

GREATER SUDBURY POLICE 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
GREATER SUDBURY POLICE
SERVICE

AND

CONSTABLE ROBERT RHEAUME #9084

DISCREDITABLE CONDUCT

DECISION WITH REASONS

Before: **Superintendent (Ret.) Greg Walton**

Counsel for the Prosecution: **Mr. David Migicovsky**

Counsel for the Defence: **Mr. Peter Brauti**

Hearing Date: **January 15, 2019**

Allegation of Misconduct

Constable Robert Rheume #9084 stands charged with discreditable conduct that on or about March 24, 2018 and on or about March 28, 2018, he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Police Service of which he is a member, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, and Section 80(1)(a) of the *Police Services Act* as amended.

The edited particulars of allegations for Constable Rheume are as follows:

Constable Rheume is a first-class constable with the Greater Sudbury Police Service; at the time of this misconduct he was assigned to patrol operations. He commenced his employment with the Greater Sudbury Police Service on April 17, 2001.

In 2008, the Greater Sudbury Police Service implemented new policy; Corporate Communications Social Media.

Section 7 of the Corporate Communications Social Media policy states:

Subsection 9 – Members shall not post information on another member on social media without that member’s permission.

Subsection 10 – Members shall not post any information that may compromise the integrity or reputation of the Service or any of its members.

Subsection 11 – Members shall not post any comments on social media or any matter relating to policies, procedures, financial matters, deployment of personnel or any other operation or administrative matter relating to the Greater Sudbury Police Service.

In 2007 a new Workplace, Discrimination and Harassment Procedure was introduced.

The Workplace, Discrimination and Harassment Procedure states in Section 6(2) that members shall not engage in any activity that is known or ought reasonably to be known to be unwelcome by another member.

On March 24, 2018 an article was posted on the Sudbury Star Facebook page, specifically, “*Sunshine list swells in Sudbury, Ontario.*” On the same date Constable Rheume commented on this post:

What people should really be looking at is how someone like Sharon Baiden at the Greater Sudbury Police Service went from making

\$130,000 just four years ago and is now at \$205,000!! That's almost 50 percent raise in less than 4 years...As a matter of fact, the year that former Chief Frank Elsner left, she got a \$48,000 raise. Sudbury taxpayers should be asking council how that happened?"

Further, on or about March 28, 2018 Constable Rheaume posted another comment on Facebook:

Don't take this the wrong way my friend...But after seeing the Sunshine List last week, you should be posting about how some Managers at the Greater Sudbury Police Service got 33% Raises...They're [sic] are a handful of them the [sic] got extremely hefty raises..Your taxes and mine going up because of the Police Service Board's approval of these raises..Look up Lori Marconato..From \$106 thousand in 2016 to \$149 thousand in 2017...How do they justify that..Here's another one..Melissa Bamberger \$110 thousand in 2016 to \$148 thousand in 2017...Again, how do you fucken justify that?? Carrie Lynn Hotson..\$109 thousand in 2016 to \$132 thousand in 2017. Three people..over \$100,000 in raises.

On March 24 and March 28, 2018 Constable Rheaume posted comments on social media on two different occasions pertaining to significant pay raises received by the CAO [Chief Administrative Officer] of the police service as well as civilian managers.

Constable Rheaume singled out the CAO of the Greater Sudbury Police Service as well as three civilian managers and questioned the integrity of the Service, City Council and the Police Services Board.

Constable Rheaume elaborated on one of the posts to include former Chief Frank Elsner.

Constable Rheaume's actions in posting the above-noted comments on social media breached the provisions of the Corporate Communications Social Media Policy and the Workplace, Discrimination and Harassment Procedure.

The actions of Constable Rheaume constitute discreditable conduct under the *Police Services Act* which states:

- Any Chief of police or other police officer commits misconduct if he or she engages in,
 - a. Discreditable conduct, in that he or she;

- xi) Acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police service of which the officer is a member.

Plea

Constable Rheaume entered a plea of not guilty. His counsel Mr. Brauti and the prosecutor Mr. Migicovsky agreed on the facts in general but disputed whether they amount to discreditable conduct.

Decision

After reviewing and considering the evidence and the submissions presented, I find Constable Rheaume guilty of discreditable conduct.

The Hearing

No witnesses were called by Mr. Brauti or Mr. Migicovsky. Instead, Counsel submitted an Agreed Statement of Facts (ASoF) and cases in support of their submissions.

Submissions and Analysis

Exhibit #6 contains the ASoF at tab 1, followed by a series of tabs, from *a* through *j*. These tabs are referred to as Exhibits in the ASoF which reads as follows, verbatim:

1. Constable Robert Rheaume #9084 is a first-class Constable with the Greater Sudbury Police Service (“the Service”); at the time of this misconduct he was assigned to Patrol Operations. He commenced his employment with the Greater Sudbury Police Service on April 17th, 2001.
2. In 2008, a new policy was implemented, Corporate Communications Social Media COR 002 (“the Social Media Policy”). On June 23, 2016 the policy was updated. Attached as Exhibit A is a copy of the 2008 policy as well as a Memorandum to all personnel dated June 23, 2016 to which is attached the newly developed policy. As a member of the Service, Constable Rheaume was familiar with the Social Media Policy and aware of the need to comply with same.
3. Section (7) of the Social Media Policy states in subsections: (9) Members *shall not post information* on another member on social media without that member’s permission. (10) Members shall not (b) Post any information that may compromise

the integrity or reputation of the Service or any of its members. (11) Members shall not post any comments on social media or any matter relating to policies, procedures, financial matters, deployment of personnel or any other operation or administrative matter relating to the Greater Sudbury Police Service.

4. In 2007 the Workplace Discrimination and Harassment Procedure OHS015 was introduced (“the Procedure”). On July 23, 2015 the Procedure was amended. Attached as Exhibit B is a copy of the memorandum to all personnel dated July 23, 2015 to which is attached the amended Procedure. As a member of the Service, Constable Rheume was familiar with the Workplace Discrimination and Harassment Procedure and aware of the need to comply with same.
5. The Workplace Discrimination and Harassment Procedure states in Section 6(2) that members shall not engage in any activity that is known or ought reasonably to be known to be unwelcome by any other member.
6. Ms. Sharon Baiden is the Chief Administrative Officer of the Service. This is a civilian position which is at the same level as that of the Deputy Chief of Police of the Service.
7. Ms. Carrie-Lynn Hotson is the Manager of Human Resources of the Service. She was previously a sworn officer with the Service.
8. Ms. Lori Marconato is employed with the Service as the Manager of Records and Customer Service of the Service.
9. Ms. Melissa Bamberger is employed with the Service as the Manager of Materials and Resource of the Service.
10. In the period preceding the events which form the basis of the current charge against Constable Rheume, he had a difficult work relationship with Ms. Baiden and Ms. Hotson. Subsequent to being served with the Notice of Investigation in relation to this misconduct, Constable Rheume filed a complaint against Ms. Hotson in which he accused her of breaching his confidentiality information regarding the manner in which she dealt with his workplace absence. He had also told Ms. Hotson that he did not trust her. By virtue of the reporting structure of Ms. Hotson, Ms. Baiden was also named in this complaint.
11. Every year the government of Ontario releases a “Sunshine List” of publicly employed individuals earning a salary of \$100,000.00 or higher. This information,

including individual names and salaries, is released according to the *Public Sector Salary Disclosure Act*. Extracts from the Sunshine List for the years 2012 – 2017 are attached as Exhibit C (1) – (6).

