In the Court of Appeal of Alberta

Citation: Quaidoo v. Edmonton (Police Service), 2015 ABCA 87

Date: 20150227
Docket: 1403-0286-AC
Registry: Edmonton

Between:

Frank Quaidoo

Applicant

- and -

The Chief of the Edmonton Police Service

Respondent

- and -

The Law Enforcement Review Board

Respondent

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

Application for Leave to Appeal

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

[1] This is an application for leave to appeal to this Court from the decision of the Alberta Law Enforcement Review Board ("LERB"). The Applicant, a member of the Edmonton Police Service, appealed to the LERB findings of guilt of professional misconduct (deceit – two counts). A separate count of unlawful use of force was not before the LERB. With one dissent regarding penalty, the LERB dismissed the appeal from convictions and penalty. The Applicant seeks appellate review in this Court of the penalty of dismissal. The application for leave to appeal is resisted by the Chief of the Edmonton Police Service.

[2] The mandate of the LERB is to review the decisions of Presiding Officers for fairness in result. In doing so, the standard of review requires that the Board consider whether the decision of first instance falls within an acceptable range of outcome. When reviewing a sanction, the standard of review is, accordingly, reasonableness.

[3] The question to be decided is whether there is a significant question of law with a reasonable prospect of success. The Court takes into account the standard of review of the Board's decision if leave is granted. In ***Boychuk v. Edmonton (City) Police Service***, 2014 ABCA 163, Wakeling J.A. sets out a most helpful compilation of the case law (at para. 53):

> "... Several judges of the Court of Appeal have concluded that an applicant should be granted leave to appeal if the ground of appeal has a 'reasonable prospect of success'. *Zalaski v. Law Enforcement Review Board*, 2013 ABCA 347, para. 24; *Chief of Police v. Furlong*, 2013 ABCA 34, para. 7; *Chief of Police v. Law Enforcement Review Board*, 2012 ABCA 370, para. 7; *Adaikin v. Chief of Police*, 2012 ABCA 190, para. 2; *Pelech v. Law Enforcement Review Board*, 2010 ABCA 4, para. 7 & *Wasylyshen v. Murdoch*, 2004 ABCA 111, para. 2. ... In the leave-to-appeal context Court of Appeal judges have consistently held that a legal question meets this test if it is arguable. *Chief of Police v. Furlong*, 2013 ABCA 34, para. 7 ('A reasonable prospect of success doesn't mean the applicant must establish that it will likely succeed, but only that it is arguable.'); *Chief of Police v. Law Enforcement Review Board*, 2012 ABCA 370, para. 10 ('the chief has an arguable case regarding the questions') & *Manyfingers v. Chief of Police*, 371 A.R. 21, 24 (C.A. 2005) ('the question of law must be arguable').What does 'arguable' mean? Chief Justice Wittmann offered this definition of a 'good arguable case' in *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, 520 A.R. 190, 200 (Q.B. 2011): '[I]t meant a case that was not fanciful or speculative but was grounded upon some evidence upon which an objective trier would say 'well, on the basis of the facts presented, the case is arguable and certainly is not to be dismissed out of hand'. To my mind, a question of law is arguable if it is not frivolous. See *Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 128 (to secure a stay an applicant must present 'a serious question to be tried as

> opposed to a frivolous or vexatious claim') & *Greenbuilt Group of Companies Ltd. v. RMD Engineering*, 2013 ABQB 297, para. 84 (the court catalogued service *ex juris* cases which utilized the 'good arguable case' standard). This is a very low standard." [footnotes omitted]

[4] My colleague then opines at paras. 54 and 55:

> "I prefer a more onerous test -- is the likelihood the appeal will be allowed at least as great as the likelihood it will be dismissed.
> ...
>
> Utilization of a more demanding standard does increase the risk that some decisions of the Board on questions of law incorrectly decided may escape review. But this is acceptable. The structure of the *Police Act* shows that the legislature is prepared to accept the risk that some legal errors made by the Board may not be corrected by the Court of Appeal."

[5] I respectfully disagree. The legislative framework is bereft of any indication that the legislature made a conscious choice to so constrain appellate review. The suggestion that the reasonable prospect of success test would be reduced to a 50/50 proposition is, on its face, problematic given my colleague's asserted acceptance of the inevitable consequence that meritorious appeals would not go forward and unjust outcomes would stand uncorrected. With great respect, this flies in the face of a legislative scheme that would surely not countenance as "acceptable" unjust police disciplinary dispositions. The legislature understood full well that police officers, given the nature of their work, are entitled to procedural and substantive safeguards at and following disciplinary proceedings that arise from public complaints of police misconduct.

[6] Leave to appeal is sought in respect of two arguable issues, which are said to be questions of law:

1) Is asserting one's innocence properly taken into account as an aggravating factor in imposing a sanction?

2) Is dismissal a virtual automatic sanction in the face of deceit?

[7] The first deceit was an alleged false statement in a police report in which the Applicant wrote that he heard banging and yelling coming from a police vehicle in which a handcuffed suspect was seated. (The Applicant struck the suspect twice with a closed fist and once with an open hand and pushed his head down). The report of banging and yelling was reiterated in a compelled written memorandum to the Professional Standards Branch in January 2010, giving rise to the second count of alleged deceit. The Applicant at the disciplinary hearing testified generally in accordance with his report and his memorandum. His testimony was not accepted by the Presiding Officer. He was thus found guilty of the use of force and two counts of deceit because his version of the events was

rejected. The sanction imposed by the Presiding Superintendent on behalf of the Chief of the Edmonton Police Service was dismissal. The Applicant appealed to the LERB.

[8] The allegation is that the Presiding Officer considered the Applicant's protestation of innocence to be an aggravating factor warranting termination. The Applicant submits that the Board reiterated and endorsed that proposition. The LERB stated, in part, (at para. 93):

> "In emphasizing the importance of an officer's obligation to account, and the appellant's lack of insight [and] contrition, the Presiding Officer set out the absence of this factor as having significant weight." [emphasis added]

[9] The reasons of the Presiding Officer provide ample support for that conclusion. He stated:

> "Finally, it is disturbing this officer has not given any indication whatsoever that he understands he acted inappropriately. Instead, he has worked to justify his actions to the point of tailoring his evidence to suit his case. ...
>
> This failure to acknowledge his misconduct stands in stark contrast to the aforementioned *Zielie*[1] case wherein the officer admitted his wrongdoing before it was even discovered. Constable Zielie also accepted the consequences of his actions by pleading guilty to a criminal charge as well as disciplinary charges. But for the actions of admitting his misconduct before it was discovered and accepting responsibility for his wrongdoing in a timely fashion, Constable Zielie would have been dismissed from the Edmonton Police Service. ...
>
> Unfortunately, Constable Quaidoo has not shown anything close to this degree of insight and contrition. How can the Edmonton Police Service warrant his trustworthiness from this day forward? A remedial sentence is not even a remotely feasible consideration based on the facts of this case."

[10] Notwithstanding the foregoing, the majority of the LERB concluded:

> "We are not persuaded, however that the Presiding Officer's consideration of this element was unreasonable or amounted to punishing the appellant for either proceeding to hearing or for conducting the type of defence that was presented."

[11] On the other hand, the dissenting member of the LERB on the issue of sanction was of the view that the Presiding Officer "equated the appellant's decision to proceed to a hearing with a lack of remorse or lack of acknowledgment of responsibility." (at para. 108) The dissent stated that it was "inappropriate to treat a person's exercise of their right to plead not guilty and go through a trial as an aggravating factor."

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[1] *Zielie* (15 September 2010) Disciplinary Decision, Edmonton (Presiding Officer Logar)

[12] The Respondent acknowledges that the contention that the Presiding Officer's use of the Applicant's protestation of innocence as an aggravating factor is, if made out, an error in law. The Respondent argues, however, that neither the Presiding Officer nor the Board treated the Applicant's protestations of innocence as an aggravating factor on sanction. On the other hand, the Respondent acknowledges that "it is true that both the presiding officer and the Board [viewed] the Applicant's refusal to admit what occurred as an important consideration that should have an effect on penalty." The submission is that one must distinguish between "an important consideration that should have an effect on penalty" and "an aggravating factor".

[13] One of the dilemmas inherent in trial advocacy (which applies with equal force and effect in the context of disciplinary proceedings) is the difficulty of reconciling asserted innocence with any expression of remorse or responsibility for one's actions (which in a proper case would mitigate the severity of the penalty imposed). It seems to me that given that conflict, the search by a Presiding Officer or the LERB for remorse or recognition of responsibility for one's actions will be futile in the face of a consistent protest of innocence in first instance and on appeal. In my opinion, it is an arguable error of law to contend, as the Respondent does, that in such circumstances the acceptance of responsibility and remorse can have a bearing on penalty. That is not to say that the lack of remorse is always irrelevant. So long as appellate remedies with respect to the underlying convictions are pursued, the protestation of innocence can, in my opinion, be no more than a neutral factor because one would hardly expect an innocent person (or, at least a person who asserts his innocence) to concurrently accept responsibility for his actions and express remorse.

[14] As to the second ground of appeal, the Applicant maintains that both the Presiding Officer and the LERB erred in law by utilizing the test for dismissal in ***Lingl v. Calgary Police Service***, LERB 025-93 rather than ***Edmonton (Police Service) v. Furlong***, 2013 ABCA 121. Put another way, the contention is that the Presiding Officer treated sanction for deceit as a dismissal default. In my view, this second ground of appeal flows logically from the first. If the first is made out on appeal, the second is arguable given the line of reasoning of the Presiding Officer apparent on this record and set out above.

[15] In the result, I would grant leave to appeal on the following questions of law:

1) Did the Board err in law by endorsing as reasonable the Presiding Officer's reliance upon the Applicant's protestation of innocence and his failure to accept responsibility and demonstrate remorse as factors preventing him from receiving a reduced sanction?

2) Did the Board err in law by endorsing as reasonable the Presiding Officer's decision to treat a finding of deceit as precluding any sanction other than the non-negotiable sanction of dismissal?

Application heard on February 19, 2015

Reasons filed at Edmonton, Alberta

this 27th day of February, 2015

Berger J.A.

