IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 87 OF THE *POLICE SERVICES ACT,* R.S.O. 1990, c. P.15 as amended AND SECTION 216 OF THE *COMMUNITY SAFETY AND POLICING ACT, 2019,* S.O. 2019, CHAPTER 1, SCHEDULE 1, as amended

Date: 2025-10-03

BETWEEN:

SERGEANT NICHOLAS MACDONELL

Appellant

and

ONTARIO PROVINCIAL POLICE

Respondent

DECISION

Adjudicators:	D. Stephen Jovanovic Emily Morton Leanne P. McClay
Appearances:	James A. Girvin and Nathan Vandermey, counsel for the appellant Adrien Iafrate, counsel for the respondent and Isabella DiMenna, student-at-law for the respondent
Heard:	June 26, 2025 by Videoconference

INTRODUCTION

[1] This is an appeal by the appellant, Sergeant Nicholas Macdonell, from the decision of Superintendent K. Michael Bickerton (the Hearing Officer) dated January 5, 2024 in which he found the appellant guilty of three counts of misconduct contrary to the *Code of Conduct*, O.Reg. 268/10 enacted pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15 (the *PSA).* The appellant also appeals from the penalty decision of the Hearing Officer dated September 17, 2024, by which he ordered that the appellant be demoted to the rank of First Class Constable for a period of one year, to be automatically reinstated to the rank of Sergeant after that time, in addition to a direction to undergo specified counselling.

DISPOSITION

[2] For the reasons that follow, the decision of the Hearing Officer on count two is set aside and the decisions on counts three and four are confirmed. The penalty is varied to a demotion from the rank of Sergeant to First Class Constable for a period of six months, with automatic reinstatement to the rank of Sergeant upon completion of the six-month demotion. The panel would not interfere with the Hearing Officer's direction to attend counselling made pursuant to s. 85(7)(b) of the *PSA*.

BACKGROUND

[3] The first count in the Notice of Hearing, which is attached to this decision as Schedule A, was for deceit for which the appellant was found not guilty. The remaining counts were as follows:

Count 2

> Sgt. Macdonell is alleged to have committed Damage to Equipment, in that he willfully or carelessly caused damage to property of the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009,* contrary to Section 2(1)(h)(i)(a) of the Code of Conduct…

This count related to the appellant's removal and discarding of a spotlight from a police cruiser, causing "damage" and repair costs to the respondent.

Count 3

> Sgt. Macdonell is alleged to have committed Insubordination in that he was insubordinate by word, act, or demeanor contrary to Section

2(1)(b)(i) of the Code of Conduct…

This count related to a number of emails and interactions between the appellant and his direct superior S/Sgt. Prud'homme, which were found by the Hearing Officer to be disrespectful and defiant. Included in the count were repeated refusals by the appellant to comply with uniform standards and directives.

Count 4

> Sgt. Macdonell is alleged to have committed Discreditable Conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct…

This count involved the appellant ordering a subordinate to store a notebook contrary to policy and circulating inappropriate communications within the detachment that were deemed to undermine discipline and the integrity of the workplace .

ISSUES RAISED BY THE APPELLANT

[4] The appellant submits on appeal that:

1. The Hearing Officer erred in dismissing the appellant's motion for an external hearing officer based on a reasonable apprehension of bias;

2. The Hearing Officer negated the appellant's right to natural justice and procedural fairness and engaged in operational bias when he acted without authority or precedent by accessing the audio recording of the hearing proceedings and rendered his decisions;

3. In relation to "damage to equipment", the evidence did not support the finding of guilt on clear, convincing, cogent and weighty evidence;

4. The Hearing Officer's credibility and reliability assessments were flawed and biased; and,

5. The Hearing Officer imposed a penalty that was unduly harsh by failing to properly consider the relevant penalty factors.

[5] The facts relevant to the counts of misconduct and these issues are detailed below.

STANDARD OF REVIEW

[6] The standard of review applied in appeals under s. 87 of the *PSA* from decisions of a hearing officer is reasonableness on questions of fact and correctness on questions of law: *Ottawa Police Service v. Diafwila*, 2016 ONCA 627. Findings of fact and credibility assessments made by a hearing officer are owed particular deference: *Toronto Police Service v. Blowes Aybar*, 2004 CanLII 34451 (Ont. Div. Ct.).

[7] With respect to issues of procedural fairness, the appellate body must consider whether the required elements of procedural fairness in the particular circumstances have been met: *Forestall v. Toronto Police Services Board*, 2007 CanLII 31785 (Ont. Div. Ct.) at para. 38; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 49.

[8] On the penalty appeal, the panel adopts the standard of review that has been applied by the Ontario Civilian Police Commission (OCPC), as affirmed by the Divisional Court in *Karklins v. Toronto (City) Police Service*, 2010 ONSC 747 at para. 10:

> The role of the Commission on a penalty is well established. Our function is not to second guess the Hearing Officer or substitute our own 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.

Issue One: Did the Hearing Officer err in dismissing the Appellant's motion for an external hearing officer based on a reasonable apprehension of bias?

[9] This issue appears to be partly grounded in what the appellant has framed as his historical mistreatment by the respondent as detailed in a decision of the Ontario Civilian Police Commission (OCPC): *Nicholas Macdonell and Ontario Provincial Police,* 2017 CanLII 37620.

[10] The appellant began working as a team leader in the respondent's Provincial Weapons Enforcement Unit of the Organized Crime Enforcement Unit in 2008. In 2013 through 2014, the appellant received a Notice of Internal Complaint followed by a Negative Documentation arising from the appellant's alleged excessive vacation time claims. In June of 2014, the appellant was transferred "immediately' by the Acting Chief Superintendent to the Ottawa detachment. The reasons given for the transfer almost two months later were that it would allow for the best utilization of the appellant's skills and knowledge while best serving the respondent's operational objectives. The reasons specifically stated that the transfer was not a disciplinary

action.

