



ONTARIO CIVILIAN POLICE COMMISSION

DATE: 2016-01-26

FILE: 2016 ONCPC-01

CASE NAME: ARDILES AND TORONTO POLICE SERVICE

**IN THE MATTER OF THE *POLICE SERVICES ACT*,
R.S.O. 1990, C.P.15, AS AMENDED**

BETWEEN:

CONSTABLE BENJAMIN ARDILES

APPELLANT

-and-

TORONTO POLICE SERVICE

RESPONDENT

-and-

MICHAEL WILLIAMS

COMPLAINANT

-and-

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR

INTERVENER

DECISION

Panel: Roy B. Conacher, Q.C., Vice Chair
Marie Fortier, Member

Hearing Date: June 15, 2015

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3

Appearances:

Harry G. Black, Q.C., for the Appellant, Const. Benjamin Ardiles

Sharon Wilmot, Counsel for the Respondent, Toronto Police Service

Kathleen Burke and Rebecca Studin for the Complainant, Michael Williams

Miriam Saksznajder for the Office of the Independent Police Review Director, Statutory Intervener

Introduction

1. Constable Benjamin Ardiles ("Const. Ardiles" or the "Appellant"), a police officer employed by the Toronto Police Service (the "Service" or "Respondent") appeals to the Commission from a disciplinary decision made by Justice Walter S. Gonet, (Ret.), (the "Hearing Officer") dated May 15, 2014, finding the Appellant guilty of misconduct, namely, "without good and sufficient cause makes an unlawful or unnecessary arrest", contrary to section 2 (1)(g)(i) of the Code of Conduct, Ontario Regulation

268/10 (the "Code") and therefore contrary to section 80 (1)(a) of the Police Services Act (the "Act").

2. The penalty issued by the Hearing Officer on July 31, 2014, accepting a joint submission, was a reprimand which was imposed at that time. No appeal was filed against the penalty.

Decision

3. Pursuant to Section 87 (8)(a) of the Act, the Commission revokes the decision of the Hearing Officer finding the Appellant guilty of misconduct.

Background

4. Const. Ardiles has been a police officer with the Service since January 11, 2007. While on uniform duty on Sunday, June 27, 2010, during the G20 Summit meetings in downtown Toronto, the Appellant was assigned to foot patrol duty in the vicinity of the intersection of Yonge and College Streets with a group of other officers. At approximately 1:00 p.m. Const. Ardiles observed the

Complainant being interviewed by another police officer. He believed that the Complainant might have been intent on being involved in a group that instigated violent protest rioting the day before since he appeared dressed in a similar manner, was being uncooperative and aggressive and not responding to the other officer's inquiries. Const. Ardiles intervened and demanded that the Complainant remove what the Complainant referred to as a "handkerchief" from around his neck and what was called a "bandana" by Const. Ardiles. The Complainant was refusing to comply, stating he was aware of his rights and had done nothing wrong. The confrontation between the Appellant and the Complainant resulted in the Appellant arresting the Complainant and handcuffing him.

5. After physically searching the Complainant and confirming his identification, his lack of possession of any weapons or any prior record and after a discussion with his supervising Sergeant about the possible grounds or lack thereof for the arrest, Const. Ardiles removed the handcuffs and released

the Complainant without charge. The entire incident took place over ten to fourteen minutes. Subsequently, Const. Ardiles completed and filed a Record of Arrest and a Supplementary Record of Arrest confirming the release without charge.

6. The Record of Arrest was for conspiracy to commit an indictable offence contrary to Section 465 (1)(c) of the Criminal Code.

7. The Complainant filed a complaint with the Office of the Independent Police Review Director ("OIPRD") challenging his arrest. The OIPRD conducted an investigation and concluded that the arrest appeared to be unlawful and directed the Chief of the Service to hold a disciplinary hearing to determine whether Const. Ardiles had committed misconduct by breaching the aforesaid provision of the Code.

Grounds of Appeal

8. The Appellant raised the following grounds of appeal:

- (a) The Hearing Officer erred in reversing the burden of proof;
- (b) The Hearing Officer erred in finding the Appellant lacked the required subjective belief that grounds existed to arrest the Complainant for conspiracy to commit an indictable offence;
- (c) The Hearing Officer failed to consider or ignored relevant evidence;
- (d) The Hearing Officer erred in failing to consider whether a finding simply of unlawful arrest constitutes misconduct;
- (e) The Hearing Officer failed to consider or give effect to relevant defence evidence and submissions regarding:
 - the test for reasonable and probable grounds;

- that the lack thereof is not necessarily misconduct;
- that the conduct must not be assessed in hindsight;
- the test for what is clear and convincing evidence;
- that supervisory instructions be taken into account along with surrounding factual circumstances as well as the officer's good faith and honest belief;

(f) The Hearing Officer erred in misstating the significance of certain evidence and in relying upon after acquired information not known to the Appellant at the time of making the arrest.

