Ontario Police Arbitration and Adjudication Commission

In the matter of an appeal from the disposition of a Hearing Officer dated August 28, 2024, pursuant to s. 87 of the *Police Services Act* and s. 216 of the *Community Safety and Policing Act, 2019*.

Date: 2025-11-12

Between:

Superintendent Stacy Clarke

Appellant

and

Toronto Police Service

Respondent

Decision

Panel: Emily Morton
Michael O'Brien
Graeme Turl

Appearances: Ravin Pillay, counsel for the appellant
Scott Hutchison, counsel for the respondent

Held by Videoconference: August 14, 2025

INTRODUCTION

[1] On October 2, 2023, the appellant, Superintendent Stacy Clarke, pleaded guilty to three counts of breach of confidence, three counts of discreditable conduct and one count of insubordination, contrary to ss. 2(1)(e)(i), 2(1)(a)(xi) and 2(1)(b)(ii), respectively, of the *Code of Conduct*, Ontario Regulation 268/10 enacted pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*").

[2] On August 28, 2024, following four days of evidence and submissions by the parties, the Hearing Officer, Retired Deputy Chief Robin D. McElary-Downer, imposed a penalty of demotion for a period of 24 months to the rank of Inspector. The Hearing Officer ordered that, at the conclusion of the 24-month period, while in the rank of Inspector, the appellant will be eligible to reapply for promotion.

[3] The Appellant appeals the penalty imposed and seeks an order varying the penalty to a demotion to the rank of Inspector for 12 months, followed by automatic reinstatement to the rank of Superintendent.

DISPOSITION

[4] For the reasons that follow, the appeal is dismissed.

BACKGROUND

[5] This discipline hearing gave rise to a complex body of evidence and issues pertaining to the role of systemic anti-Black racism in the Toronto Police Service ("Service") and its' promotional process, and its impact on the appellant's actions and decisions that led to the misconduct.

[6] The appellant is an extremely well-regarded member of the Service and the first Black female to attain the rank of Superintendent at the Service.

Summary of Misconduct

[7] The findings of misconduct were based on the appellant's pleas and an Agreed Statement of Fact ("ASF") filed before the Hearing Officer. The misconduct arose from

the appellant's decision to share and discuss interview questions with a group of constables under her mentorship during a promotional process conducted at the Service between November 29 to December 7, 2021.

[8] The candidates' interviews were conducted by a three-person panel, which on four of those dates included the appellant, who was the managing Superintendent as of October 21, 2021.

[9] On November 10, 2021, all candidates received an email advising them that mentoring for the process had to stop by November 25, 2021. The appellant and other senior officers serving on the panel received the same email, which the appellant admitted to receiving and reviewing.

[10] The interview process used a slate of questions that changed from day-to-day but were sometimes reused throughout the process. All interview candidates received the questions 30 minutes prior to the interview to prepare and were sequestered during this process.

[11] Despite this direction to cease mentorship activities, the appellant met with two of the six mentee constables on November 26, 2021 and conducted mock interviews with one. On November 29, 2021, while serving on an interview panel, the appellant took photos of the questions and the "answer rubric" from the first interview of the day, and sent the photos to three constables who had interviews scheduled in time blocks shortly after. She sent the same photos to a fourth constable on December 3, 2021, and later instructed this constable to delete the photos.

[12] On November 30, 2021, the appellant spoke on the telephone with a candidate constable and told him what the interview questions were for the day of his interview. She again took a photo, this time only of the questions, while serving on the interview panel on November 30, 2021, and texted them to the same candidate. Later in the day, after completing a different interview slot, the appellant took photos of the questions and the answer rubric and sent them to three candidate constables, who had interviews coming up in the following days. According to the ASF, several days later the appellant spoke with one of the candidates on the phone.

[13] With respect to one candidate, the appellant met with him at her home on three consecutive days before his interview on December 6, 2021. By this time, she had

sat on three interview panels for the competition. According to the ASF, the appellant coached this candidate on the interview process, including a mock interview, where she posed questions to him, some of which were identical questions asked during prior panels on which she had served. The ASF states that the appellant and this candidate were long time family friends, as well as mentor and mentee. She later served as a member of this candidate's interview panel, without disclosing the conflict of interest. This candidate admitted guilt to discreditable conduct for his role and received a six-month demotion.

[14] The other five candidate mentees received unit level discipline of between 10 to 20 days without pay.

Summary of Evidence at Penalty Hearing

[15] The respondent took the position at the penalty hearing, that while the appellant's misconduct, in the normal course, would attract a penalty of dismissal, the Service sought a two-year demotion without automatic reinstatement to rank. The appellant sought a 12- to 18-month demotion to the rank of Inspector, followed by an automatic return to Superintendent rank.

