

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE WILLIAM YAKIMISHYN

Appellant

PEEL REGIONAL POLICE SERVICE

Respondent

Presiding Members:

Roy B. Conacher, Member
Hyacinthe Miller, Member

Appearances:

Joanne Mulcahy, Counsel for the Appellant
Lynda A. Bordeleau, Counsel for the Respondent

Hearing Date: June 4, 2008

This is an appeal from a penalty of five days (40 hours) to be served (worked) at the discretion of the Commander of Staff Operations which was imposed on Constable William Yakimishyn by Acting Superintendent Steve Wollaston (the "Hearing Officer") on September 12, 2007.

The penalty in question followed a plea of guilt on May 9, 2007 and a finding of guilty on the same date on one count of discreditable conduct contrary to section 2(1)(a)(ix) of the Code of Conduct found at Regulation 123, R.R.O. 1998 (the "Code").

Background:

At the time of the events giving rise to this appeal, William Yakimishyn was 54 years old. He started his career as a fourth-class constable with Peel Regional Police Service (the "Service") on October 20, 1975. In his more than three decades of employment, he has received exemplary service medals for twenty, twenty-five and thirty years of service.

In addition to general policing duties, Constable Yakimishyn has worked in Traffic Services, the Fraud Bureau, Records, Emergency Response Unit and Criminal Investigations Branch. He has functioned as an acting sergeant, has lectured on

fraud and was seconded to the Homicide Bureau twice. His evaluation reports described him as a good officer.

Constable Yakimishyn's employment and driving record were unblemished until an off-duty incident on June 8, 2006, which is described in detail below.

The Hearing:

A copy of a Notice of Hearing was served on Constable Yakimishyn on December 8, 2006.

Constable Yakimishyn's disciplinary hearing commenced on February 1, 2007. It was adjourned to May 9, 2007, when Constable Yakimishyn pled guilty to one charge of discreditable conduct.

On May 9, 2007 the parties' Agreed Statement of Facts was read into the record:

1. On Thursday, June 8th, 2006, while off duty, Constable William Yakimishyn was operating his personal vehicle, a white Buick. He drove his vehicle into the parking lot of the East Side Mario's restaurant located at 11 Ray Lawson Boulevard in Brampton.
2. At approximately 10:15 p.m., Constable Yakimishyn turned north into a parking space beside silver Acura, owned by the complainant RU¹. In doing so, Constable Yakimishyn's front passenger side bumper made contact with the driver's side of the complainant's vehicle. This caused an eight foot scratch to the complainant's vehicle. However, due to the silver colour of the vehicle, the damage was very difficult to see. There was no visible damage to the vehicle driven by Constable Yakimishyn.
3. The complainant was advised of the damage by witnesses seated outside on the patio of East Side Mario's. The witnesses identified a white Buick as the vehicle that had hit the complainant's Acura.
4. The complainant and a friend confronted Constable Yakimishyn in the restaurant. During the conversation, Constable Yakimishyn denied causing damage to the vehicle. Three witnesses confirmed that Constable Yakimishyn was the driver of the Buick. Constable Yakimishyn continued to deny causing the damage.
5. The complainant advised Constable Yakimishyn that she would be reporting the damage to the police. At this time, Constable Yakimishyn left the scene and while not requested, he did not volunteer to give his name or provide the vehicle's ownership and insurance documents to the complainant.

¹ Name modified.

6. Constable Yakimishyn did not wait at the scene for the police to arrive, nor did he make any other attempts to contact the police.
7. Later that night, Constable Yakimishyn was charged with failing to remain at an accident and plead (sic) to a charge of Fail to Report under the Highway Traffic Act on January 11, 2007 and paid \$200 in restitution to the complainant for the damage caused.
8. The actions of Constable Yakimishyn in failing to report the accident and the manner in which he dealt with the incident were discreditable in nature and likely to bring discredit to the reputation of the Peel Regional Police.

A total of twenty-six exhibits were filed in the course of the hearing. No oral evidence was presented.

Submitted as exhibits were the Appellant's driver record report and a certificate from the Ministry of Transportation with respect to the Highway Traffic Act R.S.O. 1990, c. H.8 as amended (the "HTA") conviction.

