ONTARIO CIVILIAN POLICE COMMISSION

Safety, Licensing Appeals and Standards Tribunals Ontario

COMMISSION CIVILE DE L'ONTARIO SUR LA POLICE

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Citation: Nobody v. Andalib-Goortani and the Toronto Police Service and Office of the Independent Police Review Director

2018 ONCPC 6

Date: March 12, 2018
File Number: 15-ADJ-015

Appeal under section 87(1) of the *Police Services Act,* R.S.O. 1990, *c. P.15, as amended*

Between:	Adam Nobody	Appellant
	and	
	Cst. Babak Andalib-Goortani and Toronto Police Service	Respondents
	and	
	Office of the Independent Police Review Director	Intervener

DECISION

Panel: D. Stephen Jovanovic, Associate Chair
John Kromkamp, Member
Katie Osborne, Member

Appearances: Adam Nobody, self-represented, Appellant
Harry Black Q.C., counsel for Cst. Andalib-Goortani, Respondent
Sie-Wing Khow, counsel for Toronto Police Service, Respondent
Jean Iu, counsel for the Intervener

Place and date of hearing:	Toronto, Ontario October 5, 2017

INTRODUCTION

[1] Cst. Andalib-Goortani, the respondent, pleaded guilty to one count of discreditable conduct, contrary to section 2(1)(a)(ix) of the Code of Conduct under the *Police Services Act (*the *PSA).* That section reads as follows:

> 2(1) Any chief of police or other police officer commits misconduct if he or she engages in,
>
> (a) Discreditable Conduct, in that he or she,
>
> (ix) Is guilty of a criminal offence that is an indictable offence or an offence punishable upon summary conviction,

[2] The respondent had been convicted on September 12, 2013 of the *Criminal Code* offence of assault with a weapon arising from his involvement in the arrest of the appellant during the G20 Summit in Toronto on June 26, 2010. This was the conviction that led to the discreditable conduct charge. Following a two-day hearing before the Honourable Lee K. Ferrier (the Hearing Officer) the respondent was assessed a penalty of the forfeiture of five days' pay.

[3] Pursuant to section 87(4) of the *PSA,* the appellant was granted leave by the Commission to appeal the penalty imposed by the Hearing Officer.

DISPOSITION

[4] For the reasons that follow, the penalty is confirmed.

BACKGROUND

[5] The actions of the police in dealing with protestors, peaceful and violent, during the G20 Summit has been chronicled in a number of reports and decisions of the Commission. The Independent Police Review Director released his report, *Policing the Right to Protest,* in May 2012. In *Fenton v. Toronto Police Service,* 2017 ONCPC 15 (CanLII), the Commission reviewed the violence that marked the Summit and the mass arrests effected by the police in their attempts to protect the city and themselves. As is now well known, they were not entirely successful in those attempts.

[6] On the day of the appellant's arrest, the respondent was part of a team of officers assigned to provide security during the march on Queen's Park that attracted an estimated 10,000 people. His original duties ranged from traffic regulation to searching for hidden caches of weapons.

[7] As some of the protestors became unruly and violent, the respondent was assigned to an arrest team, a duty that he said he had no experience carrying out and no training to perform.

[8] When a team of officers approached the appellant in an attempt to arrest him for his actions while protesting, he tried to flee but was caught and taken to the ground by four officers. The respondent arrived at the melee at the point in time when, according to the Hearing Officer "…the other team members, with what is fairly described as overwhelming physical superiority were grappling with [the appellant] on the ground."

[9] The actions of the respondent were variously described as prodding the appellant with his baton, delivering a series of forceful baton thrusts, and blows to the appellant's thigh in order to secure compliance.

[10] The appellant's arrest was recorded by at least three bystanders.

[11] The respondent was eventually identified, charged and convicted of assault with a weapon following an eight-day trial before Justice Botham of the Ontario Court of Justice. She wrote the following in her decision:

> The objective evidence of the video footage at this trial is limited but cogent. It shows Adam Nobody on the ground surrounded by officers who are crouched over him. He is being punched, kneed and kicked. When the defendant prepares to deliver that second series of forceful baton thrusts, one officer has just applied a knee strike to Adam Nobody's face.
>
> I do not believe, nor am I left in a state of reasonable doubt that any of the blows struck by the defendant were proportionate or necessary and I am satisfied beyond a reasonable doubt that the force used by the defendant was not necessary to control Adam Nobody or to assist in his arrest. He will be found guilty of the charge of assault with a weapon.