Appearances:

M.T. Duckett, Q.C.
for the Applicant

G.H. Crowe
for the Respondent - The Chief of the Edmonton Police Service

S.P. McDonough
for the Respondent – The Law Enforcement Review Board

ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *Quaidoo v Edmonton (Police Service)*, 2014 ABLERB 051

Date: 20141017

Appellant: Frank Quaidoo

Respondent: Chief of Police, Edmonton Police Service

Panel Members: Christine S. Enns, Dale Wm. Fedorchuk QC, Robert Johnson

Summary: The appellant was found guilty at a disciplinary hearing of unlawful or unnecessary exercise of authority and two counts of deceit. The Presiding Officer dismissed the appellant from the police service. The appellant had no record of discipline and had approximately 13 years of service. The Presiding Officer decided that, in light of the deceit and the conclusion that his ability to perform operational policing duties had been significantly compromised, the appellant's dismissal was appropriate. The Board unanimously dismisses the appeal on conviction. The majority of the Board dismisses the appeal on penalty on the basis that the decision to dismiss was reasonable. The minority would allow the penalty appeal on the basis that the Presiding Officer's decision on sanction was not an acceptable, reasonable outcome.

Authorities Considered: *Pelech v Alberta (Law Enforcement Review Board),* 2010 ABCA 400; *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399; *Camrose (Chief of Police) v Macdonald*, 2013 ABCA 422; *Amery,* Board Decision 07-93; *Lingl*, Board Decision 025-93; *Furlong v Alberta (Law Enforcement Review Board)*, 2013 ABCA 121; *Plimmer v Calgary (City) Police Service*, 2004 ABCA 175; *R v McNeil*, 2009 SCC 3*; Kube v Chief of Police of the Edmonton Police Service*, 2013 CanLII 60845 (ABLERB); *Kube v Edmonton (Police Service)*, 2013 ABCA 438; *R v Sturko*, 2013 ABPC 211, *A v Edmonton Police Service*, 2014 CanLII 11016; *R v Ambrose*, 2000 ABCA 264

Legislation Considered: *Police Act*, RSA 2000, c P-17; *Police Service Regulation*, Alta Reg 356/1990

MAJORITY REASONS OF CHRISTINE S. ENNS & ROBERT JOHNSON:

INTRODUCTION

[1] This decision flows from the dismissal of Frank Quaidoo, the appellant, from the Edmonton Police Service ("EPS"). He was dismissed based on his conviction following a disciplinary hearing on May 3, 2013 on one count of unlawful or unnecessary exercise of authority pursuant to s 5(1)(i), and two counts of deceit pursuant to s 5(1)(d) of the *Police Service Regulation* ("PSR"). As will be seen, while the Board unanimously dismisses the appeal from conviction, the appeal from the penalty of dismissal is dismissed with the dissent of onemember. We begin with our reasons for dismissing the conviction appeal and then set out the majority and dissenting reasons on the penalty appeal.

[2] On May 12, 2008, a priority call was broadcast by EPS Communications in relation to an incident in which Cst. Mishio, a School Resource Officer, had been injured by a kick to the face by a high school student, to whom we will refer as FG[1], while Cst. Mishio was attempting to arrest FG's friend. Numerous police officers attended the scene of the call, including the appellant, Cst. D. Lewis and Cst. M. Foth.

[3] When Cst. Lewis arrived on scene, he handcuffed FG's hands behind his back, walked FG to Cst. Lewis' police cruiser, and sat FG in the back. The appellant, who arrived separately at the scene, tended to Cst. Mishio approximately 20 metres from Cst. Lewis' police vehicle.

[4] At one point in time, the appellant left Cst. Mishio, went to Cst. Lewis' police vehicle and opened the rear, driver's side door. After the appellant exchanged words with FG, he struck FG twice with a closed fist and once with an open hand. After striking at the upper left portion of FG's forehead, the appellant pushed FG's head down and returned to Cst. Mishio. As was later found at the disciplinary hearing, FG never tried to exit the vehicle to get at the appellant, who neither considered withdrawing from the vehicle instead of striking FG or any other options.

[5] After the incident, the appellant filed a supplementary occurrence report on May 12, 2008,[2] in which he wrote that, prior to approaching the police vehicle, he heard banging and yelling coming from the marked patrol car where FG was seated. Unsure of whether FG was damaging the rear of the patrol car, or trying to get the attention of all the pedestrians and bystanders in the area to possibly incite an altercation, the appellant stated that he ran to the patrol car and opened the driver's side rear passenger door. As he did this, FG leaned over slightly towards the passenger's side of the vehicle and began to raise his leg in a motion that appeared to the appellant that he was about to get kicked. As a result, the appellant wrote, he applied two closed-fist strikes to the left side of FG's upper forehead and one open-handed strike to the same area. All of this information was recorded in the supplementary occurrence report. At some point in time after the incident, as alleged by the Presenting Officer, the appellant attempted to influence Cst. Lewis' reporting of the incident when the officers were at North Division by saying to Cst. Lewis that FG was kicking and shouting. The appellant denied making any such comments to Cst. Lewis. Cst. Lewis recalled the conversation, but did not draw any particular inference from the comment.

[6] In a statement to the Professional Standards Branch ("PSB") dated January 28, 2010,[3] the appellant again stated in writing that, as he opened the driver's side rear passenger door of the police vehicle, FG leaned over slightly towards the passenger side of the vehicle and began to raise

[1] The student's identity has been obscured due to his age.
[2] Exhibit 9 in the disciplinary hearing.
[3] Exhibit 10 in the disciplinary hearing.

his left leg in a kicking motion toward the appellant. As FG was under arrest for assaulting a police officer, and to prevent a further assault, the appellant stated that he applied two closed-fist strikes to the left side of FG's upper forehead and one open-handed strike to the same area.

[7] After the PSB investigation was completed, the appellant was charged with three counts of misconduct:

1. Unlawful or unnecessary exercise of authority, as defined in s 5(1)(i) of the PSR (striking FG in the head while he was handcuffed and seated in the back of a police vehicle);
2. Deceit, as defined in s 5(1)(d) of the PSR (falsifying a police report in order to justify his attendance at the police vehicle and his subsequent use of force on FG); and
3. Deceit, as defined in s 5(1)(d) of the PSR (making or signing a false, misleading or inaccurate statement to Professional Standards Branch).

[8] A disciplinary hearing began on September 6, 2012, and continued on February 5 and 6, 2013. The Presiding Officer, Thomas Grue, a retired police inspector, heard oral testimony from Cst. Lewis, FG, Cst. Foth, and the appellant. The matter was then adjourned for closing arguments on April 3, 2013. On May 3, 2013, the Presiding Officer issued a 70-page decision finding the appellant guilty on all three counts. On May 27, 2013, the Presiding Officer issued a 10-page decision on penalty. He assessed a global sentence of dismissal from the EPS pursuant to s 17(1)(f) of the PSR.

[9] The appellant appealed the Presiding Officer's decision on conviction and sanction to the Board on June 21, 2013. Before the appeal hearing, counsel for the appellant advised that the appellant had abandoned the appeal from the finding of guilt on count 1, regarding the unlawful or unnecessary exercise of authority. The appellant maintained his appeal from conviction on counts 2 and 3, being the allegations of deceit. The appeal was also maintained from the global penalty of dismissal imposed on all counts.

ISSUE

[10] This issue on this appeal is whether the findings of guilt related to the deceit charges, and the global penalty of dismissal imposed by the Presiding Officer were acceptable, reasonable outcomes in light of the law and the facts as he found them.

DISCUSSION

Standard of review

[11] The standard of review we apply is reasonableness; that is, we must decide whether the Presiding Officer's decisions were reasonable, in the sense that they fall within the range of acceptable, reasonable outcomes in light of the law and the facts as he found them. The standard of reasonableness applies to our review of both the conviction and penalty decisions. We have outlined what this involves on a number of occasions.[4]

[12] Unless his decision was unreasonable, or unless the Board decides that the process before the Presiding Officer was compromised in a way that calls into play the Board's mandate to provide civilian oversight, the Board should not intervene.[5] In such circumstances, the Presiding Officer's expertise as a police officer is engaged and will be taken into account when considering the reasonableness of his decision.[6]

[13] As it pertains to findings of fact, deference is owed where the primary issue is factual and relates to the adequacy of the evidence, and the standard of review is reasonableness. We have a transcript of the hearing before us, where the Presiding Officer had the advantage of hearing and observing the witnesses in person. He was also able to, and did, question some of them to probe particular points. We must therefore, in reviewing his factual findings, bear in mind the advantage the Presiding Officer had as the trier of fact. His assessment of credibility must be given deference while still applying the reasonableness standard of review.[7]

[14] We note here that the appellant has not argued that our separate, but parallel, mandate to provide independent civilian oversight is engaged. We see no basis on the face of the record to suggest that it might be.

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[4] See, for example, the Board's decision in *Kube v Chief of Police of the Edmonton Police Service*, 2013 CanLII 60845 [*Kube*], leave to appeal denied, *Kube v Edmonton (Police Service)*, 2013 ABCA 438; also see *A v Edmonton Police Service*, 2014 CanLII 11016 [*A v EPS*]. We apply here the discussion in those decisions of what the reasonableness standard of review entails in reviewing a presiding officer's decision on penalty. On penalty, also see *Furlong v Alberta (Law Enforcement Review Board)*, 2013 ABCA 121 [*Furlong*] and *Camrose (Chief of Police) v Macdonald*, 2013 ABCA 422 [*MacDonald*] at para 25. We also approach our overall task in this appeal mindful of the Court of Appeal's recent affirmation that reasonableness is also concerned with the intelligibility, transparency and justifiability of the decision under review. See *MacDonald*, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

[5] *Pelech v Alberta (Law Enforcement Review Board)*, 2010 ABCA 400, 328 DLR (4th) 156 (CA) at para 33

[6] *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 at para 79. This passage was cited with approval in *Furlong* at para 17.

[7] *A v EPS* at paras 40 and 41, noting that the Court of Appeal has recently affirmed that we owe deference to the "credibility determinations" of a presiding officer in relation to witness testimony: *Land v Law Enforcement Review Board*, 2013 ABCA 435, at para 93. This is consistent with, if not the same as, the deference appellate courts give to triers of fact in criminal matters, who have the advantage of observing witness testimony. See, for example, *R v WH*, 2013 SCC 22.

Was the Presiding Officer's decision to convict reasonable?

