

FEB 06 2012

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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 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: November 28 and 29, 2011

REASONS FOR DECISION

Provincial Constable D.B. (David) Vogelzang, (VOGELZANG) has been charged with 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 particulars of the allegation are:

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

Plea

VOGELZANG pleaded not guilty to the allegation of misconduct.

Exhibits

Exhibits tendered during the Hearing included:

- Exhibit #4 - Prosecutor's Designation, Mr. Diana
- Exhibit #5 – iPhone audio recording made by Mr. Robert Francis (CD)
- Exhibit #6 – Office of the Independent Police Review Director complaint
- Exhibit #7 – Notebook entries, Provincial Constable Iaian McKinnon
- Exhibit #8 – Duty Report, Provincial Constable Iaian McKinnon
- Exhibit #9 – Transcript of Mr. Robert Francis' interview
- Exhibit #10 – Transcript of VOGELZANG's interview
- Exhibit #11 – Transcript of Mr. Robert Francis and Provincial Communications Centre call
- Exhibit #12 – Provincial Communications Centre audio recording
- Exhibit #13 – Transcript of Mr. Robert Francis' iPhone recording
- Exhibit #14 – Canadian Police Information Centre record
- Exhibit #15 – Professional Standards Bureau investigative report
- Exhibit #16 – Notebook entries, VOGELZANG
- Exhibit #17 – Arrest Report, NICHE
- Exhibit #18 – Duty Report, VOGELZANG
- Exhibit #19 – Book of Authorities - Prosecution
- Exhibit #20 – Book of Authorities - Defence

Acknowledgement

Before commencing, I would like to thank the Public Complainant, Mr. Robert Francis (RF), Mr. R. Bruce Nelson and Ms. Kate Nelson, Counsel for VOGELZANG, and Mr. Christopher Diana, OPP Prosecutor for the manner in which they presented their evidence. I heard from four witnesses and received 17 exhibits, all of which have collectively assisted me in reaching my decision.

Prosecution's Case

Mr. Diana began his case by calling the first witness, RF. RF testified he is 37 years old and currently resides in Toronto. He is employed as an auto labourer. He completed high school and has since taken

some college courses. Although he has been charged in the past with Assault, he does not have a criminal record. RF testified he has been stopped by police for speeding approximately 3 to 5 times in the past 10 years.

RF testified that on November 14, 2010, he was driving home from Montreal, operating a beige Maxima. He was feeling relaxed and had no reason to be distracted from his driving. RF stated the road conditions were good, there wasn't too much traffic and the weather was gloomy. RF could not recall his speed, but stated he knew he wasn't speeding because he was very concerned about getting a ticket. RF believed he was travelling in the left lane of Hwy 401, somewhere near Grenville when he passed by two stopped cruisers. The time was approximately 2:27 pm.

RF testified he noticed the police pull out after he passed by. He knew he wasn't speeding so he thought maybe the cruisers were going to stop the car with a bunch of kids in it, which was travelling faster than he. The cruisers came up behind him so he changed into the right lane. He subsequently stopped on the shoulder when he realized the police wanted him to stop.

RF testified that Provincial Constable Ianian McKinnon (McKinnon) approached his car on the passenger side. He rolled down the window and asked the officer why he was being stopped. McKinnon told him it was because he was all over the road. RF testified that it didn't make sense - why would he straddle two lanes when two cops were behind him? He testified McKinnon's tone was calm while he, (RF), argued with the officer claiming he was not all over the road.

RF testified that shortly thereafter, VOGELZANG approached the driver side of his vehicle.

RF described his own demeanour. He advised his voice was a little louder than normal. He was audibly upset with the officers because he was concerned over the reason given for being stopped. RF could see no justification for the traffic stop. When asked to describe his level of agitation on a scale, RF said he was just a little upset and he had control over his emotion. RF stated he did not use vulgar language and he was respectful with the officers and did not threaten them.

RF stated he believed the officers also said his licence plate cover was illegal.

RF stated VOGELZANG asked him for his vehicle documents and warned him he would be arrested if he did not produce them. RF retrieved his vehicle documents from the folder in his glove box. In doing so, he had to turn his car off, and with his right hand, remove the ignition key and use it to unlock the glove box.

RF testified that during his conversation with the officers, his hands were most likely on the steering wheel. He could not recall if his seatbelt was on. RF could not recall how long it took him to produce his documents but said he did not move slowly in producing them.

RF testified that after he produced his documents, the officers went back to their cruisers. In their absence, he turned his iPhone on record, and placed it on his passenger seat. He did so for a number of reasons: VOGELZANG's aggression; he knew he had been pulled over for no reason; and, for his own safety and peace of mind. Less than five minutes later, both officers returned to his car. VOGELZANG asked him what his address was and if he had a problem with police. RF testified that at this point, VOGELZANG did not appear overly aggressive but he seemed primed and pushing. RF advised he let VOGELZANG know that he had a problem with the way he had been pulled over.

RF testified that VOGELZANG told him to get out of his car because he was under arrest for causing a disturbance. RF complied and did not resist. He was handcuffed by VOGELZANG and placed in the back seat of one of the cruisers. RF testified that as he was being placed in the cruiser, VOGELZANG said, "I know you have something on you." From the rear seat of the cruiser, RF watched the officers search his vehicle but did not believe they searched the trunk. At one point, McKinnon returned to the cruiser and RF told him the vehicle search was illegal. RF could not recall his tone when he said this to the officer. McKinnon just leaned in and closed the centre partition window and walked away.

RF said the search did not take long and when it was completed, the officers spoke briefly and then went to the cruiser where he was. They told RF he could not go until he stopped clenching his teeth. RF could not recall if his teeth were clenched. The officers removed the handcuffs and walked him back to his car. He testified the officers tried to explain the reason for the arrest. VOGELZANG tried to sound more accommodating than before. RF asked for and received the officers' badge numbers. The officers did not issue him any tickets nor did they issue him any warnings. RF testified that before he left, he made some audio notes on his iPhone and then proceeded to the nearest OPP station.

Prosecution played the audio recording made on RF's iPhone and then tendered it as Exhibit #5. RF testified that his tone of voice heard on the recording was true to life and he could not recall it changing from the time he began the recording to before the recording.

