

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE RYAN VENABLES

Appellant

YORK REGIONAL POLICE SERVICE

Respondent

Presiding Members:

Murray Chitra, Chair
Garth Goodhew, Member
Tammy Landau, Member

Appearances:

William R. MacKenzie, Counsel for the Appellant
Jason D. Fraser, Counsel for the Respondent

Hearing Date: May 20, 2008

This is an appeal from a penalty of dismissal (in the absence of resignation within seven days) imposed against Constable Venables on January 7, 2008 by Superintendent Wayne Kalinski (the "Hearing Officer").

This penalty was for three counts of misconduct to which Constable Venables pled guilty on October 9, 2007. This included one count of discreditable conduct contrary to section 2(1)(a)(i), another count of discreditable conduct contrary to 2(1)(a)(ix) and one count of unlawful or unnecessary exercise of authority contrary to section 2(1)(g)(ii) of Ontario Regulation 123/98 as amended (the "Code").

Background:

Ryan Venables is twenty-nine years old. He joined the York Regional Police Service (the "Service") on April 5, 2004.

With the exception of one informal discipline for the improper use of a police radio¹, his career was unblemished until the early morning of Saturday, November 11, 2006. As a result of his actions on that day, Constable Venables was suspended from duty, arrested and charged with the criminal offence of Assault Causing Bodily Harm.

¹ Forfeiture of twelve hours imposed on February 8, 2006.

On April 27, 2007, Constable Venables was served with a Notice of Hearing pursuant to section 64(7) of the Police Services Act R.S.O. 1990, c. P.15 (the "Act") charging him with six counts of misconduct. Specifically, four counts of discreditable conduct, one count of neglect of duty and one count of unlawful or unnecessary exercise of authority.

On May 29, 2007, following a guilty plea in criminal court to the offence of Assault, Constable Venables was served another Notice of Hearing charging him with an additional count of discreditable conduct.

The Hearing:

On October 9, 2007, Constable Venables appeared before the Hearing Officer and pled guilty to the three counts of misconduct noted earlier. The remaining four were withdrawn.

A penalty hearing was scheduled for November 11, 2007. On that date the parties submitted an Agreed Statement of Facts (the "Statement"), which can be summarized as follows.

On Saturday, November 11, 2006, at 1:56 a.m., Constable Derrick McNamee conducted a traffic stop in the City of Vaughan. He was later assisted by Constable Kevin Partridge. As a result of their investigation, they charged VB², the driver, with Refusing to Provide a Roadside Breath Sample. VB was handcuffed behind his back and seated in the rear of Constable McNamee's cruiser. While the arresting officer was completing the paperwork, Constable Fred DeWinne and Constable Venables arrived on the scene. It was approximately 2:00 a.m.

Constable Venables walked over to Constable McNamee, who was seated in the driver's seat of the cruiser. Believing Constable Venables wanted to talk to the prisoner, Constable McNamee opened the rear passenger window. Constable McNamee did not hear the entire conversation; however, he did hear Constable Venables ask the prisoner if he was Russian. When the prisoner replied that he was, Constable Venables stated, "You fucking drunk Russian." Constable McNamee then heard the sound of a punch as Constable Venables struck the prisoner on the side of the head. The prisoner immediately asked, "Why are you calling me a drunk fucking Russian?"

Constable Venables returned to his cruiser and stated to Constable DeWinne "I hate Russians." Constable DeWinne advised Constable Venables that he had no right to do what he had done and noted that the prisoner was in handcuffs, to which Constable Venables replied, "I had enough of people lying to me." Constable Venables and Constable DeWinne left the scene at 2:18 a.m.

Constable Venables and VB had never previously met and the assault was unprovoked. VB immediately informed Constable McNamee of what had occurred. As a result of the

² Name modified.

punch to the side of his face, VB suffered a cut and swollen upper lip and a chipped tooth. He also suffered a headache for a couple of days.