Credibility findings

[15] Before making findings concerning the key facts in dispute, the Presiding Officer assessed the credibility of the witnesses. He found Cst. Lewis' evidence, taken as a whole, to be impressively coherent, externally consistent with the evidence of Cst. Foth and FG, internally consistent, highly plausible and sincere. Overall, he found Cst. Lewis to be a highly credible and reliable witness. Where Cst. Lewis' evidence conflicted with any other witness, the Presiding Officer accepted Cst. Lewis' version of the events.

[16] The Presiding Officer found FG to be less credible because his memory was weak, his evidence wavered on occasion during cross-examination, there was clear evidence of prior inconsistent statements, and he admitted to holding an initial animosity towards the appellant that resulted in the telling of falsehoods concerning the appellant. The Presiding Officer found that FG's evidence had to be viewed with particular caution and required corroboration before any particular piece of his contradicted testimony could be accepted.

[17] The Presiding Officer found Cst. Foth's evidence to be candid, coherent, and sincere. He was a credible and reliable witness in relation to his brief observations while in close proximity to Cst. Lewis' police vehicle.

[18] With respect to the appellant, the Presiding Officer found that his testimony was an attempt to provide a coherent story in the face of significant contradictory evidence. His testimony was found to be inconsistent with the evidence provided by the other witnesses on certain key issues, internally inconsistent at times, incoherent in some places and implausible in others. Overall, the Presiding Officer found the appellant's credibility to be highly questionable with respect to the critical facts in dispute. He also found that the appellant's testimony was more of an attempt to create a coherent story that was at least partially reconcilable with contradictory evidence, than it was the provision of a candid account of the events in question.

[19] On appeal, the appellant argued that this case involved what he heard, saw and thought in a period of a minute or less. The appellant argued that he was honest in his belief as to what he saw, heard and thought. The appellant reminded the Board that he had always maintained that he heard noises emanating from the police vehicle, that he did not see Cst. Lewis, and he had a concern regarding the possibility of damage to the police vehicle and crowd incitement. The hearing before the Presiding Officer took place almost five years after the incident. The appellant argued that the Presiding Officer erred in not assessing the evidentiary foundations for an honest belief, instead of taking the approach that two narratives could not stand one by the other. The

appellant also argued that Cst. Lewis made mistakes that day, such as not making notes at the time of the incident. In addition, he did not make a statement until more than seven months after the event (through no fault of his own).

[20] The appellant argued that it is the obligation of the finder of fact to assess all of the evidence to determine whether it could stand together because people perceive different things in a charged, chaotic environment with heightened emotions. The appellant argued that the environment cannot be ignored when assessing an individual's perception. He pointed to the environment at the scene, Cst. Foth's allegedly ineffectual evidence, and the timing of Cst. Lewis' absence from the police vehicle as important factors that ought to have influenced the findings of credibility by the Presiding Officer.

[21] The appellant also argued that the Presiding Officer disregarded evidence that Cst. Lewis left the police vehicle to speak to a sergeant, that he was away for about a minute, and could not have known what happened in the vehicle at that time. The appellant suggests that he could have heard the noise during the time that Cst. Lewis was away from the vehicle, or at least developed an honest, but mistaken, belief that noises were emanating from the police vehicle in a charged and noisy environment.

[22] The Chief argued that both the findings of guilt and termination fall squarely within the range of acceptable, reasonable outcomes. He reminded the Board that the Presiding Officer listened to the evidence of the witnesses, looked at their paperwork, and assessed their credibility on this basis. The Presiding Officer had available to him 500 pages of testimony transcripts and wrote a 70-page detailed written decision on conviction, the Chief noted.

[23] The Chief argued that the appellant had no honest belief regarding the key issues in dispute, and concocted stories of what he heard and saw to justify an assault on FG. The Chief argued that the appellant gave multiple versions of events that meandered and shifted with time. He changed evidence to what would be more self-serving to him on any given occasion. The Chief reminded the Board that the appellant was the furthest person away from the police vehicle. He was more than 60 feet away, while Cst. Foth was 10 to 15 feet away from the police vehicle and did not hear any noise. Cst. Lewis was in the vehicle and did not hear any noise. Cst. Lewis had conversations with FG at a normal speaking volume, notwithstanding that there were approximately 200 people at the scene. There was no cursing at the police or attitudes indicative of chaotic behaviour.

[24] While the appellant's arguments regarding perceptions and honest belief are attractive in the abstract, the Presiding Officer was of course clearly in the best position to assess the evidence of the witnesses and come to a decision on credibility and the weight to be given to their evidence. In addition to the requirement that we give deference to the findings of the Presiding Officer,

there is nothing in the evidence to suggest that the Presiding Officer's findings of credibility and the weight to be attributed to each witness' testimony was unreasonable in the circumstances. The Presiding Officer conducted a thorough, careful analysis of the credibility of each witness and gave cogent reasons for his conclusions. Upon review of the evidence before the Presiding Officer, and giving, as we must, appropriate deference to the findings of the Presiding Officer, we cannot conclude that the Presiding Officer's findings regarding credibility and the weight to be given to each witness' testimony were unreasonable.

[25] The Presiding Officer assessed the evidence as to whether or not the appellant committed deceit by examining components of the evidence that represented disputes between the witnesses on several key facts. After assessing each of the points in dispute, and having regard to his findings on credibility, the Presiding Officer concluded that the appellant was guilty of both counts of deceit. It is necessary to review the Presiding Officer's findings of fact to determine whether his decision on guilt was reasonable.

Whether Cst. Lewis was present during the assault

[26] One of the key facts in dispute was whether or not Cst. Lewis was present in his police vehicle and saw the appellant approach the police car, open the driver's side rear passenger door, and then use force on FG. The Presiding Officer accepted the evidence of Cst. Lewis on this point. Cst. Lewis testified that he and FG were alone in the police vehicle when he observed the appellant walking towards him. The appellant was approximately 15 to 20 feet away when Cst. Lewis noticed him approaching. Cst. Lewis rolled down his window on the assumption that the appellant wanted to tell him something; instead, the appellant opened the driver's side rear door of the police vehicle.

[27] At this point, Cst. Lewis was uncertain as to what was going on and wanted to determine if he had missed something. Cst. Lewis exited the vehicle and turned his attention to the back seat. He recalled the appellant asking FG, "Why would you hit a police officer?", or "Why would you do this to a police officer?", or words to that effect. Cst. Lewis remembers seeing the appellant leaning inside the back of the police vehicle with his torso and arms inside. He then saw movement from the appellant that resembled punches being thrown. He could also hear what sounded like a fist on skin. He estimated that he heard a quick succession of four to five blows. He was approximately three to five feet from the appellant at this time.

[28] The Presiding Officer found it highly implausible that the appellant could have approached Cst. Lewis' police vehicle, opened the driver side rear door, have dealings with FG in the back seat with Cst. Lewis standing a short distance behind the appellant and then walk away from the vehicle never having seen Cst. Lewis. On this point of fact, the Presiding Officer had no doubt that

Cst. Lewis was present at his police vehicle before, during and after the use of force by the appellant on FG.

[29] The Presiding Officer found that the appellant's statement in both his police report and PSB memorandum were written to convey the impression that there were no police officers in or around the vehicle when he had dealings with FG. He found the appellant's statements in this regard to be false, misleading and inaccurate.

[30] The Presiding Officer balanced the appellant's perceptions against the evidence of the other witnesses and concluded that Cst. Lewis was present at the time that the appellant interacted with FG. The contradictory nature of the appellant's evidence at the hearing led to the Presiding Officer's conclusion that the appellant's subsequent written reports contained false and misleading information. The Presiding Officer examined the evidence before him with care and explained his reasoning and findings clearly and logically. In view of the evidence before the Presiding Officer, and giving due deference to the findings of the Presiding Officer regarding credibility, we conclude that the Presiding Officer's findings on this issue were reasonable.

Whether the appellant heard FG make noise

[31] This issue concerns the reason for the appellant's decision to leave Cst. Mishio and attend at the police vehicle.

[32] The appellant said that he heard muffled banging noises and a yell or two coming from Cst. Lewis' police vehicle. In his police report, the appellant indicated that the noises he heard from FG might have been for the purpose of inciting the crowd that gathered at the scene. The noises he heard were of sufficient concern that he felt obliged to leave Cst. Mishio and investigate, to determine if FG was causing damage to the police vehicle or inciting people in the vicinity. In his PSB memorandum, the appellant repeated the concern about FG possibly damaging the police vehicle, but did not indicate that FG was trying to incite the crowd.

[33] The Presiding Officer found that the appellant's description of the sounds was unclear, confusing and characterized as more of a perception than an actual incident. The Presiding Officer noted that this evidence contrasted with the information in the appellant's police report and PSB memorandum, in which his statements about noise were much more definite. The Presiding Officer noted that, when questioned by the prosecution at the disciplinary hearing, the appellant testified that no one was trying to incite violence or was swearing at the police. The Presiding Officer concluded that nothing in his testimony or in the written reports provided any basis upon which the appellant could have formed even a reasonable suspicion that FG had been trying to incite the crowd. As the Presiding Officer stated in his decision, the "reference to FG possibly

trying to incite crowd was, in my view, redolent of embellishment if not outright fabrication."[8]

[34] Further, the Presiding Officer noted that neither Cst. Lewis, who testified that at the relevant time he was actually in the police vehicle and then very near to it, nor Cst. Foth, who testified that he was standing much closer to the police vehicle than the appellant, heard any such sounds. FG denied making such sounds. The Presiding Officer found that the lack of evidentiary support from both police officers for the appellant's statements about sounds was a strong indicator of fabrication on the appellant's part.

[35] The Presiding Officer balanced the appellant's statements as to his perception against the evidence of the other witnesses and concluded there were no noises emanating from the police vehicle. After assessing all of the evidence, the Presiding Officer stated that he had no difficulty in finding that FG was not making any banging or yelling noises inside of the police vehicle as indicated in the appellant's police report and PSB memorandum. This is a finding of fact made after hearing from the witnesses and making an assessment of credibility. The Presiding Officer found as a fact that the appellant never heard or perceived hearing such noises. Accordingly, the Presiding Officer found that the appellant's written narratives concerning the noise issue were false, misleading and inaccurate. As before, the Presiding Officer examined the evidence before him with care and explained his reasoning and findings clearly and logically. Once again, upon a review of the evidence before the Presiding Officer, and giving appropriate deference to the findings of the Presiding Officer on credibility, we conclude that the Presiding Officer's findings on this issue were reasonable.

