

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE J.J. (JONATHAN) DEVINE

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

Presiding Members:

Garth Goodhew, Member
David Edwards, Member

Appearances:

Gavin J. May, Counsel for the Appellant
Natalie Osadchy, Counsel for the Respondent

Hearing Date: November 18, 2008

On February 26, 2008 Inspector Stuart McDonald (the "Hearing Officer") found Constable Devine guilty of 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.

On March 27, 2008 the Hearing Officer imposed a penalty of demotion from second-class constable to third-class constable for a period of two years.

This is an appeal of that penalty.

Background:

Constable Devine has been a police officer with the Ontario Provincial Police ("OPP") since January 3rd, 2006.

The Notice of Hearing as amended alleges that on or about January 20, 2007 Constable Devine, while in Uxbridge Township, operated a motor vehicle which was involved in an accident and that he acted inappropriately in relation to this incident by operating the motor vehicle after having consumed alcohol. In addition, police noted indicia of impairment and Constable Devine registered FAIL on an accepted roadside screening device.

Prior to the amendment the Notice of Hearing included two additional allegations, namely,

- you did not notify police of the collision in a proper and timely manner; and,
- your vehicle had also been involved in a collision in the Whitby area, and you did not ensure the vehicle remained at the scene and did not notify police of that collision in a proper and timely manner

These two allegations were removed upon consent of the Prosecutor and Defence Counsel.

On February 26, 2008 Constable Devine appeared before the Hearing Officer and entered a plea of guilty to the charge.

The Prosecutor and Defence Counsel submitted an Agreed Statement of Facts which reads as follows:

On January 20th 2007 Constable Devine was off duty and operating his personal motor vehicle, a 1999 Chevrolet S-10 pickup truck. Constable Devine had left Brooklyn for Courtice, but had become lost. Constable Devine was travelling alone, southbound on Regional Road 23, also known as Lakeridge Road, in the Township of Uxbridge near O'Neil Road at approximately 0330 hours. The weather at the time was clear, the road surface was asphalt, and the road surface condition is described as loose snow.

At this time, Constable Devine hit a patch of black ice while attempting to navigate a sharp bend in the road. Constable Devine lost control of the vehicle and it skidded off the road and rolled over in the ditch. Constable Devine received a cut on his head in the accident which required medical attention. Constable Devine's truck was inoperable and a passerby transported him to the Uxbridge Cottage hospital. Constable Devine owned a cell phone but he lost it in the crash. He found it the next day wedged between the dashboard and the windshield.

Constable Devine received medical attention for his injury at the hospital and contacted his acquaintance, KC, for a ride back to the scene. KC picked Constable Devine up from the hospital and they went directly back to the scene of the collision to notify and wait for the police. They arrived at the scene at 0604 hours, and KC called the police on behalf of Constable Devine.

Constable Cain of the Durham Police Service was dispatched and attended the scene of the motor vehicle collision. Constable Devine identified himself to Constable Cain as the owner and driver of the involved pickup truck and indicated that he had gotten lost. Constable Devine advised that the collision had occurred at approximately 0330 hours and that he attended the hospital a short time afterwards.

Constable Devine had consumed alcohol prior to driving and Constable Cain noticed indicia of impairment, including an odour of an alcoholic beverage on his breath, dilated pupils, slurred speech, and unsteadiness on his feet. Constable Cain was very experienced in investigating impaired driving occurrences and concluded that Constable Devine was impaired by alcohol at the time that he was speaking to him.

Constable Cain phoned the Uxbridge Cottage hospital and they confirmed that Constable Devine had arrived there at approximately 0415 hours. Constable Cain did not demand a breath sample as he concluded that he did not have the grounds to do so because he could not show that Constable Devine had been operating the vehicle within the preceding three hours. At this time Constable Devine voluntarily provided a sample of his breath into an approved roadside screening device and registered a FAIL.

Constable Devine was charged from the Highway Traffic Act and later convicted of Leave Roadway Not in Safety. He received a \$110 fine.

The Hearing Officer found Constable Devine guilty of the charge of discreditable conduct. On March 27, 2008 he imposed a penalty of demotion from second-class constable to third-class constable for a period of two years. Upon completion of that time period, Constable Devine will be reinstated to the position of second-class constable with credit for the period he already served in that rank.

Appellant's Position:

Counsel for the Appellant, Mr. May, enunciated the authority of the Commission to vary penalties that are unreasonable, unjust or unfair or if all of the relevant factors were not fairly or impartially considered. Andrews and Midland Police Service (1 May 2003, O.C.C.P.S.), and Krug and Ottawa Police Service (21 January 2003, O.C.C.P.S.)