[11] In October of 2014, the appellant was transferred again, this time to the Kemptville detachment, and essentially the same reasons were given. The appellant brought an appeal to the OCPC seeking to set aside what he submitted was “disguised discipline” *i.e.* the two transfers. At the outset of the 2017 hearing before the OCPC the respondent, contrary to the stated reasons for the transfers, conceded that they were in fact disciplinary actions. The OCPC issued an order directing the Commissioner of the respondent to hold a hearing. For reasons that are not entirely clear, the hearing was not finalized until a decision was released by Superintendent Graeme Turl (Retired) in December of 2021 confirming that the appellant had been subjected to disguised discipline. That decision is part of the Record of Proceedings before us. The appellant has indicated that not all the issues from that hearing have been resolved.

[12] This history, according to the appellant, is relevant to the motion he brought before the Hearing Officer on August 15, 2022 requesting that he sever the four counts of misconduct, order that separate decision makers be appointed to different hearings, and that he appoint a judge, a retired judge or a non-OPP adjudicator to conduct the hearings. The appellant’s position regarding the motion is set out in his factum as follows:

> The Hearing Officer’s decision to deny this motion was wrong as they misinterpreted the facts and incorrectly applied the law and failed to consider the motion with “contextualized understanding of the issues” vis-à-vis the Appellant’s documented and proven historical mistreatment by the OPP.

[13] The Hearing Officer dismissed the appellant's motion in a well-reasoned decision dated September 12, 2022. First, dealing with the appointment of an external adjudicator, he concluded, correctly in our view, that hearing officers do not have the authority under the *PSA* to appoint any person to conduct a hearing as the legislation only allows the respondent’s Commissioner to do so. We also agree with his conclusion that if any bias is found a hearing officer’s duty and responsibility would be to recuse themselves from the proceeding.

[14] Second, the Hearing Officer dealt with and dismissed the appellant’s argument that an external adjudicator was required because of institutional bias. He adopted the following quotation from *Mulligan (No.2) v. Ontario Provincial Police,* 2018 ONCPC 5 at paragraph 33:

> Arguments as to institutional bias because of the statutory scheme for Chiefs of Police and the Commissioner of the Respondent to appoint Hearing Officers are not new. In *Lavoie and Greater Sudbury Police Service,* 2014 CanLII 100632 (ONCPC), the Commission dealt with this argument. The Commission decided

> that if the legislation directs the manner of appointment of an adjudicator, then that process does not give rise to bias unless the Hearing Officer or police service went beyond the statutory scheme. Authority for that statement was given as *Brosseau v. Alberta Securities Commission),* 1989 CanLII 121 (SCC), [1989] 1 S.C.R. 301. Accordingly, we do not accept that the Hearing Officer should have recused herself because she was appointed by the Commissioner, as provided for in the *PSA.*

[15] The Hearing Officer noted that the Commission's decision was approved by the Divisional Court in *Mulligan v. Ontario Civilian Police Commission,* 2020 ONSC 2031 where the Court wrote at paragraph 45:

> I also agree with the Commission that Sergeant Mulligan's allegation of institutional bias cannot stand. This Court has already found that disciplinary proceedings under the *Police Services Act* are not tainted by institutional bias (see *Amormino v. Ontario Police Services Board*, 2015 ONSC 7718*).*

[16] Third, as we understand the appellant's position on reasonable apprehension of bias, he submitted that there was a reasonable apprehension of bias both with respect to the Hearing Officer himself and any other adjudicator other than an external one, hence the need for an external adjudicator. He cites the following quote from the decision in *R. v. S. (R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. as setting out the test:

> We conclude that the reasonable person contemplated by deGrandpre J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community is supportive of the principles of equality.

[17] The appellant framed the issue before the Hearing Officer as follows:

> Can a Hearing Officer who is appointed and supervised by the OPP Commissioner conduct a fair, impartial, and unbiased hearing given the history of the Applicant's prior mistreatment by senior levels of management within the OPP which goes back to 2014?

[18] Before he answered that question the Hearing Officer set out the following quotation from the *R. v. S. (R.D.)* decision:

> The test for reasonable apprehension of bias is that set out by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*…de Grandpre J.'s articulation of the test for bias was adopted by the majority of the Court in the intervening two decades:
>
> > …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information…[T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
> >
> > The grounds for this apprehension must, however, be substantial and I…refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience."

[19] Ultimately the Hearing Officer dismissed the concerns about bias writing the following:

> I find there is no actual bias identified, and no reasonable apprehension of bias has been established. Having taken the view of the reasonable person, I suggest they would come to the same conclusion.

[20] Having considered the same tests, we are not satisfied that the Hearing Officer made any error in his conclusion that the appellant had not established institutional bias or reasonable apprehension of bias so that neither he nor any other OPP adjudicator could hear this matter. However, the appellant raised one more type of potential bias, dealt with below.

Issue Two: Did the Hearing Officer negate the appellant's right to natural justice and procedural fairness and engage in operational bias when he accessed the audio recording of a portion of the hearing proceedings and rendering his decisions?

[21] The appellant references the decision of *Robertson v. Edmonton (City) Police Service (#10),* 2024 ABQB 519 (CanLII) at paragraph 51 where the court wrote the following:

> The sixth type of bias is operational bias. This type of bias arises when the procedures adopted by the tribunal result in unfairness to one party or the other. This type of bias can arise out of *ex parte* communications between one of the parties, or other unbalanced procedures that give rise to unfairness.

