

IN THE MATTER OF
ONTARIO REGULATION 123/98
MADE UNDER THE POLICE SERVICES ACT, R.S.O. 1990, C.P.15
AND AMENDMENTS THERETO;

OFFICE OF THE INDEPENDENT
POLICE REVIEW DIRECTOR

AND IN THE MATTER OF
POLICE CONSTABLE KELLY HELBIN and
SERGEANT STEVE MISIK and
STAFF SERGEANT KEITH MYERS

AUG 10 2015

RECEIVED

AND THE

CHATHAM-KENT POLICE SERVICE

APPEARANCES

Mr. Brian Farmer
Legal Counsel

- for the Chatham-Kent Police Service

Mr. Glen Donald
Legal Counsel

- for Constable Helbin, Sergeant Misik
and Staff Sergeant Myers

BEFORE:

Superintendent (retired) Robert J. Fitches

Reasons read into the Record: August 6th, 2015

REASONS FOR DECISION

Background

These proceedings were commenced by three (3) Notices of Hearing dated October 6th, 2014 and properly served upon Constable Helbin, Sergeant Misik and Staff Sergeant Myers. The Allegations within the three Notices of Hearing are identical for each officer. The allegations are:

- **Neglect of Duty** – by neglecting or omitting promptly and diligently to perform a duty as a member of the Chatham-Kent Police Service, contrary to Section 2 (1) (c) of the Code of Conduct.

These proceedings resulted from a public complaint lodged by Mr. Albert Covemaeker who is the father of a young man who was the victim of an assault. It was Mr. Covemaeker (senior's) view that the incident had not been properly investigated and the three individuals who had allegedly taken part in the assault had not been prosecuted for the assault. Mr. Covemaeker (senior) is a retired Ontario Provincial Police Officer.

Mr. Covemaeker had originally spoken to the (then) Chief of Police, Dennis Poole. When it appeared, even after having spoken to Chief Poole, that the matters were not being properly pursued, Mr. Covemaeker (senior) filed a complaint with the Office of the Independent Police Review Director (O.I.P.R.D.).

After having conducted an investigation of Mr. Covemaeker's complaint, the O.I.P.R.D. ordered that a hearing be conducted into allegations of Neglect of Duty relating to all three officers who appeared before me.

Hearing

A hearing was convened and sat on July 2nd and 3rd, 2015 in Chatham Ontario. At that time, all three officers entered *not guilty* pleas to the allegations contained in the Notices of Hearing.

Mr. Albert Covemaeker was present during the entire hearing. As a party to the proceedings, he made submissions for my consideration.

Mr. Brian Farmer acted as prosecutor in these matters.

It was Mr. Farmer's decision to call several witnesses and file certain materials with the tribunal. Mr. Albert Covemaeker, Ms. Heather Fox, Mr. Ian Bruce and Staff Sergeant (retired) Barry Childs were identified as the witnesses to be called by the prosecution. It was also indicated that a memory stick (thumb drive) that contained recordings of witness interviews conducted by the OIPRD investigator(s) would also be filed with the tribunal.

Evidence Presented

Mr. Albert Covemaeker testified before me.

Mr. Covemaeker is a former O.P.P. officer, having served with that organization for 27 years. He retired some 14 years ago. Mr. Covemaeker lives in Thamesville, Ontario and agreed that he is the complainant in these matters.

On June 23, 2012 his son Joseph was assaulted. Joseph had been at a local festival where, from time to time, a fair amount of alcohol consumption occurs. It appears that Joseph had been partaking of this aspect of the festival in that it was Mr. Covemaeker's evidence that he understood that Joseph was quite intoxicated. When Joseph left the festival he went to the Fox residence to await his girlfriend's arrival.

Shortly after the assault, Constable Helbin interviewed Joseph in Mr. Covemaeker's presence at Mr. Covemaeker's residence in Thamesville. Mrs. Covemaeker was present during Joseph's interview as well.

Mr. Covemaeker testified that during the interview, his son Joseph was unable to identify the assailant(s). He had no memory of the assault. He remembered being in the back yard of the residence where the assault occurred. He was drunk at the time. He didn't even know how many people were involved in his assault. As a result of the assault, Joseph had swollen lips, bleeding inside his mouth and a broken nose. When asked by defense counsel how helpful Joseph would have been in prosecuting the assailant(s), Mr. Covemaeker indicated that Joseph knew what happened but didn't know how it occurred or who had done it; he wouldn't be very helpful if people were charged.

