

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE J.B. PIGEAU

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

CHRISTOPHER TAILLON

Respondent

Presiding Members:

Dave Edwards, Member
Hyacinthe Miller, Member

Appearances:

Gavin May, Counsel for the Appellant
Jinan Kubursi, Counsel for the Ontario Provincial Police

Hearing Dates: February 27, 2009 and June 16, 2009

Constable J. B. Pigeau appeals a finding of guilt for one count of unlawful or unnecessary exercise of authority, contrary to section 2(1)(g)(i) of the Code of Conduct found at Ontario Regulation 123/98 (the "Code") by Superintendent (retired) Alan Griffiths (the "Hearing Officer").

As well, he appeals the penalty of the loss of two days or sixteen hours off and the direction that he receive in-service training that deals with issues of mental illness and arrest procedures, particularly dealing with schizophrenia and illnesses brought on by diabetic complications.

Background:

Constable J. B. Pigeau joined the Ontario Provincial Police ("OPP") as a cadet in May of 2003. He was appointed a constable with the OPP August 30th, 2004. At the time of the incident giving rise to this proceeding, he had been a police officer for approximately fourteen months.

As a consequence of an arrest that occurred in the early hours of December 9, 2006, Mr. Taillon made a public complaint against Constables Pigeau and Lobsinger. This complaint was not substantiated by the OPP. Mr. Taillon appealed that decision to this Commission under Part V of the Police Services Act R.S.O. 1990, c P.15 as amended (the "Act"). A panel of Commission members reviewed the complaint and ordered that a hearing be held into allegations that misconduct had occurred.

As a result, by Notice of Hearing dated October 23rd, 2007, Constable Pigeau was charged with one count of unlawful or unnecessary exercise of authority. The particulars of the allegation are as follows:

On or about December 10, 2006 you participated in the detention and arrest of Christopher Taillon. You did not have good and sufficient cause, and that arrest was unlawful or unnecessary.

Constable Lobsinger was also charged with the same offence. The charges against both officers proceeded together.

Although some of the facts in this matter are in dispute, the circumstances leading to the disciplinary charges are fairly straightforward.

On the evening of December 8, 2006 and the early morning of December 9, 2006, Mr. Taillon had trouble sleeping. He put on a winter coat and went for a walk around midnight. The weather at the time was freezing rain. The sidewalks were covered with snow and ice.

Constables Pigeau and Lobsinger were working a paid duty assignment as part of the seasonal RIDE program. They were patrolling Government Road West in Kirkland Lake in a marked OPP cruiser. Constable Pigeau was driving. At about 12:30 a.m., they noticed Mr. Taillon walking towards them on the sidewalk on the other side of the street. They thought that he stumbled. Both officers formed the belief that Mr. Taillon may be intoxicated in a public place, contrary to the Liquor Licence Act R.S.O. 1990, c. L.19 as amended.

Both officers testified that Constable Lobsinger attempted to talk to Mr. Taillon through the open passenger-side window of their cruiser. Constable Lobsinger asked for his name and wanted to know what he was up to. The officers stated that Mr. Taillon did not respond and appeared to be ignoring them. His head was covered with the hood of his parka. Mr. Taillon turned and walked quickly in the opposite direction.

Both officers thought that his behaviour was suspicious and decided to investigate further.

Mr. Taillon testified that he told the officers they had no reason to talk to him. He then turned and walked away. Both officers deny hearing him say anything.

Constable Pigeau turned the cruiser around and parked it. He exited the vehicle and followed Mr. Taillon on foot. Constable Lobsinger was delayed as his exit from the passenger side of the cruiser was blocked by a sizeable snow bank. Constable Pigeau testified that he “voiced” to Mr. Taillon, asking that he stop. Mr. Taillon turned around to face the officers.

Both officers testified that Mr. Taillon then said “get the fuck away from me” in a voice that was “frantic” and “hysterical”. He turned and continued to walk away from the officers. The Appellant thought that Mr. Taillon’s comment was strange and believed that his behaviour was not normal.

Mr. Taillon denied that the officers called out to him as he walked away and denied that he said, “Get the fuck away from me”.

Constable Pigeau testified that when he was within arm’s distance of Mr. Taillon, he reached out and “gently” placed his right hand on Mr. Taillon’s shoulder asking him to please stop and talk to him. According to Mr. Taillon, Constable Pigeau grabbed his left arm.

Constable Lobsinger testified that he saw the Appellant touch Mr. Taillon’s shoulder with an open hand and that Mr. Taillon then shoved the Appellant. Mr. Taillon denied that the Appellant touched his shoulder and denied pushing Constable Pigeau.

