Ontario Provincial Police Discipline Hearing

In the Matter of

Ontario Regulation 268/10

Made Under the Police Services Act, RSO 1990

And Amendments Thereto

AND

In the Matter of the

The Ontario Provincial Police

And

Provincial Constable D.B. (David) Vogelzang, #10538

Charge:	**Unlawful or Unnecessary Exercise of Authority**
Before:	**Superintendent Robin D. McElary-Downer** **Ontario Provincial Police**
Appearances:	
Counsel for the Prosecution:	**Mr. Christopher Diana** **Legal Services Branch, Ministry of Community Safety and Correctional Services and Ministry of the Attorney General**
Counsel for the Defence:	**Mr. R. Bruce Nelson and Ms. Kate Nelson** **Ontario Provincial Police Association**
Date:	**January 12, 2012**

REASONS FOR DISPOSITION

Allegation

After a hearing into an allegation of misconduct, Provincial Constable D.B. (David) Vogelzang, (VOGELZANG) was found guilty of one count of Unlawful or Unnecessary Exercise of Authority, contrary to subsection 2(1) (g) (i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The particular of the allegation was:

> On or about November 14, 2010 he was involved in the arrest of a male, RF, which arrest was unlawful and /or unnecessary.

Exhibits

Exhibits tendered since the original Hearing included:

Exhibit #21 – Book of Authorities - Prosecution
Exhibit #22 – Brief - Defence

Positions on Disposition

Mr. Diana submitted the appropriate penalty in this matter be a forfeiture of 3 days or 24 hours and refresher training for VOGELZANG in regard to police powers of arrest. On behalf of the Public Complainant, RF, Mr. Diana submitted the appropriate penalty be a forfeiture of 5 days or 40 hours.

Mr. Nelson, Counsel for VOGELZANG, submitted a reprimand would be an appropriate penalty.

Submission – Prosecution

Mr. Diana tendered a Book of Authorities as Exhibit #21. The book had the following reference cases:

OPP v. Vogelzang, (November 28 & 29, 2011, O.P.P D.H)
OPP v. Vogelzang, (December 22, 2011, O.P.P D.H)
Toronto Police Service v. Blowes-Aybar, (March 7, 2003, O.C.C.P.S.)
OPP v. Pfaff, (March 31, 2005, O.P.P.D.H)
OPP v. Godfrey, (March 22, 1989, O.P.C.)
Edmonton Police Service v. Rishi, (December 31, 1997, L.E.R.B)
OPP v. Taillon, (July 15, 2009, O.C.C.P.S.)

Mr. Diana began by stating the penalty recommended by him and that of RF, was within the penalty range of similar cases and it speaks to the seriousness of the matter. He then reviewed the factors to be considered in the penalty disposition.

The matter at hand involved a significant interaction with a member of the public which resulted in an unlawful arrest. An arrest without lawful authority is a very serious matter. An individual was deprived of their liberty and placed in the rear of a cruiser beside a major highway. He referred to *Toronto Police*

Service v. Blowes-Aybar, (March 7, 2003, O.C.C.P.S.), a case where a Toronto Police officer affected an unlawful arrest and received a 4 day suspension.

Mr. Diana referred to *OPP v. Pfaff, (March 31, 2005, O.P.P.D.H)*, an OPP case where the officer was ordered to forfeit 12 hours. He pointed out the Hearing Officer's comments of that decision:

> *When an arrest is unnecessary and an individual's right to freedom has been removed, however briefly, that matter is serious.*
>
> *The arrest of Mr. Sood was unnecessary. His personal freedom was removed. He was handcuffed, was placed in the rear seat of a marked police cruiser where he could not exit voluntarily. This is a significant action against him by the Ontario Provincial Police.*

Mr. Diana submitted that the *Pfaff* matter was similar in fact to the matter at hand.