[22] On August 15, 2022, during the hearing of the severance motion a question arose as to whether the appellant and the Hearing Officer had worked together in the past. There was a brief discussion between the appellant and the Hearing Officer, in the presence of counsel, and the hearing of the motion continued. The appellant was not testifying at that point and in fact there was no *viva voce* evidence called during the hearing of the motion.

[23] Prior to the commencement of the merits hearing in March 2023 the appellant's counsel again raised the issue of the possible work relationship between the Hearing Officer and the appellant. The Hearing Officer wrote the following:

> Additionally, a new issue arose via email where Sgt. Macdonell recalled that he and the hearing officer had worked together in the past. The hearing officer believed that this issue had been addressed during the August 2022 motion. The record was reviewed to clarify the hearing officer's recollection of the exchange between he and Sgt. Macdonell to ensure an accurate email response to defence counsel's concerns.
>
> Defence counsel submitted listening to the recording was improper. The hearing officer clarified due to technical issues the recording of the motion could not actually be played but the corresponding notes made by the reporter were reviewed.

[24] The appellant submitted before us that "The Hearing Officer's access of the audio recording fundamentally undermines the police discipline hearing process including substantively impairing the appellant's right to appeal." The appellant further submitted that because there was no statutory provision specifically authorizing a hearing officer to access hearing recordings, his doing so "was contrary to the principles of natural justice, and that the Hearing Officer's conduct denied him procedural fairness and amounts to operational bias."

[25] During the hearing of this appeal, the appellant's counsel was asked what prejudice the appellant suffered as a result of the Hearing Officer's access to the record. The response was that as appeal panels are deferential to a hearing officer's findings of credibility, therefore the appellant's appeal rights have been prejudiced. Counsel for the appellant also indicated that he did not request access to the recording involved.

[26] The respondent took the position that it is routine for tribunal adjudicators to listen to audio recordings of the evidence presented to ensure accuracy and assist in the writing of decisions. The respondent referenced the practice of other tribunals such as the Licence Appeal Tribunal and the Human Rights Tribunal of Ontario in having

recordings of hearings available to tribunal members, but not necessarily available to parties or the public.

[27] In our view, there is no merit to this ground of appeal. The Hearing Officer did not listen to any evidence; what he reviewed was a brief exchange with the appellant when he was not under oath. There were no credibility issues involved. In our view, the appellant when asked during oral argument, could not point to any actual prejudice suffered by the Hearing Officer referencing the recording of his exchange with the appellant. We do not accept his submission that the deference an appellate body may pay to a hearing officer's credibility findings would amount to prejudice in the circumstances of this case. No testimony from a witness was reviewed by the Hearing Officer. The appellant has not advanced a ground of appeal related to whether he previously worked with the Hearing Officer, the narrow point the Hearing Officer sought to confirm by accessing the recording. The appellant did not request the opportunity to review that part of the recording or the reporter's notes that the Hearing Officer reviewed. Accordingly, we do not accept that there was any infringement of the appellant's rights to natural justice or procedural fairness, nor was operational bias established.

Issue Three: In relation to "damage to equipment", did the evidence support the finding of guilt on clear, convincing, cogent and weighty evidence?

[28] The appellant removed and disposed of what he said was a damaged or inoperable spotlight and its assembly from the exterior of an OPP vehicle, then plugged the opening with a piece of plastic and glue. He did not seek permission from anyone before doing so. The Hearing Officer decided that the appellant did not follow the "policy, practice, and the rules" with respect to vehicle repairs and that he did not report the incident. The question for the Hearing Officer, as set out in the Notice of Hearing was whether the appellant "willfully or carelessly caused damage to the property of the police force."

[29] The Hearing Officer used the following definition of damage from the Oxford dictionary:

> Physical harm caused to something in such a way as to impair its value, usefulness, or normal function. To inflict physical harm on (something) so as to impair its value, usefulness, or normal function.

[30] The Hearing Officer wrote that the appellant, in deciding to remove the light, "offered a number of reasons, without proof, like the light was damaged, it was dangerous, other cars had missing spotlights, S/Sgt. Prud'homme would not have supported his request etc." He ultimately concluded the following:

> Had Sgt. Macdonell complied with accepted practices and reported the incident including his alleged concerns through established channels the light would have been refurbished rather than going to a landfill. He rendered the spotlight unavailable for refurbishment thereby voiding its usefulness.

[31] We note that section 2(1)(h)(i)(a) of the Code of Conduct reads "wilfully or carelessly causes loss or damage…" but that the Notice of Hearing did not refer to loss but only to damage. The Hearing Officer did not make a specific finding on the appellant's evidence that the spotlight was damaged. Rather, he found there was no proof to support the appellant's evidence that it was damaged. In our view, there was no evidence that established what "physical harm" the appellant inflicted on the spotlight, accepting the Oxford dictionary definition of damage. The appellant did cause its loss by discarding it, but that was not the charge he faced. Accordingly, his conviction on this count must be set aside.

Issue Four: Were the Hearing Officer's credibility and reliability assessments flawed and biased?

[32] The submissions of the appellant on this issue are akin to arguing that the Hearing Officer subjected the evidence of the appellant and the respondent, especially that of S/Sgt. Prudhomme, to unequal scrutiny. As the appellant submits in para. 38 of his factum:

> Throughout the decision the Hearing Officer uses explicitly critical and dismissive language to describe the Appellant's evidence and behaviour but does not use similar language in relation to Sgt. Prud'homme's evidence although it suffers from the same issues.

