

OCCPS Decision # 08-07

DUANE SIMON
Appellant

AND

CONSTABLE DAWN LAURYSSSEN AND PEEL REGIONAL POLICE SERVICE
Respondents

Presiding OCCPS Members:

Roy R. Conacher, Member
Garth Goodhew, Member

Appearances:

Duane Simon, Appellant
William R. MacKenzie, for Cst. Lauryssen
Lynda A. Bordeleau, for Peel Regional Police Service

Heard:

July 25, 2008

Date of Decision:

October 3, 2008

DISCREDITABLE CONDUCT - Disorderly or prejudicial conduct - Appeal from dismissal of charge of discreditable conduct - Appellant a police officer in neighbouring police service - Appellant complained that Respondent officer unlawfully detained him by locking him in interview room while he wrote out witness statement - Appellant under contemporaneous investigation for alleged assault - Hearing Officer accepted Respondent's evidence that she was unaware of assault investigation when Appellant was in interview room - Hearing Officer found that Appellant was not unlawfully detained and that Respondent's action of locking interview room did not constitute discreditable conduct - No manifest error in Hearing Officer's decision - Appeal dismissed.

DISCREDITABLE CONDUCT - Disorderly or prejudicial conduct - Applicable test - Whether Respondent's action of locking Appellant in interview room constituted discreditable conduct - Hearing Officer applied appropriate test and found locking of door was a reasonable measure in accordance with reasonable expectations of the community - No manifest error in Hearing Officer's analysis of the evidence, findings of fact and credibility, application of standard of proof and relevant law - Appeal dismissed.

HEARING OFFICERS - Bias - Preliminary motion in appeal from dismissal of charge of discreditable conduct - Appellant raised allegation that Hearing Officer was biased for

the first time at appeal hearing - Fact that Hearing Officer part of same service as the officer charged not constituting bias or raising reasonable apprehension of bias - Claims of bias speculative and not factually based - Request for new hearing denied.

JURISDICTION - Appellate powers - Preliminary motion - Appellant requested new hearing on the ground that Hearing Officer was biased - Powers of Commission on appeal clearly set out in s. 70(6) of *Police Services Act* - Powers not implicitly including ordering of new hearing - Preliminary motion denied.

PROCEDURAL ISSUES - Rules of Practice - Appellant brought preliminary motion for directed new hearing on the ground that Hearing Officer was biased - Commission's Rules of Practice requiring appellants to set forth all grounds of appeal in notice of appeal - Neither notice nor factum filed by Appellant contained any such request - Allegation of bias raised for the first time at hearing of appeal - Respondents entitled to know case they have to meet - Appellant failing to comply with rule - Preliminary motion denied.

WAIVER - Preliminary motion for order directing new hearing on the ground that Hearing Officer was biased - Allegation raised for the first time at appeal hearing - Allegations of bias should be raised at earliest available opportunity - Implied waiver of objection where, as here, a party acquiesces in the process by continuing to participate - Presumption of adjudicator's impartiality not rebutted with clear evidence - Preliminary motion denied.

Summary of Reasons for Decision

Duane Simon appealed the decision of the Hearing Officer in which he found the Respondent Cst. Laurysen not guilty of one charge of discreditable conduct, contrary to s. 2(1)(a)(xi) of the Code of Conduct.

Mr. Simon, a police officer with the Toronto Police Service, had reported to the Peel Regional Police Service that he had been subjected to harassing phone calls by a former female acquaintance, TG. Constable Laurysen was directed by Sgt. Dale Waller to investigate Mr. Simon's report. On May 25, 2004 Cst. Laurysen contacted Mr. Simon, who agreed to attend 22 Division. When he arrived he was placed in an interview room and was provided with a witness statement form to complete. Constable Laurysen locked the interview room door. Service directives provided that interview rooms were to be locked when detainees were left alone in the room; the directives were silent regarding witnesses and victims.

On the same date, Sgt. Waller and Det. Heyes were investigating a complaint filed earlier that morning by TG against Mr. Simon, alleging that he had assaulted her. About 30 minutes after Mr. Simon had been placed in the interview room Sgt. Waller and Det. Heyes returned to 22 Division. When they were told that Mr. Simon was in an interview room they attended upon him and began interviewing him in relation to TG's complaint. Mr. Simon was charged with assault at the end of the interview.

Ten months later Mr. Simon filed a complaint against the officers involved in the investigation of his complaint and the officers involved in the investigation of TG's complaint of assault. With respect to Cst. Lauryssen Mr. Simon alleged that by locking the interview room she had unlawfully detained him for approximately 30 minutes and that she colluded with Sgt. Waller and Det. Heyes in their investigation of the assault complaint. Mr. Simon also alleged that Cst. Lauryssen violated his *Charter* rights by failing to advise him that he was a suspect in the assault before he provided his witness statement.

Mr. Simon's complaint was investigated and found to be unsubstantiated. He appealed that decision to the Commission, who directed that a hearing be held. Constable Lauryssen was charged with one count of discreditable conduct. The allegation was that in locking Mr. Simon in the room she had unlawfully detained him and had acted in a disorderly or prejudicial manner.

