

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

STAFF SERGEANT JOHN McCORMICK

Appellant

GREATER SUDBURY POLICE SERVICE

Respondent

Presiding Members:

David Edwards, Member
Hyacinthe Miller, Member

Appearances:

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

Hearing Date: Thursday, January 8, 2009

Staff Sergeant McCormick appeals a finding of guilt for one count of neglect of duty contrary to section 2(1)(c)(ii) of the Code of Conduct found at Ontario Regulation 123/98 (the “Code”) and one count of unlawful or unnecessary exercise of authority, contrary to section 2 (1)(g)(ii) of the Code, as well as the penalty of demotion to first-class constable for a period of one year, imposed against him on January 11, 2008 and May 16, 2008 respectively, by Superintendent (retired) Robert J. Fitches (the “Hearing Officer”).

Background:

Staff Sergeant McCormick joined the Sudbury Regional Police Service (the “Service”) in March 1990 as a cadet. He progressed through the ranks, with assignments in uniform patrol and the drug unit. He was promoted to sergeant in October of 2000 and to staff sergeant in March 2004.

In 2004, the Professional Standards Unit of the Service initiated an investigation into numerous and varied events that occurred between January 2001 and October 2005 involving Staff Sergeant McCormick. Included was an incident during an arrest in early 2001 in which injuries were sustained by a person in custody, RG.¹

¹ Name modified.

Due to the nature of some of the allegations, the rank of the Appellant and to ensure impartiality, the North Bay Police Service was requested to assist in investigating potential criminal matters and the Toronto Police Service was asked to investigate any possible disciplinary misconduct.

The incident giving rise to the matters addressed in this appeal occurred on January 14, 2001 at around 10:30 in the morning. RG, a resident of the town of Sudbury, got into an argument with LL² his girlfriend at the time. He left the residence taking with him a child's black backpack. At some point shortly after, a young police officer on patrol in the area of the Ryan Heights storefront office received information from three unidentified children that LL was pursuing a man on foot, screaming, "[RG] ... there's a warrant for [RG]."

The young constable conducted a CPIC/OMPPAC check and confirmed there was an outstanding warrant for RG's arrest, dating back to July 2000. The information was broadcast over the police radio system along with a description and details about the general direction in which RG was headed. The constable initiated a grid search and spotted RG, who was holding a black backpack, at the intersection of Kathleen and College Street. RG was confronted and given a verbal command to stop and wait to be questioned; however, he ran from the area towards a pedestrian footbridge, pursued by members of the Service.

Shortly afterward RG was apprehended by Constable Hart in the area of Eva Street. He was then arrested, handcuffed and placed in the rear passenger side of the vehicle. A quantity of drugs was found in a vial in his pocket. The backpack was found nearby and returned to LL, who was belligerent, abusive and reluctant to give a statement.

During an interview that was part of the Professional Standards' investigation, Constable Hart (who was in Staff Sergeant McCormick's platoon in 2001) indicated that during RG's arrest, after he had been handcuffed and was compliant on the ground, Staff Sergeant McCormick exited his supervisor's vehicle, approached and then kicked RG in the face for no reason. He then turned around and walked away.

Constable Train (an auxiliary officer at the time of the events in question) indicated that when he arrived on the scene, RG was standing close to the police cruiser with Constable Hart and Staff Sergeant McCormick standing on either side of him. He then saw the Appellant slap RG in the face.

When interviewed by the Professional Standards investigators some time later, RG stated that he had not been slapped or kicked in the head, but rather he had been pummeled and had his face pushed into the pavement by the arresting officer.

Staff Sergeant McCormick denied that anything untoward had occurred.

² Name modified.

The Hearing:

The Appellant was served Notice on June 13, 2006 of seven charges of disciplinary misconduct. Following a motion filed by counsel for the Appellant, the Hearing Officer quashed five charges on the basis that the Service had not complied with section 69 (18) of the Police Services Act R.S.O. 1990, c. P.15 as amended.

That left two remaining charges. The Statement of Particulars with respect to the alleged neglect of duty read as follows:

That on the 14th of January 2001 you were on duty in the capacity of uniform supervisor.

That you attended in the area of Eva Street and participated in the arrest of [RG].

That you were aware [RG] suffered injuries as a result of you kicking him in the head.

That you failed to submit a use of force report which is contrary to service policy ADM 012 section 3(1)(b)(i) which states: A member shall submit a use of force report, where the member, who during the performance of their duties: is required to use physical force which results in an injury.