[16] The appellant called a large body of evidence on the role of systemic anti-Black racism in the penalty analysis. The arguments on appeal partly revolve around the Hearing Officer's consideration and weighting of evidence she heard about anti-Black racism in the Service and its personal impact on the appellant at time of the misconduct. It is therefore appropriate to set out what evidence the Hearing Officer heard on these issues in some detail:

- Retired Chief Mark Saunders: as a longstanding colleague and supervisor of the appellant, gave evidence about the appellant's outstanding contributions as an officer and a leader. He testified about her significant work on the Police and Community Engagement Review Advisory Committee ("PACER") which addressed systemic issues and focused on improving the Service's relationship with Black communities. He highlighted the appellant's front-line leadership role in maintaining order addressing demonstrators in the large 2020 Black Lives Matter protests. The appellant played a key role in interpreting and operationalizing the problematic Ontario Regulation 58/16 pertaining to "carding." Chief Saunders testified he viewed the misconduct as out of character for the appellant and gave evidence of his firm belief the

appellant would continue to serve the public and the Service if returned to her rank.

- Retired Superintendent Dave McLeod also had a longstanding personal and professional relationship with the appellant. Supt/R. McLeod gave evidence that he and the appellant shared concerns about the inequities that faced Black officers in the promotional process at the Service. He gave evidence that the selection of Black constables to high-profile roles was uncommon and disproportionate. He testified about actions he took to align his own division's candidate selection processes with values of fairness and equity, which met with organizational resistance, Supt/R. McLeod also testified he viewed the appellant's misconduct as serious but was an "aberration" caused by her longstanding frustration with systemic inaction by the Service to fulfill commitments to equity.

- Ms. Audrey Campbell was president of the Jamaican Canadian Association ("JCA") and began working with the appellant over a decade earlier on PACER. The JCA also had concerns about hiring and promotion within the Service. She viewed the appellant as a person of exceptional integrity who was uniquely effective in building trust among marginalized communities. She testified that the misconduct was motivated by a commitment to equity and systemic reform, and that returning the appellant to her former rank was key to building or rebuilding trust between the Service and the Black community.

- Dr. Wendell Adjetey is a professor who had been qualified as an expert on anti-Black racism in the legal profession. He gave evidence that institutional measures, such as producing reports or studies, can be perceived as designed to create an illusion of progress, which in turn produces extreme frustration for Black individuals, including those in senior leadership roles. He gave evidence about particular events or milestones in the Service's attempts to expand diversity in the senior ranks and the inefficacious response of the service in committing to implementing these programs or plans. He gave evidence that the impact of anti-Black racism on a person "is emotionally, physically and materially taxing" and produces significant mental health among other stressors. The appellant, who is clearly recognized for her skills in bridge-building with Black communities and the service, would have found this work incredibly taxing.

[17] The appellant also relied on a forensic psychiatric assessment by Dr. Jonathan Rootenberg, which was filed at the hearing as two reports. Dr. Rootenberg concluded that the appellant's experiences of systemic racism, frustration with lack of institutional change, and desperation, contributed to her misconduct. In her own evidence, the appellant agreed with Dr. Rootenberg's assessment that:

> In my psychiatric opinion, the historical and exacerbating stress of Supt. Clarke's lived experience with systemic racism and her experiences and frustrations in addressing the challenges and barriers faced by black officers within the TPS played a significant and contributory role in influencing her misconduct, which is at odds with her otherwise proven record of good judgment throughout her tenure with the organization. … As I see it, and as described earlier in the report, these stressors, and the frustration and desperation she felt, compromised and negatively impacted her good judgement, and impaired her from assessing and seeing things clearly, leading to the misconduct.

[18] In addition to the two reports from Dr. Rootenberg and Dr. Adjetey's report, the appellant filed a body of documentary evidence addressing ongoing anti-Black racism within the Service. In her reasons, the Hearing Officer refers specifically to the April 2022 "Workplace Well-Being, Harassment and Discrimination Review: Report Prepared for the Toronto Police Service" by Deloitte LLP and *The Report of the Race Relations and Policing Task Force* prepared by Chair Clare Lewis in 1981 for the Ontario Solicitor General ("Lewis Report").

[19] The appellant gave evidence at her penalty hearing. This was in addition to the two statements she gave to the Service in its investigation into the misconduct, including an unsolicited statement to the Professional Standards Unit in January 2022 in which she immediately owned up to her conduct. The appellant's evidence was lengthy and varied, and is summarized in almost ten pages of the Hearing Officer's reasons. The appellant's evidence, along the lines of Dr. Rootenberg's report, was that she was "overborne with emotions, frustration and desperation" when she committed the misconduct. This was rooted in her own personal toll of the impact of systemic barriers, her experience as the only Black female officer in her rank, and the pressure of being tasked with sensitive and complex tasks pertaining to community outreach and systemic change. The appellant's evidence touched on the substantial work she did to reform the Service's promotional process, large parts of which would not in fact be implemented in late 2021 as planned. As the appellant phrases it in her appeal factum, her evidence "characterized her misconduct as borne out of a sense of

injustice, disillusionment, and frustration with the Service's failure to implement its own reforms."

