

NIAGARA REGIONAL 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
SERGEANT SCOTT ELLIOTT #2962
AND THE
NIAGARA REGIONAL POLICE SERVICE**

CHARGES: UNLAWFUL EXERCISE OF AUTHORITY X 2, NEGLIGENCE OF DUTY

DISPOSITION WITH REASONS

Before: Superintendent Brett Flynn
Niagara Regional Police Service

Appearances:

Counsel for the Prosecution: Inspector Michael Woods
Niagara Regional Police Service

Counsel for the Defence: Ms. Leanne McClay
Niagara Region Police Association

Hearing Date: October 11, 2016

PART I: OVERVIEW

Allegations of Misconduct

Sergeant Scott Elliott, #2962, a member of the Niagara Regional Police Service (NRPS), faces two counts of Unlawful or Unnecessary Use of Authority and one count of Neglect of Duty, contrary to Section 2(1)(g)(i) and 2(1)(c)(i) respectively, of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended. The edited particulars of the counts are as follows:

Count #1 - Unlawful or Unnecessary Use of Authority

On January 25, 2015, Sergeant Elliott effected an arrest of the complainant in this matter under the Trespass to Property Act without reasonable grounds to do so.

Count #2 - Unlawful or Unnecessary Use of Authority

In the process of making this unlawful arrest, Sergeant Elliott caused an injury to the complainant that required medical treatment at the hospital.

Count #3 - Neglect of Duty

Subsequent to arrest, Sergeant Elliott failed to properly or diligently ensure that the complainant was informed of his rights to retain and instruct counsel as required by Section 10 of the Charter of Rights and Freedoms.

Plea

On October 11, 2015, Sergeant Elliott appeared before me and entered a plea of guilty to each of these counts. An Agreed Statement of Fact was tendered as Exhibit #4 and read into the record. Based on those facts and the confirmation by Sergeant Elliott that they were substantially correct, a finding of misconduct was registered.

Decision

After examining and weighing the evidence presented, and in concurrence with a proposed joint submission on penalty, I direct that Sergeant Scott Elliott #2962 of the Niagara Regional Police Service perform 8 hours of community service with a registered charity for each of these counts, including the Big Brothers/Big Sisters organization in Niagara, for a total of 24 hours of community service. My reasons for this are as follows:

PART II: THE HEARING

Exhibits

The exhibits for this matter are listed in Appendix 'A', attached hereto. To avoid repetition, exhibits will be referred to by number without the preface of Appendix 'A'.

Representation

In this matter, Inspector Woods represented the Niagara Regional Police Service and Ms. McClay represented Sergeant Elliott.

Background

This matter arises from a public complaint which was retained for investigation by the Office of the Independent Review Director (OIPRD). Upon completion of the investigation, the allegations of misconduct that are before this Tribunal today were substantiated. The Director of the OIPRD determined that the allegations constituted serious misconduct and directed that the Niagara Regional Police Service would conduct a hearing into this matter.

In accordance with the Police Services Act, the complainant is a party to the proceedings and has the right to fully participate in all stages of the hearing, including the right to ask questions and make submissions. This matter was adjourned on five occasions in order to allow the complainant in this matter the opportunity to participate in the proceedings. The complainant has not attended on any of the five dates that the matter has been spoken to.

I was advised that prior to this hearing, Inspector Woods participated in a conference call that included the public complainant as well as Mr. Rick Brady of the OIPRD and the Niagara Region Police Association President, Mr. Cliff Priest, representing Sergeant Elliott. I was advised that the public complainant was informed as to his participation rights throughout the process and that the complainant was given the opportunity to provide input on a possible resolution. The complainant agreed to have Inspector Woods and Mr. Priest discuss this resolution and report back to him. Following discussions with Mr. Priest, Inspector Woods spoke with the complainant by telephone and advised him of the proposed resolution to resolve the matter that is now before the Tribunal. The complainant agreed with the resolution and indicated that he would like to see community service as a component of this penalty. Inspector Woods advised this Tribunal that he has since received no response to repeated telephone calls and emails as to whether the complainant intended

to appear before the Tribunal to make his own representations. Inspector Woods contacted the OIPRD, who also were unsuccessful in attempts to reach the complainant.