Initially, Constable Yakimishyn had been charged under section 252 of the Criminal Code of Canada with failing to remain at the scene of an accident. However, this charge was subsequently "abandoned" (sic) and replaced with the charge under the HTA of fail to report.

The parties presented the Hearing Officer with a Joint Penalty Submission (the "Submission"). It reads as follows:

1. Constable Yakimishyn #558 appears before this Tribunal with 31 ½ years service commencing his employment on October 20, 1975. Constable Yakimishyn is entering a plea of guilty at the first available opportunity, and that is being taken into consideration with this sentencing recommendation. Other factors are also being considered in making this submission on sentence.

2. **Public Interest**

The public has an expectation that the police can be trusted to follow the rules, policies, procedures and laws that are in place to safeguard the integrity of court proceedings and other public processes. In this case, the public's expectations were not met and the penalty should reflect this.

3. **Seriousness of Misconduct**

This particular matter is being considered as serious in nature. Constable Yakimishyn's conduct in this matter fell short of the expectations of a

member of the Peel Regional Police and that is a contributing factor when making the sentencing recommendation.

4. Recognition of the Seriousness of Misconduct

I consider Constable Yakimishyn's plea of guilty at this Tribunal and in the Highway Traffic Act matter as his recognition of the seriousness of this misconduct, and this is taken into account when recommending the penalty.

5. Employment History

Constable Yakimishyn has been a member of this service for 31 ½ years, commencing his employment on October 20, 1975. There are no documented disciplinary issues in his employment history. He has received three letters of appreciation, three attendance awards, and his 20 and 25 years service awards. Prior to this incident Constable Yakimishyn had a positive employment history and this has been taken into consideration in the sentencing submission.

6. General Deterrence

There is a need to deter other officers from similar behaviour in the future. Officers need to be aware that, adherence to rules, procedures, and the laws is an essential job function. Any deviation from this practice has significant consequences and will be treated as a serious matter. This fact is taken into account with the penalty recommendation.

7. Specific Deterrence

Constable Yakimishyn is an officer who has had a long distinguished career. The penalty should be significant enough that if in the future he finds himself in any similar situation, he is deterred from responding in the same manner. This sentencing recommendation takes that fact into account.

8. Ability to Reform or Rehabilitate

Constable Yakimishyn is an experienced officer who was well along in his career. He has significant investigative experience as well as a positive employment history. These factors point to the fact that Constable Yakimishyn has made a positive contribution and can continue to have a productive career. This has been taken into consideration in making the sentencing recommendation.

9. Damage to the reputation of the Police Service

While this Police Act hearing has received no attention outside of this service, there was a Highway Traffic Act conviction that Constable Yakimishyn has dealt with by paying \$200 restitution to the complainant. This factor is taken into account with the sentencing recommendation.

10. Handicap or other Relevant Circumstances

Not a factor being considered.

11. Effect to the Officer and His Family

Not a factor being considered.

12. Management Approach to Misconduct

The Peel Regional Police have a clear expectation on performance in general and specifically in relation to adherence to rules, regulations, and the law. Constable Yakimishyn clearly did not meet the expectations of the service with his conduct in this matter. While Constable Yakimishyn has no previous incidents of misconduct this matter is being viewed as falling short of meeting management's expectations and the sentencing recommendation reflects this.

13. Consistency of Penalty

Past sentences were reviewed, and the need to be consistent with previous decisions was taken into account in making this sentencing recommendation.

All of the above being considered, the parties agree that an appropriate disposition for the finding of **Discreditable Conduct** is a forfeiture of 20 hours to be served (worked) at the discretion of the Commander of Staff Operations.

Following the filing of the Statement and the Submission the Hearing Officer adjourned the proceeding to May 22, 2007. When the hearing reconvened the Hearing Officer advised the Prosecution and the Defence that he was not prepared to accept the proposed penalty of 20 hours.

The Hearing Officer indicated he was not satisfied that the penalty adequately reflected a number of aggravating factors, namely, the seriousness of the misconduct, the need for general deterrence, public interest and consistency of penalty. He noted that a number of cases, including Allen and Hamilton-

Wentworth Regional Police Service (1995), 2 O.P.R. 1001 (O.C.C.P.S), state that a hearing officer is not bound by a joint submission on sentence.

