ONTARIO CIVILIAN POLICE COMMISSION

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

BETWEEN:

CONSTABLE CRAIG WILES

APPELLANT

-and-

DURHAM REGIONAL POLICE SERVICE

RESPONDENT

DECISION

Panel:	David C. Gavsie, Associate Chair Jacqueline Castel, Member Georges Bedard, Member
Hearing Date:	September 30, 2014
Hearing Location:	Toronto, Ontario

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APPEARANCES:

William R. MacKenzie, Counsel for the Appellant, Constable Craig Wiles.

Ian B. Johnstone and Alex Sinclair, Counsel for the Respondent Durham Regional Police Service.

Introduction

1. Constable Craig Wiles ("Const. Wiles" or the "Appellant") was charged with one count of Discreditable Conduct, one count of Unlawful or Unnecessary Exercise of Authority and one count of Unlawful or Unnecessary Exercise of Force, contrary to the Code of Conduct set out as a Schedule to Ontario Regulation 268/10, enacted under the *Police Services Act*, R.S.O. 1990, c. P.15, as amended (the "Act").

2. In his decision dated September 25, 2012, Deputy Chief Terrance Kelly (Ret.) (the "Hearing Officer") found Const. Wiles guilty of the three counts.

3. The Hearing Officer ordered Const. Wiles to resign within seven days or be dismissed in his decision on penalty dated December 5, 2013 (the "Decision on Penalty").

4. Const. Wiles is appealing the Decision on Penalty.

Decision

5. The appeal is dismissed for reasons which follow.

Background

6. Const. Wiles has been a member of the Durham Regional Police Service (the "Respondent", or sometimes the "Service") since 2004.

7. The incident giving rise to his convictions for Discreditable Conduct, Unlawful or Unnecessary Exercise of Authority and Unlawful or Unnecessary Exercise of Force Occurred on September 21, 2011.

8. Const. Wiles was operating a marked Service police car. He was partnered with Constable Kapeluk ("Const. Kapeluk").

9. While patrolling the Town of Ajax, Const. Wiles observed a male, Mr. Raphael Morgan, on the roadway causing traffic to slow down and become backed up. Mr. Morgan had been struck by a car and landed in the middle of the roadway.

10. When Const. Wiles approached him, Mr. Morgan ran away without saying anything. Const. Wiles pursued him on foot to his residence, where he kicked the door in (knocking it off its hinges) to gain entry.

11. Inside the house, Mr. Morgan's mother advised Const. Wiles that her son suffered from schizophrenia.

12. Const. Wiles arrested Mr. Morgan pursuant to the *Mental Health Act*, R.S.O. 1990, c.M.7.

13. When escorting Mr. Morgan to the police vehicle with the assistance of Const. Kapeluk, Const. Wiles grounded Mr. Morgan three times.

14. The particulars of his conviction for Discreditable Conduct were:

> ...Constable Craig Wiles attended at 39 Epps Crescent in Ajax and, without knocking on the door in order to establish if the door was locked, kicked the door twice and ultimately knocked the door off its hinges. Constable Wiles did not obtain permission from the owner of the residence.

> Constable Wiles proceeded to enter the residence without lawful authority, permission from the homeowner or advice from his supervisor.

15. The particulars of the conviction for Unlawful or Unnecessary Arrest were:

> ...Const. Craig Wiles #3319, stopped at a motor vehicle accident at Harwood Road in Ajax, and without conducting an investigation, engaged in a foot pursuit of a pedestrian, Raphael Morgan, involved in the accident. Without obtaining any information from the witness or his partner, Const. Wiles attended and forcefully entered a residence. Without any lawful authority, Const. Wiles handcuffed the pedestrian, Raphael Morgan, and placed him under arrest.

