

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

DUANE SIMON

Appellant

CONSTABLE DAWN LAURYSSEN AND PEEL REGIONAL POLICE SERVICE

Respondents

Presiding Members:

Roy R. Conacher, Member
Garth Goodhew, Member

Appearances:

Duane Simon, Appellant
William R. MacKenzie, Counsel for the Respondent Constable Dawn Lauryszen
Lynda A. Bordeleau, Counsel for the Respondent Peel Regional Police Service

Hearing Date: Friday, July 25, 2008

Duane Simon appeals the December 20, 2007 decision of Superintendent Frank S. Roselli (the "Hearing Officer") finding Constable Dawn Lauryszen not guilty of one count of discreditable conduct, contrary to section 74(1)(a) of the Police Services Act R.S.O. 1990, c. P.15 as amended (the "Act") and more particularly described in section 2 (1)(a)(xi) of the Code of Conduct , Regulation 123, R.R.O. 1998 (the "Code").

Background:

On February 21, 2007 Constable Dawn Lauryszen was charged with one count of discreditable conduct relating to her actions on May 25, 2004 directed towards Duane Simon, who is a police officer with the Toronto Police Service.

The Notice of Hearing issued to Constable Lauryszen read: "You are alleged to have committed Discreditable Conduct in that on May 25, 2004, while on duty you acted in a manner prejudicial or likely to bring discredit upon the reputation of the Peel Regional Police and thereby constituting an offence against discipline ..."

The circumstances leading to this charge were as follows.

On May 25, 2004, at approximately 11:10 a.m., Constable Laurysen was on duty at the Criminal Investigation Bureau at 22 Division of the Peel Regional Police Service (the "Service"). Constable Laurysen was directed by Sergeant Dale Waller to investigate a report of harassing phone calls. This report had been made by the Appellant, Duane Simon, and his allegations were directed against a former female acquaintance, TG.¹

At 11:15 a.m. Constable Laurysen contacted Duane Simon, the complainant, by telephone, who agreed to attend 22 Division. When he arrived at 12:04 p.m., he was placed in the Criminal Investigations Bureau - Interview Room "B" and was provided with a witness statement form to complete. The interview room door was locked by Constable Laurysen.

These factual circumstances were not in dispute. The locking of the interview room door would become the major contentious issue in this case.

In 2002 the revised Peel Regional Police Directive on Holding Facilities (1-B-103F) came into effect. Section L 2, page 9, of this Directive states that, "Interview room doors shall be locked when detainees (emphasis added) are left alone in the room. After locking, the officer shall physically test to ensure that the lock is secure." The Directive was silent regarding locking interview rooms when the individuals were witnesses or victims.

A further Directive (II-B-130F) was issued effective March 23, 2004 indicating, "That it is the policy of this service to operate Peel Regional Police Holding Facilities in a safe and secure manner for the protection of both members and detainees, with full respect for human dignity, according to law." Again, this Directive was silent regarding witnesses and victims.

To put this matter further in context, earlier on the same morning prior to the attendance by the Appellant at the Division, TG had attended at 22 Division and laid a complaint against Duane Simon alleging that he had assaulted her. Sergeant Waller and Detective Mark Heyes had begun an investigation of that complaint.

At approximately 12:30 p.m. on May 25, 2004, Sergeant Waller and Detective Heyes returned to 22 Division. Upon being notified that the Appellant was in Room "B", they attended upon the Appellant and began an interview in the context of their investigation of the assault complaint by TG. Constable Laurysen was asked to transcribe this conversation. At the conclusion of the interview, the Appellant was charged with assault.

Some ten months after the incidents of May 25, 2004, in a letter dated March 16, 2005 addressed to retired Chief Catney, Duane Simon made a formal complaint against the officers involved in both the investigation of his complaint against TG and the investigation of the alleged assault by him against TG.

The above described circumstances led to allegations by the Appellant that, by locking the interview room door, Constable Laurysen had detained him unlawfully and unnecessarily for a period of approximately 30 minutes. During this period he was not

¹ Name modified.

allowed to leave the room or the building. Mr. Simon also alleged that by this action, Constable Laurysen, with knowledge of the investigation of the assault complaint against him, colluded with Sergeant Waller and Detective Heyes in their investigation of that assault complaint.