Mr. Diana advised that in some cases the seriousness of the misconduct can be mitigated by an officer's inexperience as was the case in *OPP v. Taillon, (July 15, 2009, O.C.C.P.S.)*. On appeal, the officer's penalty was reduced to a reprimand after the Ontario Civilian Commission on Police Services (OCCPS) took into consideration a number of mitigating circumstances, including the officer's limited experience of 14 months on the job. Mr. Diana submitted that in the case of VOGELZANG, inexperience was not a factor. VOGELZANG has significant experience and has conducted thousands of traffic stops.

In regard to the recognition of the seriousness of misconduct, Mr. Diana advised this has not been a case where an officer entered a guilty plea and there was no evidentiary record of remorse. He submitted that this could not be considered a mitigating factor. In fairness however, Mr. Diana pointed out that VOGELZANG was not contemptuous of the hearing process and it was his right to dispute the allegation.

In regard to the provocation consideration, Mr. Diana submitted that the argument between RF and VOGELZANG should be considered an aggravating circumstance as it illustrated VOGELZANG's temper may have been short or he had a lack of control.

Mr. Diana asked that the recent finding of guilty against VOGELZANG in another *Police Services Act* tribunal be considered as an aggravating factor with respect to employment history. He submitted the allegation against VOGELZANG in the former matter occurred only 6 months before the matter at hand. He advised that outside of these two matters, he was not aware of any other disciplinary matter.

Mr. Diana submitted the ability to reform or rehabilitate VOGELZANG was a consideration and wondered if the two recent findings of guilty against VOGELZANG may help. He said it was concerning, however, in the most recent decision and matter at hand, that VOGELZANG's credibility was called into question.

In regard to general and specific deterrence, Mr. Diana said this was clearly a serious matter and all officers must understand and appreciate their arrest authorities, specifically when it comes to breach of the peace. He suggested that a light sentence will trivialize the seriousness of the misconduct. He submitted that a significant penalty against VOGELZANG may help VOGELZANG understand the significance of his action.

Mr. Diana submitted the action of VOGELZANG can tarnish the OPP's reputation. He suggested that while a finding of guilty helps, a light sentence would send a clear message that the OPP doesn't really take the matter all that seriously.

With respect to consistency of penalty, Mr. Diana reviewed the cases in Exhibit #21. He submitted the penalty ranged from reprimand to a forfeiture of 40 hours. He pointed out the similarities and differences between VOGELZANG and each case. He submitted that the OPP's penalty position of 24 hours pre and post the Tribunal has not changed.

Mr. Diana concluded that in light of the two recent decisions against VOGELZANG, 24 hours is warranted as well as training in regard to powers of arrest.

Submission – Defence

Mr. Nelson tendered Exhibit #22, a brief which contained the following:

1. Letter of Recognition from Mr. Rick Bartolucci, former Minister of Community Safety and Correctional Services (December 16, 2008)
2. Letter of Recognition from former Commissioner Julian Fantino (July 26, 2010)
3. Letter of Recognition from Commissioner Chris D. Lewis (July 25, 2011)
4. Note of Recognition from Inspector Mike McDonell, Commander of Stormont, Glengarry and Dundas Detachment (August 29, 2011)

Mr. Nelson began by stating the decision rendered against VOGELZANG favoured the evidence of VOGELZANG and McKinnon. He pointed out that RF was found to be upset, agitated, his arms were waving, his fists were clenched, he foamed at the mouth and had the 1000 yard stare. It was found that RF vehemently argued with the officers. McKinnon had the honest belief that RF would become assaultive. He pointed out the traffic stop was proper and RF was not a model citizen.

Mr. Nelson advised the decision truly characterized the concern of the officers. VOGELZANG affected the arrest to prevent the breach of the peace and it was determined in the decision that he did not have reasonable grounds. He acknowledged that VOGELZANG missed the fact that RF had in fact calmed down.