He indicated that if a hearing officer chooses to depart from what is proposed, it is essential that he or she provide clear and cogent reasons. He stated that he was considering a penalty in the range of five days or 40 hours as more appropriate. Relying upon the case of College of Physicians and Surgeons (Ontario) v. Petrie (1989), 68 O.R. (2d) 100 (Ont. Div. Ct.) he offered both the Prosecution and Defence the opportunity to present further submissions on the propriety of a more serious penalty and adjourned the hearing.

The penalty hearing continued on July 12, 2007, at which time nineteen further exhibits were submitted in support of the Submission. These included, inter alia, a summary of motor vehicle accidents involving officers of Service, Commission and Service disciplinary decisions and Directives, discipline reports and Constable Yakimishyn's personnel records.

On September 12, 2007, the Hearing Officer issued his Decision. He rejected the Submission and he set out his reasons for so doing. He imposed a penalty of forfeiture of five days or 40 hours. It is that penalty that is the subject of this appeal.

Appellant's Position:

Ms. Mulcahy submitted that the Hearing Officer committed a number of significant errors in law in rejecting the Submission. Notably, he addressed purported factual matters which were not contained in the Statement, and he engaged in speculation on certain issues which resulted in a fundamental unfairness.

Counsel took the position that the Hearing Officer was bound by the facts as set out in the Statement as these were the basis for the finding of guilt, that the Submission was relied upon by the Appellant in his decision to plead guilty to the charge and his expectation of the possible penalty. She emphasized that the Submission was comprehensive and covered all of the key sentencing factors, both aggravating and mitigating, that must be considered given the circumstances of the case.

Ms. Mulcahy summarized the mitigating factors: Constable Yakimishyn's early guilty plea, his acceptance of responsibility for his conduct, his co-operation with the Service's investigation, the restitution he paid to the complainant, the fine which was levied on the HTA conviction, and his over 31 years of exemplary and unblemished employment record with the Service. She also drew our attention to the fact that it has been rare for officers who are involved in off-duty motor vehicle accidents to be the subjects of disciplinary hearings. There was evidence

before the Hearing Officer that many such cases were dealt with internally on an informal basis.

Ms. Mulcahy also submitted that the damage caused to the complainant's vehicle was so minor that it was difficult for a trained forensic identification officer under ideal conditions to see. She proffered this as an explanation but not an excuse for the Appellant's conduct. Ms. Mulcahy pointed out that Constable Yakimishyn's private auto insurance rates would increase as a result of this incident. She submitted that it was an error for the Hearing Officer to reject the minimal extent of the damage as a mitigating factor.

Appellant's counsel also argued that the comments made by the Hearing Officer during the hearing on May 22, 2007, to the effect that he was thinking about imposing a sentence of five days or 40 hours forfeiture, indicated that his mind was already made up. Ms. Mulcahy submitted that the adjournment of the sentencing hearing to July 12, 2007, was simply a pretence at fairness.

Ms. Mulcahy attacked the pervasive role of a chief of police under Part V of the Police Services Act, R.S.O. 1990, Chapter P.15 as amended (the "Act"). She submitted that the Chief's role under Part V of the Act establishes an institutional bias, particularly where the chief's designated prosecuting officer has negotiated and agreed to an Agreed Statement of Fact and a Joint Submission on Penalty.

Relying upon the principles established in Watson v. Catney (2007), 84 O.R.(3d) 374 (Ont. C.A.), she submitted that it is illogical for a chief, through his designated prosecuting officer, to support a joint submission, only to have his designated hearing officer reject it. Ms. Mulcahy argued that such a process undermines the confidence police officers have in the fairness of the disciplinary system. She submitted that a fairly negotiated joint submission on penalty, in which all relevant sentencing factors have been addressed, and where the proposed penalty is within the range of consistency with other similar cases of misconduct, should be respected.

