

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE ROBERT CORREA

Appellant

TORONTO POLICE SERVICE

Respondent

Presiding Members:

Roy Conacher, Member
Hyacinthe Miller, Member

Appearances:

Harry Black, Q.C., Counsel for the Appellant
Darragh Meagher, Counsel for the Respondent

Hearing Dates: July 30 & October 22, 2008

This is an appeal from a finding of guilt made on April 11, 2007 against Constable Correa by retired Superintendent Robert Strathdee (the "Hearing Officer") on one count of misconduct contrary to section 74 (1)(a) of the Police Services Act R.S.O 1990, c. P.15 as amended (the "Act") namely, insubordination contrary to section 2(1)(b)(ii) of the Code of Conduct (the "Code") set in Ontario Regulation 123/98.

As well, this is an appeal from the penalty imposed on June 25, 2007, pursuant to section 68(1)(f) of the Act, being forfeiture of seven days or fifty-six hours off.

Background:

Constable Correa began his career with the Toronto Police Service (the "Service") in September 1984. Since then, he has worked as a uniformed officer in 52 Division, as a plainclothes constable in the Juvenile Task Force and in Central Field Command, the Toronto Drug Squad and the Drug Enforcement Unit. He was transferred to 23 Division in 2004 as a uniformed constable and moved to detective constable in the Major Crime Unit.

During 2003-2004, a task force led by the RCMP was conducting an unrelated criminal investigation into the Plainclothes Unit at 52 Division. Disciplinary charges were laid against a number of police officers. On April 26, 2004, the Chief of Police announced that the investigation had led to several officers, including Constable Correa,

being charged under the Act with certain serious misconduct offences. The charges included corrupt practice, deceit, secondary activity, discreditable conduct and insubordination.

On Tuesday, November 23, 2004, a full-page article appeared on page seven of the Toronto Sun newspaper, written by a staff writer. In that article, the author purportedly quoted Constable Correa's views on the corruption investigation and his disciplinary charges at length. He was quoted as maintaining his innocence of wrongdoing and a number of comments derogatory to the Service were directly attributed to him.

As a result of the appearance of the newspaper article, an internal investigation into the conduct of Constable Correa with respect to those comments was initiated on that same day by Detective Sergeant Craig Sanson of Professional Standards.

The grounds of appeal herein raise issues related to the sufficiency of the notices given to the officer and we therefore deem it appropriate to set out in full the notices and correspondence relating to these issues.

On November 24, 2004, Detective Sergeant Sanson completed an internal Policy, Service or Conduct Report in Form T901 which contained the following summary:

On Tuesday 23 November 2004, a newspaper article appeared in the Toronto Sun Newspaper, page 7. In the article (sic), a Police Constable is quoted (sic) at length regarding his on-going Police Service Act charges as well as comments he made regarding the Toronto Police Service.

On Friday, November 26, 2004, Detective Sergeant Sanson prepared internal correspondence Form TPS 649 marked "Notification" and personally served Constable Correa with such Notification (the "first Notification") which required such officer to contact Professional Standards within five days to schedule an investigative interview.

The first Notification read:

Pursuant to s. 56(7) of the Ontario Police Services Act and Toronto Police Service procedure entitled, 'Complaint Intake" (13 - 02) I am advising you that you have been designated as a subject officer of an internal complaint investigation, which is non-criminal in nature. A brief synopsis is as follows:

That on Tuesday 23 November 2004, a newspaper article appeared in the Toronto Sun newspaper, page seven. In it, you are quoted as discussing the on-going Police Services Act charges against you and also comments attributed by you regarding the Toronto Police Service.

You must contact Professional Standards within 5 days for the purposes of an interview regarding this matter. Please contact the writer to schedule an interview.

I also wish for you to understand that you are most certainly entitled to have legal representation present at this yet to be scheduled interview. I encourage you to contact the appropriate members of the Toronto Police Association in order to seek their guidance.

Further, please refer to our Service's conduct procedures regarding all of your rights and responsibilities.

Should you have any questions, in regards to this very important issue, please do not hesitate to contact me directly at local 8 - 7733.

From December 2004 to January 2005, three additional and similar written Notifications were issued by Detective Sergeant Sanson and served on Constable Correa.

On December 18, 2004 Constable Correa was served with another internal Notification, TPS 649 (the "second Notification") dated December 3, 2004 which added the following words to the first paragraph of the synopsis: "It is alleged that you have committed misconduct, particularly, discreditable conduct and breach of confidence." He was directed to contact Professional Standards to schedule an investigative interview which was to be held within 10 days.

On January 5, 2005, following consultation with the Service Prosecutor, Detective Sergeant Sanson prepared another Form TPS 649 (the "third Notification") with the following additions to the synopsis: "It is alleged that in discussing your Police Services Act charges you have committed misconduct, particularly, discreditable conduct and breach of confidence. It is also alleged that you have committed misconduct, particularly, discreditable conduct and breach of confidence as a result of the content of the comments in the article that were attributed to you." Constable Correa was again directed to contact Professional Standards forthwith to schedule an investigative interview which was to be held within 10 days.

On January 21, 2005, the Appellant was served with another Form TPS 649 (the "fourth Notification") dated January 19, 2005, which added the following to the synopsis: "Please find a copy of the newspaper article in question attached to this notice for your reference." The Appellant was directed to contact Professional Standards forthwith to arrange an investigative interview to be conducted within 10 days.

Each of the written Notifications was responded to by Constable Correa's legal counsel, Joanne Mulcahy, who raised issues concerning process and content. By letters dated December 1 and 22, 2004, and January 18 and 31, 2005, Ms. Mulcahy took the position that the Notifications in Form TPS 649 did not comply with section 56 (7) of the Act nor with the Service's own procedure for Complaint Intake set out in 13-02 of the Service's

Policy and Procedure Manual by failing to provide to the officer the “substance” of the complaint and in failing “to detail the information concerning the allegations”.

In her correspondence she pointed out that the Notifications did not set out the specific comments complained about, did not indicate who the complainant was, nor any particulars of the allegations of misconduct. Throughout this correspondence Ms. Mulcahy took the position that, because of these deficiencies, there was no jurisdiction to request Constable Correa to attend such interview notwithstanding the amendments to the Notifications made by Detective Sergeant Sanson.

It is not disputed that Constable Correa did not contact Professional Standards to arrange for an investigative interview in response to the issued written Notifications.

