



ONTARIO CIVILIAN POLICE COMMISSION

**IN THE MATTER OF THE POLICE SERVICES ACT, R.S.O. 1990, C. P.15,
AS AMENDED**

BETWEEN:

PROVINCAL CONSTABLE L.J. TURGEON

APPELLANT

-and-

ONTARIO PROVINCAL POLICE

RESPONDENT

-and-

G.C.

PUBLIC COMPLAINANT

DECISION

Panel: Dave Edwards, Vice-Chair
John Rodriguez, Member

Hearing Date: May 30, 2012

Hearing Location: Toronto, Ontario

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Appearances

James Girvin, Counsel for the Appellant
Norman W. Feaver, Counsel for the Respondent

Introduction

1. Const. Turgeon (also the "Appellant") has been a police officer with the Ontario Provincial Police (OPP) since February 9, 1987.
2. As a result of a public complaint by G.C.*, by decision dated August 4, 2011 (the "Misconduct Decision"), the Appellant was found to have committed one count of Neglect of Duty contrary to the Code of Conduct contained in the Schedule to Ontario Reg. 123/98 as amended, enacted under the *Police Services Act*, R.S.O. 1990, c.P.15 as amended.
3. In his Decision on Penalty dated August 30, 2011, (the "Penalty Decision"), Insp. Paul Kelly (the "Hearing Officer") imposed a forfeiture of forty hours.
4. Const. Turgeon appeals both the finding of Neglect of Duty and the penalty.
5. G.C. did not participate nor was she represented in this appeal.

(* The Hearing Officer in his decisions used the initials G.C. to designate the Public Complainant. The Panel will do so as well.)

Summary Decision

6. For the reasons set out below, we dismiss the appeal.

The Disciplinary Hearing

7. The Appellant was charged with Neglect of Duty as a result of an incident that occurred on March 2, 2010, when the Appellant was alleged to have failed to properly investigate a matter reported by G.C..
8. The hearing was held on May 25, 26, 27 and June 28, 29, 2011 in Kanata, Ontario.
9. Const. Turgeon pleaded "not guilty" to the alleged Neglect of Duty.
10. Eight witnesses gave evidence at the hearing and 28 Exhibits were filed. The hearing focused on the interaction between the Appellant and G.C. on March 2, 2010.
11. Certain matters were not in dispute:
 - a. on Tuesday, March 2, 2010, G.C. contacted the OPP Communications Centre and asked to speak to an officer about reporting a domestic incident;
 - b. in her conversation with the dispatcher, G.C. mentioned being cornered in the kitchen by her husband, chest butting, finger pointing and attempts of intimidation by her husband who had been drinking at the time;
 - c. the Appellant received information from dispatch , and then called G.C. to set up an appointment for her to attend the OPP detachment to be interviewed;
 - d. G.C. came to the detachment for the interview accompanied by her son C.C.;

- e. only the Appellant and G.C. went into the interview room;
 - f. after about twenty-five minutes in the interview room, G.C. became upset and left the room;
 - g. after the interview the Appellant flagged G.C. as a "liar" and a "cuckoo". He filed a report of the incident, but failed to complete all of the paper required by the OPP's Domestic Violence Occurrence Policy (LE239);
 - h. the Appellant recorded in his notebook that G.C. had reported her husband as being verbally abusive, intimidating with a lot of finger pointing and chest butting;
 - i. the Appellant was of the view that there was not a sufficient basis to justify proceeding further (ie., to investigate further).
12. The Appellant and G.C. disagree on what transpired in the interview room.
13. The Appellant testified that he conducted a normal interview with G.C. and that she became increasingly agitated when he asked her questions for clarification purposes, or when he gave answers to her questions which did not help her achieve her agenda. The Appellant believed her agenda was the removal of the husband from the home.
14. Const. Turgeon's evidence was that G.C. stormed out of the office even after he offered to have her speak to a different police officer.
15. G.C. testified that the Appellant was aggressive and argumentative; that he did not allow her to tell her story;

and that he suggested that she go for family counseling, despite the fact that she had advised him that she had previously gone for such counseling.