He further asserted that by failing to advise him that he was a suspect in the assault investigation before he provided his witness statement, Constable Laurysen had violated his Charter rights. These allegations were denied by Constable Laurysen.

Constable Simon's complaint was investigated by Professional Standards Branch of the Service and the decision of Chief Catney was that the complaint was unsubstantiated.

Pursuant to section 72(5) of the Act, Duane Simon applied for review of that decision by the Ontario Civilian Commission on Police Services. Upon completion of the review and pursuant to section 72(8), the Commission directed that a hearing be held into the allegations of misconduct against Constable Dawn Laurysen.

The Disciplinary Hearing:

Constable Laurysen's disciplinary hearing began on February 28, 2007 and continued on September 5 and 6, November 13 and 15, and concluded on December 20, 2007. Mr. William McKenzie was Counsel for Constable Laurysen. The Respondent, Duane Simon represented himself on February 28, September 5 and 6, 2007. Mr. Michael Freeman appeared for Mr. Simon on November 13 and 15 and December 20, 2007. Ms. Lynda Bordeleau was Counsel for the Service.

Constable Laurysen pled not guilty. In the course of the disciplinary hearing, ten documents were filed as exhibits, five witnesses were called by the Prosecution, being Mr. Duane Simon, Constable David Blashuk, Staff Sergeant Michael Barnhart, Detective Mark Heyes, and Sergeant Dale Waller. Constable Laurysen was called as a witness for the Defence. Oral arguments were presented by Ms. Bordeleau, Mr. Freeman and Mr. McKenzie.

The Prosecution contended that Mr. Simon had been placed in a locked room in order to complete a witness statement as a complainant, but was kept locked in that room following its completion without his consent, thus being unlawfully and unnecessarily detained.

The Appellant testified that, in response to a telephone request from Constable Laurysen, he attended 22 Division on May 25, 2004, only to have messages taken off his pager and that Constable Laurysen agreed that he could return later to write his statement. The Appellant testified that, in fact, he did attend 22 Division voluntarily shortly after this conversation, was placed in a locked interview room and provided a blank witness statement form.

Mr. Simon subsequently expressed the belief that he had been detained in the locked interview room and held by Constable Laurysen on the instructions of Sergeant Waller who was investigating the allegation of assault against him. He further stated that he

was not told that the door would be locked and when he knocked to try to leave, his knocks were not answered. He was subsequently arrested and charged with assault. He was not cautioned as required, prior to providing his statement.

Constable Laurysen testified that she was simply following the orders of Sergeant Waller to investigate Mr. Simon's complaint of harassing phone calls and that getting Mr. Simon to complete a witness statement was part of that process. She also testified that she was not aware that Mr. Simon was a suspect in any assault investigation at any time until he was interviewed by Sergeant Waller. She further stated that she locked the door of the interview room because that was her practice in the interests of safety and security. Furthermore, she stated that she told Mr. Simon she was going to lock the door and to knock when finished or if he required assistance.

Constable Laurysen contended that she was the person who took the statement from Mr. Simon. She also asserted that she was not aware that a second investigation was being conducted involving the Appellant as a suspect until much later in the day when she was asked to transcribe the interview of Mr. Simon by Sergeant Waller and Detective Heyes. She further contends that at no time did the Appellant indicate that he wanted to leave nor did he complain about not being able to do so.

The Hearing Officer reviewed the evidence given by the witnesses and the documentation provided and considered the submissions by both the Prosecution and the Defence.

On December 20, 2007 he released his 25 page decision in which he concluded: "In viewing the facts of this case from an objective view, and in consideration of the requisite burden of proof, I am not satisfied on clear and convincing evidence that the officer's conduct was disorderly, prejudicial to discipline, or likely to bring discredit upon the reputation of the Peel Regional Police".

Accordingly, he found the officer not guilty of discreditable conduct. It is that decision which is the subject of this appeal.