Whether FG tried to kick the appellant

[36] This issue concerns the appellant's justification for using force against FG. The appellant testified that, once he opened the driver's side rear door of the police vehicle, he calmly asked FG a question. It was at this point that FG leaned over to the right enough to raise his left leg and extend it to kick the appellant.

[37] The Presiding Officer noted that the appellant's police report does not mention him saying anything to FG once the car door was opened. The Presiding Officer found that the police report was written to convey the idea that the opening of the car door was contemporaneous with FG leaning to his right and drawing his leg back. In his testimony, the appellant went further and stated that FG actually kicked at him and his foot extended about a foot outside the car door in so doing. He also testified that he managed to avoid the kick by skipping back the lower part of his body. The Presiding Officer considered this testimony to be inconsistent with the appellant's police

[8] Decision on conviction, record, p 744.

report and his PSB statement. When asked during cross-examination, the appellant could not provide a reason for the disparity on this issue between his testimony and reports.

[38] The Presiding Officer considered the nature and quality of an actual kick to be markedly different from a physical action that is merely interpreted as a potential kick that never takes place. He noted that the discrepancy between both the appellant's police report and explanatory memorandum as compared to his testimony could not be explained by a lack of detail in his written accounts of the incident, because the disparity was a matter of distinctively different detail. The Presiding Officer found that the appellant's written reports concerning the kick issue could not be reasonably reconciled with his testimony. The attempt to provide, through subsequent testimony, a revised interpretation of the appellant's written accounts of the use of force incident seriously impugned his credibility, the Presiding Officer found.

[39] Later in his decision, the Presiding Officer had no difficulty in rejecting the appellant's testimony on this issue as amounting to "self-serving embellishment." He found that FG did not actually kick at the appellant. Nevertheless, the Presiding Officer was not able to make a determinative finding as to whether FG drew back his leg for the purpose of kicking the officer without actually executing the kick, because Cst. Lewis could not see him, FG could not remember, and the veracity of the appellant's statements was questioned.

[40] The Presiding Officer balanced the appellant's perceptions against the evidence of the other witnesses and concluded that FG did not actually kick at the appellant. We conclude that evidence supported the Presiding Officer's conclusion that the appellant's subsequent written reports contained false and misleading information. The Presiding Officer was tasked with making findings of fact based on the testimony of the witnesses. The Presiding Officer, as he did elsewhere, examined the evidence before him with care and explained his reasoning and findings clearly and logically. We again find, upon review of the evidence before the Presiding Officer and giving due deference to his findings on credibility, that his findings on this issue were reasonable.

Whether the appellant said anything to Cst. Lewis at North Division

[41] On this issue, the appellant denied making any comments to Cst. Lewis about FG kicking and shouting. Cst. Lewis recalled the conversation, but did not draw any particular inference from the comment. The Presenting Officer alleged that the appellant attempted to influence Cst. Lewis' reporting of the incident when the officers were at North Division by saying to Cst. Lewis that FG was kicking and shouting. Cst. Lewis and the appellant gave contradictory testimony regarding whether the appellant made the statement to Cst. Lewis. The appellant flatly denied saying anything to Cst. Lewis about FG kicking and yelling. The Presiding Officer found that this is not the sort of incident over which two equally reliable and credible witnesses could honestly disagree. As

the Presiding Officer stated, "one of these officers is lying. Given my findings concerning Cst. Lewis' credibility, it is apparent that I do not accept the appellant's denial with respect to this issue."[9]

[42] The Presiding Officer found that the appellant did say to Cst. Lewis words to the effect that FG was kicking and shouting. The Presiding Officer then drew two inferences from that finding:

1. the appellant was concerned about the legitimacy of his actions in going to the police car to confront FG then using force on him; and

2. the appellant wanted to influence Cst. Lewis to support the false narrative about the noise issue.

[43] Having weighed all of the evidence, the Presiding Officer concluded from his examination of the evidence and assessment of the credibility and reliability of the witnesses that the appellant did include false, misleading or inaccurate statements in both the police report and the PSB memorandum. The Presiding Officer found that the false information was wilfully included in the police report in an attempt to justify the appellant's attendance at the police vehicle and to bolster his claim of self-defence with respect to his use of force on FG.

[44] As the finder of fact, the Presiding Officer was entitled to draw inferences from the evidence. The Presiding Officer drew the inference from the facts as he found them that the appellant made the comments to Cst. Lewis in an attempt to influence Cst. Lewis to accept the appellant's version of the events. Upon review of the evidence before the Presiding Officer and giving deference to his findings on credibility, we cannot conclude that the Presiding Officer's findings on this issue, which he explained clearly and logically, were unreasonable.

Conclusion regarding the appeal on conviction

[45] The Presiding Officer's findings of fact with respect to the issues discussed above relate to the appellant's deceit convictions. He concluded that the appellant provided a false narrative about FG making noise in a police vehicle in order to disguise the true reason for leaving the injured Cst. Mishio and attending at Cst. Lewis' police vehicle. The Presiding Officer found that the appellant was upset with FG for his vicious assault on Cst. Mishio. For this reason, he wanted to at least verbally confront FG about his actions. The Presiding Officer referred to Cst. Lewis' testimony, that he heard the appellant ask FG why he would hit a police officer, in support of the conclusion that the appellant wished to confront FG. The Presiding Officer found that the assault

[9] Decision on conviction, record, p 748-749.

on Cst. Mishio, not any concern about noise, appeared to be uppermost in the appellant's mind when he opened the door to confront FG.

[46] According to the Presiding Officer, since the appellant had no legitimate business with FG, who had been taken into custody by Cst. Lewis and was sitting in the back of Cst. Lewis' police vehicle, the appellant had to provide an ostensibly legitimate reason for confronting FG. The Presiding Officer found that the appellant's statements establishing FG as an ongoing threat by making noise and possibly damaging the police vehicle were a pretext for the appellant's attendance at Cst. Lewis' police car.

[47] The Presiding Officer also concluded that the appellant created a false narrative to boost the legitimacy of a claim of self-defence with respect to his use of force on FG, by portraying FG as a man who was out-of-control and who would lash out at another police officer. He rejected the appellant's testimony that FG kicked at him and concluded that this testimony constituted a self-serving embellishment. Contrary to his written accounts of the event, in which he stated that FG raised his leg so that it looked to the appellant that FG was about to kick him, the appellant testified before the Presiding Officer that FG actually kicked him. He further testified that he was able to avoid this kick by 'skipping back' his lower body. The Presiding Officer drew the inference that the most plausible explanation for the "significant change" in his description of the kicking incident was that the appellant was concerned that his use of force on FG was not justified.[10]

[48] The Presiding Officer found that the appellant said to Cst. Lewis words to the effect that FG "was kicking and shouting, right?" From that statement, the Presiding Officer drew the inference that the appellant revealed his concern about the legitimacy of his actions in going to the police car to confront FG, then using force on FG. He also found that the appellant wanted to influence Cst. Lewis so that he would support the appellant's false narrative concerning the noise issue.

[49] The Presiding Officer concluded that the appellant, on counts two and three, committed the disciplinary offence of deceit pursuant to s 5(1)(d) of the PSR. This conclusion was based on the Presiding Officer's findings of fact and the inferences he drew from the findings of fact, after hearing testimony from all of the witnesses and having regard to submissions made by counsel for both the prosecution and the defence.

[50] The Board has examined the Presiding Officer's findings that the appellant created a false narrative to justify the decisions that he made and the actions that he took in relation to FG. The Presiding Officer's reasons are logical and intelligible, clearly explaining and justifying his findings, with reference to the testimony he saw and heard. Viewed through the lens of reasonableness, we conclude that the Presiding Officer's findings of fact fall within the range of acceptable, reasonable

[10] Decision on conviction, record, p 756.

outcomes. We also find reasonable his finding that the appellant's conduct comes within the definition of deceit under s 5(1)(d) of the PSR. The Board therefore finds that the Presiding Officer's decision to convict on the two counts of deceit was reasonable. The appeal from conviction, therefore, is unanimously dismissed.

Was the decision to dismiss the appellant reasonable?

[51] The Presiding Officer found that the appellant committed intentional deceit on the basis of statements he made in his police report and PSB memorandum. While the assault upon FG appeared to be more of a spontaneous event, the statements made in the police report and PSB memorandum were considered by the Presiding Officer to be deliberate and calculated, with a view to either providing justification for the appellant's actions or, possibly, to prevent a sanction for his conduct. After convicting the appellant on all three counts, the Presiding Officer concluded that the employment relationship had been "irremediably compromised" and that the grave nature of the disciplinary misconduct in question disqualified the appellant from holding the public office of police officer.[11] Accordingly, the Presiding Officer assessed a global sentence of dismissal from the EPS pursuant to s 17(1)(f) of the PSR.

Presiding Officer's decision to dismiss the appellant

[52] In his penalty decision, the Presiding Officer referred to *Amery*[12] as setting out the principles for imposing discipline.[13] The Presiding Officer stated that he also applied the test for dismissal set out in *Lingl*,[14] as well in light of the guidance provided by the Alberta Court of Appeal in *Furlong*.[15]

[53] He placed emphasis on the public interest in conducting his analysis of the fit sanction. He noted that one of the three disciplinary charges proven against the appellant concerned the use of force, which attracts an extraordinary degree of consideration for the public interest. The Presiding Officer went on to state, "Given their inextricable connection to that particular misconduct, the remaining two proven charges of deceit do not attract any less concern for the general welfare of the community as it relates to policing services."[16]

[54] The Presiding Officer concluded that, since the misconduct occurred in an operational context and involved a member of the public, the impact of that disciplinary offence on the public

[11] Decision on conviction, record, p 691.
[12] Board Decision 07-93.
[13] Decision on penalty, record, p 685.
[14] Board Decision 025-93.
[15] *Edmonton (Police Service) v Furlong*, 2013 ABCA 121.
[16] Decision on penalty, record, p 689.

interest is a significant sentencing consideration. The Presiding Officer stated, "This is clearly a serious aggravating factor that must be considered inasmuch as the public interest was perceptibly impacted by the officer's actions."[17]

[55] Of particular concern to the Presiding Officer was the maintenance of the public's respect for the police. The Presiding Officer stated that it could not be disputed that the serious nature of the misconducts required a significant penalty, so as to demonstrate to the citizens of Edmonton that the EPS will not tolerate such behaviour from police officers and will take the necessary steps to protect the public interest. As well, assessing anything less than a significant penalty would send "a ruinous message to the general membership concerning the behaviour in question."[18]

[56] The Presiding Officer was particularly concerned with the implications flowing from the Supreme Court of Canada's decision in *R v McNeil*.[19] Crown prosecutors and defence counsel will be made aware of the appellant's convictions for deceit and inappropriate use of force in disclosure packages provided to accused persons and their counsel. This information could be used by the defence to attack the appellant's credibility as a prosecution witness. Based upon this concern, the Presiding Officer concluded that the appellant's ability to perform operational policing duties has been significantly compromised.[20]

[57] The Presiding Officer also considered it aggravating that the appellant failed to acknowledge his misconduct and had not given any indication that he understood that he acted inappropriately. His actions related to the deceit misconduct were premeditated and were considered by the Presiding Officer to be ongoing. In the Presiding Officer's view, the appellant had not shown anything close to the degree of insight and contrition demonstrated by Cst. Zielie,[21] which was another case involving deceit.