Following this interaction, Constable Pigeau arrested Mr. Taillon for assault police officer. He testified that he took Mr. Taillon to the ground. Constable Lobsinger then arrived at the scene and assisted with handcuffing Mr. Taillon. They questioned Mr. Taillon as to whether he had been drinking. He denied that he had been drinking.

Mr. Taillon testified that both officers assisted in the take down. He said that Constable Lobsinger kned him in the back.

As the officers escorted Mr. Taillon to the cruiser, they noted that his eyes were bloodshot, his pupils were dilated and he was frothing at the mouth. No alcohol was detected on his breath. Mr. Taillon noticed another police vehicle approaching and called for help.

The officer’s supervisor, Sergeant Alan Walker, then arrived on the scene and assumed control of the situation. He spoke to the officers and then Mr. Taillon.

Sergeant Walker concluded that Mr. Taillon was not intoxicated. Mr. Taillon advised him that he was schizophrenic. Sergeant Walker concluded that Mr. Taillon might be in need of medication.

Sergeant Walker decided to release Mr. Taillon unconditionally.

Mr. Taillon testified that he told Sergeant Walker he had been kneed in the back by one of the officers. Sergeant Walker denied that such a report had been made. At Mr. Taillon's request, he provided the officers' names and badge numbers.

Mr. Taillon then went to a nearby Subway restaurant and spoke with G.M.¹. Mr. Taillon testified that he showed G.M. the mark on his back. G.M. testified that he observed abrasions on Mr. Taillon's chest and wrists. Mr. Taillon told him that he received the mark on his chest when the officers tried to put him in the cruiser and that the marks on his wrists were from the handcuffs. Mr. Taillon denied saying that to G.M.

That evening and subsequently, Mr. Taillon attended the Emergency Department of the local hospital and a local clinic for medical treatment for injuries arising from the incident. He provided information to a variety of health professionals about his injuries and his medical history.

The Hearing:

The disciplinary hearing for Constables Pigeau and Lobsinger occurred on May 27 and 28, 2008.

Mr. Taillon represented himself. He disputed much of the contents of the medical records that had previously been submitted on consent and he refused to disclose his complete medical file. The Appellant requested a subpoena for Dr. Spiller who had treated Mr. Taillon. The Hearing Officer denied the request.

Christopher Taillon, G.M. and Sergeant Walker testified. Constables Pigeau and Lobsinger also gave evidence in their own defence. Submissions by counsel were made on May 29, 2008.

The Hearing Officer's decision as to guilt was given on July 2, 2008. The Hearing Officer found Constable Lobsinger not guilty and Constable Pigeau guilty of misconduct.

Penalty submissions were made on September 30, 2008 and the Hearing Officer's decision was given October 10, 2008.

Constable Pigeau is appealing both the finding of guilt and the penalty assessed.

Preliminary Matter:

On February 27, 2009 this Panel convened to hear the appeal.

Prior to the commencement of oral argument, we noted that Mr. Taillon had not received a Notice of Appeal, nor had he received a copy of the record from the disciplinary hearing, factums or supporting materials. Neither Counsel for the Appellant nor the Respondent OPP had served any of its documents upon Mr. Taillon.

¹ Name modified.

Mr. Taillon was a party to the original proceedings, in accordance with the provisions of the Act. A review of the transcript revealed that throughout the initial phase of the hearing, Mr. Taillon participated, both as a witness and as a party.

Mr. May acknowledged that the failure to serve Mr. Taillon was an error.

As a result of the above we released a Decision on a Preliminary Motion on March 5, 2009. We will not repeat those reasons here, but note that we directed:

1. The Appellant and the Respondent police service shall jointly arrange for the service upon Mr. Taillon of the Notice of Appeal, and all other documents to which he, as a party, is entitled. This shall be accomplished within 21 days.
2. Forthwith, following service of those documents, an Affidavit of Service shall be filed with the Registrar, which affidavit will include the address, and if possible, the phone number of the complainant.
3. Thereafter, the Registrar will deal with the administrative arrangements relating to rescheduling this appeal.

The Appeal:

The Panel reconvened on June 16th, 2009 to hear the appeal. We confirmed that counsel had submitted evidence of compliance with the order as to service of Mr. Taillon. In addition, Mr. Taillon had been contacted by the Registrar and was aware of the hearing date.

Mr. Taillon did not appear for the hearing.

Appellant's Position:

Mr. May raised several grounds for appeal: the Hearing Officer's refusal to issue a subpoena, the credibility of Mr. Taillon, the Hearing Officer's misapprehension of evidence regarding the reason for arrest and misapprehension/misapplication of the law, his failure to give complete reasons and manifest error leading to a harsh and excessive penalty.

