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14/08/14

**POLICE BOARD**

**NUKU'ALOFA**

**PB 1 of 2018**

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**BETWEEN:**

**POLICE**

**Applicants**

**AND:**

**SUPERINTENDENT TU'UNGAFASI POLELEI FALAKISENI**

**Respondent**

**MEMBERS OF THE BOARD**

Hon. Justice Cato

Lord Tupou

'Alisi Taumoepeau

**PARTIES**

Counsel for the applicant Mr. James Lutui

Superintendent Tu'ungafasi Polelei Falakiseni appears in person

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**J U D G M E N T**

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1. This is a referral from the Police Employment Committee under section 63 (1) (c) (i) and 63 (3) of the Tonga Police Act for the reduction of rank of Superintendent Tu'ungafasi Polelei Falakiseni one down to the rank of Chief Inspector of Police with salary Band I (\$30,240 - \$45,360) starting at the minimum point.
2. The reason for the PEC recommending reduction of rank is because it found Superintendent Falakiseni to have committed a serious lack of discipline pursuant

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to section 55 (a) and (b) of the Tonga Police Act and breach of Rule 17 (1) (xxxi) of the Police Rules 1958 and Codes 8.3 and 8.5 of the Tonga Police Code of Conduct.

3. For ease of reference of Rule 17(1) (xxxi) and Codes 8.3 and 8.5 are set out as follows;

**"17 (1) (xxxi)** Willfully, or through negligence, allowing any prisoner to escape;"

**"8. Neglect of Duty/Abuse of Authority**

8.3 Tonga Police members will not be careless, lazy or negligent in carrying out his or her duties, without reasonable cause, including for example by failing to properly supervise his or her subordinates.

8.5 Tonga Police members who have the authority to use discretion in determining any action, must ensure their decisions are unbiased, reasonable and within the boundaries of relevant law and policy."

4. At all material times Superintendent Falakiseni was the Officer in Charge of Police District No. 5 namely Vava'u.
5. Mr Dean Jay Fletcher an American Citizen was the owner of a yacht "Sea Oak" in which he came to Vava'u with his wife Mrs Patricia Linne Kearney. The yacht was moored in Neiafu Harbour near Puataukanave Hotel.
6. On 7 July Fletcher went to the Police Station in Vava'u and reported that his wife died in their yacht. Information gathered by the Police confirmed that the deceased was assaulted by Fletcher.
7. Fletcher was arrested on 9 July 2016 and taken to the Magistrate charged with the crime of Manslaughter. The Magistrate ordered that Fletcher be remanded to Police custody to be brought to court on Monday 11 July 2016. The Magistrate also ordered that the Police take Fletcher to his yacht to get his money, credit card, passport and clothing and other belongings of his. A list is made in the Internal Investigator's report of 30 December 2016 and included money of different countries (Canada, New Zealand, Australia, American and Tongan), 2 credit cards, Bank card, USA Passport number 488086393 and Canadian captain license. Fletcher's belonging were kept in the prisoner's property storage at the office of the Response Unit.