[20] The appellant also gave evidence about her own exemplary career, the negative impact of the misconduct on her mental, emotional and social health, and her commitment to responsibly serve the public in senior leadership with the Service in the future. At the conclusion of her evidence, the appellant gave a formal apology to the six constables involved, the Service and its membership, and her entire community.

Penalty Decision

[21] The Hearing Officer's penalty decision is a lengthy and thorough discussion of the evidence, the difficult issues at play and clearly referred to the different arguments of the parties as to how the evidence should be applied in her penalty analysis.

[22] As is often the case in penalty decisions, the Hearing Officer took the approach of structuring her analysis around the weight to be given to the relevant aggravating or mitigating factors, set out in Paul Ceyssens' *Legal Aspects of Policing*, Earlscourt Press, 1994, s.5.10(e), and commonly applied by hearing officers in discipline decisions. As the appellant's arguments now revolve around the reasonableness of the Hearing Officer's decision on these factors, it is useful to set out the structure of her decision in some detail.

[23] The Hearing Officer found the nature and seriousness of the appellant's misconduct weighty and aggravating in the penalty analysis. The seriousness of the misconduct, in turn, impacted the Hearing Officer's findings the damage to the public interest and reputation of the Service were aggravating factors. The Hearing Officer was cognizant of the appellant's argument that the misconduct rose to "level the playing field" in an inherently unfair promotional process, based on what she had observed through the years. The Hearing Officer declined to find that the aggravating nature and seriousness of the misconduct should be given less weight or attenuated, because of this context. When analyzing seriousness of misconduct, the Hearing Officer focused on the multifaceted nature of the misconduct, noting that they constituted a breach of trust on the part of a senior officer, harmed the six constables who were her mentees, contained elements of deception and that the appellant committed misconduct in defiance of a clear command to senior officers facilitating the interview process. Largely because of these factors that led the Hearing Officer to the conclusion that

"absent the mitigating circumstances that exist in this matter, the aggravating facts kick Superintendent Clarke's misconduct far down the field into the range of dismissal."

[24] It was when the Hearing Officer turned to the factors in the case, and in particular the appellant's employment history, disability, and other relevant personal circumstances, and her ability to rehabilitate, that the impact of the applicant's lived experience of facing systemic and unfair barriers within the Service came into play. In particular, when considering the personal circumstances of the appellant as a mitigating factor, the Hearing Officer gave weight to the social context evidence and the evidence concerning the impact of the appellant's lived experiences on her professional judgment at the relevant time. The Hearing Officer wrote:

> I concur with Dr. Rootenberg's summarization. I found Dr. Adjetey's viva voce evidence and detailed report helpful from a historical perspective, allowing me to better grasp an understanding of discrimination and the exclusion of Black people, and how this may have factored into Superintendent Clarke's perception, in that moment of time, when she decided to give her mentees an advantage, as she said, "if the opportunity presented itself".
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> The Court of Appeal found in *R. v. Morris*, 2021 ONCA 680 at paragraph 79:
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> > The social context evidence can, however, provide a basis upon which a trial judge concludes that the fundamental purpose of sentencing, as outlined in s. 718, is better served by a sentence which, while recognizing the seriousness of the offence, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism.

[25] The Hearing Officer accepted the evidence of the appellant and Dr. Rootenberg that the cumulative impact of desperation and frustration negatively impacted her judgment, thus putting her serious misconduct in context. She expressly found this was a mitigating factor of the case. While the Hearing Officer also expressed concern that this context should not entirely displace the expectation that the appellant was to act with "moral fortitude," she nevertheless recognized it was a factor. She wrote that this presented the "challenge therefore that lays ahead of finding a sanction

proportionate to the seriousness of the misconduct but tailored toward Superintendent Clarke's own personal circumstances and her mental 'overload'…"

[26] To arrive at a penalty less than dismissal, in addition to the evidence about the appellant's lived experiences, their context, and the personal toll this took on her, the Hearing Officer placed weight on the appellant's exemplary employment history and her demonstrated ability to rehabilitate. In terms of the potential to rehabilitate, the Hearing Officer again applied *R. v. Morris* and found social context evidence could provide a basis to give added weight to this disciplinary objective, rather than one of deterrence.