He argued that the Hearing Officer breached the rules of natural justice by refusing the Appellant's request for a subpoena for Dr. Spiller, the physician who treated Mr. Taillon's injury. There was a duty of fairness to allow the Appellant to call and examine witnesses. Under section 21(1) of the Statutory Powers Procedure Act R.S.O. 1990, c S. 22 (the "SPPA") the ground for refusal to issue the subpoena is "relevance". The Hearing Officer did not rule on relevance, but rather advised that he has sufficient evidence upon which to make a ruling.²

Constable Pigeau wanted Dr. Spiller's testimony to assist in showing that Mr. Taillon was not a credible witness and had mislead the hearing.

² Transcript, May 27, 2008, page 126

The medical evidence indicated that Mr. Taillon had advised Dr. Spiller that he had a history of drug abuse, which conversation Mr. Taillon had denied. Second, the Appellant hoped to show through Dr. Spiller's testimony that the injury which Mr. Taillon complained of pre-existed the arrest. This breach of the rules of natural justice and principles of fairness resulted in a loss of jurisdiction.

Mr. May asserted that the Hearing Officer's finding that Mr. Taillon was a credible witness with respect to the events surrounding his arrest was self-evidently wrong and should not be accepted by this Commission. He cited 19 different instances where, in his view, Mr. Taillon was not credible, including Mr. Taillon's assertion that he did not stumble, a statement which was contradicted by both officers. For the Hearing Officer to accept Mr. Taillon's credibility would require that he reject the testimony of two constables, a patrol sergeant, three nurses and four doctors.

He suggested that the Hearing Officer misapprehended the evidence when he stated "[Constable Pigeau] made his assessment of Mr. Taillon's condition and proceeded to arrest him. While attempting to arrest him an alleged assault occurred".³ Both officers testified that they had commenced an investigation under the Liquor Licence Act, but that they had not had time to confirm whether Mr. Taillon was intoxicated. As confirmed by Constable Lobsinger, the arrest was for assaulting police and not public intoxication.

He further submitted that the Hearing Officer had an obligation to provide complete reasons. McGuire v. Royal College of Dental Surgeons of Ontario [1991] O.J. No. 187 (Div. Ct.) at page 11 and Precious and Hamilton Police Service (2002), 3 O.P.R. 1561 (O.C.C.P.S.) at page 1572. The Hearing Officer failed to provide sufficient, specific or proper reasons. Wilson and Ontario (Provincial Police Service) [2008] O.J. No. 4019 (Div.Ct.). He did not enunciate what he found as fact.

Mr. May argued that where a hearing officer fails to provide proper reasons, the Commission must determine the appeal on the basis of the evidence already on record as it cannot order a new hearing. Wilson and Ontario (Provincial Police Service) supra, at page 6

He suggested that absent proper reasons the Appellant was left to speculate as to the reasons for a finding of misconduct. He postulated three possible lines of reasoning which might justify a finding of misconduct.

He theorized that the Hearing Officer may have felt that the arrest for public intoxication was unlawful or that Constable Pigeau failed to comply with the lawful detention rules, or finally that the Hearing Officer did not believe that Mr. Taillon struck Constable Pigeau. He noted, however, that the Hearing Officer made no findings of fact which would support any of these theories nor did he provide an analysis that would clarify how he reached his conclusions.

³ Conviction Decision, July 2, 2008, page 9

Counsel submitted that for the Hearing Officer to acquit Constable Lobsinger, he must have accepted Constable Lobsinger's evidence that he only assisted Constable Pigeau once Mr. Taillon was on the ground; therefore, he must have rejected Mr. Taillon's evidence. Constable Lobsinger had also testified that Mr. Taillon shoved the Appellant and this was the reason for his arrest. The Hearing Officer gave no explanation as to why he appeared to accept part of Constable Lobsinger's testimony and not the other part.

He asserted that the Hearing Officer misapprehended the law when he stated that "all the elements in this present hearing were dealt with by these three different courts".⁴ These cases state that police officers must investigate crime. They may stop and question pedestrians, but do not have the right to detain them unless the detention is also permitted by law. Pedestrians have a right to refuse to answer police questions.⁵

Mr. May argued that Constable Pigeau was attempting to speak to Mr. Taillon and not detain him when he touched his shoulder. Since Mr. Taillon shoved Constable Pigeau, there were grounds to detain and arrest him for assaulting a police officer.

He observed that the Hearing Officer's written decision was flawed by misstatements of testimony, inaccurate summarization of events and unexplained or puzzling conclusions. Furthermore, the Record of Hearing and Disposition (the "record") contained in the materials provided by the OPP to the Commission was inconsistent with the written penalty decision.

