

ONTARIO CIVILIAN POLICE COMMISSION



DATE: 2015-08-18
FILE: 2015 ONCPC 15
CASE NAME: Wong and Toronto Police Service

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

BETWEEN:

CONSTABLE VINCENT WONG
APPELLANT/RESPONDENT

-and-

MR. JASON WALL
RESPONDENT/APPELLANT

-and-

TORONTO POLICE SERVICE
RESPONDENT

-and-

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR
INTERVENER

DECISION

Panel: *David C. Gavsie, Associate Chair
D. Stephen Jovanovic, Member
Seppo Paivalainen, Member

Hearing Date: February 24, 2015

*Mr. Gavsie did not participate in the final decision.

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

APPEARANCES:

Alan D. Gold and Melanie Webb for Const. Vincent Wong, Appellant on his appeal and Respondent on the appeal of Public Complainant, Jason Wall

Kathleen Burke for Public Complainant Jason Wall, Appellant on his appeal and Respondent on the appeal of Const. Wong

Sharon Wilmot for the Toronto Police Service, Respondent on both appeals

Miriam Saksznajder for the Office of the Independent Police Review Director, Intervener on both appeals

Introduction

1. On December 13, 2013, Constable Vincent Wong ("Const. Wong"), a member of the Toronto Police Service (the "Service"), Badge 8456, was found guilty of misconduct by making an arrest without good and sufficient cause. On March 25, 2014, a penalty was imposed upon him of suspension without pay for not less than one day.

2. Const. Wong is appealing both:
 - (a) the finding of Misconduct made against him on December 13, 2013 (the "Findings Decision") by Hearing Officer (formerly Judge) Walter Gonet (the "Hearing Officer"); and

(b) the penalty imposed against him on March 25, 2014 (the "Penalty Decision") by the Hearing Officer.

3. Mr. Jason Wall, a public complainant and party in these proceedings sought and obtained leave from the Ontario Civilian Police Commission (the "Commission") to appeal the penalty imposed. The Commission's decision was dated August 29, 2014.

Decisions

4. The Commission substitutes its own decision for that of the Hearing Officer on the finding of misconduct and confirms the Penalty Decision.

Background

5. On Sunday, June 27, 2010, while on duty, Const. Wong arrested Mr. Wall at approximately 10:00 am in downtown Toronto. The arrest took place on the morning after riots had occurred the day before in downtown Toronto during the G20 Summit.

6. Const. Wong arrested Mr. Wall for wearing a disguise i.e. a bandana, with intent to commit an indictable offence under s. 351(2) of the *Criminal Code of Canada*, R.S.C. 1985, c. C46, as amended. His belongings were searched and he remained in custody for approximately 28.5 hours. He was thereafter released without charge.

7. Mr. Wall filed a complaint with the Office of the Independent Police Review Director ("OIPRD") in respect of his arrest.
8. The OIPRD concluded that the arrest was unlawful and directed the Chief of the Service to hold a disciplinary hearing as to whether Const. Wong had committed misconduct by making an arrest without good and sufficient cause contrary to s. 2(1)(g)(i) of the Code of Conduct set out in Ontario Regulation 268/10 and therefore contrary to s. 80(1)(a) of the Police Services Act, R.S.O. 1990, c.P.15, as amended (the "Act").
9. Const. Wong was found to have committed misconduct and received a penalty of suspension without pay for not less than one day.

Grounds of Appeal

10. The three grounds of appeal as to the Findings Decision raised by Const. Wong are:
 1. The Hearing Officer erred in misapplying the standard of "clear and convincing" evidence, and in reversing the burden of proof.
 2. The Hearing Officer erred in equating the standard of proof in the Appellant's disciplinary breach to that of a Charter breach in a criminal court, and in failing to consider that not every Charter breach, including a failure to have reasonable and probable grounds for the arrest, amounts to disciplinary misconduct.

3. The Hearing Officer erred in failing to consider the relevant evidence that the Appellant had received orders from a superior officer to arrest anyone wearing a bandana for "disguise with intent".

