OPAAC ADJ #25-009

CONSTABLE PIERRE FOURNIER
Appellant

And

OTTAWA POLICE SERVICE
Respondent

Adjudicators:
Colin Osterberg (motion); Colin Osterberg, Leonard Favreau, Kumail Karimjee (penalty appeal)

Appearances:
P. Fournier, self-represented appellant
S. Cleroux, for the respondent
M. Herasimenko, reporter (penalty appeal)

Heard:
October 15, 2024 and April 11, 2025

Date of decision:
November 20, 2024 (motion); June 6, 2025 (penalty appeal)

Length of decision 7 pp. (motion); 11 pp. (penalty appeal)

Statutory citations:
Police Services Act, R.S.O. 1990, c.P.15 (repealed), ss. 85 and 87
Community Safety and Policing Act, 2019, S.O. 2019, c. Sched. 1, ss. 216
Statutory Powers Procedure Act, R.S.O. 1990, c.S.22
Canadian Charter of Rights and Freedoms

PROCEDURAL ISSUES - Rules of practice - Appeal from misconduct and penalty decisions of hearing officer - Appellant brought motion to proceed to appeal hearing without transcripts of misconduct and penalty hearings - Commission's Rules of Practice requiring that an appellant provide copies of transcript to parties and to Commission - Appellant not prepared to accept factual findings of hearing officer in misconduct decision - Audio recording of misconduct hearing insufficient to ensure fair appeal - Appellant required to file transcript of misconduct hearing - Absent production of transcript within 30 days, appeal of misconduct decision to be dismissed.

PROCEDURAL ISSUES - Appeal record - Appeal from misconduct and penalty decisions of hearing officer - Whether appellant allowed to proceed to appeal hearing without transcripts of misconduct and penalty hearings - Appellant intending to dispute factual findings of hearing

officer in misconduct decision - Pursuant to Commission's Rules of Practice, appellant required to file transcript of misconduct hearing - With respect to penalty decision, transcript of penalty hearing unnecessary if appellant not disputing hearing officer's factual findings for purposes of appeal.

DISCIPLINARY PENALTIES - Grounds for intervention - Appeal from penalty decision of hearing officer - Role of Commission with respect to penalties is to assess whether hearing officer's decision was reasonable - Absent clear error in principle or failure to consider material factors, Commission cannot vary a penalty decision.

DISCIPLINARY PENALTIES - Reasonableness - Hearing officer found appellant guilty of one count of discreditable conduct - Appellant ordered to forfeit 10 days (80 hours) - Hearing officer set out correct test for assessing penalties and fairly considered relevant dispositional factors - No error in principle and no basis for intervention by Commission - Penalty reasonable - Appeal dismissed.

HEARING OFFICERS - Bias - Appeal from penalty decision of hearing officer - Allegation of bias not substantiated - Decision not reflecting any unfairness in hearing officer's approach - Appeal dismissed.

Summary of Reasons for Decision

Motion:

On January 22, 2024 the hearing officer found Cst. Fournier guilty of discreditable conduct. In his decision dated March 21, 2024, the hearing officer imposed a penalty of forfeiture of 10 days' pay (80 hours). Constable Fournier appealed both the misconduct decision and the penalty decision. The appeal was heard by the Commission pursuant to s. 216(4) of the *Community Safety and Policing Act, 2019.*

A pre-hearing conference commenced on July 16, 2024, at which time the appellant advised that he had not provided the transcript of either the misconduct hearing or the penalty hearing. He brought a motion to proceed with the appeal on the basis of audio recordings of those proceedings, copies of which he had in his possession. The motion was heard on October 15, 2024. The appellant asserted that transcribing the audio recordings would be very expensive for him and that audio recordings were sufficient. The respondent opposed the motion, citing Rule 34.3 of the Ontario Civilian Police Commission's Rules of Practice, which stated that an appellant "shall provide" to the parties and the Commission a copy of the transcript of the disciplinary hearing. The respondent's position was that the appeal should be dismissed unless the appellant complied with this rule and ordered transcripts.

Held, motion to proceed without transcripts dismissed with respect to appeal of misconduct decision; motion allowed with respect to appeal of penalty decision.

The issues raised by Cst. Fournier in his appeal of the misconduct decision required that evidence from the misconduct hearing be before the Commission. The filing of the audio

recording was insufficient to ensure that the appeal was conducted fairly. Neither the Rules of Practice nor the *Statutory Powers Procedure Act* provided for the use of audio recordings in place of transcripts. Using an audio recording was impractical and would likely lead to delays. The cost of obtaining a transcript was an insufficient reason to support the request. In addition, the appellant was not prepared to accept as accurate the factual findings of the hearing officer in his misconduct decision. In light of these considerations, the appellant was ordered to provide proof within 30 days that he had ordered the transcript of the disciplinary hearing, failing which the misconduct appeal would be dismissed.

However, with respect to the penalty decision, Cst. Fournier agreed to treat as accurate, for purposes of the appeal, the factual findings of the hearing officer contained in the misconduct and penalty decisions. Given this undertaking, transcripts were unnecessary. Thus, if the appellant failed to produce proof that he had ordered the transcript of the hearing within 30 days, the appeal of penalty would proceed on the basis that the factual findings of the hearing officer were accurate.

At a pre-hearing conference on January 7, 2025 the parties confirmed that the appellant had not ordered the transcript. Accordingly, the appeal of the misconduct decision was dismissed.