[58] The decision in *Zielie* was rendered by Superintendent Mark Logar on September 15, 2010. Cst. Zielie had assaulted an accused person who had been arrested by other EPS members and placed in the rear of a police cruiser in handcuffs. Cst. Zielie advised his supervisor that he had assisted in the arrest of the accused and that he had applied force during the course of the arrest. Cst. Zielie created and submitted a report that was misleading and inaccurate. He also submitted a control tactics report indicating that force was used when placing the accused under arrest and that the accused's behaviour was that of an active resister.

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[17] Decision on penalty, record, p 689.
[18] Decision on penalty, record, p 689.
[19] [2009] 1 SCR 66.
[20] Decision on penalty, record, p 690.
[21] *Zielie* (15 September 2010) Disciplinary Decision, Edmonton (Presiding Officer Logar) In the future, the *Zielie* decision must be read in the light of the Court of Appeal's recent decision in *MacDonald*, above. In para 28(d) of *MacDonald*, the Court dismissed the notion that dismissal automatically follows a finding of deceit.

[59] Five days after submitting the report, Cst. Zielie approached another EPS sergeant, indicating that the report he had submitted on the incident was inaccurate. He admitted that he had assaulted the accused and was directed to submit a revised report. Cst. Zielie admitted that he committed the misconduct of discreditable conduct and deceit. He attempted to mitigate these actions by pleading guilty to a criminal charge of assault, and by attempting to correct both his police witness report and control tactics report prior to their being approved and by pleading guilty in the disciplinary proceedings. The extent of Cst. Zielie's demonstration of remorse was such that the Presiding Officer in that case determined that punishment other than dismissal was warranted.

[60] In this case, the Presiding Officer contrasted the appellant's failure to acknowledge his misconduct with Cst. Zielie's actions in admitting his wrongdoing before it was even discovered. The Presiding Officer stated that the appellant has not shown anything close to such a degree of insight and contrition as was demonstrated by Cst. Zielie.

[61] The Presiding Officer questioned whether the appellant warranted the trust of the EPS from this day forward and concluded that a remedial sentence was not even a remotely feasible consideration.

[62] We will now outline the parties' submissions on penalty.

[63] The appellant argued that the Presiding Officer did not adequately examine the factual underpinnings when assessing the moral culpability of the appellant. The Presiding Officer also failed to take into account the length of the appellant's service and the nature of his service. The appellant's counsel argued that the appellant had a remarkable history of service with the EPS. He consistently went over and above addressing people's concerns. He also had a good record of volunteerism. His conduct demonstrated that he lived up to his leadership potential. The appellant argued that not every finding of deceit should be automatically seen as a career-ender. Counsel for the appellant argued that the Presiding Officer treated the deceit as a career-ender, on the basis that an officer convicted of deceit cannot perform policing services. The appellant argued that it cannot be the case that every instance of deceit automatically results in dismissal. One must look to the facts that form the basis of a conviction for deceit, as well as the nature of the officer's service. In this respect, there was no balance in the Presiding Officer's decision.

[64] In particular, the appellant argued, it was unreasonable for the Presiding Officer to fail to examine the factual underpinnings regarding the appellant's fitness to hold office as a police officer. The fitness of the penalty must be structured to the factual underpinnings of the offence and the circumstances of the officer. The Presiding Officer failed to explore the gamut of penalties that may be reasonable in the circumstances. The nature and degree of the deceit are pertinent

considerations. Insofar as the Presiding Officer equated deceit with dismissal, there was no consideration of a remedial approach. Counsel for the appellant also argued that it is improper to say that any offence is so egregious that any attempt at remediation is impossible.

[65] The appellant further argued that it was his right to maintain his innocence and require the prosecution to prove the case against the appellant on a balance of probabilities. In addition to relying upon his right to a hearing of the charges, the appellant maintained that he held an honest but mistaken belief in the facts in respect of which he was found by the Presiding Officer to have been untruthful. The Presiding Officer's emphasis on lack of remorse was, he argued, effectively a punishment for doing either or both.

[66] The appellant argued that his subjective belief remained the same to the date of the hearing before the Presiding Officer respecting the triggers that sent him to the police vehicle. The appellant argued that he had accepted his wrongdoing by withdrawing the appeal on the conviction related to count one, unlawful exercise of authority. Counsel for the appellant acknowledged in the hearing before the Board that nothing that the appellant stated regarding his perceptions on the day in question justified his actions in striking FG.

[67] The appellant argued that he did report the violence that he inflicted upon FG, which was recorded in his written reports. The untruths found by the Presiding Officer related to hearing a noise from the police vehicle, the impact upon the crowd of such conduct, and that Cst. Lewis was not in the vehicle. The appellant argued that these facts had no bearing upon the written report because, in and of themselves, these facts did not justify the use of force on FG. The Presiding Officer, according to the appellant, also improperly threw into the mix the suggestion that the appellant effectively accused a fellow officer lying, which suggested a lack of contrition. The appellant noted that he did not, during the course of his evidence, accuse Cst. Lewis or Cst. Foth of lying.

[68] The Chief submitted that termination of the appellant's employment was within the range of acceptable, reasonable outcomes in this case. The Chief argued that if one showed a reasonable person all of the penalties appropriate in the circumstances, termination would be on the spectrum of penalty for consideration. The Board must answer the question as to whether, in considering the decision as a whole, it was unreasonable for the Presiding Officer to arrive at this conclusion.

[69] The Chief relied upon the Board's decision in *Kube*.[22] In *Kube*, an off-duty police officer went to the scene of a traffic stop involving a woman he knew. She had been stopped by EPS

[22] *Kube v Chief of Police of the Edmonton Police Service*, 2013 CanLII 60845 (ABLERB).

officers, who told her she would be charged with various infractions, including operating a motorcycle without insurance. Kube knew the driver who was to be charged, and had sold the motorcycle to the owner. The women called him at home and he drove to the scene of the traffic stop. He then presented to the investigating police a certificate of insurance purporting to show that the motorcycle was insured. Kube had earlier cancelled the insurance, immediately after selling the motorcycle. He was charged with corrupt practice and was dismissed from the EPS after a disciplinary hearing and this decision was upheld as reasonable by the Board.

[70] The Chief argued that the appellant did not utter only one lie—he had, rather, lied repeatedly through the course of the investigation of the incident with FG and throughout the proceedings. An officer who lies again and again, including under oath, without ever "coming clean", is indicative of a situation more egregious than Kube. The Chief further argued that the appellant's mistruths created consequences for other people.[23]

[71] The Chief argued that there were spectrums of deceit ranging from minor deceit, negligent deceit and deceit of the serious nature in this case. The mistruths in this case were intentional and premeditated, requiring a heavy penalty. In the absence of an acceptance of responsibility by the appellant, there should be no leniency. The Chief took the position that the termination of the appellant's employment was largely based on the findings of deceit and less so on the unauthorized use of force. As the Chief stated, once the panic wore off, that is where character is supposed to take over. Redemption is warranted where a member acknowledges misstating the truth and accepts responsibility for it.

[72] The Chief argued that the necessity for specific and general deterrence warranted dismissal. It would be unreasonable to place the appellant in a position of responsibility that could interfere with the rights of others. There is a need for police officers to be honest. The Chief argued that Edmonton is the focal point for police services across Canada in terms of how the EPS handles cases of deceitful police officers.[24] Interfering with the Presiding Officer's decision in this case would send the message to other police officers that if they lie, they should stick to their guns, fight their discipline cases and they will not be dismissed. "Deny, deny, deny and you will be saved, or admit and take your chances" were the words put to us by the Chief's counsel during argument before us. The message, according to the Chief, should be that officers need to be honest and they need to come clean when they have been dishonest. Their evidence could put someone away for life and honesty is a police officer's number one responsibility.

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[23] This argument does not appear to be supported by the facts as found by the Presiding Officer or the evidence on the record.

[24] We were not provided with any information that supported the Chief's contention that other police services are watching the Edmonton Police Service to determine how they handle deceit cases.

[73] Character is, the Chief submitted, a critical factor to consider. The Chief argued that character is what a person does when no else is looking. Character will not allow a person to carry lies forward and will not put others at risk. The Chief suggested that the appellant does not have the character to be a police officer.

[74] The Board last year outlined the approach we take in deciding appeals from penalty, and we take the same approach here.[25] Our overall task is to determine whether the penalty imposed by the Presiding Officer was reasonable. The fitness of a penalty will depend on many factors, but it is especially sensitive to the factual underpinnings of the offence. Relevant factors to be considered include: the seriousness of the misconduct; the moral culpability of the officer; whether the officer is remorseful and accepts responsibility; the consequences for the public and for the administration of the law; the need for deterrence, denunciation or rehabilitation; the impact the misconduct had on the relationship between the officer and the police service; and the overall fitness of the officer for police service.