Mr. Nelson referred to VOGELZANG's comment to RF post arrest where he stated, "I know you have something on you." He advised that VOGELZANG is involved in highway interdiction and the very essence of this is to determine if there is more going on. It was in this context that VOGELZANG made the comment. It should be noted that VOGELZANG followed through and searched the vehicle and restricted his search to only the front of the car.

Mr. Nelson submitted that by finding VOGELZANG had misinterpreted the law, the matter becomes a moral error based on his interpretation.

Mr. Nelson encouraged that the whole picture be considered. VOGELZANG was found believable, and he was on a busy highway. RF believed the officers had no reason to pull him over. VOGELZANG did not become involved in the stop until he heard yelling from RF's vehicle.

Mr. Nelson referred to the cases tendered by Prosecution and advised they were all fact driven. He expressed his surprise that Mr. Diana had referenced a recent decision that VOGELZANG had been subject to, and pointed out the cases were in fact not similar. Different from the earlier case, Mr. Nelson advised VOGELZANG was on duty and he and McKinnon were reacting to RF's behaviour and they followed what they thought was correct.

Mr. Nelson submitted the intrusion was minimal against RF. He was arrested, he calmed down and he was released. He pointed out VOGELZANG and McKinnon were very professional during their interaction with RF.

Mr. Nelson suggested that when one looks at penalty in this case, they must understand this is a fact driven case caused by RF and because of RF. He submitted that as RF was blowing up, the officers needed to demonstrate they were ready.

Mr. Nelson acknowledged it is a very serious matter to have someone arrested. However, most situations that arise do not involve such an uncivil person as RF.

Mr. Nelson spoke of VOGELZANG's employment record. VOGELZANG joined the Ontario Provincial Police (OPP) in 1999 and now serves in the community in which he grew up in. VOGELZANG has been mostly dedicated to traffic units. He is a coach officer, and Pipeline and Radar instructor. In 2008, VOGELZANG was the recipient of the 2008 Accolades Award for enforcement. In 2010 and 2011, VOGELZANG and his East Region, Highway Enforcement Team (HET) were recipients of the Canadian Association of Chiefs of Police (CACP) Highway Pipeline/Convoy National Award. Both years, VOGELZANG led his team in enforcement. In 2011, VOGELZANG received a personal note from his detachment commander who commended his contribution as a HET member.

Mr. Nelson advised that VOGELZANG is an Interdiction instructor and has produced materials and training aids for many officers.

Mr. Nelson submitted that VOGELZANG has excelled in his career. The matter that gave rise to this Hearing was out of character for VOGELZANG. He made an error in regard to his lawful authority, and he failed to recognize that RF had calmed down. Despite the behaviour, VOGELZANG continued to be respectful toward RF. There is nothing in VOGELZANG's career to suggest he needs training and that it was hard for him to keep up with case law as suggested by Mr. Diana.

On a personal note, VOGELZANG is married and the father of a little girl. Mr. Nelson submitted that VOGELZANG is proud to be a police officer and has always showed well for his community.

Mr. Nelson referred to the McNeil report that flows from the finding of guilty and suggested the impact of that is greater than any penalty could offer. Mr. Nelson believed a penalty of 3 days was heavy and submitted a reprimand would be sufficient.

VOGELZANG addressed the Tribunal briefly and advised when he arrested RF, he believed he had the lawful authority to affect the arrest.

Discussion

On January 5, 2012, in a written decision, VOGELZANG was found guilty of one count of Unlawful or Unnecessary Exercise of Authority, contrary to subsection 2(1) (g) (i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The proven misconduct involved VOGELZANG's involvement in the arrest of RF on November 14, 2010, an arrest which was deemed unlawful.

Prosecution submitted that a forfeiture of 24 hours or 3 days and refresher training in regard to powers of arrest was warranted. On behalf of the Public Complainant, he advised RF thought a forfeiture of 5 days or 40 hours was appropriate.