[12] The respondent was sentenced to 45 days in jail and required to provide a DNA sample due to the nature of the conviction. The respondent appealed both the conviction and sentence.

[13] Justice O'Marra of the Ontario Superior Court of Justice, in a decision dated March 4, 2015, dismissed the appeal from the conviction but allowed the sentence appeal. In doing so, he wrote the following (the respondent is described as the appellant):

> The appellant is a first offender. There is no indication the appellant has a violent disposition that would cause concern for future misconduct. There is no prior history of misconduct. The appellant has made a long-standing and positive contribution to the community on and off the job. He has sustained a significant loss of income relate to his employment. His reputation in the community at large has been tarnished.
>
> The appellant has experienced significant personal, family and professional negative impacts resulting from the conviction. He will have to deal with them long after any court ordered sentencing sanction. In the particular circumstances of this offence and this offender the principles of general deterrence and denunciation can be adequately addressed by a period of probation.

[14] Justice O'Marra varied the sentence to one of time served, probation for 12 months and the requirement that the respondent complete 75 hours of community service. He also noted that the prosecution had not alleged that the respondent caused any of the injuries sustained by the appellant and that it was agreed that the appellant's arrest was lawful.

[15] There was no *viva voce* evidence heard by the Hearing Officer. The prosecution essentially relied on the decision of Justice Botham and the various videos. The defence also relied on the videos, the transcripts from the trial and, to a disputed extent, the decision of Justice Cunningham in the *PSA* proceeding involving four other officers who were members of the arrest team. On the respondent's behalf, over sixty letters of support were presented to the Hearing Officer.

ISSUES

[16] The issues raised by the appellant may be summarized as follows:

I) The Hearing Officer erred in law in failing to consider the effect of the respondent's misconduct on the appellant or on public confidence.

II) The Hearing Officer erred in his assessment of mitigating factors.

III) The Hearing Officer erred in his assessment of aggravating factors.
IV) The Hearing Officer's decision does not accord with past cases.

[17] The Toronto Police Service (the TPS) sought a one-year demotion of the respondent before the Hearing Officer while the appellant sought his dismissal. The TPS submitted on this appeal that the decision of the Hearing Officer was reasonable and it supports the respondent's position that the appeal should be dismissed. The appellant maintains that the respondent should have been dismissed from the TPS and requests that we so order or refer the matter back for a new hearing on penalty before a different hearing officer.

[18] The Director submitted that the Hearing Officer erred in allowing the respondent to file evidence that contradicted the findings of Justice Botham. The Director submitted that in doing so, the Hearing Officer allowed a collateral attack on the conviction contrary to the principles set out in the Supreme Court of Canada decision in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79,* [2003] 3 S.C.R. 77.

[19] According to the Director, the *C.U.P.E.* decision acts to prevent the respondent from questioning the finding of guilt and the specific findings of fact made by Justice Botham.

[20] On the question of the appropriate standard of review, the Director acknowledged that generally the standard of review is reasonableness. However, the Director submitted that the admissibility of evidence and the use to which it can be put is a question of law that is subject to a correctness standard of review. The Director requests an order referring the matter back to the Hearing Officer for a new penalty hearing.

ANALYSIS

[21] It is now established that the standard of review to be applied by the Commission to decisions of a Hearing Officer is reasonableness on questions of fact and correctness on questions of law: *Ottawa Police Services v. Diafwila,* 2016 ONCA 627 at paras. 53-63. Questions of whether the facts satisfy a legal test are questions of mixed fact and law and are also to be reviewed on the standard of reasonableness unless there is an extricable question of law involved: *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII) at para 53.

[22] The role of the Commission in reviewing a penalty decision was set out in *Karklins v. Toronto (City) Police Service,* 2010 ONSC 747 (Div. Ct.) at para 10 where the court confirmed the following statement made by the Commission:

> [The Commission's] function is not to second guess the Hearing Officer or substitute our opinion. Rather, it is to assess whether or not the Hearing Officer fairly and impartially applied the relevant dispositional principles to the case before him or her. We can only vary a penalty where there is a clear error in principle or relevant material facts are not considered. This is something not done lightly.

