

OCCPS Decision # 08-05

CONSTABLE WILLIAM YAKIMISHYN
Appellant

AND

PEEL REGIONAL POLICE SERVICE
Respondent

Presiding OCCPS Members:

Roy B. Conacher, Member
Hyacinthe Miller, Member

Appearances:

Joanne Mulcahy, for the Appellant
Lynda A. Bordeleau, for the Respondent

Heard:

June 4, 2008

Date of Decision:

July 30, 2008

SENTENCING - Joint submissions - Off-duty incident in which Appellant damaged complainant's car and failed to report accident - Appellant pled guilty to charge of discreditable conduct - Parties made joint submission to Hearing Officer with recommended penalty of 20 hours - Hearing Officer rejected joint submission and imposed penalty of five days - Hearing Officer failed to provide fair, reasonable, clear and cogent reasons for rejecting joint submission - Hearing Officer also relied on information which was not part of the evidentiary record - Penalty varied to reflect agreed submission - Appeal allowed.

SENTENCING - Joint submissions - Standard for justifying departure from joint submission on penalty - Joint submission entitled to significant weight especially where submission based on detailed analysis of sentencing factors - Not appropriate to apply threshold used in criminal proceedings - Departure from joint submission must be based on solid evidentiary foundation - Hearing Officer required to act fairly, impartially and give clear and cogent reasons for rejecting joint submission - In instant case standard not met - Joint submission unfairly and unreasonably rejected - Agreed penalty restored - Appeal allowed.

DISCREDITABLE CONDUCT - Off-duty conduct - While off-duty Appellant damaged complainant's car in parking lot - Appellant denied responsibility when

confronted by complainant and left the scene - Appellant pled guilty to charge under *Highway Traffic Act* for failing to report accident - Appellant also pled guilty to disciplinary charge of discreditable conduct - Joint submission on penalty reviewed all sentencing factors and recommended 20 hours - Hearing Officer rejected joint submission and imposed penalty of five days - Rejection of joint submission not supported with clear and cogent reasons - Improper reliance on information not forming part of evidentiary record - Process and result unfair and unreasonable - Agreed penalty restored - Appeal allowed.

Summary of Reasons for Decision

Constable Yakimishyn appealed the penalty imposed by the Hearing Officer, 5 days (40 hours), following his plea of guilty to a charge of discreditable conduct, contrary to s. 2(1)(a)(ix) of the Code of Conduct. Constable Yakimishyn had over 30 years of service with the Peel Regional Police Service and had an unblemished employment record.

On June 8, 2006, while off duty and while parking his car, Cst. Yakimishyn damaged another vehicle. The complainant confronted him but Cst. Yakimishyn denied causing the damage, and left the scene. The complainant called the police. Constable Yakimishyn was charged later that night under s. 252 of the *Criminal Code* with failing to remain at the scene of an accident and under the *Highway Traffic Act* with failing to report an accident. The criminal charge was later abandoned. Constable Yakimishyn pled guilty to the *HTA* charge, paid a fine of \$500.00 and also paid \$200.00 in restitution to the complainant.

Constable Yakimishyn was charged with discreditable conduct. When the disciplinary hearing commenced he pled guilty to the charge. Following an adjournment the parties made a joint submission on penalty, which reviewed each of the various sentencing factors. The parties proposed a penalty of 20 hours. The Hearing Officer indicated that he was not prepared to accept the proposed penalty since in his view it did not adequately reflect certain aggravating factors. He advised the parties that he was considering a penalty of five days, and adjourned the hearing after offering the parties an opportunity to present submissions on the propriety of a more serious penalty. The parties did make further submissions. Subsequently the Hearing Officer released his decision, in which he rejected the joint submission and set out his reasons for doing so.

