

ONTARIO CIVILIAN POLICE COMMISSION

REASONS FOR DECISION ON MOTION

CRYSTAL PITAWANAKWAT

Appellant

WIKWEMIKONG TRIBAL POLICE SERVICE

Respondent

Presiding Members:

Dave Edwards, Member
Tammy Landau, Member

Appearances:

Richard Guy, Counsel for the Appellant
Brian T. Daly, Counsel for the Respondent

Hearing Date: Monday, December 21, 2009

Constable Crystal Pitawanakwat has filed an appeal from a finding of discreditable conduct made by Superintendent (retired) Morris Elbers (the "Hearing Officer").

The Wikwemikong Tribal Police Service ("Police Service") has brought a motion requesting an order quashing the appeal on the basis that the Ontario Civilian Police Commission ("Commission") lacks jurisdiction to hear the appeal.

Background:

Constable Pitawanakwat was appointed a First Nations Constable on September 12, 2001, pursuant to section 54 of the Police Services Act R.S.O. 1990, c. P.15 as amended ("Act").

Pursuant to Article 6.3 of the Wikwemikong Policing Agreement, the Board of Directors of the Wikwemikong Tribal Police Service Board Corporation agreed to provide a mechanism to deal with allegations of misconduct of the First Nations Constables in its employ. On April 30, 2008 the Wikwemikong Tribal Police Service Board Corporation adopted the Act for the purposes of providing that mechanism.

In a Collective Bargaining Agreement, effective April 30, 2008, the Wikwemikong Tribal Officers Association agreed that the process described in the Act would be used to maintain order, discipline and efficiency of the employees of the Police Service. Constable Pitawanakwat is an employee of the Police Service.

A hearing was directed under that process and the Hearing Officer found Constable Pitawanakwat guilty of discreditable conduct. It is that decision from which Constable Pitawanakwat appeals.

Preliminary Matter:

The Police Service filed its Motion Record and Book of Authorities with the Commission on October 26, 2009. On December 17th, 2009, two business days prior to the hearing, there was a flurry of filings with the Commission. The Appellant filed its Factum and the Police Service filed a Factum and an amended Book of Authorities. The materials

revealed that each party had served the other with their respective documents by fax on December 16, 2009.

Rule 14.5 of the Commission's Rules of Practice ("Rules") allows the responding party under a motion to file a response "at least seven days before the Commission deals with the motion". Service may be affected various ways, but if by fax, it is deemed to be received on the day after it was sent.¹

No written request was made by counsel to waive any of the relevant time limits pursuant to Rule 3.4, or to file amended or additional documents.

During oral argument and upon questioning from the Panel, both counsel requested that we waive the time limits and grant an order allowing these documents to form part of the record.

The Rules and the time limits with respect to service serve a dual purpose. They ensure that all parties are treated fairly and have sufficient time to respond to matters raised by other parties. They also ensure that the Panel will have sufficient time to review and consider the issues raised by the parties.

The fact that both counsel agreed to waive the relevant time limit and to allow the Police Service to file additional documents, is helpful, but not determinative of the issue. Had the materials been more voluminous or the issues more complex, the Panel would have ordered the hearing adjourned as it would not have had sufficient time to review and consider them prior to the hearing.

In the circumstances and based upon the materials filed, the Panel ordered that the time limits be waived and that the

¹ Rule 12.3(c)

Police Service be permitted to file its Factum and amended Book of Authorities.

The Panel proceeded to hear oral argument on the Motion.

Police Service's Position on the Motion:

Mr. Brian T. Daly appeared for the Police Service.

He argued that the appeal commenced by Constable Pitawanakwat dated August 6, 2009 should be quashed on the ground that the Commission does not have jurisdiction to hear that appeal since Constable Pitawanakwat received her appointment as a First Nations Constable pursuant to section 54 of the Act.

He noted that the Commission derives its statutory power to hear appeals pursuant to section 87 (formerly section 70) of the Act. The two parties who have the right to appeal under that section are a police officer and a complainant. The definition of "police officer" in section 2 of the Act specifically excludes First Nations Constables. As Constable Pitawanakwat is a First Nations Constable, the Commission has no jurisdiction to hear the appeal.

He submitted that the Commission is a creature of statute and has no inherent jurisdiction. As well, there is no inferred jurisdiction created by the provision of any statute.

In addition, Mr. Daly provided the Panel with information regarding the Police Service, the Wikwemikong Policing Agreement, the Collective Bargaining Agreement, and the steps followed with respect to Constable Pitawanakwat's discipline process.

Officer's Position on the Motion:

Mr. Richard Guy represented Constable Pitawanakwat.

He agreed that Constable Pitawanakwat was a First Nations Constable appointed pursuant to section 54 of the Act. He argued that as the Commission has the jurisdiction to appoint and terminate First Nations Constables, it has the inferred power to hear appeals from disciplinary processes for such officers.

He submitted that as the Police Service and the officers had agreed under the Collective Bargaining Agreement that the disciplinary process set forth in the Act would be applicable to the First Nations Constables in the employ of the Police Service, that this Commission must hear appeals from such process.

He was unable to direct the Panel to any statutory or judicial authority supporting this position.

Decision:

Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.²

Therefore, this Commission is a creature of statute and has no inherent jurisdiction. Its authority must be found in applicable statutes.

² Dunsmuir v. New Brunswick [2008] S.C.J. No. 9 at para. 29 (S.C.C.)

The Commission derives its authority to hear discipline appeals from section 87 of the Act. It reads:

87(1) A police officer or complainant, if any, may, within 30 days of receiving notice of the decision made after a hearing held under subsection 66(3), 68(5) or 76(9) by the chief of police ... appeal the decision to the Commission ...

Section 2 of the Act states that “‘police officer’ means a chief of police or any other police officer, but does not include...a First Nations Constable ...”

There is no dispute that Constable Pitawanakwat is a First Nations Constable, appointed under section 54 of the Act.

Under section 87 (1) of the Act the Commission only has the authority to hear appeals commenced by a police officer or a complainant. As Constable Pitawanakwat is neither, this Commission does not have jurisdiction to hear the appeal.

Further, the right to appeal is conditional upon the receipt of notice of a decision made by the chief of police following a hearing held under subsection 66(3), 68(5) or 76(9) of the Act. The Act provides that it is only a “police officer” who may be subject to a hearing under those sections. As Constable Pitawanakwat is, by definition, not a police officer, these sections are not applicable to her. She, could not therefore, receive a notice of decision under any of these sections of the Act. For this additional reason, Constable Pitawanakwat cannot rely upon section 87(1) as the authority under which the Commission must hear the appeal.

It was argued that the adoption by the Police Service and its employees of the disciplinary process set forth in the Act confers the authority and perhaps the obligation upon the Commission to hear the appeal.

Many bodies have disciplinary codes and processes. Such parties may develop their own process or adopt another entity's process. The disciplinary process, however, remains the process of those parties. Their agreement cannot impose the authority or the obligation upon a third party, such as the Commission, to be involved in their disciplinary process. The Commission remains a statutory body and has only those powers granted to it by statute.

For the above reasons the Motion is granted and the appeal is quashed.

DATED AT TORONTO THIS 6th DAY OF JANUARY, 2010.

Dave Edwards
Member, OCPC

Tammy Landau
Member, OCPC