

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

IN THE MATTER OF

THE ONTARIO PROVINCIAL POLICE

AND

PROVINCIAL CONSTABLE IAIAN MACKINNON, #10844

UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY

DECISION AND DISPOSITION WITH REASONS

Before: Superintendent Greg Walton
Ontario Provincial Police

Counsel for the Prosecution: Mr. Chris Diana
Ministry Of Community Safety & Correctional
Services

Counsel for the Defence: Mr. Bruce Nelson
Ontario Provincial Police Association

Hearing Date: September 12, 2017

Allegation of Misconduct

Provincial Constable (PC) Iaian MacKinnon, #10844, stands charged with unlawful or unnecessary exercise of authority in that without good and sufficient cause, he made an unlawful or unnecessary arrest, contrary to Section 2(1)(g)(i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The edited particulars of allegations for PC MacKinnon are as follows:

- On or about November 14, 2010, PC MacKinnon was involved in the unlawful and/or unnecessary arrest of Robert Francis.

Plea

PC MacKinnon, represented by Mr. Nelson, entered a plea of not guilty. Mr. Diana represented the Ontario Provincial Police (OPP) and indicated that the public complainant, Mr. Francis, had been consulted, but chose not to participate in this hearing.

The Hearing

Mr. Diana tendered an Agreed Statement of Facts (ASoF) which was marked as Exhibit #26. The amended ASoF is as follows:

On November 14, 2010, Robert Francis, an autoworker who resided in the City of Toronto was driving home from Montreal. He was thirty-seven years of age at the time and was driving a beige Nissan Maxima. At approximately 2:20 p.m., while driving in the left lane, Mr. Francis drove past two stopped OPP cruisers on the side of Highway 401. He was not speeding; he was very concerned about getting a ticket because he had been pulled over for speeding in previous years.

At the time of this incident, PC MacKinnon was assigned regular shift duties at the Grenville OPP detachment. PC Vogelzang was a member of the OPP and was assigned to the East Region Highway Enforcement Team.

PCs Vogelzang and MacKinnon were parked beside each other in their assigned cruisers facing north in the centre turn-around of Highway 401, near Prescott, Ontario. As they prepared to head to Prescott for lunch, Mr. Francis passed them. The officers observed Mr. Francis weave within his lane and on two occasions cross in to the right lane. Mr. Francis slowed to 85 km/h and moved to the right lane to allow the cruisers to pass. PC MacKinnon, alerted because of the slow speed and weaving, stopped Mr. Francis to check on his sobriety. Mr.

Francis pulled over to the right shoulder of the highway; PCs MacKinnon and Vogelzang stopped behind him.

PC MacKinnon approached the passenger side of Mr. Francis' vehicle and asked for his licence and registration. PC Vogelzang remained in his cruiser, conducted a CPIC check and learned that Mr. Francis was flagged "V" (violent), but had no criminal convictions.

Mr. Francis immediately challenged PC MacKinnon upon being advised that he was pulled over because his vehicle was weaving. Mr. Francis asserted that he had not left his lane. He believed the stop was unlawful and arbitrary. He spoke loudly, clenched his fists (though did not raise them in an assaultive manner) and waved his arms in an animated fashion. Mr. Francis ignored the request for his licence and continued to argue. PC Vogelzang heard the yelling and approached the driver's side of Mr. Francis' vehicle. PC Vogelzang observed Mr. Francis to be in an aggressive state, that he was clearly angry, that he was spitting his words and giving a "one thousand yard stare." PC Vogelzang opened the driver's door and told Mr. Francis to surrender his licence or he would be arrested.

Further to PC Vogelzang's demand, Mr. Francis surrendered his licence in a defiant manner, following which PCs MacKinnon and Vogelzang backed away from the vehicle to discuss the situation. PC Vogelzang advised PC MacKinnon that Mr. Francis was flagged as violent. Based on that and the demeanour of Mr. Francis, PCs MacKinnon and Vogelzang believed he was about to assault them and they were concerned for their safety, the safety of Mr. Francis and the motoring public. PCs Vogelzang and MacKinnon agreed they had to arrest Mr. Francis to prevent a breach of the peace.

During that conversation, Mr. Francis activated his I-Phone recorder. PC Vogelzang returned to Mr. Francis' vehicle and an argument ensued. PC Vogelzang asked Mr. Francis a number of questions in an aggressive tone, all to which Mr. Francis responded. PC Vogelzang asked what his problem was with police. Mr. Francis became more agitated and accused the officers of intimidating and harassing him.