Positions of the Respondent, Complainant and Intervenor

9. The Respondent submitted that the decision was reasonable and that the prosecution had established on clear and convincing evidence that the arrest was unlawful.

The language used by the Hearing Officer was not perfect; however, perfection is not the standard of review: Wolfe and Ontario Provincial Police, November 16, 2005, (OCCPS #05-08). The reasons were adequate and intelligible and sufficient to permit the Appellant to understand the rationale for his conviction.

10. The Complainant agreed with and adopted the submissions of the Respondent regarding the standard of review and submitted that the decision was reasonable and was based upon clear and convincing evidence. The Complainant stated that the reasons were adequate and correctly identified and applied the onus on the prosecution and did not reverse that onus. The Hearing Officer correctly set out the test for misconduct and justifiably concluded that the Appellant did not have reasonable and probable grounds to arrest the Complainant and, therefore, the arrest was unlawful and unnecessary. The Complainant requested that the appeal be dismissed.

11. Counsel for OIPRD stated that this disciplinary hearing was a civil administrative process involving an employment relationship, not a criminal trial: McCormick v. Greater Sudbury Police Services, 2010 ONSC 270 (Div. Ct.). In an administrative law context, reasons are not held to the same standard as in the criminal law context: Clifford v. Ontario Municipal Employees Retirement System, (2009) ONCA 670. The reasons of the Hearing Officer must be sufficient to fulfill the purposes required, namely, to permit the individual whose rights, privileges or interests are affected to know why the decision was made: Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII).

12. The OIPRD also submitted that deference must be accorded to the Hearing Officer's findings of fact and credibility, and that the reasons should be read as a whole and not be subject to microscopic examination.

13. The OIPRD also submitted that the burden of proof is on the prosecution, that the reversal of that burden would result in the need for a new hearing but that the entirety of the Hearing Officer's decision must be reviewed to determine whether the onus was truly reversed or whether the Hearing Officer's language was simply unclear. If the language is unclear, the Commission should consider whether there are any other factors to support a finding that the Hearing Officer truly reversed the burden of proof.

14. With respect to the elements of the offence, the OIPRD submitted that not every unlawful arrest necessarily amounts to misconduct but good faith alone does not satisfy the requirements of "good and sufficient cause". The OIPRD submitted that "sufficient cause" on its plain meaning imports a requirement for an objective analysis.

Reasons and Analysis

A. Standard of Review

15. The Commission is an expert body as noted in the Court of Appeal's decision in Ontario (Provincial Police) v. Favretto (2004), 2004 CanLII 34173 (ON CA), 72 O.R. (3d) 681, [2004] O.J. No. 4248 (C.A.), at para. 51: "The Commission is a specialized administrative tribunal that has been given broad powers on an appeal from a decision of a Hearing Officer to "confirm, vary or revoke the decision being appealed" or to "substitute its own decision for that of the chief of police", which would include a decision by a Hearing Officer to impose a penalty of dismissal." In the same decision, the expertise of Hearing Officers appointed under the Act was also recognized at para. 50.

16. The Commission's role on appeal is multi-faceted. The Commission has broad powers of review under s. 87 of the Act including the power to call evidence, to confirm, vary, or revoke the Hearing Officer's decision, to substitute its own decision or to send the matter back for a new hearing.

In this case, we have relied solely on the record of the first instance hearing. We did not have the benefit of hearing witnesses, weighing their evidence and assessing their credibility.

17. In most cases, the Commission will decline to interfere with the Hearing Officer's factual and credibility findings, deferring to the findings of the Hearing Officer. However, the Commission must ensure that the findings involve no errors of principle and that the evidence can support them. However, questions of law are reviewed on a standard of correctness: see Ontario Provincial Police v. Purbrick, 2013 ONSC 2276 (CanLII), 2013 ONSC 2276 (Div. Ct.).

B. Burden of Proof

18. Section 84 of the Act provides that a charge under section 66 (3) must be proven on clear and convincing evidence. In a disciplinary matter the burden or onus of proof is upon the prosecution. In order to satisfy this requirement, the prosecutor must adduce sufficient evidence that is weighty,

cogent and reliable upon which a Hearing Officer, acting with care and caution, can come to a fair and reasonable conclusion that the police officer is guilty of misconduct: Burrows and Ontario Provincial Police, OCPC #12-12 (August 13, 2012) at para. 88; Jacobs and Ottawa Police Service and Krupa, OCPC #14-02 (March 25, 2014).

