

OTTAWA POLICE SERVICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

AND IN THE MATTER OF

THE OTTAWA POLICE SERVICE

AND

CONSTABLE PATRICK LAFRENIERE # 1661

AND

CONSTABLE KIRK BATSON # 1772

APPEARANCES:

Ms. Christiane Huneault

for Ottawa Police Service

Mr. Mark Wallace

for Constable Kirk Batson

Mr. William Carroll

for Constable Pat Lafreniere

Mr. Denis Seguin

for Mr. Denis Seguin

Hearing Officer:

Superintendent Dan Delaney # 825

Ottawa Police Service

Hearing Dates:

Tuesday October 7, 2014

Thursday October 9, 2014

Wednesday May 6, 2015

Thursday September 10, 2015

Monday October 5, 2015

CHARGES:

It is alleged that you committed the following acts of misconduct contrary to the *Police Services Act, R.S.O 1990 cP.15, as amended*:

Constable Kirk Batson # 1772

Count 1 – Unlawful or Unnecessary Exercise of Authority

You are alleged to have committed Unlawful or Unnecessary Exercise of Authority in that on September 1st, 2013 while on duty you affected the unlawful arrest of Mr. Denis Seguin on city of Ottawa property, more specifically the sidewalk located outside municipal address know as 73 Rideau Street , Ottawa , Ontario for the offence of “ Failing to Leave When Directed “ pursuant to the *Trespass to Property Act* , thereby constituting an offence against discipline as prescribed in section 2(1)(g)(i) of the Code Of Conduct , Ontario Regulations 268/10, as amended, and therefore contrary to section 80(1) of the *Police Services Act* .

Count 2 – Unlawful or Unnecessary Exercise of Authority

You are alleged to have committed Unlawful or Unnecessary Exercise of Authority in that on September 1st, 2013 while you affected the unlawful arrest of Mr. Denis Seguin you applied unnecessary force, thereby constituting an offence against discipline as prescribed in section 2(1)(g)(ii) of the Code of Conduct, Ontario Regulation 268/10 , as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Constable Pat Lafreniere # 1661

It is alleged that you committed the following acts of misconduct contrary to the *Police Services Act, R.S.O 1990 cP.15, as amended*:

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Disposition:

I wanted to begin by thanking Ms. Huneault, Mr. Wallace, Mr. Carroll and Mr. Seguin for their guidance and cooperation during the course of this hearing. With a hearing that spans over the time period that this one has it is expected to have challenges, I want to thank all of you for the efforts and willingness to worked through those challenges to ensure that a fair and complete hearing of the evidence was achieved .

It is my intention to summarize the evidence provided by the witnesses in this hearing in a succinct manner and then provide a thorough rational for each of my decisions.

As stated in the *Police Services Act*, misconduct must be proven on clear and convincing evidence. This is defined in *Carmichael and the Ontario Provincial Police* (21 May 1998, OCCPS) as “weighty, cogent and reliable evidence upon which a Trier of Fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct”.

In *Bargh and the Ottawa Police Service* (30 September 2011), Inspector (Ret’d) Gregory C Connolley defined weighty as “important, material and deserving of consideration” and cogent as “compelling and convincing”.

Five witnesses testified in this hearing and each of them provided their version and interpretation of the events as they perceived them to have occurred.

Witnesses:

I would like to provide a short introduction of the witnesses that provided testimony in this hearing:

Witness 1

Mr. L

On September 1st 2013 he was employed by “The Bay “at 73 Rideau Street as a Loss Prevention Officer. On September 1st 2013 he was in operation of a camera system that recorded some of the interaction between the members of the Lower

town Foot Patrol and Mr. Seguin. He recorded the interaction from his first observation until Mr. Seguin walked away from the scene. He indicated that to his knowledge there were no additions, deletions or alterations to the video that was shown as evidence.

Witness 2

Denis Seguin

He indicated that he was 58 years old, 5 Ft 6 and approximately 150 lbs. He had been a member of the Commissionaires for 6 years and he currently holds the rank of Sergeant. He testified that he has been busking for some time and that he has been performing on the sidewalk in front of 73 Rideau Street for approximately 15 years. On July 6th 2013 he was busking on the sidewalk in front of 73 Rideau Street when he was met by By-Law Officer Powers and Cst. Lafreniere. That interaction resulted in him leaving the scene with a warning and information from By-Law Officer Powers.