[27] In her reasons, the Hearing Officer also grappled with what she was to make of the dispositional factor of systemic or institutional response to the misconduct. She reviewed the body of evidence before her concerning attempts to study and reform racial inequalities in the Service. Ultimately, she did not give weight to systemic inaction over the years as a mitigating factor with respect to these issues in the penalty analysis. Rather, she found the appellant's misconduct was fundamentally covert and deceptive and not designed to shine a light on lack of systemic progress. She further found this was not a case where the appellant had expressed despair, and the Service had turned its back or sat idly by in the face of this information. The Hearing Officer found she could not link the misconduct itself to any systemic or organizational failure of the Service to more effectively and expediently address inequities in the hiring process.

[28] For these reasons, the Hearing Officer found the penalty of demotion, rather than dismissal, was fair and proportionate. She then turned her mind to the issue of reinstatement to rank following demotion, applying what the parties agree are the relevant principles as set out in *Detective Sergeant Stephen Ingham and Ontario Provincial Police* September 28, 2007. The Hearing Officer found there was tangible evidence of unsuitability. for an automatic reinstatement for rank, despite the fact the appellant had earned her rank and had outstanding leadership qualities, The Hearing Officer revisited the serious and calculated nature of the misconduct itself, which she found was a violation of trust as well as "an abuse of position, and power", and further that the Appellant's misconduct "undermined the integrity of the promotional process in a cheating scheme" and "violated the trust of colleagues", causing "significant reputational damage". Finally, six junior officers now carry "stained employment records," reflecting serious consequences of her leadership decisions. She found these circumstances made the appellant an unsuitable candidate for automatic return to rank.

ISSUES ON APPEAL

[29] The Appellant alleges the Hearing Officer erred by:

i. Improperly evaluating and weighing the social context evidence led at the penalty hearing;
ii. Relying on her person experience when addressing issues central to determining the appropriate penalty; and,
iii. Finding that there was tangible evidence of unsuitability for an automatic return to the rank of Superintendent following demotion.

STANDARD OF REVIEW

[30] Pursuant to s. 216(4) of the *Community Safety and Policing Act, 2019*, S.O. 2019, c.1, Sched. 1 ("*CPSA*"), OPAAC is mandated to exercise the powers and perform the duties of the Ontario Civilian Police Commission ("OCPC") in determining the appropriate standard of review. We are therefore bound by the penalty appeal standards set out below and the case law defining the role of the OPC in relation to penalty appeals under s. 87 of the *PSA*.

[31] The OCPC has repeatedly confirmed its role on a penalty appeal, as set out by the Divisional Court in *Karklins v. Toronto (City) Police Service*, 2010 ONSC 747 ("*Karklins*") at paragraph 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 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] This panel must pay deference to the Hearing Officer's weighing of dispositional factors and findings of fact unless an examination of the record shows that the conclusions cannot be reasonably supported by the evidence. The panel will only interfere with a penalty if there has been an error in principle, or relevant factors have been ignored. Our role is to determine whether the Hearing Officer's decision was reasonable in the circumstances: *Kobayashi and Waterloo Regional Police Service*, 2015 ONCPC 12 (CanLII) at paragraph 33; *Gould v. Toronto Police*, 2018 ONSC 4074 (CanLII) (Div. Dt.) at paragraph 6.

[33] In *Husseni v. York Regional Police Service*, 2018 ONSC 283 at para. 31 the Divisional Court confirmed that the OCPC is not to second-guess the decision of a hearing officer on penalty, and to give deference to the assessment and weight given by a hearing officer to the dispositional factors.

[34] Many of the arguments raised on appeal relate to the reasons given for the Hearing Officer's weighting and assessment of evidence on particular aggravating and mitigating factors she found relevant. These arguments engage the principle that, in conducting a review on the standard of reasonableness, this panel is to read the reasons of the Hearing Officer as a whole. The courts are clear that, a reviewing panel must "bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection" and that a reasonableness review is not a "line by line treasure hunt for error": *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 at paras. 91 and 102. Rather, reasons must be read as a whole and in context. They should demonstrate that the decision-maker dealt with the issues necessary to decide the matter: *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 9.

ANALYSIS

ISSUE ONE: The Hearing Officer did not err in her analysis of the social context evidence

[35] The appellant argues the Hearing Officer erred in principle when she did not consider the evidence about the impact of anti-Black racism when she dealt with a number of dispositional factors. Rather, she focused on this evidence when she considered the mitigating factors of the personal circumstances of the appellant and the appellant's potential to rehabilitate, as well as the issue of systemic or institutional failures of the Service as a potential mitigating factor. The appellant submits that the failure to refer to and apply this evidence in specific portions of the decision that dealt with, for example, deterrence, employment history and the nature and seriousness of the misconduct, is evidence of a failure on the Hearing Officer's part to address the social context evidence and how it related to crafting a just and fit disposition for the appellant.