Constable Lauryssen pled not guilty to the charge. Mr. Simon testified that he was not told the door would be locked; he attempted to leave by knocking on the door but his knocks went unanswered. He was not cautioned prior to providing his statement. Constable Lauryssen testified that she was simply following Sgt. Waller's order to investigate Mr. Simon's complaint. She stated that she was not aware of the second investigation into the assault complaint until much later that day. In the interests of safety and security, it was her practice to lock the door of the interview room. She claimed she told the Appellant that she was locking the door and to knock when he was finished or if he required assistance. Constable Lauryssen further claimed that the Appellant never indicated he wanted to leave the interview room.

The Hearing Officer was not satisfied that there was clear and convincing evidence of discreditable conduct. He dismissed the charge against Cst. Lauryssen.

On appeal from that decision, Mr. Simon brought a preliminary motion requesting that the Commission direct a new hearing before a different hearing officer from a different service. The Appellant alleged that the Hearing Officer, who came from the same service as the officer charged, was in a direct conflict of interest. He claimed that this conflict of interest raised a reasonable apprehension of bias. Counsel for both Respondents opposed the motion on the grounds of jurisdiction and surprise. On the merits, the Appellant argued that the Hearing Officer ignored evidence which suggested that Cst. Lauryssen knew of the second investigation, was not objective in his analysis and erred in making findings of credibility. The Respondents argued that the Hearing Officer correctly applied the test for discreditable conduct; his decision as a whole was reasonable and supported on the evidence. The Appellant was not detained, as there was no element of coercion.

Held, preliminary motion and appeal dismissed.

With respect to the preliminary motion, the Commission noted that the allegation of bias was raised for the first time at the appeal hearing. The Commission's powers were clearly set out in s. 70(6) of the *Police Services Act*. The enumerated powers did not implicitly include the power to order a new hearing before another hearing officer. The Commission's Rules of Practice required appellants to set forth all grounds of appeal in the Notice of Appeal. The Appellant failed to comply with Rule 8.2(b) by not including the allegation of bias. Furthermore, by continuing to participate a party may be taken to have acquiesced in the process. This gave rise to an implied waiver of objection. Finally, the presumption of adjudicative impartiality had not been rebutted by any clear evidence of bias or predisposition. The fact that the Hearing Officer and Cst. Laurysen were part of the same service did not, without more, raise a reasonable apprehension of bias. The Appellant's allegations were speculative and not factually based.

With respect to the charge of discreditable conduct, the Hearing Officer correctly identified the central issues: whether Mr. Simon was detained, and if so, whether the detention was unlawful. The Hearing Officer concluded that the evidence did not support the allegation of detention. He was not satisfied on clear and convincing evidence that Cst. Laurysen knew Mr. Simon was a suspect when he arrived at 22 Division. He rejected Mr. Simon's version of events, and found Cst. Laurysen's version credible. The Hearing Officer found that as an experienced police officer Mr. Simon knew that obtaining a witness statement was a sound investigative technique. Mr. Simon did not attempt to leave the room, and his evidence was inconsistent with a subjective belief that he had been improperly deprived of his liberty; moreover, there was nothing requiring his apprehension at that time. Finally, the Hearing Officer found that locking the door was a reasonable practice in a police station, and would be viewed by the community as a reasonable measure. Thus he concluded that Cst. Laurysen's action of locking the door did not constitute discreditable conduct.

Findings of credibility and fact were the hearing officer's domain and should not be disturbed unless flawed by manifest error. There were no manifest errors in the Hearing Officer's analysis of the evidence, his findings of fact and credibility, or his application of the standard of proof and relevant law. As for the detention aspect, the factual findings supported the conclusion that the Appellant did not complain about being detained at the time or for a considerable time thereafter. Thus the necessary element of compulsion was absent.

Statutes cited

Police Services Act R.S.O. 1990, c.P.15 as amended, ss. 70(6), 72(5), 72(8), and 74 (1)(a)
O. Reg. 123/98, s. 2(1)(a)(xi)

Authorities cited

Geneen v. Toronto (City) [1999] O.J. No. 149 (Gen. Div.)

Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board (2005), 76 O.R. 321 (Ont. C.A.)

Wewaykum Indian Band v. Canada [2003] 2 S.C.R. 259 (S.C.C.)

Robertson v. Edmonton (City) Police Service [2004] A.J. No. 805 (Q.B.)

Carmichael and Ontario Provincial Police (1998), 3 O.P.R. 1232 (OCCPS #98-07)

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

Faryna v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.)

Girard v. Delaney (1995), 2 P.L.R. 337 (Ont. Bd. Inq.)

Mulholland and Halton Regional Police Service (March 25, 2003, OCCPS #03-08)

Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Ont. Div. Ct.) (JR #03-17)

R. v. Therens [1985] 1 S.C.R. 613 (S.C.C.)

[Respondents' list of authorities found on pp. 9-10 of the decision.]