On September 1st, 2013 he was again busking on the sidewalk in front of 73 Rideau when he was met by By-Law Officer Powers, Special Constable Weeks, Cst. Lafreniere and Cst. Batson. That interaction resulted in him being placed under arrest for section 2(1) (b) of the Ontario Trespass to Property Act and issued an offence noticed from By-Law Officer Powers for City of Ottawa noise bylaw 2004-253 section 19 (1). At the conclusion of that interaction he left the scene.

Witness 3

Chris Powers

Chris Powers has been employed as a City of Ottawa By-Law Officer for almost 8 years. On July 6th 2013 he was assigned to the Lower Town Foot Patrol and was working with Cst. Lafreniere. He and Cst. Lafreniere responded to the area of 73 Rideau Street and came upon Mr. Seguin who was busking on the sidewalk. That interaction resulted in him giving Mr. Seguin a warning and providing him with information.

On September 1st 2013 he was assigned to the Lower Town Foot Patrol and he was working with Cst. Lafreniere, Cst. Batson and Special Constable Weeks. The officers responded to the area of 73 Rideau Street and came upon Mr. Seguin who

was busking on the sidewalk in front of 73 Rideau Street. That interaction resulted in him issuing Mr. Seguin with an offence noticed for City of Ottawa noise bylaw 2004-253 section 19 (1).

Witness 4

Kirk Batson

Kirk Batson has been a member of the Ottawa Police Service since December 2005 and he currently holds the rank of Constable. On September 1st 2013 he was assigned to the Lower Town Foot Patrol and that day he was working with By-Law Officer Powers, Cst. Lafreniere and Special Constable Weeks.

On that date the officers responded to the area of 73 Rideau Street and they came upon Mr. Seguin who was busking on the sidewalk in front of 73 Rideau Street. That interaction resulted in him placing Mr. Seguin under arrest as per section 2(1) (b) of the Ontario *Trespass to Property Act*.

Witness 5

Pat Lafreniere

Pat Lafreniere has been a member of the Ottawa Police Service for approximately 13 years and he currently holds the rank of Constable.

On July 6th 2013 he was assigned to the Lower Town Foot Patrol and was working with By-Law Officer Powers. He and By-Law Officer Powers responded to the area of 73 Rideau Street and came upon Mr. Seguin who was busking on the sidewalk. He provided support for By-Law Officer Powers during that interaction. On September 1st 2013 he was assigned to the Lower Town Foot Patrol and that day he was working with By-Law Officer Powers, Cst. Batson and Special Constable Weeks.

On that date the officers responded to the area of 73 Rideau Street and they came upon Mr. Seguin who was busking on the sidewalk in front of 73 Rideau Street. That interaction resulted in him assisting in the arrest of Mr. Seguin as per section 2(1) (b) of the Ontario *Trespass to Property Act*.

When assessing the testimony and credibility of each witness I considered the O'Halloran test as a guide throughout my decision making process. It gives tangible factors to include in the assessment of testimony by the witnesses.

“If a trial Judge’s findings of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.

A witness by his manner may create a very unfavorable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions “ .

Summary of the Event:

I think it is important to begin with the events of July 6th, 2013. On that date Cst. Lafreniere and By-Law Officer Powers encountered Mr. Seguin who was busking on the sidewalk in front of the doors at 73 Rideau Street. This first contact between Mr. Seguin and members of the lower town foot patrol provides important context to the events on September 1st, 2013.

On the 6th of July 2013 By-Law Officer Powers and Cst. Lafreniere were conducting foot patrol and walking on Rideau Street when at 12:09 they encountered Mr. Seguin who was set up on the City of Ottawa sidewalk in front of 73 Rideau Street which is an entrance to The Bay. Mr. Seguin had a guitar and a microphone hooked up to an amplifier and he was playing music. The two officers

determined that this was a by-law scenario and that By-Law Officer Powers would take the lead on the call and Cst. Lafreniere would provide support.