Defence submitted that a reprimand would be an appropriate penalty.

I listened closely to and have assessed the rationale counsel provided for their penalty positions. Additionally, I have reviewed the relevant cases as well as the correspondence in regard to VOGELZANG's career achievements.

In deciding the appropriate penalty in police disciplinary matters, there are key elements to be considered by a tribunal. They include the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer and the damage to the reputation of the police service. There are other factors that may also be considered by a tribunal in assessing recognition of the seriousness of the misconduct; the officer's employment history and public interest as well as general and specific deterrence.

In the matter that gave rise to this Tribunal, most can appreciate that public interest is the leading consideration in this penalty disposition. The allegation of misconduct was brought forth by a member of the public. RF, a citizen, was arrested by VOGELZANG for breach of the peace, an arrest that has since been deemed unlawful. VOGELZANG said that at the time of the arrest, he believed he had the authority. While I do not dispute VOGELZANG's claim, the fact remains that the freedom of a member of the public was removed as a result of a groundless arrest. I believe it is fair to say, that given the significant powers and authorities granted to a police officer, the public expect police not to fault on their powers of arrest, given the incidental restrictions that flow from removing one's freedom. This is a significant aggravating factor that will be weighed accordingly in the penalty disposition. The public must have confidence that the OPP deems matters such as these very serious.

The seriousness of an unlawful arrest cannot be understated. In this case, RF was deprived of his freedom, handcuffed and placed in the rear of a cruiser. His vehicle was searched incident to arrest on the premise the arrest was lawful and it was not. The intrusiveness of the arrest went beyond RF's person – it extended to his property. Police are afforded significant powers to remove an individual's freedom, and it is for this reason they are expected to exercise their arrest authorities with the greatest due diligence, care and caution. There is little forgiveness in the public sphere when police get this wrong.

To mitigate the seriousness of this matter, I have taken into consideration that VOGELZANG misinterpreted the law which led him to believe he had the grounds to affect a lawful arrest for breach of the peace. I have also considered VOGELZANG's early warning to RF of a pending arrest if he failed to

identify himself. I believe that had VOGELZANG's attitude been truly cavalier, he would have taken advantage of this earlier opportunity to arrest RF. The nature and seriousness of the matter is a significant aggravating factor which has been mitigated to some extent because of these facts.

There are many ways to demonstrate one's recognition of the seriousness of their misconduct, including an early attempt to minimize the damage as seen in *Pfaff*, or the more obvious, a plea of guilty. Neither of these existed in VOGELZANG's case. I do take note, however, of VOGELZANG's comments during his testimony: "I thought I was doing the right thing", "I didn't think I had an option" and "I am not perfect, I make mistakes," and believe that while it was less apparent, he did in fact recognize the seriousness of his misconduct and with it came humility. This will hold limited weight as a mitigating factor in the penalty decision.

In regard to the provocation consideration, Mr. Diana submitted that the argument between RF and VOGELZANG should be considered an aggravating circumstance as it illustrated VOGELZANG's temper may be short or not controlled. While I appreciate Mr. Diana's position, I believe VOGELZANG kept his temper well in tact, despite RF vehemently arguing with the officers. I am more concerned with VOGELZANG's comments to RF immediately pre and post arrest, comments which caused me to call into question his creditability. So while I do not think VOGELZANG exhibited signs of short temperament, I am convinced his comments certainly aggravated the situation. I will weigh this accordingly in the penalty decision.

Employment history is a consideration in this matter. VOGELZANG has been with the OPP since 1999. He served as a cadet for 10 months before being posted to the Marathon Detachment. He later transferred to the Gananoque Detachment before moving into the East Region, HET. By all accounts, VOGELZANG has enjoyed a rewarding career with respect to some notable achievements. He is a coach officer and an instructor in Pipeline, Interdiction and Radar. He has been the recipient of three fairly prestigious awards, including the 2008 Accolade Award for Enforcement, and the 2010 and 2011 CACP Highway Pipeline/Convoy National Award in the category of "Deputy Commissioners Highway Interdiction TEAM Award." He also received a personal note from his detachment commander which acknowledged his valuable contribution as a HET member.