Several months later (after having spoken to Chief Poole), Mr. Covemaeker received information that one person had been charged and two others who were present at the time of the assault were being called as witnesses. Mr. Covemaeker stated that he had received no official information or notification from the police regarding the case. When he asked the police for a copy of the report, he was told that since Joseph was over 18 years of age, they were unable to tell Mr. Covemaeker anything. Mr. Covemaeker made it clear that he was Joseph's father and that he was representing Joseph.

Mr. Covemaeker next went to see Inspector Littlewood of the Chatham-Kent Police Service and also spoke to an Assistant Crown Attorney. Inspector Littlewood and the Assistant Crown Attorney indicated that the matter was being looked after.

Around the same time as he spoke with Chief Poole and the Assistant Crown Attorney, Mr. Covemaeker was aware that nobody had interviewed two witnesses, Heather Fox and Ian Bruce. These two individuals lived at the location of the assault and might have been able to offer some relevant information. At some point, Mr. Covemaeker became aware that one individual had been charged and that that charge had been withdrawn because of a lack of evidence. This displeased Mr. Covemaeker greatly. Within

approximately the same time frame, Mrs. Covemaeker wrote to their local MPP. The MPP's reply to Mrs. Covemaeker suggested that the police service was not responding his inquiries. This information angered Mr. Covemaeker and shortly after hearing this information he filed his complaint with the OIPRD.

Mr. Covemaeker testified that his son Joseph never complained about this. Joseph just wanted to forget the whole thing. He had made application to the Criminal Injuries Compensation Board (CICB). After some initial difficulties, he was eventually awarded approximately \$5,000 by the CICB. He has since fully recovered from his injuries and has moved on.

It was Mr. Covemaeker's testimony that he had never seen the reports nor the crown brief. He had received no adequate explanation about the charge being withdrawn. He had heard that the accused person had been permitted to donate to a charity to put the legal matters to rest; he had never heard of such a thing before.

Mr. Covemaeker became aware of information that indicated that sometime after the assault took place, two people returned to the scene to look for a wallet that had been dropped at the time of the assault. When Joseph had arrived at the hospital by ambulance, he had been in possession of two wallets; only one of which was his. When Mr. Covemaeker interviewed the two witnesses (Fox and Bruce), he was told that two people had returned to look for the wallet. Mr. Covemaeker did not share this information with the police.

When asked about the reason(s) for his complaining to OIPRD, Mr. Covemaeker indicated that when he found out that the accused was allowed to pay money to get a discharge, he felt it was ridiculous. When he found out that the Chatham-Kent Police Service was not responding to the MPP's inquiries, Mr. Covemaeker testified that he just couldn't get over it.

In summarizing his views of the results of the investigation, Mr. Covemaeker indicated that he had wanted three people charged; one being the person registered to the license plate that was available and 2 people who lost their wallets at the scene. Only one charge was laid and that was withdrawn after a charitable donation had been agreed upon.

Heather Fox testified before me. She was shown her statement to refresh her memory. She testified that she had written the statement about a week after the assault. She had called in to report a license number of a vehicle that might have been involved. The police told her to write out the statement and that someone would come by to pick it up. Nobody ever came by so Ms. Fox gave the statement to Mr. Covemaeker. She never did give it to the police.

At the time of the assault, Ms. Fox was at home getting ready to go to bed. She heard a commotion outside her window. There were three men in their twenties whom she did

not recognize standing in a circle. The group of people was just a few feet away from her window.

When the commotion did not subside, Ms. Fox yelled at the men to get off her property or she would call the police. They jumped in a truck and left. (She recalled no details about the truck but the next day she was able to obtain a license number from a similar truck.)

When these men left, Ms. Fox noticed someone laying on the ground where the group of men had stood. She yelled out to see if this person was ok. She then summoned her husband (Ian Bruce) who went out with the portable phone. The person was on his knees with his hands on his face. His face was covered in blood and swollen. There were footprints on his back.

Ms. Fox called 911. While on the phone she looked again at the person and saw a 'Superman' tattoo on his back; now recognizing this person to be Joseph Covemaeker. When Ms. Fox realized it was her friend Joseph Covemaeker, she 'freaked out', but stayed on the phone until the ambulance arrived.

When the police arrived, Ms. Fox spoke to one male and one female officer. She identified the female officer as Kelly Helbin. She did not know who the male officer was. At some point a large crowd assembled to see what was going on.

