OPAAC ADJ #25-016

SERGEANT NICHOLAS MACDONELL
Appellant

And

ONTARIO PROVINCIAL POLICE
Respondent

Adjudicators:
D. Stephen Jovanovic, Emily Morton, Leanne P. McClay

Appearances:
J.A. Girvin and N. Vandermey, for the appellant
A. Iafrate and I. DiMenna, student-at-law, for the respondent

Heard:
June 26, 2025

Date of decision:
October 3, 2025

Length of decision: 25 pp.

Statutory citations:
Police Services Act, R.S.O. 1990, c.P. 15 (repealed), ss. 85(7)(b) and 87(8)(a)
O. Reg. 268/10 (repealed), ss. 2(1)(h)(i)(a), 2(1)(b)(i), and 2(1)(a)(xi)
Community Safety and Policing Act, 2019, S.O. 2019. c.1, Sched. 1, s. 216

DAMAGE TO EQUIPMENT - Appellant charged with wilfully or carelessly damaging police property, contrary to O. Reg. 268/10, s. 2(1)(h)(i)(a) - While appellant removed and discarded spotlight from police cruiser, no evidence that he damaged spotlight - Conviction set aside.

INSUBORDINATION - Defiant or disrespectful behaviour - Series of emails and interactions between appellant and direct supervisor - Hearing officer found appellant's words and tone were disrespectful - Hearing officer also found appellant repeatedly refused to comply with simple instructions - No basis to interfere with hearing officer's finding that appellant was insubordinate within the meaning of s. 2(1)(b)(i) of O. Reg. 268/10.

DISCREDITABLE CONDUCT - Disorderly or prejudicial conduct - Hearing officer found appellant ordered a subordinate to store a notebook contrary to policy and circulated inappropriate communications - Hearing officer found appellant's actions undermined discipline and integrity of the workplace - No basis to interfere with finding that appellant breached s. 2(1)(a)(xi) of O. Reg. 268/10.

JURISDICTION - Appellate powers - Standard of review applicable to decisions of a hearing officer - Questions of fact reviewable on standard of reasonableness - Questions of law reviewable on standard of correctness - Issues of procedural fairness assessed in terms of whether required elements of procedural fairness were met.

HEARING OFFICERS - Bias - Hearing officer dismissed appellant's motion asserting bias - Appellant's concerns grounded in perception of historical mistreatment - No error in hearing officer's conclusion that appellant failed to establish either institutional bias or reasonable apprehension of bias.

DISCIPLINARY HEARING - Conduct of hearing - Fairness - Alleged denial of natural justice and procedural fairness - Hearing officer accessed portion of hearing proceedings for narrow purpose of confirming a brief exchange - No operational bias involved - Not established that appellant's rights to natural justice or procedural fairness were impaired.

HEARING OFFICERS - Reviewable errors - Hearing officer's findings of fact and credibility assessments owed particular deference - No legal errors in hearing officer's credibility and reliability assessments - Reasons amply supported conclusions that appellant guilty of insubordination and discreditable conduct.

DISCIPLINARY PENALTIES - Grounds for intervention - Appeals from disciplinary penalties - Role of appeal panel not to second guess hearing officer - Absent clear error in principle or failure to consider relevant material facts, panel will not vary penalty decision.

DISCIPLINARY PENALTIES - Demotion - Appellant convicted on three counts of misconduct - Hearing officer imposed one-year demotion and directed appellant to attend counselling - Evidence not supporting conviction on count of damage to equipment - Penalty varied to six-month demotion.

DISCIPLINARY PENALTIES - Directed program or activity - Convictions on counts of insubordination and discreditable conduct upheld - Evidence not supporting conviction on charge of damage to equipment - While misconduct warranted a demotion, appropriate to reduce period from one year to six months - No error in principle in hearing officer's order to attend counselling.

Summary of Reasons for Decision

Sergeant Macdonell appealed the January 5, 2024 decision of the hearing officer finding him guilty of three counts of misconduct contrary to the Code of Conduct in O. Reg. 268/10, enacted under the *Police Services Act.* Sergeant Macdonell also appealed the September 17, 2024 penalty decision of the hearing officer, demoting him to the rank of First Class Constable for a period of one year, with automatic reinstatement in rank at the end of the period. Pursuant to s. 85(7)(b) of the *PSA,* the hearing officer also directed the appellant to undergo counselling.

The notice of hearing contained four counts of alleged misconduct. The appellant was found not guilty of the first count, deceit. The hearing officer found the appellant guilty on the second, third and fourth counts: damage to equipment, contrary to s. 2(1)(h)(i)(a) of the Code of Conduct; insubordination, contrary to s. 2(1)(b)(i) of the Code; and discreditable conduct, contrary to s. 2(1)(a)(xi). The second count related to the appellant's removal and discarding of a spotlight from a police cruiser, which, the hearing officer found, caused damage and repair costs to the respondent. The third count was based on a series of emails and interactions between the appellant and his director supervisor, S/Sgt. Prud'homme; the hearing officer found these communications disrespectful and defiant; he also found that the appellant repeatedly refused to comply with dress/uniform standards and directives. The fourth count concerned the appellant ordering a subordinate to store a notebook contrary to policy and circulating inappropriate communications within the detachment deemed to undermine discipline and integrity of the workplace.