The record is a form which is completed by the Hearing Officer after the final disposition of the matter. It contains space for inserting the name of the Appellant and hearing officer, the officer's plea, the finding following adjudication and the penalty assessed. Notations were made on the record in longhand, dated and signed by the presiding officer.

The record, dated at Orillia on October 10, 2008, indicates that the penalty assessed is:

Forfeiture (Loss) of *one day off or 8 hours off*. Penalty imposed under Section 68(1)(f) of P.S.A. Further under section 68(5)(b) officer to receive in service training dealing with issues of mental illness, schizophrenia, diabetic complications and other mental illness (*sic*) related to the officer's powers of arrest and detention (*sic*)⁶

The penalty decision of the same date provides for the loss of two days or sixteen hours off. As well, the training aspect noted is different as it provides for "in-service training

⁴ Transcript, July 2, 2008, page 17, R. v. Dedman (1981), 32 O.R. (2nd) 641 (Ont. C. A.), R. v. Mann [2004] 3 S.C.R. 59 (S.C.C.) and R. v. Osbourne [2008] O.J. No. 1135 (O.C.J.).

⁵ R. v. Osbourne supra, page 3

⁶ Record of Proceedings, Tab A, page 2

that deals with the issues of mental illness and arrest procedures, particularly dealing with schizophrenia and illnesses brought on by diabetic complications.”⁷

Mr. May commented that these inconsistencies were further examples of the lack of accuracy by the Hearing Officer.

He argued that the Hearing Officer made so many errors that the finding of guilt should be set aside.

In the alternative he submitted that the Hearing Officer erred in assessing the penalty.

At the penalty hearing the Prosecutor had asked for forfeiture of twenty-four hours and the Appellant had asserted that an order for training would be appropriate.

Mr. May submitted that the Hearing Officer found that the conduct was a “momentary deviation”⁸ and fell in the “less serious category for penalty”⁹. He also indicated that there “may have been a misunderstanding of training received by Constable Pigeau in arrest procedure”¹⁰. Although the Hearing Officer cited the need for training he ultimately imposed a penalty which included a forfeiture of time off.

He asserted that the Hearing Officer failed to consider that the conduct fell into a grey area which was a source of confusion for many people, including those at higher ranks and with more policing experience. Mr. May reminded us that at the time of the incident, Constable Pigeau was a very junior officer with only fourteen months experience.

Further, he argued that the requirement for training in arrest procedures dealing with “illnesses brought on by diabetic complications” is a clear error as there was no evidence whatsoever in the hearing documentation regarding diabetes. There is no logical reason based upon the evidence for the Hearing Officer to impose such a penalty.

Mr. May requested that the Hearing Officer’s decision be revoked and a finding of not guilty be issued instead. In the alternative, he requested that the penalty be varied and a reprimand be issued.

Respondent’s Position:

Ms. Jinan Kubursi represented the OPP.

She submitted that reasonableness is the standard of review to be applied by the Commission, guided by principles of deference when credibility is an issue. Toronto

⁷ Penalty Decision, October 10, 2008, page 3

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

(City) Police Service v. Blowes-Aybar [2004] O.J.No. 1655 (Div. Ct.), at paras. 31 and 33

She argued that the decision of the Hearing Officer to deny the request for a subpoena for Dr. Spiller was not an error. The Hearing Officer denied the request on the basis that there had already been sufficient evidence produced in relation to Mr. Taillon's alleged injuries. Further, the Hearing Officer decided that additional evidence from Dr. Spiller on this point was not relevant to whether the officer had made an unlawful or unnecessary arrest.

She asserted that in ruling that the evidence sought by the Appellant through a summons of Dr. Spiller was not relevant, the Hearing Officer was acting within his jurisdiction and the decision was a reasonable one. Carter v. Phillips [1998] O.J. No. 1833 (Ont. C.A.) at page 3

Ms. Kubursi submitted that the Hearing Officer did not err in determining the credibility of Mr. Taillon and he did not misapprehend the evidence.

She suggested that the Hearing Officer's decision that Mr. Taillon was credible with respect to the issues surrounding his arrest did not mean that the Hearing Officer was required to reject wholly the testimony of the police officers and medical practitioners.

She submitted that the inconsistencies in evidence raised by the Appellant are peripheral to the central issue of whether the Appellant's arrest of Mr. Taillon was an unlawful and unnecessary exercise of authority. The Hearing Officer acknowledged certain inconsistencies of Mr. Taillon's evidence, particularly regarding his medical treatment. However, on the central issue of the allegation of misconduct the Hearing Officer found that Mr. Taillon's evidence was similar to the evidence of the Appellant and Constable Lobsinger.¹¹

She asserted that the courts have accepted that a hearing officer may find a witness to be essentially credible, notwithstanding inconsistencies in the evidence on issues that are peripheral to the main issues. Wilson v. Ontario (Provincial Police Service) [2008] O.J. No. 4019 (Div. Ct.) at paras. 14 and 23 to 24.