12. On the 24th of March 2018, an article was posted on the Sudbury Star Facebook page specifically “Sunshine list swells in Sudbury, Ontario.” On the same date, Constable Rheume commented on this post. His comments are set out below in italics. Attached as Exhibit D is a copy of Constable Rheume’s comments as they appear on the extract from the Sudbury Star Facebook page. The Sudbury Star Facebook article and comments on that article were accessible to anyone who visited the Sudbury Star Facebook page, as well as to anyone who forwarded the story and the comments to anyone else. The comments made by Constable Rheume were also accessible to anyone who accessed Constable Rheume’s Facebook page.

“What people should really be looking at is how someone like Sharon Baiden at the Greater Sudbury Police Service went from making \$130000.00 just 4 years ago and is now at \$205000.00!! That’s almost 50 percent raise in less than 4 years...As a matter of fact, the year that former Chief Frank Elsner left, she got a \$48000.00 raise. Sudbury taxpayers should be asking council how that happened?”

13. Further, on or about the 28th of March 2018, Robert Rheume posted another comment which appears in italics below on the Facebook page of Constable Enzo Rizzi. Attached as Exhibit E is a copy of this posting. This posting was in response to a posting that someone else had posted about gas prices. Constable Rheume’s posting would have been accessible to any of the individuals who accessed that Facebook page or Constable Rheume’s own Facebook page, as well as countless other individuals who may have been Facebook friends with someone else who was a Facebook friend of Constable Rheume. Constable Rizzi has in excess of 700 Facebook friends, some of whom are members of the Service.

“Don’t take this the wrong way my friend ... But after seeing the Sunshine List last week, you should be posting about how some Managers at the Greater Sudbury Police Service got 33% Raises ... They’re are a handful of them that got extremely hefty raises .. Your taxes and mine going up because of the Police Service Board’s approval of these raises.. Look up Lori Marconato.. From \$106 thousand in 2016 to \$149 thousand in 2017 How do they justify that .. Here’s another one .. Melissa Bamberger \$110 thousand in 2016 to \$148 thousand in 2017 ... Again, how do you fucken justify that.?? Carrie Lynn Hotson .. \$109 thousand in 2016 to \$132 thousand in 2017. Three people .. over

\$100 000 in raises.”

14. Both of the posts made by Constable Rheume were made in his own name. Anyone who viewed the posts could also access Constable Rheume’s Facebook profile (as far as his Facebook privacy would allow) which showed his picture. His profile did not identify him as a police officer or as a member of the Greater Sudbury Police Service.
15. All of the individuals whose salary was the subject of Constable Rheume’s postings on social media were managers who had received salary increases to which they were lawfully entitled under the relevant collective agreement or pay equity. In some cases, the published salary reflected retroactive pay owing from a prior year. Constable Rheume would not have known the reasons for the pay increases. None of these individuals had consented to Constable Rheume’s postings.
16. Constable Rheume’s posts were the subject matter of discussion among many members of the Service. One member of the Service received hard copies of the posts in an envelope delivered anonymously to him at work.
17. As previously noted, Exhibit D singled out Ms. Baiden. It also noted that Ms. Baiden had received a large raise in the year that former Chief Elsner had left the Service. After Chief Elsner left the Service, he joined the Victoria Police Service as Chief of Police. As a result of actions undertaken by former Chief Elsner in Victoria, there were many media stories reported about him in Sudbury and nationally. These stories portrayed former Chief Elsner in a very negative light for his actions while Chief of Police in Victoria. Ms. Baiden found Constable Rheume’s post about her to be embarrassing, demeaning, accusatory and a direct attack. She believed the references to former Chief Elsner were intended to suggest that her salary increases were not merited and to leave people reading the post to have questions about whether she had been paid off.
18. Ms. Baiden and Ms. Hotson, who were the subject of Constable Rheume’s postings on social media were extremely upset by Constable Rheume’s actions. They felt singled out, insulted and disrespected. They perceived his postings about them to be vexatious. They also did not understand why Constable Rheume was posting information which could adversely affect the integrity or reputation of the Service and its members. Attached are the transcripts from the interviews of Ms. Baiden and Ms. Hotson (Exhibits F & G).

19. Constable Rheume's agreement to the facts set out in paragraphs 10, 16, 17 and 18 is without prejudice to his right to argue that these facts are not relevant to the current disciplinary charge against him.
20. In response to a request from Staff Sergeant Brunette that Constable Rheume remove the Facebook posts he had made, Constable Rheume sent him an email dated April 2, 2018 which is attached as Exhibit H.
21. Constable Rheume was interviewed on April 17, 2018 by Professional Standards. A transcript of his interview is attached as Exhibit I.
22. Constable Rheume does not agree that he breached the Social Media Policy (Exhibit A) or the Workplace Discrimination and Harassment Procedure (Exhibit B).
23. Constable Rheume's actions as noted above had led to a Chief's complaint. As a result, Constable Rheume was served with the attached Notice of Investigation dated March 29, 2018 (Exhibit J). This was followed by a Professional Standards investigation which substantiated the misconduct and led to the issuance of the Notice of Hearing in this matter.

The particulars of allegation associated to the Notice of Hearing contains a series of bullet points. Based on the ASoF and the detailed submissions from Counsel, the first 10 particulars of allegation are not in dispute. Therefore, it is acknowledged that Constable Rheume was the author of two social media posts on March 24, and March 28, 2018 regarding the salaries of specific members of the Greater Sudbury Police Service. It is also clear that Constable Rheume understood the Greater Sudbury Police Service's Social Media policy and Workplace, Discrimination and Harassment Procedure which was in place at the time of these two posts.

It is only the final two particulars of allegation which are in dispute; whether or not Constable Rheume's posts breached existing policy and procedure and do the posts constitute misconduct. Mr. Brauti acknowledged Constable Rheume's actions may have in fact breached the provisions of the Corporate Communications Social Media Policy and the Workplace, Discrimination and Harassment Procedure. However, Mr. Brauti submitted that if this is the case, the outlined policy and procedure breach the *Charter of Rights and Freedoms* and therefore the actions of Constable Rheume do not constitute discreditable conduct.

Mr. Brauti noted that the ASoF contains Constable Rheaume's right to argue paragraphs 10, 16, 17 and 18 contained within. He submitted the facts contained within these paragraphs are not relevant to the current disciplinary charge against him. It is noteworthy that Mr. Brauti did not take issue with the accuracy of the facts contained within these paragraphs, it is the relevancy which concerned him. I will address this in my analysis which follows.

Counsel made fulsome submissions including extensive case law for my consideration. In my analysis which follows, not all aspects of Counsel's submissions will be referenced nor will I cite each case. However, I have reviewed each case submitted and I have considered all submissions thoroughly. Exhibit #7 is the prosecution's Book of Authorities tabbed 1 through 8. Exhibit #8 contains additional cases tabbed 9 through 17. Exhibit #10 is Mr. Brauti's book of Authorities tabbed 1 through 17.

I have identified three critical issues which must be explored in order to properly assess the evidence: 1. What is the definition of discreditable conduct and what must I take into consideration to correctly assess the evidence? 2. Should the posts be taken at face value or should they be viewed in context? 3. Were the posts political statements, authorized by the *Charter of Rights and Freedoms* and by the *Police Services Act*?

CRITICAL ISSUE #1:

What is the definition of discreditable conduct? What must I take into consideration to correctly assess the evidence?

