



ONTARIO CIVILIAN POLICE COMMISSION

DATE: September 23, 2016
FILE: OCPC-15-0352
CASE NAME: WILSON AND TORONTO POLICE SERVICE

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

BETWEEN:

POLICE CONSTABLE DAWN WILSON #9761

APPELLANT

-and-

TORONTO POLICE SERVICE

RESPONDENT

-and-

TAMARA BAPTISTE

COMPLAINANT

DECISION

Panel: D. Stephen Jovanovic, Associate Chair
Roy B. Conacher, Q.C., Vice Chair

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON
M7A 2T3

Hearing Date: 21 April 2016

Appearances:

Joanne E. Mulcahy, Counsel for the Appellant

Robert Fredericks and Justin Basinger, Counsel for the Respondent

Jean Iu, Counsel for the Independent Police Review Director

Introduction

1. This decision arises from the Appeal by Police Constable Dawn Wilson ("the appellant"), from her conviction on June 7, 2013 by Superintendent Robin D. McElary-Downer ("the Hearing Officer") on the following charge:

You are alleged to have committed misconduct in that you did use unnecessary force against a prisoner or other person contacted in the Execution of Duty, contrary to section 2(1)(g)(ii) of the *Schedule Code of Conduct* (the "Code") of Ontario Regulation 123/98, and therefore, contrary to section 80(1)(a) of the *Police Services Act*, R.S.O. 1990, as amended.

2. A second charge of discreditable conduct arising from the same facts was dismissed for duplicity.
3. The appellant also appeals the penalty decision of the Hearing Officer dated September 4, 2013 imposing the forfeiture of five days' pay.
4. The Statement of Particulars to both charges read as follows:

Being a member of the Toronto Police Service attached to the Toronto Anti-Violence Intervention Strategy, Rapid Response Team, you were assigned to uniform duties.

On Monday, October 19, 2009, at approximately 6:30 p.m., you were on duty when you were observed by T. B., a private citizen, to kick a male party, who was in handcuffs and lying on the ground. The male was in the care of other officers that were present prior to your arrival. The male was not struggling or resisting arrest at the time of this action.

In doing so, you committed misconduct in that you did use unnecessary force against a prisoner or other person contacted in the execution of duty.

Decision

5. Pursuant to section 87(8)(a) and (b) of the *Police Services Act* ("the PSA") the Commission revokes the decision of the Hearing Officer and orders a dismissal of the charge.

Background

6. On the evening of October 19, 2009, Mr. Tyrone Walker was approached at approximately 6:30 p.m., in the parking lot of the John Garland Plaza, by Police Officers Andrew Dunning and Jason Morris. When the identification Mr. Walker produced could not be verified, Officer Dunning accused him of lying and, in response, Mr. Walker pushed the officer. Mr. Walker then attempted to run away and a foot chase began with the officers catching Mr. Walker a short time later as he tried to jump a fence.
7. The two officers struggled with Mr. Walker while attempting to arrest him, and issued what were subsequently termed 'distracting strikes' in an attempt to subdue him to the point where he could be handcuffed. Officer Dunning had dropped his radio during the foot pursuit, found it nearby, and transmitted a priority call for assistance. Whether this radio call occurred before or after Mr. Walker was handcuffed was very much in dispute.
8. The appellant and her partner, Officer Mike Kim, responded to the call for assistance along with other officers.
9. These events were witnessed by Ms. Tamara Baptiste from her 7th Floor apartment balcony, which would have been approximately 182 feet from the scene of the takedown and arrest.
10. Ms. Baptiste did not see Officers Dunning or Morris strike Mr. Walker but believed that he was handcuffed prior to other officers arriving at the scene, although she did not actually see the handcuffs. She testified that she observed a female officer, who proved to be the appellant, come from around a corner and shout, "Where are you guys?" Ms. Baptiste testified that she

then saw the appellant kick Mr. Walker twice with her right foot/leg in the area of his abdomen while he was seated or kneeling on the ground.

