

**ONTARIO CIVILIAN POLICE COMMISSION**

**REASONS FOR DECISION**

CONSTABLE DANIEL ZARELLO

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

**Presiding Members:**

Roy Conacher, Member  
Garth Goodhew, Member

**Appearances:**

Mr. Leo A. Kinahan, Counsel for the Appellant  
Jordana Joseph, Counsel for the Respondent

**Hearing Date:** Tuesday, April 14, 2009

On August 6, 2008 Constable Daniel Zarello filed a notice of appeal with the Ontario Civilian Police Commission (the "Commission") pursuant to section 70 of the Police Services Act R.S.O. 1990, c. P.15 as amended (the "Act").

That appeal was with respect to both conviction and penalty imposed on May 17, 2007 and May 9, 2008 respectively by Superintendent (retired) Robert J. Fitches (the "Hearing Officer") for one count of neglect of duty contrary to section 2(1)(c)(i) of the Code of Conduct, Ontario Reg. 123/98 as amended (the "Code").

The penalty consisted of suspension without pay for a period of 3 days or 24 hours with such suspension to take effect, and be carried out in a manner determined appropriate by the

Regional Commander, Greater Toronto Region in consultation with the Bureau Commander, Professional Standards Bureau.

### **Background:**

Constable Zarrello is a 44 year old police officer who joined the Ontario Provincial Police ("OPP") in November of 1989. At the time of the events giving rise to this appeal, he was serving in the Traffic Patrol Unit with responsibility for traffic patrol on Highway 400 north of the Greater Toronto Area. His employment record discloses that since 2003, Constable Zarrello has been found guilty of three prior disciplinary offences.

On January 7, 2004, Constable Zarrello was called to investigate a motor vehicle accident which occurred on Highway 400 involving a person by the name of ML<sup>1</sup> who alleged that his vehicle was struck from behind by a vehicle driven by one DB<sup>2</sup>. As a result of Constable Zarrello's investigation of this accident, DB was charged with careless driving under the Highway Traffic Act R.S.O. 1990, c. H.8 as amended ("HTA").

A court date for the trial of this charge was set for June 30, 2004 at the Provincial Court, Tannery Mall, 465 Davis Drive in Newmarket, Ontario. ML was subpoenaed as a witness to attend the trial that day and Constable Zarrello was also present as the investigating officer.

As a result of an interaction between the witness ML and Constable Zarrello on that date at the Court, it was alleged that the witness left the Court facility and did not testify and the HTA charge of careless driving against the accused DB was withdrawn by the Prosecutor and dismissed by the Court.

Constable Zarrello was subsequently charged with one count of neglect of duty and served with a notice of hearing dated December 20, 2004. The particulars of the allegation read as

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<sup>1</sup> Name modified. Initials used ML

<sup>2</sup> Name modified. Initials used DB

follows:

On or about June 30, 2004, at approximately 9:10 a.m., you were at the Provincial Offences Court "Tannery Mall" in relation to a charge you laid against one [DB] for careless driving from a collision investigation you conducted on January 7, 2004. Your neglect in relation to this incident includes, but is not limited to:

- You met with a witness [ML] outside the courtroom and when asked by him as to whether he had to be there, you told him "no, not really".
- You advised you did not recognize [ML] and did not realize that he was your witness but [ML] says that he said hello and introduced himself to you.
- As a result of your conversation with the witness, he left and was not available to testify and the careless driving charge was dismissed.

You knew or ought to have known that your actions were a neglect of duty.

During the course of the initial disciplinary hearing, which is the subject of this appeal, three witnesses testified for the prosecution and no evidence was called on behalf of the officer. A total of 10 exhibits were filed.

At the conclusion of the evidence and submissions by Counsel, the Hearing Officer issued his decision on May 17, 2007, with respect to the finding of guilt. Following further submissions on penalty, the Hearing Officer issued his decision on penalty on May 9, 2008.

It is both these decisions which are the subject of this appeal.