Finding:

I find I must apply an objective test, measured against the reasonable expectation of the community. I must analyze how the reputation of the Greater Sudbury Police Service was likely to be affected by the conduct in question. I must place myself in the position of the dispassionate reasonable person in the community, fully apprised of the circumstances of the case aware of the applicable rules and regulations, to assess whether the conduct in question was discreditable.

The Notice of Hearing alleges Constable Rheaume acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Police Service of which he is a member, contrary to Section 2(1)(a)(xi).

Mr. Migicovsky submitted discreditable conduct covers a range of behavior. In this case, he submitted the conduct diminished the reputation of the Greater Sudbury Police Service. He noted that case law suggests the test which determines discreditable conduct

must be a primarily objective one, measured by a reasonable person in the community. It is not necessary to demonstrate the reputation of the police service was actually discredited, but whether in the view of a dispassionate person, aware of all the facts and the existence of the rules and regulations that it could have been.

To guide me in the determination of discreditable conduct, Mr. Migicovsky submitted the case of *Girard v Delaney*, a 1995 Board of Inquiry decision which stated the following principle:

1. The test is primarily an objective one.
2. The Board must measure the conduct of the officer by the reasonable expectations of the community.
3. In determining the expectations of the community, the Board may use its own judgement, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.
4. In applying the standard, the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time...

Mr. Migicovsky also submitted *Mancini v (Courage) Niagara Regional Police Service*, OCPC 2004 to put the test into perspective. The OCPC noted:

The concept of discreditable conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.

It is not necessary to establish actual discredit. As the Commission noted in *Silverman and Ontario Provincial Police* (1997), 3 O.P.R. 1181 (O.C.C.P.S.) at 1187: "The measure used to determine whether or not conduct is discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge."

It is not even necessary that the conduct in question offend, frighten or be "vexatious" to the individual who is the object of the action in question. This is reflected in a number of Commission decisions.

Mr. Brauti submitted the test to determine discreditable conduct is an objective one, not a *primarily* objective test as noted in the case of *Girard v Delaney* and *Mancini*. He submitted case law has evolved since then.

There were multiple “*Mulligan*” cases submitted for consideration. At tab 15 of Exhibit #8 is *Mulligan (No.2) v. Ontario Provincial Police*, OCPC, January 26, 2018. Mr. Brauti submitted the case of *Mulligan v Ontario Provincial Police*, OCPC, December 27, 2017 found at tab 2 of Exhibit #10 and it states:

We agree that the test for discreditable conduct is an objective one. The objective test would require that the Hearing Officer place a dispassionate reasonable person fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether the conduct in question was discreditable...

Mr. Brauti submitted that the test is from the perspective of the reasonable member of the community, fully informed; how would that person objectively look at the postings, would they find them discreditable?

I agree with the assessment in *Mulligan* and also, in *Mancini*, the OCPC stated:

The proper question is whether or not a reasonable person in the community would find that the conduct of the officer (if it were to be made public) would likely discredit the reputation of the police force.

Mr. Migicovsky stressed that based on *Mancini*, it is not necessary for there to be evidence about how the community perceived Constable Rheume’s conduct; the test is for the hearing officer to determine what would a reasonable person would conclude if they knew Constable Rheume was breaching his employer’s policy’s, making disparaging comments about his employer and attacking its integrity while targeting four female managers. Furthermore, Mr. Migicovsky submitted it is not necessary to prove that the public actually knew a police officer was responsible for the two posts, it only matters what damage to the reputation of the Greater Sudbury Police Service would occur if the public knew he was a police officer.

Bates v. Durham Regional Police, OCPC, July 8, 2003 is a discreditable conduct matter wherein the officer made an utterance to the effect “nobody better be nice to her when she gets back or give her the time of day;” comments were made by a sergeant about a subordinate officer to other subordinates.

In *Tapp v. Ontario Provincial Police*, OCPC, November 28, 2018 the officer referred to his supervisor as being racist. In that matter, it was not clear whether the comments were overheard by members of the public. The OCPC noted:

The Hearing Officer determined that “If the public heard PC Tapp’s comments and the manner in which they were made, they would reasonably believe his behaviour was discreditable.” In our view, his decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law, thereby meeting the definition of reasonableness.

Mr. Migicovsky submitted that *Bates* and *Tapp* support his assertion that it is not relevant Constable Rheume did not identify himself as a police officer, the issue is 'if the public knew.'

I agree with Mr. Brauti's submission that it is for the hearing officer to determine if the posts adversely affected the reputation of the Greater Sudbury Police Service. The opinions of Sharon Baiden and Carrie-Lynn Hotson contained in the ASoF ought not to be considered.

At tab 3 of Exhibit #10 is the matter of *Monaghan v. Toronto Police Service* [2005] O.J. No. 1396 (Div. Ct.) which states:

Unfortunately, by analyzing the evidence by reference to these characterizations of the critical essential element of the offence alleged, the Tribunal lost sight that it was necessary for the prosecutor to prove that the appellant's conduct would likely bring discredit upon the police force and that it was not sufficient for the prosecutor to prove that it was only a possibility. By employing this language, and applying the test set out, the Tribunal fell into reversible error.

Mr. Brauti submitted that the prosecution is not obliged to bring people to testify to discuss how the public has been affected. Mr. Brauti submitted *Stock v. Windsor Police Service*, OCPC, October 15, 2014 to illustrate the need to analyze how the reputation of the Greater Sudbury Police Service was likely to be affected. Mr. Brauti acknowledged that the prosecution was not obliged to bring people to testify to discuss how the public has been affected by Constable Rheume's social media posts as the hearing officer, I can make that determination, but that assessment must be based on the likelihood the conduct would bring discredit, not just the possibility that it would.

Mr. Brauti noted that Constable Rheume was off-duty at the time he posted his comments, he did not identify himself as a police officer and he did not indicate his comments were to represent the Service; he was therefore permitted to discuss the pay of Greater Sudbury Police Service employees and his comments are not discreditable.

I accept the definition of discreditable conduct found in the more recent cases which state the test is an objective one, not a primarily objective test. While this may be a subtle difference, it means I must make every effort to place myself entirely in the shoes of the dispassionate reasonable person in the community and not be influenced by my perspective as a former police officer and supervisor.

I will discuss the few discrepancies between Counsel's submissions further in this decision, but much of this case has been agreed upon including the fact it was Constable Rheume who posted the comments and that policy and procedure was in existence specifically addressing this type of situation.

The allegation is that Constable Rheume's conduct was prejudicial to discipline or was likely to bring discredit upon the Greater Sudbury Police Service. I accept that to find Constable Rheume guilty of the allegation, there must be a finding that the posts were likely to bring discredit upon the police service, not just that it was a possibility.

Mr. Migicovsky acknowledged the social media posts do not identify Constable Rheume as a police officer however, he noted that in both instances there is a photograph of him attached to the post. He submitted Sudbury is not a city the size of Toronto; citizens could easily recognize him as a police officer from his photograph. Mr. Migicovsky added that undoubtedly, many of Constable Rizzi's followers would have known Constable Rheume was a police officer either by name or facial recognition.

The ASoF notes that the two Facebook posts are attributed to Robert Rheume but neither his Facebook profile nor the actual posts identify Robert Rheume as a police officer. There were no submissions by Counsel indicating whether or not it was possible for anyone having access to the posts, could navigate through Constable Rheume's Facebook account to identify he was a police officer. Therefore, I will take the position that was not possible and therefore none of the readers of his social media posts were aware he was a police officer with the Greater Sudbury Police Service.