About an hour after everyone had left, a silver truck pulled in. Two men got out and started looking around where they'd been standing outside her window. At about the same time, a police car pulled in. Ms. Fox, Mr. Bruce and Joe's girlfriend Kerri went outside to speak to the police. Ian asked these men what they were looking for. They indicated 'a friend's wallet'. The police officer told them there was no wallet and to be on their way. The police officer called in and discovered that a wallet had been found with Joseph at the hospital. Ms. Fox did not know who the officer was. He did not ask her for a statement or inquire into her identity. Other than asking the people to leave, he didn't say or do anything.

The next morning, the same silver truck came back. There were now three males looking in the yard. Ms. Fox went out and wrote down their license number. She called the police and left a message that she had further information. A female officer called her right back – no indication who the officer was. Ms. Fox gave this officer the license number and asked if she needed to write out a statement. This officer said 'yes' and indicated that someone would come by Ms. Fox's residence to pick up the statement.

When discussing the statement that she had written out, she indicated that by the time Mr. Covemaeker called and spoke with her, she had already completed the statement. She agreed, however, that when speaking to the OIPRD investigator over the telephone, she might have indicated that she had written the statement at the behest of the Covemaekers.

When asked why she had not requested the police during her 911 telephone call, particularly when considering Ms. Fox's observation within her statement that Joseph had been the 'victim of violent crime', she stated that she only asked for an ambulance because she was primarily concerned about Joseph's well-being.

These inconsistencies raise some serious concerns about Ms. Fox's reliability as a witness.

There appeared to also be inconsistencies in what Ms. Fox testified to before me and what she had told the OIPRD. She had told OIPRD that the men in the circle had been punching and kicking – although she had not seen either action. When a truck returned to the scene a while later, she told OIPRD it was a different truck, even though she believed it was the same truck. She was not sure if the police officer who returned an hour or so after the assault was the same male police officer who had been there originally, yet she told the OIPRD it had been the same officer. Although Ms. Fox states she called the police with the license number and they asked for a statement to be prepared which they would pick up, the license number does not appear in the written statement she prepared.

Mr. Ian Bruce testified before me. Mr. Bruce was, at the time of these events, living with Ms. Heather Fox.

At the time of the assault, Mr. Bruce was sitting watching television while his wife was getting ready for bed. She came in and told him that someone was beaten up pretty badly. Mr. Bruce went out, saw the victim on the ground and told Heather to call 911. Mr. Bruce stayed with the victim. Mr. Bruce did not recognize the victim and simply told him to hang on – that help was on the way. After some mumbling, Mr. Bruce realized it was Joseph. When the ambulance arrived, Mr. Bruce backed away from Joseph to let the ambulance personnel do their job. A short time later, two police officers arrived; one male and one female.

Later that night a truck came by with two males looking in the grass. Mr. Bruce spoke to them and another police officer arrived. He asked to see their shoes. The guys in the truck were allowed to leave. It was a silver truck. Mr. Bruce was unaware whether or not anyone obtained the truck's license number.

It was Mr. Bruce's testimony that he and Ms. Fox had not really spoken about these events.

On or about January 17th, 2014 Mr. Bruce wrote out a statement at Mr. Covemaeker's request. As far as Mr. Bruce is aware, Ms. Fox did her statement at about the same time – also at Mr. Covemaeker's request. Mr. Bruce testified that he was unaware if this was about the same time as Joseph was to appear before, or file a complaint with the CICB. When clarifying the details of how and when he prepared his statement, Mr. Bruce indicated that he had dictated his statement and Mr. Covemaeker had written it down. He was unaware of who had typed it. He indicated that he was of little use to the

police as to who had done what. Mr. Bruce indicated that he had not been interviewed by the OIPRD relative to these matters.

Retired Staff Sergeant Barry Childs testified before me. He appeared to discuss and explain some of the pertinent details relative to the records management and reporting systems.

Staff Sergeant (ret'd.) Childs offered a great deal of detailed and helpful information regarding how records and reports are created and the various stages in how these documents are checked and approved. The upshot of Staff Sergeant (ret'd.) Childs' testimony is that each level in the reporting structure – Constable, Sergeant, Staff Sergeant, etc. has a responsibility to ensure that reports are accurate, timely, etc., and that in the investigation with which we are dealing in this hearing, there were shortcomings at all levels from Constable Helbin up to and including Staff Sergeant Myers. In Staff Sergeant (ret'd.) Childs' opinion, Constable Helbin could have done a better job of the investigation. In Staff Sergeant (ret'd.) Childs' opinion, Sergeant Misik had a responsibility to check Constable Helbin's work and failed to do so to an acceptable level. And in Staff Sergeant (ret'd.) Childs' opinion, Staff Sergeant Myers had the overall responsibility to check Constable Helbin's work and Sergeant Misik's work and failed to do so to an acceptable level.

