

APR 09 2013

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Ontario Provincial Police Discipline Hearing

In the Matter of

Ontario Regulation 268/10

Made under the Police Services Act, RSO 1990,

And

In the Matter of

The Ontario Provincial Police

And

Provincial Constable Justin R. Maguire #12713

Charge: Discreditable Conduct

Before:

A/Superintendent S. McDonald, Ontario Provincial Police Adjudicator

Appearances:

Counsel for the Prosecution: Ms. Jodie-Lynn Waddilove
Ontario Provincial Police

Counsel for the Defense: Mr. James Girvin
Ontario Provincial Police Association

Hearing Date: January 13, 2012

Particulars of the Allegations

The Notice of Hearing alleged that Provincial Constable Justin R. Maguire #12713 on or about April 20, 2010 you acted improperly in relation to two parties, MF and JC, at a vehicle stop in the Georgetown area. You:

- searched the parties and vehicle without proper authority to do so;
- looked under the front passenger seat while the female party was still seated in it;
- asked if they were going to do sexual things; and
- made a comment re wet t-shirt contests.

The Hearing

Provincial Constable Justin Maguire pled not guilty on October 16, 2012 of Discreditable Conduct pursuant to Section 2 (1)(a) (xi) of the Code of Conduct contained in the Schedule for Ontario Regulation 268/10, as amended. A hearing was held on October 16, 17, 18, 2012.

On 17 December 2012 Provincial Constable Maguire was found guilty of Discreditable Conduct on two of the particulars of allegation in the notice of hearing which were that he on or about April 20, 2010 acted improperly in relation to two parties, MF and JC, at a vehicle stop in the Georgetown area. He:

- looked under the front passenger seat while the female party was still seated in it;
- asked if they were going to do sexual things;

The hearing continued on 13 January 2013 with submissions on disposition.

Submissions by Prosecution

Ms. Jodie-Lynn Waddilove submitted that a penalty of 30 hours would be appropriate given the seriousness of the misconduct on April 20, 2010. Ms. Waddilove asserted that the suggested penalty is not overly severe and delivers the proper message to Provincial Constable Maguire and the public that this type of behavior is unacceptable.

In support of this position Ms. Waddilove tendered a brief of authorities, Exhibit #15, containing the following indexed material:

1. *Andrews and Midland Police*, 1 May 2003, O.C.C.P.S.
2. *Blowes-Aybar and Toronto Police Services*, 7 March 2003, O.C.C.P.S.
3. *Brayshaw and Ontario Provincial Police*, 3 September 1992, O.P.R 937
4. *Brudlo and Toronto Police*, 23 November 2006, O.C.C.P.S.
5. *Cate and Peel Regional Police Services*, 17 July 1998, O.C.C.P.S.
6. *Drennan and Hamilton- Wentworth Regional Police Service*, 6 August 1996, O.C.C.P.S.

7. *Grainer and Ontario Provincial Police*, 4 July 2005, O.C.C.P.S.
8. *Hassan and Peel Regional Police*, 8 September 2006, O.C.C.P.S.
9. *Ontario Provincial Police v. Favretto*, [2004] O.J. No. 4248 (Ont. C.A.)
10. *Schofield and Metropolitan Toronto Police Services*, 11 September 1984, 2 O.P.R. 613
11. *Williams and Ontario Provincial Police*, (1995) 2 O.P.R. 1047 (O.C.C.P.S.)

Ms. Waddilove reviewed several of the factors for consideration in determining a penalty disposition.

In speaking to the public interest Ms. Waddilove put forth that the purpose of discipline is to protect the public and ensure the public confidence in the police. The penalty must impress upon the public that conduct as demonstrated by Provincial Constable Maguire is unacceptable and attracts sanctions.

