

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

SERGEANT SHAWN HEWLETT

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

Presiding Members:

Biagio (Bill) Marra, Member
Hyacinthe Miller, Member

Appearances:

William R. MacKenzie, Counsel for the Appellant
Lynette E. D'Souza, Counsel for the Respondent

Hearing Date: January 10, 2007

This is an appeal from a finding of guilt for one count of neglect of duty contrary to section 2(1)(c)(i) of the Code of Conduct found at Ontario Regulation 123/98 as amended (the "Code") made against Sergeant Shawn Hewlett by Inspector (retired) Gregory C. Connolley (the "Hearing Officer") on January 12, 2006.

Penalty is not at issue.

Background:

The facts giving rise to this appeal are complex. They have their origins in the acrimonious separation of a Ramara Township couple. For the purposes of this decision they are referred to as Mr. and Mrs. R.

On September 5, 2003, Mr. R was served with a separation notice. The same day, Mrs. R, along with three of the couple's adult children returned to the matrimonial home to pick up her medication and some personal belongings and, at the instruction of counsel, to videotape the contents of the house. An altercation arose with Mr. R, but police were not called.

On September 10, 2003 Mrs. R and the children returned to the matrimonial home to remove more items. On this occasion, they requested and received an

Ontario Provincial Police ("OPP") escort consisting of two officers. Mr. R was not at home.

On September 12, 2003, W (an adult daughter) called the OPP Communications Centre in Orillia to arrange for a police escort the following day, to prevent a breach of the peace, while Mrs. R removed the remainder of her personal belongings. W remarked to the dispatcher that her father was violent, a drinker and had guns on the premises.

The following day, Mrs. R and her children assembled in a park near the matrimonial home to await the arrival of their escort. When the escort did not appear as agreed, a second adult daughter called the Communications Centre and was told that the officers would be delayed due to a priority service call. The dispatcher advised that the family could proceed to the residence, but should call 9-1-1 if an emergency arose.

Mr. R was present at the home. The situation became tumultuous and emotions were running high. There was yelling, pushing and confrontation. Mr. R grabbed his wife by the arm, threatened to kill his son, tried to push one daughter down the stairs and run the other over with a car.

W called 9-1-1 at approximately 4:18 p.m. She reported that her father was getting violent, may have been drinking and that there were guns on the property.

Constable Sean McTeague was dispatched and told that there was a domestic situation where six people were fighting on the front lawn of a residence. He was alone in his vehicle. A second unit responded. That unit consisted of Constable Anne Stringer and a recruit, whom she was coaching at the time, Constable Jason Avery.

That same afternoon, Sergeant Hewlett was on duty in his police vehicle. Sergeant Hewlett is an experienced police officer. At that time, he had been a member of the OPP for almost twenty-two years. He had held the rank of sergeant for five years and was responsible for the supervision of twelve constables of B platoon of the Orillia Detachment.

Sergeant Hewlett heard the dispatch and knew that two cars were on route. He decided to drive to the residence. He arrived at 4:23 p.m. When he exited his cruiser, he noted there were several vehicles and trailers in the driveway. There was also a group of people. They included two daughters, a boyfriend, a son and his spouse. The situation appeared to be under control.

The five adults were speaking with Constable McTeague. Their understanding was that police were responding to a domestic violence situation and would take appropriate action. They were advised by Constable McTeague that the police were not leaving without Mr. R.

Mrs. R was seated inside a garage speaking with Constable Stringer. Constable Avery was dealing with Mr. R. In other words, there were three scenes ongoing. At some point during the afternoon Mrs. R complained of chest pains. Paramedics were called; however, she did not require hospitalization.

While this was taking place a man identified as Gord Moon arrived. Mr. Moon was an off duty OPP constable employed at the Orillia Detachment. He was married to a third daughter of Mr. and Mrs. R. She appears to have been the only adult child whose sympathies rested with her father.

Sergeant Hewlett was advised by Constable Moon that he had been called by Mr. R. The two engaged in a brief conversation out of earshot of the other family members. Sergeant Hewlett asked Mr. Moon to move to the rear of the garage out of sight of the rest of the persons involved and to remain there with Mr. R.

Sergeant Hewlett and Constables McTeague, Stringer and Avery were at the residence for between 2½ to 3 hours. During this time, Sergeant Hewlett moved between the three scenes gathering information about the incident from those present and relaying that information to one officer or another.

A decision was made that events were family-driven, and that there was no substance to the allegations of domestic violence. Constable McTeague, with the approval of Sergeant Hewlett, determined that Mr. R would not be arrested.

