

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE SCOTT HAMPEL

Appellant

TORONTO POLICE SERVICE

Respondent

Presiding Members:

David Edwards, Member
Hyacinthe Miller, Member

Appearances:

Harry Black, Q.C., Counsel for the Appellant
Ian Solomon, Counsel for the Respondent

Hearing Date: July 23, 2008

This is an appeal from a finding of guilt made on March 6, 2007 against Constable Hampel by now retired Superintendent Robert Strathdee (the "Hearing Officer") on one count of insubordination contrary to section 2(1)(b)(ii) of the Code of Conduct (the "Code") found at Ontario Regulation 123/98.

As well, this is an appeal from the penalty imposed on May 29, 2007, being forfeiture of seven days or fifty-six hours.

Background:

Constable Hampel began his career with the Toronto Police Service (the "Service") in 1987 as a fourth-class constable. Since then, he has worked as a uniform officer in 31 Division, 21 Division, 22 Division and 23 Division. He was a member of the Emergency Task Force for six years. He has also been a volunteer firefighter in his community.

The facts of this case are quite straightforward.

Constable Hampel undertook certain person and vehicle queries on October 22 and November 5, 2004. He admitted making Canadian Police Information Centre ("CPIC") inquiries, believing they were for police business.

The Hearing Officer found that the inquiries were not for police business. He found Constable Hampel guilty of insubordination, in that he failed to follow Service policy with respect to CPIC inquiries and imposed the penalty, which is also the subject of this appeal.

The Hearing:

Constable Hampel was charged with six disciplinary offences. He pled not guilty to all charges. The hearing began on July 17, 2006 and continued on July 21, August 22 and August 23, 2006. The Prosecutor withdrew charges three and four. The Hearing Officer found Constable Hampel not guilty with respect to charges one, two and five, and guilty with respect to charge six. Accordingly, the particulars of charges one through five inclusive and the evidence in relation thereto, are not relevant to this appeal.

The Statement of Particulars for charge six was as follows:

Being a member of the Toronto Police Service, attached to Number 23 Division, in October and November 2004, you were assigned to uniform traffic duties.

On October 22, 2004 and November 5, 2004, you conducted CPIC inquiries on [N]¹. On the same dates, you also conducted vehicle queries on license 993YML.

Investigations revealed that these queries were not for official police business and were, therefore contrary to Rule 4.13.1 of the Toronto Police Service Rules.

At the hearing the Prosecution filed a number of exhibits including a copy of Rule 4.13.1. The relevant section read:

¹ Name modified.

All computer and telecommunications equipment owned, leased, loaned or rented by the Service shall be used exclusively for police business.

On August 23, 2006 the Defence admitted that the CPIC inquiries specified in the Notice of Hearing had been performed by Constable Hampel.

Constable Hampel testified that, for a number of reasons, he, his wife N and family had a heightened fear of his ex-wife, also a Toronto police officer, Constable T.²

Constable T had a history of performing CPIC checks on his wife, himself and various other family members, not for official purposes. He further testified that in 1997 Constable T was on assignment in a non-uniform capacity. However, she had attended at his wife's former residence wearing a police uniform and firearm, in an attempt to speak with his wife. This was perceived as very threatening by (N).

Constable Hampel testified about a "horrific incident" which occurred on October 23, 1999 at his former residence. Someone called his parents in Brockville, identifying himself as Scott Hampel. The caller said: "I've done it; I've chopped [N's] head off". Around 4:30 a.m., he heard the volunteer firefighter dispatcher reporting a stabbing at his residence address. At the same time, he heard a helicopter overhead.

He called 9-1-1. The dispatcher asked to speak with his wife and directed him to open his front door. When he did, a Hamilton police officer, with his weapon drawn, ordered Constable Hampel to raise his hands. There were five police cars in attendance, as well as a fire truck and ambulance. In Constable Hampel's mind, Constable T was the main suspect. He advised the police services in his community and the town in which his parents resided about his concerns and the reasons for those concerns. In his view, neither police service investigated the matter properly.