By-Law Officer Powers approached Mr. Seguin and advised him that he could not busk at this location. By-law Officer Powers asked for and received identification from Mr. Seguin. By-Law Officer Powers took this opportunity to educate Mr. Seguin as opposed to charging him. By-Law Officer Powers discussed with Mr. Seguin the importance and limitations of licenses and permits and advised him how to get them. He advised Mr. Seguin that busking at this location, using an amplifier and selling CD's, were all By-Law offences. He gave Mr. Seguin a verbal warning and strongly cautioned him that if he was found playing at this location again he would be facing charges and fines. Mr. Seguin told the officers that he had been playing at this location for about 15 years and he set up here because he made more money here. Mr. Seguin was described as being rude and agitated but he eventually cooperated and packed up his equipment and left the scene.

On September 1st, 2013 at approximately 10:50 Mr. Seguin was again busking on the City of Ottawa sidewalk in front of 73 Rideau Street. He was set up in the same location with the same equipment as he was on July 6th, 2013.

Four members of the Lower Town Foot Patrol were on duty that day and were walking together. Along with Cst. Lafreniere and By-Law Officer Powers were Special Constable Weeks of OC Transpo and Cst. Batson of the Ottawa Police Service.

The four officers were walking on Rideau Street when they could hear music and as they got closer to the sidewalk area in front of 73 Rideau the music was getting louder, they could determine that the music was coming from Mr. Seguin. Mr. Seguin was playing music and selling CD's which he had on display in his guitar case.

By-Law Officer Powers and Cst. Lafreniere both testified that they had recognized Mr. Seguin as being the same busker that they had dealt with at the same location on July 6th, 2013.

Upon arrival By-Law Officer Power's signaled to Mr. Seguin to stop the music. Mr. Seguin stopped playing and he and By-Law Officer Power's (who again took the lead on the call because it was a by-law related scenario) began to discuss the

situation. Cst. Batson, Cst. Lafreniere and Special Cst. Weeks took up positions to provide support to By-Law Officer Powers during the encounter.

During the conversation Mr. Seguin took offence to the officers wearing sunglasses and on several occasions demanded that they remove them, the Officers did not remove the sunglasses for safety reasons.

By-Law Officer Powers requested that Mr. Seguin provide valid identification, which would give him the needed information to proceed with a notification (ticket) of a by-law charge. This request made Mr. Seguin agitated, frustrated and he began to pace.

At this point Cst. Batson stepped in to assist By-Law Officer Powers because he felt the interaction was escalating; Cst. Batson testified his intention was to defuse the situation. Mr. Seguin produced an identification card that did not have all of the required information needed and Cst. Batson advised Mr. Seguin of such. Mr. Seguin searched for and located his driver's license and he then attempted to give Cst. Batson the driver's license.

During the exchange of the driver's license Cst. Batson, with the assistance of Cst. Lafreniere, took physical control of Mr. Seguin and he was taken to the ground, and placed in handcuffs. Mr. Seguin was placed under arrest by Cst. Batson for section 2(1) (b) of the *Ontario Trespass to Property Act*:

2(1) every person who is not under a right or authority conferred by law and who,

(a) Without the expressed permission of the occupier, the proof of which rests on the defendant,

- (i) Enters on premises when entry is prohibited under this Act, or
- (ii) Engages in an activity of premises when the activity is prohibited under this Act;

(b) does not leave the premise immediately after he is directed to do so by the occupier of the premise or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than \$ 2,000. R.S.O 1990, c. T.21, s.2 (1)

Cst. Lafreniere read Mr. Seguin his Rights to Counsel.

Cst. Batson removed the handcuffs and Mr. Seguin was released after he received an offence noticed from By-Law Officer Powers for City of Ottawa noise bylaw 2004-253 section 19 (1), which states:

“No person shall operate or use or cause to be operated any sound reproduction device on a highway or a public place”

The decision was made to release Mr. Seguin without charging him with the offence that he was arrested for under the *Trespass to Property Act*.

Mr. Seguin then packed up his equipment and left the scene.