Mr. Migicovsky submitted the issue is "if" the public knew he was a police officer and that falls within the parameters of the dispassionate reasonable member of the community, apprised of all the circumstances of the case. Mr. Brauti submitted it is significant that Constable Rheume did not identify himself as a police officer and that he did not make any attempt to suggest his views represented the Greater Sudbury Police Service.

In *Tapp*, the officer made disparaging comments in a public place. The evidence was that the public could have heard the comments, not that they actually did hear the comments. The facts here are different, but I find the premise somewhat analogous. I agree with Mr. Brauti that it is important to note that Constable Rheume did not identify himself as a police officer and that he did not make any attempt to suggest his views represented the Greater Sudbury Police Service. I find those are mitigating factors to be considered when determining a fitting sanction. I find that the issue is how a dispassionate reasonable person in the community would view the posts if they were aware of all the information,

including that the person who posted them was an officer with the Greater Sudbury Police Service.

I must place myself in the position of the dispassionate reasonable community member, one fully apprised of all the circumstances, including that the author of the social media posts was a police officer. Employing the perspective of this member of the community, I must determine if the reputation of the Greater Sudbury Police Service was likely to be damaged by the social media posts.

CRITICAL ISSUE #2:

Should the posts be taken at face value or should they be viewed in context?

Finding:

I find the context of the posts to be a relevant consideration.

Mr. Migicovsky made repeated reference to the suggestion that Constable Rheume specifically targeted these managers because of their gender. This was not agreed upon in the ASoF and there was no evidence to support the assertion. It was left to me to draw that conclusion. I do not find it necessary to delve into this area beyond noting that I was not impacted by this submission and did not consider the gender of the four managers a relevant point for consideration.

Mr. Migicovsky submitted that the history between Constable Rheume and some of the involved managers is relevant. He submitted the history accounts for some of the circumstances that the reasonable member of the community ought to be aware of when assessing the allegations. Conversely, Mr. Brauti submitted it would be improper to try to interpret the context of the posts; I must take them at face value. Mr. Brauti submitted the posts are simply Constable Rheume expressing his concern about how tax dollars have been spent, they are nothing more than a political statement. He submitted it is the face of the two postings which must be examined, and on the face, the posts do not meet the threshold of discreditable conduct. Constable Rheume commented on public information in a public way, he did not identify himself as a police officer and did not attribute the comments to the Greater Sudbury Police Service.

Mr. Brauti did not take issue with the fact Constable Rheume may have had a difficult working relationship with Sharon Baiden and Carrie-Lynn Hotson, but he submitted there is no relevance and it should not be taken into consideration. Mr. Brauti submitted the commentary by Constable Rheume was more constructive than critical and the perspective ought to be an objective one, based on the face value of the posts.

Mr. Migicovsky submitted *Grainer v Ontario Provincial Police*, OCPC, July 4, 2005 to support his position that the context of the commentary is important. He also submitted *Children's Hospital of Eastern Ontario and Ontario Public Service Employees' Union*, a 2015 arbitration decision that stated:

...the subtle nature of the conduct does not militate against a finding of harassment. Whether the comments or conduct are overt, or whether it is passive non-verbal behavior, a finding of harassment is only dependent on whether the conduct is vexatious and was known or ought to have been known to be unwelcome.

This case is not on point, but I agree with the notion that the context of the posts is important to consider in order to understand the full circumstances.

At tab d of Exhibit #6 is an article published on March 23, 2018 by the Sudbury Star with the headline "Sunshine List Swells in Sudbury, Ontario." The article is fact based, it is not an editorial analyzing or questioning the merit of any salaries belonging to Sudbury's public sector employees. The story provided an overview from a provincial perspective and then made the following observation:

Closer to home, City of Greater Sudbury had more than 430 employees on the Sunshine List, including firefighters and police officers. City CAO Ed Archer is the top earner, with a salary of \$261,652.69 and benefits of more than \$9,000. Catherine Matheson, the city's general manager of community development, earned \$215,179.28 in 2017, plus benefits of about \$8,300. Tony Cecutti, general manager of infrastructure services, earned \$211,014.76 and a benefits package worth about \$9,000. Former fire chief Trevor Bain, who was fired last October, earned \$169,109.27 in 2017, plus benefits of about \$2,300. Police Chief Paul Pedersen earned a total of \$241,980.40 in 2017 as well as a benefits package worth more than \$16,000. Sharon Baiden, CAO of the police services board, and Al Lekun, deputy chief were the next top earners for the Greater Sudbury Police Service, each pulling in \$205,878.40 in 2017. The top earning firefighter was Colin Braney, who earned \$175,077.39 last year.

Constable Rheume posted his comment the following day stating:

What people should really be looking at is how someone like Sharon Baiden at the Greater Sudbury Police Service went from making \$130000.00 just 4 years ago and is now at \$205000.00!! That's almost 50 percent raise in less than 4 years...As a matter of fact, the year that former Chief Frank Elsner left, she got a \$48000.00 raise. Sudbury taxpayers should be asking council how that happened?

The Sudbury Star article did not focus on any one sector, it merely presented the salaries of public servants such as fire fighters, health care workers, education and legal professionals and members of the Greater Sudbury Police Service. Constable Rheaume's post in response to the article focused on Sharon Baiden. Mr. Migicovsky submitted this was deliberate and I agree. The post could have included other commentary such as but not limited to, the deputy chief's salary which is on par with Ms. Baiden's, or to question how a fire chief made \$169,109.27 in a year where he was fired in October.

Sharon Baiden is the Chief Administrative Officer with the Greater Sudbury Police Service, a civilian position equal to the rank of deputy chief, yet Constable Rheaume made no mention of the deputy chief's salary. This on its own is insufficient to create any impact; I have not lost sight of the fact that the focus of this post was the size of the raise as opposed to the actual salary so that could reasonably be considered one rationale why he did not mention the deputy chief's salary.

The Sudbury Star article contained neutral information; it was not an editorial and did not include commentary of how tax dollars were being utilized. It straightforwardly reported the salaries of high-profile public servants from the Sudbury area and it only listed 2017 salaries.

At pages 18 and 19 of the transcript of Constable Rheaume's interview with Professional Standards, he stated:

Okay, so if anything, it's not my integrity that's being questioned here...and don't take offence to this, but it's the, the [sic] police service's integrity...I mean, or, the Board. When you start approving 33 or 38 percent pay raises, you gotta [sic] be able to justify that in one year. Like I'm a taxpayer, and when you see pay raises like that like in the public sector, you should be questioned.

I do not find Constable Rheaume's statements are consistent with a person writing from the perspective of a concerned citizen. If his sole purpose was to take up the cause of a concerned taxpayer, he would have delved deeper in his analysis of other people in similar situations rather than singling out only a select four people, two with whom he had an unfavourable relationship. Constable Rheaume's post was not limited to Ms. Baiden's 2017 salary; he summarized the previous four years by suggesting a near 50 percent raise from \$130,000 to \$205,000. Mr. Migicovsky quite rightly submitted Constable Rheaume would have had to have researched the matter to draw that conclusion. Constable Rheaume's posts did not mention the deputy chief's salary or delve into any other sector of the hundreds of other people from Sudbury on the Sunshine List. It is logical to conclude that Constable Rheaume was conducting research into the salary

history of Ms. Baiden because he was focused on her specifically. He did not express concern about anyone from other sectors of the community listed.

The fact that he had a difficult working relationship with Ms. Baiden as noted in the ASoF must be considered to help put the comments into proper context.