On July 26, 2000 an email from an investigator in Internal Affairs was sent to his Unit Commander, indicating that he had "received information that Scott Hampel does not live at 75 Hollybush any longer. Could you please update his new address"? Constable Hampel showed his Commander the paperwork he had previously submitted to update his address. He also advised his wife, N, about this inquiry. They both were concerned that Constable T was the source of the request and that she was continuing to pursue them.

Constable Hampel instructed his counsel to write the investigator on August 3, 2000 requesting, amongst other things, to be advised who had told Internal Affairs that he had moved. He received no response to this inquiry.

² Name modified.

Subsequent to this, N saw his ex-wife in the parking lot of a mall located close to their new home. His wife, who was pregnant, was very concerned about the possibility that Constable T had seen her licence plate and had run a CPIC check to determine their new address. She wanted to confirm whether that had happened. Constable Hampel wanted to allay her fears. Due to the above-noted incidents and the fact that N was so concerned, he conducted CPIC checks on October 22 and November 5, 2004 on his wife N and the vehicle registered in her name to determine if anyone else had made similar queries.

The CPIC searches did not provide any information.

Constable Hampel testified that he felt that the CPIC checks which he had undertaken were for police business. If he had learned that Constable T had run the licence plate, he would have brought the matter forward to be investigated appropriately. He stated that the lack of response to his counsel's letter to Internal Affairs in 2000 made him question what answer he would get if he asked someone to query his wife's licence plate.

N testified and substantially confirmed Constable Hampel's testimony.

The Hearing Officer found Constable Hampel guilty of insubordination on March 6, 2007. His reasons are contained in a forty-seven page decision.

The matter then turned to penalty. Sergeant John Robb, Sergeant Oliver Febbo, and Sergeant Richard Blanchard testified in support of Constable Hampel's performance as a police officer. Detective Norman Proctor provided a written character reference.

Performance evaluations were submitted. All were positive. Nineteen commendations and the August 3, 2000 letter to Internal Affairs were also tendered.

Also tendered were details of two informal discipline matters; both were more than two years before the penalty hearing.

Finally, an informal discipline record of Constable T was made an exhibit. Constable T received a penalty of a loss of four hours for using CPIC for personal reasons on three different occasions in 1998 to check on Constable Hampel, his girlfriend at the time, and his uncle.

The Hearing Officer released his twenty-one page penalty decision on May 29, 2007. As noted earlier the penalty imposed was forfeiture of seven days or fifty-six hours off.

Appellant's Position:

Mr. Harry Black appeared as counsel for the Appellant. He challenged both the conviction and penalty.

He asserted that the Hearing Officer erred in his characterization that “Constable Hampel’s defence is based on doing the ‘right and noble thing’ and the peace of mind of his wife [N]”. Constable Hampel’s defence was that the checks were done for “police business” and therefore lawful.

Mr. Black submitted that the Hearing Officer erred when he held that “there was no evidence adduced before me that any reports were ever made by Constable Hampel concerning T’s alleged misconduct when she testified as to her CPIC abuses in Constable Hampel’s criminal trial”. In his view there was evidence, including counsel’s letter of August 3, 2000 addressed to the investigator in Internal Affairs.

He argued that the Hearing Officer erred in finding that “there was also no evidence adduced as to [T] being a suspect in the bogus 9-1-1 call in Waterdown Ontario” when in fact evidence to that effect was given by Constable Hampel.

In his view the Hearing Officer also erred in finding “nor did Constable Hampel report [Constable T’s] unauthorized, unofficial visit to [N’s] former residence on King Street West”, as Constable Hampel was never asked that question.

