

IN THE MATTER OF AN ARBITRATION

BETWEEN

DURHAM REGIONAL POLICE ASSOCIATION

("the Association" / "the Union")

- AND -

DURHAM REGIONAL POLICE SERVICE

("the Employer" / "the Service")

CONCERNING THE OPERATIONAL REVIEW GRIEVANCE of P.C. GLEN TURPIN ("the Grievor" / "PC Turpin")

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Association:

Joshua Phillips, Counsel
Samantha Scott, Counsel
Doug Cavanaugh, President
Michael Glennie, President
Gary Foxwell, Vice-President
Glen Turpin, Grievor

For the Board:

Glenn P. Christie, Counsel (from the May 4, 2011 hearing)
Matthew Wilson, Counsel (until the June 9, 2010 hearing)
Tracey Lillie, Employee Relations Advisor
Sheila Schwietzer, Director, Legal Services
Inspector Joe Maiorano

Hearings held in OSHAWA on May 7, 2009, March 31, April 19, May 3, 10, 17, June 9, 2010,
May 4, June 8, 2011, February 6, 8, 27, 28, April 13 and 18, 2012.

Award issued on December 4, 2012.

AWARD

Issues

1. Previous awards have been issued in this matter on August 31, 2009, April 6, 2010 and July 30, 2010. The first award addressed a jurisdictional challenge, the second the order of proceedings and an adjournment request, and the third, the admissibility of certain evidence.

2. This award concludes the matter. I quote the Factual Background from the award of August 31, 2009 because it describes the matter.

Factual Background

3. On November 27, 2007, the Chief of Police (“the Chief”) ordered an internal review of the Grievor’s work performance. In exercising his authority to order such an operational review, the Chief referred to s.31(4) and s.41(1) of the *Police Services Act*, RSO 1990, c P.15 (“the Act”)¹, which read:

¹ The references to the Act are to the version of the Act that applied at the time of the operational

Responsibilities of boards

31.

...

Restriction

...

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

Duties of chief of police

41. (1) The duties of a chief of police include,

(a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31(1);

(b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;

(c) ensuring that the police force provides community-oriented police services;

(d) administering the complaints system in accordance with Part V.

4. The operational review was to examine the Grievor's police related activities, the reports filed by him, his notebook entries, and related Crown briefs.

Interviews were conducted and all complaints regarding the Grievor were examined.

5. The Chief explained his reasons for the review as follows (here I take extracts from his Order of November 27, 2007 to the Grievor):

review – the period November 27, 2007 to May 2008. That version was applicable for the period August 20, 2007 to December 31, 2008.

...
AND WHEREAS the Uniform Collective Agreement and the Service's directives recognize the Chief's ability to direct, classify, and transfer members;

...
I am writing to advise that commencing December 3, 2007 the Service will conduct an internal review of your work performance.

In the last twenty months you have been the subject of eight public complaints under the *Police Services Act*. The sheer number of public complaints that have been generated regarding your job performance gives the Service cause for concern.

For instance, the average complaint per uniform officer in 2006 was .19 – that is one of every five officers had a complaint filed against them. In 2006, you had 26 times the number of public complaints compared to your colleagues. You were the subject of five public complaints in that year. You are tending in a similar manner for 2007, having been subject to three complaints to date. As of September you had 23 times the number of public complaints compared to your colleagues.

The number of public complaints that have been directed at you on the job conduct is noteworthy as no other officer has been the subject of such a high volume of public complaints in recent years. The Service readily acknowledges that with the exception of one public complaint which is still pending, these complaints have been resolved in your favour either by a withdrawal by the Complainant or as having been unsubstantiated. That said, the Service notes that resolution through a withdrawal or a finding the complaint is unsubstantiated does not mean from a performance management perspective that the conduct is entirely appropriate. The Service must investigate you on the job performance to determine if remedial action is necessary given the anomalous statistics concerning the number of conduct complaints you are attracting.

As a responsible employer and recognizing the Service's duty to our community members, the Service must be diligent to ensure that the conduct of its officers and its policies and procedures are at all times appropriate. In this instance, given the statistically anomalous number of conduct complaints directed at your job performance the Service would be remiss not to investigate the circumstances surrounding these complaints to ensure that your training, the Service's policies and the handling of these complaints has been appropriate.

To that end, effective 12:00hrs December 3rd, 2007 you will be assigned to the Central Alternative Response Unit – ‘D’ Platoon – for the duration of this internal performance review. Please note your assignment to the Central Alternative Response Unit is for administrative reasons as the Service must take steps to insulate itself, its officers, and members of the community from undue risks. It is noted that seven of the eight conduct complaints relate to unnecessary use of force. This quantity of excessive use of force complaints is objectively disconcerting. In 2006, one third of all excessive use of force complaints received by the Service was directed at your conduct. Moreover, given your expertise as a use of force instructor and your knowledge of the fundamental tenet of de-escalation it is difficult to reconcile why an individual with your training and experience is attracting such a volume of conduct complaints. It is the Service’s aim to use the internal performance review to verify that your training, call response decisions, and the Service’s policies are appropriate.

...

6. The review was completed in April 2008 and submitted to the Chief in May 2008. The grievance was filed in June 2008.

7. The review’s Executive Summary contains the following findings:

- The concept of progressive discipline (increasing penalties) related to police misconduct committed by Police Constable Glen Turpin has not been a consideration for recent penalty assessment. Further to this point, police complaint investigations appear to be mutually exclusive investigations and do not take into consideration previous similar acts.
- Police Constable Glen Turpin is responsible for 10% (4/40) of all DPR related Special Investigations Unit (SIU) investigations.
- Police Constable Glen Turpin demonstrates that he has the knowledge and skill to complete excellent police work, but fails to perform at an acceptable level on a regular basis; as highlighted through his notebooks, reports and criminal investigations. This is reinforced through his failure to follow proper protocol when dealing

with accused; either through arrest procedures or the proper documentation / submission of General Occurrence reports.

8. On May 1, 2008 Superintendent J. Douglass of Policing Operations wrote to the Grievor, as follows, advising him of the operational review report and providing him with a copy:

...

The Service has strived to help you succeed through various performance improvement plans however the results have been temporary at best. Your future success with this organization now solely depends on you and your future conduct and work performance. Until such time as we develop a workable solution you will continue to be assigned to the CARU [Central Alternative Response Unit].

... We would ask that you carefully review [the report] as it is our intent to follow through after this review to determine what remedial action will resolve all of these issues in a satisfactory manner.

During this review conduct was identified that was beyond the scope of this operational review. As a result some items of concern have been provided to the Professional Standards Branch for their further review.

9. The grievance concerns the Chief's decision to initiate the operational review, the manner in which the review was conducted, and its findings. The grievance claims that:

The Association hereby grieves that the Order of the Chief of Police dated November 27, 2007, the transfer of the grievor to the Central Alternate Response Unit, the fact of and the manner in which the "operational review" was conducted, and the findings of the "operational review", dated April 2008 and May 1, 2008, breach Article 5.01 of the Uniform Collective Agreement, in that they:

1. Violate section 68(9) of the *Police Service Act*, R.S.O. 1990, c. P. 1, as amended (“the *Act*”);
2. Were not produced or conducted in accordance with a policy for the assessment of police officers’ work performance established pursuant to section 13 of O. Reg. 123/98;
3. Are otherwise inconsistent with section 56, 57, 58, 59, 64, 68, 69 and 72 of the *Act*, section 13 of O. Reg. 123/98, section 13 of O. Reg. 926 and section 11 of O. Reg. 673/98;
4. Constitute a discriminatory, arbitrary or capricious exercise of the Board’s management functions;
5. Constitute an unreasonable exercise of the Board’s management functions;
6. Violate natural justice by virtue of bias and the Board’s failure to meet its duty of fairness to the grievor;
7. Attribute fault to the grievor for problems with the Board’s own policies and procedures, or for circumstances that are beyond his control; and
8. Constitute an improper use of power over, and harassment of, the grievor.

10. The relief sought by the Association is a declaration of the above; a declaration that the findings of the operational review are void; and orders that the operational review findings be expunged from the Grievor’s employment record, that the Grievor be returned to the position he was in prior to his transfer to the Central Alternative Response Unit, that the Board apologize to the Grievor and the Association for alleged improper use of its power over, and for the alleged harassment of, the Grievor, that the Board establish a policy for the assessment of police officers’ work performance, as required by section 13 of O. Reg. 123/98, that the management employees of the Board attend training courses on the lawful

conduct of performance reviews, and that the Board pay the Grievor \$25,000.00 in general damages.

11. The Grievor was employed by the Service in September 1988.

Context and legislation

12. In the award of August 31, 2009, at ¶¶51-52, I found the following:

51. ... this case is not about the substance of the Grievor's conduct or performance. It about whether the Police Chief acted in accordance with the management's rights Article of the collective agreement when he initiated the operational review in the manner he did. It is also about how the review was conducted and its result. These are issues that fall under Article 5.01 of the collective agreement. Section 126² of the Act is not engaged by them.

52. For these reasons the Association is entitled, through the grievance, to contend that the Board, as represented by the Chief, failed to exercise the functions set out in Article 5.01(a) "in a manner consistent with the provisions of [the collective agreement] or [the Act]" (Article 5.01(c)), among its other contentions.

13. Article 5.01 of the collective agreement reads:

² **Restriction**

126. Agreements and awards made under this Part [PART VIII LABOUR RELATIONS] do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3), Part V (except as provided in subsection 64 (17)) and Part VII of this Act and by the regulations.

ARTICLE 5 – MANAGEMENT RIGHTS

- 5.01 (a) The Association and its Members recognize and acknowledge that, subject to the provisions of the *Police Services Act*, it is the exclusive function of the Board to:
- (i) maintain order, discipline and efficiency;
 - (ii) discharge, direct, classify, transfer, promote, demote or suspend, or otherwise discipline any Member;
 - (iii) hire.
- (b) If a Member claims that the Board has exercised any of the functions outlined in paragraph (a)(ii) in a discriminatory, arbitrary or capricious manner then such a claim may be the subject of a grievance under the provisions of the grievance procedure outlined in this Agreement or dealt with under procedures within the exclusive jurisdiction of the Ontario Civilian Commission on Police Services, as prescribed by the *Police Services Act*.
- (c) The Board will not exercise any of the functions set out in this Article in a manner inconsistent with the provisions of the Agreement or the *Police Services Act*.

14. At the time the Chief established the operational review, Ontario Regulation 123/98, under the Act, governed aspects of the relationship between the Board, the Chief and individual officers like the Grievor. (The Regulation was effective at the relevant time until July 4, 2010, revoked on July 5, 2010 under O. Reg. 268/10, ss. 31, 32). Part IV of Regulation 123/98 read:

PART IV UNSATISFACTORY WORK PERFORMANCE

12. This Part applies to municipal police forces and the Ontario Provincial Police. O. Reg. 123/98, s. 12.

13. (1) Every chief of police shall establish policies for the assessment of police officers' work performance. O. Reg. 123/98, s. 13 (1).

(2) The chief of police shall make the policies available to the police officers. O. Reg. 123/98, s. 13 (2).

(3) Before the chief of police may make a complaint against a police officer of unsatisfactory work performance,

(a) the police officer's work performance shall have been assessed in accordance with the established procedures;

(b) the chief of police shall advise the police officer of how he or she may improve his or her work performance;

(c) the chief of police shall accommodate the police officer's needs in accordance with the *Human Rights Code*, if the police officer has a handicap that requires accommodation because of handicap, within the meaning of the *Human Rights Code*;

(d) the chief of police shall recommend that the police officer seek remedial assistance, such as counselling or training or participation in a program or activity, if the chief of police is of the opinion that it would improve the police officer's work performance; and

(e) the chief of police shall give the police officer a reasonable opportunity to improve his or her work performance. O. Reg. 123/98, s. 13 (3).

15. Pursuant to this regulation, the Chief established a Performance Management process. The one in place at the time of the operational review (Exhibit 8) contemplated the employee being provided with all relevant information and documentation and being able to provide input and feedback to management. The assessment was to be mutually developed between the officer and the manager to support the officer's continuous improvement. The focus was forward looking, to review goals and results in order to develop a plan for future progress.

16. Among the documents produced by the Service is the Chief's Performance Management Process directive (Exhibit 7). Although the document was revised on June 9, 2009 (after the events relevant to the operational review) there was an earlier version that applied to the Special Reviews of PC Turpin's performance in 1999, described below. It followed closely the procedure described in paragraph 4 – Special Review Process – of the Performance Management Process directive.

The relevant portions of paragraph 5 read:

5. SPECIAL REVIEW PROCESS

- a. Special review shall apply to any member who has been identified for accelerated performance management as a result of unsatisfactory work performance.
- b. The Special Review Process consists of two parts:
 - 1. Part 1 – Notification and Assessment.
 - 2. Part 2 – Improvement Plan.
- c. Where a supervisor identifies a member's work performance as less than satisfactory and the work performance cannot be corrected through discussion, guidance or training, the supervisor shall record the deficiency on a "*Request for Special Review From Supervisor to Unit Leader*", form DRP 71, and forward it to the unit leader. This shall commence the Special Review Process.
- d. Special review is a two-part process:
 - 1. The first part involves an interview between the member, their supervisor and unit leader. The purpose is to assess the member and to ensure that issue(s) outside of the member's control are not the root cause of the work performance deficiency. If this is the case, a review of the issue(s) shall be undertaken by the unit leader to determine the cause and make improvements where required.
 - 2. The second part of the special review process shall be initiated where it

is identified that the work performance deficiency is a persistent situation attributable to the individual member. A meeting between the unit leader, assigned supervisor and the member shall be held to:

- Develop a plan for corrective action.
- Create a time frame for improvement.
- Detail the specific standard(s) to be met.
- Explain the possible consequences if the standard(s) are not met.

e. The anticipated time frame for a special review is 90 calendar days. During the special review period, the supervisor and the subject member shall discuss and document the progress to date.

f. Additional review periods may be added where the member has demonstrated an effort to comply, but has not sufficiently met the threshold level; or, the supervisor was unable to fully observe the performance of the member as a result of injury or illness. The additional review periods shall be in increments of 30 calendar days, to a maximum of 90 calendar days.

g. At the conclusion of the special review the outcome(s) shall determine the next course of action:

1. If the member meets the standard:
 - The special review is concluded and documentation is place in the member's personnel and divisional files until one year has passed without further incident.
2. If the member fails to meet the standard:
 - For civilian members ...
 - For sworn members – the complaints process may be initiated in accordance with Directive AO-09-002 "Complaints Process – Police Services Act" and the *Ontario Police Services Act*, as applicable.