Despite VOGELZANG's achievements, I cannot say his career history is unblemished. In December 2011, VOGELZANG was found guilty of discreditable conduct as a result of an off duty traffic stop. The incident occurred 5 months before the RF matter arose. While the matters seem to be unrelated, I find it nonetheless concerning given the proximity of the events.

Other than VOGELZANG's noteworthy awards and note from his detachment commander, I am restricted to giving weight to that information which is before me. It is evident that VOGELZANG has been a high performer since 2008 and that he recently was the subject of a disciplinary matter. Both these aggravating and mitigating facts will be weighed accordingly in the penalty decision.

In regard to the reform and rehabilitation consideration, I agree with Mr. Diana that the two recent decisions against VOGELZANG may be helpful. I heard no evidence that he takes a reckless approach to his duties and authorities as a police officer; in fact I heard evidence to the contrary. I do not believe he set out on November 14, 2010, with the intent to affect an unlawful arrest. It just happened and it was a mistake. I am confident that VOGELZANG has learned from this. As good as an officer is, they are susceptible to making mistakes and for this reason officers must be absolutely 100 percent sure of their arrest powers at all times without exception. I believe this is an isolated mistake, one that I hope

VOGELZANG has learnt from. I therefore consider his ability to rehabilitate a mitigating fact and this will be afforded the appropriate weight in the penalty decision.

General and specific deterrence are relevant considerations in this matter. This matter serves as yet another bold reminder to all officers, that regardless of how competent, experienced and knowledgeable one is, mistakes can be made and it is for this reason officers need to continually stay abreast of their arrest authorities. It is clear from the *Godfrey* decision that there is little tolerance for mistakes, given the police accountability to the public.

In regard to a specific deterrence, I refer back to my comments to VOGELZANG on January 12, 2012. If my read of his demeanour was right, I believe the decision has had a significant impact on him. I can appreciate this, especially when he did what he thought was right. I can only hope that given his excellent enforcement achievements, he will move past this, a wiser officer from this experience.

Consistency in dispositions is the hallmark of fairness. The penalty range in similar cases goes from reprimand to 40 hours. To ensure a fair and appropriate decision is assessed, I will review the five cases provided by Mr. Diana.

OPP v. Godfrey, (March 22, 1989, O.P.C.) – (Godfrey)
Godfrey was an OPP member. The case was silent in regard to his service record and experience. After pacing a vehicle travelling in excess of 160 km/hr with 3 occupants, Godfrey affected a high risk take down. Godfrey had some significant safety concerns for doing so, including 3 recent police shootings on the same highway and part of the Province. The penalty assessed was 2 days pay. Godfrey appealed to OCCPS and his penalty was increased to 5 days pay. Of note, OCCPS found the Hearing Officer had failed to properly give weight to the public's perception of such "awful" conduct.

Edmonton Police Service v. Rishi, (December 31, 1997, L.E.R.B)- (Rishi)
In this matter, an Edmonton police officer with 20 years of service and good service record affected an unlawful arrest. The officer admitted the mistake and attempted to mediate the matter through informal measures. The penalty assessed was reprimand. On appeal, the penalty was increased to suspension without pay for 40 hours.

Toronto Police Service v. Blowes-Aybar, (March 7, 2003, O.C.C.P.S.)- (Blowes-Aybar)
Blowes-Aybar was a 6 year member of the Toronto Police Service with an excellent service record. He arrested a cyclist for public intoxication who then spent the balance of the night in the bull pen. The arrest was unlawful and the penalty assessed was a 4 day suspension. Amongst other points raised, the OCCPS found that the officer failed to diffuse the situation when the opportunity presented itself.

