

OCCPS Decision # 09-10

CONSTABLE J.B. PIGEAU  
Appellant

AND

ONTARIO PROVINCIAL POLICE  
Respondent

AND

CHRISTOPHER TAILLON  
Respondent

Presiding OCCPS Members:

Dave Edwards, Member  
Hyacinthe Miller, Member

Appearances:

Gavin May, for the Appellant  
Jinan Kubursi, for the OPP

Heard:

February 27, 2009 and June 16, 2009

Date of Decision:

July 15, 2009

**UNLAWFUL OR UNNECESSARY ARREST** - Officer found guilty of unlawful or unnecessary exercise of authority - Interaction with Respondent citizen escalating into an arrest - No indication that citizen intoxicated other than a single stumble on an icy side walk late at night - Appellant made physical contact with citizen without proper justification, leading to unnecessary arrest - Appeal from conviction dismissed.

**SENTENCING - Penalties - Directed program or activity** - Conviction on charge of unlawful or unnecessary exercise of authority - Hearing Officer imposed loss of 16 hours and direction to undergo training dealing with arrest procedures and mental illness, schizophrenia and diabetic complications - Training aspect of penalty incomprehensible based on the record - Training component of penalty revoked - Appellant ordered to attend refresher training program regarding powers of arrest - Appeal from penalty allowed.

**SENTENCING - Penalties - Grounds for intervention** - Unnecessary arrest - Inconsistency between descriptions of penalty in the record and penalty in written

decision - Appellant's conduct appropriately characterized as a momentary lapse of judgment - Loss of 16 hours excessive - Penalty varied - Reprimand substituted - Appeal from penalty allowed.

**HEARING OFFICERS - Decision of hearing officer - Standard of review -** Appellant convicted of unlawful or unnecessary exercise of authority - Conviction and penalty decisions at issue - Applicable standard of review is reasonableness - Reasonableness standard encompassing both reasoning process and outcomes - Cumulative qualitative deficiencies in Hearing Officer's reasons for conviction - Necessary for Commission to examine record to determine whether evidentiary basis exists to support Hearing Officer's conclusion - Notwithstanding deficiencies in written reasons, Hearing Officer's conclusion was reasonable - Appeal from conviction dismissed - Hearing Officer erred with respect to assessment of penalty - Penalty varied from loss of 16 hours to reprimand - Training component revoked- Refresher training program substituted - Appeal from penalty allowed.

#### Summary of Reasons for Decision

Constable Pigeau appealed his conviction on one count of unlawful or unnecessary exercise of authority, contrary to s. 2(1)(g)(i) of the Code of Conduct. He also appealed the penalty imposed, loss of 16 hours and a direction that he undergo in-service training dealing with issues of mental illness and arrest procedures, particularly schizophrenia and illnesses occasioned by diabetic complications.

In the early hours of December 9, 2006 Cst. Pigeau arrested Christopher Taillon. At the time, Cst. Pigeau had been a police officer for approximately 14 months. During the evening of December 8, 2009 Constables Pigeau and Lobsinger were working a paid duty assignment as part of the seasonal RIDE program. They noticed a man, Mr. Taillon, walking on the sidewalk around midnight. The sidewalks were icy. They thought Mr. Taillon stumbled. Concerned that he might be intoxicated, the officers approached Mr. Taillon and tried to speak to him. Mr. Taillon did not want to speak to the officers, and proceeded to walk off in the opposite direction. Constable Pigeau followed on foot. He called out and asked Mr. Taillon to stop. According to the officers, Mr. Taillon responded "Get the fuck away from me." Constable Pigeau found Mr. Taillon's behaviour bizarre. He testified that he felt obliged to touch Mr. Taillon to get his attention. An altercation ensued, and quickly escalated into a takedown and an arrest for assaulting a police officer.

Mr. Taillon was released when the officers' supervisor, St. Walker, appeared on the scene. He did not believe that Mr. Taillon was intoxicated. Mr. Taillon advised Sgt. Walker that he was schizophrenic. Mr. Taillon went to the ER of a local hospital later that night and received treatment for injuries arising from the incident.

Mr. Taillon filed a public complaint against both officers. The OPP found that the complaint was not substantiated. Mr. Taillon appealed to the Commission; and the

Commission ordered that a hearing be held. At the disciplinary hearing Mr. Taillon represented himself. The Appellant requested that a subpoena be issued for Dr. Spiller, who had treated Mr. Taillon. The Hearing Officer denied the request on the basis that there was other sufficient evidence of Mr. Taillon's injuries. The Hearing Officer found Cst. Lobsinger not guilty and Cst. Pigeau guilty of unlawful or unnecessary exercise of authority. He assessed a penalty of forfeiture of 16 hours and the direction to undergo training. However, the hearing record form noted loss of 8 hours or one day off.

Constable Pigeau appealed both the conviction and the penalty decisions. When the Commission convened to hear the appeal, it was noted that Mr. Taillon, who was a party to the proceeding, had not been served with a Notice of Appeal or other materials. In a preliminary decision (OCCPS #09-03) the Commission ordered the Appellant and the police service to serve these documents upon Mr. Taillon. Counsel complied with that order accordingly; however Mr. Taillon did not appear for the appeal hearing.

Counsel for the Appellant argued that there were several grounds for appeal:

- 1) the Hearing Officer's refusal to issue a subpoena for Dr. Spiller, which amounted to a denial of natural justice;
- 2) the erroneous acceptance of Mr. Taillon's credibility;
- 3) the Hearing Officer's misapprehension of the evidence and misapplication of the law concerning the grounds for arrest;
- 4) the failure to give complete reasons; and
- 5) a penalty which was harsh, excessive, inconsistent with the hearing record form and with the mitigating factors, and which lacked a proper foundation in the evidence (e.g. the absence of any evidence in the hearing documentation regarding diabetes).