17. These portions of s. 13 of O. Reg. 123/98 and of the Chief's process for special performance review are mentioned because the Association argues that they ought to have been used rather than the operational review.

18. Prior to the introduction of the Chief's Performance Management Process directive, the Service had a Performance & Development Review (PDR) procedure that applied to performance issues (Exhibit 9). This procedure began on October 31, 2007. It was designed for the annual performance review conducted by a supervisor for the officers under their authority. It does not appear to have had provision for the special review process, as contained in the Performance Management Process, starting from July 9, 2009. Prior to the PDR procedure, there was a previous performance management template (Exhibit 10 – the version effective from January 2002).

19. The Act prescribes the procedure for addressing public complaints. The Act gives the officer certain procedural safeguards once a complaint is made. As mentioned, the references to the Act herein are to the Act as it applied in November 2007.

20. Under s.56(7) the officer must immediately be given notice of the substance of the complaint. The officer must be immediately told if the complaint is withdrawn (s.56(4)). The Chief must immediately notify the officer if he decides not to deal with the complaint (s.59(6)). A set procedure applies, under s.64, for dealing with complaints against officers. If the Chief decides to deal with

the complaint and it is not withdrawn, an investigation is required (s.64(1)).

Under s.64(6), if, “at the conclusion of the investigation and on review of the written report submitted”, the Chief decides the complaint is unsubstantiated, the Chief “shall take no action in response to the complaint” and shall notify the officer of this decision.

21. Under s.64(1.1) the Chief may himself initiate a complaint, which is then subject to the same process as a public complaint.

22. If the complaint were substantiated, so there is evidence of officer misconduct or unsatisfactory work performance, the Chief is given various mechanisms under the Act to resolve the matter. Informal resolution is available if the conduct is not serious (s.64(11)). If informal resolution fails, a hearing is held under s.64(15). The officer is then given reasonable information concerning the matter and the opportunity to reply, orally or in writing. The Chief may impose a lesser penalties described in s.68(1)(e) and s.68(5) – up to 3-days or 24-hours loss of pay, a reprimand, a direction to undergo specified counselling, treatment or training or activity. An entry made in the officer’s employment record of such lesser penalties is expunged after 2 years with no further entries of misconduct or unsatisfactory work performance (s.64(16)).

23. If a hearing is held into an officer's misconduct or unsatisfactory work performance the officer is afforded significant natural justice and procedural protections to ensure a fair hearing (s.69 and the *Statutory Powers Procedure Act*, RSO 1990, c S.22). The officer has a right of appeal to the Ontario Civilian Police Commission (s.70).

24. Under s.68(9) (as it was at the time of the operational review), if a complaint does not establish misconduct or unsatisfactory work performance, then no record of the complaint may be used for any purpose against the officer:

Police officer's employment record

(9) The chief of police or board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

- (a) the complaint is proved on clear and convincing evidence; or
- (b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of. 1997, c. 8, s. 35.

25. The Board has an oversight role regarding the Chief's handling of complaints. Under s. 31(1)(j), the Board has a duty to review the Chief's complaint system and to receive regular reports from the Chief on his

administration of the complaints system.

26. The Chief is required to investigate any incident the SIU has been notified of (s.11 of O. Reg. 673/98 – Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit). The purpose of the investigation “is to review polices of or services provided by the police force and the conduct of its police officers” (s. 11(2)).

The evidence

27. Three witnesses gave evidence: Inspector Joe Maiorano, Superintendent Jim Douglass and the Grievor. Inspector Maiorano was the principal witness. At the time of the operational review he was a staff sergeant; by the time of testifying he had been promoted to inspector. He is referred to herein as both staff sergeant and as inspector. He was the person who prepared the operational review report for the joint management team appointed by the Chief to oversee the review. Superintendent Jim Douglass was the chair of the joint management team.

28. The Service called no rebutting evidence. The Association³ asks that I

³ citing *Canada Post Corp. and C.U.P.W. (Seymour), Re* (1992), 25 L.A.C. (4th) 137 (Shime), at

draw an adverse inference from the Employer's failure to call evidence answering the allegations made by PC Turpin in his testimony.

29. As a consequence of the Employer's decision to call no witnesses, I have only the Chief's letter advising PC Turpin of the then impending operational review as the explanation for the Chief's motivation. Employer counsel argues this is enough. The letter fully explains why the Chief initiated the review. I have, though, no explanation why the Chief chose to use the mechanism of an operational review rather than the performance assessment and review procedures in Part IV of O. Reg. 123/98 and in the Chief's Performance Management procedure that applied to the Service.

30. I divide the evidence into the following categories: (i) what information was available to the Chief about PC Turpin at the time the Chief ordered the operational review; (ii) how was the operational review initiated; (iii) how was the operational review done; (iv) what is contained in Sergeant Kritzer's February 2008 report⁴; (v) what information was gathered by Inspector Maiorano (then

142; *Windsor Regional Hospital v. C.U.P.E., Loc. 1132 (Johnston Grievance)*, [2001] O.L.A.A. No. 335 (Verity).

⁴ Sergeant Kritzer was first assigned to prepare the draft of the operational review report. After his report was provided, the joint management team decided that Staff Sergeant Maiorano should re-do the draft report.

Staff Sergeant Maiorano) for the operational review; (vi) what is contained in Inspector Maiorano's report; (vii) what recommendations were made regarding PC Turpin in the operational review, (viii) what happened to PC Turpin as a result of the operational review, and (ix) PC Turpin's explanation for the operational review.

(i) what information was available to the Chief about PC Turpin at the time the Chief ordered the operational review

31. The Chief had a record of public complaints against the Grievor, reports of his performance reviews, and the Grievor's resume.

Public complaints

32. The schedules of investigations of public complaints for the period 2005 to 2007 shows the following. In 2005 PC Turpin had two complaints against him, one for excessive force, which was unsubstantiated, and the other for neglect of duty, which was withdrawn. This was not excessive relative to other officers. In 2006, PC Turpin had the most public complaints against him of any other officer, five in total, four of which were withdrawn, the fifth was unsubstantiated. Three

of the five complaints were for excessive use of force. One other officer had four complaints, while the others had either one or two. In 2007, PC Turpin had three complaints against him: two for excessive use of force. Two of the complaints were unsubstantiated; the third (for excessive force) proceeded. Three other officers had four complaints against them, one other had three, and the rest listed had one or two complaints against them.

33. Assessing the number of complaints in the relevant period (2005 to 2007) against other officers, although PC Turpin had the most complaints against him (an average of about 4 per year), there were others who had many complaints against them, though with a lower overall average.

34. PC Turpin explains his higher than average number of public complaints. He says he was assigned to work the late shift (4pm to 4am) in the Whitby bar district where officers must often deal with complaints of brawls and vandalism. PC Turpin says he was required to subdue unruly impaired individuals, who were making a public disturbance. Half of the complaints against him for excessive use of force arose in this context.

35. There were two other public complaints against PC Turpin in the months

between Inspector Maiorano's three-month performance review between February and April 2007 and the Chief's decision to require the operational review. The public complaints were received on June 4 and June 17, 2007.

Performance appraisals

36. From the reports of PC Turpin's performance reviews, the Chief would have known of the following. PC Turpin was commended for his work in the bar district. He was put forward by Inspector McMullen to lead proactive initiatives in the bar district, by approaching the bar proprietors to de-escalate conflict situations and by increasing officer foot patrols. The initiatives resulted in notably fewer disturbances. PC Turpin's 2006 performance appraisal includes the following:

Glen has also been instrumental in dealing with growing disturbances and criminal offences occurring in the downtown during bar nights. His initiative in getting to know the proprietors and negotiating "best practices" has resulted in a noticeable decrease in calls for service. Glen has been recognized for his hard work in this area and was recently appointed Project Leader for a month-long project in the downtown. Glen was responsible for coordinating deployment of volunteer overtime officers and developing a plan that best utilized resources.

37. In the period leading to the operational review, overall the assessments of PC Turpin's performance were favourable. The assessment of January 24, 2006

included some particularly complimentary comments:

Glen is a senior member of his platoon with over 17 years with the DRPS. Earlier this year, Glen was the primary officer involved in a fatal police shooting whereby the life of a female party was saved by his quick actions. While it would be difficult to appreciate the emotional impact that such an incident might have on an individual, let alone an officer, Glen demonstrated remarkable optimism and confidence throughout the SIU investigation that ensued. This entire experience, while personal in nature, served as an experience to the fellow officers on the platoon who might have also been affected in some way. Glen conducted himself both positively and patiently throughout this incident and he is to be commended for his professionalism.

Glen is one of the most highly trained officers on the platoon and is very knowledgeable of various tactical and scene containment strategies. Glen is a volunteer member of the Ontario Volunteer Emergency Response Team (“OVERT”) which assist crime scene investigations across the province. His expertise in this area is through the provision of training of his own K-9 units.

...

Glen continues to improve himself by keeping abreast of changes in police training and incident response tactics. He best exemplifies confidence in this area and is a model to the younger officers on the platoon with respect to conflict negotiations.

Glen is a very self-motivated individual and models good police investigative skills and tactics. Glen is a valuable asset to the platoon and continues to demonstrate personal growth and initiative in the context of community based policing.

Excellent job Glen!

38. These glowing comments by PC Turpin’s supervisor were qualified by an Inspector who reviewed them. He pointed out that PC Turpin had over excelled at responding to urgent calls, at times contrary to directions he had received from his supervisor. His unwillingness at times to follow direction, his headstrongness,

resulted in him being mentored by two sergeants. Some improvement was seen by the Inspector. PC Turpin was criticized too for failing to consistently report his observations and findings to enable the appropriate units to act on the intelligence.

39. A special performance review of PC Turpin by then Staff Sergeant Maiorano commenced on February 13, 2007. This special review was presumably at the instance of the Chief. The reason for the review was that there had been 5 separate police complaints against PC Turpin in the preceding 2 years (4 were withdrawn, one was unsubstantiated). The review was to last for 3 months, with monthly reports of PC Turpin's performance from two sergeants.

40. The first month, February to March 2007, resulted in the following note:

PC Turpin is a positive influence on the platoon; he leads by example and cares passionately for the safety of our members. He has aggressively embraced the White Oaks initiative. Critiques and Case Management Memos are addressed in a timely manner.

41. The second month, March to April 2007, report was positive, with PC Turpin being commended for his "professionalism and devotion". The final month's report, April to May 2007, included the following:

As a result of PC Turpin's strong work ethic and knowledge of criminal and

provincial offences, along with familiarity of “persons of interest”, he was selected to participate in two Divisional Initiates. Glen was a strong asset in both endeavours and gave up a weekend to assist with the LLA initiative. Glen continues to stand out as a strong informal leader.

Résumé

42. The Chief would have had the Grievor’s résumé. He had unsuccessfully applied for a position in the Service’s canine unit. The Chief would have known from the CV that, in addition to his experience as a police constable, he was a tactical officer on the Tactical Support Unit of the Nuclear Site Response Team. He had been a use of force instructor. He was also the team coordinator of the Durham Region for the Ontario Volunteer Emergency Response Team (OVERT) and a member of OVERT’s International Disaster Response Team. He was part of the international response after earthquakes in Peru in 2007 and Indonesia in 2010, the cyclone in Burma in 2009, the hurricane in Haiti in 2008, and the cholera outbreak there in 2011. Within OVERT he had held the position of Unit Chief – Canine Unit, being a dog handler for both general purpose and cadaver search dogs.

(ii) how was the operational review initiated?

43. From the evidence of Superintendent Jim Douglass, a superintendent with the Service, and the head of 5 police divisions at the time of the operational review, it appears that Deputy Chief Mercier, Superintendent Mike Ennis, who headed the division within which PC Turpin worked, and Superintendent Lockwood, in charge of the professional standards unit, initiated the idea of the operational review.

44. Deputy Chief Mercier referred to the success the Service had had from doing operational reviews of police pursuits. The operational reviews done after each pursuit helped to reduce the risks and liabilities of such pursuits. He thought an operational review of the high number of police complaints against PC Turpin might help to reduce them.

(iii) how was the operational review done

45. The task of conducting the operational review was given to a joint management team. It consisted of Deputy Chair Mercier, Superintendent Douglass, Inspector Dan McMullan, Detective Sergeant Darren Nesbitt, and Staff Sergeant Maiorano. Although Deputy Chief Mercier was the senior ranking officer, he attended only the first joint management team meeting on December

17, 2007. Superintendent Douglass chaired the team. He was in overall daily charge of the operational review, and was ultimately responsible for the report. The joint management team was to meet two or three times a month until the report was complete. Superintendent Douglass kept Deputy Chief Mercier informed of progress in the review at weekly meetings between them to discuss the review, among other topics.