11. Four other officers arrived, some of whom then allegedly began to administer additional blows to Mr. Walker.
12. Mr. Walker testified that as he was caught on the fence, an officer pulled him off and threw him to the ground. At this point he gave up, said that he was done, and was handcuffed. His evidence varied as to which, or how many officers handcuffed him, but he testified that while handcuffed, he was struck several times in the face and had his head hit against the "floor" three times.
13. Mr. Walker did not see the appellant until he was being led away to one of the police cars nearby. Notably, he did not testify that the appellant kicked him at any point.
14. The appellant testified that she and her partner were on patrol in the area of the Garland Plaza when she heard Officer Dunning's priority radio call for assistance. She responded, secured his scout car, and then ran down an alley yelling "Where are you guys?" She then came upon Officers Dunning and Morris giving commands to, and struggling with, Mr. Walker.
15. The appellant testified that Mr. Walker was not handcuffed, so she used her right foot to push one of his arms, and then one of his legs, in order to stop him from kicking. She testified that she did not kick

Mr. Walker, nor did she know which officer eventually handcuffed him.

16. Officer Kim, who had stopped briefly behind the appellant to pick up Mr. Walker's jacket, arrived a few seconds after the appellant. In his evidence, Officer Kim stated that the appellant did have her foot on Mr. Walker's leg area, while he was on his stomach on the ground. Although Officer Kim assisted the other officers in securing Mr. Walker's legs, he was not certain if Mr. Walker was handcuffed when he first arrived.
17. Officer Morris testified that he brought Mr. Walker down from the fence, gave him some 'distracting strikes' to the face while he was struggling, and told him that he was under arrest. With the assistance of Officer Dunning, he turned Mr. Walker onto his stomach and applied his handcuffs. He further testified that he saw other officers in the area after Mr. Walker was handcuffed, and stood him up while he continued to struggle "a little bit." Officer Morris did not see the appellant kick Mr. Walker.
18. Officer Dunning indicated in his priority radio call at 6:41 p.m. that he and his partner had Mr. Walker in custody and requested that an officer secure his scout car. He testified, however, that he did not mean that Mr. Walker was actually handcuffed, but that he wanted rapid assistance to get him handcuffed. His notes of the incident were, in part:

While on the ground the male continued to kick towards us and swing his arms. I issued several strikes

to the male in an attempt to effect the arrest. The male struggled until after he was handcuffed to the rear. My radio had fallen off and I went back to get it to put over our location so other units could assist us.

He agreed in his evidence that the notes were an accurate reflection of what occurred.

19. The Hearing Officer, in finding the appellant guilty of misconduct by using "unnecessary force", concluded as follows:

Wilson admittedly applied pressure to Mr. Walker's arm with her foot and then stepped on his leg. Ms. Baptiste testified Wilson kicked Mr. Walker twice. Regardless of whether it was a kick or pressure to the arm with a foot, this Tribunal is satisfied and finds clear and convincing evidence that Wilson applied force to Mr. Walker while he was on the ground. Based on an analysis of all [the] evidence, there was no justifying reason for the applied force, since Mr. Walker was already handcuffed and not resisting upon Wilson's arrival.

I found Wilson's testimony, in regard to what she saw and didn't see and why and how she applied force to Mr. Walker in the manner that she did, disconnected. It was self-serving and not to be believed. I am convinced that there was no mistaken or honest belief on her part that Mr. Walker was resisting and not handcuffed. If force was being applied to Mr. Walker after

he was handcuffed, and I have found no justification for this, it was Wilson's duty to step in and stop it and not join in.

I find, as a fact, that the force Wilson levelled against Mr. Walker was unnecessary.