### **Appellant's Position:**

On behalf of the Appellant, Mr. Kinahan raised a number of

issues as grounds for appealing the decision of the Hearing Officer, namely:

1. The Hearing Officer misapprehended the evidence by failing to consider all of the evidence presented and by being mistaken on the substance of material parts of the evidence resulting in errors in his reasoning leading to the finding of guilt;
2. The Hearing Officer erred in his rationalizing the inconsistencies in the evidence presented by the prosecution;
3. The Hearing Officer failed to apply the proper test, or any test in assessing the credibility of the witnesses;
4. The Hearing Officer failed to consider that the evidence presented did not confirm the identity of the Appellant as the officer with whom the witness ML was interacting at Court on the date in question;
5. When addressing the central issue of credibility, the Hearing Officer failed to set out adequate reasons why he believed or disbelieved certain witnesses;
6. The Hearing Officer, when faced with inconsistent or ambiguous evidence, drew improper or incorrect inferences and conclusions which were not supported by the evidence when considered in totality;
7. The Hearing Officer inappropriately applied a reverse onus of proof on the Appellant in relation to evidence of the officer's attendance at the residence of the witness ML later on June 30, 2004, in essence, requiring the officer to disprove that such evidence corroborated his alleged actions at Court that morning; and
8. The penalty imposed is excessive in the circumstances.

Mr. Kinahan submitted that the evidence of the witness ML

was inconsistent with the evidence of one Constable Singh, the court officer that day, and with the evidence of the Crown Prosecutor, relating to the layout of the Court facilities and the times that Constable Singh testified that he contacted the witness ML during the morning of June 30, 2004.

Mr. Kinahan asserted that the evidence of Constable Singh, which was corroborated by the Crown Prosecutor, was rejected by the Hearing Officer in preference to the uncorroborated evidence of the witness ML without any reasonable explanation and that the decision on this issue amounted to what has described as a "rote assertion deserving little weight."

On this point he drew our attention to R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), R. v. Vanloon [1997] O.J. No. 3209 (O.C.J. Gen. Div.), Gulf Sea Products Ltd. v. National Sea Products Ltd. [1985] P.E.I.J. No. 11 (P.E.I.S.C. App. Div.), R. v. Valois [2005] O.J. No. 1594 (Ont. S.C.J.) and McGuire v. Royal College of Dental Surgeons of Ontario (1991), 77 D.L.R. 4<sup>th</sup> 732 (Ont. Div. Ct.).

Mr. Kinahan noted specific inconsistencies between the evidence given by ML and that of Constable Singh and the Crown Prosecutor. He submitted that ML's descriptions of the Courthouse and how ML arrived just outside the courtroom and later left the Court facility were totally incorrect and that error was acknowledged by the prosecution.

Likewise, Mr. Kinahan asserted that the location of the alleged conversation between ML and Constable Zarrello as taking place outside the courtroom in the hallway of the Mall was also incorrect. He pointed out that the evidence of the Crown Prosecutor was that the courtroom was separated from the hallway of the Mall and one could not see the courtrooms from the hallway. These inconsistencies were so substantial, Mr. Kinahan submitted, that they cast serious doubt upon the credibility of the evidence of ML.

Mr. Kinahan argued that the Hearing Officer inappropriately attributed these inconsistencies to the fact that ML was not certain of his recollection of the facilities as he had only attended the Courthouse that one time. Such explanation in the Reasons indicated a misapprehension of the evidence and confirmed that the Hearing Officer was inappropriately speculating and relying upon the uncorroborated evidence of ML which was demonstrably incorrect.

Mr. Kinahan submitted that there were further discrepancies in the evidence between ML, Constable Singh and the Crown Prosecutor, as to the timing of certain telephone calls placed by Constable Singh to ML at his home. Mr. Kinahan argued that ML's evidence was that he had arrived at the Court at approximately 9:10 a.m. at which time he introduced himself to the Appellant. There was a brief conversation between the two of them during which ML says he got the impression from Constable Zarello's comments and actions that he, ML, did not have to stay at the Court.

ML testified that he left after a few minutes and arrived home at approximately 9:45 a.m. He received a telephone call about one hour later at approximately 11:00 a.m. from another officer during which there was a discussion about the Court proceeding. ML confirmed to this officer that he had already been at Court that morning and had been released and had come home and would prefer not to come back. He also stated that there was a second call from the officer in which it was again discussed about ML's attendance at Court that morning and whether he was willing to come back to Court.