It was Staff Sergeant Childs' opinion that Constable Helbin seemed to be struggling somewhat with electronic disclosure. She had received additional training. All officers have training available to them whenever a need is identified and a supervisor can request additional training if it is required. Staff Sergeant Childs had reviewed this specific file and in his opinion, it appeared that the report was not filed; that there were issues.

When assessing this particular file, it was Staff Sergeant Childs' opinion that it is always the officer's responsibility to manage the investigation. Supervisors are there to push the tasks but it is always the investigator's responsibility to manage the investigation.

When assessing failure and fault, Staff Sergeant Childs testified that Constable Helbin appears to have failed to properly file appropriate paperwork relative to the investigation. Similarly, Sergeant Myers did not appear to catch it and Staff Sergeant Misik too failed to accurately monitor the situation.

During his testimony, Staff Sergeant Childs suggested that Constable Helbin had been on maternity leave and this might have created some initial difficulties for her in catching up to the current methods and systems. As a result of this investigation, further training was conducted to address any shortcomings that might be indicated. In addition to the maternity leave reintegration, it was also pointed out that at about this same time, there were significant changes being brought in. These two aspects were not in any way put forth as excuses for Constable Helbin's performance. They were, however, put forward as one possible explanation for what occurred.

When assessing the strength of the case being put before the court, Staff Sergeant Childs suggested that this might be a difficult case to prove. One of the officers who was involved in the investigation (none of the three before the tribunal) had noted that it 'looked like self-defence'. This was some independent officer's view. Such an observation within the file would raise significant challenges once the matter came to trial.

Other Evidence

In addition to various documentary and viva voce evidence presented at the hearing, I was also provided with electronic recordings of statements made by various individuals relative to the subject of these proceedings. After having spent many hours listening to a number of interviews, including interviews with the officers who are facing these allegations of misconduct, I am satisfied that the evidence produced at the hearing and the submissions by counsel adequately represent a true and complete picture of what transpired in relation to the investigation and reporting of the assault upon Joseph Covemaeker. With the exception of some discrepancies between various versions of the events being examined as related by Heather Fox, the statements are consistent with the evidence put before me.

Submissions by Counsel

By the Prosecutor

Mr. Farmer observed that after having heard the evidence put forth at the hearing, it would be entirely understandable why Mr. Covemaeker was as frustrated as he was. After having spoken to Ms. Fox and Mr. Bruce, it seemed apparent that the investigation had not uncovered all of the evidence that Mr. Covemaeker believed it ought to have; relating specifically to the fact that there were 3 people present during the assault and only one of the three had been charged.

Mr. Covemaeker approached the (then) Chief of Police and had rightly expected that the matter would have been looked into. Unfortunately, there was no follow-up with Mr. Covemaeker. The next thing Mr. Covemaeker hears is that the party believed to be responsible for his son's injuries is permitted to pay some money to a charity, resulting in the charges being withdrawn. Mr. Covemaeker was completely unfamiliar with such procedures and it therefore seemed unreasonable to him that someone could deal with criminal charges in such a fashion. In hindsight, it was truly unfortunate that nobody spoke to Mr. Covemaeker to fully explain what had transpired.

When examining the Crown Brief – that being the sum total of all of the evidence, it becomes apparent that there was really no realistic basis for the charges against Mr. Christian. Ms. Fox saw nothing and Mr. Bruce saw nothing. Joseph Covemaeker was unable to provide any details whatsoever regarding the assault. When Constable

Bertock interviewed Mr. Christian, he provided an exculpatory statement, stating that his actions were in self defense. When the Crown Attorney received the case, it became apparent that there was no case to prosecute and a decision was made to divert. It is unfortunate and difficult to understand why the deficiencies in the case weren't raised with Mr. Covemaeker earlier on. Had that been done, these matters might well have been avoided entirely.

It was clear that Constable Helbin was the investigating officer. As such, she had a responsibility to investigate adequately and report in a timely and accurate fashion. There were various policies and procedures that weren't followed properly which led to a number of shortcomings in Constable Helbin's work.

There were a number of investigative and operational deficiencies found by the OIPRD investigators during their investigation of these matters. These included a failure to carefully and accurately describe the scene of the assault, accurately describe where the wallet was found while at the scene, follow up on the statement provided by Mr. Christian to Constable Bertok and review the photographs of Mr. Covemaeker's injuries to determine whether or not they were consistent with the account of the confrontation given by Mr. Christian. Constable Helbin has accepted responsibility for many of the shortcomings identified by the OIPRD investigators.