[75] As the Court of Appeal has confirmed, the factors set out in previous Board decisions, notably *Amery* and *Lingl* will also be relevant.[26] The Court of Appeal has also observed that a Presiding Officer may decide dismissal is appropriate based on his or her experience with police discipline, public safety and public confidence in police, the effectiveness of certain punishments in promoting discipline and correcting behaviour, and knowledge of what safe police practices require.[27] The Court of Appeal has also indicated that, in considering whether dismissal is appropriate, it is necessary to ask whether the officer's conduct is of such a nature that he or she is no longer fit or suitable to hold the public office of police officer and perform the duties and responsibilities of that position. This question aims the outcome at the facts in context.[28]

[76] Even an officer with a clean disciplinary record may be dismissed where the circumstances lead a presiding officer to conclude that dismissal is warranted, with fitness to hold office being a more important factor than the relationship between the officer and the service.[29]

[77] With these observations in mind, at its heart, our task is to decide whether the Presiding Officer's decision to order the appellant's dismissal is reasonable, in the sense that it falls within the range of acceptable, reasonable outcomes on the facts and the law.[30]

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[25] *Kube*, above. Also see *A v EPS*.
[26] *Furlong* at para 27.
[27] *Plimmer v Calgary (City) Police Service*, 2004 ABCA 175 at para 28.
[28] *MacDonald* at para 28(d).
[29] *Furlong* at para 27.
[30] *Furlong* at para 34.

[78] We commence our consideration of this issue by underscoring that our consideration of the Presiding Officer's assessment of penalty applies to the appellant's three disciplinary offences globally. While the appellant had initially appealed all three counts of misconduct, he advised prior to the hearing of this appeal that he was abandoning his appeal on the finding of guilt on count 1, regarding the unlawful or unnecessary exercise of authority. As we have upheld the Presiding Officer's conviction on the two counts of deceit as reasonable, we will proceed to assess the reasonableness of the Presiding Officer's penalty decision, that the fit sanction was dismissal, within the context of all three counts of misconduct on which the appellant was found guilty. We have, in this light, considered the record before us and the arguments made by the parties in assessing the Presiding Officer's penalty decision as a whole in order to determine whether his decision to dismiss the appellant was reasonable on the facts as he found them and on the law.

[79] It is on the basis of the findings and conclusions reached following the disciplinary hearing that the Presiding Officer assessed penalty, applying the established disciplinary principles and factors as noted above. The Presiding Officer also considered the test for the penalty of dismissal as set out in *Lingl*. In reviewing the entirety of the matter, we are of the view that the penalty of dismissal was reasonable on the basis of the facts and the law as the Presiding Officer found them. We will now give our reasons for this conclusion.

[80] We find it helpful to briefly revisit the findings made by the Presiding Officer regarding the appellant's convictions. He found the appellant's testimony to be:

> …an attempt at providing a coherent story in the face of significant contradictory evidence. His testimony was inconsistent with the evidence provided by the other witnesses on certain key issues, internally inconsistent at times, incoherent in some places and implausible in others.[31]

[81] Further, the Presiding Officer found the appellant's credibility to be "highly questionable with respect to the critical facts in dispute."[32]

[82] In finding the count of unlawful or unnecessary exercise of authority proven, the Presiding Officer found "the manner in which Constable Quaidoo conducted himself in relation to [FG] can best be characterized as reckless and undisciplined."[33] In finding the second and third counts proven, that of deceit in relation to the police report and PSB memorandum, the Presiding Officer found that the false information was wilfully included in an attempt by the appellant to justify his attendance at the vehicle and bolster his claim of self-defence with respect to the use of force.[34]

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[31] Decision on penalty, record, p 742.
[32] Decision on penalty, record, p 749.
[33] Decision on penalty, record, p 762.
[34] Decision on penalty, record, p 759.

[83] The essence of the appellant's argument is that the Presiding Officer failed to adequately assess the various established principles, and aggravating and mitigating factors, when assessing the appellant's moral culpability. He also contends that the Presiding Officer failed to account properly for the nature and length of his prior service, nor was any consideration given to the appellant's immediate disclosure of his use of force. Further, suggested the appellant, the Presiding Officer effectively treated deceit as always warranting dismissal, and thus failed to analyse all relevant factors, including whether a remedial approach was appropriate. In maintaining his innocence and his position that he held an honest but mistaken belief regarding certain facts, argued the appellant, the emphasis by the Presiding Officer on lack of remorse was effectively a punishment for exercising his right to plead not guilty and mount a defence.

[84] We have upheld the Presiding Officer's decision regarding deceit as reasonable. In so doing, we have assessed his factual findings and his findings on credibility as reasonable. We acknowledge that the Presiding Officer ultimately declined to accept the appellant's testimony and arguments relating to an honest but mistaken belief as to the way the events unfolded, and were recorded by the appellant in his report and PSB memorandum. The appellant's arguments before the Presiding Officer in this regard were simply not successful. Instead, the Presiding Officer found the appellant's conduct related to the deceit to be premeditated, intentional and ongoing.

[85] In light of the guidance provided by the Court of Appeal, we are mindful that we are unable to interfere with the penalty decision on the basis that we would have assessed the various factors and principles differently than the Presiding Officer. The Board cannot substitute a different outcome on the basis that we disagree. Only when a penalty is outside the range of reasonable outcomes on the facts and law can we intervene, because the Presiding Officer has come to an unreasonable result.

[86] In reviewing mitigating factors, the Presiding Officer specifically made reference to the appellant's lengthy service, favourable performance reviews, recognitions and accomplishments, work-related and otherwise. His reasons therefore display an awareness of these matters, and show that he considered the positive aspects of the appellant's service. We are unable to conclude, as argued by the appellant, that the Presiding Officer failed to account for the length and nature of his service, or considered them in an unreasonable way.

[87] The Presiding Officer repeatedly referred to the significant impact of the appellant's misconduct on the public interest. We understand the Presiding Officer's reasons to indicate that the impact resulted from several aggravating factors cumulatively, including that the misconduct involved use of force and the operational public context of the misconduct.

[88] The Presiding Officer also repeatedly emphasized the serious nature of the appellant's

misconduct, requiring a significant penalty to achieve several objectives, to maintain the respect of the public and to send a message to other officers (that is, the goal of general deterrence). We find no basis on which we might conclude the Presiding Officer's consideration of these factors was unreasonable.

[89] Similarly, the Presiding Officer considered the practical implications of these disciplinary convictions on the appellant's ability to perform operational policing duties as an aspect of the provision of effective and efficient policing services. The Presiding Officer commented that the appellant's ability to perform operational policing duties has been significantly compromised. Again, on the standard of reasonableness, we see no basis to interfere with this conclusion.

[90] We acknowledge the appellant's argument regarding the nature of his defence and the issue of how the Presiding Officer treated this in assessing remorse and moral culpability. On its surface, the defence of honest but mistaken belief appears to be incompatible with any concept of genuine remorse. That being said, however, we are not considering the reasonableness of the Presiding Officer's decision on the basis of how the appellant argued his defence, but considering the reasonableness of the penalty decision as a fit sanction on the basis of the Presiding Officer's disciplinary findings. Penalty is to be assessed in the context of the factual underpinnings of the misconduct, and this includes the facts as found by the Presiding Officer after the disciplinary hearing.

[91] The Presiding Officer found that the appellant's deceit was premeditated, intentional and ongoing. He appears to have considered that the deceit continued through the disciplinary hearing, where he ultimately rejected the appellant's defence. The Court of Appeal has identified moral culpability as a relevant factor to be considered by the Presiding Officer in determining penalty. In dissenting, our colleague finds fault with the Presiding Officer for having, as he sees it, treated the appellant's exercise of his right to mount a defence, *i.e.*, to plead not guilty as an aggravating factor in the penalty phase. For the reasons that follow, we do not consider the Presiding Officer to have done this.

[92] In emphasizing the seriousness of the appellant's misconduct as a breach of trust, the Presiding Officer considered the obligation for police officers to account for the manner in which authority is exercised. The concept of accountability, he suggested, goes hand in hand with the concept of remorse. The Presiding Officer, in comparing the appellant's situation with that of *Zielie*, determined, that when present, remorse and responsibility was a significant mitigating factor. The appellant's lack of remorse related to his intentional and ongoing deceit was considered by the Presiding Officer to be an important sentencing factor. We do not, however, read his reasons on the issue as having treated a not guilty plea as aggravating. Our reasons for this view follow.

[93] In considering the appellant's misconduct overall, the Presiding Officer stated that it must be considered "particularly egregious inasmuch as it concerns breaching the bond of trust between the cited officer, his fellow officers, the police service and the community."[35] The Presiding Officer described the obligation to account for the manner in which authority is exercised as "a bright line rule" and indicated it is "non-negotiable".[36] In emphasizing the importance of an officer's obligation to account, and the appellant's lack of insight and contrition, the Presiding Officer set out the absence of this factor as having significant weight.

[94] We are not persuaded, however, that the Presiding Officer's consideration of this element was unreasonable or amounted to punishing the appellant for either proceeding to hearing or for conducting the type of defence that was presented. In comparing the appellant's circumstances to those in *Zielie*, the Presiding Officer indicated that, but for admitting the misconduct and accepting responsibility, Zielie would have been dismissed. We understand this comparison to support our conclusion that, in the context of a premeditated and ongoing deceit, the appellant, in not taking responsibility or showing remorse, did not have the benefit of a mitigating factor in regards to penalty, as Zielie did. In coming to his conclusion, the Presiding Officer reasonably looked to the facts that formed the basis for the appellant's conviction. He could also reasonably consider the fact that he had, after hearing testimony, including the appellant's, found the appellant's evidence to be not credible. We therefore conclude that the Presiding Officer did not inappropriately approach the appellant's not-guilty plea as an aggravating factor. We consider the treatment of this factor to be neutral for the Presiding Officer and see no basis, given the Court of Appeal's confirmation of this element as a relevant sentencing factor, to interfere.

[95] The appellant argued that the Presiding Officer effectively treated deceit as always warranting dismissal. In considering this argument, we note that the Presiding Officer stated that "a remedial sentence is not even a remotely feasible consideration based on the facts of this case."[37] This refers explicitly to the "facts of this case", which to us indicates the Presiding Officer was well aware of the need to fashion an appropriate penalty in light of the factual underpinnings. His reasons support the view that, for the Presiding Officer, the cumulative effect of the aggravating factors—including the seriousness of the intentional and ongoing misconduct and the impact on the public, even in acknowledgement of the mitigating factors such as the nature and length of the appellant's service were such that no other conclusion was reasonable on the facts. We do not understand the Presiding Officer to have viewed deceit as always requiring dismissal regardless of the facts, or that a remedial approach was discounted absolutely. Instead, on assessment of aggravating and mitigating factors based on the facts before him, we conclude that the Presiding Officer simply viewed a lesser penalty to be inappropriate. His reasons clearly state

[35] Decision on penalty, record, p 691.
[36] Decision on penalty, record, p 691.
[37] Decision on penalty, record, p 691.

this. In his view, a lesser sanction would not adequately protect the interests identified, including public trust.

