

**OTTAWA POLICE SERVICE DISCIPLINE HEARING
IN THE MATTER OF ONTARIO REGULATION 268/10**

**MADE UNDER THE POLICE SERVICES ACT, RSO 1990,
AND AMENDMENTS THERETO;**

**IN THE MATTER OF
OTTAWA POLICE SERVICE**

AND

CONSTABLE MOHAMED MOHAMED, #90328

CHARGE:

1. DISCREDITABLE CONDUCT

DECISION WITH REASONS

Before: Superintendent (Retired) Chris Renwick.

Counsel for the Prosecution: Ms. Vanessa Stewart.

Counsel for the Defence: Mr. Michael Smith.
Mr. Paolo Giancaterino.

Disposition Hearing Dates: June 28, 2023.
July 19 and 21, 2023.
August 10-11, 2023.
September 28-29, 2023.

Constable (Cst.) Mohamed Mohamed is before this Tribunal accused of the following *Police Service Act (PSA)* charges:

Count one: Discreditable Conduct

Cst. Mohamed is alleged to have committed Discreditable Conduct in that on or about April 26, 2021, he did, without lawful excuse, act in a disorderly manner or in a matter prejudicial to discipline or likely to bring discredit upon the reputation of the Ottawa Police Service. While off-duty and on extended leave, and having no connection to an investigation of a Break and Enter, he attended the location of the property manager as a police officer, thereby placing himself on duty, and interfered with an investigation by attempting to view and attempting to have the occupant view footage of the Break and Enter, thereby constituting an offence against discipline as prescribed in section 2(1)(a)(xi) of Schedule 1 of the Code of Conduct, Ontario Regulation 268/10, as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Count two: Insubordination

Cst. Mohamed is alleged to have committed Insubordination in that on or about April 26, 2021, he did, without lawful excuse, neglect to carry out a lawful order, namely Ottawa Police Service Policy #2.02 on Duty Books/Note Taking pertaining to the making of electronic or written notes to document his involvement in the Break and Enter investigation. Furthermore, he failed to notify investigators with the Break and Enter Unit thereby constituting an offence against discipline as prescribed in section 2(1)(b)(ii) of Schedule 1 of the Code of Conduct, Ontario Regulation 268/10, as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Representation

The seven day, in-person hearing commenced on June 28, 2023, at Ottawa Police Service's (OPS) Huntmar Community Boardroom, 211 Huntmar Dr., Ottawa and at the Professional Development Centre, 1385 Woodroffe Ave., Ottawa, Ontario. Ms. Vanessa Stewart represented the OPS as Prosecutor with Mr. Michael Smith as counsel for Cst. Mohamed and Mr. Paolo Giancaterino providing submissions on behalf of Cst. Mohamed for the Application for Recusal portion of the hearing.

Overview

The first appearance convened via teleconference on July 28, 2022 with OPS Superintendent (Supt.) Chris Rheume presiding as the designated Hearing Officer. Four subsequent teleconference appearances were held with Mr. Smith appearing as new counsel for Cst. Mohamed on November 1, 2022 and hearing dates were set for June 28-29 and July 19-21, 2023.

A sixth teleconference continuation was held on June 20, 2023 to address a scheduling conflict with Supt. Rheume. It was decided that the way forward was the designation of a new Hearing Officer to avoid any significant delay to the June 28, 2023 start date. The OPS designated myself, Supt. (retired) Chris Renwick, as the new Hearing Officer, effective June 22, 2023, at which time a seventh appearance videoconference was held.

During the videoconference, Mr. Smith raised concern to the “eleventh hour” designation of myself and indicated that he would be bringing forth an Application for Recusal and required time for the application to be investigated and prepared. Ms. Stewart advised the Tribunal that an Application for Recusal was being initiated by the Defence should Supt. Rheume have continued as Hearing Officer, and that the Prosecution would oppose any adjournment of the June 28, 2023 hearing date. It was the decision of the Tribunal that the in-person session would commence with the hearing of a Motion for Adjournment.

Motion for Adjournment

The in-person Motion for Adjournment was heard on June 28, 2023. Mr. Smith provided oral submissions for Cst. Mohamed, the Applicant. Ms. Stewart followed and entered a written Response to the Applicant’s Motion for Adjournment (exhibit #12), a Book of Authorities (exhibit #14), and provided oral submissions for the OPS, the Respondent.

Mr. Smith submitted that he would be bringing a formal Motion of Bias and asked for the Hearing to be adjourned to the July 19-21, 2023 scheduled dates to hear the motion. In his oral submissions, Mr. Smith focused on five considerations: the timing of the request; the reason for the adjournment; the reasonableness of the request; prejudice to the parties; and the remedy available to the Tribunal.

Timing of the request: Mr. Smith submitted that the appropriate time to table a Motion of Bias is at the beginning of the hearing, in fact at this very point, and not at the end which would cause a delay to the closing. In this scenario the bias is present from the beginning and is not as a result of evidence of bias surfacing during the hearing process.

Reason for the adjournment: Mr. Smith submitted that the adjournment request is to provide the Applicant time to gather robust and complete information, and investigate concerns raised by the Respondent Officer since learning of the designation of myself as the new Hearing Officer. Seven days had elapsed since the change in Hearing Officer, and it would be unreasonable not to grant sufficient time to investigate and prepare submissions.

Reasonableness of the request: Mr. Smith submitted that it is not unreasonable for the Tribunal to provide the time to put together the arguments which would be heard on July 19, 2023, three weeks from the Motion of Adjournment, and a date already scheduled into the hearing.

Prejudice to the parties: Mr. Smith submitted that there is little to no prejudice to the Prosecution should a three-week adjournment be granted. The Respondent Officer is not under suspension and is present at work.

Remedy available to the Tribunal: Mr. Smith submitted that it is important to start the hearing on the right foot and get it right the first time. The Hearing will resume in three weeks and additional dates can be set as early as August. The remedy is to keep the hearing on a reasonable timeline and an adjournment will not derail the process.

In her written response (exhibit #12), Ms. Stewart submitted that the Applicant's intention to make an application challenging the impartiality of the Hearing Officer does not meet the test for an adjournment on the grounds that the Applicant has not provided an evidentiary basis for the application, and that there is no merit to the application of bias.

Ms. Stewart submitted that for adjournments, the issue is whether there is an evidentiary basis for one, not if it is convenient or reasonable. Section 21 of the *Statutory Powers Procedure Act (SPPA)* allows for a hearing to be adjourned from time to time, however case law requires a need for an evidentiary basis with procedural fairness as a guiding principle, but no right to an adjournment.

After citing various cases contained in the Prosecutions Book of Authorities (exhibit #14), Ms. Stewart summarized her oral submissions with seven key points: There is no evidentiary basis for an adjournment; there is a lack of evidence to support one; there is a presumption that the Tribunal is impartial; a perceived bias with Supt. Rheame was raised long before the change in Hearing Officer was made; there is a requirement for a speedy resolution; the respondent and the public have an interest in a timely resolution; and there is no merit to the Application of Bias. Ms. Stewart submitted that the Motion for Adjournment should be dismissed and for the Prosecution to proceed with calling their case.

Decision: Motion for Adjournment

In reaching a decision whether to grant the motion, I carefully listened to the oral submissions of both Mr. Smith and Ms. Stewart and reviewed the Respondent's written submission and Book of Authorities, being aware of the threshold that the Applicant had to surmount based on the cited case law.

In the Applicant's favor, I appreciate that the concerns of a potential or perceived bias was raised on the June 21, 2022 videoconference, the day after notification that I was being designated as the replacement Hearing Officer, and the earliest opportunity for the Applicant to do so. I also considered and put significant weight on the submission of the Respondent that there was clear indication of the intent of the Applicant to bring an Apprehension of Bias Motion against Supt. Rheame, should he have continued as Hearing Officer, just as there is now an application against myself as the replacement

Hearing Officer, with no specifics on the grounds for the perceived bias included in the Motion for Adjournment.

I am in agreement with Mr. Smith that the most appropriate time to bring forward a formal Motion on Reasonable Apprehension of Bias is at the commencement of the hearing (or upon such conduct by the Hearing Officer which raises the question of bias mid-hearing) where the Hearing Officer can formally hear the particulars of the perceived bias and provide a decision on recusal. The issue before me here is whether to grant a three-week adjournment to provide time for the Applicant to gather information and/or evidence to support a formal Application for Recusal.

Within the overarching principles of Natural Justice and Procedural Fairness, I felt it necessary that I fulsomely heard the Application for Recusal at the outset of the Hearing. To do so would require my allowing the Motion for Adjournment to permit a reasonable timeframe for Mr. Smith to prepare and present his application.

The Motion for Adjournment was granted. The issue of delay was mitigated by setting the hearing of the Application for Recusal for July 19, 2023, with a firm commitment for a decision immediately following oral submissions. Should the application be denied, the hearing would proceed on the following day, July 20, 2023, as scheduled.

