a Police Training Officer (PTO).

His behavioral events on file include: a noteworthy from May 2019 noting teamwork, operational skills, decision making and communication; In April 2019, a positive noteworthy regarding his commitment and leadership as a PTO; In [REDACTED] he also received an Inspectors Complement for Lifesaving for [REDACTED].

In 2018, he received two additional positive behavioral events referencing his teamwork, decision making and communication.

[REDACTED] was assigned to the Community Safety Response Team (CSRT).

Ms. Campbell advised that [REDACTED] has current discipline on his file both consisting of "Official Warnings." The first in January 2019 for Insubordination for failing to make notes at a call. The second in August 2019 for Discreditable Conduct for making a disparaging and profane comment to a young person. The two warnings originated from the same event.

The presenting officer provided five matters of disciplinary penalties as like cases:

EPS and [REDACTED] 2018

CPS and [REDACTED] 2015

Smith v Chief of Police of the Edmonton Police Service, 2013

CPS and [REDACTED] 2015

Thursby v Chief of Police, 2013

The penalties in these matters ranged from forfeiture of hours, to suspension without pay.

Ms. Campbell then spoke of the aggravating and mitigating factors. In aggravation, she stated the prior discipline must be considered. Secondly, the complainant in this matter was the victim of a violent robbery, not a suspected offender.

In mitigation, she states the officer has eight years of service and his performance assessments speak to him being a well-rounded officer with a good work ethic. He possesses investigative ability and is a team player and informal leader. He is also a PTO. His Noteworthy Events should be considered in mitigation.

Ms. Campbell states there is little justification that the use of force in the circumstances was necessary. [REDACTED] had been injured and was possibly disoriented. He was the victim of a robbery and deserved compassion. A peaceful de-escalation was called for in these circumstances, not a use of force to gain compliance.

[REDACTED] advised that he has suffered from anxiety and was taking treatment with a mental health provider but has since stopped. He owns his own cleaning service and continues to work at the [REDACTED], which now has much better security measures in place. He would like to see [REDACTED] receive better training and counselling.

Ms. Campbell states in the like cases, penalties ranged between 10 hours forfeiture to 20 hours suspension without pay for Unlawful or Unnecessary Exercise of Authority (UUEA) alone. [REDACTED] has two prior disciplinary sanctions and was the primary officer involved in using excessive force by striking [REDACTED]. She submits a penalty in the higher range of 25-30 hours forfeiture or 25-30 hours suspension should be imposed.

She also requests [REDACTED] be ordered to report to the Calgary Police Service Psychological Therapies Section and Human Resources Services Section for assessment. He should be specifically assessed for anger management issues.

Submissions of Counsel for the Cited Officer

Mr. Wilson commenced his submissions with an apology to [REDACTED] on behalf of [REDACTED]. [REDACTED] was present at the hearing. Mr. Wilson stated : *"No matter what was going on, you shouldn't have that negative interaction with police. In hopes that time has healed this, he understands that you had anxiety and were going through a significant amount during that period of time right after the robbery. So, he does offer that heartfelt apology to you. It's difficult for him to talk in these circumstances because of what's going on, so he asked me to pass that on to you, and I truly hope that you do accept his apology for this."* [REDACTED] accepted the apology.

Mr. Wilson then turned to the merits of the case and the factors to be considered when imposing an appropriate penalty. These submissions are argument, and not evidence. I have taken them into account as such.

Mr. Wilson advised that [REDACTED] is “incredibly remorseful” and apologetic for this incident. He is apologetic to [REDACTED], as well as to the Calgary Police Service. He realizes his actions brought discredit to the Service and its members.

Mr. Wilson stated [REDACTED] has had a stellar career other than for the official warning for swearing at someone which he characterized as a blip in a nearly nine-year career.

He states [REDACTED] is a team player, he is a learner, and he wishes to take what has occurred in this matter to come back as a better and much more mature police officer.

Mr. Wilson stated: *“Sometimes it takes these kinds of incidents and having to come before someone like you, sir, for police officers to realize that there are different ways, and what [REDACTED] has been able to do since this incident is actually sit down with various supervisors and talk about this incident. He’s been very open about what occurred on this date and asking about different ways he could have approached it.”*

Mr. Wilson stated that [REDACTED] was the victim of a horrific and violent assault during the robbery, but it was not for this reason he was the victim of what occurred. [REDACTED] was out of control and causing a disturbance. He was not taken to the ground because he was confused as being the victim, it was because [REDACTED] and the other officers were unable to get him under control. He took him to the ground and in the moment, he thought the best way to get control of him *“and to have something register with him”* was to use a stun, which he did.

