

Ontario Police Arbitration and Adjudication Commission

In the matter of an Appeal from a Decision of a Hearing Officer dated January 22, 2024 and an Appeal from the Disposition of a Hearing Officer dated March 21, 2024 pursuant to s. 87 of the *Police Services Act* and s. 216 of the *Community Safety and Policing Act, 2019*.

Between:

Constable Pierre Fournier

Appellant

and

Ottawa Police Service

Respondent

MOTION ORDER

ADJUDICATOR: **Colin Osterberg**

APPEARANCES:

For the Appellant: Self-represented

For the Respondent: S. Cleroux, Counsel

Held by videoconference: October 15, 2024

BACKGROUND

- [1] The appellant has appealed the Decision dated January 22, 2024 (“Misconduct Decision”) and Disposition (“Penalty Decision”) dated March 21, 2024 of the Hearing Officer, Superintendent (retired) C. Renwick. After a five-day hearing, the Hearing Officer found the appellant guilty of discreditable conduct. In the Penalty Decision, the appellant was ordered to forfeit 10 days’ pay (80 hours). This appeal is before the Ontario Police Arbitration and Adjudication Commission (the “Commission”) pursuant to s. 216(4) of the *Community Safety and Policing Act, 2019*, S.O. 2019, c. 1, Sched. 1 (the “Act”).
- [2] A pre-hearing conference was commenced on July 16, 2024. The appellant advised at the pre-hearing conference that the transcripts of the proceedings before the Hearing Officer have not been ordered. The appellant requested that he be allowed to proceed to a hearing in this appeal without being required to order the transcripts. He asked that, rather than transcripts, he be allowed to rely on the recordings of the hearing which are already in his possession or to present that evidence is some other way.
- [3] The parties agreed that the question of whether the appeal may proceed without requiring the appellant to order all of the hearing transcripts be determined by way of motion to be brought by the appellant and that motion was heard by videoconference on October 15, 2024.
- [4] Rule 34.3 of the Ontario Civilian Police Commission Rules of Practice (the “Rules of Practice”) states that:

The appellant shall provide to the parties [and] the Commission...a copy of the portions of the transcript, if any, of the disciplinary hearing upon which the appellant intends to rely.
- [5] The respondent takes the position that, in order to be allowed to proceed with the appeal, the appellant is required to order the transcripts in accordance with Rule 34 of the Rules of Practice.
- [6] The respondent argues that, because the appellant has not ordered the transcripts in accordance with the Rules of Practice the appeal should be dismissed
- [7] The appellant takes the position that, rather than ordering the transcripts, he should be allowed to file the audio recordings of the hearing. He argues that, if the audio recordings are submitted, the transcripts are not necessary and his appeal should be allowed to proceed without them.

ISSUES

[8] The issues on this motion are as follows:

- i. Should the Appellant be required to order transcripts rather than be allowed to rely on audio recordings of the evidence he intends to rely upon in the appeal?
- ii. If yes, what is the consequence of the failure to order transcripts?

[9] Should the Penalty Decision be dismissed as the result of the appellant's failure to order transcripts of the hearing?

RESULT

[10] I find that, to proceed with the appeal of the Misconduct Decision the appellant must order the transcripts of that hearing in compliance with the Rules of Practice.

[11] I find that the appellant may proceed with his appeal of the Penalty Decision without ordering transcripts on the terms set out in the Order below.

ANALYSIS

Misconduct Decision

[12] Rule 34.3 of the Rules of Practice states that the appellant bears the responsibility for providing the parties and the Commission a copy of the portions of the transcript, if any, of the disciplinary hearing upon which the appellant intends to rely.

[13] The respondent argues that, in addition to the fact that the Rules of Practice require that the appellant provide the transcripts of the hearing, the appeal that has been commenced by the appellant cannot be properly adjudicated without access to the transcript.

[14] The appellant concedes that he requires that the evidence at the hearing must be before the Commission in order that the appeal can be properly adjudicated. However, the appellant argues that the audio recordings of the hearing are sufficient for that purpose and that the transcript itself is not necessary.

- [15] In my view, the issues raised by the appellant in the appeal of the Misconduct Decision require that the evidence presented at the hearing be before the Commission. The issues raised by the appellant include the following:
- i. Whether the hearing officer erred in finding that the public complainants were under arrest and therefore entitled to receive their Rights to Counsel;
 - ii. Whether the investigation into the appellant's conduct was deficient;
 - iii. Whether the investigators and the Hearing Officer ought to have accepted the evidence of the public complainants over the appellant's own evidence;
 - iv. Whether there was relevant evidence given at the hearing which the Hearing Officer should have considered but did not and which amounted to a reversible error ;
 - v. Whether the Hearing Officer wrongly characterized the appellant as a bully when there was evidence tendered by the appellant that showed he was not; and
 - vi. Whether the Hearing Officer erred by allowing the public complainants, who were under 18 years of age, to testify by video conferencing.
- [16] The appellant also takes the position that the hearing officer was biased throughout the hearing, did not consider the appellant's mental health, and did not consider that the appellant was proceeding as a self-represented party without any assistance from his police association.
- [17] I agree with the parties that the proper adjudication of an appeal with respect to the issues raised by the appellant requires that the evidence be before the Commission. I am not satisfied, and the appellant did not seriously argue, that the appeal can be fairly heard without the evidence given at the hearing.
- [18] The only issue raised by the appellant for the purposes of this motion is whether the audio recordings would be sufficient rather than the transcript. The appellant stresses that transcribing the audio recordings will be very expensive and cost more than he will lose from the suspension imposed.
- [19] The respondent argues that audio recordings are an inadequate substitute for a transcript. It says the standard, not only at the Ontario Civilian Police Commission, but also at every level of the courts in Ontario, is for the provision of transcripts and not audio recordings. The Respondent also argues that there is no provision in the Rules of Practice or the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA") which provides for the use of audio recordings rather than transcripts.
- [20] Further, the respondent argues that audio recordings are not a practicable substitute for transcripts and that their use would be so unwieldy as to preclude their usefulness.