Motion on Reasonable Apprehension of Bias

The Application for Recusal was heard on July 19, 2023, in-person. Mr. Paolo Giancaterino appeared for the Applicant with Ms. Stewart appearing for the Respondent. The Tribunal received a written Application for Recusal Re: Bias dated July 11, 2023, and the Applicant's Book of Authorities dated July 17, 2023. (Exhibits #15 and #16.) A Respondent's Factum in response to the Applicant's Motion of Reasonable Apprehension of Bias, dated July 14, 2023, and the Respondent's Book of Authorities, both dated July 14, 2023, were submitted by Ms. Stewart. (Exhibits #17 and #18).

Mr. Giancaterino provided a summary of the applicable case law that needs to be considered when determining the test for a reasonable apprehension of bias. Namely, the apprehension of bias needs to be reasonable, the test is objective in that it is based on a reasonable and right-minded person with all the information available, and based on what would the informed person viewing the matter realistically and practically conclude. The person considering the bias must be reasonable, as must the apprehension itself be reasonable. (*R vs. Brown*, 2003 CanLII 52142 (ON CA), *R. v. Elrick* [1983] O.J. No. 515 (H.C.J.), *R. vs. Stark* [1994] O.J. No. 406 (Gen. Div.), *R. vs. S.* (R.D.) [1997] 3 S.C.R. 484 (S.C.C.)).

Mr. Giancaterino further submitted that that there is a strong presumption of impartiality for members of Tribunals, that the onus rests with the Applicant to establish apprehension of bias, the threshold to do so is high, and the applicable test for bias is the balance of

probabilities. The objective nature is to ensure the appearance of a fair, impartial adjudication process.

Specifically, Mr. Giancaterino submitted that there are two facts that underscore this application, thus two areas of concern: The familiar relationship between the Hearing Officer and a member of the Drug Unit and the position previously held within the OPS by the Hearing Officer.

Detective (Det.) Tim Renwick is a member of the OPS Drug Unit and is the younger brother of the Hearing Officer, retired OPS Supt. Chris Renwick. Det. Renwick, as a member of the unit, had direct and clear involvement with the activities that lead to this misconduct hearing. Further, Mr. Giancaterino submitted that Det. Tim Renwick is a direct subordinate of Sergeant (Sgt.) Doug Hill, an intended witness for the Prosecution in this *PSA* hearing. The Hearing Officer will be called to make findings of credibility and reliability of Sgt. Hill who holds a position over Det. Renwick.

Secondly, Mr. Giancaterino submitted that retired Supt. Renwick's former role was to oversee Special Operations and Criminal Investigations of the OPS, which includes the Drug Unit and the Guns and Gangs Unit. Given his former position there would be a natural tendency to favor the work, conduct, and approach taken by his former units. There is a paternal relationship that would be hard to escape.

Mr. Giancaterino submitted that the two areas cannot be looked at separately, rather it is a constellation of factors that leads to the determination of a reasonable apprehension of bias. It must be accepted that there is a strong *prima facie* case that the two relationships (familiar with a member of the Drug Unit and paternal as former superintendent of the unit) would impact the Hearing Officer's ability to decide the case fairly, consciously or unconsciously. What would a reasonable, right-minded person think at the end of the day?

Mr. Giancaterino submitted that the onus has been met. The practical remedy is for the Hearing Officer to recuse himself and afford another hearing officer to take over the proceedings.

The Respondent, Ms. Stewart, submitted that a reasonable person, understanding the nature of the statutory scheme set out in the *PSA* and the absence of an evidential and factual basis in this Application, does not meet the perception of a likelihood of bias. Ms. Stewart cited *Ontario Provincial Police v MacDonald*, (2009 ONCA 85) in which the Court of Appeal determined the reasonable person has to have the knowledge of counsel, knowing the law, the scheme, and the evidence before the Tribunal.

Ms. Stewart submitted that procedural fairness is applicable to all parties and the court is presumed to be impartial, therefore a significant onus on the Applicant is required. Only where this onus is met would recusal be appropriate. This Tribunal must look at whether the Applicant has met the onus and demonstrated, on a balance of probabilities, there is

an institutional bias. Unreasonable and unsubstantiated claims of bias will undermine the integrity of the Part V discipline system. Chiefs of Police have the duty to an administrative discipline system under Part V, section 76 of the *PSA* and, under section 82, have the authority to appoint prosecutors and hearing officers, typically drawn from within their Services. The scheme is appropriate and does not support a claim of bias to have a senior officer designated from that Service. The nature of the scheme, role of the chief, and the absence of factual basis put forward by the Applicant does not support a bias, either institutional or personal.

Ms. Stewart submitted that the fact that the decision maker has professional experience is not fatal to a claim of impartiality, citing the case of *Yukon Francophone School Board, Education Area #23 v Yukon Attorney General* (2015, SCC 25). This highlights the principle that decision makers can come with prior experience and can apply their personal experiences and perspectives when properly applied. Ms. Stewart submitted that the Applicant has provided no evidence that this Hearing Officer's prior professional experience as superintendent of the Criminal Investigations Directorate (CID) has impacted his impartiality on this matter. Further, the Applicant has not established that this Hearing Officer has an interest in the case arising from the employment of his brother in the Drug Unit. Nor has the applicant provided any evidence that the relationship should lead to the recusal application being successful.

Decision: Motion on Reasonable Apprehension of Bias

As I must, I take the Application for Recusal very seriously as it speaks directly to the very core of Natural Justice and the absolute requirement for a fair and impartial hearing (and the appearance of such) in this *Police Services Act*, administrative law application. This is the underlying reason why I granted the Motion for Adjournment--so that the Respondent Officer and his counsel could properly prepare well laid out submissions for the motion, both written and orally.

There are a few points of clarification in the submissions by the Applicant that I need to address to put my ruling into context, relating to both the personal relationship to Det. Tim Renwick and the positional relationship as the former superintendent of CID.

The Drug Unit is just that, a unit, commanded by a staff sergeant and divided into three sections, each supervised by a sergeant. The section assigned the drug trafficking investigation of Mr. Ameer El Badry was Sgt. Doug Hill's section and Det. Renwick is not a member of that section, nor is Sgt. Hill his direct supervisor or in his chain of command, as submitted by the Applicant. The three sections are purposely kept separate and apart for several reasons, including operational security. (Deconfliction within the unit and with other covert investigative units is done at the Intelligence and Covert Operations Branch level). I accept Sgt. Hill's submitted evidence (exhibit #20) that Det. Renwick was not involved with nor had any knowledge of the investigation into Mr. Ameer El Badry.

As to clarification on the positional relationship, there are six superintendents within the OPS, each having command of a Directorate. The CID Directorate, which I commanded during the 2021 events from which these PSA charges originate, consisted of over 450 personnel and encompassed all aspect of criminal investigations, divided into three branches: Frontline Investigations, Major Investigations, and Specialized Investigations. Each branch is in turn commanded by an inspector. Within this organization structure (exhibit #22) the inspector of Major Investigations was the senior officer in charge of Drug Unit investigations and would be the highest-level decision maker at the investigative level. As superintendent, I had knowledge of the Drug Unit investigation through occasional briefings by the inspector in charge but no direct involvement in the running of the drug trafficking investigation.

I had absolutely no knowledge of the Royal Canadian Mounted Police (RCMP) anti-corruption investigation, which was requested and liaised through the Professional Standards Unit (PSU), as dictated by a “need to know” basis for operational security. The PSU is outside of my former area of command and reported to another superintendent. Even during short assignments as Acting Deputy Chief, I was never briefed nor had any knowledge of the RCMP anti-corruption investigation until charges were laid and Cst. Mohamed’s criminal Obstruction of Justice charge was made public.

The alleged misconduct for which Cst. Mohamed is before this Tribunal relate to the allegations he inserted himself into a break and enter investigation, neglecting to submit electronic or written notes, and failing to notify investigators of the Break and Enter Unit of his investigative actions. This diminishes the Respondent’s arguments that I would have a potential paternal bias to Sgt. Hill’s evidence and the investigative methods used during the trafficking investigation. The issue I must decide upon is whether Cst. Mohamed’s actions into the perceived break and enter constitute misconduct, despite the fact the that the break and enter was ‘staged’ by the Drug Unit investigators to cover the required seizure of a significant quantity of fentanyl.

This really comes down to the perception of a reasonable person with the knowledge of the particulars and what their threshold for the potential of apprehension of bias, either conscious or unconscious, with the two issues of personal and positional relationships.

The system we have, as outlined in the *PSA*, is intended to govern employer/employee relationships in addressing police misconduct and the Act is clear on the responsibility of a chief to designate a Hearing Officer, principally one internally of sufficient rank and experience. Case law has clearly established a presumption of impartiality unless specific, direct evidence to the contrary, and the Ontario Civilian Police Commission has, time and again, established that here is no inherent or built-in bias due to an in-house hearing officer with their long-established organization relationships.