Based on this information, it is my opinion that the NRPS has been diligent in attempting to ensure the complainant has been treated fairly and aware of his right to participate in the process. I appreciate the earnest and sustained effort made to ensure the rights of the public complainant have been considered and respected in this matter.

Inspector Woods also advised me that he has provided a copy of the ASoF to the OIPRD and that he has learned through Mr. Brady that the OIPRD has no objection to the contents of the document. Ms. McClay indicated that the OIPRD is not a party to this hearing and that, while she appreciated that the OIPRD had no issue with the ASoF, their input had no bearing. While this assessment may be factually correct, I am appreciative of having received this information and knowing that those charged with the responsibility of conducting this investigation believe the facts contained within the ASoF are representative of the evidence that was garnered during the investigation.

Agreed Statement of Facts

The facts of this matter are substantially agreed upon by the parties to this Tribunal. The unedited ASoF, filed as Exhibit #4, reads as follows:

On January 25, 2015 at approx. 12:25 A.M., the complainant was at the Level 3 Nightclub on James St., St. Catharines, when he and several friends were escorted out of the premise by security staff for being intoxicated and causing issues within the club.

The complainant repeatedly demanded that security staff permit him to re-enter the club to retrieve his coat, however he was refused entry. The complainant was given direction to return the following day to pick-up his coat. He was then asked to leave the area of the club entrance several times by security staff.

A passing Niagara Regional Police Constable observed the disturbance at the entrance to the club and stopped to investigate. The officer advised the complainant and his friends to leave the area of the club entrance several times before they complied. The officer then departed at approx. 12:33 A.M.

Minutes later, the complainant and his friends returned to the club and attempted to re-enter, however they were prohibited from doing so by security staff. At approx. 12:38 A.M., Niagara

Regional Police Service Sergeant Scott Elliott was passing by when he witnessed a disturbance at the club entrance, at which point he stopped to investigate. The Constable who had been in attendance on the first occasion also returned to assist.

The complainant and his friends were once again asked to leave the area of the club entrance several times, and were escorted to the opposite side of the street by police. Despite the efforts of the police officers and his friends, the complainant indicated that he would not leave without his coat and insisted that he was going to re-enter the club to retrieve it.

At approx. 12:40 A.M., the complainant was arrested by Sergeant Elliott for a contravention of the Trespass to Property Act (TPA). The complainant resisted and as a result during the course of the arrest both Sergeant Elliott and the complainant slipped on the icy sidewalk and fell to the ground. The complainant's face struck the ground, and Sgt. Elliott fell on top of the complainant, resulting in a small laceration above the complainant's eye.

Following his arrest by Sergeant Elliott, the complainant was turned over to the Constable in attendance. The Constable attempted to take the complainant to his residence, however there was no responsible person at that location to take custody of him which was determined to be necessary for his personal safety given his inebriated condition. The complainant was subsequently transported to the Central Holding facility. Upon arrival, it was noted that the laceration above the complainant's eye continued to bleed. As a result, he was transported by police to the Niagara Health System – St. Catharines Site for examination and treatment. The complainant subsequently received 3 stitches to close the laceration above his eye, and was further diagnosed with a cracked nose.

At the hospital, the complainant was released from custody by the Constable and was issued with a Provincial Offence Notice for "Fail to Leave Premises When Directed", contrary to S.2 (1) (b) of the TPA.

As the complainant was not on the L3 premises or departing therefrom at the time of his arrest, the arrest for an offence under the Trespass to Property Act was not clearly authorized and therefore Sergeant Elliott did not have sufficient grounds to make the arrest under the Trespass to Property Act. There were grounds available for an arrest to be made for other offences but Sergeant Elliott did not pursue those other offences at the time given his mistaken belief that the Trespass to Property Act applied to the circumstances and was sufficient to addressing the

disturbance caused by the complainant. As Sergeant Elliott was not authorized by law to arrest the complainant under the Trespass to Property Act, the use of force following the arrest, which was taken to gain control of the complainant, was also not authorized.

