

OCCPS Decision # 09-01

CONSTABLE ROBERT CORREA
Appellant

AND

TORONTO POLICE SERVICE
Respondent

Presiding OCCPS Members:

Roy Conacher, Member
Hyacinthe Miller, Member

Appearances:

Harry Black, Q.C., for the Appellant
Darragh Meagher, for the Respondent

Heard:

July 30 & October 22, 2008

Date of Decision:

February 19, 2009

INSUBORDINATION - Disobedience of orders - Appellant ordered to attend investigative interview - Substance of interview identified as Appellant's comments to newspaper reporter and article which quoted Appellant's remarks about the service and on-going disciplinary charges against him - Lawful order to attend interview which Appellant disobeyed on five occasions - Lawful excuse not established - Conviction on charge of insubordination upheld - Appeal dismissed.

INSUBORDINATION - Components - Lawful order - Appellant quoted in newspaper article - Remarks made about the service and on-going disciplinary charges - Appellant received four written notifications and one oral direction to attend investigative interview - Notices complied with s. 56(7) of *Police Services Act* as well as service's policies - Appellant had sufficient details - Substance of complaint clear - Lawful orders issued - Conviction on charge of insubordination upheld - Appeal dismissed.

INSUBORDINATION - Components - Lawful excuse - Appellant acting on legal advice when he failed to comply with orders to attend investigative interview - Explanation of motivation rather than lawful excuse - Reliance on advice of legal counsel not relieving Appellant of duty to obey lawful order - Conviction on charge of insubordination upheld - Appeal dismissed.

SENTENCING - Penalties - Grounds for intervention - Conviction on charge of insubordination - Counsel for Appellant suggested reprimand while Prosecutor suggested loss of three days' pay - Hearing Officer imposed penalty of loss of seven days - Submissions of counsel not binding - Consistency of penalty not an absolute - Range of penalties available depending on mitigating and aggravating factors - Hearing Officer did not err by imposing penalty at the higher end of the scale for comparator cases - No manifest error in principle or failure to consider appropriate sentencing factors - Penalty upheld - Appeal dismissed.

Summary of Reasons for Decision

Constable Correa appealed his conviction on one charge of insubordination, contrary to s. 2(1)(b)(ii) of the Code of Conduct, as well as the penalty imposed, loss of seven days or fifty-six hours. At the time of events giving rise to the charge Cst. Correa had 20 years of service and a clear disciplinary record.

An investigation led by the RCMP into the Plainclothes Unit at 52 Division resulted in a number of officers being charged with various disciplinary offences, including corruption. Constable Correa, who had worked at 52 Division, was one of the officers charged.

On November 23, 2004 a full-page article appeared in the Toronto Sun newspaper. The article quoted Cst. Correa at length and identified him by name. Remarks attributed to Cst. Correa included his views on the corruption investigation, his declaration of innocence and derogatory comments about the service, particularly Cst. Correa's description of the Toronto Police disciplinary tribunal as a "kangaroo court".

Three days later Cst. Correa was served with a Notification pursuant to s. 56(7) of the *Police Services Act* and the service's complaint intake procedure. The Notification advised Cst. Correa that he was the subject of an internal, non-criminal complaint investigation in connection with the Toronto Sun article. Constable Correa was directed to contact Professional Standards within five days for the purpose of scheduling an interview regarding the matter. He was also advised of his right to have legal representation at the interview. Acting on the advice of his legal counsel, Cst. Correa did not contact Professional Standards for an interview.

Between December 2004 and January 2005 Cst. Correa received three additional Notifications, each one expanding on the allegations that he committed discreditable conduct and breach of confidence as a result of the newspaper interview and article. Each Notification directed Cst. Correa to contact Professional Standards for an interview. Constable Correa's legal counsel had responded to each Notification, asserting that Cst. Correa was not required to obey these directives as the Notifications were deficient and did not comply with s. 56(7) or the service's internal protocols.

On March 3, 2005 the Professional Standards investigator personally attended 23 Division, where Cst. Correa worked, and gave him a direct order to contact Professional Standards to schedule an interview. Constable Correa failed to comply with the oral direction, as he had similarly failed to comply with the four written orders.

On April 7, 2005 Cst. Correa was issued a further Notification of Investigation, alleging that he had committed the offence of insubordination by failing to respond to a direct lawful order.

At the disciplinary hearing Cst. Correa pled not guilty. His legal counsel was called as a defence witness. The Hearing Officer found Cst. Correa guilty of insubordination. At the sentencing portion of the hearing commendations, positive evaluations and character references were submitted on behalf of the Appellant. The Prosecutor suggested a penalty of loss of three days. The Defence suggested that a reprimand was an appropriate penalty. The Hearing Officer imposed a penalty of loss of seven days.

Counsel for the Appellant argued that the Notifications were defective in that they did not identify the “substance of the complaint” in accordance with s. 56(7), and did not detail the allegations in accordance with the service’s complaint intake policy. As a result, the orders were not lawful and the Hearing Officer lacked jurisdiction to conduct a hearing on the charge of insubordination. Counsel submitted that the conviction was based on several manifest errors and the Hearing Officer failed to give proper weight to the Appellant’s good-faith reliance on legal advice as a lawful excuse. Further, the Hearing Officer erred in failing to accept the penalty submission of the Prosecutor. Counsel submitted that the penalty was excessive and thus inconsistent with comparator cases.