Towards the end of the afternoon, Sergeant Hewlett observed Constable McTeague distribute OPP statement forms to the individuals on scene. Constable McTeague advised them to complete the forms once they returned home and to fax them into the Detachment. Constable McTeague would then consult with the Crown with respect to the possible bringing of criminal charges against Mr. R.

The three adult children assisting Mrs. R were not satisfied with this approach and immediately called the Communications Centre in an effort to reach the Detachment Commander. They were not successful. On September 26, 2003 they filed a formal public complaint against Sergeant Hewlett and Constable Moon.

This complaint eventually resulted in a direction on June 1, 2004 by this Commission that a disciplinary hearing be held. The specific allegation against Sergeant Hewlett was:

On September 13, 2003 you attended at a residence at ... Avenue, Ramara Township to supervise the actions of constables that responded to an occurrence at that location. You failed to have assault and threatening allegations properly investigated.

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

The Hearing:

The Disciplinary Hearing was conducted over a period of five days: June 28, June 29, November 10 and December 16, 2005 and January 12, 2006. Ten witnesses were called. They included three of Mr. and Mrs. R's adult children, Constable Sean McTeague, Constable Anne Stringer, Constable Jason Avery, Detective Sergeant Jennifer Robertson, Constable Gordon Moon and Sergeant Hewlett.

Sergeant Hewlett testified that he was at the scene on September 13, 2003 as a "backup" officer. He was present when Constable McTeague brought Mr. and Mrs. R together for a conversation. At that time Mrs. R was asked if she had been assaulted, and responded that she had not. According to Constable McTeague's testimony, it was this denial that led to the conclusion no domestic violence had occurred.

As well, Sergeant Hewlett and Constable McTeague testified that once they learned from Constable Moon about the totality of events as it related to family interactions that day and on previous days, it was decided there was not sufficient evidence on which to substantiate a domestic violence occurrence. In other words, having received Constable Moon's input, Sergeant Hewlett and Constable McTeague then determined that there was no need to arrest Mr. R at that time.

Detective Sergeant Robertson was the officer assigned to lead the team investigating the public complaint. During her testimony she was questioned at some length about the OPP policies relating to family disputes and domestic violence.

Detective Sergeant Robertson gave evidence that OPP Orders define verbal altercations or arguments between a husband and wife as well as those that include violence or threat of violence, as a domestic violence. As well, she gave evidence that it was OPP policy that all parties to a domestic violence occurrence be interviewed separately (i.e. not in each others presence).

She testified that she began the investigation on October 9, 2003 in Orillia, with a meeting attended by the Detachment Commander, Inspector Szarka and Staff Sergeant Vessey. Detective Sergeant Robertson and Staff Sergeant Vessey attempted to locate an incident report; however, after consulting with the data entry staff, they determined that no report had been dictated with respect to the events of September 13, 2003. She stated that she later spoke with Sergeant Hewlett, who assisted her to locate copies of the involved officers' notebooks.

On October 14, 2003 Detective Sergeant Robertson met with Constable McTeague who reported that the Rs' adult children had faxed their statements as directed. However, they had to subsequently mail them because the faxed copies had been cut off when transmitted. As of that date, Constable McTeague had not consulted with the Crown Attorney with respect to charges in connection with the incident.

According to Detective Sergeant Robertson, Constable McTeague was aware that the R's son had been assaulted by his father on September 13, 2003 after he stepped in between his parents, and that his father had also threatened several other people.

Detective Sergeant Robertson stated that on October 24, 2003, following review of the investigative file, it was possible to formulate the grounds to lay six charges against Mr. R for assault and threatening. That afternoon, the investigators located him at the residence of Constable Moon in Orillia. Mr. R was arrested and released, with arrangements made for Mr. Moon to turn in his father-in-law's firearms.

Between late October and December, 2003 there were several meetings with the Crown Attorney. The eventual resolution was withdrawal of the charges based on an agreement by Mr. R to enter into a peace bond that included a non-communication order with family members, a prohibition from possessing firearms and agreement that he would enter into a Partner Assault Response Program.

The Hearing Officer considered this evidence and received submissions. On January 12, 2006 he delivered a twenty-one page decision finding Sergeant Hewlett guilty of neglect of duty. It is that decision which is the subject of this appeal.

Appellant's Position:

Mr. MacKenzie, on behalf of the Appellant, argued that the Hearing Officer erred in principle by failing to properly apply the law with respect to neglect of duty. In particular, he set expectations for Sergeant Hewlett that were both unrealistic and unreasonably high.