Notwithstanding his agitation, Mr. Francis did not threaten either officer or sound as though he was about to become assaultive. Mr. Francis did not attempt to leave his vehicle during this exchange. PC MacKinnon did not participate in the questioning, but was present for the following exchange:

VOGELZANG: Where are you coming from?
FRANCIS: Montreal Sir.
VOGELZANG: What are you doing there?
FRANCIS: My girlfriend lives there.
VOGELZANG: Yeah, you are from Woodstock?
FRANCIS: Yes I am sir.
VOGELZANG: What is your address?
FRANCIS: 133 Bay St. Unit 16, 9247 Highway 7.
VOGELZANG: Have you ever been arrested before or what?
FRANCIS: For what?
VOGELZANG: Have you ever been arrested before?
FRANCIS: For assault. (VOGELZANG interrupts)
VOGELZANG: What is your problem with the police?
FRANCIS: What is my problem with police? Sir if you guys want to pull me over for speeding or for whatever. Don't pull me over and harassing [sic] me. You on one side, him on the next side, like why are you guys trying to intimidate me?
VOGELZANG: I'm not trying to intimidate you.
FRANCIS: Yes you are, you are trying to intimidate me. You guys just sitting there looking for speeders and then all of a sudden I pass, then you pull over on the left, then he comes over on the right, I pull over to give you way to pass, you do not pass. Then he pulls over on the next side of me.
MACKINNON: Step out of the car.
FRANCIS: Seriously
MACKINNON: Step out of the car.
VOGELZANG: Step out of the car. You are under arrest for breach of the peace, until you calm down, ok.
FRANCIS: Why are you bending my arm sir?
MACKINNON: Just calm down.
VOGELZANG: You are under arrest for breach of the...

PC Vogelzang arrested Mr. Francis for a breach of the peace. He was detained for approximately five minutes. Mr. Francis was not read his right to counsel. PC Vogelzang applied little to no use of force to carry out the arrest. PCs Vogelzang and MacKinnon handcuffed Mr. Francis outside of his vehicle. PC Vogelzang said at that time: "You are now on the highway in the Province of Ontario; I can arrest you for anything."

As Mr. Francis was being placed in a cruiser, PC Vogelzang said to him: "I know you have something on you." PC Vogelzang conducted a cursory search of Mr. Francis' vehicle and neither weapons nor anything of interest was found. Following the search, Mr. Francis calmed down and was released unconditionally. He was warned in regard to an illegal licence plate cover and failing to drive in a marked lane.

Prior to the search and following his arrest, Mr. Francis' I-Phone picked up the following conversation between the two officers:

MACKINNON: When I pulled him over I said you're all over the road, you crossed the centre line. He was like ooh, ooh, oh.

VOGELZANG: He was tailgating the tractor trailer too.

MACKINNON: What was that?

VOGELZANG: He was tailgating the tractor trailer.

MACKINNON: Yeah

Upon his release, PC Vogelzang and Mr. Francis had the following conversation that was recorded by the I-Phone:

VOGELZANG: So are you calmed down now?

FRANCIS: Yes sir

VOGELZANG: Okay, you understand, you get assaultive you get aggressive like that with police. What are we supposed to do? Okay? We're out here stopping people from impaired driving, drinking drivers, you are all over the lane, you have a plate cover, we can't see your plate. It is nothing personal.

FRANCIS: Sir, I bought those plate covers at Canadian Tire (VOGELZANG interrupts)

VOGELZANG: Listen to me. It is nothing personal. It is not because of anything...(FRANCIS interrupts)

FRANCIS: But... (VOGELZANG interrupts)

VOGELZANG: Listen to me

FRANCIS: I was just...(VOGELZANG interrupts)

VOGELZANG: Let me talk for a second okay. It is not because of any race, colour, or anything.

FRANCIS: Sir I did not bring that up, you did.

VOGELZANG: We stop hundreds of cars.

FRANCIS: I never brought that up you sir, you did. Sir, can I please get your badge number, both of your guys badge numbers. Please.

VOGELZANG: Sure

FRANCIS: It is only fair. Right?

VOGELZANG: Do you have a pen?

FRANCIS: Like I know what I did from what I did not do, but if that's what you say...

VOGELZANG: You can argue it all that you want.

Section 30 of the *Criminal Code* states everyone who witnesses a breach of the peace is justified in preventing the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace. Neither PC Vogelzang nor PC MacKinnon had any evidence to suggest that Mr. Francis had previously breached the peace or even was about to cause a breach of the peace. There were no objective grounds to believe a breach of the peace was occurring or may occur.