RF attended the Grenville OPP and using the police telephone he advised the dispatcher he wanted to lodge a complaint. The conversation, (Exhibit #12) was played for the benefit of the Hearing Officer.

RF advised that McKinnon attended the detachment shortly after he spoke to the dispatcher. He spoke to McKinnon briefly and then left. RF testified he filed a formal complaint with the OIPRD [Office of the Independent Police Review Director] within 24 hours of the incident because he felt the officers had gone too far. RF reviewed the OIPRD complaint (Exhibit #6) and advised it was an accurate account of the event. RF testified he has never before lodged a complaint against a police officer. He advised he has not processed a lawsuit or Human Rights complaint against the OPP.

In cross examination, RF testified he is 5'11" and weighs 225 lbs. When he was stopped by the police, he described Hwy 401 as busy, but not bumper to bumper. He advised he first saw the cruisers when he rounded a curve. When asked if he was travelling in excess of the speed limit when he first saw the cruisers, RF advised he could not recall his speed. When he passed the cruisers, he made no attempt to initially change lanes because he thought it would have appeared like he was doing something wrong.

RF advised the cruisers were on the left side of the westbound lanes parked in an unpaved area. They were side by side, and both facing the westbound traffic. RF stated that after he passed the police, he looked in his mirror and saw them pull out. RF believed both cruisers travelled in the left lane. He eventually moved over to the right lane and one of the cruisers followed in behind while the other stayed in the left lane. RF saw the cruisers' lights activate and he pulled over to the right shoulder. RF stated he felt intimidated by being followed by two police officers.

RF stated he did not think he raised his voice when he asked McKinnon why he had been stopped. RF again said he did not agree with McKinnon's explanation.

RF testified VOGELZANG asked for his identification. He retrieved his driver's licence, which he kept in a plastic folder in his wallet and did not think it took too long to do so. When asked if he clenched his teeth, RF testified he is not a clencher. He believed he kept his hands on his steering wheel when he was speaking to VOGELZANG. RF stated he did not wave his fists around.

After RF surrendered his licence and vehicle documents, the officers walked away. When they returned, VOGELZANG arrested him. RF advised that VOGELZANG twisted his arm while putting the handcuffs on him. RF advised it took approximately 5 to 10 minutes before the officers removed him from the cruiser and uncuffed him. RF stated he could not recall when he had stopped yelling. RF advised the officers told him he could leave as soon as he stopped clenching his teeth.

Prosecution called McKinnon as the next witness. McKinnon testified he has been employed with the OPP for the past 10 ½ years. He is posted to the Grenville Detachment and has extensive traffic experience. McKinnon estimated he conducts approximately 1000 traffic stops each year.

McKinnon testified he worked dayshift, 7 am to 7 pm, on Sunday, November 14, 2010. McKinnon testified he observed an older model gold Maxima, with a rear licence plate slightly obstructed by its cover, travelling westbound, Hwy 401 in the left lane at approximately 85 km/hr. He stated the vehicle was travelling much slower than the other traffic and on two occasions, it crossed the centre line. He added the vehicle was driving close to other vehicles when it moved from the passing lane to the driving lane.

When asked to further explain "driving close", McKinnon advised the Maxima was too close to the rear of a tractor trailer when it changed lanes. He estimated the tractor trailer speed to be approximately 100 km/hr.

McKinnon testified that just prior to this, he was parked alongside VOGELZANG in the centre medium turn-around near mile marker 734, conducting traffic enforcement. McKinnon testified both cruisers were facing the westbound traffic. He did not recall seeing the Maxima pass by and explained he and VOGELZANG had been discussing where to go for lunch.

McKinnon testified he first noticed RF (the Maxima) approximately one minute after he started heading westbound. He advised he travelled approximately 25 metres behind RF and VOGELZANG's cruiser was behind his cruiser. He explained the Maxima crossed the centre line twice by approximately 6 to 12 inches. The Maxima remained in the left lane for approximately 30 to 45 seconds before changing into the right lane. McKinnon advised he changed into the right lane also, behind the Maxima and followed it for approximately 10 seconds before initiating the traffic stop. McKinnon stated he thought the driver may have been impaired or using his cell phone.

McKinnon testified he approached the passenger side window of the vehicle and asked RF for his driver's licence and vehicle documents. RF questioned why he had been stopped and McKinnon told him it was because he was all over the road. McKinnon testified that RF told him if he had been stopped for speeding he would understand, but argued about the reason provided by McKinnon.

McKinnon testified RF's voice was loud, his fists were clenched and raised shoulder height, and he was foaming around the mouth. McKinnon advised that his repeated requests for the licence and vehicle documents were ignored as RF continued to yell. McKinnon found RF's demeanour intimidating. Approximately two minutes passed before VOGELZANG approached the driver side of the vehicle.

McKinnon stated VOGELZANG assured RF that the traffic stop was HTA [Highway Traffic Act] related. RF became more agitated when speaking with VOGELZANG, so much so that the vehicle rocked back and forth.

McKinnon testified RF's behaviour was not normal and it gave him the impression RF would become assaultive. VOGELZANG asked RF why he was so upset. VOGELZANG requested RF to surrender his licence and cautioned him he would be arrested if he failed to do so. From McKinnon's viewpoint, he observed RF grab his car keys and jam them into the glove box where he retrieved his documents. McKinnon could not recall if RF removed his licence from his wallet.

After RF surrendered his documentation, both McKinnon and VOGELZANG backed off and met at the rear of RF's car. McKinnon expressed concern to VOGELZANG that RF would get out of his vehicle and become assaultive. VOGELZANG agreed. A plan was developed that VOGELZANG would return to the driver side and arrest RF for breach of the peace. VOGELZANG returned to the driver side of the vehicle, informed RF he was under arrest for breach of the peace and requested he get out of his vehicle. RF's exit from the car was not immediate, but he did comply. RF was handcuffed and placed in the rear of McKinnon's cruiser. He noted RF's voice had lowered a bit. McKinnon testified he thought the arrest was lawful. McKinnon explained RF's behaviour did not make sense – he seemed to be getting angrier and the arrest prevented him from driving in his current state.