At the time of his arrest the complainant was not informed of his rights to retain and instruct counsel by Sergeant Elliott. The transporting Constable was not aware that the complainant had not been advised of his rights to counsel at the time of detention, and therefore did not advise him of his right to counsel. As Sergeant Elliott was the arresting officer, he was ultimately responsible to inform the complainant of those rights. (End ASoF)

Positions on Penalty

As indicated, Ms. McClay joined Inspector Woods in recommending a penalty that required Sergeant Elliott to perform a total of twenty-four hours of community service. I am advised that the complainant in this matter specifically asked that a penalty include completion of community service be considered as opposed to the forfeiture of hours.

Submissions

During this phase of the hearing, the prosecution and defence both entered Books of Authorities. The prosecution submitted a book, entered as Exhibit #5, containing multiple documents in four tabs, the contents of which are as follows:

Tab 1 – 3 NRPS Performance Appraisals of Sergeant Elliott for 2013 to 2015

Tab 2 – Batson/Lafreniere v. Ottawa Police Service (Mar 24, 2016)

Tab 3 – Mulville/Araryev v York Regional Police (Jan 11, 2016)

Tab 4 – Wong v. Toronto Police Service (OCPC decision, Aug 18, 2015)

The defence submission was received as Exhibit #6 and contained the following documents:

Tab 1 – Work Performance

- Commendations
- 11 NRPS Performance Appraisals of Sergeant Elliott for 2006 to 2015
- Attendance acknowledgment
- Letters of Recognition/appreciation

Tab 2 – Letters of reference

- Dr. Daryl Wolski, Investigative Coroner
- Staff Sergeant Tim Carter, NRPS
- Sergeant Ken McGregor, NRPS
- Inspector Chris Cincio, NRPS

Tab 3 – Case Law

- Schofield v. Metropolitan Toronto Police (Oct 26, 1984)
- Batson/Lafreniere v. Ottawa Police Service
 - Decision (Jan 13, 2016)
 - Penalty (Mar 24, 2016)
- Mulville/Araryev v York Regional Police (Jan 11, 2016)
- Blakely/Parker v. Quinte West Police Service (Aug 15, 2007)
- Wong v. Toronto Police Service
 - Hearing officer decision (Mar 25, 2014)
 - OCPC appeal decision (Aug 18, 2015)

Summary of Prosecution Submissions

Inspector Woods stated that the goals of the police discipline process include the maintenance of discipline through the correction of the behaviour of the involved officer while deterring others officers from engaging in the same behaviour; reassuring and restoring public confidence in the Police Service by demonstrating that officers will be held to a higher standard of conduct and are accountable for their actions; ensuring the fair treatment of the involved officer during the disciplinary process; and, in the case of a public complaint, ensuring that the interests of the complainant are protected.

In his submissions, Inspector Woods referenced a number of elements that should be considered in the police discipline process as proposed by Paul Ceysens in *Legal Aspects of Policing* (1994). These factors have been widely accepted and adopted by numerous police Tribunals and represent both mitigating and aggravating factors for consideration. Inspector Woods emphasized the overriding public interest to ensure that police officers are aware of their arrest authorities and the limitations they impose and that the public must have confidence that police

officers will work within the appropriate legislative framework and govern themselves accordingly. They must also be reassured that police officers that do not maintain the required standards will be held to account and that the public will be protected. Inspector Woods stated that it was his belief that Sergeant Elliott recognized the seriousness of his misconduct and had accepted responsibility for his role and actions in this matter.

Inspector Woods reviewed Sergeant Elliott's very positive employment history, since he began his duties in May 1986 and his subsequent promotion to the rank of Sergeant in October 2009.

Inspector Woods submitted a number of cases to assist with consistency considerations. He noted that the cumulative total of hours suggested with the joint submission in this matter was higher than the referenced decisions, but submitted this was appropriate given Sergeant Elliott's supervisory position, experience, and the totality of allegations.