[23] Similarly, in *Kobayashi et al and the Waterloo Regional Police Service,* 2015 ONCPC 12 (CanLII), the Commission wrote the following:

> [T]he Commission is not permitted to reweigh the disposition factors to come to a conclusion on penalty which it believes is more appropriate. Unless there has been an error in principle or relevant factors have been ignored, the Commission cannot interfere with a decision on penalty even if it might have come to a different conclusion if hearing the matter at first instance.

[24] Ultimately, within the above framework, the question to be decided is whether a penalty decision is reasonable.

[25] We will now deal with the issues raised by the parties.

I) The Hearing Officer erred in law in failing to consider the effect of the respondent's misconduct on the appellant and on public confidence

[26] The Hearing Officer began his analysis of the law at page five of his decision where he wrote the following:

> The cases reflect features of police discipline cases that bear consideration, including the need for general deterrence; conduct of officers requires a higher standard than ordinary citizens; and the damage improper conduct causes to the public perception of the police – bringing discredit to the police force and impairing of public confidence.

[27] The decision of the Hearing Officer is brief, essentially seven and a half pages. He did, however, review the thirteen cases put forward by the prosecution and the twenty-three decisions referred by the defence. He also had before him the decisions of Justice Botham and Justice O'Marra.

[28] While the reasons of the Hearing Officer could have been more expansive, we are satisfied that he was well aware of and did take into account the effect of the respondent's misconduct in determining what he believed was an appropriate penalty. In reviewing his decision we do so with the following quotation in mind from *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

II) The Hearing Officer erred in his assessment of the mitigating factors

[29] The appellant made four submissions under this heading. In summary these were:

- The *PSA* proceeding could not in and of itself constitute a mitigating factor;
- The criminal proceeding could not constitute a mitigating factor;
- The determination that the sentence for assault with a weapon was "too large a price to pay" was a collateral attack on the ruling of the criminal court;
- There was no evidence before the Hearing Officer that the appellant suffered "no bruises and no injuries" as a result of the assault.

[30] The Hearing Officer wrote the following in his decision at the paragraphs indicated:

> 23. This proceeding and the criminal conviction in 2013 have wreaked havoc on the life of this officer…
>
> 45. The officer's three years of a commendable record on the force have been followed by five years of turmoil – living with these proceedings hanging over his head for five years; the strain of a criminal proceeding followed by a criminal conviction, appeal and penalty; his marriage breakup; his limited employment activity in a desk job for a large part of that period; the effect on his health.
>
> 46. The officer has already paid too large a price for his misdeed.

[31] Hearing Officers typically list then deal individually with the aggravating and mitigating factors that have developed in the case law to be considered in

assessing an appropriate penalty. There are sixteen such factors set out in *Ceyssens, Legal Aspects of Policing,* Earlscourt, 2014. There is no requirement that all factors must be set out in a penalty decision, but the practice that has developed of doing so is beneficial to all of the parties, as well as to the Commission, when asked to review a penalty decision.

[32] The respondent submitted that the Hearing Officer did not consider the disciplinary or criminal proceedings as mitigating factors, but recited them as some of the "very unfortunate and undesirable consequences of the various proceedings". He submitted that it would have been an error in principle had the Hearing Officer not considered the proceedings and their impact on him.

[33] On any fair reading of the decision of the Hearing Officer, he did in fact consider the "five years of turmoil" the respondent faced after the assault on the appellant as a mitigating factor. His sympathies were not hidden. The respondent was to a large extent the author of his own misfortune. Whether due to lack of experience or training or having been caught up in the heat of the moment, he did commit a criminal assault with a weapon. However, one of the factors to be considered by a Hearing Officer, as set out in *Ceyssens,* is the effect of the matter on the officer and his family.

[34] Accordingly, we see no error in the Hearing Officer having considered the impact of the proceedings, criminal or disciplinary, on the respondent. Nor do we consider that his comment about the respondent having paid "too large a price for his misdeed" as being a collateral attack on the criminal proceeding. It was simply his view of what happened to the appellant in the years since the assault and since the conviction. More will be said about what constitutes a collateral attack below when dealing with the similar argument made by the Director.