McKinnon testified he did not think VOGELZANG was confrontational. McKinnon then agreed that maybe VOGELZANG's comment, "What is your problem with the police," could be considered confrontational.

McKinnon advised that following the arrest, he remained close to his cruiser where RF was, while VOGELZANG conducted a quick search of RF's vehicle. As this was going on, RF was yelling that the search was illegal. McKinnon testified the search of the vehicle was based on common law - search incident to arrest. VOGELZANG informed McKinnon the search revealed no weapons or anything of interest.

McKinnon advised that RF was by far the most aggressive person he has ever dealt with.

McKinnon advised he could not recall if RF ever took his seatbelt off nor could he recall if RF had it on when VOGELZANG arrested him. McKinnon said VOGELZANG told him that RF was flagged violent.

Prosecution tendered Exhibits #7 and #8, McKinnon's notebook entries and Duty Report.

In cross examination by RF, McKinnon advised he did not participate in the search of RF's vehicle. McKinnon advised that RF displayed no signs of alcohol.

Prosecution called Detective Sergeant Mark Allison, (D/Sgt. Allison) as the next witness. D/Sgt. Allison has been employed with the OPP since 1994 and posted to the Professional Standards Bureau (PSB) for the last two years. In November 2010, he was assigned to investigate RF's complaint. His investigation focused on three allegations:

1. Exercise of Authority- Improper Arrest
2. Harassment
3. Exercise of Authority- Improper Search

D/Sgt. Allison walked the Tribunal through his investigation. He interviewed RF and VOGELZANG and obtained transcripts of these interviews, (Exhibits #9 and #10). He received a copy of RF's iPhone recording (Exhibit #5) and transcribed it, (Exhibit #13). He obtained a copy of RF's conversation with the OPP Provincial Communications Centre (PCC), (Exhibit #12) and had it transcribed, (Exhibit #11). He collected Duty Reports and notebook entries from VOGELZANG and McKinnon, (Exhibits #7, #8, #16 and #18). He conducted an off line Canadian Police Information Centre (CPIC) search and the result of that search was tendered as Exhibit #14. D/Sgt. Allison also collected a copy of the RMS Arrest Report (Exhibit #17).

D/Sgt. Allison testified that as a result of his investigation, he concluded that allegations 1 and 2 - Improper Arrest and Improper Search - were substantiated. He submitted his report, (Exhibit #15), to this effect.

Defence's Case

Mr. Nelson called VOGELZANG as his witness. VOGELZANG testified he is 37 years old and has been employed with the OPP since 1999. After serving for 10 months as a Cadet in Lanark County, he was posted to the Marathon Detachment, and years later he transferred to the Gananoque Detachment. In 2008, he was seconded to the East Region Traffic Unit, which later evolved into the Highway Enforcement Team. In June 2011, he transferred to the Morrisburg Detachment.

VOGELZANG advised he is an instructor for Pipeline and Highway Interdiction. He has conducted thousands of traffic stops.

VOGELZANG testified he was working dayshift on November 14, 2010 in the Stormont, Dundas, Glengarry Detachment area. At 1420 hrs, he was in the centre medium of Hwy 401, visiting with McKinnon. Both cruisers were facing northbound, beside each other. He and McKinnon decided to go to Prescott for lunch and fuel up. They started travelling westbound, with McKinnon ahead of him when he noticed a slower moving Maxima drifting in the left lane. The Maxima changed into the right lane and tucked in behind a transport. McKinnon activated his emergency lights and the vehicle stopped on the right shoulder close to the fog line. McKinnon approached the vehicle passenger side, while he remained in his cruiser to conduct a CPIC check. VOGELZANG could hear yelling from the stopped vehicle. He approached the driver side and could see that RF was very upset and arguing with McKinnon about the reason for the stop. VOGELZANG asked RF what his problem was. RF said this was bullshit and his fists were clenched and he had foam coming from the side of his mouth. RF was staring at VOGELZANG. VOGELZANG opened the driver door briefly and warned RF if he did not identify himself, he would be arrested. In a purposely slow manner, RF provided his driver's licence and eventually retrieved his vehicle documents from the glove box.

VOGELZANG testified he stepped back from the vehicle as he was concerned for his own safety. He was fully aware that the vehicles on the 401 were speeding by. He stated he had never in his career seen someone behave so aggressively. VOGELZANG stated he had no idea what was going on with RF and that he (VOGELZANG) had enough of his (RF's) behaviour.

VOGELZANG testified that after a brief discussion with McKinnon, he returned to the driver side of the vehicle with the intent to arrest RF. He chose to engage in further conversation with RF because it just made sense to him to do so before he effected the arrest. He asked RF why he was acting this way and

then informed RF that he was under arrest for breach of the peace. VOGELZANG placed RF in McKinnon's cruiser after he was handcuffed. VOGELZANG stated he conducted a cursory search of RF's vehicle, looking for weapons. His search included the floor and front seat area.

VOGELZANG testified that McKinnon told him RF started to calm down after he was placed in the cruiser. Following the search, RF was released and VOGELZANG provided him with his badge number.

In cross examination by RF, VOGELZANG testified the highway was very busy with traffic. He explained he could see RF's car drift over the centre line because he was far enough back from McKinnon's vehicle. He stated that when he arrested RF, RF tensed his muscles. VOGELZANG described RF's behaviour as defiant, but not resistful. VOGELZANG testified he did not search RF's trunk as he had no lawful authority to do so.

In cross examination by Mr. Diana, VOGELZANG agreed that if the arrest of an individual was unlawful then a search incident to arrest would be unlawful.

VOGELZANG advised he completed his notebook entries shortly after the incident and then he completed the arrest report. VOGELZANG could not remember running a second CPIC search on RF later in the afternoon, but said it would not be uncommon to do so when completing a report.

Mr. Diana tendered a copy of VOGELZANG's notebook entries and RMS Arrest Report as Exhibits #16 and #17, respectively.

Mr. Diana referred VOGELZANG to the CPIC check he conducted on RF. VOGELZANG explained that it is his experience that when someone is flagged "V", it means previous assaultive behavior. He believed he told McKinnon that RF had a history of violence. VOGELZANG testified it doesn't matter to him the date the "V" may have been entered, it is simply something to keep in the back of his mind.

