

**IN THE MATTER OF THE POLICE (CONDUCT) ORDERS AND THE PUBLIC SERVICE REGULATIONS 2001
AND IN THE MATTER OF AN APPEAL OF THE DECISION OF THE MISCONDUCT PROCEEDINGS
PANEL MADE IN JANUARY 2020 BROUGHT BY OSWIN PEREIRA BEFORE THE PUBLIC SERVICE
COMMISSION**

BETWEEN:

OSWIN PEREIRA

Appellant

- and -

COMMISSIONER OF POLICE

Respondent

DECISION OF THE PUBLIC SERVICE COMMISSION

1. In January 2020, the Misconduct Proceedings Panel ("MPP") handed down a decision in which it found charges of gross misconduct had been made out by the Appropriate Authority against PC Oswin Pereira ("the Appellant") and dismissed the Appellant. This is an appeal of that decision brought by the Appellant pursuant to Order 37 of the Police (Conduct) Orders 2016 and Regulation 28(1)(c) of the Public Service Commission Regulations 2001 (the "Regulations") to the Public Service Commission ("the PSC")

The Charges

2. The charges brought by the Appropriate Authority were that the Appellant's actions fell below the acceptable standards of professional behavior that are expected of members of the Bermuda Police Service and in particular the following standards:-
 - (i) Honesty and Integrity
Police officers are honest, act with integrity and do not compromise or abuse their position.

- (ii) Authority, respect and courtesy
Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.
- (iii) Discreditable Conduct
Police officers behave in a manner which does not discredit the Service or undermine public confidence in it, whether on or off duty.
- (iv) Use of Force
Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.

The Particulars of the Allegations

3. The full allegations against the Appellant are set out in paragraphs 6 to 6(vii) of the decision of the MPP but for the purposes of the appeal can be summarized as follows:-
- (I) The Appellant intentionally turned off his body camera in a deliberate attempt to conceal his actions at a critical time of the arrest of Mr. Talundae Grant when he was heard to say “camera’s off”;
 - (II) The Appellant assaulted Mr. Grant by striking him twice with his ASP baton in the head;
 - (III) The Appellant in his written statement, audio interview and in Magistrates Court gave an untruthful account in order to protect himself and cover up the truth and in particular:-
 - (a) lied when he said he accidentally struck Mr. Grant with his ASP when he braced for his fall;
 - (b) lied when he denied that he struck Mr. Grant multiple times;
 - (c) lied when he said he told his fellow arresting officer PC Boden “your camera is off” as he wanted PC Boden to record the incident from a different vantage point.

Findings by the MPP

4. The full findings of the MPP are set out in paragraph 15 of the decision of the MPP and can be summarized as follows:-
 - (i) The Appellant's overall account was implausible;
 - (ii) The Appellant lawfully deployed his taser during the arrest;
 - (iii) The Appellant willfully and intentionally turned his body camera off during the arrest;
 - (iv) The Appellant then unnecessarily struck Mr Grant in the head using his ASP;
 - (v) The turning off of the camera indicated premeditation of a cover up of an unjustifiable assault;
 - (vi) This action constituted gross misconduct.
5. As a result of its findings, the MPP concluded the Appellant's conduct undermined any continuing trust and confidence in his ability to perform his role as a police officer by his superior officers and fellow officers, and the public's trust and confidence in the Bermuda Police Service would be seriously undermined if gross misconduct of this sort was not dealt with appropriately. In such circumstances, the MPP found the only realistic and proper disciplinary action was dismissal.

Jurisdiction and Powers on Appeal

6. The jurisdiction and powers on appeal are set out in Section 37(2) of the Police Conduct Orders ("PCO") and Regulation 28(1)(d) of the Regulations:

Section 37(2) of the PCO

The only grounds of appeal under this order are that—

- (a) the finding or disciplinary action imposed was unreasonable;*

(b) there is evidence that could not reasonably have been considered at the misconduct proceeding which could have materially affected the finding or decision on disciplinary action; or

(c) there was a serious breach of the procedures set out in these Orders or other unfairness which could have materially affected the finding or decision on disciplinary action."