16. The particulars of the conviction for Unlawful or Unnecessary Exercise of force were:

> ...Const. Craig Wiles #3319 handcuffed and physically removed Raphael Morgan from his residence at 39 Epps Crescent in Ajax. While escorting him from his residence to the cruiser, Constable Wiles forcefully grounded him twice, without proper cause to do so.

17. Prior to the incident with Mr. Morgan, Const. Wiles had two previous convictions under the Act and had also been found guilty of a criminal offence.

18. On April 7, 2009, Const. Wiles pleaded guilty in criminal court to assaulting a female prisoner in custody. The incident had occurred on October 20, 2007. Const. Wiles was given a conditional discharge.

19. On May 9, 2009, Const. Wiles pleaded guilty to Discreditable Conduct under the Act in relation to the October 20, 2007 incident. He received a penalty of a demotion from First Class Constable to Second Class Constable for 12 months.

20. On September 12, 2012, Cont. Wiles was found guilty of Unlawful or Unnecessary Exercise of Authority and Neglect of Duty. The conviction related to an incident that occurred on March 9, 2011. On December 7, 2012, he received a penalty of a demotion from First to Second Class Constable for 15 months.

Appellant's Submissions

21. Mr. MacKenzie submitted that the Hearing Officer committed three errors in law by treating Const. Wiles' assertion, that with the benefit of hindsight, he would conduct himself in the same way, as (i) a failure to accept responsibility and demonstrate remorse; (ii) evidence of a likelihood of recurrence and failure of rehabilitation; and (iii) a significant aggravating factor on penalty. He relied on Carson v. Pembroke Police Service, (July 27, 2001, OCCPS); R v. K.A. [1999] O.J. No. 2640 (Ont. C.A.); and Walker v. Peel Regional Police Service, (November 6, 2000, OCCPS).

22. He argued that the Hearing Officer also erred by failing to give proper weight and consideration to the mental health issues experienced by Const. Wiles during his employment with the Respondent.

23. He submitted that Const. Wiles was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and underwent a course of three separate sessions of treatment, consisting of cognitive behaviour therapy, for these conditions. The first session was from May 9, 2008 to May 4, 2009 and consisted of 20 treatment sessions.

The second session was from July 5, 2010 to August 25, 2010 and consisted of 9 treatment sessions. The third session was from November 21, 2011 to July 25, 2013 and consisted of 31 treatment sessions. Dr. Sean O'Brien, a clinical psychologist, prepared a letter (Ex. 13) detailing his contacts with, diagnosis and treatment of, Const. Wiles over these sessions.

24. Mr. MacKenzie submitted that the Hearing Officer erred in placing any weight at all on the fact that Dr. O'Brien could not speak to the issue of "risk assessment".

25. In addition, he submitted that the Respondent failed to provide the Hearing Officer with a medically authored "risk assessment" regarding future behavior by Dr. Hy Bloom, a Forensic Psychiatrist who attended the sentencing hearing on July 25, 2013.

26. Mr. MacKenzie argued that the Hearing Officer erred in law in placing too much emphasis on the "nature and seriousness" of the offence and failed to address the issue of damage to the reputation of the police service and the ability to reform the officer: Williams v. Ontario Provincial Police, (December 4, 1995, OCCPS), and Guenette v. Ottawa-Carleton Police Service, (March 22, 1998, OCCPS).

27. He argued that when Const. Wiles' misconduct is examined within the context of the findings, the nature and seriousness of the misconduct is minimized significantly.

28. Mr. MacKenzie noted that Service Directive LE-70 states:

> Members Shall
>
> (A) General
>
> a) Respond, assist and if necessary, apprehend and take into custody persons whose behavior suggests

they are emotionally disturbed, have a mental illness or a developmental disability.

29. He submitted that while the Hearing Officer found that Const. Wiles did not have "reasonable cause" to arrest Mr. Morgan, the "bizarre scenario" would have mandated the police to inquire about Mr. Morgan's state of mind. He further submitted that the Appellant acted in good faith when he chased Mr. Morgan, believing that he was not in his right mind.