This evidence conflicted with Constable Singh's statement that he placed a telephone call to ML shortly after 9:10 a.m. that morning to find out why this witness was not present. After that telephone discussion with ML, Constable Singh stated that he advised the Crown Prosecutor, who appeared upset by this information. Constable Singh decided to place a second call to ML to confirm the information. He stated

that this second call occurred within a few minutes after his discussion with the Crown Prosecutor.

Mr. Kinahan submitted that this evidence of Constable Singh was corroborated by the transcript of events in the Courtroom and the evidence of the Crown Prosecutor. Further, Constable Singh testified that he made notes of the events that occurred that morning shortly thereafter and Mr. Kinahan submitted that those notes were made contemporaneously, were not challenged and ought to have been given credence by the Hearing Officer.

Mr. Kinahan asserted that when the uncorroborated evidence of ML is weighed against the evidence of Constable Singh and the Crown Prosecutor, both of whom were called as witnesses for the prosecution, the inconsistencies are so contradictory that it cast substantial doubt upon the reliability and credibility of ML's evidence.

It was Mr. Kinahan's submission that instead of conducting a proper analysis of the evidence of Constable Singh and the Crown Prosecutor and importantly, the transcripts of the Court proceedings that morning and the notes of Constable Singh, the Hearing Officer simply attempted to establish a reason for the difference by indicating that Constable Singh's recollection of events and his notes were not credible or reliable even though that evidence was not challenged.

Mr. Kinahan also submitted that the allegation in the charge was not correct (i.e. that as a result of the actions of the Appellant, the witness ML was not available). That witness testified that he discussed with Constable Singh the possibility of coming back to Court to give evidence and expressed a willingness to do so if he had been requested. Further, Counsel asserted that it was not the actions of Constable Zarello that caused the witness not to be available but rather, the actions of Constable Singh who testified that he believed that ML had done his duty and advised ML that he did not have to return to Court.

Mr. Kinahan submitted that there was no evidence given during the course of the disciplinary hearing that identified the Appellant as the officer with whom the witness ML interacted on June 30, 2004. He argued that this was an essential component of the case and was never proven. At no time during the proceedings did anyone seek to identify the Appellant as the officer with whom ML interacted at Court nor did the Appellant make any admission on this point.

Counsel submitted that where credibility is a central issue in a proceeding, it is not enough to make findings of credibility without setting out the evidence upon which such findings are based. Further, it is incumbent upon the trier of fact to state the reasons why certain evidence is believed or disbelieved. In this case, it was not enough for the Hearing Officer to have indicated that he simply disbelieved Constable Singh and attempt to rationalize that opinion by coming to speculative conclusions. That is particularly the case where such evidence was corroborated by the unchallenged evidence of the Crown Prosecutor and the transcripts of the Court proceedings.

On the above noted points Mr. Kinahan drew our attention to Re Pitts and the Director of Family Benefits Branch of the Ministry of Community and Social Services (1985), 51 O.R. (2d) 302 (Ont. Div. Ct.), Bluenose Fisheries Ltd. v. Tabusintac Fish Market Ltd. [1987] N.B.J. No.11 (N.B.C.A.), R. v. M. (Y.) (2004), 71 O.R. (3d) 288 (Ont. C.A.), R. v. Tottenham Transport Ltd. (2005), 76 O.R. (3d) 116 (Ont. Ct. Jus.), R. v. Kendall [ 2005] O.J. No. 2457 (Ont. C.A.) and R. v. H.S.B. [2007] B.C.J. No. 579 (B.C.C.A.).

In reviewing the summary of the Hearing Officer, Mr. Kinahan again pointed out that the description given by ML of the Court facilities was not remotely correct yet the Hearing Officer appeared to make a finding that his description was correct. Further the evidence suggested that there was no actual conversation between ML and the Appellant that day but rather only body gestures by the

Appellant that gave ML the impression that he could leave without suffering any peril. This contradicted ML's initial indication that he did ask the Appellant whether he had to be there that day and the Appellant responding "not really".

It was Mr. Kinahan's position that the Hearing Officer's Reasons appear to indicate some uncertainty in the evidence of the times that Constable Singh telephoned the witness, ML, and therefore, it was possible that the times given by that officer were correct yet the Hearing Officer found the evidence of the officer on this point not credible. This constituted a misapprehension of evidence.