16. On March 4, 2010, Sgt. Cyr, an OPP officer working out of the same detachment as the Appellant, contacted G.C. in relation to an unrelated matter. G.C. provided information to Sgt. Cyr regarding the domestic violence incident and her interview about it with the Appellant.
17. Sgt. Cyr reviewed the Appellant's notebook and the occurrence report and concluded that a further investigation was required. She arranged for G.C. to be interviewed by Const. Dignard.
18. On March 4, 2010, Const. Dignard interviewed G.C. for two and one half hours. Later the same day she also interviewed C.C. and B.C., two of G.C.'s sons. On May 3, 2010 her third son, S.C., was interviewed. On March 5, 2010, G.C.'s husband was arrested for Criminal Harassment.
19. On March 11, 2010 G.C. filed a complaint with the Office of the Independent Police Review Director with respect to the conduct of the Appellant. Sgt. Bildassare Nuccio of the OPP investigated the matter and, as a result, a charge of neglect of duty was laid against Const. Turgeon.
20. Following a hearing the Hearing Officer found the Appellant had committed one count of Neglect of Duty, and imposed a penalty of forfeiture of forty hours.

Appellant's Submissions

21. Mr. Girvin asserted that the finding of Neglect of Duty was primarily based upon a determination of credibility and that the Hearing Officer erred in law in making this finding.

22. He argued that although the Hearing Officer's findings of credibility and fact are entitled to deference by the Commission on this appeal, where the Hearing Officer's reasoning is self-evidently wrong, contains clear error or cannot reasonably be accepted, the Commission may interfere with the Hearing Officer's findings. Lloyd and London Police Service (1999), O.P.P. 1345 (OCCPS) at 1351.
23. In particular, he submitted that the Hearing Officer made errors in apprehension of the evidence such as failing to note that the dispatcher was not aware if the matter was an assault, or improperly noting the point at which Sgt. Cyr concluded that a further interview with G.C. was required.
24. Mr. Girvin acknowledged that the Hearing Officer correctly identified the appropriate basis for assessing an officer's conduct, (Mousseau and Metropolitan Toronto Police Services (1981), OCCPS #81-07). However, he submitted that the Hearing Officer erred in his application of Mousseau by failing to first analyze the credibility of the Appellant and G.C. before assessing the Appellant's conduct, and by analyzing the actions of the Appellant in light of events which occurred after the Appellant's dealings with G.C..
25. Mr. Girvin asserted that the Hearing Officer also erred in assessing credibility by relying on which witness was more sincere or had the appearance of truthfulness or the witness's demeanour.
26. He submitted that a proper assessment of credibility is much more detailed than demeanour as it should include such features as:
 - a. opportunities for knowledge
 - b. powers of observation

- c. ability to recall details and
 - d. whether or not the witness has an interest in the outcome.
27. Mr. Girvin submitted that the correct starting point to analyze the Appellant's credibility was with his notes. The Appellant's notes were made contemporaneous to the interview. G.C.'s notes were made some days after the interview.
28. He noted that the Professional Standards Bureau Investigator reviewed and compared the Appellant's evidence and testified that the Appellant was a credible officer.
29. Mr. Girvin asserted that the Appellant's acknowledgment of his failure to complete a LE239 demonstrated his candour; whereas G.C. had inconsistencies or omissions in her statements to various officers which the Hearing Officer failed to consider in assessing her credibility.
30. He noted that G.C. on a number of instances in her interview with Const. Dignard stated that her husband did not touch her. In addition, in Const. Dignard's assessment, G.C. was neither assaulted nor threatened. Mr. Girvin submitted that Const. Dignard's testimony supported the Appellant's version of his interview and his conclusions about G.C.
31. Mr. Girvin emphasized that at the hearing G.C. had the opportunity to hear the other witnesses' testimony prior to giving her testimony, and that her testimony, at times, mirrored the language of the investigator who testified prior to her. He noted that in his submissions before the Hearing Officer he emphasized this fact, and yet the Hearing Officer failed to deal with this issue.

32. He stated that the Appellant clearly indicated during his testimony that if G.C. had stated that she or her son had been assaulted or threatened, he would have laid charges against the husband.
33. He asserted that the Hearing Officer faulted the Appellant for his short answers and for requesting a repetition of the questions, but did not fault G.C. for consistently failing to directly answer straight forward questions.
34. Mr. Girvin argued that Sgt. Cyr was not credible and her testimony should be given no weight as her evidence as to whether she consulted the Crown Attorney was directly contradicted by Const. Dignard.
35. Mr. Girvin asked that we revoke the Hearing Officer's decision and substitute a finding that the Appellant had not committed Neglect of Duty. In the event that we dismiss the appeal from the finding of Neglect of Duty, he requested that we vary the penalty decision to a forfeiture of between 12 and 20 hours.

