



ONTARIO CIVILIAN POLICE COMMISSION

IN THE MATTER OF THE POLICE SERVICES ACT, R.S.O. 1990, C. P.15, AS AMENDED

Citation: Alden v. Ottawa Police Service,

2013 ONCPC 13

BETWEEN:

CONSTABLE PATRICK ALDEN

APPELLANT

-and-

OTTAWA POLICE SERVICE

RESPONDENT

DECISION

Panel: Jacqueline Castel, Member
Zahra Dhanani, Member

Hearing Date: October 29, 2013

Hearing Location: Toronto, Ontario

**Ontario Civilian Police Commission
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Appearances:

Mark Wallace, Counsel for the Appellant
Christiane Huneault, Counsel for the Respondent

Introduction

1. Constable Patrick Alden (“Const. Alden” or the “Appellant”) of the Ottawa Police Service (the “Service”) was charged with one count of Insubordination and one count of Discreditable Conduct under the Code of Conduct, which is set out as a Schedule to Ontario Regulation 123/98 enacted under the *Police Services Act* R.S.O. 1990, c.P.15, as amended (the “Act”)
2. A hearing was held before Supt. Jill Skinner (the “Hearing Officer”) at which Const. Alden pled not guilty to both charges.
3. On November 5, 2012, the Hearing Officer found him guilty of both counts. On January 28, 2013, she imposed a penalty of a forfeiture of eight days of work (eight hour shifts), five days for the Insubordination conviction and three days for the Discreditable Conduct conviction.
4. Const. Alden initially sought to appeal both convictions and the penalty as evidenced by the Notice of Appeal. However, on the date of the appeal hearing, his counsel informed the Panel that he is abandoning the appeal of the conviction for Discreditable Conduct and of the Decision on penalty with respect to that conviction.
5. As such, Const. Alden is appealing the conviction for Insubordination. His position is that the conviction for Insubordination should be quashed, and as a result the penalty should be modified to the forfeiture of three days of work (eight hour shifts), which was the penalty allocated for just the Discreditable Conduct conviction.

6. The Notice of Hearing regarding the count of Insubordination reads as follows:

Count # 1 – Insubordination:

You are alleged to have committed the offence of Insubordination in that on or about January 25th, 2011 you engaged in an off-duty traffic stop in violation of Ottawa Police Service Traffic Stops and Vehicle Searches policy #8.10 contrary to section 2(1) (b) (ii) of the prescribed Code of Conduct, Ontario Regulation 268/10, as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Decision

7. The appeal is dismissed for reasons which follow.

Background

8. On January 25, 2011 Const. Alden and Ms. Kendra Banks were both driving on Hazeldean Road. Ms. Banks' vehicle was in the right lane approaching a merge to the left as her lane was coming to an end due to construction. Const. Alden was driving in the left lane next to her.
9. Const. Alden, who was off-duty, in plain clothes and driving his own pickup truck, noticed Ms. Banks' vehicle trying to merge left into his lane. He accelerated.
10. Ms. Banks believed Const. Alden intentionally blocked her from merging. She honked, stuck out her middle finger at Const. Alden and merged behind his vehicle.
11. Ms. Banks drove closely behind Const. Alden and eventually passed his truck when the road opened. She then stopped at a traffic light in the left turn lane.