Regulation 28 (1)(d)

"The Commission may –

(a) affirm, reverse or vary any disciplinary penalty imposed by the disciplinary award; or

(b) remit the matter for determination on rehearing by the empowered person with or without any observations the Commission thinks fit to make."

7. There was no new evidence being presented during the hearing of the appeal so only limbs (a) and (c) of Order 37(2) of the PCO were engaged in this appeal and of course Regulation 28 of the Regulations.
8. The facts of the incident as found by the MPP are contained in paragraphs 14(a) to 14(i) of the decision of the MPP.
9. It is established that the PSC may only allow an appeal and substitute its own determination if it concludes that the panel's decision was unreasonable or finds there was a serious breach of procedures or unfairness which could have materially affected the finding or the decision of the MPP.
10. The Appellant filed twelve (12) grounds of appeal which were grouped into five (5) general areas. This decision addresses the appeal grounds in the order set out in the Notice of Appeal and the Appellant's submissions.

Appeal Ground 1

The Panel acted unfairly when it appointed Mr. Alan Dunch as chair of the Panel being a barrister who represents the police.

11. The Appellant alleges unfairness when Mr. Dunch continued to act as Chair of the MPP despite concerns being raised by the Appellant's counsel at the commencement of the disciplinary hearing as to a possible conflict of interest on the part of Mr. Dunch. The objection is based on *"the appearance of bias on the part of the Chair of the MPP based on his past relationship with the prosecuting authority"*. The Appellant submits there would be an appearance of bias such that a reasonable observer who is fully informed of the relevant facts would have a concern of bias.
12. During the initial stages of the disciplinary hearing, concerns were indeed raised by the Appellant's former counsel, Mr. Marc Daniels. Mr. Dunch, during the directions hearing explained his relationship with the Bermuda Police Association who still regarded Mr. Dunch as their lawyer. Mr. Dunch also openly disclosed that he advises the Commissioner of Police on matters of promotions. Mr. Dunch further disclosed he informally advised another high-ranking officer in connection with this officer's contract of employment.
13. At the suggestion of the counsel for PC Boden, Mr. Dunch agreed to go "off record" and a private discussion ensued between counsel for PC Boden and the Appellant with the cameras recording the proceedings switched off and without either the Appellant or Sgt. Brian Mello, the police officer presenting the case for the Appropriate Authority, being present. The PSC has reservations about this course of action as under Order 36 of the PCO a verbatim record of the hearing must be taken and Order 56 of the PCO, the Commissioner of Police must cause a record of the disciplinary proceedings to be kept. This obligation was fulfilled by the video recording of the disciplinary proceedings, however, the video recording was turned off by mutual agreement of the MPP and counsel for the Appellant and counsel for PC Boden. As a result, the PSC was deprived of a full record of what transpired and what was discussed during the "off camera" causerie between the Chair and counsel for the parties.
14. In advance of the hearing of the appeal, the PSC requested counsel for the Appellant and the Respondent to determine what was discussed during the off record meeting and was

advised by counsel for the Appellant that both Mr. Marc Daniels and Mr. Allan Doughty described that the discussion:-

“was essentially between Allan Doughty (counsel for PC Boden) and Alan Dunch as they were at that time representing various police officers and advising the COP, respectively in promotion matters”.

15. Following the off-record discussion, the MPP reconvened with all parties present and both counsel for the Appellant and PC Boden agreed that Mr. Dunch could continue to sit on the MPP and act as Chair.
16. The Appellant, with the benefit of legal counsel, made an informed decision to continue with the disciplinary proceedings having knowledge of the potential conflict of interest on the part of the Chair. While the off-record discussion caused concern, the PSC is satisfied that the Appellant had knowledge of the essential facts which raised the potential appearance of bias yet chose to continue on with the proceedings and withdrew any objection to the appointment of Mr. Dunch and his continuing to chair the disciplinary proceedings. In those circumstances, the PSC is of the view it is bound to dismiss this ground of appeal on the basis that the Appellant waived his right to now complain about any appearance of bias.
17. Further, in Judicial Review proceedings brought by the Appellant, (Boden and Pereira v His Excellency the Governor and the Commissioner of Police [2019] SC (Bda) 50 CIV) the Chief Justice ruled that the Appellant’s right to a rehearing by way of an appeal to the PSC cured any breach of natural justice and therefore this Ground of Appeal would have been liable to be dismissed in any event.