Respondent's Submissions

36. Mr. Feaver agreed that the decision in this case turned on the Hearing Officer's findings of credibility. He submitted that the Hearing Officer's findings of credibility were appropriate and should not be disturbed.
37. He submitted that the Hearing Officer applied the "O'Halloran test" in assessing credibility; that he examined all of the relevant evidence; and that he properly decided credibility utilizing the correct legal test.

38. He asserted that it is the Hearing Officer's role to make findings of credibility and to make findings of fact based upon the evidence. Mousseau, supra.
39. Mr. Feaver submitted that the Hearing Officer examined the testimony of both the Appellant and G.C., citing inconsistencies and determined which testimony was more consistent with the preponderance of evidence, including the Appellant's notes.
40. Mr. Feaver noted that many of G.C.'s allegations were in the Appellant's notes, particularly G.C.'s allegations made during the telephone discussion prior to the interview that her husband was, "verbally abusive, intimidating, a lot of finger pointing and chest butting".
41. With respect to the Appellant's notes, he asserted that they are only one piece of the evidence and the Appellant had admitted that not everything from the interview was contained in the notes.
42. He asserted that no negative inference should be drawn by the fact that G.C. advised the Appellant that her son was not being interviewed. In her mind he simply accompanied his mother to the police station. It is up to the police officer to determine who he wished to interview during an investigation.
43. Mr. Feaver stated that the Appellant's role was to conduct an investigation and then make a determination as to whether the matter should go forward. No investigation occurred here; only a brief unsatisfactory interview.
44. He asserted that all witnesses, except for the Appellant, felt that the information which was in the possession of the Appellant justified a full investigation.

45. Mr. Feaver argued that the Hearing Officer had analyzed all of the evidence in a reasonable step by step approach and concluded that G.C.'s evidence was consistent with the other witnesses' testimony. It was the Appellant's testimony which he found to be inconsistent with the preponderance of evidence.
46. He asserted that the penalty was appropriate, that the Hearing Officer considered all of the necessary principles, and that the penalty fell within the range of penalties available to the Hearing Officer.
47. He urged the Panel to dismiss the appeal.

Reasons for Decision

48. Const. Turgeon appeals the finding of Neglect of Duty and the penalty imposed by the Hearing Officer.
49. As the Commission has stated previously, under the standard of review enunciated by the Supreme Court of Canada, it is clear that the Commission's role on an appeal is "to review...[the] decision to determine whether the conclusions reached are reasonable, reflect a correct understanding and application of the law, are based upon clear and cogent evidence and are articulated in a logical manner". Barlow and Ottawa Police Service, (August 15, 2011, OCPC).
50. The Hearing Officer must interpret and apply the law correctly. His/her findings of fact must be reasonable. Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9.
51. Two additional principles are relevant to this appeal. As hearing officers are not legally trained, the Commission must not be overly critical of the language used by a hearing officer. We must not focus on mistakes that do not affect the decision as a whole. Galassi v. Hamilton Police Service,

(September 3, 2003, OCCPS, upheld [2005] O.J. No. 2301 (Div. Ct)).

52. Secondly, deference should be granted to hearing officers' findings of credibility; in other words these findings are reviewed from a standard of reasonableness. Lloyd v. London Police Service (1999), O.P.R. 1345 (OCCPS) at 1351.
53. The Appellant's arguments can be grouped into four issues:
 - a. the Hearing Officer erred by failing to deal with each point raised by counsel in closing argument;
 - b. the Hearing Officer erred in his application of the principle set out in Mousseau in determining credibility;
 - c. the Hearing Officer's decision contains a number of factual errors which impact upon his findings; and,
 - d. the finding of the Hearing Officer that the Appellant had sufficient information following the interview with G.C. to warrant further investigation into the alleged domestic dispute, was an unreasonable finding.
54. Turning to the first issue, did the Hearing Officer err by failing to deal with each point raised by counsel in closing argument? This is a question of law and the standard of review is correctness.
55. Mr. Girvin asserted that G.C. had the benefit of hearing the testimony of certain witnesses before she gave her evidence. In closing argument at the hearing counsel for the Appellant had argued that this tainted her evidence. The Hearing Officer made no mention of this issue in his decision.
56. The Hearing Officer is under no duty to deal with each issue or point raised by counsel, nor each piece of evidence tendered. The Ontario Court of Appeal has directed that a reviewing body should focus on what is in the decision; not what is not. Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670 (Can LII), at paras. 39 and 40.