During the course of the arrest Mr. Seguin received a cut above the eye and his wrists were injured as a result of the handcuffs being placed on him too tightly.

On the 2nd of September 2013, Mr. Seguin filed a complaint with the Office of the Independent Police Review Director regarding the interaction he had with members of the Ottawa Police on September 1st, 2013.

Analysis and Findings

I would like to state at this time that it was very unfortunate that the events of September 1st, 2013 even occurred. On July 6th, 2013 By-Law Officer Powers and Cst. Lafreniere responded to the area of 73 Rideau Street where they came upon Mr. Seguin who was busking. At that point By-Law Officer Powers made the decision to provide information to, and educate Mr. Seguin in regards to licensing and permits as well as the By-Law offences that he was committing that day. Instead of enforcing those By-Laws, By-Law Officer Powers gave Mr. Seguin a warning and By-Law Officer Powers and Cst. Lafreniere left with the knowledge that Mr. Seguin clearly understood the situation. I applauded the approach By-Law Officer Powers took that day, it is fair and reasonable and consistent with his normal practice.

Mr. Seguin made the decision to ignore that warning and attended the same location on September 1st, 2013 in contravention of the same by-law offences.

During the course of testimony in this hearing Mr. Seguin's behavior during the two interactions with members of the Lower Town Foot Patrol was described as

extremely rude , verbally aggressive , passive aggressive , angry , frustrated and I can go on .

I accept that testimony. It is also clear, that by returning to the same location Mr. Seguin demonstrated little respect and concerns for the By-Laws of this City.

It is not uncommon for members of the Ottawa Police Service to encounter people who have little respect and concerns for our City's By-Laws and who act and respond to the police in a similar rude aggressive manner.

These encounters challenge and test our member's tolerance and patience however; it is essential and expected that they will maintain a very high level of professionalism.

Count 1 – Unlawful or Unnecessary Exercise of Authority

On September 1st 2013 Mr. Seguin was placed under arrest by Cst. Batson for section 2(1) (b) of the Ontario Trespass to Property Act:

2(1) every person who is not under a right or authority conferred by law and who,

(c) Without the expressed permission of the occupier, the proof of which rests on the defendant,

(iii) Enters on premises when entry is prohibited under this Act, or

(iv) Engages in an activity of premises when the activity is prohibited under this Act;

(d) does not leave the premise immediately after he is directed to do so by the occupier of the premise or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than \$ 2,000. R.S.O 1990, c. T.21, s.2 (1)

The Act defines the Occupier as:

(a) A person who is in physical possession of premise , or

- (b) A person who has responsibility for and control over the conditions of premises or the activities there carried on , or control over persons allowed to enter the premises , even if there is more than one occupier of the same premises

The Act defines Premise as:

“Premises” means lands and structures, or either of them and includes,

- (a) Water
- (b) Ships and vessels
- (c) Trailers and portable structures designed for residence, business or shelter,
- (d) Trains , railway cars, vehicles and aircraft , except while in operation

Mr. Seguin was placed under arrest while he was busking on the City of Ottawa sidewalk. This location does not meet the definition of a premise for the purposes of the act.

The officers both indicated that they were acting as agents for The Bay and that they both thought that Mr. Seguin was located on “The Bay’s” property and therefore were acting in good faith.

I agree with Mr. Wallace’s argument that we cannot expect perfection from the members of the Ottawa Police while they carry out their duties day to day. But the public does expect a level of due diligence and fact verification from the members of the police when possible before they react to a situation. Both Cst. Batson and Cst. Lafreniere testified that they were under the impression that they had agent status with “ The Bay “ but they at no time confirmed it nor did they make the attempt to verify or gather an understanding of the boundaries and limitations of that agent status .

This is particularly concerning considering that Cst. Lafreniere and By-Law Officer Powers dealt with Mr. Seguin on July 6th. 2013 while he was busking in the same location that he was arrested at on September 1st, 2013.

On July 6th, 2013 Mr. Seguin actions and words should have left By-Law Officer Powers and Cst. Lafreniere with little confidence that he would be taking direction from them and not returning to this location to busk. The location that he told the officers that he had been busking at for 15 years and that it was the location that he had made good money at.

