



TORONTO POLICE SERVICE DISCIPLINE HEARING  
IN THE MATTER OF ONTARIO REGULATION 268/10  
MADE UNDER THE POLICE SERVICES ACT, RSO 1990,  
AND AMENDMENTS THERETO:

IN THE MATTER OF THE  
THE TORONTO POLICE SERVICE  
AND CONSTABLE VLADIMIR HREBENAK (9171)

Charges: Unnecessary Force

**DECISION**

Hearing Officer: Superintendent Frank Bergen  
Toronto Police Service

Prosecutor: Inspector Peter Callaghan  
Toronto Police Service

Defence Counsel: Mr. Lawrence Gridin

Case Number: 32/2013

Hearing Dates: February 24, 25, 26, 2016

Decision Date: 2016.09.09

## DECISION

---

CONSTABLE VLADIMIR HREBENAK (9171)

**DATE: 2016.09.09**

**REFERENCE: 32/2013**

Superintendent Bergen: Before commencing sentencing in this matter, I would like to thank Mr. Lawrence Gridin, Defence Counsel and Inspector Peter Callaghan, the Service Prosecutor, for their submissions and exhibits tendered, all of which have assisted me in reaching my decision.

Constable HREBENAK 9171, pled not guilty to one charge of Unnecessary Force, contrary to the Police Services Act.

### **Decision**

After a review of the facts presented in this matter, I find that the standard of proof of clear and convincing evidence has not been met. I therefore find Constable Hrebenak not guilty. I base my decision on the following:

### **Summary**

The Statement of Particulars in the Notice of Hearing was as follows:

- Being a member of the Toronto Police Service, attached to 51 Division, you were assigned to uniform duties.
- On Tuesday, February 26, 2013, you were on duty. You responded to a radio call for unknown trouble at 295 Shuter Street, apartment [REDACTED], in the City of Toronto.
- As you did, you observed Mr. Jamie Herring exit a stairwell door and run away from the building.
- You were able to catch up to Mr. Herring a short distance from the building and detained him.

- During the detention you placed Mr. Herring's hands behind his back and handcuffed his wrists. You then conducted a pat down search.
- You returned to your police vehicle to make certain investigative queries and after so doing, you approached Mr. Herring and without provocation, kned him in the groin.
- In so doing, you committed misconduct in that you did use any unnecessary force against a prisoner or person contacted in the execution of duty.

### **Prosecution Introduction**

The Service prosecutor indicated that he had initially intended on calling three witnesses but having received written submission(s) from two independent witnesses indicating that they did not want to attend the Tribunal, he would thereby rely on the evidence of the complainant Mr. Jamie Herring. He further clarified that he would concede to the reason for the stop / interaction as being appropriate, and that he deemed it to be a proper investigation detention.

### **Mr. Jamie Herring – Evidence in Chief**

Mr. Jamie Herring testified that he was 25 years old and resided in the Moss Park Community. He stated that he was employed at the John Innes Community Centre. On February 26<sup>th</sup>, 2013, Mr. Herring was running late for work and as he was exiting his mother's apartment on the eighth floor, he overheard an argument between the Toronto Community Housing Janitor and another party. Mr. Herring said that he overheard the janitor telling the gentleman, who appeared intoxicated, to please go back to their unit.

He stated that he stopped to see if the Toronto Community Housing janitor was okay. Subsequently, the janitor assured him that all was okay, and Mr. Herring went on his way to the stairwell. He added that he believed he had heard a mention of a weapon.

He testified that once outside the stairwell, he jogged towards the parking lot and after realizing he had a few minutes to spare, decided to walk. At this time, he first noticed a blue car behind him.

Mr. Herring offered that he was wearing headphones and therefore could not hear if the officer in the blue car was trying to communicate with him.

Mr. Herring stated that the blue car pulled over ahead of him and at that time, the officer "pulled down the window and told me bluntly to take my fucking hands out of my pocket." Mr Herring asked why, and the officer said there was a gun threat.

Mr. Herring asserted that he was not a gun threat; he was just a city worker going to work. Mr Herring stated, "At that point in time, (the officer) proceeded to push open the door, that almost hit me. I jumped back from it. As he came out, he said he needed to search me."

At this time, he described that the officer proceeded to get close and that the officer placed his right hand on Mr. Herring's left side pocket. Mr. Herring stated that at this action, he jumped back and said; "...you can't do that, it's an illegal search."

Mr. Herring told Constable Hrebenak that he didn't have anything in his pockets and described the officer as having his hand on his holster of his gun.

Mr. Herring stated that when he became very upset and scared, the officer suggested that he was resisting. Mr. Herring said he was not resisting, offered his arms and allowed the officer to handcuff him and bring him to his car.

After he had provided the officer with his name, Mr. Herring, assuming that he had been arrested, asked why he had been handcuffed. Mr. Herring said the officer "told me to shut the fuck up, and from there, the officer grabbed my head and while I was at the back of his vehicle, he said he would smash my head off the vehicle, if I didn't be quiet." Mr. Herring continued to assert that he had not committed any crime.

**Mr. Jamie Herring – Evidence in Chief continued**

When Mr. Herring told the officer that what he was doing was against the law, Mr. Herring said the officer replied; "...that he would say I disarmed his handgun from him."

Mr Herring told the Tribunal that he heard the officer speaking on his radio, and subsequently three officers arrived. He wanted to speak with a different officer at this point in time, and ended up speaking with a "Caucasian officer."

Mr. Herring advised the new officer that "...this officer has been threatening me and he's also said he would hit me." He added that the officer tried to calm him down, telling him that everything would be okay, to "just to get through this."

At this time, speaking to the three officers, Mr Herring asked "why should I have to let you guys do this to me?"