Page six of the transcript of the interview, Constable Rheume noted that he was off-duty at the time he made the two social media posts and that his intention was to let his friends know about these large pay raises. He stated:

So, my intention was to, first of all, I was off-duty when I posted those...I mean I want that to be entered in. My intention is just as a taxpayer, let my friends know that, you know, as you can see from some of the raises, those are fairly large [sic] amount of raises.

Constable Rheume confirmed his stance when he was asked a clarifying question, "So it was in order to notify friends?" He answered, "yeah."

I do not accept this was a situation where Constable Rheume was notifying his friends about disturbing wage increases for public sector employees. He did not post his comments on his own Facebook page to reach his friends, his supposed intended target audience, he posted on the Sudbury Star website and on the Facebook page of another Greater Sudbury Police Service officer.

At tab f of Exhibit #6 is the transcript of Sharon Baiden's interview with the Professional Standards Bureau. Ms. Baiden explained that she felt the social media post was a personal attack intended to undermine her authority. I am not impacted by how Ms. Baiden interpreted the post. It is the perspective of the dispassionate reasonable person in the community which is of importance, not Ms. Baiden's respectfully. However, I do find it relevant that Ms. Baiden and Constable Rheume were recently at odds over an internal issue dealing with medical benefits; an issue that had not been resolved at the time of the posts.

At tab c of Exhibit #6 are excerpts from the Public Sector salary disclosure commonly referred to as the "sunshine list." Mr. Migicovsky noted that Sharon Baiden made \$205,878.40 in 2017 and \$201,840.56 in 2016 which represents about a two percent increase in salary. In 2015 she made \$206,162.32 which was more than in any other year. In 2014 Sharon Baiden's salary was \$190,492.64 and in 2013 it was \$194,444.56.

Mr. Migicovsky noted that Constable Rheume's assertion that Sharon Baiden's salary increased from \$130,000 four years ago is not an accurate reflection of the facts. Mr. Migicovsky pointed out that in 2012, Ms. Baiden's salary was \$146,700.80. At that time, she was the Director of Corporate Services. Her subsequent salary increase came with her career advancement to Chief Administrative Officer of the Greater Sudbury Police Service. Over the past four years, Sharon Baiden's salary increase amounted to approximately eight percent. Mr. Migicovsky submitted this supports his position that the posts were an attack on her personally and on the Greater Sudbury Police Service.

Mr. Migicovsky added that because Constable Rheume misrepresented the facts, that information cannot be considered 'public' information. He submitted that Constable Rheume did not just regurgitate public information, he put a negative spin on that information.

At tab c of Exhibit #6 are extracts from the "Sunshine List" for the years 2012-2017. The calculations alluded to by Mr. Migicovsky are supported in this Exhibit. The social media post concerning Ms. Baiden's historic income is not accurate. This is another reason why it is important to look at the context of the posts and to not simply take them at face value.

Constable Rheume may or may not have intended to post misleading information, but it does show his lack of attention to detail that a "concerned taxpayer" would be expected to demonstrate. The inaccuracy of the statement concerning Ms. Baiden's income adds to the context.

Mr. Migicovsky submitted Constable Rheume's social media post in the Sudbury Star suggests Sharon Baiden is not worth the money she is being paid. The fact that the post mentioned that she received a \$48,000 pay-raise the same year the Chief Elsner left the Service, suggests her increase must have been linked to his departure.

Mr. Brauti noted that paragraph 17 of the ASoF states that Ms. Baiden believed the posts would have people question whether she had been "paid-off" and for me to make that conclusion would be an impermissible leap. I agree with Mr. Brauti that Ms. Baiden's perspective concerning this issue is not relevant, it is how the dispassionate, reasonable person in the community would view it.

Mr. Brauti submitted that to conclude Ms. Baiden had been "paid-off" is a dangerous leap to make. He submitted Constable Rheume could have referenced the Chief by name for any number of reasons, such as simply wanting to use Chief Elsner's tenure as a time stamp or to point out that the wage increase did not occur under the current Chief's regime.

I understand Mr. Brauti's concern, but I find it is not only important, but necessary to analyze the context of this post. Constable Rheume did not need to make reference to Chief Elsner to timestamp the pay raises. The post specifically states Sharon Baiden received a near 50 percent increase over the past four years. He could have inserted actual dates, but additional dates were not necessary because his post had already addressed the timeline quite adequately and further timestamping was not needed. Constable Rheume had made his point about questioning the pay increase, but he then went on to state:

As a matter of fact, the year that former Chief Frank Elsner left, she got a \$48000.00 raise. Sudbury taxpayers should be asking council how that happened?

Mr. Migicovsky submitted Chief Elsner gained notoriety locally when he was suspended from duty from his position of Chief of Police in Victoria following his resignation with the Greater Sudbury Police Service.

The ASoF states that former Chief Elsner was portrayed in a very negative light in the media. I am satisfied that when Constable Rheume wrote the above noted sentence, it was to infer there was something nefarious in the fact, Ms. Baiden received a \$48,000 raise in pay coinciding with Chief Elsner's departure. The subsequent suggestion that taxpayers should ask how that happened, simply drives that point home.

Mr. Migicovsky submitted that an average informed person in the community of Sudbury who reads the newspapers would know about the former Chief's coverage and would draw the inference that Sharon Baiden received a significant raise when she did, must have been linked to his departure somehow.

I find the wording of this post concerning even if the dispassionate reasonable person in the community may not have been aware of the former Chief's reputation. I find the wording of the post is to cause the reader to question the rationale for the raise and to suggest there was an underlying reason beyond merit. I find it unlikely that that dispassionate reasonable person would absolutely conclude that Ms. Baiden was "paid-off" but the social media post does suggest something was amiss; it was certainly an attempt to link Ms. Baiden to something negative. I find Constable Rheume intentionally linked Sharon Baiden with the deputy chief due to the unflattering media attention he received in this community over the years.

On March 28, 2016 Constable Rheume posted another comment on social media in relation to three other members of the Greater Sudbury Police Service. Constable Rheume commented on fellow Greater Sudbury Police Service officer Enzo Rizzi's Facebook page in response to another person posting about gas prices. The post stated:

Don't take this the wrong way my friend...But after seeing the Sunshine List last week, you should be posting about how some Managers at the Greater Sudbury Police Service got 33% Raises...They're [sic] are a handful of them that got extremely hefty raises...Your taxes and mine going up because of the Police Service Board's approval of these raises..Look up Lori Marconato..From \$106 thousand in 2016 to \$149 thousand in 2017....How do they justify that.. Here's another one..Melissa Bamberger \$110 thousand in 2016 to \$148 thousand in 2017...Again, how do you fucken justify that?? Carrie Lynn Hotson..\$109 thousand in 2016 to \$132 thousand in 2017. Three people..over \$100,000 in raises.

At tab e of Exhibit #6 is a screenshot of Constable Enzo (Jake) Rizzi's Facebook page indicating he has 793 followers. As noted in the ASoF, this post was unsolicited, it was not in response to the Star article, it was in response to a posting that someone else had posted about gas prices. Lori Marconato, Melissa Bamberger and Carrie-Lynn Hotson are all managers at the Greater Sudbury Police Service. They were not referenced in the Sudbury Star article; their reference was confined to this post. Constable Rheume would have had to conduct research to determine what their salaries were over the years.

Mr. Brauti asked that I not focus on the use of a curse word in the post saying courts find it offensive to link such comments to the fact they are police officers. He noted that in *Mulligan*, the officer openly criticized the commissioner of the OPP suggesting that he was putting lives in danger by housing the helicopter too far away. Officer Mulligan identified himself as an officer and questioned the operational decision of the commissioner. That is not the situation concerning Constable Rheume.