I would have hoped that Cst. Lafreniere would have made efforts to improve his situational awareness and looked at enforcement options in anticipation of Mr. Seguin's return.

Cst. Lafreniere and Cst. Batson are both experienced officers who should have confirmed the scope and parameters of the authorities of the "Agent Status" given to members of the Ottawa Police Service by the "The Bay" before they exercised those authorities.

The evidence before me was that there was also an expectation that Mr. Seguin remained at the scene so that By-Law Officer Powers could issue him a by-law ticket. Further, the evidence shows that the incident was on City, not "The Bay's" property.

I find based on the evidence that Cst. Batson and Cst. Lafreniere did not have the grounds or the authority to arrest under the *Trespass to Property Act* and as such the arrest of Mr. Seguin was unlawful.

Count 2 – Unlawful or Unnecessary Exercise of Authority

Cst. Batson with the assistance of Cst. Lafreniere took physical control of Mr. Seguin because Cst. Batson interpreted Mr. Seguin's attempt to provide him his driver's license as a threat.

A police officer is permitted to use force if he/ she believes on reasonable grounds that the force is necessary for the purpose of protecting the police officer from harm.

Once the decision to use force was made the evidence presented did not indicate that the force used was excessive for the situation.

It is also worth noting that Cst. Lafreniere became involved to assist Cst. Batson who had engaged with Mr. Seguin.

I find that based on the evidence that Cst. Batson did perceive the movements of Mr. Seguin as a threat that the force used was justified and the level of force was acceptable.

I am not disputing that Cst. Batson's interpretation and perception of Mr. Seguin movements and motions surrounding his attempt to give him his driver's license was threatening to him.

That being said, I have concerns with the poor tactical decision Cst. Batson made by putting himself in a position that did not give him the time, space and perspective to react and respond accordingly nor did it provide Mr. Seguin the room to present his driver's license at waist level and to the front.

Cst. Batson made the decision to close the reactionary gap between himself and Mr. Seguin so that they were inches apart. He admitted to closing the gap in his testimony and the video confirms this.

The members of the Ottawa Police Service are very well trained and the principles of positioning and distance when dealing with individuals are basics that are taught to our members as recruits at the Ontario Police College and reinforced annually at the Ottawa Police Professional Development Center during the members Use of Force Requalification's. If Cst. Batson would have responded in accordance with how he was trained this scenario may have been avoided.

PART IV: DECISION

Constable Kirk Batson

Count 1

The allegations of Unlawful or Unnecessary Exercise of Authority, On September 1st, 2013 while you were on duty affected the unlawful arrest of Mr. Denis Seguin on city of Ottawa property, more specifically the sidewalk located outside municipal address know as 73 Rideau Street, Ottawa, Ontario for the offence of "Failing to leave when directed "pursuant to the *Trespass to Property Act* has been proven on clear and convincing evidence. To this end, I find you guilty of misconduct pursuant to the sections 2(1) (g) (i) of the Code of Conduct.

Count 2

The allegations of Unlawful or Unnecessary Exercise of Authority, On September 1st, 2013 while you affected the unlawful arrest of Mr. Denis Seguin you applied unnecessary force has not been proven on clear and convincing evidence. To this end I find you not guilty.

Constable Pat Lafreniere

Count 1

The allegations of Unlawful or Unnecessary Exercise of Authority, On September 1st, 2013 while you were on duty affected the unlawful arrest of Mr. Denis Seguin on city of Ottawa property, more specifically the sidewalk located outside municipal address know as 73 Rideau Street, Ottawa, Ontario for the offence of “Failing to leave when directed “pursuant to the *Trespass to Property Act* has been proven on clear and convincing evidence. To this end, I find you guilty of misconduct pursuant to the sections 2(1) (g) (i) of the Code of Conduct.

Count 2

The allegations of Unlawful or Unnecessary Exercise of Authority, On September 1st, 2013 while you affected the unlawful arrest of Mr. Denis Seguin you applied unnecessary force has not been proven on clear and convincing evidence. To this end I find you not guilty.



Superintendent Dan Delaney

PSA Hearing Officer

Date of decision: January 13th, 2016