

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE WENDY GARDNER

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

Presiding Members:

David Edwards, Member
Hyacinthe Miller, Member

Appearances:

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

Hearing Date: November 21, 2008

This is an appeal from a finding of guilt made on April 16, 2007 against Constable Gardner by Superintendent M. Elbers (the "Hearing Officer") on one count of discreditable conduct contrary to section 2(1)(a)(xi) of the Code of Conduct (the "Code") found at Ontario Regulation 123/98.

As well, this is an appeal from the penalty imposed, being forfeiture of forty hours.

Background:

Constable Gardner has been a constable with the Ontario Provincial Police (the "OPP") since 1998. The Particulars of the disciplinary allegation against her read:

On or about September 22, 2005 you were on duty, in uniform, working at the Listowel "Ploughing Match". During your time on duty you joined two other uniform members of the OPP standing at a traffic checkpoint in view of the public. At one point you approached one of these officers and grabbed him by his genitalia.

Constable Gardner pled not guilty to the charge. Her disciplinary hearing began on February 5, 2007 and continued on February 7 and 8, 2007.

The evidence at the hearing showed that during the week of September 19, 2005 the OPP had the responsibility of traffic control at the Listowel International Ploughing Match. Constable Gardner was assigned to this task, as was Constable Yves Lacasse, a six year member of the OPP. Constable Lacasse had known Constable Gardner for approximately three to three and a half years, having worked the Ploughing Match on two other occasions with Constable Gardner.

All of the OPP members assigned to this task received rental accommodation in Stratford. Constable Wilson was part of the OPP contingent. His room served as a meeting area for the members when off duty.

Constable Lacasse testified that he worked predominately at Checkpoint #6 and spent the majority of the week working with Constable Wilson.

Constable Lacasse and Constable Wilson testified that on September 22, 2005 they were working Checkpoint #6 together when Constable Gardner attended at that location. Constable Wilson further testified that they were leaning against a police cruiser. Both Constable Wilson and Lacasse testified that they were discussing the Simpson's and Seinfeld TV shows when Constable Gardner approached and spoke to Constable Lacasse and then with her right hand groped Constable Lacasse by his genitals, commenting, "By the way, how are the twins?" Constable Lacasse testified that he stepped back in surprise. Constable Wilson testified that Constable Gardner stated something to the effect of, "I'll look after the boys", or "Don't worry about the boys".

Constable Gardner testified that she worked Checkpoint #6 on Wednesday afternoon (September 21, 2006) with Constable Wilson and that Constable Lacasse attended at Checkpoint #6 for a visit. Constables Lacasse and Wilson were leaning against the police cruiser. They were joking about the Simpsons show and Constable Gardner, because of the traffic noise, leaned in to hear the punch line. At that time she said "What was that you said about jewels?" and accidentally the back of her thumb and forefinger came into contact with the front of Lacasse's pants.

She further testified that Constable Lacasse stated "Oh, you grabbed my crotch", and she replied: "sorry, I didn't mean to do that". Constables Lacasse and Wilson made some jokes about "checking out packages" which embarrassed Constable Gardner who left to continue to do traffic patrol nearby.

There was conflicting testimony about the events following the incident, including Constable Lacasse's interaction with Constable Gardner at the scene and later at the hotel in Stratford where they were staying.

The Hearing Officer found that there was no disagreement as to whether the incident occurred. The issue was whether the contact was intentional or accidental.

Although the evidence regarding the nature of the contact between Lacasse and Gardner was conflicting, the Hearing Officer concluded that it was intentional. Accordingly, he found Constable Gardner guilty of discreditable conduct. A penalty of forfeiture of forty hours was subsequently imposed.

Preliminary Proceedings:

Constable Gardner's appeal was scheduled to be heard on September 18, 2008. However, the Commission's Registrar was advised on September 17th that a hearing of the appeal may not be required. This resulted in a conference call between this Panel, both counsel and the Registrar, to discuss a possible consent order revoking the Hearing Officer's decisions.

