

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

GUS BAKOS

Appellant

DETECTIVE CONSTABLE GEORGE GALLANT
(HAMILTON POLICE SERVICE)

Respondent

Presiding Members:

Noëlle Caloren, Member
Garth Goodhew, Member

Appearances:

Mr. Gus Bakos, Appellant
Mr. Tom Andrew, Agent for the Respondent

Hearing Date: February 8, 2008

This is an appeal brought under section 70(3) of the Police Services Act R.S.O. 1990, c. P.15, as amended (the "Act") by Mr. Gus Bakos from a decision rendered by Deputy Chief Eric Girt (the "Hearing Officer") on June 4, 2007.

In his decision, Deputy Chief Eric Girt found Detective Constable George Gallant not guilty of the disciplinary offence of neglect of duty contrary to section 2(1)(c)(i) of the Code of Conduct contained in O. Reg.123/98, as amended (the "Code").

Background :

On June 18, 2005 Constable Darren Smith of the Hamilton Police Service (the "Service") had occasion to stop a motorcycle driven by a friend of Mr. Bakos, the Appellant. Upon ascertaining that Mr. Bakos had been placed under observation in connection with the investigation of motorcycles with suspicious histories, Constable Smith contacted Detective Constable George Gallant, who attended the scene. Following his inspection of the motorcycle, Detective Constable Gallant made the decision to seize it for further investigation.

Detective Constable Gallant determined that the motorcycle had been registered to Gus Bakos since 1999. He further determined that although the VIN number had been manually engraved on the motorcycle, it was genuine. Mr. Bakos' lawyer later conceded that his client had engraved the serial number on the engine casing.

Approximately one month later, on July 13, 2005, Detective Constable Gallant decided to release the motorcycle to the Appellant as he could not establish that the engine had been stolen.

On July 19, 2005, Mr. Bakos filed a public complaint in relation to the seizure of his motorcycle in which he alleged that Detective Constable Gallant and another officer had refused to return his motorcycle when requested and had made inappropriate comments about his sale of motorcycles. Following an investigation, on October 25, 2005, the Service advised Mr. Bakos that there was insufficient evidence to support his allegations and that no further action would be taken.

Mr. Bakos then asked for a review of the decision by the Ontario Civilian Commission on Police Services (the "Commission") pursuant to which a further investigation was ordered, specifically "to determine what actions or steps Detective Constable Gallant took" in order to comply with section 489.1(1)(b) of the Criminal Code R.S.C. 1985, c. C-46 as amended (the "Criminal Code") following the seizure of Mr. Bakos' motorcycle.

Section 489.1(1)(b) essentially requires that a police officer submit a report to a Justice of the Peace following the seizure of property subsequent to a search without a warrant. It reads as follows:

489.1(1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,

(a) where the peace officer is satisfied,

- (i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and
- (ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,

return the thing seized, on being issued a receipt therefore, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or

(b) where the peace officer is not satisfied as described in subparagraphs (a) (i) and (ii),

- (i) bring the thing seized before the justice referred to in paragraph (a),
or

- (ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained

to be dealt with by the justice in accordance with subsection 490(1).

The second investigation resulted in a similar decision by the Service on the matter of compliance with section 489.1(1)(b). Following a second request for review filed by Mr. Bakos, the Commission directed a hearing to determine whether Detective Constable Gallant neglected his duty when he failed to comply with section 489.1(1)(b) of the Criminal Code.

Accordingly, a charge of neglect of duty, contrary to section 2(1)(c)(i) of the Code was brought against Constable Gallant and was the focus of his disciplinary hearing.

The Disciplinary Hearing:

The facts of this case as presented at the hearing are not in dispute. In particular, the lawfulness of the seizure of the Appellant's motorcycle and the basis of Detective Constable Gallant's investigation were not at issue. The sole focus of the hearing was to determine Detective Constable Gallant's compliance with section 489.1(1)(b) of the Criminal Code following the seizure of the Appellant's motorcycle, and whether non-compliance could constitute a form of neglect of duty under the Code.

Detective Constable Gallant did not dispute his failure to comply with section 489.1(1)(b). He admitted to not filing the requisite report, but argued that he should not be disciplined in that his failure was not conscious or wilful and was consistent with the belief in a number of jurisdictions that the requirement to file a report did not apply to common law seizures of property.

The Prosecutor argued that discipline could be avoided only by having a lawful excuse for not fulfilling a required duty. He argued that ignorance of the law or inadvertence are not adequate defences. In his submission, the fact that Detective Constable Gallant's behaviour had not been deliberate or wilful did not constitute a legal excuse for his failure to file the requisite report.