Preliminary Motion:

At the commencement of this appeal, the Appellant raised a preliminary issue. He submitted that the Hearing Officer was not objective in considering all of the evidence and in the findings he made, that he misinterpreted much of the evidence and erred in law in his interpretation of what is meant by the terms 'detained' and 'unlawful detention'.

The Appellant submitted that the Hearing Officer was aware that the case before him involved an officer from another police service complaining about an officer of the Service of which the Hearing Officer was also a member. As well, the Hearing Officer was also aware that the Appellant had commenced a lawsuit against that Service. The Appellant submitted that such information was generally known through the media and also bulletins which the Service had issued about him.

Mr. Simon alleged that the Hearing Officer was trying to protect the Service and was in a direct conflict of interest and could not issue an objective decision. When questioned why he had not raised the issue of bias or conflict of interest at the hearing, the Appellant admitted that these issues were not raised by him but indicated that he was inexperienced in the hearing process, was not aware that he could have raised these issues at that stage and that he felt “ganged up on”. Prior to the hearing, he felt there was a conflict of interest and that the Hearing Officer would not be fair.

As such, he submitted that there was a reasonable apprehension of bias or conflict of interest on the part of the Hearing Officer. Mr. Simon requested the Commission to make a preliminary ruling directing a new hearing before a different hearing officer from a different police service.

Counsel for both Respondents objected to the Appellant’s position. Ms. Bordeleau pointed out that the Commission has no jurisdiction to order a new hearing and further, the Appellant had not raised these issues at the commencement of the hearing nor at anytime thereafter until he filed his appeal to the Commission. Mr. MacKenzie concurred that the Commission has no jurisdiction to make such an order.

Ruling on Motion:

The powers of the Commission on an appeal are clearly set out in section 70(6) of the Act. The Commission may confirm, vary or revoke the decision being appealed or may substitute its own decision. In our opinion, those enumerated powers do not implicitly include ordering the matter to another hearing officer for a new hearing as requested by the Appellant.

Further, neither the Appellant’s Notice of Intention to Appeal dated April 8, 2008 nor the Factum filed by the Appellant include any request for such an Order. Rule 8.2(b) of the Commission’s Rules of Practice requires the Appellant to set forth all grounds of appeal in the Notice of Appeal. The Respondents in this appeal are entitled to know the case they have to meet. The Appellant has failed to comply with the Rule.

It is well established that if a party intends to rely upon a claim of bias or reasonable apprehension of bias on the part of the adjudicator, that party must raise the objection at the earliest practical and available opportunity. Failure to do so may result in the loss of the right to impugn the proceedings particularly where the party continues to participate in such proceeding after being fully aware of the alleged nature of the disqualification and having the opportunity to object. In such circumstances where a party acquiesces in the process, there is an implied waiver of objection. Geneen v. Toronto (City) [1999] O.J. No. 149 (Gen.Div.) and Stetler v. Ontario Flue-Cured Tobacco Growers’ Marketing Board (2005), 76 O.R. 321 (Ont. C.A.)

There is a presumption of impartiality on the part of a tribunal and the onus is upon the party arguing for disqualification to establish that the circumstances justify a finding that the adjudicator must be disqualified. The evidence must be clear and not simply rest upon suspicion or speculation. Wewaykum Indian Band v. Canada [2003] 2 S.C.R. 259 (S.C.C.)

In Robertson v. Edmonton (City) Police Service [2004] A.J. No. 805 (Q.B.), similar allegations of bias were raised against a presiding officer hearing a charge against an officer in the same service. In his decision rejecting claims of bias or reasonable apprehension of bias, Slatter J. commented at paragraph 140 and 141:

To summarize, the Respondent Presiding Officer could be disqualified if he has expressed a fixed view about the guilt of the Applicant, or about some other key issue. If he had closed his mind on the subject, that would be actual bias, but an expression of a predisposition on an issue might create reasonable apprehension of bias. If he had received information about the case prejudicial to the Applicant, of a type that would not be admissible in evidence at the hearing, that might also disqualify him. The evidence is that the Respondent Presiding Officer at most heard generalized “talk” about the situation, or perhaps read newspaper reports on the issue. He heard that there were competing views about the conduct of the Applicant, and he never took one side or the other. The mere fact that the Respondent Presiding officer works with or for the E.P.S., knows many of the persons involved, and reports to the Respondent Chief is of no legal significance. There is a presumption that the adjudicator will act impartially and mere suspicion is not bias.