30. Mr. MacKenzie also argued that the Hearing Officer placed too much weight on the grounding of Mr. Morgan while he was being walked backwards, while failing to give any weight or consideration to the circumstances that led to the grounding of Mr. Morgan at the house and on approach to the police car.

31. In addition, he argued that the facts underlying the Unlawful Arrest and Unnecessary Use of Force in other cases were far more egregious and resulted in significantly less severe penalties: Godfrey v. Ontario Provincial Police, (March 22, 1989, OPC); Turgeon v. Ontario Provincial Police, (November 5, 1999, OCCPS); Blowes-Aybar v. Toronto Police Service, (March 7, 2003, OCCPS); Wayne Penner v. Parker, Koscinski and Niagara Regional Police Service, (July 6, 2005, OCCPS); Batista v. Ottawa Police Service, (May 8, 2007, OCCPS); and Robert Elliott v. Wayne King and Durham Regional Police Service, (February 5, 2007, OCCPS).

32. He submitted that the purpose of the totality principle is to ensure that the sentence is in aggregate "just and appropriate. He relied on C.C. Ruby, G.J. Chan, N.R. Hasan, Sentencing 8th edition – Chapter 2, "Finding an Appropriate Sentence – Totality Principle".

33. Mr. MacKenzie submitted, further, that the courts have held that a cumulative sentence may offend the "totality principle" if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects: R v. Wozny [2010] M.J. No. 384, (Manitoba C.A.).

34. He argued that given the approximation of the two incidents in 2011, and the finding by the hearing officer, in the case arising out of the incident of March 9 2011, that Const. Wiles could be rehabilitated, the decision in this case to dismiss Const. Wiles offended the totality principle by being "harsh and excessive".

Respondent's Submissions

35. Mr. Johnstone submitted that the standard of review of a Hearing Officer's findings of fact, findings of credibility and penalty disposition is reasonableness: Toronto (City) Police Service v. Blowes-Aybar, [2004] O.J. No. 1655 (Div. Ct.), Hall v. Chief of Police, Ottawa Police Service, [2008] CanLII 65766 (Div. Ct) at paras 47 and 48; Karklins v. Toronto (City) Police Service, [2010] O.J. No. 418 (Div. Ct.); and Wolfe v. Ontario Provincial Police, [2008] CanLII 23503 (Div. Ct.).

36. He submitted that the Hearing Officer reasonably interpreted the applicable sentencing principles in imposing the penalty.

37. Mr. Johnstone argued that the Appellant's insistence that he would conduct himself in the same way with the benefit of hindsight is different and distinct from the Appellant's right to insist that his conduct did not contravene the Act. Consequently, the authorities cited by the Appellant do not apply.

38. He submitted that no evidence was placed before the Hearing Officer that the Appellant's misconduct was caused by his mood disorder and, in any case, a mood disorder cannot excuse his conduct: Vaughan-Evans and the Toronto Police Service, (July 15, 2008, OCCPS) in which the panel in that case held that Post-Traumatic Stress Disorder does not excuse misconduct.

39. Mr. Johnstone argued that the Hearing Officer acknowledged the evidence that the Appellant suffered from a mood disorder and underwent lengthy courses of treatment. However, the Hearing Officer also considered and weighed the fact that the Appellant continued to engage in similar conduct despite having received "gold standard" treatment, with positive results noted.

40. He disputed Mr. MacKenzie's assertion that the Respondent failed to assist the Appellant with his mental health issues. Dr. O'Brien gave evidence at the hearing that the Appellant had been in his care since May 2008, and it was also noted at the hearing that this counseling (over 60 sessions) was completely paid for by the Respondent.

41. Mr. Johnstone argued that there was no legal onus on the Respondent to pay for the Appellant to undergo a risk assessment with an independent clinician. The Respondent determined that it would not undertake a risk assessment after receiving a medical opinion that the Appellant's mood disorder had no nexus to the misconduct. The Appellant could have introduced more detailed information with respect to his mental health issues.

