

ONTARIO CIVILIAN POLICE COMMISSION
DECISION ON A PRELIMINARY MOTION

Sergeant Ray Wiggers

Appellant
(Applicant on Motion)

Durham Regional Police Service

Respondent

Presiding Members:

Murray W. Chitra, Chair
Garth S. Goodhew, Member

Counsel:

David Butt, Counsel for the Appellant
Visha Sukdeo and Sheila Schweizer, Counsel for the
Respondent

Hearing Date: January 25, 2010

This is a motion brought on behalf of the Appellant, Sergeant Wiggers, for an order pursuant to section 25 (1)(b) of the Statutory Powers Procedure Act R.S.O. 1990, c. S.22, as amended ("SPPA").

The Respondent Durham Regional Police Service (the "Service") consents to the order requested. The parties filed joint materials on this motion.

The effect of the order sought would be to lift the automatic stay of the penalty of demotion from sergeant to first-class constable for the period of one year imposed by Staff Inspector Brian Fazackerley (the "Hearing Officer") on April 30, 2009, pending the outcome of Sergeant Wiggers' appeal.

The Appellant does not request a similar order with respect to the balance of the penalty (i.e. several conditions applying beyond the period of demotion), which remains the subject of this appeal.

We considered this motion in writing on January 25, 2010. That same day, we advised parties that the motion had been granted, with reasons to follow. These are those reasons.

Background:

On May 1, 1989, Sergeant Wiggers was hired as a fourth-class constable by the Service. On October 7, 2003 he became a sergeant and in January of 2007 was transferred to 15 Division.

In early September of 2007, Inspector Townley, the officer in charge of 15 Division, became concerned about the amount of leave taken by Sergeant Wiggers. As a result, an internal time management audit was initiated into Sergeant Wiggers' absences from work during the period January through to the fall of 2007. This audit found that during that time Sergeant Wiggers had taken over 140 hours of unaccounted time off work.

As a result, the Professional Standards Unit commenced a misconduct investigation in respect of the unaccounted hours. When he became aware of this investigation,

Sergeant Wiggers acknowledged wrongdoing, stating that he had personal problems and needed help with substance abuse.

On February 4, 2009, Sergeant Wiggers was served with a Notice of Hearing which read:

You are alleged to have committed misconduct in that you, on or between January 1 and September 30, 2007 acted in a manner likely to bring discredit upon the reputation of the police force, thereby committing the offence of Discreditable Conduct, contrary to Part V, clause 74 (1)(a) of the Police Services Act, R.S.O. 1990, c.15, as amended, and clause 2 (1)(a)(xi) of the Schedule Code of Conduct, O. Reg.123/98, as amended, under the Police Services Act.

The Notice further alleged that during the period in question Sergeant Wiggers had been absent from work or booked time off during a scheduled shift for a total of 164.5 hours without proper time bank accounting.

When the disciplinary hearing convened on March 12, 2009, Sergeant Wiggers pled guilty. An Agreed Statement of Facts describing a series of incidents involving 165 hours (later amended to 161 hours) of workplace "time theft" was tendered by the prosecution and adopted as substantially correct by Sergeant Wiggers. On the basis of this the Hearing Officer accepted the guilty plea and convicted Sergeant Wiggers of one count of discreditable conduct.

A penalty hearing was held on March 12, April 7, and April 8, 2009. Evidence was introduced establishing the extensive record of Sergeant Wiggers' unreported absenteeism. Medical experts testified about related medical issues, including the abuse of alcohol which was seen to be a factor in the absenteeism.

On April 30, 2009 the Hearing Officer released a decision imposing the following penalty:

- (1) A demotion from sergeant to first-class constable for a period of one year effective May 3, 2009, following which period he would revert to the rank of sergeant; and,
- (2) Reinstatement to duty was subject to eight conditions.

Significantly, a number of the conditions referred to above were to apply beyond the period of his demotion.

On May 4, 2009 Sergeant Wiggers filed a notice of appeal from the penalty imposed by the Hearing Officer. Pursuant to section 25 (1)(b) of the SPPA, the commencement of Sergeant Wiggers' appeal effected an automatic stay of the demotion imposed by the Hearing Officer.

On January 15, 2010 the parties filed this motion with the Commission jointly requesting an order lifting the automatic stay of the Appellant's one year demotion so that he could begin serving it.

The Appellant also filed a notice of partial abandonment of appeal with the Commission. The effect of this was that Sergeant Wiggers formally discontinued his appeal with respect to the demotion, leaving only the issue of the conditions outstanding.

The Motion:

The Service supported the granting of the order requested on this motion and joins in the submissions made by Mr. Butt on behalf of the Appellant.

In his factum Mr. Butt argued that under section 25(1)(b) of the SPPA the Commission has jurisdiction to lift a stay of a decision at a disciplinary hearing pending an appeal.

Section 25(1)(b) reads:

An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless the tribunal or the court or other appellate body orders otherwise.

