

OCPC Decision # 09-15

CONSTABLES JAMIE HARTNETT, DAN MACLEAN AND GREG
ROBINSON
Appellants

AND

PETERBOROUGH LAKEFIELD COMMUNITY POLICE SERVICE
Respondent

AND

SEAN O'BRIEN
Respondent

Presiding OCPC Members:

Dave Edwards, Member

Hyacinthe Miller, Member

Appearances:

David Butt, for the Appellants

Glenn P. Christie, for Peterborough Lakefield
Community Police Service

Heard:

July 27 and September 29, 2009

Date of Decision:

November 13, 2009

**NEGLECT OF DUTY - Failure to work in accordance
with orders** - Three officers found guilty of neglect of duty
- Appellants contravened service order with respect to
search of premises - No reviewable errors in Hearing
Officer's decision - Appeal dismissed.

DISCREDITABLE CONDUCT - Disorderly or prejudicial conduct - Three officers found guilty of discreditable conduct - Appellants contravened service order with respect to arrest procedures - Appellants entered an apartment without obtaining a Feeney endorsement or proper consent - No reviewable errors in Hearing Officer's decision - Appeal dismissed.

EVIDENCE - Fresh evidence - Appellants convicted on charges of neglect of duty and discreditable conduct - Appellants entered an apartment without obtaining proper consent - Subsequent to conviction phase but prior to sentencing, counsel for Appellants brought a motion to introduce fresh evidence - Hearing Officer heard motion on consent of both Appellants and Respondent police service but rejected fresh evidence as irrelevant to central issues - Appellants argued Hearing Officer erred in rejecting fresh evidence - Hearing Officer had no authority to entertain fresh-motion evidence following a finding of guilt - Hearing Officer's decision on motion a nullity.

PROCEDURAL ISSUES - Adjournment - Following conviction decision Hearing Officer entertained motion to introduce fresh evidence but declined to admit evidence - Since Hearing Officer had no authority to revisit his decision on conviction, decision on motion was a nullity - Appellants requested an adjournment to file a motion to admit fresh evidence on appeal - Appeal hearing already adjourned once due to parties' failure to serve the record on complainant - No valid rationale for granting a second adjournment - Request denied.

HEARING OFFICERS - Reviewable errors - Appellants found to have contravened service's arrest and search policies by entering an apartment without obtaining a Feeney endorsement or proper consent - Appellants argued Hearing Officer misinterpreted and conflated two distinct policies - Not an error for Hearing Officer to consider two

policies in concert since policies not contradictory - Hearing Officer's interpretation of policies, analysis of evidence and conclusions were reasonable - No reviewable errors in decision on conviction - Appeal dismissed.

HEARING OFFICERS - Decision of hearing officer - Standard of review - Hearing Officer's findings of fact and credibility entitled to deference - Hearing Officer considered requirements of the *Charter*, issue of consent and content of service policies contravened by Appellants - Analysis of evidence and conclusion that Appellants entered an apartment without obtaining proper consent were reasonable - Conviction on disciplinary charges one of the possible outcomes that would be defensible in respect of the facts and relevant law - Appeal dismissed.

Summary of Reasons for Decision

Constables Hartnett, MacLean and Robinson appealed their conviction on one count each of neglect of duty, contrary to s. 2(1)(c)(ii) of the Code of Conduct and one count each of discreditable conduct, contrary to s. 2(1)(a)(xi) of the Code. They did not contest the penalty imposed, which reflected the parties' joint submission on penalty, forfeiture of five days' time.

On December 13, 2005 Constables Hartnett and MacLean attended Mr. O'Brien's last known address for the purpose of serving an arrest warrant. Mr. O'Brien's former domestic partner had filed a complaint and as a result he had been charged with criminal harassment.