42. Mr. Johnstone submitted that the penalty imposed was not harsh or excessive in the circumstances. Const. Wiles committed extremely serious misconduct and he had two prior convictions under the Act related to similar misconduct.

43. He submitted that Mr. MacKenzie did not cite any authority for the proposition that the "totality principle" is applicable to the determination of a penalty under the Act, and he stated that it is not an appropriate consideration for the Commission.

44. He argued, in the alternative, that even if the totality principle were applicable to proceedings under the Act, the penalty imposed was appropriate in all circumstances. He submitted that in the following cases, a penalty of dismissal was warranted for similar misconduct: Mahood and the Hamilton-Wentworth Regional Board of Commissioners of Police, (July 18, 1975, OPC); Groot and the Peel Regional Police Service, (April 5, 2002, OCCPS); Beckingham and the Metropolitan Toronto Police Force, (April 25, 1978, OPC); and Maguire and the Ontario Provincial Police, (November 4, 1975, OPC).

45. Mr. Johnstone submitted that police officers are held in a position of high trust and accountability and the repeated misconduct by the Appellant has vitiated his usefulness as a police officer. In the totality of circumstances, the penalty imposed by the Hearing Officer was reasonable and appropriate.

46. He also submitted that the law is clear that a Hearing Officer may examine disciplinary convictions occurring subsequent to the original misconduct, in the context of assessing the ability to reform or rehabilitate, as a disposition consideration: Galassi v. Hamilton Police Service, [2005] O.J. No. 2301 (Div. Ct).

47. Finally, he submitted that the decision of Hearing Officer Elbers in the case arising out of the March 9, 2011 incident (referred to in paragraph 20 above) should not handcuff the findings of the Hearing Officer in this case. No medical or mental health information was introduced in the case

before Hearing Officer Elbers. As such, Hearing Officer Elbers did not know that Const. Wiles had already been receiving the gold standard in therapy for his mood disorder since 2008.

Issues:

48. The issues in this appeal are:

    1) What is the standard of review?

    2) Did the Hearing Officer treat the Appellant's right to a hearing as an aggravating factor?

    3) Did the Hearing Officer fail to give proper weight and consideration to the mental health issues experienced by the Appellant?

    4) Did the Hearing Officer impose a penalty that was harsh and excessive in the circumstances of the case?

    5) Did the Hearing Officer err by failing to take into account the "totality principle" when sentencing the Appellant?

Reasons

Standard of Review

49. The law is clear that the standard of review for a Hearing Officer's penalty disposition is that of reasonableness. As the Divisional Court stated Karklins v. Toronto (City) Police Service, *supra* at para 9:

    > On the issue of penalty, the standard of review is reasonableness. The Commission was required to

observe deference to the decision of the Hearing Officer and did so.

50. As the Hearing Officer's decision on penalty is being appealed, we are required to use a reasonableness standard when reviewing the decision.

51. The Supreme Court of Canada described the standard of reasonableness in Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Instead, they may give rise to a number of possible reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable rational solutions. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

52. In certain limited cases, it may be open to the Panel to reach a different conclusion from the trier of fact. However, the Panel should only intervene if there has been an error in principle, or relevant factors have been ignored: see Williams and Ontario Provincial Police (December 4, 1995, OCCPS), Favretto and Ontario Provincial Police (February 13, 2002, OCCPS), and Karklins and Toronto Police Service, *supra*.

53. An appeal to the Commission is an appeal on the record. Unlike a hearing officer, we do not have the advantage of hearing and observing the witnesses as they testify. Deference must be accorded to the hearing officer's findings, unless an examination of the record shows that the hearing officer's conclusions cannot reasonably be supported by the evidence: see Blowes-Aybar and Toronto (City) Police Service, *supra*.