[33] At paragraph 49 of his factum, the appellant writes:

> Again, the Hearing Officer does not engage in any analysis of the S/Sgt.'s conduct in this case demonstrating a clear differential level of scrutiny between the evidence of the appellant and the S/Sgt.

The appellant made no reference specifically to unequal scrutiny of evidence in his oral argument and cited no authorities in his factum.

[34] In reviewing the appellant's submissions on this issue, we start with the oft-repeated principle that findings of fact and credibility assessments made by a hearing officer are owed particular deference: *Toronto Police Service v. Blowes-Aybar,* supra at para. 33 and *Johnson v. Sault Ste. Marie Police Force,* 2024 ONCPC 34 at para. 12. We note that at page 45 of his decision, the Hearing Officer correctly instructed himself on the principles of assessing credibility and reliability of witnesses.

[35] The appellant sets out the following examples in support of his submission about "critical and dismissive language" used by the Hearing Officer in assessing his evidence: teetering on bizarre; utterly beyond belief; uncorroborated; fabricated; inconsistent; actively deceptive, unreasonable, manipulative. The appellant also takes issue with the Hearing Officer's characterization of his actions creating a "toxic work environment."

[36] We do not intend to review the context of all of the allegedly negative comments made by the Hearing Officer about the appellant's credibility and the reliability of his evidence. Some of the Hearing Officer's language may have been somewhat harsh, but he generally explained the reasons he gave for not accepting the appellant's evidence. It is not our function to conduct a new hearing without the benefit of seeing and hearing the witnesses. We do, however, refer to two examples of the Hearing Officer's rationale for using certain language.

[37] The allegations set out in the Notice of Hearing for count three, the disobedient and/or disrespectful behaviour by the appellant toward S/Sgt Prud'homme, included:

- Flatly refusing a direction to remove a non-issue baseball hat while in uniform,.
- Continuing to wear or display non-issued hats around the detachment despite being told not to, including a hat embroidered with a phrase "Serving and Protecting Despite Employer Wilful Disguised Discipline".

[38] The Hearing Officer wrote the following:

> Sgt. Macdonell's explanation as to why he wore non-issued baseball hats was quite sensational and could not be considered accurate or truthful. He explained he had a habit of touching his face which was not a good habit during the pandemic. He wore the baseball hat to remind himself not to, and/or somehow prevent himself from touching his face. This entire explanation presented as a complete fabrication and was utterly beyond belief.

[39] We see no legal error on the part of the Hearing Officer using the descriptive words, such as utterly beyond belief, that he did when the context of the actual evidence he had heard is considered.

[40] At page 55 of the decision, in concluding comments after he had made all of his findings of fact and applied them to the counts before him, the Hearing Officer wrote that the appellant's behaviour was toxic to the workplace. He did so after his findings of guilt. The appellant submitted that there was no evidence to "corroborate" this characterization of a "toxic" workplace. The appellant's disrespect for S/Sgt. Prud'homme, evident from some of his emails, and defiance of simple instructions

from her amounting to insubordination would, in our view, justify such a comment.

[41] Once the Hearing Officer's assessments as to credibility and reliability are accepted, his reasons amply support his conclusions on count three and count four. Neither in his factum or during oral argument did the appellant submit otherwise.

[42] One final point needs to be addressed before dealing with the appropriate penalty. During his closing submissions before the Hearing Officer, the appellant raised for the first time an argument that the appellant was once again subjected to disguised discipline because S/Sgt. Prud'homme denied him a northern deployment opportunity, removed him from the paid duty list, and assigned him to administrative duties at the Ottawa Detachment.

[43] The appellant did not list this as one of the issues in his factum on this appeal but at para. 64 he submitted that the Hearing Officer's failure to make any finding as to whether the appellant had been subjected to disguised discipline amounted to a misapprehension of evidence, a failure to correctly apply the law, and bias towards the appellant. The Hearing Officer wrote that there was insufficient evidence or information to conclude that these later instances of alleged disguised discipline had occurred. The appellant did not submit that a finding of disguised discipline would be a defence to the misconduct charges. The appellant ultimately indicated that issue could be addressed as part of the penalty appeal.

Issue Five: Did the Hearing Officer impose a penalty that was unduly harsh by failing to properly consider the relevant penalty factors?

[44] At the penalty phase, the respondent sought a 12- to 14-month demotion, stating that it had determined dismissal was not an appropriate disposition as the appellant had potential to rehabilitate. The appellant, emphasizing the role the history of disguised discipline played in his conduct, submitted the appropriate disposition was one of 40 to 60 hours of forfeiture. In arriving at the penalty of a 12-month demotion, the Hearing Officer engaged in a lengthy and careful analysis. He dealt with several of the aggravating and mitigating factors that have developed in the case law in assessing an appropriate penalty. The Hearing Officer also considered the significant contextual factors of the impact of the COVID-19 pandemic on the appellant's actions and the role the history of disguised discipline by the OPP should play in his analysis.

[45] The appellant has advanced six areas in which he claims the Hearing Officer erred in principle in his penalty analysis. For the reasons that follow, we would not give effect to any of these arguments.

a) Weight Given to Past Disguised Discipline to the Penalty Analysis

[46] Most of the appellant's submissions on the reasonableness of the penalty analysis revolve around his submission the Hearing Officer erred by failing to place greater weight on the impact of the unresolved disguised discipline by the OPP. The appellant argued at the penalty hearing that the past disguised discipline should have mitigating effect in virtually every area of the penalty analysis, including an assessment of the seriousness of the appellant's misconduct, the impact on the public interest and the reputation of the police service and on the appellant's demonstration of an understanding of the seriousness of his misconduct.