46. The joint management team met first on December 17, 2007. Inspector Maiorano was assigned to prepare a work plan scoping document. He did so between then and the next meeting on January 8, 2008, used to decide its *modus operandi*. The joint management team saw its objectives as being, “if sub-standard performance or conduct is identified related to the police duties of PC Turpin, develop and implement a performance improvement plan”, and “ensure [the Service]’s relevant policies are suitable and the managing of police complaints into the conduct of PC Turpin has been appropriate”.

47. No procedural safeguards were built into the operational review. No provision was made for input by PC Turpin.

48. There were two separate parts to the operational review. The operational

review joint management team first gave the task to Sergeant Keith Kritzer to review the relevant documents and prepare the draft report. Sergeant Kritzer completed his report in February 2008. The second part followed. The joint management team decided that Sergeant Kritzer's report did not meet the team's requirements. The team was not satisfied that Sergeant Kritzer's comments and conclusions could be validated independently. In particular, contrary to the joint management team's instructions, the questions Sergeant Kritzer put to the Grievor's previous supervisors were not documented, the responses were not documented verbatim, and much of the conversations were paraphrased.

49. Staff Sergeant Maiorano was then assigned to prepare the draft report. His report is the second report of the operational review.

50. The scoping document (Exhibit 4B, B and Exhibit 11), prepared by Inspector Maiorano for the joint management team and approved by the team on January 8, 2008, identified the anticipated scope of the operational review, as follows:

The operational review into the police duties of Constable Glen Turpin #722 will entail a fully documented performance analysis and assessment into all activities completed, including but not limited to:

- Officer profile and employment history towards the development of a

timeline and the identification of pattern performance, training and behaviour issues.

- Review of officer's Divisional and Human Resources files.
- Review of all police generated police reports (incident, arrest, accident, supplementary, property and all other reports on record).
- Review of all police issued memo books.
- Review of all Crown Briefs and associated Crown memos.
- Review of officer workload and call response, including unit histories, calls for service and outcomes.
- Interviews with Durham Regional Police officers.
- Review of all internal disciplinary incidents and findings.
- Review of all police complaints investigations.
- Consultation with subject matter experts on matters relating to use of force.

The operational review into the performance of Constable Glen Turpin #722 will not involve the reinvestigation of completed police complaint investigations or the interviewing of previous police complaint complainants. The operational review will lend itself to identifying police complaint complainant behaviour profiles at the time the noted incidents occurred and the identification, if any, of pattern behaviour responses, operational concerns and training issues related to the duties of PC Glen Turpin #722.

51. Ultimately certain of the objectives set in the scoping document were not carried out in the operational review, they being: “review of officer workload and call response, including unit histories, calls for service and outcomes”; “interviews with Durham Regional Police officers”; and “consultation with subject matter experts on matters relating to use of force”.

52. Staff Sergeant Maiorano's sources of information for his investigation and his report were principally the electronic records management system in the

Service and PC Turpin's personnel and divisional files within 18 Division. He also had regards to records in the professional standards branch regarding the Grievor. Staff Sergeant Maiorano reviewed two incidents on video of PC Turpin forcibly subduing individuals in custody. These were shown at the hearing, under the objection of the Association. These two videos were to form the basis of criminal charges brought against PC Turpin by the Service at the conclusion of the operational review.

(iv) what is contained in Sergeant Kritzer's February 2008 report

53. Sergeant Kritzer's report identifies the incidents for which PC Turpin received some disciplinary penalty in the period January 1997 to June 2007. There were several incidents of discipline. PC Turpin received time penalties for his early disciplinary infractions (the first 24 hours, the second 36 hours, the third 84 hours – all in 1997). After 1997, he received only one unpaid time penalty of 12 hours, in January 2005, but otherwise received only verbal reprimands, or no discipline. Sergeant Kritzer's conclusions on the discipline were the following:

... it is apparent that the DRPS has given mixed signals regarding the behaviour of PC Turpin. Ten years ago, he was behaving improperly and was initially being penalized with increasing time increments. In hindsight, it had little effect on him in an effort to persuade him to conform. His fourth infraction penalty was back down to a minimal amount (compared to his previous penalties). ...

54. Sergeant Kritzer reviewed PC Turpin's professional standards files.

Among his conclusions (at p.9)(Exhibit 16) are the following:

Four incidents of assault allegations ... proven or unproven involve punches to the head. Three of them are to the eyes. ... This appears to be pattern behaviour.

Three complaints ... appear to demonstrate a total disregard for the rights of individuals and / or their property. These actions should not be committed by an 18-year veteran which is deemed to know the law and at times is an acting supervisor.

Four of the complaints ... were withdrawn. The forms do not indicate why they were withdrawn or if PC Turpin was counselled. ...

55. Sergeant Kritzer recommended a change to the Professional Standards Branch procedure. This recommendation was later adopted by Inspector Maiorano as an organizational objective arising from the operational review. Sergeant Kritzer said:

This [the withdrawal of complaints against PC Turpin] identifies a flaw in how the Professional Standards Branch (PSB) "disposes" of some of its complaints. After reviewing the complaints, it is suggested that the PSB forms have a synopsis to go with every withdrawal, or a documented debriefing of each case to demonstrate why a complaint was suddenly and inexplicably withdrawn. It should include comments from the complainant as well to corroborate the agreed conclusion to the file. This is suggested because many of the withdrawn complaints have a common thread to them, such as strikes to the face. There is a section where the complainant wants to withdraw the complaint, yet there is no reason stated. Generally, the space has a generic comment, such as: "Complainant wishes to withdraw complaint". It would appear more transparent

if reasons were stated for why, all of a sudden, the complaint is withdrawn. ...

There is also nothing on the PSB forms to state whether there is any counselling done by the PSB members. The complaint may be withdrawn, however, with many of them, it is evident that the officer may have erred, and should be addressed on the issue. This, again is a risk management issue.

56. Sergeant Kritzer analyzed the notes of calls makes by PC Turpin. Sergeant Kritzer's conclusions included the following:

After reviewing the incidents at bars, where arrests are made, the reports are extremely similar: police attend, the inebriated persons are identified and either arrested or told to leave. The warned ones don't leave and are then arrested for causing a disturbance by the officer. They resist and then he takes them to the ground, generally causing some injury, either by the grounding or, in one instance, punches to the face.

57. Sergeant Kritzer records that PC Turpin had 12 recommendations in his Human Resources file over his career.

58. Reviewing PC Turpin's notebooks, Sergeant Kritzer found deficiencies. PC Turpin did not properly store his notebooks, nor number them. The notebooks had too many spaces. It appeared that PC Turpin's supervisors had not adequately checked his notebooks or PC Turpin had not followed their directions.

59. Sergeant Kritzer analyzed PC Turpin's use of Versadex, the police case

management system. Those in case management informed Sergeant Kritzer that PC Turpin's work on Versadex was good and his statistics over a two-year period were very good, although it was not possible to compare officer averages because comparative statistics were not available.

60. Sergeant Kritzer interviewed PC Turpin's supervisors and his fellow officers. The consensus was that PC Turpin gravitated towards the serious, potentially confrontational calls. "He is the officer who everyone wants at a fight call". PC Turpin put little effort into routine calls and was unwilling to follow direction. Sergeant Kritzer's own assessment was that PC Turpin performed well when micromanaged, but exposed the Service to unnecessary risk when left to his own devices. When under review he would meet the required standards, but once the performance review was complete he would revert to the inconsistent performance that characterized his police career. Sergeant Kritzer described PC Turpin as manifesting chronic disobedient behaviour.

61. After reviewing Sergeant Kritzer's report, the joint management team concluded it did not meet what the joint management team wanted. The team found various deficiencies in Sergeant Kritzer's approach to the review that the team thought made his report unreliable. For example, Sergeant Kritzer was to

have scripted the same set of questions to put to PC Turpin's supervisors, yet he did not do so. His interviews with the supervisors were therefore regarded as unreliable because, in the absence of scripted questions and in the absence of his keeping a detailed record of what he asked, it was thought that a variety of incomparable responses were elicited from his questioning, responses that could not be verified. In general, the joint management team thought Sergeant Kritzer's report lacked sufficient supporting documentation, with little cross-referencing, and without the standards of comparison that underpinned his conclusions being explained. The report could not be independently verified or validated. It was therefore regarded as unreliable.

62. In addition, Staff Sergeant Maiorano and the joint management team concluded, from the Chief's original mandate, that the operational review did not involve "the reinvestigation of completed police complaints investigations or the interviewing of previously police complaint complainants" (Exhibit 4A, p.5).

63. Staff Sergeant Maiorano was then assigned to prepare the report. He started afresh, having minimal regard to what Sergeant Kritzer had done. Sergeant Kritzer's report was shelved and not later submitted to the Chief. Sergeant Kritzer ceased being a member of the joint management team.

64. Staff Sergeant Maiorano took only one item from Sergeant Kritzer's report. He adopted Sergeant Kritzer's organizational recommendation that "the Professional Standards Unit complete a case synopsis to accompany the withdrawal of each public complaint to allow a comprehensive review of individual officer conduct".

(v) what information was gathered by Inspector Maiorano for the operational review

65. Staff Sergeant Maiorano's approach to the task was different from what Sergeant Kritzer had done. Sergeant Kritzer had interviewed some of PC Turpin's supervisors. Staff Sergeant Maiorano decided not to interview the supervisors again. His explanation is that Sergeant Kritzer's approach was inconsistent and he had failed to properly document his interviews with the Grievor's supervisors. That tainted any information that Staff Sergeant Maiorano might gather from them.

66. Although no time period of review was specified by the Chief, when Staff Sergeant Maiorano took over the preparation of the report, the joint management

team advised that he go back two years in detail regarding PC Turpin's performance and behaviour.

67. Notwithstanding this advice, Staff Sergeant Maiorano decided to go back, in recording PC Turpin's disciplinary notations, to 1990, with a full record of every disciplinary notation since the Grievor's employment in September 1988 (Exhibit 4B, pp.6-10). The Chief's area of concern was principally the excessive use of force. I note the following entries of that sort, and I include those entries that show PC Turpin exercising police authority apparently unlawfully or excessively. The list is as follows:

- May 26, 1998, conviction, unlawful use of authority – entered residence without legal authority and used force on resident without proper justification. Penalty: 84 hours.
- December 2003, Assigned as A/Sgt NSD "B" – attended TSU callout in Port Perry without authorization. Outcome: resolved by way of performance management
- February 18, 2006, Police Complaint – Theft (ripped chain from neck) and punched complainant in face. ... No incident report filed by PC Turpin. ... Outcome: Withdrawn
- May 20, 2006, Police Complaint – The complainant states that he was involved in a domestic dispute. The complainant left the scene of the dispute and was located by officers a short distance away. The complainant alleges that the officers physically assaulted him, punching him in the face, and then released

him with no charges. .. Outcome: Withdrawn.

- June 2006, SIU not contacted – Not deemed threshold event. PC Turpin investigating MVC where driver attempting to walk from scene. Driver ignored PC Turpin’s direction to stop. PC Turpin was catching up to driver with his cruiser when the male started to run. Male changed direction suddenly and bounced off front of cruiser and bounced his head on the ground. Male admitted to hospital for observation. ... Outcome: Not deemed threshold event for SIU involvement. No PSU investigation.
- June 11, 2006, Police Complaint – Struck complainant in face. .. NOTE – PC Turpin’s notes indicated that he directed 2 separate knee “blows” (strikes) to the accused’s head during altercation. ... Outcome: Unsubstantiated.
- August 29, 2006, Police Complaint – PC Turpin in Tim Horton’s. Confronted 2 males with expandable batons on belt in store. Complainant removed from store and batons seized. ... Outcome: Withdrawn.
- November 2006, SIU Investigation – 06-OCI-209. PC Turpin responded to disturbance call. 1 of 3 accused suffered a fractured jaw. ... Outcome: SIU concluded cannot accept unconfirmed evidence of the complainant. No RPG that subject officer committed a criminal offence.
- November 3, 2006, Police Complaint – PC Turpin kicked in door and entered residence without legal authority in an effort to complete a compliance check. ... Outcome: Withdrawn – DRPS replaced door.
- June 4, 2007, Police Complaint – Assault of accused in 18 Division cell ... Outcome: Under investigation.
- June 13, 2007, Police Complaint – Assault of accused in cells – 17 Division ... Outcome: Unsubstantiated.

68. The February 18, 2006 notation is incorrect. PC Turpin was not the

officer involved. He was merely present, among other officers, when this occurred.

69. The Police Complaints referred to by the Chief in the original document appointing the operational review are those listed, above.

70. There is reference also to the incident, referred to below, in May 2005 when PC Turpin attended a domestic related call. The report reads:

- SIU Investigation – 05-OFD-068 – Domestic related call. Male holding female hostage. Male fatally shot. Police Complaint File – N/A. Outcome: SIU concluded lethal force necessary.

71. The report records that in 1999 PC Turpin was subject to a special review under the Special Review Program because of concerns regarding his performance. The purpose of the program was to afford PC Turpin “reasonable time to correct the deficiencies and, with help, to meet acceptable standards of performance”.

72. The report contains reference to all SIU investigations involving PC Turpin. He was exonerated in each of the completed investigation, though the

references to the SIU investigations appear under the Grievor's discipline record. The report notes that PC Turpin "is responsible for 10% (4/40) of all DRP related Special Investigations Unit (SIU) investigations." One investigation was not complete at the time of the report. The SIU's 11 reviews were not available to Staff Sergeant Maiorano. He asked to see the Chief's investigation reports of the incidents giving cause for the SIU investigations, but he was denied access. As a result the joint management team was deprived from being able to use those reviews and reports as part of the Grievor's overall performance assessment. As Staff Sergeant Maiorano said in the report, that was a significant omission, given that the focus of the report was to understand the high ratio of public complaints against PC Turpin.