Did the Hearing Officer treat the Appellant's right to a hearing as an aggravating factor?

54. The Appellant had the right to plead not guilty at the Hearing and to vigorously defend his actions, which he did.

55. At the penalty hearing, the Appellant was not entitled to the mitigation or reduced sentence which a guilty plea, an apology or remorse would warrant. However, it would be an error in law for the Hearing Officer to consider the not guilty plea as an aggravating factor and impose an increased sentence because of it: see Carson v. Pembroke Police Service, *supra*; R v. K.A., *supra*; and Walker v. Peel Regional Police Service, *supra*.

56. The Hearing Officer referred to the following statement by Const. Wiles at the Hearing on Findings, at page 23 of the Decision on Penalty:

> When asked by the Service prosecutor if, on looking back and with the benefit of hindsight, would he have done anything differently, Constable Wiles stated, "After going over it again and again, no sir, I've made my decision and if I was faced with that incident again with the same exact circumstances, I would react in the same way.

57. At no point in the Decision on Penalty did the Hearing Officer state that he deemed Const. Wiles' insistence that he did nothing wrong (at the Hearing on Findings) to be an aggravating factor. Mr. MacKenzie acknowledged this in response to a question from a member of the Panel, but invited us to infer that the Hearing Officer considered it aggravating by the fact that he chose to underline the passage in his decision, emphasizing that this was the only passage of the decision he underlined.

58. The Hearing Officer considered the Appellant's response – that he would behave the exact same way with the benefit of hindsight – in assessing whether the Appellant could be rehabilitated at pages 22 and 23:

> The failure of Police Constable Wiles to demonstrate any remorse speaks to the likelihood of his rehabilitation potential and, consequently, the likelihood of recurrence. Constable Wiles' failure to acknowledge any wrongdoing is reflective of his view that acting in such a manner is acceptable and, since Constable Wiles himself believes that acting in such a manner is acceptable, he is not likely to alter his behavior.

59. However, the statement was only one of the factors he considered in the context of rehabilitation and not the main factor. The Hearing Officer placed more weight on the Appellant's prior convictions for similar misconduct and the fact that despite having received the gold standard in treatment for his Adjustment Disorder with Mixed Anxiety and Depressed Mood since 2008, he has had on-going anger-management issues, and he has continued to engage in similar types of misconduct.

60. Ultimately, the Hearing Officer imposed the penalty of resignation in 7 days or dismissal because he deemed Const. Wiles' misconduct to be extremely serious and it

was his third offence for similar misconduct. To have imposed a lesser penalty, the Hearing Officer concluded at page 25, would have severely undermined the public's confidence in the Service:

> I concur with the comments of the Service prosecutor that the conduct of Constable Wiles on September 21st, 2011 was so egregious as to cause serious damage to the reputation of this Police Service. Police officers who commit such serious offences must be severely dealt with and, therefore, only one course of action is available to this Tribunal which has a duty to prevent further serious breaches of conduct.

61. As such, when the Decision on Penalty is read as a whole, we find no basis for inferring that the Hearing Officer treated the Appellant's statement that he would do nothing differently with the benefit of hindsight as an aggravating factor. The Hearing Officer considered this response in his detailed decision, but put more weight on other factors. Based on the Hearing Officer's clearly articulated reasons, the penalty would have been the same even if Const. Wiles had not made this statement or the Hearing Officer had not mentioned it in the Decision on Penalty, given the seriousness of the Appellant's misconduct and prior convictions.

Did the Hearing Officer fail to give proper weight and consideration to the mental health issues experienced by the Appellant?

62. We disagree with Mr. MacKenzie's submission that the Hearing Officer failed to give proper weight and consideration to the mental health issues experienced by the Appellant.