Ms. Mulcahy conceded that a hearing officer is not bound to accept a joint submission on sentence as long as he or she provides clear and cogent reasons for departing from the penalty proposed. She submitted that, apart from the foregoing principle, the Commission has not clearly enunciated the test that is to be met before deviating from a joint submission. In addition, she invited the Commission to adopt criteria applied in criminal proceedings, to the effect that joint submissions on sentence should not be rejected unless they are unreasonable, contrary to the public interest, or would bring the administration of justice into disrepute. R. v. Druken (2006), 215 C.C.C. (3d) 394 (Nfld. C.A.)

Ms. Mulcahy drew our attention to a quote from Finlayson, J.A., in R. v. Cerasualo (2001), 151 C.C.C. (3d) 445 (Ont. C.A.), set out in R. v. Druken, supra, at paragraph 14:

This Court has repeatedly held that trial judges should not reject joint submissions unless the joint submission is contrary to the public interest and the sentence would bring the administration of justice into disrepute ... This is a high threshold and is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge.

This includes bringing issues to a final resolution through plea bargaining. This laudable initiative cannot succeed unless the accused has some assurance that the trial judge will in most instances honour agreements entered into by the Crown. While we cannot overemphasize these agreements are not to fetter the independent evaluation of sentences proposed, there is no interference with the judicial independence of the sentencing judge in requiring him or her to explain in which way a particular joint submission is contrary to the public interest and would bring the administration of justice into disrepute. (Emphasis added)

Ms. Mulcahy also quoted the statement of Rowe, J.A., in R. v. Druken, supra, set out at paragraph 18:

In making this determination, the question of whether the sentence is unreasonable must be considered ... Counsel must provide sufficient facts to permit the sentencing judge to determine whether the sentence is reasonable in the circumstances. The court is bound by the agreed statement of facts; the sentencing judge cannot “find” additional facts. As well, any inferences the judge may draw must follow clearly from what is set out in the agreed statement.

And, further, at paragraph 19:

The acceptable range of sentence must be such that the accused has an incentive to plead guilty, i.e., a *quid pro quo*. That requires an adjustment down from the normal range of sentence to take account of the accused's agreement to forego his right to a trial. Of course, there must be some minimum, having regard to the facts of each case, below which a proposed sentence cannot be accepted.

Ms. Mulcahy submitted that the Hearing Officer erred in taking into account information that was not included in the Statement or otherwise properly introduced into evidence before him.

At pages 7 and 8 of the Decision, the Hearing Officer wrote:

Since 2004, a total of seven (7) Peel Regional Police officers have been the subject of Fail to Remain accident investigations. This has become an important issue for the Peel Regional Police, and it is imperative that officers of this service are made aware that this organization considers this misconduct to be serious in nature and will not be tolerated. The penalty in this case must reflect the need to send this message.

Ms. Mulcahy argued that the information referred to by the Hearing Officer in this quote is not contained in the Statement or in any of the evidence in the record before him. Nor was it information falling into the category of "common knowledge" of which judicial notice may properly be taken. As a consequence, Constable Yakimishyn did not have an opportunity to test the accuracy of this information, or to present responding evidence. Ms. Mulcahy submitted that the Hearing Officer's consideration of this information was inherently unfair and an error in law.

In terms of the concerns expressed by the Hearing Officer that the proposed penalty did not adequately reflect the seriousness of the misconduct, the need for general deterrence, the public interest and the consistency of penalty, Ms. Mulcahy asserted that the Submission addressed each of these issues and applied the proper weight to each in recommending the proposed penalty.

Ms. Mulcahy further submitted that the Hearing Officer failed to take into account the financial impact on Constable Yakimishyn of the increased penalty, namely, a further \$760.00 loss of pay in addition to the agreed upon loss of \$760.00, restitution of \$200.00, the HTA fine of \$500.00 and increased insurance costs.

Appellant's counsel also argued that the failure of the Hearing Officer to give any weight to the very minor damage to the complainant's vehicle was an error in law. This was a mitigating factor to be considered when assessing the seriousness of the conduct of the officer.

Ms. Mulcahy submitted that the failure to give any weight to the abandonment of the Criminal Code charge of Leaving the Scene and the substitution of a HTA charge of Fail to Report was also a substantial error.