57. Also, this argument is a double edged sword. The Appellant was present throughout the entire hearing and testified last. He had the benefit of listening to the testimony of all witnesses.
58. We find that absent glaring examples of tainted evidence, the Hearing Officer was under no obligation to consider this issue.
59. The second issue advanced by the Appellant was that the Hearing Officer erred in the application of the principle set out in Mousseau. Mr. Girvin asserted that the Hearing Officer must assess the conduct of the officer in light of the circumstances as they exist at the time of the conduct, without the "benefit of hindsight". Further, the Hearing Officer must determine credibility of the Appellant and G.C. first. He argued that the Hearing Officer erred in applying *ex post facto* evidence in assessing credibility.
60. It is a question of law as to whether the Hearing Officer applied the correct legal principle and the standard of review is correctness. It is a question of fact with respect to the specific findings of credibility and the standard of review is reasonableness.
61. Although the Hearing Officer does not explicitly state that he employed the "O'Hallaran test" to determine credibility, it is clear from his findings that he did.
62. This test is described in Faryna v. Chorny (1952) 2 D.L.R. (B.C.C.A.):

The credibility of interested witnesses, particularly in a case of conflict in evidence must be reasonably subjected to an examination of the consistency of their stories with the possibilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such cases must be its harmony with the preponderance of the probabilities,

which a practical and informed person would readily recognize as reasonable in that place under those conditions. [emphasis added]

63. The Hearing Officer discusses in detail his assessment of the testimony of both G.C. and the Appellant. In assessing G.C.'s testimony, he first describes her demeanour and then he states:

Secondly, and more importantly than her demeanour at the hearing, on my analysis of the evidence, I found her version of events very consistent with the overall evidence....I will elaborate with some examples [emphasis added]....(Misconduct Decision, at p.8.)

64. The Hearing Officer subsequently provides examples which enabled him to reach this finding.
65. The Hearing Officer also analyzes Const. Turgeon's testimony. After commenting upon his demeanour he finds that "[h]is responses to similar or identical questions shifted over the course of his cross examination. Further, Constable Turgeon's story was not consistent with the evidence overall and therefore in some areas was unreliable." [emphasis added] (Misconduct Decision, at p. 9.)
66. The Hearing Officer then provides examples to support this finding.
67. We find that the Hearing Officer applied the correct legal principle in assessing credibility and that his findings of credibility are reasonable.
68. The third issue advanced by the Appellant was that the Hearing Officer's decision contains a number of factual errors which impact upon his findings.
69. These are questions of fact and will be reviewed from a standard of reasonableness.

70. For example, in response to a question from the Appellant as to whether there was an assault, the evidence showed that the dispatcher advised "I don't know"; whereas the Hearing Officer summarized that as "but the dispatcher gave no additional information". The Hearing Officer also stated that the dispatcher spoke to the Appellant; whereas the evidence showed that a third party relayed the dispatcher's information to the Appellant.
71. As noted above, our role is not to fault the Hearing Officer for errors which do not affect the decision as a whole. We are of the view that the factual errors raised by the Appellant are all minor in nature and do not affect the decision as a whole, nor do they render his decision unreasonable.
72. Finally, counsel for the Appellant argued that the critical question was whether the Appellant had sufficient information following the interview with G.C. that warranted further investigation into the alleged domestic dispute.
73. This is a question of fact and will be reviewed from a standard of reasonableness.
74. All witnesses testifying, except for the Appellant, were of the view that the Appellant had sufficient evidence to warrant an investigation and that the interview with G.C. could not be classified as an investigation, nor used as justification that the Appellant take no further action.
75. The Hearing Officer's decision that the Appellant had sufficient information to warrant an investigation into the alleged domestic dispute is a reasonable decision.
76. Overall, we find the Hearing Officer's finding of Neglect of Duty to be reasonable and without error of law. His findings are clearly set out in logical progression in the decision. The Hearing Officer supports each finding with evidence from the hearing.

