

**1111 ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES**

**REASONS FOR DECISION**

CONSTABLE DAVID MOORE

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

**Presiding Members:**

Murray Chitra, Chair  
Roy Conacher, Member  
Hyacinthe Miller, Member

**Appearances:**

William R. MacKenzie, Counsel for the Appellant  
Amy Leaman, Counsel for the Respondent

**Hearing Date:** February 28, 2008

On December 23, 2005, Constable Moore was charged with one count of neglect of duty contrary to section 2(1)(c)(i) of the Code of Conduct, Ontario Regulation 123/98, as amended (the "Code").

Following a two-day disciplinary hearing, Superintendent (retired) Robert Fitches (the "Hearing Officer") found Constable Moore guilty on April 16, 2007. On June 15, 2007, the Hearing Officer imposed a penalty of a reprimand.

Constable Moore appeals from his conviction and requests that it be quashed.

**Background:**

The facts of this case are not in dispute.

At the time of the events in question, Constable Moore had been a member of the Ontario Provincial Police ("OPP") for twelve and a half years. He was assigned to the North Bay Detachment cluster working out of the Powasson office. During the previous three years he had worked in the Traffic and Marine Unit in North Bay.

On July 1, 2005, Constable Moore was working the day shift. At about 3:45 p.m. he was conducting stationary radar on Highway 11 for northbound traffic. It was the holiday weekend and traffic was heavy. Constable Moore identified a white cube van in the passing lane travelling at 148 kilometres an hour in a 100 kilometre an hour zone. He started to follow the van but as he got close the driver took evasive action.

Constable Moore then initiated a pursuit. The van swerved, forcing Constable Moore onto the shoulder. He reduced speed and contacted the Communications Centre with the van's licence plate number. Constable Moore was then instructed to discontinue the pursuit, which he did.

A short time later, the Communications Centre Sergeant advised Constable Moore that the van had been reported stolen in Toronto on May 19, 2005. As Constable Moore was receiving this information, Sergeant Wilkie, in an unmarked cruiser, initiated a pursuit of the van on Highway 11 north of North Bay. Sergeant Wilkie's pursuit was also discontinued as being too dangerous. Both Constable Moore and Sergeant Wilkie continued to follow the van from a distance.

Some time later, for an unknown reason the van pulled onto the shoulder of Highway 11. Almost immediately Sergeant Wilkie pulled his cruiser in front of the van, and Constable Moore pulled his vehicle behind it. As Constable Moore got out of his cruiser the van suddenly reversed, causing damage to the cruiser. As a result of the male driver's actions, both at the scene and during the pursuit, he and his female passenger were arrested at gun-point.

The male ("RM"), and the female passenger ("Ms. D"), were taken into custody. When questioned, RM admitted to stealing the van together with a quantity of gasoline from a service station.

At this point, in addition to Constable Moore and Sergeant Wilkie, Inspector Andrews, Constable McGregor, Constable Grassie, and Constable Shannon (all from the Regional Traffic and Marine Unit) were at the scene. Constable Moore took control of the investigation because he was the only officer from the North Bay Detachment and he had originated the pursuit in his jurisdiction.

When he searched RM Constable Moore found a wallet, cash totalling \$794.08, and some keys. Constable Moore read RM his Charter rights, and asked Sergeant Wilkie and others officers present to search the rear of the van. Sergeant Wilkie and Constable McGregor carried out a search for weapons and contraband.

No weapons were found. However, coolers, plastic shipping boxes filled with food, gym bags and knapsacks of personal belongings were located. The gym bags and knapsacks were not opened or searched. Constable Moore did not

conduct any additional search of the rear of the van or of the items found in the rear of the van.

At the North Bay Detachment holding facility, RM told Constable Moore that the cash in his possession was from his pay cheque, and asked that most of it be given to Ms. D for her trip home. When he released Ms. D, Constable Moore gave her \$594.08 of the \$794.08 found on RM, together with the gym bags and knapsacks that had been in the rear of the van. After being released Ms. D was driven to the North Bay bus terminal to catch a bus to Toronto.