Appeal Ground 2

The Panel acted unfairly when it appointed Douglas Soares as the layperson without notification to the Appellant or giving reasons.

18. This appeal ground was not seriously advanced during the hearing. The Appellant asserted what may be described as a technical breach of Section 20(2) of the PCO, which provides that the identity of the panel members should be supplied to the Appellant in advance of the hearing. The Appellant was aware of the identity of Mr. Soares at the commencement of the disciplinary proceedings. The disciplinary proceedings were adjourned for several months in order to allow the judicial review proceedings to run their course. The Appellant had ample time to voice any concerns in connection with the appointment of Mr. Soares prior to the substantive proceedings getting underway. No bias or any criticism is leveled at Mr. Soares. Any unfairness would have been cured by this appeal to the PSC in accordance in any event. This ground of appeal is dismissed.

Appeal Ground 3

The Panel acted unfairly when they allowed Sgt. Brian Mello to be appointed pursuant to paragraph 7(5) of the Police (Conduct) Orders 2016 when he had a personal interest in the matter.

19. The Appellant suggests Mr. Mello was appointed under Order 7(5) of the PCO. That is an incorrect assertion. Order 7(5) provides that the appropriate authority (COP) can appoint a person to advise the persons conducting the misconduct proceedings. In fact, Mr. Mello appears to have been appointed under Order 7(4) of the Orders which provides that the Appropriate Authority may be represented at misconduct proceedings by a police officer.
20. It is clear from the record that Sgt. Mello presented the case to the MPP on behalf of the Appropriate Authority. He was not a member of the MPP and was therefore not a party to the MPP decision and deliberations in the case. He was advocating for the Appropriate Authority and prosecuting the case on the Authority's behalf. The Appeal Panel finds no merit in this ground and dismisses it. It should be noted, that even if there had been any merit in the complaint, the PSC would have ruled that there was no unfairness which could have materially affected the finding or decision on disciplinary action. The PSC would again

add that, in line with the Chief Justice's ruling, any perceived unfairness would be cured by this appeal to the PSC.

Appeal Grounds 4 & 5

The Panel was in breach of procedure when it applied the incorrect standard of proof to the proceedings.

The Panel acted unfairly when it did not give reasons for applying the standard of proof to the proceedings.

21. Order 32(14) of the PCO provides:-

(14) The person or persons conducting the misconduct proceedings must not find that the conduct of the police officer concerned amounts to misconduct or gross misconduct unless—

(a) he is or they are satisfied on the balance of probabilities that this is the case;

or

(b) the police officer concerned admits that it is the case.

[emphasis added]

22. The Appellant referred to Regulation 25 of the Regulations which in some cases can require the criminal standard to be applied in relation to civil servants but Regulation 23(3) provides:-

3) Nothing in this regulation or regulations 24 to 28 applies in relation to a police officer...

23. The PSC is bound by the provisions of the PCO and the Regulations. Counsel for the Appellant appeared to accept the position that the PSC was bound by the PCO and the

Regulations and any constitutional challenge to these provisions could only be dealt with by bringing proceedings in the Supreme Court. Grounds 4 & 5 are therefore dismissed.

Appeal Grounds 6, 7, 8 & 9

“The Panel acted unfairly when they admitted the statement of Talundae Grant (deceased) for the limited purpose of setting the background and context which resulted in the misconduct hearing proceedings being instituted.”

“The Panel acted unfairly when they admitted the statement of Talundae Grant (deceased) when the statement was made after he had viewed the body camera footage.”

