

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

BETWEEN:

THE HAMILTON POLICE SERVICE

AND

POLICE CONSTABLE DENNIS ZIVOLAK #651

CHARGE: DISCREDITABLE CONDUCT

DISPOSITION WITH REASONS

Before: Superintendent James E. Anderson
Hamilton Police Service

Appearances

Counsel for the Prosecution: Mr. Marco Visentini
Hamilton Police Service

Counsel for the Defence: Mr Belchar Arruda
Hamilton Police Association

Hearing Date: February 21, 2018

1. The exhibits for this matter are listed in 'Appendix A'. To alleviate unnecessary repetition, all exhibits will be referred to by number without preface of 'Appendix A'.
2. The undersigned was designated (exhibit 1) as Hearing Officer in respect to the charge of discreditable conduct against Constable Dennis Zivolak as laid out in the Notice to Hearing (exhibit 3) as follows:

“You are alleged to have committed Discreditable Conduct in that on or about June 28, 2017, being a sworn member of the Hamilton Police Service, you were found guilty of assault contrary to the *Criminal Code*, a criminal offence that is an indictable offence or an offence punishable on summary conviction, thereby constituting an offence against discipline as prescribed in section 2(1)(a)(ix) of the Code of Conduct, Regulation 268/10, as amended.”

3. Constable Zivolak pleaded guilty to the above referenced charge.
4. An Agreed Statement of Facts (exhibit 4) on which the plea of guilty was made was read to me as follows:

“On September 28, 2016, while off duty, Police Constable Dennis Zivolak (“Zivolak”) was at the home he shared with his common-law spouse, X.Y.

Zivolak and X.Y. were involved in a common-law relationship for over 10 years. They lived together at their home in Brantford. They both have children from previous relationships. X.Y. is significantly smaller, physically, than Zivolak.

At the time of this incident, on the evening of September 28, 2016, the relationship between Zivolak and X.Y. was in decline. There was tension in the household concerning money and other issues. That evening, after both returned home from work, there was an argument that included screaming and name calling, admittedly initiated by Zivolak. They separated for a period of time; X.Y. went to the master bedroom, Zivolak went to the basement.

Just after 10:00 p.m. that night, Zivolak confronted X.Y. in the master bedroom. X.Y. was sitting on the bed texting on her cell phone as Zivolak stood next to her. He was angry. He grabbed the cell phone from her. The argument became physical as X.Y. tried to retrieve her cell phone from him.

As a result of the struggle over the cell phone, as Zivolak kept it away from her, Zivolak asserted force in pushing her away, causing X.Y. to fall once into the computer room.

X.Y. left the home, and called 9-1-1 from a neighbour's home. The police arrived. Police observations of X.Y. included that she appeared visibly shaken and upset. She complained of soreness in her right knee. The police noted redness to the right side of her neck, a hole ripped in her white t-shirt and other red scrapes.

As a result of his actions on September 28, 2016, Zivolak was arrested and charged with assaulting causing bodily harm, contrary to section 267(b) of the *Criminal Code of Canada*.

On June 28, 2017, Zivolak appeared before the Honourable Justice Amlin in the Ontario Court of Justice in Brantford, Ontario and entered a guilty plea to the criminal offence of assault, contrary to section 266 of the *Criminal Code of Canada*. A redacted Certified copy of the Court Information is attached hereto as Appendix A.

Upon considering the facts as read into the court record, Zivolak's plea of guilt, and the submissions of both the Crown and the defence, Justice Amlin found Zivolak guilty of the criminal offence of assault.

Following the finding of guilt, Justice Amlin imposed a conditional discharge with a 18-month period of probation, with conditions. In addition, Justice Amlin ordered that Zivolak perform 25 hours of Community Service. The redacted Transcript of the Proceedings at Plea is attached hereto as Appendix B."