Ms. Waddilove submitted that the seriousness of the misconduct is a fundamental consideration in penalty. She argued that the actions of Provincial Constable Maguire were deliberate and that he could have had Ms. Cybuchowski step out of the car, as she requested twice, but did not. He further chose to deliberately ask on two occasions if Ms. Cybuchowski and Mr. Favro were there to do sexual things. Ms. Waddilove argued that this is clearly offensive behaviour and serious misconduct. She pointed out that the OPP requires officers to maintain a professional image and refrain from abusive comments as part of the organization's core values. Ms. Waddilove asserted that the actions of Provincial Constable Maguire is a serious contravention of these core values and is aggravating toward penalty. She further added that this behaviour is concerning when observed in the actions of an officer with less than two years service at the time of the event.

Ms. Waddilove submitted that there has been no clear recognition by Provincial Constable Maguire that he regrets the incident and accepts his actions. She argued that the absence of this recognition or acknowledgment is an aggravating factor towards penalty.

In discussing Provincial Constable Maguire's work performance Ms. Waddilove entered Exhibit # 16, which contained a Probationary Constable performance evaluation for Provincial Constable Maguire covering the period of 07 December 2009 to 07 January 2010 and his career profile. Ms. Waddilove pointed out that Provincial Constable Maguire started his probationary period on 09 January 2009 and received permanent status on 09 January 2010. Prior to this Provincial Constable Maguire had served as an OPP cadet since June 2008. Ms. Waddilove advised that the behavior of Provincial Constable Maguire in this incident seems to be a departure from the work performance described in the performance evaluation.

Ms. Waddilove drew my attention to the career profile and pointed out that Provincial Constable Maguire had been found guilty in March 2012 of discreditable conduct for an improper search in December 2009 and had forfeited 32 hours. Ms. Waddilove argued that the past performance of Provincial Constable Maguire is not mitigating in these proceedings given his short time of service and his previous discipline.

Ms. Waddilove in addressing the ability to rehabilitate put forth that despite his short time of service and the previous discipline, Provincial Constable Maguire continues to work diligently and has demonstrated his work ethic. He will be able to recover from this circumstance.

Ms. Waddilove suggested that specific and general deterrence in this case was necessary. The penalty must communicate to Provincial Constable Maguire that his behavior in this instance is clearly inappropriate and unacceptable. The penalty must also communicate to all members of the Ontario Provincial Police that inappropriate conduct and unacceptable comments as demonstrated by Provincial Constable Maguire, will not be tolerated.

Ms. Waddilove put forth that the conduct of Provincial Constable Maguire in this incident falls short of the professionalism expected by the public. She argued that the knowledge in the community of this conduct has damaged the reputation of the Ontario Provincial Police.

Ms. Waddilove submitted that the suggested penalty of a thirty hour forfeiture will not have an impact on Provincial Constable Maguire or his family.

In addressing the consistency in penalty Ms. Waddilove submitted that to ensure fairness similar conduct should receive similar penalty and that the penalty should be consistent with penalties already decided. Ms. Waddilove drew attention to three cases contained in Exhibit #15;

- *Drennan and Hamilton- Wentworth Regional Police Service*, 6 August 1996, O.C.C.P.S.
- *Grainer and Ontario Provincial Police*, 4 July 2005, O.C.C.P.S.
- *Cate and Peel Regional Police Services*, 17 July 1998, O.C.C.P.S.

Ms. Waddilove puts forth that these cases are on the continuum of seriousness and penalty and drew my attention to them as guidance on this point.

Ms. Waddilove submitted that Provincial Constable Maguire's record is positive but with a prior conviction for misconduct as referenced earlier the requested penalty of 30 hours is measured and reasonable.

Submissions by Defense

Mr. Girvin submitted that an appropriate penalty in this circumstance would be a forfeiture of 8 hours and training specific to dealing with members of the public and an awareness of gender related issues.

Mr. Girvin submitted that it is important to note that the complaint in this case came from Mr. Favro and not Ms. Cybuchowski.