“The Panel acted unfairly when they admitted the statement of Talundae Grant (deceased) without comparing it to the live testimony given in the criminal trial R v Oswin Pereira (17CR00607) on the same facts.”

“The Panel acted unfairly when they failed to compare the Appellant’s testimony at the hearing to his testimony at his criminal trial on the same facts.”

24. Sadly, Mr. Grant died in an unrelated road traffic accident prior to the disciplinary proceedings. It was clearly open to the MPP to admit the statement as the maker of the statement was now deceased. In order to address any unfairness that might arise, the MPP stated it was only admitting the statement for the limited purpose of setting the background and context of the complaint. The PSC can find no fault in the MPP adopting that course and admitting his statement for that limited purpose.
25. Mr. Grant had, however, testified in the Appellant’s criminal trial in Magistrates’ Court and would have been subjected to cross-examination during those criminal proceedings. Counsel for the Appellant and PC Boden sought to admit the evidence given during the Magistrates Court trial. The MPP declined to review the recording (or transcript as offered by Mr. Doughty) of the criminal trial.

26. The PSC is of the view that the Appellant was denied the opportunity to put before the MPP evidence that may have assisted him in his defence of the charges. At the core of the disciplinary charges was the allegation that the Appellant had struck Mr. Grant twice in the head with his ASP. Mr. Grant in his witness statement dated the 13th September 2017 made several allegations against the Appellant for which there appears little or no supporting evidence. Those allegations are:-

- (i) The Appellant hit Mr. Grant “multiple times” in the face;
- (ii) While on the ground, the Appellant kicked Mr. Grant in the face;
- (iii) While on the ground, the Appellant beat Mr. Grant in his leg;
- (iv) When on his knees, the Appellant hit him in his head;
- (v) When on his feet, the Appellant gripped the handcuffs and pulled Mr. Grant down twice;
- (vi) When they got to the roadside, the Appellant again pulled Mr. Grant down to the ground by the handcuffs;
- (vii) When Mr. Grant looked at him, the Appellant hit Mr. Grant on the left side of the face with his helmet;

27. It is noted that the Appropriate Authority adduced no medical evidence at the hearing before the MPP. In the opinion of the PSC, there was no independent evidence confirming any of the allegations listed above. The King Edward VII Memorial Hospital Visit Summary exhibited in the appeal record specifies the presenting complaint as an abdominal injury relating to being tased by the police and a “Road Traffic Collision”. It is telling that there was no evidence of a complaint of an assault made by Mr. Grant on the 13th May 2017.

28. Presumably, Mr. Grant would have been challenged in cross-examination on these and other matters such as the late complaint which seems to have arisen after Mr. Grant’s criminal defence attorney obtained a copy of the body camera video in disclosure in the criminal proceedings. Had the MPP reviewed the recording of the criminal trial, the MPP

may have well formed a different view as to whether or not the Appellant actually intentionally struck Mr. Grant with the ASP baton.

29. Given the Appellant was fighting for his professional life, the PSC is of the opinion that the Appellant should not have been denied the opportunity to put the cross-examination of Mr. Grant into evidence if he so wanted. In the absence of Mr. Grant being present for the hearing, there could be no better evidence for the MPP to consider whether Mr. Grant's complaint was credible. The PSC finds the refusal of the MPP to admit and consider the evidence was unfair to the Appellant and allows this ground of appeal. The question of what flows from accepting this ground of appeal is dealt with in the section below when considering whether the finding of an "unjustifiable assault" by the MPP was unreasonable or not.

Appeal Ground 10

The Panel acted unfairly when it accepted the evidence of PC McNab

30. The crux of this complaint, which is fleshed out in the Appellant's written submissions, is whether the MPP was right to allow PC McNab to comment on the body camera recording and whether PC McNab had the necessary expertise to give evidence relating to the operation of the body cam.
31. Counsel for the Appellant and PC Boden at the hearing agreed PC McNab's statement could be taken as read. There was no objection by the Appellant's counsel at the hearing in respect of PC McNab giving opinion evidence. His statement, which went unchallenged, confirmed that PC McNab had been accepted by the Bermuda Courts as an expert in both the taser and firearms. The PSC agrees that there was no proper foundation to declare PC McNab an expert in the operation of the body camera but there was no real dispute as to how the body camera operated. The PSC does not therefore think the admission of PC McNab's evidence in connection with the body camera was unfair to the extent that it had

a material effect on the proceedings, particularly given there was no objection by the Appellant's counsel and there was no real dispute as to how the camera operated.