Mr. Herring intimated that this prompted the two officers, "one Hispanic and one ... Asian" to proceed to the car and tell Constable Hrebenak that I basically said to him that he was gonna hit me. Specifically, "they told the officer that I told them he won't hit me."

Mr. Herring said at this time, Constable Hrebenak "...came out of the vehicle and said, 'you think I won't fucking hit you', and then sacked me in my balls."

Mr. Herring testified that he then heard from a distance the two TCH janitors from the building yell out, "'Hey, that's police brutality'. And from there, they waived down one of the officers."

Mr. Herring said he could overhear their conversation, and he stated that one of the janitors said that "...he was probably just late for work, he works around the corner and sometimes he ends up running towards work." Mr. Herring further offered that the two officers who were speaking with the janitors learned that it was they who made the call, and one stated, "'that child doesn't fit the description of an intoxicated white male that is

heavy set.' And then as that was said, all the officers turned around, looked towards me and came to realization that I'm not the suspect they were searching for."

Mr. Herring stated that while all this was going on, his phone was ringing. It was his employer calling because he was late for work. Mr. Herring gave permission to one of the officers to take the phone out of his pants and unlock his iPhone. The officer spoke with Mr. Herring's employer and learned that he did in fact work for the city of Toronto.

After Mr. Herring was released, Constable Hrebenak approached him and said, "Next time you see me, you'll know the fuckin drill. Cause the next time if you don't, we're gonna have a problem." Mr. Herring said he responded, "I understand. Yes I know the drill officer."

Mr. Herring said he attempted to give the officer a fist bump, to which the officer threw his hand away. Mr. Herring stated, "I apologize to all the officers that were there, if I gave any of them a hard time." Mr. Herring went to work and stated he told his employer the story.

At this time, the prosecutor reviewed the evidence of Mr. Herring in order to clarify all the details, reviewing the actual location and sequence of events.

- Mr. Herring left 295 Shuter Street, via the west stairwell en route to The John Innes Community Centre at 150 Sherbourne Street.
- Mr. Herring first noticed the blue car behind him, in the parking lot at Shuter Street and Berkeley Street.
- Mr. Herring remembered it was the end of winter as he was putting away stuff at the ice rinks; and was wearing "crappy track pants, a crappy hoody," and a black parka.
- Mr. Herring stated he was wearing over the ears headphones.
- Mr. Herring stated that the initial interaction with the officer; "the initial conversation was bluntly, he cut me off. Just like that. Rolled the window down...he basically cut me off from my walking path."

### **Mr. Jamie Herring – Evidence in Chief continued**

- Mr. Herring stated the officer then rolled the window down and said “get your hands out of your f’n pockets. Twice.”
- Mr. Herring was aligned with the driver’s seat when the door was opened.
- Mr. Herring confirmed that he heard the officer because he had removed his headphones.
- Mr. Herring asked the officer why a few times, and the officer told him there was a gun threat.
- Mr. Herring stated that he had not initially connected the officer’s actions as related to the original call to the building.
- Mr. Herring stated “the officer didn’t just push the door open nicely. He rushed out. Like an attack.”
- Mr. Herring offered that during this time, the officer was reaching out for his pockets and saying; “you’re resisting.” That’s all he kept saying. But he never said resisting arrest. He just said “resisting, stop resisting.”
- Mr. Herring told the officer it was an illegal search and that he was not a gun threat.
- Mr. Herring recalled that at no time had the officer stated that he was under arrest.
- Mr. Herring permitted the officer to go through his pockets, and subsequently, the officer handcuffed him.
- Mr. Herring was taken to the car, patted down, searched and said the officer located his keys and cell phone
- Mr. Herring said that the officer told him to be quiet, because he kept asking; “why am I here. Why am I in handcuffs?” And, at that time, he stated that the officer threatened him.
- Mr. Herring clarified the threatening statement; “he said he would um, he said that he would blame me for disarming him. And that would be the reason for why my face would be smashed into a police car.”
- Mr. Herring described the blue car as a highway traffic car and its distinct darkened-symbols.

- Mr. Herring gave the officer his information; name, age and address, and the officer put it in his note book.
- Mr. Herring said three officers arrived some 5 to 7 minutes later; a Caucasian, a Hispanic and an Asian officer.
- Mr. Herring said that while he was speaking with the Caucasian officer, the others were close to them. He stated; "he's threatened to hit me and you need to uphold the law because it's not fair. I didn't do anything to him."
- Mr. Herring added that at this time, "those two officers took what I said and twisted my words to the other officer and said to him that, he says you won't hit him. So the officer came out smiling and hit me right after."
- Mr. Herring clarified for the prosecutor the term "sacked me in the balls." As; "in a nut shell, he put two arms on my shoulder, he bent me over a bit and then drove his knee right into my penis."
- Mr. Herring also clarified that the janitors; Chris and Shane, were at Shuter Street and Berkeley Street and that they would have witnessed the whole thing.
- Mr. Herring confirmed that the Caucasian officer spoke with Stacey Unera from The John Innes Community Centre.

In conclusion, the prosecutor revisited the exit fist bump as portrayed by Mr. Herring. Specifically, Mr. Herring stated he just wanted to de-escalate what took place, but the officer didn't seem to want to de-escalate, "he seemed to want to put fear into me."

By way of follow-up, Mr. Herring stated, "It doesn't make sense that an officer would do that to somebody like me and I've grew up in that neighbourhood long enough to know where I was going." The prosecutor further probed and Mr. Herring added; "...and he tried to put me in a car. And at the end of the day, in my neighbourhood I know he was gonna beat me up."

