

OCCPS Decision # 08-10

CONSTABLE J.J. DEVINE
Appellant

AND

ONTARIO PROVINCIAL POLICE
Respondent

Presiding OCCPS Members:

Garth Goodhew, Member
David Edwards, Member

Appearances:

Gavin J. May, for the Appellant
Natalie Osadchy, for the Respondent

Heard:

November 18, 2008

Date of Decision:

November 26, 2008

DISCREDITABLE CONDUCT - Off-duty conduct - Drinking and driving -

Appellant pled guilty to charge of discreditable conduct but appealed penalty of two-year demotion - Off-duty accident involving Appellant's motor vehicle - Appellant failed voluntary breath sample - Parties submitted agreed statement of facts which did not include charge of deliberate delay - Delay improperly treated as an aggravating factor by Hearing Officer - Manifest error - Penalty varied to one-year demotion - Appeal allowed.

HEARING OFFICERS - Reviewable errors - Off-duty incident of drinking and driving - Contrary to agreed statement of facts, Hearing Officer found Appellant deliberately delayed calling police to avoid criminal charge - Manifest error - Penalty varied - Appeal allowed.

SENTENCING - Penalties - Grounds for intervention - Two-year demotion imposed for off-duty incident of drinking and driving - Hearing Officer erroneously departed from agreed statement of facts and found Appellant deliberately delayed calling police to avoid criminal charge - Manifest error to find delay and to treat such as an aggravating factor - Penalty varied to one-year demotion - Appeal allowed.

Summary of Reasons for Decision

Constable Devine was a third class constable with the OPP. He was charged with one count of discreditable conduct, contrary to s. 2(1)(a)(xi) of the Code of Conduct. He pled guilty to the charge. The Hearing Officer imposed a penalty of demotion from third class constable to second class constable for a period of two years. Constable Devine appealed that penalty.

While off-duty and while driving his own truck, Cst. Devine hit a patch of black ice, then slid off the road and into a ditch. He suffered a cut on his head. A passerby transported him to the Uxbridge Cottage hospital where he was treated. Constable Devine called an acquaintance for a ride back to the scene of the accident. The acquaintance then called police on Cst. Devine's behalf.

The attending officer noticed an odour of alcohol on Cst. Devine's breath and other indicia of impairment. Constable Devine voluntarily provided a breath sample, which he failed. Constable Devine was charged under the *Highway Traffic Act* and later convicted of Leave Roadway Not in Safety. He was fined \$110.

The amended notice of hearing alleged that Cst. Devine operated a motor vehicle after having consumed alcohol and that he failed a roadside breath test. Prior to amendment the notice contained two other allegations: 1) that Cst. Devine failed to notify police in a proper and timely manner; and 2) that he had been involved in another collision in the Whitby area and left the scene without notifying police. The two additional allegations were removed upon the consent of the prosecutor and defence counsel.

The parties appeared at the disciplinary hearing and submitted an agreed statement of facts. At the hearing the prosecutor specifically stated that he was not relying on the first of the additional charges, delay. Constable Devine pled guilty to the amended charge. The Hearing Officer opined that Cst. Devine "ensured that he was outside the required timelines prior to calling police to avoid the criminal charge. These evasive actions are a significant aggravating factor." The Hearing Officer then imposed the two-year demotion.

Counsel for the Appellant argued that the Hearing Officer erred in finding deliberate delay and treating it as an aggravating factor. This was a departure from the agreed statement of facts and thus a breach of natural justice. Further, counsel argued that a two-year demotion was at the extreme high end of the range of penalties for drinking and driving. The penalty was excessive and did not reflect mitigating factors, such as the Appellant's guilty plea. Counsel suggested a six-month demotion as an appropriate penalty.

Counsel for the Respondent argued that the Hearing Officer properly considered all relevant sentencing factors and made no manifest errors. Counsel contended that the appeal should be dismissed.

Held, Penalty varied; appeal allowed.

Constable Devine pled guilty to the amended charge. Despite that, the Hearing Officer found that the Appellant deliberately delayed calling police in order to avoid a criminal charge. This allegation was a departure from the agreed statement of facts and a departure from the grounds as stated by the prosecutor at the hearing. The Appellant had no notice of this additional charge or allegation and thus no opportunity to defend himself against it. Once that charge was deleted, it was a breach of natural justice for the Hearing Officer to consider it without notice to the parties.

In addition, no reason for the delay was set forth in the agreed statement of facts. By reaching a conclusion as to the reason for the delay, the Hearing Officer effectively imported fresh evidence into the agreed statement of facts.

Therefore it was a manifest error for the Hearing Officer to find delay and to treat the delay as an aggravating factor.

Drinking and driving was a serious offence. Nevertheless there were mitigating factors in this case: a guilty plea, positive performance evaluations, letters of support from co-workers and supervisors, minimal damage resulting from the accident.

In light of the manifest error, the seriousness of the misconduct and the mitigating factors, it was appropriate to vary the penalty to a one-year demotion from third class constable to second class constable.

Statutes cited

O. Reg. 123/98, s. 2(1)(a)(xi)

Authorities cited

Andrews and Midland Police Service (May 1, 2003, OCCPS #03-12)

Krug and Ottawa Police Service (Jan. 21, 2003, OCCPS #03-01)

Galassi v. Hamilton Police Services Board [2005] O.J. No. 2301 (Div. Ct.) (OCCPS JR #03-20)

Carson and Pembroke Police Service (July 27, 2001, OCCPS #01-05)

Ontario (Provincial Police) v. Favretto (2004), 72 O.R. (3d) 681 (Ont. C.A.) (OCCPS JR #02-03)

Wildeboer and Toronto Police Service (Nov. 7, 2006, OCCPS #06-10)

Carson and Pembroke Police Service (March 9, 2006, OCCPS #06-02)