

OCCPS Decision # 09-04

GUS BAKOS
Appellant

AND

DETECTIVE CONSTABLE GEORGE GALLANT
(HAMILTON POLICE SERVICE)
Respondent

Presiding OCCPS Members:

Noëlle Caloren, Member
Garth Goodhew, Member

Appearances:

Gus Bakos, Appellant
Tom Andrew, for the Respondent

Heard:

February 8, 2009

Date of Decision:

April 3, 2009

NEGLECT OF DUTY - Failure to perform duties - Appeal from dismissal of disciplinary charge - Appellant's motorcycle was seized by Respondent officer - Respondent determined he could not establish that engine was stolen and returned motorcycle to Appellant approximately one month later - Whether Respondent's failure to submit a report to a Justice of the Peace following warrantless seizure of property constituted neglect of duty - Respondent admitted he failed to comply with s. 489.1(1) of *Criminal Code* - Hearing Officer found Respondent had a lawful excuse - Open to Hearing Officer to conclude that matter must be viewed as a performance issue rather than an issue of statutory misconduct - Appeal dismissed.

NEGLECT OF DUTY - Essential ingredients - Appeal from dismissal of disciplinary charge - Neglect of duty comprising two-part test - Must be shown that member failed to perform duty - To avoid discipline member must show lawful excuse for failing to perform duty - Respondent's non-compliance with s. 489.1(1) of *Criminal Code* admitted - Hearing Officer found Respondent had a lawful excuse - Hearing Officer relied on ambiguity in service policy and generalized practice in Ontario regarding warrantless property seizure - Reasons of Hearing Officer support his decision - Appeal dismissed.

Summary of Reasons for Decision

Mr. Bakos appealed the Hearing Officer's finding that the Respondent, Detective Constable Gallant, was not guilty of neglect of duty, contrary to s. 2(1)(c)(i) of the Code of Conduct.

In connection with an investigation of motorcycles with suspicious histories, Constable Smith stopped the Appellant's motorcycle when it was being driven by the Appellant's friend. Detective Constable Gallant was called, and he seized the motorcycle. Approximately one month later the motorcycle was returned to the Appellant. Detective Constable Gallant had been unable to establish that the engine was stolen.

Mr. Bakos filed a public complaint. Following an investigation, Mr. Bakos was advised by the service that his allegations were unsubstantiated and no further action would be taken. Mr. Bakos appealed to the Commission. The Commission directed an investigation to determine what actions Detective Constable Gallant took to comply with s. 489.1(1)(b) of the *Criminal Code*, which requires that a police officer submit a report to a Justice of the Peace after property is seized subsequent to a search without a warrant. The second investigation yielded a similar answer from the service. Mr. Bakos again requested a review by the Commission. The Commission then directed a hearing. The Respondent was charged with neglect of duty and a disciplinary hearing ensued.

The Hearing Officer referred to the two-part test for establishing neglect of duty. For a conviction on this charge, it must be shown that the member failed to perform a duty because of neglect or did not perform the duty in a prompt or diligent matter. To avoid conviction, the member had to show that he or she had a lawful excuse for not performing the duty. Since the Respondent admitted that he failed to comply with s. 489.1(1)(b), the sole issue before the Hearing Officer was whether he had a lawful excuse. The Respondent argued that he did have a lawful excuse, because his failure was not wilful and it was consistent with the prevailing practice of not filing a report in common law seizures of property. The Prosecutor argued that ignorance of the law or inadvertence was not an adequate defence.

Documentary evidence was tendered at the hearing with respect to the service's Search of Premises Policy. Oral evidence was also given, suggesting that it was a common practice throughout Ontario for police officers not to file a report with a Justice when items were seized under the common law.

The Hearing Officer determined that the Respondent had a lawful excuse for failing to comply with s. 489.1(1)(b). His conclusion was based on the ambiguity in the service's policy as well as the pervasive practice on reporting seizures of property.

At the appeal hearing the Appellant essentially reiterated arguments made by the Prosecutor at the disciplinary hearing. The Appellant asked that the decision of the Hearing Officer be reversed. The Respondent argued that the Hearing Officer made no error in his findings of fact or in his application of the law to those facts. The

Respondent emphasized that the service's policies were not clear as to common law seizures of property off premises.

Held, appeal dismissed.

In his decision the Hearing Officer considered the requirements of s. 489.1(1) of the *Criminal Code*. He accurately summarized the evidence with respect to the ambiguity of the service's policy and the practice in Ontario with respect to warrantless property seizures. He reviewed the relevant law and applied the two-part test for a finding of neglect of duty. The Hearing Officer referred to **R. v. Backhouse** (*infra*), a decision of the Ontario Court of Appeal which was released around the time of the alleged offence in this case. The Hearing Officer found that prior to the release of this decision there was a lack of clarity in the procedure to be applied to the preservation and return of property seized without a warrant. In concluding that in this case the duty to be followed was not sufficiently clear or explicit, the Hearing Officer relied on the service policy and the generalized practice in Ontario.

It was open to the Hearing Officer to find that the matter must be viewed as a performance issue rather than an issue of statutory misconduct. The Respondent's actions were not inconsistent with his employer's policies and the procedure followed in many Ontario jurisdictions regarding warrantless property seizures.

The Hearing Officer's reasons as a whole supported his decision.

Statutes cited

Police Services Act R.S.O. 1990, c.P.15 as amended, ss. 64(10) and 70(3)

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

Criminal Code R.S.C. 1985, c.C-46 as amended, s. 489.1(1)

Authorities cited

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

Soley and Ontario Provincial Police (1996), 3 O.P.R. 1098 (OCCPS #96-05)

R. v. Backhouse (2005), O.J. No. 754 (Ont. C.A.)

Hewitt and Devine and Toronto Police Service (1999), 3 O.P.R. 1372 (OCCPS #99-07)