The prosecutor probed Mr. Herring as to whether he had heard stories about that kind a thing happening before? Mr. Herring replied, "Yes, about that particular officer." The prosecutor reiterated, 'stories about that particular officer,' and Mr. Herring answered, "Yes."



## **Mr. Jamie Herring – Cross Examination**

Defence counsel examined the original OIPRD complaint, the Professional Standards interviews, and the evidence-in-chief of Mr. Jamie Herring.

Mr. Gridin sought clarification from Mr. Herring with respect to numerous aspects of his testimony including:

- Whether he was wearing ear buds or over the ear headphones,
- Being late for work,
- Whether he or Constable Hrebenak spoke first,
- His statement to the OIPRD,
- Whether Constable Hrebenak was issuing commands from inside the car.
- Mr. Herring suggesting the use of “Stop Resisting.”
- Mr. Herring claiming poor English skills.
- Whether there was a reply to the command to show his hands.
- Mr. Herring’s interpretation of the request to take his hands out of his pockets.
- The number of threats uttered.
- Whether he actually fell to the ground and the sequence of the apparent assault.
- Whether Mr. Herring was polite after being kned.
- His use of the statement “You know the fucking drill.”
- His recollections of the final fist bump/hand shake exchange.
- The lack of corroboration.
- Whether the phone call with his employer was incoming or outgoing.
- The door knock intimidation incident.
- Whether Mr. Herring had been arrested before

In conclusion, defence counsel suggested that Mr. Herring’s evidence had become more exaggerated over time, and that it was unreliable.

### **Constable Hrebenak – Evidence in Chief**

Constable Hrebenak testified that he was 39 years old, married and the father of two children. He was born in Slovakia, Czechoslovakia, where he attended Military University, graduating in 1999 with the rank of Second Lieutenant and receiving a master's degree in Mechanical Engineering.

He subsequently worked at United Nations training in Nitra, Slovakia, for Peacekeeping and held the position of Chief Ordnance Officer. He came to Canada in 2002, and was hired by the Toronto Police Service in 2005.

Constable Hrebenak was deployed to 51 Division, and in June 2014 was reassigned to Traffic Services.

Constable Hrebenak testified that on February 26, 2013, he was working solo in uniform, in scout car 5180, a divisional traffic car which was blue with suppressed markings and no roof lights.

By way of offering background, defence counsel had Constable Hrebenak review his understanding of interactions with 'gun calls' and his impression of working in 51 Division.

Constable Hrebenak stated that he heard the radio call to 295 Shuter Street at 1305 hours – "unknown trouble / person with a gun" call. Although not dispatched to the radio call, he made his way there to assist. He understood the address to be very high in gun and gang activity, stating, "...it's a high rise, community housing, very high crime rate, stabbings, robberies, drug deals, homicides."

Upon arrival, he observed a police officer entering the front lobby, so he decided to go and cover the back of the building. At this point, he stated that, "I saw a male sprinting from the building, running away."

When defence counsel probed his interpretation of the male's actions, Constable Hrebenak stated, "I didn't know if he was involved directly, but seeing a person running from a crime scene and not to follow up, would be foolish of me."

Constable Hrebenak stated that he proceeded to drive up the sidewalk between buildings 295 and 285, following the male that he described as white, wearing a toque and a winter jacket. As he was following, the male looked back over his shoulder and slowed to a walk. The male had both hands in his pockets.

Constable Hrebenak testified that as the male continued to walk, he pulled the car up beside him, exited the police car, and told him that "I needed to speak to him in regards to a person with a gun call."

He further stated that he asked the male to remove his hands from his pockets. Defence counsel asked for clarification on Mr. Herring's testimony that Constable Hrebenak yelled for him to "take his fucking hands out of his pockets." Constable Hrebenak responded that, "that's not accurate. I asked him first time, forcefully, to remove the hands from the pockets." When Mr. Herring questioned, "Why am I under arrest," Constable Hrebenak stated that, "I bladed my body." I placed my hand on my gun, and I told him, more forcefully, remove your fuckin' hands out of the pockets." Constable Hrebenak offered that when he is uncertain of whom he is dealing with, if he uses street language, people will understand that he means business.

Constable Hrebenak grabbed Mr. Herring's right arm in an attempt to remove it from the pocket, and when Mr. Herring pulled away and said, "You have no permission to search me," Constable Hrebenak placed him under investigative detention, handcuffed him and patted him down for safety.

Subsequently, Police Constable(s) Cote, Sotelo and Lee arrived and Constable Hrebenak asked the male for his name and address. While checking out the information in his scout car, Mr. Herring was speaking with the other officers. Having had no

success, Constable Hrebenak returned and had Mr. Herring spell his name for a second time. Subsequently, Constable Hrebenak confirmed the information and was satisfied.

### **Constable Hrebenak – Evidence in Chief Continued**

Defence counsel stated that Mr. Herring had testified that while Constable Hrebenak was investigating in the scout car, one of the officers approached Constable Hrebenak and said “this guy thinks you won’t hit him.” Constable Hrebenak stated that this did not occur.

In addition, defence counsel enquired about potential civilian witnesses and the proximity of the other officers. Constable Hrebenak did note that Constable Sotelo spoke with a building superintendent who offered that while Mr. Herring came from the same floor, he was not involved in the radio call. He further stated that Constable Cote assisted Mr. Herring in contacting his employer to advise them that he would be late for work.

Defence counsel asked Constable Hrebenak to comment on the testimony of Mr. Herring, that after exiting the vehicle, “you walked up to him and kneed him in the groin.” Constable Hrebenak stated that did not happen.

Constable Hrebenak removed the handcuffs and advised Mr. Herring that he was released unconditionally.

