

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

CONSTABLE CHRIS MAGUIRE

Appellant

PETERBOROUGH-LAKEFIELD COMMUNITY POLICE SERVICE

Respondent

Presiding Members:

Murray W. Chitra, Chair
Garth Goodhew, Member

Appearances:

David Butt, Counsel for the Appellant
Glenn P. Christie, Counsel for the Respondent

Hearing Date: Tuesday, June 17, 2008

Constable Chris Maguire appeals the penalty of loss of five days imposed against him on September 7, 2007 by Superintendent (retired) Robert J. Fitches (the "Hearing Officer"), following a finding of guilt for one count of neglect of duty contrary to section 2(1)(c)(ii) of the Code of Conduct found at Ontario Regulation 123/98 (the "Code").

Background:

The Appellant was charged on September 29, 2006 with a single count of neglect of duty for failing to work in accordance with orders.

The allegations against him read: "Between August 1, 2006, and August 23, 2006, Constable Chris Maguire failed to ensure that the appropriate Crown Brief package was submitted prior to the fingerprint date and the court date on incident PB03013311, Arrest, as required by Peterborough-Lakefield Community Police Service General Orders LE-005 and LE-059."

The circumstances leading to this charge are not in dispute.

On August 1, 2006, Constable Maguire arrested a woman on an outstanding warrant issued when she was a young offender. Before he released the woman, Constable Maguire asked Staff Sergeant Hawthorne if she should be returned to Adult or Youth Court.

Staff Sergeant Hawthorne mistakenly advised Constable Maguire that the woman should be returned to Adult Court. Constable Maguire released her from custody to re-

attend for fingerprinting on August 15, 2006 and to appear in Adult Court on August 24, 2006.

On August 15, 2006, the woman returned to the police station for fingerprinting as required. On August 23, 2006, she showed up at Adult Court, stating that she had lost her copy of the documents setting out the date for her court appearance. The Court Officer, Constable John Crowe, made inquiries.

He discovered that while the woman's court appearance was set for the following day, she had been returned to the wrong court. As a result, Constable Maguire served the woman with a new appearance notice, with a date of September 18, 2006, this time, for Youth Court.

During the various inquiries related to this matter, it was determined that Constable Maguire had not completed and submitted the required Crown Brief package. Section 4.4 of General Order LE-005 (the "Order") reads:

In all cases of arrest, the officer shall ensure that appropriate documentation and record checks are completed, including completing and submitting an Arrest Report which outlines the details of the arrest and information on the arrested person prior to the fingerprint date and court date.

Constable Maguire was advised. He explained that he had simply forgotten. Constable Maguire subsequently completed a Crown Brief package for Youth Court and submitted it on September 1, 2006.

As a result of the above, an internal complaint was initiated and Constable Maguire was charged with neglect of duty for his failure to complete and submit the Arrest Report.

The Hearing:

Constable Maguire's disciplinary hearing commenced on June 18, 2007. Constable Jeff Chartier appeared on behalf of Constable Maguire. Mr. Glenn P. Christie appeared on behalf of the Service.

The parties asked the Hearing Officer to provide an interpretation of section 4.4 of the Order. After his ruling, the Hearing Officer raised another preliminary issue. This matter was whether Constable Maguire's alleged conduct, if proven, fell within the parameters of neglect of duty, or was a performance issue.

The Hearing Officer asked for written submissions focusing on the principles set out in P.G. v. Ontario (Attorney General) [1996] O.J. No. 1298 (Ont. Div. Ct.). After considering the parties' written material the Hearing Officer found that Constable Maguire's alleged conduct, if proved, "crossed the line" from a performance issue to a disciplinary matter.

The Hearing Officer then proceeded to hear evidence. Constable John Crowe and Sergeant Lynne Buehler testified for the Service. Eight exhibits were received. No witnesses were called for Constable Maguire. Mr. Christie and Constable Chartier presented oral arguments.