That you failed to note in your duty book the pertinent information as to your participation in this incident relating to the criminal offenses committed by [RG] contrary to service policy ADM 013 section 6(h) which states: All information pertaining to offenses, investigations and incidents shall be recorded ...

The essential aspects of the Statement of Particulars with respect to the alleged unlawful or unnecessary use of authority read:

That Cst Hart had [RG] on the ground and in custody and you intentionally kicked [RG] in the head causing injury.

That you intentionally slapped [RG] while he was at the back of the cruiser, under arrest and compliant ...

Staff Sergeant McCormick's disciplinary hearing with respect to these matters began on November 19, 2007 and continued on November 21 and 22.

Constables Chris Hart, Steven Train and Neil McNamara appeared on behalf of the Service. RG was called as a witness by the Defence. Staff Sergeant McCormick gave testimony in his own defence.

Fourteen exhibits were received, including transcripts of witness and officer statements, documents from medical personnel at the Sudbury Jail, photographs of RG's injuries,

copies of his arrest report and criminal record, the Service Fleet list for 2001, officers' notes and street maps and photographs of the area around which the incidents occurred.

Submissions were tabled on November 23, 2007. On January 11, 2008, the Hearing Officer released a fourteen page written decision. He set out the allegations against Staff Sergeant McCormick and reviewed the evidence and submissions of counsel. He found there was clear and convincing evidence to support a finding of guilt for both neglect of duty and unlawful or unnecessary exercise of authority.

On May 16, 2008 he issued a sixteen page penalty decision directing that Staff Sergeant McCormick be demoted to first-class constable for a period of one year, after which time he be permitted to enter the promotional process and attempt to qualify for promotions in the normal manner.

Staff Sergeant McCormick is appealing the findings of guilt and the penalty assessed.

Appellant's Position:

Mr. Peter Brauti appeared for Staff Sergeant McCormick.

In his factum he raised three grounds for appeal.

First, he argued that the Prosecution failed in its duty to disclose when it refused to provide a photograph of Constable Hart and that the Hearing Officer erred at law when he refused to order such disclosure and further ruled that the photograph would not be admitted into evidence.

Mr. Brauti asserted that in the face of RG's testimony during cross-examination that he could identify the officer who injured him, the Hearing Officer should have permitted the Appellant's counsel to show RG a photograph of Constable Hart. Mr. Brauti contended the photograph was relevant, it was in the possession of the Prosecution and no privilege was being claimed.

Second, Mr. Brauti argued that the Hearing Officer erred at law when he misapprehended and misapplied the clear and convincing burden of proof test. He submitted that there was not weighty, cogent or reliable evidence of either a kick or slap by Staff Sergeant McCormick. In relation to the kick, only Constable Hart testified that the kick occurred. Staff Sergeant McCormick and the victim denied that a kick took place. As to the slap, only Constable Train testified that the slap occurred. Constable McNamara saw neither a kick nor a slap.

He suggested that the Hearing Officer misunderstood the test to be applied in assessing evidence when he concluded at page 13 of his January 11, 2008 decision:

For me to accept Sergeant McCormick's version of these events, I would have to believe that Constable Hart is either lying or mistaken and that Constable Train is either lying or mistaken. I believe neither of these.

He asserted that the Supreme Court of Canada had rejected such approaches in Regina v. W.(D.) [1991] 1 S.C.R. 742. While acknowledging that case was a criminal one with a different standard of proof, he suggested that the Hearing Officer should not have pitted the witnesses against each other.

Third, he submitted that there were errors, omissions, misapprehensions and unreasonableness in the decision of the Hearing Officer.

Mr. Brauti described a number of elements of the evidence which he suggested the Hearing Officer failed to refer to and which would have rendered his finding of certain facts to be unreasonable. For example, the Hearing Officer noted that Constable Hart testified that the kick caused the injury to RG's nose, but then neglected to note in his decision that Constable Hart, under cross examination, stated that the injury may have resulted from RG's nose being pushed into the pavement while he was resisting being handcuffed by Constable Hart.

Counsel for the Appellant asserted that the Hearing Officer provided no reasons for rejecting the testimony of the Appellant.

He argued that the Hearing Officer made an improper finding that RG's testimony was influenced by drug or alcohol use. The Hearing Officer himself noted that "I am not qualified to assess the likely effect of such a drug on a particular individual", and further the Hearing Officer had no evidence that RG had been using Percocet improperly or drinking that morning.

