

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

IN THE MATTER OF AN INQUIRY INTO THE CONDUCT AND PERFORMANCE OF DUTIES OF DAVID ASPDEN OF THE BARRIE POLICE SERVICES BOARD

Presiding Members:

Garth Goodhew, Member
David Edwards, Member

Appearances:

D. Thomas Bell, Counsel, Ontario Civilian Commission on Police Services
Morris Manning, Q.C., Counsel, David Aspden
Timothy J. Riddell, Counsel, David Aspden

Hearing Dates: December 4 and 5, 2007

This is an inquiry pursuant to section 25(1)(a) of the Police Services Act R.S.O., 1990, c. P.15 as amended (the "Act") into the conduct and performance of the duties of David Aspden.

Background:

On March 9, 2007, Mr. Stan Choptiany, a member of the Barrie Police Services Board (the "Board"), wrote to the Ontario Civilian Commission on Police Services (the "Commission") concerning the conduct of Board Chair David Aspden.

Specifically, Mr. Choptiany requested that the Commission investigate whether or not David Aspden was in breach of section 2 of Ontario Regulation 421/97-Members of Police Services Boards-Code of Conduct (the "Code") which states:

Board members shall not interfere with the police force's operational decisions and responsibilities or with the day-to-day operation of the police force, including the recruitment and promotion of police officers.

Mr. Choptiany alleged that David Aspden, while Chair of the Board, wrote a letter on City of Barrie letterhead, indicating his support for Barrie Police Service Constable Brian Byblow, who was in the midst of a disciplinary hearing under the Act.

The initial request and related materials were tabled at the monthly Commission meeting of April 10, 2007. The Commission decided on its own motion to initiate an investigation under section 25 of the Act. Terms of reference were prepared. On April 17, 2007 Vice-Chair Jerry Moore was advised of the Commission's decision and directed to provide

David Aspden with a letter advising him that he was suspended pending the outcome of the investigation.

Commission staff interviewed seven individuals. An Investigative Report was prepared and tabled at the Commission's July meeting. That report concluded that David Aspden's action, in providing a reference letter for use by Constable Byblow during the penalty phase of his disciplinary hearing, may constitute misconduct contrary to sections 2, 8 and 13 of the Code and that "there [was] sufficient evidence to warrant a hearing into the allegation".

A quorum of Commission members agreed with this conclusion and directed that a hearing be held. A Notice of Hearing was prepared on July 25, 2007 and served the following day upon David Aspden's solicitors.

The Hearing was subsequently scheduled for four days in Barrie, Ontario commencing on December 4, 2007 at 10:00 a.m.

Preliminary Motion:

Counsel for David Aspden filed a Notice of Motion prior to the hearing that was subsequently withdrawn.

Hearing:

The Hearing commenced approximately one half hour late at 10:30 a.m. to allow counsel to conduct settlement discussions. The Designation of the Panel and of Counsel for the Commission were admitted as Exhibits 1 and 2 respectively. The Notice of Hearing containing the allegation of misconduct was introduced as Exhibit 3.

The Panel noted for the record that neither of the Panel members had participated in, nor received any information with respect to the investigation or the discussion by other Commission members as to whether this matter should proceed to a hearing.

At the request of both counsel the hearing was adjourned until 9:30 a.m. on December 5, 2007.

When the hearing resumed Counsel for the Commission advised that counsel had an Agreed Statement of Fact and Joint Submission. It was entered as Exhibit 4 and read into the record as follows:

1. On January 25, 2007, Mayor Dave Aspden ("the Mayor") delivered to barrister and solicitor Karen Jokinen, counsel for Constable Brian Byblow, a letter providing a character reference for use in the penalty phase of a Barrie Police Service Discipline Hearing of Constable Byblow.

2. On this date, Superintendent Maurice Elbers, who had been designated as Hearing Officer by Barrie Police Chief Wayne Frechette in the Hearing, admitted the Mayor's character reference as Exhibit 11 at the Hearing.
3. On March 9, 2007, Superintendent Elbers determined that the Mayor's letter did not assist the Tribunal in any degree and held that "if one is to speak on behalf of a subject officer they must be prepared (as three members of Barrie Police Service have) to attend in person".
4. In providing a character reference to counsel for Constable Byblow for use in the penalty of a disciplinary hearing, the Mayor acknowledges that he unintentionally contravened section 2 of O. Reg. 421/97 - Members of Police Services Boards - Code of Conduct ("the Code of Conduct") and in so doing committed misconduct not of a serious nature.
5. The Mayor's providing of a character reference for use in the disciplinary hearing was an honest mistake made in good faith.
6. In delivering the character reference to counsel for Constable Byblow, the Mayor did not act with an improper, immoral or objectionable purpose.
7. Further, the Mayor had reason to believe that his conduct was lawful. The request for a character reference came from a barrister and solicitor who is also a federal prosecutor in the City. The Mayor relied on the fact that others in the policing and justice community had given character evidence and letters of reference in disciplinary and criminal court proceedings.
8. In this matter, the Barrie Police Services Board and the Ministry of Community Safety and Correctional Services Police Services Zone Advisor recognized that the Barrie Board had no policy in relation to a member of the Barrie Board providing such a letter and that such a policy should be developed. A plan was made by the Board to develop such a policy.
9. There being a number of Ontario Association of Police Services Boards ("the OAPSB") training modules, the Mayor undertakes that if he has not already done so, to complete within 12 months the board governance training module offered by the OAPSB.
10. Counsel for the Commission and counsel for the Mayor jointly agree and recommend to the Tribunal that the appropriate penalty in the circumstances of this case is the period of the Mayor's suspension from the Board served to date.