On Thursday, March 3, 2005, Detective Sergeant Sanson personally attended 23 Division and verbally issued Constable Correa a direct order to contact Professional Standards within ten days to schedule an interview. Constable Correa failed to comply with this order.

On March 10, 2005, Ms. Mulcahy wrote to Detective Sergeant Sanson indicating it was her position the order given on March 3rd was not lawful and that such order was an attempt to circumvent the legal assistance that the officer was receiving in this matter.

On April 7, 2005 Detective Sergeant Sanson issued a further Complaint Intake Form TPS901 and subsequently on the same date a TPS 649 “Notification of P.S.A. Investigation” to Constable Correa notifying him that he had committed misconduct, namely, insubordination, by failing to respond to a direct lawful order. This Notification read:

Pursuant to section 56 (7) of the Police Services Act and the Toronto Police Service Procedure 13-02, this correspondence will serve as notification that you are the subject of a Police Services Act investigation being conducted by Internal Affairs.

It is alleged that you have committed misconduct by failing to respond to a direct lawful order thereby committing insubordination.

The following issues form the substance of the complaint:

Over the time period of November 2004 and January 2005, you were personally served with four (4) notifications which clearly indicated that you were a subject officer in a non-criminal internal complaint. The notifications indicated that you were to contact and attend Professional Standards for an interview as required.

Furthermore, on Thursday 3 March 2003 (sic) at approximately 12:10 p.m. you were given a direct order, in person, by a superior officer to attend

Professional Standards within the following ten days for the purposes of an investigative interview. You failed to obey that lawful order.

Please be advised that an information brief will be prepared and submitted to Prosecution Services regarding this matter.

As a result of his failure to comply, disciplinary proceedings were initiated against Constable Correa.

On April 27, 2005, a Notice of Hearing was prepared and served on Constable Correa. The Statement of Particulars set out in that Notice was as follows:

Being a member of the Toronto Police Service attached to 23 Division.

On Friday, November 26, 2004, you were served with a written request to contact Professional Standards for the purpose of scheduling an investigative interview regarding a newspaper article published in the Toronto Sun on Tuesday, November 23, 2004, in which you allegedly made several comments about the Toronto Police Service.

From December 2004 to January 2005, 3 other similar written requests were served on you. On Thursday, March 3, 2005, you were given a direct order to contact Professional Standards to schedule an interview. You have failed to comply with this order.

In so doing you committed misconduct in that you did without lawful excuse, disobey, omit or neglect to carry out any lawful order.

The Hearing:

The hearing began on January 19, 2007. Constable Correa pled not guilty. The Prosecution called Detective Sergeant Craig Sanson, the Professional Standards investigator, as a witness. The Defence called Joanne Mulcahy, Constable Correa's legal counsel, as a witness. Submissions were made on February 7, 2007, at which time the Hearing Officer reserved his decision.

On April 11, 2007 the Hearing Officer found Constable Correa guilty of misconduct, namely, insubordination. On May 8, 2007, submissions were made on penalty. Commendations and positive evaluations, as well as character witnesses were brought forward in support of the Appellant. The Prosecutor submitted that an appropriate penalty would be forfeiture of three days. The Defence position was that the penalty should be a reprimand.

On June 25, 2007, the Hearing Officer imposed a penalty of forfeiture of seven days or 56 hours off. It is both the conviction and penalty that are being appealed.

The Issues:

The fundamental questions to be answered by the Hearing Officer were:

1. Did the Appellant receive an order?
2. If the Appellant received an order, was it a lawful order?
3. Did the Appellant disobey, neglect or omit to carry out that order?
4. If the answer to 3 is in the affirmative, then did the Appellant have a lawful excuse for doing so?

Appellant's Position:

Mr. Black made the following submissions:

He asserted that:

1. there were substantial defects in the notifications presented to Constable Correa and they did not comply with section 56 (7) of the Act or 13-02 of the Service's policy;
2. specifically, the notifications did not provide the "substance of the complaint" as required by section 56 (7) of the Act and did not provide the "detailing of the information concerning the allegations of misconduct" as required by Service Policy 13-02;
3. as a result of such non compliance, the orders given to the Appellant by Detective Sergeant Sanson were not lawful;
4. as a further result, the Hearing Officer had no jurisdiction to conduct a hearing on the charge of insubordination;
5. in convicting the Appellant, the Hearing Officer made manifest errors in his factual findings, misconstrued the evidence, made contradictory findings on credibility, permitted admission of evidence that was not relevant to the issue before the Hearing Officer and which dealt with matters beyond the scope of the hearing;
6. the Hearing Officer did not give proper weight to the Appellant's position that his good-faith reliance on advice of legal counsel constituted a lawful excuse or, in the alternative, that such reliance constituted an innocent mistake; and
7. the Hearing Officer erred in failing to consider the factor of consistency in sentencing in imposing a penalty beyond those imposed in other similar cases.

He submitted that starting with the first communication from Detective Sergeant Sanson, the Notifications failed to comply with Service Procedure 13-02 Complaint Intake in that the Service failed to provide sufficient detail for the Appellant to provide an informed response.

He drew our attention to the provisions of section 56(7) of the Act, Burns and Brownlee and Toronto Police Service (30 September, 1996, Hearing Officer Kelly), Gage v. Ontario (Attorney General) (1992), 90 D.L.R. (4th) 537 (Div. Ct.), Ontario Police Services Act 2002-2003 (Ceyssens, Dunn & Childs) and 2002 Annotated Ontario Police Services Act (Hamilton, Shilton, Mulcahy). Additionally, he outlined several definitions of 'substance' and 'detail' from the Concise Oxford Dictionary and Black's Law Dictionary.

Mr. Black noted that despite the number of letters sent from Ms. Mulcahy to the investigating officer expressing her client's position regarding the notifications, Detective Sergeant Sanson never replied in writing to any of the letters. Although there were telephone discussions between them, Mr. Black submitted that the investigating officer simply amended the Notifications adding insignificant wording that did not address the issue of providing substance and detail of the complaint.

He argued that because of these and other procedural defects, the Hearing Officer had no jurisdiction to conduct the hearing. Counsel cited Clarke and Peel Regional Police Service (18 June 2007, O.C.C.P.S.), Gage v. Ontario (Attorney General) supra., Kuntz v. Assn. of Optometrists (Saskatchewan) (1992), 8 Admin L.R. (2d) 312 (Q.B) and Forde and Ontario Secondary School Teachers' Federation (1980), 30 O.R. (2d) 169 (Div. Ct.).