He submitted that the Hearing Officer unfairly rejected RG's testimony due to his confusion about the type/size of the Supervisor's vehicle. Further, without evidence, the Hearing Officer improperly concluded that RG would not have been able to see the party who kicked him, because of his prone position.

He argued that the Hearing Officer erred in assessing the credibility of Constable Hart. Hart failed to make any note of the matter and did not report the incident to anyone. He suggested that testimony given by Constable McNamara and Constable Hart may have been discussed before the disciplinary hearing. The Hearing Officer should have taken this into consideration. Constable Hart was the arresting officer and the person who, according to Mr. Brauti, could logically be the officer identified in RG's testimony as the party who kicked him. Mr. Brauti noted he was troubled by the fact the word 'pavement' was crossed out in Constable Hart's notebook and replaced by the word "ground". Further, Constable Hart testified that Mr. Giroux was compliant but RG's evidence was that he consistently runs from police and resists when arrested.

Further, Mr. Brauti suggested that the Hearing Officer fell into the trap of thinking he had to disbelieve other witnesses to find Staff Sergeant McCormick not guilty. He was not correct when he concluded that "there can be no logical or reasonable explanation for Constable Hart fabricating this story, since these events only came to light as part of a much larger investigation about assaults on persons in custody and that RG did not formally complain that he had been assaulted". Constable Hart's motivation to lie would be to shift the blame from himself to the Appellant.

He asserted that the Hearing Officer erred in assessing the credibility of Constable Train. He had no notes of the matter, nor did he report it to anyone. His recollection of the events was vague. He was inexperienced at the time and admitted that he may have been wrong about his observation of a strike taking place and the timeline he remembered. Having made hundreds of arrests since 2001, it is not surprising the Appellant has limited recollection of what occurred.

Mr. Brauti agreed that the Appellant's notes were sparse, but given his marginal involvement in the matter, the lack of notes did not rise to the level of a neglect of duty. He drew our attention to the Staff Sergeant's notebooks accumulated over a number of years, in which he recorded whenever he was involved in a use of force situation.

Mr. Brauti acknowledged there was evidence Staff Sergeant McCormick was dispatched to the scene, that he saw RG, participated in some way in the containment and saw Constable Hart with RG. He asked us, however, to consider that events unfolded as RG said, that there was a foot chase, that he was apprehended by Constable Hart, that Constable Hart was annoyed that he had to engage in a foot pursuit and, in the heat of the moment of arrest, RG's face came into contact with the pavement.

He submitted that the two findings of guilt should be set aside or in the alternative, having regard to the circumstances, the penalty should be reduced.

Respondent's Position:

Mr. Parisé represented the Service.

He suggested that we bear in mind the following facts. The photos in evidence and the testimony of the attending officers indicate that RG had suffered an injury. His bleeding was incident to his arrest, a condition that should have been evident to all of the officers present. The Appellant made no notes about this injury. Mr. Parisé asked us to remember that Staff Sergeant McCormick was the supervising officer. He acknowledged that he was at the scene of the arrest and at the police station when RG was "booked". One would have assumed that as a supervisor he would have questioned the injury and made a notation of it, but neither occurred. He questioned the Appellant's stated reliance on the booking officer at the holding facility to determine what happened to cause RG's injury.

With respect to the Appellant's assertion the Prosecution should have called RG as a witness he submitted that the Prosecution viewed RG as unreliable. He was involved in two similar incidents, one in January 2001 and the second in November 2001, that both included a foot chase prior to arrest.

RG was totally confused about the facts, in that he did not recall consistent details about the older officer who drove up in what he described as a small supervisor's van. He does not clearly recall the various injuries he claimed, nor that he was taken to hospital or that he was in Sudbury jail for only a brief period of time (rather than the month he asserted). Accordingly, the Prosecution did not call him as a witness.

He argued that the Hearing Officer was correct in refusing to allow a photograph of Constable Hart being shown to RG. The issue was not one of disclosure, but related to counsel for the Appellant desiring to re-examine his own witness, RG, and introduce evidence with limited probative value in the face of RG's admission that the other two officers on scene could have been involved. The standard argued for introducing the photo of Constable Hart during the disciplinary tribunal was a criminal law standard.