The test for reasonable apprehension of bias is whether a reasonable and informed observer, fully apprized of the facts, would believe that the tribunal is biased.

And at paragraph 154: “As far as questions of bias or reasonable apprehension of bias go, the standard of review is whether there is, in fact, bias on the part of the Respondent Presiding Officer, or whether there is a reasonable apprehension of bias.”

The Appellant raises the issue of bias at this appeal for the first time. The facts put forward by him regarding the connection of the Hearing Officer to the same Service as the officer subject to the charge herein and the alleged knowledge of the Hearing Officer of a lawsuit commenced by the Appellant against the Service were known by the Appellant prior to the commencement of the hearing.

The Appellant’s claims that he was unfamiliar with the hearing process or that he could raise such issue or was pressured become tenuous, in our opinion, since the Appellant was represented by legal counsel during the major part of the hearing and could have instructed counsel regarding his concerns. No evidence was presented that the Hearing Officer expressed any opinion about the Appellant’s case or had closed his mind on the issues or had taken one side or the other prior to the hearing.

We have reviewed the submissions made by the Appellant on these issues, carefully considered the evidence presented at the hearing and the Decision of the Hearing Officer and we can find no evidence that raises any concerns about bias above the threshold that must be met by the Appellant. The fact that the Hearing Officer is part of the same Service as the officer charged or that he made certain findings or interpreted

the evidence differently than expected by the Appellant alone does not constitute bias or raise a reasonable apprehension of bias. In our opinion, the claims made by the Appellant amount to mere suspicion or speculation and are not factually based.

For the above reasons, the request for an Order referring this matter to another hearing officer from another police service for a rehearing is denied.

Appellant's Position:

On the Appeal itself, Mr. Simon submitted that the Hearing Officer erred in his interpretation and analysis of the evidence, omitted considering important evidence and misconstrued evidence presented at the hearing. In support of these claims he presented the following submissions:

1. Constable Laurysen testified she had no recollection of being told the details of the assault allegation of TG against Mr. Simon but she never stated that she was not told. The Hearing Officer failed to consider that possibility.
2. Sergeant Waller's evidence was that Mr. Simon was a suspect in the assault allegation by TG but did not think that information was communicated to Constable Laurysen but later in his evidence said he told her that the investigations of Mr. Simon's complaint and TG's complaint may be linked. The Hearing Officer ignored the divergence in such evidence and accepted the evidence of Constable Laurysen.
3. Constable Laurysen's account was not supported by her notes as there was a gap in the notes between the time she commenced her shift and the time Mr. Simon came to 22 Division to make his report and it was unknown what transpired in the office during that period. It was impossible that Constable Laurysen did not hear or become aware of the investigation commenced against Mr. Simon by Sergeant Waller and Detective Heyes and had she known this information, she would have been required to caution Mr. Simon before he gave his witness statement. Again the Hearing Officer ignored this evidence and preferred the evidence of Constable Laurysen.
4. The telephone numbers given to Constable Laurysen to call the Appellant were obtained from Sergeant Waller or Detective Heyes in the course of their investigation. This further confirms that information on their investigation was relayed to Constable Laurysen. The Hearing Officer failed to consider this corroborative evidence.
5. As a result of the telephone call made by Constable Laurysen to Mr. Simon at 11:15 a.m. on May 25, she became aware Mr. Simon was at his mother's home and that Sergeant Waller and Detective Heyes must have know this information from Constable Laurysen. The Hearing Officer failed to consider this possibility in assessing the credibility of the evidence of Sergeant Waller and Detective Heyes.