In particular, she noted that at page 7 of the Decision, the Hearing Officer wrote:

Constable Yakimishyn had every opportunity to take responsibility for his actions at the scene of this collision but made a conscious decision to leave without supplying his name and address, the minimum required by the Criminal Code of Canada. I do not agree with Mr. Baltin's submission that in the *"realm of the seriousness of misconduct charges this matter should be considered at the low end of the scale"*.

Ms. Mulcahy asserted that the Hearing Officer erred in relying upon the standards of the Criminal Code in assessing the seriousness of the Appellant's misconduct when the initial Criminal Code charge was replaced with a less serious HTA one.

Ms. Mulcahy then asked us to consider that the Hearing Officer erred in his approach to the issue of the seriousness of the misconduct. The incident took place while the Constable was off-duty, there was no violence, no alcohol and only minor damage. There was no evidence that Constable Yakimishyn had identified himself as a police officer or used his position for his own benefit to escape responsibility.

Ms. Mulcahy objected to the Hearing Officer dismissing the Service's failure to provide performance evaluations for the Appellant for the four years prior to the hearing. At page 6 of the Decision, he wrote:

I have previously stated that I give considerable mitigating weight to the officer's unblemished employment record. Four additional performance reviews would not change this assessment.

Ms. Mulcahy submitted that the Hearing Officer was speculating or drawing inferences which were not supported on the evidence before him. She contended that Constable Yakimishyn's performance evaluations do have a bearing on management's approach to discipline and the Hearing Officer was wrong to discount this as a mitigating factor. Dinsdale and. Ontario Provincial Police (30 December, 2004, O.C.C.P.S.)

Appellant's counsel also submitted that the Hearing Officer erred when he over-emphasized the factors of general deterrence, the public interest, and possible damage to the reputation of the Service. She again referenced the Hearing Officer's comments relating to the other 7 Service officers, and that a proper penalty must make it clear to the Service that such misconduct would not be tolerated. Ms. Mulcahy argued that these comments were based upon facts which were not part of the record. Further, she submitted, there was no evidence that the reputation of the Service was damaged. She asserted that Constable Yakimishyn simply made an error in judgment when he left the accident scene.

Ms. Mulcahy submitted that the Hearing Officer committed a manifest error when he rejected the parties' recommended penalty. She asserted that the proposed penalty was well within the range of penalties imposed for serious misconduct. She referred us to Exhibit 7 which listed penalties for other Service misconduct charges. Ms. Mulcahy submitted that the penalty imposed by the Hearing Officer was harsh and excessive and not consistent with the disposition of the charges listed in the Exhibit.

Ms. Mulcahy took issue with the Hearing Officer's reliance on the case of Guse and Peel Regional Police Service (October 18, 2006, Hearing Officer Patton). In that case, an off-duty officer, after consuming alcohol, was involved in a single vehicle collision resulting in damage to a traffic signal standard and to his vehicle, and left the scene without reporting the accident. Ms. Mulcahy submitted that the misconduct in this case was much more serious than Constable Yakimishyn's with the result that the two are clearly distinguishable.

Finally, Ms. Mulcahy submitted that the Hearing Officer erred when he failed to consider the principle of progressive discipline. Constable Yahimishyn has a long and exemplary service record with no prior disciplinary matters. For this first instance of misconduct the Hearing Officer imposed a penalty at the high end of the available range.

Ms. Mulcahy requested that we set aside the Hearing Officer's penalty and vary it to a forfeiture of 20 hours as recommended in the Submission.

Respondent's Position:

Ms. Bordeleau for the Respondent opposed this appeal and submitted that it be dismissed on the following grounds:

1. Police officers are held to a higher standard of conduct because of their statutory office and Constable Yakimishyn was found to have fallen short of this standard.
2. The Hearing Officer fairly assessed the gravamen of the misconduct being Constable Yakimishyn's denial of the accident and his involvement despite confirmation by witnesses at the restaurant, his leaving the scene even though the complainant told him she was calling the police and his failure to take any steps to report the occurrence.
3. The Hearing Officer quite properly determined that the accident and the extent of damage caused were not relevant to the issue of the misconduct that followed.
4. Part V of the Act sets out the statutory responsibilities of the chief of police and the powers to appoint a prosecuting officer and a hearing officer. The submission by the Appellant that the provisions of Part V create a potential systemic conflict suggesting that, in order to avoid such conflict the hearing officer ought to be bound by the joint submission on penalty, misconstrues the statutory functions of the chief, prosecuting officer and hearing officer. This issue was not raised at the hearing nor as a ground of appeal. The Appellant's suggestion that the rejection of the joint penalty submission will undermine the faith of officers in the disciplinary process or will increase costs has no evidentiary basis. Part V of the Act requires a

hearing officer to perform certain functions and not simply act as rubber stamp.