Ms. Kubursi argued that the Hearing Officer did not misapprehend the evidence regarding the reason for the arrest. The Hearing Officer is clear that initially the Appellant was investigating a possible Liquor Licence Act offence and referred to Sergeant Walker's evidence that the Appellant told him that he arrested Mr. Taillon for intoxication and for assault police.¹²

She submitted that the Hearing Officer did not fail to provide complete reasons for his decision. The "reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their insufficiency should be measured not in the abstract,

¹¹ Conviction Decision, July 2, 2008 page 7

¹² Transcript, May 27, 2008, page 12, line 20 to page 13, line 8 and Transcript, May 28, 2008, page 6, lines 13 to 20.

but as they respond to the substance of what is in issue”. R. v. Walker [2008] S.C.J. No. 34 (S.C.C.), at paras. 19 to 20.

She noted that the Hearing Officer in his decision made findings of fact which are supportable by the record:

There is no doubt from evidence given by the witnesses that Constable Pigeau was the arresting officer. He made an assessment of Mr. Taillon’s condition and proceeded to arrest him. While attempting to arrest him an alleged assault occurred.....¹³

As well, she asserted that the functional test for sufficiency is that “[a]n appeal based on insufficient reasons will only be allowed where the trial judge’s reasons are so deficient that they foreclose meaningful appellate review”. R. v. Dinardo [2008] S.C.J. No 24 (S.C.C.) at para. 25.

Ms. Kubursi submitted that even if the tribunal’s reasons are deficient, the Commission has the right to review the record, the reasons of the hearing officer, and bearing in mind the hearing officer’s rulings on credibility, determine whether the finding of misconduct should be upheld. Wilson v. Ontario (Provincial Police Service) supra para. 35

As to the penalty, she described the Commission’s role on an appeal of a hearing officer’s decision on penalty. Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 (Div. Ct.) at para. 17 and Armstrong v. Peel (Regional Municipality) Police Services [2003] O.J. No. 3437 (Div. Ct.) at para. 59

She asserted that the penalty was within the range of those available to the Hearing Officer and that he applied the correct principles. As there were no manifest errors, there is no basis for the Commission to intervene. Armstrong v. Peel (Regional Municipality) Police Services, supra., at para. 61, Penalty Decision, pages 2 to 3

In summary, Ms. Kubursi asserted that the appeal should be dismissed.

Decision:

The first issue to be dealt with is the appeal of the finding of guilt.

The Commission’s role on appeal of a finding of guilt has been described in Williams and Ontario Provincial Police (1995) 2 O.P.R. 1047 (O.C.C.P.S.) at page 1058:

Our role or function in such matters is not to second-guess the decision of the adjudicator. In certain limited cases, it would be open for us to reach a different conclusion from the trier of fact. However, that must be based on the strongest ground. In other words, there can be no other determination

¹³ Conviction Decision, July 2, 2008, page 9

than the conclusions of the adjudicator, as to the credibility of witnesses, cannot be reasonably accepted. The question to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

This test was also spoken to in Wilson and Ontario Provincial Police (November 20, 2006, O.C.C.P.S.) at page 7:

This can be a difficult test for an Appellant to meet. The words “void of evidentiary foundation” clearly contemplate that appellate interference with evidentiary findings will be exercised sparingly. Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.)

Commission appeals are on the record. Not only do we hear from counsel for an appellant and respondent, we have the opportunity to review all of the evidence submitted, including transcripts of sworn testimony, physical evidence such as photographs, audiotapes and police documentation. However, we do not have the benefit of seeing and hearing the witnesses.

The standard of review exercised by this Commission is one of reasonableness.¹⁴ If the Commission fails to apply the correct standard of review, it commits an error at law.¹⁵

Recently the Supreme Court of Canada commented upon that standard of reasonableness in Dunsmuir v. New Brunswick [2008] S.C.J. No. 9 at para 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

In addition, deference should be given by this Panel to the Hearing Officer’s findings as to credibility.¹⁶

This Commission is also guided by the Divisional Court’s direction contained in Galassi v. Hamilton (City) Police Service supra. at paragraph 19:

¹⁴ Toronto (City) Police Services v. Blowes-Aybar supra. at para 31.

¹⁵ Ibid, paras 26 and 56

¹⁶ Ibid, para. 33

In reviewing the reasons of a lay tribunal, the task of this Court is not to be overly critical of the language used, nor is it to focus on mistakes that do not affect the decision as a whole (Re Del Core and Ontario College of Pharmacists (1985), 51 O.R. (2nd) 1 (Ont. C.A.)). This approach must be kept in mind when the reasons of the Hearing Officer are examined, as he is not legally trained.