6. Constable Laurysen was aware of the requirement to record certain telephone messages on Mr. Simon's cell phone confirming harassing calls from TG, being one of the main reasons he agreed to attend 22 Division, yet she failed to record these during his attendance and this constitutes evidence of her mindset that Mr. Simon was a suspect. The Hearing Officer failed to consider this evidence.
7. The witness statement made by Mr. Simon was immediately turned over by Constable Laurysen to Sergeant Waller upon the latter's return to the office and the Hearing Officer failed to consider that evidence as corroborating collusion between Constable Laurysen and Sergeant Waller and Detective Heyes.
8. The Hearing Officer was not objective in his analysis of the evidence and erred in the findings made on the issue of credibility of witnesses particularly regarding the evidence given by Mr. Simon which he submitted was discounted as evasive while Constable Laurysen's evidence was referred to as direct, consistent and responsive.
9. The Hearing Officer completely ignored the possibility that Mr. Simon was in a state of shock by the assault charge when he responded "good" when asked by the investigating officers, prior to their interview with him, how he was doing, and that his mind was not focused on the issue of being unlawfully detained by Constable Laurysen so he did not complain at the time.
10. The Hearing Officer was wrong in his finding that Mr. Simon had not made any effort to leave the Interview Room and that he had given the witness statement to Constable Laurysen. The Hearing Officer completely ignored Mr. Simon's evidence that he had knocked on the interview room door but his knocks went unanswered, and that he had given the written witness statement to a male officer who was present and opened the locked door. The Hearing Officer also failed to consider the evidence of Staff Sergeant Barnhart that the door would not normally be locked when the room was occupied by a witness or victim.
11. The Hearing Officer erred in deciding that in a secure facility one may require assistance of others to unlock doors but one is not necessarily detained.

The Appellant requested that the decision of the Hearing Officer be revoked and a finding of discreditable conduct be substituted and appropriate penalty imposed.

Respondents' Position:

Both Respondents submit that the appeal be dismissed. The submissions of the Respondents are essentially as follows:

1. The test relating to a charge of discreditable conduct by a police officer is an objective one to be measured by the standard of a reasonable person in the community having knowledge of all of the relevant facts and circumstances. Actual discredit upon the applicable police service need not be established but one must simply establish potential damage to the reputation and image of the police service

if the misconduct were to become publicly known. Girard v. Delaney (1995), 2 P.L.R. 337 (Ont. Bd. Inq.) and Mancini, Courage and Niagara Regional Police Service (August 12, 2004, O.C.C.P.S.)

In this case, the Hearing Officer correctly applied the objective test and concluded that the conduct of the officer would be considered reasonable in all the circumstances.

2. The standard of review of a decision of a Hearing Officer on appeal is one of reasonableness simpliciter. Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No.1655 (Ont. Div. Ct.). The Commission ought not to interfere with a reasonable decision and particularly so if, after a somewhat probing analysis, the reasons taken as a whole, support the decision. Law Society of New Brunswick v. Ryan [2003] 1 S.C.R. 247(S.C.C.), Favretto and Ontario Provincial Police (2002), 3 O.P.R. 1540 (O.C.C.P.S.) and Buckle v. Ontario Provincial Police [2006] O.J. No. 554 (Ont. Div. Ct.)

The Hearing Officer gave careful consideration to all of the evidence and applied the appropriate standards of proof and the reasons, taken as a whole do support the decision.

3. Matters of credibility and findings of fact are clearly within the Hearing Officer's domain. Only in exceptional cases where the reasoning is self-evidently wrong, contains clear error or cannot reasonably be accepted should the Commission interfere with the conclusions made by the Hearing Officer. Mulholland and Halton Regional Police Service (March 25, 2003, O.C.C.P.S.)

The Hearing Officer made certain findings of fact based upon his assessment of the testimony of the witnesses and the documents filed and made no manifest error in so doing and deference ought to be extended and the Commission should not interfere with these findings.