We granted counsel until October 3rd 2008 to provide a written motion together with a factum as required by our Rules. Counsel were advised that we were of the view that we had a duty to determine whether the relief sought was reasonable based upon materials provided. We also asked for submissions as to our jurisdiction on the motion.

On October 3, 2008 the Commission received a written Notice of Motion requesting an order revoking both decisions of the Hearing Officer on consent of counsel. No factum or written argument accompanied the Notice. We directed that counsel had until November 15, 2008 to provide written material in support of their Motion which was scheduled to be argued on November 21, 2008.

We indicated that in the absence of such material the Motion would be denied and we would proceed with the appeal. Further, counsel was advised that if the material was filed and Motion denied the appeal would immediately follow.

This order was issued on October 31, 2008.

Motion to Revoke:

The requested material was filed and oral argument on the Motion was heard on November 21, 2008.

Ms. Simone, with the consent of Ms. O'Donnell, requested that we revoke the decision of the Hearing Officer dated April 16, 2007 convicting Constable Gardner of misconduct and the decision as to penalty dated June 27, 2007.

The reason for this request was new evidence that came to light shortly after the original discipline hearing that brought into question the credibility of Constable Lacasse. As the Hearing Officer relied heavily upon Constable Lacasse's credibility in reaching his findings of guilt, she asserted that it would be appropriate, in this unusual situation, to revoke the Hearing Officer's decisions.

She argued that section 4.1 of the Statutory Powers Procedures Act R.S.O. 1990, c. S.22 as amended (the "SPPA") authorized the Commission on the consent of both parties to dispose of this appeal without a hearing, notwithstanding section 70(2) of the Police Services Act R.S.O. 1990, c. P.15 as amended ("Act").

Alternatively, she asserted that as the Commission's Rules of Practice defined "hearing" to include a "motion hearing", this satisfied the requirement of the Act.

She submitted that the relief requested, namely a revocation of the Hearing Officer's decisions, was specifically permitted by section 70(6) of the Act.

Acknowledging that the process was unique, Ms. O'Donnell submitted that it was not the intention of counsel for the Commission to "rubber stamp" the motion. Rather, the materials provided in support of the Motion and the fact that both counsel were consenting made it reasonable for this panel to grant the relief requested.

Decision on Motion to Revoke:

Two provisions of the Act are helpful:

The Commission shall hold a hearing upon receiving a notice under subsection (1) from a police officer. section 70(2)

A hearing held under this section shall be an appeal on the record, but the Commission may receive new or additional evidence as it considers just. section 70(5)

Section 4.1 of the SPPA provides:

If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another Act or a regulation that applies to the proceeding provides otherwise.

It is quite clear that section 70(2) of the Act imposes a positive obligation upon the Commission to hold a hearing where a police officer appeals a hearing officer's decision. The word "hearing" is not defined in the Act. A hearing can take many shapes and forms. For example, the SPPA includes definitions of electronic hearings as well as written hearings.

In our view the critical element of a hearing, in the context of our appeal process, is that this Commission must consider the appeal in relation to the entire record. We must adjudicate the appeal on the basis of the record filed (subject to the rules with respect to admission of new or additional evidence).

This imposes an obligation upon the Commission to review all of the material of which the record is composed and, with input from counsel, arrive at a conclusion as to the appropriate relief, if any. If counsel have prepared a joint submission, it will be a factor for the Commission to consider in the course of the appeal.

Any procedure which truncates that process would not be appropriate.

The material submitted in support of the Motion raises doubts about the credibility of Constable Lacasse who was the complainant. However, the Hearing Officer did not rely solely upon Constable Lacasse's testimony to reach the conclusion as to Constable Gardner's guilt. The Hearing Officer relied substantially upon Constable Wilson's testimony and this testimony is not challenged by any material submitted.

It would be unreasonable in the face of Constable Wilson's testimony to grant the summary relief requested. The appropriate procedure must be to hold a hearing to consider the merits of the appeal in the context of the complete record and full argument.