Summary of Defence Submissions

In her submissions, Ms. McClay also addressed a number of factors for consideration as previously tendered by Inspector Woods. To a great degree, the submissions of the defence aligned significantly with those of the prosecution and, where this is the case, I have not repeated them.

Ms. McClay acknowledged that the proposed agreement was reached following numerous discussions, input from the complainant, and an in-depth analysis of the relevant sentencing considerations.

Ms. McClay provided an overview of Sergeant Elliott's commitment to his profession and turned to numerous performance evaluations that indicated consistently high performance and asked that strong weight be given to his long and exemplary employment history.

Also included in the defence submissions were four Letters of Reference; three from fellow officers and the fourth from an Investigative Coroner, Dr. Darryl Wolski. Sergeant Elliott's co-workers spoke of his work ethic, commitment to volunteering, his treatment of victims with dignity and respect, and to his dedication to leading and mentoring fellow officers. Dr. Wolski, in his letter noted;

“I participated in several ride-alongs with Scott, and each included many trying situations in which his patience and compassion were put to the test. He never

failed. I also observed frequent positive interactions with the public, specifically with the homeless and children. Each interaction made it clear that police officers were people to turn to when you need help".

Ms. McClay submitted that while a serious matter, the circumstances of this incident could be considered as being on the lower end of the spectrum for these types of offences and that the unlawful arrest was the result of a premature action rather than an overall ignorance of Sergeant Elliott's power to arrest. In her summation, Ms. McClay provided the following interpretation of the arrest:

"The facts give little doubt that the complainant, despite being advised numerous times that he was not welcome back on the premises, was fully intent on re-entering the premises and was on his way to do just that. Had Sergeant Elliott waited those few moments then there would be no issue with the arrest and subsequent use of force. In relation to the failure to provide the right to counsel, this situation was not one where there was some inappropriate reason behind the failure to provide the complainant with his counsel rights. The complainant was not detained for the purpose of questioning. The complainant was detained solely because he was not capable of caring for himself. There was no purposeful intention at any time to deny the complainant his Charter rights. Rather it was a situation where the Charter violation came about inadvertently with no intention to purposely or arbitrarily circumvent the complainant's counsel rights or to take advantage of the complainant. It was an oversight by Sergeant Elliott at the time of the arrest and he has taken full responsibility for it".

PART III: ANALYSIS AND FINDINGS FOR PENALTY DISPOSITION

Summary of misconduct

The facts of Sergeant Elliott's misconduct are not in dispute. On January 25, 2015, Sergeant Elliott arrested the complainant in this matter under the Trespass to Property Act without reasonable grounds to do so. In the process of making this unlawful arrest, Sergeant Elliott caused an injury to the complainant that required medical treatment at the hospital. Subsequent to the arrest, Sergeant Elliott failed to properly or diligently ensure that the complainant was

informed of his rights to retain and instruct counsel as required by Section 10 of the Charter of Rights and Freedoms.

What remains to be determined in this matter is the appropriate sanction. The cases and references presented by counsel confirm in my mind that the proposed joint submission on penalty before this Tribunal is just and appropriate.

It is widely accepted the goals of the discipline process are to correct errant behaviour or misconduct, deter misconduct, and reassure the community. There must be a balance between the expectations of the community, the needs of the organization and fairness to the subject officer. To guide me through these issues, I will analyze the evidence using a variety of commonly held disposition considerations. They include:

- Public interest
- Nature and seriousness of the misconduct
- Recognition of the seriousness of the misconduct
- Potential to reform or rehabilitate the police officer
- Employment history
- Consistency of disposition
- Specific and general deterrence
- Damage to the reputation of the police service
- Effect on police officer and his family
- Effect of publicity

Public interest

There exists an overriding public interest to ensure that police officers are aware of their arrest authorities and the limitations they impose and that the public must have confidence that police officers will work within the appropriate legislative framework and govern themselves accordingly. They must also be reassured that police officers that do not maintain the required standards will be held to account and that the public will be protected.