[47] The Hearing Officer found the impact of the disguised discipline on the appellant himself was a consideration "worthy of a degree of mitigation." He declined to consider it as a weightier mitigating factor that justified or reduced the seriousness of the appellant's misconduct over the five-month period in question. Though he understood the appellant felt "betrayed by his employer" this was not, in the Hearing Officer's view, a justification for misconduct against his employer in general, and in particular immediate supervisors and managers who had nothing to do with the disguised disciplined decisions over a decade earlier. The Hearing Officer also found that the penalty disposition before him was not an appropriate forum to address the historic disguised discipline, holding "[t]he issue of the use of disguised discipline by the OPP before the *PSA* tribunal is settled, full stop" and that "[a]ny resolution of matters related to the disguised discipline are not within the authority or purview of this (current) disciplinary tribunal."

[48] We find no error in his overall conclusion that the disguised discipline issue should be given only limited weight as a mitigating factor with respect to its personal toll on the appellant. The disguised discipline issue was the subject of adjudication before both the OCPC and the OPP Commissioner's hearing. The Hearing Officer determined, reasonably in our view, that the appellant's past dealings with OPP management should not attenuate the nature or seriousness of the current misconduct. It was reasonable for the Hearing Officer to limit the mitigating effect of the disguised discipline to the personal strain it had on the appellant and assign it no greater weight than that.

[49] The appellant's submissions on appeal amount to little more than an attempt to relitigate the weight that should be given to the factor of disguised discipline in the penalty analysis. It is not the function of this panel to entirely revisit and reweigh a single factor relevant to the penalty analysis and substitute its own opinion on the weight that should be given to that factor. The appellant has not advanced a cogent argument the Hearing Officer erred in principle by assigning limited mitigating weight to the appellant's negative history with OPP management. Nor is there any basis to hold

the Hearing Officer disregarded or misapprehended evidence on the disguised discipline issue. There is no basis for this panel to interfere with the weight given to this contextual factor by the Hearing Officer.

[50] The appellant has attempted to characterize recent actions of his current OPP management (S/Sgt. Prud'homme) as a further instance of disguised discipline. He raised this argument at the merits hearing, as discussed above, and again in penalty submissions before the Hearing Officer. The Hearing Officer held the appellant was not permitted to raise these arguments on penalty as he had failed to raise the issue at the merits hearing. We also refuse to entertain this argument; there is no evidentiary record to support it and it was not properly raised before the Hearing Officer.

[51] In all but one of the remaining five errors in the penalty analysis alleged by the appellant, the central argument is that the Hearing Officer erred in principle by failing to factor in the disguised discipline to reduce the weight of an otherwise aggravating factor. For the reasons given, we will not reweigh the weight given to the aggravating factors of the seriousness of the misconduct, recognition by the appellant of the seriousness of the misconduct, impact on the public interest and reputational damage to the police service because of disguised discipline. Nor would we recalibrate the mitigating factors of employment history and the personal impact of the penalty on the appellant and his family because of disguised discipline.

b) Nature and Seriousness of Misconduct

[52] When dealing with the nature and seriousness of the misconduct, the Hearing Officer considered the fact the misconduct took place over a period of months and, in his view, were aimed at undermining confidence or sowing distrust with respect to senior management. He found the pattern and effect of the combined misconduct very serious and gave this "substantial weight" in arriving at the penalty.

[53] The appellant now takes issue with the Hearing Officer's characterization of the misconduct as contributing to or creating a "toxic workplace." The Hearing Officer was alive to the issue there had not been an investigation in accordance with OPP or Ontario Public Service guidelines to come to the specific conclusion that the appellant's misconduct met the definition of a "toxic workplace." Rather, he considered evidence before him that "other employees were off-put and concerned" about the appellant's behaviour and "may well have found it at least unpleasant." He went further and found it was not "unreasonable to suppose that those who were directly involved in this matter were not the only employees who shared these sentiments."

[54] The appellant now submits the Hearing Officer fell into error by engaging in speculation there was a widely held view the appellant had created a toxic workplace

environment. We do not agree. The Hearing Officer was careful to note there had been no separate finding of the existence of a toxic workplace. He based his observation about the impact of the appellant's misconduct on evidence of witnesses that was properly before him. He also based this conclusion on his own observation that:

> This misconduct took place over an approximate four- or five-month period. This, in my view, represented an inexplicable, at times bordering on bizarre, and relentless campaign of rebellious and confrontational behaviour by Sgt. Macdonell toward his S/Sgt. Many of the acts of misconduct described above, occurring in isolation as singular incidents, may not, by some, be considered as serious. However, the combined, sustained and unrelating acts of what could be described as defiance constitute what is serious, troubling and weighty misconduct.
> ….
>
> Sergeants in the OPP can disagree with management decisions but should not express their disagreement in a manner that undermines confidence in senior leadership and possibly create an environment of distrust or diminished confidence in management in the minds of those they lead.

[55] It was open to the Hearing Officer to draw this conclusion based on the evidence before him and, in light of this finding, reasonable to assign great weight to the nature and seriousness of misconduct. The insertion of the word "toxic" in a general sense does not undermine the reasonableness of the Hearing Officer's conclusion.

c) Recognition of Seriousness of Misconduct

[56] Third, the appellant submits the Hearing Officer erred in principle by considering the appellant's failure to apologize or express remorse for the misconduct as an aggravating factor. We do not agree. The Hearing Officer looked to the appellant's evidence at the merits hearing as the basis to conclude he had little if any contrition for his misconduct. He found that the appellant qualified and justified his misconduct, particularly with respect to the damage to property count. Ultimately, the Hearing Officer concluded the "lack of recognition of the seriousness of misconduct is aggravating and weighty."