Further, by indicating in his Reasons that he would have expected someone, whether the Appellant, Constable Singh or another person would have testified that these conversations did not take place, the Hearing Officer inappropriately applied a reverse onus upon the Appellant to disprove that the attendance of Constable Zarello at ML's residence and such conversations corroborated the Appellant's actions at Court.

When taking all of the evidence into consideration, Mr. Kinahan submitted that there was no clear and cogent evidence to find Constable Zarello committed any of the allegations set out in the charge. Furthermore, there were so many inconsistencies and contradictions in the evidence given that the Appellant ought to have been given the benefit of the doubt.

For these reasons, Mr. Kinahan argued that the appeal ought to be allowed and the conviction set aside.

In the alternative, Mr. Kinahan submitted that the penalty was excessive and ought to be reduced to a suspension of 10 hours without pay.

**Respondent's Position:**

On behalf of the Respondent, Ms. Joseph made the following

submissions regarding the Hearing Officer's decision:

1. The finding of misconduct was reasonable based on the evidentiary foundation outlined in the decision;
2. The factual findings were based on findings of credibility which are within the domain of the Hearing Officer;
3. The reasons were sufficient;
4. The required standard has not been met to warrant the Commission interfering with the Hearing Officer's findings and decision;
5. The penalty imposed was reasonable; and
6. The decision should be confirmed and the appeal dismissed.

Ms. Joseph submitted that the standard of review is one of reasonableness simpliciter. Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Ont. Div. Ct.) She asserted that the decision was reasonable because the Hearing Officer properly considered and weighed all of the relevant evidence in making his findings, particularly in regard to credibility.

Ms. Joseph argued that the role of the Commission in reviewing the findings of a Hearing Officer is one of determining "whether the Hearing Officer's assessment of credibility and the application of the standard of proof was unreasonable in the sense of not being supported by any reasons that can bear a somewhat probing examination." Dr. Q. v. College of Physicians and Surgeons of British Columbia (2003), 223 D.L.R. (4<sup>th</sup>) 599 (S.C.C.), Toronto (City) Police Service v. Blowes-Aybar (supra), Armstrong v. Peel (Regional Municipality) Police Services [2003] O.J. No. 3437 (Ont. Div. Ct.) and Bates and Durham Regional Police Service (July 8, 2003, O.C.C.P.S.)

Ms. Joseph submitted that the Commission has confirmed on a number of occasions that findings of credibility are within the domain of the Hearing Officer who is in the best position to assess the credibility of witnesses and to weigh their evidence. The Commission has expressed the principle that its role is not to second-guess the decision of the Hearing Officer. Only where it is clear that there is no evidentiary foundation for the findings or there can be no other determination than the conclusions of the Hearing Officer as to credibility of witnesses cannot reasonably be accepted or where the Commission believes that there has been a manifest error will the Commission intervene.

Counsel submitted that the principle of deference is inherent in the standard of reasonableness and the Commission ought not to retry the case based upon a review of the transcripts by re-evaluating the evidence and applying its own reasoning. Toronto (City) Police Service v. Blowes-Aybar (supra), Law Society of New Brunswick v. Ryan (2003), 223 D.L.R. (4<sup>th</sup>) 57 (S.C.C.) and Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.)

Ms. Joseph reviewed the evidence submitted before the Hearing Officer. The uncontraverted evidence indicated that ML attended at Court on June 30, 2004 as a witness in a careless driving prosecution, that he met with the Appellant outside Courtroom T-2 and that it was ML's impression from the Appellant's words and actions that he did not really have to stay as a witness. The uncontroverted evidence also indicated that ML left the building and returned home. Subsequently he received two telephone calls from the Court. As a result of those discussions, ML did not return to Court. Later on the same day, the Appellant attended at ML's residence and a discussion took place regarding the events that had occurred at the Court.

Ms. Joseph submitted that the Hearing Officer considered, analyzed and addressed the inconsistencies in the evidence in an appropriate manner. He turned his mind to the issue of

the credibility of ML and found the evidence clear and compelling. He concluded that any inconsistency in ML's evidence regarding the description of the Court facility did not affect his credibility as he had only been there once and that was on the morning of June 30, 2004.

The Hearing Officer also considered the evidence of Constable Singh and clearly expressed reservations about the accuracy of that evidence particularly regarding the timing of the telephone calls to ML.