[REDACTED] with the benefit of time now realizes without a doubt the stun was not an appropriate use of force. He realizes he should not have done that in the situation. He realizes there were alternatives; he could have walked away and allowed someone else to speak with [REDACTED].

He added [REDACTED] has had the opportunity to work in the Skills and Procedures Unit for a period of almost two months. He has had the opportunity to both observe and to do real-time feedback and ongoing training. That is going to be beneficial not only for [REDACTED] but everybody else and everyone he works with. He is going to be able to take that additional training and those additional tools and use it when he is on the street, but also be able to provide that information to other officers who he is working with.

Mr. Wilson states this matter has “hung over the head” of both [REDACTED] and [REDACTED] for two and a half years. This was primarily a result of the matter being sent for review by the Crown Prosecutor’s Office.

Mr. Wilson disputes the contention of the Presenting Officer that [REDACTED] was “taken down” because he was a victim or there was some sort of confusion of what his

position was. He was taken down because he was told if he did not calm down, he was going to be arrested for “breach of the peace” or “causing a disturbance.” That is what he was being detained for.

Mr. Wilson then discussed the like cases offered by Ms. Campbell. He stated that this matter before me is more minor in nature than what is seen in the like cases. He argues this matter should attract a lower forfeiture of hours and he would almost argue for a reprimand had it not been for the prior discipline on [REDACTED] file. He suggested a forfeiture of ten (10) hours would be appropriate.

Analysis

[REDACTED] has been found guilty of one count of misconduct under the *Police Service Regulation* and it is required that a penalty be imposed upon him.

Determining an appropriate penalty involves the assessment of many factors. In 1993 the Law Enforcement Review Board (LERB) provided a statement of principles regarding disciplinary sanctions in the matter of *Amery v. Young*,¹. Since that time, these principles have been the guidelines used to assist Presiding Officers in imposing disciplinary sanctions.

The Amery principles are as follows and I will speak to those principles that I believe are relevant to the matter before me.

1. *The principal purpose of police discipline is to advance the organizational objective of effective and efficient police services to the community.*

It is important that the public have the utmost trust and confidence in its Police Service. Without the support of the community, a police service’s level of effectiveness is severely hampered. The front-line police officer is the face of any policing agency. These members have the day-to-day contacts with people from all walks of life. They interact with the public as victims, offenders, witnesses and in many other ways. The perception left with those people as a result of the contact, positive or negative, multiplies as those people tell their friends and families. Police officers must strive to leave the best impression possible given the circumstances of the contact. While a person may not agree with a result, if they see they have been treated respectfully and fairly, it goes a long way.

When a police officer fails in the eyes of a member of the public, it must be seen that the police service is willing to recognize and effectively deal with members if it has been determined the member has committed a disciplinary offence. Hence, the disciplinary process is integral to the maintenance of the public trust.

¹ Amery v. Young ALERB #007-093

2. *A fair and just sanction in the circumstances is the goal. The public interest must be considered in those cases where it is engaged.*

The primary purpose of discipline is to correct and educate. However, with police officers who have recent, prior discipline on their file, specific deterrence resulting in more punitive consequences for the officer must also be factored into subsequent penalties. This is particularly the case when the subsequent misconduct has a related theme.

Any penalty assessed must be appropriate to the circumstances of the misconduct, as well as personal circumstances of the police officer. Consideration must also be given to the position of the complainant/victim. What effect has the misconduct had on them, and do they have a position on penalty. A complainant/victim is but one stakeholder in the outcome of the process.

The penalty must be fair, and the reasons for the penalty clearly stated. This is important for all parties. An open and transparent process culminating in a justifiable and understandable penalty gives the police disciplinary process credibility in the eyes of the cited officer, the complainant, the public, as well as the members of the Police Service.

3. *In cases where organizational or administrative factors have played significant roles in contributing to the misconduct that contribution must be considered. In those instances, organizational policy or procedure should take priority for correction. Any individual discipline imposed in such circumstances must consider the overall context.*

Not applicable.