20. The evidence of various witnesses will be reviewed further below.

The Issues

21. The appellant raised 41 Grounds of Appeal in her Notice of Appeal regarding the finding of misconduct and 10 Grounds of Appeal regarding the penalty of five days' forfeiture of pay.
22. The multiple Grounds of Appeal, as expanded in the appellant's factum regarding the finding of misconduct, may be summarized as follows:
 1. Errors with respect to discreditable conduct.
 2. Unfair findings with respect to Officer Dunning and Morris.
 3. Failure to consider relevant evidence (or misapprehended the evidence of):
 - i) Tamara Baptiste
 - ii) Officer Dunning
 - iii) Mr. Walker

- iv) Officer Morris
- v) The appellant
- vi) Officer Kim

- 4. Errors in the analysis of the evidence.
 - 5. Errors with respect to the Hearing Officer's consideration of the question of: was Walker handcuffed before or after Wilson arrived?
 - 6. Errors with respect to analysis of: was Walker resisting/struggling with Officers Dunning and Morris at the time Wilson arrived?
 - 7. Errors as to the analysis of whether the force levelled against Walker was necessary.
23. Buried among the Grounds of Appeal were submissions that the evidence relied on by the Hearing Officer was not clear and convincing, nor was it weighty or cogent.
24. The appellant also submitted that the Hearing Officer's failure to decide exactly what it was that the appellant did, yet finding her guilty of misconduct, was fundamentally unfair, especially in light of the particulars set out in the Notice of Hearing.
25. The respondent supports the decision of the Hearing Officer, submitting that it is not the role of the Commission to second guess her decision unless it is

void of evidentiary foundation. Further, it is not the role of the Commission to assess the credibility of the witnesses or the Hearing Officer's findings as to credibility. The submission was made that these findings are entitled to the "highest level of deference."

26. The OIPRD also supports the decision of the Hearing Officer submitting that there is no basis upon which the Commission could set it aside. The OIPRD submitted that deference must be accorded to the Hearing Officer's findings of fact and assessment of credibility, unless an examination of the Record shows that the conclusions cannot reasonably be supported by the evidence. The OIPRD also submitted that in her reasons, the Hearing Officer was not required to review every piece of evidence, or include all of the arguments, statutory provisions, jurisprudence and findings on each element leading to the result.

27. Finally, the OIPRD took exception to the treatment of Ms. Baptiste and Mr. Walker by the appellant's counsel before the Hearing Officer, and the lengthy cross-examinations on their prior involvement with the criminal justice system. The OIPRD sought to stress that the focus of a PSA Hearing and by extension, an appeal from a Hearing Officer's decision, should be on the complaint and should not be turned into an investigation of the person making the complaint.

Reasons and Analysis

28. Before we turn to an analysis of the Hearing Officer's decision, it would be useful to state some general principles applied to appeals by the Commission. The standard of review to be applied by the Commission on an appeal from the decision of a Hearing Officer is reasonableness on questions of fact and correctness for questions of law: **Dunsmuir v. New Brunswick**, 2008 SCC9 (CanLII); **Ontario Provincial Police v. Purbrick**, 2013 ONSC 2276 (CanLII) (Div. Ct.)
29. In certain cases, it may be open to the Commission to reach a different conclusion from that of the Hearing Officer; however, it should only intervene if there has been an error in principle, or if relevant factors have been ignored.
30. The role of the Commission is not to second guess the decision on appeal, but to review the decision to determine whether the conclusions reached are reasonable, reflect a correct understanding and application of the law, are based upon clear and cogent evidence, and are articulated in a logical manner: **Whitney v. Ontario Provincial Police**, [2007] O.J. No. 2668 (Div. Ct.).
31. The standard of proof in disciplinary hearings under the PSA is a higher standard of "clear and convincing evidence" rather than the usual civil standard of the balance of probabilities: Section 84(1) of the PSA; **Jacobs v. Ottawa (Police Service)**, 2016 ONCA 345 (CanLII).
32. Turning to the decision under appeal, the Hearing Officer reviewed the evidence of the four prosecution

witnesses: Ms. Baptiste, Mr. Walker, Officers Dunning and Morris. The appellant testified on her own behalf and called as witnesses: Inspector Fernandes, Sergeant Van Schubert, Constable Kim, Constable Zettles and Constable Kosher. The Hearing Officer commented that the “one consistency I found in view of all of the testimony was [that] there was no consistency”. A review of the transcripts confirmed the validity of that comment.