Further, the relief requested on the Motion is revocation of the Hearing Officer's decisions. When asked for clarification, counsel indicated that they were not seeking a dismissal of the charge.

The Commission does not have the authority to order a re-hearing. We are concerned that if we revoke a decision without dismissing the charge, the possibility remains that a charge may remain outstanding and a subsequent hearing could be initiated.

We will not, by our action, permit something to occur indirectly, which we do not have the authority to order directly. In this situation, the fact that counsel for the Respondent and for the Appellant have consented to a motion does not relieve us of the responsibility to abide by the Act in exercising our powers.

For the reasons stated above, the Motion to revoke the Hearing Officer's decisions is therefore denied.

Motion to Admit New Evidence:

The Appellant then brought an application for an order to admit new evidence, which included the diary of Constable Lacasse, the police notebook of Constable Lacasse, a memorandum from Staff Sergeant Moffat dated October 11, 2005, numerous items arising from a civil action lodged by Constable Lacasse against the Appellant and certain documents relating to a subsequent discipline complaint against Constable Gardner.

Appellant's Position on the Motion:

Ms. Simone argued that the Hearing Officer's finding of guilt is flawed as he did not have the benefit of the new evidence before us at the time he made determinations of credibility.

She argued that the admission of the fresh evidence is essential to the Appellant's defence of the allegations and that such evidence existed, but was not disclosed, as requested, for the original hearing.

She asserted that admission of the fresh evidence was crucial to the interests of fairness and justice. She maintained that the Hearing Officer made a finding of fact on the credibility of Constable Lacasse believing he had no motive to lie, whereas the civil action which was brought against Constable Gardner clearly provided such a motive.

Ms. Simone argued that the Respondent had misled the Hearing Officer by not providing the handwritten notes of the complainant Constable Lacasse and by not providing disclosure of relevant documentation to the Appellant.

Further, various statements made by Constable Lacasse in the documentation related to his civil action against Constable Gardner contradicted his testimony in the hearing.

She suggested that Constable Lacasse's failure to disclose the handwritten diary at the discipline hearing, and then to disclose them for the civil action is sufficient reason to suspect his statement about being groped by Constable Gardner was contrived.

She argued that the fresh evidence satisfied the requirements for admission by the Commission.

Ms. Simone agreed to withdraw her request to admit the e-mail chains described at Tab G of Application Record for the Admission of New and Fresh Evidence of the Appellant, with the exception of items #15, 16 and 17.

Respondent's Position on the Motion:

Ms. O'Donnell objected to the e-mail chains described at Tab G with the exception of the e-mail chain designated as #15. She had no objection to the admission of the balance of new evidence submitted.

Decision on Motion to Admit New Evidence:

A hearing before the Commission pursuant to section 70(5) of the Act is an appeal on the record. The Commission, however, has the discretion to admit new or additional evidence as it considers "just".

The Act does not describe what factors are to be considered in assessing whether it is "just" to admit fresh evidence. In past cases the Commission has applied the four point test set out in the Supreme Court of Canada case of Palmer v. Her Majesty the Queen (1980) 1 S.C.R. 759.

We are of the view that all of the e-mail chains set forth at Tab G of Application Record for the Admission of New and Fresh Evidence of the Appellant with the exception of #15 are not admissible as they do not satisfy the Palmer test.

All other items submitted as fresh evidence do satisfy the test and are admissible.

Appeal:

Appellant's Position:

Ms. Simone argued that the Hearing Officer's conclusions were void of evidentiary foundation and ignored fundamental evidence. R. v. Morrissey (1995), 97 C.C.C. (3rd) 193 (O.C.A.)

She further suggested that the Hearing Officer erred by failing to address the inconsistencies and obvious conflicts in testimony. Further, by failing to assign "incriminating weight" to the inconsistent statements and differing accounts of events offered by the complainant and the prosecution witness, Constable Wilson, the Hearing

Officer shifted the onus to the Appellant to explain why the complainant would provide inaccurate testimony. R. v. S. (W) (1994), 90 C.C.C. (3rd) 242 (O.C.A.)