Mr. Black submitted that the Hearing Officer failed to apply the case law provided to him which supported Constable Hampel’s position. He noted that the hearing officer in Donoghue and Metropolitan Toronto Police Service (26 June, 1997, Hearing Officer Kelly) acquitted an officer on a similar charge and stated “that the officer was justified in that he was acting in good faith to advance a legitimate investigation, albeit personal in nature”. In his view, the evidence in this case showed that Constable Hampel was acting in good faith to advance a legitimate investigation.

He argued that in finding that “Constable Hampel consciously and knowingly disobeyed the lawful order and entered his wife’s name and vehicle make of the car she was driving into CPIC for non-police business”, the Hearing Officer erred by ignoring the evidence of Constable Hampel to the contrary, when no evidence that contradicted this testimony was submitted by the Prosecution. Furthermore, he did not provide reasons to support this conclusion.

He asserted that the Hearing Officer’s findings were inconsistent and cannot be reconciled. He found that there was no lawful excuse and then found that he had an excuse. McCoy and Fort Frances Police Service (1969), 1 O.P.R. 16 (O.P.C.). He ignored the evidence that if Constable Hampel found information had been improperly obtained by someone else conducting the CPIC checks, he would have brought that information forward to be investigated appropriately. P.G. v.

Ontario (Attorney General) [1996] O.J. No. 1298 (Ont. Div. Ct.) and Blowes-Aybar and Toronto Police Service (28 February, 2003, O.C.C.P.S)

Mr. Black submitted that the Hearing Officer disregarded the evidence submitted when he held that “Constable Hampel informed no one at the Toronto Police Service of his stated concerns about [T’s] alleged misconduct”.

He asserted that the Hearing Officer’s approach to the case is one of judging *ex post facto* or in hindsight Constable Hampel’s conduct, rather than considering the evidence before him. Magda and Sheppard v. Ontario (Board of Inquiry) (23 October, 1992, Ont. Div. Ct.), Tomie-Gallant v. Ontario (Board of Inquiry) (21 August, 1996, Ont. Div. Ct.) and McCoy and Fort Frances Police Service, supra

As to the penalty, Mr. Black asserted that the Hearing Officer made several reviewable errors. He implicitly penalized Constable Hampel for requiring a trial. He had concerns with respect to specific deterrence, recognition of the seriousness of the misconduct, remorse and rehabilitation as a result of Constable Hampel’s insistence that the searches were performed for police business. College of Physicians and Surgeons of Ontario v. Gillen [1993] O.J. No. 947 (Ont. C.A.) and College of Physicians and Surgeons of Ontario v. Boodoosingh [1990] O.J. No. 921 (Ont. Div. Ct.)

The Hearing officer ignored the evidence of Constable Hampel’s concerns about his former wife, the non-response of two police services to previous serious incidents and his stated intentions of reporting any CPIC violations that he found through his searches. Cate and Peel Regional Police (2002), 3 O.P.R. 1604 (O.C.C.P.S.)

He submitted that the Hearing Officer erred in finding that “minimal penalties tend to provide for minimal general deterrence”. He suggested that the certainty of a finding of misconduct rather than the severity of the penalty has a greater impact on deterrence. R. v. McKimm [1970] 1 O.R. 819 (Ont. C.A.) and R. v. Wismayer (1997), 115.C.C.C. (3d) 18 (Ont. C. A.)

With respect to the records of previous informal discipline, Mr. Black asserted that the incidents were unrelated, that no weight was given to Constable Hampel’s explanation, and the incidents occurred more than two years before the penalty hearing. Section 64(16) of the Police Services Act R.S.O. 1990, c. P.15 as amended (the “Act”) and Monaghan v. Toronto (City) Police Service [2005] O.J. No. 1396 (Ont. Div. Ct.)