Mr. Diana pointed out to VOGELZANG that while he testified RF said, "This is bullshit," it was never reported in his notes or Duty Report. VOGELZANG stated he remembered RF saying it, but regardless, he was more concerned about RF's tone and body language.

Mr. Diana referred to VOGELZANG's size, his use of force equipment and training. VOGELZANG stated he does not underestimate anyone just because he himself is a big guy.

Mr. Diana asked VOGELZANG if he thought he created a greater confrontation by removing someone from their vehicle. VOGELZANG stated he had to make a decision, and he thought arresting RF was the right thing to do. VOGELZANG testified he did not know what RF was going to do next. VOGELZANG testified he initiated the discussion with McKinnon in regard to what to do next with RF. VOGELZANG testified he thought what he was doing was right.

In regard to his testimony that, "he had had enough," VOGELZANG explained that he believed something dangerous was going to happen, that he had seen enough, and he believed if he didn't do something, he would be criticized. RF gave him the 1000 yard stare and combined with waving his fists around and being very animated, VOGELZANG believed RF was going to be assaultive.

VOGELZANG testified he could not recall if RF had his seatbelt on or not. When asked if he was open to not arresting RF, VOGELZANG advised that it had already gotten to a point where he had to do

something. When asked if RF had raised his fists above his shoulders, VOGELZANG responded that RF had not squared off as if in a fighting stance.

VOGELZANG was asked why he would not have taken RF's keys from him if he was worried and he responded he would never reach across to remove keys from a vehicle.

VOGELZANG stated RF was out of control. He understood breach of the peace, section 31 of the Code gave authority to arrest someone when safety or breach of the peace is about to happen. In RF's case, VOGELZANG stated the breach of the peace was already happening, it was about to happen and he was concerned it would happen. The arrest was to prevent something from happening. VOGELZANG explained he did not know what RF was going to do; go into traffic and cause a collision, hurt him or hurt McKinnon.

VOGELZANG explained RF is the second most aggressive person he has ever dealt with in his career.

In regard to RF's iPhone recording and Mr. Diana's suggestion that RF did not sound too bad, VOGELZANG pointed out that the iPhone only captured a small portion of what had been said.

Submissions

Tendered as Exhibits #19 and #20 by Prosecution and Defence were books of authorities, which included the following cases:

- *Brown v. Durham (Regional Municipality) Police Force* [1998] O.J. No. 5274(C.A), leave to appeal to SCC granted [1999] S.C.C.A. No. 87, notice of discontinuance filed October 6, 2000, - (*Brown*)
- *R v. Januska* [1996] O.J. No. 2883 (Ct. J. (Gen. Div.)) - (*Janaska*)
- *Pozniak v Sault Ste. Marie (City) Police Services Board* [1991] O.J. No. 3408 (S.C.J.) - (*Pozniak*)
- *R v. C.E.* [2009] N.S.J. No. 331 (C.A.) - (*CE*)
- *Terrio v. VanRuyven* (1994), 2 P.L.R. 328 (Ont. Bd. Inq.) - (*Terrio*)
- *Bibby v. Chief Constable of Essex Police*, 2000 WL 345165 (UK CA (Civ Div))- (*Bibby*)
- *Penner, Parker, Koscinski v. Niagara Region Police, Ontario Civilian Commission on Police Services*, April 22, 2005 Ontario Civilian Commission on Police Service - (*Penner*)
- *Bray v. Ottawa Police Services Board*, 2007, - (*Bray*)
- *Hayes v. Thompson*, 1985 CanLII 151 (BC CA), - (*Hayes*)
- *R v. Morin*, 2010 ABPC 307 - (*Morin*)

Prosecution Submissions

Mr. Diana began his submissions by stating the issue at hand is the legality of the arrest of RF by VOGELZANG. Mr. Diana stated the charge against VOGELZANG was that, he without good and sufficient cause, made an unlawful or unnecessary arrest. He stated that it is not clear what authority VOGELZANG made the arrest under, whether it be common law or statute. He pointed out that VOGELZANG's Duty Report refers to section 30 of the Criminal Code. During his testimony, VOGELZANG corrected this and stated the arrest was pursuant to section 31 of the Criminal Code. Mr. Diana advised section 31 does not provide authority to arrest a person in order to prevent a breach of the peace, but rather provides the authority to arrest when found committing a breach of the peace. Mr. Diana pointed out that neither officer reported they were relying on the common law authority to arrest.

Mr. Diana submitted that he specifically asked VOGELZANG if RF was actively breaching the peace and he did not get a clear answer. He stated VOGELZANG said, the breach of the peace was happening, it was about to happen, and he knew it was imminent. Mr. Diana submitted he is not sure what to make of VOGELZANG's response.

Mr. Diana submitted that RF was not breaching the peace and therefore the arrest pursuant to section 31 was unlawful. He further submitted that VOGELZANG cannot rely on common law authority as there was not a substantial risk of breach of the peace, and any risk of breach of the peace was not imminent.

Mr. Diana advised the leading case in Ontario is *Brown*. He referred the Hearing Officer to paras. 73- 75 and 79 and advised the case is about common law authority and the test that needs to be met to prevent the breach of the peace.

73. A breach of the peace does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing, or even vaguely threatening. A breach of the peace contemplates an act or actions which result in actual or threatened harm to someone. Actions which amount to a breach of the peace may or may not be unlawful standing alone. Thus, in *Percy v. D.P.P.*, [1995] 3 All/ E.R. 124 at 131 (Q.B), Collins J. observed:

The conduct in question does not itself have to be disorderly or a breach of the criminal law. It is sufficient if its natural consequence would, if persisted in, be to provoke others to violence, and so some actual danger to the peace is established.

74. ...The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice...

75. Neither the power to arrest in anticipation of the commission of an indictable offence nor the power to arrest for an apprehended breach of the peace is meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous and prone to criminal activity.