The appellant raised five grounds of appeal, asserting that:

- The hearing officer erred in dismissing the appellant's reasonable apprehension of bias motion;
- The hearing officer denied the appellant procedural fairness and engaged in operational bias by accessing audio recordings of the proceeding;
- The evidence did not support a finding of guilt on count two, damage to equipment;
- The hearing officer's assessments of credibility and reliability were flawed and biased; and
- The penalty was unduly harsh and failed to incorporate relevant penalty factors.

Held, Conviction on count two set aside; findings of misconduct on counts three and four confirmed. Penalty varied to six-month demotion; order for counselling confirmed.

The standard of review on appeals under s. 87 of the *PSA* was reasonableness for questions of fact and correctness for questions of law. Issues of procedural fairness were assessed in terms of whether the required elements of procedural fairness were met. With respect to penalty, the role of a panel hearing an appeal from penalty was not to second guess the hearing officer or substitute the panel's own opinion. In the absence of a clear error in principle or a failure to consider relevant material facts, the panel would not vary a penalty decision.

The first ground of appeal was rooted in the appellant's perception of historical mistreatment by the respondent. In 2014 the appellant was transferred twice in circumstances which he submitted were disguised discipline. In a December 2021 decision the Ontario Civilian Police Commission confirmed that the transfers were in fact disciplinary in nature. In light of this history, the appellant brought a motion before the hearing officer on August 15, 2022 requesting that he appoint an external adjudicator. In a decision dated September 12, 2022, the hearing officer dismissed the motion, ruling that he lacked the authority under the *PSA* to appoint any person to conduct a hearing. He also ruled that there was no evidence of actual bias and no reasonable apprehension of bias. The hearing officer did not err in applying the relevant legal tests. There was no error in his conclusion that the appellant had not established institutional bias or a reasonable apprehension of bias.

The basis for the second ground was a brief exchange between the appellant and the hearing officer during the motion part of the proceeding, regarding the question of whether they had ever worked together in the past. The hearing officer sought to confirm that question by reviewing a non-evidentiary portion of the audio recording. The appellant did not advance a ground of appeal related to a past working relationship. Under the circumstances, no operational/procedural bias was established and there was no infringement of his rights to natural justice.

However, with respect to the third ground, the evidence did not support the finding of guilt on clear, cogent and convincing evidence; the hearing officer erred in concluding that the appellant violated s. 2(1)(h)(i)(a) of O. Reg. 268/10. That section of the Code of Conduct read: "willfully or carelessly causes loss or damage". The Notice of Hearing referred only to damage, not loss. There was no evidence establishing what physical harm or damage was inflicted on the spotlight. The appellant did discard the spotlight, which resulted in its loss; however, that was not the charge he faced. Accordingly, the conviction on this count was set aside.

The fourth ground alleged that the hearing officer's credibility and reliability assessments were flawed and biased. In particular, the appellant submitted that the hearing officer scrutinized his testimony more closely than that of his supervisor, S/Sgt. Prud'homme; in addition, the hearing officer assessed the appellant's testimony using negative and unflattering terms. However, a hearing officer's findings of fact and credibility were owed deference. In this case, while the language used by the hearing officer may have been somewhat harsh, he explained his reasons for not accepting the appellant's evidence. There was no legal error in the descriptive words he used, and some of the comments appeared to be justified - for example, the appellant's disrespect for S/Sgt. Prud'homme, evident from his emails, together with his defiance of simple instructions, could be characterized, as they were by the hearing officer, as "toxic" to the workplace.

As to the fifth ground, there was no merit to the appellant's argument that the hearing officer erred in principle in his analysis of the appropriate penalty. It was not the role of the panel to reweigh any single factor. In this case, it was reasonable for the hearing officer to give the disguised discipline history limited weight as a mitigating factor; he found that it led to personal strain but did not excuse or justify the appellant's subsequent misconduct. Accordingly, the weight of relevant aggravating factors should not be reduced or reweighed because of disguised discipline: nature and seriousness of the misconduct; recognition of the seriousness of the misconduct; and impact on public interest/reputation of the police service. Similarly, the disguised discipline argument could not serve to increase the mitigating effect of employment history and impact on the officer.

Nevertheless, although there was no error in principle in the hearing officer's approach to penalty, the appropriateness of the disposition was affected by the removal of the conviction on count two. The hearing officer viewed the damage to equipment as a key component in what he characterized as a pattern and campaign of defiance. Given the panel's conclusion that there was no misconduct involved in the appellant's disposal of the spotlight, the seriousness of the misconduct and negative impact on the reputation of the service/public interest were correspondingly lessened. The panel endorsed the hearing officer's overall findings that the appellant's insubordination, lasting over a period of months, was serious misconduct which

warranted a demotion. However, the seriousness of the misconduct and the appellant's minimization of it were less significant once the damage to equipment count was set aside.

Considering all the various factors, a six-month demotion was an appropriate penalty, with automatic reinstatement to the rank of Sergeant at the end of this period. There was no error in principle in the hearing officer's direction pursuant to s. 85(7)(b) to attend counselling. The issue of counselling was raised by the appellant's counsel at the hearing. In addition, the order rationally linked the hearing officer's recognition that the history of disguised discipline did take a personal and professional toll on the appellant with his view that the appellant would benefit from professional therapy or counselling.

Authorities cited

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