There were also supervisory failings identified by the OIPRD investigators. Where there were deficiencies indicated within the file, the supervisors ought to have followed up with Constable Helbin to clarify whether or not things were being done properly.

After Inspector Littlewood's actions were examined by the OIPRD investigators, it was determined by them that he was not guilty of any misconduct and consequently no allegations were made against him.

The OIPRD investigators found that Staff Sergeant Myers and Sergeant Misik were likely guilty of misconduct in that they did not take appropriate action in relation to the file, even when there were red flags indicating that review and follow-up were required. While Sergeant Misik remembers speaking to Constable Helbin about the assault, he had no specific recollections and no notes about what specific guidance he might have given to Constable Helbin. From the OIPRD perspective, they would have expected specific instructions to be given and proper records be kept of such instructions. In summary, there appears to have been insufficient detail in the chain of command, in OIPRD's view.

In the '*Chatham Kent Police Service Criminal Investigations Management Plan*', it is plain that supervisors are responsible to review investigations and ensure that qualified members conduct investigations and also ensure that all investigations meet common sense and internal requirements. Even when emails from Inspector Littlewood identified concerns with the investigation, Constable Helbin's supervisors – who had been copied on the emails – failed to properly review the file and appropriately direct the investigating officer.

When assessing the totality of the facts surrounding this investigation, it seems that there were systemic failures. All parties within the system appeared to have difficulties keeping things rolling and keeping a concerned citizen informed.

By Mr. Albert Covemaeker

Mr. Covemaeker submitted that whether Ms. Fox knew there was an assault occurring or not, had she not opened her window that night, a death might well have occurred.

By Mr. Donald

In his summary of the case from the defense perspective, Mr. Donald made the following observations:

- The investigation began in Ms. Fox's side yard
- Constables Helbin and Vaughn responded
- Joseph Covemaeker was belligerent
- Mr. Bruce went outside and although he had known Joseph for years, he did not immediately recognize him
- Ms. Fox called 911
- Mr. Bruce noticed the 'Superman' tattoo on Joseph's back and immediately alerted Ms. Fox as to Joseph's identity
- Neither Ms. Fox nor Mr. Bruce had seen the assault
- A vehicle similar to the vehicle in which the assailant departed returned to the scene
- Within seconds of its arrival, the police showed up. It is unclear whether it was the Chatham-Kent Police or the Ontario Provincial Police
- Mr. Bruce had asked the occupants to show their shoes (looking for blood) but stopped when the police arrived

It was Mr. Donald's further submission that Ms. Fox's version of events was troubling. Ms. Fox said that she had no reason to fear telling the complete truth. The assailants were only a few feet from her window and were being very loud. After trying to ignore it for a short time, Ms. Fox eventually opened her window and yelled at the group of young men, threatening to call the police. After that, she saw Joseph on the ground and called 911. It was interesting, from Mr. Donald's perspective, that Ms. Fox only asked for an ambulance – she did not ask for the police. A short period of time into the 911 call, Ms. Fox became aware that the victim of the assault was her friend Joseph Covemaeker. She had expected him to arrive at her home at some point during the evening.

When Ms. Fox spoke with the police, it appeared clear that she had not seen the assault take place and would therefore be of little use in describing what had occurred.

Joseph Covemaeker left in an ambulance and unknown to him he was accompanied by two wallets; one of his own and one allegedly belonging to the assailant, Justin Christian.

When Ms. Fox provided a statement, she alluded to the fact that she had expected the police to pick it up at some point. She acknowledged that she had provided the statement at the request of Mr. Albert Covemaeker and told the OIPRD investigator that she had not expected the police to return after she had seen the truck again. She also told OIPRD that she did not know when she had written the statement. At the hearing, she indicated she had done so within a couple of weeks of the assault. At first Ms. Fox testified that the statement was exactly as it had been originally written. When challenged, she admitted that she had added some words after the fact.

Mr. Donald asked the tribunal to consider why Ms. Fox had not put the license number of the silver truck in her statement; particularly since she had, at one time, indicated that the police said they would return for the statement and it purportedly referred to the identity of the silver truck. Additionally, the OIPRD investigators were unable to ascertain with certainty whether or not a police officer had returned to get the statement. There had been no record of Ms. Fox's telephone call to the police.

