

ONTARIO CIVILIAN POLICE COMMISSION

REASONS FOR DECISION

CONSTABLE JAMIE HARTNETT
CONSTABLE DAN MACLEAN
CONSTABLE GREG ROBINSON

Appellants

PETERBOROUGH LAKEFIELD COMMUNITY POLICE SERVICE

Respondent

SEAN O'BRIEN

Respondent

Presiding Members:

Dave Edwards, Member
Hyacinthe Miller, Member

Appearances:

David Butt, Counsel for the Appellant
Glenn P Christie, Counsel for the Peterborough Lakefield Community Police Service (the "Service")

Hearing Dates: July 27 and September 29, 2009

On November 30th, 2007 Superintendent (retired) Robert J. Fitches (the "Hearing Officer") made a finding of guilt for one count of neglect of duty, contrary to section 2(1)(c)(ii) of the Code of Conduct found at Ontario Regulation 123/98 (the "Code") and a finding of guilt for one count of discreditable conduct, contrary to section 2(1)(a)(xi) of the Code against Constables Hartnett, MacLean and Robinson.

A Notice of Appeal was filed within the required timeframe, indicating that Constables Hartnett, MacLean and Robinson "hereby appeal to the Ontario Civilian Commission ofn (sic) Police Services under subsection 70(1) of the Police Services Act, R.S.O. 1990, c. P. 15 as amended in respect of the following

matter: The finding of misconduct or unsatisfactory work performance.” There was no appeal with respect to penalty.

Background:

At the time of this incident Constable MacLean had been a member of the Service for eighteen years. During this period of time he has been variously assigned to uniform patrol, Community Service, the Criminal Investigation Branch, the Active Crime Unit and Major Crime Unit, the Emergency Response Unit. He had also worked as a Use of Force Instructor, a Coach Officer and Training Officer. For the last six years he has been designated as Acting Sergeant for a platoon. On the day of the incident, he was assigned to the Criminal Investigations Branch, in the Major Crime Unit.

Constable Robinson joined the Service in July 2002 after serving for one year with the Halton Regional Police Service. For most of his police career he had been assigned to uniform patrol.

Constable Hartnett had been a member of the Service for six years, having previously served as a member of the Peel Regional Police Service for approximately one year. After an assignment in uniform patrol, he performed duties in a number of front line projects relating to bail management, compliance checks and warrant checks. In 2005 he moved to the Criminal Investigation Unit and had a brief assignment to the Sexual Assault Unit, after which he returned to the Bail Management, High Risk Unit.

On December 13, 2005 Constable Hartnett and MacLean attended at Mr. O'Brien's last known address on Charlotte Street for the purpose of serving an arrest warrant. A complaint had been filed by a former domestic partner and he had been charged with 'criminal harassment and unlawfully in a dwelling place'.

The officers gained entry to the apartment building. At Mr. O'Brien's apartment on the fourth floor, Constable McLean knocked on the door. A male voice asked, "who is it" from inside the apartment. Constable Hartnett said, "It's Jamie", then, when asked by the male for more detail, replied, "Jamie Hartnett". When Constable Hartnett inquired who was speaking, the male answered, "Bob". There were several pauses and silences of 30 and 60 seconds between the verbal interactions. After the police vocally identified themselves and indicated they were searching for Sean O'Brien, the door remained closed. Constable McLean indicated to "Bob" that they were going to get a key from the superintendent and possibly gain entry. A female voice called out that Mr. O'Brien was not in the apartment. At that point "Bob" opened the door part way. He identified himself with an Ontario driver's licence as [T. O.¹]

¹ Name modified. Initials used T.O.

[T.O.'s] conversation with the two officers took place at the door. He indicated that Mr. O'Brien was not at home and that he and a female were the only people in the apartment. [T.O.] denied the police access to the apartment. A call was made to request another officer to attend and shortly thereafter, Constable Robinson arrived. Constable McLean stepped away from the door and used Constable Hartnett's cell phone to contact the officer-in-charge. The intention was to obtain a Feeny endorsement to the arrest warrant, which would authorize the police to enter the apartment without consent to effect the arrest.

As Constable McLean was on the phone speaking with the duty sergeant, [T.O.] and the female exited the apartment and walked a short distance away down the hall. The officers engaged them in conversation. [T.O.] indicated that he was the one in authority and that he would not permit the police to enter Mr. O'Brien's apartment. [T.O.] became somewhat upset and raised his voice. Concerned about the possibility of a confrontation, the officers asked him to stand further away, near a stairwell.

