

OCCPS Decision # 08-03

CONSTABLE JAMES VAUGHAN-EVANS
Appellant

AND

TORONTO POLICE SERVICE
Respondent

Presiding OCCPS Members:

Murray W. Chitra, Chair
Hyacinthe Miller, Member
Garth Goodhew, Member

Appearances:

Andrew McKay, for the Appellant
Darragh Meagher, for the Respondent

Heard:

April 2, 2008

Date of Decision:

July 15, 2008

DISCREDITABLE CONDUCT - Criminal offences - Illegal drugs - Appellant under suspension with pay for consuming marijuana at work and/or reporting under the influence of marijuana - While under suspension and en route to signing in Appellant was observed rolling a joint - Appellant arrested and pled guilty to charge of possession - Repetitive misconduct - Appellant previously dismissed and reinstated on terms including treatment and monitoring - Hearing Officer properly considered service's efforts to accommodate Appellant - Reasonable conclusion that dismissal appropriate - Appeal dismissed.

DISABILITY - Duty to accommodate - Addiction to marijuana - Hybrid case involving mix of culpable and non-culpable factors - Service made efforts to accommodate Appellant - Appellant failed to take full advantage of treatments and services - Hearing Officer properly weighed service's efforts to accommodate against Appellant's repeated criminal misconduct - Number of relapses despite various accommodations casting doubt on Appellant's rehabilitative potential - Appeal dismissed.

DISABILITY - Duty to accommodate - Duty to accommodate must be assessed in light of individual employee and employer - Undue hardship analysis informed by nature

of employment duties - Hearing Officer not erring in finding that service met its legal obligation to accommodate Appellant's disability.

SENTENCING - Disciplinary record - Appellant pled guilty to two criminal charges and two counts of discreditable conduct during 10-year period of heavy marijuana use - Finding that Appellant's actions amounted to serious misconduct amply supported on the record - Dismissal not unreasonable penalty - Appeal dismissed.

SENTENCING - Rehabilitation - Lengthy history of marijuana use and related deceptions - No independent corroboration of Appellant's declaration that he was drug free - Not unreasonable for Hearing Officer to treat Appellant's assertion with scepticism - Appeal dismissed.

SENTENCING - Aggravating factors - Reputation of the service - Illegal drug use incompatible with sworn duties as a police officer - Appellant knowingly broke the law every time he purchased and used marijuana - Hearing Officer found damage to the reputation of the service would be significant if Appellant continued to serve and his marijuana use became public knowledge - Finding supported by the record - Dismissal not unreasonable penalty - Appeal dismissed.

Summary of Reasons for Decision

Constable Vaughan-Evans appealed the penalty imposed by the Hearing Officer, dismissal failing resignation within seven days. The Appellant pled guilty to one count of discreditable conduct, contrary to s. 2(1)(a)(ix) of the Code of Conduct.

The Appellant began using marijuana when he was 12 years old, and he became a regular user until age 18. At age 19 he joined the service.

In June of 1992 the Appellant began working in the Youth Bureau. In 1993 he was exposed to traumatic events in the course of his work, which led to emotional distress and a subsequent diagnosis of Post Traumatic Stress Disorder. He began using marijuana heavily in the spring of 1994 to alleviate the symptoms of his disorder. To pay for the expense of his habit, he stole eight pay cheques from fellow officers. In 1995 he was charged criminally, pled guilty and received a conditional discharge plus 12 months probation. The Appellant was then charged with the disciplinary offence of discreditable conduct as a result of his conviction. He pled guilty. A penalty of dismissal failing resignation within seven days was imposed. However, on appeal to the Toronto Police Services Board he was reinstated with a demotion and with conditions including a commitment to maintain a drug free lifestyle. The Appellant was reassigned to office work, relieved of patrol and night duties, and attended some treatment programs.

The Appellant stopped attending Alcoholics and Narcotics Anonymous and in 2002 he began playing guitar in two bars. He also started using marijuana heavily again.

In December 2003 he was caught at work smelling of marijuana; a roach was found on a washroom floor. The Appellant admitted the roach was his but denied having smoked the joint in the washroom. He was suspended with pay. Six months later, while still under suspension and while on his way to sign in at police headquarters, the Appellant was observed at a subway station in his car, rolling a joint. He was arrested and charged with possession of marijuana.

In September 2005 the Appellant pled guilty to this second criminal charge. He received a second conviction and a second conditional discharge, this time with probation for two years. The second conviction led to the second charge of discreditable conduct. Again the Appellant pled guilty to the disciplinary charge. On this occasion, as with the earlier conviction, the Hearing Officer imposed the penalty of dismissal failing resignation.