OPP v. Pfaff, (March 31, 2005, O.P.P.D.H)- (Pfaff)
Pfaff was a 5 year member of the OPP with an excellent service record. He arrested Mr. Sood following Sood's heated exchange with a health club manager. The arrest, pursuant to the Trespass to Property Act was unnecessary. The penalty assessed was 12 hours. Mitigating factors in the case included Pfaff sending a letter of apology to Sood and pleading guilty.

OPP v. Taillon, (July 15, 2009, O.C.C.P.S.)- (Taillon)
In this matter, Pigeau was an OPP officer with 14 months experience and a positive work record. He touched Mr. Taillon's shoulder to get his attention. Taillon shoved back and the officer arrested him for assault police. Pigeau testified that Mr. Taillon did not exhibit normal behaviour. The arrest was

unlawful and a penalty of 16 hours and training was assessed. On appeal, the penalty was reduced to a reprimand and training. OCCPS took into consideration a variety of mitigating circumstances including the officer's inexperience.

Although all the cases are instructive, no one case shares the same substance and fact. However, there are some similarities and dissimilarities in each, compared to the VOGELZANG matter. I will give reason why I found some cases more helpful than the others.

In *Godfrey*, the officer affected an unnecessary high risk take down on 3 occupants of a speeding car. Similar to VOGELZANG, the officer relied on officer safety concerns to justify his action. I found this case instructive in that despite the officer's valid concerns, OCCPS determined that public interest and perception played a more significant role in the penalty disposition.

Rishi is similar to the *Pfaff* matter in that the officer took responsibility for the unlawful arrest and attempted to mitigate the mistake informally. Despite this, he received a penalty at the high end of the spectrum. These factors did not exist in VOGELZANG's case.

In *Blowes-Aybar*, the arrested party was detained for an unreasonable period of time. The OCCPS found that the officer had the opportunity to diffuse the situation but failed in this regard. This was not the case with VOGELZANG. The detention of RF was brief and he was released shortly after. For this reason, I will find the *Blowes-Aybar* case less than instructive.

These three aforementioned cases all resulted in high end penalty dispositions. Subject to the weight I have given to the mitigating circumstances in VOGELZANG's matter, I am satisfied that a penalty of 36 or 40 hours would be harsh and excessive.

In *Pfaff*, there were several mitigating facts that were absent in the VOGELZANG matter. Pfaff recognized and took responsibility for his mistake. He wrote a letter of apology to the victim. He pled guilty. There appeared to be an agreed statement of fact and joint penalty submission presented at his hearing. I found *Pfaff* instructive as it provided credible reasoning for the low end penalty of 12 hours.

In regard to *Taillon*, and unlike the VOGELZANG matter, Pigeau was an inexperienced officer with only 14 months of field time. On appeal, Pigeau received a reprimand. I found the *Taillon* case far more complex in nature than VOGELZANG, and for this reason it was not as helpful.

In light of these last two cases, I consider *Pfaff* the most relevant case to refer to penalty wise, in regard to establishing a starting point. Taking into consideration the weight I have given to the aggravating circumstances in VOGELZANG's matter, I am satisfied that a penalty higher than 12 hours is warranted.

Specific to the submission that refresher training is appropriate in this matter; I agree with Mr. Nelson and do not think it is warranted. This was an isolated incident. VOGELZANG misinterpreted the law. I am satisfied that given the extensive review of case law specific to breach of the peace that this Tribunal has heard, VOGELZANG is now well educated on the legislation and his arrest authority.

Disposition

In light of the mitigating and aggravating circumstances, the seriousness of this allegation and bearing in mind all the evidence placed before me, VOGELZANG is ordered to forfeit 24 hours pursuant to subsection 85(1) (e) of the *Police Services Act*, R.S.O. 1990.

Specifically, VOGELZANG is required to work these hours and this will be completed within the next 3 months.

Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Dated: February 9, 2012