Nature and Seriousness of the Misconduct

The facts in issue of this misconduct are concerning in that a citizen was arrested without lawful authority and suffered an injury in the process of that arrest. While under arrest, the citizen was deprived of his rights to counsel as provided by the Charter of Rights.

In mitigation, I accept that this was not a case where there was some unprincipled reason behind the failure to provide the complainant with his counsel rights. The complainant was not detained for the purpose of questioning and there was no purposeful intention to deny the complainant his Charter rights while police sought to gather incriminating evidence.

It is unknown whether, as the defence suggested, the complainant in this matter would have continued to disregard the directions of the police and enter the premise had Sergeant Elliott not acted preemptively. This did not happen and I do not consider it to bear weight as a mitigating factor.

Recognition of the Seriousness of the Misconduct

This Tribunal was informed that, since the time of his initial interview with the OIPRD, Sergeant Elliott has accepted responsibility for his role and actions in this matter, as evidenced through his guilty plea to the three counts before the Tribunal. He also agreed to the request of the complainant that the penalty include the completion of community service. This, coupled with his demeanour during the hearing, has weighed favourably and deserves credit in mitigation of the final disposition.

Potential to Reform or Rehabilitate the Police Officer

Sergeant Elliott has been a police officer for some 31 years and has never before come before a tribunal. By his actions in resolving this matter, Sgt. Elliott has demonstrated to me that his ability to reform is not of concern. I trust that Sgt. Elliott will not appear again on a related matter.

Employment History

I have taken note of Sergeant Elliott's very positive employment history, since he began his duties in May 1986 and subsequent promotion in October 2009. Sergeant Elliott's career history includes positions in uniform patrol, the Sexual Assault Unit, and the Training Unit, and he has no prior record of discipline for misconduct. The information placed before the Tribunal provided an overview of Sergeant Elliott's commitment to his profession as indicated by numerous performance evaluations that indicated consistently high performance. The employment history of Sergeant Elliott is a significant mitigating factor for consideration.

Consistency of Disposition

In their submissions, both Inspector Woods and Ms. McClay tendered *Batson & Lefreniere and the Ottawa Police Service, OPS, Mar 24, 2016*; *Mulville & Araryev and York Regional Police, YRP, Jan 11, 2016*; and *Wong and Toronto Police Service, 2015 ONCPC 15 (CanLII)*. Ms. McClay further provided *Blakely v. Parker, 2007 CanLII 33123 (ON SCDC)* and *Schofield and Metropolitan Toronto Police Service (1984), 2 O.P.R. 613 (O.P.C)*.

With the exception of the fact that *Batson & Lefreniere* were both constables, I found the facts in this case most similar to the matter before this Tribunal in that a complainant was arrested for 'Failing to Leave Premises When Directed' under the Trespass to Property Act while he was on a public sidewalk. Both Constables were subsequently alleged to have committed misconduct, that being Unlawful or Unnecessary Exercise of Authority. A joint submission on penalty led to the forfeiture of 8 hours as well as training on arrest authorities for the primary Constable, while the secondary Constable received a reprimand and arrest authorities training. This joint submission relied on input from a complainant who did not provide the hearing with any separate submissions.

In *Mulville and Azaryev*, Constable Mulville faced misconduct allegations of Discreditable Conduct and Unlawful or Unnecessary Exercise of Authority, while Constable Azaryev faced one allegation of Unlawful or Unnecessary Exercise of Authority with respect to the unlawful arrest of an individual within a private residence. Differing submissions as to the disposition of that matter resulted in a decision by the Hearing Officer which led to a forfeiture of 12 hours and a reprimand for primary Constable Mulville and a reprimand for secondary Constable Azaryev.

In *Wong*, a decision of the Ontario Civilian Police Commission, the officer was initially found to have committed misconduct by making an arrest without good and sufficient cause, which falls under the same section as Unlawful or Unnecessary Exercise of Authority. This occurred during the G20 protests in Toronto and the penalty imposed was a one day suspension without pay. The Hearing Officer took into account the officer's work history, the instructions received from his Sergeant and his previous day's experience of trying to control a riot. The length of custody was given strong weight and far exceeds the amount of time the complainant was detained in the matter now before the Tribunal. As a result, the fact situation in *Wong* is clearly higher on the

spectrum for these types of offences. Following an appeal to the OCPC, both the finding of misconduct and the penalty were upheld.