Defence counsel further explored this interaction and the resulting release. It was agreed that Mr. Herring was upset, but friendly towards Constable Cote. Regarding a fist bump or hand shaking, Constable Hrebenak stated, that did not happen.

Constable Hrebenak was asked if he told Mr. Herring “next time you’ll know the drill”. Constable Hrebenak stated “no.”

Defence counsel revisited the use of profanity and the parting conversation. In closing, defence counsel specifically asked Constable Hrebenak, "The Notice of Hearing alleges that you kned Mr. Herring in the groin. Did that happen?" Constable Hrebenak replied, "No it did not happen."

### **Constable Hrebenak – Cross Examination**

The prosecutor began by reviewing Constable Hrebenak's knowledge about firearms, crime statistics and the characteristics of an armed person. He further explored the origins of the radio call and the assumptions that a gun was involved.

The prosecutor reviewed the sequence of events and walked Constable Hrebenak through the ICAD timeline, commencing at 13:05 hours. In the absence of a memo book, Constable Hrebenak recalled his knowledge of the event and verified that scouts 5131.2 and 5111.2 were dispatched in ICAD, and further accepted that his first radio transmission occurred when he advised the dispatcher that a male had run on him. Constable Hrebenak testified that he had gone to that back of the building after seeing Constable Parks entering the front of the building.

The prosecutor had Constable Hrebenak refer to ICAD 13:10:19 and the entry: 5131.2 AEO no one in the apartment - speaking to the complainant. He further asked Constable Hrebenak to refer to ICAD 13:12:09 and the entry for TR51E, and explain the meaning, to which Constable Hrebenak acknowledged he had advised the dispatcher "Male running away - Tried to do subject stop - Gave me hard time - On north side of 25 Shuter Street."

To this, the prosecutor suggested that prior to Constable Hrebenak attempting to stop Mr. Herring a broadcast was received indicating "all was in order." Constable Hrebenak stated that that information had not been passed on to him.

The prosecutor sought further clarification as to whether the initial interaction between Constable Hrebenak and Mr. Herring occurred while the officer was in the car or face to face. As to the language used to ask Mr. Herring to remove his hands from his pocket,

Constable Hrebenak stated that when he asked the first time, Mr. Herring's response was, "why, am I under arrest?" When the prosecutor inquired as to why he asked more forcefully the second time, Constable Hrebenak offered, "Cause, he didn't comply with order to remove the hands from the pockets for my safety first time."

The prosecutor queried, what would compel him to comply with your order, and further asked if there is some law that requires a citizen to remove their hands from their pockets when a police officer orders it. Constable Hrebenak replied, "It's common sense."

The prosecutor addressed the process of obtaining the information from Mr. Herring in order to check him out. Constable Hrebenak had described writing the information down on his hand and initially getting no return. Constable Hrebenak cautioned Mr. Herring for obstruct and on the second attempt with the proper spelling, found no issues.

The prosecutor went over Constable Hrebenak's Evidence-in-Chief regarding the location of Mr. Herring and two potential civilian witnesses while he was conducting the computer checks. Constable Hrebenak agreed that he saw two people 80 – 90 feet away and that Constable Sotelo went to speak with them. In addition, he stated that there were people in closer proximity walking in the area.

In closing, the prosecutor addressed the characterization of how everyone parted company on that day. In addition, he enquired as to how Constable Hrebenak had prepared for trial and his knowledge of the disclosure materials, specifically pertaining to the statements and attendance status of the two civilian witnesses.

With respect to his Evidence-in-Chief, the prosecutor referred to defence counsel's final question to Constable HREBENAK regarding Mr. Herring's assertion about being kicked in the groin. He suggested that in their statements, the two witnesses said that they also saw that, and questioned whether they were not being truthful in their statements. Constable HREBENAK responded "I don't know what they saw, but I never kneed Mr. Herring in the groin."

### **Constable Hrebenak – Defence Response**

Defence counsel revisited the initial interaction between Constable Hrebenak and Mr. Herring, specifically the request to Mr. Herring to remove his hands from his pockets in relation to the gun call, and asked if he felt that Mr. Herring's response was unreasonable. Constable Hrebenak stated that he didn't feel Mr. Herring's reaction was a reasonable one. He went on to say that he expected him to remove his hands.

When asked whether this refusal caused him additional concerns, Constable Hrebenak agreed, explaining that "...there was no question in my mind that he heard me, by his response, but he refused to cooperate. So, I thought that he really might have a gun on him."

### **Detective Kevin Cote – Evidence-in-Chief**

Detective Kevin Cote testified that he is currently working at 14 Division, in the Divisional Criminal Investigation Bureau. He is 41 years old and joined the Toronto Police Service in April 2002. He had spent his first 10 years in 51 Division, and was quite familiar with the division, and in particular, Regent Park and Moss Park.

On February 26, 2013, Kevin Cote was a uniform Constable working at 51 Division. His escort for the shift was Constable Elliot Lee, and their call sign was 5111. At approximately 13:04 hours they received a hotshot call for unknown trouble at 295 Shuter Street. The call for service was made by a male in Brampton indicating that his father had been the victim of a break and enter the night before and during the call; mentions of a shooting before the call was abruptly hung up.

Once on scene, they met with other officers who were speaking with the complainant's father. All was in order.

At approximately, 13:13 hours, while still on the eight floor, Detective Cote stated he heard a radio transmission call for assistance from a traffic unit as "somebody run from

him, and he wasn't, he needed somebody to attend to go see him and that he wasn't cooperating."

Defence counsel indicated that this transmission was consistent with the gun call. Detective Cote acknowledged that and added that although the transmission was garbled, he recognized the voice as Constable Hrebenak. Detective Cote further indicated that he left the eighth floor with Constable Lee to respond to the call for assistance. He located Constable Hrebenak in the north parking lot between 275 and 285 Shuter Street.