[96] In reaching this conclusion, further, the Presiding Officer questioned how the EPS could "warrant his trustworthiness from this day forward?"[38] While our colleague has inferred from the Presiding Officer's reasons that he had concluded that the appellant was not trustworthy from this day forward, we are unable make the same inference. Instead, we understand that, in making this statement, the Presiding Officer only went as far as to consider the appellant's trustworthiness to be in question.

[97] The Court of Appeal has indicated that the Presiding Officer is to determine the fit sanction in the circumstances and this is, we conclude, what he did. His reasons are clear and transparent, although not lengthy, and explain why he considered a severe penalty to be appropriate, how that penalty was tied to the specific facts of the appellant's situation, as found following the disciplinary hearing. Looking at the penalty decision as a whole, we find it to be reasonable. The Presiding Officer turned his mind to the facts before him, notably the seriousness of the misconducts and the public impact, and did not apply any automatic rule as to what penalty might flow from certain types of misconduct. Nor did he fail to consider any applicable principles from *Amery*, *Lingl* or Court of Appeal decisions.

[98] For the reasons given above, the appeal from conviction and the appeal from penalty are dismissed.

Edmonton, Alberta

October 17, 2014

Christine S. Enns	Robert Johnson
Presiding Member	Member

REASONS OF DALE WM. FEDORCHUK QC (DISSENTING ON PENALTY):

[99] I concur with my colleagues that, for the reasons given above, the appeal from conviction on the two counts of deceit should be dismissed.

[100] My colleagues have already outlined the Presiding Officer's decision on penalty and the parties' arguments on that aspect of the appeal. I have decided, however, that I must respectfully

[38] Decision on penalty, record, p 691.

disagree with the majority's conclusion that the penalty of dismissal was a reasonable outcome on the facts and law. My reasons for dissenting follow, but I will note here that I adopt my colleagues' reasons as they relate to the standard of review, and applicable principles, respecting the penalty aspect of the appeal.

[101] The appellant argued that not every finding of deceit should be automatically seen as a career-ender and that the Presiding Officer treated the deceit as a career-ender. The appellant argued that it cannot be the case that every instance of deceit automatically results in dismissal. One must look to the facts that form the basis of a conviction for deceit, as well as the nature of the officer's service. In this respect, there was no balance in the Presiding Officer's decision. I agree with the appellant's arguments in this regard.

[102] I have considered the entirety of the Presiding Officer's analysis of the circumstances and findings before him in relation to each of the *Amery* factors and have concluded that his decision on penalty was unreasonable. In my view, the Presiding Officer over-emphasised deterrence, denunciation, the overall fitness of the appellant for police service, and the impact the misconduct had on the relationship between the appellant and his police service. It was also not reasonable for the Presiding Officer to put greater weight upon his perception of the appellant's lack of remorse and to give little weight to, or fail to reasonably consider, mitigating factors and the principle of rehabilitation.

[103] As was enunciated in the *Amery* case, the intent of assessing penalty in police discipline cases is to arrive at a fair and just sanction in the circumstances. While it is true that the public interest must be considered in those cases where it is engaged, the public interest is not an over-riding principle of sentencing. It is one of many factors that must be taken into account in arriving at a fair and just sanction in the circumstances of the case. I conclude, in any case, that the Presiding Officer unreasonably over-emphasised the public interest dimension when sentencing the appellant.

[104] The Presiding Officer placed much emphasis upon the effect that *R v McNeil* would have upon the appellant's ability to perform operational policing duties. To be clear, I do not ignore that concern, as the impact of his deceit conviction is such that the appellant's evidence may be challenged in any court proceedings in which he might be called upon to testify against an accused person. The appellant could be subjected to cross-examination on his disciplinary record and his deceit conviction. Defence counsel may attempt to invite the court to disregard the evidence of the appellant and make adverse findings of credibility against him. Such findings would frustrate the course of justice in that people could be acquitted of offences for which they would otherwise be convicted. *McNeil* considerations, however, are but one factor among many that triers of fact consider when assessing the credibility of witnesses and the weight to be given to their testimony.

[105] Cst. Zielie, mentioned earlier, faced *McNeil* considerations in the case of *R v Sturko*.[39] In that case, Richardson PCJ noted that it was important to bear in mind that all witnesses are presumed to be telling the truth. It is only after their evidence is tested in cross-examination, and carefully assessed within the evidence as a whole, that the court can assess credibility.[40] Cst. Zielie's testimony began with a review of his admission of past deceit, discreditable conduct and criminal conviction for common assault. The Court noted that Cst. Zielie pled guilty to assault and was punished under the Act. At para 25, the Court stated:

> While the fact and circumstances of these convictions is a factor that the court must consider in weighing this officer's testimony and in assessing his credibility, no individual is the static sum of his worst day. In terms of his credibility, I note that his dishonesty, though serious, was not under oath. His evidence in this trial was under oath. Constable Zielie was palpably humiliated by his previous conduct. His shame at his actions was practically quantifiable. […]

[106] The Court did say that it is a serious breach of the public trust and a serious matter any time the police abuse their position of power and then file a false report to prevent the discovery of this abuse.[41] Nevertheless, the court was not inclined to support the accused's contention that Cst. Zielie was a witness of bad character in relation to his testimony and that he had a propensity to assault suspects in his custody.[42]

[107] Here, in "determining aggravating factors"[43], the Presiding Officer found it "disturbing" that the appellant "has not given any indication whatsoever that he understands he acted inappropriately."[44] He added "the failure to acknowledge his misconduct stands in stark contrast to the aforementioned *Zielie* case."[45] He then contrasted that case, "wherein the officer admitted his wrongdoing before it was even discovered. Cst. Zielie also accepted the consequences of his actions by pleading guilty to a criminal charge as well as disciplinary charges."[46] The Presiding Officer then said, "Unfortunately, Constable Quaidoo has not shown anything close to this degree of insight and contrition. How can the Edmonton Police Service warrant his trustworthiness from this day forward? A remedial sentence is not even remotely feasible consideration based on the facts of this case."[47]

[39] *R v Sturko*, 2013 ABPC 211 (ABPC) [*Sturko*].
[40] *Sturko* at para 18.
[41] *Sturko* at para 26.
[42] *Sturko* at para 27.
[43] Decision on penalty, record, p 688.
[44] Decision on penalty, record, p 690.
[45] Decision on penalty, record, p 690.
[46] Decision on penalty, record, p 690.
[47] Decision on penalty, record, p 691.

[108] While *Zielie* was a case with somewhat similar circumstances, the significant distinguishing factor in this case is that the appellant exercised his right to proceed to a hearing and have the Chief prove a case against him. The appellant also maintained the position that his statements and evidence were based on an honest, but mistaken belief. The Presiding Officer, who discussed this aspect of the matter in his discussion of aggravating factors, in my view, equated the appellant's decision to proceed to a hearing with a lack of remorse or lack of acknowledgment of responsibility.

[109] The Alberta Court of Appeal addressed this issue *R v Ambrose*,[48] which was cited to us in argument. In *Ambrose*, the Court stated that remorse has consistently been treated as a mitigating factor, but the absence of a mitigating factor does not necessarily translate into an aggravating factor. A sentence higher than appropriate for the offence should not be imposed for lack of remorse, but that factor might well disentitle a person to leniency that might otherwise have been extended.[49] Two different rationales have been offered in support of this approach. One is linked to the right of a person to make full answer and defence. The theory is that if lack of remorse were to be treated as an aggravating factor, this would in effect punish those who choose to rely on their right to a trial. The other rationale is the proposition that a person should not be sentenced for an offence for which he or she has not been convicted.[50] Someone should not suffer greater punishment for the way they conducted their defence.[51] In other words, while someone who shows no remorse loses the benefit of remorse as a mitigating factor, a sentencing judge must ensure that the sentence is not higher than that which is appropriate for the offence involved.[52] Nor is it appropriate to treat a person's exercise of their right to plead not guilty and go through a trial as an aggravating factor. It is at most neutral.

[110] I draw an inference from the reasons of the Presiding Officer that he considered that the appellant's failure to show the insight and contrition demonstrated by Cst. Zielie rendered him not trustworthy from this day forward. If that inference is correct, it would be unreasonable to conclude that the appellant's deceit and lack of acknowledgment of his misconduct has rendered him a liar in every circumstance, for all time. As the Court stated in *Sturko*, no person is the unchanging sum of their worst misconduct at a given time.

[111] The Presiding Officer's finding that the appellant was deceitful in the preparation of a police report and a PSB memorandum must be acknowledged. I accept the finding that this was

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[48] *R v Ambrose*, 2000 ABCA 264 [*Ambrose*].
[49] *Ambrose* at para 71.
[50] *Ambrose* at para 72.
[51] *Ambrose* at para 74, 76, 77. As the Court said, at para 84, "It would not be proper to take the way in which an accused has chosen to conduct his or her defence, equate this with lack of remorse and use it to buttress a finding that at the time of commission of the offence, that person's moral blameworthiness was therefore relatively high or to justify a higher sentence than would otherwise be appropriate in all the circumstances."
[52] *Ambrose* at para 76.

for the purpose of justifying his attendance at the police vehicle and his use of force on FG, and to protect himself from sanction as a result of an unlawful or unnecessary exercise of authority. It is reasonable, I agree, to suggest that the appellant's misconduct was of a serious nature that requires a significant penalty. The application of a significant penalty for this conduct will have the effect of specifically deterring the appellant from such conduct in the future. A significant penalty will also have the effect of deterring other police officers from similar misconduct and of maintaining public respect for the police. I am, nonetheless, of the view that the Presiding Officer's conclusion that a remedial sentence is not even a remotely feasible consideration was unreasonable.