[57] The panel recognizes that if the Hearing Officer had squarely focused on lack of evidence of an apology by the appellant as "aggravating and weighty", this could constitute an error in principle. Prior cases decided by the OCPC have held that lack of evidence of an apology or expression of remorse can be a factor at the penalty stage: *Fenton, Supt. Mark v. Toronto Police Service*, 2017 ONCPC 15; *Deviney and Toronto Police Service*, 1999 CanLII 31612 (ONCPC); *Constable RoelfVos and the Peel*

Regional Police Service, 1993 CanLII 14137. We agree that there is no authority that the failure of an officer to apologize should be considered a weighty aggravating factor on penalty.

[58] Despite this agreement, the difficulty with the appellant's submission is that Hearing Officer did not focus on lack of evidence of an apology. Rather, he looked to the evidence of the appellant at the merits hearing which sought to justify and minimize all of the alleged misconduct to form a conclusion that he lacked any recognition or insight into the nature and seriousness of his misconduct.

[59] In any event, the issue of the weight to be given to this factor is a matter the panel will need to revisit in reassessing penalty as much of the appellant's lack of contrition seems to centre on his belief he was justified in removing and discarding the spotlight.

d) Public Interest/Damage to the Reputation of the Police Service

[60] The Hearing Officer found the negative impact of the misconduct on both the public interest and the reputation of the OPP to be "aggravating and weighty" factors. Though he acknowledged that the appellant's misconduct had not been widely publicized, reasonable members of the public would conclude the appellant's misconduct was "objectionable and unbecoming of any police officer," particularly one holding the rank of sergeant.

[61] The appellant does not identify an error in principle with respect to the analysis on these two factors apart from the weight the Hearing Officer gave to disguised discipline in his analysis. For reasons given, the panel declines to reweigh the context disguised discipline in the penalty analysis.

e) Employment History

[62] The Hearing Officer reviewed the appellant's employment history in detail, finding the appellant is an experienced officer who has held specialist positions and has received favourable ratings for teamwork, public interactions and enforcement activities. The Hearing Officer also considered the appellant's submission he had not been performance managed effectively, but gave this lack of management little to no weight as the appellant had often refused to participate in the performance appraisal process. After considering the evidence before him, along with the submissions of the appellant, the Hearing Officer held employment history is a "marginally mitigating" factor.

[63] There is no basis to give greater weight to appellant's employment history as a mitigating factor. Again, the appellant argues the employment history of the appellant should be a "weighty mitigating factor" when viewed in the context of the historical disguised discipline, which took a toll on the appellant's relationship with OPP

management through the years. He raises no other argument with respect to this dispositional factor. There is therefore no basis for the panel to interfere with the minimal weight given to this factor by the Hearing Officer.

f) Impact on the Officer and his Family

[64] On appeal, the appellant again argues the Hearing Officer erred by failing to give weight to the impact of the unresolved disguised discipline matter on the appellant. For reasons already given, we see no error in the Hearing Officer's approach to the disguised discipline issue in his penalty analysis.

g) Appropriate Disposition

[65] We find that even when the damage to equipment count is removed from consideration, the remaining counts of misconduct attract a penalty of demotion. The Hearing Officer placed considerable weight on the seriousness of the misconduct, the appellant's lack of an expression of remorse and the impact on the reputation in the service from the perspective of a reasonable community member given what he found was a troubling pattern of misconduct, taken while the appellant had a supervisory role. The Hearing Officer's ultimate conclusion was:

> For this and other reasons, demoting any officer, and in this case, Sgt. Macdonell, is not a decision to be taken lightly or without a compassionate look at the consequences. Unfortunately, the nature and seriousness of his actions; blatant disrespect for S/Sgt. Prud'homme and other managers which he shared, in some cases, for all to see who worked at the detachment; and his disregard for policy with respect to notebook storage and vehicle maintenance, leave me with little choice but demotion as the most fitting and appropriate disposition. This position was reinforced by the fact that Sgt. Macdonell was a leader with rank at the time and he, along with all other OPP employees and the public, need to be reminded that rank and leadership role is earned and must not be taken for granted.

[66] We find that the removal of the count of damage to equipment has an impact on the weight to be assigned to the nature and seriousness of the misconduct and the impact on the reputation of the service. These are significant dispositional factors in any analysis and will have an impact on the length of demotion.

[67] With respect to the nature and seriousness of the misconduct, as we have stated we would not interfere with the Hearing Officer's finding the insubordination count related to a prolonged series of incidents of rebellious and confrontational behaviour toward his Staff Sergeant. The Hearing Officer found the "combined, sustained, and unrelenting acts of what could be described as defiance constitute what is serious, troubling, and weighty misconduct."

[68] It is clear the Hearing Officer viewed the damage to equipment count as a key element of what he characterized as a campaign of defiance. We have found there was no misconduct involved in the appellant's disposal of the spotlight. Though the panel agrees with the Hearing Officer's conclusion the seriousness of the misconduct is aggravating and "warrants significant and meaningful consequences," the removal of

the damage to equipment count in turn removes a significant aspect of the appellant's pattern of defiant behaviour and reduces the time span over which his insubordinate conduct took place from five to four months.

[69] In assessing the damage to the reputation of the service, the Hearing Officer acknowledged there was no evidence to indicate the misconduct was widely known or reported in the media. However, he did avert to the fact employees from an auto service centre had some knowledge and involvement with the damage to equipment count. In our view, removing the facts surrounding the disposal of the spotlight from the penalty analysis lessens the negative impact on both the reputation of the police service, and the public interest in effective and responsible delivery of police services.