Conversation resumed with the unknown female, who remained in the hallway. She declined to identify herself, but reiterated that Mr. O'Brien was not in the apartment. The female stated that she did not know Sean O'Brien, that she had just met [T.O.] a short time earlier and had visited the apartment to have a beer with him. She was unable to provide information as to who lived in the apartment.

She was asked several times if the officers could enter the apartment so that they could satisfy themselves that O'Brien was not there. She repeated that he was not there but finally agreed to allow them entry. The three officers accompanied the female into the apartment. She eventually produced documentation identifying herself as [G.R.]² The officers searched the apartment and did not locate Mr. O'Brien.

After some time, the officers left the apartment with [G.R.] Three minutes later, the officers re-entered the apartment. Their stated purpose was to secure the premises by ensuring the windows and patio door were locked. The officers exited the apartment after several minutes and waited for the apartment superintendent to lock the apartment door.

Unbeknownst to the officers, a video camera had been set facing the apartment door and vestibule and their two entries into the premises were recorded. Mr. O'Brien subsequently lodged a public complaint alleging that the three officers entered his apartment without proper authorization.

² Name Modified. Initials used G.R.

The Service initiated an investigation. The three officers were subsequently charged with one count of neglect of duty for failing to work in accordance with Peterborough Lakefield Community Police Service General Order LE-011 and for one count of discreditable conduct with respect to Service General Order LE-05, by entering an apartment without obtaining a Feeney endorsement or proper consent on December 13, 2005.

The Hearing:

The disciplinary hearing for Constables Hartnett, MacLean and Robinson was held on September 17, 18, 19 and 20, 2007.

Mr. O'Brien was not represented by counsel. Although he was present throughout the hearing, he did not exercise his right to participate during the proceedings as a party in any other way. The three officers were present for the entirety of the proceedings.

Constables James Hartnett, Greg Robinson and Daniel MacLean gave evidence in their own defence. Mr. O'Brien, [G.R.,] [T.O.] and Cory McMullan testified.

The Hearing Officer's decision as to guilt was given on November 30th, 2007. The Hearing Officer found Constables Hartnett, MacLean and Robinson guilty of neglect of duty and discreditable conduct.

Motion to Introduce Fresh Evidence

Subsequent to the tribunal's conviction, the Appellants' counsel advised the Hearing Officer of fresh evidence, in the form of a DVD containing information from two confidential informants, which he felt might alter the findings of the Hearing Officer as to guilt.

On consent of both parties the Hearing Officer accepted the following procedure:

1. The DVDs were to be forwarded to the adjudicator for viewing.
2. Counsel for the appellant officers was asked to prepare written submissions on the evidence contained in the DVDs for consideration by the adjudicator.
3. Counsel for the prosecution was asked to prepare written submissions addressing the evidence, as well as the previously submitted written submissions by the appellants' counsel, for consideration by the adjudicator.
4. Counsel for the appellant officers was asked to prepare a brief reply to the prosecutor's submission.
5. Written reasons were prepared addressing the following:
 - a. The procedures adopted

- b. the evidence itself---specifically whether it is relevant to the issues
- c. Ruling---including the potential effect of the fresh evidence, if accepted upon the original findings.³

The Hearing Officer considered the information contained on the DVDs. In his written decision he noted that the fresh evidence included material from two females who claimed to have information about the incident. The fresh evidence appeared to indicate that Mr. O'Brien was present in the apartment when the police officers first arrived.

The Hearing Officer identified that the critical question was whether the police officers had bona fide consent to enter the apartment. He concluded that "the DVDs do not offer up any details that would have any meaningful impact upon my findings relative to the consent the officers were acting upon."⁴ Further he stated:

It seems to me that whether or not Mr. O'Brien had such a scheme, the officers nonetheless entered the premise without informed consent, without having such consent in writing and signed, and without the appropriate Feeney endorsement.....Nothing that was offered within the fresh evidence touches upon any aspect of these issues⁵

Penalty

The Hearing Officer received a joint submission as to penalty on October 22 2008. He released his Penalty Decision on November 30, 2007 (sic) which was consistent with counsels' proposal, ordering that Constables Hartnett, MacLean and Robinson each forfeit five days time.

Constables Hartnett, MacLean and Robinson are appealing "the finding of misconduct or unsatisfactory work performance".⁶

Preliminary Matter:

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

Mr. Butt appeared on behalf of the Appellants. Mr. Christie appeared on behalf of the Service.