32. However, as noted by the Appellant's counsel in her submissions, the MPP stated in paragraph 12 of its decision the MPP was *"greatly assisted by essentially the unchallenged explanations of the footage that it received from PC McNab"*. Other than this general statement, the MPP did not specify what unchallenged explanations of the footage made by PC McNab it accepted. The Appeal Panel has reviewed and listened to PC McNab's testimony in detail and there was one significant observation by PC McNab which appears to have been ignored or certainly not referred to in its decision (see below).

33. See 16:50 at Recording No. 112 on Camera 1 there was the following exchange:-

Chair: *Bearing in mind also we actually haven't seen any footage showing the baton, the ASP, baton coming into contact with Mr. Grant.*

PC McNab: *We can't say the end of the baton definitely struck him on the head, however, we can say as Mr. Daniels pointed out that his forearm which formed part of his wrist is compressed against onto Mr. Grant's head. However, the conclusions I came to, I looked at other evidence, which included, PC Pereira's statement, the record of the taped interview from Mr. Grant, Mr. Grant's statement, what his allegations were.*

34. PC McNab's evidence was that the recording did not definitively show the Appellant striking Mr. Grant. PC McNab should not have been giving his views of the contents of the video in reference to the primary question as to whether the video shows the Appellant striking Mr. Grant or not. This was not a matter that called for expertise. The MPP was in as good a position as anyone to make that determination and this did not require expert evidence.
35. But the MPP, having found that it accepted PC McNab's explanations of the video evidence, appears to have disregarded his evidence that the recording did not show the Appellant

striking Mr. Grant despite this evidence being unchallenged by the Appropriate Authority. It should also be noted that in arriving at his conclusions, PC McNab took into account Mr. Grant's written statement and his record of interview when the MPP had previously ruled the statement would not be admissible for the purposes of proving whether Mr. Grant had been struck or not.

36. In addition, PC McNab's evidence appears to have been ignored in relation to the difficulty being experienced by PC Boden in putting the handcuffs on Mr. Grant. At 11:00 at recording 112, PC McNab, gave evidence that at the latter part of the arrest, he was not sure whether the handcuffs were properly on as Mr. Grant's left arm had free movement. PC McNab had thought previously that the handcuffs were properly on, but based on the video subsequently showing Mr. Grant's left hand free and moving, PC McNab stated he would need to revise his opinion.

Chair: *We have watched this video now for several hours and I said to you 5 minutes ago, I was troubled about whether or not the handcuffing had successfully happened, these two gentlemen were involved with something that occupied about 5 or 6 seconds of time, based upon what we have seen. If PC Pereira had perceived, rightly or wrongly, but if he had perceived that his partner was struggling with effecting the handcuffing of this suspect and he had determined it appropriate in his judgment to assist in helping to get the suspect under control, in those circumstances, would you have understood the use of the ASP?*

PC McNab: *Yes I would understand the use. If that was a training scenario, there would be a lot of feedback as why are you striking somebody in the head in the no go area when you have a myriad of other options. However, you have to say, a high stress situation, you do what comes naturally. And if his honest held belief was that this is going to help, then that is for him to explain and as I said in a couple of times in my statement, I can only draw conclusions with what I have got. The person you*

really need to ask about the level of force is the officer who applied it and the circumstances in which it was applied.