I was asked to view Ms. Fox's testimony and statement with some skepticism. I was also asked to consider that none of Ms. Fox's evidence was of much importance in any event, since there is no suggestion that Constable Helbin was ever aware of Ms. Fox's information regarding the truck returning on a subsequent occasion.

In Mr. Donald's opinion, the real problem with Ms. Fox's evidence is that it greatly affected Mr. Albert Covemaeker's impression of what had taken place that night and during the investigation of the assault. It was submitted that Ms. Fox's statement can be viewed as having been designed to assist Mr. Joseph Covemaeker with his application before the CICB, wherein she opined that in her opinion, Mr. Covemaeker had been the victim of a *violent crime*.

Constable Helbin was following up on the wallet that had been found at the scene when she asked Constable Bertok to speak to Mr. Christian. Mr. Christian provided his version of the events which seemed to suggest that there was an element of self-defence in his altercation with Joseph Covemaeker. Constable Bertok included this version of events in a report that, quite correctly, found its way into the Crown Brief. In Mr. Donald's opinion, Constable Bertok's views of Mr. Christian's actions would be extremely useful to any defence counsel. These independent observations by Constable Bertok could represent a significant impediment to a successful prosecution for assault or assault causing bodily harm.

When Constable Helbin took a statement from Joseph Covemaeker, from all accounts, she was courteous and compassionate. When Constable Helbin became aware of Mr. Christian's statement to Constable Bertok having been taken without a caution, she hoped to get an opinion from the Crown's Office regarding its admissibility.

In her statement to the OIPRD investigators, Constable Helbin admitted that thus far in her career, she had never obtained hospital records in relation to an assault investigation. She also admitted that she could not recall whether or not she had ever investigated an assault causing bodily harm.

It was Mr. Donald's opinion that if a legal opinion of this case had been sought, the only admissible piece of evidence would have been Justin Christian's statement – which was exculpatory. In all probability, such a legal opinion would have been that there was no reasonable likelihood of conviction.

There were some indications that Constable Helbin tried several times to contact the other individuals who were with Justin Christian on the night in question. There is nothing to refute these assertions. In her statement to OIPRD investigators, Constable Helbin acknowledged that perhaps she ought to have asked for help. It appears to be rather clear that Constable Helbin is accepting responsibility for any failings on her part and remains willing to correct any deficiencies. Without any contradictory evidence, Constable Helbin's evidence regarding the investigation must be accepted at face value. There are no indications that what she related to the OIPRD investigators is incorrect in any fashion. If such indications had been present, it might then have been possible to reasonably infer that Constable Helbin had somehow been reckless or that her failings had been intentional; therefore raising the character of her actions to the level of misconduct.

It was suggested that it is easy to armchair quarterback an investigation after the fact. The evidence before the tribunal does not, in Mr. Donald's view, establish on the balance of probabilities, that any of the actions of any of the three officers before the tribunal, rise to the level of misconduct, as defined within existing case law.

When speaking of the case being raised against the supervisors it was suggested that there is no evidence of any policy or procedures for bringing an officer back up to speed after maternity leave. It might be considered that the investigation being examined herein is a basic investigation and perhaps ideal for allowing Constable Helbin to reorient herself to investigative procedures and practices.

I was asked by Mr. Donald to consider the fact that the supervisors before the tribunal have been shown to be present and supportive. They were doing their best to support an officer who was returning after some extended time off. In relation to the brief, it has been described by others as adequate and sufficient to put the matters before the courts. Other players in the system had allowed this case to proceed as it did.

At all times during these matters, Constable Helbin has been honest and forthright. She has acknowledged her deficiencies; including failures to record pertinent information regarding other witnesses. She has acknowledged that she lacked confidence in the e-Brief system in correspondence with her superiors. She has been responsive to emails from supervisors. She recognized the difficulties that could arise because of the

uncautioned statement from Justin Christian and set about to try to mitigate those issues. She has acknowledged that any fault lies with her; not with anyone else.

It was Mr. Donald's final submission that the real failure on Constable Helbin's part was a failure to communicate with others in a timely fashion to allow others to see the efforts she had made to locate other witnesses. This led to a breakdown in communication which caused Mr. Albert Covemaeker to suspect that all the necessary investigative steps were not being covered.

It was submitted that there is nothing in the evidence to suggest that the failures on Constable Helbin's part, or the actions of both levels of supervision represented by Sergeant Myers and Staff Sergeant Misik that could be interpreted as rising to the level of misconduct.

I was next taken to various cases that provided some guidance in assessing conduct such as negligence and determining whether or not such negligence can be accurately characterized as misconduct. In other words, where does a matter cross the line from performance to misconduct?