Mr. Girvin pointed out that Provincial Constable Maguire was charged previously from a complaint resulting from a vehicle stop in December 2009. As a result of this complaint the Special Investigations Unit (SIU) conducted an investigation resulting in criminal charges being laid against Provincial Constable Maguire in May 2010. Provincial Constable Maguire was suspended from duty on May 31, 2010 and reinstated on February 28, 2012. The criminal Charges were withdrawn by the crown.

Mr. Girvin points out that Provincial Constable Maguire at the time of the two complaints was a new member still on probation. He draws my attention to Provincial Constable Maguire's first disciplinary matter decision, *Maguire and Ontario Provincial Police* (March 5, 2012) in Exhibit #14, where the hearing officer at page three refers to Provincial Constable Maguire as a "junior officer". Mr. Girvin asserts that it is the same junior officer involved in the incident in April 2010 presently before the tribunal.

Mr. Girvin tendered an excerpt from police orders, page 8 and 19 of Chapter 6, Professionalism in the OPP Exhibit #17. He referenced portions under the heading Direct Management Action on page 8 which states:

- A Manager/supervisor shall address issues personally and directly by:
- Calling attention to the event, indicating it is unacceptable behaviour;
 - Taking action to ensure unacceptable behaviour is modified;
 - Following-up to ensure unacceptable behavior is not repeated;
 - and
 - Informing and educating employees about unacceptable behaviour

Mr. Girvin pointed out that the two incidents came within months of each other and that no member in a supervisory or training capacity had any debriefing or counseling with Provincial Constable Maguire on either complaint. He was left to his own in dealing with the situations. Mr. Girvin argued that management was not overtly responsible for the events of 20 April 2010 but was absent in its responsibility for support and training. Mr. Girvin asserted that Professional Standards Bureau is a blunt instrument to use in this case with minimal effectiveness. He argued that if a briefing after the December 2009 incident had occurred then the April 2010 incident may have been prevented.

Mr. Girvin further pointed out that in the decision in *Maguire* (March 5, 2012) there was no direction for a debriefing of the incident or a requirement for training. Mr. Girvin recognized that in that case there was a joint submission on penalty but submitted that it was a missed opportunity. He put forth that it is still incumbent on the Ontario Provincial Police to provide support, counseling and training to ensure that behavior like this does not happen again. Mr. Girvin asserted that this is an opportunity for the organization to sit back and look at the entire situation with Provincial Constable Maguire. He argued that the public recognizes not only that there must be sanctions but also training and counseling in the disciplinary process.

Mr. Girvin quoted from the *Maguire* (March 5, 2012) decision from page five;

“It is fair to say that an officer with this limited amount of time on the job is bound to make mistakes – in fact, I can say with confidence that it normally happens. Unfortunately some mistakes just happen to be much less forgiving than others, as in the case of MAGUIRE’s misconduct. I will therefore weigh MAGUIRE’s limited experience as a police officer as a mitigating factor.”

Mr. Girvin argued that the limited experience of Provincial Constable Maguire is still relevant in this proceeding and should be considered as mitigating towards penalty.

In commenting on the cases put forward by Ms. Waddilove in Exhibit # 15, Mr. Girvin asserts that these are all cases where there has been conscious conduct in a sexualized manner unlike in Provincial Constable Maguire’s case.

In support of his proposed penalty position Mr. Girvin also reviewed the factors for consideration in determining disposition.

Mr. Girvin submitted that the public interest requires both that there be a fair sanction but also that the conduct will not occur again which in this incident he argued could be assisted through a training component.

Mr. Girvin submitted that any complaint is serious but that the disciplinary process does not lend itself to a quick remedy if appropriate and does not facilitate discussion to solve the complaint. Mr. Girvin submitted that if there had been an opportunity for a conversation with Mr. Favro the complaint may have been resolved informally and the need for a three day hearing would have been avoided. Mr. Girvin submitted that this was never considered.

He argued that there was a lack of timeliness in this case as the incident occurred in April 2010 and it is now still being dealt with in January 2013.