73. The list of performance issues in 1999 included the following:

- Decisions and actions concerning the use and level of force are appropriate and not excessive.
- Behaviour during high-risk incidents is not impulsive or dangerous to other police officers and citizens.
- "Service" aspects of the job are not overlooked in favour of responding to "hot" calls.
- Modifications to the appearance of the police uniform are not made; particularly those that present an unauthorized and inappropriate paramilitary image.

74. At the end of the special performance review, from February to May 1999, the conclusion of Staff Sergeant Cameron, who conducted the review, was the following:

On May 10, 1999, PC Turpin completed the Special Review Period. He failed to meet acceptable standards of performance in six of the ten categories. ...

PC Turpin's performance problems do not appear to be the result of a lack of knowledge or skill. He knows what to do and how to do it, but he does not do it. For this reason, additional training was not helpful in attempting to find a solution.

Attempts at counselling and assistance were only marginally successful, as his performance assessments will attest.

Close supervision was the most successful strategy but this too was only marginally successful and cannot be sustained without undue hardship on my platoon.

In my opinion, he has demonstrated a lack of ability to achieve acceptable standards of performance for his position as Police Constable.

Constable Turpin's continual and sustained performance problems over several years led to this Special Review. The Special Review Period has confirmed that he fails to achieve acceptable standards of performance. I am reluctant to recommend that a second Special Review Period be commenced because I don't think it will result in any improvement of his performance. You may wish to consider this however.

I recommend that the Chief of Police made a complaint about Constable Turpin's conduct under Part V of the Police Services Act on the basis that it constitutes unsatisfactory work performance.

...

75. The then Chief of Police decided to extend the Special Performance Review into a second period of review, from June to November 1999. PC Turpin

met all of the six performance standards which he had failed in the first special review. The recommendation was that he be returned to regular patrol duties.

76. It seems that Inspector Maiorano looked at incidents involving PC Turpin that were investigated by the Special Investigations Unit (SIU). Section 11 of Ontario Regulation 673/98 empowers a police chief to investigate any incident of which the SIU is notified. The evidence on whether the Chief used his powers under s. 11 is not clear. On balance, it seems the Chief did not do so. While doing the investigation for the operational review, Staff Sergeant Maiorano asked Deputy Chief Mercier if s. 11 investigations into PC Turpin's SIU-reported incidents were done. Deputy Chief Mercier told Staff Sergeant Maiorano they were done, but that he was not going to get access to those documents. Superintendent Douglass testified the investigations were not done, and he was troubled by that.

77. The operational review was to entail a fully documented performance analysis and assessment into all activities completed by PC Turpin, including: his profile and employment history to identify performance patterns, training and behavioural issues; his divisional and Human Resources files, all of his reports, his memo books, all Crown briefs and memos, his workload and call responses,

interviews with other officers, his performance management documents, his internal disciplinary incidents and the findings, police complaint investigations, and subject matter experts were to be consulted on matters relating to the use of force. Despite this broad ambit, the review was specifically not to involve the reinvestigation of completed police complaint investigations, nor were previous police complainants to be interviewed.

78. Inspector Maiorano did not to avail himself of PC Turpin's performance appraisals, which were generally favourable towards PC Turpin, with some enthusiastic praise for his performance (in Exhibits 12 and 13). Inspector Maiorano's explanation for this omission was that they were not done consistently, the gaps between them being irregular, which meant for him that there could be no consistency in the conclusions reached. Inspector Maiorano cannot recall whether he actually saw the performance reviews entered into evidence by the Association that were generally favourable and praiseworthy of PC Turpin.

79. The detailed performance review of PC Turpin's behaviour, done some months prior to the operational review, was considered by Inspector Maiorano, but it receives only one-line, passing reference in the operational review report.

(vi) what is contained in Inspector Maiorano's April 2008 report

80. Staff Sergeant Maiorano completed the draft report. He submitted it to the joint management team for review and confirmation, after which it was prepared for the Chief.

81. Since Deputy Chief Mercier features in the Association's submissions, he had very little input into the operational review and its report. As mentioned, he attended few meetings of the joint management team. Inspector Maiorano says that Deputy Chief Mercier's only input into the report was a suggestion that one of the organizational objectives recommended by Inspector Maiorano in his draft report be removed. Deputy Chief Mercier made no suggestions as to the conclusions made by Inspector Maiorano with respect to PC Turpin.

82. The report is a comprehensive summary of all documents concerning any allegation of misconduct against the Grievor over the period of his employment. It has an executive summary, an overview, a profile and employment history of PC Turpin, a long summary of every instance of discipline or potential discipline over PC Turpin's career with the Service, and findings. There is a review of PC

Turpin's 2006 and 2007 arrests and of his Police Issued Memo Books. There are then recommendations concerning PC Turpin, and a conclusion.

83. The report looks at PC Turpin's record for the full period of his employment. It makes reference to 7 instances of prior informal discipline issued to PC Turpin. This discipline ought to have been purged from his file under the sunset provisions of the Act, yet it forms part of the operational review report. Furthermore, there are references to unsubstantiated allegations of misconduct, but they are set out as if they occurred and as if they were the subject of discipline. They fall under the heading in the report, "officer disciplinary record". Many of the allegations were not subject to any disciplinary process, formal or informal, they were not matters that PC Turpin had admitted, and he disputes many of them. They were allegations never proven and never put to PC Turpin for a response, yet they are recorded as disciplinary facts.

84. Staff Sergeant Maiorano made no mention of PC Turpin's good performance on Versadex, as did Sergeant Kritzer.

85. The absence of any reference to the laudatory performance reviews by PC Turpin's supervisors during the period of the review, when compared to the detail

of PC Turpin's disciplinary history, is an omission in the report. Overall there is little praising of the Grievor in the report and much that suggests a propensity for misconduct.

86. Some entries in the report are misleading. They suggest that PC Turpin was the individual involved in the apparent misconduct. Only by reference to the appendices (which were not attached to the version provided to the Grievor) is it apparent that this was not so. For example, as mentioned above, under the heading Officer Disciplinary Report, there is reference to an incident on February 18, 2006. The complaint, later withdrawn, was of theft, ripping a chain off the complainant's neck, and of punching the complainant in the face. From the appendices it is apparent that PC Turpin was in attendance at the incident with many other officers, but that another officer was accused of doing the things complained of.

87. Similarly, there is a heading in the report, "Instances of Deceit". It records four events, from April and May 1999, February 2004, and May-June 2004. The report says, "Police Constable Turpin has been deceitful on at least four occasions." This is a serious allegation, "deceit" being a specific disciplinary

offence in the Code of Conduct Regulation 123/98⁵. PC Turpin was never charged or formally accused of this, and he disputes the incidents.

(vii) what recommendations were made regarding PC Turpin in the operational review

88. Inspector Maiorano (and the joint management team appointed to conduct the operational review) produced three versions of the report. The issue of what reports to produce was discussed by the joint management team. It was decided that the organizational lessons learnt from the exercise did not need to go to PC Turpin since they required implementation by management on a general basis. The information relating specifically to PC Turpin would go to him. As a result, Inspector Maiorano was told to prepare separate reports.

89. The first report was a full version that went to the Chief. It contained organizational recommendations as well as the recommendations directed at PC Turpin. It also contained copies of all of the supporting documents used to prepare the report. This version was only revealed to PC Turpin and the Association during the hearing of the grievance.

⁵ s. 15 2(1)(d).

90. The second version had the organizational recommendations removed. It has been referred to as “the disclosure version”. It lacked the supporting documents that informed the report conclusions. Until the hearing, the Association and PC Turpin were led to believe that the disclosure version was the full version. The cover letter to PC Turpin of May 1, 2008 from Superintendent Jim Douglass, the chairperson of the operational review joint management team, stated the following:

Along with this letter we are also providing you with a copy of the full findings of this Operational Review for your further consideration.

91. What Superintendent Douglass meant was that PC Turpin was receiving the full report intended for him, that which the joint management team thought applied only to him individually.

92. There was also a third version of the operational review report, “the executive summary”. It contains a summary of the findings in the operational review, described above.

93. The operational recommendations in the report – not disclosed to PC

Turpin in the version sent to him – include the following:

1. The Professional Standards Unit is to complete a case synopsis to accompany the withdrawal of each public complaint to allow a comprehensive review of individual officer conduct. Further, that recommendations are made, when appropriate, where training is required relevant to the issues in law, communication (attitude) and other common, or not so common, issues that arise during course of officer's on and off duty conduct.
2. All public complaint file case synopses are reviewed by the Disciplinary Review Committee, including a history of previous officer complaints and conduct issues.
3. A documented debriefing of each public complaint occurs with the respective subject officer(s) to ensure a thorough review of the circumstances surrounding each complaint. This will ensure training and performance issues are also considered at the Unit level.
4. ...

94. As mentioned, the conclusion reached in Inspector Maiorano's report is as follows:

It is evident that Police Constable Glen Turpin has the knowledge, skills and abilities to perform at an acceptable level; what he seems to lack is a combination of willingness, readiness, desire and motivation to perform at [a] level consistent with DRP expectations. Prior efforts to set consistent performance behaviours have proven to be unsuccessful in the long-run. It is unknown what future performance management processes will achieve towards Police Constable Glen Turpin performing at an acceptable level of consistent performance.

95. The recommendations made in the report regarding PC Turpin were:

As a result of the comprehensive review into the activities of Police Constable

Turpin, as detailed in this operational review, performance and potential conduct issues have been identified. This report is submitted to the Executive Branch for decision.

Note – Prior to Executive Branch assessment, an excessive use of force concern was identified through a routine file review. This file has been forwarded to the Professional Standards Branch for investigation.

Police Constable Glen Turpin has both unsuccessfully and successfully completed previous forms of performance management processes; these undertakings do not seem to achieve long-term performance improvement behaviours and in fact any performance improvements seem to be short lived. Thus, it is also recommended that progressive actions be undertaken should Police Constable Glen Turpin either fail this performance improvement plan or regresses to a standard of performance that is clearly unacceptable and contrary to the performance improvement plan established as a result of this undertaking.

96. No training recommendations were made in the report. This is not surprising because the Grievor was among the most highly trained individuals in the Service in the use of force. He was himself a trained use of force instructor, having acted in that capacity in 1993-94. He had specialized training and certification as a Glock pistol specialist and as a baton weapon instructor. He is also extensively trained and accomplished in various styles of martial arts. He is a certified defensive tactics instructor with the US Department of Justice, the FBI, and is a pistol training instructor certified with the FBI. In the period 1993-94, PC Turpin provided training within the Service on defensive tactics, officer safety, non-firearms training, hand-to-hand combat, impact weapons, aerosol weapons and in the techniques related to each of these. He trained officers in high risk

vehicle takedowns, in approaching armed or dangerous individuals, and in mitigating injury.

97. PC Turpin was provided a copy of the operational review report on May 1, 2008 by letter from Superintendent Douglass. PC Turpin is told in the letter that he will remain in CARU, “until such time as we develop a workable solution”. The letter asks PC Turpin to carefully review the report, “as it is our intention .. to follow through after this review to determine what remedial action will resolve all of these issues in a satisfactory manner”.

(viii) what happened to PC Turpin as a result of the operational review

98. PC Turpin was moved into the Central Alternative Response Unit (CARU) at the start of the operational review. Apparently no risk assessment was done prior to that decision being made. CARU deals with public complaints that do not require police attendance, the lower priority calls the Service receives from the public.

99. A few days after the operational review was completed, May 5, 2008, PC Turpin was placed on administrative suspension as a result of criminal charges

laid against him under the Act. As of the last date of hearing, he had not returned to work as the outcome of the charges was still awaited.

100. Whether because of the criminal charges laid against PC Turpin, or otherwise, no action was taken by the Chief as a result of the operational review, or not any that was brought to the attention of the Association or presented in evidence.

(ix) PC Turpin's explanation for what motivated the operational review

101. PC Turpin's explanation for the operational review is the unreasonable antipathy felt towards him by Deputy Chief Mercier, who initiated the operational review and who was a member of the joint management team that conducted the operational review. He cites three incidents that the Association suggests show an unreasonable antagonism towards him.

102. The first involved an event in 2005. PC Turpin had taught dog handling in the Department of Forensic Sciences of Laurentian University. Following this, from 2002, PC Turpin taught a course on body recovery searches at the Ontario Police College in Aylmer, Ontario. In 2005 his academic supervisor received an

email from Deputy Chief Mercier that PC Turpin was not a certified cadaver dog handler and that the Service did not use his services in that capacity. Both allegations were not accurate. The result was prejudicial to the Grievor. He lost his position as an instructor at the Police College.

103. The second incident concerned the occasion, in May 2005, when PC Turpin saved an individual in imminent mortal danger by shooting dead her assailant. PC Turpin was awarded the Canadian Professional Police Association award for excellence for his role in the incident. After the incident PC Turpin went to the division. After some time confined to his office he came outside for some fresh air, at about 1am. He says that Deputy Chief Mercier curtly advised him that it was inappropriate for him to be out there if the media appeared, and he directed PC Turpin to return to his office. Later PC Turpin asked Deputy Chief Mercier how his absence after the incident, pending the SIU investigation, should be treated. According to PC Turpin, Deputy Chief Mercier responded, “why, you looking for some free time?”, showing no empathy towards him, although he had been through an intense circumstance.

104. The Grievor claimed that, besides a call from the corporate nurse, no-one from the Service contacted him for an operational debriefing or to see how he was

copied after the incident. He said, about 8 months later, someone from the Critical Incident Stress Support Team contacted him. He appreciated the contact, but felt it came much too late.