I am not impacted by the use of the word "fucken" other than it goes towards the tone of the post; it reflects that it is not an objective political statement, but rather a personal condemnation. Constable Rheume disseminated a message indicating that these managers were not worth what they were getting paid and it suggested impropriety by the Greater Sudbury Police Service in paying these salaries.

At tab g of Exhibit #6 is the transcript of Carrie-Lynn Hotson's interview with Professional Standards. Again, I am not impacted by how Ms. Hotson was made to feel by this post, but I do find it relevant that she had been dealing with Constable Rheume in her capacity as the manager of Human Resources. The content of paragraph 10 of the ASoF was agreed upon, Mr. Brauti did take issue with the relevance of it, however. It states they had a difficult relationship and in her interview with Professional Standards, Ms. Hotson described Constable Rheume as being confrontational in his emails, condescending and unprofessional.

In his interview with the Professional Standards, Constable Rheume stated he selected these four members because “they represented the highest pay raises within our department over a one-year period, that’s all it was...”

I do not accept his assertion. If that were indeed the case, he would have posted the information about all four managers in his initial on-line reply to the Sudbury Star article and he would have ensured his information was accurate. In her statement, Ms. Hotson alluded to the fact there were other managers who received the same pay increases at the same time due to back-pay and yet they were not mentioned in either of these posts.

Mr. Brauti submitted the case of *Allen v. Alberta Law Enforcement Review Board* to highlight the fact that not every transgression equates to misconduct. But *Allen* also stated:

The officer’s conduct must be analyzed as a whole, in context, having regard to all the sources of defining acceptable police conduct. Those sources include the Charter, the Criminal Code, parameters set by prevailing court and Board decisions, the standards set in the Regulation, the internal policies of police service, the expertise of police officers, and any other relevant source.

I realize this is slightly out of context and that the Review Board was looking at the overall context of the officer’s conduct, but I find that the philosophy is similar. It is important to conduct a review of all the circumstances so the context of the posts can be taken into consideration.

It is this context which the dispassionate, fully informed, reasonable person must be aware of when deciding if the purpose of the posts was to bring concerning salary increases to the attention of taxpayers as Constable Rheume suggested in his interview, or if they were meant to discredit the reputation of the Greater Sudbury Police Service.

It is no different than a situation involving a social media post which, on its face may appear to be discreditable, but, based on the context, would not be considered discreditable. It is important and necessary for the dispassionate, fully informed, reasonable member of the community to consider the context of Constable Rheume’s social media posts.

CRITICAL ISSUE #3:

Were the posts political statements, authorized by the *Charter of Rights and Freedoms* and by the *Police Services Act*?

Finding:

I find that Constable Rheume's posts do not fall under the realm of political speech. I find that his commentary breached existing policy and procedure and that it is not protected by the *Charter of Rights and Freedoms* or the *Police Services Act*.

Mr. Migicovsky submitted the expectation of the community is that police officers would not criticize their service and would not be insubordinate by not following policies; police officers know more than anyone that there is a need to comply with policy. Mr. Migicovsky submitted *Amato v York Regional Police*, OCPC 14 Jun 2014 which is not on point factually, but the OCPC noted:

In Orr, supra, the Commission stated

It is critical that police officers follow legal orders issued to them considering the special status that they have in society...It is critical for the operation of a police service that a police officer obeys orders...

If a police officer does not follow orders, how can she/he then expect to require citizens to follow the law and obey his/her orders? This would be hypocritical and is partly the reason why insubordination by a police officer is such a serious offence...

I agree with Mr. Malinovsky's submission, although *Amato* is an insubordination case, the concept applies here, the public expects police officers to abide by orders; it is an essential and fundamental characteristic the community expects from all police officers.

At tab a of Exhibit #6 is the original Greater Sudbury Police Service social media policy from 2008 and a copy of the most current policy dated June 23, 2016 which was in effect at the time of this incident. When the policy was updated, it was accompanied by correspondence from Chief of Police Paul Pedersen, it included the following comment:

In addition to the official use of social media, the Procedure also outlines the responsibility of members in their personal use of social media...

The policy is a comprehensive 12-page document. The policy outlines the guidelines and restrictions of members in relation to the personal use of social media. The definition of 'member' in this policy includes sworn members, civilians and auxiliary members of the Service. Section 7 is titled "Personal use of Social Media." Mr. Migicovsky highlighted only

a few of the 19 subsections:

- 1) While members of the Service are entitled to use social media and maintain personal web pages in their private lives, their status as a member of the Service requires that the content of those posting not jeopardize the integrity and reputation of the Police Service or the reputation or safety of other persons.
- 3) Members should remain cognizant that information posted on social media is not private and should not expect that privacy exists when choosing to upload personal information to social media.
- 9) Members shall not post information on another member on social media without that member's permission.
- 10) Members shall not:
 - a. Divulge any confidential police service business.
 - b. Post any information that may compromise the integrity or reputation of the Service or any of its members.
 - c. Post comments regarding a past or current member's employment with the Service.

At tab B of Exhibit #6 is a copy of the Greater Sudbury Police Service workplace discrimination and harassment procedure dated July 23, 2016. The purpose of the 13-page document is to outline the procedure to be followed in dealing with complaints of workplace discrimination and harassment arising in the workplace to ensure compliance with Police Services Board's policy of workplace violence and harassment, the *Ontario Human Rights Code* and the *Occupational Health and Safety Act*.

The policy and the procedure are clear; there is no ambiguity in language or in application and the ASoF indicates Constable Rheume was familiar with the policies and the need to comply.

Mr. Migicovsky submitted that police services are para-military organizations and as such, rules and regulations must be adhered to; they are applied by the chief for all members to follow. They are there for a reason, it is not up to individuals to decide whether to follow them or to disregard them.

Mr. Migicovsky submitted that Constable Rheume breached the social media policy when he posted comments on the Sudbury Star Facebook page on March 24, 2018. His post was not solely for the viewing of his personal friends, his comments were posted in the Sudbury Star website in response to one of their stories.

Mr. Migicovsky submitted it is clear from the first sentence alone that Constable Rheume violated the policy by virtue of the reference to Sharon Baiden and her salary; he posted financial matters without her consent contrary to policy and he misrepresented the facts. Mr. Migicovsky submitted the comments were intended to affect the integrity and reputation of Sharon Baiden, the city, the Greater Sudbury Police Service, and Council.

Mr. Migicovsky submitted that Constable Rheume's posts breached the workplace discrimination and harassment procedure which defines harassment:

As defined by the *Occupational Health and Safety Act*, means engaging in a course of vexatious comment or conduct against a worker in the workplace that is known or ought to be known as unwelcome.

Mr. Migicovsky submitted the manner in which this information was posted is concerning, it was a violation of the members' rights and privacy expectations.

I find that Constable Rheume did not just pass along neutral and factual information as was the case with the reporter of the Sudbury Star article. One of Constable Rheume's posts contained inaccurate information and both posts are editorial in nature; they contain personal attacks both directly and by inference. Mr. Migicovsky submitted that even without the existence of the policy, these posts would still amount to discreditable conduct because they affect the reputation and the integrity of the Service. It is not necessary to analyze that submission because the social media posts are in contravention of Greater Sudbury Police Service's Social Media Policy.

The social media posts identify members of the Greater Sudbury Police Service and they jeopardize the integrity and reputation of the Service and the reputation of the members he identified. While the salary disclosure was public information, he did not have the permission of the managers to post information specific to them. His intent was to use their situations to question the integrity of the Greater Sudbury Police Service.