He submitted that the Hearing Officer did not give adequate weight to Constable Hampel’s character evidence. Conforzi v. Assn of Professional Engineers of Ontario [1987] O.J. No. 940 (Ont. Div. Ct.). He failed to address the informal assessment of four hours that Constable T received for her unauthorized use of CPIC. Dinsdale and Ontario Provincial Police (30 December 2004, O.C.C.P.S.)

and Scholfield and Metropolitan Toronto Police Service (1984), 2 O.P.R. 613 (O.P.C.)

He asserted that having regard to the circumstances of the misconduct and Constable Hampel's prior work record, the penalty imposed was excessive. He drew our attention to nineteen cases in which the penalty ranged from a reprimand to a maximum of four days off. Scholfield and Metropolitan Toronto Police Service supra, Sterling and Hamilton-Wentworth Regional Police Service (1999), 3 O.P.R. 1356 (O.C.C.P.S.), Morris and Ontario Provincial Police (1992), 2 O.P.R. 932 (O.C.C.P.S.), Young and Metropolitan Toronto Police Service (27 May, 1997, Hearing Officer Kelly), Chambers and Toronto Police Service (25 January, 2002, O.C.C.P.S.) and Lamontangue and Toronto Police Service (26 July, 2001, Hearing Officer Boyd)

Mr. Black requested that the finding of misconduct be quashed or in the alternative, that a penalty of less than seven days be imposed.

Respondent's Position:

Mr. Ian Solomon acted as counsel for the Respondent.

He submitted that there were only two issues:

1. Did the Appellant's unauthorized use of CPIC and vehicle inquires, for the purpose other than official police business, constitute insubordination?
2. Was the penalty imposed by the Hearing Officer reasonable in the circumstances?

He outlined the Commission's position regarding the standard of review for assessing a Hearing Officer's decision. Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

He asserted that the Hearing Officer's decision was not void of evidentiary foundation and was supported by his reasoning. Deviney and Toronto Police Service (1999), 3 O.P.R. 1315 (O.C.C.P.S.)

Mr. Solomon noted that the Appellant agreed that a lawful order, in the form of Service's Rule 4.13.1 had been made; that he had undertaken the CPIC searches; and, that he had disclosed the results to his wife. In his view that was sufficient to prove the necessary elements of the offence.

He referred to Coon and Toronto Police Service (10 April, 2003 O.C.C.P.S.) wherein the Commission ruled that the Appellant's admission that he had conducted CPIC inquiries prevented the Commission from concluding that the

Hearing Officer's decision was without evidentiary foundation or was unsubstantiated. As Constable Hampel had admitted to doing the CPIC inquiries, Mr. Solomon asserted that there was an evidentiary foundation to the Hearing Officer's decision.

Mr. Solomon noted that the Commission in Burdett and Guelph Police Service (1993), 3 O.P.R. 1336 (O.C.C.P.S.) at page 1344 held that Constable Burdett should not have utilized the CPIC system to pursue a possible suspect in a break and enter at his home:

As a police officer, he ought to have known that there is a process to be followed in an investigation and he should not have attempted to take the matter into his own hands. Moreover, we agree with Counsel for the Respondent that Constable Burdett received E.P.'s address because of his connection with the police services. By using his position as a police officer to allow him to resort to self-help, we find, is sufficient to constitute discreditable conduct.

He also drew to our attention to the fact that in Coon and Toronto Police Service supra, the Commission rejected the argument that CPIC used to advance a personal interest (concern over the safety of the officer's children) was a use "for police business" and further that police officers should not be in a better position than ordinary citizens who do not have access to CPIC.

Mr. Solomon asserted that we ought not to be overly critical of the language used by the Hearing Officer given that he was a lay tribunal, not legally trained. Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 (Ont. Div. Ct)

He argued that the Hearing Officer is entitled to interpret evidence and make factual findings using the benefit of his or her personal experience. Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.). He submitted that the Hearing Officer made decisions based upon the evidence before him and he did not ignore, misapprehend or fail to consider relevant evidence.