19. The Appellant submitted that the Hearing Officer erred in law by placing the onus upon the Appellant to prove that he had reasonable and probable grounds to make the arrest rather than upon the prosecution to prove that he did not have reasonable and probable grounds. He points to the concluding statement of the Hearing Officer: "I find that the prosecution has provided clear and convincing evidence that Police Constable Ardiles failed both subjectively and objectively in showing that he had reasonable and probable grounds to make the arrest".
[see Decision-pg.11].[emphasis added]

20. Unfortunately, we have serious concerns with the language used by the Hearing Officer in that concluding paragraph of his decision.

21. Although the Hearing Officer acknowledged elsewhere in the decision the correct principle of burden of proof, on this issue, in his application of the language used, he appeared to have reversed the burden by appearing to require the Appellant to prove that he had the requisite grounds to make the arrest. The wording is very problematic and raises an ambiguity on this important principle of law. The lack of clarity prevents the Panel from determining whether the Hearing Officer applied the proper burden of proof. This constitutes a manifest error.

C. Standard of Proof

22. Section 84 describes the nature of the evidence required to satisfy the standard of proof: Burrows, supra; Wong, supra. As stated, such evidence must be weighty, cogent and reliable. However, the standard of proof remains the

balance of probabilities: Carmichael and Ontario Provincial Police 21 May, 1998, (O.C.C.P.S); Jacobs, supra; Wong, supra.

23. In order to establish misconduct under S.2 (1)(g)(i) of the Code, it is clear, based on the wording of the provision, that the Hearing Officer must be satisfied on two criteria, namely, that the prosecution has established, with clear and convincing evidence, that (i) the arrest of the Complainant was unlawful or unnecessary and (ii) it was without good and sufficient cause.

24. Under S. 495 (1) of the Criminal Code, a police officer may arrest, without warrant, a person who, on reasonable grounds, he or she believes is about to commit an indictable offence. In this case, in our view, the Hearing Officer correctly identified the factors to be considered to establish reasonable and probable grounds for an arrest. He commenced his analysis by referencing the case of R. v.

Storrey, [1990] 1 S.C.R. 241. He cited the following quotation:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justified from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest [emphasis added].

25. The Hearing Officer then went on to state:

Reasonable and probable grounds will exist when the officer subjectively believes those grounds and those beliefs are justifiable from an objective point of view.

26. He then referred to the case of R. Howser, 2012 ONCJ 476 wherein the principle of objective evidence was discussed.

In that case there is a quotation from a Court of Appeal decision in R. v. Brown, 2012 ONCA 225, which the Hearing Officer appears to have considered to be very relevant to the issue of what has to be proven to justify an arrest. The Court in that case stated:

There must be something in the conduct observed by the officer, placed in the context of the rest of the circumstances, that lends some objective justification or verification to the officer's belief.

Section 495 of the Criminal Code and, more importantly, s. 9 of the Charter demand that the belief be "reasonable", meaning that a reasonable person standing in the shoes of the police officer be

able to see the grounds for the arrest. Without this objective component, the scope of the police power to arrest would be defined entirely by the police officer's perception of the relevant circumstances.

The individual's constitutional right to be left alone by the state cannot depend exclusively on the officer's subjective perception of events regardless of how accurate that perception might be. The issue is not the correctness of the officer's belief, but the need to impose discernable objectively measurable limits on police powers.

27. The Hearing Officer stated that "common sense must prevail in assessing the objective qualities and weight must be given to the immediate circumstances at the time of arrest." [see Decision ,pg. 9].

28. Taking into account the Hearing Officer's analysis he properly set out the requirements the prosecution had to prove in order to determine whether Const. Ardiles had

reasonable and probable grounds for the arrest. After analyzing the evidence before him in detail, the Hearing Officer concluded, correctly in our view, that the Appellant did not have reasonable and probable grounds and the arrest was therefore unlawful.

29. The Hearing Officer's analysis had to involve a weighing of the factual evidence of the immediate circumstances facing Const. Ardiles upon the latter forming his subjective belief. The analysis also had to involve consideration of the available objective evidence surrounding the Appellant's decision to take the action of arresting the Complainant.

30. Unfortunately, the decision appears to focus primarily upon the Appellant's lack of consideration of the available objective evidence in forming his decision to arrest the Complainant and gives no indication of any consideration or weighing of the evidence of the defence regarding the Appellant's subjective beliefs.