12. Const. Alden got out of his vehicle and approached Ms Banks' vehicle. He checked the interior of the vehicle and observed two children in the back seat.
13. Const. Alden testified that the window on the driver's side of the vehicle was rolled down. Ms. Banks testified that her window was closed and she rolled it down when Const. Alden showed his badge, identifying him as a police officer. At the appeal hearing, Mr. Wallace conceded that the window was closed since the incident took place in January.
14. Const. Alden told Ms. Banks that one of his co-workers would handle the laying of a charge for careless driving. Ms. Banks began using profane language and demanded to know if Const. Alden was on duty. Const. Alden told her he is "on duty 24 hours a day".
15. Const. Alden returned to his vehicle before the light turned green. He wrote Ms. Banks' license plate number on a scrap of paper and left to continue with his personal business.
16. On his return to work on January 27, 2011, he queried Ms. Banks' licence plate number and learned that she was a suspended driver. He generated an Investigative Action report.
17. On January 27, 2011, Const. Alden attended Ms. Banks' house accompanied by another officer, both of whom were in uniform. They served Ms. Banks with a Careless Driving charge and a Notice of Driver's License Suspension.
18. Ms. Banks complained to the Independent Police Review Director ("IPRD") and, as a result, a disciplinary hearing was directed.
19. Ms. Banks was convicted of careless driving. However, according to her evidence at the hearing, the conviction was subsequently removed from her record after she provided the IPRD report relating to the matter to a person she believed to be a justice of the peace.

20. The IPRD did not make submissions at the appeal.

Appellant's Submissions

21. Mr. Wallace submitted that the Hearing Officer's "common sense" definition of traffic stop constituted an error in law.
22. He argued that the Hearing Officer's definition of traffic stop – "when a police officer becomes involved in some type of investigation, either criminal or other breach of legislation involving a motor vehicle" – is overly broad, vague and serves to muddy rather than clarify matters.
23. Mr. Wallace acknowledged that the definition of "stop" in the *Highway Traffic Act*, R.S.O. 1990, c H.8 ("HTA") is not applicable to a police traffic stop, but he argued that the definition is nevertheless instructive. He submitted that using police powers to "halt" a vehicle is what constitutes a traffic stop. According to Mr. Wallace, if a police officer comes across a stopped vehicle and instructs the person not to go forward, that too would qualify as a traffic stop.
24. Mr. Wallace argued that the Hearing Officer erred in law in finding no evidentiary value in the fact that the traffic light remained red before, during and after Ms. Banks' encounter with Const. Alden. He submitted that the colour of the light should have been considered in determining what constituted a traffic stop in the circumstances.
25. In addition, Mr. Wallace argued that the Hearing Officer erred in law in concluding that Ms. Banks' state of mind informed the issue of whether or not a traffic stop occurred. Speculative opinions from the complainant of how she would have reacted had the light turned green is not a finding of fact that can be made on the evidence. The Hearing Officer was required to base her decision on the evidence before her as it pertained to the charge.

26. Mr. Wallace argued that the Hearing Officer's finding that Const. Alden was guilty of Insubordination was unreasonable and should be revoked.
27. Mr. Wallace submitted that for Const. Alden to be guilty of Insubordination, the Hearing Officer had to find that he "disobeyed, neglected or omitted" to carry out Ottawa Police Service Policy No. 8.10 "Traffic Stops and Vehicle Searches" ("Policy No. 8.10"). However, he argued that the Hearing Officer erred in finding that a traffic stop, or more specifically, an off-duty traffic stop, occurred. As such, Const. Alden could not have been guilty of Insubordination as he did not contravene Policy No. 8.10.
28. Mr. Wallace argued that the Hearing Officer should have based her definition of traffic stop on the act of using police powers to halt a vehicle and on the safety issues that are the focus of Policy No. 8.10.
29. Mr. Wallace submitted that it was unreasonable for the Hearing Officer to determine that the following actions, in isolation or together, turned the incident into a traffic stop:
- Const. Alden using his police identification;
 - Const. Alden approaching the vehicle to confirm Ms Banks' identity; and
 - Const. Alden writing down Ms. Banks' licence plate number.
30. Mr. Wallace argued that the Hearing Officer's definition focuses on the purpose of the interaction (i.e., investigative), whereas it should have been informed on the police officer's perspective and the safety concerns that Policy #8.10 is based on.
31. He argued that a lay person could just as easily have written down the license plate number and approached the driver to determine their gender and relative age in order to submit a

report to the police. Further, the Hearing Officer's definition does not require a vehicle to be stopped to qualify as a "police stop".