Mr. Solomon referred to N's testimony. He conceded that she had a fear of Constable T. He submitted that such fear, as expressed to her husband, was a personal matter. The Hearing Officer had sufficient evidence to conclude that Constable Hampel performed the CPIC searches to appease his wife and not for police business.

He asserted that the Hearing Officer need not deal with every aspect of the evidence in his decision. Thomas v. Ontario (Police Complaints Commissioner) [1994] O.J. No. 2731 (Ont. Ct. Jus.) and R. v. Burns (1994), 89 C.C.C. (3rd) 193 (S.C.C.)

Mr. Solomon submitted that the Hearing Officer had provided both adequate and compelling reasons for his decision. It is plain from the record not only those facts upon which the Appellant was convicted, but also the basis upon which the Hearing Officer found the Appellant guilty of insubordination. Toronto (City) Police Services v. Blowes-Aybar [2004] O.J. No 1655 (Ont. Div. Ct.) and Dr. Q. v. College of Physicians and Surgeons of British Columbia (2003), 223 D.L.R. (4TH) 599 (S.C.C.)

Furthermore, the Hearing Officer did not misapprehend or fail to take into account relevant evidence. Any extrapolations he made were based on his experience as a police officer. Orr and York Regional Police (2001), 3 O.P.R. 1457 (O.C.C.P.S.) Any perceived inconsistencies in the Hearing Officer's decision occurred through the use of imprecise language rather than real inconsistencies. R. v. Sheppard (2002), 162 C.C.C. (3rd) 298 (S.C.C.)

He discussed Constable Hampel's counsel's letter of August 3, 2000 and noted that it was sent ten months after the bogus 9-1-1 call of October 23, 1999, two years after Constable T's disciplinary conviction for using CPIC for personal reasons, and four years prior to the current charge relating to improper CPIC use by Constable Hampel.

He drew to our attention to the key elements to be considered when imposing a penalty. Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758 (Ont. Div. Ct.), Favretto and Ontario Provincial Police (2002), 3 O.P.R. 1540 (O.C.C.P.S.) and Williams and Ontario Provincial Police, supra.

He pointed out that the Hearing Officer considered the nature and seriousness of the misconduct and dealt with the issue of specific and general deterrence.

Mr. Solomon submitted that the spectrum of punishment for unauthorized use of the CPIC system ranged from a reprimand to a demotion and historically, the penalty has been more severe when information is released to a third party. Kleinsteiber and Ontario Provincial Police (1996), 3 O.P.R. 1092 (O.C.C.P.S) and Grbich and Aylmer Police Service (9 August 9, 2002, O.C.C.P.S.)

He noted that the Hearing Officer identified three complicating factors.

1. The unauthorized use occurred on two separate occasions:
2. This was the second disciplinary action for misuse of Service technology, and
3. Based upon the testimony of the Appellant, he does not appreciate that CPIC use for personal use is totally prohibited.

Mr. Solomon submitted that the prior informal discipline matters could be considered to be within the two year period if one uses the date of the Notice of Hearing to be the guiding date.

He argued that given:

1. The seriousness of the misconduct;
2. The need to deter the Appellant from further misconduct of a similar nature;
3. The need to deter all Service officers from committing misconduct of a similar nature; and,
4. The complicating factors addressed by the Hearing Officer,

the Hearing Officer's sentence of a loss of seven days or fifty six hours was appropriate. There was no clear or manifest error and the penalty was within the spectrum of appropriate penalties.

Finally, he requested that the appeals as to conviction and penalty be dismissed.

Decision:

The first issue to be dealt with is the appeal of the finding of guilt.

The Commission's role on appeal of a finding of guilt has been described on page 1058 of Williams and Ontario Provincial Police:

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 the credibility of witnesses, cannot be reasonably accepted. The question to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

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

This can be a difficult test for an Appellant to meet. The words "void of evidentiary foundation" clearly contemplate that appellate interference with 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 an 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.

How does this apply to the facts of this appeal?