105. This evidence was somewhat contradicted by a notice produced by a fellow officer on May 13, 2005, relatively shortly after the fatal shooting. The notice reported that PC Turpin “is definitely overwhelmed with the phone calls and visits he has received. .. He has a two page list of people .. who have called him so if you haven't got a return phone call that's why. I can say that without everyone's support shown so far it would be much more difficult for him. ..” PC Turpin accepts this notice is accurate.

106. The Service's Directive concerning the Critical Incidents Stress Support Team, HR-02-003, makes clear that the Team is responsible to respond and assist members, though “only when requested”. PC Turpin did not request their assistance. Also the same directive makes clear that the debriefing is deferred if there is an SIU investigation, as there was. PC Turpin claims, though, that no debriefing occurred after the SIU investigation was complete and he came back to work.

107. After the incident and PC Turpin's return to work, he proposed, through the Association, that a joint Service – Association support team be established to assist officers involved in a major incident. The matter was raised at the Chief's liaison meeting with the Association. Apparently Deputy Chief Mercier was particularly opposed to it, and the idea was not adopted. Instead the Association set up its own support service to its members after major incidents.

108. PC Turpin applied for one of two available positions on the canine unit in 2007. He had the required training, experience and qualification. He received the endorsement of his supervisors, of the divisional staff sergeant (Staff Sergeant Maiorano), and of the divisional commander. He was not appointed. PC Turpin attributed his non-appointment to the antagonism he believes was felt towards him by Deputy Chief Mercier.

Other evidence

109. The Employer produced a statistical record of all public complaints against all officers of the Service for 2005, 2006 and 2007. The records reveal that in this period PC Turpin had 2 in 2005, 5 in 2006, 3 in 2007, 6 of which were for excessive use of force. There were other officers with complaints against them,

some multiple complaints in one year, though none as many as the Grievor, and not with as many in repeated years. PC Turpin clearly had most complaints involving use of force.

110. I viewed two videos taken of PC Turpin with individuals in custody at a police station (with the video analysis reports at Exhibits 20 and 21). This was done over the objection of the Association, following an award I issued on July 30, 2010. My reason for admitting the videotapes, as expressed in that award, at ¶17, was that “they have a bearing on the fairness of Inspector Maiorano’s conduct of the review and on the conclusions he reached with respect to the Grievor’s conduct described in his report”. In both videotapes it appears that PC Turpin forcefully assailed and subdued the individual being held in custody in a cell. In both there was an escalation of force, of the compliance technique. In one, PC Turpin used a grounding technique, taking the accused to the ground, smashing his face against two walls of the cell. In the other, through PC Turpin’s physical restraint of the accused in the cell, the individual struck his head against a bench, causing injury. Inspector Maiorano seems to have treated the videotape evidence professionally, without particularly drawing attention to it, and without making any particularly adverse comment on PC Turpin’s conduct. Inspector Maiorano noted that he regarded PC Turpin’s conduct identified on the videotapes

as being beyond the performance issues the operational review was intended to address, and that he had referred the videotapes to the Professional Standards Branch for their consideration. As a result of that referral the criminal charges mentioned above were brought against PC Turpin at the time the operational review report was issued. If anything, I think Inspector Maiorano understated the import of the videotapes and of their content, particularly as they are germane to the issue of public complaints.

Submissions

The Association Argument

111. The Association takes the position that the four matters challenged (the initiation of the operational review; the conduct of the operational review; the findings of the operational review; and the decision to transfer PC Turpin to CARU pending the outcome of the review) were arbitrary and discriminatory, acts of harassment, and an abuse of the Chief's power (as described in *T.T.C. and A.T.U. (Stina Grievance)* (2004), 132 L.A.C. (4th) 225, [2004] O.L.A.A. No. 565 (Shime), at ¶¶248-249).

112. Association counsel argues that the decision to conduct a formal investigation into PC Turpin's conduct, in the operational review, was the result of a flawed assessment of the public complaints against him. Counsel says that the public complaints against PC Turpin were disproportionately high because of his work in the Whitby bar district where he was more likely, on occasion, to have to use force for restraint, and that the Chief ought to have been aware of this. Further, Association counsel suggests, the Chief ought first to have reviewed PC Turpin's more recent performance appraisals. From them he would have determined that, overall, PC Turpin had received positive performance assessments.

113. The Association points out that a three-month special performance review had been done by Staff Sergeant Maiorano in the early months of 2007, completed some 8 months before the Chief's decision to require the operational review. The Association asks, why was the further operational review necessary, when the careful review of early 2007 had concluded that PC Turpin was performing well.

114. Although, ostensibly, the purpose of the operational review was to include a review of PC Turpin's training needs, the Association submits that the Chief

was well aware that PC Turpin was highly trained in the use of force and that no insights were to be gained into any training required of him.

115. Besides training, the Association says the purpose of the operational review was to assess the Grievor's call response. The Association argues that there is no justification for why the Chief did not use the normal performance procedures to address any failings in PC Turpin's call response.

116. The Association says that the Act and Regulations prescribe how performance issues arising from public complaints are to be addressed. The Act and particularly Regulation 123/98 address how performance appraisals generally should be done. They provide avenues and mechanisms to deal with performance issues. The Association says that the Act gives a comprehensive code for dealing with performance matters, whether from routine performance appraisals or public complaints or SIU investigations. The code provides safeguards to ensure officers are dealt with fairly and transparently. Within this code are procedural safeguards for the officers, which, the Association submits, were entirely absent in the operational review.

117. The Association argues that the operational review wholly neglected the

performance review process prescribed in the Act, the regulation, and in the Chief's policy. The policy contemplated mutuality, discussion between the manager and the officer, an opportunity for feedback from the officer, a performance assessment that fairly evaluated the officer's performance with the officer's full input and comment. The plan developed was to be one that was mutually agreed between the officer and the manager. The feedback of the officer is an essential feature of the performance review. The Association contrasts this statutory process – fair to the officer – with the unilateral operational review that occurred without any input from PC Turpin.

118. The Association points out that the performance review policy issued by the Chief specifically contemplated the officer and their manager addressing the officer's ability to use force appropriately, among other competencies; this being the issue that induced the Chief to start the operational review.

119. Given that public complaints against PC Turpin, chiefly alleging excessive use of force, inspired the Chief to undertake the operational review, the Association focuses on how the Act deals with public complaints against officers. It says Part V of the Act provided the mechanisms the Chief should have used to address the public complaint concerns he had regarding PC Turpin. The

procedure, described above, sets out significant protections for the officer complained of. The Association argues that PC Turpin would have had these entitlements had the complaints been investigated, in contrast to his exclusion from the process in the operational review. Further, had the Chief concluded the complaints were unsubstantiated, then no further action could have been taken against PC Turpin. His employment record would be clear.

120. The Association points out that the Chief had it within his power to pursue the public complaints had he wished to do so, even once they were withdrawn by the complainants. He failed to do so. Also he could have initiated his own complaint under s.64(1.1) of the Act. He didn't. As a further alternative he had available to him the DRP performance review process that had been used by the Service for PC Turpin in September 2004 and January 2006. That process would have included input from the Grievor. The Chief chose not to use it.

121. The Association suggests, in the face of these statutory and established channels of investigation, the Chief cannot then create his own procedure for reviving these complaints, as he effectively did by using the operational review; a process that had no set rules of procedure. The reason the Chief cannot do so, in the Association's submission, is that PC Turpin would have had all of the

protections afforded an accused officer under the Act, while he had none under the ad hoc process of the operational review. Further, the Association argues, the operational review had no historical precedent as being applied to an officer, which, the Association suggests, is why it discriminated against the Grievor.

122. The Association asks that I draw various adverse inferences. Firstly, as to the incidents involving PC Turpin that were investigated by the SIU, the Association submits that the Chief could have conducted his own investigation each time, under s. 11 of O. Reg. 673/98. It appears he did not do so, and no explanation has been given by the Chief why not. The Association argues I should draw an adverse inference that there is no rational explanation, and that the inclusion of SIU matters under the operational review was therefore arbitrary and discriminatory.

123. Secondly, the Association wants an adverse inference to be drawn from the Chief's failure to testify and explain why he did not avail himself of the statutory procedures that were available to him, and why he chose instead to subject PC Turpin to an operational review. The Association suggests the adverse conclusion I should draw is that the Chief has no reasonable explanation for his failure to use the available statutory processes and that his choice of the

operational review was arbitrary and discriminatory.

124. In his letter appointing the operational review, the Chief mentions four purposes for the review: PC Turpin's job performance "to determine if remedial action is necessary..."; "to ensure [PC Turpin's] training ... has been appropriate"; "to ensure ... the Service's policies" are appropriate; and to ensure the Service's handling of the public complaints against PC Turpin were dealt with appropriately.

125. Subject to the Association's overall objection to the review, the Association has no particular quibble with the third and fourth of these objectives. Those, it submits, are legitimate purposes for the Chief to inquire into. They concern the functioning of the Service. The Association's objection is to the first two purposes: PC Turpin's job performance and his training. Those, in the Association's submission, are appropriately addressed under the work performance procedures of the Act and the Regulations.

126. As to the conduct of the operational review, the Association has several complaints. It says the failure by Inspector Maiorano to interview any of PC Turpin's supervisors was unreasonably and prejudicial. They had given him

favourable reports and their input into his performance would have been helpful in obtaining an accurate portrayal of his work. They might have been able to answer some of Inspector Maiorano's queries. The Association submits that the effect of not interviewing the supervisors was that their recent reports of his good performance were not considered in the operational review. The Association suggests the operational review was fundamentally flawed because it failed to take account of the performance appraisals the Grievor's supervisors had done, and of the favourable comments they would likely have made had they been interviewed by Inspector Maiorano. The PDRs were generally praiseworthy of the Grievor. The Association suggests that their exclusion prejudiced the joint management team's overall assessment of the Grievor.

127. Also PC Turpin himself was not interviewed. He was not asked to explain any of the documents or information Inspector Maiorano came across. This meant that Inspector Maiorano did not have the benefit of any input by PC Turpin. This, the Association argues, necessarily prejudiced the outcome because incidents and circumstances that were unexplained could have been explained by PC Turpin, and he would have been better vindicated in the report. The Association argues this was particularly egregious in the context of the operational review expanding to include unsubstantiated disciplinary matters and every complaint ever made

against the Grievor. There were prejudicial comments in some of the reports, but, given the documentary approach adopted by Staff Sergeant Maiorano and the joint management team, no response or input was sought from PC Turpin. From the Grievor's evidence in the arbitration, it would have been clear that he had responses and answers to each of the negative reports of his conduct. The Association argues this was particularly damaging when, relying only on documents available to him, Inspector Maiorano drew conclusions harmful to the Grievor's reputation, such as in the section in the report, "Instances of Deceit". None of the allegations in that portion, presented as fact, was ever tested.

128. Similarly, the Association argues that the perfunctory one-line reference to the detailed, 3-month long, daily performance review of the Grievor gave insufficient weight in the operational review report to the Grievor's generally good performance over the review period.

129. The Association points out the scope note for the operational review contemplated interviewing a use of force expert. This was not done. The Association suggests the failure to interview or consult a use of force expert was remiss because PC Turpin's use of force was central to the review.

130. As to the report itself, the Association says that PC Turpin was treated fundamentally unfairly by being told, falsely, he was receiving the complete report, when he was not receiving the executive version that contained the organizational recommendations, nor the substantial supporting appendices that were attached to the full version. The Association argues that, had the Association and the Grievor received the full report, they would have been aware of the extent to which organizational failings might have accounted for the issues that arose for the Grievor.

131. The Association points out that the report also says that supervisors, officers and subject experts were consulted, when this was not true. The early consultations by Sergeant Kritzer were discarded entirely, and none were done by Staff Sergeant Maiorano.

132. The Association argues that the operational review was intended to address PC Turpin's performance. It was not concerned with discipline or misconduct. There was no fault found on the part of PC Turpin for the public complaints that were the catalyst for the review, so, in the Association's view, there ought not to have been any reference to discipline and misconduct. Yet the report is replete with references to earlier informal discipline of the Grievor

which, under the Act, ought long ago to have been expunged from his record. Further, the Association says that, under s. 68(9) of the Act⁶, it cannot form part of his employment record. This prejudiced Inspector Maiorano's assessment of the Grievor, in the Association's submission.

133. The Association argues that the principal failing of the report was that it failed to address the issues sought to be investigated by the Chief: there was no review of the circumstances of the public complaints, the Grievor's call response, and no consideration of the training issue. Further, the Association criticizes the report for drawing no conclusions on the adequacy of PC Turpin's performance, given that was the purpose of the review.

134. In summary, the Association argues that the report amassed every negative item, innuendo, or rumour written by anyone regarding PC Turpin, presenting all the events in his career in a negative light, whether relevant to the subject matter of the review or not, while ignoring or downplaying positive aspects of his performance and work history. For example, the Association says that PC Turpin's positive performance reviews were not taken into account or considered.

⁶ **Inadmissibility of documents**

(9) No document prepared as a result of a complaint is admissible in a civil proceeding, except at a hearing under this Part. [Part V – Complaints].

The detailed 3-month review performance monitoring of his work, which he successfully passed, was mentioned only in a one line entry. That got much less coverage than his long passed, purged disciplinary records, which, the Association submits, were much less relevant than his most recent performance assessment. Further, the incident in which PC Turpin was compelled to shoot and kill an individual to save a woman's life, for which he received an award, was given only glancing reference in this report. All of this, the Association suggests, shows bias and arbitrariness towards the Grievor.