5. The role of the Commission on this appeal is to review the decision of the Hearing Officer and to determine whether that decision was reasonable or whether errors were committed by the Hearing Officer entitling the Commission to vary the penalty he imposed. Applying the standard of reasonableness, the reasons given by the Hearing Officer support the decision and must be read as a whole. Ontario Provincial Police v. Favretto [2004] 191 O.A.C. 3, 72 O.R. (3d) 681 (Ont. C.A.); Toronto (City) Police Service v. Blowes-Aybar [2004] 185 O.A.C. 352 (Ont. Div. Ct.); and Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758 (Ont. Div. Ct.)
6. The Commission should not apply a criminal law standard when reviewing the Hearing Officer's rejection of the Submission. This is not a criminal law proceeding with the liberty of the individual at stake but rather a labour relations matter between an employer and employee. 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 (Ont. Div. Ct.)
7. The test to be applied when reviewing a hearing officer's departure from a joint submission on penalty has already been clearly enunciated by the Commission, being one of fairness, providing clear and cogent reasons that are based on a sound factual foundation and taking into account the relevant sentencing factors. Allen and Hamilton- Wentworth Regional Police Service (1995), 2 O.P.R.1001 (O.C.C.P.S.) and Toronto (City) Police Service v. Kelly, supra.
8. The Hearing Officer properly applied the fairness test by adjourning the hearing and providing an opportunity to the parties to address the issue of the adequacy of the proposed penalty in view of his comments regarding the issues of the seriousness of the misconduct, the need for general deterrence, the public interest and consistency of penalty. He provided clear and cogent reasons why he could not accept the joint penalty submission addressing each of the relevant sentencing factors. There was no error.
9. Reasons for decision should not be subjected to microscopic scrutiny, particularly where the hearing officer is essentially a lay person who may have special expertise in a particular area. The fact that a hearing officer may have misstated or inadvertently omitted reference to certain factors should not undermine the decision which must be reviewed in its totality. Boulis v. Canada (Minister of Manpower & Immigration) [1974] S.C.R. 875 (S.C.C.) and Woolaston v. Canada (Minister of Manpower & Immigration) [1973] S.C.R.102 (S.C.C.)

10. The Hearing Officer was entitled to draw reasonable inferences based upon the facts set out in the Statement. It was open to him to infer that Constable Yakimishyn made the conscious decision to leave the scene and, further, that the four missing performance evaluations from the Appellant's file would not likely have disclosed any additional information other than that his record was exemplary.
11. The Hearing Officer is entitled to draw upon his experience, knowledge and expertise as a senior officer in the Service. As such he was aware of certain problems with officers in that Service failing to remain at the scene of motor vehicle accidents and the requirement to uphold the standards of conduct. He was entitled to rely upon that knowledge and experience in considering the seriousness of the misconduct in this case and the need for general deterrence.
12. The Hearing Officer properly assessed the importance of the public interest in maintaining the public trust and confidence in the Service and the possible damage to the reputation of the Service. There was no error on his part in emphasizing this factor in his decision.
13. The Hearing Officer applied the appropriate principles in determining consistency of penalties. This was not an easy task as there were few cases with similar facts. He attempted to balance the factors and properly concluded that the most similar case was Guse and Peel Regional Police Service, supra.