[35] The Hearing Officer did reject some medical records tendered by the appellant, but we do not consider that doing so foreclosed his finding that the appellant did not suffer any injuries or bruises as a result of the assault with the baton. The records were rejected because they were incapable of establishing when the appellant sustained his injuries or by whom the injuries were caused. The appellant attempted to introduce the records as they "spoke to the severity of the force" being applied during the arrest. In our view, the Hearing Officer was correct when he refused to admit the medical records.

[36] There was no evidence presented at the criminal trial as to any injuries to the appellant that may have been caused by the respondent. Justice O'Marra noted that the prosecution did not allege that the respondent caused any injuries. We acknowledge that the Hearing Officer wrote that the appellant suffered no injuries

as a result of the assault. Correctly put, there was no evidence that the appellant suffered any injuries caused by the respondent. In our view, the difference in wording is legally insignificant.

III) The Hearing Officer erred in his assessment of the aggravating factors

[37] The appellant submitted that the Hearing Officer made four errors in his assessment of what should have been the aggravating factors in arriving at the penalty. In summary, these were;

- The failure of the appellant to wear a name tag or other identification;
- The respondent's continued avoidance of responsibility by not identifying himself after the assault;
- The respondent's "untruthfulness" while testifying before Justice Botham
- The respondent's lack of remorse.

[38] The Hearing Officer wrote the following at para. 42 of his decision:

> Concerning the Officer's failure to have worn his badge number or name tag, he was administratively disciplined for that failure. In my view, it would be inappropriate to consider that as an aggravating circumstance in this case.

[39] We have not been provided with any authority that would suggest the Hearing Officer was wrong in so finding. In our view, this was a reasonable consideration.

[40] The appellant submitted that the respondent should have come forward and identified himself as having been involved in the assault once his picture was published in the media. The Hearing Officer dealt with this submission at para. 43 of his decision where he wrote:

> Similarly, his failure to come forward to identify himself is explained, at least to a large degree, by the fact that when photos were published in the media, he was on his charitable trip to El Salvador.

[41] We accept the respondent's submission that there was no evidence at the criminal trial or before the Hearing Officer that the respondent was aware that his picture had been published. While it may be naïve to think that at some point he did not become aware, whether through friends or colleagues, that his picture had been published, there was no evidence to establish what he knew and when he knew it. We see no error in the Hearing Officer's decision on this point.

[42] The Commission has previously considered whether an officer's "untruthfulness" in testifying, as was found in this matter by Justice Botham, could be used as an aggravating factor when assessing a penalty. In *Rose v. Toronto Police Service,* 2016 CanLII 84144 (ONCPC) the Commission adopted the principle stated in *R. v. Bradley,* 2008 ONCA 179. The court held that it was an error for a trial judge to treat an accused's fabricated evidence as an aggravating factor when deciding an appropriate sentence. We see no reason to depart from that principle.

[43] In *Batista v. Smith and the Ottawa Police Service,* 2007 ONCPC 6 (CanLII), the Commission considered whether a lack of remorse, as appears to have been the situation with the respondent, should be considered an aggravating factor. The Commission wrote the following:

> Finally, there is the matter of the penalty not reflecting Constable Batista's 'defiant attitude' and 'refusal to accept responsibility'. Constable Batista pled not guilty. He mounted a vigorous defence to the charge against him. He offered his explanation of what occurred and why.
>
> All of these actions were his right. Constable Batista cannot be penalized for so doing. Rather he is not entitled to any mitigation that flows from a guilty plea and clear acceptance of responsibility.

[44] Accordingly, we do not find that a lack of remorse can be used as an aggravating factor in determining a penalty.

IV) The Hearing Officer's decision does not accord with past cases

[45] In reviewing the transcripts of the *PSA* hearing, we note that the appellant did not present any case law that would support the dismissal of the respondent, a penalty that the prosecution did not seek. The Hearing Officer reviewed the numerous cases presented by the prosecution and the defence. In our review of these cases, we note that there are both stark and subtle differences between the situations of those officers and the respondent. These differences relate to the nature of the offences, the officers' employment histories, their personal circumstances and a myriad of other distinguishing features.