32. Mr. Wallace argued that the Hearing Officer's findings failed to establish the necessary evidentiary foundation to sustain the conviction. The evidence revealed that throughout the time that Const. Alden left his vehicle, spoke with Ms. Banks and returned to his vehicle, the traffic light remained red. Mr. Wallace argued that Const. Alden never used his police powers to stop the vehicle.
33. Mr. Wallace argued, in the alternative, that Const. Alden's actions were defensible. According to Mr. Wallace, Const. Alden held a reasonable, honest belief that he had not conducted a traffic stop. This was so even after reviewing the policy upon his return to work. Further, he argued that Const. Alden's actions do not rise to the level of rebellion or disobedience. As such, the defence of lawful excuse would apply: see Constable Martin Rowe v. Sault Ste. Marie Police Service, (April 23, 2003, OCCPS).
34. In response to a question from the Panel, Mr. Wallace confirmed that the defence of lawful excuse was not raised by counsel at the hearing.

Respondent's Submissions

35. Ms. Huneault argued that the Hearing Officer did not make an error in law in arriving at her decision, and that her reasons should not be subjected to microscopic examination or painstaking scrutiny. She argued that the language used by a lay tribunal should not be misconstrued as misstatements of legal tests.
36. Ms. Huneault submitted that the Hearing Officer was aware of and applied the law and the required standard of proof, and she made appropriate and reasonable findings based on the evidence.

37. Ms. Huneault argued that the Hearing Officer correctly concluded that the definition of “stop” contained in the HTA applies to a “stop” initiated by a driver and not a police officer. As such, the definition is not applicable to a police traffic stop.
38. In the absence of a legislative definition of “police traffic stop”, Ms. Huneault argued that the Hearing Officer properly relied on her experience and the steps typically taken by police officers engaged in traffic stops in defining “police traffic stop”. She submitted that the Hearing Officer did not make an error in law when she drew on her expertise as a Superintendent to provide a definition of “police traffic stop”.
39. Ms. Huneault argued that Const. Alden did consider officer safety when he examined the interior of the vehicle.
40. Ms. Huneault argued that it was not an error in law for the Hearing Officer to find that the duration of the red light was of no evidentiary value. This is a factual matter. The operative action of a “police traffic stop” is investigatory and not the manner of coming to a stop. Const. Alden approached a motorist and engaged his police powers to investigate a breach of the legislation involving the motorist. The fact that the vehicle was already stopped at a red traffic light when Const. Alden approached the vehicle was a moot issue.
41. Ms. Huneault also argued that the Hearing Officer did not rely on the state of mind of Ms. Banks when arriving at her conclusions that a “police traffic stop” took place, but rather she said that Ms. Banks’ state of mind was consistent with the fact a “police traffic stop” had occurred. She submitted that it was not an error in law to confirm Ms. Banks’ state of mind.
42. Ms. Huneault stated that the Hearing Officer acknowledged that there was no evidentiary value in what would have happened had the light turned green. What was important was how Ms. Banks felt at that moment in time.

43. Ms. Huneault submitted that the Hearing Officer justified her conclusions, and the evidence that led to her conclusions was clear and cogent. Her decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
44. Ms. Huneault argued that the Hearing Officer did not err in finding that Const. Alden conducted an off-duty traffic stop. Const. Alden confirmed that he was aware of Policy #8.10 and the "Training Moment" video that deals with traffic stops. Const. Alden also confirmed that no exigent circumstances existed.
45. Ms. Huneault submitted that Const. Alden's actions are not defensible under a lawful excuse or honest mistake, but rather constituted a deliberate disobedience of the policy. She also stated that it was disingenuous of Mr. Wallace to bring up this defence on appeal when it was not raised at the hearing.