When the officers attended the address they identified themselves through the door, indicating they were looking for Mr. O'Brien. A male, T.O. answered, indicating that Mr. O'Brien was not at home and that he and a female were the only people there. T.O. denied the police access to the

apartment. A call was made for another officer to attend and shortly thereafter Cst. Robinson arrived. Constable MacLean made a call with the intention of obtaining a Feeney endorsement to the arrest warrant, which would authorize the police to enter the apartment without consent to make the arrest. As he was placing the call, T.O. and the female, G.R., exited the apartment. T.O. indicated that he was the one in authority and he would not permit the police to enter Mr. O'Brien's apartment. The officers asked G.R. several times if they could enter the apartment to see for themselves whether Mr. O'Brien was there. She indicated that she did not know Mr. O'Brien, repeated that he was not in the apartment, but finally agreed to allow them entry. The officers searched the apartment but did not locate Mr. O'Brien. The officers left the apartment with G.R., but returned a few minutes later, for the stated purpose of making sure the windows and patio door were locked.

The officers were unaware that a video camera positioned in the hallway had recorded their two entries. Subsequently Mr. O'Brien lodged a public complaint, alleging that the three officers entered his apartment without proper authorization.

After investigating, the service charged the officers with one count of neglect of duty for failing to work in accordance with service order LE-011 ("Search of Premises") and one count of discreditable conduct with respect to service order LE-005 ("Arrest"), by entering an apartment without obtaining a Feeney endorsement or proper consent.

Mr. O'Brien was present during the disciplinary proceeding and testified, but did not exercise his right to participate as a party. In a decision dated November 30, 2007 the Hearing Officer found the officers guilty of neglect of duty and discreditable conduct.

Subsequent to that decision but prior to the sentencing portion of the proceeding, counsel for the officers 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 guilt. With the consent of both parties, the Hearing Officer heard the motion. He considered the information, which appeared to indicate that Mr. O'Brien was present in the apartment when the officers first arrived. However, he declined to admit the evidence, because in his view it was not relevant to the critical question of whether the police had consent to enter the apartment.

Following a joint submission, the Hearing Officer then released his decision as to penalty.

The complainant, Mr. O'Brien, was served with the notice of appeal, the Appellants' factum and the disciplinary hearing transcript only four days before the scheduled date for the appeal hearing. Mr. O'Brien contacted the Commission and requested an adjournment because of the late delivery of materials. As of the appeal hearing date he had not been served with the Respondent's factum. On the scheduled hearing date, counsel for the Appellants confirmed that he had been deliberately selective about the material disclosed to Mr. O'Brien, and he requested an *in camera* hearing to protect the confidential informants. The Commission ordered that Mr. O'Brien be served with the Service's factum. The Commission also granted Mr. O'Brien's request for an adjournment, stating its concerns with the parties' deviation from the Commission's Rules of Practice on a number of points. The request for an *in camera* hearing was denied because absent compelling reasons, the *Police Services Act* mandated that Commission hearings be public.

Counsel for the Appellant argued that the Hearing Officer made two errors: in his treatment of the fresh evidence, and in his interpretation of Policy LE-005 and Policy LE-011. The fresh evidence suggested that Mr. O'Brien had set up the entire incident and enlisted the aid of T.O. and G.R., so as to

entice the officers to illegally enter his apartment, thereby furnishing grounds for a civil lawsuit. Counsel argued that it was inconsistent for the Hearing Officer to accept this theory and yet reject the evidence, then convict the officers on the disciplinary charges. Counsel also argued that there were inconsistencies between the Hearing Officer's decisions on conviction and penalty. With respect to the service policies, counsel argued that the policies dealt with different events and he asserted that the Hearing Officer erred by mixing them together. Counsel requested that the decision be revoked and a finding of not guilty be substituted.

Counsel for the Respondent argued that the Hearing Officer properly rejected the fresh evidence because it did not meet the threshold identified in **R. v. Palmer** [1980] 1 S.C.R. 759 (S.C.C.); the evidence was not relevant to the critical issue of whether the Appellants entered the apartment without obtaining a Feeney endorsement or proper consent. Counsel argued that there were no internal contradictions in the Hearing Officer's decisions. The Appellants were convicted of neglect of duty because they failed to obtain appropriate consent from an "occupant", contrary to service policy. Similarly, they were convicted of discreditable conduct because they ought to have known that their entry into the dwelling was without genuine permission, G.R. not being an "occupant". The Hearing Officer properly considered the fresh evidence and rejected it because it was not relevant to the central issue. As for the service policies, the Hearing Officer's interpretation reflected his understanding that there was a degree of overlap between the policies.