[46] The Hearing Officer wrote the following at para. 41 of his decision:

> Turning to the cases referenced by the defence, the following involved criminal convictions for assault or assault causing bodily harm, and resulted in penalties of 2 to 5 days off, forfeited: *Ward, Mills, Roy, Walker, Flis, Racette, Smith, Zarafonitis, Kellock and Partridge.*

[47] Accordingly, the appellant has not satisfied us that the penalty imposed by the Hearing Officer was not in the range of reasonable penalties for his misconduct.

The collateral attack issue raised by the Director

[48] The Director, like the appellant, submitted that the Hearing Officer erred in allowing a collateral attack on the criminal conviction. According to the Director, the Hearing Officer erred in receiving evidence that contradicted the findings of the criminal court and made findings of fact that were different from those made by Justice Botham. The Director further submits that this collateral attack, or the re-litigating of Justice Botham's decision, amounted to an abuse of process.

[49] In the *C.U.P.E.* decision cited above, the court wrote the following about a collateral attack:

> The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen,* [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack,
>
> > …has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[50] The issue in *C.U.P.E.* was "whether a person convicted of sexual assault and dismissed from employment could be reinstated by a labour arbitrator who concluded, on the evidence before him, that the sexual assault did not take place."

[51] The court concluded that such a collateral attack amounted to an abuse of process and that the arbitrator was required to give full effect to the decision of the court.

[52] In our view, there was no error made by the Hearing Officer whereby he allowed a collateral attack on the criminal conviction. There was some considerable discussion about the respondent's intention to introduce the decision of Justice Cunningham, who ultimately dismissed the *PSA* charges against the four other members of the arrest team. Justice Cunningham found that the arrest of the

appellant was lawful and that the force used by those officers during the arrest was justified. We note that his decision has also been appealed to the Commission.

[53] At pages 51-52 of the transcript, where the admissibility of the Justice Cunningham's decision was being discussed, the Hearing Officer made it clear that he was not going to retry the criminal conviction. In his words "[i]t's not going to happen." In our view, on a fair reading of his decision, the Hearing Officer lived up to this caveat. It should also be remembered that the Hearing Officer was dealing only with the appropriate penalty to be imposed.

[54] The Director submitted that the respondent "implicitly" urged the Hearing Officer to reject the findings of Justice Botham. We see no basis in the evidence or in the decision that the Hearing Officer may have succumbed to this implicit suggestion. Even if the Hearing Officer erred in admitting the decision of Justice Cunningham, we are not satisfied that the Hearing Officer improperly relied on that decision in reaching his conclusion as to an appropriate penalty.

[55] The Director also submitted that the Hearing Officer's decision supported the argument that he gave in to a collateral attack on the criminal conviction by making findings of fact that were inconsistent with those of Justice Botham. For example, the Hearing Officer wrote that the assault, while "assuredly wrongful….was barely over the line of wrongfulness." The Director submitted that this comment was an "impermissible impeachment" of the findings of Justice Botham. We do not agree. His characterization of the "assuredly wrongful" assault did not amount to a collateral attack on the decision of Justice Botham.

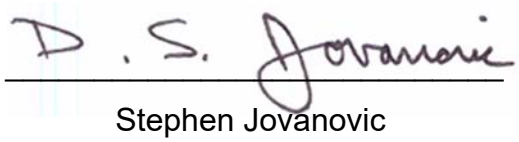
[56] There were a number of incidental differences in the language used by the Hearing Officer compared to the words used by Justice Botham. She termed the actions of the respondent in committing the assault on the appellant as a series of "forceful baton strikes" while the Hearing Officer wrote that the actions were "of a fleeting and minor nature." In our view, this difference in the language used does not support the argument that the Hearing Officer was retrying the criminal conviction, as he clearly told the parties he was not about to do.

[57] Finally, the Hearing Officer was obviously impressed by the letters of support filed on behalf of the respondent as he was with the respondent's employment record. We cannot say that he made any errors in principle in his reliance on those letters that would justify our varying the penalty or ordering a new hearing. The Hearing Officer was entitled to place whatever weight he thought proper to these letters and the respondent's record of service.

ORDER

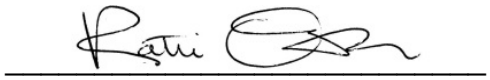
[58] Pursuant to section 87(8) of the *PSA* the decision of the Hearing Officer is confirmed.

Released: March 12, 2018



Stephen Jovanovic

John Kromkamp



Katie Osborne