On July 18, 2007, the Hearing Officer released a seven page written decision. He set out the allegation against Constable Maguire and reviewed the evidence. The Hearing Officer stated that the basic question before him was whether Constable Maguire submitted an Arrest Report prior to the fingerprint date (August 15, 2006). He found that the Constable did not.

The Hearing Officer considered the Order in context. He stated that for the administration of justice to work as smoothly and efficiently as possible, it is necessary that all pertinent information be in the hands of appropriate individuals at appropriate times. He concluded that this is the purpose of the Order. He further found that as an experienced officer Constable Maguire must have known the importance of the Arrest Report, and that, after an arrest, completing such a report was one of the first tasks to be attended to by an officer.

After weighing the evidence and applying the case law, the Hearing Officer concluded on the basis of clear and convincing evidence that Constable Maguire had failed to fulfill the requirements of the Order and found him guilty of neglect of duty.

Submissions on penalty were received.

On behalf of the Service, Mr. Christie noted that Constable Maguire had a prior disciplinary history. This included a finding of discreditable conduct in January of 2005 which resulted in a penalty of four days. As well, in September of that same year Constable Maguire was admonished for being late and neglecting his duty. The latter arose from an earlier failure to submit a Crown Brief package.

Mr. Christie suggested that Constable Maguire had not accepted responsibility for his failure to complete the Arrest Report. Mr. Christie submitted that the evidentiary record and the Appellant's work and disciplinary histories suggested a sanction that would encourage Constable Maguire to improve his performance. Mr. Christie submitted that a penalty of ten days would be appropriate.

On behalf of Constable Maguire, Constable Chartier submitted that the record established that the Appellant had a very good work history. He pointed out that the administration of justice was not affected by Constable Maguire's failure to complete the Arrest Report: the subject returned for fingerprinting and by the time she appeared in Youth Court the required Arrest Report had been submitted.

Constable Chartier acknowledged that the Appellant had a previous disciplinary offence for breaching the Order. This prior offence was resolved informally with a verbal reprimand. Constable Chartier indicated that he had not been able to find any precedent for a penalty for a second offence for similar conduct.

On September 7, 2007, the Hearing Officer released a six page penalty decision. Given all the circumstances, including the importance of encouraging Constable Maguire to rehabilitate himself, the prior disciplinary history and specific deterrence, the Hearing Officer imposed a penalty of a loss of five days time off.

It is that penalty which is the subject of this appeal.

Appellant's Position:

Mr. David Butt appeared for Constable Maguire.

Mr. Butt argued that the sanction imposed by the Hearing Officer should be reduced to a penalty in the range of three to sixteen hours.

Mr. Butt accepted that a very high standard of review applies in a penalty appeal. He referred us to Blackburn and Niagara Regional Police Service (September 17, 2003, O.C.C.P.S.). He submitted that on an appeal from penalty the Commission grants significant deference to the decision of the Hearing Officer. The Commission must find a manifest error in principle, or that relevant factors have been ignored before it will interfere with a hearing officer's decision.

Mr. Butt argued that the five day penalty reflected a manifest error because the Hearing Officer based his decision on Constable Maguire's entire disciplinary history rather than only on the Appellant's prior breach of the Order, which was resolved informally with a verbal reprimand.

Mr. Butt submitted that by choosing the wrong basis for the penalty, the Hearing Officer imposed a sanction that was grossly disproportionate to the seriousness of the Appellant's offence, and thus erred in law.

Mr. Butt also argued that the Hearing Officer misapplied two relevant legal principles: "the jump principle" and "the like cases must be treated alike principle". If the Hearing Officer had correctly applied these principles, Mr. Butt argued, an appropriate penalty would be in the range of one day. Such a penalty would have been a "jump" from the previous verbal reprimand and both instances of "like" misconduct would have been treated similarly.

Mr. Butt further argued that the Hearing Officer erred when he failed to give proper weight to the fact that no harm resulted from Constable Maguire's failure to submit the court package as required by the Order. He pointed out that on page 4 of his penalty decision the Hearing Officer wrote "That there was little if any actual impact upon the administration of justice in this matter is really of little consequence."