77. It is true that some evidence adduced at the hearing can be brought forth which is inconsistent with the Hearing Officer's findings. That, however, is one reason why there is a hearing officer. It is his/her responsibility to sift through inconsistencies, and then, utilizing the appropriate legal principles, make findings, such as findings of credibility, and ultimately to reach a decision.
78. It is not our role to re-try the matter.
79. The finding of Neglect of Duty "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law". Dunsmuir, supra
80. Accordingly, we dismiss the appeal of the finding of Neglect of Duty.

PENALTY

81. The standard of review of a penalty as it relates to findings of fact is reasonableness and as to the Hearing Officer's interpretation and application of the law is correctness. Dunsmuir, supra.
82. As noted in Barlow, supra at p. 45:

Past decisions of the Commission have described this standard of review for penalty appeals in a less technical way, noting that the Commission's role on appeal is not to second-guess the decision of a hearing officer but to review their decision to determine whether the conclusions reached are reasonable, reflect a correct understanding and application of the law, are based upon clear and cogent evidence and are articulated in a logical manner.

83. Counsel for the Appellant argues that the Hearing Officer made five errors:
 - a. failure to recognize the Appellant's good work record;

- b. insufficient weight given to the offer of Informal Resolution;
 - c. undue emphasis on the principle of general deterrence;
 - d. insufficient weight given to the Appellant' apology for his use of unprofessional language; and,
 - e. the timeline of the occurrence was not considered as a mitigating factor.
84. All of these issues are questions of fact and the standard of review is reasonableness.
85. First, counsel contends that the Hearing Officer failed to recognize the good work record of the Appellant. We disagree. The Hearing Officer acknowledged the positive aspects of the Appellant's work history including the letters of appreciation, his Exemplary Service Medal and the absence of a previous record of misconduct. In fact he states that these "are a significant mitigating factor and I will weigh them accordingly". (Penalty Decision, at p. 5.)
86. However, the Hearing Officer also notes that the performance assessment "shows a member who is not performing to an acceptable standard. It does not reflect a motivated and high contributing member..."(Penalty Decision, at p. 5.)
87. The Hearing Officer's conclusions are reasonable and supported by the evidence.
88. Second, the Appellant alleges the Hearing Officer erred by not giving significant weight to the offer of Informal Resolution of 12 hours. We disagree and adopt the Hearing Officer's reasons on this issue:

This offer was made during the discipline process in an effort to resolve the complaint as soon as possible. Resolution is a key goal of the discipline process. However, where an offer is rejected it remains a possibility that a hearing may result in a lesser or greater disposition depending on what is disclosed

through evidence. In this case I believe that there is much more evidence available to the Tribunal to assess a disposition than would have been available to the Discipline Committee who authored this early offer. Also see Gruzuk and OPP (1991) OCCPS; and McDougall and Brockville Police Service (1993) OCCPS which support this view. Therefore, I do not accept that this offer is definitive in determining a disposition in this case. (Penalty Decision, at p. 7.)

89. Third, the Appellant asserts that the Hearing Officer erred by placing undue emphasis on the principle of general deterrence. We disagree. The Hearing Officer found that this was a "very serious incident" and concluded that "[w]e must signal to all members that this is clearly an unacceptable response to a domestic violence complaint" – (Penalty Decision, at p. 6.) This is a reasonable finding.
90. Fourth, the Appellant contends that the Hearing Officer erred by not giving appropriate weight to the Appellant's apology for his use of unprofessional language. The Hearing Officer dealt with this issue and concluded that the Appellant had apologized for his language, but that it was a partial apology and further stated "I do not believe that Constable Turgeon has fully acknowledged or accepted his responsibility for how he managed this occurrence". Based upon the evidence this finding is a reasonable one.
91. Finally, in oral argument the Appellant raised for the first time the timeline of the occurrence as a mitigating factor. As the Appellant went off shift within one and half days after the event, he did not have the opportunity to remedy the matter. Aside from the fact that this issue was not raised in the Appellant's factum, we agree with the Respondent that when the interview with G.C. ended, the evidence supports the conclusion that the Appellant had no intention of pursuing the matter further.
92. In summary, we find that the penalty imposed and the reasons in support fall "within a range of possible,

acceptable outcomes which are defensible in respect of the facts and the law”.

93. We therefore dismiss the appeal of penalty.

94. Accordingly, we dismiss this appeal.

DATED AT TORONTO THIS 20th DAY OF July, 2012

Dave Edwards
Vice-Chair, OCPC

John Rodriguez
Member