The Appellants' Notice of Appeal to the Commission was dated 21 November 2008; however, the Commission's records showed that the public complainant, Mr. O'Brien, had only been served with a Notice of Appeal and a letter of

³ Motion Decision, September 9th, 2008 page 2

⁴ Reasons for Ruling on Fresh Evidence, September 9, 2008, page 4

⁵ Ibid, page 5

⁶ Notice of Appeal, page 1

explanation on July 16, 2009. On July 23, 2009, Mr. O'Brien was served with the Notice of Appeal, the Appellants' factum and the transcript from the disciplinary hearing.

Mr. O'Brien was not present on July 27th, but he had contacted the Registrar to request an adjournment for 30 days because of the late delivery of hearing materials.

Mr. O'Brien, a public complainant, is by virtue of our Rules, a party to the appeal. Although it would have been preferable if the public complainant had been named as a party in the style of cause of the Hearing Officer's Decisions, this omission does not alter the fact that Mr. O'Brien is a party to the appeal and therefore must be served with all of the appropriate documentation.

The Panel noted that the Service's Factum had not been served on Mr. O'Brien and ordered that this should occur within five days. The Panel also ordered that Mr. O'Brien would be allowed 30 days to file a factum.

Mr. Butt, in his introductory comments on July 27th, took the position that the heart of this appeal was the evidence that came to light after the finding of guilt by the Hearing Officer but before the penalty was rendered. He referenced a 'collision' between our Rules of Practice and disclosure constraints embodied in R. v. Leipert (1997), 112 C.C.C.(3d) 385 (S.C.C.), confirming that, for a number of reasons, he had been deliberately selective about the material disclosed to Mr. O'Brien. Finally, he requested that no document or item pertaining to the confidential informant should be publicly available and that the appeal hearing should be conducted in camera to protect the confidential informant.

With respect to the issue of introduction of fresh evidence, the Panel drew counsels' attention to Cate and Peel Regional Police Service (2001), 3.0.P.R, 1491 (OCCPS). A copy of that case was also forwarded to Mr. O'Brien.

The Panel stated its concern with the deviation from the Commission's Rules by counsel on a number of points. The issue of incomplete service to the public complainant was noted, as were the subsequent attempts to partially ameliorate the lack of proper service. Counsel did not obtain authorization with respect to these deviations from our Rules.

The Panel also observed that the factums of the Appellants and the Respondent failed to follow the Rules generally; more specifically, no Authorities being relied upon had been provided to the Panel, as required. Mr. Christie advised that the Service would file a Book of Authorities forthwith. Mr. Butt advised that at an appeal level he liked to simplify the matters to their basic elements. He was not relying on any authorities other than the few which had been mentioned in his factum.

We noted that, absent compelling reasons, the Act mandates that Commission proceedings are public, rather than *in camera*. The matter was adjourned to a date no later than September 27, 2009 as determined in consultation between counsel and the Commission Registrar.

The Appeal:

The Panel reconvened on September 29, 2009 to hear the appeal. We confirmed that counsel had submitted evidence of compliance with the order to serve appeal documentation on Mr. O'Brien. Mr. O'Brien was present for the appeal hearing.

Appellant's Position:

On appeal, the Appellants raised two issues.

First, they argued that the Hearing Officer erred in his treatment of the fresh evidence. Second the Hearing Officer erred in his interpretation of Policy LE-005 and Policy LE-011.

With respect to the fresh evidence, Mr. David Butt, for the Appellants, noted that both the Appellants' and Respondent's counsel took the position the Hearing Officer had the authority to admit fresh evidence. He argued the Statutory Powers Procedure Act R.S.O. 1990, C.s.22 as amended (the "SPPA") is broad enough to allow the admission of fresh evidence subsequent to a finding of guilt. The Hearing Officer should have turned his mind to fairness to the parties. In some situations additional evidence not previously known, could be relevant to an original trier of fact or to an appeal tribunal, based on reasonableness.

He acknowledged that the key evidentiary issue related to the circumstances of the officers entering the apartment. The three officers attended the apartment to arrest a person on an outstanding warrant. They did not obtain a Feeney endorsement, but that does not change the reason for their presence.

The Hearing Officer determined that [G.R.] could not have given valid consent because she was not an occupant of the apartment. He rejected the fresh evidence which suggested that Mr. O'Brien had set up the entire incident and enlisted [T.O.] and [G.R.] as participants in his deception.