[70] Finally, considering the recognition of the seriousness of misconduct, the Hearing Officer placed weight on what he viewed as the appellant's minimization or justification of his conduct with respect to the removal of the spotlight. We have found that conduct did not amount to misconduct. We would therefore reduce the aggravating weight the Hearing Officer gave to the appellant's lack of contrition when it comes to count two.

[71] In sum, while we would not interfere with the Hearing Officer's findings that the appellant's insubordination, lasting over a period of months, was serious misconduct warranting a demotion, the seriousness of the misconduct and the appellant's minimization of it is less significant when the damage to equipment count is set aside. Taking all of these factors together, we find a demotion of six months is an appropriate disposition.

[72] Finally, we do not interfere with the Hearing Officer's order under s. 85(7)(b) of the *PSA* directing the appellant to attend counselling. First, the Hearing Officer's reasons reflect the fact the appellant's counsel suggested an order including counselling. Second, the Hearing Officer did give limited mitigating weight to the personal and professional toll the history of disguised discipline took on the appellant. He clearly and rationally linked the order for counselling to his view the appellant would "benefit from professional therapy or counselling to gain insight into how to cope with disharmony or confrontation." There was no error in principle in the imposition of the s.85(7)(b) order.

ORDER

[73] Pursuant to s. 87(8)(a) of the *PSA* the panel confirms the findings of misconduct in counts three and four in the Notice of Hearing. The panel sets aside the finding of misconduct in count two of the Notice of Hearing. The penalty is varied to demotion from the rank of Sergeant to First Class Constable for a period of six months. Upon completion of the six-month demotion, the appellant shall be automatically reinstated to the rank of Sergeant. The panel confirms the order for counselling made pursuant to s. 85(7)(b) of the *PSA*.

Released: October 3, 2025

"D. Stephen Jovanovic"

D. Stephen Jovanovic

"Emily Morton"

Emily Morton

"Leanne P. McClay"

Leanne P. McClay

APPENDIX A

The Police Services Act

NOTICE OF HEARING

TO: Sergeant N.S. (Nicholas) MACDONELL, #9237

Count 1:

YOU ARE ALLEGED TO HAVE COMMITTED DECEIT, in that you willfully or negligently made a false, misleading or inaccurate statement pertaining to official duties, contrary to Section 2(1)(d)(ii) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

On or about May 21, 2020 at approximately 6:52pm you removed the spotlight and its assembly from an unmarked OPP cruiser #3-367. Your actions were captured on the Ottawa Detachment garage/sally port security video. The Detachment Commander, S/Sgt. Julie Prud'homme viewed the video on June 10, 2020 and forwarded an email to detachment members advising that she was concerned about a missing piece of police vehicle equipment and asked if anyone knew where the spotlight was and if anyone had information about its removal. It is alleged you committed the following deceit:

- Subsequent to her email on June 10, 2020, on June 16th, 2020 S/Sgt. Prud'homme specifically asked you if you or your shift members knew where the spotlight from #3-367 had gone or if they knew anything about it. You responded by shaking your head indicating "no" and stated words to the effect – that it had been replaced by a new one already and that the spotlight had been broken for a while. You further indicated the wind breaks them and it gets annoying and that spotlights were useless.

On or about September 30, 2020 when interviewed by Investigators from the Office of Professionalism about your response to S/Sgt. Prud'homme's inquiry on June 16, 2020 you responded she could be lying or has you confused with someone else.

You knew you were being deceitful with S/Sgt. Prud'homme.

Count 2:

YOU ARE ALLEGED TO HAVE COMMITTED DAMAGE TO EQUIPMENT, in that you willfully or carelessly caused damage to the property of the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, contrary to Section 2(1)(h)(i)(A) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

On or about May 21, 2020 at approximately 6:52pm it is alleged you removed the spotlight and its assembly from an unmarked OPP cruiser #3-367. Your actions were captured on the Ottawa Detachment garage/sally port security video. The removal of the spotlight and its assembly left an opening where the spotlight is mounted on the exterior of the vehicle. The arm that connects the spotlight to the handle inside the vehicle and the handle itself were disposed of and you plugged the opening with a piece of plastic and glue.

- The cost to the OPP to have the vehicle repaired and a refurbished spotlight installed amounted to approximately $268.00

You wilfully caused damage which required a repair to the OPP vehicle.

Count 3:

YOU ARE ALLEGED TO HAVE COMMITTED INSUBORDINATION in that you were insubordinate by word, act or demeanour contrary to Section 2(1)(b)(i) of the Code of Conduct and/or that you without lawful excuse, disobeys, omits or neglects to carry out any lawful order; contrary to Section 2(1)(b)(ii) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

- It is alleged that on or about June 16, 2020 you sent an email to S/Sgt. Prud'homme that included the following:
    - ...Ottawa Detachment is a revolving door for Staff Sergeants. In my short time at this office I have seen a half dozen other people sit in your chair. Every one of them wanted to do things their own way. Some supervisors have been very supportive of my situation. You, as of late, have not!... Although you repeatedly sympathize with my situation, you have failed to display empathy. Until you are able to develop the capacity to understand, or feel, what I have experienced from my perspective, we will never attain a cooperative working relationship, and you will continue to cause me stress and affect my mental health.

      I am happy to continue a professional working relationship with you, as it pertains to the members of my platoon or the detachment. However, your repeated attempts to minimize what the employer has done, and how the employer continues to treat me, can no longer continue...

  Your written communication to S/Sgt. Prud'homme was insubordinate.