Mr. Girvin submitted that Provincial Constable Maguire deliberately made the comments to Ms. Cybuchowski, and believed them to be appropriate at the time to further the investigation. Mr. Girvin asserted that it was not Provincial Constable Maguire's intention with these comments to sexualize the incident, although it had that effect somewhat and this needs to be distinguished from the cases submitted by the prosecution.

Mr. Girvin submitted that the organization must recognize how things can be done differently by identifying the gaps in performance and what training is needed. The disciplinary process is not conducive for officers to express regrets. Provincial Constable Maguire in his evidence identified that he now understood how Ms. Cybuchowski felt. Mr. Girvin asserts that the process does not allow for half a guilty plea. The misconduct proceeded on all points and the officer only had the choice to plead to all or plead to nothing. Mr. Girvin reminded the tribunal that pleading not guilty cannot be taken as aggravating.

In speaking to the need for deterrence Mr. Girvin submitted that based on the findings no officer would condone what occurred. He added that general deterrence is satisfied in reading this tribunal's decision where the issues are brought to the attention of officers.

Mr. Girvin tendered *Constable J.B. Pigeau and Ontario Provincial Police, 15 July 2009, O.C.C.P.S. Exhibit #18* for consideration by the tribunal. He argued that this case was more on point as it was a junior officer who conducted an unlawful arrest and the penalty was varied on appeal to a reprimand with a direction for training.

Mr. Girvin put forth that the previous discipline incident is so close in time to this incident that it is difficult to distinguish between the two for the purpose of considering the first as a prior count of discipline. He further points out that there has been nothing to indicate that Provincial Constable Maguire has been inappropriate to anyone else since this incident. Mr. Girvin asserts that given all the facts 8 hours and training specific to dealing with members of the public and an awareness of gender related issues is not an unreasonable disposition.

Provincial Constable Maguire addressed the tribunal stating that he acknowledges that Ms. Cybuchowski may have felt uncomfortable during the incident and that due to the ongoing SIU matter he was not given the opportunity to apologize for his actions. He stated that he made a mistake by keeping Ms. Cybuchowski in the passenger seat and would have her exit in the future. Provincial Constable Maguire stated that he has learned from this incident and he felt that the submissions by Mr. Girvin for hours and training were more than sufficient.

In reply Ms. Waddilove pointed out that nothing changes on whether it was Mr. Favro that complained or Ms. Cybuchowski.

Ms. Waddilove in responding to Mr. Girvin's comments regarding the process not allowing for quick review and the incident not being resolved earlier put forth that it is the officers right to have a hearing and if the officer exercises that right Mr. Girvin cannot then claim that there was a delay in the process and criticize the organization on the lack of timeliness.

Ms. Waddilove appreciated that training would benefit Provincial Constable Maguire.

In commenting on the *Constable J.B. Pigeau and Ontario Provincial Police Exhibit #18*, Ms. Waddilove submitted that the case has different facts and that the officer had no previous discipline.

Ms. Waddilove asserted that the case of Provincial Constable Maguire involving two disciplinary incidents with a short window of time between them cannot be used as mitigating and is not a lapse in judgement but indicative of Provincial Constable Maguire's conduct. This conduct may be remedied by training but 30 hours is still an appropriate penalty for this incident.

Findings:

I thank Ms. Waddilove and Mr. Girvin for their submissions on this matter. I have listened with interest to their points and I have reviewed all the material provided to me.

In *Williams* and the Ontario Provincial Police, the Commission identified three key elements a Hearing Officer must take into account when imposing a penalty. These are: the nature and seriousness of the misconduct; the ability to reform or rehabilitate the officer, and the damage to the reputation of the Police Force that could occur if the officer remained on the Force.

The actions of Provincial Constable Maguire crouching down, placing his head below seat level, shining a flashlight around and under the seat and floor, and looking under the seat area while a female passenger dressed in a short skirt with bare legs was sitting in the seat are unacceptable. The inappropriateness is compounded by the fact that during his search Ms. Cybuchowski asked on two separate occasions if he wanted her to get out of the vehicle. Provincial Constable Maguire had asked investigative questions and received answers from Mr. Favro and Ms. Cybuchowski regarding drugs or alcohol. He had received an explanation as to why they were at the West 7 driveway and turned around. I can see no justification in these circumstances for inquiring as to their possible sexual activity. The question was inappropriate.