He noted that the Hearing Officer specifically rejected the defence position that [G.R.] was an instrument of Sean O'Brien's scheme⁷. He pointed out that two pages later in his decision, the Hearing Officer noted:

In his written submissions in reply, Mr. Butt stated the following:

⁷ Reasons for Ruling on Fresh Evidence, September 9, 2008 page 4

The fresh evidence demonstrates that O'Brien gloated over his clever little scheme to video tape the officers in his apartment. He wanted the officers to enter his apartment because, with the video tape running, their entry furthered his objective of a bad faith lawsuit. In other words, he was happy [G.R.] let the officers in. He wanted her to let them in and she delivered. In these circumstances it would be sadly ironic if this Tribunal were to find three exemplary officers guilty of misconduct on the basis that [G.R.] did not deliver a valid consent to enter the apartment.

I must agree heartily with Mr. Butt's observation on this point.⁸

Notwithstanding the Hearing Officer's decision to reject the fresh evidence from the confidential informant, Mr. Butt submits that he allowed that same evidence to alter his view of the case. In his Reasons for Penalty, he repeats his apparent acceptance of the defence theory by stating:

There were very clear indications that Mr. O'Brien might have been attempting to lure a police officer into his apartment for self-serving purposes: allegedly to form the basis for a potential civil suit against the police. Unfortunately it appears that the officers fell for Mr. O'Brien's ruse.⁹

Mr. Butt argued that the Hearing Officer's approach to addressing the fresh evidence rises to the level of unreasonableness. There was an internal contradiction in his findings that is irreconcilable. His dramatic reversal of position had five fatal consequences.

1. It created an unsustainable disconnect between the Hearing Officer's sentencing and penalty decisions.
2. The Reasons, considered in their entirety, did not provide clear and convincing evidence of the Appellants' guilt.
3. In his first decision, he rejected the defence argument that [G.R.] provided valid consent but in his reasons for disposition, he appeared to accept that argument.
4. Since the Hearing Officer accepted that Mr. O'Brien hatched the scheme to trap the police officers, their conduct was not likely to bring discredit on the reputation of the Service. "It appears likely that Mr. O'Brien's motives would be seen to offend the public interest, rather than exemplify it".¹⁰

⁸ Ibid, page 6

⁹ Reasons for Disposition, November 30, 2007(sic), page 2

¹⁰Ibid

5. The Hearing Officer erred in refusing to admit the fresh evidence which, in his opinion, satisfied the test set out in R. v. Palmer [1980] 1 S.C.R.759.

Further, Mr. Butt argued that for the Service to pursue this conduct matter was, in itself, discreditable, as the Service was used by Mr. O'Brien.

He submitted that the Hearing Officer focused on the narrow interpretation of "consent" and "occupant" and missed the larger issue. Mr. O'Brien was the occupant of the apartment. The fresh evidence is believable. Mr. Butt asked us to consider that [G.R.] was a key element in O'Brien's trap. The Hearing Officer cannot both "agree heartily" with Mr. Butt that there was a scheme afoot, yet reject the assertion that the consent she gave the officers to enter the apartment was valid because, as Mr. O'Brien's agent, she was delivering his consent.

The Hearing Officer erred by taking selective passages from two different Service General Orders and mixing them together. They deal with different and unrelated events. General Order LE-005 is entitled "Arrest" and General Order LE-011 is entitled "Search of Premises". It was an error for the prosecution to buttress its argument about what the officers did or did not do. He submitted that only General Order LE-005 applied in this case. It was an error for the Hearing Officer to apply provisions of the "search" order (General Order LE-011).

Mr. Butt argued that the convictions cannot stand because of the doubt raised about on what evidence the Hearing Officer relied. It was an error for the Hearing Officer to place himself in the position of a police officer rather than take a 'bird's eye' view of events.

He requested that the Hearing Officer's decision be revoked and a finding of not guilty be issued instead.

Respondent's Position:

Mr. Glenn Christie represented the Service.

He acknowledged that the Hearing Officer is a creature of statute with responsibility to control his own process. Section 21(2) of the SPPA allows a tribunal to review its own decisions, in order to prevent abuse. While Mr. Christie argued the Hearing Officer could have taken a broader view of his powers and ruled to admit the fresh evidence, his jurisdiction to admit fresh evidence is not affected by consent between counsel.

After the conviction decision was made but prior to the conclusion of the discipline hearing, counsel became aware of Palmer evidence that went to the credibility issues at the heart of the hearing. Mr. Christie noted that the Hearing Officer considered the motion and reviewed the fresh evidence, determining that it did not meet the threshold enunciated in Palmer, in that it did not alter the propriety of

the Appellants' actions that gave rise to the disciplinary charges and the subsequent convictions. Further, the evidence did not shed light on how the Appellants came to rely on [G.R.] as being in a position to give them valid, informed consent, in the face of [T.O.'s] declaration that he was an authorized occupant who did not give them permission to enter.