She asserted that the Hearing Officer erred by disregarding the positive evidence with respect to Constable Gardner and focused on testimony that bolstered the credibility of the complainant.

Ms. Simone argued that the Hearing Officer either ignored facts or misapprehended them. For example, Constable Gardner testified that she was partnered with Constable Wilson and that Constable Lacasse later joined them immediately prior to the incident. The Hearing Officer in his decision stated that Constable Gardner testified that she joined Constable Wilson and Lacasse.¹

As a further example, she drew our attention to the Hearing Officer's summation of Sergeant Moffatt's testimony.² At page 8 of the decision the Hearing Officer stated that "Moffat noted that Gardner admitted to the incident and that it was a mistake". The testimony of Moffatt was that Gardner, when asked about what happened, stated that the contact was an "accident" for which she had immediately apologized.³

Ms. Simone asserted that the Hearing Officer ignored the fact that Constables Wilson and Gardner both testified that Constable Wilson and Lacasse were leaning against the cruiser, whereas Constable Lacasse testified that he took a step back after the contact.

She argued that the date of the incident was a significant factor. The Hearing Officer noted the complaint intake form indicated the incident occurred on September 21st.⁴ Constable Gardner testified that the incident occurred in the afternoon on the 21st. On that day, she was partnered in the afternoon with Constable Wilson due to the early departure of her partner for court commitments in Windsor the following day.

Constable Lacasse testified that the incident occurred in the morning on September 22nd. Constable Wilson testified that the incident occurred in the afternoon.⁵ There were inconsistencies with regard to the weather conditions, which were sunny and mild on the 21st but cloudy in the morning and rainy late in the afternoon of the 22nd.

Ms. Simone submitted that the Hearing Officer ignored any inconsistencies between Constable Wilson's and Constable Lacasse's testimony. Furthermore, the new evidence showed significant inconsistencies between Constable Lacasse's testimony at the hearing and his subsequent position in the Statement of Claim for his civil law suit against Constable Gardner.

Throughout the disciplinary proceedings, Constable Lacasse had been requested to provide full and complete disclosure with respect to the allegations made. Responses to disclosure requests were provided by the Prosecutor. Constable Lacasse testified before the Hearing Officer that he had no other handwritten notes about the incident.

¹ Decision of Hearing Officer Elbers, dated April 16, 2007, page 8

² Memorandum dated October 11, 2005 from Sgt. Moffatt

³ Decision of Hearing Officer Elbers, dated April 16, 2007, page 8

⁴ Ibid., page 7

⁵ Transcript of Proceedings, Volume 1, page 91

The documentation produced for the civil action showed this to be false because in those proceedings he produced a diary which he claimed to have authored contemporaneously to the incident.

Constable Lacasse testified at the hearing that he had no issues with Constable Gardner before the incident or afterwards. His position in the civil suit was that she had sexually harassed him both before and after the incident.

Ms. Simone submitted that the Hearing Officer's fundamental finding with respect to Constable's Lacasse's credibility and lack of animus towards the Appellant was flawed since he did not have the benefit of this fresh evidence. In her view the Hearing Officer would never have reached the following conclusion if he had had the benefit of this information:

Lacasse and Wilson have no "axe to grind" with Gardner. There is no reason to lie or deceive anyone about the incident.⁶

According to Ms. Simone, Constable Lacasse had 50,000 reasons, referring to the amount sought in the civil suit.

Ms. Simone drew our attention to a number of cases which dealt with the credibility of witnesses and the proper limits of an appellate body to intervene if the trier of fact had inappropriately assessed the credibility of the witnesses. She noted that these are criminal law cases, but that the principles are applicable.