Before the end of the shift, Staff Sergeant Merith spoke with the officers involved and, as a result of the information that he received, notified Constable Venables that he was suspended from his duties.

On December 14, 2006, Constable Venables attended the Professional Standards Bureau and was arrested for Assault Causing Bodily Harm. He was released on a Promise to Appear.

On April 2, 2007, Constable Venables attended at the Professional Standards Bureau with counsel, Mr. William MacKenzie, to provide a statement. Describing the events of November 11, 2007, Constable Venables stated that earlier that shift, while assisting Constable DeWinne with a domestic matter, they came upon an impaired driver.

During this encounter, the driver began to swear and wanted to be released. Constable Venables asked the driver where he was from. The driver responded that the Constable would not know the place he was born. After several guesses, Constable Venables correctly guessed the driver's country of origin to be Georgia. The driver started to become aggressive upon arrival at his residence and stated to the officers, "Don't fucking come to Georgia."

After leaving the impaired driver's residence, Constable Venables attended at the traffic stop of Constable McNamee. He approached the rear of Constable McNamee's cruiser. Constable Venables stated that he wanted to see if he recognized the prisoner. He asked the prisoner if he knew that he was under arrest, and then asked if he was Russian. Constable Venables stated that he has an interest in Eastern European Organized Crime and that he often submits reports to the Intelligence Bureau.

After sticking his head in the window to see if he could smell alcohol, Constable Venables stated that he observed the prisoner's nostrils flare and his lips purse. Believing he was going to be spit on, Constable Venables punched the prisoner on the side of his face. The Constable then walked back to his cruiser not believing, he testified, what had just transpired. Constable Venables states that he does not recall the comments that he made during the incident with the prisoner. After reading the disclosure for his criminal charge, Constable Venables now states that he feels horrible and embarrassed that he made these types of comments.

When questioned by investigators, Constable Venables stated that he was frustrated from the previous call he had attended, and that he had never intended to punch the prisoner whom he knew was handcuffed. The Constable also acknowledged that, if he had believed that VB was going to spit on him, he could simply have stepped away from the cruiser.

After reviewing Constable Venables' notebook, it was evident that he had not made a record of this incident with the prisoner. Constable Venables explained that he planned to complete his notes prior to leaving at the end of his shift; however, at that time he was approached by Staff Sergeant Merith and informed him that he was suspended from his duties. Constable Venables admitted that he signed off his notebook without making entries about the incident with the prisoner, VB.

Constable Venables stated that his conduct was totally out of character, and that this was the act of an individual and not reflective of the great work conducted by the Service. He stated that his conduct during and related to the incident with the prisoner has been an embarrassment to himself, his family and, especially, to his father.

Following the incident the Constable has been working on his issues by attending counseling for anger management and registering for a certificate course at York University on racial sensitivity.

On May 2, 2007, Constable Venables pled guilty to the Criminal Code offence of Assault. The Court accepted the joint submission of counsel, suspended the passing of sentence, and placed Constable Venables on probation for eighteen months, subject to the following terms:

- keep the peace and be of good behaviour;
- appear before the Court when required to do so;
- notify the Court of any change in name, address or employment;
- report to and be under the supervision of a probation officer;
- not associate or communicate with VB except through counsel;
- not attend within 500 metres of VB's residence or place of work;
- perform 150 hours of community service;
- attend counseling and rehabilitative programs for anger management and anti-racism; and,
- not carry any weapons except for the purpose of employment as a police officer.

In addition to this Statement, character evidence was presented on behalf of Constable Venables. This included testimony from Inspector Leslie Young, Detective Andrew Graham and Detective David Wagniere, as well as volunteer and employment references, commendations and employment evaluations. They spoke positively about Constable Venables' background, employment history and potential as a police officer.

The Hearing Officer released his Penalty Decision on January 7, 2008. He ordered Constable Venables to resign within seven days or be terminated from his employment with the Service.

It is this penalty which is the subject of this appeal.

Appellant's Position:

Mr. MacKenzie appeared on behalf of Constable Venables.