With respect to the Hearing Officer's decisions, Mr. Christie argued there were no contradictions or evidentiary inconsistencies. Rather, he properly separated the evidence into two categories, which he found to be supported by fact and irrelevant information such as whether Mr. O'Brien was present in the apartment or whether a deception had been perpetrated. The latter two defences do not address or change the basis of the conviction, being neglect of duty for failing to work in accordance with the Service's General Orders and discreditable conduct in that the Appellants acted in a manner likely to bring discredit on the reputation of the Service.

The Hearing Officer considered all the relevant evidence. There was evidentiary foundation for his findings. He committed no error.

The essence of the neglect of duty conviction was the failure of the Appellants to obtain appropriate consent to enter a dwelling, in contravention of the policies of the Service. Consent was needed from an "occupant", an individual who is more than a guest or someone who just happened to be there.¹¹ When he first answered the officers' knock on the door, [T.O.] stated that he did not give them permission to enter. Mr. Christie drew our attention to [G.R.'s] conversation with the officers. She stated she had been in the apartment for a short time, having joined [T.O.] for a drink after a brief conversation on the street. She maintained she did not know the occupant of the apartment. She did not have any information about him or his whereabouts. Having heard those admissions, the Appellants could not then form a credible belief that she was in the position to give them permission to enter and look for Mr. O'Brien.

The discreditable conduct conviction was based on the finding the Appellants ought to have known that their entry into the dwelling was without genuine permission. He argued that whether or not Mr. O'Brien "set the officers up" and whether or not he boasted about this, the fundamental issue is that the Appellants failed to comply with Service policies. These policies, if followed, would have protected the officers from just this type of situation. Considering the Preamble to the Charter, the Service requires officers to exercise an abundance of caution and comply with policies.

Mr. Christie discussed the standard of review, citing Williams and Ontario Provincial Police (1995), 2 O.P.R., 1047 (O.C.C.P.S.) at p.1058. He noted that the Commission will defer to the adjudicator unless the adjudicator's findings of fact

¹¹ Reason for Decision, November 30, 2007 (sic), page 10

are void of evidentiary foundation, whereas the adjudicator's findings of the law are not entitled to deference. As this appeal raises questions of the evaluation of the evidence, deference should be shown to the Hearing Officer.

He submitted that the Hearing Officer properly considered the fresh evidence and refused to admit it because it was not relevant to the decisive issue.¹² The Hearing Officer's conclusion that the fresh evidence did not alter those findings, was correct. His consideration of the two Service policies reflects his understanding that there is a degree of overlap that precludes them being considered in separate silos.

As a retired senior police officer, the Hearing Officer was entitled to assess the officers' conduct through his experiential lens rather than through the 'birds-eye' view the Appellants would have us accept.

Mr. Christie argued that the Hearing Officer's comment regarding the irony of the situation did not alter the fact that the Appellants failed to follow applicable policy and therefore committed the offences for which they were convicted.

Mr. Christie asked us to dismiss the appeal.

Decision:

This is an appeal by the Appellants from the Hearing Officer's finding of one count of neglect of duty and one count of discreditable conduct.

The standard of review to be applied this Commission with respect to a finding of guilt is one of reasonableness.¹³ If the Commission fails to apply the correct standard of review, it commits an error at law.¹⁴

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

¹² Reasons for Ruling on Fresh Evidence, September 9, 2008, pp. 6-7

¹³ Toronto (City) Police Services v. Blowes-Aybar supra. at para 31.

¹⁴ Ibid, para 26 and 56

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.¹⁵

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

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 this matter?

Two issues must be addressed. First, did the Hearing Officer issue three contradictory decisions: the Reasons for Decision/Findings, the Fresh Evidence Ruling and the Reasons for Disposition? If so, was that a reviewable error? Second, did the Hearing Officer err in his analysis of the Service Policies LE-0015 and LE-011.

The chronology of events is important to the analysis of the first issue.

1. Following receipt of evidence and submissions from counsel, the Hearing Officer provided a written decision in which he found the Appellants guilty of the charges.
2. Prior to the Hearing Officer receiving submissions with respect to penalty, counsel for the Appellants and for the Respondent consented to the Hearing Officer entertaining a motion to admit fresh evidence which the Appellants felt should be admissible under the Palmer test.¹⁶
3. The Hearing Officer considered written submissions and denied the motion. The fresh evidence was not admitted.
4. The Hearing Officer received joint submissions as to penalty and accepted that submission.