5. Constable Zivolak acknowledged the facts as being substantially correct.
6. I concluded that the facts as accepted were clear and convincing and sufficient for a finding of guilt and to enable penalty to be considered.
7. I was asked to accept a joint-submission as to penalty reached between the prosecution and the defence. A proposed penalty of a one year demotion to second class was submitted for consideration.
8. Oral submissions with respect to the proposed Joint Penalty were made by both Mr. Visentini for the prosecution and Mr. Arruda on behalf of Constable Zivolak.
9. Following submissions, and on agreement of both parties, I advised that I would in due time

deliver a written decision on penalty with reasons as I have herein.

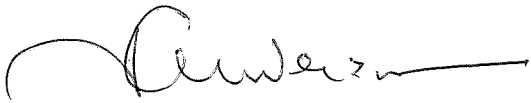
10. To be accepted, a joint submission as to penalty must meet the test of fairness as measured not only by being consistent and proportional having regard to specific facts of the case but as well, being consistent with the disposition of cases that may be regarded as similar while recognizing that the facts of each case will vary.
11. I was referred to page 13 of *Williams and the Ontario Provincial Police (1995) OCPC* in which is stated the three elements that must be considered as one determines the continued usefulness of an officer to their Service when a misconduct occurs. They are: the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police force that would occur should the officer remain on the force.
12. I was also referred to pages 12-13 in the case of *Krug and Ottawa Police Service (2003)* in which is listed the factors previously identified by the Commission and summarized by Paul Ceysens in *Legal Aspects of Policing* as those to be taken into consideration when determining penalty. It goes on to state that there is no requirement to give more weight to one factor over the other and that aggravating factors can serve to diminish the weight to any mitigating factors.
13. The principles start with the recognition that the public in this Province holds the police in a position of high trust and accountability. The public grants police officers extraordinary powers but in return it holds them to a higher standard of behaviour than citizens at large - whether on or off duty.
14. As a result, the penalty must be regarded as being in the public interest. Given the facts provided and along with the consideration of the mitigating factors noted below favouring the constable, I am satisfied that the public interest is served with the proposed penalty.
15. The seriousness of the misconduct is a fundamental consideration. Domestic violence is a very serious matter; one that the Hamilton Police Service has worked tirelessly with our community to reduce or eliminate. The victim, in the Victim Impact Statement read to the court during the criminal proceedings, underscored the impact of the domestic violence on her. The nature of the offence and subsequent finding of guilt for assault in a criminal court makes this a very serious matter. When an officer is found guilty of assault they risk losing the trust of the public and their colleagues. When trust is gone, their usefulness as a police officer becomes questionable. Constable Zivolak has a road to travel to restore the trust and confidence in him by the public.
16. I am satisfied that the plea in both the criminal court and in this tribunal along with the joint submission demonstrates recognition of the seriousness of the offence and acceptance of responsibility by Constable Zivolak. The early plea also brings this matter to an end and in the public interest eliminates a further demand of time and resources.

17. I am satisfied that the officer has by his statements accepted the seriousness of his conduct and demonstrated remorse.
18. I note from the employment history of the constable that this is the only disciplinary matter in his personnel files after over 30 years of service and that other than this incident his employment has been exemplary. A review of Performance Appraisals shows Constable Zivolak as a reliable, committed, and compassionate officer with the support of his peers and supervisors (exhibit 6).
19. I was referred to the details eleven commendations (exhibit 7) in the submissions by Mr. Arruda. They portray an officer committed to public safety. I am satisfied that they are consistent with those of an exemplary officer.
20. This conduct was in my view a 'one off' occurrence for Constable Zivolak and nothing of the kind is likely to occur in the future. However, should he appear before this Tribunal again for a similar circumstance, he was told and is aware that his employment will be in jeopardy.
21. It cannot be disputed the negative impact this incident will have on the reputation of the Hamilton Police Service due to publicity attracted through both the criminal trial and this proceeding. At risk as well, given the nature of the circumstances surrounding the assault, is the reputation of the Service among the community interest groups advocating against domestic violence and for the victims which the Service has worked so hard at developing. By his conduct related to the related proceedings, particularly with this quick plea, Constable Zivolak has limited the damage to the reputation of the Police Service.
22. The importance of the proposed penalty comes from the acceptance of conduct as being inappropriate. The boundaries of personal conduct are reinforced here for all officers making clear the significant personal, professional, and financial consequences one will suffer under similar circumstances. The additional warning that one's employment would certainly be in jeopardy if the behaviour is repeated concretizes the specific and general deterrence threshold for all.
23. It is often not understood that the loss of an opportunity for advancement in the face of a potential penalty as the one imposed, when accepted does also operate as deterrence by the officer and others.
24. The impact of the public nature of the disciplinary process on the officer and his family were expressed in a statement by Constable Zivolak made through Mr. Arruda. The officer stated that he regrets any embarrassment this has brought onto his family and the Hamilton Police Service. The prosecution submitted that the salary impact of the jointly submitted penalty on the Zivolak family is approximately \$20,000 over the period of the proposed demotion. Mr. Arruda submitted that the combined total of all related costs related to this matter to Constable Zivolak amount to

