

OCCPS Decision # 09-02

STAFF SERGEANT JOHN McCORMICK  
Appellant

AND

GREATER SUDBURY POLICE SERVICE  
Respondent

Presiding OCCPS Members:

David Edwards, Member  
Hyacinthe Miller, Member

Appearances:

Peter M. Brauti, for the Appellant  
Réjean Parisé, for the Respondent

Heard:

January 8, 2009

Date of Decision:

February 20, 2009

**UNNECESSARY FORCE** - Appellant participated in pursuit and arrest of individual, RG - Allegations made by other officers, that Appellant kicked and slapped RG in the head and face, were denied by both Appellant and RG - Hearing Officer found other officers credible - Evidentiary foundation for Hearing Officer's decision - No errors of law - Appeal dismissed.

**NEGLECT OF DUTY - Work records - Failure to make entries** - Pursuit and arrest of individual, RG - Injuries sustained as a result of Appellant kicking and slapping RG - Appellant failed to submit use of force report and failed to note incident in his duty book - Evidentiary foundation for Hearing Officer's conclusions that Appellant committed offences of neglect of duty and unlawful or unnecessary use of authority - No errors of law - Convictions upheld - Appeal dismissed.

**EVIDENCE - Credibility of witnesses** - Test as articulated by Supreme Court of Canada in criminal case - Divisional Court stating strict application of test not required in context of disciplinary hearings before administrative tribunals - Clear that Hearing Officer believed truth and accuracy of other officers' testimony - Failure to provide detailed reasons for rejecting Appellant's testimony not fatal - Hearing Officer applied correct burden and standard of proof - Evidentiary foundation for Hearing Officer's

decision - No errors of law - Convictions on disciplinary charges upheld - Appeal dismissed.

**DISCIPLINARY HEARING - Conduct of hearing** - Issue concerning production and introduction into evidence of arresting officer's photograph - Hearing Officer found arrested individual's testimony unreliable - Reasonable ruling not to allow photograph given Hearing Officer's view of witness's lack of credibility - Hearing Officer not erring by refusing to order disclosure of photograph and refusing to admit photograph into evidence.

**SENTENCING - Aggravating factors - Leadership position** - Appellant was a sergeant at the time of arrest incident - As supervising officer Appellant had a greater duty to ensure compliance with service policies and procedures - Penalty of demotion not excessive - Appeal dismissed.

**SENTENCING - Penalties - Demotion** - Conviction on charges of unlawful or unnecessary exercise of authority and neglect of duty - Serious and repugnant misconduct including unauthorized use of force on handcuffed individual - Relevant sentencing principles applied in fair and impartial manner - Hearing Officer did not err by imposing demotion rather than penalty of dismissal sought by Prosecutor - Appeal dismissed.

### Summary of Reasons for Decision

Staff Sergeant McCormick appealed his conviction on two disciplinary charges: neglect of duty, contrary to s. 2(1)(c)(ii) of the Code of Conduct and unlawful or unnecessary exercise of authority, contrary to s. 2(1)(g)(ii) of the Code. In addition, S/Sgt. McCormick appealed the penalty imposed, demotion to first-class constable for a period of one year.

At the time of events giving rise to the charges the Appellant was a sergeant. On January 14, 2001 he participated in the pursuit and arrest of RG. RG was apprehended and arrested by Cst. Hart, a subordinate officer in the Appellant's platoon. During a Professional Standards investigation, Cst. Hart indicated that the Appellant kicked RG in the face while he was handcuffed and compliant on the ground. Constable Train, an auxiliary officer, indicated that when he arrived on the scene RG was standing close to the police cruiser, and he saw the Appellant slap RG in the face. The Appellant denied both of these allegations.

Photographs were taken of RG's injuries while he was in custody. RG denied that it was the Appellant who was responsible for his injuries. He also denied being slapped in the face. RG maintained that the arresting officer pummelled him and pushed his face into the pavement.

The Appellant was charged with unlawful or unnecessary exercise of authority, in that he intentionally kicked RG in the head and intentionally slapped RG in the face. He was also charged with neglect of duty, in that he failed to file a use of force report or to make an entry about the incident in his duty book, all contrary to the service's policies.

Counsel for the Appellant argued that the Hearing Officer erred in refusing to order disclosure of a photograph of Cst. Hart and refusing to admit the photograph into evidence. Counsel further argued that the Hearing Officer erred in pitting witnesses against each other, contrary to the Supreme Court of Canada's decision in **R v. W.(D)**, [1991] 1 S.C.R. 742. Finally, counsel asserted that there were several errors, omissions, misapprehensions and unreasonable findings in the Hearing Officer's decision, including his assessment of the credibility of witnesses. With respect to the neglect of duty charge, counsel argued that although the Appellant's notes were sparse, his involvement in the incident was marginal and the lack of notes did not rise to the level of neglect of duty. Counsel submitted that the findings of guilt should be set aside or the penalty reduced.