¹⁵ Ibid, para. 33

¹⁶ Palmer v. R. supra

Appeals to the Commission are “on the record, but the Commission may receive new or additional evidence as it considers just”.¹⁷

In the Appellants’ view, the Hearing Officer’s treatment of the fresh evidence was inconsistent and an error fatal to his finding of guilt. Mr. Butt asked us to consider what he characterized as inconsistencies in the Hearing Officer’s reasons, as demonstrated in the three decisions: the finding, the motion and the penalty.

Before analyzing this argument, we examined precedent that spoke to the legal status of the motion to admit fresh evidence and the Hearing Officer’s actions in that regard.

On July 27th 2009, at the first appearance on this matter, we brought to the attention of the parties the case of Cate and Peel Regional Police Service supra.

The facts in Cate were unusual. Constable Cate was charged with misconduct for failing to surrender his police notebooks. His defence was that he had surrendered the notebooks. The Hearing Officer convicted him.

Before the Hearing Officer dealt with penalty, the notebooks were discovered at police headquarters, locked away in a seldom-used area. Consequently, the Hearing Officer stayed one misconduct charge and declared a “mistrial” on a second charge. The matter was appealed to the Commission. At issue was whether a hearing officer had the authority to re-visit his/her decision once the decision had been issued.

The analysis contained in Cate is worth repeating:

A Hearing Officer conducting a disciplinary proceeding is a “creature of statute”. By that, we mean that he or she can only exercise those powers granted by law.

The normal rules and procedures for disciplinary matters concerning police officers are found in two places. The first is Part V of the Act. Second, section 69(1) of the Act also provides that disciplinary hearings “shall be conducted in accordance with the Statutory Powers Procedure Act”.

The Statutory Powers Procedure Act contains a number of provisions of general application. It also permits tribunals to establish their own specific rules governing practices and procedures. For example, section 21.2 provides:

¹⁷ Section 70(5) Police Services Act

21.2(1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

(2) The review shall take place within a reasonable time after the decision or order is made.

We are advised that no such specific rules exist for the Service.

Accordingly, the question to be answered is whether or not there is a clear power granted to Hearing Officers under either Part V of the Act or in the general provisions of the Statutory Powers Procedure Act to order a mistrial.

We can find no such authority in the Act. There is nothing in legislation which would suggest to us that a Hearing Officer, having received three days of evidence and rendered a written decision finding guilt, can revisit that decision during a subsequent phase of a hearing.

.....the only general section of that legislation...[Statutory Powers Procedure Act] that has been brought to our attention that may have potential relevance is section 23(1). It reads:

23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

This section is followed by two subsections giving tribunals the power to limit the examination and cross-examination of witnesses and to exclude incompetent agents.

Case law appears to support the notion that the power to grant a stay of proceedings can be implied from the wording of section 23(1). See Re Straza (1992), 8 Admin. L.R. (2d) 161, 9 C.E.L.R. (N.S.) 314 (Ont. Env. Ap. Bd.) Accordingly, the stay with respect to the charge of insubordination stands.

However, to our mind, the power to issue general orders or directions to ensure that proceedings are not abused by a party does not encompass the authority to grant the equivalent of a criminal mistrial.

No judicial authority was brought to our attention, either through written submissions or orally, that would in any way demonstrate that the reasoning in

Cate was wrong. As well, nothing was provided to us to demonstrate that rules had been created under section 21.2(1) of the SPPA which would authorize such a review.

Counsel for the Appellants argued that fairness dictated that the Hearing Officer should have been allowed to deal with the fresh evidence following his finding the officers guilty.

The Hearing Officer is a creature of statute and has no inherent powers. The fact that both parties consented to the motion to admit fresh evidence does not alter the law or the situation.

The Hearing Officer had no power to re-visit his decision. He had no legal authority to entertain the motion to admit fresh evidence following a finding of guilt. In any event, the motion was denied and the information in question did not form part of the record provided to us.

At the end of his submissions Mr. Butt requested that, in the event that we ruled the motion was a nullity, he wished an adjournment to allow his clients the opportunity to file a motion to admit fresh evidence on appeal.