He argued that as the Chief of Police had not provided "notice of the substance of the complaint" in accordance with the Act or established Service procedure, neither Constable Correa nor his counsel had the proper detail required for them to provide an informed response to the allegations. Mr. Black submitted the Service's "repeated and wrongful refusal" to inform Constable Correa of the details was contrary to law and the Hearing Officer's narrow interpretation of Gage v. Ontario (Attorney General) supra. was an error. Mr. Black stated the Hearing Officer mischaracterized Detective Sergeant Sanson's correspondence dated January 19, 2005 as "lucid, well-reasoned, logical, to the point and very unequivocal".

Furthermore, Counsel submitted that when Detective Sergeant Sanson attended 23 Division on March 3, 2005 to issue the Appellant a direct verbal order to attend at Professional Standards within ten days for an interview, that order was given without prior notification to Ms. Mulcahy. According to Mr. Black, Ms. Mulcahy wrote to Detective Sergeant Sanson on March 10, 2005. Her letter included the following statements:

It is my position this is not a lawful order.

You made this order notwithstanding that you were aware that Constable Correa has counsel and is represented by myself and notwithstanding that you have not responded to my letters of January 18th, 2005 and January 31, 2005. It appears that you are attempting to circumvent the legal assistance that Constable Correa is receiving.

Constable Correa has never received any notice that complies with the Police Services Act.

You have no legal authority to order him for an interview in these circumstances.

Mr. Black drew our attention to the testimony of Detective Sergeant Sanson who did not challenge assertions made by Ms. Mulcahy in her various pieces of correspondence. In fact, he had testified that Ms. Mulcahy had requested details of the allegations against her client and he had responded that the Appellant's comments in the newspaper article might bring the Service into disrepute, and he redrafted the subsequent communications "to clarify" the information.

Mr. Black submitted that if an officer facing allegations of misconduct is interviewed without having full knowledge of the issues, he may, during an investigative interview or in later testimony at a hearing, provide an answer that may be detrimental. This was, he argued, the situation in which Constable Correa found himself. He referred to Kuntz v. Saskatchewan Assn. of Optometrists supra.

Mr. Black submitted that, in view of the awareness of the fact that the officer had retained legal counsel and there were ongoing communications between Ms. Mulcahy, the investigator and the Service Prosecutor, the verbal order showed bad faith on the part of the Service. Furthermore, as the Appellant clearly indicated he would be seeking the advice of his counsel, and subsequently followed the advice of counsel not to participate in an investigative interview, it was incomprehensible that he would then be formally charged without the issue of proper notice being resolved to Counsel's satisfaction.

Mr. Black suggested that the order of March 3rd allowed for a 10-day period for Constable Correa to report to Professional Standards, however, a March 7th meeting already scheduled between Ms. Mulcahy and the Service Prosecutor was rescheduled to March 16th, because the Service Prosecutor had forgotten about the scheduled meeting. According to Mr. Black, there had never been any indication from counsel that the Appellant would not attend or was refusing to attend an interview. For the Hearing Officer to conclude otherwise was unfair and violated the principles of natural justice.

He argued that in finding that there were five lawful orders, the Hearing Officer failed to address the fact that each subsequent correspondence contained additional information. The Hearing Officer's statement that "this case revolves around the newspaper article" was not correct; rather, Mr. Black argued that the Hearing Officer failed to consider that over a period of time, defence Counsel was making good faith queries and that during that time, she was in discussions with the Service Prosecutor about the disposition of this charge and the other six disciplinary charges against the officer.

Mr. Black submitted the Hearing Officer stated in his decision that credibility of the witnesses was not an issue, yet he attacked Ms. Mulcahy's testimony rather than giving due consideration to the concerns she expressed to Detective Sergeant Sanson and her instructions to the Appellant. R v. Tonelli (1951), 99 C.C.C. 345 (B.C.C.A) and R v. Salai (2007), 217 C.C.C. (3d) 201 (Alta. C.A.)

Mr. Black took issue with the Hearing Officer's findings in relation to whether Constable Correa understood the nature of the allegations with respect to his comments in the newspaper article in the context of an investigative interview with Professional Standards. He submitted the Hearing Officer erred in rejecting Ms. Mulcahy's assertion that she and the Appellant had "no idea of the substance of the complaint or any details of the allegations". Further, he objected to the Hearing Officer's comment that no amount of clarification or form of lawful order would have satisfied Ms. Mulcahy sufficiently to have her permit Constable Correa to attend an investigative interview and explain his quotes. The inference that she was deliberately failing to cooperate was wrong.

Mr. Black argued that the "barebones internal correspondences that Constable Correa received never addressed what the 'substance of the complaint was or any details of the allegations'." The Hearing Officer's conclusion that Detective Sergeant Sanson "sincerely endeavoured to accommodate Constable Correa and his counsel in providing additional details" demonstrated his failure to comprehend that the issue before him was not about accommodation but rather compliance with the Act.

Counsel pointed out that Ms. Mulcahy was not cross-examined on the contents of her correspondence to Detective Sergeant Sanson. The Hearing Officer, by improperly making findings about Ms. Mulcahy's uncontradicted testimony in his Reasons for Judgment, made a mockery of the hearing process. Further, his findings were unfair, improper and inconsistent. Browne v. Dunn [1884] 6 R. 67 (H.L.), R v. Christensen [2001] B.C.J., No. 1697 (Sup. Ct.) and R v. Dyck (1970), 2 C.C.C. 283 (B.C.C.A)

He asserted that the Hearing Officer committed an error when he permitted Detective Sergeant Sanson to give evidence about Service Rules 4.3.1 and 4.3.2 and Procedure 17-01, information that had not been previously tendered to the Defence. According to Mr. Black, these were irrelevant and extraneous and violated fair hearing principles. He cited Re Golomb and College of Physicians and Surgeons (1976), 68 D.L.R. (3d) 25 (Div. Ct.) and Gill v. Canada (Attorney General) [2006] F.C.J. No.1395 (F.C.).

Mr. Black also submitted that the Hearing Officer engaged in speculation in the absence of evidence when he characterized the Appellant as having “cause for concern” about the Appellant’s quote to the Sun Reporter that Service tribunals were joked about as “kangaroo courts”. Counsel asserted that there was no evidence to support that interpretation. Mr. Black characterized Detective Sergeant Sanson’s responses to Ms. Mulcahy’s queries as minimal.