In this regard, I was presented with P.G. v. Ontario, in which the Divisional Court observed as follows:

Accepting the Board's findings of 'inadvertence', on this record, the only logical conclusion is that the appellant made an honest mistake – he did what he undertook to do but he did it imperfectly.¹

Within P.G., the Court referred to Pollock v. Hill², wherein the supervisory officers were charged with neglect of duty. In its decision, the Board of Inquiry wrote;

... we will not find the Officers guilty of neglect of a duty to supervise unless there was some element of wilfulness in their neglect or unless there is a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct.³

I was also presented with Gottschalk⁴, wherein the Ontario Civilian Commission on Police Services observed as follows:

It is also worth noting that neglect of duty is not an absolute offence. The law is clear that there must be either 'wilfulness' or 'a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct (citing P.G. and Pollock v. Hill).⁵

¹ P.G. v. Ontario (Attorney General) [1996], Div.Crt., 90 O.A.C. 103, para 84

² Pollock v. Hill – Board of Inquiry – November 19, 1992)

³ *Ibid.*, para 83

⁴ Gottschalk and Toronto Police Service, O.C.C.P.S., January 2003

⁵ *Ibid.*, p. 9

I was also referred to Brown and Ontario Provincial Police in which the Commission also refers to P.G. v. Attorney General of Ontario, stating that;

*... mere failure to comply is not enough. There must be some evidence of deliberateness or recklessness.*⁶

After consideration of P.G. v. Ontario, Gottschalk and Toronto Police Service and Brown and Ontario Provincial Police, I was asked to conclude that given the complete and total lack of clear and convincing evidence pointing to any degree of wilfulness, recklessness or deliberateness by any of the officers, the allegations of Neglect of Duty are not made out.

Mr. Donald joined Mr. Farmer in observing that it was most unfortunate that Mr. Albert Covemaeker was not kept apprised of the realities of this prosecution as matters unfolded.

Discussion

Before entering into my discussion of these matters, I need to make it clear that I have significant concerns about the testimony of Ms. Heather Fox. Although her testimony would be of limited use in any event, I found inconsistencies in her testimony that cause me to question the reliability and truthfulness of her evidence.

During her testimony, there appeared to be some inconsistency around whether or not Ms. Fox had expected the police to return to pick up the statement she had mentioned during her testimony in-chief. On the one hand, Ms. Fox suggested that the police asked her to prepare a statement and that they would have someone drop by to pick it up. On the other hand, Ms. Fox told OIPRD that she had written her statement at the behest of the Covemaekers. On the third hand, Ms. Fox told OIPRD that she did not expect the police to come by for the statement as she had already told them all she knew. When questioned further on the issue of why and/or when she had prepared her statement, Ms. Fox indicated that Joseph's parents had asked if she had made a statement. When she advised she had not, they asked if she could do that. She typed it out and signed it. This was some time after the events in question. Ms. Fox admitted that at the conclusion of her statement, wherein she said, "nobody ever came" (in relation to the police returning to pick up the statement), this was added afterward.

Because of the inconsistencies in her testimony, I can place little reliance upon any of it.

When assessing and interpreting evidence in matters such as these where an officer or officers have done something or failed to do something that brings about allegations of misconduct, I must be mindful that the conduct or behaviour that is alleged to have occurred needs to have some element of wilfulness or recklessness, or a degree of

⁶ Sergeant Dalton Brown and Ontario Provincial Police (O.C.C.P.S.) October 2006, p. 10

neglect that moves the matter across the line that differentiates poor performance from misconduct.

The other aspect of the specific matters before me that I need to carefully consider is the aspect of totality. What I am referring to here is that in the matters before me, notwithstanding the fact that Constable Helbin has a positive duty to properly manage her investigations, and her supervisory officers, Sergeant Misik and Staff Sergeant Myers similarly have a positive duty to oversee her investigations to ensure the timeliness and quality controls are in place, the fact that all three of these individuals failed to act properly in these matters does not increase the seriousness of the conduct of any *one* of them. In other words, the actions of each of the officers before me must be assessed in isolation from the actions of the other two.

Constable Helbin's specific actions and/or failings will be assessed against the standards normally applied in matters such as these. Sergeant Misik's actions and/or failings and Staff Sergeant Myers' actions and/or failings will similarly be assessed against the standards normally applied in matters such as these.