[36] In terms of specific complaints, the appellant first submits it was an error for the Hearing Officer to "fail to give effect" to the social context evidence when she considered whether a systemic or institutional failure at the Service with respect to anti-Black racism in the promotional process was a factor requiring mitigation. The Hearing Officer did not give weight to this factor, and found "the evidence does not support a systemic organizational failure, rather it represents a human frailty that led to a serious course of misconduct." This finding, the appellant argues, represents a failure to give weight to evidence.

[37] The Hearing Officer's reasons provide a transparent and intelligible line of reasoning as to why she did not give this factor mitigating weight. The Hearing Officer considered the body of evidence before her about the history of systemic racism and steps the Service had made towards progress. She found that while the effect was not perfect, there had been some progress. However, the Hearing Officer found that the nature of the misconduct, which involved subterfuge and deception, could not be characterized as the type of response to these systemic inequities that was worthy of mitigation.

[38] We see no basis to interfere with the Hearing Officer's analysis of this dispositional factor. The fact that a different decision maker considering the social context evidence could have come to a different conclusion about the role of the Service's progress in addressing anti-Black racism as a mitigating factor, is not the test. The Hearing Officer provided clear reasons for the weight she gave to this factor, and it is not our role to reweigh it.

[39] Nor do we agree with the proposition that statements made throughout the Hearing Officer's reasons that "it was not her role to inquire into the Toronto Police Service's promotional process and make recommendations", undermine the reasonableness of her decision. The Hearing Officer was alive to and received a great body of social context evidence about systemic racism in the Service and its impact on the appellant. She applied this evidence to give significant mitigating weight with respect to its personal impact on the appellant. It was open to the Hearing Officer to find "my job is not to make inquiry and or, cast judgment, and or, make recommendations on either anti-Black racism or the promotional process." Indeed, this approach mirrored a submission made by counsel who represented the appellant at the penalty hearing:

> The Defence well understands that a penalty hearing is not and cannot be a public inquiry into the pace and quality of the efforts of the Toronto Police Service to reconcile the societal ill of systemic discrimination policing towards Blacks, within

the Toronto Police Service, or within the hiring promotion processes. However, it is an inquire into the history and scope of mitigating factors impacting Superintendent Clarke and the Commission of misconduct, and therefore these couple of factors impacting her experiences, emotional duress and motivation are relevant and provide important context and mitigation to the commission of the misconduct.

[40] There is no basis for the panel to substitute its opinion that the Police Service's systemic failure to make progress in addressing inequality in the promotional process ought to be given mitigating weight. The arguments raised on this point come close to inviting the panel to engage in a correctness analysis in terms of the weight to be given to this factor. We recognize the penalty hearing raised profound issues of systemic racism in the promotional process at the Service, resulting in a large and complex body of evidence for the Hearing Officer to apply in crafting the penalty. The fact that this penalty analysis raised such weighty issues does not in turn mean there is only one correct answer to how to apply and weigh evidence and, ultimately, balance the different dispositional factors. As we have found, where there is no basis to find the Hearing Officer erred in principle in her analysis, we cannot substitute our opinion on the weight to be given to the factor of the Service's systemic response to the issues that played a role in the misconduct.

[41] Second, the appellant submits that the Hearing Officer misapprehended the evidence about barriers and systemic inequities based on race in the Service's promotional process when she wrote that the six constables were "already on a level playing field coming into their interviews." This argument fails to appreciate the context of the statement. The idea that the six were "on a level playing field" was based on the Hearing Officer's review of the evidence before her relating to the strength of their respective applications. The Hearing Officer also observed that the appellant's actions could have served to disadvantage other racialized candidates in the process who were not the appellant's mentees. We do not read this statement as an indication that the Hearing Officer disregarded the social context evidence about the disparities in the Service's promotional process, and its impact on the appellant. This single phrase, taken out of the breadth of the evidence on which it was based, does not amount to an error in principle and is not a basis for this panel to interfere.

[42] Third, the appellant argues that the Hearing Officer erred in principle by "failing to give proper effect to the social context evidence, its potential to mitigate the Appellant's conduct, its relevance to the severity of the conduct, and its impact on the

Appellant's moral blameworthiness." In other words, the appellant submits that the Hearing Officer erred by failing to apply social context evidence to discount the aggravating factor of nature and seriousness of the misconduct. Again, we find this submission does little more than invite the panel to reopen the hearing officer's assessment of the weight to be given to the aggravating factor of seriousness of misconduct and substitute our own opinion by giving it less weight.

[43] We find the Hearing Officer gave clear and succinct reasons why she found Superintendent Clarke's misconduct extremely serious and "at the far end of the spectrum." She considered the fact that the appellant surreptitiously photographed the confidential interview questions, instructed one of the constables to delete the photographs, and defied the order to cease mentoring constables. She conducted three additional mentoring sessions with one constable, who was also a family friend, as well as to meet in person to conduct mock interviews. The gravity of her misconduct was far reaching, as she betrayed the trust not only of the six constables, who lost out on opportunities for promotional consideration and faced misconduct charges of their own, but also betrayed the trust of the other members of the interview panel and the Service itself. Again, we are not permitted, on appeal, to now reweigh this individual factor and find it should have been given less weight because of the context of this misconduct.