- S/Sgt. Prud'homme declined support for you to participate in a northern deployment and following this, on or about June 27, 2020 at approximately 5:56pm you sent an email to S/Sgt. Prud'homme while copying 4 other officers:
    - Thanks For the quick response Staff. I can only assume the lack of support is because all of your friends on C platoon are already committed

to Northern deployments. You can expect my grievance shortly. Have a great weekend! Nick

Your written communication to S/Sgt. Prud'homme was insubordinate.

- On or about July 13, 2020 a hand written message in black magic marker on an 81/2 x 11 piece of paper was taped to S/Sgt PRUD'HOMME's closed office door. It was removed and placed on her desk. The note that was posted for all in the detachment to see stated:
    - Staff,

      Just a friendly reminder that you owe me 131 hrs.

      Thanks, Nick

  When interviewed by the Office of Professionalism investigators you admitted writing the message, but denied taping it to her door. You confirmed the note was in relation to being denied a northern deployment and an estimate of the overtime you anticipated working.

  Your written communication to S/Sgt. Prud'homme was insubordinate.

- On or about July 16, 2020 at approximately 5:00am S/Sgt. Prud'homme attended the Ottawa Detachment and observed you in the office in uniform wearing a non-issued beige ball cap. When asked about the ball cap you responded with words to the effect – It's a baseball cap. S/Sgt. Prud'homme stated it was inappropriate for you to be wearing it. You responded by shrugging your shoulders. She told you it wasn't OPP issued and told you that you couldn't wear it at work. She asked you if you wore it out in public to which you responded "no." S/Sgt. Prud'homme again told you to take it off while working. You responded with words to the effect – you were not going to take it off, that you were just wearing it at the office. She again told you to take it off, even if you were only wearing it at the office. You repeated words to the effect – you were not taking it off. S/Sgt. Prud'homme told you that you would have to deal with the consequences. You responded with words to the effect – that's fine.

  Your verbal and non-verbal communication with S/Sgt. Prud'homme was insubordinate.

- It is alleged that on or about July 21, 2020 you sent an email to S/Sgt. Prud'homme containing the following:

  Staff – for the benefit of the Acting Superintendent whom you chose to cc below, I will advise you that this grievance is not solely because you denied my northern deployment request. This grievance and the one that will be coming shortly stem directly from the fact that you have been showing favouritism to some officers in this detachment and then knowingly go out of your way to treat me differently. A number of your recent actions have been harassing and discriminatory in nature. Your overt lack of empathy for my decade long disguised discipline battle with the employer is further aggravating the situation. I wish you well in your promotional desires but I ask for the benefit of the detachment whose members

have been witness; moving forward until our next temporary Detachment Commander arrives and changes everything once again that you simply leave me alone. Nick Macdonell
Your written communication to S/Sgt. Prud'homme was insubordinate.

- On or about August 13, 2020 while you were on duty and in uniform you were observed by S/Sgt. Prud'homme outside of the detachment wearing a non-issue beige ball cap. You were told by S/Sgt. Prud'homme that non-issue hats were not to be worn while you were in uniform on July 16, 2020.
  Your actions on August 13, 2020 were insubordinate.

- On September 16, 2020 S/Sgt. Prud'homme observed a non-issued black hat with yellow embroidery which read: "Serving & Protecting Despite Employer Wilful Disguised Discipline." It was on your desk facing the doorway. When she saw you later she told you to remove it, that it was not conducive to a respectful workplace. You complied with her direction. As a result of seeing this hat and receiving additional information, she reviewed security video from September 9, 2020. The video revealed you were on duty in uniform wearing the non-issued black ball cap with yellow embroidery she had seen on your desk September 16, 2020. S/Sgt. Prud'homme told you on July 16, 2020 that non-issue hats were not to be worn while in uniform.
  Your actions on September 9, 2020 were insubordinate.

Count 4:
YOU ARE ALLEGED TO HAVE COMMITTED DISCREDITABLE CONDUCT in that you did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

- On or about April 29, 2020 at approximately 3:05pm you ordered PC Patrick AUGER to keep his OPP notebook in his locker. PC AUGER is a member of your shift on B platoon. You knew or reasonably ought to have known this was contrary to policy. Your order to him was witnessed by PC Guy PREVOST. Your intention with this order was to frustrate S/Sgt. Prud'homme's ability to access members' notebooks.

- On or about June 8, 2020 at approximately 6:33pm you forwarded the following email to (OPP DL Ottawa (OPP)) all of the Ottawa Detachment members:
  - Folks, I have a brand new pair of OPP dress pants (size 38/32) – never worn. They are good for promotional interviews, memorial marches, recognition ceremonies or really anytime you just want to feel proud to be a part of the OPP. Dress for scandalous PSB tribunals that go on for over

a decade because the employer refuses to provide disclosure remains the working uniform; clearly I will never have use for these.. Sitting on the Constables room firing range table.. First come first served. Enjoy....

You knew or reasonably ought to have known that your conduct was inappropriate and discreditable.

You are hereby ordered to attend in person, or by video conference on Wednesday, December 16, 2020, at 09:30 hrs at OPP GHQ, Room 1-128, Adjudication Suite, 777 Memorial Avenue, Orillia, Ontario, pursuant to the *Police Services Act*.

Dated this 23 day of OCTOBER, 2020.

Chief Superintendent Marty Kearns
Commander,
Office of Professionalism, Respect, Inclusion and Leadership

NOTE: IF YOU DO NOT ATTEND AT THE HEARING OF THIS CHARGE, THE PRESIDING OFFICER MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

Person Effecting Service:

Print Name Julie Prudhomme Signature

Copy served on person charged the 23rd day of October, 2020.

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Form PCS 72 (04/98)