Reasons and Analysis

11. This is an appeal on the record and the principles of appellate review are well established.
12. The standard of review that the Commission is to apply on an appeal is reasonableness for questions of fact and correctness for questions of law and interpretation of the law: see Ontario Provincial Police v. Purbrick, 2013 ONSC 2276 (Div. Ct.) and Ottawa Police Services v. Diafwila, 2015 ONSC 931 (Div. Ct.). The standard of review with respect to factual findings is reasonableness: see Dunsmuir v. New Brunswick [2008] S.C.C. No. 9.
13. The Supreme Court of Canada described the reasonableness standard as being concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. This standard is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law: see Dunsmuir, supra, at p. 47; and Newfoundland and Labrador Nursery Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62.
14. The role of the Commission on an appeal is not to second guess the decision of a hearing officer 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 transparent, logical and intelligible manner: see Purbrick, *supra*; Precious and Hamilton Police (2002), 3 O.P.R. 1561 (OCCPS); and Whitney v. Ontario (Provincial Police) [2007] O.J. No. 2668 (Div. Ct.).

15. It may be open to the Commission, in certain cases, to reach a different conclusion than that reached by the Hearing Officer. However, the Commission should only intervene if there has been an error in principle, or if relevant facts have been ignored: see Purbrick, *supra*.
16. Deference must be accorded to a hearing officer's findings unless an examination of the record shows that the conclusions reached cannot reasonably be supported by the evidence: see Blowes-Aybar and Toronto (City) Police Service, 2004 Carswell Ont 1583 (Div. Ct.).

The Hearing Officer erred in misapplying the standard of "clear and convincing evidence", and in reversing the burden of proof.

17. In so framing this ground of appeal Const. Wong is, in fact, conflating three different considerations, i.e. the standard of proof, the burden or onus of proof, and what needs to be proved to establish a breach of s.2(1)(g)(i) of the Code of Conduct. According to Const. Wong: "The burden [of proof] was upon the prosecution to prove, on clear and convincing evidence, that a) the arrest was unlawful or unnecessary, and b) it was without good and sufficient cause. Merely showing that the arrest was unlawful or unnecessary, by itself, was not sufficient".

18. At the heart of the issue is the following statement made by the Hearing Officer: "In assessing the 'clear and convincing' evidence given by all witnesses in this matter, I find that Police Constable Wong has failed to establish the objective requirement in the formulation of his belief that he had reasonable and probable grounds to make the arrest." We disagree that the statement was problematic in respect of the standard of proof; however, we do consider that the statement raises concerns about the burden of proof and what was required to be proven.
19. With respect to the issue of the standard of proof, the phrase "clear and convincing evidence" in s. 84 (1) of the Act is a reference to the nature or the quality of the evidence required. "Clear and convincing" does not prescribe a distinct standard of proof.
20. The Hearing Officer as the trier of fact was required to act with care and caution and come to a fair and reasonable conclusion that Const. Wong was guilty of misconduct. The evidence to reach this conclusion must be weighty, cogent and reliable. However, the standard of proof remains the balance of probabilities: see Jacobs v. Ottawa Police, 2015 ONSC 2240 at paras. 37 and 41 (Div. Ct.). That does not change.
21. With respect to the issue of both the burden of proof and what was required to be proved to establish a breach of s.2(1)(g)(i), the Hearing Officer began his analysis of what constitutes a legal arrest by taking the following quotation from R. v. Storrey, [1990] 1 S.C.R. 241 at para. 17:

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.

22. The requirement that it must be "objectively" established that reasonable and probable grounds for an arrest exist is intended to be an added safeguard against arbitrary arrests: R. v. Storrey.
23. The Hearing Officer concluded: "I find that Police Constable Wong has failed to satisfy the objective requirement in the formulation of his belief that he had reasonable and probable grounds to make the arrest."
24. We have two difficulties with the language used by the Hearing Officer in this statement. First, the statement is either equivocal as to which party has the burden of proof or it in fact shifted the burden of proof to Const. Wong.
25. Second, the statement did not make sufficiently clear what findings must be made to establish a breach of the Code of Conduct. The conduct proscribed by section s. 2(1)(g)(i) is the Unlawful or Unnecessary Exercise of Authority where an officer "without good or sufficient cause makes an unlawful or unnecessary arrest". There are two necessary elements that must be established to find a breach of this

provision. There must be (1) an unlawful or unnecessary arrest and (2) the officer must not have had good or sufficient cause to make the arrest.