Mr. Butt cited a decision of the Commission, Kyle and York Regional Police Service (November 29, 2002, O.C.P.C.). In Kyle after considering section 25 (1) of the SPPA and relevant jurisprudence, the Commission concluded that it has the authority to order that an automatic stay of a penalty pending appeal be lifted.

Mr. Butt also referred to Kyle to identify criteria that the Commission should consider when deciding whether to lift a stay of a penalty. He pointed out that on page 7 of the Kyle decision the Commission stated,

If an appeal on the face of it is frivolous or vexatious then section 25 should not be permitted to be used by an officer as a shield against the timely application of a proper disciplinary penalty. On the other hand, if the lifting of the stay would have the practical effect of rendering an appeal meaningless in a particular situation then a police employer should not be allowed to use section 25 to frustrate an officer's entitlement to seek appellate relief from the Commission.

Other factors that the Commission considered in the Kyle case were the presence or absence of prejudice, and the merits of the appeal.

Mr. Butt argued that Sergeant Wiggers' appeal is neither frivolous nor vexatious. He noted that his client is not trying to delay serving his penalty; on the contrary, the Appellant seeks to have the stay lifted so that he can start serving the demotion right away. Mr. Butt also pointed out that the Service does not wish to frustrate Sergeant Wiggers' wish to appeal but rather supported his desire to begin serving the demotion as soon as possible.

Mr. Butt submitted that in the Kyle decision the Commission stated that the presence or absence of prejudice is an important consideration when determining whether to lift a stay pending appeal. He argued that Sergeant Wiggers would be prejudiced if the stay was not lifted.

Mr. Butt drew our attention to the evidence that it is the practice of the Service to promote its personnel at the beginning of each year (i.e., in January), and he noted that a denial of the request to lift the stay pending appeal could result in unfairly delaying Sergeant Wiggers' reinstatement to the rank of sergeant until 2012 (that is, for longer than the year imposed by the Hearing Officer).

As noted above, in the Kyle case the Commission stated that the merits of an appeal are a relevant consideration on this motion. Mr. Butt argued that this factor does not apply because the Appellant had abandoned his appeal of the one year demotion.

Mr. Butt noted that should the stay be lifted, the appeal with respect to the ongoing conditions imposed by the Hearing Officer could be decided by the Commission while his client serves his demotion.

Decision:

Section 25 (1) of the SPPA reads as follows:

25 (1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay unless,

- (a) another Act or regulation that applies to the proceeding expressly provides to the contrary; or
- (b) the tribunal or the court or other appellate body orders otherwise.

As stated in Kyle, the term "tribunal" is defined in section 1 of the SPPA to mean "one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute."

There is no doubt that a hearing officer conducting a disciplinary proceeding under section 64 of the Police Services Act R.S.O. 1990, c. P.15 as amended (the "Act"), or imposing a penalty under section 68 of the Act, qualifies as a "tribunal" within the meaning of section 25 (1) of the SPPA. Further, in deciding an appeal pursuant to section 70 of the Act, the Commission is an "appellate body" within the same provision.

Clearly, when acting as an appellate body under section 70 of the Act, the Commission has jurisdiction to decide whether to grant a request to lift an automatic stay pending appeal of a penalty imposed at a disciplinary hearing. In this case, the penalty in question is a one year demotion from the rank of sergeant to the rank of first-class constable.

Mr Butt submitted that Sergeant Wiggers' appeal is neither frivolous nor vexatious. We agree.

Further, Sergeant Wiggers is not attempting to delay the serving of his demotion but rather is asking to be permitted to serve it right away. It is also important to note that Sergeant Wiggers has abandoned his appeal of that demotion, and the Service supports the request to lift the

stay so that Sergeant Wiggers may begin serving his demotion as soon as possible.

We also accept Mr. Butt's argument that a denial of the request to lift the stay could cause prejudice to Sergeant Wiggers. The record on this motion persuades us that, given the promotion practices of the Service, a refusal to lift the stay on the demotion could lead to Sergeant Wiggers not being reinstated to the rank of sergeant until 2012, which in effect would extend the duration of the demotion well beyond that imposed by the Hearing Officer.

We accept Mr. Butt's argument that lifting the stay on the demotion in this case would not adversely impact our consideration of the merits of Sergeant Wigger's appeal of the conditions attached by the Hearing Officer to his ongoing employment with the Service.

In summary, it is clear that the Commission has jurisdiction to lift the stay on the one year demotion imposed by the Hearing Officer. As well, we accept the submissions of Mr. Butt, made on behalf of both Sergeant Wiggers and the Service, that this is a proper case for the Commission to lift the stay.

For these reasons we are satisfied that the integrity of the disciplinary process would be best served by lifting the automatic stay of the one year demotion imposed by the Hearing Officer.

Accordingly, this motion is granted.

Dated at Toronto this 23rd Day of March 2010.

Murray W. Chitra
Chair, OCPC

Garth S. Goodhew
Member, OCPC