Constable Hampel admitted that a lawful order was given. That order (Rule) stated:

4.13.1 All computers and telecommunications equipment owned, leased, loaned to, or rented by the Service shall be used exclusively for police business.

Constable Hampel admitted that on two occasions he performed CPIC inquiries at his wife's request due to her fear that Constable T may have located their address by performing a CPIC search. The purpose of Constable Hampel's use of the CPIC system was to determine whether Constable T had performed such a search.

Constable Hampel testified that he performed these searches for police business, that is, to determine if an improper inquiry had been carried out. The Service disagreed with this position. The Hearing Officer concluded that the Service's position was correct.

At the heart of this matter, the central question is whether the searches in question were undertaken "exclusively for police business".

This Commission has previously commented upon the personal use of CPIC. In Coon and Toronto Police Service at page 12 the Panel noted:

The Commission has ruled in the past that the personal use of CPIC constitutes major misconduct. The use of CPIC must be solely reserved for official police work and must never be used for personal reasons. Fundamental to the successful functioning of the CPIC system is a strong sense of trust; trust that the system is there to help police officers in pursuit of their official duties and trust that no police officer will purposely or willfully misuse the system.

In that same decision a statement was made in the penalty portion of the reasons at page 13 which is equally applicable with respect to the issue of guilt:

Further, Constable Coon, although stating he was remorseful, tried to justify his behavior by stating that S.C. was a criminal and he had every right to do a CPIC enquiry for that reason. Constable Coon felt justified in doing the searches for the safety and well being of his children. As a police officer, he should not

be in a better position than an ordinary citizen who would not have access to CPIC in similar circumstances. This panel believes that Constable Coon, to this date, still does not believe that he acted inappropriately. We are not convinced that Constable Coon would not use the CPIC system again for his own personal use.

Section 45 of the Act states that: "A person appointed to be a police officer shall, before entering on the duties of his or her office, take oaths or affirmations of office and secrecy in the prescribed form".

Ontario Regulation 144/91 provides two options for the oath or affirmation of office. Both include the obligation that the officer swear or affirm that he or she will discharge his or her duties "impartially".

The integrity of the policing system requires that the community has an absolute trust in an unbiased police system. There is a clear apprehension of bias in situations where a police officer, using resources available only by virtue of his or her office, pursues a matter in which she or he has a personal interest.

The conflict of interest is clear. Save for the most exceptional circumstances, a police officer should not pursue, in his or her capacity as a police officer, any matter in which she or he has a personal interest.

Constable Hampel performed the CPIC searches at the request of his wife, to determine whether his ex-wife had undertaken improper CPIC searches. In doing this, he committed misconduct. It was exacerbated because he shared the results with his wife, a civilian, with no right to have access to that confidential police information.

The Appellant raised a number of grounds of appeal relating to perceived errors made by the Hearing Officer with respect to the evidence surrounding the events which gave rise to N's fear of Constable T.

The reasonableness of N's fear of Constable T is not relevant to the issue of guilt. It may explain the motivation for Constable Hampel's actions, but it does not alter the principle enunciated above.

The Hearing Officer had evidence before him that a lawful order had been given and that it had been disobeyed. He quoted from Coon and Toronto Police Service supra to support the proposition that CPIC searches for a reason, not dissimilar to this case, (the safety of the officer's children compared to the safety of the officer's wife), were not for police business.

Given the above, we conclude that the decision of the Hearing Officer was not void of evidentiary foundation.

The Appellant argued that the decision also contained inconsistencies or errors unrelated to the events surrounding Constable T's actions. With respect to those perceived or actual inconsistencies or errors, we adopt the reasoning of the Divisional Court in Galassi v. Hamilton (City) Police Service supra 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. (2nd) 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.

Therefore, the appeal on the finding of guilt with respect to insubordination is dismissed.

Constable Hampel also appealed the penalty imposed.

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

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

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

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

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

seriousness of the transgression and handicap or other relevant personal considerations.