Counsel for the Respondent argued that the notices were not deficient or non-compliant; they contained sufficient information for the Appellant to know what would be discussed at the investigative interview. Counsel submitted that reliance on legal advice was not a lawful excuse for disobeying a lawful order. The conviction was based on a sound evidentiary foundation, and the penalty reflected no manifest errors, nor did it fall outside the range of appropriate penalties in other similar cases involving insubordination.

Held, Conviction and penalty upheld; appeal dismissed.

The Hearing Officer had to answer four fundamental questions: 1) whether the Appellant received an order; 2) whether the order was lawful; 3) whether the Appellant disobeyed, neglected or omitted to carry out the order and if so, 4) whether he had a lawful excuse for doing so.

With respect to the first and second questions, the Appellant received four written Notifications. These contained the degree of substance and detail required by s. 56(7) and the service’s policies, such that the Appellant was required to comply with the orders. The Notifications directed the Appellant to attend an investigative interview. In a labour relations context, it was inappropriate to import a criminal or quasi-criminal threshold for notifications. The notices outlined the basic information: they advised of an internal

complaint and the nature of the allegations, and they provided sufficient detail that the Appellant ought reasonably to have known the substance of the complaint. It was unreasonable to expect the service to provide particulars which were not within its knowledge and which it sought to ascertain through the process of the investigative interview. The fact that the Appellant's counsel requested more detail did not invalidate the notices or relieve the Appellant of his duty to comply. Thus the Hearing Officer did not err in concluding that five lawful orders were issued to the Appellant.

With respect to the third question, there was no dispute that the Appellant did not comply with any of the orders to contact Professional Standards to arrange an investigative interview.

With respect to the fourth question, the Hearing Officer rejected the Appellant's assertions that he relied in good faith on the advice of his counsel and/or that he made an honest or innocent mistake. The Appellant was not an uninformed civilian or a novice officer; he was a seasoned police officer. While it might explain his motivation, his reliance on the advice of legal counsel did not relieve him of the duty to obey a lawful order. Therefore the Appellant did not have a lawful excuse for failing to obey the orders.

With respect to penalty, the Hearing Officer regarded the repeated disobedience of an order as an aggravating factor, while the Appellant's positive employment record and character references were regarded as mitigating factors. The Hearing Officer interpreted the fact that the Appellant remained non-compliant with the order as indicating a lack of recognition and remorse. This finding, which was based on the evidence before him, was not invalidated or undermined by the use of some strong statements.

The Hearing Officer referred to the need for general and specific deterrence to avoid the prospect of officers picking and choosing which orders they will obey. Potential damage to the service and effective management of the force were also considered.

The Hearing Officer concluded that he was not bound by the submissions of counsel. In addition, consistency of penalty was not an absolute; rather, a range of penalties were available depending on the mitigating and aggravating factors in any given case. The Hearing Officer did not err by choosing a penalty which was at the higher end of the scale of penalties for other cases involving insubordination.

There were no manifest errors in principle or a failure to consider relevant sentencing factors, and thus no basis for varying the penalty imposed.

Statutes cited

Police Services Act R.S.O. 1990, c.P.15 as amended, ss. 56(7) and 74(1)(a)
Statutory Powers and Procedures Act R.S.O. 1990, c.S.22 as amended
O.Reg. 123/98, s. 2(1)(b)(ii)

Authorities cited

Carmichael and Ontario Provincial Police (1998), 3 O.P.R. 1232 (OCCPS #98-07)
Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (OCCPS)
Gage v. Ontario (Attorney General) (1992), 90 D.L.R. (4th) 537 (Div. Ct.)
Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 (Div. Ct.) (OCCPS JR #03-20)
Yakimishyn and Peel Regional Police Service (July 30, 2008, OCCPS #08-05)
Bright v. Konkle (1997), 2 P.L.R. 481 (Ont. Bd. Inq.)
Precious and Hamilton Police Service (2002), 3 O.P.R. 1561 (OCCPS #02-08)
Christiano and Metropolitan Toronto Police Service (1997), 3 O.P.R. 1126 (OCCPS #97-02)
Quintieri and Toronto Police Service (2002), 3 O.P.R. 1509 (OCCPS #01-09)
Allen and Hamilton-Wentworth Regional Police Service
Wildeboer and Toronto Police Service (Nov. 7, 2006, OCCPS #06-10)
Carson and Pembroke Police Service (2001), 3 O.P.R. 1479 (OCCPS #01-05)
Thompson and Chatham Police Service (1977), 1 O.P.R. 342 (OPC)
Gregg and Midland Police Service (2001), 3 O.P.R. 1522 (OCCPS #01-11)
Orr and York Regional Police Service (2001), 3 O.P.R. 1469 (OCCPS #01-02)

[Further authorities as submitted by the parties may be found at pp. 7-14 of the decision.]