Counsel for the Respondent argued that the Appellant failed to make any notes about RG's injuries. The Hearing Officer properly refused to allow a photograph of Cst. Hart to be shown to RG, whom he found to be a confused and unreliable witness. Counsel argued that **R v. W.(D)** was not applicable, since it concerned instructions given to a jury, not to a trier of fact. The Hearing Officer's reasons demonstrated that he understood and applied the proper test and burden of proof. There was ample evidence to support his findings, and the appeal against convictions and penalty should be dismissed.

*Held*, convictions and penalty upheld; appeal dismissed.

The credibility of witnesses and the reliability of their evidence were central in the disciplinary hearing. The Hearing Officer found that RG was not credible. His testimony was confused and riddled with inconsistencies. Given the Hearing Officer's views in that regard, his ruling not to allow the photograph was reasonable. Further, there was nothing to suggest that the ruling was contrary to some failure on the prosecution's part to meet a disclosure obligation.

As for Cst. Hart, the Hearing Officer accepted his explanation for having made no notation of the kick. He also concluded that Cst. Train's testimony was compelling. It was open to the Hearing Officer to accept or reject witnesses' testimony.

With respect to the Hearing Officer's failure to follow **R v. W.(D)**, the Supreme Court of Canada had said that in a criminal case it was an error for a trial judge to instruct a jury that in order to render a verdict they had to decide whether they believed the defence's evidence or the Crown's evidence. Recently the Ontario Divisional Court had commented that a strict application of the test in **R v. W.(D)** was not required in the context of disciplinary hearings before an administrative tribunal, as long as the trier of fact applies the correct burden and standard of proof (**Law Society of Upper Canada v. Neinstein, infra**). The Hearing Officer made reference to the standard of proof, and it

was clear that he believed the truth and accuracy of the testimony of Constables Hart and Train.

Although he may not have specifically stated why he did not find the Appellant's testimony to be credible, the Hearing Officer indirectly did so through his acceptance of the other officers' testimony. Failure to provide detailed reasons was not fatal. There was an evidentiary foundation for the Hearing Officer's decision, and no errors of law. Consequently the convictions had to stand.

As for penalty, the Hearing Officer noted that the Appellant had no prior disciplinary record, and had received numerous commendations and awards. However, the disciplinary charges were serious and troubling. As a supervisor, the Appellant was under a greater duty to ensure compliance with service policies and procedures.

Considering the repugnant nature of the misconduct, including the unauthorized use of force on a handcuffed individual, demotion was within the range of penalties available. The Hearing Officer identified the relevant sentencing principles, applied them in a fair and impartial manner, and committed no errors by imposing the penalty of demotion rather than the penalty of dismissal sought by the service.

#### Statutes cited

O. Reg. 123/98, ss. 2(1)(c)(ii) and 2(1)(g)(ii)  
*Police Services Act* R.S.O. 1990, c.P.15 as amended, s. 69(18)

#### Authorities cited

**Williams and Ontario Provincial Police** (1995), 2 O.P.R. 1047 (OCCPS)  
**Galassi v. Hamilton (City) Police Service** [2005] O.J. No. 2301 (Ont. Div. Ct.) (OCCPS JR#03-20)  
**R v. W.(D.)** [1991] 1 S.C.R. 742 (SCC)  
**Law Society of Upper Canada v. Neinstein** (2007), 85 O.R. (3d) 446 (Ont. Div. Ct.)  
**Trotter v. College of Nurses of Ontario** [1991] O.J. No. 348, 44 O.A.C. 302 (Gen. Div.)  
**Blackburn and Niagara Regional Police Service** (Sept. 17, 2003, OCCPS #03-22)  
**Reilly and Brockville Police Service** (1997), 3 O.P.R. 1163 (OCCPS #97-07)  
**Schofield and Metropolitan Toronto Police Service** (1984), 2 O.P.R. 613 (OPC)  
**Carson and Pembroke Police Service** (March 9, 2006, OCCPS #06-02)  
**Kyle and York Regional Police Service** (March 11, 2003, OCCPS #03-06)  
**Eschweiler and Ontario Provincial Police** (1998), 3 O.P.R. 1276 (OCCPS #98-12)  
**Konkle and Niagara Regional Police** (1992), 2 O.P.R. 927 (OCCPS)  
**Toronto (Metropolitan) Police Complaints Board** [1987] O.J. No. 1966 (Ont. Div. Ct.)  
Ceysens, Paul. Legal Aspects of Policing  
**Gulliver and Brantford Police Service** (1997), 2 O.P.R. 1175 (OCCPS #97-10)

**Fright and Hamilton-Wentworth Police Service (2002), 3 O.P.R. 1593 (OCCPS #02-09)**

**Hewlett and Ontario Provincial Police (May 16, 2007, OCCPS #07-07)**