He asserted that the Hearing Officer erred in two respects when he concluded that "Provincial Constable Devine ensured that he was outside of the required timelines prior to calling police to avoid the criminal charge."

On consent of both counsel the allegation as to delay was removed from the Notice of Hearing and the Prosecutor specifically advised the Hearing Officer that "the delay is not an aggravating factor in any way, sense or form". For the Hearing Officer to raise this issue without prior notice to counsel, Mr. May argued is a breach of natural justice.

Mr. May asserted that the Hearing Officer also erred in concluding that "[i]n my opinion, based upon the Agreed Facts, Provincial Constable Devine ensured that he was outside the required timelines prior to calling police to avoid the criminal charge" as the Agreed Facts do not support that conclusion.

Mr. May argued that it was common ground that the highest penalty for this type of misconduct was a two year demotion. As the Hearing Officer accepted a number of mitigating factors, Mr. May argued that the penalty should not have been at the highest extreme.

He listed the mitigating factors accepted by the Hearing Officer, but argued that the Hearing Officer did not reflect these factors in the penalty.

Mr. May suggested that the Hearing Officer failed to recognize as mitigating factors the facts that the incident was out of character for Constable Devine, that the demotion would have a severe adverse economic impact on him, and that he voluntarily provided a breath sample.

Further, Mr. May asserted that the Hearing Officer erred by not recognizing that the absence of drinking and driving criminal charges distinguished this case from other cases where such charges were considered to be aggravating factors.

Mr. May argued that the Hearing Officer confused the principles of general and specific deterrence. As well there was nothing to support the Hearing Officer's decision that specific deterrence was required in this case.

Mr. May asserted that the Hearing Officer applied the criminal principle of sentencing of protection of the public when he stated: "The Ontario Provincial Police must deliver a penalty that not only prevents a recurrence, but also adequately protects the public".

Finally, Mr. May submitted that the Hearing Officer failed to distinguish other cases from this one. Aggravating factors support the penalty at the high end of the range. The Hearing Officer acknowledged several mitigating factors, but failed to apply them in assessing the penalty.

Mr. May requested that the Commission vary the penalty and impose a six month demotion from second to third-class constable and that upon completion of that time that Constable Devine be reinstated to second-class constable with credit for the period of time already served in that rank.

Respondent's Position:

Counsel for the Respondent, Ms. Osadchy, asserted that the penalty imposed upon Constable Devine was reasonable and within the acceptable range, and that the Commission should only vary penalties on appeal when the penalty imposed was unfair or unreasonable.

She submitted that the Hearing Officer was entitled to rely upon his own experience in assessing evidence and the impropriety and gravity of the misconduct. Galassi v. Hamilton Police Services Board [2005] O.J. No. 2301 (Div. Ct.)

She described the test to be applied in reviewing penalties and the Commission's role on such appeals. She argued that the Hearing Officer properly considered all relevant factors and that the penalty imposed fell within the accepted range. Carson and Pembroke Police Service (27 July 2001, O.C.C.P.S.), Krug and the Ottawa Police Service, supra

Ms. Osadchy asserted that the Commission should show deference to the Hearing Officer's decision unless the Hearing Officer made a manifest error in principle, failed to consider relevant factors or the penalty was not within the acceptable range. Galassi v. Hamilton Police Services Board, supra

She submitted that the Hearing Officer had read and considered all cases, but was not bound by previous decisions. Ontario (Provincial Police) v. Favretto (2004), 72 O.R. (3rd) 681 (Ont. C.A.)

She asserted that the Hearing Officer appropriately considered all mitigating factors and assigned appropriate weight. He reviewed and considered each mitigating factor raised by the Appellant.

She argued that the Hearing Officer did not confuse the principles of general and specific deterrence. Both were appropriate considerations in the circumstances.

In summary, Ms. Osadchy requested that the appeal be dismissed.

Decision:

On February 26, 2008 the Hearing Officer found Constable Devine guilty of one count of discreditable conduct.

On March 27, 2008 the Hearing Officer imposed a penalty of demotion from second-class constable to third-class constable for a period of two years.

It is this penalty that Constable Devine has appealed.

Our role on an appeal of penalty is quite clear.

The Commission stated in Wildeboer and Toronto Police Service (7 November 2006, O.C.C.P.S.) at page 7:

When evaluating or assessing a penalty, the role of the Commission is clear. It is not to second-guess the decision of the Hearing Officer. It is not to substitute our opinion for that of the Hearing Officer. Rather, it is to assess whether or not the Hearing Officer applied the correct principles and imposed a penalty that is consistent with those handed down in similar cases.