While Constable Hrebenak was in the scout car running the computer check, Detective Cote stood with Mr. Herring who "was swearing and yelling, and saying this is bullshit"; he didn't agree with being stopped and was late for work. Detective Cote described Mr. Herring as angry.

When defence counsel asked if the male made any complaint about force being used against him, that Constable Hrebenak had threatened to break his jaw, Detective Cote responded "no."

Detective Cote testified that they were joined by Constable Sotelo. The janitor he had spoken to in the lobby was in the company of another male standing approximately 40 or 50 feet away. Detective Cote believed they were familiar with Mr. Herring and said that Mr. Herring lived on the eighth floor with his grandmother.

When Constable Hrebenak exited the car and went over to Mr. Herring, Detective Cote described the exchange as heated; they got into each-other's faces. When asked if, at any point during the exchange, Constable Hrebenak laid his hands on Mr. Herring or kneed him in the groin, Detective Cote responded "No."

Detective Cote went on to state that he offered to call Mr. Herring's boss to explain why he was late for work. Detective Cote reassured Mr. Herring and when they parted, they shook hands.



### **Cross Examination by Prosecution**

The prosecutor compared the Evidence-in-Chief to the memo-book notes and the 217 complaint response of Detective Cote. Detective Cote stated "...in retrospect, I wish I would have written a good deal more notes."

The prosecutor further explored the defence counsel's questions about the interaction of Constable Hrebenak and Mr. Herring pertaining to the description of an apparent knee strike, comparing it to how officers are taught in ISTP training.

### **Constable Elliot Lee – Evidence-in-Chief**

Constable Lee testified that he is 32 years old and has been a police officer for six years. He has worked at 41 Division, TAVIS, and 33 Division.

On February 26, 2013 he was a constable at 51 Division. He was assigned to uniform duties, his call sign was 5111 and his escort was Constable Cote. They received a radio call to attend 295 Shuter Street, the [REDACTED] floor. Prior to entering the building, Constable Lee saw Constable Hrebenak in a car and he told Constable Lee that he had checked the perimeter.

Having completed the call, Constable(s) Lee and Cote heard a radio transmission, and they went to check on Constable Hrebenak, who was in a parking lot between 275 and 285 Shuter Street. At this time, Constable Lee observed Constable Hrebenak speaking with Mr. Herring. When defence counsel asked if it appeared that Constable Hrebenak was angry, Constable Lee responded "No."

Constable Lee testified that he watched Mr. Herring as Constable Hrebenak ran some checks on the computer. When asked about Mr. Herring's demeanour, Constable Lee said that he seemed 'pretty upset.' Constable Lee testified that Mr. Herring did not complain about any use of force or threatening of physical violence including a threat to break his jaw.

Constable Lee testified that, based on his proximity, that there was no possibility of him missing anything that was happening between Constable Hrebenak and Mr. Herring.

Defence counsel asked Constable Lee if he remembered Constable Hrebenak saying something about a next time, or what a person should do in the future. Constable Lee recalled that, as "Mr. Herring was walking away, PC Hrebenak said something along the lines of maybe the next time a police officer wants to talk to you, you know it might be a good idea to talk to them."

### **Constable Lee - Cross Examination**

The prosecutor clarified the positioning of the officers in relation to Mr. Herring. He asked Constable Lee to expand on his recollection, as there was little information in Constable Lee's memo-book.

### **Constable Troy Sotelo – Evidence in Chief**

Constable Troy Sotelo testified he is 33 years old and has been a police officer for six years. He described himself as Filipino and is assigned to uniform duties working at 51 Division in primary response.

On February 26, 2013 he was in uniform working solo and his call sign was 5142. He advised that at approximately 13:04 hours he was dispatched to 295 Shuter Street for an unknown trouble call. He further advised that while en route to the call he remembered Constable Hrebenak voiced over the radio that he's investigating one that ran out of 285. Upon arriving, he saw that Constable Hrebenak had a male in custody. He also stated that Constable(s) Lee and Cote were also on scene.

Defence counsel had Constable Sotelo explain the sequence of events. Sotelo joined Constable(s) Lee and Cote at the rear of Constable Hrebenak's police vehicle, Mr.

Herring was in handcuffs, and they stood by as Constable Hrebenak was in his vehicle using his computer.

Constable Sotelo testified that Mr. Herring appeared normal and that he had stated that he worked for the City and was concerned and unhappy that he would be late for work.

Defence counsel asked a series of questions regarding whether Mr. Herring complained about force or threats being used, and whether Mr. Herring said that Constable Hrebenak had threatened to break his jaw. Constable Sotelo answered "No" to all.

Constable Sotelo stated that he had spoken to two TCH employees who were standing approximately 30 feet away. Defence counsel asked if Constable Sotelo had maintained an awareness of the actions of Constable Hrebenak during this time and specifically asked,

- Did Constable Hrebenak call Mr. Herring a bitch?
- Did Constable Hrebenak call Mr. Herring any derogatory names?
- Did Constable Hrebenak lay hands on Mr. Herring or in any way get physical with him?
- Did Constable Hrebenak knee Mr. Herring in the groin?
- Did Mr. Herring complain about having been kneeed in the groin?
- Did he (Mr. Herring) shout in pain at any point?
- Did he (Mr. Herring) double over at any point as if in pain, and by double over, I mean bending at the waist more than 90 degrees?
- Based on your proximity to the male, is there any possibility that you could have missed that happening?

Constable Sotelo responded "no" to all questions.

Regarding the civilians present at the time, defence counsel asked Constable Sotelo if he heard anything from the civilians about police brutality or words to that effect.