We had provided all parties with a copy of the Cate decision on July 27th 2009, some two months prior to the date of the oral argument. We had also drawn their attention to the Commission's Rules of Practice. When asked why this request was made at such a late date, Mr. Butt stated that it was his view we should not follow Cate and in all fairness we should allow the fresh evidence to be considered, or at the very least, we should consider the Hearing Officer's comments on the fresh evidence.

We are not prepared to grant the request for an adjournment. Both counsel should have been aware that the process that they encouraged the Hearing Officer to undertake was not one that lay within his legal authority. If there was any doubt about this issue, it should have been dispelled on July 27th, 2009 when we provided a copy of Cate to all parties.

This is not the first occasion in this matter where Commission Rules were not followed. The adjournment on July 27th, 2009 arose because both counsel neglected to follow our Rules, as they failed to serve the record on a party, the public complainant, Mr. O'Brien.

Mr. O'Brien has travelled from Peterborough to Toronto at his expense to attend the hearing.

Commission Rules also direct the timing and procedure to be followed with respect to the introduction of fresh evidence.¹⁸ A motion must be made. It must be in writing. Appropriate notice must be given to the parties. It would have been prudent for counsel for the Appellant to have brought a motion to admit fresh evidence in accordance with our Rules. That should have been clear on July 27th, 2009.

The Appellants failed to demonstrate a valid rationale for granting a second adjournment on this matter.

Accordingly, neither the fresh evidence which was not admitted in the disciplinary proceeding, nor the Hearing Officer's decision with respect to the motion to admit fresh evidence form part of the record for this appeal.

Mr. Butt also drew our attention to a perceived inconsistency between the Hearing Officer's decision on the findings of guilt and the penalty decision. Commenting about the fresh evidence that had been considered but not admitted, the Hearing Officer stated: "While this does not in any way excuse the conduct, it does place it in a very unusual context."¹⁹

In the penalty phase, it is not unusual for a hearing officer to hear and consider information which may not have been introduced during the disciplinary hearing. In any event, penalty is not the subject of this appeal. Even if there was an error in the penalty decision, in this case, the decision on the finding of guilt is independent of penalty.

In examining the totality of the Hearing Officer's 15-page decision, we find that he spent considerable time analyzing the oral and documentary evidence. He weighed the arguments of both the Appellants' and Respondent's counsel and clearly reached his conclusions based on a reasonable assessment of the facts before him. He also turned his mind to the requirements of the Charter, the issue of consent and 'clear reading' of policy and the contested definitions.

The second issue which was raised requires an examination of the two policies of the Service. The policies contain specific directions.

Where an officer wishes to arrest an individual in a dwelling he may do so "on lawful consent offered by an occupant of the building". (LE-0015). Where an officer wishes to search a residence "...informed consent must be received." (LE-011).

The Hearing Officer's decision shows that he was cognizant of the fact that the policies are for two different matters. He noted their commonality with respect to

¹⁸ Brudlo and Toronto Police Service, (23 November 2005, O.C.C.P.S.) at page 11

¹⁹ Reasons for Disposition, page 2

the requirement of obtaining consent. He undertook an analysis of “lawful consent” and “informed consent” and reached his conclusion, based on plain meaning of these terms. Neither counsel provided any judicial authority which would confirm or negate the Hearing Officer’s analysis.

The Hearing Officer continued with his analysis and examined the word “occupant”.

It seems to me that ‘occupant’ has a dimension of permanence to it. Based on the usage in the policy, it is highly improbable that the word is intended to suggest that anyone who is within the premises becomes an ‘occupant’. If, for example, someone was in a dwelling as a ‘guest’, it is highly unlikely that that person would be deemed to be an appropriate person to give consent in relation to that dwelling. The word ‘occupant’ seems to me to suggest tenancy or ownership, rather than mere presence.²⁰

The Hearing Officer further noted:

Ms. [G.R.’s] connection to the O’Brien apartment was tenuous indeed. She testified that she barely knew Mr. [T.O.] having just met him a short time prior to these incidents in the apartment.... A short time later, [T.O.] and [G.R.] attempted to leave the apartment. Ms. [G.R.], however, did not [leave], although her testimony indicated quite clearly that she wanted to leave. As she stated several times, ‘this had nothing to do with me.’