He argued the Hearing Officer misapprehended evidence, failed to consider relevant evidence and ignored evidence adduced by the Defence. R v. Zack [1999] O.J. 5747 (O.C.J.), Gill v. Canada (Attorney General) supra, and Gregg and Midland Police Service (2001), 3 O.P.R. 1522 (O.C.C.P.S.). He was wrong in making findings that the Appellant and his counsel “knew ... (he) would be questioned about his specific comments in the newspaper article” and that “Ms. Mulcahy must understand that she does not dictate how and when prosecutions may be processed and/or commenced”. Mr. Black submitted that there was no such evidence before the Hearing Officer.

With respect to lawful excuse, Mr. Black contended the Hearing Officer misinterpreted or failed to distinguish between precedent cases and the case before him. He referred to Rossi and Toronto Police Service (9 April, 1998, Hearing Officer Kelly), Deviney and Toronto Police Service (13 April, 2000, Hearing Officer Hoey), Ion and Toronto Police Service (23 February, 2007, O.C.C.P.S.), Orr and York Regional Police (2001) 3 O.P.R. 1469 (O.C.C.P.S.) and Clarke and Peel Regional Police Service supra. The Hearing Officer failed to address why the Appellant’s reliance in good faith on legal advice was not a lawful excuse, in light of Constable Correa’s acknowledged right to retain and instruct counsel. Joplin v. Chief Constable of the City of Vancouver et al (1982), 144 D.L.R. (3d) 285, (B.C.S.C); (1985), 20 D.L.R. (4th) 314 (B.C.C.A.)

He submitted that, in the alternative, the Hearing Officer erred in not finding that reliance upon legal advice in good faith supported a defence of innocent mistake. P.G. v. Ontario (Attorney General) [1996] O.J. No. 1298 (Div. Ct.), Hansen et al. and Toronto Police Service (3 August, 1994, Hearing Officer Fox), Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Div. Ct.) and Rowe and Sault Ste. Marie Police Service (23 April, 2003, O.C.C.P.S.)

Counsel for the Appellant submitted that the evidence before the Hearing Officer was not clear and convincing that the Appellant had received lawful orders or that he had been insubordinate by refusing to follow the orders. Constable Kaye (1986), 2 O.P.R. 697 (O.P.C.) and Rowe and Sault Ste. Marie Police Service (supra). The Hearing Officer failed to consider that the Appellant had a lawful excuse. Mr. Black argued that the structure of the Hearing Officer’s reasons and his approach to decision-making led him to the erroneous conclusion that the Appellant was insubordinate.

Further, the Hearing Officer erred in failing to accept the penalty submission of the Prosecutor of forfeiture of three days or twenty-four hours. Wildeboer and Toronto Police Service (7 November, 2006, O.C.C.P.S.), Watson v. Catney (2007), 84 O.R., (3d) 374 (Ont. C.A.), R v. McFarlane [1999] O.J. No. 873 (Ont. C.A.).

The penalty imposed was harsh and excessive. Gottschalk and Toronto Police Service (22 May, 2001, Hearing Officer Fitches), Blakely v. Quinte West Police Service, [2007], O.J. No. 3109 (Div. Ct.) and Schofield and Metropolitan Toronto Police Service (1984), 2 O.P.R. 613 (O.P.C.)

The Hearing Officer did not give adequate weight to Constable Correa's over twenty years of exemplary service, the positive character references and the thirty commendations and awards presented in evidence. Carson and Pembroke Police Service (2001), 3 O.P.R. 1479 (O.C.C.P.S.)

Mr. Black requested that the appeal be allowed and the finding of guilt on the charge of insubordination and the penalty be quashed or, in the alternative, that the penalty be varied to a reprimand.

Respondent's Position:

Mr. Meagher made several submissions on behalf of the Respondent.

He stated that the article that appeared in the Toronto Sun, in which Constable Correa was quoted, was the causative factor in the subsequent Professional Standards investigation and the first notice delivered to the Appellant.

He noted that a great deal of evidence in this appeal deals with 'notice' and asked us to consider the distinction between 'notice' and 'understanding'. He provided us with a synopsis of the issue arguing that, beginning with the first communication in November 2004 to the last written communication of March, 2005, each notice provided by the Service was in compliance with the Act and, in fact, subsequent amendments were only provided to address concerns raised by Appellant's counsel. He observed that while the Service is obliged to provide a notice of an internal complaint to a police officer, the Service cannot compel understanding. Further, identifying complainants, as requested by Ms. Mulcahy, goes beyond notice requirements.

Mr. Meagher contended that Clarke and Peel Regional Police Service supra is distinguishable from this proceeding because there was no delay in providing Constable Correa with notice at the earliest opportunity possible. He submitted that Mr. Black's argument the Hearing Officer had no jurisdiction to conduct the discipline hearing because of a lack of compliance with Service policy or the Act, was not correct. Further, the charge against the Appellant did not relate to his quoted comments in the newspaper article, but rather to his insubordination in failing to contact Professional Standards to arrange an interview and to his failure to follow the lawful orders of Detective Sergeant Sanson.

He did not accept that the notices from November 2004 to March 2005 were deficient. With respect to Kuntz v. Assn. of Optometrists supra., the Respondent's position is that the notices provided sufficient particulars about the nature of the allegations so that the Appellant could make a reasonably informed determination of what would be discussed

at the investigative interview. Further, the Prosecutor submitted that Constable Correa bears the ultimate responsibility for the consequences of his actions; in other words, if he chooses to rely on legal advice and follow a specific course of action, it is the officer who assumes the consequences.

With respect to Forde and Ontario Secondary School Teachers Federation supra., Mr. Meagher drew our attention to the fact that the individual in that case was not accorded the procedural safeguards required. He received a flawed notice of complaint in violation of by-laws, creating a prohibition for action on the charges made against him. In comparison, Mr. Meagher submitted the Service notices herein were in compliance with the Act and established Service procedures, providing Constable Correa not only with “notice of the substance of the complaint” referencing the newspaper article in question and providing additional information over the period of time during which the Appellant failed to obey. He acknowledged the orders were added to but argued they did not have to be because they were consistent with the Commission findings in previous cases. Gregg and Midland Police Service supra.

He argued that the questions posed by Ms. Mulcahy in her letter of January 5, 2005 relating to the third notice supports his assertion that the Appellant knew the substance of the complaint. Specifically, in referencing discussion of the disciplinary charges against Constable Correa as quoted in the Sun article, it is clear that the Appellant and his counsel knew what was the substance of the complaint and investigation, which is what the Act requires.