Regina v. Morrissey supra, R. v. W. (R) [R.W.] [1992] 2 S.C.R. 122 (S.C.C.), Regina v. M.G. (1994), 93 C.C.C. (3d) 347(O.C.A.), R. v. J.F. [2003] O.J. No. 3241 (O.C.A.), R. v. V. K. (1991), 68 C.C.C. (3d) 18 (B.C.C.A.), R. v. G.R.A. [1994] O.J. No. 2930 (O.C.A.), R. v. W.S. (1994), 90 C.C.C. (3d) 242 (O.C.A.), R. v. B. (R.W.) [1993] B.C.J. No. 758 (B.C.C.A.), R. v. Gostick (1999), 137 C.C.C. (3d) 53 (O.C.A.), Jagoo v. College of Physicians and Surgeons of Ontario [2000] O.J., No. 974 (Div. Ct.) and R. v. Strong [2001] O.J. No. 1362 (O.C.A.)

While the Commission's role on appeal is clearly recognized, Ms. Simone submitted it was open to us to reach a different decision than the trier of fact based on the totality of evidence. She asked us to allow the appeal and substitute our own decision that the Hearing Officer's findings should be overturned based on the lack of weighty, reliable, cogent evidence. Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

As to penalty, she argued that the Hearing Officer erred by failing to apply the correct principles and by penalizing Constable Gardner for requiring a hearing. In addition, the penalty was harsh and excessive.

⁶ Decision of Hearing Officer Elbers, dated April 16, 2007, page 10

Respondent's Position:

Ms. O'Donnell advised us that neither the OPP nor its counsel was aware of Constable Lacasse's diary until it was produced through the civil action. However, she submitted that nothing in the diary or other fresh evidence contradicted the core issue in the matter, namely the fact that the incident had occurred in the manner asserted by Constable Lacasse.

She argued that there was no dispute the incident occurred. The issue was whether it was intentional or accidental. Constable Wilson testified that it was not accidental. His credibility was not challenged by the fresh evidence and should be sufficient to constitute a foundation for the Hearing Officer's findings.

She asserted that the Hearing Officer considered the relevant factors and that the penalty was well within the range of penalties acceptable for this type of misconduct.

Ms. O'Donnell submitted that the Hearing Officer's decisions should be revoked, but that we should not dismiss the charge.

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 (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 therefore apply to the facts of this matter?

To our mind, it is clear that the Hearing Officer misapprehended several significant aspects of the testimony before him.

First, Constable Gardner testified that the day of the incident was September 21st and that Constable Wilson “came and said he was there to relieve Jones to help me with traffic. And when he came it was after, sometime after lunch.” She further testified that “at some point in the afternoon” Constable Lacasse drove his cruiser over to Checkpoint #6 and joined them⁷. She stated, “and then the joking around started with Constable Wilson and Constable Lacasse” and “we were laughing pretty hard”.

The Hearing Officer’s summation of the Appellant’s testimony was: “Constable Gardner testified that she attended the location of Check Point #6 and walked towards Wilson and Lacasse ...”⁸

Second, Sergeant Moffat testified that when he first confronted Constable Gardner with the allegation against her, she stated that the contact was an “accident”.⁹ In his decision dated April 17, 2007, the Hearing Officer summarized this testimony as follows:

Moffat testified on September 29, 2005 he disclosed the nature of the complaint to Provincial Constable Gardner. Moffat noted that Gardner admitted to the incident and that it was a mistake.

Third, there was conflicting testimony as to both the date of the incident and the weather conditions. Constable Lacasse testified that a storm occurred on September 23rd, whereas Constable Wilson, Constable Gardner and Constable Jones testified that it occurred on September 22nd in the afternoon.

There was evidence from Constable Gardner that on September 22nd due to the storm Sergeant Travis authorized the officers to return to the hotel to dry off and then go out to dinner.¹⁰ In support of this testimony a receipt from Kelsey’s restaurant dated September 22nd was attached as an exhibit.¹¹

Constable Gardner’s police notes for September 23rd indicate that the weather was sunny and the roads dry and clear.