Ms. Joseph asserted that identification of the Appellant was not at issue at the disciplinary hearing. She submitted that the Hearing Officer did not reverse the burden of proof regarding the attendance of the Appellant at ML's residence. He was simply weighing that evidence in forming his conclusions and findings.

Finally, Ms. Joseph argued that the notice of appeal did not raise any issue with the penalty imposed. She submitted that the penalty was reasonable and consistent with those provided in other similar cases. The Hearing officer had clearly reviewed in a fair and balanced approach all of the appropriate sentencing factors that have been well established by the Commission.

Accordingly, Ms. Joseph submitted that the appeal should be dismissed.

**Decision:**

The Commission's role in considering an appeal from a decision of an adjudicator in a disciplinary hearing has been well settled. As stated in Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.) at page 1058:

Our role or function in such matters is not to second guess the decision of the adjudicator. In certain limited cases, it would be open for us to reach a different conclusion from the trier of fact.

However, that must be based on the strongest ground. In other words, there can be no other determination than the conclusions of the adjudicator, as to credibility of witnesses, cannot be reasonably accepted.

The question then to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

That test was also referred to in Wilson and Ontario Provincial Police (November 20, 2006, O.C.C.P.S.) at page 7:

This can be a difficult test for the Appellant to meet. The words "void of evidentiary foundation" clearly contemplate that Appellate interference with the evidentiary findings will be exercised sparingly. Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.)

Commission appeals are on the record. Not only do we hear from counsel for the appellant and respondent, we have the opportunity to review all of the evidence submitted, including transcripts of sworn testimony, physical evidence such as photographs, audiotapes and police documentation. **However, we do not have the benefit of seeing and hearing the witnesses.** (emphasis added)

The Commission must also keep in mind the comments of the Divisional Court in Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 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. (2d) 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.

The Commission has also previously expressed its role to be one of review to determine whether a Hearing Officer's decision was reasonable or whether a manifest error was committed requiring the Commission to intervene and vary the decision. In applying the standard of reasonableness, the reasons given by the Hearing Officer must support the decision and be read as a whole. Toronto (City) Police Service v. Blowes-Aybar (supra), Ontario Provincial Police v. Favretto (2004), 72 O.R. (3d) 681 (Ont. C.A.) and Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758 (Ont. Div. Ct.)

The Commission has held that criminal law standards should not apply when reviewing the decision of a Hearing Officer as disciplinary proceedings are administrative proceedings involving issues between an employer and employee. Toronto (City) Police Service v. Kelly (supra), Gottschalk and Toronto Police Service (January 29, 2003, O.C.C.P.S.), Carson and Pembroke Police Service (March 9, 2006, O.C.C.P.S.), Burnham v. Metro-Toronto Chief of Police [1987] 2 S.C.R. 572 (S.C.C.) and Godfrey v. Ontario Police Commission (1991), 5 O.R. (3d) 163 (Div. Ct.)

How do these principles apply to this appeal?

Under section 2(1)(c)(i) of the Code, an officer commits neglect of duty if he or she "without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force".

The Act sets out the duties of a police officer. Section 42(1)(e) states that they include "laying charges and participating in prosecutions". The issue before the Hearing Officer was whether Constable Zarello committed misconduct on June 30, 2004 by neglecting his duty to participate in the prosecution of the charge of careless

driving he had laid against one DB by failing to insure that the witness ML remained at Court to testify.

The Appellant's position is that based upon the evidence presented by the prosecution, the essential criteria of the charge of misconduct, being neglect of duty, is not made out. That evidence consisted of the uncorroborated testimony of ML, a witness subpoenaed to appear in a HTA case, whose evidence was clearly wrong in relation to his description of the layout of the Court facilities at Tannery Mall and was directly contradicted by the testimony of two other witnesses, the Crown Prosecutor and the court officer, Constable Singh both of whom were called by the prosecution.

Also contradicted by those two witnesses were the times of certain telephone calls. The Appellant submitted that both the Crown Prosecutor and Constable Singh's evidence is corroborated by the Court transcripts of that day and the notes of the court officer. The Appellant's position is that ML was not a credible witness specifically concerning the evidence of the interaction between ML and the Appellant.