135. The Association argues that the purpose of the report was simply to produce it, to taint the Grievor's good name and reputation; that there was no other purpose. This is shown, the Association submits, by the failure of the Service to take any steps, following the report. The Grievor was suspended on pay pending an investigation when the report was released, but, the Association says, that should not have precluded the Chief from indicating what action he would, or would not take, as a result of the report. The existence of the report is a blot on the Grievor's character, in the Association's submission. In the context of him having no input into it, no entitlement to respond, and no means of defending himself from the allegations against him in it, the Association argues that he has been fundamentally prejudiced with his good name besmirched. Had the Chief used

one of the statutory mechanisms available to him, the Grievor would not have faced this unfairness. He could have defended himself under the procedures of the Act for unsatisfactory work performance and for misconduct. The Association argues that not only was the operational review inconsistent with the provisions of the Act, it was arbitrary and discriminatory because the Grievor has been the only person to have his performance subjected to such an unusual process.

136. The Association points out that many of the adverse comments in the report, which harm PC Turpin's reputation, are unsubstantiated. Under s. 64(6)⁷ of the Act, no further action should be taken on such unsubstantiated matters and, under s. 68(9)⁸ no record is to be kept of unsubstantiated allegations. However, the Grievor faces the existence of the report and the taint on his character.

⁷ **Unsubstantiated complaint**

(6) If, at the conclusion of the investigation and on review of the written report submitted to him or her, the chief of police is of the opinion that the complaint is unsubstantiated, the chief of police shall take no action in response to the complaint and shall notify the complainant and the police officer who is the subject of the complaint, in writing, together with a copy of the written report, of the decision and of the complainant's right to ask the Commission to review the decision within 30 days of receiving the notice.

⁸ **Police officer's employment record**

(9) The chief of police or board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

- (a) the complaint is proved on clear and convincing evidence; or
- (b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of.

137. As to the Grievor's transfer to CARU (the Central Alternative Response Unit) during the period of the operational review and for a period thereafter until the Grievor was suspended, the Association says the transfer was wholly unjustified and arbitrary. It argues that the Grievor did not constitute a threat to the public. No risk assessment was done prior to the transfer to see if it was warranted. The Association argues from PC Turpin's evidence that a stigma attaches to transfers to CARU, unless one is incapacitated. Transfer to the unit is seen as disguised discipline.

138. The Association argues that the antipathy felt towards the Grievor by Deputy Chief Mercier, described in PC Turpin's evidence, informed the operational review. The Association submits that, in the face of PC Turpin's evidence of antipathy towards him, the Service had an obligation to call rebutting evidence, which it failed to do. The Association argues I should accept that the operational review was in bad faith, tainted by the antagonism felt towards the Grievor by Deputy Chief Mercier, who was in effective control over the operational review; evidence that is unchallenged.

139. In summary, the Association argues that by picking the operational review

process PC Turpin was denied all of the statutory procedural protections and controls over what appears on his employment record. Rather than using the statutory procedures, the Chief chose a process without rules. As a result, the scope was unlimited, the way in which information was gathered was unfair, and the result was highly prejudicial to the Grievor. The operational review contained many inaccuracies and misrepresentations, with inclusions contrary to the Act.

140. The Association seeks a declaration that the operational review violated the collective agreement. It wishes to have the operational review report declared null and void, that it be expunged from the Grievor's employment record and from all other records in the Employer's control that could impact on the Grievor's employment. The Association asks that the Grievor be returned to his former position, prior to his transfer to CARU, upon his return to work. The Association seeks an order that the Service be directed to use only its performance review procedures for performance issues to prevent any use of extraordinary procedures, like a operational review, in the future. The Association asks for \$25,000 in general damages for the Grievor, for the wrongful public humiliation and disparagement among co-workers that resulted from the operational review. The Association requests that an order be made requiring the training for the Board's management personnel on the lawful conduct of performance reviews.

The Service's Argument

141. The Employer submits this case has little to do with the collective agreement and labour relations in the policing environment, and much to do with the governance of a police force. The Employer argues that the operational review does not arise from the Employer's management rights; it arises from the Chief's powers under the Act.

142. The Employer says the Chief has the power and authority to review the employment history and performance of any officer at any time. He does not need a specific trigger for doing so. He can therefore conduct an investigation to determine whether a charge will be laid against an officer, or whether some other statutory procedure should be used to address an officer's performance issues, whether misconduct or unsatisfactory work performance. The operational review was such a preliminary investigation to inform the Chief of whether further steps, pursuant to the statute, would be necessary. The Employer contends that Part V of the Act is not the full scope of the Chief's powers – he is entitled to investigate any aspect of the police service, including any performance issue of an officer, in order to decide whether he wishes to initiate procedures under the Act to

discipline, demote or terminate an officer's employment. Nothing in the collective agreement curtails the right of the Chief to review an employee's complete employment file, including performance issues.

143. The Employer presents the following context. Police officers may be disciplined only under Part V of the Act. This is indicative of the relative independence of the police service. Only the Chief can give orders to police officers. The Board, which oversees the Service, has no power to do so. That is because of the relative independence of the Chief. The Chief is independent because only the Board may give him orders, and only about certain subjects. The operation of the Service is entirely within his control and direction.

144. The Service submits that the Chief's powers stem, not from the collective agreement, but from the manner in which police authorities are entitled to operate under our system of law. A police chief must be free of interference in the due enforcement of the law and, to that end, the Chief necessarily has the power to review the conduct of one of his officers if he thinks there is enough concern to warrant an investigation, one outside the scope of Part V of the Act.

145. The Chief uses Part V if he wants to fire, demote, or suspend for

unsatisfactory work performance or other misconduct. But, the Service argues, a police chief cannot be restricted to the remedies available for charging an officer under Part V of the Act. The Chief must be able to use less drastic methods, particularly if the purpose of the exercise is information gathering in order to make a more informed decision on how to address the situation.

146. In support of these notions, to show the foundation of a police chief's independence, the Employer refers to Lord Denning's comments in *Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, 135-136:

.. But I have no hesitation in holding that, like every constable in the land, [the Commissioner of Police within the Metropolis] should be, and is, independent of the executive. ... I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation of this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. ...

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be

made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. ...

147. Extrapolating, the Employer argues that the Chief has original powers that give him very wide discretion. The Employer refers also to *Chief Constable of Sussex, Ex Parte International Trader's Ferry Ltd, R v.* [1998] UKHL 40; [1999] 2 AC 418; [1999] 1 All ER 129; [1998] 3 WLR 1260 (11th November, 1998) as further authority for the wide discretion of a police chief to determine the disposition of the police force in their area of responsibility.

148. The Employer submits that the Chief could have done the operational review in secret; he could have asked one of his managers to look into PC Turpin's past work history, as Inspector Maiorano did, and provide a report, which the Chief could have used to decide whether further corrective action was needed to address the manifest problem of PC Turpin being the subject of a disproportionate number of public complaints. The fact that the review was done openly, with PC Turpin being informed of it, does not alter the fact that the Chief continued to exercise the power, as head of the police service, to ensure that its operation is efficient and performing satisfactorily.

149. The Service relies particularly on two arbitration awards by Arbitrator Knopf: *Toronto Police Services Board v Toronto Police Association (2)*, 2012 CanLII 1800 (ON LA) and *Toronto Police Services Board v. Toronto Police Association (1)*, 2011 CanLII 6172 (ON LA). [I refer to the awards as (2) and (1) for ease of reference]. The first cited (2) is the later of the two awards. It concerned the Toronto Police Chief's requirement that those suspended with pay report twice daily to police headquarters. The earlier decision (1) concerned a directive from the Toronto Police Chief to officers about the discharge of firearms towards the driver of a motor vehicle. In both cases Arbitrator Knopf found that, as an arbitrator appointed under the collective agreement, she did not have jurisdiction to review the Police Chief's directives.

150. The Employer relies on the two awards for their understanding of the role of a police chief in relation to the police officers of their force. Arbitrator Knopf found in each case that the directive issued by the Toronto Police Chief was an exercise of his statutory and common law authority, which was not subject to arbitral scrutiny under the collective agreement.

151. The Employer argues that if the Chief were to want to examine the work performance of an officer, that is not the exercise of a management right under the

collective agreement.

152. The Employer says that the Chief did not have to rely on his managerial authority under the collective agreement to justify his appointment of the operational review. His original authority and that described in the Act entitled him to order the operational review.

153. The Service refers to the duties of a chief of police in s.41 of the Act. It argues these duties have nothing to do with Part V of the Act. Under s.41, the Chief has responsibility to administer “the police force and oversee its operations”, and to ensure that “the members of the police force carries out their duties in accordance with the Act and in a manner that reflects the needs of the community”. Employer counsel points out the continuity between these operational responsibilities, which he argues the Chief was carrying out when requiring the operational review regarding PC Turpin, and what is in Part V of the Act. Part V may never be reached. There may never be a complaint against an officer, but the Chief has the power and the obligation under the Act to administer the force in such a way that its officers carry out their statutory responsibilities properly. That, counsel submits, is what the Chief was doing when he started the operational review.

154. The Employer argues that, under Part V of the Act, unsatisfactory work performance is equated with misconduct – both are dealt with through a complaint process and through hearings to determine officer culpability. Part V of the Act is not concerned with performance management, but with discipline and correction. The Employer says that the Chief was not engaged in any accusation of culpability by PC Turpin, which might have required the procedures of Part V of the Act, but with an investigation, to find out how best to manage PC Turpin's performance. The Chief had available to him the unsatisfactory work performance procedures if he had wanted to pursue them, but what he did was at a much earlier stage. He was confounded by the apparent enigma of the Grievor – an officer with significant commendations and appreciation awards for bravery over the years, with considerable experience and training, himself a trainer in the use of force and in deescalating conflict, with past experience of performance review and observation, including special performance reviews at two different stages of his career, yet who continued to have a disproportionately high number of public complaints against him.

155. In appointing the operational review the Chief was interested to find out how best to address the situation. PC Turpin appeared not to learn from these

monitoring and coaching experiences. In opting for the operational review, the Chief was not prosecuting PC Turpin, not accusing him of misconduct or unsatisfactory work performance, but merely wanting to know what steps he should take to ensure consistent unproblematic performance by the Grievor. Employer counsel argues, the end point might be an accusation of unsatisfactory work performance, but that is not the starting point. The Chief was interested to learn how best to deal with the starting point, how best to manage the Grievor's work performance.

156. In support of its contention that the operational review was not disciplinary, the Service points out that no action has been taken by the Chief against PC Turpin as a direct consequence of the report. He was charged criminally for certain conduct, referenced in the report, but the report was not the basis of that charge. In the Employer's submission, the outcome might have been that the Service's Performance Management Process would be triggered, the procedure advocated by the Association, under which steps could be taken to address the Grievor's conduct.

157. The Employer responds to the Association's suggestion that the Chief was required to avail himself of the policies he issued for the assessment of their work

performance, under s.13 of O/Reg. 123/98. The Employer contends that is only if the Chief wished to make a complaint against the officer of unsatisfactory work performance because use of the policies is a precondition for making such a complaint (s.13(3)(a)). Because the Chief never intended or purported to use Part V of the Act, to show culpability by PC Turpin, the Chief was not restricted to his performance assessment procedure when trying to understand the enigma of PC Turpin's performance. Although many of the public complaints against PC Turpin were unsubstantiated, that did not mean that the Chief couldn't take a look to see if some steps could be taken to improve the situation and reduce the number of public complaints against the Grievor. In other words, the Chief served a public interest by trying to delve into what might be the problem and the Chief was not obliged in these circumstances, as part of his preliminary investigation of the situation, to use either the performance review procedures he had in place or to prosecute the Grievor under Part V of the Act. Those were not the only options available to the Chief. He was entitled, in the Employer's submission, to find out first what was going wrong.

158. The Employer argues that the Chief had to act only within a range of reasonableness in exercising his managerial authority to initiate the operational review. Arbitrators appropriately give deference to decisions founded in an

employer's operational and business needs within that employer's expertise:

Toronto Police Services Association and The Toronto Police Board, unreported decision of September 11, 2009 (Kirkwood); *Re Metropolitan Toronto Zoo and CUPE* (2008), 171 L.A.C. (4th) 80 (Randall); *Re Navistar International Corp. and CAW-Canada, Loc. 127* (1995), 52 L.A.C. (4th) 223 (Snow); *Re OPG and Society of Energy Professionals* (2007), 165 L.A.C. (4th) 438 (Swan); *Re Hamilton (City) and CUPE* (2001), 98 L.A.C. (4th) 21 (Devlin).

159. In summary, the Employer argues that the Association has mistaken Part V of the Act as a complete code that restricts the Chief from carrying out his usual day-to-day operational responsibilities to ensure the proper function of the force. The Employer submits that, as part of the Chief's regular responsibility to ensure the best functioning of the force, the Chief was entitled to investigate why PC Turpin's public complaints were noticeably higher than anyone else's and for a sustained period of time. The form of this investigation was the operational review, but there is no particular magic in that description. At its essence, the Chief ordered an internal review of PC Turpin's conduct, as he was entitled to do under his responsibility to administer the force. The Chief could have done it without any notice to PC Turpin, without informing him of it. The Chief chose to tell the Grievor of it. His doing so was sensible because it brought his concern to

the Grievor's attention and informed the Grievor's bargaining agent of what was to occur.

160. The Employer points out that the operational review looks a lot like the Special Review Process that forms part of the Chief's Performance Management Process. That process applies "to any member who has been identified for accelerated performance management as a result of unsatisfactory work performance". The Service submits that, to the extent the Special Review Process is a legitimate exercise of the Chief's managerial discretion, the operational review is wholly analogous. The Employer submits that the Chief did something squarely within his authority to oversee the police force.

161. The Employer says that the Chief conveyed to PC Turpin there would be an investigation into why he had such a disproportionately high level of public complaints, he would be provided with the findings in writing and he would be told what might be done. This, the Employer submits, was not discipline, not unsatisfactory work performance and not misconduct. The Chief then encouraged the Grievor to read the report and the Chief would be available to discuss it.