On July 2, 2005, Constable Moore contacted the owner of the van, and advised him of its recovery. The owner told Constable Moore that his wallet and \$3,000 in cash had been in the van when it was stolen, and that the van had been filled with furniture.

On July 3, 2005, a wallet and identification belonging to the owner was found by a cleaner in the garbage at the North Bay bus terminal.

On July 6, 2005, an internal complaint was initiated against Constable Moore, Inspector Andrews, Sergeant Wilkie, Acting Sergeant Hotson, Constable McGregor, Constable Moore, and Cadet Woodward. A lengthy investigation followed. On December 23, 2005, Constable Moore was charged with neglect of duty.

The particulars of the allegations against him were as follows:

On July 01, 2005 while on duty at North Bay Detachment you investigated an occurrence on Hwy #11 involving a stolen vehicle and two occupants. You neglected to conduct a diligent and proper investigation of this occurrence. Your inappropriate and neglectful actions in this matter include:

- You failed to properly investigate property that came into your possession during the course of this investigation.
- You failed to follow proper procedures and did not properly search and inventory property that came into your possession during the course of this investigation.
- You improperly released property to two suspects during the course of this investigation.

You knew or reasonably ought to have known your conduct was neglectful.

### **The Hearing:**

Constable Moore's disciplinary hearing took place on February 20 and 21, 2007. Eight witnesses testified and thirty items were entered into evidence.

In a nine-page decision dated April 16, 2007, the Hearing Officer found that, given the circumstances and information available to him, Constable Moore's actions in connection with the investigation of the van were negligent, and that he was guilty of violating section 2(1)(c)(i) of the Code.

At page seven of his Reasons for Decision the Hearing Officer wrote:

There are a great number of investigative avenues that ought to have been pursued in the proper and thorough handling of this occurrence. In coming to this position, I have considered that Constable Moore, at the time of these events, had 12 years experience; surely enough experience to recognize what ought to have been done.

Given the length of time that the van had been outstanding, and the involvement of at least three police jurisdictions in the events that brought the van to the North Bay area, it is my opinion that either [RM], [Ms. D] or both ought to have been questioned about where they had been in the past period of time, what they had done, what they had done with the furniture and where the almost eight hundred dollars had come from.

The circumstances at the time of these events were such that much more ought to have been done. Failure to properly investigate property that was in Constable Moore's possession was negligent.

Following the finding of guilt, the hearing proceeded to the penalty phase. In a written decision dated June 15, 2007, the Hearing Officer imposed a reprimand.

In this appeal Constable Moore requests that his conviction be quashed. Penalty is not at issue.

### **Appellant's Position:**

On behalf of the Appellant, Mr. MacKenzie argued that neglect of duty is not an absolute liability offence. He asserted that there is a spectrum, from 'mistake' which can give rise to work performance issues, at one end, to an 'omission' characterized by wilfulness or recklessness that will result in a breach of the Code.

Mr. MacKenzie submitted that the Hearing Officer committed an error in law when he convicted Constable Moore given that the evidence established that his conduct during the investigation of the van, its contents and occupants, amounted to no more than a mistake, or a poor effort. The Hearing Officer compounded this error, Mr. MacKenzie argued, when he went on to find neglect of duty without concluding that Constable Moore's conduct was characterized by wilfulness or recklessness.

Mr. MacKenzie asked us to consider the positive elements of the occurrence. Specifically, that Constable Moore successfully concluded the pursuit; RM was taken promptly to jail; and, RM subsequently pled guilty to all charges.

Mr. MacKenzie noted that there was no OPP policy or procedure setting out which officer is to assume control of an occurrence when numerous officers respond to it. Mr. MacKenzie submitted that the Hearing Officer properly identified the culpabilities on the parts of the other officers present, but erred in not finding that the mistakes committed by the other officers (on whom the Appellant relied for assistance) mitigated the Appellant's errors. Hewlett and Ontario Provincial Police (May 16, 2007, O.C.C.P.S.)