I listened to the submissions with an open, undecided mind and carefully reviewed the Application and the cited case law. It is my decision that the Application falls short of the necessary threshold established by the volume of case law for me to reach the conclusion

that my personal and positional relationships, in concert and totality, present a reasonable apprehension of bias to cause me to recuse myself. The Application for Recusal RE: Bias was dismissed.

Plea

On July 21, 2023, Cst. Mohamed was arraigned on one count of Discreditable Conduct and one count of Insubordination, with the Notice of Hearing being read into the record. Cst. Mohamed plead not guilty to both counts.

Finding

To the allegations of misconduct before me, I make the following findings, based on the standard of clear and convincing evidence:

Count One: Guilty of Discreditable Conduct.

Count Two: Guilty of Insubordination.

The Hearing

Testimony

Ms. Vanessa Stewart called four witnesses for the Prosecution: Sgt. Serge Bérubé; Mr. Craig Salmon; Sgt. Doug Hill; and Staff Sergeant (S/Sgt.) Dave Merkel. Mr. Smith requested two witnesses be summoned for the Defence, Cst. Abdullahi Ahmed and Cst. Feisal Bila-Houssein, however no witnesses were called by the Defence.

Sgt. Serge Bérubé – Examination-in-Chief

Sgt. Bérubé testified that he is a 19-year police officer and has been a sergeant in the Professional Standards Unit (PSU) for the past three and a half years. His role in PSU is to investigate allegations of police misconduct, service complaints, and policy breaches and that he was the lead investigator for the misconduct investigation of Cst. Mohamed.

Sgt. Bérubé testified that an internal Chief's Complaint was generated in June 2021 at the time of Cst. Mohamed's arrest following a criminal investigation. His PSA investigation commenced on October 13, 2021, at the conclusion of the criminal proceedings.

Sgt. Bérubé provided an overview of his investigation, referencing a Prosecution prepared document, the Affidavit of Sgt. Serge Bérubé, entered as exhibit #13. The document contained the following Appendix:

Appendix A: Investigative Report of Sgt. Bérubé.

Appendix B: Transcript April 25, 2021, Phone recording.

Appendix C: Cst Mohamed and Cst. Haidar El Badry text messages.

- Appendix D: Cst. Mohamed and Mr. Ameer El Badry text messages.
- Appendix E: Transcript April 26, 2021, phone recording.
- Appendix F: Transcript May 29, 2021, truck recording.
- Appendix G: RCMP interview. June 24, 2021.
- Appendix H: PSU interview. May 25, 2021.
- Appendix I: Email from Sgt. Hill. June 26, 2023.

Sgt. Bérubé testified that in September 2020, the OPS received allegations that Cst. Haidar El Badry and his brother, Mr. Ameer El Badry were involved in criminal activity. This resulted in the RCMP Anti-Corruption Unit initiating a criminal investigation into the allegations against Cst. El Badry and the OPS Drug Unit opening a parallel investigation into alleged drug trafficking by Mr. El Badry. Several investigative techniques were employed during the investigations, including surveillance, off-line police databank searches, lawful interception of communications, and the execution of a general warrant at a residence linked to Mr. El Badry on the night of April 24/25, 2021, a condominium apartment at 98 Richmond Rd., Ottawa.

Sgt. Bérubé testified that a covert entry was conducted by the OPS Drug Unit who removed one kilogram of fentanyl and a large sum of money from a safe found within the bedroom of Mr. El Badry's apartment. Duty bound to seize the large quantity of a dangerous and deadly drug to prevent its distribution; the attending detectives staged the apartment to make it appear that a break and enter had occurred. This was necessary for the integrity and continuation of the trafficking investigation. The lock mechanism of the door was drilled, the cabinets and bedroom were made to appear searched, and a jacket and Play Station 5 were removed.

Sgt. Bérubé testified that at 2:00 am on April 25, 2021, a phone conversation was lawfully intercepted where Mr. Ameer El Badry calls his brother, Cst. Haider El Badry to advise of the break and enter to his apartment. Mr. El Badry states that \$90,000 worth of "things" were taken from the safe. Mr. El Badry stated that the break and enter appeared to be "professional" and that not more than three people knew where he lived. Mr. El Badry expresses a hope that the person responsible was caught on the camera but there was "no way" he would be able to get the video of it. Cst. Al Badry asked his brother if he was going to call the police and the call ended as he was receiving another call. A second short call was initiated by Cst. El Badry at 2:12 am and ended when Mr. El Badry indicated he would FaceTime him, communications that were not subject to interception.

Sgt. Bérubé testified that Cst. El Badry called Cst. Mohamed at 3:05 am and Cst. Mohamed did not answer. Cst. El Badry then immediately called and spoke to Cst. Abdullahi Ahmed and advised him that his brother's apartment had been broken into and approximately \$2,000, his Play Station, and a coat were taken. Cst. Ahmed suggested that Mr. El Badry report the break and enter to the police and then discusses how to get the video and stated it would be unlikely that Mr. El Badry would be shown the video.

In his investigative report, Sgt. Bérubé records that two intercepted follow up phone calls were made by Cst. El Badry to Cst. Ahmed, one at 3:29 am, the second at 3:35 am. The

first call confirmed that Mr. El Badry had reported the break and enter to the police and the second was about obtaining video from the landlord and Cst. Ahmed re-iterates that once the report is in, getting the video will not be a problem.

Sgt. Berube testified that at 4:00 am, Cst. Mohamed texted Cst. El Badry. A series of intercepted texts has Cst. Mohamed asking if Cst. El Badry was OK and what happened. Cst. El Badry responded for him to check his Signal Application (App), an encrypted App that was not intercepted.

Sgt. Bérubé testified that Mr. El Badry called the OPS reporting center on April 25, 2021, at 11:41 am, to report the break and enter and theft. He advised the report taker that the apartment was rented by his girlfriend and that between \$5,000-\$10,000 was in the safe that was taken. A Scenes of Crime Officer (SOCO), Cst. Amanda Williams was assigned and attended to process the scene for evidence.

Sgt. Bérubé testified that on April 26, 2021, there was a series of intercepted text message between Cst. El Badry and Cst. Mohamed. At 4:17 pm, Cst. El Badry asks Cst. Mohamed if he spoke to Mr. El Badry and Cst. Mohamed replies that he is still waiting for him to call. Cst. El Badry texted that he would call his brother and at 4:20 pm, texts Cst. Mohamed that Mr. El Badry has woken up and will message Cst. Mohamed, followed by a message thanking Cst. Mohamed for helping out his “bro”. Cst. Mohamed responds with a text “no worries man ...la Familia”.

Sgt. Bérubé’s investigative report records that Mr. El Badry texts Cst. Mohamed approximately 20 minutes later, at 4:32 pm, advising him he is “just jumping in the shower and I’ll be ready”. Cst. Mohamed replies that “I will come scoop u” and, at 4:26 pm, “I’M outside”.

Sgt. Bérubé testified that video surveillance at 98 Richmond Rd. showed Cst. Mohamed and Mr. El Badry entering the building. The two enter the condominium office and met with Mr. Craig Salmon, the President of the Condominium Board. Sgt. Bérubé’s testimony and the findings of his investigative report is that Cst. Mohamed identified himself as a police officer by showing Mr. Salmon his police issued badge and indicated that he was a friend of Mr. El Badry’s brother who was also a police officer. Cst. Mohamed told Mr. Salmon that he would like to obtain the surveillance video from the security camera so that he and Mr. El Badry could identify who broke into the apartment. Mr. Salmon denied the request to view the video as it was policy to not release it without the case number and then only to the investigator in the matter. A reservation was made for the elevator to be put on service to facilitate Mr. El Badry’s moving out of the building.

Sgt. Bérubé testified that a telephone call at 5:24 pm later that same day between Cst. El Badry and Cst. Mohamed was intercepted in which Cst. Mohamed updated Cst. El Badry on his visit to the Richmond Rd. apartment building with Mr. El Badry. Cst. Mohamed indicated that it went well, Mr. Salmon was police friendly, the video would be released to the police, and once he found out how the lead investigator was, he would get the video for them to view.

Sgt. Bérubé testified of his review of the transcription of a lawfully intercepted, recorded conversation between Cst. Mohamed and Cst. El Badry, on May 29, 2021, while both were within Cst. El Badry's personal F-150 truck. The recording at 10:42 am was about police projects, wire taps, Guns and Gangs Unit investigations, and an RCMP investigation. A second recorded conversation at 10:52 am was pertaining to coded informants with Cst. El Badry advising Cst. Mohamed that he feels that something is wrong, and he is being looked at. Cst. Mohamed tells Cst. El Badry that he needs to be "on top of his brother" and to know everything he does "Cause this goes down, you go down."