Held, appeal dismissed.

In light of the Supreme Court of Canada's decision **Dunsmuir v. New Brunswick** [2008] 1 S.C.R. 190, the standard of review applicable to the Hearing Officer's decision was reasonableness. According to **Dunsmuir**,

reasonableness should be assessed in relation to both process and outcome.

This appeal raised two issues: first, whether the Hearing Officer rendered three contradictory decisions (the findings decision, the fresh evidence ruling and the disposition decision) and if so, whether that was a reviewable error; secondly, whether the Hearing Officer erred in his analysis of the two service policies.

At the first scheduled appeal hearing date, the Commission brought to the attention of the parties the case of **Cate and Peel Regional Police Service** (*infra*). At issue in **Cate** was whether a hearing officer had the authority to revisit his/her decision once the decision had been released. In **Cate** the Commission determined that a hearing officer had no authority to declare a mistrial, based on newly discovered information, once the conviction decision had been released. No judicial authority was brought to the Commission's attention that would demonstrate that the reasoning in **Cate** was wrong. In addition, nothing in the Commission's Rules authorized such a review. The Hearing Officer was a statutory tribunal with no inherent powers. He had no power to revisit his decision, and no legal authority to entertain the motion to admit fresh evidence. In any event, the Hearing Officer denied the motion.

In the event the Commission declared that the motion was a nullity, counsel for the Appellants requested an adjournment to allow his clients the opportunity to file a motion to admit fresh evidence on appeal. However, counsel for both parties should have been aware that the Hearing Officer had no authority to entertain the motion; any doubts in that regard should have been dispelled when they were provided with a copy of **Cate**. The Appellants could have filed a motion in accordance with the Commission's Rules, but did not. There was no valid rationale for granting a second adjournment in this case. Thus neither the fresh evidence which was not

admitted at the disciplinary hearing nor the Hearing Officer's decision on the motion formed part of the record on this appeal.

As for the alleged inconsistency between the decision on guilt and the decision on penalty, only the conviction was being appealed in this case. Even if there were an error in the penalty decision, the finding of guilt was independent of penalty.

Examining the Hearing Officer's decision as a whole, his conclusions were based on a reasonable assessment of the facts. He turned his mind to the requirements of the *Charter*, the issue of consent and the content of the policies.

The Hearing Officer's reasons showed that he was aware the policies were for two different matters. He noted their commonality with respect to the requirement to obtain consent. The fact that he considered the two policies in concert was not an error, since they were not contradictory. The Hearing Officer examined the word "occupant" in LE-005 and determined that G.R. was not an occupant. That was a reasonable conclusion. If she was not an occupant, the Appellants could not have obtained the "lawful consent offered by an occupant of the building". Accordingly they were in breach of policy LE-005.

Applying the **Dunsmuir** framework, the Hearing Officer's analysis and conclusions were reasonable; and conviction on the disciplinary charges represented one of the possible outcomes that would be defensible in respect of the facts and the relevant law.

Statutes cited

Police Services Act R.S.O. 1990, c.P.15 as amended, ss. 70(1) and 70(5)

Statutory Powers Procedure Act R.S.O. 1990, c.S.22 as amended, s. 21.2(1)
O.Reg. 123/98, ss. 2(1)(a)(xi) and 2(1)(c)(ii)

Authorities cited

R. v. Leipert (1997), 112 C.C.C. (3d) 385 (S.C.C.)
Cate and Peel Regional Police Service (2001), 3 O.P.R. 1491 (OCCPS #01-06)
R. v. Palmer [1980] 1 S.C.R. 759 (S.C.C.)
Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (OCCPS)
Dunsmuir v. New Brunswick [2008] 1 S.C.R. 190 (S.C.C.)
Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Ont. Div. Ct.); OCCPS JR #03-17)
Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 (Ont. Div. Ct.); OCCPS JR #03-20)
Brudlo and Toronto Police Service (Nov. 23, 2005, OCCPS #05-09)