Mr. MacKenzie asserted that the Hearing Officer's conclusion that as officer in charge, the Appellant alone was guilty given the many investigative failings that occurred was unfair in the circumstances. Hewitt and Devine and Toronto Police Service (1999), 3 O.P.R. 1372 (O.C.C.P.S.)

Mr. MacKenzie drew our attention to the OPP Order that states, "An employee in possession of property shall exercise care and diligence to maintain the security and preservation of property, and make every reasonable effort to locate the lawful owner." He noted that the \$794.08 found in RM's wallet was accounted for in the Prisoner Report and in the Property Report. Fright and Hamilton Police Service (2002), 3 O.P.R. 1593 (O.C.C.P.S.)

Further, given the van had been stolen six weeks earlier, determining the ownership of the property in the van, including the cash in RM's possession, was uncertain at best.

Mr. MacKenzie also argued that the Hearing Officer enjoyed the benefit of hindsight in scrutinizing the Appellant's conduct. Given the circumstances on the day, the information known to him and his experience, Mr. MacKenzie asserted that Constable Moore's actions were prudent, reasonable and amounted to a proper exercise of discretion.

Alternatively, Mr. MacKenzie submitted that Constable Moore's actions, as found in the evidence and properly understood, did not disclose the wilfulness or recklessness necessary to a finding of neglect of duty.

For these reasons, Mr. MacKenzie submitted that the Hearing Officer's finding of neglect of duty should be quashed.

**Respondent's Position:**

Ms. Leamen, on behalf of the Respondent, reminded us of the standard of review to be applied by this Commission in disciplinary appeals. Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Ont. Div. Ct.), Dr. Q. v. College of Physicians and Surgeons of British Columbia (2003), 223 D.L.R. (4<sup>th</sup>) 599 (S.C.C.) and Law Society of New Brunswick v. Ryan (2003), 223 D.L.R. (4<sup>th</sup>) 577 (S.C.C.)

Ms. Leamen submitted that we should give deference to the findings of the Hearing Officer. She argued that if the Hearing Officer's decision is not unreasonable in view of the evidence before him, we have no authority to enter into a re-evaluation of the evidence, or to substitute our own findings with respect to guilt or innocence.

She referred us to Williams and Ontario Provincial Police (1995), 2 O.P.R. 1048 (O.C.C.P.S.) for the proposition that we may intervene only if we conclude that the Hearing Officer's decision is void of evidentiary foundation. She noted Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.) for the principle that there must be a manifest error if we are to intervene. Only in exceptional cases where the reasoning is evidently wrong, contains error or cannot reasonably be accepted will the Commission interfere with a Hearing Officer's decision. Cate and Peel Regional Police Service (2002), 3 O.P.R. 1604 (O.C.C.P.S.)

Ms. Leamen submitted that the Hearing Officer carefully examined the Appellant's conduct in light of the circumstances at the time, noting:

- RM admitted he stole the van;
- when the van was stolen it was filled with furniture;
- there was no furniture in the van when it was recovered;
- when apprehended, RM had \$794.08 in his possession, even though he admitted to having stolen gasoline a few days earlier;
- there were gym bags and knapsacks in the van with RM and Ms. D when they were apprehended. At no time did Constable Moore have any direct knowledge of the contents of the bags; and
- Inspector Andrews suggested to Constable Moore that the \$794.08 in RM's possession could be the proceeds of crime.

Ms. Leamen submitted that the Hearing Officer's findings were supported by the evidence, including Constable Moore's testimony. She argued that the Hearing Officer correctly found that much more ought to have been done by Constable Moore to investigate the large amount of cash, the gym bags and knapsacks prior to releasing them to Ms. D.

Further, by not carrying out a more thorough investigation, Constable Moore acted in a manner that was not reasonable or prudent, nor to the level expected of an experienced police officer.