The Prosecution submitted the following case law:

Soley and Ontario Provincial Police (1996), 3 O.P.R. 1098 (O.C.C.P.S.); Hewitt and Devine and Toronto Police Service (1999), 3 O.P.R. 1372 (O.C.C.P.S.); Gottschalk and Toronto Police Service (10 December, 2002, O.C.C.P.S.); Humphries and Kelly and Durham Regional Police Service (26 August, 2003, O.C.C.P.S.); section 489.1 of the Criminal Code; *R. v. Backhouse* (2005), O.J. No. 754 (Ont. C.A.); *R. v. Mann [2004] 3 S.C.R. 59, [2004] S.C.J. No. 49 (S.C.C.)*; *R. v. Calderon [2004] O.J. No. 3474 (Ont. C.A.)*

Detective Constable Gallant's representative referred to the following case law:

Blacks Law Dictionary; Soley and Ontario Provincial Police supra.; R. v. Backhouse supra.; R. v. Calderon supra.; R. v. Mann supra.; Ridge and Metropolitan Toronto Police Service (1995), 2 O.P.R. 1024 (O.C.C.P.S.); Gottschalk and Toronto Police Service supra; section 68(5) of the Act

The Hearing Officer rendered an eleven page decision on June 4, 2007 in which he concluded that based on the evidence and the state of the law at the relevant time he could not find Detective Constable Gallant guilty of neglect of duty. It is this conclusion that is the subject of this appeal.

POSITION OF THE APPELLANT:

The Appellant was not represented at the hearing, nor did he appear to have had the assistance of legal counsel in articulating the basis for this Appeal. In his Notice of Appeal, the Appellant expressed dissatisfaction with the Hearing Officer's decision and relies on the well known adage "ignorance is not an excuse for not complying with the law". The Appellant did not file a Factum or any written materials.

At the Appeal hearing, the Appellant requested an adjournment which was denied by this Panel on the basis that he had received ample notification as to the hearing time, date and requirements. When it became apparent that the Appellant might not have fully grasped the basis on which appeals can be made to the Commission, this Panel took a few minutes to explain to the Appellant what was expected of him and recessed to allow him to collect his thoughts and prepare his oral submissions.

Upon resumption of the Appeal hearing, the Appellant reiterated, in a summary fashion, the arguments which had been presented at the disciplinary hearing by prosecution counsel. Essentially, he argued that the Respondent had failed to comply with the provisions of section 489.1 of the Criminal Code following the seizure of his motorcycle and that this failure amounted to neglect of duty under the Code.

He further suggested that the context of this case did not provide Detective Constable Gallant with any lawful reason for failing to follow the requirements of the Criminal Code and that ignorance of the law or inadvertence did not offer an adequate defence in the circumstances. Finally, the Appellant alluded to the lengthy period of time during which he had not had access to his motorcycle as a motivating factor for his decision to file the appeal. On the basis of all of the aforementioned arguments, the Appellant requested that the decision of the Hearing Officer be reversed.

Position of the Respondent:

Mr. Tom Andrew, Executive Officer with the Hamilton Police Association, argued that the decision of the Hearing Officer should stand.

Mr. Andrew submitted in essence that no error had been made by the Hearing Officer in his consideration of the facts, which were essentially undisputed, and his application of the law to those facts.

Mr. Andrew conceded that while there was no doubt that Detective Constable Gallant had a duty to submit a report to a Justice of the Peace and that that duty had been breached through Detective Constable Gallant's actions, the policies which were in effect at all material times and applied by the Service were not clear as to common law seizures of property off premises.

Specifically, the Service had a policy in place regarding the search of premises (Policy 4.1.09) which focused on searches and seizures conducted with warrants. He argued further that coincidentally, around the time of the incident at the root of this case, the Backhouse decision was rendered, giving support to the suggestion that the scope of section 489.1 of the Criminal Code was unclear and that a credible argument could be made limiting the section's reach to express search powers under Federal legislation.

On the basis of the preceding arguments, Mr. Andrew submitted that the Hearing Officer was justified in his decision to the effect that there existed no clear and convincing evidence to support a finding of misconduct by virtue of neglect of duty by Detective Constable Gallant.

Decision:

Under section 74 of the Act, a police officer may be found guilty of misconduct if he or she contravenes the Code. This must be determined following a hearing. In a misconduct Hearing, the Hearing Officer is to review the evidence, make findings of fact and as is pertinent to this case in particular, apply the relevant law.

The standard which must be applied by the Hearing Officer to determine the existence of misconduct pursuant to section 64(10) of the Act is that of clear and convincing evidence.

On the other hand, the Commission's responsibility on appeal is somewhat different. The Commission's role in that capacity has been articulated in its 1995 decision Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.) in which it was established that it is not the Commission's role to second guess the decision of the Adjudicator.

