

OCCPS Decision # 08-11

CONSTABLE WENDY GARDNER  
Appellant

AND

ONTARIO PROVINCIAL POLICE  
Respondent

Presiding OCCPS Members:

David Edwards, Member  
Hyacinthe Miller, Member

Appearances:

Theresa R. Simone, for the Appellant  
Crystal O'Donnell, for the Respondent

Heard:

November 21, 2008

Date of Decision:

December 12, 2008

**DISCREDITABLE CONDUCT - Sexual harassment** - Appellant and other officers assigned to traffic control duty - Fellow officer alleged Appellant approached him and grabbed his genitalia - Hearing Officer found Appellant guilty of discreditable conduct and imposed penalty of forfeiture of 40 hours - Hearing Officer misapprehended the evidence and reached key conclusions that were unfounded - Fresh evidence casting grave doubt upon complainant's credibility and undermining Hearing Officer's factual findings - Conviction set aside - Appeal allowed.

**HEARING OFFICERS - Reviewable errors** - Incident of alleged sexual harassment - Numerous conflicts in the evidence surrounding incident - Hearing Officer's decision not demonstrating that he considered obvious inconsistencies in witnesses' testimony - Key conclusions unfounded - Fresh evidence casting serious doubt upon complainant's credibility - Conviction on charge of discreditable conduct set aside - Appeal allowed.

**EVIDENCE -Fresh evidence** - Motion to admit fresh evidence - Complainant withheld disclosure of critical evidence to counsel for both parties - Complainant then produced diary for the purpose of civil suit which he launched against Appellant - Appropriate to receive fresh evidence - New evidence casting serious doubt upon credibility and reliability of complainant's testimony - Evidence undermining factual

findings of Hearing Officer - Standard of clear and convincing proof not met in light of new evidence - Conviction set aside - Appeal allowed.

### Summary of Reasons for Decision

Constable Gardner appealed her conviction on one count of discreditable conduct, contrary to s. 2(1)(a)(xi) of the Code of Conduct, as well as the penalty imposed, forfeiture of 40 hours.

The disciplinary charge arose from an on-duty incident in which Cst. Gardner and other officers were assigned to traffic control. There was conflicting evidence about whether the incident occurred on September 21, 2005 (the Appellant's testimony) or September 22, 2005 (the complainant's testimony). There were further inconsistencies about details surrounding the incident. In essence, the complainant alleged that Cst. Gardner walked up to him and grabbed him by the genitalia, in full view of the public. Constable Gardner admitted touching the complainant but claimed this was accidental. Thus contact was admitted, but intention was not. The incident was witnessed by another officer.

Prior to the scheduled appeal hearing date the parties filed a joint motion requesting the Commission to revoke both the conduct and penalty decisions of the Hearing Officer on the basis of evidence which came to their attention after the hearing and sentencing. In particular, the complainant testified at the hearing that he had no other handwritten notes about the incident. However, he brought a civil action against Cst. Gardner for which he produced a diary. He claimed to have authored the diary contemporaneously. This evidence called into question the complainant's credibility.

In a preliminary decision (OCCPS #08-09) the Commission ruled that 1) it had a duty to determine whether the relief sought was reasonable and 2) this determination could not be made in the absence of any supporting material. The Commission also asked for submissions as to jurisdiction on the motion.

Supporting material was subsequently filed. The Commission denied the motion to revoke the penalty and conduct decisions without a hearing. Section 70(2) of the *Police Services Act* imposed a positive obligation upon the Commission to hold a hearing where a police officer appeals a hearing officer's decision. The critical element of a hearing was the Commission's consideration of the entire record; and any procedure which truncated that process was not appropriate. Furthermore, while the motion to revoke raised doubts about the complainant's credibility the Hearing Officer did not rely solely on the complainant's testimony in reaching his decision. Finally, the Commission did not have authority to order a re-hearing. Revoking a decision without dismissing the charge raised the possibility that the charge might remain outstanding. The fact that the revocation motion was brought on consent did not relieve the Commission of its responsibility to abide by the *PSA* in exercising its powers.

The Appellant then brought a motion to admit fresh evidence consisting, inter alia, of the complainant's diary and police notebook. With the exception of some e-mail chains, the new evidence satisfied the test set out in **Palmer** (*infra*) for the admission of fresh evidence.

The Appellant's position on the appeal was that the Hearing Officer ignored fundamental evidence, particularly inconsistencies between Cst. Gardner's and the complainant's testimony. In addition, the new evidence showed inconsistencies between the complainant's testimony at the hearing and his subsequent position in the civil suit: he failed to disclose key evidence (his diary) and claimed that there was no such evidence during the hearing; he also testified in the hearing that he had no issues with Cst. Gardner before or after the incident, but in his civil suit he claimed that she sexually harassed him before and after the incident. Finally, counsel for the Appellant submitted that the penalty was excessive.

Counsel for the Respondent argued that the Hearing Officer's decisions should be revoked, but the charge should not be dismissed. Counsel argued that the fresh evidence did not contradict the core issue that the incident occurred in the manner asserted by the complainant. The complainant's version was supported by the officer who witnessed the incident, who said that the touching was not accidental.

*Held*, Conviction set aside; appeal allowed.

It was clear that the Hearing Officer misapprehended significant aspects of the testimony. For example, the Hearing Officer concluded that the conflict about the date of the incident did not matter. That conclusion was erroneous. The date was of major significance as it related to the essential matter of the credibility of witnesses and the reliability of their testimony about events. The Hearing Officer did not demonstrate that he considered obvious inconsistencies or that he weighed them. He reached key conclusions that were unfounded.

In addition, the fresh evidence cast serious doubt upon the complainant's credibility and it undermined several factual findings. For example, contrary to the complainant's position in his civil suit, the Hearing Officer described Cst. Gardner and the complainant as agreeing that they had a good working relationship with no negative history.

The fresh evidence indicated that the complainant was neither forthright nor honest in some of his testimony under oath. He withheld disclosure of critical evidence to counsel for both sides. His testimony, which the Hearing Officer had preferred, now had to be viewed with great scepticism given the discrepancies between his evidence at the hearing and the claims revealed by the new evidence.

In light of the new evidence, the standard of proof in disciplinary hearings, clear and convincing evidence, could not be met and the conviction could not stand.

Statutes cited

*Police Services Act* R.S.O. 1990, c.P.15 as amended, ss. 70(2) and 70(5)

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

*Statutory Powers Procedure Act* R.S.O. 1990, c.S.22 as amended, s. 4.1

Authorities cited

**Palmer v. Her Majesty the Queen** (1980) 1 S.C.R. 759 (SCC)

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

**Wilson and Ontario Provincial Police** (Nov. 20, 2006, OCCPS #06-11)

[Further authorities as submitted by the parties may be found at pp. 6-8 of the decision.]