4. *A remedial approach which seeks to correct and educate, rather than to punish, should be considered as a priority in those circumstances where it is appropriate. In the Alberta context Regulation 17 (3) promotes the use of special training or professional counseling. The constructive use of this option, in some circumstances, may work to achieve this goal.*

This incident should not have occurred. The interaction between [REDACTED] and [REDACTED] escalated to a point where neither individual was going to back down. This resulted in [REDACTED] deciding he was going to take [REDACTED] into custody and a using a disproportionate degree of force to do so.

[REDACTED] has, with the benefit of hindsight, seen that there were other ways he could have handled this matter. His ability to de-escalate matters was noted in a Behavioral Event authored by [REDACTED] Why he did not employ that skill in this instance is a mystery.

Additional training in De-escalation Techniques is warranted.

5. *Both aggravating and mitigating factors should be considered in determining a just sanction or punishment.*

(a) Previous good record of the officer

██████████ has an excellent service record. He has ten positive Noteworthy Events on his file which exhibited some exceptional qualities as a police officer. These events were authored by Sergeants, Acting Sergeants, and peers, all who compliment ██████████ for his abilities, and his willingness to go beyond the norm. From reviewing his PEAKS Assessments, I am able to determine he is well thought of by his supervisors, District Commanders, as well as his teammates. They further state he is an organized police officer who manages his work very well.

(b) Long service of the officer

██████████ has over eight years of service with the Calgary Police Service. He is currently at the pay level of Senior Constable Level II.

(c) Whether or not the misconduct was an isolated incident in the employment history of the officer.

██████████ has two Official Warnings on his file from 2019. These warnings arose from the same incident where he used inappropriate language towards a minor female, and then failed to make notes on the incident. I do note that an aspect of the admitted count in this matter states ██████████ made inappropriate remarks or comments to ██████████. This is conduct similar in nature to that for which he received the Official Warning. This is an aggravating factor.

(d) The existence or absence of provocation.

It is stated in the Agreed Statement of Facts, ██████████ was causing a disturbance by yelling. He was warned he would be arrested if he did not calm down. ██████████ demeanor was uncooperative. He had just been the victim of a violent robbery where he was struck in the face with a bottle and pepper sprayed. His demeanor at the time was totally understandable. He was not posing any type of threat.

I find that there was no form of provocation on the part of ██████████ that caused the actions of ██████████

(e) Whether or not the misconduct was premeditated or was done on the spur of the moment being aberrational in nature.

██████████ physically engaged ██████████ to take him to the ground to control him. He reacted to the situation as it presented itself. This was a spur of the moment decision that he acted upon.

(f) Whether the imposition of a particular penalty will create a special economic hardship for an officer in light of his/her particular circumstances.

Not applicable.

(g) Evidence that the rules or internal policies of the police service (written or unwritten) have not been uniformly enforced or applied, thus constituting a form of discrimination.

Not applicable

(h) Evidence indicating that a police officer misunderstood the nature or intent of a given order or directive and as a result disobeyed it.

Not applicable.

(i) The seriousness of the misconduct. In circumstances involving a member of the public the impact or consequence to that person, or persons.

Excessive or unnecessary use of force is by its nature, serious misconduct. Police officers are given legal permission to apply force only in appropriate circumstances and to the right degree. When either of these two conditions are not met, appropriate disciplinary consequences must follow.

██████████ had just been the victim of a violent robbery. He had been pepper sprayed and hit in the face with a bottle. When the initial police officers arrived, ██████████ declined to provide a statement to them. The surveillance video then showed ██████████ standing alone by a vehicle in the parking lot. He was approached by ██████████. There was no information whether the officers knew what ██████████ role in the event was, but it would be reasonable to conclude he was not a suspect in the robbery. He had already been spoken to by the police. Having been assaulted and pepper sprayed, he would have physically exhibited the signs. A police officer is well versed in the effects of pepper spray and would readily be able to identify someone who had recently been sprayed. ██████████ wanted to be left alone.

The interaction between ██████████, and ██████████ became heated with ██████████ yelling and becoming belligerent. ██████████ in return told him he would be arrested if he continued to yell.