- [21] The appellant argues that the audio recordings contain all the same evidence as would a transcript and that audio recordings may be better in some ways as they not only capture *what* was said but *how* it was said. He says that, in terms of practicality he expects that the parties would refer the Commission to the portions of the recordings he wishes to refer to rather than requiring the Commission to listen to the entire hearing.
- [22] I am not satisfied that the filing of the audio recording of the hearing is sufficient to ensure that the appeal can be conducted fairly.
- [23] First, neither the Rules of Practice nor the SPPA provide for the use of audio recordings in place of transcripts with respect to appeals. The appellant has submitted no case law from any other Tribunal or court in Ontario which has allowed for the use of audio recordings in place of transcripts for the purposes of an appeal. If such cases exist, I expect that they are rare and turn on their own specific circumstances.
- [24] Second, in my view, the use of audio recordings is impractical. It would involve asking the Commission to locate and interpret what was being said at various times, which would likely be time-consuming and imprecise. Difficulties are likely to arise in determining, not only what is being said, but also who the speakers are. The parties are likely to disagree about what is being said and by who, which the Commission would then have to resolve. Given that the parties are likely to be referring to multiple parts of the evidence, that evidence would have to be played for the Commission during the hearing itself lest the Commission disagree with a party's translation of the audio, and this is likely to cause significant additional hearing time. These concerns are exacerbated by the fact that the appeal is being heard by a three-member panel.
- [25] I note that these practical problems would impact, not only the appeal before the Commission, but any subsequent review by the Divisional Court. Presumably, if the Commission based its determinations on the audio recordings of the hearing, the Divisional Court may be obligated to rely on those recordings rather than a transcript as well.
- [26] Third, while I am alive to the possibility that, in some instances a party may require the use of audio recordings rather than transcripts as an accommodation for the inability of that party to access a transcript, that is not the case here. The appellant does not suggest that he would be unable to adequately work with a transcript or even that the price of the transcript is cost prohibitive. Rather, the appellant says that he does not wish to purchase a transcript because the salary that he would recoup in the event of a successful appeal would be less than the cost of the transcript. I find the appellant's reason is insufficient to support the order he seeks on this motion.

- [27] Finally, it may be that, if the appellant were prepared to undertake that his argument would be based exclusively on the Hearing Officer's reasons with respect to the finding of guilt in the Misconduct Decision, and that he undertake to treat, for the purposes of the appeal, the factual findings of the Hearing Officer contained in the Misconduct Decision as accurate, the ordering of the transcript may be dispensed with. However, the appellant did not do that, and nor could he practically make those undertakings and expect to be successful on the appeal given the issues he has raised.
- [28] In conclusion, I do not accept the appellant's request that he be allowed to file the audio recording rather than the transcript of the hearing to proceed with the appeal with respect to the Misconduct Decision.

Penalty Decision

- [29] In contrast to the Misconduct Decision, the appellant is prepared to undertake that his argument would be based exclusively on the Hearing Officer's reasons with respect to the Penalty Decision and the findings of fact made by the Hearing Officer in the Misconduct Decision and the Penalty Decision.
- [30] Although the respondent opposed dispensing with the requirement for a transcript for the purposes of the Penalty Decision as well as the Misconduct Decision, it agreed that the absence of a transcript with respect to the Penalty Decision is less problematic.
- [31] The role of the Commission with respect to appeals of penalties is set out by the Divisional Court in *Karklins v. Toronto (City) Police Service*, 2010 ONSC 747, as follows:
- Our function is not to second guess the Hearing Officer or substitute our opinion. Rather, it is to assess whether or not the Hearing Officer fairly and impartially applied the relevant dispositional principles to the case before him or her. We can only vary a penalty decision where there is a clear error in principle or relevant material facts are not considered. That is not something done lightly.
- [32] In my view, to the extent that the fair hearing of the appeal does not require transcripts, the appellant should be relieved from the requirement for transcripts. With respect to the Penalty Decision, on the basis that the appellant agrees to treat, for the purposes of the appeal, the factual findings of the Hearing Officer contained in the Misconduct Decision and the Penalty Decision as accurate, I am

satisfied that transcripts are largely unnecessary for the determination of the appeal to the Commission.

- [33] On the basis that the appellant agrees to treat, for the purposes of the appeal, the factual findings of the Hearing Officer contained in the Misconduct Decision and the Penalty Decision as accurate, the ordering of the transcript may be dispensed with.

ORDER

- [34] With respect to the appeal of the Misconduct Decision, the appellant shall provide to the respondent and the Commission proof that he has ordered the transcript of the hearing within 30 days of the date of this order.
- [35] If the appellant does not provide proof that the transcript has been ordered, at the request of the respondent, the Commission will issue an order dismissing the appeal of the Misconduct Decision.
- [36] With respect to the appeal of the Penalty Decision, if the appellant fails to provide to the respondent and the Commission proof that he has ordered the transcript of the hearing within 30 days of the date of this order, then the appeal of the Penalty Decision shall proceed on the basis that the factual findings made by the Hearing Officer are accurate.

Released: November 20, 2024

A handwritten signature in dark ink, appearing to read 'C. Osterberg', with a stylized, overlapping flourish at the end.

Colin Osterberg
Adjudicator