37. The evidence of PC McNab appears to suggest, in his capacity as a training officer, that in circumstances where Mr. Grant was not under control, PC McNab could have understood the use of the ASP in getting control of the suspect, particularly given the high stress situation. This evidence should have been considered as relevant by the MPP in making its determination as to whether there was an unjustifiable assault by the Appellant on Mr. Grant. PC McNab did, however, make it clear he would have expected other options to be used but notwithstanding that fact, in the circumstances that had arisen, PC McNab's opinion was that he could have understood the use of the ASP.
38. The MPP also appears to have ignored PC McNab's evidence that had Mr. Grant been struck on the left side of his face with the ASP baton, PC McNab would have expected to have injuries to the left side of Mr. Grant's face. It is questionable whether PC McNab was qualified to give this evidence but on the basis of his position as an experienced training officer, he could be said to have the necessary knowledge to comment on whether one would expect injuries to be inflicted with the intentional striking of the ASP baton on a subject. There were no apparent injuries on the left side of Mr. Grant's face attributable to being struck twice by the ASP. As noted above, no medical evidence was called, however, the Appeal Panel, like the MPP, had the benefit of photos of Mr. Grant and there do not appear to be any injuries where one would expect had Mr. Grant been struck with the heavy weapon on the left side of his face. The hospital report did not document any injuries to the left of Mr. Grant's face.
39. One last piece of relevant evidence that appears to have been ignored in the MPP's decision was PC McNab's evidence that the ASP baton could be extended by accident which was consistent with the Appellant's explanation he had not intentionally extended the ASP

baton. At the penultimate page of PC McNab's statement which went into evidence, by agreement of all parties, he stated:-

"It should be noted that it is possible for the baton to extend by falling forward as it is only held closed by a small retention spring in the end cap"

This evidence assisted the Appellant as it was consistent with the Appellant's defence that he had not intentionally extended the ASP baton, however, it appears to have not been taken into consideration by the MPP.

40. The PSC is troubled with the MPP's statement that the MPP was greatly assisted by the unchallenged evidence of PC McNab without particularising which parts of the evidence of PC McNab it accepted. As demonstrated above, PC McNab gave evidence that supported the Appellant and which went unchallenged, however it was not referred to in the decision handed down by the MPP.
41. Coming back to Appeal Ground 10, PC McNab's evidence was adduced without objection. Counsel agreed his written statement could be taken as read. There was no objection to PC McNab giving opinion/expert evidence. Further, there was no real dispute as to the operation of the body camera. On this ground itself, the PSC would have found no significant unfairness that materially affected the findings made by the MPP.

Appeal Ground 11

The Panel acted unreasonably in finding the Appellant's action amounted to gross misconduct

42. While the Appellant put forward this general ground of appeal, the written submissions of the Appellant's counsel failed to particularise the complaints in relation to the evidence in support of the assertion that the MPP acted unreasonably in finding the Appellant's actions amounted to gross misconduct. The written submissions simply regurgitate the previous grounds of appeal which are focused on whether the Appellant had a fair hearing.

43. In light of the ground of appeal itself, the PSC went on to consider whether the Appellant's actions could be said to amount to gross misconduct. The findings by the panel which were relied on as constituting gross misconduct were the following:-

- (i) The Appellant willfully and intentionally turned his camera off;
- (ii) The Appellant administered two rapid blows to the head region of Mr. Grant;
- (iii) The turning off of the camera indicated premeditation of a cover up of an unjustifiable assault.

Was the finding that the Appellant unjustifiably assaulted Mr. Grant unreasonable?

44. The PSC also reviewed the body camera video evidence in depth. A special hearing was convened to allow for the video to be shown frame by frame, facilitated by Detective Constable Nigel Richardson. The PSC were unanimous in its finding that the body camera recording did not show Mr. Grant being struck twice in the head as found by the MPP. Indeed, as mentioned above, PC McNab concurred that the recording did not show the Appellant being struck twice in the head. Mr. Dunch, the Chair of the MPP, indicated during the hearing, that despite viewing the video recording for several hours, the MPP did not see the Appellant being struck by the ASP baton.

45. There was no medical evidence adduced but there were some pictures of Mr. Grant exhibited in the record which do not evidence any injury to the left side of his face. The PSC also notes the Visit Summary of KEMH specifies the presenting complaint as taser injuries to Mr Grant's abdomen and "Road Traffic Collision".

