

**ONTARIO CIVILIAN
POLICE COMMISSION**

**COMMISSION CIVILE DE
L'ONTARIO SUR LA POLICE**



**Safety, Licensing Appeals and
Standards Tribunals Division**

**Division de la sécurité, des appels en
matière de permis et des normes**

Citation: Rollins v. PC W.J (Wayne) Desjardins and Ontario Provincial Police Service,
2020 ONCPC 10

Date: 09-30-2020
File Number: 19-ADJ-005

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

Between:

Louise Rollins

Appellant

and

PC W.J. (Wayne) Desjardins

Respondent

and

Ontario Provincial Police

Respondent

DECISION

Panel:

D. Stephen Jovanovic, Associate Chair
Laura Hodgson, Vice-Chair
John Kromkamp, Member

Appearances:

Louise Rollins, the appellant
W. Mark Wallace, counsel for the respondent
Adrien Iafrate, counsel for respondent OPP
Jason Kirsh, student-at-Law for respondent OPP

**Place and date of
hearing:**

Toronto, Ontario
February 25, 2020

INTRODUCTION

- [1] This matter is an appeal from the decision of Superintendent Lisa Taylor (the Hearing Officer) dated June 3, 2019 in which she found the respondent not guilty of one count of Neglect of Duty and one count of Deceit under sections 2(1)(c)(i) and 2(1)(d)(i) respectively of the *Code of Conduct*, O. Reg. 268/10, Schedule, under the *Police Services Act*, R.S.O. 1990, c.P.15 (the *PSA*).
- [2] The appellant disputes these findings and submits that the hearing was procedurally unfair with respect to certain evidence. In her oral submissions to the Commission, the appellant indicated that she is not requesting a new hearing but asking that the Commission “re-examine” the evidence relating to the allegation of deceit.

DISPOSITION

- [3] For the reasons that follow, the decision of the Hearing Officer is confirmed, and the appeal dismissed.

BACKGROUND

- [4] On August 23, 2015, the appellant was cutting plants with a knife at the edge of her rural property. She had an exchange with a neighbor, Shannon Pinkerton, who was walking by the property. Subsequently, Shannon Pinkerton called the appellant’s husband and uttered what the appellant believed to be a threat.
- [5] The Rollins contacted the Ontario Provincial Police (OPP), Pembroke detachment to report the incident and the respondent, PC Desjardins, was dispatched to investigate. Shannon Pinkerton was the wife of OPP Supervisor, Sergeant Pinkerton who on the day in question was the respondent’s direct supervisor.
- [6] The respondent attended the site and conducted an investigation. At the conclusion of the investigation no criminal charges were laid. The appellant laid a private information against Mrs. Pinkerton that was ultimately withdrawn or dismissed.
- [7] The respondent was served with a Notice of Hearing on December 20, 2017, which contained allegations of Neglect of Duty and Deceit. As set out by the Hearing Officer, it was alleged that the respondent committed Neglect of Duty in the following manner:

- Upon arriving at the complainant's residence, P/C Desjardins heard from the complainant that a threatening statement had been made by Sgt. Pinkerton's wife...as a result of an incident that occurred earlier along the roadway. The complainant verbally reported the context and the specifics of the threat to P/C Desjardins and further offered for him to view a notepad on which he recorded the statement shortly after the threat was made towards his wife. P/C Desjardins made no effort to view the wording of the threat recorded by the complainant and was dismissive toward it.
- Despite the fact that the notepad was a key piece of evidence in the threat investigation P/C Desjardins failed to seize it as evidence.
- P/C Desjardins failed to record the actual threat in his notebook. He only recorded the first half of the statement which had no threat component and did not accurately represent the threat information being provided by the complainant.
- P/C Desjardins submitted a Benchmark Occurrence Report which contained incorrect information about the wording of the threat allegedly uttered by Sgt. Pinkerton's wife. The discrepancy between what was reported by the complainant and what was actually recorded by P/C Desjardins, diminished the severity of the alleged threat. (Hearing Officer, Reasons p. 3)

[8] The particulars of the allegations of Deceit were set out as follows:

“After receiving the initial information from the complainant, P/C Desjardins explained that he would be further investigating the allegations against Sgt. Pinkerton's wife. He explained that he would follow up with the complainant with regards to the direction of the investigation. Despite P/C Desjardins' claim that he returned to the complainant's residence after speaking with Sgt. Pinkerton's wife, the complainant said this never happened.

It is alleged that P/C Desjardins committed deceit in the following manner

- P/C Desjardins recorded in his notebook on August 23, 2015 at 1511(3:11) that he re-attended the complainant's residence and had a conversation with the complainant about the investigation.