31. The Hearing Officer's unfortunate language and his sparse analysis do not make it sufficiently clear what findings had to be made to establish a breach of the relevant provisions of the Code in this case. Further, while the lack of objective grounds was relevant to the finding with respect to the lawfulness of the arrest, the analysis also had to consider the issue of whether the Appellant had good and sufficient cause. This required a broader analysis involving consideration of the evidence that the Appellant provided about his subjective belief.

32. That evidence consisted of the testimony of Const. Ardiles as summarized on pages 5-6 of the decision. The Hearing Officer did not make any express findings on the issue of credibility of the witnesses. We are unable to conclude from a review of the decision that the Hearing Officer considered this significant and important evidence. The simple bald statement contained in the Hearing Officer's concluding paragraph of the decision is not sufficient to show that he did, in fact, consider this evidence for the defence.

33. Nowhere in his decision does the Hearing Officer show that he considered the second element of the offence, namely, whether or not there was good and sufficient cause. It is therefore not possible to determine whether he did, in fact, consider these critical issues.

34. The decision of the Hearing Officer must show in a transparent and intelligible manner that all of the relevant evidence presented, including that of the Appellant, was carefully considered and weighed.

35. Having reviewed the record and the decision, the Hearing Officer was correct in finding that there was a lack of consideration by the Appellant of objective factors at the time of his making the decision to arrest the Complainant. Under such circumstances, the arrest was unlawful. (See Storrey, supra; Wong, supra, at page 9).

36. However, because of the problematic language used regarding the issue of the burden of proof, in addition to the Hearing Officer's failure to address the second element

of the offence under S.2 (1)(g)(i) of the Code, the reasons set forth in the decision are insufficient to support a finding of misconduct. They do not permit the Appellant to understand the rationale for his conviction.

D. Balance of grounds of appeal

37. In view of the conclusions reached above, we do not find it necessary to consider the remaining grounds of appeal as submitted by the Appellant.

E. Remedy

38. We have reviewed the decision of the Hearing Officer and the entire record of the first instance proceeding, including all transcripts and exhibits. As stated above, the Hearing Officer's reasons for decision indicate an error in law on the issue of burden of proof, and are missing an analysis of key evidence and findings of credibility that should have been made relative to the second element of the offence and are insufficient to allow the Appellant to understand the rationale for the finding of misconduct.

39. The Commission has the power under Section 87 of the Act to substitute its decision for the decision of the Hearing Officer. We have considered all of the evidence, including the factual circumstances described by the Appellant related to conditions on the morning of the arrest and the instructions given to him by his superiors, the submissions of the parties including those related to the Appellant's subjective beliefs at the time of the arrest of the Complainant. While the evidence raises significant concerns for the Panel about the lawfulness of the arrest and the possible lack of good and sufficient cause, the record of the disciplinary proceedings and the assessment of the evidence by the Hearing Officer are not sufficient, in our view, for us to make the necessary findings to be able to substitute our decision for the decision of the Hearing Officer.

40. The arrest that led to this misconduct charge against Const. Ardiles occurred more than five years ago. Although we are acutely aware of the significant public interest in

ensuring that the G20 cases receive full and careful hearing and while the Commission clearly has the power to remit the matter back for a new hearing, the delay in this case has already been excessive. In our view, it would not be in the public interest to prolong this matter further and at considerable expense by returning this case for a new disciplinary hearing. A further hearing in the matter may constitute an abuse of process.

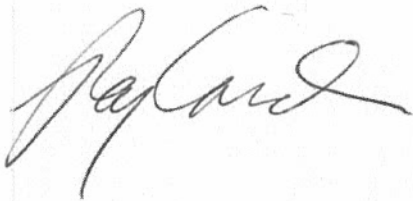
41. The Panel wants to be clear that we do not intend to minimize the importance of maintaining public confidence in police by addressing police conduct issues that arose during the G20 event in Toronto. Nor do we consider the issue of unlawful arrest to be a minor breach of discipline. The Complainant was subjected to unacceptable behavior that resulted in a deprivation of his civil rights and created inconvenience, frustration and embarrassment for him in a public setting. Notwithstanding the above, in this case, the issues related to the first instance disciplinary hearing and the decision of the Hearing Officer as outlined herein have

resulted in an unacceptable delay in bringing this matter to a final conclusion.

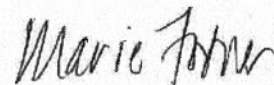
F. Disposition

42. Pursuant to Section 87(8) of the Act the decision of the Hearing Officer finding the Appellant guilty of misconduct is hereby revoked.

DATED AT TORONTO THIS 26th DAY OF JANUARY, 2016



Roy B. Conacher, Q.C.
Vice Chair



Marie Fortier
Member