Mr. Butt argued that the Hearing Officer's conclusion that the absence of adverse consequences was irrelevant to penalty was a startling proposition. He stated that while the lack of adverse consequences does not excuse misconduct, behaviour which occasions no harm is manifestly less serious than behaviour that does.

In summary, Mr. Butt argued that the Hearing Officer's five day penalty reflected manifest error, was disproportionate and excessive, and should be varied as noted above.

Respondent's Position:

Mr. Christie, on behalf of the Service, submitted that the penalty was appropriate and should not be varied.

Mr. Christie suggested that there were two principle issues in this appeal: first, what is the standard of review; and, second, did the Hearing Officer err in assessing a five day penalty?

On the issue of the standard of review, Mr. Christie referred us to Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.) and Byrne and Ontario Provincial Police (October 9, 2007, O.C.C.P.S.).

Mr. Christie argued that a more stringent standard of review applies in an appeal from penalty. He submitted that in an appeal from penalty alone the Commission must show even greater deference to the decision of the Hearing Officer. In support of this argument Mr. Christie cited Blackburn and Niagara Regional Police Service (September 17, 2003, O.C.C.P.S.).

Mr. Christie then addressed his second issue: did the Hearing Officer err in assessing a five day penalty? In answering in the negative, Mr. Christie stated that the Hearing Officer identified and considered all of the relevant sentencing principles and applied them appropriately. Furthermore, Mr. Christie argued that the Hearing Officer did not consider or apply any irrelevant factors.

Mr. Christie addressed the issue of progressive discipline. In particular, he responded to Mr. Butt's submission that the Hearing Officer gave undue weight to Constable Maguire's prior disciplinary record and that unrelated acts of prior misconduct should not be taken into account when determining progressive discipline.

It is clear in law, Mr. Christie submitted, that in imposing progressive discipline a hearing officer is not limited to considering only related acts of misconduct; instead, he or she must consider an officer's entire disciplinary history.

Mr. Christie noted that Constable Maguire's prior disciplinary record included a conviction for discreditable conduct, together with a prior breach of the Order which was resolved informally by a verbal reprimand.

Mr. Christie argued that in Byrne and Ontario Provincial Police, supra, the Commission found that an officer's entire disciplinary history is a relevant factor when deciding a penalty. Mr. Christie noted that in this case, the Commission disagreed with a hearing officer who found that "unrelated" prior discipline was irrelevant to a decision on the penalty for subsequent misconduct.

He further argued that the fact that earlier penalties have not modified behaviour is one of the main reasons for imposing progressively more severe penalties. Mr. Christie argued that the essence of employee discipline is that penalties are intended to encourage employees to improve their job performance. He further argued that the severity of a penalty will increase if it can be shown that prior penalties have not had the desired effect of improving performance.

Mr. Christie submitted that, if Mr. Butt's logic was applied, police officers would be entitled to the lowest range of penalty for each of a long series of acts of unrelated misconduct, serious or otherwise. Further, Mr. Christie argued that penalties would not increase in severity until there were repeated instances of identical misconduct. At the least, such a process would undermine any specific deterrent effect.

In conclusion, Mr. Christie argued that the Hearing Officer applied the correct approach to progressive discipline and specific deterrence. The Hearing Officer did not err when he considered Constable Maguire's entire disciplinary history. The penalty imposed was based on the relevant sentencing factors and was appropriate in all the circumstances.

As a result, Mr. Christie submitted, this appeal should be dismissed.

Decision:

The issue on this appeal is whether the penalty of loss of five days imposed by the Hearing Officer should be reduced because it reflects manifest error, or is excessive and disproportionate to the misconduct involved.

When hearing an appeal from a penalty the role of the Commission is clear. It is not to substitute our opinion for that of the Hearing Officer. Rather, it is to assess whether the Hearing Officer applied the correct dispositional principles in a fair and impartial manner.