The Hearing Officer was rightfully concerned about the reliability of the evidence in general and specifically due to the earlier evidence of RG, in which he was confused about the events that unfolded. He submitted that this was a reasonable ruling by the Hearing Officer. With respect to LL's witness statement that RG was a user of alcohol and possibly drugs, the Hearing Officer properly characterized her evidence when he stated RG 'may' have been under the influence.

Further, RG had accepted as fair, the outline LL provided about the possibility of his impairment by drugs or alcohol at the time. RG's assertion that the officer initially chasing him on foot (Constable Train) attacked him was wrong. His assertion that the officer who first tried to stop him at the intersection of College and Kathleen (Constable Ealdama) had struck him was wrong, based on police records.

Mr. Parisé drew our attention to the transcript of police audio communications that day, during which the Appellant confirmed he saw RG and was involved in his pursuit and arrest.

Mr. Parisé asserted that the methodology of the R v. W. (D) supra does not apply here. In that case, the concern was with respect to assessment of credibility and instructions given to a jury, not to a trier of fact. He submitted that the Divisional Court in Law Society of Upper Canada v. Neinstein (2007), 85 O.R. (3d) 446 rejected the idea of the application of Regina v. W (D) supra in administrative cases.

He submitted that Law Society of Upper Canada v. Neinstein also confirms that the failure of an adjudicator to mention certain evidence or to provide specific reasons for its rejection is not fatal to a decision. He argued that the Hearing Officer's Reasons for Decision, demonstrated he understood the proper test and burden of proof.

He asserted that based on the test of appellant review, there is ample evidence to support the Hearing Officer's findings. Evidence provided by Constables Hart, McNamara and Train were clear and uncontradicted in many aspects by the Appellant. While Staff Sergeant McCormick's testimony is that his recollection of being involved in RG's containment was vague, the evidence places him there and in a supervisory position.

He drew our attention to the Commission's role in reviewing findings based upon credibility as enunciated in Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.).

He noted that the question to be asked is whether the conclusions of the hearing officer are void of evidentiary foundation. Karklins and Toronto Police Service (25 September,

2007, O.C.C.P.S.) Further, he pointed out that we may intervene in the face of clear errors of law or obvious misapprehensions of evidence. Stone and Toronto Police Service (4 July, 2007, O.C.C.P.S.)

In summary, Mr. Parisé asserted that both the appeals against convictions and penalty be dismissed.

Decision:

The first issue to be dealt with is the appeal of the findings of guilt.

The Commission's role on appeal of a finding of guilt is described at page 1058 of Williams and Ontario Provincial Police supra:

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 spoken to 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.

It is also important to keep in mind the comment of the Divisional Court in Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 at paragraph 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.

How does this apply to the facts of this appeal?

At the Appellant's disciplinary hearing the question of the credibility of the witnesses and the reliability of their evidence was central. Constable Hart testified that the Appellant kicked RG in the face while RG was prone on the ground, compliant and handcuffed. The Appellant and RG denied that occurred. Constable Train testified that he saw Staff Sergeant McCormick slap RG. RG testified that he had not been slapped. Constable Hart, who was standing beside RG, testified that he did not see a slap and the Appellant testified that he did not slap RG.

The issue raised by the Appellant regarding the production and introduction of the photograph of Constable Hart has two aspects to it. Did the Prosecution have an obligation to provide the Defence with the photograph, and secondly, was the Hearing Officer's ruling to prohibit the production of a picture of anyone to RG reasonable?

The Hearing Officer considered the evidence and concluded that RG was not credible.

[RG] presented himself as someone who had a fair number of facts at his disposal, but someone who was unable to clearly define which facts went with a variety of similar incidents.³

This is the Hearing Officer's finding, after hearing all of the witnesses' testimony over a number of days. His speculation as to the "number of possibilities for this" does not detract from his finding that RG's testimony is confused.

RG's testimony is riddled with inconsistencies. The Hearing Officer's finding is not void of an evidentiary foundation.

Given the above, the Hearing Officer was quite clear that he was very concerned about the usefulness of presenting photographs to RG following comments made in cross-examination that he might be able to identify the officer who assaulted him:

I have serious concerns about it, showing this witness a picture of anybody, whether it's Constable Hart or anybody else ... I have some conditions around evidence and I have to have some belief that it's reliable ... When we couple those observations with observations I've made this morning, my concern about it is tripled. So I'm not in the least prepared to go through - to me it would be an exercise in futility no matter what the witness says.⁴

Based upon the Hearing Officer's view of the lack of credibility of the witness, this is a reasonable ruling. As well, there is certainly nothing to suggest that this somehow represents a failure on the part of the Prosecution to meet an ongoing disclosure obligation.