Sgt. Bérubé testified that he reviewed the June 24, 2021 in-custody interview of Cst. Mohamed by RCMP Sgt. Nicole Noonan, following Cst. Mohamed's arrest. Sgt. Bérubé testified that he was present as the OPS liaison outside the residence of Cst. Mohamed when he was arrested however played no role in the arrest or detention.

As to the RCMP interview, Sgt. Bérubé testified that Cst. Mohamed stated that he was helping Cst. El Badry's brother as he was afraid following the break in to his apartment. Cst. Mohamed was concerned for Mr. El Badry's safety and to find out who was staking out his residence. He drove him to talk to the building superintendent and drove him back. Cst. Mohamed stated he identified himself as a police officer to Mr. Salmon and told him to send the video to the Break and Enter Unit detectives. He further stated that he was not friends with Mr. El Badry, rather was a friend of his brother, Haider, who was not available that day, so he volunteered to take him. He did not know anything about Mr. El Badry, nor had he ever spoken to him other than the day prior to the visit. He accompanied Mr. El Badry because Mr. El Badry was afraid, and he did ask if they were able to see the video to see if there was someone they could recognize. Cst. Mohamed was not on duty, and he did not reach out to the Break and Enter Unit.

Sgt. Bérubé testified that he conducted a compelled interview with Cst. Mohamed on May 25, 2022. During the interview, Cst. Mohamed advised that he has known Cst. El Badry since 2018 when they were on the same platoon, and he did not know Mr. El Badry and only met him a few times prior to the day he assisted him with the break and enter. He stated that he went to assist Mr. El Badry as he was a victim of crime and if someone was identified from the video, he would have advised the Break and Enter Unit. It was something that the Neighbour Resource Team (NRT) South did many times—picking up video.

Sgt. Bérubé testified that Cst. Mohamed stated that he never cared about the video and was not trying to retrieve it. He told Mr. Salmon to send it to the Break and Enter Unit. He never called Mr. El Badry back and never talked to him or Cst. El Badry about it after that day. He felt framed by his own service as PSU, the Drug Unit, or the Break and Enter Unit could have advised him. He was not aware that Mr. El Badry was involved in criminal activity. As to the intercepted conversation, he stated that Cst. El Badry advised of his concerns with his brother and his new Audi, designer clothing while not having a job. Cst. Mohamed told him he needed to sit down and to deal with his brother if he is "shady", but

he never pictured criminality until he was charged in June 2021. He did not know what was going on in Mr. El Badry's life.

Sgt. Bérubé testified that Cst. Mohamed stated he did not make the conclusion that the break and enter was targeted until after his attendance with Mr. El Badry to the condominium building. He went there in good faith and his mistake was in trusting a colleague. Cst. El Badry was concerned that his brother was going to get hurt by whomever did the break and enter and he went to assist his friend's brother who he believed was a victim of a crime. Cst. Mohamed stated he was a scapegoat, and the OPS should have advised him of what was going on instead of bringing more people "into the web" of the El Badry brothers.

Sgt. Bérubé testified that his investigation determined that no notes were submitted by Cst. Mohamed, there was no investigative action report submitted, nor any notification or communication with any member of the Break and Enter Unit by Cst Mohamed. Further, there was no connecting Mr. El Badry with the Victims Crisis Unit (VCU) and that Cst. Mohamed was off-duty on April 26, 2021, recovering from an injury, from January 4 to June 13, 2021.

Sgt. Serge Bérubé – Cross-Examination

Sgt. Bérubé testified that he first became aware of the investigation on June 23, 2021, the day before Cst. Mohamed's arrest when he was advised to attend a briefing with the RCMP. He had no knowledge of the investigation prior, and he understood that Cst. Mohamed was going to be arrested by the RCMP for a criminal code obstruct charge. He stated that a Chief's Complaint was initiated on June 25, 2021 and he was assigned as the lead investigator for the misconduct investigation. He stated that the misconduct investigation went dormant until the completion of the criminal proceedings and when a Chief's Complaint is initiated there is no pre-determination that there will be charges. As the lead investigator he determines who will be interviewed and whether the information gathered supports a finding of misconduct. He stated that in this case there were others who were charged criminally, and he could not interview them for the *PSA* misconduct investigation until the conclusion of the criminal proceedings. He confirmed that there was a time limit of six months to complete the investigation if there are to be misconduct charges however, due to the criminal charge, the investigation was 18 months after the event and an extension was required and obtained from the Police Services Board (PSB) to proceed.

Sgt. Bérubé testified that he did not accept the compelled statement of Cst. Mohamed that he did not go the building to see the video but rather to book an elevator and that the video was only raised during the conversation with Mr. Salmon. He stated he based this on the evidence within the intercepts and Mr. Salmon's statements. He testified that Cst. Mohamed went with the intent to view the video and to see if Mr. El Badry could identify anyone in the video. Sgt. Bérubé testified that it was wrong to bring a victim to view a video without a proper photograph line up and it could have jeopardized the entire investigation should this have been a legitimate break and enter investigation.

Sgt. Bérubé testified that there was no previous communication with Mr. El Badry on Cst. Mohamed's cellular phone and the relationship between Mr. El Badry and Cst. Mohamed was limited to three interactions prior to the trip to the condominium on April 26, 2021. The connection was through the brother, Cst. Haidar El Badry and Cst. Mohamed had to ask Cst. El Badry for Mr. El Badry's phone number on April 26, 2021.

Sgt. Bérubé testified that Cst. Mohamed is aware of Cst. El Badry's concerns about his brother and, as the PSA misconduct investigator, he never alluded that Cst. Mohamed knew that Mr. El Badry was a drug trafficker. However, the signs—the high-end car, the clothing, the money taken from the break and enter, and Mr. El Badry's fear of being harmed or killed—should have led to the conclusion that something was up. There was nothing to stop him from reporting this to his superiors. He was aware of the circumstances and as seasoned as he was, he ought to have seen the signs.

Sgt. Bérubé testified that he conducted a 40-minute telephone interview with Mr. Craig Salmon after Mr. Salmon was interviewed by the RCMP and after his compelled interview with Cst. Mohamed. He stated that he did not re-interview Mr. Salmon to fact check as he did not see the need to do so. Regardless of when Cst. Mohamed identifies himself and shows his badge, Sgt. Bérubé testified that Cst. Mohamed attempted to have Mr. El Badry view the video. It does not matter what occurred first. When the badge came out Cst. Mohamed had the obligation to report. The discussion on viewing the video started the day prior on April 25, 2021 when Cst. Amanda Williams, the SOCO, was processing the scene for evidence. Whether it was Mr. Salmon, Mr. El Badry, or Cst. Mohamed who raised the video on April 26, 2021, Cst. Mohamed felt it important for Mr. El Badry to see the video. This is not the proper process and would be a problem should this have been a legitimate break and enter that led to charges and court.

Sgt. Bérubé testified that his investigation found there was no pressure put on Mr. Salmon to show the video, nor were there any promises, threats or inducements. There was no information that Cst. Mohamed was insistent or persistent. Mr. Salmon had previous experience in dealing with the release of video evidence to the OPS, the condominium's policy, and made it clear that he would not be releasing the video to anyone but the OPS and only then with the proper protocols and a case number.

Sgt. Bérubé testified that one of his findings was Insubordination by Cst. Mohamed in that he did not provide or take notes or file an investigative action report.

Sgt. Serge Bérubé -- Re-examination

Sgt. Bérubé testified that it is the officer's responsibility to attach reports and notes to the file. He confirmed that Cst. Mohamed did not learn that the break and enter was not a legitimate investigation (rather a ruse by the Drug Unit to cover their covert entry and seizure of a substantial quantity of fentanyl) until his arrest on June 24, 2021, and that no notes or report was submitted by Cst. Mohamed following his return to work on June 21, 2021.

Mr. Craig Salmon -- Examination-in-Chief

Mr. Salmon testified via a video link as he was vacationing out of province at the time of the scheduled Hearing.

Mr. Salmon testified that he is employed as a Department of National Defence (DND) consultant and was the President of a three building Condominium Corporation on Richmond Rd. His first involvement in the April 24/25, 2021 break and enter was in the form of a call from the property manager informing him that a female constable required building access to process the scene. He met and escorted the constable to the second floor where the tenant was present.

Mr. Salmon testified that there was a conversation regarding video cameras located in the entrance and lobbies and he was quite familiar with the technology as it was his area of expertise in his profession. He believed it was he who stated he would go have a quick look at the system to see if there was anything there and the male tenant was present and did respond to his statement about the video cameras. Mr. Salmon testified he had further conversation with the constable as she was departing.