He submitted that the matter before the Hearing Officer was Constable Correa’s failure to comply with the order contained in the notices requiring that he schedule an interview forthwith. The Hearing Officer’s assessment of whether the Appellant was given lawful orders and neglected to follow such orders was based on fact.

In determining whether the order violated any of the Appellant’s Charter rights, Mr. Meagher asked us to consider the test and comments of the Commission as expressed in Precious and Hamilton Police Service (2002), 3 O.P.R. 1561 (O.C.C.P.S.) and Orr and York Regional Police Service supra.

With respect to Mr. Black’s assertion that it was reasonable for the Appellant to believe he did not have to attend Professional Standards, Mr. Meagher argued to the contrary. He noted that Ms. Mulcahy, while asserting in her correspondence that Detective Sergeant Sanson had no authority to order Constable Correa to an interview, did not request that the requirement for her client to attend should be delayed.

In response to Mr. Black’s argument that the principles of Deviney and Toronto Police Service supra should be applied in this case, and that we should consider the importance of what was in the mind of the officer and his counsel, Mr. Meagher responded that the Hearing Officer had considered that case, noting that it was an unusual situation not intended to become precedent.

With respect to reliance on the advice of legal counsel, Mr. Meagher submitted that in Orr and York Regional Police Service supra, the Commission concluded that an internal investigation was disciplinary in nature. Notwithstanding the officer's concerns that any questions to be asked could negatively impact on the ongoing criminal investigation, these concerns did not, however, persuade the Commission that the officer had a choice not to attend as ordered.

Counsel drew our attention to the following comments in the Orr and York Regional Police Service supra. at page 1468:

In this case at hand, the request to respond to the eight questions was made directly to Constable Orr by Inspector Kirk. It contained no caution or reference to access to legal counsel. The expressed purpose of the request was to assist the Peel officers with their investigation into the death of a child. Accordingly, in our view any response that might have been provided could not have been admitted in any subsequent criminal proceedings.

Section 13 of the Charter does not give a party the right to refuse to answer a question on the grounds that the answer might incriminate them. Rather, section 13 gives the witness the right "not to have any incriminating evidence so given used to incriminate that witness in any other proceeding".

In the circumstances of this case, it is the Service's position that a lawful order was given, that the lawful order was not followed by Constable Correa and that there was no legal authority for the Appellant not to comply.

In his decision, the Hearing Officer stated that Constable Correa knew that if he attended an interview, he would be asked about the last two paragraphs of the newspaper article, in which he is quoted making negative comments about the Service and the tribunal process. Mr. Meagher argued this was a fair assessment for the Hearing Officer to make, given that the article was referenced from the first notice onwards and specifically attached to the fourth notice. He asked us to consider the context as a challenge to the authority of the Service to order Constable Correa to contact Professional Standards and attend an investigative interview.

He outlined the Commission's position regarding the standard of review for assessing a Hearing Officer's decision as set out in Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.).

He asserted that the Hearing Officer's decision was not void of evidentiary foundation and was supported by his reasoning. Deviney and Toronto Police Service supra. Mr. Meagher noted that in Precious and Hamilton Police Service supra, the Appellant's counsel took issue with the order for Constable Precious to provide a written report in relation to an investigation into both criminal and disciplinary allegations. In this case,

Constable Correa was ordered to contact Professional Standards to arrange for an investigative interview relating to comments attributed to him in a newspaper article. He further noted that at page 1569 of the Constable Precious' decision, the Commission observed that the situation mirrored Orr and York Regional Police Service supra.

Mr. Meagher argued that each of the notices advised Constable Correa of his right to counsel. If there were concerns, the police disciplinary process afforded an officer the opportunity to address those concerns during the hearing process. He argued that only by misreading the notices could someone not understand what they were about.

He submitted this was not the same fact situation as in Yakimishyn and Peel Regional Police Service (30 July, 2008, O.C.C.P.S.) since the Hearing Officer had as evidence the notices mentioning the newspaper article as well as a copy of the newspaper article itself. He was also entitled to consider the Rules of the Service, including 4.3.0, which were available to him through his professional expertise and knowledge and thus, he was able to draw his conclusions from such information. It was open to him to consider them in assessing the legitimacy of the orders given to the Appellant and the need for Constable Correa to attend an investigative interview.

As for the Hearing Officer taking issue with the quote about a "kangaroo court" attributed to Constable Correa in the article, Mr. Meagher asked us to consider that the context was not an officer repeating a joke to a colleague or family member, but a statement that "there is a joke among police rank and file", made by a veteran police officer to a newspaper reporter. Counsel for the Respondent argued the Hearing Officer was well within the scope of his authority to characterize the statement in the manner he did, as a cause for further investigation.

With respect to Ms. Mulcahy's statement to Detective Sergeant Sanson in her letter of March 10, 2005 that he was attempting to circumvent Counsel by meeting with Constable Correa personally and giving him a direct order on March 3, 2005, the allegation was put to Detective Sergeant Sanson in cross-examination. Based on the response, the Hearing Officer was entitled to find that Detective Sergeant Sanson was not attending 23 Division to pursue a discussion with the Appellant or attempt to obtain a statement, but simply to issue, a lawful order, in the face of Constable Correa's previous failure to obey four written orders.

Mr. Meagher submitted the key elements to be considered when imposing a penalty, referring to Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758, Favretto and Ontario Provincial Police (2002), 3 O.P.R. 1540 (O.C.C.P.S.) and Williams and Ontario Provincial Police, supra. Mr. Meagher indicated that the Hearing Officer had considered the nature and seriousness of the misconduct and all of the other enumerated factors and that the conviction and sentence of a loss of seven days or fifty six hours was appropriate. There was no clear or manifest error and the penalty was consistent and within the range of appropriate penalties in other similar cases involving insubordination.

Finally, he submitted that the appeal should be dismissed.

Decision:

It is a well established principle that an appellate authority like this Commission should only intervene if a hearing officer has made a manifest error, ignored relevant evidence, misunderstood the evidence or drawn erroneous conclusions from it.

As expressed by this Commission in Carmichael and Ontario Provincial Police (1998), 3 O.P.R. 1232 (O.C.C.P.S.) at page 1238:

The applicable burden of proof in this case is that of “clear and convincing evidence”. 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. We agree with the Appellant that the Commission can review whether there has been clear and convincing evidence presented. We also agree with the Respondent that generally it is not our role to assess the credibility of the witnesses. In the normal course of events, it is the Hearing Officer who has the benefit of seeing the witnesses, hearing their testimony and assessing its weight or value.