Decision:

It is well established that the Commission's function on appeal is not to second guess a hearing officer's decision, even if we might have imposed a different disposition. Rather, our role is to assess whether or not the hearing officer fairly and impartially applied the principles of sentencing and properly considered all relevant matters. Where there is a manifest error in principle, or the proper considerations are ignored, we may vary a disposition. This is not done lightly. Quintieri and Toronto Police Service (2002), 3 O.P.R. 1509 (O.C.C.P.S.) and Allen and Hamilton-Wentworth Regional Police Service, supra

It is also well established that the matters to be taken into account when imposing penalty consist of three key factors, namely, the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police service were the officer to remain on the force. Additional factors include the employment history and experience, the officer's recognition of the seriousness of the misconduct, any handicap or other relevant personal consideration and consistency in management's approach to discipline in dealing with similar types of misconduct. Williams v. Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

Did the Hearing Officer in this case fairly and impartially apply the principles of sentencing and properly consider all relevant matters?

Having reviewed the Decision of the Hearing Officer, we have come to the conclusion that he did not.

The Hearing Officer was faced with the Statement. No viva voce evidence was presented. Furthermore, the Submission was presented which purported to address all of the relevant factors to be considered in imposing a penalty for discreditable conduct.

Given these circumstances, we are of the view that the Hearing Officer must give careful consideration and proper weight to the agreed facts and the documentary evidence filed in support thereof as these form the only evidentiary foundation for the finding of guilt and for the assessment of penalty.

Aside from observations based upon common general knowledge or any specialized understanding of police practices inherent in a hearing officer's senior rank, he or she ought not to stray from the evidence presented in the form of such agreed statement of facts and documentary evidence. Toronto (City) Police Service v. Kelly, supra

Similarly, where there is a joint submission on penalty, a hearing officer must also undertake a very careful consideration of the submissions, particularly where there appears to have been an in depth analysis of the factors enumerated in Williams and Ontario Provincial Police, supra. A joint submission on penalty ought to be accorded significant weight when deciding an appropriate penalty.

We do not accept the submission of Ms. Mulcahy that the Commission ought to establish additional criteria for hearing officers who are considering rejecting or departing from the recommendation contained in a joint submission on penalty. The Commission has decided that, if a joint penalty submission is to be rejected or varied, the hearing officer must act fairly, impartially and on solid evidentiary foundation and provide clear and cogent reasons. Allen and Hamilton Wentworth Regional Police Service, supra and Toronto (City) Police Service v. Kelly, supra

We find that there is insufficient linkage of the functions of the chief, the prosecuting officer, and the hearing officer under Part V of the Act to justify a higher standard applying when a hearing officer decides to deviate from the recommendation set out in a joint penalty submission. The disciplinary process under Part V of the Act is in essence a labour relations exercise between an employee and an employer. In our view, the threshold that applies in criminal proceedings before a judge may reject a joint submission on sentence, namely, whether the joint submission is contrary to the public interest or would bring the

administration of justice into disrepute, ought not to be applied in disciplinary proceedings.

We have reviewed the decision of the Hearing Officer carefully and are of the opinion that he adequately addressed Constable Yakimishyn's employment history, specific deterrence, ability to rehabilitate, recognition of responsibility, any handicap or other personal circumstance, and the effect on the officer and his family. It is clear that the Hearing Officer appropriately considered the Constable's unblemished 31 and a half year employment record, and that specific deterrence was not an issue. In addition, the Hearing Officer acknowledged that Constable Yakimishyn pled guilty to the charge of discreditable conduct at the first opportunity, co-operated fully with investigators, paid the fine imposed for the HTA offence, and paid restitution to the complainant.

However, when reviewing the decision relative to the other required sentencing factors we find that the Hearing Officer has made a number of errors:

1. We concur that the Hearing Officer correctly identified that Constable Yakimishyn's conduct after the collision is the primary gravamen of the misconduct. In analyzing the seriousness of the misconduct, the Hearing Officer rejected the Submission as not having given sufficient weight to this issue, and he went on to assess the actions of the Appellant as being one of an officer, who, while well aware of the responsibilities involved, made a conscious decision to leave the scene of an accident without supplying his name and address, the minimum required by the Criminal Code of Canada.

There was no Criminal Code charge against the Appellant on the record as it had been abandoned. Instead, the record disclosed that Constable Yakimishyn pleaded guilty to an offence under the HTA. In our view, this error was more than a simple misstatement by the Hearing Officer; it was a significant misdirection that appears to have coloured his evaluation of the seriousness of the Constable's misconduct.

