

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE WENDY GARDNER

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

Presiding Members:

David Edwards, Member
Hyacinthe Miller, Member

Appearances:

Theresa R. Simone Counsel for the Appellant
Christine Perruzza for the Respondent, Ontario Provincial Police

This is an appeal from a finding of guilt made on April 16, 2007 against Constable Gardner by Superintendent M. Elbers (the "Hearing Officer") on one count of discreditable conduct contrary to section 2(1)(a)(xi) of the Code of Conduct (the "Code") set in Ontario Regulation 123/98.

As well, this is an appeal from the penalty imposed, being forfeiture of forty (40) hours.

Motion

This hearing was scheduled to be heard on September 18, 2008. Prior to that time, the parties indicated to the Registrar that it may not be necessary for the hearing to proceed. There was some confusion as to the reasons why that would be the case. This subsequently resulted in a telephone conference among the panel, both counsel, and the Registrar for the Commission on September 18, 2008.

At that time, counsel advised the panel that they would be submitting a motion on consent, the particulars of which were unclear, but that both counsel would be consenting to this motion.

After some discussion, the panel granted counsel until October 3, 2008 to provide the written motion together with the factum supporting such motion, as is required by our Rules.

The panel particularly directed counsel to consider and provide written argument dealing with the jurisdiction which the panel has upon receiving a consent

motion. The panel noted to counsel that the Commission imposes a duty upon a hearing officer to determine that a joint submission is reasonable. The hearing officer may not simply rubber stamp a joint submission, but must examine the factors presented.

The panel was of the view that it could have no less of a duty on a motion on consent than the duty on a hearing officer who receives a joint submission during a disciplinary hearing.

Further, the panel indicated that it would advise counsel by October 31, 2008 as to whether a hearing on the motion was required.

On October 3, 2008, the Commission received a Notice of Motion, on consent, requesting an order revoking the conduct decision of the Hearing Officer dated April 16, 2007 and the decision as to penalty dated June 27, 2007.

The grounds for the motion were as follows:

1. Superintendent M. Elbers reached his decision without all relevant evidence.
2. The complainant Constable Yves Lacasse failed to disclose all relevant evidence until after the discipline hearing.
3. The failure to make full and complete disclosure prior to the hearing denied Constable Gardner the opportunity to provide a full answer and defence resulting in a breach of natural justice.
4. Such further and other grounds as Counsel may advise and this honourable tribunal may deem appropriate.

Despite the direction of the panel, no written argument or factums were filed by counsel on the motion. In addition, counsel did not file any evidence on the motion, as is required by rule 14.4 of the Commission's Rules of Practice.

Further, both counsel failed to address the legal issue (the panel's jurisdiction on a consent motion) raised by the panel during the conference call.

To perhaps better clarify this issue, the following example could be considered:

Discipline may be imposed upon an officer by a hearing officer, which the Police Service, following a review, may decide is excessive. On appeal of that decision counsel for both the appellant and respondent might file a joint submission to the Commission requesting relief from the original decision.

In such a circumstance, it would be incumbent upon counsel to provide a written submission for consideration by the Commission, to assist in the decision with respect to the reasonableness of the relief sought in the joint submission.

A bald request for relief on consent without the supporting material which includes the evidence or rationale required for the Commission to satisfy itself as to the reasonableness of the relief requested is clearly not sufficient.

We would also draw counsels' attention to the grounds upon which fresh evidence may be admitted on an appeal. The consent of counsel is not the relevant factor. What is the determining factor is whether the fresh evidence satisfies the legal test as enumerated by this Commission.

This matter is no different.

The panel has the obligation to satisfy itself that any relief granted complies with the statute as interpreted by the Commission and the Courts.

Further, the record filed by counsel on this motion is not satisfactory as it does not address the jurisdictional issue raised by the panel during the telephone conference on September 18, 2008.

As a result, we will allow counsel until the 15th day of November, 2008 to file all evidence and written argument relied on in support of their motion to revoke the decision of the Hearing Officer, failing which, the motion is dismissed as the materials submitted do not provide grounds which speak to the reasonableness of the relief sought, nor do they speak to whether the panel has jurisdiction to grant the relief requested in the absence of such evidence.

Should counsel file evidence and factums as directed, oral argument on this motion will be heard on November 21, 2008.

As we have previously directed, if the motion for an order revoking the decision of the Hearing Officer is unsuccessful, subject to any other motions filed in accordance with the Commission's Rules, on November 21, 2008, we will hear the proposed motion to admit fresh evidence and argument on this appeal.

DATED AT TORONTO THIS 31ST DAY OF OCTOBER, 2008.

Hyacinthe Miller
Member, OCCPS

David Edwards
Member, OCCPS