Ms. McClay also submitted *Blakely*, a decision of the Ontario Divisional Court. The facts of this case involve the arrest of Mr. Parker for theft and possession of stolen property. Parker was prevented from communicating with anyone for some 28 hours after his arrest under the direction of Sergeant Blakely in order to prevent him from notifying others, who were known to be part of a crime group, about the related police investigation. As a result, Mr. Parker's right to counsel was delayed for officer safety reasons. The officer safety concerns ceased approximately 90 minutes before Parker was permitted to call his lawyer. As a result, Sergeant Blakely was found guilty of neglect of duty for failing to provide Parker with his right to retain and instruct counsel without delay under section 10(b) of the Charter for the 90 minute period. The Hearing Officer took into account that Blakely's conduct was not arbitrary and that he had taken steps to ensure that no advantage was taken by the police of the deferral of the right to counsel. Other mitigating factors included the officer's unblemished work history and strong references. As stated, the matter before this Tribunal differs in that the complainant was detained, but for a very short period of time. The penalty imposed by the Hearing officer in the Blakely case was a verbal reprimand and this penalty was upheld by the Divisional Court.

Lastly, the defence stressed the importance of providing discipline that is considered be fair and that this could best be achieved by carefully examining the facts surrounding the misconduct and acknowledging penalties provided in similar circumstances as set out in *Schofield*. In this decision, the Ontario Police Commission stated:

“Consistency in the discipline process is often the earmark of fairness. The penalty must be consistent with the facts and consistent with similar cases that have been dealt with on earlier occasions.”

Specific and General Deterrence

I accept that the proposed disposition is sufficient to provide specific deterrence and the likelihood of repeated similar misconduct by Sergeant Elliott is remote. A disposition must also serve as a general deterrent and a reminder to all members of the Service that the authority to make an arrest carries a significant responsibility and ought not to be treated as a routine matter. Officers must be familiar with arrest authorities and their limits, and abide by the provisions of

the Charter of Rights and Freedoms to advise all arrested or detained persons of their right to retain and instruct counsel.

Damage to the Reputation of the Police Service

Law enforcement officers are entrusted by the communities they serve with powers to enforce the law and the reputation of a police service is damaged whenever the actions of a member result in substantiated allegations of misconduct. This matter received public attention through the attendance of the local media and the resulting public awareness of this incident will cause damage to the reputation of the Niagara Regional Police Service. This is clearly an aggravating factor.

Effect of Publicity

This matter has been addressed in a public forum, resulting in media attention and will likely result in further publication of details upon the conclusion of these proceedings. Inspector Woods submitted that the publicity has had an effect and impact on Sergeant Elliott and his family, as well as the Police Service, and is the cost of an open and transparent disciplinary process.

PART IV: DISPOSITION

After examining and weighing the evidence presented, and in concurrence with a proposed joint submission on penalty, I direct that Sergeant Scott Elliott #2962 of the Niagara Regional Police Service perform 8 hours of community service with a registered charity for each of these counts, including the Big Brothers/Big Sisters organization in Niagara, for a total of 24 hours of community service. The hours of community service must be completed within 4 months of the date of this decision and this Tribunal will remain seized of the matter until such time as satisfactory written documentation of the community service is received by Inspector Woods indicating satisfactory completion.



Brett Flynn
Superintendent
Niagara Regional Police Service

Date electronically delivered: January 10, 2017

Appendix "A" - NRPS Discipline Hearing – Sergeant Scott Elliott

Exhibit List

Exhibit	Description of Exhibit
1	Designation Inspector Michael Woods – Prosecutor
2	Designation – Superintendent Scott McLean – Hearing Officer
3	Designation – Superintendent Brett Flynn – Hearing Officer
4	Agreed Statement of Fact
5	Book of Authorities – Prosecution
6	Book of Authorities - Defence