With the consent of Counsel for the Service, he provided us with four letters of reference on behalf of Constable Venables.

Mr. MacKenzie submitted that an appellate or review body may interfere with a penalty imposed at a disciplinary hearing if there is either an error in principle or, even if an error in principle is not committed, the disposition is outside an acceptable range, i.e. clearly unreasonable, demonstrably unfit, or a substantial and marked departure from the norm. R. v. Rezaie (1996), 31 O.R. (3d) 713 (Ont. C.A.)

Mr. MacKenzie argued that the Hearing Officer committed an error in principle by completely disregarding positive character evidence and references without sound justification and thereby abrogated his duty to fairly balance and consider the issue of Constable Venables' continuing usefulness as a police officer. Guenette and Ottawa-Carlton Regional Police Service (1998), 3 O.P.R. 1301 (O.C.C.P.S.) and Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

Mr. MacKenzie argued that the Hearing Officer failed to give adequate consideration to the three factors that make up the 'usefulness' test: (i) the nature and seriousness of the misconduct; (ii) the ability to reform the officer: and, (iii) damage to the reputation of the force. Mr. MacKenzie further submitted that the Hearing Officer failed to apply the principle of progressive discipline, which requires that a hearing officer impose increasingly serious sanctions to employee misconduct in an effort to correct the employee's behaviour. Galassi v. Hamilton (City) Police Service [2005] O.J No. 2301 (Ont. Div. Ct.)

Mr. MacKenzie acknowledged that the Hearing Officer had addressed the thirteen penalty considerations identified by the Commission in Blowes-Aybar and Toronto Police Service (7 March, 2003, O.C.C.P.S). However, Mr. MacKenzie submitted these considerations were either misapplied or misunderstood by the Hearing Officer.

By way of example, Mr. Mackenzie identified the following:

- i) Public Interest: The Hearing Officer suggested the public should not have to live in "fear of contact" with police officers, without an evidentiary basis for this statement;
- ii) Seriousness of the Misconduct: The Hearing Officer did not give consideration to the fact that the Crown reduced the criminal charge from Assault Causing Bodily Harm to simple Assault;
- iii) Recognition: The guilty plea submitted by Constable Venables was evidence of both his remorse and acceptance of responsibility for his actions. This should be

considered in conjunction with Constable Venables' apology to VB. The Hearing Officer only paid 'lip service' to this principle. R. v. Santos [1993] O.J. No. 4248 (Ont. C.A.)

- iv) Employment History: The Hearing Officer failed to fully consider the character testimony of senior police officers, employment references and the many positive emails in support of Constable Venables' work ethic and rapport with other police officers. Mr. MacKenzie submitted that this material spoke directly to Constable Venables' continuing usefulness or fitness to remain an employee of the Service.
- v) Need for Deterrence: The Hearing Officer failed to consider general and specific deterrence. While Mr. MacKenzie acknowledged that general deterrence should be one aspect of the penalty in this case, he argued that there was no basis upon which to apply specific deterrence to Constable Venables.
- vi) Ability to Reform or Rehabilitate: The Hearing Officer failed to properly consider Constable Venables' ability to reform and rehabilitate given that the evidence submitted at the hearing demonstrated that Constable Venables was, "if not fully rehabilitated, well on his way to becoming so". Ontario Provincial Police and Favretto [2004] O.J. No. 4248 (Ont. C.A.)
- vii) Damage to the Reputation of the Police Force: The Hearing Officer concluded that Constable Venables caused damage to the Service, without evidence of such damage having occurred.
- viii) Effect on Police Officer and His Family: The Hearing Officer did not give sufficient consideration to the stress that this case has caused Constable Venables and his family, and the material adverse impact that dismissal from his employment would have on his future livelihood and security.
- ix) Management Approach to Misconduct in Question: The Hearing Officer concluded, without foundation, that "the public faith and confidence of all York Regional Police employees needs rebuilding" and that "a clear and consistent disposition in this matter is crucial."
- x) Consistency of Penalty: The Hearing Officer failed to articulate any basis for the penalty of dismissal. The penalty imposed was inconsistent with that in Kyle and York Regional Police Service (11 March, 2003, O.C.C.P.S.).
- xi) Financial Loss: While Constable Venables has been on paid suspension, he had nevertheless suffered financial loss by being precluded from reclassification to a higher salary scale, applying for promotional opportunities and paid duty assignments.