33. The Hearing Officer framed her analysis of the issues by formulating three questions:

1. Was Mr. Walker handcuffed before or after Wilson arrived?
2. Was Mr. Walker resisting/struggling with Dunning and Morris at the time Wilson arrived?
3. Was the force Wilson applied against Mr. Walker unnecessary?

34. The Hearing Officer found that Mr. Walker was handcuffed before the appellant arrived and, in our view, this finding is reasonable. She considered the radio transmission of Officer Dunning when he said “calm down, got one in custody, our vehicle is unsecured in front of John Garland Plaza, we need someone to go there first, secure our vehicle.”

35. In her decision, the Hearing Officer wrote:

I reject Dunning’s explanation that he really didn’t mean Mr. Walker was handcuffed when he said “in custody”.

It is entirely inconsistent and outside the realm of possibility that an officer of Dunning's experience, or any police officer for that matter, would make such a mistake. Even if I were to accept he used the term "in custody" in error, it remains inconceivable that Dunning would tell units to slow down and tend to an unsecured cruiser first, had his partner been on the ground struggling to get handcuffs on a suspect.

36. This radio transmission occurred before the appellant arrived on the scene. Officer Dunning could not remember who handcuffed Mr. Walker, while Officer Morris testified that it was only he and Officer Dunning who handcuffed Mr. Walker. The Hearing Officer was entitled to make this finding, rejecting the evidence of the appellant and of Officer Kim to the contrary. It was within her purview to do so.
37. The Hearing Officer was satisfied, "on the totality of the evidence", that Mr. Walker was not resisting/struggling when the appellant arrived. In so finding, she again rejected the evidence of the appellant and Officer Kim. The Hearing Officer considered Officer Dunning's notes where he wrote: "The male struggled until after he was handcuffed to the rear. My radio had fallen off and I went back to get it to put over our location so other units could assist us." Officer Morris testified that Mr. Walker calmed down after he was handcuffed. Mr. Walker testified that he did not resist after he was handcuffed, but there was a physical altercation with some officers after he stood up.

38. Accordingly, there was support in the evidence for the Hearing Officer's conclusions that Mr. Walker was not struggling when he was handcuffed on the ground, prior to the appellant's arrival.
39. The Hearing Officer then considered if the force the appellant levelled against Mr. Walker was unnecessary. The first relevant question is whether the appellant kicked Mr. Walker. A brief review of some of the evidence before the Hearing Officer follows.
40. Ms. Baptiste testified that as Mr. Walker was kneeling or sitting on the ground, "handcuffed" as two officers were each holding one of his arms, the appellant ran up to him and kicked him with her right leg twice. She gave the following response to the prosecution asking her where Mr. Walker was kicked:

Um, from my angle it would appear that she woulda caught him in the abdomen area.

41. In cross-examination, Ms. Baptiste agreed with defence counsel that she had no idea if the appellant, in fact, made contact with Mr. Walker, at the time of the first kick. When asked about the second kick, Ms. Baptiste testified as follows:

I would say I don't know factually because as you indicated I am quite far away, I don't know where she exactly connected to or how forcefully she connected, because again I am at a distance. But she was very close to the man, there was no way you could

miss, and her leg did not fly in the air.
So I can only assume she connected.

42. Mr. Walker testified that as he was on the ground, face down and handcuffed, he was punched in the face at least two times. He then heard footsteps as two or three other officers arrived and heard someone say "Stop hitting him, a car is coming." He was then stood up by two officers. He testified in cross-examination as follows:

Okay. Can I say something? When I got up I didn't see any female officer until we got up the little hill and we probably did like ten steps then I'd seen her. **But the whole situation at the fence, there was no female officer there.** [emphasis added].