Mr. Migicovsky submitted there is a vast amount of personal information about virtually all members of society on-line from multiple sources, such as court proceedings being accessible to the public, however that does not make it acceptable to circulate and comment on that information.

Mr. Brauti submitted that on face value, the postings speak to the salaries of government workers and notifying taxpayers, and this equates to political speech. Mr. Brauti cited section 2 of the *Charter of Rights and Freedoms* stating it authorizes Constable Rheume to make the comments he did; if he violated Greater Sudbury Police Service Social Media policy, then that policy is unlawful.

Mr. Brauti submitted the allegation of discreditable conduct imposes an unlawful “gag order” and prohibits protected free speech. Section 12 of Regulation 268/10 of the *Police Services Act* speaks to political activity. In part, it states:

A municipal police officer who is not on duty and who is not in uniform may engage in the following political activities:

1. Expressing views on any issue not directly related to the police officer’s responsibilities as a police officer, as long as the police officer does not,
 - i. Associate his or her position as a police officer with the views, or
 - ii. Represent the views of the police force.

Mr. Brauti submitted the *Police Services Act* authorizes a police officer to engage in political activity while off-duty as long as the message is not connected to their duties or, some unprofessional nexus can be made between their duties and the speech.

I agree with Mr. Brauti’s submission; however, the allegations are in respect to discreditation of the Greater Sudbury Police Service. I find Constable Rheaume’s posts were not political in nature but were meant to be disparaging given all the circumstances.

Mr. Brauti submitted that this section of the *Police Services Act* is a complete answer to the issue of discreditable conduct, but if I do not accept that, Section 2 of the *Charter of Rights and Freedoms* is also applicable.

Section 2 of the Charter of Rights and Freedoms addresses fundamental freedoms:

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.

Mr. Brauti submitted the case of *Dore v. Quebec (Professional Tribunal)*, 2012 SCC 12 to help guide me in managing the *Charter* issue:

How does an administrative decision maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the Statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives...Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives.

Mr. Brauti submitted that it is permissible for a police officer to make social media posts such as these, as long as they are tempered comments. Even if the comments are considered aggressive or colourful or bordering on aggression, they are still permitted under 2(b) of the *Charter of Rights and Freedoms*. Section 2(b) provides freedom of expression, it is not qualified by other sections of the *Charter*.

Mr. Brauti submitted the “Sunshine List” was published for a reason; so that taxpayers could scrutinize public employee salaries and spending. The whole purpose was to create discussion about the compensation provided to public employees; therefore, the posts served their purpose, they questioned the spending of tax dollars and they generated conversation.

Mr. Migicovsky submitted that police officers have a duty to their employers; they are public servants and must be careful about making comments about their employers. He submitted freedom of expression is not an absolute right; employees have a duty of loyalty to their employers. He submitted the rule is even more strict when dealing with public servants, because they must be perceived as being impartial and effective. It is incumbent upon me as the hearing officer to balance freedom of expression with duty of loyalty. Mr. Migicovsky stated employees are permitted to criticize their employer and breach that duty of loyalty if they are “whistleblowers.” To meet the definition of a whistleblower, stringent conditions must be met; life, health and safety must be affected and first, the involved person must have made an attempt to address the issue at hand internally. Mr. Migicovsky submitted these conditions did not exist in this instance and the whistleblower protection is therefore not applicable.

In *Mulligan* (No 2), the OCPC was addressing the whistleblower analysis by the hearing officer and noted:

These factors were described in a more expansive fashion in *Haydon v. Canada* (treasury Board), 2004 FC 749 (CanLII) at para. 49:

[T]he following factors are relevant in determining whether or not a public service employee who makes public criticism breaches his or her duty of loyalty towards the employer: the working level of the employee within the government hierarchy; the nature and content of the expression, the sensitivity of the issue discussed; the truth of the statement made; the steps taken by the employee to determine the facts before speaking; the efforts made by the employee to raise his or her concerns with the employer; the extent to which the employer’s reputation was damaged; and the impact on the employer’s ability to conduct business.

Mr. Brauti submitted he was not relying on the “whistleblower” defence, but I find it significant that there is no evidence to suggest Constable Rheume made any attempts to ascertain rationale for the wage increases by making internal inquiries before his social media posts. If his sole purpose in making these social media posts was to bring concerning wage increases to the attention of taxpayers, would he not first make an internal inquiry to ensure it was in fact irresponsible management of Greater Sudbury Police Service funds? The issue is compounded the fact a portion of the first post was inaccurate.

Mr. Migicovsky submitted *Fraser v. Public Service Staff Relations Board*, a 1985 Supreme Court of Canada decision, which remains relevant despite the fact it was 34 years ago. The Court stated:

...a public servant is required to exercise a degree of restraint in his or her actions relating to criticism of Government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties. It is implicit throughout the Adjudicator’s reasons that the degree of restraint which must be exercised is relative to the position and visibility of the civil servant...The act of balancing must start with the proposition that *some* speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser’s apt phrase, “silent members of society.”

I am not suggesting it is improper for a police officer to draw the public’s attention to careless spending, but it must be done in the correct manner and for political reasons, not for self-serving reasons as in this case.

Fraser also states:

...Public servants have some freedom to criticize the government. But it is not an absolute freedom. To take but one example, whereas it is obvious that it would not be ‘just cause’ for a provincial Government to dismiss a provincial clerk who stood in a crowd on a Sunday afternoon to protest provincial day-care policies, it is equally obvious that the same Government would have ‘just cause’ to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.

...a public servant must not engage, as the appellant did in the present case, in a sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government...there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual and apparent, impartiality of the public service.

There is in Canada, in my opinion, a similar tradition surrounding our public service. The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service, or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.

In this case, Constable Rheume did not demonstrate loyalty to his employer; he ought to have known that his posts could damage the reputation of the Greater Sudbury Police Service. A reasonable conclusion to questioning the integrity of one's employer in a public forum, is damage to the employer's reputation.

The case of *Haydon v. Canada* (Treasury Board) 2005 federal Court of Appeal 249 took a similar stand post *Charter of Rights and Freedoms*:

Fraser was a pre-charter case...“Freedom of Expression” has now been elevated as a fundamental freedom guaranteed under subsection 2(b) of the Charter. In view of section 1 of the Charter, it is still true to say, as it was in *Fraser*, (p.463) that “freedom of expression is not an absolute value. It must be qualified and balanced against other important and competing values...”

...the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter.

Mr. Brauti submitted the case of *Bratzer v Victoria Police Department*, a decision concerning the *Human Rights Code*. *Bratzer* cited *Kljajic v. City of Vancouver and another*, 2014 BCHRT 258:

However, I note that the freedom to hold and to express one's political opinion is one of the touchstones of our democracy. Any interference with that right must be strictly circumscribed with the onus being squarely on those who would restrict it. To similar effect is the right to be heard in one's own voice where one chooses and is able to do so. Speech by its very nature involves contemporaneous editing and emphasis that may not be adequately captured when one is required to rely on someone else's voice.

Bratzer is a decision of the Human Rights Tribunal. I find it assistive, but one significant difference is that I do not find Constable Rheume's posts to be political statements. Furthermore, Constable Rheume had other alternatives available to him; there is no

evidence to suggest he made any attempts to ascertain rationale for the wage increases by making internal inquires. Internal dialogue and correspondence were rarely constructive, but extensive in *Bratzer*.

Mr. Brauti submitted the case of *R v Kopyto*, [1987] O.J. No. 1052 found at tb 16 of Exhibit #10.