Reply Submissions

46. Mr. Wallace argued that the definition of "traffic stop" should not change with the facts. There should be a coherent definition which acts as a guide.
47. Mr. Wallace argued that the prosecution also had an obligation to make submissions on the defense of lawful excuse at the hearing. The fact that neither counsel raised the defense at the hearing should not preclude it from being considered on appeal.
48. Mr. Wallace submitted that Ms. Banks was not intimidated by Const. Alden. She launched into profanities about his driving. This should be considered when characterizing their interaction.

Issues

49. The issues before us are:

- 1) Does the Hearing Officer's definition of "traffic stop" constitute an error?
- 2) Did the Hearing Officer err by failing to consider or give weight to the fact that the traffic light was red?
- 3) Did the Hearing Officer's finding that Ms. Banks' state of mind informed the issue of whether a traffic stop occurred, constitute an error?
- 4) Was the Hearing Officer's finding that Const. Alden's actions constituted Insubordination reasonable?
- 5) Should the defence of reasonable mistake have been considered?

Reasons and Analysis

Standard of Review

50. The principles to be applied by the Commission on an appellate review of a disciplinary decision are well settled.
51. The standard of review with respect to the Hearing Officer's interpretation and application of the law is correctness: see Law Society of Upper Canada v. Neinstein (2010), 99 O.R. (3d) 1 (Ont. C.A.). The standard of review for the Commission with respect to the Hearing Officer's factual findings is reasonableness: see Dunsmuir v. New Brunswick [2008] S.C.J. No. 9 and Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (Can LII).
52. The Supreme Court of Canada described the standard of reasonableness as being concerned mostly with the existence of

justification, transparency and intelligibility in the decision-making process but also whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the law and facts: see Dunsmuir, supra.

53. The role of the Commission is not to second-guess the decision of the Hearing Officer but rather to review the decision to determine whether the conclusions reached are reasonable, reflect a correct understanding and application of the law, are based on clear and cogent evidence and are articulated in an intelligible, transparent and logical manner: see Dunsmuir, supra, Precious and Hamilton Police (2002) 3 O.P.R. 1561, (OCCPS); Whitney v. Ontario (Provincial Police) [2007] O.J. No. 2668 (Div. Ct.).
54. In certain limited cases it may be open to us to reach a different conclusion from the one reached by the Hearing Officer. However, we should only intervene if there has been an error in principle, or relevant factors have been ignored: see Williams, Wilson and Ontario Provincial Police (November 20, 2006, OCCPS); Favretto and Ontario Provincial Police (February 13, 2002, OCCPS); Karklins and Toronto Police Service (September 25, 2007, OCCPS); Wilson and Ontario Provincial Police (November 20, 2006, OCCPS); and Quintieri and Toronto Police Service (2002) 3 O.P.R. 1509 (OCCPS).
55. In the case before us, Mr. Wallace presented the alleged errors as errors of law, which would call for the correctness standard of review. In our review of the materials we find that the alleged errors are not errors of law as there is no actual interpretation of law by the Hearing Officer. Therefore the standard of review that is applicable for the grounds of appeal in this case is the standard of reasonableness. Dunsmuir, supra, and Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board), supra.

Does the Hearing Officer's definition of "traffic stop" constitute an error?

56. Mr. Wallace conceded in his oral submissions that the definition of "stop" in the HTA does not apply to traffic stops by police officers.
57. Since there was no definition of "traffic stop" in the legislation or Policy # 8.10, it was appropriate for the Hearing Officer to use her experience in policing to define traffic stop. This was an issue within her core area of expertise.
58. As stated above, as the Hearing Officer was not interpreting or applying law in defining "traffic stop", we consider this ground for appeal using the standard of reasonableness: see Dunsmuir, *supra*.
59. The Hearing Officer's definition of "traffic stop" may not be perfect from the standpoint of a lawyer or for the purpose of being incorporated into legislation. However, this was not her purpose in offering a definition. The Hearing Officer is a lay person and her writing is not expected to meet the standards of legal perfection: Clifford v. Ontario Municipal Employees Retirement System (2009) ONCA 670, 98 O.R. (3d) 210
60. We find that Mr. Wallace focused too much on the following one sentence definition of "police traffic stop", in critiquing the Hearing Officer's definition and analysis:
- "It is this tribunal's position that a "police traffic stop" to a reasonable person would be when a police officer becomes involved in some type of investigation, either criminal or other breach of legislation involving a motor vehicle."
61. Mr. Wallace critiqued the definition because it does not specify that the vehicle must be stopped or halted. We find that the Hearing Officer accepted as a given that the vehicle would not be moving, given the plain language meaning of the word