He noted that there is no definition of "proper investigation". He agreed with the Hearing Officer that assessing the quality of an investigation in the context of a chaotic and emotionally charged event was particularly challenging.

He pointed out that the situation confronting the officers on September 13, 2003 was one where elderly parents were in the midst of an acrimonious separation. Their adult children were divided in their allegiance. Property was being removed from the matrimonial home.

According to Mr. MacKenzie, the officers who attended the scene that day had considerable policing experience: Constable McTeague, twenty-two years; Constable Avery, fifteen years.

Sergeant Hewlett elected to attend the call as backup officer and provide assistance. This was not required by policy or protocol; rather, he chose to stay and assist for upwards of three hours, a significant investment of time. When he arrived things were under control and the parties separated.

Constable McTeague, as Officer-In-Charge at the scene, was responsible for the investigation. Sergeant Hewlett had no concerns about his abilities or decision-making.

Mr. MacKenzie noted two decisions referred to by the Hearing Officer. They were Fright and Hamilton-Wentworth Police Service (2002), 3 O.P.R. 1593 (O.C.C.P.S.) and Andrews and Midland Police Service (1 May, 2003, O.C.C.P.S.). He argued that they were not relevant to the facts of this case. Fright concerned mandatory procedures not being followed and Andrew related to investigations not being done or written documentation being completed.

He asked us to consider that Sergeant Hewlett was aware of what his subordinates were doing; offered advice, assistance and proper direction but ultimately deferred to the decision-making of Constable McTeague with respect to an appropriate investigative strategy.

Mr. MacKenzie noted that Sergeant Hewlett was not charged with breaching a specific procedure. He argued that to find him guilty of neglect of duty, it was necessary to establish that a duty existed and then demonstrate that the officer either failed or neglected to perform that duty in a diligent manner. He suggested that the neglect must also be of a degree that would cross the line from a mere performance matter to one of misconduct. Gottschalk and Toronto Police Service (29 January, 2003, O.C.C.P.S.)

Mr. MacKenzie suggested that the events confronting the officers on the day in question were exceptional. He pointed out that in exceptional cases, officers can defer laying charges and consult with the Crown. He also suggested there was no substance to the charges ultimately laid against Mr. R and no reasonable prospect of conviction, and for that reason they were "wiped clean" by the Crown.

According to Mr. MacKenzie, Sergeant Hewlett's actions were not neglectful. Rather, he was acting properly in his role as a supervisor. The officers did the best they could with the information they had. Further, he asked us why Sergeant Hewlett should be held accountable when Constable McTeague was the decision-maker.

He asked that the Hearing Officer's findings be quashed.

Respondent's Position:

Ms. D'Souza, on behalf of the Respondent, reminded us of the standard of review to be applied by this Commission in disciplinary appeals. Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Ont. Div. Ct.), Godfrey and Ontario Provincial Police (15 January, 2002, O.C.C.P.S.) and Law Society of New Brunswick v. Ryan (2003), 223 D.L.R. (4th) 577 (S.C.C.)

Ms. D'Souza submitted that we, as an appellate tribunal, cannot second-guess the findings of the Hearing Officer. Provided the Hearing Officer's decision is not unreasonable in view of the evidence before him, we have no authority to set it aside and substitute our own finding with respect to guilt or innocence. She relied on Williams and Ontario Provincial Police (1996), 2 O.P.R. 1047 (O.C.C.P.S.), for the proposition that we must conclude the Hearing Officer's decision was "void of evidentiary foundation" before we can intervene.

She noted that findings of credibility are properly within the Hearing Officer domain. Carmichael and Ontario Provincial Police (1998), 3 O.P.R. 1232 (O.C.C.P.S.) and Cate and Peel Regional Police Service (2002), 3 O.P.R. 1604 (O.C.C.P.S.)

Ms. D'Souza observed that the Hearing Officer heard ten witnesses and examined twelve exhibits over a period of four days. She asserted that he properly considered Sergeant Hewlett's role as a supervisor and concluded that his duty extended beyond his mere attendance on scene, and included an obligation to ensure that, because of the complex issues that arose during and after the events in question, a meticulous investigation was completed.

She argued that the Hearing Officer correctly found the initial investigation was substandard. She observed that Sergeant Hewlett was the supervisor of the officers involved and the senior officer on the scene. He was advised by the adult children about the allegations of assault by their father. She submitted that there were clear policies in place with concerning investigations and follow-up for domestic and family violence situations. They were not followed.

Sergeant Hewlett was aware of these policies.