[44] The Hearing Officer was alive to the appellant's arguments at the hearing, that systemic failures at the Service should attenuate the weight to be given to the seriousness of the misconduct. She declined to apply the evidence in this manner and instead focused on it when considering the personal circumstances of the appellant and her potential to rehabilitate as mitigating factors. She did so in keeping with the principles set out in *R v. Morris*, where the Court held at paragraph 77 that [i]t is important to preserve the distinction between the factors relevant to the seriousness or gravity of the crime on one hand, and the factors relevant to offender's degree of responsibility on the other." The Hearing Officer provided clear and intelligible reasons for doing so. We would not interfere by reweighing these factors and substituting our own opinion.

ISSUE TWO: The Hearing Officer did not improperly rely on her policing experience

[45] It is a settled principle that Hearing Officers are permitted to draw on their own policing experience in adjudicating police misconduct under the *PSA*: *Siriska v. Ontario Provincial Police*, 2022 ONCPC 8 ("*Siriska*"), *Stevenson v. York Regional Police*

Service, 2013 ONCPC 12; *Carter v. Ontario Provincial Police Service*, 2018. In *Siriska* the OCPC wrote "[i]t is well established that hearing officers may bring to disciplinary proceedings both their practical and specialized knowledge of the workings of their police services." This is consistent with the OCPC's approach that hearing officers may bring to disciplinary proceedings both their practical and specialized knowledge of the workings of their police services. This allows a hearing officer to both understand and interpret the evidence in context when assessing misconduct: *Schmidt v. Ontario Provincial Police*, 2011 ONCPC 11 at para. 42. While the appellant relies on the criminal law case of *R. v. J.M.*, 2021 ONCA 150, which discusses permissible use of judicial notice, a hearing officer's use of practical and specialized experience in evaluating evidence at *PSA* hearings from is distinct from the evidentiary rules surrounding judicial notice.

[46] The key limitation on a Hearing Officer's license to draw on policing experience to assist in the fact-finding process is that the experience must not fill in a gap in evidence or make essential findings of fact. Recent OCPC decisions holding that Hearing Officers erroneously applied their experience to supplant evidence on an essential issue illustrate this limitation. In *Gannon v. Windsor Police Service*, 2024 ONCPC 29 at paragraphs 62 to 69, the OCPC held that the Hearing Officer erred by replacing the actual policies in place at the relevant police service with his own past professional experience; this had the effect of erroneously creating a "duty" on the appellant in the context of hearing into a count of neglect of duty. In *Pais v. Toronto Police Service*, 2023 ONCPC 14 at paragraphs 85 to 91 the OCPC found the Hearing Officer erred by replacing requirements set out in the *Equipment and Use of Force Regulation*, RRO 1990, Reg. 926 with his own experience in the context of a hearing into an unreasonable use of force count of misconduct. In both cases the errors related to replacing evidence heard at the hearing with the hearing officer's own experience, and in each case with respect to making findings on the element of the count of misconduct at issue.

[47] We do not agree with the appellant that the Hearing Officer's references to her personal career experience in a police service served to fill a gap in the evidence or related to an essential finding of fact.

[48] When addressing the how, the appellant's personal circumstances, including her lived experiences with racism in the Service, were a mitigating factor, the Hearing Officer elaborated:

> While I understand why Superintendent Clarke did what she did, her actions were nonetheless inexcusable and has left a profound impact on others. Based on my own personal experiences, I can say there are many competing internal inequities in policing. It is frustrating when you think people are not listening or that you are being arbitrarily dismissed when your input/ideas do not align with others. It is lonely when you feel like you are the only person on the island. I completely understand this. But this does not give one the license to step outside their moral fortitude and commit misconduct.

[49] This single comment about the Hearing Officer's own personal recognition that a large institution such as a police service has "many competing inequalities" does not amount to an essential finding of fact. It must be read in the context of the entire decision, which repeatedly references the evidence the Hearing Officer heard about the appellant's own personal lived experiences with systemic inequality in the Service. This is in addition to the social context evidence received from Dr. Adjetey and other witnesses. This comment does not reflect a finding of fact that contradicts other evidence. In any event, when reading the decision as a whole, it is not possible to say the Hearing Officer supplanted the evidence of the appellant's lived experience with her own. In the section immediately preceding this comment the Hearing Officer wrote:

> It is beyond question that racism, and specifically anti-Black racism, including overt and systemic anti-Black racism, exists in our society, and shamefully, it exists in our policing circles. To say otherwise would indicate my head was in the sand. I do not challenge Superintendent Clarke's "lived experiences." I found her candidacy and forthrightness in regard to them refreshing and believable.