The psychologist whom the Appellant had been consulting testified at the disciplinary hearing. He described the Appellant's PTSD, anxiety and depression, as well as the course of treatment. He offered the opinion that the Appellant had ceased using illegal drugs upon his arrest in 2004, but admitted that his opinion could not be confirmed independently.

The Hearing Officer found that the Appellant exhibited a pattern of behaviour characterized by heavy illegal drug use and related criminal activity. The Appellant had not succeeded in refraining from using marijuana, and he had deceived physicians, caregivers, his fellow officers, his supervisors and his wife. The Hearing Officer also found that the Appellant had damaged the reputation of the service and had exhausted his usefulness as a police officer.

Counsel for the Appellant argued that the Appellant had a disability, addiction to marijuana, and the service had a duty to accommodate the Appellant to the point of undue hardship. In counsel's view, the Hearing Officer gave insufficient attention to the duty to accommodate. In particular, the Hearing Officer erred by: failing to equate illegal drugs with alcohol/prescription drug abuse in characterizing the disability of substance abuse; failing to recognize that the duty to accommodate extends beyond administrative support; failing to give proper weight to the Appellant's employment history; and failing to acknowledge the evidence of rehabilitation. Counsel requested reinstatement with random drug testing or alternatively demotion.

Counsel for the Respondent argued that the Hearing Officer properly concluded that the Appellant's usefulness as a police officer had been exhausted. He chose not to stop using marijuana and sought assistance only after he was arrested. Counsel argued that the Commission's approach to a Hearing Officer's decision should be deferential. In this case there were no manifest errors or other grounds for interfering with a decision which was reasonable.

Held, Appeal dismissed.

As the Hearing Officer observed, the Appellant's misconduct was serious; it was also repetitive. The Appellant's actions in 2003 and 2004 were strikingly similar to his misconduct in 1994 and 1995. The Hearing Officer's conclusions about a pattern of deceit were likewise supported by the record. As for the alleged undervaluing of his employment history, the quality of the Appellant's police work might have been good but his employment history was chequered by lengthy suspensions, two criminal convictions, two periods of probation, a significant demotion and three years of drug use monitoring.

Marijuana was an illegal substance, so addiction to marijuana was obviously not synonymous with addition to alcohol; and the Hearing Officer did not err by distinguishing the two.

The duty to accommodate must be assessed on an individualized, case-by-case basis, in light of the requirements of the employee and the employer. The duty was a shared responsibility, in that employees were under a corresponding duty to facilitate reasonable accommodation efforts. In hybrid cases such as this one, involving a mixture of culpable and non-culpable elements, assessing the duty to accommodate could be particularly challenging. Notwithstanding that challenge, the Hearing Officer properly weighed the service's accommodation efforts against the Appellant's repeated criminal misconduct.

The Hearing Officer acknowledged that the service had an obligation to accommodate employees with addiction related disabilities. However, he found that the service had met its burden in this case. In particular, he rejected the assertion that the service had offered mere administrative support, and he recounted at some length the steps taken to accommodate the Appellant after his addiction was first revealed in 1995. These steps included reassignment, modified hours, non-enforcement duties and drug monitoring. In addition, he noted that the Appellant failed to take full advantage of the services and treatments offered. He failed to make a concerted effort to overcome an addiction which led him to engage in persistent criminal behaviour. These conclusions were supported on the record.

The Hearing Officer treated the Appellant's assertion of rehabilitation with scepticism, noting that there was no independent corroboration of the assertion. In light of the Appellant's history of marijuana use and his related deceptions, it was not unreasonable for the Hearing Officer to have reservations about the Appellant's self-declared rehabilitation.

It was self-evident that for a police officer to become involved in illegal drugs was unacceptable, antithetical to the officer's sworn duties and, if known to the public, discrediting to the police force. The Appellant knowingly and repeatedly broke the law and breached his sworn duties. The Hearing Officer's conclusions about the damage that would result if the Appellant were retained on the force and his marijuana use became public knowledge were borne out by the record. Although the penalty was severe, it did not reflect any manifest error; instead it was considered, reasonable and just.

Statutes cited

O. Reg. 123/98 s. 2(1)(a)(ix)

Controlled Drugs and Substances Act s. 4(5)

Police Services Act R.S.O. 1990, c.P.15 as amended

Ontario Human Rights Code R.S.O. 1990, c.H.19 as amended

Authorities cited

Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (OCCPS)

Reilly and Brockville Police Service (1997), 3 O.P.R. 1163 (OCCPS #97-07)

Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758 (Ont. Div. Ct.)

Ontario (Provincial Police) v. Favretto (2004), 72 O.R. (3d) 681 (Ont. C.A.)

Hall and Ottawa Police Service (Dec. 5, 2007 OCCPS #07-17)

[Further authorities as submitted by the parties may be found at pp. 8-13 of the decision.]