██████████ missed the fact that it was the presence of the police at the moment that agitated ██████████. Prior to being engaged by ██████████ he was standing by himself in the parking lot. The first sign that ██████████ was not going to cooperate was an opportunity for the officers to disengage or to simply help and to empathize. There was little regard for the fact that ██████████ had been recently and violently assaulted. Instead, he was threatened with

arrest. Given [REDACTED] had just been robbed and assaulted, I can easily see how this would agitate him further. When [REDACTED] went to take physical control of [REDACTED], he pulled away. With the officers on each side, he is taken to the ground. The dynamics of the take-down have not been described, but the ASF states he went first to his knees. He would not have been thrown to the ground. [REDACTED] then placed a knee on his upper back. This would tell me he had been proned out onto his stomach. [REDACTED] then struck [REDACTED] in the head with his left hand, in what the defence described as a stun. In the words of his Counsel, he did this as he “*believed the best way to get control of him and to try to have something register with him was to use that one stun.*” During this time, he told [REDACTED] to “shut up.”

The failure of [REDACTED] to fully evaluate the overall situation and to have the incident escalate to the point that it did is unfortunate. As it escalated, he threw fuel on the fire with the threat of arrest, which he then executed with a takedown and stun.

The normal use of a stun is to distract in order to gain compliance and in most instances that is to have someone relinquish their hands for handcuffing. It is not to be used to get someone to be quiet. Although [REDACTED] was detained, he was not handcuffed after he was taken to the ground. He was restrained and then allowed to get up. He was released from custody and he was not charged. This raises the point of the necessity in using force which I will discuss later.

[REDACTED] was rightfully concerned with the actions of [REDACTED]. He made his complaint against the officer the same day as the incident occurred and he attended the Hearing in person. He has a vested interest in the outcome of these proceedings. He was a victim of a violent robbery who shortly after was victimized by a police officer.

(j) Officer cooperation, frankness, and overall attitude.

[REDACTED] has pleaded guilty to count #2 and has accepted the fact that his actions were inappropriate. A hearing with numerous witnesses has been avoided. He is aware there were ways to de-escalate the incident that he did not employ, and he states he has learned from this. His apology to [REDACTED] via his Counsel was genuine.

(k) Circumstances of mental or emotional stress or a context of substance addiction or drug dependence. In considering such circumstances the likelihood of future misconduct arising from the same cause or causes is an important factor.

Not applicable

(l) Other mitigating or aggravating factors unique to the personal circumstances of the officer or the misconduct involved.

Not applicable

6. Deterrence of other police officers and maintenance of public respect of the police are legitimate goals in the context of police discipline.

When a police officer employs inappropriate, unnecessary, or excessive use of force, it casts a shadow onto all police officers. Any penalty assessed must take into consideration the deterrent factor it needs to have on other police officers.

Use of force is top of mind for most of the public when they are asked about police misconduct. The majority of the public will support a police officer where the use of force was necessary, and appropriate to the circumstances. They will not and should not support the use of force when it is unnecessary or excessive.

Police officers who use force in those circumstances need to know they are accountable and may face serious disciplinary sanctions. Any penalty assessed for such misconduct needs to consider the deterrence factor.

7. *Consistency in disciplinary sanctions should be strived for. Like instances of misconduct should attract like sanctions.*

Consistency with like sanctions is a worthy objective and it has been the point of discussion in several Alberta court decisions. In those decisions, they also address how it is the facts of a matter that should determine what an appropriate penalty should be. Penalties from other matters provide an excellent guideline for a Presiding Officer on what an acceptable range of the available penalties is but imposing a penalty is a subjective process that is as individual to the circumstances of the matter, as it is to the circumstances of the cited officer.

The Presenting Officer has offered several matters as like cases. These will be discussed in the next portion of this decision.

Discussion re penalty

The position of the parties on what is an appropriate penalty is that a forfeiture of hours would be appropriate. The Presenting Officer suggests the number of hours should be in a range, higher than the like cases she provided. Counsel for the cited officer states he would have asked for a reprimand if not for the prior Official Warnings, so he submitted a forfeiture of ten hours would be warranted.

The like cases offered by the Presenting Officer are as follows:

EPS and [REDACTED] 2018 Arriving second on scene the member's observations were that another officer was on top of a suspect, but the suspect had not given up his

hands and was flailing his arms and legs. The suspect was not complying with verbal directions. The Member applied inappropriate force to B.B. by administering a kick to his head during his arrest. The cited officer was charged with UUEA s.5(2)(i)(ii). He received a forfeiture of 10 hours accumulated through overtime.