162. As to the Grievor's transfer to CARU during the operational review, the

Service says it made eminent sense to transfer the Grievor to a position where he had much less contact with the public, with no loss of pay, no loss of benefits or seniority or service, to perform other law enforcement duties. There is no disciplinary aspect to this decision. The decision was not arbitrary nor discriminatory, in the Employer's submission.

163. The Employer argues it was not necessary to call any rebutting evidence. The evidence of Deputy Chief Mercier telling the Grievor to go inside the police station and not be outside where the media might congregate after the shooting by PC Turpin was a reasonable response to the situation.

164. The Service submits that PC Turpin tried to create some improper motivation for the operational review, when the reasons for it were patently described in the letter of November 27, 2007 to PC Turpin from the Chief, Mike Ewles. The Employer refers to *Jacobs Catalytic Ltd. and LIUNA, Local 1089*, 2006 CanLII 7737 (ONLA) (Albertyn), which suggests that the facts of each case should be carefully considered before an adverse inference is drawn from the failure to call a witness.

165. The Employer challenges that PC Turpin had no opportunity for input into

the process. It says that, when the report was given to PC Turpin, he was advised that there would be follow up to resolve all issues in a satisfactory manner. This, the Employer suggests, was an invitation to PC Turpin to discuss the issues. Also the Chief had advised PC Turpin at the outset that he was free to discuss the matter with him when the report was produced.

Decision

166. The Employer has arguably re-opened, in its argument, the question of whether I have jurisdiction to determine the grievance. As the Association points out, that issue has been decided already, in the award I issued on August 31, 2009.

167. I recognize that the Chief has original powers, as explained in *Pembroke (City) Police Services Board and Kidder*, 1995 CanLII 7172 (ON SC), at ¶19:

. . . the office of chief of police and all the duties thereof remain of a very public nature and the manner in which the duties are performed remains a matter of public concern. The rights and obligations of a chief of police to exercise authority according to his or her discretion and judgment are original and derived from statute. They are not delegated in any way by the local police services board or municipal government. They arise and exist independent of any contract.

168. I recognize too, as Arbitrator Knopf said in *Toronto Police Services Board*

v Toronto Police Association (2), at p.35, that, although working conditions may be affected by a police chief's order, that does not necessarily mean that the order is subject to arbitral review:

There is virtually no aspect of a Police Officer's duties and obligations that do not relate to working conditions. However, as shown above, not all working conditions or employment matters fall within the scope of a Collective Agreement or an arbitrator's jurisdiction, as prescribed by s. 126. Discipline is the prime example. So, too, is a routine or operational order. This makes sense. The Legislature has granted the Police Chief the exclusive power to oversee operations and the day-to-day operation of a police force, s. 31(3). Arbitrators are granted the power to interpret and apply collective agreements, and those agreements cannot affect the "working conditions" contained in sections 42 - 49 of the *Act*. Those working conditions that are not within the scope of negotiations or arbitral edict include the duty to "perform the lawful duties that the chief of police assigns," s. 42(1)(g). Therefore, the fact that an Order affects working conditions does not, in itself, dictate that the matter is arbitrable.

169. Plainly, as Arbitrator Knopf explains, there are areas of a chief's authority that are not within the scope of a collective agreement. A chief's general operational authority and control, such as in *Toronto Police Services (1)* and *(2)*, fall outside of the management rights that are regulated under the collective agreement. However, as I said at ¶¶51-52, quoted above, in the award of August 31, 2009 in this matter, I have jurisdiction to consider the grievance.

170. A key question in the case is whether the Chief is restricted to the Special Review process that forms part of the Chief's Performance Management Process

if he wishes to investigation the work performance of a particular officer, or whether he can initiate another, broadly similar process, as he did in this case.

171. There are six broad areas of contention in this case: (i) the Chief's decision to initiate the operational review; (ii) the Chief's choice of an operational review as the mechanism for investigation of PC Turpin's conduct and performance; (iii) the manner in which the operational review was conducted; (iv) the findings made in the operational review; (v) the status now of the operational review report; and (vi) the decision to transfer PC Turpin to CARU.

172. The Association's claim is that, for each area of dispute, the Employer discriminated against PC Turpin, in that he was treated less favourably than other officers without reasonable justification, and that the Employer acted arbitrarily, i.e. the Chief exercised his discretion without lawful justification, outside of the governing criteria.

(i) The Chief's decision to initiate the operational review

173. When initiating the operational review the Chief made clear that he was not treating the review as a disciplinary matter, but as a work performance issue.

174. As the parties submit, the Act distinguishes between the roles of the Chief and of the Board. Broadly, the Chief has jurisdiction over operational matters and the Board oversees the Chief. Employment matters are delegated from the Board to the Chief. The management rights of the Employer under the collective agreement with the Association are delegated to the Chief.

175. The question, as posed by the Association with respect to the Chief's decision to initiate the operational review is, firstly, whether he had any justification for doing so.

176. From the operational review it seems clear that in several of the public complaints against PC Turpin no action or review was undertaken by the Chief when the complaint was withdrawn. In each public complaint withdrawal form there is notice to the police officer that reads:

The withdrawal of this public complaint does not prevent the Chief of Police or the Police Services Board from commencing or continuing to deal with the complaint, as it considers appropriate, under Part V of the *Police Services Act*. Where the Chief or Board determines it shall continue with the complaint, the involved officer(s) shall receive notice within 30 days of the decision to continue. (s.56(6)).

177. The failure at all to pursue a withdrawn complaint, or even to investigate whether to do so, gave rise to the organizational recommendations made by Inspector Maiorano in the operational review report, described above. Arguably, had the Chief pursued the public complaints against PC Turpin, by investigating them further, the circumstances giving rise to the operational review might have been different and the need for the review might no longer have existed.

178. The question under this heading is whether the Chief was justified in undertaking some review or investigation of the Grievor's conduct.

179. The Chief had a legitimate concern that lessons learnt by PC Turpin from his various performance reviews and from deliberate monitoring of his performance were not being internalized by him. This was a problem that the Chief legitimately wanted to address.

180. PC Turpin had played a valuable role in providing proactive solutions to problems of drunkenness and unruliness in the bar district of Whitby. He was exemplary in eliciting the assistance and support of the bar owners to reduce rowdiness and unlawfulness. As a result of PC Turpin's efforts, with others, illegal behaviour dropped significantly. Despite this, the number of public

complaints against PC Turpin was about 26 times⁹ as many as the average of his fellow officers. PC Turpin was subject to a special performance review process in 1999 and divisional performance monitoring in February 2007. There were then further public complaints against him. For the Chief, the Grievor gave a contradictory presentation of himself; at once highly capable, yet apparently repeatedly responding excessively in apprehending offenders.

181. I have no doubt that the Chief was justified to conduct an investigation. Public complaints against PC Turpin were disproportionately high. The Chief had a right to try to understand what was happening, and why so many complaints were being made against him. As Inspector Maiorano said in evidence, the Grievor performance was inconsistent. When under scrutiny, under performance review, he performed most competently, often exemplarily. When interested in a particular task or objective, he would take a lead, show initiative and excel. When not under scrutiny, his performance tended to sag and was at times unsatisfactory. Some of his conduct was troubling and warranted investigation. So, the decision to initiate an investigation was bona fide and, in my view, justified. It was also

⁹ PC Turpin points out the average includes many officers whose work does not take them into the community and who have virtually no contact with the public. He suggests a better comparison is to front line officers, those doing the same type of work as he did, first response cars, those in uniform, in vehicles, who face the most heated circumstances. If half the officers were excluded on this basis, PC Turpin's complaint rate would still be more than 10 times that of any other officer.

plainly within the authority of the Chief to conduct an investigation into the conduct of one of his officers.

182. Some question was raised in the evidence as to whether Deputy Chief Mercier had a particular antipathy towards the Grievor, whether he bore some grudge against him and so instigated the report. Deputy Chief Mercier clearly played an important role in initiating the operational review. Although the Board chose not to call any evidence to contest the allegations PC Turpin made regarding Deputy Chief Mercier's apparent disfavour towards him, I am not persuaded that the operational review lacked a reasonable foundation, based in the operational concerns of the Service. Were there no objective basis for the review, and only PC Turpin's evidence of Deputy Chief Mercier's apparent antipathy, I might have doubted the bona fides of the operational review, but there was sufficient objective fact for concern at the volume of public complaints against the Grievor to have warranted the operational review. I am therefore not persuaded that the decision is tainted by any animosity felt by Deputy Chief Mercier towards the Grievor.

(ii) The Chief's choice of an operational review as the mechanism for investigation of PC Turpin's conduct and performance

183. The second question is whether the Chief's failure to invoke any the statutorily prescribed procedures for addressing work performance in favour of the operational review meant that he exercised the Employer's management rights inconsistently with the Act or arbitrarily or discriminatorily.

184. O. Reg. 123/98, s.13, required the Chief to establish policies for the assessment of police officers' work performance. The Chief did so. He established a policy for doing so. He made the policy available to the police officers, as required.

185. The questions that arises, though, is firstly whether the Chief complied with s. 13 of the Regulation, and if not, whether, with the policy in place, the Chief was required to use it exclusively, or whether he could go outside of it and initiate the operational review, as he did?

186. Section 13(3)¹⁰ of O. Reg. 123/98 provided that the Chief could not bring a

¹⁰ (3) Before the chief of police may make a complaint against a police officer of unsatisfactory work performance,
(a) the police officer's work performance shall have been assessed in accordance with the established procedures;
(b) the chief of police shall advise the police officer of how he or she may improve his or her work

complaint against an officer for unsatisfactory work performance unless the officer's work performance had first been assessed under the policy and the Chief had advised the officer of how he might improve his work performance.

187. The first question that arises is whether the operational review constitutes the investigation of a "a complaint against a police officer of unsatisfactory work performance"? If not, then there is no limitation from s. 13 of the Regulation to the operational review.

188. Both parties take the view, for slightly different reasons, that the operational review was not an investigation of a complaint against a police officer for unsatisfactory work performance. The Association does so because, if the operational review were such an investigation, it would fall under Part V of the Act and, under s. 126, an arbitrator would have no jurisdiction to review the decision under the collective agreement. That issue was addressed in the award issued on August 31, 2009. Both parties there took the position that the

performance;

(c) the chief of police shall accommodate the police officer's needs in accordance with the *Human Rights Code*, if the police officer has a handicap that requires accommodation because of handicap, within the meaning of the *Human Rights Code*;

(d) the chief of police shall recommend that the police officer seek remedial assistance, such as counselling or training or participation in a program or activity, if the chief of police is of the opinion that it would improve the police officer's work performance; and

(e) the chief of police shall give the police officer a reasonable opportunity to improve his or her work performance.

operational review was not an investigation of a complaint, and, on that foundation, for various reasons, I found I had jurisdiction to hear the grievance because it arose from the exercise of management's discretion under the collective agreement, and not from Part V of the Act.

189. The Board also argues that the operational review is not an investigation of a complaint. Rather it is a precursor to a possible complaint, or to possible use of the policy for officers' performance assessment. The Chief wanted some organizational answers to the problem of regulating its officers so as to ensure fewer public complaints. Also the Chief wanted guidance as to what informed the unusually high incidence of complaints against PC Turpin.

190. Given that both parties do not regard the operational review as the investigation of a complaint, s. 13(3) of O. Reg. 123/98 can have no application. It is a precondition for the investigation of a complaint. There is no precondition for the operational review, which is a general investigation.

191. So, in summary, the Chief has the authority to require the investigation the performance of an officer. That can be done under the rubric of an operational review. The fact that the Service investigated the Grievor's performance did not

make that investigation one that fell under Part V of the Act.

(iii) The manner in which the operational review was conducted

192. I have no doubt that Inspector Maiorano sought to prepare a fair assessment of the history of PC Turpin's performance. He sought, as best he could, to carry out the Chief's objectives and to try to address the source of the Chief's concerns, the large number of public complaints against the Grievor. The report presented to the Chief has some omissions, though, that are not explained. Particularly there is no explanation of the extent of the Grievor's involvement in various disciplinary matters listed. In some instances he was either minimally involved, or a witness to some other officer's involvement. This distinction is missing in the report.

193. While PC Turpin's awards and commendations are listed in the report (Exhibit 4A, p.6), there is no mention of the successful and praising performance reviews of the Grievor by his supervisors. There is also no mention of the Grievor's successful completion of an extended performance review that Inspector Maiorano himself conducted not long before the operational review. Inspector Maiorano explained in his evidence that some of the commendations

were included in the appendices to the operational review report, but one would have to read the appendices with care to find them, when mention of them in the main report would have been fairer to the Grievor.

194. Also, to have included the Grievor's successes would have better highlighted the anomaly he presented: an officer capable of exemplary performance, leadership and courage juxtaposed with his apparent excessive use of force, despite his being a specialist in this area, and despite his own knowledge of the need to de-escalate conflict situations.

195. The operational review report was ostensibly comprehensive, yet it insufficiently made reference to the Grievor's accomplishments and his successes. It therefore overemphasized the problematic nature of his behaviour as an officer and so did not provide a fair appraisal of the enigma he presents for the Service: at once immensely skilled, dedicated, competent, knowledgeable and yet, equally, over-zealous and apparently unable to exercise the restraint needed in challenging situations, despite the learning and experience that should have enabled him to do so.

196. Surprisingly the report makes no particular mention of the single most

important event of PC Turpin's career, his fatal shooting of an assailant in a domestic dispute to save someone's life. This was a singular act of bravery for which PC Turpin received considerable commendation from the police associations. It was also a unusual event for the Service, being one of two fatal shootings in a period of some 20 years. The omission, in my view, illustrated the rather narrow focus of the review: although it purported to be a comprehensive assessment of the Grievor's performance, it tended to emphasize his shortcomings, rather than the contradiction within his performance between exemplary and failing, as I have mentioned.