The behaviour demonstrated by Provincial Constable Maguire on April 20, 2010 as described is not the manner in which a member of the Ontario Provincial Police should be conducting themselves and is a serious misconduct.

Mr. Girvin's comments that the disciplinary process does not lend itself to a quick remedy if appropriate and does not facilitate discussion to solve the complaint I find perplexing. It has been my experience that the process has always been open to discussions on resolution in which proposals can be advanced by all parties involved for consideration. Some of these discussions occur as part of a prehearing process. Although not aware of any of the details of the discussions I am aware that a prehearing did occur in this case. Based on my experience I believe that counsel would have had an opportunity to raise any potential solutions in that forum. If at the end of these discussions a resolution is not attained and a hearing occurs it is neither mitigating nor aggravating.

Mr. Girvin quoted the hearing officer from Provincial Constable Maguire's first disciplinary proceeding, *Maguire* (March 5, 2012) and argued that the limited experience of Provincial Constable Maguire is still relevant in this proceeding and should be considered as mitigating towards penalty. I do not entirely agree. The agreed facts in the first hearing dealt with the improper search of a vehicle. This was recognized as a mistake made by inexperienced officers. The facts in the finding of guilt in this second incident deal with inappropriate conduct and comments by Provincial Constable Maguire. I believe a distinction must be made between the inexperienced misuse of authority as in the first hearing and the inappropriate actions and offensive comments in the present hearing. I do recognize that inexperience can narrow an officer's focus to the single task at hand but inexperience does not mitigate a lack of common sense and decency. Provincial Constable Maguire's inexperience will be given some consideration but is less mitigating in determining penalty in this situation than in the first hearing.

Ms. Waddilove provided three cases in Exhibit # 15, *Drennan and Hamilton-Wentworth Regional Police Service, Grainer and Ontario Provincial Police and Cate and Peel Regional Police Services* and she submits these cases are on the continuum of seriousness and penalty and drew my attention to them as guidance on penalty. I have reviewed the cases and conclude that all of the cases are more serious in misconduct than that of Provincial Constable Maguire. The penalties range from a six month demotion to a forfeiture of 72 hours. All three cases I believe are more serious and the penalties higher than necessary for the case before the tribunal. Provincial Constable Maguire's conduct, although offensive, does not rise to the level of the submitted cases. I note that Ms. Waddilove's penalty position of 30 hours is also considerably lower.

Mr. Girvin has submitted *Constable J.B. Pigeau and Ontario Provincial Police* as a case more on point as it was a junior officer who conducted an unlawful arrest and the penalty was varied on appeal to a reprimand with a direction for training. I believe the conduct of Provincial Constable Maguire to be more offensive and serious than the conduct of Provincial Constable Pigeau. I also agree with Ms. Waddilove's comment that Provincial Constable Maguire has a previous disciplinary matter which was absent in the *Pigeau* case.

In reviewing Provincial Constable Maguire's career profile and performance evaluation Exhibit #16, it is evident from the comments of his coach officer and supervisor that he has recognized potential to be a productive officer and was progressing favorably towards that goal. As pointed out by Ms. Waddilove this incident appears to be a departure from Provincial Constable Maguire's usual performance. The performance evaluation is considered mitigating towards penalty.

Mr. Girvin put forth that it is incumbent on the Ontario Provincial Police to provide support, counseling and training to ensure that behavior like this does not happen again. He argued that the public recognizes not only that there must be sanctions but also training and counseling in the disciplinary process. I agree that in some circumstances training may be an additional requirement to both reassure the public and prevent a recurrence of the misconduct. The behavior demonstrated by Provincial Constable Maguire in this case raises concerns about his ability to interact correctly with the public and practice safe and proper search techniques. These abilities may benefit from additional training. This concern is compounded by the fact that this is the second disciplinary incident in a short period for Provincial Constable Maguire involving search issues.