The concept of free and democratic speech permeates all truly democratic societies. Caustic and biting debate is, for example, often the hallmark of election campaigns, parliamentary debates and campaigns for the establishment of new public institutions. The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should have to worry unduly about the framing of their expression of ideas. The very life-blood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.

Kopyto, was not an employer/employee hearing, it was an appeal of a criminal matter and the commentary speaks to “citizens” of a democratic state. Not all civilians are bound by the rules of internal policies, procedures and in this case, also the *Police Services Act*; police officers are held to a higher standard.

Mr. Brauti submitted a Report of the Canadian Judicial Council to the Minister of Justice regarding the conduct of Theodore Matlow of the Ontario Superior Court of Justice. Justice Matlow contacted politicians and wrote letters in which he identified himself as a Justice of the Superior Court opposing the construction of a residential complex near his residence. Mr. Brauti submitted that if a judge, who is supposed to be as neutral as possible can act in this manner, certainly the bar cannot be higher for a police officer.

The Report stated:

This does not mean that all contentious expression is prohibited for members of the judiciary. Judges do not surrender their rights as citizens on appointment to the Bench. As with many legal issues, this is about line-drawing and context.

No two matters are completely analogous and therefore each case must be scrutinized based on their own unique set of circumstances. The Report was based on the conduct of a Superior Court Justice who was dealing with an issue he had a personal vested interest in, in a direct and transparent manner. Justice Matlow was a leader of a group known as “The Friends of the Village,” representing a group of people properly

questioning whether the planned construction project was in accordance with decisions made by a municipal council.

Constable Rheume's remarks were unprofessional and were not for a political purpose. In *Mulligan (No.2)* the OCPC upheld the decision of the hearing officer who noted:

As a police officer, Sgt. Mulligan is held to a high degree of professionalism. Such expectation is outlined in the OPP's Professionalism policy. His letter fell far below this expectation, and without doubt served to undermine the public's confidence.

The public's confidence in their police service cannot be taken lightly, it is a significant consideration. In the Justice Matlow report, there was not a finding that he had undermined public confidence in the judiciary. The OCPC found officer Mulligan's behaviour "served to undermine the public's confidence." Similarly, I find Constable Rheume's posts were not political statements, they were malicious comments intended to discredit the members and the Greater Sudbury Police Service.

Mr. Brauti submitted the case of *Allen v. Alberta Law Enforcement Review Board* to highlight the fact that not every transgression equates to misconduct:

It cannot be the case that a *Charter* breach is *ipso facto* a disciplinary offence, because it would mean that mere errors in judgement or carelessness would inevitably rise to the level of discreditable conduct. While police officers may not require a full level of *mens rea*, and negligence may in some instances amount to a disciplinary offence, there must be some meaningful level of moral culpability in order to warrant disciplinary penalties

As noted earlier, Constable Rheume admitted in his statement that his intent was to question the integrity of the Police Services Board. I do not accept his explanation that this was a political statement out of concern for taxpayers in the community or to bring this to the attention of his friends.

Mr. Brauti submitted just because a member of the Greater Sudbury Police Service received hard copies of the posts in an envelope delivered anonymously at work, is irrelevant to the determination of misconduct.

It is most unlikely that Constable Rheume intended for someone to print off his posts and deliver them to the Police Service. It could potentially speak to damaging the reputation of the Greater Sudbury Police Service, but because they were delivered anonymously, there is no way to truly evaluate the incident and as such, the reasonable person in the community ought not to be influenced by this whatsoever.

For all these reasons, I do not accept that it was Constable Rheume's intent to make a political statement. Therefore, Mr. Brauti's submission that the posts are protected by the Charter of Rights and Freedoms and the Police Services Act do not apply.

Conclusion

It is imperative that I place myself in the position of the dispassionate, reasonable community member, one fully apprised of all the circumstances. It is a challenging task for a hearing officer to determine the perspective of "a dispassionate reasonable person fully apprised of the same facts and circumstances, aware of the applicable rules and regulations."

Mr. Brauti submitted the Greater Sudbury Police Service policy and procedure effectively, is a "gag order" which cannot be balanced with *Charter* values. As noted in *Dore*, people should be able to forcefully criticize government decisions. I do not disagree, but *Dore* also states:

On the other hand, lawyers should not be expected to behave like eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

Similarly, police officers are constrained by their profession; a member of the public has an unfettered right to criticize a police service, but a member of that same police service has a duty of loyalty. A police service has a duty and right to maintain discipline. I have carefully considered and balanced the statutory objectives of the *Police Services Act* with the *Charter* rights of the officer. Police officers are also subject to internal policy, procedure, and the *Police Services Act*. For these reasons, police officers do not enjoy unrestricted freedom of expression.

Constable Rheume had a difficult work relationship with Sharon Baiden and Carrie-Lynn Hotson. He was aware of his employer's existing Social Media Policy and Workplace Violence and Harassment Procedure. Constable Rheume failed to comply with applicable policy and procedure of the Greater Sudbury Police Service. By his own admission, his social media posts were intended to question the integrity of his employer.

Police officers are held to a higher standard than other members of the public and are bound by a duty of loyalty to their employers. Constable Rheume did not make an inquiry with his employer before posting his concerns on social media, he simply editorialized information (some of which was inaccurate) concerning the salaries of certain members of the Greater Sudbury Police Service, his co-workers.

Employing the perspective of the dispassionate, reasonable community member, fully apprised of all the circumstances, it is obvious that Constable Rheume knew or ought to have known these social media posts were likely to cause damage to the reputation of the Greater Sudbury Police Service.

Any person in the community would be surprised to know the person authoring these social media posts was a serving police officer with the Greater Sudbury Police Service. Members of the community expect police officers to abide by internal policy and not to publicly question the integrity of his employer. The fully apprised member of the community would also be aware of former police chief Elsner's notoriety in the media. Constable Rheume's attempt to link Ms. Baiden's \$48,000 increase in salary to his departure was a clear attempt to disparage her character. Furthermore, Constable Rheume misrepresented Ms. Baiden's pay increase. This may have been carelessness or a further attempt to cast aspersions, either way, the misrepresentation is far below what the public would expect from a police officer when making a public statement. The figures presented are deceptive and irresponsible at best.

The context of the social media posts provide clarity; the posts are meant to discredit the reputation of the involved managers, suggesting the increases in salary were not based on merit and in the case of Ms. Baiden specifically, something was amiss. In his statement with professional standards, Constable Rheume indicated it was the integrity of the Greater Sudbury Police Service or the Police Service Board he was questioning. His intent was to discredit the reputation of some members of the Service and thereby, by association, the reputation of the Greater Sudbury Police Service. His intent to do so is masked in a weak explanation of a political statement.

The test is an objective one. For the reasons listed, placing myself in the position of the dispassionate, reasonable community member, fully apprised of all the circumstances, I find Constable Rheume's behavior is likely to damage the reputation of the Greater Sudbury Police Service.

Mr. Brauti submitted that a police officer's political comments or otherwise, should not be restricted unless the comments are completely "off-side" and Constable Rheume's posts do not come close to that level. I agree that the posts are not terribly offensive and are not at the extreme end of the spectrum, but that does not mean they do not equate to discreditable conduct. The seriousness of the misconduct will be a factor for consideration when assessing an appropriate sanction.

Decision

I find Constable Rheume guilty of discreditable conduct.



Greg Walton
Superintendent (Ret.)
Adjudicator

Date electronically delivered: February 5, 2019