Constable Lacasse testified that following a storm on September 23rd, at the end of their shift, officers returned to the hotel to change their clothes prior to going to Kelsey’s for dinner.¹²

The Hearing Officer summarized that evidence as follows:

We have heard evidence it was a clear day¹³ ...

⁷ Transcript of Proceedings, Volume 2, page 20

⁸ Decision of Hearing Officer Elbers, dated April 16, 2007, page 8

⁹ Transcript of Proceedings, Volume 2, page 136

¹⁰ Ibid, page 3

¹¹ Transcript of Proceedings, Volume 2, page 41

¹² Transcript of Proceedings, Volume 1, page 21

¹³ Decision of Hearing Officer Elbers, dated April 16, 2007, page 8

There was much testimony about the date of the incident. The Notice of Hearing indicates “on or about September 22, 2005. In my mind whether the incident occurred on the 21st or 22nd does not matter. The basis of the charges is covered with “on or about”.¹⁴

In our view, that conclusion was an error. The date of the incident is of major significance, not as it pertains to the particulars of the charge, but rather as it relates to the essential matter of the credibility of the witnesses recollecting the incident and the reliability of their testimony about events.

In his decision, the Hearing Officer did not demonstrate that he considered the accumulation of obvious inconsistencies. He failed to weigh them and reached key conclusions that were unfounded.

Leaving that aside, there is the matter of the new evidence that has become known since the Appellant’s conviction and that is now before us.

The Hearing Officer, in applying the O’Halloran test in assessing credibility, concluded the evidence of Constables Lacasse and Wilson was more in harmony with the preponderance of probabilities. However, the fresh evidence casts grave doubt upon the credibility and veracity of Constable Lacasse and undermines several findings of the Hearing Officer.

The Hearing Officer accepted the testimony of Constable Laccasse when it conflicted with Constable Gardner’s. It now seems very doubtful that any prudent trier of fact would accept the truth of the testimony that Constable Lacasse gave in this matter in light of the materials provided in September 2007 in his civil action.

Constable Lacasse testified at the disciplinary hearing that he had made no other handwritten notes of the incident¹⁵. Yet, in the civil action, via an affidavit sworn on December 3, 2007, Constable Lacasse submitted a “handwritten journal” for the period September 22, 2005 to June 27, 2007. It is obvious this journal had been created contemporaneously with the incident.

Constable Lacasse testified at the disciplinary hearing that he had experienced no “issues” with Constable Gardner prior to the incident or subsequent to the incident. In his subsequent civil action he stated that Constable Gardner had harassed him repeatedly both before and after the incident.¹⁶

On this point, we would note that the Hearing Officer commented:

I agree with Ms. Perruza when she stated the following:” On the evidence, there are a number of facts which are not in dispute. We know that Constable Lacasse and Constable Gardner have a good working relationship with no negative history. Constable Lacasse and Constable Gardner have agreed to this.

¹⁴ Ibid., page 9

¹⁵ Transcript of Proceedings, Volume 1, page 18-19

¹⁶ Statement of Claim of Yves Lacasse, dated September 18, 2007, page 4

Lacasse and Wilson have no “axe to grind” with Gardner. There is no reason to lie or deceive anyone about the incident.¹⁷

This finding cannot stand.

It is evident that the testimony of Constable Lacasse must now be viewed with great skepticism given the significant number of discrepancies between his testimony and the claims revealed by the fresh evidence. It appears that he was neither forthright nor honest in some of his assertions under oath. He withheld disclosure of critical evidence to the Appellant’s counsel and to the counsel for the OPP.

In any event, the standard of proof in police disciplinary hearings is “clear and convincing evidence”. In light of the new evidence before us, that standard cannot be met.

For the above noted reasons, the finding of guilt of April 16, 2007 cannot stand and is set aside.

DATED AT TORONTO THIS 12TH DAY OF DECEMBER, 2008.

David Edwards
Member, OCCPS

Hyacinthe Miller
Member, OCCPS

¹⁷ Decision of Hearing Officer Elbers, dated April 16, 2007, page 8