79. The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. In some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

Mr. Diana next referred to *Januska* and submitted the case involved the accused loitering around a sub shop. He referred to paras. 2, 5, 7, 8, 9 and 10 and submitted that para. 9 was closely aligned to the matter at hand where RF questioned the officers in regard to why he was stopped.

9. Any time a suspicious person is stopped and questioned by the police, there is a danger of abuse of process. The police officer has a great deal of prestige and authority in our community.

He or she may seriously restrain the liberties of individuals and unless the officers act in a very prudent fashion, they are open to all sorts of allegations of abuse. I have no doubt, that in this situation, all their antennae were out and that they had good reasons to suspect the accused of trafficking in narcotics. However, they had no reasonable or probable grounds to charge him with anything until they started patting him down as part of the process of arresting him under the alleged breach of the peace. That he was being very uncooperative was made very clear to every one. On the other hand, no suspect is ever forced to be co-operative with police officers investigating his conduct. It should not be open to a police officer simply to arrest for a breach of the peace an individual who demands even vociferously to be told what he has done wrong in the eyes of the law.

Mr. Diana referred to *Pozniak*, para. 14, a case which involved an overly protective mother who brought her son to the police station.

14. Section 31 of the Criminal Code did not authorize the arrest of the Plaintiff. This section does not create an offence, but authorizes a peace officer to arrest any person whom he finds committing a breach of the peace. This power has been constructed narrowly. "Breach of the peace" in this context means an act or actions which result in "actual or threatened harm to someone" (*Brown v. Durham* 43 O.R. (3d) 223). The Plaintiff's behaviour created no risk of personal injury or property damage. Vehement or emotional verbal expression of disagreement with police in this context does not constitute a breach of the peace under 31 of the Criminal Code.

Mr. Diana referred to *Terrio* and specifically spoke of paras. 21-23. In brief, Mr. Diana explained this was a 1993 Niagara Region case where it was found that the arrest for breach of the peace was unlawful because the officer did not have reasonable grounds to believe a breach of the peace was imminent.

Lastly, Mr. Diana referred to *Bibby* and advised that while the case was not binding, it cited on page 4 several considerations for breach of the peace:

1. There must be the clearest of circumstances and sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully – Foulkes
2. The threat must be coming from the person who is to be arrested – Redmond-Bate
3. The conduct must clearly interfere with the rights of others – Redmond-Bate
4. The natural consequence of the conduct must be violence from a third party – Redmond-Bate
5. The violence in 4 must not be wholly unreasonable – Redmond-Bate
6. The conduct of the person to be arrested must be unreasonable – Nicol

Mr. Diana conceded that RF was agitated and upset. His fists were clenched – McKinnon testified they were raised and VOGELZANG testified they were not raised. He submitted however, that RF was compliant with direction and he answered their questions. Mr. Diana acknowledged there was conflicting evidence between RF and the officers in regard to RF's tone and body language. Mr. Diana submitted that even if I accept the officers' version of events, the actions of RF did not amount to breach of the peace. He pointed to *Januska* where the individual was loud, belligerent, uncooperative and waving his arms around at a sub shop. He pointed to *Pozniak* where the mother was angry and shouting in a police station and submitted that in both cases it was deemed that breach of the peace had not been committed.

Mr. Diana then moved to the common law authority to arrest for breach of the peace and pointed to the *Brown* case where it found that the breach must be imminent and the risk that the breach will occur must be substantial. He submitted it was not enough for VOGELZANG to say RF was upset and may get into a MVC [motor vehicle collision]. He suggested there is simply no legal authority to arrest a motorist because they are argumentative, angry or abusive.

Mr. Diana submitted VOGELZANG testified he was concerned he would be attacked by RF. He suggested that if this were true, why didn't VOGELZANG arrest RF immediately. Instead, VOGELZANG spoke with McKinnon first, all the time RF still had his keys. VOGELZANG then returned to the car and engaged in further discussion, asking RF what his problem was with the police. He submitted that VOGELZANG was the one who was confrontational and argumentative with RF.

Mr. Diana submitted that while the iPhone recording is limited, it captures the most important part before the arrest. It supports RF's version of events.

Mr. Diana pointed out that similar to the officers completing their notes, RF completed his OIPRD complaint within 24 hours of the incident. In his complaint, RF included the statement VOGELZANG made to him upon arrest, "I know you have something else on you." RF testified to this comment and VOGELZANG denied it.

Mr. Diana submitted that both officers testified that RF was one of the most aggressive drivers they had ever encountered on the road. He submitted that even if that were true, it does not make the arrest lawful.

Defence Submissions

Mr. Nelson began by reviewing the charge against VOGELZANG and submitted the question that must be answered is, did VOGELZANG have good and sufficient cause to make an arrest and if so, then the arrest was not unlawful. He submitted it was clear from VOGELZANG's testimony that he knew he had the lawful authority to arrest pursuant to section 31.(1) of the Criminal Code when he stated "the breach of the peace was happening, it was ongoing and he had to prevent it."

Mr. Nelson pointed out that in *Januska*, the law must be applied to the facts. He submitted that *Januska* was different from the RF matter, in that Januska had been a passenger in a vehicle, not a driver.

Mr. Nelson emphasized the need to look at the facts of the matter that gave rise to this Tribunal. He pointed out that RF had difficulty accepting that he was angry. He suggested the evidence of McKinnon was that RF's voice had been much louder before the iPhone recorder was activated. He suggested that only RF knew the recorder was on.

Mr. Nelson submitted that McKinnon testified he was embarrassed to say he was intimidated by RF. There was evidence from both officers that RF was well beyond being normal, and VOGELZANG believed he was breaching the peace.

Mr. Nelson pointed to *Januska* and advised it paled in comparison to *Brown*. He referred to *Brown* paras. 68 and 70:

[68] Preventative policing which limits an individual's liberty is not, however, limited to the regulatory sphere. There are at least four powers available to the police which authorize restrictions on individual liberty in the name of crime prevention. Three of those powers require only brief consideration. They are...

[70] In addition to the three powers outlined above, a police officer may also arrest or detain a person who is about to commit a breach of the peace. That power deserves more detailed consideration in this case because, like the police power the respondent contends the police acted under here, the power to arrest for an apprehended breach of the public peace is a manifestation of the common law ancillary power doctrine: *Hayes v. Thompson*.