Ms. Leamen also argued that the Hearing Officer applied the proper test for establishing neglect of duty. With respect to the wilfulness of his conduct, she noted that Constable Moore took responsibility for the occurrence and thus was accountable overall for the investigation.

She noted that the Hearing Officer found that Constable Moore, an experienced police officer, accepted the word of an admitted thief and his female companion at face value without further inquiry. Indeed, the Hearing Officer concluded that “based on the evidence before me, there was no investigation. As an investigation, this matter could not have been handled in a more incompetent fashion”.<sup>1</sup>

Ms. Leamen argued that when considered together Constable Moore’s errors supported the necessary wilfulness required for a finding of neglect of duty.

On the matter of the fact scenario being “replete with multiple culpabilities”, Ms. Leamen submitted that the Hearing Officer’s observations about the conduct of the other officers did not detract from his conclusions concerning the Appellant. He was correct in finding that, as the officer in charge, Constable Moore was ultimately responsible to ensure the completion of a prudent and thorough investigation.

In summary, Ms. Leamen argued that the Hearing Officer’s findings were reasonable and supported by the evidence, and that the conviction should be upheld.

**Decision:**

The standard applicable to the Commission’s review of a Hearing Officer’s decision on appeal was clearly stated in Williams and Ontario Provincial Police supra, 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 to us to reach a different conclusion from the trier of fact. However, that must be based on the strongest ground. In other words, there could be no other determination than the conclusions of the adjudicator as to the credibility of witnesses, cannot be reasonably accepted.

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<sup>1</sup> Reasons for Decision, April 16, 2007, page 4.

The question then to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

As well, if a trier of fact misapprehends the evidence or makes a clear error of law, this Commission has the power to vary or revoke the Hearing Officer's decision.

How do these principles apply in this case? Is the decision of the Hearing Officer without evidentiary foundation or does it demonstrate a manifest error in principle?

The Hearing Officer released his nine-page Reasons for Decision on April 16, 2007, and his five-page Penalty Decision on June 15, 2007. In his reasons the Hearing Officer described in full the history of the occurrence, discussed the circumstances of the investigation and identified the related policy considerations.

It is without dispute that on the day in question, RM was speeding north on Highway 11 in a stolen white cube van. His pregnant girlfriend, Ms. D, was with him. Constable Moore gave pursuit.

RM attempted to avoid being stopped by driving erratically, at one point forcing Constable Moore's cruiser off the road at high speed. RM and Ms. D were arrested at gun-point in a high-risk take down by several officers.

Constable Moore, after being advised that the van was stolen, took responsibility for RM's arrest and transportation to the station. He asked other officers present to search the van. He assumed that this request would be carried out. It was not.

The fact that there were several officers present at the time does not relieve Constable Moore, as officer in charge, of the responsibility for ensuring that all of the appropriate investigative steps were taken after RM was arrested and the van seized.

At the side of the highway, immediately after his arrest, RM admitted that he had stolen the van and some gasoline, and that he had previous involvement with the justice system, including a prior similar occurrence. However, even with this information, Constable Moore did not even ask RM basic questions about the large roll of cash in his possession, such as 'where were you working', 'when did you get paid' or 'where have you been since the van was reported stolen'?

Rather, Constable Moore accepted the word of an admitted thief without question, going so far as to accede to RM's request that \$500 from the roll of cash be given to Ms. D upon her release so she could get back to Toronto.

In short, the cash in RM's possession was not accounted for as property incidental to RM's arrest nor were its origins properly determined.

The backpacks in the van were identified as belonging to Ms. D. However, they were never searched nor were their contents inventoried in either a Prisoner Report or a Property Report in the Niche RMS database. On completion of the investigation, Constable Moore had no documented listing or other assurance regarding the contents of the backpacks, or their ownership.