Mr. Salmon testified that the next day he received a phone call from the tenant advising that he had someone with him that wanted to speak to him. He attended the lobby and recognized the tenant who was accompanied by a tall male who introduced himself as a police constable and showed him a badge. He stated that the constable indicated that he worked with the tenant's brother and not with the Break and Enter Unit. They discussed the video, but he was not sure who brought it up. He mentioned to them that he observed a heavy-set male enter the lobby area and someone came down and let him through a side door. Mr. Salmon stated that he was pretty sure that the constable indicated that he wanted to view the video and he advised the constable that for privacy, he could only provide the video to the OPS and with a file number.

Mr. Salmon testified that the constable and the tenant indicated that they were going to move the tenant out over the weekend as he did not feel safe in the condominium apartment.

Mr. Salmon testified that he met with and provided the video to Sgt. Killeen of the Break and Enter Unit whom he knew from previous bike thefts and break and enters to units in the buildings. Mr. Salmon testified that he was later interviewed by the RCMP, followed by an interview by Sgt. Bérubé.

Mr. Craig Salmon -- Cross Examination

Mr. Salmon testified that the April 26, 2021 event was over two years ago and to prepare for his testimony, he reviewed the June 23, 2021 RCMP transcript of his interview that he was provided. He was not provided nor reviewed the March 9, 2022 telephone interview with Sgt. Bérubé.

Mr. Salmon testified that he is very familiar with video as he is a software engineer for DND and that he offered the female constable to go look at the video. He stated that the tenant phoned him the next day and advised him that someone was downstairs and wanted to speak to him. He does not recall what time he went to the lobby to meet them, nor for how long, although he recalls the conversation was not long, a few minutes.

Challenged on his ability to recall, and his statement to Sgt. Bérubé that he was having trouble recalling details, Mr. Salmon testified that on this occasion he put more thought into it, and does recall some detail as memory improves when you start thinking about things. He remembers having a telephone conversation with the tenant who advised that there was someone downstairs who wanted to speak to him and he met the two individuals in the lobby for ten to fifteen minutes. He testified that he recalls the badge, the constable was not in uniform and did not have business cards, and that the tenant stated the constable worked with his brother. Mr. Salmon did not recall his name. Mr. Salmon testified that he believed it was the constable who brought up the video and not the tenant.

Mr. Salmon listened to the audio recording of his March 9, 2022 telephone interview with Sgt. Bérubé (exhibit #24) and testified that it assisted in refreshing his memory.

Mr. Salmon testified that the constable stated that he had concerns for the safety of the tenant and said it at least once. He testified that the constable was clear that he was not a part of the Break and Enter Unit but does not recall if the constable told him he was there to conduct an investigation. When asked whether it was clear to him that the intent of the constable's visit was to move the resident out for his safety, Mr. Salmon replied that it was, but he was also interested in the details of the break and enter and in the building's surveillance video. He believes it was the constable who asked to see the video as the conversation was with the constable and not the tenant.

Mr. Salmon testified that the constable was not aggressive and made no promises. He requested, not insisted, to view the video, and moved on when advised that it was not going to be released to him.

Mr. Salmon testified that he had no concerns about the identity of the constable as he showed his badge and knew him to be a member of the OPS. He recognized the tenant and had no concerns there. He testified that he was not asked to provide his phone number or particulars by the constable nor was there any indication that there was going to be any follow up by the constable.

Testimony of Sgt. Doug Hill -- Examination-in-Chief

Sgt. Hill testified that he is a sergeant in the Drug Unit and has been in this role for four years and is into his 20th year as a police officer. He was the case manager for the investigative project into Mr. Ameer El Badry's drug trafficking activity.

Sgt. Hill testified that the drug trafficking market is unregulated, lucrative, highly competitive, and violent. Violence is used for a number of reasons, including to push onto another crew, to take over geographical boundaries, retribution for indiscretions, rips, robberies, and unpaid debts. As to drug rips or robberies, two things can happen: There can be no response which sends a message that the victim of the robbery is weak, does not have the stomach for a violent reaction and is giving up their business. The alternative response is to retaliate with violence to signal to competitors that they are not an easy target. Recovering the loss is not important.

Sgt. Hill also testified that the covert drug trafficking investigation could have been compromised if Mr. El-Badry viewed the video.

Testimony of Sgt. Doug Hill -- Cross Examination

Sgt. Hill testified that he provided the above information (exhibit #13a) in an email format, after receiving a request by Sgt. Bérubé to provide it. Sgt. Bérubé was looking for context and he provided it.

Sgt. Hill testified that the staged break and enter to Mr. Ameer El Badry's condominium was planned and that safeguards were put in place to ensure public safety and plans for a compromise. Safeguards were also put in place to monitor any adverse fall outs from the actions of the investigators but did not include retrieval of the surveillance video as it posed additional risks to the covert operation. There was concern that Mr. El Badry would get access to the video from the building and that was part of the risk profile.

Sgt. Hill testified that Mr. El Badry was not aware that the police were involved and could have concluded that a rival gang had ripped him off. This risk was mitigated by monitoring to prevent and stop any planned retaliation.

Testimony of S/Sgt. Dave Merkel – Examination in Chief

S/Sgt. Merkel testified that is the staff sergeant of the West Neighbourhood Resource Team (NRT) since 2022 and prior was the staff sergeant of the Professional Standards Unit (PSU).

S/Sgt. Merkel testified that he was e-mailed a summary of a Notice of Action/Statement of Claim (exhibit #30) in which he was a named defendant and that he notified two additional named co-defendants, Sgt. Bérubé and Sgt. Hill. He testified that he had a conversation with both, and learnt that Sgt. Bérubé had been notified by his inspector and that Sgt. Hill was unaware of the civil lawsuit until notified by S/Sgt. Merkel.

S/Sgt. Merkel went through the Statement of Claim and testified that the synopsis contained within was similar to this PSA matter.

Testimony of S/Sgt. Dave Merkel – Cross-Examination

S/Sgt. Merkel testified that he did not know Cst. Mohamed prior to the date he was arrested by the RCMP. He was the staff sergeant of PSU and first met Cst. Mohamed when he served him with administrative documents in relation to the PSA misconduct investigation, after he had been released from RCMP custody. He testified that he became aware of the charges during the course of the RCMP investigation.

S/Sgt. Merkel testified that he knew Sgt. Bérubé at the time as Sgt. Bérubé reported directly to him. He testified that he assigned Sgt. Bérubé as the PSU support officer on the day of Cst. Mohamed's arrest and that Sgt. Bérubé was the lead investigator on the PSU misconduct investigation. He did not specifically recall if he personally assigned Sgt. Bérubé to the PSU misconduct investigation, but likely did as he was the staff sergeant in June 2021 when the assignment occurred. He testified that assignments are made if there is an arrest for a criminal offence. Assignment would be based on workload and case management. S/Sgt. Merkel would remain the supervisor of the investigator' but would have no hands-on involvement nor provide any direction or input.

S/Sgt. Merkel testified that he was not served the Notice of Action, rather received an e-mail summary from OPS Legal Services. The first time he saw the Notice of Action was on August 11, 2023.

Submissions and Analysis

Count One. Discreditable Conduct. Prosecution Submissions.

Ms. Stewart brought the Tribunal to the utterance made by Cst. Mohamed in his in-custody interview with the RCMP investigator on June 24, 2021, where he states "...if I am charged for this I'm actually feeling [a] little bit better than what I was feeling before because I was more worried about something else...". Ms. Stewart questioned what is that "something else? The Tribunal will have to deal with this on clear and convincing evidence.

Ms. Stewart submitted that the uncontested facts are: Cst. Mohamed was off-duty; he attended the apartment building with Mr. Ameer El Badry; and he did not take any notes. Two contested facts are whether Cst. Mohamed knew or ought to have known that Mr. El Badry was engaged in serious criminal activity and whether he attended the apartment to try and obtain and attempt to view the video with Mr. El Badry.

Ms. Stewart cited *Jacobs v Ottawa Police Service*, (2016 ONCA 345) to submit that the standard of proof to be applied by this Tribunal is the standard of clear and convincing evidence and not that of a balance of probabilities.

Ms. Stewart submitted that the applicable test, as established in *Mulville and Azaryev and York Regional Police Service* (2017 CanLII 19496), "would require the Hearing Officer to place a dispassionate, reasonable citizen, fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether the officer's [conduct] was discreditable." Ms. Stewart submitted that the

case law is well settled that the misconduct is to be weighed for likelihood to bring discredit and not whether actual discredit occurred. Ms. Stewart further cited *Silverman and Ontario Provincial Police* (1997 CanLII 22046) paragraph 32, which extends the jurisdiction of the PSA to off-duty actions that bring discredit to the reputation of the Service and further reinforces the notion of the extent of potential damage, should the act become public knowledge.