[112] The first *Amery* factor, promoting effective and efficient police services, recognises that the principal purpose of police discipline is to advance the objective of effective and efficient police services to the community. The public must have confidence and trust in the truthfulness and professionalism of police officers. Effectiveness and efficiency are advanced if there is mutual trust between the police and the public. Anything that could diminish that trust must be dealt with decisively.[53]

[113] The Board recognized this in *Kube* and in *Officer A*.[54] These were both cases where the Board found as reasonable the decisions of the Presiding Officers to dismiss for deceit. I consider the facts in *Kube* to be distinguishable from the facts here. Kube stood to benefit personally by lying to fellow police officers, but, more importantly, his actions readily could be seen as an attempt to obstruct justice. In that case, Kube travelled to the scene of a traffic stop and took with him documentation with the intent to convince fellow police officers that the motorcycle he sold to the accused was insured, when he knew it was not. Driving without insurance is not merely an offence under the *Traffic Safety Act*: it has serious consequences for an injured third party if there is an accident. The gravity of the actions undertaken by Kube is underscored by the degree of calculation in his attempt to mislead.

[114] The facts in the *Officer A* case are also distinguishable from the facts of this case. As an acting detective, Officer A drafted and swore an application for a search warrant, which was issued by the court. After the warrant was executed, charges were laid against an individual. Having found the appellant guilty of deceit in the warrant application and guilty of deceit in statements to PSB and the Chief, the Presiding Officer dismissed the appellant from the EPS.

[115] Swearing an application for a search warrant has serious consequences for the member of the public who will be affected by the execution of the warrant. Members of the public enjoy the constitutional right to be free from unreasonable search and seizure. A search and seizure is only

[53] *Kube* at para 19.
[54] *A v EPS*.

reasonable if it is authorized by law, if the law itself is reasonable, and if the search is carried out in a reasonable manner. Swearing a false application for a warrant potentially renders the search unreasonable, in that it is no longer authorized by law. The gravity of the actions of Officer A is underscored by the jeopardy in which a member of the public may be placed by such conduct. Such conduct also has the potential to harm a prosecution and contribute to an obstruction of justice.

[116] In the appellant's case, the scene in which he found himself was undoubtedly highly-charged emotionally. An officer had been assaulted and injured. The perpetrator of the assault was in custody. The appellant's reaction, as found by the Presiding Officer, was to exact a form of retribution for a vicious and unprovoked assault on a police officer. I do not condone the appellant's decision to assault FG, but it would appear that the decision to do so was made in haste and in the heat of the moment, as opposed to being the result of a calculated decision. The Presiding Officer made a specific finding of fact, that the appellant's "hasty confrontation was more consistent with a police officer who had lost his composure than an officer motivated by a legitimate suspicion that possible damage was being done to a police vehicle and who sought to attend to this concern any responsible matter."[55]

[117] The appellant was later deceitful in his reporting of the event, in an attempt to cover up his unauthorized and decidedly improper actions. Again, I do not condone any of his actions. Deceit is serious, even if it does not directly impact upon a member of the public in terms of creating jeopardy at law or contribute to an obstruction of justice. The appellant's deceit, however, cannot be said to have risen to the level of seriousness of an attempted obstruction of justice or to have placed FG in further danger in terms of his charges for assaulting Cst. Mishio. As a result, the *Kube* and *Officer A* decisions are less compelling authorities in terms of determining whether the Presiding Officer's decision to dismiss the appellant was reasonable.

[118] In this case, there is no indication that the appellant tampered with the criminal justice system, including in a way that affected the outcome of FG's case. There was no transcript before the Presiding Officer of the appellant's testimony in FG's case, nor in any proceedings involving the appellant directly. While deceit on the part of a police officer cannot be condoned in any circumstance—including where, as here, the deceitful statements are made to PSB and therefore, ultimately, the Chief—the offence of deceit is more egregious when it has the effect of tampering with the criminal justice system. Deceit of that kind is especially damaging to public trust in the police. This was not such a case, even recognizing that the appellant's deceit was not excusable.

[55] Decision on conviction, record, p 745.

[119] The second *Amery* factor speaks to the penalty being fair and just in the circumstances and with consideration of the public interest where it is engaged. There is a significant public interest in ensuring that police officers do not attempt to seek or acquire private benefit, and in doing so interfere with the administration of justice. In discharging their vitally-important duties in exercising their considerable powers, police officers undoubtedly must conduct themselves with objectivity and without bias. They also must not allow their personal interests or the personal interests of others to influence what they do.

[120] The appellant's actions were not found to be an attempt to interfere with his colleagues' duties,[56] and thus an attempt to interfere with the administration of justice. The Presiding Officer in this case did draw an inference from the facts that the appellant sought to acquire a private benefit by justifying his actions in going to the police vehicle, confronting FG, and subsequently striking him. The Presiding Officer did not come to the conclusion that the appellant decided to assault FG before he went to the police vehicle, but that he was acting in the heat of the moment and on feelings generated by the assault upon Cst. Mishio.

[121] The third *Amery* factor, relating to administrative or organizational factors that contributed to the misconduct does not apply here.

[122] The fourth *Amery* factor concerns a remedial approach. A remedial approach that seeks to correct and educate, rather than to punish, should be considered as a priority in those circumstances where it is appropriate. While the unlawful or unnecessary exercise of authority and deceit cannot be considered appropriate, there is no authority that suggests that a remedial approach is not available in circumstances where there has been such misconduct. Whether a remedial approach is appropriate depends upon the circumstances of each case and must be assessed accordingly. A remedial approach should be considered in every case, as it is a factor of sentencing. In some cases, a remedial approach should be considered as a priority. It cannot be disregarded outright.

[123] In my view, in this case, the Presiding Officer inflexibly rejected the remedial approach, as I now discuss. The Presiding Officer acknowledged the submissions made by the defence respecting the appellant's years of service, his favourable performance reviews, the recognitions documented in his service record summary and the fact that he had no record of previous discipline. After acknowledging these mitigating factors, however, I consider that the Presiding Officer gave them little regard when questioning whether the appellant is trustworthy and concluding that a remedial sentence was not even a remotely feasible consideration. It was not reasonable for the

[56] This is with the possible exception of influencing the manner in which Cst. Lewis wrote his report in order to back up the appellant's version of the events that led him to go to the police vehicle in which FG was seated. Such interference did not take place here because Cst. Lewis was not influenced by the comment and there was no consequential interference with the administration of justice.

Presiding Officer to simply advert to the existence of mitigating factors, but not give them any discernible weight in sentencing or disregard them entirely.

[124] I note in this respect that the service record summary,[57] disclosed no record of disciplinary action. It did include thirteen letters of thanks between August 5, 2003, and February 19, 2012. (The appellant started duty in February 2002). During the same period, three "Job Well Done" notes were appended to his Service Record Summary. On April 14, 2010, the appellant received the Jim Dempsey Customer Service Award.

[125] The appellant also filed 20 reference letters.[58] The reference letters were prepared by retired and active-duty police officers, business people, a firefighter, a psychologist, a crown prosecutor, EPS employees, family and friends. Each of the reference letters acknowledges the Presiding Officer's findings of guilt for unlawful exercise of authority and deceit. The letters describe the appellant's character in glowing terms and suggest that the appellant's professionalism, honesty and integrity were beyond question in the circumstances involving the authors of the letters. One individual wrote, "I served 20 years in the Air Force and encountered many individuals who I would trust with my life. I consider Frank to be in this group of individuals." One police officer expressed the hope that the appellant would serve as an example that, while people may make very serious mistakes, they can become better and have productive lives and careers afterwards. The reference letters expressed confidence in the appellant's ability to learn from his mistakes and grow as an individual. He appears to have tremendous family and community support. All of this was before the Presiding Officer and formed part of the Record.

[126] During the five years after the incident and leading up to the Presiding Officer's decision on guilt, the appellant was actively employed by the EPS in a supervisory position. There was no indication in the record before the Presiding Officer, when it came to considering an appropriate, fit sanction, of any intervening disciplinary sanctions. There is no indication in the record that the appellant was not of some value to the police service and the public during that five-year period. One EPS sergeant, we note, had expressed his firm belief that the appellant could continue as an effective, professional and credible member of the service.

[127] A careful examination of the reference letters, the letters of thanks, and the commendation letters suggest that the appellant is a person of previously good character, conduct and repute. He was well-regarded by his superior officers and fellow officers, as well as members of the public with whom he interacted. This evidence was material to an assessment of the appellant's character or the prospect of success of a remedial sentence. In any event, these are factors that ought to have been given careful consideration by the Presiding Officer. I conclude

[57] Exhibit 12 in the disciplinary hearing.
[58] Exhibit 13 in the disciplinary hearing.

that the Presiding Officer did not reasonably account for this evidence, and overall the remedial factor, in deciding that dismissal was a fit penalty.

[128] As the Board stated in *Kube*, whether or not we would impose the same penalty as the Presiding Officer is not a question we are called to answer. Our task is to determine whether the Presiding Officer's decision to dismiss the appellant falls within the range of acceptable, reasonable results on the facts before him and on the law. Our job is not to substitute our own judgment for that of the Presiding Officer. For a police officer, the penalty of dismissal is said to be the ultimate penalty. Such a sanction must be a fit one in the circumstances. The task of the Presiding Officer is to take all principles of sentencing, including both mitigating and aggravating factors, into consideration when assessing a fit penalty in the circumstances.

[129] In this case, the Presiding Officer's reasoning does not fit comfortably with the principles of justification, transparency and intelligibility. Further, for reasons given above, the outcome falls outside the range of acceptable, reasonable outcomes in light of the law and the facts. Among other things, I agree with the appellant that deceit does not automatically lead to dismissal and the appellant's decision to defend himself at the disciplinary hearing ought to be neutral as a factor. The public interest does not oust the remedial approach (including where, as here, the officer has a discipline-free record and is otherwise, on the record, seen as a credit to public service). In this case, the Presiding Officer's decision to impose the penalty of dismissal was not within the bounds of acceptable, reasonable outcomes. It was not a fit sanction in light of the factual underpinnings of the misconduct.

CONCLUSION

[130] While I agree with the majority that the appeal against conviction should be dismissed, for the reasons I have just given, I would allow the appeal from the penalty of dismissal and seek further submissions from the parties on the issue of the appropriate penalty to be assessed against the appellant. Given the overall outcome, it would not be appropriate for me to consider what might be the appropriate penalty.

Edmonton, Alberta

October 17, 2014

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Dale Wm. Fedorchuk QC
Board Member

For the appellant: M. Duckett
For the Chief of Police: G. Crowe