Ms. D'Souza also drew our attention to the chronology of events between September 13 and October 9, 2003, during which little of investigative consequence was achieved. No occurrence report had been dictated. There had been no report to or discussion with the Crown Attorney. Sergeant Hewlett had not reviewed the attending officers' notes or RMS reports. He had not followed up with Constable McTeague to inquire about the possible laying of charges.

Given the above, Ms. D'Souza argued that the findings of the Hearing Officer were reasonable and supported by clear and convincing evidence. All of this was reflected in his reasons.

On these points she drew our attention to McNabb and Ontario Provincial Police (1997), 3 O.P.R. 1193 (O.C.C.P.S.), Soley and Ontario Provincial Police (1996), 3 O.P.R. 1098 (O.C.C.P.S.), Gottschalk and Toronto Police Service supra., and Hewitt and Devine and Toronto Police Service (1999), 3 O.P.R. 1372 (O.C.C.P.S.).

Ms. D'Souza also argued that the Hearing Officer applied the proper test for establishing neglect of duty. Supervisors have a duty to supervise independent of any specific procedures. This included a responsibility to ensure that a proper investigation takes place and reports are filed. Some cases, by their nature will require greater diligence than others.

On these issues she cited Fright and Hamilton-Wentworth Police Service supra., Andrews and Midland Police Service supra. and Humphries and Kelly and Durham Regional Police Service (26 August, 2003, O.C.C.P.S.).

For the above noted reasons, Ms. D'Souza requested that the Hearing Officer's findings with respect to conviction be confirmed.

Decision:

The standard applicable to the Commission's review of a Hearing Officer's decision on appeal was clearly annunciated in Williams and Ontario Provincial Police supra., at page 1058:

Our role or function in such matters is not to second guess the decision of the adjudicator. In certain limited cases it would be open to us to reach a different conclusion from the trier of fact. However, that must be based on the strongest ground. In other words, there could be no other determination than the conclusions of the adjudicator as to the credibility of witnesses cannot be reasonably accepted.

The question then to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

As well, if a trier of fact misapprehends the evidence or makes a clear error of law, then this Commission has the power to vary or revoke the Hearing Officer's decision.

How do these considerations apply to this case?

The Hearing Officer, in a twenty-one page decision dated January 12, 2006, described the evidence before him in some detail. He characterized his responsibilities in assessing this evidence as 'challenging'.

He described the history of events leading up to September 13, 2003 to provide some context. It seems beyond doubt that central to matters was the difficult marital separation of an elderly man and woman. Their children and other family members were seriously at odds.

The Hearing Officer noted that September 13, 2003 was not the first time the police had been called to attend at the matrimonial home. A few days before, Mrs. R and a number of her children attended the family home, accompanied by two OPP officers who stood by while property was removed.

On the day in question the same children received instructions from the OPP Communications Centre to proceed to the matrimonial home without another escort to remove further articles. As the Hearing Officer observed, the above appeared to provide Mrs. R and her children with "tacit approval to do just what they did".

When Mrs. R and her children arrived they were confronted by Mr. R. Several 9-1-1 calls were made. When Constables McTeague, Avery and Stringer arrived, the situation was chaotic, with several vehicles in the driveway and people milling about.

The Hearing Officer found that there were clear allegations of assault, threats and domestic violence. The R children were informed that the police would not be leaving without their father. Such findings are clearly supported by the evidence.

The Hearing Officer identified the OPP Orders and Policies that apply to situations of domestic violence and family disputes. The Hearing Officer noted: "Testimony provided by W [sic] stated that she saw her father holding her mother's arms above her head very tight and shaking her and yelling at her. To an observer this would appear to fit the Domestic Violence Occurrence criteria. W [sic] also testified that she told officers about the alleged assault."

The Hearing Officer also noted that Mrs. R subsequently denied being assaulted. However, this statement was made in the presence of her husband. It would seem self evident that questioning an alleged victim of domestic violence in the presence of the man accused of assaulting her is not a good investigative technique. Sergeant Hewlett was present when this took place.

Further, the Hearing Officer noted that Sergeant Hewlett was aware of threats by Mr. R directed towards his son, but felt they were minor. The Hearing Officer

observed: "I do not understand the process whereby threats to kill some one are considered minor, particularly before an in-depth investigation is completed."

These are reasonable concerns.

Events were further complicated by the arrival of off-duty Constable Moon on the scene at the request of the same potential accused. The Hearing Officer noted that after Constable Moon spoke with Sergeant Hewlett and Constable McTeague that the focus of inquiries shifted from alleged domestic violence to the lawfulness of the presence of Mrs. R and her children at the matrimonial residence.