How does the foregoing apply to the facts of this matter?

The Hearing Officer denied a request for a summons where the defence wished to call Dr. Spiller who would testify with respect to the medical treatment given by him to Mr. Taillon prior to, and subsequent to, the interaction with Constable Pigeau.

The Hearing Officer's power to issue a subpoena arises from the SPPA. The summons is issued where the hearing officer finds that the person may have evidence "relevant to the subject-matter of the proceeding and admissible at a hearing".¹⁷

The Hearing Officer concluded that he would not issue the summons as "there's no need for the doctor to appear at this time to clarify those issues that you've raised".¹⁸ In our view that is a misstatement of the grounds for refusing a summons.

However, we are also of the view, having reviewed the transcripts of the proceedings, that this additional testimony was marginally relevant to the charge facing the officer. The Hearing Officer could properly have denied the request for the subpoena on the basis of relevance; therefore, his order did not result in a breach of natural justice for Constable Pigeau.

Among other responsibilities, a hearing officer's function is to receive and weigh evidence, observe the demeanour of witnesses, and assess credibility. Bearing these determinations in mind, a hearing officer must then make findings of fact upon which the adjudicative decision is based. There must also be careful analysis presented and clarity of reasoning. In making a finding, a hearing officer must enunciate a sufficiency of reasons so that the Appellant, the Respondent and, for that matter, anyone reading a conviction or penalty decision, can identify assessments of credibility and the facts upon which the decision is based, understand the evidence examination process and the foundation for the adjudicator's final determinations. There are several deficiencies in the Hearing Officer's decision in this regard.

For example, the Hearing Officer stated that he found Mr. Taillon to be a credible witness with respect to the events surrounding this charge,¹⁹ which leads one to speculate that he accepted Mr. Taillon's version of the interaction. He did not, however, comment why the credibility of the other witnesses was less acceptable. In

¹⁷SPPS section 12(1)

¹⁸ Transcript, May 27, 2008, page 125

¹⁹ Conviction Decision, July 2, 2008, page 8

fact, he stated that, “I found the evidence given by Mr. Taillon, Constable Pigeau and Constable Lobsinger dealing with the offence that the officers are charged with to be very similar and even supportive at times.”²⁰ This leaves us to speculate on his line of reasoning.

In acquitting Constable Lobsinger the Hearing Officer appears to accept Constable Lobsinger and Pigeau’s version of the “take down” without precisely saying so, and without indicating the elements that he considered in reaching such a conclusion. If, in fact, he did accept the officers’ testimony on this point, (and as specificity in the written decision is lacking, one must speculate that he did), one must wonder exactly what portion of Mr. Taillon’s evidence did he accept or reject regarding the entire incident, notwithstanding his comment that he found Mr. Taillon to be a creditable witness with respect to the issues surrounding his arrest.²¹

The Hearing Officer noted that numerous exhibits and cases had been reviewed by him and found to be helpful or not. He did not, however, indicate which exhibits and cases he relied on, the reasons why such documents were helpful or otherwise, nor how such reasoning impacted his decision.

We would also note the discrepancy between the penalty outlined in the penalty decision and that which is contained in the hand written record. Given the cumulative qualitative deficiencies in the Hearing Officer’s decision, this causes us further concern.

The standard of review which this Panel must employ is one of reasonableness. One of the questions to be asked is set out in Dunsmuire v. Brunswick supra at paragraph 47: “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

This Commission has the power under section 70(6) of the Act to “...confirm, vary, or revoke the decision being appealed or may substitute its own decision...”

It is possible that a decision may be reasonable, but that the reasons to support the decision as enumerated by the hearing officer are neither sufficiently complete nor reasonable.²² In such event the Commission must determine the appeal on the basis of the evidence already on the record.²³ This could result in the Commission upholding the decision of a hearing officer, but substituting, in whole or in part, its own reasons for that decision.²⁴

Given the deficiencies in the Hearing Officer’s decision referred to above, it is necessary for this Panel to look to the record to ascertain whether appropriate facts exist to support the Hearing Officer’s decision.

²⁰ Transcript, July 2, 2008, page 16

²¹ Ibid, page 8

²² Carson v. Pembroke Police Service [2007] O.J. No. 5392 (Div. Ct.)

²³ Wilson v. Ontario (Provincial Police Service) supra.