The Hearing Officer next considered the credibility of Constable Hart. He dealt with the troubling fact that Constable Hart had made no notation of the kick and did not report

³ Decision, page 10

⁴ Vol 4 Transcript, page 820

the kick. He accepted Constable Hart's reasons for such omission. It is open to the Hearing Officer to accept or reject this testimony. In fact it is the Hearing Officer's job to make such decisions.

The Hearing Officer listened to Constable Hart. He observed Constable Hart and then he applied the appropriate test for weighing the evidence, the O'Hallaran Test, and concluded "I am left with no doubt whatsoever that what he testified to did, in fact, occur".⁵

The Hearing Officer's observation that "(t)here can be no logical or reasonable explanation for Constable Hart fabricating this story, since these events only came to light as part of a much larger investigation and that RG did not formally complain that he had been assaulted" is an observation and is not the basis for his finding.

The Hearing Officer next considered the credibility of Constable Train. Applying the same process as he applied to Constable Hart's testimony he concluded that his testimony was "compelling" and that the hand strike occurred while RG was handcuffed. Further, he concluded although there were indications of resistance on RG's part, such resistance did not justify the slap.⁶

All of the above findings of the Hearing Officer were not void of an evidentiary foundation.

With respect to Staff Sergeant McCormick's testimony the Hearing Officer commented as follows:

For me to accept Sergeant McCormick's version of these events, I would have to believe that Constable Hart is either lying or mistaken and that Constable Train is either lying or mistaken. I believe neither of these.

In R. v. W. (D.) supra., the Supreme Court of Canada stated that in a criminal case it was an error for a trial judge to instruct a jury that in order to render a verdict the jury had to decide whether they believed the Defence evidence or the Crown's evidence.

The Divisional Court of Ontario commented upon the applicability of this approach to an administrative hearing.

While the reasoning in W. (D.) may be of assistance to a trier of fact faced with an assessment of credibility, the strict application of the test in W. (D.) is not required in the context of disciplinary hearings before administrative tribunals. A failure to follow the test is not fatal provided the trier of fact applies the correct burden and standard of proof. Law Society of Upper Canada v. Neinstein supra, paragraph 58

The Hearing Officer analyzed the evidence against Staff Sergeant McCormick in relation to the allegation of directing Constable McNamara to ensure that Constable

⁵ Decision, page 11

⁶ Ibid, page 12

Train withheld information. He noted that the evidence fell “well short of the standard of proof required in these matters”, and earlier stated that “before I were to make such a finding against Sergeant McCormick, the evidence would have to be crystal-clear, unambiguous and of significant weight”.⁷ From earlier statements it is clear that the Hearing Officer believed the truth and accuracy of the testimony of Constables Hart and Train.

Although it may have been preferable for the Hearing Officer to state specifically the reasons why he did not find Staff Sergeant McCormick’s testimony to be credible, he has indirectly done so through his acceptance of the testimony of Constables Hart and Train where it contradicted Staff Sergeant McCormick’s evidence. There is no requirement for him to itemize each point of acceptance. As well, the failure to provide detailed reasons is not fatal. Law Society of Upper Canada v. Neinsten supra, at paragraph 84 and Trotter v. College of Nurses of Ontario [1991] O.J. No. 348, 44 O.A.C. 302 (Gen. Div)

Appeals to the Commission are on the record. Our task is not to re-try the matter. Nor is it to substitute our view for that of the Hearing Officer. Had we been the adjudicator at the disciplinary hearing, we may or may not have made the same findings as the Hearing Officer. However, if there is an evidentiary foundation for his decision and absent an error at law, the Hearing Officer’s decision must stand.

The Hearing Officer’s decision is not void of an evidentiary foundation. He not only examined the evidence before him, he also discussed at some length his evaluation of that evidence and the testimony which he heard first-hand. There are no errors of law. The findings of guilt must stand and the appeal as to guilt is dismissed.

The Appellant also challenges the penalty imposed by the Hearing Officer.

When hearing an appeal from a penalty the role of the Commission is clear. It is not to substitute our opinion for that of the Hearing Officer, even if we would have reached a different conclusion based on the evidence. Rather, it is to assess whether the Hearing Officer applied the correct dispositional principles in a fair and impartial manner.