- xii) Effect of Publicity: There was no publicity regarding this case, and the Hearing Officer erred in speculating that future publicity would have an adverse effect on the Service.

In summary, Mr. MacKenzie argued that the Hearing Officer committed errors in principle by disregarding positive character evidence and rehabilitative prospects thus failing to give proper weight to relevant factors. Krug and Ottawa Police Service (21 January, 2003, O.C.C.P.S.)

For the above noted reasons, Mr. Mackenzie requested that the penalty of dismissal be varied to a demotion of unspecified nature and duration.

Respondent's Position:

Mr. Fraser appeared on behalf of the Service.

He drew to our attention a number of cases on the issue of the standard of review for a penalty appeal. These included Andrews and Midland Police Service (1 May, 2003, O.C.C.P.S.), Hassan and Peel Regional Police Service (8 September, 2006, O.C.C.P.S.) and Ontario Provincial Police and Favretto, supra.

Mr. Fraser argued that we may vary a penalty only where it is unreasonable, unfair, or all of the relevant factors have not been fairly or impartially considered. He noted that it is not our role to second guess a hearing officer.

Mr. Fraser pointed out that the Hearing Officer identified all of the essential factors to be taken into account in determining an appropriate penalty in this case and applied them properly. Williams and Ontario Provincial Police, supra and Krug and Ottawa Police Service, supra

Mr. Fraser asserted that in our analysis of the Hearing Officer's decision we should not be overly critical of the language used or focus on technical mistakes that do not affect the decision as a whole. Galassi v. Hamilton (City) Police Service, supra., Carson and Pembroke Police Service (9 March, 2006, O.C.C.P.S.) and Carson and Pemroke Police Service (23 May, 2007, Ont. Div. Ct.)

Mr. Fraser disputed the assertion that the facts in Kyle and York Regional Police Service, supra, were similar to those in this case. He noted that Staff Sergeant Kyle has twenty-nine years of service, committed his assault off duty, was intoxicated at the time and was suffering from depression and alcoholism.

Mr. Fraser argued that despite any potential for reform or rehabilitation, the Hearing Officer was entitled to conclude it was outweighed by the seriousness of the misconduct and the damage to the Service that would occur if Constable Venables was permitted to remain an employee. Essentially, Constable Venables' misconduct was so reprehensible that he was no longer useful to the Service.

In conclusion, Mr. Fraser asserted that given the nature of Constable Venables' misconduct and the absence of precedents to the contrary that it was reasonable for the Hearing Officer to conclude that he was no longer fit to remain an officer.

For these reasons, he requested that this appeal be dismissed and the penalty confirmed.

Decision:

On October 9, 2007 Constable Venables pled guilty to three counts of misconduct.

These disciplinary charges arose from an unprovoked assault on a handcuffed, confined and unresisting prisoner on November 11, 2006. This assault had discriminatory overtones. It resulted in a criminal conviction against Constable Venables on May 2, 2007.

At the time of the assault Constable Venables was twenty-seven years of age. He had been a police officer for less than three years.

Two of the disciplinary matters to which Constable Venables pled guilty were for discreditable conduct. The first was for contravention of section 2(1)(a)(i) of the Code. That provision makes it a disciplinary offence when an officer "fails to treat or protect a person equally without discrimination with respect to police services because of that person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, race, marital status, same-sex partnership status, family status or handicap".

The second count of discreditable conduct was for violation of section 2(1)(a)(ix) of the Code. That provision makes it a disciplinary offence when a police officer "is guilty of an indictable criminal offence or a criminal offence punishable on summary conviction".