The Commission’s role on appeal of a finding of guilt has been often cited as set out in Williams and Ontario Provincial Police supra at page 1058:

Our role or function in such matters is not to second guess the decision of the adjudicator. In certain limited cases, it would be open for us 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 the credibility of witnesses, cannot be reasonably accepted.

The question to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

This test was also described in Wilson and Ontario Provincial Police (20 November, 2006, O.C.C.P.S.) at page 7:

This can be a difficult test for an Appellant to meet. The words “void of evidentiary foundation” clearly contemplate that appellate interference with evidentiary findings will be exercised sparingly. Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.)

Commission appeals are on the record. Not only do we hear from counsel for an appellant and respondent, we have the opportunity to review all of the evidence submitted, including transcripts of sworn testimony, physical evidence such as photographs, audiotapes and police documentation. However, we do not have the benefit of seeing and hearing the witnesses.

In order to address these principles on the facts of this case, it is necessary to answer a number of questions.

First, did the Appellant receive an order? Second, was it lawful? Specifically, did the four written Notifications and the verbal direction to Constable Correa comply with section 56 (7) of the Act and Service Policy 13-02?

Constable Correa was quoted in an article appearing in the Toronto Sun, a major newspaper, on November 23, 2004. In that article which, according to the undisputed evidence of Detective Sergeant Sanson, the staff writer “stands by”, the Appellant is identified as “Rob Correa”, a Toronto Police Service officer with “an unblemished 20-year record”. He was “going public with a demand that an outside service probe ‘unfair’ corruption charges against him so he can clear his name”. He was quoted as saying the allegations that he and another officer had made secret commissions are “based on a mistake”, that “everybody was just doing this out of the goodness of their hearts”. The article also purported to quote Constable Correa as saying “there is a joke among the rank and file that the Toronto Police Tribunal is a ‘Kangaroo court’ and means ‘plead guilty or be found guilty. They hold all the cards; they are the investigators, prosecutors, the judge and executioner’.”

On the same day that the article appeared, the Service initiated a Professional Standards investigation. Three days afterwards, on November 26, 2004, Constable Correa was served with a notice directing that he contact Professional Standards to arrange an interview. He was advised the interview was “to be conducted within 10 calendar days” of the notice being served, which would have been December 6, 2004. He failed to do so. Three subsequent Notifications were issued and served upon him, each incorporating the initial wording but adding additional wording as noted.

These Notifications were pursuant to section 56(7) of the Act which states:

56(7) Where a complaint is about the conduct of a police officer, the chief of police shall forthwith give the police officer notice of the substance of the complaint unless, in the chief of police’s opinion, to do so might prejudice the investigation.

We agree with the Hearing Officer that the four written Notifications issued from November 26, 2004 to January 19, 2005 and served upon Constable Correa contained the degree of substance and detail required by section 56(7) of the Act and 13-02 of the Service’s policies such the Appellant was required to comply with the orders contained therein.

We cannot agree that the processing of the complaint against Constable Correa was improper or unfair.

As stated many times before by this Commission, police disciplinary hearings are labour relation matters and not criminal or quasi-criminal proceedings. It is important to note

that the Notifications issued to this officer were to advise him of a complaint and direct him to attend an **investigative interview**. (emphasis added)

As the Hearing Officer stated at page 24 of his reasons:

The Service Prosecutor referred to defence counsel's comment that the Correa matter deals with off-duty conduct and the Service Prosecutor responded by stating that that is the essence of it 'we don't know'. All we do know is that the article appeared in the Toronto Sun newspaper on Tuesday, November 23, 2004. There is no reference as to when Constable Correa was interviewed by the author of the article ... It is not known where the interview occurred or how it took place, and that is why it was necessary to interview Constable Correa.'

The Service Prosecutor asked the rhetorical questions, 'Who knows better what went on than the person involved? That was why the interview was essential to clarify the article and the circumstances, such as was he on-duty or off-duty, the contents of the comments, have the comments been taken out of context, are the quotes accurate? All that information is being held captive by Constable Correa.'" (Hearing Decision, April 11, 2007, pp. 24-25)

The factual circumstances of each case must be examined carefully. In our opinion, the notification must, firstly, set out sufficient information to constitute a warning or caution to the officer that there has been a complaint made against the officer and, secondly, must provide a general summary or synopsis of the available fundamental or basic information forming the basis for such complaint at that time.

In these types of circumstances, it would be unreasonable to require the Service to provide "substance" or "details" of information not within its knowledge and which it seeks to ascertain or verify through the process of the investigative interview.

In a labour relations context, to establish a higher threshold for notifications in such circumstances, similar to an information in a criminal or quasi-criminal process, would not be appropriate.

It is instructive to review procedure 13-02 Complaint Intake. It states that "the (complaints) system is designed to be thorough and yet be administered without unnecessary delay". In addition to quoting the governing authorities and forms to be used, it provides definitions and outlines procedures to be followed, including notifications. Overall, the intentions and process contained in 13-02 are clear, simple and amenable to plain language interpretation.

Parsing out individual words such as "substance" and "detailing" does not negate the evidence before the Hearing Officer that the Notifications provided to this officer reasonably outlined the fundamental or basic information forming the basis for the complaint at that time and justify the requests for the Appellant to contact Professional Standards "forthwith" or immediately. The fact that Constable Correa's counsel

corresponded with Detective Sergeant Sanson requesting more detail does not invalidate the November 26th notice or the subsequent notices nor relieve the officer from the duty to comply.

The second Notification dated January 5, 2005 particularized the allegations that the Appellant “in discussing...Police Services Act charges...committed misconduct, particularly, discreditable conduct and breach of confidence... as a result of the content of the comments in the article that were attributed to you.” He was directed to contact Professional Standards forthwith, to arrange for an investigative interview. The evidence shows that having received five such directions, he did not do so.

The Hearing Officer considered Gage v. Ontario (Attorney General) supra. and distinguished the facts from this case, as Gage dealt with a ten-month delay rather than the substance of the notice. As the Hearing Officer rightly noted, Constable Correa received notice within three days of the alleged occurrence.

We recognize that the first order could have been framed more expansively, but there are key elements which point unequivocally to the substance of the issue: “you have been designated as a Subject Officer of an internal complaint investigation which is non-criminal in nature”, “on Tuesday 23 November 2004”, “A newspaper article appeared in the Toronto Sun Newspaper, page 7”, “you are quoted as discussing the on-going Police Service Act charges against you”, “comments attributed by you regarding the Service”. A reasonable person with no knowledge of the specifics would be able to determine what the notice was about.