26. A finding that the arrest did not meet the objective requirement of the *Storrey* test was relevant to both of these two elements. With respect to the first element – the lawfulness of the arrest – a finding that the arrest lacked the objective element of reasonable and probable grounds was determinative of whether it was lawful. As per *Storrey* a lawful arrest requires both subjective and objective grounds.
27. The second element – whether there was good and sufficient cause – requires a more nuanced analysis. The lack of objective grounds for the arrest is relevant but it is not necessarily determinative. It requires an analysis of other factors including the officer’s subjective belief. To be clear – and this addressed again in the next ground of appeal – acting in good faith does not necessarily satisfy the requirement of good and sufficient cause required by section 2(1)(g)(i) of the Code of Conduct: Wowchuk and Bernst v. Thunder Bay Police Service, (October 2, 2013 OCPC). It is merely one of the considerations, and each case must be examined on its own merits.
28. For the reasons above, we find that the Hearing Officer made an error with respect to both the burden of proof and the essential elements of a finding under 2(1)(g)(i) of the Code of Conduct. We deal with the implications of that finding in the disposition section below.

Equating standard of proof in disciplinary breach to that of Charter breach in criminal court

29. Counsel for Const. Wong further submitted that the Hearing Officer erred in equating the standard of proof in the Appellant's disciplinary breach to that of a Charter breach in criminal court and in failing to consider that not every Charter breach, including failure to have reasonable and probable grounds for that arrest, amounts to disciplinary misconduct. The submission is that an honest mistake on the part of the officer does not amount to outright misconduct especially in light of the entirety of the circumstances, which included the unique events of the G20 weekend in Toronto. As indicated above we disagree that good faith alone on the part of the officer committing the breach or a subjective belief of good and sufficient cause necessarily satisfies the requirements of good and sufficient cause required by section 2(1)(g)(i) of the Code of Conduct.

The Order

30. Const. Wong submitted that the main factor in his decision to arrest Mr. Wall was the existence of what he understood to be an order by his superior officer to investigate and arrest persons wearing a bandana and carrying a back pack. He submitted that conceivably he could have been charged with insubordination if he did not obey the order, and that the existence of the order should excuse the officer from the usual requirements of a lawful arrest. Finally, Const. Wong submitted that the Hearing Officer failed to consider this evidence.

31. The Panel is of the view that the Hearing Officer's consideration of this evidence was reasonable in coming to his decision regarding the lawfulness of the arrest.
32. The evidence regarding the nature of the order was conflicting as there was some variance in the evidence of the wording used by the superior officer as recalled by several witnesses. Sergeant Gibb who had issued the order could not clarify or confirm the actual wording of the order as his notes from that day were no longer available.
33. Evidence from several officers confirmed that they understood that persons wearing a bandana over the face or concealing the face were to be arrested. Sergeant Gibb stated at page 34 of the transcript that a person wearing a mask or balaclava to disguise over their face was to be stopped, investigated for the charge of "wear disguise with intent." Const. Wong's description of the wearing of the bandana was that it was over Mr. Wall's chin. He agreed that the rest of Mr. Wall's face was visible.
34. The Hearing Officer found that the bandana was not a disguise in the manner it was worn as described by Const. Wong. Also there was evidence that other members of the public wearing bandanas were not arrested for that factor alone.
35. The order itself appears to have been understood differently by several officers in attendance. His own counsel submits that Const. Wong may have misunderstood the order or instructions that were issued that Sunday morning.