The Appellant also asserted that the Hearing Officer improperly rejected or disregarded the evidence of these two witnesses when assessing the inconsistencies and credibility of all witnesses. By doing so, the Appellant submitted that the Hearing Officer misapprehended the evidence and did not apply the proper test or any test in addressing the issue of credibility. The Appellant asserted that the reasons given do not adequately set out why certain evidence was rejected or disregarded and the evidence of ML was accepted.

With regard to the issue of ML's description of the Court facilities raised by the Appellant, the Hearing Officer clearly acknowledged that there were some discrepancies between the actual physical layout and ML's recollection but the Hearing Officer went on to express uncertainty as to the degree of error as no visual reference was presented to him. He stated at page 3 of his Decision on Conviction:

Notwithstanding the fact that [ML's] recollection of the layout was apparently not in accord with [the Crown Prosecutor's] description, I believe it is important to note that [ML], it seems, did not arrive at the facility with any knowledge of the layout, and according to his testimony, he has not been back to the facility since that one day in June 2004.

In his testimony, ML stated as follows:

I'll be honest. I can't remember the layout of the building that well, so I don't remember if I turned a corner, if I went around a corner and then was gone and then down a hall. I can't remember how I got to the courtroom exactly.

One might quite easily expect that a casual observer and one-time visitor such as [ML] would not lock the floor plan into his memory with laser-like clarity.

Further at page 6 of the Decision, the Hearing Officer stated:

A fair amount of time was spent examining [ML] relative to the layout of the Tannery Mall court facility. His recall of the layout seemed to contradict evidence by others who were more familiar with the facility.

I am being asked to consider this in determining whether [ML] was a credible witness. I have given due consideration to the conflicting testimony relating to the physical layout of the facility and I do not find it particularly troubling. [ML] appears to have been in this facility only once – on the date in question. He had not been there before, as indicated by his need to follow signage to the right

location, and he had not been there since, by his own evidence. Based solely upon his apparently erroneous testimony about the physical layout of the facility, I do not have issues with his credibility.

In our opinion, the Hearing Officer appropriately reviewed the evidence presented to him on the issue of the contradictory testimony concerning the descriptions of the layout of the Court facilities. He found that the discrepancy did not adversely affect the credibility of ML. Based upon the reasons cited, in our opinion, the decision adequately sets out the analysis and conclusions reached.

The Appellant also noted the contradictory evidence concerning the timing of certain telephone calls made by Constable Singh to ML after ML had left the Court and returned home.

The Hearing Officer reviewed in detail the sequence of events that had occurred on June 30, 2004 and particularly the evidence of ML, the Crown Prosecutor, and Constable Singh as to the timing of such events. There were substantial inconsistencies between the evidence of ML and that of Constable Singh particularly regarding the time of telephone calls.

It is clear from the Decision of the Hearing Officer that he found the testimony of Constable Singh troubling. The timing of the second telephone call as alleged by Constable Singh did not accord with the time as stated by the Crown Prosecutor and also as disclosed in the Court transcript. A further concern expressed by the Hearing Officer was the statement given by Constable Singh that he did not have a substantial conversation with Constable Zarello regarding the missing witness.

At page 7 of the Decision the Hearing Officer stated:

Presuming that Constable Singh had in fact had

such a conversation with [ML], and recognizing that [the Crown Prosecutor] was rather agitated when Constable Singh reported that [ML] had been there and had been excused, I find it absolutely beyond comprehension that Constable Singh wouldn't have had a very significant conversation with Constable Zarello, bearing in mind the consequences of what had apparently transpired. Nonetheless, Constable Singh asks me to believe that he did not discuss this with Constable Zarello to any notable degree whatsoever...

Human nature being what it is, and considering the facts that were known to Constable Singh, including [the Crown Prosecutor's] agitation, I simply do not believe that Constable Singh would not have had a serious, detailed and frank discussion with Constable Zarello relative to exactly what did or did not happen that morning between him and [ML].

The Hearing Officer considered further evidence given by Constable Singh and found the latter's answers to the question about the telephone calls occurring when ML said he was at the Court to be problematic. The Hearing Officer stated at page 8 of his reasons:

Once again, that answer is not, in and of itself, particularly troubling. When taken within the context of several other points in Constable Singh's testimony that I have found to be problematic, the answer is, in my opinion, oblique, at best. The question could have been answered in a very forthright and compelling fashion, yet it was not. I found Constable Singh's response to be evasive.