4. It is the Hearing Officer alone who has the ability to hear and see the witnesses. It is impossible from the transcripts to determine when a pause takes place in answer to a question or when eyes might be diverted or nervousness shown by a witness. Krug and Ottawa Police Service (January 21, 2003, O.C.C.P.S.). The Commission cannot, in essence, re-try the case based upon the transcripts and make findings of credibility without the benefit of hearing the evidence. Toronto (City) Police Service v. Blowes-Aybar, supra.
5. The role of the Commission is not to second guess the decision of the Hearing Officer. In certain limited cases, it may be open to the Commission to reach a different conclusion from the trier of fact. However that must be based on the strongest ground. In other words, there can be no other determination than the conclusions of the adjudicator, as to credibility of witnesses, cannot reasonably be accepted. Groat and Quinte West Police Service (2001), 3 O.P.R. 1513 (O.C.C.P.S.) and Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

6. In defining what is meant by detention there must be some form of compulsion or coercion to constitute interference with liberty or freedom of action. R. v. Therens [1985] 1 S.C.R. 613 (S.C.C.). The evidence does not disclose any compulsion or coercion exercised by Constable Laurysen on the Appellant and therefore there was no detention.
7. In his decision, the Hearing Officer clearly demonstrated that he did, in fact, conduct an objective and thorough review of the evidence and made appropriate findings of fact based upon the evidence he accepted as being credible. Under such circumstances, the Commission should not interfere with his findings nor the decision made by the Hearing Officer which is clearly supported by the evidence.
8. The Appellant was not happy with the decision of the Hearing Officer and was attempting, in this appeal, to re-litigate the issues that were decided at the disciplinary hearing.

For these reasons the Respondents requested that this appeal be denied.

Decision:

In his reasons, the Hearing Officer correctly identified the primary questions to be answered. They were, first, on an objective view of all the evidence, was Mr. Simon detained, and, second, if so, was the detention unlawful or unnecessary? The path to answering these questions was complicated by the fact that two investigations were going on at the same time and both involved Mr. Simon.

Constable Laurysen was asked to investigate Mr. Simon's complaint involving harassing phone calls from TG, and Sergeant Waller and Detective Heyes were investigating TG's allegation that she had been assaulted by Mr. Simon. The issues at the hearing included the knowledge of Constable Laurysen about the investigation being conducted by Sergeant Waller and Detective Heyes prior to her contacting the Appellant, and her intention in placing him in a locked Interview Room to provide a witness statement.

The answers to these questions involved considering whether the Appellant implicitly consented or acquiesced to being placed in and remaining in the locked interview room to write out his witness statement or whether there was a form of compulsion or coercion in putting him in a locked room at any time up to the point when Sergeant Waller and Detective Heyes began their interview of him.

In determining the extent to which Constable Laurysen was aware that Mr. Simon was a suspect in an assault allegation when he arrived at 22 Division, the Hearing Officer correctly considered and applied the standard of proof enunciated in Carmichael and Ontario Provincial Police (1998) 3 O.P.R. 1232 (O.C.C.P.S.). In that decision, at page 1238, the Commission stated that the applicable burden of proof is that of clear and convincing evidence, and that "There must be weighty, cogent and reliable evidence

upon which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct.”

At pages 20 and 21 of his decision, the Hearing Officer states, “I am not satisfied on clear and convincing evidence of the extent of the information Laurysen received. I cannot conclude that Laurysen was sufficiently informed that she could consider Mr. Simon a suspect at the time he arrived at 22 Division.”

The Hearing Officer, in addressing the issue of witness credibility, considered the case of Krug and Ottawa Police Service, supra, wherein the Commission agreed with the statements of O’Halloran, J., in Faryna v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.):

If a Trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with the purely arbitrary finding and justice would then depend on the best actors in the witness box. On reflection it becomes axiomatic that the appearance of telling the truth is but one of the elements that enters into the credibility of the evidence of a witness. Opportunity for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors is combined to produce what is called credibility ... in short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

In applying the “O’Halloran test”, the Hearing Officer did not accept the version of events as described by Mr. Simon as he did not consider his version credible.

In arriving at this conclusion, the Hearing Officer considered the factors that Mr. Simon, as an experienced police officer would know, including that requesting a written statement was a sound investigative method, and that he was not compelled either to write a statement as a witness or to remain in the police station. Mr. Simon stated that he did not know that the door of the interview room would be locked. On his own evidence he made no attempt to open the door once it was closed, or otherwise attempt to leave except to knock when he had finished the statement. Other officers testified that, upon being released, Mr. Simon did not complain about being unlawfully detained in the interview room.