Counsel for the Appellant argued that the Hearing Officer made a number of errors in rejecting the joint submission. In particular, he addressed information which was not contained in the joint submission. With respect to the standard required for justifying departure from a joint submission, counsel advocated the adoption of the threshold criteria used in criminal proceedings: joint submissions should not be rejected unless they were unreasonable, contrary to the public interest or would bring the administration of justice into disrepute. Counsel argued that such a standard was appropriate in light of the "institutional bias" of a disciplinary process wherein both the prosecuting officer and the hearing officer were appointed by the Chief (p. 7). Counsel referred to the Hearing

Officer's comment that a total of 7 officers from Peel had been the subject of fail-to-remain accident investigations, indicating a problem which needed to be addressed through this case. Counsel submitted that this information was not part of the evidentiary record or the joint statement, and the Hearing Officer unfairly and erroneously relied on it to escalate the penalty.

Counsel for the Respondent argued that the standard advocated by the Appellant for rejecting a joint submission was not required in order to avoid the prospect of "systemic conflict" (p. 11). The appropriate standard had already been articulated by the Commission: fairness and the provision of clear and cogent reasons based on a firm factual foundation and on relevant sentencing factors. The allegation of improper reliance on ex-record information was misplaced: a Hearing Officer was entitled to draw upon personal experience, knowledge and expertise in making his or her decision. In this case the Hearing Officer was aware of problems with other officers leaving accident scenes and he was entitled to rely on that in considering the seriousness of the misconduct and the need for general deterrence.

Held, Penalty varied to 20 hours as per joint submission; appeal allowed.

In rejecting the joint submission the Hearing Officer failed to provide reasons which were fair, reasonable, clear and cogent. He also relied on information which was not properly before him.

The standard for rejecting a joint submission had already been established by the Commission. Additional criteria based on those utilized in criminal proceedings were not required or appropriate in the context of disciplinary hearings, which were essentially labour relations proceedings between an employer and an employee. Nor did the functions of the chief, the prosecuting officer and the hearing officer under Part V of the *Police Services Act* justify the adoption of a higher standard. As stated previously by the Commission, in rejecting a joint submission the Hearing Officer had to act fairly, impartially and on the basis of a solid evidentiary foundation. Clear and cogent reasons for the departure had to be provided.

A Hearing Officer was obliged to give careful consideration to a joint submission. Where, as here, the submission contained a detailed analysis of all the relevant sentencing factors, it should be accorded significant weight. Although a Hearing Officer could make observations based on common general knowledge or specialized understanding of police practices, he or she was not entitled to stray from the evidence as presented. That is what occurred in this case when the Hearing Officer improperly introduced information concerning 7 other Peel officers without an evidentiary foundation. This information did not fall into the category of common knowledge or personal experience, and consideration of the information led the Hearing Officer to place more weight on the factors of seriousness of the misconduct and general deterrence. The Appellant had no opportunity to respond to the information. The process and the result were therefore unfair to the Appellant.

The Hearing Officer provided no clear and cogent reasons why the joint submission should be rejected on the grounds of public interest and reputation of the service. This constituted a manifest error. In addition, the Appellant had a lengthy, unblemished career with the service, yet the Hearing Officer erroneously failed to consider the application of progressive discipline.

The penalty imposed by the Hearing Officer was harsh and excessive. By contrast, the negotiated penalty was within the range found in other decisions filed by the parties. Accordingly the penalty of five days was varied to the agreed penalty in the joint submission, 20 hours.

Statutes cited

Police Services Act R.S.O. 1990, c.P.15 as amended, Part V

O. Reg. 123/98, s. 2(1)(a)(ix)

Highway Traffic Act R.S.O. 1990, c.H.8 as amended

Criminal Code s. 252

Authorities cited

Quintieri and Toronto Police Service (2001), 3 O.P.R. 1509 (OCCPS #01-09)

Allen and Hamilton-Wentworth Regional Police Service (1995), 2 O.P.R. 1001 (OCCPS)

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

Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758 (Ont. Div. Ct.) (OCCPS JR 05-03)

Guse and Peel Regional Police Service (Oct. 18, 2006, Hearing Officer Patton)

[Further authorities as submitted by the parties may be found at pp. 7-13 of the decision.]