Counsel requested that the conviction be revoked. In the alternative, he requested that the penalty be varied to a reprimand.

Counsel for the Respondent OPP submitted:

- 1) the denial of the request for a subpoena was not an error, on the basis of sufficiency of the other evidence and irrelevance to the central issue of whether the arrest was unlawful;
- 2) the Hearing Officer did not err in finding Mr. Taillon credible with respect to the critical issues;
- 3) there was no misapprehension of the evidence regarding the reason for arrest;
- 4) the reasons should be assessed as a whole, and in this case they were sufficient; and
- 5) the penalty was within the range available to the Hearing Officer.

Counsel argued that the appeal should be dismissed.

*Held*, appeal from conviction dismissed; appeal from penalty allowed.

The standard of review exercised by the Commission was reasonableness. In **Dunsmuir v. New Brunswick** [2008] S.C.J. No. 9, the Supreme Court of Canada said that the standard of reasonableness was concerned with both the decision-making process and with outcomes. Where, as in this case, the reasons were deficient the Commission must determine the appeal on the basis of the evidentiary record.

The Hearing Officer misstated the grounds for refusing a summons. However, it was clear from the record that Dr. Spiller's testimony was marginally relevant to the disciplinary charge. Thus the Hearing Officer did have proper grounds for refusing the summons (relevance), and his order did not result in a breach of natural justice for the Appellant.

Although a hearing officer's findings of credibility were entitled to deference, in this case it was unclear exactly which portions of Mr. Taillon's version of the entire incident were accepted, and why. Similarly, there was no explication of which documents and case law were helpful, and why. Furthermore, there was a troubling discrepancy between the penalty as described in the written penalty decision and the penalty as contained in the hand written record. Given the cumulative qualitative deficiencies in the Hearing Officer's decision, it was therefore necessary for the Commission to examine the record to determine whether there was a factual basis to support the Hearing Officer's conclusion.

Based on a clear reading of Cst. Pigeau's own testimony, the only potential indication of public intoxication was a single stumble on an icy sidewalk late at night. It was apparent that Mr. Taillon didn't wish to speak to the officers. Absent other indicia of public intoxication, information that a crime may have been committed, or indications that the individual was a danger to himself or others, there were no grounds for arrest prior to the touch. Whether the purpose of the touch was to get Mr. Taillon's attention (Ct. Pigeau's testimony) or to arrest him for public intoxication (Sgt. Walker's testimony), the contact was therefore improper, which rendered the subsequent arrest unnecessary. According to the OPP's policy on arrest and detention, making physical contact was a step along the arrest continuum. If Cst. Pigeau simply wanted to get Mr. Taillon's attention, he had other options for accomplishing that objective.

On a clear reading of Cst. Pigeau's own evidence, his conduct precipitated the altercation. He made physical contact with Mr. Taillon without proper justification; doing so led directly to an unnecessary arrest. Alternatively if the contact were part of the process of arresting Mr. Taillon for public intoxication, that too was an unnecessary arrest.

Notwithstanding the deficiencies in the reasons of the Hearing Officer, his conclusion was thus one of the possible outcomes which would be defensible in respect of the facts and the relevant law [per **Dunsmuir**]. The conclusion being reasonable, the appeal from the conviction was dismissed.

However, the Hearing Officer erred in his assessment of the penalty. The order with respect to training was incomprehensible based on the record. The inconsistencies

between the penalty as described in the decision and the penalty as described in the hand written hearing record were also of concern.

The Appellant was a very junior officer at the time of the incident, with a good work history and positive references from his superiors. The Commission accepted that Cst. Pigeau incorrectly assessed the situation in which he found himself. The Hearing Officer appropriately recognized that Cst. Pigeau's conduct was a momentary lapse of judgment and inconsistent with his normal conduct, yet this mitigating factor was not reflected in the penalty. The loss of 16 hours was harsh and excessive.

Accordingly, the penalty was varied and a reprimand substituted. The training portion of the penalty was revoked. Instead, Cst. Pigeau was ordered to attend an approved refresher training program regarding powers of arrest.

#### Statutes cited

*Police Services Act* R.S.O. 1990, c.P.15 as amended, s. 70(6)

O. Reg. 123/98, s. 2(1)(g)(i)

*Liquor Licence Act* R.S.O. 1990, c.L.19 as amended

*Statutory Powers Procedure Act* R.S.O. 1990, c.S.22 as amended, s. 21(1)

#### Authorities cited

**Williams and Ontario Provincial Police** (1995), 2 O.P.R. 1047 (OCCPS)

**Wilson and Ontario Provincial Police** (Nov. 20, 2006, OCCPS #06-11; JR #06-11)

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

**Dunsmuir v. New Brunswick** [2008] S.C.J. No. 9

**Galassi v. Hamilton (City) Police Service** [2005] O.J. No. 2301 (Div. Ct.) (OCCPS JR #03-20)

**Carson v. Pembroke Police Service** [2007] O.J. No. 5392 (Div. Ct.) (OCCPS JR #06-02)

**R. v. Dedman** (1981), 32 O.R. (2d) 641 (O.C.A.)

**R. v. Osbourne** [2008] O.J. No. 1135 (O.C.J.)

**Blackburn and Niagara Regional Police Service** (Sept. 17, 2003, OCCPS #03-22)

**Reilly and Brockville Police Service** (1997), 3 O.P.R. 1163 (OCCPS #97-07)

**Schofield and Metropolitan Toronto Police Service** (1984), 2 O.P.R. 613 (OPC)

[Further authorities as submitted by the parties may be found at pp. 6-10 of the decision.]