- The Office of the Independent Police Review Director (OIPRD) investigator told P/C Desjardins that the complainant denied that he returned to their residence at any time. P/C Desjardins maintained he returned to the complainant's residence after attending the Pinkerton residence.
- Professional Standards Bureau investigators obtained Global Positioning System (GPS) information for P/C Desjardins' vehicle which revealed that on August 23, 2015 he was at the Pinkerton residence at 1:53 p.m. and then left at 3:14 p.m. to attend a call. The GPS information did not show him returning to the complainant's residence again that date.

[9] A two-day hearing was held in September 2018 in Pembroke, Ontario. The OPP, the respondent and the appellant were in attendance as parties. At the hearing, the appellant participated, testified, and represented herself.

[10] With respect to the allegation of Neglect of Duty the Hearing Officer found that, while the respondent's actions were "imperfect", there was not clear and convincing evidence to support such a finding. The Hearing Officer found that there was no wilful attempt to diminish the incident. She noted:

The actions in relation to the Rollins' investigation were undertaken while the officer was tasked with several other assignments and ultimately in relation to an investigation that was to be reassigned. Although the officer may not have performed his duties in an optimal manner or to the high standard expected of an OPP officer, I cannot say he did so in a reckless or deliberate manner.

[11] With respect to the allegation of Deceit, during the hearing, the respondent admitted that he had made a mistake in his notes and had not, in fact, attended the appellant's residence on two separate occasions. Prior to the hearing, he located "scratch notes" which explained this error. He also testified that he may have meant to write "re-interview" as opposed to "reattend". Further, the timing of the interviews was captured on the audio recordings taken by the respondent. The Hearing Officer found that, although the respondent may not have given proper care to the investigation or his responses to the OIPRD investigation, his actions were not deceitful. There was not clear and convincing evidence to support such a finding.

Issues

[12] The issues to be addressed can be summarized as follows:

- I. What is the standard of review?
- II. Was the Hearing Officer procedurally unfair in dealing with evidence relating to the allegation of Deceit?
- III. Should the Commission re-examine the evidence on the allegation of Deceit?

Analysis

I. Standard of Review

[13] The standard of review traditionally applied by the Commission to a decision of a hearing officer has been reasonableness on questions of fact and correctness on questions of law: *Ottawa Police Service v. Diafwila*, 2016 ONCA 627 at paras. 61-63. Questions as to whether the facts satisfy a legal test are questions of mixed fact and law and were also to be reviewed on the standard of reasonableness unless there was an extricable question of law involved: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53.

[14] No party took the position that we should instead apply the appellate standard of review for questions of fact, palpable and overriding error, as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[15] When considering issues of procedural fairness, the Commission may consider whether the required elements of procedural fairness in the particular circumstances have been met (see: *Forestall v. Toronto Police Services Board*, 2007 CanLII 31785 (Ont. Div. Ct.) at para. 38; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para 49; *Brooks v. Ontario Racing Commission*, 2017 ONCA 833 at para. 5).

II. Were the proceedings fair?

[16] The appellant argues that the Hearing Officer was procedurally unfair in dealing with evidence relating to the charge of Deceit. More specifically, the appellant alleges that she was not included in a meeting where new evidence (i.e., the

‘scratch notes’) was discussed, was not given opportunity to examine this new evidence and was not permitted to call a witness with respect to this evidence.

- [17] This Commission has held that a public complainant is owed the same procedural rights as respondent police officers. A Hearing Officer is required to provide a minimum level of assistance to unrepresented complainants to ensure meaningful participation. The content of the duty owed to public complainants, is however, different and less than the duty owed in criminal and civil proceedings (see *Timms-Fryer and Amherstburg Police Service and Challans*, 2015 CanLII 69340 at paras. 24-33, *aff’d Challans v. Timms-Fryer*, 2017 ONSC 1300 (Div. Ct.)). In reviewing the transcripts, it appears that the appellant actively participated throughout the hearing and her rights as an unrepresented public complainant were fully respected.

The New Evidence

- [18] As indicated in the Notice of Hearing, the respondent was alleged to have knowingly made a false statement in his notebook and at his OIPRD interview a year later. He incorrectly stated that he attended the Rollins’ residence twice on August 23, 2015. On day two of his disciplinary hearing the respondent acknowledged that he did not, in fact, reattend the Rollins’ residence on that date. When preparing for the hearing, the respondent located his “scratch notes” from this date. As explained by the Hearing Officer at page 40 of her decision, “Scratch notes are common in policing as it is often difficult to remain contemporaneous with notes when responding to numerous calls for service in a short time.”
- [19] Based on the “scratch notes”, the respondent realized that his notebook notes, indicating he reattended the Rollins’ residence, were completed after he had completed an arrest in an unrelated matter. They were not made contemporaneously and were inaccurate.