The Hearing Officer found that OPP policies, while not precise, indicate that where the ownership of property coming into possession of the OPP is in question, significant efforts are required to determine the rightful owners. As the Hearing Officer noted, "Given the nature of these events and the character of at least one of the players, I cannot imagine that the rightful ownership of anything relating to the van, and/or these individuals, would not reasonably be in question."<sup>2</sup>

The Hearing Officer went on to find that Constable Moore failed to ensure that significant efforts were made to determine the ownership of the property in the van.

In our opinion the evidence supports this finding.

The Hearing Officer considered Hewitt and Devine supra. and Gottschalk and Toronto Police Service (January 23, 2003, O.C.C.P.S.) when he examined the circumstances of the occurrence. In finding that "There are a great number of investigative avenues that ought to have been pursued in the proper and thorough handling of this occurrence"<sup>3</sup>, the Hearing Officer took into consideration that Constable Moore had over twelve years of experience and that, should he have requested, his colleagues were available to assist.

The Hearing Officer acknowledged that "those individuals who had agreed to carry out certain functions did not do so as they had said they would."<sup>4</sup> However, he properly determined that Constable Moore had an obligation to satisfy himself that all of the appropriate investigative steps had been completed in accordance with OPP policy. His failure to so satisfy himself was neither prudent nor reasonable and constituted the foundation of his neglect of duty.

Constable Moore testified that, "I still don't know what it is that I've done or haven't done to this day".<sup>5</sup> We are troubled by this statement. We are also troubled by Constable Moore's testimony that he felt it was not practical or necessary to search, inventory and document the contents of the gym bags and

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<sup>2</sup> Ibid., page 8.

<sup>3</sup> Ibid., page 9.

<sup>4</sup> Ibid., page 8.

<sup>5</sup> Ibid., page 6.

knapsacks. The same faulty reasoning led Constable Moore to assume that a proper search had been done, even though he did not receive completed property reports.

Attempting to minimize his omissions by claiming that relevant OPP policies were not sufficiently specific flies in the face of common sense and investigative prudence. Further, while Constable Moore was entitled to request assistance, he cannot delegate accountability for investigative failures. This is self-evident and does not require a specific policy or procedure.

The fact that the subsequent criminal charges brought against RM resulted in convictions registered is not relevant here. More to the point, when Constable Moore released Ms. D, it is self-evident that he put into her possession several pieces of property that did not belong to her.

Ms. D was driven to the North Bay bus terminal where she discarded personal effects belonging to the individual who six weeks earlier had reported his furniture-filled van stolen. Clearly, these discarded personal effects were in the bags returned, unchecked, to Ms. D by Constable Moore, the lead investigator.

We also agree with the Hearing Officer's finding that Constable Moore was neglectful in not ensuring that his documenting of RM and Ms. D, and of the property in their possession, was complete. He failed to make significant efforts, or to ensure that significant efforts were made to clarify the ownership of all of the property collected when RM and Ms. D were arrested. This is another instance where we agree with the Hearing Officer that Constable Moore's conduct of and during the investigation went beyond mere mistake.

In our opinion, it cannot be said that the Hearing Officer's decision to convict Constable Moore of neglect of duty is void of evidentiary foundation, or is based on some manifest error.

We accept that Constable Moore is respected and admired by his colleagues. We accept, as the Hearing Officer noted, there was "more than enough blame to go around."<sup>6</sup> These facts do not diminish Constable Moore's important responsibilities as lead investigator of the occurrence.

There was sufficient evidence before him to permit the Hearing Officer to find that Constable Moore, without lawful excuse, neglected or omitted to promptly and diligently perform his duties as a police officer. There is no basis upon which we can interfere with the Hearing Officer's findings.

This appeal is dismissed.

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<sup>6</sup> Ibid., page 8.

DATED AT TORONTO THIS 2<sup>ND</sup> DAY OF MAY 2008.

Murray Chitra  
Chair, OCCPS

Roy Conacher  
Member, OCCPS

Hyacinthe Miller  
Member, OCCPS