over \$45,000 should the joint submission on penalty be imposed.

25. I note that by virtue of this charge being outstanding in one sense since January 2017, the officer has been deprived of the opportunity to earn extra income by performing voluntary paid duties in the intervening time which would have otherwise have been available to him.
26. In order to satisfy the factor of consistency of disposition, I was offered the case of *Hamilton Police Service and Daniels (2014)* as being similar in fact. In that case Daniels received a conditional discharge with a 12-month period of probation in criminal court for a domestic related assault and was subsequently demoted for a period of 12 months. I am satisfied with the assertion that the facts in issue were similar enough to consider it for this purpose.
27. Upon review of the information presented, the filed material, and for the above reasons I am satisfied to accept the joint submission as to penalty. Pursuant to Section 85(1)(c) of the *Police Services Act*, R.S.O. 1990, Constable Zivolak will be demoted from 1st Class Constable to 2nd Class Constable for a period of one year (12-months) effective the 25th day of March, 2018.

Dated at Hamilton this 19th day of March, 2018

A handwritten signature in black ink, appearing to read "Anderson", with a long horizontal flourish extending to the right.

Superintendent James E. Anderson
Hearing Officer

APPENDIX A

Exhibit No.	Description of Exhibit	Submitter
1	Delegation of Powers and Duties to Hearing Officer	Prosecution
2	Designation as Prosecutor	Prosecution
3	Notice of Hearing	Prosecution
4	Agreed Statement of Facts	Prosecution
4 – Appendix A	Criminal Information C16001936 DV, 25 January, 2017	Prosecution
4 – Appendix B	R. vs. Zivolak, Transcripts of Proceedings at Plea Transcript, June 18, 2017 OCJ	Prosecution
5	<ul style="list-style-type: none"> • KRUG and Ottawa Police, OCCPS, 21 January, 2003 • WILLIAMS and Ontario Provincial Police, OCCPS, September 18, 1995 • Hamilton Police and DANIELS, 09 September, 2014 	Prosecution
6	Performance Appraisals 2006, 2007, 2009 - 2012, 2014 - 2016	Defence
7	<p>Commendations:</p> <ul style="list-style-type: none"> • Stolen auto recovery, 88/10/17, Insp. Hanmer • Drugs on traffic stop, undated, S/Insp. R. Slack • B&E arrest, 1990, Insp. R. Pope • obstruct arrest, 90-11-05 • Dedication and Professionalism, 21 Mar 91, Insp Pope • Crime Scene Protection, 91-02-07, Sgt. Graham • B&E arrest, 91-04-19, Insp. R. Pope • Courageous actions, 94-02-18, Insp. G. Williams • Stolen Auto Arrest, 95-02-08, Inps. G. Williams • Safe Unit POP Project, January 24, 2005, Insp. Stewart • Level 2, Negotiator – Suicidal Male, April 11, 2014, Supt. Goodes-Ritchie 	Defence