I am not at all satisfied that Constable Singh called [ML] at the times he indicated in his

testimony. [ML] would have no reason to insist that the calls occurred at or near 11:00 a.m., unless that was what had actually occurred. There would be no further jeopardy for [ML] if the calls had occurred earlier than 11:00 a. m.

We have reviewed the above analysis of this evidence by the Hearing Officer and, in our opinion, the Hearing Officer was entitled to come to the conclusion that the evidence of Constable Singh did not undermine the credibility of ML.

It is clear from the reasons that the Hearing Officer accepted the evidence of ML on the substantive issues before him. He expressly indicated that he found ML to present as a completely candid, forthright and compelling witness. He was unequivocal on the time of the telephone calls. The Hearing Officer also accepted the "abundance" of evidence before him "to clearly illustrate, and from which a logical inference can be drawn" that ML did attend Court that day and did have some communication with Constable Zarello there.

The Hearing Officer also found that there was uncontested evidence that Constable Zarello subsequently attended ML's residence to discuss the matter. The Hearing Officer concluded that that evidence added significant credence to ML's assertion that he had been at the courthouse that day. In his reasons, the Hearing Officer went on to state that if ML had concocted the whole tale, one of the involved parties, Constable Zarello, Constable Singh or some other person would have testified to that effect. In our view, the comments of the Hearing Officer on this point do not indicate a reversing of onus but rather a weighing of evidence in his attempt to determine the issue of attendance by ML at Court.

The Appellant takes issue with this analysis by the Hearing Officer however, we have reviewed the reasons and find that the Hearing Officer was entitled to draw the inferences that he did, based upon the testimony of the witnesses.

We agree with the Respondent that the identity of the officer was not an issue at the disciplinary hearing but also we point out that the grounds for this appeal did not raise that issue. Considering the evidence that was presented at the disciplinary hearing, the Hearing Officer was entitled to draw the inference that Constable Zarello was the officer with whom ML had an exchange.

At page 10 of the Decision, the Hearing Officer summarized his findings. We have examined the Reasons and those findings, and particularly on the critical issue of the credibility of the witnesses, and we can find no manifest error committed by the Hearing Officer.

In our view, the Hearing Officer clearly accepted and preferred the evidence of ML on all of the substantive issues. He did not reject the evidence of the Crown Prosecutor but found that her testimony did not affect the credibility of ML on those central issues which involved confirming that ML did attend the Tannery Mall Court facility as a subpoenaed witness on June 30, 2004 and did have some exchange with Constable Zarello which left the impression with ML that he could leave. There was no evidence before the Hearing Officer that Constable Zarello took any action to prevent ML from leaving.

The Hearing Officer had the benefit of observing and hearing the witnesses as they testified. In such circumstances, deference must be accorded to findings of credibility made unless there is patent error in the interpretation of and conclusions drawn from the evidence.

In our opinion, having read the Reasons as a whole, the Hearing Officer did not misapprehend or fail to consider or mistake the substance of the critical evidence. The analysis of the evidence was thorough. The logic was self evident. While the Reasons may contain wording that could be taken as ambiguous on some findings, overall, we do not find there was palpable error. The Hearing Officer clearly gave

adequate justification for the findings he made.

We find that the Reasons given by the Hearing Officer for conviction are not void of evidentiary foundation.

Notwithstanding that the grounds for appeal raise no issue with respect to penalty, we have considered the oral submissions of Counsel for the Appellant and Respondent on this appeal. The Appellant submitted that ten hours suspension would be more appropriate. The Respondent argued that the disposition of the Hearing Officer was correct.

We have also reviewed the submissions made and cases cited by both parties at the disciplinary hearing as well as the considerations on penalty expressed by the Hearing Officer. It is our opinion that the Hearing Officer reviewed and correctly applied the criteria set forth in Williams and Ontario Provincial Police (supra) and we see no reason to vary the sentence imposed.

Therefore the appeal is dismissed.

DATED AT TORONTO THIS 23<sup>rd</sup> DAY OF NOVEMBER, 2009.

Roy B. Conacher  
Member

Garth Goodhew  
Member