Mr. Nelson submitted that *Brown*, para. 70 clearly states that if officers believed a breach of the peace is going to occur, they had the authority to arrest. He then referred to *Brown*, para. 71:

[71] In *R. v. Howell* (1981), 73 Cr. App. R. 31 at 36, Watkins L.J. justified the police power to arrest for an apprehended breach of the public peace in these terms:

The public expects a policeman not only to apprehend the criminal but to do his best to prevent the commission of the crime, to keep the peace, in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognizing that a wrongful arrest is a serious invasion of a person's liberty, provides the police with this power in the public interest.

Mr. Nelson submitted that while breach of the peace is not a power to be abused, it is in fact a power that can be used.

Mr. Nelson submitted that a breach of the peace had already occurred and that both officers shared a genuine concern that they were in potential danger. He submitted that McKinnon testified RF's attitude was the worst he had ever seen and VOGELZANG testified it was the second worst. The officers found themselves in a situation that was unpredictable and there was potential harm to themselves as well as others. Similar to *Brown*, para. 74, the officers believed there was a breach or a continued breach.

[74] ...Both powers are, however, rooted in the recognition that intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.

Mr. Nelson referred to *Penner*, page 9 and asked that the Hearing Officer look at the totality of the facts. He suggested the iPhone recording, for a number of reasons, should not be considered as the best evidence. He suggested PSB wrongfully made the assumption in the investigative report (Exhibit #15) that VOGELZANG had found the iPhone in record mode when he was searching the vehicle.

Mr. Nelson pointed to *Bray*, para. 19, and the test for breach of the peace that was set out.

[19] There is both a subjective component and objective component to the inquiry into whether the necessary reasonable grounds exist. Cory J. put it this way in *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241;

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

Mr. Nelson suggested that any reasonable man would have felt the arrest of RF was justifiable. RF was angry, even though RF's evidence lacked how angry he was. RF thought the police were after him. RF got mad at the dispatcher. No reasonable person would see his behaviour as proper and it appeared RF would blow up at anything.

Mr. Nelson submitted he agrees that shouting and swearing at police does not amount to breach of the peace, but he asserted the evidence goes much further than this.

In *Hayes*, Mr. Nelson referred to page 3:

As to the part based upon the language of s.31, I share the view expressed by Ilesley C.J. in *Reid v. DeGroot and Brown* (1964) 42 C.R. 252 (N.S.C.A.) that the section seems to be confined to breaches of the peace which have actually taken place. In the same case, however, the trial judge had held that the defendants were justified in making the arrest at common law since they on reasonable and probable grounds believed the plaintiff was about to commit a breach of the peace.

In *Morin*, Mr. Nelson pointed out that passing traffic was a valid concern in the officers' consideration to arrest.

Mr. Nelson summarized that RF was out of control. The officers had no other option than to arrest RF until he calmed down. He was arrested, he calmed down and he was released. The officers believed they had the grounds to arrest.

Findings

VOGELZANG has been charged with one count of unlawful or unnecessary exercise of authority. The charge stems from his involvement in the arrest of RF on November 14, 2010, an arrest which is alleged to have been unlawful and /or unnecessary. RF filed a complaint and the OPP PSB investigated the matter. The PSB determined that VOGELZANG had made an improper arrest and search of RF's vehicle.

For ease, I have broken my finding into three parts:

1. Credibility/ Reliability Assessment
2. Finding of Fact Summary
3. Questions of Law
 - What is breach of peace, pursuant to section 31.(1) of the Criminal Code?

- Was the arrest of RF for breach of the peace lawful?
- Did VOGELZANG act without good and sufficient cause in the arrest of RF?

1. Credibility / Reliability Assessment

I heard from four witnesses, three whom I consider principle in this matter; RF, McKinnon and VOGELZANG. I will go in order as they testified.

RF presented himself as a well spoken and articulate witness. For reasons outlined, I accept his evidence as truthful, specific to immediately pre and post arrest. Within 24 hours of his interaction with VOGELZANG and McKinnon, RF filed an OIPRD complaint, (Exhibit #6). His testimony was consistent with his complaint. I accept Exhibit #6, on the same premise as I accept VOGELZANG and McKinnon's notes - it was completed in a timely manner while the events were still fresh. Evidence that corroborated RF's testimony included the iPhone recording, (Exhibit #5), and RF's statement to the PSB five weeks post incident, (Exhibit #9). Of importance, I also noted that both officers corroborated RF's testimony in that he made no verbal threat toward them or the public during their interaction.

Having found most of RF's testimony truthful, I am not convinced he was completely candid in regard to his demeanour before the iPhone recording. RF could not describe his level of agitation on a scale - and yet VOGELZANG testified he could hear yelling while he sat in his cruiser. RF testified his was not slow in surrendering his documentation, but if this had been the case, why had it not been surrendered to McKinnon? He testified he was agitated, but not to the extent described by McKinnon and VOGELZANG. However questionable I found his testimony on these points, I recognize that RF readily admitted he was agitated and upset with the officers. He refused to accept the reason for the traffic stop and on this premise he testified that he vehemently argued with them.

I found McKinnon delivered his testimony in a forthright manner. He testified he was on route to Prescott for lunch when he observed RF in the left lane travelling at a slower speed and weaving. He stopped RF, approached the passenger side, informed RF of the reason for the stop and requested his licence and documentation. Rather than surrender his documentation, RF argued with McKinnon. McKinnon's description of his interaction with RF is corroborated by his notes, Duty Report, VOGELZANG and RF, albeit RF's version specific to his own behaviour was tempered. McKinnon testified RF's behaviour was not normal and it gave him the impression RF would become assaultive. He also stated RF seemed to be getting angrier and the arrest prevented him from driving in this state. McKinnon testified RF was the most aggressive driver he had ever encountered. I believe McKinnon was honest when he testified he had a concern that RF may become assaultive, and he did not want RF driving in this state. I found McKinnon's concern was what it was – *it was a concern*.