Constable Sotelo responded "No. All they said was, you got the wrong guy - he's a nice kid, you got the wrong kid, something along those lines."

### **Constable Sotelo - Cross Examination**

The prosecutor reviewed the sequence of events and the positioning of all involved. He also spoke to the conversation Constable Sotelo had with the two civilians and asked if he was facing towards or away from the gentlemen. When Constable Sotelo responded that he was facing the gentlemen, the prosecutor suggested that if something had happened while he was speaking to the civilians, Constable Sotelo would not have been able to see it. Constable Sotelo agreed with this.

### **Prosecution Submissions**

The prosecutor summarized the allegation of Use of Unnecessary Force and submitted that Constable HREBENAK behaviour did not meet the standards of conduct expected by the public or the occupational requirements of a police constable.

The prosecutor submitted the case of Jacobs versus Ottawa Police Service, 2014, Ontario Superior Court of Justice (Exhibit 27). The Court concluded police discipline matters are civil proceedings whose sanctions are administrative and relate to employment matters. The standard of proof is the civil standard of a balance of probabilities.

The prosecutor also referred to Faryna versus Chorny, 1951, British Columbia Court of Appeal (Exhibit 28) to speak to the assessment of credibility.

*'The credibility of interested witness, particularly in cases of conflict of evidence, cannot be solely by the test of whether the personal demeanour 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.'*

He went on to state that a Hearing Officer may rely on his own experience to make an assessment on the credibility of witnesses. Police officers should be expected to be informed, in contrast to inexperienced witnesses who are unfamiliar with expectations. Inexperienced witnesses unfamiliar with cross examination may appear to challenge, and may respond in an inappropriate fashion.

The prosecutor cautioned that Mr. Herring's responses should be taken in the context of the entire interaction, and that minor inconsistencies highlighted by Defence Counsel in relation to the OIPRD summary and statement to PRS investigators, were unrelated to the main allegations in the case.

The prosecutor characterised Mr. Herring as showing a reasonable reaction to being stopped. He stressed caution in being judgemental in one's perception of police interactions – each person experiences this in their own way. Furthermore, an understanding of Mr. Herring's lived experience would enhance his credibility and reliability.

The prosecutor also highlighted Mr. Herring's actions prior to meeting Constable Hrebenak in particular the fact that he was late for work, was aware of police interaction with TCH employees and, while he noticed the police car following him, he had no information to connect his to the activity on the [REDACTED] floor.

The prosecutor conceded that Constable Hrebenak did have reason to investigate Mr. Herring, as he was at the location in relation to a gun call. This however, did not excuse his approach, lack of professionalism and prejudice.

The prosecutor went on to caution that the Tribunal should not draw undue negative inference to Mr. Herring for not taking his hands out of his pockets. Mr. Herring had no reason to believe he was involved in any criminal investigation. In the absence of a clear explanation, Mr. Herring was in no way obliged to talk to police or remove his hands from his pockets. Citizens should not be expected to know what investigation

detention is, and Constable Hrebenak invested no time in communicating the reasons for his demands.

### **Prosecution Submissions Continued**

The prosecutor submitted that the Tribunal should not adopt an adverse inference to the withdrawal letters submitted by two civilians. As they worked and lived within the community, they did not wish to participate. In the apparent void of corroboration the prosecutor highlighted that there was a great deal of corroboration found in the testimony of the defence witnesses.

The prosecutor recounted the evidence of Constable Hrebenak, characterizing it as being, contradictory, shocking and not straightforward. Constable Hrebenak demonstrated a disregard for a person's rights, believing that when a police officer tells you to do something, you do it. The prosecutor submitted that Constable Hrebenak did not like to be challenged and that this was reflected in his approach to Mr. Herring.

The prosecutor submitted that the testimony of the three police officers who were witnesses for the defence needed further scrutiny. He made reference to their sparse notes and lack of detail, submitting that less notes give you an advantage of greater freedom.

Detective Cote was the first to introduce the "in your face" interaction between Constable Hrebenak and Mr. Herring. The prosecutor characterized the officer's evidence as not straightforward. Detective Cote struggled to try to explain away the profanity and aggression of Constable Hrebenak.

The prosecutor dismissed the evidence of Constable Lee as very poor, undetailed and totally unreliable.

With reference to the testimony of Constable Sotelo, the prosecutor agreed that leaving the rear of the scout car to approach the civilians on the sidewalk would have left the officer unable to testify to the activities occurring behind his back.

In closing, the prosecutor highlighted the fact that Mr. Herring's testimony exactly depicted the Toronto Police College's in-service training on the delivery of knee strikes, submitting that this added to Mr. Herring's credibility. In contrast, the witness officers' poor notes, lack of recall and inability to articulate, made their testimony unreliable. The prosecutor submitted that within a balance of probabilities, it was more likely than not that Mr. Herring was telling the truth.

### **Defence Counsel Submissions**

Defence counsel began by acknowledging that a Hearing Officer may accept or reject some or all of the evidence presented, but urged the Tribunal to consider all of the evidence globally.

Defence counsel submitted that "the allegation before the tribunal is a very narrow one" and that the tribunal must "determine whether the prosecution has proven on *clear and convincing* evidence that Constable Hrebenak approached Mr. Herring and without provocation kneed him in the groin".

In their written submissions, defence counsel did not dispute the set of facts regarding the sequence of events that led to the interaction, but stated that what was "at issue, (was) whether, after the second computer check, and just prior to releasing Herring without charge, Hrebenak grabbed him, put hands on each of his shoulders, and delivered a knee strike to his groin." This is the issue that the prosecution must prove on clear and convincing evidence.