We may vary a penalty only if we find that it is unreasonable, fails to consider all relevant matters, demonstrates a manifest error in principle, or would amount to an injustice: Williams and Ontario Provincial Police, supra, and Blackburn and Niagara Regional Police Service, supra.

The factors to be taken into account by a Hearing Officer when imposing a penalty are well established. There are three key elements to be considered. These 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 service.

There are other factors to be considered in light of particular misconduct. These include:

- recognition of the seriousness of the misconduct;
- employment record; and,
- public interest in the administration of justice.

Additional relevant factors can include management's approach to the misconduct in question, general or specific deterrence, and the need for consistency. Reilly and Brockville Police Service (1997), 3 O.P.R. 1163 (O.C.C.P.S.), and Schofield and Metropolitan Toronto Police Service (1984), 2 O.P.R. 613 (O.P.C.)

The Hearing Officer's reasons on penalty identified all of the above factors.

He concluded that "in the grand scheme of things" Constable Maguire's conduct in this particular instance did not amount to serious misconduct. On the question of the potential for reform he expressed the "strong belief" that Constable Maguire had a "high potential" for rehabilitation.

However, when the Hearing Officer examined the conduct in question together with Constable Maguire's prior employment history, he expressed concern that the Appellant had not taken earlier disciplinary actions seriously. In particular, the Hearing Officer was concerned that the penalties imposed on Constable Maguire in respect of his prior misconduct had not persuaded him to comply with orders.

At page 3 of his penalty decision the Hearing Officer wrote:

At first blush, one might be tempted to presume that the behaviour that gave rise to these allegations was such that this matter ought not to have found its way into a hearing room. Upon closer examination of all the pertinent facts, however, one realizes that these allegations are part of a continuum of behaviours that Constable Maguire has exhibited over the past two to three years that must be dealt with in some constructive fashion. It is obvious the police service is attempting to assist Constable Maguire in identifying his neglect in order that he might choose to correct his course ...

This is both a reasonable and fair observation.

The Hearing Officer considered Constable Maguire's employment record. On the one hand Constable Maguire's work performance was considered to be good. On the other hand, Constable Maguire's disciplinary record consisted of two informal reprimands, and a conviction for discreditable conduct. One of the informal reprimands was imposed for not submitting a Court Brief package on time, identical to the misconduct in this case.

The Hearing Officer noted at page 4 of his decision that: "in 2004 or 2005, it appears that his performance might have slid off the rails somewhat and it also appears that this less than stellar performance continued until at least the summer of 2006."

The Hearing Officer then wrote at pages 5 and 6:

It is important that this disposition reflect, to the degree possible, the fact situation, along with the career and discipline history ... I consider Constable Maguire's career history to be a mitigating factor. Unfortunately,

the discipline history aggravates, and seriously impairs my ability to mitigate in a substantial fashion ... The single most important aggravating factor, in my view, is the fact that Constable Maguire has conducted himself in a similar fashion in the past.

The Hearing Officer commended the Service for working with Constable Maguire and expressed the hope that he will learn to recognize the need to attend to detail and recognize the importance of maintaining a high level of diligence in the administrative side of his duties.

The Hearing Officer expressed concern that Constable Maguire did not appear to acknowledge his misconduct "and was more interested in aiming blame at others". However, he acknowledged at page 4 of his decision that at the conclusion of the hearing that Constable Maguire "stood before me and indicated quite clearly for the record that he had accepted that what had occurred was not right and apologized. He also indicated for the record that he was a proud member of this service and I take him at his word."

The Hearing Officer found that both general and specific deterrence were important factors when deciding the penalty in this case. We agree. The first time Constable Maguire breached the Order a verbal reprimand was imposed following informal resolution. Obviously, the verbal reprimand did not deter Constable Maguire from breaching the Order a second time.