In his decision, the Hearing Officer referred to seven Service officers having been the subject of fail to remain accident investigations. He found that this had become an important issue for the Service and it was imperative that the officers of that Service be made aware that the organization considered such misconduct to be serious in nature which would not be tolerated. The penalty in this case, he found, must reflect the need to send this message to officers of the Service.

In our view, the introduction by the Hearing Officer of the information concerning the seven Service officers when rendering his penalty decision, without notice or the right to respond, was improper. We agree

with Ms. Mulcahy's submission that this information was not set out in the Statement or in the additional documentary evidence filed. While it appears to be based upon the personal knowledge of the Hearing Officer as a senior officer in the Service, there was no evidentiary foundation other than the Hearing Officer's own statement.

We do not accept Ms. Bordeleau's submission that this information falls into the category of common knowledge or personal experience or expertise which would entitle the Hearing Officer to consider it in coming to his decision. We find that the consideration of this information led the Hearing Officer to improperly place significantly more weight in his decision on the factors of seriousness of the misconduct and general deterrence. The Hearing Officer relied upon this information without providing any opportunity to the parties to make submissions or call evidence in response or otherwise challenge it. This was fundamentally unfair and unreasonable.

2. In analyzing the weight to be applied to the factor of general deterrence, the Hearing Officer relied upon his own information regarding officers with the Service failing to remain at the scenes of accidents. As noted, this reliance improperly resulted in the over-emphasis of this factor in the Hearing Officer's decision. With no opportunity to respond to this information, the process and the result were unfair to the Appellant.
3. During the hearing concern was expressed by the Hearing Officer that the Submission did not satisfactorily address the issues of the public interest and the possible impact on the reputation of the Service. All of the evidence before the Hearing Officer on these factors was set out in the Statement and the Submission. In his decision, however, the Hearing Officer repeats the statements contained in the Submission and provides no clear and cogent reason why the Submission should be rejected on this factor. In our view, this amounted to manifest error.
4. Evidence was presented that motor vehicle accidents involving police officers in the Service were treated informally in most cases. There was no evidence before the Hearing Officer that failing to remain at an accident scene was a problem in the Service or that management had developed a plan to deal with such a problem.

There was evidence that Constable Yakimishyn had a long unblemished career with the Service with no prior disciplinary record. As has been noted, disciplinary proceedings under the Act are labour relations matters. This Commission has indicated on a number of occasions that consideration must be given to the application of progressive discipline. No consideration was given to this factor. This was in error.

5. In dealing with consistency of penalty, the Hearing Officer rejected all of the cases presented for his consideration except for Guse and Peel Regional Police Service, supra, which he found to be most similar to the case before him. We appreciate the difficulty faced by the Hearing Officer in view of the fact that there were no cases presented to him which were factually very similar. We are, however, of the opinion that in comparing the conduct of the officers in these two cases, the conduct of Constable Guse was much more serious.

Constable Guse had consumed alcohol prior to the single car accident, he left the scene of the collision with the signal light standard bent over a traffic lane and the signal light in the lane. He left the scene without reporting and in a condition which could have resulted in damage or injury to the public. To apply this case when considering consistency of penalty to support the rejection of the recommended penalty contained in the Submission was inappropriate, unfair and unreasonable.

Considering all the relevant factors, we find the penalty imposed by the Hearing Officer to be harsh and excessive. At the same time, it is our view that the recommended penalty set out in the Submission is within the range set out in other decisions which were filed with the Hearing Officer.

In summary, considering the Decision in totality, we find that the Hearing Officer has failed to provide reasons for rejecting the Submission which are fair, reasonable, clear and cogent. In addition, in deciding the penalty the Hearing Officer relied on information which was not properly before him and which lacked any evidentiary foundation. In view of this determination, we do not find it necessary to deal with the other submissions made by the parties.

Accordingly, the penalty imposed by the Hearing Officer is set aside and is varied to the forfeiture of 20 hours to be served (worked) at the discretion of the Commander of Staff Operations, which is the penalty set out in the Submission.

DATED AT TORONTO THIS 30TH DAY OF JULY, 2008.

Roy B. Conacher
Member, OCCPS

Hyacinthe Miller
Member, OCCPS