I found VOGELZANG delivered his testimony in a forthright manner. His testimony was corroborated by his notes and Duty Report, McKinnon and RF, albeit RF's version specific to his own behaviour was tempered. Based on VOGELZANG's comments, "I thought I was doing the right thing", "I didn't think I had an option" and "I am not perfect, I make mistakes," I believe he has a great deal of humility. I accept VOGELZANG's evidence that he heard yelling from RF's vehicle while he was in his own cruiser. I accept that he found RF argumentative and in his opinion, defiantly slow to surrender his identification. I accept VOGELZANG's testimony that RF was aggressive and that he believed RF was going to be assaultive. I believed VOGELZANG when he said he wasn't sure what RF was going to do: whether it would be go into traffic and cause a collision, hurt him or hurt McKinnon. I found VOGELZANG's concern was what it was – *it was a concern*.

I found VOGELZANG's credibility diminished however in his expressed desire to see RF calm down, as reported in his notes, RMS Arrest Report and Duty Report, (Exhibits #16, #17 and #18.). His statements to RF, "What is your problem with police?", "You are now on the highway in the Province of Ontario, I can arrest you for anything," and, "I know you have something on you," are not things one would typically say if their goal was to in fact bring calm to an individual. The comments in fact support RF's assessment of VOGELZANG's demeanour when he stated, "He was not overly aggressive but seemed primed and pushing." Additionally, I noted that for a 40 second period pre arrest, VOGELZANG asked RF a number of questions all of which RF responded to. During this interaction, VOGELZANG missed the fact that RF had actually calmed down. In view of this, I cannot accept VOGELZANG's evidence as entirely creditable.

2. Finding of Fact Summary

After hearing and considering the evidence of the witnesses, assessing their credibility and determining their opportunity to observe and record, and after a close examination of all exhibits tendered, I make the following finding of fact:

On Sunday, November 14, 2010 at approximately 2:20 pm, VOGELZANG and McKinnon were parked beside each other, facing north in the centre turn-around of Hwy. 401, near Prescott. They were visiting and decided to head into Prescott for lunch.

Around the same time, RF passed by them. He slowed to approximately 85 km/hr and watched in his rear view mirror as the cruisers pulled out and travelled in the same direction as he.

No doubt distracted because his attention was drawn to the cruisers, RF weaved within his lane and on two occasions crossed into the right lane. He eventually changed into the right lane to allow the cruisers to pass. McKinnon, alerted because of the slow speed and weaving, stopped RF to check on his sobriety. RF pulled over to the right shoulder, and both McKinnon and VOGELZANG stopped in behind.

McKinnon approached the passenger side of RF's vehicle and asked for his licence and registration. VOGELZANG remained in his cruiser, conducted a CPIC check and learned that RF was flagged "V" (violent) but had no criminal conviction.

RF immediately challenged McKinnon when he learned he was being stopped for weaving. RF told McKinnon he could understand if he was being stopped for speeding but argued he had not left his lane. RF spoke loudly, clenched his fists and waved his arms about in an animated fashion. RF ignored McKinnon's request for his licence and continued to argue. VOGELZANG heard the yelling and approached the driver side of RF's vehicle. He observed RF's fists clenched and determined he was in an aggressive state. According to both officers, RF was so angry, his car rocked, he was spitting his words, had foam forming at the corners of his mouth and giving the 1000 yard stare. VOGELZANG opened the driver door and told RF to surrender his licence or he would be arrested.

According to VOGELZANG and McKinnon, RF surrendered his licence and vehicle documentation in a slow and purposefully defiant manner. Upon receipt of RF's identification, the officers backed away and discussed the situation. VOGELZANG informed McKinnon that RF was flagged "V". They both believed RF was about to assault them and they were concerned for their safety, the safety of RF and the motoring

public. VOGELZANG believed he had no option but to arrest RF to prevent a breach of the peace. While this discussion was taking place, RF activated his iPhone recorder.

VOGELZANG returned to the car and engaged in further conversation with RF. For approximately 40 seconds, VOGELZANG asked RF a number of questions, all to which RF responded. When VOGELZANG asked RF what his problem was with the police, RF became agitated and accused the officers of intimidating and harassing him. Up to this point, RF responses had been to the point, succinct and abrupt. However, when VOGELZANG asked the "problem with police" question, RF became more agitated.

VOGELZANG arrested RF for breach of the peace. Outside his vehicle, the officers handcuffed RF. VOGELZANG tells RF, "You are now on the highway in the Province of Ontario, I can arrest you for anything."

According to RF, as he was being placed in the cruiser, VOGELZANG said, "I know you have something on you." VOGELZANG conducted a cursory search of RF's vehicle and neither weapons nor anything of interest was found. From the rear seat of the cruiser, RF yelled and vocalized his protest in regard to the legality of the search so much so, that at some point McKinnon returned to the cruiser and closed the centre partition window. Following the search and according to the officers, RF calmed down and was released unconditionally. He was warned in regard to an illegal license plate cover and failing to drive in a marked lane.

Subsequent to his release, RF attended an OPP Detachment and spoke with the OPP PCC. He advised he wanted to complain about the officers and this conversation was recorded on the PCC logger tape. While this evidence is post incident, I noted that RF's demeanour was calm and polite and he only became less patient with the dispatcher when he was told there was not a sergeant available to meet with him.

3. Questions of Law

- What is breach of peace, pursuant to section 31.(1) of the Criminal Code?

Both VOGELZANG and McKinnon indicated in their Duty Reports that RF was arrested for breach of the peace pursuant to section 30 of the Criminal Code. During the Hearing, both officers corrected this and testified the arrest was pursuant to Section 31.(1) of the Criminal Code.

Section 31.(1) of the Criminal Code states:

Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

So what does breach of the peace, specific to Section 31.1(1) of the Criminal Code mean? I find the following cases most instructive: *Brown*, para. 73, *Januska*, para. 9, and *Pozniak*, para. 14. And while *Bibby* is not binding, I find that for definition purposes, it helps to put things into perspective.

Brown, para. 73

A breach of the peace does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing, or even vaguely threatening. A breach of the peace contemplates an act or actions which result in actual or threatened harm to some. ...