8. On Sunday 10 July 2016 Fletcher made his first attempt to escape. He was caught by the Police after he had jumped into the sea to swim to his yacht.
9. On Monday 11 July 2016 Fletcher was taken to the Magistrate Court charged for manslaughter and interference with the course of justice. The Magistrate ordered that Fletcher be remanded in police custody.
10. Fletcher was kept in the Police cell until 12 August 2016. He was allowed in and out in the yard to exercise and read his book. He was also allowed to contact his lawyer and friends in Vava'u by phone.
11. On the 12<sup>th</sup> August 2016 Falakiseni heard a lot of noise and swearing from the police cell. He went to the station and asked the officer on duty what the commotion was about. He was informed that in police operation that evening, 7 people were arrested for drunken behaviour in public and detained in the same cell as Fletcher. He directed that Fletcher be brought to the Criminal Investigation Unit room and a bed be made for him on the table where he will sleep. He says that this arrangement was meant for only one night but Fletcher stayed in the CIU room up to his escape on 29 September 2016.
12. Falakiseni admit that his order for Fletcher to remain in the CIU room was only for 1 night was not followed and admits that this was negligence and fault on his part for which he humbly apologized.
13. On the early morning of 29 September 2016 Fletcher escaped from custody at approximately 0430am and got on his yacht before police became aware.
14. Falakiseni was informed of the escape at about 0445am and their boats including police boat "Kapakau 'o Tafahi" were engaged in the chase of "Sea Oak". But they failed to apprehend Fletcher.
15. Fletcher sailed to Pago Pago, American Samoa. Request was made for his extradition to Tonga to stand trial but the American authorities said he had to be transferred to Hawaii. Application for extradition was made to Hawaii but this was denied. It appears that Fletcher, an American citizen, is free from his crime alleged in Tonga. As an aside, we suggest that Government clarify Tonga's position with the United States with regard to the extradition of American citizen to face criminal charges in Tonga.
16. The Internal Investigator Detective CIP Meleane Taueli made her first report on 30 December 2016 to the Police Employment Committee. In this report she identified 7 police officers including Superintendent Falakiseni to be considered on their performances or lack thereof that allowed the escape of Fletcher.

17. After supplying more information requested by the Police Employment Committee, a decision was made by the PEC on 3 October that Falakiseni be issued with a Notice of Loss of Confidence in accordance with Section 75 of the Tonga Police Act, 2 Police Officers were reprimanded, to provide a written reply to PEC and placed in probation for 6 months and 1 Police Officer was issued with a written reprimand then freed from the disciplinary process, 1 Police Officer was placed on 6 months' probation and the last Police Officer was released from the disciplinary process.

18. The Notice of Loss of Confidence was issued on the 16 October 2017 and delivered to Falakiseni on 17 October 2017. The Notice informed Falakiseni that the PEC is considering recommending to the Police Board for the termination of his appointment with Tonga Police under section 74 (2) (a) of the Tonga Police Act. This was based on:-

- Gross negligence as Officer in Charge, Police District 5 that allowed Fletcher who was charged with the brutal death of his wife, to escape on 29 September 2016.
- Fletcher's escape from Police custody was directly linked to his negligence, lack of judgment, lack of direction and oversight not expected from an officer of his rank and experience.

These findings stem from the decision of Falakiseni to allow Fletcher to be kept out of the prison cell and keep him in the CIU room both day and night. This decision was made knowing that Fletcher was a high risk of escaping as he had tried this on 10 July 2016.

19. Fletcher's yacht Sea Oak was not properly secured and his passport, cash and credit cards were not properly secured.

20. The escape has caused huge embarrassment to the Tonga Police, the Government of Tonga and the Kingdom of Tonga. Further, the deceased's family is still deprived of the justice for the brutal murder of their loved one.

21. In a letter dated 18 October 2017 Falakiseni responded to the Loss of Confidence Notice issued by the PEC.

22. With regard to his decision on 12 August 2016 to put Fletcher in the CIU room instead of the cell, this was because the noise and swearing in the cell which then held 7 people who were arrested because of drunken behaviour, he thought it's

best to put Fletcher in the CIU room because of his feeling of love (maybe more sorrow) for the foreigner, this was supposed to be for only one night.