Regarding the public interest, the Hearing Officer found that the public clearly has an interest in the proper administration of justice. The consistent failure of an officer to submit documents required for court proceedings on time would undermine this important public interest and waste scarce court resources. In our view the record supports the Hearing Officer's concern about a pattern of conduct on Constable Maguire's part which could have adverse consequences on the administration of justice.

The Hearing Officer acknowledged that Constable Maguire's failure to comply with the Order had little adverse impact on the charges brought against the woman in question. The Hearing Officer also considered damage to the Service's reputation. He found that there was little if any damage to the Service's reputation flowing from Constable Maguire's misconduct, but that there was potential for significant damage if Constable Maguire did not reform his conduct. In our view given the record this was a reasonable finding for the Hearing Officer to make.

Mr. Butt argued that the Hearing Officer erred because the penalty was not based directly and solely on the verbal reprimand received by Constable Maguire for his prior failure to comply with the Order. Mr. Butt also argued that deciding the penalty after considering Constable Maguire's complete disciplinary history resulted in an excessive penalty which bore no responsible relationship to the present misconduct.

We do not agree.

The Commission found in Byrne and Ontario Provincial Police, supra, a constable's entire disciplinary history is a relevant consideration when deciding penalty. Page 13 of that decision stated:

... it would also appear to us that there were factors that were understated by the Hearing Officer. They concern Constable Byrne's prior disciplinary history. On June 25, 2004 Constable Byrne was informally disciplined for disrespectful and profane comments directed towards his police partner and a member of the public. These comments were made May 15, 2003. As a result, Constable Byrne forfeited eight hours of banked time. ...Further we also note that Constable Byrne pled guilty to the disciplinary offence of neglect of duty contrary to section 2(1)(c)(i) of the Code on April 7, 2005. This arose from the failure of Constable Byrne during the summer of 2003 to initiate charges of driving while suspended against a motorist as directed. The penalty imposed was 24 hours. The Hearing Officer appeared to be of the view that these matters were irrelevant to the proceedings before him. We do not agree ...

It is important to note that the Hearing Officer was presiding over an employment related disciplinary proceeding, not a criminal trial. A key purpose of a penalty imposed after a finding of misconduct is to educate the officer, to encourage and assist him or her to reform, to improve the performance of duty and to comply with all orders.

In our view consideration of a constable's entire employment record is part of the process by which a just penalty is decided. This is particularly the case where the officer has a number of recent disciplinary sanctions that demonstrate performance deficiencies. This is the essence of progressive discipline.

The Hearing Officer addressed consistency of penalty. He found that a sanction must reflect the misconduct in question together with all relevant sentencing principles, and it must be as consistent as possible with penalties imposed for similar misconduct. Romanic and Niagara Regional Police Service (1998), 3 O.P.R. 1272 (O.C.C.P.S.) and Hayward and Sarnia Police (1987), 2 O.P.R. 762 (O.P.C.)

The penalty of five days was decided after the Hearing Officer considered the relevant factors. In our view, the penalty was within the range available to him.

In conclusion, it is our view that the Hearing Officer did not err when he considered the potential for harm resulting from the Constable's misconduct. The record supports the Hearing Officer's concerns arising from the Constable's prior disciplinary history, including a verbal reprimand for failing to comply with the Order. This is an employment related hearing. The record establishes that the Constable's job performance did not improve despite previous penalties, including for the same misconduct. The Hearing Officer's penalty reflects the remedial nature of the discipline process, and of the Service's desire to encourage Constable Maguire to improve his job performance.

We find that the Hearing Officer identified the relevant sentencing principles and applied them in a fair and impartial manner. Further, we find that the Hearing Officer did not err

when he took the Constable's entire employment record into consideration in deciding the penalty. It is our view that the penalty does not reflect any manifest error.

For all of the above reasons this appeal is dismissed.

DATED AT TORONTO THIS 28TH DAY OF JULY 2008.

Murray Chitra
Chair, OCCPS

Garth Goodhew
Member, OCCPS