[50] The second specific complaint in this area relates to the Hearing Officer's comment when addressing the dispositional factor of systemic failure and the organizational/institutional context of the misconduct:

> I understand Superintendent Clarke's frustration with the constable to sergeant promotion process. Dr. Adjetey's historical evidence in regard to white supremacy, broken promises, change never coming to fruition, the belief the system was built to keep Black people form attaining position and equality, strategic subterfuge, and the perceived belief of the closing of the ranks in TPS, gave context to Superintendent Clarke's frustration. One cannot argue with the historical reports, but through my own lived experiences, I am not convinced there has not been progress since Clare Lewis filed his report 30 years ago. Please understand, I am

> not saying anti-Black racism does not exist. It does and no one is arguing this point, but again, in my view, there has been progress in addressing the inequities caused by it.

[51] Again, the Hearing Officer's comments, and when her reasons are read as a whole, do not supplant or contradict evidence on an essential factor, with her own experience. First, the Hearing Officer's comment that, in her experience, there has been progress in the past three decades, is borne out by the evidence before her. The Hearing Officer summarized this evidence, which included reports spanning a 30-year period, when considering systemic or institutional failure of the Service in the penalty analysis. Second, the inclusion of a personal observation about some level of progress cannot be characterized as making an "essential finding of fact" or "filling a gap in the evidence". The Hearing Officer considered, and was alive to, all of the social context evidence presented in the hearing. The Hearing Officer did not allow her "lived experience" to override her analysis of the impact of the appellant's own lived experience as a mitigating factor.

[52] Finally, the appellant takes issue with the following reference to personal experience by the Hearing Officer:

> Based on my protracted career in two police services and having the privilege of meeting police officers from across North America, I can say that to my knowledge, a fair and completely objective, bias-free promotional process that cannot be subjectively penetrated, one in which every person in the Service applauds, simply does not exist. It is therefore commendable that Toronto Police Service recognizes their promotion process has deficiencies and as such, has undertaken to implement a new system, one which would in the eyes of the employees will improve on the existing process.

[53] This comment is within the Hearing Officer's practical and specialized knowledge of the workings of police services. It does not represent an essential finding by the Hearing Officer when she conducted her analysis about the role of the Service's systemic or institutional response and its role in the appellant's misconduct.

[54] Most importantly, the Hearing Officer's use of examples from her own lived experience, needs to be placed in the context of the decision as a whole. The three impugned passages added little to the analysis in whole. They did not drive any fundamental conclusions and the reasons for disposition would be unchanged if they

were simply removed. The authorities relating to altering the decision are clear, we are not to conduct a microscopic analysis of reasons or be overly critical of language choices in a decision.

ISSUE THREE: The Hearing Officer did not err in finding there was tangible evidence of unsuitability for automatic return to rank

[55] The appellant submits that the Hearing Officer erred in principle in her consideration of the factors relating to unsuitability for return to rank, asset out in *Det. Sergeant Ingham v. Ontario Provincial Police* When the Hearing Officer found there was "tangible evidence of unsuitability" for a non-automatic return to the rank of Superintendent following demotion.

[56] *Ingham* has been relied on in decisions imposing a demotion that includes a requirement for re-qualification for return to the present rank, which must entail the consideration of "tangible evidence of unsuitability." In *Ingham*, the hearing officer held:

> …it is not sufficient to simply state that a particular type of misconduct would automatically render an individual unsuitable. The context of the misconduct must be considered, as must the duration of the misconduct and any subsequent behaviour that might have been intended to assist the misconduct being hidden, mischaracterized or covered up.
>
> …
>
> I have some difficulty accepting the notion that Detective Sergeant Ingham's usefulness as a supervisor has been spent or irreparably harmed. The source of my discomfort includes some very telling passages in his Performance Management & Development Plan, his commendable efforts toward his continuing education, observations by professional associates and colleagues, and statements made by his peers, supervisors and managers.

[57] The appellant argues that the Hearing Officer's reliance on *Ingham* as setting out the appropriate test for determining whether there should be an automatic return to rank was correct, but her application of the test was not. The Hearing Officer's consideration of this point, found at page 69 of her reasons, is:

> I believe Superintendent Clarke possesses outstanding leadership qualities. I found her demeanour quite personable when she testified. That being said, I find there is sufficient and tangible evidence in front of me to find her actions amply illustrated an abuse of position, and an abuse of power. This makes her an unsuitable candidate for automatic reinstatement to the rank of Superintendent.

[58] The appellant submits the Hearing Officer erred in her application of *Ingham* because she failed to consider mitigating factors such as her ongoing contribution to the Service and the community, alongside her exemplary employment history.