I find it somewhat troubling that during these events, we [have] three police officers who are hoping to enter an apartment to see if the subject of an arrest warrant is inside. We also have these officers denied access by an occupant of the apartment who indicates he has the authority of the tenant to do so. We then have [T.O.] and [G.R.] attempting to leave the area, and only one---[T.O.] is successful. The individual who remains has a conversation about obstruction of justice with the police, and then we have that individual giving consent to enter an apartment which is not hers and to which she appears to have no tangible relationship....²¹

I also have great difficulty with the fact that the person from whom consent was allegedly obtained was so ineffectually associated with the property and the legal tenant of the apartment. Ms. [G.R.] made it clear on more than one occasion that she did not know the tenant and she did not have anything to do with what was transpiring.²²

²⁰ Reasons for Decision, page 10

²¹ Reasons for Decision, page 11

²² Ibid, page 12

When the Appellants decided to enter the apartment, they knew that:

- (a) The male who answered the door to Mr. O'Brien's apartment, [T.O.], had advised them that he had authority over the apartment;
- (b) [T.O.] stated he was 'old school' and refused to grant consent to enter the dwelling without Mr. O'Brien being there;
- (c) They did not know the identity of the female 'occupant' they spoke with outside the apartment;
- (d) The 'occupant' on whom they relied did not know the name of the apartment's tenant;
- (e) The 'occupant' stated she had been in the apartment for a short period of time;
- (f) The 'occupant' told them that she nothing to do with the situation and wanted to leave.

In his supplementary occurrence report, Constable Maclean stated, 'She did not know Sean O'Brien' and that she indicated 'she had nothing to do with this'. In Constable Robinson's statement, he also referred to [G.R.'s] lack of familiarity with the tenant of the apartment: The female was unwilling to provide her name to police and was unable to provide information as to who resided in the apartment. The female advised that she did not have keys to the apartment....²³

We did not receive from counsel, either in their factums or in oral argument, any guidance as to the meaning of "occupant". However, given the Appellants' understanding of [G.R.'s] tenuous connection to the apartment, the Hearing Officer's conclusion that she was not an 'occupant' was a reasonable one. If she was not an "occupant", then the Appellants could not have obtained the "lawful consent offered by an occupant of the building". Absent such consent, the Appellants were in breach of Policy LE-0015.

The fact that he considered the two policies in concert was not an error, as they are not contradictory. The Hearing Officer's conclusion as to the interaction of the two policies is not fundamental to his finding that the Appellants breached Policy LE-0015.

Mr. Butt asked us to consider that the situation in which the officers found themselves was fluid and dynamic and that they had to make a quick determination of which Service policies applied. We know from the evidence that over a period of some minutes, [T.O.] was unequivocal in his assertions that Mr. O'Brien was not present in the apartment. He was clear that he did not give the

²³ Reasons for Decision page 13

officers authorization to enter. This was reiterated in testimony. We also saw the interactions of [T.O.] and [G.R.] with the officers, on videotape. We were able to calculate the timing of events captured by that recording.

The three constables on scene were not recruits. Constable McLean had 18 years' experience and had served as a training officer and acting supervisor. During their careers, these officers would likely have made dozens of arrests in a variety of static and dynamic situations. They would have been familiar with the law and Service policies. Constable McLean, as the senior officer on scene, properly determined the need for a Feeney endorsement to the warrant for Mr. O'Brien's arrest. He was on the telephone and in the process of obtaining the appropriate documentation when [T.O.] and [G.R.] exited the apartment. At that point, some of the dynamics of the situation changed. What did not change was the lack of permission from [T.O.], the assertion that Mr. O'Brien was not present, and the absence of any evidence that any risk or emergency situation existed. However, the officers continued, as if they had the appropriate authorities. In doing so, they breached Service policy.

We cannot, as Mr. Butt suggested, take a "bird's eye view" of the situation as we consider a disciplinary appeal. It was his submission that information unknown to the officers at the time they determined that they had the "lawful consent offered by an occupant of the building", should be imported into the decision-making process to justify what otherwise might have been misconduct. He contended the fresh evidence which was not admitted would have made sense of his contention that the officers had been tricked by Mr. O'Brien and his agents, [T.O.] and [G.R.] into entering the apartment.

He presented no judicial authority to support that position and we are not prepared to accept such an unorthodox approach to analyzing an officer's conduct, particularly given our role on appeal.

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."

Following a review of the Hearing Officer's decision and the record in its entirety as clarified by our rulings, we are of the view that the analysis and conclusions supporting the findings of guilt were reasonable. Conviction of each of the officers on one count of neglect of duty and one count of discreditable conduct is one of the possible outcomes that would be defensible in respect of the facts of this matter and relevant law.

Accordingly, we dismiss the appeal.

DATED AT TORONTO THIS 13th DAY OF NOVEMBER 2009.

Dave Edwards
Member, OCCPS

Hyacinthe Miller
Member, OCCPS