36. It was suggested by Const. Wong's counsel that failure to arrest Mr. Wall in the face of the order may have exposed Const. Wong to misconduct proceedings. No evidence was presented that the failure to arrest Mr. Wall would have been considered insubordination. The Hearing Officer noted, "in accordance with the orders of the day, Police Const. Wong felt that this was a disguise and Mr. Wall was arrested." It is clear that the Hearing Officer gave consideration to the order to which Const. Wong referred.
37. Several witnesses testified that the order given by Sergeant Gibb was that anyone wearing a bandana as a disguise was "arrestable" which would suggest that any officer involved had had some further discretion in deciding whether to in fact arrest. The Hearing Officer dealt with the evidence related to the order issued that morning. He also mentioned the circumstances of that morning in the context of the difficult situation that the police and specifically Const. Wong faced. The Hearing Officer made a reasonable assessment of the evidence to the issue of whether or not the arrest was lawful.

Disposition

38. For the reasons outlined above, we find that the Hearing Officer's reasons reflected an error with respect to the burden of proof and the essential elements of section 2(1)(g)(i) of the Code of Conduct. Both errors stem from what was one equivocally-worded sentence in an otherwise thorough review of the evidence and some very specific credibility findings based on his assessment of the witnesses.

39. The Commission, however, under section 87(8) of the Act, has broad powers on appeal, including the power to substitute its own decision for that of the Hearing Officer. There was a complete evidentiary record before us as well as a detailed and thorough assessment of the evidence by the Hearing Officer. In the circumstances of this case, that record is sufficient for us to exercise our discretion under section 87(8). The arrest that led to the charge against Const. Wong occurred over five years ago. In our view, given this lapse of time and with a full evidentiary record, it would not be in the interest of the parties or the public to return this matter for a new hearing.
40. We have carefully reviewed the findings of fact made by the Hearing Officer and the transcripts of the evidence of the witnesses. The Hearing Officer found that the circumstances of the arrest of Mr. Wall "offend common sense" and he listed six factors why he reached such a conclusion. The findings of fact and any inferences of fact made by him are entitled to deference absent any palpable and overriding error as he had the advantage of hearing the evidence of all witnesses viva voce: Housen v. Nikolaisen, [2002] 2 SCR 235. It is not our role to reweigh the evidence called, nor is it, in our view, necessary in this case.
41. In our view, the Service satisfied the burden of proof in respect of the two key elements of section 2(1)(g)(i) of the Code of Conduct. The Hearing Officer rejected the Appellant's account of the circumstances of the arrest and, accordingly, found that the evidence did not support that there were objective grounds for arrest. Significantly, the Hearing Officer also rejected P.C. Wong's evidence that Mr. Wall was wearing a disguise, the bandana, preferring Mr.

Wall's evidence on this point. On that basis, the evidence was that there were neither subjective nor objective grounds on which to arrest Mr. Wall. Considered as a whole, this constituted proof, on a balance of probabilities, that the arrest was unlawful and that there was no good or sufficient cause to make the arrest.

42. Accordingly, while the decision of the Hearing Officer was based on errors of law we substitute our own finding of misconduct pursuant to section 87(8) of the Act.

Penalty Decision

43. We now will deal with the issue of the appeal of the penalty by both Const. Wong and by Mr. Wall.

Const. Wong's Grounds of Appeal Regarding Penalty

44. Const. Wong submits that the penalty imposed is harsh and excessive having regard to the circumstance of the offence. Further, that the Hearing Officer erred in finding that a combination of penalties was available for a single charge. Also, that he erred in penalizing Const. Wong for circumstances that were beyond his control including the length of time that Mr. Wall was held in custody.

Jason Wall's Grounds of Appeal Regarding Penalty

45. Mr. Wall submits that the Hearing Officer erred by not considering or by failing to give proper weight to the relevant principles and factors in determining an appropriate penalty in the Penalty Decision. Secondly, that

the penalty imposed does not reflect the proportionality of the seriousness of the misconduct. Third, that the penalty does not adequately reflect the public interest and is inconsistent with the penalties in similar cases. Finally, Mr. Wall submits that the Hearing Officer did not properly assess the need for general and specific deterrence.

46. The Service indicated its only submission regarding the Penalty Decision was the standard of review which it stated was reasonableness. In the Service's view, the Penalty Decision was reasonable. The OIPRD took no position on the issue of the appropriate penalty.