46. Given the MPP ruled it would not take into account the veracity of Mr. Grant's statement, the only evidence it had available to it to make a determination as to whether the Appellant struck Mr. Grant twice in the head was the recording itself and the Appellant's evidence. Indeed, as referenced above, Mr. Dunch, the Chair, noted that after reviewing the

recording for a substantial period of time, the MPP did not see the Appellant striking Mr. Grant. PC McNab also testified the recording did not definitely show the ASP baton come into contact with Mr. Grant.

47. The PSC, having carefully considered the body camera evidence, finds that the MPP's conclusion that the Appellant unjustifiably assaulted Mr. Grant by striking him twice in the head was unreasonable and it reverses that finding.

Was the MPP's finding that the Appellant willfully and intentionally turned his body camera off unreasonable?

48. The MPP rejected the Appellant's explanation that he was not advising PC Boden to turn his camera off but rather instructing him to turn his camera on and he did not intentionally switch his camera off. In its findings, the MPP "dismissed the Appellant's account as implausible". The relevant part of the judgment relating to the turning off the body camera is found at paragraph 14(g) of the MPP's decision. Having heard the Appellant and considered his version of events, the MPP rejected the Appellant's evidence and made a finding that the Appellant intentionally and willfully turned off the camera.
49. It is noted that PC Boden's camera was not on during the incident and he faced no criticism in that regard. The matter was considered during PC McNab's testimony when it was discussed that when PC Boden alighted out of the car, PC Boden didn't have his camera on. PC McNab said that in these circumstances there was no evidence of breach of operational standards when PC Boden failed to turn his camera on.

Chair: *Assuming it wasn't on (PC Boden's camera) whilst, I think what you were saying, whilst, it would have been preferable if it had been turned on, you are not surprised and it's not contrary to operational standards that it wasn't?*

PC McNab: *That's correct.*

Acting COP Sean Field-Lament (one of the members of the MPP)

I am working the new policy, it's a real area of new development, certainly the public expectation now is that the body cameras will be on for every interaction, the culture of what it was to now has completely shifted

50. The exchange above indicates that it was not against operational standards at the time of the incident to require the body camera to be turned on. In the circumstances of a chase where an officer may not have the time or the wherewithal to turn it on during the course of a pursuit, this was not contrary to operational standards. PC Boden's situation can be distinguished as he was rushing to the Appellant's aid but certainly, PC Boden faced no criticism for failing to have his camera on during the incident. The comments by Acting COP Field-Lament indicated a new policy was, at the time of the hearing, in the process of being developed but at the time of the incident, there existed within the Bermuda Police Service a different culture as to the operation of the body cameras.
51. The MPP found that the Appellant had willfully turned his camera off. The PSC cannot say this finding was unreasonable in the circumstances.
52. The MPP did not accept the Appellant's explanation and described his account as implausible. The MPP, by finding the Appellant had willfully turned his camera off, inferred that the Appellant was being untruthful in giving his side of the story. The MPP did not accept that the Appellant was instructing PC Boden to turn his camera on and the PSC is unable to say that this finding of fact was unreasonable. Giving an inaccurate or implausible account in order to shield himself from criticism and potential misconduct charges was in the PSC's opinion gross misconduct.

Disciplinary Action

53. The PSC has reversed the finding that the Appellant unjustifiably assaulted Mr. Grant but has not interfered with the MPP's finding that the Appellant willfully turned off his body camera and gave an account that was not plausible. In those circumstances, the PSC has gone on to consider whether the disciplinary action of dismissal without notice was unreasonable.
54. In considering whether the disciplinary action handed down by the MPP was unreasonable, the PSC reminds itself that the purpose of the police misconduct regime is to:-
- (i) Maintain public confidence in, and the reputation of, the police service
 - (ii) Uphold high standards in policing and deter misconduct
 - (iii) Protect the public
55. In determining the appropriate sanction, the PSC must assess the seriousness of the conduct while keeping in mind the purpose of imposing sanctions as outlined above in paragraph 54 and then choose the sanction which most appropriately fulfills that purpose.
56. The Bermuda Police Service Guidance Misconduct Guidance Notes provide:- See page 31:-