CPS and [REDACTED], 2015 The member conducted a traffic stop on a driver who was issued a traffic violation ticket. Upon receiving the ticket, the driver drove away. He was immediately stopped again for not producing his driver's license during the first stop and in regard to an arrest warrant that had been identified during the first stop. The member used profanity and insulting language during a conversation with the driver after placing him inside a police vehicle and struck him in the face. The member entered false information into his notes and an occurrence report with respect to when the member learned of the outstanding warrant for the driver. The member was charged and found guilty of: UUEA s. 5(2)(i)(i); Discreditable Conduct s. 5(2)(e)(viii); Neglect of Duty s. 5(2)(h)(i); Discreditable Conduct s. 5(2)(e)(viii); Deceit s. 5(2)(d)(ii): As a penalty, he was suspended without pay for 10 hours, suspended without pay for 20 hours, suspended without pay for 10 hours, reprimanded, and suspended without pay for 40 hours.

Smith v Chief of Police of the Edmonton Police Service, 2013 CanLII 78548 (AB LERB). The member conducted a traffic stop on a taxi, to speak to a passenger who had yelled obscenities at the police. The citizen refused to exit the taxi and the appellant took the citizen from the taxi, utilized OC (pepper) spray on him and drew his firearm to force another passenger in the taxi to return to the vehicle. The citizen was arrested for obstruction, transported to police headquarters, and subsequently driven to his hotel. The member was charged and found guilty of UUEA s. 5(2)(i)(ii): Penalty: Suspension without pay for 10 hours.

CPS and [REDACTED], 2015. While assigned to the Arrest Processing Unit, while in a physical confrontation, the member struck an injured female prisoner 3 times in the face. The member failed to document the use of force as per CPS policy. She was charged with UUEA s. 5(2)(i)(ii) and Insubordination s. 5(2)(g)(ii) and received a forfeiture of 20 hours overtime and a reprimand.

Thursby v Chief of Police, 2013 CanLII 88626 (AB LERB). Constable Thursby was alleged to have kicked or stepped on Mr. C.D.'s head while Mr. C.D. was handcuffed and lying on the ground. Mr. C.D., who was involved in the RCMP pursuit, was not engaging in any type of violent conduct when Constable Thursby applied force to him, there were no injuries. He was charged with UUEA s. 5(2)(i)(ii) and suspended without pay for 15 hours. The penalty was upheld on appeal to the LERB.

I will first speak to the CPS matter of [REDACTED] While the [REDACTED] matter originally involved a count involving unnecessary or excessive use of force, that count was withdrawn. The penalty assessed does not reflect a count involving the use of force. The count of discreditable conduct for using profane or abusive language is applicable to this matter however in [REDACTED] the language was profane, vulgar, and repeated. This

is dissimilar in nature to this matter. I do not hold [REDACTED] as a like case relating to use of force.

The EPS matter of [REDACTED] involved the member “shuffle kicking” a robbery suspect’s head while being taken into custody by another police officer who was seen as an active resister. In [REDACTED] the suspect suffered a broken nose, as well as a hematoma to his right eye. [REDACTED] charge was for using an untrained and unsanctioned use of force technique.

In Thursby, the officer stepped on the head of a fourteen-year-old suspect who was handcuffed and proned onto the ground. The suspect had been the passenger in a car pursued by the RCMP and was offering no resistance.

The type and level of force used in these instances in my view is more serious than the type and level of force used by [REDACTED]. That being said, I also view the penalties as lenient given the nature of the misconduct and its circumstances.

The EPS matter of [REDACTED] involved the improper use of pepper-spray. It has some similarities, in that the officer was dealing with an uncooperative subject. The use of pepper-spray was deemed inappropriate under the circumstances.

The CPS matter of [REDACTED] is the most similar in nature to the matter before me. [REDACTED] was working in the Arrest Processing Unit dealing with an uncooperative and violent intoxicated female who was exhibiting suicidal tendencies. During their interaction, [REDACTED] struck the complainant in the face/head three times as “stuns” in order to gain compliance. Like [REDACTED], she stated, after the fact she realized there were other options she could have employed. [REDACTED] did not have any prior discipline on her file. I also note that the penalty assessed in [REDACTED] was the product of a joint submission of the parties.

Several additional CPS use of force matters that have come before me are worthy discussion.

CPS and [REDACTED], 2013 [REDACTED]. [REDACTED] arrested an intoxicated individual and took his prisoner to the Arrest Processing Unit. The male was vocal and belligerent. While escorting the male between the booking area and the medic room, [REDACTED] struck the male in the face/head using a closed fist. The victim was not injured. [REDACTED] was found guilty of s. 5(2)(i)(ii) *PSR* and penalized with a suspension from duty without pay for a period of forty (40) hours.