REASONS

47. The law is clear that the standard of review for a hearing officer's penalty disposition is that of reasonableness: Karklins, *supra*, at para 9:

[The Commission's] function is not to second guess the Hearing Officer or substitute our opinion. Rather, it is to assess whether or not the Hearing Officer fairly and impartially applied the relevant dispositional principles to the case before him or her. We can only vary a penalty decision where there is a clear error in principle or relevant material facts are not considered. This is not something done lightly.

48. The Commission is not permitted to reweigh the disposition factors to come to a conclusion on penalty which it believes is more appropriate. Unless there has been an error in principle, the Commission cannot interfere with a decision on penalty even if it might have come to a different

conclusion if hearing the matter at first instance: see Groot and Peel Regional Police, (April 5, 2002, OCCPS) at p. 7, and Hassan and Peel Regional Police, (September 8, 2006, OCCPS) at p. 10.

49. The Hearing Officer in his brief reasons referred to aggravating and mitigating factors. While his Penalty Decision could be criticized for brevity or for failing to more clearly articulate the factors taken into account in the discussion, we find the penalty ultimately to be reasonable. The penalty was not "harsh and excessive" as submitted by Const. Wong nor "inadequate" as submitted by Mr. Wall.
50. Const. Wong submitted that if the finding of misconduct were upheld the appropriate penalty would be a reprimand as was assessed in the similar situation in Ardiles v. Toronto Police Service, 2014 where the officer was also found guilty of misconduct for making an unlawful or unnecessary arrest during the G20 summit. The penalty in *Ardiles* was based on a joint submission of the parties so it should not be taken as the go forward precedent in all similar cases.
51. Mr. Wall submitted that the relevant factors that may be considered in the assessment of a penalty include:
 - the public interest
 - seriousness of the misconduct
 - recognition of the seriousness of the misconduct
 - procedural fairness
 - employment history
 - potential to reform the subject officer
 - effect on the subject officer and the subject officer's family

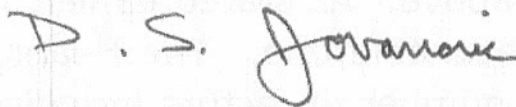
- consistency of the disposition
 - specific and general deterrence
 - organizational issue
 - damage to the reputation of the police force
 - effect of publicity and
 - the penalty should be corrective not punitive.
52. Mr. Wall submitted that the penalty should be varied to one of a suspension for not less than one day and that Const. Wong forfeit not less than six days off.
53. The imposition of a penalty is a balancing act taking into account the factors mentioned above. As stated earlier, in our view the penalty was a reasonable one. The Hearing Officer did take into account a number of factors including Const. Wong's employment history, the G20 riots of the previous day and the order or directions given by Sergeant Gibb. Both Const. Wong and Mr. Wall submitted to us other police discipline cases ranging from a reprimand to multi-day suspensions. The Hearing Officer was apparently presented with a number of these cases although he did not refer to them in his decision. He did not elaborate on the aggravating and mitigating factors he took into account in imposing the one day suspension. We have considered all of the cases submitted by the parties. Again, we find that the penalty imposed on Const. Wong by the Hearing Officer was reasonable and see no reason to decrease or increase the penalty as submitted by Const. Wong and Mr. Wall respectively.
54. On appeal, an issue was raised as to whether or not a combination of penalties is available on a single charge. The Hearing Officer ruled a combination was available but did not impose such a combination so we see no need to

comment on this issue especially in view of our dismissal of the appeals as to sentence.

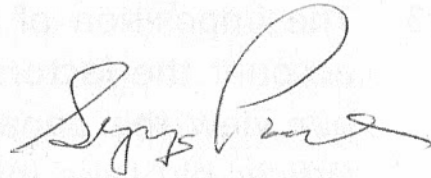
55. For these reasons:

The Commission substitutes its own decision on the finding of misconduct and confirms the Penalty Decision.

DATED AT TORONTO, THIS 18th DAY OF AUGUST, 2015



Stephen Jovanovic
Member



Seppo Paivalainen
Member