Further, the Appellant was told of the requirement for him to contact Professional Standards within five days to schedule an interview, he was advised of his entitlement to legal representation, encouraged to contact the police association for guidance and referred to Service conduct procedures regarding his rights and responsibilities.

We agree with the Hearing Officer’s finding that by January 19, 2005, the notice delivered to the Appellant was “lucid, well-reasoned, logical, to the point and unequivocal”. Even if the previous notices had been deemed non-compliant with the statutory and Service policy requirements, which we have determined they were not, we concur with the Hearing Officer’s finding that the notice issued on that date was clear and Constable Correa was in receipt of a lawful order that he was required to obey.

We therefore conclude that no manifest error was committed by the Hearing Officer in finding that lawful orders were issued to Constable Correa. In view of this finding, we cannot agree that the Hearing Officer lacked jurisdiction to proceed with the disciplinary hearing.

On the third issue before the Hearing Officer, there was no dispute that Constable Correa did not comply with any of the orders to contact Professional Standards to arrange an investigative interview.

The Appellant raised numerous grounds of appeal relating to perceived errors made by the Hearing Officer with respect to his interpretations of the evidence in his reasons and argued that the Hearing Officer's language was intemperate and his treatment of the testimony of the Appellant's counsel, disrespectful.

With respect to those perceived or actual inconsistencies or errors, we adopt the reasoning of the Divisional Court in Galassi v. and Hamilton (City) Police Service [2005] O.J. No. 2301 (Div. Ct.) at page 19:

In reviewing the reasons of a lay tribunal, the task of this Court is not to be overly critical of the language used, nor is it to focus on mistakes that do not affect the decision as a whole (Re Del Core and Ontario College of Pharmacists (1985), 51 O.R. (2nd) 1 (Ont. C.A.)). This approach must be kept in mind when the reasons of the Hearing Officer are examined, as he is not legally trained.

Was the language used by the Hearing Officer somewhat florid, overblown or excessive at times? Perhaps, but those expressions do not undermine the essential clarity of his reasons in his findings that lawful orders existed, that Constable Correa failed to follow those lawful orders and that the officer did not have a lawful excuse for failing to obey.

We find that the Hearing Officer's observation about Detective Sergeant Sanson's efforts to "accommodate" Ms. Mulcahy's requests for additional details was just that, an observation about the ongoing dialogue.

In our view, these issues do not affect his findings in the context of the evidence heard. His choice of words does not rise to the level where it invalidates his approach to the evidence or his assessment of the Appellant's misconduct.

With respect, we do not agree with the submission that the Hearing Officer's refusal to accept Ms. Mulcahy's opinion evidence was fundamentally wrong, unfair or an error and an attack on her credibility. Her testimony consisted primarily of her legal opinion relating to the interpretation and application of the Act and Service policies. Having made the observation that she was a credible witness, however, the Hearing Officer was not bound to accept and adopt her opinions as his own.

It is well established that hearing officers may bring to disciplinary proceedings both their practical and specialized knowledge of the workings of their police services. This allows a hearing officer both to understand and interpret the evidence and to determine what evidence is relevant. Certainly, we see no reason why this principle cannot extend to familiarity with the elements of what constitutes a lawful order to a police officer.

In reviewing the reasons of a hearing officer it is not our role or function to be overly critical of the language used or to focus on mistakes that do not affect the decision as a whole. This is in recognition of the fact that the hearing officer is a lay tribunal without formal legal training. As a lay tribunal, the Statutory Powers and Procedures Act R.S.O.

1990, c. S.22 as amended affords a hearing officer broad discretionary authority to accept evidence that may be relevant to the issues before the tribunal, and we can find no fault with the Hearing Officer accepting the Service Rules as an exhibit. There was evidence that Detective Sergeant Sanson had reviewed the Rules prior to preparing the notice to Constable Correa to contact Professional Standards, which made them relevant in the context of providing background information to the actions taken by Detective Sergeant Sanson.

In analyzing the reasons of the Hearing Officer, he drew certain inferences from the evidence and we find no substantive error in the conclusions and findings made relating to the essential elements of the offence. Whether or not Constable Correa knew or understood the import of the notices he received is not determinative of the issue of compliance with the Act and Service policies. The test is an objective one. The statements of the Hearing Officer that Constable Correa knew he had committed misconduct when he gave the interview with the newspaper or that he knew the questions he would face in the investigative interview are not material to the consideration of the lawfulness of the notices and the orders contained therein.

In terms of assessing credibility, the Hearing Officer reviewed the evidence before him, which included many positive character and employment references. He acknowledged the Appellant's "enviable career", noting that the officer was "a mature, competent and congenial police officer who would appear to have made a valuable contribution in every role assigned to him" and who "during the investigation that preceded six prior disciplinary charges being laid, Constable Correa had cooperated fully with the investigators."¹

The Hearing Officer was correct in his statements that the Appellant had every right to retain and instruct counsel, but also that counsel "cannot dictate how and when prosecutions may be processed and/or commenced".

There was evidence upon which the Hearing Officer could find that the submissions that either Constable Correa was relying in good faith on the advice of his counsel or that he made an honest or innocent mistake are simply not credible. As we have noted in previous decisions, police officers are held to a higher standard considering the special status that they have in society. Yakimishyn and Peel Regional Police Service supra., Bright v Konkle (1997), 2 P.L.R. 481 (Ont. Bd. Inq.) and Precious and Hamilton Police Service supra. The Appellant is a seasoned police officer who has worked in several high profile units. His stated reliance on the advice of legal counsel does not relieve him of the duty to obey a lawful order. It perhaps explains the motivation for Constable Correa's actions, but it does not alter the principle enunciated in other cases that reliance upon legal advice does not provide a lawful excuse for failing to comply with or disobeying a lawful order. Christiano and Metropolitan Toronto Police Service (1997), 3 O.P.R. 1126 (O.C.C.P.S.) at 1128

¹ Penalty Decision - June 25, 2007, page 2

In summary, there was clear and convincing evidence before the Hearing Officer upon which he could find that the Appellant committed misconduct when he failed to respond to the lawful written notices and the direct verbal order.

On the fourth issue of whether the Appellant has established a lawful excuse for disobeying, neglecting or omitting to carry out a lawful order, we concur with the Hearing Officer that Constable Correa had no lawful excuse.