The principles to be applied by hearing officers were described by the Commission in Carson and Pembroke Police Service (9 March, 2006, O.C.C.P.S.) at pages 14 and 15:

The factors to be taken into account when assessing a suitable penalty are well established. In Williams and Ontario Provincial Police this Commission identified three key elements. They include the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police services that would occur if the police officer remained on the force.

Further considerations can include the need for deterrence, provocation, or concerns arising from management's approach. Other factors can be relevant either mitigating or aggravating a penalty, depending on the conduct in question. These include the officer's employment history and experience, recognition of the seriousness of the transgression and handicap or other relevant personal considerations.

In addition, when imposing a penalty, it is important to take into account prior disciplinary cases dealing with similar types of misconduct. This is to ensure consistency.

How do we apply these principles in this case?

The original Particulars of Allegation initially contained in the Notice of Hearing stated:

On or about January 20, 2007 while in Uxbridge Township, you operated a motor vehicle and were involved in a motor vehicle collision. You acted inappropriately in relation to this incident including that:

- you did not notify police of the collision in a proper and timely manner;
- you operated the motor vehicle after having consumed alcohol, and police noted indicia of impairment and you registered FAIL on a roadside screening device; and,
- your vehicle had also been involved in a collision in the Whitby area, and you did not ensure the vehicle remained at the scene and did not notify police of that collision in a proper and timely manner.

On the consent of both counsel the first and third bullets were removed from the particulars and the Prosecutor advised the Hearing Officer that ... "there is no issue with respect to the delay. The delay is not an aggravating factor in any way, sense or form ... It's going to be my submission, sir, that that is not a significant issue in the Police Services Act proceedings or should not be." (Transcript, pages 10 and 11).

Constable Devine then pled guilty to the amended charge, following which the Agreed Statement of Facts was introduced into evidence.

Notwithstanding the forgoing the Hearing Officer concluded, at page 18 of his Decision:

In my opinion, based on the Agreed Facts, Provincial Constable Devine ensured that he was outside the required timelines prior to calling police to avoid the criminal charge. These evasive actions are a significant aggravating factor.

It is a fundamental aspect of natural justice that one must be advised of the charge or allegation in order that one may properly defend oneself from such a charge. Once the Particulars of Allegation were amended by the deletion of the allegation of delay and the Prosecutor advised that delay was not an issue, it was a breach of fundamental justice for the Hearing Officer to consider that issue without first advising counsel that in his opinion the remaining particulars and the Agreed Statement of Facts supported such consideration.

Further, in this particular case, the Agreed Statement of Facts does not support the conclusion that Constable Devine "ensured that he was outside the required timeline prior to calling the police ...". No reason for the delay is set forth in the Agreed Statement of Facts. Accordingly the Agreed Statement of Facts does not

support any conclusion as to the reason for the delay. To reach any conclusion as to the reason for delay one must import fresh evidence into the Agreed Statement of Facts.

While it is acknowledged that all cases turn on their specific facts, there was general agreement both at the original hearing and at the appeal that the high range of penalty for misconduct involving drinking and driving is two years. However, it is also clear that given a certain fact situation even dismissal could be a possible penalty for such misconduct. The facts, therefore, of the specific case are critical as the mitigating and aggravating elements are fact dependent.

Provided the Hearing Officer has properly and impartially applied all of the relevant sentencing principles and not otherwise made a manifest error, we may not disturb a decision if the penalty is within the appropriate range, even if we would not have imposed the same penalty.

For the reasons stated above, we are of the view that the Hearing Officer made a manifest error in finding delay to be an aggravating factor.

It is clear that drinking and driving is conduct which constitutes serious misconduct. It is conduct which cannot be tolerated and for which a substantial penalty must be assessed.

Both the community and police services across Ontario have become increasingly less tolerant of drinking and driving. Police forces have expended considerable resources to combat drinking and driving. Clearly the perception of the seriousness of this misconduct has increased with the passage of time.

Constable Devine therefore deserves a substantial penalty for his misconduct. As well, however, there are mitigating factors which are present in this case.

These include the fact that Constable Devine entered a guilty plea. He had very positive performance evaluations. Letters from co-workers and supervisors were very supportive. The consequences of the accident, as compared to other cases, were limited, as it was a single car accident without significant personal injury.

Accordingly, in view of the Hearing Officer's manifest error, we revoke the penalty imposed by the Hearing Officer. Considering the seriousness of the misconduct and the mitigating factors in this case, we impose a one year demotion for Constable Devine from second to third-class constable. Upon completion of that time period, Provincial Constable Devine will be reinstated to the level of second-class constable with credit for the period that he has already served to date at that rank.

DATED AT TORONTO THIS 26TH DAY OF NOVEMBER 2008.

Garth Goodhew
Member, OCCPS

David Edwards
Member, OCCPS