This is troubling. The conflicting evidence of the parties should have been cause for concern. The presence of an off duty and obviously interested OPP Constable should have caused further concerns. The Hearing Officer noted: "the conflicting information and previous involvement of the police, would demand a meticulous investigation. This certainly was not the case here."

Further, it is not disputed that at the end of the day, no one was arrested. The parties were issued with blank witness forms and sent on their way. Notwithstanding assurances that matters would be followed up on, weeks after, incident reports had not been prepared or the Crown consulted.

The Hearing Officer concluded that the investigation was "sub-standard". On the evidence before him, this was a finding open to the Hearing Officer.

It was suggested that Sergeant Hewlett was not compelled to attend this occurrence. In other words, he had the option of choosing to attend what was classified as a domestic occurrence involving multiple adults or simply driving by after assuring himself his officers were in control of the occurrence.

That well may be so, but Sergeant Hewlett chose to drive to the residence. He was on duty, in his sergeant's uniform and in a police vehicle. He chose to remain on the scene for some 2 ½ to 3 hours. He became actively involved in the events that unfolded.

Sergeant Hewlett was not a passive bystander or "backup". He was the senior officer on the scene. He was the immediate supervisor of all officers present. We agree with the Hearing Officer that Sergeant Hewlett was "responsible to ensure that the officers under his supervision satisfactorily perform their duties as assigned." This is self-evident and does not require a specific policy or procedure.

As well, these are responsibilities that cannot be discarded or ignored.

Sergeant Hewlett's role was to provide advice and guidance while the occurrence was being investigated; afterwards, his role was to ensure that the investigation was properly completed by his officers.

The Hearing Officer relied on two cases that defined the scope of responsibilities of a police supervisor. They were Fright and Hamilton-Wentworth Police Service supra., and Andrews and Midland Police Service supra.

Fright concerned the responsibility of supervisors to ensure that reports of their subordinates are complete. The Appellant urges us to find that it was Constable McTeague's responsibility to ensure that the appropriate reports were filed and consultation with the Crown completed. Perhaps. But, it was Sergeant Hewlett's responsibility to see that this was done in a prompt and timely manner. Supervisors must supervise.

In the alternative, it is suggested that the particulars against Sergeant Hewlett for neglect to have "allegations properly investigated" must be limited to his actions on September 13, 2003. We do not agree. The investigation was not concluded on that date. It was ongoing.

As well, the fact that criminal charges were subsequently laid and then dropped in consideration of a peace bond is not relevant. The fact that grounds apparently existed for the laying of charges in the first instance is the point.

We agree with the Hearing Officer that Sergeant Hewlett did not offer proper direction to his officers. He was neglectful in not ensuring that the appropriate OPP Orders were followed by officers under his immediate and direct supervision. He did not ensure that there was diligence in the collection of evidence.

Sergeant Hewlett testified that he observed Constable McTeague handing out statement forms to the witnesses and found nothing amiss. He also stated there was little he did not know about the events on scene. Despite the allegations of assault and family members' expressions of concerns about their safety, despite his awareness of the requirements of OPP policies with respect to family violence or domestic violence occurrences, he neither consulted with his supervisor, Staff Sergeant Vessey, nor the Area Crime Sergeant.

Sergeant Hewlett did not review the notes of Constables McTeague, Avery or Stringer after the incident. He did not make his own notes. He does not recollect advising his supervisor of the involvement of Constable Moon. Accountability for directing, monitoring and coaching his subordinates cannot be selective.

One explanation given by Sergeant Hewlett for the lack of proper follow-up was that he and his officers 'had gotten wind' that the case would be reassigned. The Hearing Officer found this rationale to be self-serving and a means of deflecting

responsibility. As for not contacting the Crown for four weeks, the reason offered was shift scheduling, days off and costs. The Hearing Officer described this explanation as “self-serving”. These were characterizations that on the evidence were open to him.

Given the above, it certainly cannot be said that the decision of the Hearing Officer lacked evidentiary foundation, or displayed a misapprehension of that evidence or displayed clear error of law.

There was more than enough evidence before him to permit the Hearing Officer to find that Sergeant Hewlett, without lawful excuse, neglected or omitted to promptly and diligently perform his duties as a supervisor.

We therefore dismiss this appeal.

DATED AT TORONRO THIS 16TH DAY OF MAY 2007.

Biagio (Bill) Marra
Member, OCCPS

Hyacinthe Miller
Member, OCCPS