CPS and [REDACTED], 2014 [REDACTED]. The member arrested a female subject and transported her to the Calgary Police Service Court Services Section, placed her on a bench and shortly thereafter struck the female across her head with his hand. The subject was handcuffed and heavily intoxicated. She was not injured. [REDACTED] was reduced in seniority within the rank from Senior Constable Level I to 1st Class Constable (5th year) for a period of two years. Prior similar discipline was on his file.

CPS and [REDACTED], 2015/[REDACTED]. The member arrested a female, transporting her to the hospital for assessment under the Mental Health Act. The prisoner was restrained with handcuffs and leg restraints, lying on the floor being loud and belligerent. The member grabbed the prisoner's lower body by means of her hands, arms and restraint strap, and pulled her up in the air. The member struck the prisoner in her lower body with his hand and flipped her over onto her stomach onto the floor. The member compressed the prisoner's legs against her lower back. The member put the leg restraint strap through the handcuffs on the prisoner, hog tied her and pulled back on the strap. The member was found guilty of UUEA s. 5(2)(i)(ii) PSR for the use of force, and Insubordination s. 5(2)(g)(ii) PSR for the improper use of the leg restraint (Hog-tying). He was suspended without pay for 80 hours for count one, and order to forfeit 40 hours on count two.

The first matter with [REDACTED] is similar in nature to the matter before me in that the male was vocal and belligerent. [REDACTED] contended the male attempted to bite him. This was rejected as it was found that his belief was not objectively reasonable.

In the second matter involving [REDACTED], the subject was handcuffed, seated and was also vocal and belligerent. [REDACTED] struck the subject in the head once.

In both of these matters, the officer used a single strike against a person in his custody.

In the [REDACTED] matter, the use of force was excessive against a person in his custody but not for criminal matters.

The three matters noted above show significantly harsher sanctions than the matters offered by the Presenting Officer. I refer to these matters to show that penalties vary widely with some similar facts.

In crafting an appropriate penalty, the *Alberta Court of Appeal* in *Furlong*² stated:

*"The task before the Presiding Officer and the Board was to select a fit sanction for the respondent, having regard to the misconduct for which he was being sanctioned. The fitness of a sanction depends on numerous factors, **and is particularly sensitive to the factual underpinnings of the offences.** The factors mentioned in *Amery v Young*, *Lingl v Calgary Police Service* and other decisions will be relevant in many cases. The appropriate sanction will depend on **the seriousness of the misconduct, the moral culpability of the constable, the existence of remorse and recognition of responsibility, the consequences for the public and the administration of law that resulted, the need for deterrence, denunciation or rehabilitation, the overall fitness of the constable for police service, the impact that the misconduct had on the relationship between the constable and his police service, and any other relevant factor.**"*

(Bolding and underline added)

² Edmonton (Police Service) v Furlong, 2013 ABCA 121 para 36 (CanLII)

I noted a comment in [REDACTED] 2018 Assessment authored by [REDACTED] [REDACTED] which was six months after this incident occurred. It reads as follows: *“Through the year, I have had discussions with [REDACTED] regarding Use of Force and over the last months, I feel [REDACTED] has worked hard to push that line in the sand a bit farther back and to show a little more patience in the calls he deals with.”* I also note, [REDACTED] was present at the scene of the incident before me. The comment of [REDACTED] is directly on point to the matter before me and must be considered in my assessment. It indicates [REDACTED] has a penchant to use force when other options are available. This is concerning and must be taken into consideration; however, it also mentions he has worked on addressing the observation.

In fairness, another comment by [REDACTED] which I referenced previously stated: *“[REDACTED] has proven time and again his excellent verbal judo skills as he is very articulate when de-escalating situations and gaining compliance from a variety of individuals including victims, offenders and witnesses.”* This tells me he has some skills relating to de-escalation. The issue here appears to be an inconsistent application between the use of force, and de-escalation.