11. The parties hereto acknowledge that the Mayor may return to the Board as Chair after the Tribunal has rendered its Reasons for Decision.

Mr. Bell submitted that the proposed penalty was appropriate for a number of reasons. He was of the view that given the nature of the conduct, that this was misconduct not of a serious nature. Hearing Officer Elbers noted in his decision that the letter had no impact on the outcome of Constable Byblow's disciplinary proceeding. Avoiding the necessity of a four-day hearing was also significant. Finally, there is no precedent Commission decision on point.

Mr. Manning submitted that this was an unintentional contravention of section 2 of the Code. He adopted the submissions of Mr. Bell. As well, he argued that the law was very unclear on this point. He pointed to the fact that police officers often given character letters in support of other police officer's disciplinary proceedings and that even during a review of a judge's performance character letters are written by people from all walks of life.

Decision:

As Mr. Aspden acknowledged his actions constituted misconduct, the Commission has the right under section 25(5) of the Act to remove or suspend him as a member of the Board.

As a practical matter, Mr. Aspden has been suspended since April 17, 2007, the date on which the formal investigation began. In effect, he has been suspended for just under eight months.

Counsel have made a joint submission as to sentence recommending that the appropriate penalty be a suspension from the Board and that the period of such suspension be the period of Mr. Aspden's current suspension from the board to the date of this hearing, and further that the parties acknowledged that Mr. Aspden may return as Chair of the Board after we render our Reasons for Decision.

In determining the appropriateness of the proposed penalty we have considered a number of issues including the following.

Disciplinary procedures involving police officers (other than those in which the chief of police is the subject of such discipline) are by statute matters that are within the purview of the chief of police. The board has no role in such disciplinary process unless prescribed by statute and individual board members have no role whatsoever in the disciplinary process.

Board members cannot define themselves for certain actions to be board members and for other actions to be ordinary citizens. If a person, who is a board member, writes a reference or character letter for the purpose of its use in a police disciplinary matter, he or she has clearly crossed the line and is involved in a process which by statute, is a matter

of which the chief of police has carriage. This is interference into the day-to-day operations of the police. Such action constitutes misconduct.

It is correct that there is not a precedent decision by this Commission on point - perhaps because it is self-evident.

It is very difficult to infer the intent of Mr. Aspden at the time that he wrote the character letter. It is possible that his intent was honourable. It is possible that he did not consider the consequences at all. Public figures are often asked to write reference letters for his or her constituents. It is also possible that his purpose was to attempt to utilize his position as Chair of the Board to influence a police disciplinary matter. One of the reasons that the Act prohibits such interference into the day-to-day operations of the police is precisely because intent is difficult to discern.

The appearance, however, of perceived interference is evident to the general public.

It was suggested that the seriousness of this misconduct was lessened because the Hearing Officer confirmed in his decision that the letter had no impact upon Constable Byblow's penalty. The success of the interference or lack thereof is not the appropriate factor to consider when assessing the seriousness of the misconduct. It is the intent of the misconduct and not the success of the interference which is the significant element for assessing the seriousness of the misconduct. In the Agreed Statement of Fact and Joint Submission Mr. Aspden acknowledged that "he unintentionally contravened" the regulation. That is why one can classify this as misconduct not of a serious nature.

If it were shown that a board member intended to use his position to influence the penalty outcome of a disciplinary hearing, but was unsuccessful, the misconduct would nevertheless be of a very serious nature.

However,

- given the fact that Mr. Aspden has serviced the public both as a police officer and a board member for many years without any previous allegation of misconduct;
- due to the absence of prior Commission decisions on point;
- the fact that this settlement avoids the necessity of a long hearing; and
- Mr. Aspden has already been suspended for almost eight months we agree that the joint submission as to penalty, with slight amendment, is appropriate.

Accordingly, we find Mr. Aspden guilty of misconduct and suspend him for the period served to date. We also order him to attend the board governance training mode offered by OAPSB within the next twelve months if he has not previously taken the course within the last twelve months.

Finally, we make no order with respect to the question of Mr. Aspden assuming the role of the Chair of the Board. There is no legal impediment in him so doing and subject to the wishes of the Board, he may so do.

DATED AT TORONTO THIS 12TH DAY OF DECEMBER 2007.

Garth Goodhew
Member OCCPS

Dave Edwards
Member OCCPS