

OCPC Decision # 10-03

CONSTABLE NICK CHEUNG AND
CONSTABLE SEAN MCGRATH
Appellants

And

TORONTO POLICE SERVICE AND
PAUL JOSEPH HOLMES
Respondents

Presiding OCPC Members:

Murray Chitra, Chair

Hyacinthe Miller, Member

Appearances:

David Butt, for the Appellants

Robert Fredericks, for Toronto Police Service

Paul Holmes, Complainant

Heard:

February 25, 2010

Date of Decision:

April 23, 2010

DISCREDITABLE CONDUCT – Disorderly or prejudicial conduct - Applicable test - Test for discreditable conduct primarily objective in nature - Hearing Officer properly identified test and addressed question of the public's reasonable expectations - Whether police officer's intent a relevant factor - Regardless of whether good faith intentions part of the test for discreditable conduct, in this case factor of intent not assisting Appellants - Unauthorized entry into private dwelling would offend reasonable expectations of the public - Appeal dismissed.

DISCREDITABLE CONDUCT - Disorderly or prejudicial conduct - Appellants responded to call from landlord who had difficulty collecting rent from tenant - Appellants entered tenant's dwelling unlawfully - Pre-conditions for a warrantless entry not present - Appellants committed a trespass - Unauthorized entry into private dwelling would offend reasonable expectations of the public - Appeal dismissed.

PROCEDURAL ISSUES - Notice - Preliminary motion by Complainant that counsel for Appellants failed to serve him with notice of appeal and related documentation in a timely manner - Complainant eventually provided with necessary materials - Right to participate in appeal hearing not prejudiced by delay - Alternative remedies sought by Complainant either unwarranted or outside scope of Commission's jurisdiction - Motion denied.

Summary of Reasons for Decision

On October 10, 2008 the Hearing Officer found Constable Cheung and Constable McGrath guilty of one count each of discreditable conduct, contrary to s. 2(1)(a)(xi) of the Code of Conduct. They appealed their convictions. Initially, they also appealed the penalty imposed, forfeiture of 3 days or 24 hours off. Prior to the hearing of the appeal Cst. McGrath passed away. Constable Cheung continued with his appeal of the conviction, but not the penalty.

The events giving rise to the conviction arose out of a landlord tenant dispute. In 2006 the Complainant, Mr. Holmes, was renting a basement apartment. His landlady, K.A., lived on the main floor. They shared a laundry room in the basement; the rest of the basement was Mr. Holmes' private dwelling.

On August 15, 2006 K.A. visited Mr. Holmes in his apartment to ask about his overdue rent. Mr. Holmes closed the door in her face and refused to talk to her. She then phoned the service's non-emergency number and asked officers to attend and speak to Mr. Holmes about why he wouldn't talk to her and his non-payment of rent.

Constables McGrath and Cheung responded to the call. They spoke to K.A. first, who then led them to the basement. Constable McGrath knocked on the apartment door a few times. There was no response. As they turned to leave, the officers looked through an open doorway and noticed Mr. Holmes sitting in the middle of a room at the end of a passageway. Mr. Holmes did not respond when Cst. McGrath called out to him, identifying himself as a police officer and stating they wished to speak with him. The two officers then entered the room. A brief conversation ensued. Mr. Holmes asked them to leave and tried to walk past Cst. McGrath. According to Mr. Holmes, Cst. McGrath bumped him with his stomach. Constable McGrath claimed that Mr. Holmes pushed him and screamed at him to get out.

Mr. Holmes was arrested, handcuffed and charged with assaulting Cst. McGrath. Constable Cheung claimed that Mr. Holmes deliberately bumped him with his shoulder as he was being placed in the police cruiser. Mr. Holmes was charged with a second count of assaulting an officer.

The criminal charges against Mr. Holmes were dismissed in May of 2007. The trial judge was critical of the officers' conduct and expressed reservations about their credibility.

On November 21, 2007 both officers were charged with discreditable conduct. Mr. Holmes participated as a party in the disciplinary hearing which began in July 2008. The Hearing Officer convicted both officers on the disciplinary charge. She denied a defense motion to admit expert evidence at the penalty phase.

Prior to the beginning of the appeal hearing Mr. Holmes brought a preliminary motion. Counsel for Cst. Cheung had failed to serve him with a Notice of Appeal and related documentation in a timely manner. He did not receive full disclosure, specifically the defense motion to admit expert evidence. He viewed this as a deliberate strategy and argued that the appeal was invalid due to procedural breaches. He requested a number of alternative remedies: quash the appeal; order a new hearing; substitute a penalty of dismissal; or adjourn to allow him to prepare.