Mr. Wilson submits the matter took two and a half years from the date of the incident to the Hearing. As pointed out by Counsel, a significant portion of that time is attributed to the Crown in its review. The matter has hung over the head of the cited officer and this should be considered a mitigating factor when formulating the penalty. The period of time this matter has taken cannot be attributed to the cited officer. [REDACTED] [REDACTED] was not suspended. He was not placed on modified duties or placed in an administrative role. I agree having an outstanding disciplinary matter can cast a shadow onto a police officer and add a level of stress but at what point should it be given favourable consideration? It is unfortunate these matters take as much time as they do. It is not uncommon for there to be five years from the date of occurrence to when a matter gets to a Hearing. Efforts are being undertaken to reduce these times. The time frame for this matter has in fact been quicker than most. That being said, I do take the timeframe of this matter into consideration.

Police officers receive a significant amount of training in the use of force, the use of intermediate weapons and firearms. Their training is updated annually in some of these areas. There have been significant amounts of discussion about the “Warrior” win at all cost attitudes taught to police officers in the past. There is no doubt there are times where winning at all costs is necessary, but not in all situations. That is where judgment and the knowledge of a police officer’s legal authorities come into play. As well, sometimes simple common sense. A question to ask one’s self is going for the win worth it. In this case, it was not and there were no winners. There are times when “standing down” and stepping back are the best options.

The Presenting Officer has requested [REDACTED] be ordered to report to the Calgary Police Service Wellness and Resiliency Division and Human Resources

Services Section for assessment and be specifically assessed for anger management issues. The submission is opposed by [REDACTED] Counsel.

Ms. Campbell has not provided a foundational basis for this request. There is no indication [REDACTED] acted out of anger. The take down was controlled, and the single strike was described as a stun in order to gain compliance. My interpretation of the takedown and strike were that they were the result of poor decision making, and an improper assessment of the circumstances. His use of language telling [REDACTED] to "shut up" was not profane or vulgar which would be more in-line with an angry outburst.

Instead of referring this matter to the Wellness and Resiliency Division, my assessment of the incident tells me [REDACTED] could use additional training in de-escalation. He needs to make better decisions as to when and to what extent, the use of force can be applied.

[REDACTED] was a victim of a crime. His interaction with the officer's became heated resulting in him causing a disturbance. In my view, [REDACTED] contributed to [REDACTED] creating this disturbance by not disengaging. When [REDACTED] chose to detain [REDACTED] which in my view was a poor exercise of judgment, albeit likely lawful, he suffered minor injuries (skinned knees) as a result of being taken to the ground. There is no evidence of injury from the strike. This is fortunate, because if the injuries had been more serious, so would be the sanction. I also must make the comment, that taking someone to the ground in order to detain them should be the exception, not the rule. Often time, injuries result from such a maneuver. When two police officers are present with one on each side as was the case here, arm control can most times achieve the same goal.

The parties agree that a forfeiture of hours would be an appropriate penalty in this matter. I also agree. I do not agree with the cited officer's Counsel that a reprimand would be appropriate if not for the discipline on file. I also do not agree that a ten-hour forfeiture is appropriate. Such a penalty does not reflect the seriousness of an inappropriate or unnecessary use of force. It also provides little to no effect as a deterrent for other police officers. And I do not believe it would be seen as appropriate to [REDACTED], or the public at large given the situation which led up to the use of force in this case.

I am guided by the like cases provided however other than the second [REDACTED] matter, in each of those cases, none of the cited officers had prior discipline on file. This is an aggravating factor and in particular to the point one of the Official Warnings on file relates to the use of inappropriate language. The penalty in the second [REDACTED] matter is an example of progressive discipline.

ORDER

On count #2, Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the *Police Service Regulation*, as further defined by section 5(2)(i)(ii) of the *Police Service Regulation* as by applying inappropriate force in circumstances in which force was used, pursuant to section 17(1)(b) of the *Police Service Regulation*, I order that [REDACTED], forfeit thirty (30) hours of work accumulated through overtime. The forfeiture of hours will be immediately taken from the cited officers time-bank.

In addition, pursuant to section 17(3) of the *Police Service Regulation*, [REDACTED] is ordered to undergo training in “De-escalation Techniques” as to be determined by the Calgary Police Service Human Resources Services Section. The training is to be undertaken at the earliest opportunity taking into consideration, and imposed COVID restrictions.

Original Signed

Superintendent Paul Manuel (Ret'd)
Presiding Officer

Presenting Officer: Ms. Valerie Campbell
Counsel for the Cited Officer: Mr. Cory Wilson

Issued at the City of Calgary, in the Province of Alberta, December 17th, 2020