²⁴ Carson v. Pembroke Police Service supra

According to the testimony of Constables Pigeau and Lobsinger:

1. On the evening in question, a male out walking late on a wintery night stumbled once on a slippery sidewalk in icy conditions.
2. The police were concerned about potential public intoxication due to the stumble.
3. When approached by the police the male turned and proceeded to walk in a brisk fashion in the opposite direction, clearly not wanting to speak further with the police. This sign of agility did not offset their concern about public intoxication as evidenced to them by the one stumble.
4. The police officers turned their vehicle around and parked on the side of the road.
5. Constable Pigeau followed the male at a brisk pace in order to catch up with him and called out asking that he stop.
6. The male turned to face the officers and shouted, "Get the fuck away from me."²⁵ He then turned and proceeded to walk away from the officers.
7. Constable Pigeau found this behaviour to be bizarre and wanted to continue an investigation of the public intoxication charge.
8. Constable Pigeau had observed no other indicia of public intoxication (i.e., slurred speech, confusion, staggering, vomiting, etc) other than the one stumble on an icy sidewalk.
9. Constable Pigeau "voiced" to Mr. Taillon to stop.
10. Constable Pigeau felt obliged to touch the male to get his attention.
11. The touch led to an altercation and Mr. Taillon's arrest.

The Court of Appeal has stated in R. v. Dedman supra at page 12:

Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to a police officer as to anyone else.

Based upon a clear reading of the testimony which is most favourable to Constable Pigeau, namely his own testimony, the only potential indicium of public intoxication was one stumble on an icy sidewalk late at night. According to Constable Pigeau, having observed the stumble, the two officers in the police cruiser "tried to initiate a conversation", get his attention, "ask him to stop and talk to us".²⁶ Also, based upon Constable Pigeau's testimony it is clear that he was aware that Mr. Taillon did not want to speak further with the police.²⁷ Constable Pigeau stated "he did not answer any of our questions", "he appeared to be ignoring us", "continued to walk westbound as we

²⁵Transcript May 28, 2008, page 27

²⁶ Ibid, page 24

²⁷ "Get the fuck away from me", Transcript, May 28, 2008, page 27

were patrolling beside him slowly” and “quickly turned away from us and began to... walk at a quick pace in the opposite direction”. However, “based on his experience as a police officer”, Constable Pigeau suspected this was not normal behaviour, noting that “we were simply asking a question” and that “no answer was given”. In the absence of additional or obvious signs of public intoxication, other relevant information that a crime may have been committed or indications that the individual was a danger to himself or others, the prudent course of action for Constable Pigeau would have been to let Mr. Taillon proceed upon his way. R. v. Osbourne, supra.

Further, whether Constable Pigeau’s physical contact with Mr. Taillon was a touch or a grab; it precipitated the verbal and physical interactions with Mr. Taillon. Constable Pigeau stated that Mr. Taillon had not been advised that he was being investigated for a possible Liquor Licence Act infraction. The officers had not fully assessed if Mr. Taillon was, in fact, intoxicated because the interaction escalated quickly into a takedown.

As Sergeant Wilson stated, once he was on scene he was able to de-escalate the situation and obtain Mr. Taillon’s particulars. After speaking with Mr. Taillon for a few minutes, it was clear that Mr. Taillon knew that police officers were approaching him but he turned around and walked away “because he was tired of being harassed by the police”. Although Mr. Taillon was irate and yelling profanities when handcuffed, there was no smell of alcohol on his breath.

During his testimony, Constable Pigeau’s attention was drawn to the four steps to a proper arrest contained in the force policy on arrest and detention, namely, “Ontario Provincial Police Orders, Chapter 2 Law Enforcement”. In that policy, the second step is to “take custody by touching the person being arrested”.²⁸ We found nothing in the record to substantiate that grounds existed for an arrest prior to the touch. There was no legal justification for Constable Pigeau to physically contact Mr. Taillon.

Whether the purpose was to get Mr. Taillon’s attention as Constable Pigeau testified, or to arrest him for public intoxication as Sergeant Walker testified²⁹, the contact was improper.

The subsequent arrest was unnecessary.

Real care must be taken by police officers prior to making physical contact with a member of the public. Police officers must have valid legal grounds for so doing, else that conduct is improper, as are the consequences which flow therefrom. Often a significant reaction to any unwanted contact will follow, which can quite easily escalate into an altercation.

Constable Pigeau’s stated reason for the physical contact was to get Mr. Taillon’s attention. That statement is not consistent with the facts to which Constable Pigeau

²⁸ Transcript, May 28, page 66

²⁹ Transcript, May 28, pp. 6 and 10

testified. Mr. Taillon, in very colourful language, had made it clear that he knew that the police were there, and further that he did not want to interact with them.