43. There was no suggestion in his evidence that the appellant, the only female officer at the scene, kicked him once, let alone twice, while he was kneeling or sitting on the ground.
44. No officer at the scene testified that the appellant kicked Mr. Walker once, let alone twice, as described by Ms. Baptiste.
45. In our view, even recognizing limitations on the role of the Commission in an appeal, there are two bases, taken in tandem, that justify our revoking the decision of the Hearing Officer.
46. Firstly, the Hearing Officer did not decide, one way or the other, whether the appellant kicked Mr. Walker, as alleged in the Statement of Particulars, part of the

Notice of Hearing. The evidence before the Hearing Officer was not clear and convincing on this essential allegation. The only evidence of the kicks came from Ms. Baptiste. Mr. Walker testified that the appellant was not at the scene where the alleged kicking took place. Had the kicks happened, as Ms. Baptiste testified, the appellant would have been facing Mr. Walker, and he clearly would have seen the appellant kick him.

47. We accept the appellant's submission that it would be unfair to find her guilty of misconduct where no finding was made that her actions fell, even giving the particulars a considerable amount of latitude, within the particulars. The entire foundation of the prosecution's case before the Hearing Officer was the evidence of Ms. Baptiste that she saw the appellant kick Mr. Walker twice in the abdomen while handcuffed and kneeling or sitting on the ground.

48. A somewhat analogous situation occurred in **Smith v. Murdoch**, [1987] O.J. 827 (Div. Ct.) where the Court, in setting aside a finding of misconduct made by a Board against a police officer, wrote the following:

In the result, the Board found the appellant's misconduct to be different than that in the complaint and in the Respondent's evidence. They found it to have occurred in a different room and to be unintentional rather than deliberate. The evidence of this alleged offence came not from the complainant, but from the evidence called by the appellant in his defence.

The purpose of a hearing under the legislation, as the Notice of Hearing sets out, is to determine whether the officer, against whom the allegations of misconduct have been made, is guilty beyond a reasonable doubt of the particular misconduct alleged. The Board erred in finding the appellant guilty of misconduct other than that alleged in the complaint in the Notice of Hearing.

Our conclusion in this matter is not to be interpreted as a blanket holding that any minor difference between the evidence of alleged misconduct and the Statement of Particulars will justify an acquittal or the setting aside of a finding of misconduct.

49. However, in this case, the Hearing Officer did not accept or make a finding on the evidence of the prosecution's principal witness, Ms. Baptiste, that the appellant kicked Walker, the essence of the charge against the appellant.
50. Secondly, as the Court of Appeal held in *Jacobs*, the standard of proof in a PSA Hearing is that of clear and convincing evidence, a higher standard than that of a balance of probabilities. The evidence in this matter, as it related to the Statement of Particulars, was certainly not clear and convincing. In our view, the Hearing Officer, once she concluded that she could not decide if the appellant kicked Mr. Walker, as alleged in the Statement of Particulars, should have concluded that the prosecution had not met this standard of proof.

51. The Toronto Police Service and the OIPRD submitted that the Statement of Particulars was reasonable, complied with the *Statutory Powers Procedure Act*, or could be amended to reflect the evidence. The submission was made that statutes, like the *Criminal Code*, allow for amendments to charges. Given that the Hearing Officer did not actually decide if Mr. Walker was kicked twice, again, the entire basis for the charges, any proposed amendment to the Particulars would have been a substantive change and it is not clear to us if it would have been granted.
52. The Toronto Police Service submitted that the Hearing Officer correctly concluded that, under the circumstances, any use of force by the appellant was unnecessary. The degree of force applied by the appellant was not set out in the evidence or the decision of the Hearing Officer. Whatever the merit of that submission may be, our decision is based on the failure of the prosecutor to prove the misconduct, as alleged in the Statement of Particulars.

Disposition

53. Pursuant to section 87(8)(a) and (b) of the *Police Services Act*, the Commission revokes the decision of the Hearing Officer and orders a dismissal of the charge.

DATED AT TORONTO THIS 6th DAY OF SEPTEMBER, 2016.

D. S. Jovanovic

D. Stephen Jovanovic, Associate Chair

A handwritten signature in blue ink, appearing to read "D. Stephen Jovanovic", is centered within a light blue rectangular box.

Roy B. Conacher, Q.C., Vice-Chair