The appropriate training that may be required cannot be determined by this tribunal based on the facts of this incident alone. Provincial Constable Maguire returned to duty in February 2012 after a 21 month suspension and there are no submissions on his current performance. Mr. Girvin advised that Provincial Constable Maguire has recently completed his annual block training and also the Highway Interdiction course. I have no submissions on what this training contained. It is my opinion that this tribunal may direct that additional training in search, public interaction and gender awareness be provided but the content and duration of the training should be identified by Provincial Constable Maguire's Divisional Commander in consultation with the Provincial Police Academy based upon an assessment of his overall performance. As submitted by Mr. Girvin this is an opportunity for the organization to look at the entire situation with Provincial Constable Maguire.

The identifying of additional training to prevent a recurrence of the misconduct does not eliminate the need for an appropriate penalty. Provincial Constable Maguire ultimately is accountable for the decisions and actions he took on April 20, 2010.

Mr. Girvin put forth that the previous discipline incident is so close in time to this incident that it is difficult to distinguish between the two for the purpose of considering the first as a prior count of discipline. I disagree. There was a period of 4 months between these two incidents which I find to be sufficient to allow a

clear distinction between them. I find the previous discipline to be an aggravating factor.

The ability to reform or rehabilitate the officer is a key element in penalty consideration. Provincial Constable Maguire in addressing the tribunal recognized that he made a mistake by keeping Ms. Cybuchowski in the vehicle during the search and he understood how it may have made her feel uncomfortable. I believe that the recognition and understanding of the misconduct is a critical element of the rehabilitation process. The recognition of his mistake, although coming at the end of the hearing process, is important and mitigating towards penalty. I believe Provincial Constable Maguire to be a dedicated young police officer with potential to continue to contribute to the Ontario Provincial Police and hope that he has learned from this experience.

I have had submissions to indicate that the proposed penalty range will create no undue hardship on Provincial Constable Maguire.

Specific and general deterrence must be considered when assessing an appropriate disposition for Police Act cases. It is necessary to consider a general deterrence for all members. The penalty must reflect that the actions of Provincial Constable Maguire as described are not those expected of a police officer and below the standard of conduct for members of the Ontario Provincial Police. There must also be specific deterrence for the member to send a message that individuals will be accountable for their conduct. I believe that Provincial Constable Maguire recognizes that his actions were unacceptable. The OPP must deliver a penalty that prevents a recurrence and adequately ensures the public.

Members of the Ontario Provincial Police must always conduct themselves in a professional manner. There is no tolerance in this organization for unprofessional behaviour as demonstrated by Provincial Constable Maguire. These actions have damaged the reputation of the Ontario Provincial Police. This damage is unacceptable.

The Ontario Provincial Police views the misconduct as serious and is cognizant that a penalty must be imposed to protect the interest of the public we serve.

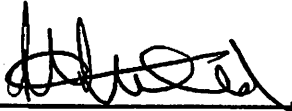
Disposition:

In light of the seriousness of this allegation and bearing in mind all the evidence placed before me, Provincial Constable Maguire will forfeit twenty-four(24) hours pursuant to Section 85 (1) (f) of the Police Services Act.

This means you will attend your office on either rest days or annual leave days and work the prescribed hours until twenty-four (24) hours have been

accomplished. Your Detachment Commander will advise Professional Standards Bureau when these hours are completed. Your Detachment Commander will issue the timeline; however, I believe this should be completed within the next three (3) months.

It is also directed, pursuant to Section 85 (7) (b) of the Police Service Act, that Provincial Constable Maguire successfully complete a suitable training program on search techniques, dealing with the public and gender awareness as selected by the Divisional Commander of Highway Safety Division in consultation with the Director of the Provincial Police Academy. The timelines for the completion of this training will be determined by the Divisional Commander of the Highway Safety Division.



S. McDonald, A/Superintendent

February 14, 2013
Date