On the merits, counsel for Cst. Cheung argued that the Hearing Officer failed to apply the correct legal test for discreditable conduct, in that she failed to consider Cst. Cheung's good faith and good intentions. Counsel submitted that Cst. Cheung's action in entering Mr. Holmes' apartment, while technically a trespass, was a good faith error which was not discrediting to the service and which occurred in a mixed-use area of a home where the property lines were ambiguous. Counsel asked that the conviction be set aside.

Mr. Holmes pointed out that the non-payment of rent was a civil matter, and the circumstances were not urgent. He argued that good faith was not a lawful excuse for a police officer's failure to follow the rules for entering a private dwelling. Mr. Holmes asked that the appeal be dismissed and a more serious penalty imposed.

Counsel for the service argued that K.A.'s request for assistance in collecting overdue rent did not justify the officers' unlawful entry into Mr. Holmes' dwelling. Counsel argued that good intentions did not excuse their conduct and did not lessen any potential discredit. Counsel asked that the appeal be dismissed.

Held, preliminary motion denied; appeal denied.

Pursuant to s. 69(3) of the *Police Services Act*, Mr. Holmes was clearly a party to the disciplinary hearing. Pursuant to s. 70(1), he clearly had a right to appeal the decision of the Hearing Officer. Rule 8.1 of the Commission's Rules required a notice of appeal to be served within 30 days of the decision. Mr. Holmes had not been served in a timely manner. However, this failure was subsequently remedied and Mr. Holmes was eventually provided with the necessary materials. He had the opportunity to make written submissions and appear at the appeal. Consequently, his right to participate had not been prejudiced.

A copy of the defense motion was neither required nor necessary, since the motion was decided in favour of the prosecution and Mr. Holmes, and in any event Cst. Cheung had not appealed that ruling. Mr. Holmes had not exercised his statutory right to appeal the penalty, so it was not open to him to request that Cst. Cheung be dismissed. In addition, penalty was not at issue in this appeal. The Commission's powers under the former s. 70(6) [predating amendments to the *PSA* on October 19, 2009] did not include ordering a new hearing. Finally, an adjournment was neither necessary nor warranted, since all parties had been in possession of the appeal material for some time.

Accordingly the preliminary motion was denied.

With respect to the merits, the Commission's role on appeal was not to second-guess the Hearing Officer's decision. Instead, the Commission was required to assess whether or not her conclusions were reasonable and reflected a proper understanding of the law.

In her decision the Hearing Officer accurately described the burden of proof and onus. She concluded that "notwithstanding their good intentions", the officers entered Mr. Holmes's residence without his consent or lawful authority. This conclusion was reasonable. Constable

Cheung was responding to a low priority call about a civil matter. There was no emergency and no indication that drugs or alcohol were a factor. Mr. Holmes was under no obligation to speak to the officers.

The Hearing Officer properly identified the test for discreditable conduct as being primarily an objective one, and she addressed the question of the reasonable expectations of the public. As she pointed out, the public expects police officers to respect private property. In this case, a trespass occurred. It was noteworthy that the actions of the two officers generated both a public complaint and judicial criticism.

The Hearing Officer appeared to conclude that Cst. Cheung's intent was not a relevant consideration. Good faith or intent was not universally accepted as a relevant factor in the test for discreditable conduct. But regardless of whether or not intent was factored into the equation, it did not assist Cst. Cheung in this case.

As the trial judge observed, the officers had no business being in Mr. Holmes' apartment or challenging him. And as the Hearing Officer observed, the two officers' conduct indicated complacency and a failure to apply their training, experience and knowledge of the law.

Constable Cheung had other options: disengaging, asking a senior officer for advice, or obtaining a warrant. In the absence of conditions that would justify a warrantless entry, Cst. Cheung committed a trespass when he entered Mr. Holmes' private space. Such unauthorized entry would offend the reasonable expectations of the public.

There was no manifest error or procedural defect in the Hearing Officer's decision.

Statutes cited

Police Services Act R.S.O. 1990, c. P.15 as amended, ss. 69(3), 70(1) and 70(6)
O.Reg. 123/98, s. 2(1)(a)(xi)

Authorities cited

Girard v. Delaney (1995), 2 P.L.R. 337 (Ont. Bd. Inq.)
Leone v. Catalano (1992), 1 P.L.R. 573 (Ont. Bd. Inq.)

[Further authorities as submitted by the parties may be found on pp. 12-13 of the decision.]