63. The Hearing Officer devoted three pages in his Decision on Penalty (pages 19 to 21) to reviewing and analyzing the evidence concerning the Appellant's mental health issues, and provided cogent reasons why he did not consider the evidence to be mitigating, in the circumstances of this case. Specifically, the Hearing Officer observed, that despite having undergone extensive therapy since 2008 and the gold standard in treatment for his adjustment disorder, the Appellant's anger management issues persist and he continues to commit the same types of serious misconduct.

64. Further, the Hearing Officer also correctly observed that the Appellant did not introduce any evidence to suggest that his mental health issues caused his misconduct.

65. We do not agree with Mr. MacKenzie's submission that the Hearing Officer erred by placing any weight on the fact that Dr. O'Brien could not speak to whether Const. Wiles was going to engage in the same type of misconduct (involving force) in the future. The Hearing Officer noted at page 21 of the Decision on Penalty:

> When questioned by the Service prosecutor if he could explain his assessment of Constable Wiles and why he used force against the two individuals in 2011, Doctor O'Brien stated he could not, nor could he say, whether or not Constable Wiles was going to engage in that kind of behavior again in the future.

66. What the Hearing Officer weighed, in reaching his decision that rehabilitation was not possible, was that despite having received extensive therapy since 2008, when he was charged criminally with assault, Const. Wiles was still engaging in the same type of serious misconduct against members of the public. Given that the therapy has not succeeded in changing Const. Wiles' behavior to date, the

Hearing Officer concluded that there was no basis for believing that it would in the future.

67. We find the Hearing Officer's conclusions, based on the evidence, to be reasonable.

68. In addition, we agree with Mr. Johnstone's submission that there was no onus on the Respondent to provide the Hearing Officer with a "risk assessment" by a Forensic Psychiatrist as to the likelihood of the Appellant committing the same type of misconduct in the future. If the Appellant believed that a risk assessment of this nature would have assisted his defense, it was open to him to obtain and introduce one at the Hearing on Penalty.

Did the Hearing Officer impose a penalty that was harsh and excessive in the circumstances of the case?

69. The Appellant did not appeal the Hearing Officer's findings of guilt, or the facts on which these findings were based. Therefore, it is not open to the Appellant to challenge these facts as part of his appeal on disposition. For this reason, we will not be considering the following arguments raised by Mr. MacKenzie:

    1) Based on Mr. Morgan's behavior after being struck by a vehicle (as also witnessed by the driver of the vehicle), and the wording of Service Directive LE-17-010, it was reasonable to believe that Mr. Morgan was emotionally disturbed and that Const. Wiles acted in good faith when he chased him; and

    2) The Hearing Officer placed too much weight on the grounding of Mr. Morgan while he was being walked backwards and failed to give weight to circumstances which led to the grounding.

70. We find that the Hearing Officer considered all of the appropriate sentencing factors, in relation to the misconduct before him. He weighed the seriousness of the misconduct, the prior convictions for similar misconduct, the public's trust in the Service and possible damage in the reputation of the Respondent, the possibility of rehabilitation, and general and specific deterrence.

71. Const. Wiles' misconduct was extremely serious and this was his third conviction for Unnecessary Exercise of Force in his ten year career with Service. He was previously demoted for 12 and 15 months. As such, Const. Wiles' misconduct was by no means an isolated incident in an otherwise unblemished career.

72. We do not agree that the Hearing Officer failed to put sufficient weight on the damage to the reputation of the Service or the potential for rehabilitation.

73. He considered the reputation of the Service, in the context of the seriousness of the Appellant's misconduct, as well as his prior convictions for similar misconduct at page 21:

> Police, by reason of their responsibilities, are given extended rights over and above those accorded to the general public. When these rights are abused the whole policing system is brought into disrepute and its effectiveness threatened. The Police Service must, therefore, zealously ensure its officers are not unlawfully or unnecessarily exercising authority or harassing the general public. Obviously Constable Wiles has had great difficulty with this for the majority of his career as witnessed by the circumstances of the past three (3) incidents.