Januska, para. 9

Any time a suspicious person is stopped and questioned by the police, there is a danger of abuse of process. The police officer has a great deal of prestige and authority in our community. He or she may seriously restrain the liberties of individuals and unless the officers act in a very prudent fashion, they are open to all sorts of allegations of abuse. I have no doubt, that in this situation, all their antennae were out and that they had good reasons to suspect the accused of trafficking in narcotics. However, they had no reasonable or probable grounds to charge him with anything until they started patting him down as part of the process of arresting him under the alleged breach of the peace. That he was being very uncooperative was made very clear to every one. On the other hand, no suspect is ever forced to be co-operative with police officers investigating his conduct. It should not be open to a police officer simply to arrest for a breach of the peace an individual who demands even vociferously to be told what he has done wrong in the eyes of the law.

Pozniak, para. 14

... Vehement or emotional verbal expression of disagreement with police in this context does not constitute a breach of the peace under 31 of the Criminal Code.

Bibby

There must be the clearest of circumstances and sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully – Foulkes

It is patently clear based on the above case law, there has to be the clearest of circumstances to justify an arrest for breach of the peace. The breach of the peace must have already been committed or have been found committing and or a belief that the person is about to join or renew the breach of the peace. As seen particularly in *Januska* and *Pozniak*, the law is narrowly constructed to ensure an individual's liberty is not deprived without just cause.

- Was the arrest of RF for breach of the peace lawful?

There is no doubt that this question is truly the heart of the matter. I heard evidence from VOGELZANG and McKinnon that RF was argumentative and his body language was aggressive. His voice was loud, he waved his clenched fists around, he ignored repeated requests for identification before surrendering his documentation and when he did it was in a purposely slow and defiant manner, he gave the 1000 yard stare, his car rocked, he spit as he argued and even had foam forming at the corners of his mouth. The officers testified they were concerned about permitting RF to drive in his state given the risk he may pose to other motorists. They also testified they were intimidated and concerned for their own safety in that they believed RF may become assaultive toward them.

It was clear from the evidence, that RF's anger was directed toward the officers and not the motoring public. Outside of VOGELZANG and McKinnon's subjective concern, no reasonable evidence was present to substantiate the belief that RF was a risk or threat to the motoring public.

VOGELZANG and McKinnon testified they believed RF may or was about to become assaultive with them. While I accept VOGELZANG and McKinnon's testimony that RF was one of the most confrontational (my words) and aggressive drivers they had ever come across, I am not convinced the belief that something *may* happen amounts to reasonable grounds to justify a lawful arrest. In so many instances, law enforcement officers will attest to their gut feeling that something is not right, however this on its own does not provide a licence to arrest. An officer needs much more than a mere suspicion or a concern – an officer needs reasonable grounds and I have found that RF's behaviour did not cross this threshold.

VOGELZANG testified he believed he had no option but to arrest RF. When VOGELZANG returned to RF's vehicle, he asked RF a number of questions during a period of approximately 40 seconds before affecting his arrest. RF responded to every question in a succinct manner and seemed only to become agitated near the end when VOGELZANG asked, "What is your problem with the police?" Unfortunately, VOGELZANG missed the fact that RF had in fact already calmed down.

I refer to the *Januska* and *CE*, cases which I find very similar in fact. In *Januska*, police attended a sub shop parking lot to investigate a complaint of suspicious individuals. Januska, a passenger in a vehicle was told to step out as police wanted to question him and the driver separately. Januska complied. Police put a number of questions to him at which point he became agitated and started to yell at the officer and wave his arms in the air. To quote the officer, "The more I questioned him the more he became uncooperative and agitated." Januska was arrested for breach of the peace. The court held that the arrest was unlawful.

In *Januska*, para. 7, Justice Fleury wrote,

In this case, there is simply no evidence as to the circumstances under which the so-called breach of the peace was committed. All we know is that the accused became belligerent, that he was loud and unco-operative. That he was yelling or shouting and that he was waving his arms about. That is certainly not enough to justify being placed under arrest with all the incidental restrictions that flow from the arrest itself.

In regard to *CE*, police attended the 17 year old's residence after her mother contacted the police. CE had argued with her sister over the whereabouts of a purse and her mother, annoyed with the "yapping" asked the officers to remove CE from the house. Police entered CE's bedroom and she became upset and verbally aggressive with the officers. When she refused to leave, the officers arrested her for breach of the peace. The court held the arrest was unlawful.

While I only make reference to *Januska* and *CE*, I have dedicated considerable time reviewing all cases provided by counsel. Having done so, I found *Bray*, *Hayes* and *Morin* perhaps the best examples to support my statement that there had to be more evidence other than RF's aggressive and argumentative state to justify or warrant an arrest for breach of the peace.

In totality of all evidence coupled with an extensive review of the relevant case law, I am satisfied that VOGELZANG's arrest of RF for breach of the peace was neither justified nor lawful. I believe in the matter at hand, VOGELZANG misinterpreted the law.

- Did VOGELZANG act without good and sufficient cause in the arrest of RF?

I believe there is occasion when an officer can make an honest mistake despite their best of intention and good faith. In the matter at hand, I am not convinced this was the case. I accept and believe both VOGELZANG and McKinnon found RF one of the most aggressive drivers they had ever encountered. And I accept and believe they shared a concern for their own safety and that of the motoring public. However, I am not convinced this was purely the reason behind the arrest. I rely on VOGELZANG's comment to RF post arrest, "I know you have something on you" and believe over and above his stated reasons for the arrest, VOGELZANG had a keen desire to discover the reason for RF's behaviour. The search incident to arrest provided an opportunity to discover what this may have been.

In regard to VOGELZANG's other comment to RF post arrest, "You are now on the highway in the Province of Ontario, I can arrest you for anything," I only say I find this comment very disturbing as it paints a picture that police operate in a lawless society. This is not the case, and I have to believe VOGELZANG knows this is not the case.

Based on these reasons, I am not satisfied VOGELZANG acted with good and sufficient cause in the arrest of RF.

Disposition

I have carefully considered the facts presented in this matter and conclude there is clear and convincing evidence to support a finding of guilty against VOGELZANG for 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.



Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Dated: January 05, 2012

Electronic Release: January 5, 2012

Next Hearing Date: January 12, 2012