On a clear reading of Constable Pigeau's testimony he wanted to stop Mr. Taillon so that he could further question him. In this particular situation Constable Pigeau had no legal grounds for so doing. Mr. Taillon had no obligation to stop and speak to the police. In the absence of sufficient legal grounds, a police officer's call to stop is not a command which citizens are obliged to follow, disconcerting as that may be for the police officer.

Alternatively, if Constable Pigeau truly only wanted to get Mr. Taillon's attention in a lawful way, he had other options available to him, rather than making physical contact which, according to policy, is a step along the arrest continuum.

In Wilson and Ontario Provincial Police Service supra, this Commission upheld the decision of a hearing officer notwithstanding significant deficiencies in the reasons. This decision was appealed to the Divisional Court. The Commission's decision was upheld. The Court stated:

In this case, the Commission examined all the evidence, as well as the reasons of the Hearing Officer, as the members were quite aware of the deficiencies in the Hearing Officer's reasons. Having examined the record, they reasonably concluded the Hearing Officer's findings of misconduct should be upheld, given his conclusion about the credibility of the testimony of [the two witnesses] and given the other evidence in the record.³⁰

We believe that, based upon a clear reading of Constable Pigeau's own evidence, his conduct precipitated the altercation.

Without proper justification he made physical contact with Mr. Taillon and this directly led to an unnecessary arrest.

Alternatively, if the contact was part of the process of arresting Mr. Taillon for public intoxication as Sergeant Walker testified, that too based upon Constable Pigeau's testimony, was an unnecessary arrest.

Following a review of the Hearing Officer's decision and the record in its entirety, and recognizing the deficiencies in the reasons of the Hearing Officer, we are of the view that the conclusion that Constable Pigeau detained and arrested Mr. Taillon in an unlawful or unnecessary manner is one of the possible outcomes which would be defensible in respect of the facts of this matter and relevant law.

The Hearing Officer's conclusion is therefore reasonable.

³⁰ Wilson v. Ontario (Provincial Police) supra. headnote

Accordingly, we dismiss the appeal with respect to the finding of misconduct.

The Appellant also takes issue with the penalty imposed by the Hearing Officer.

When hearing an appeal from a penalty the role of the Commission is clear. It is not to substitute our opinion for that of the Hearing Officer, even if we would have reached a different conclusion based on the evidence. Rather, it is to assess whether the Hearing Officer applied the correct dispositional principles in a fair and impartial manner.

We may vary a penalty only if we find that it is unreasonable, fails to consider all relevant matters, demonstrates a manifest error in principle, or would amount to an injustice: Williams and Ontario Provincial Police, supra, and Blackburn and Niagara Regional Police Service (September 17, 2003, O.C.C.P.S.)

The factors to be taken into account by a Hearing Officer when imposing a penalty are well established. There are three key elements to be considered. These include the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police service.

There are other factors to be considered in light of particular misconduct. These include:

- recognition of the seriousness of the misconduct;
- employment record; and,
- public interest in the administration of justice.

Additional relevant factors can include management's approach to the misconduct in question, general or specific deterrence, and the need for consistency. Reilly and Brockville Police Service (1997), 3 O.P.R. 1163 (O.C.C.P.S.), and Schofield and Metropolitan Toronto Police Service (1984), 2 O.P.R. 613 (O.P.C.)

We are of the view that the Hearing Officer erred with respect to his assessment of the penalty.

His endorsement with respect to training is incomprehensible based on the record. The inconsistencies between the descriptions of penalty in the record and the written penalty decision are also very concerning.

The Appellant has requested that the penalty be varied and a reprimand issued. We note the brief nature of the detention, Constable Pigeau's position as a very junior officer at the time of the incident, his good work history to date and positive letters of reference from three OPP middle managers. There were no previous disciplinary notations on his employment record. We accept that the officer incorrectly assessed the situation in which he found himself, with the result that he initiated an interaction which led to an improper arrest; we do not, however, accept the proposition that the situation "fell into a grey area".

The Hearing Officer correctly recognized that Constable Pigeau's conduct was a momentary lapse of judgment and inconsistent with his normal conduct. However, he imposed a penalty which is not reflective of that consideration. The loss of 16 hours is harsh and excessive.

We hereby vary the penalty and substitute a reprimand.

We also note the wording of the original draft order with respect to training.³¹ We revoke that portion of the penalty and order that Constable Pigeau attend an approved refresher training program regarding powers of arrest, such as the Advanced Patrol Training Course or in-house BLOC training offered by his employer or through the Ontario Police College.

DATED AT TORONTO THIS 15th DAY OF JULY 2009.

Dave Edwards
Member, OCCPS

Hyacinthe Miller
Member, OCCPS

³¹ Transcript, September 30, 2008, page 19