Having carefully reviewed the reasons for decision and the record, we conclude that the findings of the Hearing Officer on these four issues are not void of evidentiary foundation and, in this case, there were no manifest errors committed which would require the Commission to intervene.

The appeal against conviction is therefore dismissed.

With respect to penalty, this Commission has stated that our function is not to second guess a hearing officer's decision, even if we might have imposed a different disposition. Rather, our role is to assess whether or not the hearing officer fairly and impartially applied the principles of sentencing and properly considered all relevant matters. Where there is a manifest error in principle, or the proper considerations are ignored, we may vary a disposition. This is not done lightly. Quintieri and Toronto Police Service (2002), 3 O.P.R. 1509 (O.C.C.P.S.) and Allen and Hamilton-Wentworth Regional Police Service supra., Wildeboer and Toronto Police Service, supra.

Further, the role of the Commission on appeal of a penalty is clear and well understood. As was noted in Carson and Pembroke Police Service supra., at pages 14 to 15:

The factors to be taken into account when assessing a suitable penalty are well established. In Williams and Ontario Provincial Police this Commission identified three key elements. They include the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police service that would occur if the officer remained on the force.

Further considerations can include the need for deterrence, provocation or concerns arising from management's approach. Other factors can be relevant, either mitigating or aggravating a penalty, depending on the conduct in question. These include the officer's employment history and experience, recognition of the seriousness of the transgression and handicap or other relevant personal considerations.

In addition, when imposing a penalty, it is important to take into account prior disciplinary cases dealing with similar types of misconduct. This is to ensure consistency.

Our function in a disciplinary appeal is not to second-guess the hearing officer or substitute our own opinion. Rather, it is to assess whether or not the Hearing Officer fairly and impartially applied these principles and properly considered all relevant matters. Where there is a manifest error in principle or the proper factors are ignored, we may vary the disposition. This is not lightly done.

Did the Hearing Officer fairly and impartially apply the principles of sentencing and properly consider all relevant matters with respect to penalty and does the penalty fall within an appropriate range?

The Hearing Officer had evidence before him that five lawful orders had been given and that they had been disobeyed. He considered the serious nature of the misconduct in which a veteran officer repeatedly failed to obey four written orders and one verbal order to contact Professional Standards forthwith to schedule an investigative interview.² He was clear that the charge was not related to what was quoted in the newspaper article, but for failing to obey a lawful order. He relied on Thompson and Chatham Police Service (1977), 1 O.P.R. 342 (O.P.C.).

He considered the factor of the officer's recognition of the seriousness of the misconduct and/or remorse and noted that the officer's lack of recognition or any remorse was exhibited by the fact that Constable Correa still has not been interviewed in relation to the newspaper article and consequently remains defiant of the five lawful orders. He concluded that the "blatant disregard and contempt" of Constable Correa was a challenge to the good order of the Service and "grossly offends the public interest" and that the officer's conduct "portrays a disturbing impression of an officer who is readily amenable to defying management's lawful orders". These are strong statements, but within his authority to conclude based upon the evidence and the findings made.

Clearly, the Hearing Officer also considered the commendable work history of this officer and the positive character references in determining that but for those factors he would have considered reduction in rank as an appropriate penalty.

In determining a penalty that was within an appropriate range under the circumstances, the Hearing Officer considered the need for general and specific deterrence for police officers who cannot "pick and choose" which orders they will comply with. He considered the potential damage to the reputation to the Service and the effective management of the police force. In our opinion, the Hearing Officer did not err by imposing a penalty that was at the higher end of the scale of penalties set in other cases.

In weighing the Appellant's submission that a suitable penalty would be a reprimand and the Service Prosecutor's suggestion of a three-day loss of pay should be applied,

² Conviction Decision – April 11, 2007, page 45

the Hearing Officer carefully assessed the most appropriate cases made available to him and concluded that the submissions of counsel were not binding. Wildeboer and Toronto Police Service, supra.

Further, consistency of penalty is not an “absolute”. There is a range of penalties that have been imposed for similar fact situations, however, the mitigating and aggravating factors vary considerably. See Precious and Hamilton Police Service supra., Gregg and Midland Police Service supra. and Orr and York Regional Police Service supra. In this case the Hearing Officer determined that the repeated failure of the officer to comply with the orders was an aggravating factor and the mitigating factor was the officer’s positive employment record and character references.

In Thompson and Chatham Police Service supra., at page 345, it was stated that:

This Commission takes a serious view of deliberate disobedience of orders, properly authorized by statute and by authorities given responsibility under the statute. The Commission is of the opinion that if the decision as to whether or not a lawful order should be obeyed is a subjective one, then chaos must be the result and the complete breakdown of policing which would undermine the force to a degree as to make it impotent and create anarchy. There are saving procedures to protect constables against tyrannical and illegal orders, but the method chosen by the appellant to challenge the system, assuming that he was sincere in his convictions, was completely improper.

We agree with these comments.

We do not accept the Appellant’s argument that he was reasonably relying on advice of counsel, or that he honestly or innocently relied on what he felt was reasonable legal advice and he should not be found guilty of insubordination. This was not the case of an uninformed civilian or novice police officer blindly following the advice of counsel. Retaining legal counsel does not shield a police officer from his sworn duty to obey a lawful order. Nor can relying on legal advice cloak or defend his choice to defy a lawful order. Constable Correa was being asked to report for an investigative interview to account for statements attributed to him.

The role of a police officer carries considerable authority. With that authority comes accountability. Constable Correa is an experienced police officer with over twenty-four years of service in a number of capacities including Central Command, the Drug and Major Crime Units. According to character evidence, he is competent, popular, a team player and well thought of. He had no previous disciplinary infractions recorded on his personnel file. However, it has been found that he disobeyed five lawful orders with respect to contacting Professional Standards to arrange an interview. We agree that obeying lawful orders is non-negotiable. The community must have confidence in officers sworn to serve and protect.

The Hearing Officer found Constable Correa guilty of one count of insubordination for wilfully disobeying five lawful orders. Having reviewed the cases presented by the Appellant and the Respondent and the reasons of the Hearing Officer on the issue of penalty, we can find no manifest error in principle or lack of consideration of the appropriate factors of sentencing that would entitle us to vary the penalty imposed.

For these reasons, we dismiss the appeal.

DATED AT TORONTO THIS 19TH DAY OF FEBRUARY, 2009.

Roy Conacher
Member, OCCPS

Hyacinthe Miller
Member, OCCPS