197. In the same vein, the failure of the report to mention PC Turpin's exemplary work on what was known as the White Oaks initiative – working with establishment owners in the bar district – is an unreasonable omission. The report included reference to the Grievor passing the performance monitoring he was subjected to, but it fails to reflect the many positive comments in the 2007 performance monitor report. Given that the operational review was meant to be a comprehensive and fair assessment of all of the Grievor's conduct, the Grievor should have received credit for his exceptional work in promoting responsibility among the establishment owners to garner their support to limit intoxication among bar patrons. Reference to his role in the initiative would have given a more

balanced assessment of his overall activity and behaviour.

198. I think it a defect in the process that the joint management team and Staff Sergeant Maiorano decided it would be better to rely only on the documents available concerning PC Turpin, and not to interview him at all. Despite the criticism the joint management team had of Sergeant Kritzer's interviewing of PC Turpin's supervisors, in my view, some insight might have been gained in the operational review had they been interviewed by Staff Sergeant Maiorano, and had their observations been included. This is all the more so true of the failure to interview the Grievor. He should have been asked to explain the principal problem the Chief had identified, the disproportionate number of public complaints brought against him. Besides defending himself, he may have provided some information that may have been of assistance to the Chief in deciding how to address the situation.

199. So, overall, Inspector Maiorano produced a substantial piece of work, though it had omissions that did not give sufficient credit to the Grievor.

200. The Association argues that PC Turpin was misled by being told he would receive the full version of the report, while receiving the disclosure version only.

The full version is not very different from the disclosure version. In substance, the difference between the full version and the disclosure version is only the list of organizational recommendations. PC Turpin had no particular entitlement to these. They were recommendations to the Chief on what the Service could learn from public complaints and on how it could improve organizationally. These were properly separated from the report that went to the Grievor.

201. Nonetheless, having decided to include the Grievor in the process – albeit only that he had notice of the investigation and that he would receive a report of its outcome, he ought to have been given a copy of the supporting appendices so he could see what information was relied on by Staff Sergeant Maiorano when he drafted the report.

202. Finally, given that the Chief is entitled to investigate officer conduct – and that I have found the operational review to be an example of such an investigation – there is no particular rule as to the fairness of such an investigation. The more unfair is an investigation, the more likely it will be flawed when put to a different purpose, such as prosecuting an officer. So too with the operational review report. It could have been done more fairly to the Grievor, as I have said, but the more important question is what difference that would make? That depends on the

status of the report, which I address below.

(iv) the findings made in the operational review

203. Inspector Maiorano's report had some valuable recommendations. He pointed out the inconsistency in the discipline issued to the Grievor over the period of his employment. Despite repeated misconduct, there was no consistent escalation of penalty as would be consistent with progressive discipline. There was not a long-term consistent view taken of PC Turpin in management's handling of his performance. Each period was treated separately, with its own distinct response, sometimes inconsistent with the previous response. These anomalies, or organizational lapses, were pointed out by the report.

204. The report made beneficial organizational suggestions in order to identify consistent patterns in officer behaviour and to address such patterns appropriately.

205. The organizational recommendations were of value to address the situation upon the withdrawal of a public complaint. The procedures recommended by Inspector Maiorano in the report, if implemented, would likely ensure a more coherent, consistent and effective organizational response to the

withdrawal of a public complaint against a police officer.

206. Besides these observations, particularly in relation to PC Turpin, I am not persuaded the Chief was placed in any better position as a result of the report than he was at the start of the operational review. The conclusions reached in the report, that PC Turpin “has both unsuccessfully and successfully completed previous forms of performance management processes”, and that “these undertakings do not seem to achieve long-term performance improvement behaviours and in fact any performance improvements seem to be short lived”, were presumably known to the Chief before the operational review began. The only substantive recommendation in the report was to threaten to PC Turpin, that if he did not maintain the standards required from further performance improvement plans, “that progressive actions be undertaken”, without such actions being specified. In short, while the report has much content, lots of history (some of it inaccurate), it was thin on what the Chief could do to address the problem the Service faced with PC Turpin, that his performance was good when he was closely monitored, but that its quality declined when not closely supervised. The Chief’s advice to PC Turpin, when he mandated the operational review, was that “the Service must investigate your on the job performance to determine if remedial action is necessary ...”. The Chief said that the

investigation of “the circumstances surrounding [the public] complaints” was “to ensure that your training, the Service’s policies and the handling of these complaints has been appropriate”. Besides the recommendations for amendments to the Service’s policies for handling public complaint withdrawals, little advice was provided in the elaborate review that was germane to the Grievor.

(v) the status now of the operational review report

207. It appears that none of the recommendations of the operational review, including the organizational recommendations, have been implemented. This is, in part, the consequence of the establishment provincially of the Office of the Independent Police Review Director (OIPRD) that looks at all public complaints. It became effective in October 2009. All public complaints are referred to that agency, which reviews the relevant information and makes appropriate recommendations. The Service looked into acquiring a computer program to maintain an ongoing record of officer conduct, but the price was prohibitive and the idea was not pursued.

208. After the review report was issued, the Grievor was charged criminally for allegedly assaulting the two individuals referred to above when they were being

held in police custody. The videos and circumstances of those incidents were revealed by the operational review. The Service decided to initiate criminal proceedings against PC Turpin as a result of the revelations. The charges were initiated when the report was issued. The Grievor has been on paid suspension from work since then, May 2008. There was press publicity of the charges at the time. PC Turpin attributes the publicity to the operational review, though the publicity clearly relates to his being charged for criminal offences, and not to the operational review.

209. Attention was drawn in the hearing to the Service's Records Retention Bylaw, AO-07-008, applicable at the time of the operational review. Under No. HR06, on pp.28-29, provision is made that all records concerning the Grievor's performance evaluations relied on for the operational review are to be retained for 8 years. Though this limit is qualified to make clear that the 8 years of retention runs from after the duration of the Service, meaning that while the Service operates, the retention continues. It appears, therefore, there has been no breach by the Service arising from retaining the records on which Staff Sergeant Maiorano relied to prepare the operational review report.

210. The question, though, remains, what is the status of the operational review

report now that it is complete?

211. Were charges of misconduct brought against PC Turpin, then, under s. 68(9) of the Act, the allegations of the complaint would not form part of his employment record, unless the complaint were proved on clear and convincing evidence.

212. As Employer counsel argues, the operational review report is the result of a preliminary investigation, preparatory to some further steps or procedures under the Chief's powers.

213. The operational review was not an investigation of unsatisfactory work performance under Part V of the Act. It was not a report arising from s. 13 of the Regulation. It has no status under the Act or any Regulation. It was not done in a manner that was fair to PC Turpin. Given that the report does not form part of any discipline or formal performance appraisal, it ought not to prejudice PC Turpin's employment and career. Despite this, the Service has given no assurance to the Association and to the Grievor that the operational review report will not form part of PC Turpin's employment record.

214. I find, given my conclusions on the operational review report, the narrow purpose for which the report was written, and the limitations and deficiencies in the report, there ought to be significant limits on the use of the operational review report.

215. The first limitation I direct is that the operational review report will not itself form part of PC Turpin's employment record.

216. The operational review report is the compilation of a lot of information concerned PC Turpin; information that exists already in the Service's records. It would be artificial to say that the Service cannot rely on the report for any purpose, when the information is otherwise accessible through sources other than the report. There are some reasonable limits, though, that should apply to use of the information contained in the report in relation to PC Turpin's employment. The first is a temporal limit. Any information relied on by the Service in the report, which might be used for an employment purpose in relation to PC Turpin, will not go back more than would be permissible for timely use if a complaint or other proceeding were brought against him under the Act.

217. The second limit is procedural. The information in the report may be used

for an employment purpose in relation to PC Turpin only in recognized performance review or complaint procedures under the Act, in which PC Turpin has all the statutory and collective agreement procedural protections that were absent in the operational review.

218. The reason for these conclusions is that, while the Chief has powers to conduct investigations, as in this case, if those investigations are going to impact the employment record of an officer, then they must arise out of a statutory procedure, either Part V of the Act or the performance review process under s. 13(3) of O. Reg. 123/98.

219. In the circumstances, I direct that the report will not form part of PC Turpin's employment record. Further, the report may be used for a purpose relating to PC Turpin's employment only back to a period no more than would be permissible for timely use if a complaint or other proceeding were brought against him under the Act, and only if PC Turpin has the procedural protections afforded to him under the Act and the collective agreement. To this extent, I uphold the grievance. Use other than as so directed would be arbitrary and discriminatory.

(vi) the decision to transfer PC Turpin to CARU

220. CARU is staffed typically by officers facing charges under the *Police Services Act*, requiring them not to be on the road, officers with WSIB claims, officers with injuries or accommodated off their regular job on light duties. It is colloquially referred to as, “the penalty box”. The Grievor saw his placement there as a punishment, as a form of disguised discipline and the Association submits that is how officers in the Service regard placement there if one is not being accommodated for injury or illness.

221. The Chief made clear in the letter to the Grievor appointing the operational review that he was being transferred to CARU for administrative reasons. He did so, “to insulate [the Service], its officers and member of the community from undue risks.” The Chief, as head of the Service, has a very wide discretion as to how he assigns his officers. Unless he is in bad faith, or arbitrary, his discretion cannot be impugned. In my view the Chief had reasonable grounds for coming to the conclusion he did, that the Service would be better served with PC Turpin in CARU and off regular duties in the community while the operational review was done. He did not want to risk another public complaint against the Grievor during the period of investigation under the operational review. I therefore find no breach of the collective agreement by the Chief in

assigning the Grievor to CARU, pending the outcome of the review.

222. A few days after the review report was issued the Grievor was suspended from work pending the outcome of criminal proceedings against him. His assignment to CARU therefore came to an end. He has not been back to work since. The grievance concerns the assignment to CARU as a consequence of the operational review. That assignment has been superseded by events. The rationale for the assignment – to keep the Grievor in CARU pending the outcome of the report – has also ended. What happens to PC Turpin's employment now is beyond the scope of the grievance, as will be any assignment or transfer that might occur upon his return to work. I therefore make no finding of a breach of the collective agreement on account of PC Turpin's transfer to CARU, and I make no order with respect to this aspect of the Association's grievance.

The grievance reviewed

223. I have reached a number of conclusions regarding the operational review, above. I will not repeat them. I summarize the outcome, though, in relation to the specific allegations of the grievance.

224. I do not find a violation of s. 68(9) of the Act because that provision does not apply to the operational review. However, I find that the operational review report may not form part of the Grievor's employment record.

225. As I have explained, although the operational review was arguably conducted in accordance with a policy for the assessment of police officers' work performance established pursuant to s. 13 of O. Reg. 123/98, that did not preclude the Chief from conducting the operational review. There was accordingly no breach of Article 5.01(c) on this account.

226. The allegation that the operational review breached sections 56, 57, 58, 59, 64, 68, 69 and 72 of the Act is not established. Those sections fall under Part V of the Act. I have no jurisdiction to make the inquiry, but in any event, the sections have no application to the operational review.

227. I am not persuaded, except in the Board not assuring the Association that the operational review will not form part of the Grievor's employment record and that only reasonable use will be made of the report, that the operational review constitutes discrimination, or an arbitrary or capricious exercise of the Board's management function. As I explained I am satisfied the Chief was bona fide in

appointing the operational review and that he did so on reasonable grounds, given the information available to him. In other words, the operational review was a reasonable exercise of the Board's management functions.

228. I am not persuaded that the operational review was conducted in a biased manner. There were some omissions, as I have said, but the endeavour of Inspector Maiorano was to be fair to the Grievor. I recognize that the procedure was not fair to the Grievor, given that he was not given any participation, but, provided the operational review can have no impact on the Grievor's employment record, except as I have directed, the absence of a fair process does not nullify it.

229. There was no evidence to establish that the operational review found fault with the Grievor for problems with the Board's own policies and procedures, or on account of circumstances beyond his control.

230. Similarly there was no evidence of an improper use of power in the establishment and conduct of the operational review. Nor do I find that the Grievor was harassed by the operational review, or as a consequence of it.

231. While I recognize that the operational review was not a fair process, I am

not persuaded that any damages should be awarded to the Grievor on that account. The Association argues there had been much adverse publicity in the local press as a result of the Employer's actions that harmed the Grievor's reputation. I have no evidence that the publicity was the result of the operational review. The evidence suggests it much more likely that the criminal charges brought against the Grievor caused the publicity.

232. I have addressed the issue of PC Turpin's transfer to CARU above. I find that transfer was intended as a temporary measure pending the outcome of the operational review and that it has been superseded by events. Any future assignment of PC Turpin is no longer part of this grievance.

233. Various remedies have been sought by the Association consistent with the allegations made in the grievance. As I have said, I order the following remedies:

- a direction that the operational review report not form part of PC Turpin's employment record;
- a direction that any information relied on by the Service in the report, which might be used for an employment purpose in relation to PC Turpin, will not go back more than would be permissible for timely use if a

complaint or other proceeding were brought against him under the Act;
and

- a direction that any information in the report relied on by the Service for an employment purpose in relation to PC Turpin may be used only in recognized performance review or complaint procedures under the Act, in which PC Turpin has all the statutory and collective agreement procedural protections, absent in the operational review.

234. The grievance is therefore partially upheld.

235. I remain seized of the implementation of the award.

DATED at TORONTO on December 4, 2012.

A handwritten signature in blue ink, appearing to read "Albertyn", is written over a horizontal line.

Christopher J. Albertyn - Arbitrator