While one might be tempted to look at the entirety of the failings of all of the officers named in the notices of hearing and characterize the outcomes as completely unacceptable, it is not the sum total of their actions that I am here to assess. I am asked to assess each officer's conduct individually and determine whether or not the conduct demonstrated by each officer rises above the level of poor performance to the level of misconduct.

So the over-arching question to which I must address my mind is:

Does the evidence of the actions and/or failings of any one of these officers cross that line that distinguishes misconduct from poor performance?

The clear and unequivocal answer is no; it does not.

The investigation of the assault upon Joseph Covemaeker was not investigated well. The investigation was not overseen well and the administrative paper-flow was not tracked well. The investigating officer and the two supervisory officers did not perform their duties to a level I can only assume is expected by the Chatham-Kent Police Service. Evidence was not collected that perhaps ought to have been collected. The timeliness of the investigation and associated filings was unacceptable and not at all in keeping with the standards expected by the Chatham-Kent Police Service. The oversight and supervision of the investigation and the investigating officer were not done to an acceptable level. All of this is clearly illustrated by the evidence. What is also clearly illustrated by the evidence, however, is that none of these officers did what was done or failed to do what was not done with any sense of wilfulness or recklessness whatsoever. Their actions therefore cannot be characterized as misconduct, in my view.

While the actions and/or failings of each of the officers before me cannot be characterized as misconduct, the totality of the evidence before me seems to suggest that there may be systemic failings that would permit all of this to have occurred. While I do not know whether these matters have resulted in a review of some aspects of the police service, I would be very surprised if such an assessment has not already been done. The evidence has, however, shown that Constable Helbin has been the beneficiary of some additional training as a result of these matters. That is, in my view, a very strong indication that the police service is taking these matters very seriously, as they must. In my view, when three operational levels within the police service show indications that there may be shortcomings, it would only be prudent to perform at least a limited operational review to forestall future similar occurrences from happening.

One area of caution of which tribunals ought to remain vigilant is to refrain from assessing a situation in the light of the hearing room and substituting the tribunal's own judgment for the judgment of the individual whose conduct or behaviour is being assessed. So while one might examine all of the actions of all of these officers and come up with various improvements, I believe it improper to do so.

Could I recommend improvements in the manner in which this matter was investigated? Likely yes.

Could I recommend improvements in the manner in which this investigation was supervised and monitored? Likely yes.

So notwithstanding the fact that I might have done things differently, that is not the standard against which these allegations ought to be measured; at least not insofar as a disciplinary hearing is concerned. The only appropriate standard with which I need to be concerned is whether or not the conduct or behaviour was malicious, reckless, intentionally bad or cavalier.

In my view the evidence does not establish clearly or convincingly, on the balance of probabilities, that these officers offended the code of conduct. They simply performed poorly.

When I consider the case law that has been put before me, including *P.G. v. Ontario, Pollock v. Hill*, *Brown v. Ontario Provincial Police* and *Gottschalk and Toronto Police*, it is abundantly clear that it would be completely inappropriate to find any of these officers guilty of misconduct.

The *Code of Conduct* within the *Police Services Act* was created to deal with wrongdoing of various types and levels of severity. It is important and necessary to differentiate between wrongdoing and poor performance. That is what the case law does. These cases provide me with the guidance I need to be able to distinguish between the two. When there is no clear indication of malfeasance in the officers' conduct, misconduct cannot be found to have been proven. That is precisely the case before me.

Performance deficiencies can and must be dealt with. The appropriate vehicle for doing so, however, is performance management, performance improvement, performance evaluation and/or training. It is not appropriately dealt with through the disciplinary process. The evidence clearly shows that steps have already been taken by the police service to address performance deficiencies or the level of confidence in certain investigative and/or administrative aspects illustrated by these matters. That is as it should be.

I concur with Mr. Farmer and Mr. Donald that it is unfortunate that Mr. Albert Covemaeker was not kept abreast of various developments in the investigation and prosecution of his son's assailants. I would like to commend Mr. Covemaeker for pursuing these matters as a father and as a tax payer.

My decision in these matters is as follows:

I find **Constable Kelly Helbin** NOT GUILTY
Of
NEGLECT OF DUTY

Notice of Hearing dated October 6th, 2014

I find **Sergeant Steve Misik** NOT GUILTY
Of
NEGLECT OF DUTY

Notice of Hearing dated October 6th, 2014

I find **Staff Sergeant Keith Myers** NOT GUILTY
Of
NEGLECT OF DUTY

Notice of Hearing dated October 6th, 2014



Robert J. Fitches
Supt. (ret'd.)
Hearing Officer

August 6th, 2015
Date