Ms. Stewart submitted that the criminal matter of Cst. Mohamed was unproven with his criminal charges being withdrawn, however the burden of proof under the PSA is different and it does not carry over, nor does the *mens rea*. Intent is not something that the Prosecution has to prove. (*Cst. A.L. Favretto and Ontario Provincial Police* (2020 CanLII 63877)).

Ms. Stewart submitted that if an off-duty officer takes action, they in effect place themselves on-duty. Officers cannot use badges off-duty to gain benefit and advantages and, again, can be charged for off-duty conduct just as they can be charged for on-duty conduct. (*Escweiler and Ontario Provincial Police* (1998 CanLII 27141)).

Ms. Stewart submitted that when a police officer associates with or gives special treatment to a known criminal, it is not about what the officer knew, rather was they should have known or ought to have known. (*Markham and Waterloo Regional Police Service* (2015 ONCPC)). There is clear and convincing evidence that Cst. Mohamed knew Mr. El Badry was engaged in criminal activity, or he was willfully blind. On April 26, 2021, Cst. Mohamed acted in a manner that brought discredit to the OPS.

Ms. Stewart submitted that the purpose of the April 26, 2021 visit to the apartment was to view the video. This was externally collaborated in the post visit intercept where Cst. Mohamed tells Cst. Haider El Badry “[t]his guy’s gonna give us the videos. We’ll tell him we’re gonna pick up the video for you.” Mr. Craig Salmon, the official at the building, also gave evidence that it was the constable who brought up the video. Lastly, it is by Cst. Mohamed’s own admission during his June 24, 2021 in-custody interview with the RCMP that he asked Mr. Salmon if “we are able to see the video? Maybe there are [sic] someone he can recognize.”

Ms. Stewart submitted that the next issue to consider is whether Cst. Mohamed had knowledge of Mr. El Badry’s criminal activity. Ms. Stewart submitted that the intercepted conversation between Cst. Mohamed and Cst. Haider El Badry on May 29, 2021 infers that Cst. Mohamed knew what Mr. El Badry was involved in. Cst. Mohamed’s utterance that Cst. El Badry needed “to be on top of [his] brother” and “...Cause this goes down, you go down”. Ms. Stewart submitted that the inference from the intercepted conversation is that there is some knowledge that Mr. El Badry was involved in activity that could cost his brother his job.

Ms. Stewart submitted that Cst. El Badry told his sister and discussed with his wife his fear of having Mr. El Badry living in his house. He confronted his brother and advised him that he could get caught and go to jail. All evidence is that Cst. El Badry would have

told Cst. Mohamed. Cst. Mohamed was his mentor and advised Cst. El Badry to give his brother Ameer an ultimatum. Cst. El Badry does in fact tell his brother only to contact him regarding family issues. This, Ms. Stewart submits, is clear and convincing evidence.

Ms. Stewart pointed out contradictions in Cst. Mohamed's June 24, 2021 RCMP in-custody interview, his compelled OPS PSU interview on May 25, 2022, and the July 13, 2023 Statement of Claim for the civil lawsuit initiated by Cst. Mohamed and served on the OPS. Ms. Stewart submitted that major inconsistencies exist in the three versions of the same events and this is important as it pertains to credibility. Cst. Mohamed did not testify to explain inconsistencies, and this speaks to reliability.

Ms. Stewart submitted that Cst. Mohamed either had direct knowledge that Mr. El Badry was involved in criminal activity or ought to have known there was something else going on when he accompanied him to the apartment with the intent for them to view the video. As provided by the testimony of Sgt. Doug Hill, there could have been significant impacts had this actually been a break and enter with drugs and money taken, and had Mr. El Badry viewed the video and recognized the person or persons responsible.

Count Two. Insubordination. Prosecution Submissions.

Ms. Stewart submitted that the count of Insubordination is in respect to a lack of notes. The Book of Authorities, exhibit #23, contains OPS policy on note taking and the requirement to take notes. Quite simply, Cst. Mohamed took no notes and failed to notify any personnel in the Break and Enter Unit.

Ms. Stewart submitted that Cst. Mohamed was unaware that the break and enter was staged. He was with the victim who gave him statements, and this should have triggered his obligation to take notes. If there was a prosecution for the break and enter his account that there was nothing of substance on which to take notes would simply not hold.

Count One. Discreditable Conduct. Defence Submissions.

Mr. Smith invited the Tribunal to dismiss both counts of misconduct. He submitted that the picture painted by the Prosecution is inaccurate, unfair, and unnecessary. Put in context, the evidence heard should conclude that Cst. Mohamed's conduct was not discreditable, nor does it meet Insubordination.

Mr. Smith submitted that in reviewing the evidence, it really comes down to two individuals: Cst. Mohamed and Mr. Craig Salmon. Mr. Smith submitted that the Tribunal should discount Mr. Salmon's testimony at this hearing as it is not reliable nor creditable and certainty does not align with his June 23, 2021 RCMP interview, conducted two months after his April 26, 2021 interaction with Cst. Mohamed.

As to the June 23, 2021 RCMP interview, Mr. Smith submitted that Mr. Salmon was already having problems with his memory as he referred to Mr. Ameer El Badry as Mr. Mohamed, and it was in fact Mr. Salmon who started the review of the video the day

before Cst. Mohamed attended. The discussion around the video on April 26, 2021 was driven by Mr. Salmon. In his RCMP interview Mr. Salmon stated that he was more focused on the tenant that was just broken in to, however in his testimony he states he was focused on Cst. Mohamed. Further, Mr. Salmon initially stated to the RCMP that the resident had further questions, so he went downstairs to meet them, whereas two years later this is changed to the constable having questions, citing his memory was better this time around.

Mr. Smith submitted that Mr. Salmon was evasive with the Defence's questions during his video testimony, had a viewpoint, and made great effort to present it. There appeared a hearing issue that was not present during the examination-in-chief by the Prosecution.

Mr. Smith submitted that the notion presented was that Cst. Mohamed went there to somewhat thwart the investigation, which does not make any sense at all. He identifies himself, advises Mr. Salmon that he is not the investigator, and tells Mr. Salmon to give the video to the Break and Enter Unit. Mr. Salmon's version is that it was he who would not release the video and that it was going to be released to the Break and Enter Unit.

Mr. Smith submitted Cst. Mohamed's evidence was that during the course of the meeting, as the conversation is taking place, he showed his badge to Mr. Salmon to reduce the temperature and not to put pressure on Mr. Salmon. This is consistent in both interviews of Cst. Mohamed, the RCMP in-custody interview and the compelled OPS interview. Cst. Mohamed's concern was with Mr. El Badry's safety, and this can be accepted as it is consistent in both interviews.

Mr. Smith submitted that Cst. Mohamed did not say in the interviews that he did not ask about the videos, he said he asked to see it, not retrieve it. Evidence is that he did not directly ask, rather it came out in the conversation with Mr. Salmon. This is important as Cst. Mohamed walked into the situation not knowing anything about Mr. El Badry's history or the investigation. He comes into the fray as a friend of Cst. Haider El Badry. Mr. Smith submitted that a reasonable person would see no ill will or intention. Absolutely none.

Mr. Smith submitted, to put it into context, Cst. Mohamed had the conversation with Mr. Salmon, and Mr. Salmon said he will give the video to the Break and Enter Unit. There was no push back by Cst. Mohamed and he moved on, with no further persuasion or ask. Cst. Mohamed did not follow up later on nor did he ask for Mr. Salmon's contact number. Mr. Smith submitted that it shows he went, helped the brother of his friend, and moved on.

Mr. Smith submitted that Mr. Salmon's inability to recollect should be reason to dismiss his evidence on the whole.

Mr. Smith asked the Tribunal to step back and consider the situation that transpired, through a non-sterile, human lens. A number of constables are in a garage, and they are friends. Information is discussed that the brother of the host constable was the victim of a break and enter and there are expressions of concern. A request for assistance or help

is made and Cst. Mohamed stands up to assist as he is on leave and has the time. He does that and now finds himself before a Tribunal fighting for his career. Any one of those officer's present could have been in this position if they assisted. There was nothing about his conduct that indicates that he was involved in criminal activity with the El Badry brothers. Mr. Smith submits that the RCMP interview with Cst. Noonan is a raw version of his reaction when he learns of the activities of the El Badry's. He is candid.

Mr. Smith submitted that the RCMP interview confirms that he is not friends with Mr. Ameer El Badry and that Cst. Mohamed had to get his number from Cst. Haider El Badry to make contact. Cst. Mohamed shows surprise when he learns during the interview that Mr. El Badry is a drug dealer. His response is a surprised "no". He met Mr. El Badry on two previous occasions and in no way had knowledge that he was a drug dealer. Mr. Smith submitted that it is important to look at what he ought to have known in April 2021 when the apartment visit occurred and not in May when the recorded conversation is captured of Cst. Mohamed telling Cst. El Badry that he needs to talk to his brother and "if he goes down, you go down". Mr. Smith submitted that this information is after the fact and does not drive the actions in April.