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

The Appellant raised a number of arguments as to the Hearing Officer's assessment of penalty.

In particular, the record disclosed that Constable Hampel had two previous informal disciplinary documentations on his record: April 23, and November 2004. These incidents were considered specifically by the Hearing Officer as a "complicating issue".

Two sections of the Act must be noted. First, section 68(9):

68(9) The chief of police ... may cause an entry concerning the matter, the action taken and the reply of the ... police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

(a) The complaint is proved on clear and convincing evidence;

or

(b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of.

More to the point, section 64(16) states:

64(16) An entry made in a police officer's employment record under paragraph 2 of subsection (15) shall be expunged from the record two years after being made if during that time no other entries concerning misconduct or unsatisfactory work performance have been made in the record under this Part.

The date that the Hearing Officer found Constable Hampel guilty of insubordination was the date when that complaint was "proved on clear and convincing evidence". That date was March 6, 2007. The prior informal disciplinary matters occurred in April and November of 2004.

By the application of section 64(16), these informal documentations were deemed to be expunged from Constable Hampel's employment record at the

time of his conviction for insubordination. The employment record containing those matters should not have been admitted as an exhibit at the hearing and those prior matters should not have been considered by the Hearing Officer in imposing penalty. To do so was an error at law.

The Appellant argued that he was penalized by the Hearing Officer for requiring a hearing and for not pleading guilty. The Hearing Officer considered Constable Hampel's testimony and his steadfast view that his actions were appropriate as they relate to the issue of specific deterrence. He did not penalize the Appellant for requiring a hearing; rather, he considered how best to deter Constable Hampel from a repetition of the misconduct, in light of Constable Hampel's continued belief that his CPIC searches were police business.

The Hearing Officer considered the elements of penalty referred to in Carson and Toronto and Toronto Police Service. He specifically dealt with the seriousness of the matter. He had concerns about rehabilitation in light of Constable Hampel's steadfast opinion of the appropriateness of his behaviour.

He expressed concern about the continued CPIC violations by Service officers and the need for general deterrence. He noted that the CPIC abuse by Constable Hampel had occurred on two separate occasions separated by several weeks. He considered Constable Hampel's prior work history and the positive character evidence. However, as noted earlier, he did err in considering the prior informal discipline as a factor.

"The Appellant argued that the Hearing Officer erred by not addressing the discipline of Constable Hampel's former wife, Constable T, who received an informal penalty of a loss of a few hours for a similar transgression."

We are of the view that his failure to do so is not an error in principle. Constable T. was not the subject of the disciplinary matter before the Hearing Officer. Her penalty was imposed in 1998 and the factors taken into account are not known. The case law on the issue of penalty for improper CPIC use has evolved since that time. As well, the Hearing Officer is not obligated to deal with every aspect of the evidence in his decision. Thomas v. Ontario (Police Complaints Commissioner) supra

Counsel presented a number of cases both to the Hearing Officer and to this panel showing the range of penalty in similar fact situations. There is a range of penalties that have been imposed for similar fact situations; however, the mitigating and aggravating factors vary considerably.

The role of a police officer carries considerable authority; however, with that authority comes accountability. Constable Hampel is an experienced police officer with over twenty years of service in a number of capacities. According to

character witnesses, he is well thought of, professional, respectful and is considered a diligent worker. However, he disobeyed a lawful order with respect to maintaining the security and confidentiality of information stored on the CPIC system, for personal purposes. This is not to be taken lightly.

In the specific circumstances of this case, taking into account the evidence and in light of the error by the Hearing Officer with respect to considering the matter of the prior discipline, we revoke the penalty imposed by the Hearing Officer and replace it with a forfeiture of three days or twenty-four hours.

DATED AT TORONTO THIS 14TH DAY OF AUGUST, 2008.

David Edwards
Member, OCCPS

Hyacinthe Miller
Member, OCCPS