"In considering the question of outcome the person(s) conducting the meeting/hearing will need to take into account any previous written warnings imposed under the Police (Conduct) Orders that were live at the time of the initial assessment of the conduct in question, any aggravating or mitigating factors and have regard to the police officer's record of service"

57. In assessing the misconduct, the Appellant was clearly culpable in denying he had requested PC Boden to turn his camera off with an explanation that was found by the MPP to be inaccurate. Honesty and integrity are fundamental requirements for a police officer and it is imperative that the public have confidence in the Bermuda Police Service. However, it seems that at the time, there was no operational requirement or policy in place requiring the Appellant to even have his camera on. No criticism was leveled at PC Boden for failing to turn his camera on. There were of course mitigating circumstances in respect of PC Boden as he was involved in a fluid chase, however by the same token, it would seem that had the Appellant not turned his camera on, he wouldn't have suffered any criticism in connection with the body camera.
58. The real aggravating factor in this case was, as described by the MPP, the Appellant's implausible account of what transpired when he stated that he asked PC Boden to turn his camera on and denied that he willfully turned off his own camera off.
59. In terms of the harm caused, there was no physical harm found to be suffered by Mr. Grant at the hands of the Appellant by reference to any unjustifiable assault. There was no evidence of any physical injury attributable to the alleged assault. The only harm that could said to be caused was harm to the reputation of the Bermuda Police Service and the undermining of the public confidence in policing. Giving an untruthful explanation in order to protect himself from criticism does undermine the reputation of the Bermuda Police Service.
60. Against those factors, Order 34 (10) required the MPP to have regard to the record of service of the Appellant as shown by his personnel record. Submissions were made by the Appellant's counsel which appear not to have been taken into consideration by the MPP. It is not clear what weight the MPP gave to the Appellant's previous clean service record of nearly a decade with the Bermuda Police Service. The Appellant's career summary was exhibited at Tab 3 of the Appeal Record and the Appeal Panel notes:-

“PC Pereira had numerous assessments made on his appraisals and each was similar in content that he is well rounded officer who is self-driven and motivated and an asset to the BPS. His Performance Report in April 2017 from Sergeant 849 D. Astwood reflect that “he displays a high level of respect for his colleagues and the public in general. Within his 9 years of Service PC Pereira had established himself well within the organization as an officer with a positive attitude and aspirations to further himself in the service”

61. The MPP commented in its decision and praised the Appellant for his *“skill, courage and tenacity”* in his driving which resulted in the apprehension of Mr. Grant who showed scant regard to the public users of the road and placed members of the public at serious risk of injury or worse. The Appellant, in carrying out his duties, placed himself at great personal risk during the pursuit of Mr. Grant who was, subsequently found to be in possession of a knife at the time, something that the Appellant had a reasonable belief to be the case. As PC McNab testified, this was a real life high stress situation which training scenarios cannot fully prepare an officer for.
62. Having considered all the factors in this case, and in light of finding no evidence to support the MPPs finding that the Appellant unlawfully assaulted Mr. Grant, the PSC finds that dismissing the Appellant without notice was unreasonable. The Career Summary prepared by Sgt. Mello which referred to the Appellant’s last performance report confirms that the Appellant has previously displayed a high level of respect for the public and was previously a well-rounded motivated police officer who had previously carried out his duties in an acceptable manner and was an asset to the Bermuda Police Service. He had no previous warnings on his personnel record.
63. The PSC does, however, consider the Appellant’s conduct was serious. However taking into account his past record of service with the Bermuda Police Service and having found the

penalty of dismissal without notice was unreasonable, it has decided to vary the disciplinary action of dismissal without notice and in its place impose a final written warning. The Appeal is therefore allowed to the extent the PSC varies the disciplinary penalty imposed by the MPP to a final written warning.

Dated the 17th August 2020



Chairman of the Public Service Commission
Gregory Swan