The third count was for unlawful or unnecessary exercise of authority contrary to section 2(1)(g)(ii) of the Code. That section makes it a disciplinary offence when an officer "uses any unnecessary force against a prisoner or other person contacted in the execution of duty".

The Hearing Officer accepted Constable Venables' guilty plea. Having done so, it was his responsibility to impose an appropriate disciplinary penalty. This required an assessment of the conduct in light of a number of factors, both mitigating and aggravating.

In Williams and Ontario Provincial Police, supra, the Commission identified three key considerations. These included the nature and seriousness of the misconduct in question, the ability to reform or rehabilitate the officer and the damage that would occur to the reputation of the police service if the officer were to remain on the force.

Other factors can be pertinent. They include the officer's:

- employment history and experience;
- recognition of the seriousness of the transgression; and
- handicap or other relevant personal circumstances.

Further potential considerations are provocation, the need for both general and specific deterrence, concerns arising from management's approach and consistency with previous penalties for similar infractions.

Our role in this appeal is different from that of the Hearing Officer. It is not to second guess his decision and substitute our own opinion. Rather, it is to assess whether or not the Hearing Officer has properly, fairly and with impartiality taken into account the relevant factors and principles and imposed a penalty within the range appropriate to the particular circumstances of the case at hand.

How do these considerations apply?

The Hearing Officer's penalty decision was released on January 7, 2008. It is twenty-three pages in length. The decision accurately summarized the Statement, evidence and submissions of counsel. As well, the Hearing Officer identified the above-noted dispositional considerations and addressed each in turn.

The Hearing Officer described the conduct in question as being "very serious". He characterized Constable Venables' actions as "shocking and egregious", a "significant lapse of judgment", a breach of public trust warranting both general and specific deterrence and conduct that has "caused serious damage to the reputation of the York Regional Police."

This seems self evident. It is hard to imagine behaviour that is more offensive. Without provocation, Constable Venables deliberately assaulted a handcuffed, unresisting, defenseless and confined prisoner. VB suffered a chipped tooth and a cut and swollen upper lip. This individual was not known to Constable Venables. He was not even his prisoner. As the Hearing Officer observed: "Constable Venables was not dispatched to this call nor did he have a reason to be present."

The Commission stated in Groot and Peel Regional Police Service (2002), 3 O.P.R. 1552 (O.C.C.P.S.) at page 1558:

It is clear that police officers, whether on or off duty should not be threatening harm to others or engaging in assaultive behavior. Such conduct is discreditable, warrants discipline and must be deterred, Gulliver and Brantford Police Service (1997), 3 O.P.R. 1175 (O.C.C.P.S.). This is particularly the case, where a police officer assaults an intoxicated, handcuffed and helpless prisoner at a police station. This is highly damaging to the reputation of a police service. We agree with the Hearing Officer's conclusion that, "What occurred was a serious deviation from the

professional behaviour expected and demanded by the public of an officer and every member of this service.”

As was noted in Gladish v. Byers (1992), 1 A.L.E.R.B. 55, at 61: “Excessive use of force by a police officer which causes bodily harm, is one of the most serious forms of police misconduct. It must be made clear to the few who engage in such misconduct that serious penalties are likely to follow proof of such an event.” Absent significant mitigating factors, such conduct can warrant dismissal.

This principle is reflected in other Commission decisions concerning unprovoked assaults on handcuffed prisoners. Maguire and Ontario Provincial Police (1975), 1 O.P.R. 229 (O.P.R.)

Two aggravating factors arise from Constable Venables’ actions. First, the assault had clear discriminatory overtones (“You fucking drunk Russian” and “I hate Russians”). As the Hearing Officer properly noted at page 16 of his decision:

I am particularly concerned with not only the assault but the bias that Constable Venables demonstrated towards the Russian community. I want to [assure] all citizens that the York Regional Police take this matter seriously. The Region of York is a multicultural community that respects all citizens. I am concerned that our community outreach initiatives may face serious setbacks if this matter is not properly dealt with.