Ultimately, the Hearing Officer concluded at page 25 that Const. Wiles' misconduct was "so egregious as to cause serious damage to the reputation of the Police Service."

74. As discussed above, he considered the potential for rehabilitation in the context of the mental health evidence and the fact that despite extensive therapy since 2008, Const. Wiles is still committing the same types of misconduct.

75. We disagree that the cases presented by Mr. MacKenzie in which the Hearing Officer imposed a lesser penalty for Unreasonable Exercise of Authority, were analogous to the present case. The facts in those cases were distinguishable for various reasons, including: they were not as serious; they involved one conviction rather than three convictions arising out of the same incident (as in the case of Const. Wiles); they involved a junior officer having to make a decision with respect to a complex legal issue (Robert Elliott v. Wayne King and Durham Regional Police Service, *supra*); they the occurred over a few seconds or minutes (Batista v. Ottawa Police Service, *supra*); and/ or the Appellants in the other cases did not have a disciplinary record (e.g., Wayne Penner v. Parker, Koscinski and Niagara Regional Police Service, *supra*, Robert Elliott v. Wayne King and Durham Regional Police Service, *supra*, and Batista v. Ottawa Police Service, *supra*).

Did the Hearing Officer err by failing to take into account the "totality principle" when sentencing the Appellant?

76. Mr. MacKenzie did not introduce any case law supporting his argument that the "totality principle" applies to cases under the Act. It is our finding that the totality principle, which is used in the criminal law context, does not apply to penalty decisions under the Act.

77. Further, we do not agree with Mr. MacKenzie's submission that the Hearing Officer erred in considering the incident of March 2011 as a prior conviction because Const. Wiles would have had only one prior disciplinary penalty on his

record on September 21, 2011, when the incident giving rise to this case occurred.

78. In Galassi v. Hamilton Police Service, *supra*, the Divisional Court held that in cases under the Act, it is reasonable for the Hearing Officer to consider the Appellant's entire employment record, including any discipline which may have occurred after the conduct giving rise to the current proceedings. The Court explained at para. 34 and 35:

> In my view, a *Police Act* discipline proceeding is not a criminal or penal proceeding within the purview of s. 11 [of the *Canadian Charter of Rights and Freedoms*] ... A police discipline matter is a purely administrative internal process ... The basic object of dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or, possibly, to exact some form of modern retribution) but rather, to rid the employer of the burden of an employee who has shown that he or she is not fit to remain an employee.
>
> In determining the suitability of an individual to continue as a police officer, it was reasonable for the Hearing Officer to consider the Appellant's whole employment record, including performance evaluations and disciplinary record, even if the conduct giving rise to the discipline occurred after the conduct which led to the current proceeding.

79. We also disagree that the finding of Hearing Officer Elbers that Const. Wiles could be rehabilitated, in the case arising out of the March 9, 2011 incident, makes Hearing Officer Kelly's decision harsh and excessive. Hearing Officer Elbers released his decision on penalty on December 7, 2012, approximately one year before Hearing Officer Kelly's decision on penalty was released in the present case.

80. Further, no mental health evidence was introduced in the case before Hearing Officer Elbers. As such, Hearing Officer Elbers did not know, when he concluded that rehabilitation was possible, that the Appellant had already undergone extensive cognitive behaviour therapy since 2008 for his mental health conditions.

81. Hearing Officer Kelly, in the present case, had more information before him on which to base his decision.

Conclusion

82. For the above reasons, we answer questions 2 to 5 in paragraph 48 in the negative.

83. We find that the Decision on Penalty was well justified and within the range of possible and acceptable outcomes, defensible in respect of the facts and law.

84. Accordingly, we dismiss the appeal.

DATED AT TORONTO, THIS 3RD DAY OF NOVEMBER, 2014

David Gavsie	Jacquèline Castel	Georges Bedard
Associate Chair, OCPC	Member, OCPC	Member, OCPC