Mr. Smith submitted that we have to look at the context to determine if Cst. Mohamed knew or ought to have known about the criminality. There is nothing in the intercepted exchange between Cst. Mohamed and Cst. Haider El Badry that his brother was involved in anything. There is no basis to say that he ought to have known. Mr. Smith submitted that there is no foundation, and this is unfair to Cst. Mohamed. The theory is that now we know of Mr. El Badry's criminality then Cst. Mohamed ought to have known at the time.

As to the Statement of Claim, Mr. Smith submitted that the rules are clear on what is admissible, and the issue is what weight will be applied. No one was cross examined on the Statement of Claim and the information contained within is not inconsistent with the statements of Cst. Mohamed to Sgt. Noonan or Sgt. Bérubé.

Count Two. Insubordination. Defence Submissions.

In respect to Insubordination, Mr. Smith submitted that he agreed that there is not a lot to consider. Cst. Mohamed goes to the apartment and is not on duty. The conversation has already started and nothing worthy of note taking has transpired. More importantly, he stated that it was not his area and for the video to go to the Break and Enter Unit directly from Mr. Salmon.

As to notification of the Break and Enter Unit, the way the charge wording is particularized there are a number of different ways for notification to occur. The information can still be carried indirectly and Cst. Mohamed did advise Mr. Salmon to send the video to the Break and Enter Unit.

Mr. Smith submitted that there is a foundational argument here with Cst. Mohamed being insubordinate in failing to carry out his lawful duty in not writing notes. Sgt. Bérubé's evidence is that there was no break and enter investigation as it was a ruse by the Drug

Unit and there was no real break and enter. If there was no break and enter investigation, then what is the purpose of taking notes?

Analysis—Count One

I will begin the analysis of the Discreditable Conduct charge by establishing the facts that have strong supporting evidence and, for the most part, were undisputed.

Firstly, that Cst. Mohamed was off-duty on April 26, 2021 when the alleged misconduct occurred. Evidence was presented that he was on an extended medical leave from February 4 to June 13, 2021, recovering from surgery. This was evidence provided by Sgt. Bérubé and confirmed by Cst. Mohamed in his in-custody interview with RCMP Sgt. Noonan.

Secondly, I am satisfied, by a review of the documentary evidence and the testimony of Sgt. Bérubé, that Cst. Mohamed had no connection to the break and enter investigation in any official capacity, nor was he directed or requested to by anyone with such authority to attend 98 Richmond Rd. to initiate any investigative actions.

I accept Cst. Mohamed's statements during his in-custody and compelled interview that he involved himself after the April 25, 2021 social gathering of eight off-duty constables at the residence of Cst. Haidar El Badry where Mr. Ameer El Badry was present and the break and enter was discussed. There are no recordings or collaborating evidence from others present, but it is indeed plausible that, based on the conversation, it is at this point that Cst. Mohamed stepped forward and volunteered to assist. There is certainly no evidence to refute this, and it is consistent with the intercepted communication between Cst. El Badry and his wife, advising her that "Mo" would pick up Mr. El Badry and go to the building to view video footage.

Thirdly, there is no dispute whatsoever that Cst. Mohamed attended 98 Richmond Rd. with Mr. El Badry on April, 26, 2021, and met with the President of the Condominium Corporation, Mr. Craig Salmon. Tab 3 of the Prosecution's Exhibit Book (exhibit #23) has video image stills of Cst. Mohamed and Mr. El Badry entering the lobby at 1:18 pm, as collaborated by the two interviews with Cst. Mohamed and the testimony of Mr. Salmon.

What is contested are whether the actions of Cst. Mohamed interfered with an investigation by attempting to view, and attempting to have Mr. El Badry view, video footage of the break and enter and whether Cst. Mohamed had knowledge or ought to have knowledge of the criminal activities of Mr. El Badry.

As to the video, it is clear that Mr. El Badry was focused on viewing the surveillance video upon returning home and discovering the break and enter to his apartment. He immediately called his brother, Cst. El Badry at 2:00 am and his telephone call was lawfully intercepted by investigators. Mr. El Badry expressed hope that the "camera" "caught who it is" and expressed concern that there was no way he, as the tenant, was going to get the "camera" for this. Cst. El Badry has been made aware that \$90,000 of

money and “other stuff” was taken in the safe yet he advises his brother to report it to the police. Unfortunately, their communication is ended when they switch to FaceTime which was not intercepted.

It is also established in Cst. Abdullahi Ahmed’s May 18, 2022 compelled interview that he received a 3:05 am call from Cst. Haidar El Badry advising of the break and enter, and they discussed how they were going to go about obtaining the video.

By his own admission in his in-custody interview with RCMP Sgt. Noonan, Cst. Mohamed stated that he asked Mr. Salmon “[a]re we able to see the video? Maybe there are [sic] someone he can recognize?”

In the lawfully intercepted telephone call between Cst. El Badry and Cst. Mohamed just after Cst. Mohamed dropped off Mr. El Badry after their visit to 98 Richmond Rd., Cst. Mohamed again discussed the video. He advised Cst. El Badry that “we just wait for the cameras” and Mr. Salmon is “gonna give us the videos.”

I find that the testimony of Mr. Craig Salmon, despite the submissions of Mr. Smith, is of some assistance to this Tribunal, although by his own admission, there were parts on which he was unclear. What is helpful is Mr. Salmon’s testimony that he met Cst. Mohamed and Mr. El Badry in the lobby for approximately 15 minutes, and verifies Cst. Mohamed’s statement that the constable identified himself with a police badge and Mr. Salmon learnt that the constable was a friend of Mr. El Badry’s brother, who was also a constable. Although Mr. Salmon’s testimony was not clear on who raised what issues during the conversations, the video was discussed during the conversation as well as safety concerns for the tenant, and discussion around the circumstances of the break and enter appearing targeted.

Mr. Salmon was clear that the constable was not aggressive, and, to his recollection, requested to view the video, not insisted, and moved on when Mr. Salmon was firm on the policy that the video would only be released to the appropriate investigator and with the case number.

I reject Cst. Mohamed’s claim in his compelled interview that he was only driving the brother of a friend to book an elevator, that he never cared about the video. By his own admission in his compelled interview, Cst. Mohamed did state that he was not denying that he asked to see the video and that Mr. El Badry would be the best person to know who targeted his apartment.

I accept the statements of Cst. Mohamed that he formulated a concern for the safety of Mr. El Badry, heightened while at 98 Richmond Rd. where he concluded that this was a targeted, professional break and enter/theft which likely involved pre-planning in watching the apartment and, in his opinion, risked further targeting.

The evidence is clear and convincing that the obtaining of the video was the primary focus of the El Badry brothers and was coordinated by Cst. El Badry, soliciting his colleagues

to assist. Cst. Mohamed went to 98 Richmond Rd. with the primary purpose of facilitating Mr. El Badry to view the video and/or to receive the video.

The next issue to analyse is whether Cst. Mohamed had knowledge or ought to have had knowledge of the criminal activity of Mr. El Badry.

What is clear is that Cst. El Badry had knowledge of his brother's drug trafficking activities, established by his awareness of the contents of the safe stolen on April 25, 2021. He certainly did not raise any concern when he learnt of the value of the contents or ask for clarification on the "things" contained within. Cst. El Badry provided misleading statements to both Cst. Ahmed and Cst. Mohamed on the value that was taken, another indication of his knowledge. His lawfully intercepted telephone call to his sister on May 1, 2021, removes all doubt as he is concerned about him going to jail or getting killed and he had an intercepted discussion with his wife about not having his brother remain in their house due to his criminal activity and the associated risks to their immediate family.

What is not so clear is exactly what Cst. Mohamed knew or when he became aware. The evidence, which was unrefuted, was that Cst. Mohamed had met Mr. El Badry on two previous occasions prior to the April 25, 2021 meeting of Mr. El Badry and the eight constables at Cst. El Badry's residence. The evidence is that Cst. El Badry had to ask for his contact number once he agreed to accompany him the next day.

The May 29, 2021 recorded conversation between Cst. El Badry and Cst. Mohamed provides evidence that Cst. Mohamed is aware to some degree of illicit activities by Mr. Ameer El Badry as he is telling Cst. El Badry "you need to be on top of your brother...'[c]ause this goes down, you go down."

The prosecution submitted that Cst. Mohamed is much older and more experienced than Cst. El Badry and is a mentor to him, confirmed by Cst. Mohamed in his statements. The inference is that Cst. El Badry would have told Cst. Mohamed sufficient details to cause Cst. Mohamed to make the statements that were intercepted and establish knowledge of criminal activity.