This case is not one of fact or credibility, but rather one involving a review of certain legal requirements and practices adopted in furtherance of such legal requirements. The issue placed before the Hearing Officer in this case was whether or not the admitted failure of Detective Constable Gallant to file a report with a Justice of the Peace in accordance with the provisions of section 489.1 of the Criminal Code must be characterized as a form of misconduct, and in particular, as a form of neglect of duty contrary to section 2(1)(c)(i) of the Code.

At the hearing, the parties agreed that a finding of neglect of duty is based on the application of a two branch test. While this test has been articulated in a variety of ways, the following excerpt from the Soley decision at page 1100 captures the two elements of the test in an appropriate and comprehensive manner:

To be convicted of this charge, it must be shown that:

The member was required to perform a duty, and the member failed to perform this duty because of neglect, or did not perform the duty in a prompt or diligent manner.

Once proven, the member to avoid discipline, must then show that:

They had a lawful excuse for not performing the duty in the prescribed manner.

This appeal does not raise any issues regarding the appropriateness of the test applied by the Hearing Officer. Nor does it turn on the first branch of that test, given the Respondent's own admission that he had failed to comply with the requirements of section 489.1 of the Criminal Code by omitting to file a report to a Justice of the Peace. The core issue in this appeal is centered around the Hearing Officer's finding that Detective Constable Gallant had a lawful excuse for not performing the duty to report his seizure and retention of the Appellant's motorcycle to a justice of the peace, as prescribed by the Criminal Code.

The evidence offered at the hearing, which was reviewed in detail by the Hearing Officer, consisted of documentary evidence introduced for the purpose of establishing that the Service had a Search of Premises Policy which could not clearly be considered to address the scenario of off-premises seizures of property; and verbal evidence as to a somewhat common practice throughout Ontario for police officers not to file a report with a Justice in respect of items seized under the common law (for example stolen vehicles or similar items seized without a search of premises).

On the basis of the evidence submitted, it was argued on behalf of Detective Constable Gallant, that he had a lawful excuse for not submitting the required report because, at the time of the alleged offence, the Service, of which he was a member, did not have a clear policy instructing its officers to submit such a report. It was Detective Constable Gallant's position that neglect of duty did not occur because there was neither any willingness or a degree of neglect on the part of Detective Constable Gallant that would make the matter cross the line from what would be a mere performance issue to a form of statutory misconduct.

The Prosecutor took the position that Detective Constable Gallant did not have a lawful excuse for his failure to follow a statutory obligation, more specifically to submit a report to a Justice of the Peace. He argued that the absence of deliberate or wilful behaviour was not relevant in the case of a statutory breach of duty.

In his decision, the Hearing Officer considered the requirements of section 489.1(1) of the Criminal Code, accurately summarized the evidence pertaining to the ambiguity of Policy 4.1.09 of the Service and the practice throughout the Province on reporting seizures of property. The Hearing Officer further articulated his understanding of the law as it applied at the material times relevant to this case, highlighting the recentness of the topical Ontario Court of Appeal decision in R. v. Backhouse. He considered and applied the two-part test which the parties at the hearing agreed was generally applicable to determine the existence of neglect of duty and applied this test in a systematic way to the facts as they were presented in evidence, taking into account all of the submissions and arguments of the parties.

In his reasons, the Hearing Officer correctly identified the differences in position of the parties as they related to the second branch of the neglect of duty test. He also clearly appreciated the importance of the legal “context” in this case and the particular policing practices at issue. Referencing the Backhouse decision, which was issued on March 3, 2005, shortly before the alleged offence in this matter, the Hearing Officer found that until the issuance of the decision, there was a lack of clarity regarding the procedure applying to the preservation and return of property seized under a warrantless procedure.

The Hearing Officer’s analysis of the context and the legal developments then formed the basis for his finding that the test articulated in Hewitt and Devine, which was relied upon by the Prosecution in support of its arguments regarding the second branch of the neglect of duty test, did not apply to this case given that the duty to be followed was not sufficiently clear or explicit. In making his finding the Hearing Officer relied on the then applicable Service policy and the generalized practice regarding warrantless property seizure in Ontario.

This Panel has carefully reviewed the reasons set out in the Hearing Officer’s decision and we conclude that it was open to the Hearing Officer to find that there was not, in this case, clear and convincing evidence to support a finding of neglect of duty. In particular, we find that it was open to the Hearing Officer to conclude that the matter must be viewed as one of performance in the context of an employee/employer relationship, rather than one of statutory misconduct. The Panel is of the further view that to decide otherwise would have placed the Respondent in a difficult position given that his actions were not inconsistent with his employer’s policies and the generally followed procedure in many jurisdictions in Ontario regarding warrantless seizures of property.

The reasons, taken in their entirety, support the decision and, accordingly, this appeal is dismissed.

DATED AT TORONTO THIS 3RD DAY OF APRIL, 2009.

Noëlle Caloren
Member, OCCPS

Garth Goodhew
Member, OCCPS