Counsel further submitted that, "The prosecution and defence evidence are starkly contradictory as to whether the knee strike occurred. There is no middle ground. Either the knee strike occurred or it did not. Herring says it happened. Hrebenak says it did

not. Herring's version has zero corroboration. Hrebenak is corroborated by three police officers."

If the Tribunal accepted that Mr. Herring's evidence met the 'clear and convincing' standard required in a PSA prosecution, and that the test for balance of probabilities found in the cases submitted by the prosecutor was met, it remained that "the quality of the evidence presented by the prosecution must ...be clear, weighted, and cogent."

In examining the OIPRD complaint, Professional Standards interviews and the evidence-in-chief of Mr. Herring, counsel submitted that Mr. Herring's evidence was unreliable, exaggerated, contradicted both by outside evidence and common sense, and at times, completely unbelievable. Mr. Herring presented inconsistent testimony regarding whether the phone call with his employer was an outgoing or incoming call, the particulars of a door knock incident that occurred months after his initial complaint interview, whether he had ever been arrested before and his command of the English language.

With regard to his interaction with Constable Hrebenak, Counsel submitted that there were other incidents of inconsistency including whether Mr. Herring was wearing ear buds or over-the-ear headphones, who spoke first, whether Hrebenak issued commands from inside the car, Mr. Herring's interpretation of the request to take his hands out of his pockets and whether he replied to the command to show hands, the number of threats issued by Constable Hrebenak, and whether Herring was polite after being kneed.

Defence counsel went on to suggest, that for the prosecutor to prove its case, it is not enough for Mr. Herring's evidence to be accepted. It is not enough that his evidence could stand up to the *clear and convincing* standard in the face of all of its problems with reliability, demeanour, personal bias, and internal as well as external inconsistencies.

Furthermore, defence counsel submitted that even if Mr. Herring's evidence is accepted, then as a practical matter, the prosecution still has to go further and disprove the evidence of all of the defence witnesses in the case. If the evidence of even a single



one of the defence witnesses is accepted on the issue of whether the knee strike happened, then at best there is a situation where both versions are plausible, the tie must go to Constable Hrebenak.

### **Defence Counsel Submissions Continued**

As submitted previously, the only issue under consideration is whether the knee strike did or did not occur. When the “burden of proof is on the prosecution on a balance of probabilities, which means that (Mr. Herring’s) version must be accepted as being ‘more likely than not’ to have happened, inconsistent and contradictory evidence (together with the above mentioned lack of corroboration) cannot meet the requisite standard.”

In conclusion, defence counsel stated that Constable Hrebenak’s action was reasonable, and while his conduct may not have been perfect, it does not amount to Discreditable Conduct.

### **Analysis and Decision**

I remind myself from the outset that the officer need not prove or establish any fact; the onus is on the Service prosecutor to prove the allegation of Use of Unnecessary Force particularized in the Notice of Hearing, to a standard of clear and convincing evidence.

A number of facts which provide context in this case were undisputed during the trial, and accordingly, I find the following:

- Constable Hrebenak was on duty in uniform when these events took place on February 26, 2013.
- He was responding to a radio call for unknown trouble at approximately 13:04 hours.
- Mr. Herring ran from the rear of 285 Shuter as he was late for work.
- Constable Hrebenak focused on Mr. Herring and assumed he was related to the radio call – unknown trouble.

- Constable Hrebenak interacted with Mr. Herring in the vicinity of 285 Shuter Street.
- Constable Hrebenak engaged Mr. Herring in a verbal exchange, which resulted in an arrest and subsequent investigation.
- The incident was in part witnessed by three fellow police officers and attracted the attention of a couple of civilians.

I find that Mr. Jamie Herring's initial actions were unrelated to the original call for police response on February 26, 2013. Although his behaviour contributed to the creation of the incident before the Tribunal, it was a reasonable reaction to the misguided approach by Constable Hrebenak.

I also find that Constable Hrebenak was tunnel-visioned in his response to the radio call for unknown trouble and his subsequent attention towards Mr. Herring. His predisposed prejudice on the criminality of Moss Park, his limited knowledge and articulation of police powers, his clumsy professionalism and lack of customer service contributed to this misdirected interaction.

These findings may in part explain, but do not excuse, Constable Hrebenak's reaction. Although this provides context to the allegation before the Tribunal, it has more relevance in mitigating sentence than determining whether or not misconduct has occurred. Ultimately, the charge requires that Constable Hrebenak's behaviour in the parking lot must be examined on the available evidence, and assessed to determine if it constitutes the Use of Unnecessary Force.

Although Mr. Herring cannot be regarded as an independent witness in this matter, I found him to be forthright and credible regarding the salient facts at issue. I note too, that on these points, there was no corroborating evidence available from other sources; potential eyewitnesses gave written notice to the prosecution that they would not attend the Tribunal.

I am mindful of the caution to be used in accepting the evidence of witnesses who did not testify before the Tribunal and were unavailable for cross examination.

Nonetheless, the information which was presented by way of the Examination-in-Chief of Mr. Herring, Sergeant Cote and Constable Sotello does corroborate, to a degree, the testimony of the apparent witnesses. Similarly, the CAD information lends credence to other evidence regarding the sequence, duration and nature of the interaction between Constable Hrebenak and Mr. Herring. I note that Constable Lee had no evidence with respect to anything that transpired in the periphery.

### **Analysis and Decision**

As an experienced police officer, Constable Hrebenak should have been well equipped to deal with the situation in a more professional manner. Instead, he chose to embark on a course of action that escalated the situation and by his own admission, initiated a confrontation during which he brought discredit to the Service by using crude, aggressive and bullying tactics.