The Alleged Meeting

- [20] The appellant alleges that on the second day of the hearing there was a meeting about this evidence. The appellant states that respondent’s counsel, the OPP prosecutor and the Hearing Officer met, in her absence, with respect to the respondent’s admission and the introduction of the “scratch notes”. The appellant did not raise her concerns about an alleged, off-record meeting at the time of the hearing. There is simply no evidence of such a meeting before the Commission and no basis for a finding of procedural unfairness.

Opportunity to Examine New Evidence

[21] The appellant further submits that she did not have the full opportunity to examine the new evidence. Initially, the appellant suggested that she did not receive a copy of the scratch notes that were tendered as an exhibit. In her reply factum, however, the appellant concedes that she did, in fact, receive the document on the day it was entered as an exhibit. Based on the transcripts, the appellant was provided a copy of the scratch notes and did not object to the single page document being entered as an exhibit. Nor did the appellant request an adjournment to review the evidence. As noted by the OPP in their submissions, the document consisted of 14 handwritten lines on a single page. The appellant had time, prior to cross examination, to fully review the note. While not ideal, the late receipt of this document does not render the hearing procedurally unfair.

Permission to Call Witness

[22] Lastly, the appellant submits that it was procedurally unfair for the Hearing Officer to not permit her to call a specific witness to testify. The prosecution had planned to call OPP Detective Sergeant Nicholas to testify about OPP vehicle GPS data. This data would have been relevant to the issue of whether the respondent reattended the appellant's residence on August 23, 2015. Prior to this witness taking the stand, the respondent located his "scratch notes" and acknowledged that he did not reattend the Rollins' house. As a result of this admission, the Detective Sergeant was not required to testify, and the prosecutor closed her case.

[23] The appellant then indicated that she wished to call this witness. The Hearing Officer asked the appellant to explain why it was necessary given the respondent's admission. The appellant indicated that she wanted to hear the witness' evidence with respect to the GPS data. The Hearing Officer, after adjourning to review the exhibits, the particulars on the Notice of Hearing, and the specific admission of the respondent, found that there would be no evidentiary value in having the Detective Sergeant testify. Because the respondent had admitted that he did not return a second time to the Rollins residence, the GPS evidence on this point was unnecessary.

[24] At the very outset of the proceedings the Hearing Officer explained to the complainant her right to call witnesses. She stated the following:

You will have the opportunity to call your own witnesses if you have any, ones which have not already testified obviously if you wish to do so, but I will

inquire about any evidentiary value. A witness has to have some evidentiary value or something that's relevant to the charges that are before the tribunal. (Transcript of September 18, 2018 proceedings, p. 9, l. 5)

- [25] The Hearing Officer retains a gatekeeper function. This helps ensure a just, expeditious and cost effective determination of the proceeding on its merits in accordance with section 2 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22 (*SPPA*). Parties do not have an absolute right to call any witness they want. A Hearing Officer is entitled to refuse the tendering of irrelevant or repetitive evidence (s.15, *SPPA*). Based on the information before her, and the respondent's admission, it was open to the Hearing Officer to find that there was no evidentiary value in Detective Sergeant Nicholls testifying. Accordingly, there was no denial of procedural fairness.

III Request to Re-examine evidence

- [26] The appellant requests that the Commission "re-examine" the evidence as it relates to the allegation of deceit. It is not our function to second guess the Hearing Officer or to substitute our opinion. Findings of fact made by a Hearing Officer are owed deference by the Commission: *Toronto Police Service v. Blowes - Aybar*, 2004 CanLII 34451 (Ont. Div. Ct.).
- [27] The Hearing Officer held that the respondent erred in noting that he reattended the Rollins' residence and erred in relying on these notes when he spoke to the OIPRD investigator a year later. The Hearing Officer ultimately found the respondent's testimony in relation to the late discovery of his scratch notes to be credible, noting that there was no suggestion of recent fabrication. The Hearing Officer also noted that there was no benefit to the respondent to say that he reattended the residence when he did not. She found no intention to deceive.
- [28] While finding that the respondent did not give proper care to the investigation, the Hearing Officer did not find that the respondent's actions constituted deceit. The Hearing Officer cited the Commission's decision in *Burgess and St. Thomas Police Service* (1989), 2 O.P.R.822 (O.P.C.) at page 828: "It is a long mile, however, between the point at which one can find a statement to be inaccurate and the point at which one can find a statement was made with intent to mislead or deceive". In our view, it was open to the Hearing Officer to find, after a detailed review of the evidence, that deceit was not established in the circumstances of this case.

ORDER

[29] Pursuant to section 87(8) of the *Police Services Act*, the Commission confirms the decision of the Hearing Officer.

Released: September 30, 2020

Laura Hodgson

D. Stephen Jovanovic

John Kromkamp