23. Falakiseni admitted the allegations made against him and want to apologize and confirm that it was his carelessness with his duties that enabled Fletcher to escape while remanded in police custody.
24. Falakiseni pleads the PEC to reconsider its recommendation to terminate his employment. He has served as a police officer for almost 34 years rising to the position of Superintendent in 2012. He has had commendations from 3 Commissioners of Police and 4 Deputy Commissioners of Police. He has been working in Vava'u for 26 years and in a number of various working commitments and is in his sixth years training to become a Reverend in the Free Church of Tonga. He has had some mental problems since the decision to terminate his employment. He has a loan with the Tonga Development Bank which requires him to pay the Bank \$1500 per month.
25. In addition, there is no secure place in Vava'u to hold prisoner's like Fletcher. There was a lack of man power at the time and Police Officers had to work long hours. We feel that the Authority should address and find a remedy to these problems.
26. Finally Falakiseni in summary of his response to the allegations made against him by the PEC says – "I apologize and please forgive me and grant me another chance and I am sorry again".
27. On 19 January 2018 the PEC met to consider the response from Falakiseni. The PEC acknowledged the honesty of submission by Falakiseni. He did not blame anyone else but took full responsibility for his actions. It also noted that Falakiseni has an extensive police career with positive recommendations through his 34 years' service. Prior to this there has been no adverse report against him. Nevertheless, the PEC decided that the breach of discipline by Falakiseni was serious and referred this matter to the Police Board recommending the termination of his appointment pursuant to section 63 (1) (c) (iv). He was transferred to Tongatapu awaiting the decision of the Police Board.
28. On 13 July 2018 the PEC met after instructions sought by the Senior Crown Counsel James Lutui on 13 July 2018, reviewed it's position with regards to it's referral to the Police Board. PEC reviewed it's finding in particular and importantly, the fact that there was no corruption involved, his honesty and cooperation during investigation, his taking full responsibility for what happened and his unblemished record of 34 years of service. PEC also acknowledges

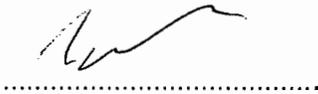
Falakiseni's loyalty and ongoing commitment to his job and the Tonga Police despite knowing PEC's intent to terminate his appointment in the earlier decision.

29. PEC in conclusion wishes to modify its position in terms of the penalty to impose with a recommendation for Falakiseni's rank to be reduced one rank down. That is to the rank of Chief Inspector of Police.
30. The PEC also recommended that with the reduction in rank to Chief Inspector, Falakiseni will be paid under Salary Band (\$30,240 - \$45,360) starting at the minimum point i.e. \$30,240.
31. We thank the Commissioner and the PEC members for the hard work and effort put into this investigation. We thank also the Internal Investigator for her diligent work in which greatly help in closing the issues of this case.
32. We also thank the PEC for reviewing their original stance of recommending the termination of the appointment of Falakiseni to the reduction of rank to Chief Inspector of Police. The reasons given for the charge of view are accepted and supported by us, and in particular by the fact that there was no evidence of corruption, and the long unblemished service he served rising to the distinguished post of Superintendent of Police in 2012.
33. There is only one part of the PEC decision that we do not agree with and that is with the regard to the reduction in salary. As we see in section 63 (1) (c) (1) the penalty to impose is the reduction in rank or salary. As a matter of statutory interpretation when the word OR is placed between "reduction in rank" and "salary" this means one or the other, not both as this will have the effect of a double punishment for the same offence which is not allowed under clause 12 of the Constitution.
34. Falakiseni's current salary we are told is \$39,842.92 per annum.
35. We accordingly make the following Orders;
  - i. That Superintendent of Police 538 Tu'ungafasi Polelei Falakiseni rank be reduced to Chief Inspector of Police due to breach of discipline pursuant to section 55 (a) and (b) of the Tonga Police Act 2010; breach of Rule 17 (1) (xxxi) of the Police Rule 1958 and Code 8.3 and 8.5 of the Tonga Police Code.
  - ii. That the salary of Tu'ungafasi Polelei Falakiseni will remain at what he was getting as Superintendent of Police, namely \$39,842.92 per annum on salary Band I (\$30,240 - \$45,360) of a Chief Inspector of Police.

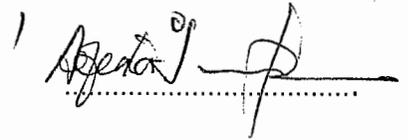
- iii. That this order becomes effective from the date it was orally delivered namely 9 August 2018.



**Hon. Justice Cato  
(Chairman)**



**Lord Tupou  
(Member)**



**'Alisi Taumoepeau  
(Member)**

**DATED: 9 AUGUST 2018**