“stop”. Further, on the facts of this case, there was no dispute that the vehicle was stopped at a red light.

62. The Hearing Officer provided further elaboration on the steps normally involved in a “police traffic stop” and regarding why she considered Const. Alden’s actions to amount to an off-duty traffic stop:

“There are a number of factors that have led me to this finding. They are that Constable Alden **engaged his powers as a police officer by utilizing his police badge for identification** and that he **documented the licence plate on a scrap of paper, which he utilized in his subsequent investigation**. He also testified that he **approached Ms Banks’ vehicle to confirm her identity related to the offence of improper lane change**. The identification of alleged offenders is a fundamental aspect of an investigation and I conclude that Constable Alden had undertaken this step to further investigate the traffic offences.” (Emphasis added)

63. According to Mr. Wallace, if a police officer comes across a stopped vehicle and instructs the driver not to go forward, it would qualify as a police stop. We disagree that instructing the driver not to go forward is a necessary precondition for a police traffic stop in all circumstances. In this case, there was no need to instruct the driver not to go forward because the light was red and Const. Alden had time to confirm the driver’s identity while the light remained red. It was enough for Const. Alden to use his authority as a police officer by showing his badge. After he did so, Ms. Banks opened her window and he confirmed her identity, something he needed to do to complete his investigation and ultimately lay a charge for careless driving.

64. Finally, it cannot be denied that this stop was conducted by Const. Alden who is a police officer not a lay person and that the stop led to the laying of charges which but for the “stop” would not have been laid.
65. In the absence of a definition in the legislation or policy, we find that the Hearing Officer’s definition of “traffic stop”, measured against the standard of a lay person, her analysis of Const. Alden’s actions, and her conclusion that these actions amounted to a “traffic stop” fall within the range of possible, acceptable outcomes which are defensible in respect of the law and facts. She provided clear and cogent evidence to support her conclusion, and articulated her reasons in an intelligible and logical manner.

Did the Hearing Officer err by failing to consider or give weight to the fact that the traffic light was red?

66. At the outset, we consider the issue of the traffic light being red to be a factual, not a legal, matter.
67. We find, further, that the Hearing Officer clearly explained why the colour of the traffic light did not negate her position that Const. Alden’s actions constituted a “police traffic stop”.
68. Specifically, she explained that Const. Alden exercised his authority as a police officer by showing his police badge and, in response to Ms. Banks’ inquiry about whether he was on duty, responding that he is on duty 24 hours a day. In these circumstances, the Hearing Officer concluded, it was reasonable for Ms. Banks or someone in her shoes to believe she was not free to go. It would have been different if Const. Alden did not show his police badge and did not answer that he was on duty at all times.
69. Therefore, we do not find that the Hearing Officer ignored a relevant fact in reaching her decision. She provided a logical explanation, based on the evidence, as to why she did not

consider the colour of the traffic light to be relevant, in the circumstances of this case.

Did the Hearing Officer's finding that Ms. Banks' state of mind informed the issue of whether a traffic stop occurred, constitute an error?

70. In her 16 page decision as to findings, the Hearing Officer made only a passing comment, which was not even a full sentence in length, regarding Ms. Banks' state of mind:

"Therefore in relation to whether it was the traffic light or the authority of the police officer that kept her from leaving is of no evidentiary value, *although it does speak to the state of mind of Ms. Banks.*" (Italics added)

71. The Hearing Officer gave cogent reasons why she found Ms. Banks to be a credible witness, including that she was candid about things which were not favourable to her, such as giving Const. Alden the finger and directing profanities at him, all while her children were in the back seat. As such, she accepted that Ms. Banks believed that she was required to stay regardless of the colour of the traffic light.