I find that Cst. Mohamed certainly had a degree of knowledge on May 29, 2021, and will factor that into this decision, however, I cannot come to the firm conclusion that he had a full awareness of the criminal activity of Mr. El Badry on April 26, 2021 when he accompanied Mr. El Badry to the Richmond Rd condominium. There were obvious previous conversations between Cst. El Badry and Cst. Mohamed or observations made by Cst. Mohamed, as evident to the warning given by Cst. Mohamed on May 29, 2021, but there is no direct evidence of exactly what he knew and when he learnt it.

Similarly, I cannot conclude that Cst. Mohamed ought to have come to the conclusion that Mr. El Badry was involved in criminal activity on or prior to the April 26, 2021 visit to the condominium and that he was wilfully blind in assisting him. To reach such a conclusion would require clear and convincing evidence on what exactly he knew of Mr. El Badry which would have had to have come from Cst. El Badry as it has been established

that Cst. Mohamed had little direct contact with and no prior relationship with Mr. El Badry. There is no evidence before me and to make such an inference would be an error on my part.

The decision I must make is whether my findings of fact add up to misconduct as defined by the *PSA*. As submitted by Ms. Stewart, the applicable test is found in *Mulville and Azaryev and York Regional Police Service* (2017 CanLII 19496). This 2017 Ontario Civilian Police Commission decision is applicable and most helpful in assessing whether Cst. Mohamed's conduct is discreditable.

The accepted facts are that Cst. Mohamed, while on a four-month medical leave of absence, accompanied the complainant/victim of a break and enter to the condominium office of his rented apartment for the primary purpose of having him view the surveillance video to try and determine who broke into his apartment and stole his safe. Cst. Mohamed, in plain clothes, identified himself as an OPS constable with his badge, and advised the president of the condominium corporation that he is not a Break and Enter Unit investigator, rather a friend of the brother of the victim, also an OPS constable. During the conversation, Cst. Mohamed requests to see the video and have the tenant view it, which is denied. Cst. Mohamed departs and conducts no further follow up.

No notes were made or submitted, no investigative action was submitted, nor is any member of the Break and Enter Unit contacted or advised of his actions.

It is revealed two months later, on June 24, 2021, that the complainant/victim was under investigation by the Drug Unit for trafficking and the break and enter was staged by the Drug Unit investigators to conceal the removal of one kilogram of fentanyl and a large sum of cash from the control of the trafficker.

Testimony was provided that if this was in fact a break and enter, the viewing of the surveillance video by the complainant/victim would have circumvented policy for photo/video lineups and would have created an obstacle to any future prosecution. The potential consequences of having a drug trafficker view video surveillance and identify who robbed him could and often does result in retaliatory firearm violence. It could have also caused Mr. El Badry to conclude that the fentanyl was seized by the police which would have compromised the investigation.

It is my conclusion that a dispassionate, reasonable citizen would conclude that Cst. Mohamed's actions were discreditable and had the likelihood to bring discredit to the OPS. With his experience, Cst. Mohamed is well aware of the risks of inserting himself into an investigation and circumventing sound investigative practices. If not for the good sense of Mr. Salmon on insisting following his Condominium Corporations protocol of not permitting tenants to view surveillance video, real consequences could have materialized.

Further, the evidence establishes that on or before May 29, 2021, Cst. Mohamed became aware of some degree of criminal activity by the victim that he was attempting to assist one month earlier on April 26, 2021. What is troubling is that Cst. Mohamed took no action

to report his newly acquired knowledge of Mr. El Badry's illicit activities nor the potential link to the break and enter in which he intervened on behalf of Mr. El Badry. Instead, he chose to warn Cst. El Badry to "keep on top of his brother" as he was jeopardizing his career.

Cst. Mohamed provided special treatment to Mr. El Badry who was involved in serious criminal activity. I have ruled that there is insufficient clear and convincing evidence that Cst. Mohamed knew or ought to have known this on April 26, 2021, but it is relevant in that the public would have concerns that special treatment is being extended to family members of police colleagues. This speaks to the misguided and inappropriate attitude of Cst. Mohamed in his April 26, 2021 text response to Cst. El Badry, who is thanking him for helping out his brother, which reads "no worries man ..la Familia". Cst. Mohamed furthered this notion of expected preferential treatment during his compelled interview as his motivation for improperly inserting himself into the investigation whereas the proper response would be to direct the victim to the assigned investigator with some latitude for information and support.

Analysis—Count Two

OPS Policy 2.02, Duty Books/Note Taking, section 9, requires officers to complete notes in accordance with their duties. Section 10 specifically addresses off duty incidents and requires that officers shall complete their notes as soon as practicable. (Exhibit #23, tab A.)

I find that Cst. Mohamed's deliberate, planned actions of picking up a victim of a break and enter and driving him to the condominium building to meet the person in charge for the primary purpose of having him view the video surveillance meets the threshold of events that require both notes and an investigative action report to be submitted. By Cst. Mohamed's own admission, he formulated the belief that Mr. El Badry was the victim of a targeted break and enter while speaking to Mr. Salmon and feared further victimization, to the extent that he assisted Mr. El Badry in vacating the apartment. This would, as directed by OPS policy, require documentation in the form of an investigative action, supported by notes yet no investigative reports were generated, or notes taken. Nor, at the very least, is there any evidence that Cst. Mohamed contacted any member of the Break and Enter Unit to relay his actions and pass along the information received and conclusions drawn during his visit to the condominium building.

Mr. Smith submitted that, in the way the charge wording is particularized, there are a number of different ways of notification, including indirectly, and Cst. Mohamed did advise Mr. Salmon to send the video to the Break and Enter Unit. I reject this submission as there were far more relevant observations and conclusions as to the nature of the break and enter by Cst. Mohamed beyond the video.

I also reject the notion of Mr. Smith's submission that there was in fact no break and enter, thus no break and enter investigation, therefore no purpose in taking notes. Cst. Mohamed inserted himself into the investigation believing there was a break and enter

and formulated the belief that it was a targeted, professional occurrence, and that Mr. El Badry was at risk of serious harm or death.

Decision

Cst. Mohamed is before this Tribunal on one count of Discreditable Conduct and one count of Insubordination. In considering the exhibits entered, the testimony of all witnesses, and the review of case law provided in the Book of Authorities, I make the following findings to the standard of clear and convincing evidence:

Count One: Guilty of Discreditable Conduct.

Count Two: Guilty of Insubordination.

(Original signed)
Chris Renwick
Superintendent (Retired).

Dated November 20, 2023.

Electronically delivered: November 21, 2023.

Appendix A

Exhibits

- Exhibit 1: Notice of Disciplinary Hearing.
- Exhibit 2: Hearing Officer Designation, Supt. Chris Rheaume.
- Exhibit 3: Prosecutor Designation, Ms. Angela Stewart.
- Exhibit 4: Prosecutor Designation, Ms. Christiane Huneault.
- Exhibit 5: Prosecutor Designation, Mr. Shawn Cleroux.
- Exhibit 6: Notice of Increased Penalty.
- Exhibit 7: Hearing Officer Designation, Supt. (retired) Chris Renwick.
- Exhibit 8: Prosecutor Designation, Ms. Vanessa Stewart.
- Exhibit 9: Summons. Sgt. Sege Berube.
- Exhibit 10: Summons. Sgt. Douglas Hill.
- Exhibit 11: Summons. Mr. Craig Salmon.
- Exhibit 12: Respondent's Factum. Response to Applicant's Motion for Adjournment.
- Exhibit 13: Affidavit of Sgt. Serge Berube.
- Exhibit 13a: Affidavit of Sgt. Serge Berube with redactions. (To replace page 9.)
- Exhibit 14: Respondent's Factum—Book of Authorities.
- Exhibit 15: Application for Recusal RE: Bias.
- Exhibit 16: Applicant's Book of Authorities. Motion on Reasonable Apprehension of Bias.
- Exhibit 17: Respondent's Factum. Response to Applicant's Motion on Reasonable Apprehension of Bias.
- Exhibit 18: Respondent's Book of Authorities. Response to Applicant's Motion of Reasonable Apprehension of Bias.
- Exhibit 19: Affidavit of Sgt. Serge Berube.
- Exhibit 20: E-mail titled 'Assistance'. Sgt. Doug Hill.
- Exhibit 21: E-mail titled "RE: Response to bias application. Mr. L. Laporte.
- Exhibit 22: Investigations Directorate organizational chart.
- Exhibit 23: Exhibit Book. Prosecution.
- Exhibit 24: External USB drive. Audio recordings.
- Exhibit 25: E-mail titled "RE: Mohamed and OPS. Mr. Michael Smith.
- Exhibit 26: Witness summons. Cst. Abdullahi Ahmed.
- Exhibit 27: Witness summons. Cst. Feisal Bila-Houssein.
- Exhibit 28: External USB drive. Ontario Superior Court of Justice Notice of Action and Statement of Claim.
- Exhibit 30: Ontario Superior Court of Justice Notice of Action and Statement of Claim.