Second, Constable Venables’ conduct resulted in a criminal conviction. It is also worth observing that this crime took place while Constable Venables was on duty, in uniform and in the presence of other officers who were put in the difficult position of having to do their sworn duties and report the event. On the latter point, the Hearing Officer observed “this assault has caused problems with the officers on this shift; they are uncomfortable for having been brought into this situation.”

The facts of this case raise no issues of handicap or concerns relating to management approach.

However, in his decision, the Hearing Officer properly identified a number of mitigating factors. These included a good prior employment record, the guilty plea, an apology to his victim and a sincere expression of remorse by Constable Venables reflecting recognition of the seriousness of his misconduct. As well, the Hearing Officer noted that Constable Venables had completed an anger management course.

On the first mitigating factor, we would observe that Constable Venables’ career has been rather brief. Indeed, on the date of the incident in question he had been in uniform for only thirty-one months. He was a very junior officer who had not even reached first-class constable rank. As such, unlike in Kyle and York Regional Police Service, supra., the mitigating value of his good employment history is limited.

On a related point, the Hearing Officer attempted to assess whether this lack of experience had a bearing on the conduct in question. He concluded "I am unable to draw a parallel or make any type of connection". This finding is supported by the record.

Having dealt with these issues, the Hearing Officer's decision appears to have then turned on the question of whether or not the seriousness of the misconduct, and the potential damage to the reputation of the Service if Constable Venables were to remain as an officer, outweighed his potential for rehabilitation. Put another way, had the nature of his misconduct spent Constable Venables' potential future usefulness as a police officer?

The Hearing Officer noted the evidence of Inspector Young that Constable Venables could still function as a police officer, if he were to be transferred to another office. This qualification arose from concerns about possible trust issues with members of his former platoon.

However, the Hearing Officer repeated his observation that the assault had greatly jeopardized public trust and raised serious issues of police accountability and integrity. More to the point, he stated at the final page of his reasons:

As the Hearing Officer, I have a great concern for the bias that Constable Venables has for the victim ... [VB]. It was this bias towards an individual from another ethnic group that ultimately led to this unprovoked assault. The victim in this matter was under police arrest, handcuffed behind his back and sitting in the rear of a police cruiser. Other than remorse that Constable Venables has shown, I am not convinced that his deep rooted anger has healed itself.

It is my ruling that Ryan Venables committed a misconduct that was so reprehensible that the officer is no longer useful to the York Regional Police.

To our mind, on the disturbing facts of this case, this conclusion was available to the Hearing Officer.

Unprovoked violence by a police officer on a citizen is never acceptable. Unprovoked violence motivated by ethnic intolerance is exponentially more offensive.

To put this in perspective, policing in Ontario is based on six principles. They are set out in the very first section of the Act. It reads:

1. Police services shall be provided throughout Ontario in accordance with the following principles:

1. The need to ensure the safety and security of all persons and property in Ontario.

2. The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.
3. The need for co-operation between the providers of police services and the communities they serve.
4. The importance of respect for victims of crime and understanding their needs.
5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.
6. The need to ensure that police forces are representative of the communities they serve.

Ryan Venables' conduct on the morning of November 11, 2006 offended five of these six principles.

Notwithstanding mitigating factors in his favour, to our mind, it was certainly open to the Hearing Officer to conclude that Constable Venables' actions were so egregious that they raised insurmountable doubts about his future suitability as a police officer.

For these reasons we are satisfied that the Hearing Officer imposed a penalty that properly took into account the relevant factors and was within the range of sanctions appropriate to the particular circumstances of the case before him.

This appeal against penalty is therefore dismissed.

DATED AT TORONTO THIS 3rd DAY OF OCTOBER 2008.

Murray Chitra
Chair, OCCPS

Garth Goodhew
Member, OCCPS

Tammy Landau
Member, OCCPS