We may vary a penalty only if we find that it is unreasonable, fails to consider all relevant matters, demonstrates a manifest error in principle, or would amount to an injustice. Williams and Ontario Provincial Police, supra, and Blackburn and Niagara Regional Police Service (17 September, 2003, O.C.C.P.S.)

The factors to be taken into account by a hearing officer when imposing a penalty are well established. There are three key elements to be considered. These 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.

There are other factors to be considered in light of particular misconduct. These include:

⁷ Decision pages 12 and 13

- recognition of the seriousness of the misconduct;
- employment record; and,
- public interest in the administration of justice.

Additional relevant factors can include management's approach to the misconduct in question, general or specific deterrence, and the need for consistency. Reilly and Brockville Police Service (1997), 3 O.P.R. 1163 (O.C.C.P.S.), and Schofield and Metropolitan Toronto Police Service (1984), 2 O.P.R. 613 (O.P.C.)

We agree with Mr. Brauti that unlike Carson and Pembroke Police Service (9 March, 2006, O.C.C.P.S.) there was no suggestion of protracted misconduct nor was there a record of performance difficulties. Kyle and York Regional Police Service (11 March, 2003, O.C.C.P.S.), Eschweiler and Ontario Provincial Police (1998), 3 O.P.R. 1276 (O.C.C.P.S) and Konkle and Niagara Regional Police (1992), 2 O.P.R. 927 (O.C.C.P.S.)

The Hearing Officer acknowledged Defence arguments in support of demotion, rather than dismissal. They included information on the Appellant's personnel file that indicated he had received numerous commendations, awards and other tributes, had no previous disciplinary record and had been an exemplary officer. The Hearing Officer noted the submissions relating to work history and penalty and the principle "a respondent officer is entitled to the most favourable disposition in the circumstances of the case, where possible". Toronto (Metropolitan) Police Complaints Board [1987] O.J. No. 1966 (Div. Ct), Legal Aspects of Policing, Ceysens, Paul and Gulliver and Brantford Police Service (1997), 2 O.P.R. 1175 (O.C.C.P.S.)

The charges represent the first recorded blot on an otherwise unblemished work record. They are, however, serious and troubling. Staff Sergeant McCormick was, at the time of the misconduct, a sergeant. His responsibilities included supervision of subordinate officers and ensuring that the constables on scene satisfactorily performed their duties. It is clear RG was injured. While all of the officers should have been aware of their responsibilities with respect to care of a person in custody, Sergeant McCormick had a greater duty to ensure compliance with Service policies and procedures incident to RG's arrest.

We do not accept Mr. Brauti's argument that Staff Sergeant McCormick's lack of recollection of events is evidence of his lack of active involvement in application of unauthorized force to RG. Staff Sergeant McCormick was the only sergeant on duty and on the road during that shift. He was dispatched to the scene and arrived in a supervisor's vehicle. He participated in the foot chase and the arrest. As the Commission has enunciated previously, "supervisors must supervise." Fright and Hamilton-Wentworth Police Service (2002), 3 O.P.R. 1593 (O.C.C.P.S.) and Hewlett and Ontario Provincial Police (16 May, 2007, O.C.C.P.S.)

Any penalty imposed must comply with the principle of progressive discipline. At the time of the events of January 14, 2001, the Appellant was a sergeant. In light of the nature of the misconduct committed by the Appellant, at trial the Prosecution had sought a penalty of dismissal. The Hearing Officer considered the appropriate

disposition factors with respect to penalty and decided that a penalty short of dismissal was appropriate in the circumstances.

The misconduct for which the Appellant was found guilty was repugnant, including unauthorized use of force on a handcuffed individual. Demotion is within the range of penalties available to the Hearing Officer.

The Hearing Officer considered the two findings of misconduct, observing that Staff Sergeant McCormick failed in his “responsible position to oversee the operations, performance and activities of subordinate members of the Greater Sudbury Police Service.”

We find that the Hearing Officer identified the relevant sentencing principles and applied them in a fair and impartial manner and did not commit an error when he assessed a penalty of demotion rather than the penalty of dismissal sought by the Service.

Accordingly, we uphold the penalty.

DATED AT TORONTO THIS 20TH DAY OF FEBRUARY 2009.

Dave Edwards
Member, OCCPS

Hyacinthe Miller
Member, OCCPS