Penalty appeal:

The incident which gave rise to the disciplinary proceedings occurred on April 24, 2023. The appellant was off work on extended medical leave. He and his brother encountered seven youths operating motocross bikes on land owned by an acquaintance of the appellant. The appellant confronted the youths and a verbal altercation ensued, which escalated to a physical altercation, including pushing and strikes. The appellant used aggressive language, swearing at the youths and mocking them. During the incident the appellant identified himself as a police officer. After the incident he called 911 and responding officers arrived on the scene.

The hearing officer found that the appellant's actions amounted to police actions and effectively placed him on-duty. As he exercised his authority as a police officer, he thus had an obligation to take notes, complete an investigation report, and conduct himself in accordance with the standards demanded by the Ottawa Police Service – all of which he did not do. In addition, the hearing officer found that the appellant violated the rights of one of the youths under the *Charter of Rights and Freedoms* by not providing him with his right to counsel.

The hearing officer concluded that the OPS proved, on clear and convincing evidence, that the appellant was guilty of one count of discreditable conduct. In his penalty decision, he ordered the appellant to forfeit 10 days (80 hours). The appeal of the misconduct decision was dismissed pursuant to the Commission's motion order. The appellant continued to pursue his challenge of the penalty decision.

In accordance with s. 216(4) of the *CSPA,* the Commission was mandated to exercise the powers and duties of the Ontario Civilian Police Commission (OCPC). As such, the Commission was bound by the standard of penalty appeal described in *Karklins v. Toronto (City) Police Service*

(*infra*), 2010 ONSC 747 and the case law defining the standard of penalty appeal. At para. 10 of *Karklins* the Ontario Divisional Court confirmed that the role of the Commission on hearing an appeal from penalty was not to second guess the hearing officer or substitute the Commission's opinion. Instead, the Commission's role was to assess whether the hearing officer "fairly and impartially applied the relevant dispositional principles". The Commission could only vary a penalty decision where there was a clear error in principle or a failure to consider material factors – an authority not exercised "lightly". Subsequent cases followed this approach, stating that the role of the Commission was to determine whether the decision of the hearing officer was reasonable in the circumstances.

In this case, the appellant raised several grounds of appeal, asserting that the hearing officer:

- Erred in failing to give weight to the prosecutor's request for a penalty, a 40-day forfeiture, not allowed by statute
- Erred in not allowing the appellant to read into the record more than 4 letters of support
- Gave insufficient consideration to the appellant's past service record
- Erred by over-weighting the fact that the complainants were youths
- Erred by imposing a penalty which was inconsistent with the penalty imposed in past similar cases.

In his reasons for decision the hearing officer reviewed the foundational principles governing the process of determining a fair and appropriate disposition: purposes of the police discipline process; an approach that gives precedence to correction over punishment; presumption of the least onerous disposition; proportionality in terms of similar cases; the higher standard of conduct expected of police officers compared to other employees.

The hearing officer then noted that the respondent raised 7 of the 14 commonly cited dispositional factors: public interest, seriousness of the misconduct, employment history, impact on the police officer and officer's family, consistency of disposition, specific and general deterrence, and damage to the reputation of the service. The hearing officer also considered two additional factors: provocation, and recognition of the seriousness of the misconduct. The hearing officer reviewed and weighted each of these factors, identifying them as aggravating or mitigating.

Regarding the first ground of appeal, under s. 85(1)(f) of the *Police Services Act,* one of the penalties available was to direct the police officer to forfeit not more than 20 days or 160 hours. While the prosecutor's suggestion of 40 days' forfeiture exceeded the maximum specified in this section of the *PSA,* nothing in the hearing officer's decision suggested that the option he chose was influenced by the prosecutor's erroneous submission.

With respect to the second ground of appeal, the hearing officer allowed the appellant to read into evidence 4 of 21 letters of support. Nevertheless, he accepted all 21 as written evidence and clearly considered all of them, noting that he was "impressed" by the volume and content.

Regarding the third ground, the appellant argued that his service record should have led the hearing officer to prefer his version of events over that of the youths. However, the hearing officer referred to the appellant's excellent service record and the fact that he was respected by

police colleagues, his supervisor, and in his community. In addition, he noted that the youths were trespassers and characterized them as defiant, confrontational, and determined to conceal their identity. It was clear, therefore, that the hearing officer considered the actions of the youths and the appellant's service record. It was not the Commission's role to re-weigh the evidence.

With respect to the fourth ground, the appellant argued that the hearing officer went out of his way to accept the evidence of the complainants, simply because they were youths. However, there was no evidence to substantiate this allegation. More generally, the hearing officer's decision did not support the appellant's claims of unfair, biased, or differential treatment.

As to the fifth ground, the hearing officer considered previous cases, recognizing that these were a guideline because no two cases are identical and penalty must be tailored to circumstances. The resulting disposition of 10 days was neither excessive nor inconsistent with prior decisions.

The hearing officer set out the correct test and fairly considered the relevant dispositional factors; and his decision contained no errors in principle. Even if the alleged errors had been made, none was sufficiently central. His decision was reasonable within the meaning of the Supreme Court of Canada's decision in *Vavilov* (*infra*). Accordingly, there was no basis for intervention by the Commission, and the appeal of the penalty decision was dismissed.

Authorities cited

Karklins v. Toronto (City) Police Service, 2010 ONSC) 747 (Ont. Div. Ct.)
Kobayashi and Waterloo Regional Police Service, 2015 ONCPC 12 (CanLII)
Gould v. Toronto Police Service, 2018 ONSC 4074 (Ont. Div. Ct.)
Krug v. Ottawa Police Service, 2003 CanLII 85816 (ONCPC)
Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65