[59] The Hearing Officer clearly focused on the nature of the misconduct in making the finding that there was tangible evidence of unsuitability for return to prior rank. Though compendious, her use of the terms “abuse of position” and “abuse of power” at this final stage of the reasons, reflects the full and extensive reasons given for her finding. It is sufficient that she addressed both the nature and the seriousness of the misconduct, noting that they were both a weighty and aggravating factor.

[60] It is important to read this paragraph in context. While the appellant states this isolated paragraph does not discuss mitigating factors beyond leadership abilities in detail, we are not permitted to read this paragraph in isolation. In the paragraphs immediately preceding, the Hearing Officer finds:

- It is mitigation that the appellant had an “incredibly remarkable, stellar, blemish free career” and “has been the face of the Toronto Police Service in improving the relationship between the Service and the Black community” and that she “possesses exceptional character traits that make her stand out as an incredible law enforcement officer”;

- Superintendent Clarke receives full credit for recognizing the seriousness of her misconduct. She accepted responsibility immediately. She has expressed remorse for her conduct. I accept Dr. Rootenberg’s opinion that Supt. Clarke’s “desperation and frustration negatively impacted her good judgement and impaired her from seeing things clearly”;

- The appellant’s potential to rehabilitate is mitigation and her motivation is high to get her career back on track, and stay on top” that no order directing counselling was required;

- That the appellant did not act for personal gain, but a desire to help others which overtook her good judgment, required consideration.

[61] The Hearing Officer then goes on to consider the "magnitude of the aggravating features" at play, including:

- A violation of the public's trust and confidence as a senior ranking officer;
- The fact that she conducted herself in a dishonest and deceptive manner and abused her power;
- The result of leading the six constables themselves to commit very serious misconduct when they "showed promise as future leaders" in the service;
- That she counselled one of the officers to delete evidence of misconduct;
- The misconduct breached the integrity of the promotional process and made it difficult for officer to have faith in a process easily tampered with by a senior officer;
- The unwanted publicity and irreparable damage to the Service.

[62] The Hearing Officer reviewed these mitigating and aggravating factors in detail in her reasons just before turning her mind to the parties' positions on automatic reinstatement. It simply cannot be said that she ignored the mitigating factors in applying *Ingham* and considering the issue of automatic return to rank. We cannot identify an error in principle in terms of how the Hearing Officer applied the principles in *Ingham,* which include a consideration of the context of the misconduct, its duration, and any behaviour intended to hide, mischaracterize, or cover up this misconduct. Again, the fact that a different decision-maker may have given more weight to the mitigating factors in this aspect of the analysis is not the apposite question in a reasonableness review.

[63] The appellant raised the unreported penalty decision in *Insp. Joyce Schertzer and the Toronto Police Service* ("*Schertzer*"), decided on January 13, 2025. In *Schertzer*

the subject officer received a nine-month demotion from Inspector to Staff-Sergeant, with automatic reinstatement to prior rank. The hearing officer returned findings of guilt for discreditable conduct and neglect of duty. The facts in the *Schertzer* matter concerned misconduct that was neither protracted, nor involved planned misconduct. We have reviewed the *Schertzer* decision and there is no discussion of *Ingham*, nor is there any language through which that Hearing Officer characterized the misconduct as an abuse of power or abuse of trust, as was the case here.

[64] We further note that the appellant did not make argument, in written submissions or at the appeal hearing, that the Hearing Officer was required to apply the social context evidence in the *Ingham* analysis itself. Regardless, we find that by appellant's personal circumstances as mitigating, because of her lived experience of confronting and attempting to redress systemic barriers in the Service, it had been fully addressed by the Hearing Officer both earlier in her reasons and in this final portion of her penalty analysis.

[65] Finally, we note the Hearing Officer considered the issue of reinstatement to Superintendent earlier in her reasons, by thoroughly evaluating the dispositional factor of the Appellant's employment history. Witnesses Chief Saunders, Superintendent MacLeod, and Ms. Campbell testified that failure to reinstate the appellant would be a failure to the Black community. The Hearing Officer held she was not swayed by their opinions for the following reasons. The appellant had only held her rank for less than ten months before the misconduct; and, most of her accomplishments in terms of work with the Black community had occurred before she was promoted to superintendent. She therefore gave less weight to these witnesses' evidence with respect to the appellant's return to rank.

[66] For these reasons, we find there is no basis to interfere with any aspect of the Hearing Officer's penalty disposition. The Hearing Officer's penalty disposition is confirmed is confirmed.

ORDER

[67] The appeal is dismissed. Pursuant to s. 216(4) of the *CPSA* and s. 87(8)(a) of the *PSA,* OPAAC confirms the penalty imposed by the Hearing Officer.

Released: November 12, 2025

"Emily Morton"

_____

Emily Morton

"Michael O'Brien"

_____

Michael O'Brien

"Graeme Turl"

_____

Graeme Turl