72. However, the Hearing Officer did not base her definition of "police traffic stop" on Ms. Banks' state of mind; nor did the Hearing Officer rely on Ms. Banks' speculative testimony about how she would have behaved if the light had been green. Rather, she based her decision that Const. Alden's actions constituted an off-duty traffic stop on the facts that Const. Alden:

- used his police authority by showing his badge and telling Ms. Banks he was on duty;
- confirmed Ms. Banks' identity;

- wrote down her license plate number and used it for his investigation; and
- returned two days later with a colleague and charged Ms. Banks with careless driving.

73. In these circumstances, the Hearing Officer's passing comment about Ms. Banks' state of mind is not an error of law or fact.

Was the Hearing Officer's finding that Const. Alden's actions constituted Insubordination reasonable?

74. Mr. Wallace argued that Const. Alden did not commit Insubordination because he did not conduct an off-duty traffic stop and, therefore, did not violate Policy #8.10.

75. As explained above, we find that the Hearing Officer provided an acceptable definition of "traffic-stop". It was appropriate for her to develop a definition, using her own experience and expertise, given the absence of such a definition in the legislation and in Policy #8.10. We also find that she clearly articulated, based on a thorough review of all of the evidence, why Const. Alden's actions amounted to an off-duty police traffic stop. Her reasons and conclusion are well within the range of possible and acceptable outcomes, defensible in respect of the facts and law.

76. Under Policy #8.10, officers are not permitted to attempt a traffic stop while off duty unless there are exigent circumstances. Const. Alden admitted that there were no exigent circumstances in this case. As such, we find that the Hearing Officer properly concluded that Const. Alden committed Insubordination, by conducting an off-duty traffic stop in contravention of Policy #8.10.

77. Further, Policy #8.10 provides that where an off duty officer witnesses a traffic violation, the officer should consider him or herself a witness and report the offence by calling the Communication Center or making a report for follow-up. Const.

Alden did not call the Communication Center, even though he admitted to having a cell phone with him at the time. Personally attending Ms Banks' residence with a colleague two days later to charge her with careless driving, as the Hearing Officer concluded, is not consistent with the meaning of "making a report for follow-up" under Policy #8.10.

Should the defence of reasonable mistake have been considered?

78. Mr. Wallace submitted that even if Const. Alden was found to have conducted a traffic stop and therefore committed insubordination by violating Policy #8.10, the defence of lawful excuse applied. He argued that Const. Alden's actions do not rise to the level of disobedience or rebellion, and the Hearing Officer erred in failing to consider this defense.
79. Significantly, counsel for Const. Alden did not raise the defence of lawful excuse in submissions at the hearing. In these circumstances, there was no requirement for the Hearing Officer to address this defence in her reasons.
80. Nevertheless, the Hearing Officer's reasons, read as a whole and including the sections dealing with Discreditable Conduct, make clear that she found Const. Alden to be acting out of personal retribution and to have deliberately disregarded a policy of which he admitted he was well aware. We find that these actions were tantamount to disobedience and rebellion.
81. As such, although the Hearing Officer did not explicitly reference the defence of lawful excuse, her reasons, read as a whole, in light of the record, make clear that such a defence would not apply in the circumstances of this case.

Conclusion

82. Considering the reasons for decision in totality, we can find no manifest error in principle in the interpretation and application of the facts or law. The Hearing Officer's analysis is transparent, intelligible and logical.

83. In summary, on the issues posed in paragraph 49, we would answer all in the negative.

84. For all of the above reasons, the appeal is dismissed.

DATED AT TORONTO, THIS 18th DAY OF NOVEMBER, 2013

Jacqueline Castel
Member, OCPC

Zahra Dhanani
Member, OCPC