During this interaction, Constable Hrebenak's apparent conduct and the language he chose to use while in uniform, was a serious deviation from the standard of conduct demanded by the Service and a violation of the reasonable expectations of the community. I find that by any objective standard, if his behaviour were to become known to the public at large, it would undoubtedly cause damage to the reputation of the Toronto Police Service.

With a Motion for Non-Suit, an embedded Motion and three protracted delays, to say that this case has been convoluted would be an understatement.

I have struggled with my impression of the interaction between Constable Hrebenak and Mr. Herring, in contrast with what is best characterised as an estoppel defence submission.

That being said, in the absence of any corroboration to the testimony of Mr. Jamie Herring, there is a dearth of evidence to substantiate the charge of Use of Unnecessary Force.

Defence counsel submitted that the allegation before the Tribunal is a very narrow one: to determine whether the prosecution has proven on *clear and convincing* evidence that Constable Hrebenak “approached Mr. Herring and without provocation, kneed him in the groin.”

The prosecution and defence evidence are starkly contradictory as to whether or not the knee strike occurred. There is no middle ground – either the knee strike occurred or it did not. Mr. Herring says it happened; Constable Hrebenak says it did not. During this Tribunal, Mr. Herring’s version of events has no direct corroboration while in contrast, Constable Hrebenak’s is corroborated by three police officers.

The prosecution submitted the case of Jacobs versus Ottawa Police Service, Ontario Superior Court of Justice, October 30, 2014; in reaching its conclusion that the standard of proof in disciplinary hearings under the *PSA*, is more likely than not that what is alleged to have occurred; is the *balance of probabilities*. This matter was in relation to a subsequent *civil action*, and as such, went on to explain that in establishing a standard of proof, *the prosecutor’s failure to prove the charges by “clear and convincing evidence” does not necessarily mean that those same allegations could not be established on a balance of probabilities*, that being a lower standard of proof.

This Tribunal is bound to determine whether the prosecution has established the allegation, by the standard of proof in disciplinary hearings under the *PSA*, with a *clear and convincing* threshold within the Notice of Hearing; that Constable HREBENAK approached Mr. Herring and without provocation, kneed him in the groin. After considering all of the facts presented, I find that the evidence pertaining to the allegation has not met the standard of proof of clear and convincing evidence.

I therefore find that Constable Vladimir Hrebenak, with respect to the Service Disciplinary case 32/2013 – one count of Use of Unnecessary Force contrary to the Police Services Act is not guilty.

A handwritten signature in black ink, appearing to read 'Frank Bergen', written in a cursive style.

Frank Bergen  
Superintendent  
Hearing Officer

Dated: September 6, 2017

## **APPENDIX A**

### **LIST OF EXHIBITS - 32/2013**

#### **CONSTABLE VLADIMIR HREBENAK (9171)**

Letter of Designation Hearing Officer Inspector Eley (Exhibits 1)

Letter of Designation Superintendent Wardle (Exhibits 2)

Letter of Designation Inspector Callaghan (Exhibit 3)

Letter of Designation Superintendent Bergen (Exhibit 4)

Letter from Chris Cooper dated January 21, 2015 (Exhibit 5)

Letter from Shane Tracey dated January 21, 2015 (Exhibit 6)

Photograph of Community Centre before renovations (Exhibit 7)

Map of Moss Park Arena and John Innes Community Centre (Exhibit 8)

Map of high rises in the area (Exhibit 9)

OIPRD Form (Exhibit 10)

Defence Book of Authorities - Prosecution Motion to Put the Defence to an Election to Call Evidence before a Non-Suit Motion will be Heard (Exhibit 11)

    Prosecution Motion Brought too Late (Exhibit 11, Tab 1)

    The OPSEU Decision Does Not Bind (Exhibit 11, Tabs 1-3)

    No Mandatory Election - Municipal Cases (Exhibit 11, Tab 4)

    No Mandatory Election - Human Rights Cases (Exhibit 11, Tab 5)

    No Mandatory Election - Labour/Employment Cases (Exhibit 11, Tabs 6-8)

No Mandatory Election - Discipline Cases (Exhibit 11, Tabs 1, 2, 9 and 10)

Ontario v. Ontario Public Service Employees Union (OPSEU) (Exhibit 12)

Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd. (Exhibit 13)

Ontario Civilian Commission on Police Services - Sergeant Michael Younan and Ontario Provincial Police (Exhibit 14)

Standards of Proof (Exhibit 15)

ICAD Report Event #: B143759 (Exhibit 16)

Video - Communications Audio (Exhibit 17)

ICAD Report Event #: B143759 (Exhibit 18)

ICAD Unit History Report date range 2013.02.26 05:00 to 2013.02.26 24:00 (Exhibit 19)

Cote Notes (Exhibit 20)

TPS 217 - Statement: Complaint Response (Exhibit 21)

Transcript of Interview with PC K. Cote and Tony Smith by D/Sgt. J. Babiar and D/Sgt. C. Kirkpatrick on June 26, 2013 at 13:05 a.m. (Exhibit 22)

TPS 466 - Lee Notes (Exhibit 23)

Transcript of Interview with PC E. Lee and Tony Smith by D/Sgt. J. Babiar and D/Sgt. K. Gallant on July 15, 2013 at 10:30 a.m. (Exhibit 24)

Diagram where PC Lee was (Exhibit 25)

Transcript of Interview with PC T. Sotello and Tony Smith by D/Sgt. J. Babiar and D/Sgt. K. Gallant on July 15, 2013 at 10: 08 a.m. (Exhibit 26)

Ontario Superior Court of Justice Division Jacobs v. Ottawa Police and Mark Krupa

Case Law Faryna v. Chorny (Exhibit 28)