The Hearing Officer concluded that this evidence was inconsistent with someone who holds the belief that he has been improperly deprived of his liberty. The Hearing Officer also rejected Mr. Simon’s belief that he was detained by Constable Laurysen in order to assist Sergeant Waller and Detective Heyes with their investigation of him. The Hearing Officer concluded that there was no circumstance which would require the apprehension of Mr. Simon at that time. He is a Toronto police officer, who could be easily located and was not likely to flee the area.

The final matter before the Hearing Officer was to determine if Constable Laurysen’s action of locking Mr. Simon in the interview room constituted discreditable conduct. In

determining this issue he applied the principles laid out in the case of Girard v. Delaney, supra.

These principles are:

- (1) The test is primarily an objective one.
- (2) The Board must measure the conduct of the officer by the reasonable expectations of the community.
- (3) In determining the reasonable expectations of the community, the Board may use its own judgment, in absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.
- (4) In applying this standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations at that time.
- (5) Because of the objective nature of the test, the subjective element of good faith is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.

The Hearing Officer applied these principles to the actions of Constable Laurysen. He concluded that the locking of the door, after advising Mr. Simon to knock should he require something and after taking into consideration the potentially volatile nature of a police station, would be viewed by the community as a reasonable measure. He accepted Constable Laurysen's explanation of her practice to maintain control and to monitor.

We have carefully reviewed the reasons for the decision of the Hearing Office. We can come to no other conclusion but that the Hearing Officer thoroughly reviewed and analyzed the evidence presented by the six witnesses, the documents filed, and correctly applied the appropriate standard of proof.

Where there were inconsistencies in the testimony of the witnesses, the Hearing Officer clearly preferred and accepted the evidence of Constable Laurysen. Mr. Simon argued that evidence was ignored by the Hearing Officer. To have accepted the evidence referred to by the Appellant would have required the Hearing Officer to infer that Constable Laurysen heard something about the assault investigation before she called the Appellant; or, to speculate on the mindset of the Appellant as to why he did not complain to Sergeant Waller about being detained; or, to speculate on the mindset of Constable Laurysen regarding why she failed to copy the messages from the Appellant's cell phone.

Much of the evidence given by Constable Laurysen was supported by the testimony of the other officers involved and the notes made at the time of these incidents. In our view, based upon the evidence before him, it was open to the Hearing Officer to find

that the allegations of misconduct by Constable Laurysen were not established by clear and convincing evidence.

In reviewing the evidence, the Hearing Officer clearly considered evidence corroborating both the Appellant's and Constable Laurysen's position and found the evidence supporting the latter to be more compelling. We can find no manifest error in his analysis of the evidence, his findings of fact and credibility and his application of the appropriate standard of proof and applicable law.

As the Commission has stated previously, matters of credibility and findings of fact are clearly within the jurisdiction of the Hearing Officer and ought not to be interfered with unless the conclusions are self-evidentially wrong, contain clear errors or cannot reasonably be accepted. Mulholland and Halton Regional Police Service, supra. We cannot retry the case on this appeal. Toronto (City) Police Services v. Blowes-Aybar, supra.

On the issue of detention, we concur with the findings of the Hearing Officer that one may be locked within a secure facility and not able to leave except by the actions of another party but yet not be detained. There must be an element of compulsion or coercion present. R. v. Therens, supra.

The factual findings made by the Hearing Officer reasonably support the conclusion that the Appellant did not raise any issue about detention at the time of the occurrence or for a substantial period thereafter. Therefore, it was open to the Hearing Officer to find that there was no compulsion or coercion applied by Constable Laurysen when she left the Appellant locked inside the interview room.

The reasons, taken as a whole, support the decision and accordingly, this appeal is dismissed.

DATED AT TORONTO THIS 3RD DAY OF OCTOBER, 2008.

Roy B. Conacher
Member, OCCPS

Garth Goodhew
Member, OCCPS