Following a *Police Services Act (PSA)* hearing, an OPP Adjudicator found there was clear and convincing evidence to support a finding of guilt against PC Vogelzang for unlawful or unnecessary exercise of authority, contrary to subsection 2(1)(g)(i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10 as amended. PC Vogelzang was ordered to forfeit 24 hours pursuant to section 85 (1)(e) of the *PSA*.

Mr. Nelson acknowledged the ASoF was accurate. No further evidence was presented by Mr. Diana or Mr. Nelson, but they each made submissions.

Prosecution Submissions

Mr. Diana stated that based on the ASoF there is no doubt that PC MacKinnon was involved in the arrest of Mr. Francis. The issue is whether or not the arrest was unlawful or unnecessary and that was the same issue and the same facts that were before Superintendent McElary-Downer when PC Vogelzang had his hearing into allegations of misconduct. Following PC Vogelzang's not guilty plea, evidence was heard from Mr. Francis, from PC MacKinnon and from PC Vogelzang. Exhibit #27 is the written decision of Superintendent McElary-Downer where PC Vogelzang was found guilty of unlawful or unnecessary exercise of authority.

Superintendent McElary-Downer conducted a credibility assessment of the witnesses, summarized her finding of facts and addressed the legal issues which were relevant to that proceeding and are equally relevant to this proceeding. The ASoF read into the record in this matter are based on the findings in Superintendent McElary-Downer's

decision. Superintendent McElary-Downer reviewed the applicable case law and summarized it correctly.

Exhibit #28 is prosecution's book of authorities. Tab 1 contains the Ontario Civilian Police Commission (OCPC) decision addressing PC Vogelzang's appeal of the conviction and the penalty, dated January 30, 2013. The appeal was dismissed and in that decision, the OCPC stated:

We find that the Hearing Officer correctly identified and applied the applicable legal tests. Her findings of fact are supported by the evidence and are reasonable.

Mr. Diana stated that based on the ASoF, the findings by Superintendent McElary-Downer and the decision by OCPC, it is clear PC MacKinnon had no lawful authority to arrest Mr. Francis under the circumstances. As long as this tribunal is satisfied PC MacKinnon is involved in the arrest, no other conclusion can be attained other than the one reached by Superintendent McElary-Downer. This tribunal is bound by the decision of Superintendent McElary-Downer based on the same set of circumstances, the same parties, the same facts and the same issues.

Defence Submissions

The issue to be determined in order to come to a finding of guilt is whether or not PC MacKinnon was the arresting officer. Mr. Nelson acknowledged the content of the ASoF was based on the previous decision concerning PC Vogelzang which included the testimony of PC MacKinnon. Mr. Nelson submitted PC Vogelzang was the arresting officer and PC MacKinnon was merely present and was not the arresting officer. PC MacKinnon did not take a position opposing the arrest of Mr. Francis, but he was not the arresting officer.

It was PC Vogelzang who made the decision to affect the arrest of Mr. Francis and it is in question whether or not PC MacKinnon was an active participant to the extent he be held responsible for this misconduct. PC MacKinnon first approached the vehicle and spoke with the driver, but it was PC Vogelzang who took over the matter. PC MacKinnon directed the driver to exit the vehicle, but he was not responsible for the arrest of Mr. Francis.

Prosecution Submissions in Reply

Mr. Diana submitted PC MacKinnon does not have to be the arresting officer in order to be held accountable for this misconduct; he simply needs to have been somehow involved in the arrest of Mr. Francis by either being one of the directing minds or by providing assistance in some manner. The facts clearly illustrate PC MacKinnon's direct involvement.

Analysis

In the decision concerning PC Vogelzang, the Hearing Officer stated:

It was clear from the evidence that RF's [Robert Francis'] anger was directed toward the officers and not the motoring public. Outside of Vogelzang and MacKinnon's subjective concern, no reasonable evidence was present to substantiate the belief that RF was a risk or threat to the motoring public...In totality of all evidence coupled with an extensive review of the relevant case law, I am satisfied that Vogelzang's arrest of RF for breach of the peace was neither justified nor lawful. I believe in the matter at hand, Vogelzang misinterpreted the law....I am not satisfied Vogelzang acted with good and sufficient cause in the arrest of RF.

In their decision, the OCPC stated at paragraph 64:

There was a clear and direct path to the Hearing Officer's conclusions. We find the reasons well-written and clear, and the decisions reasonable and supported by the evidence and the law.

Paragraph 67 of OCPC's decision states:

Her conclusion that "It is patently clear based on the above case law, there has to be the clearest of circumstances to justify an arrest for the breach of peace" was legally correct.

Paragraph 75 of the decision states:

We find that the Hearing Officer correctly identified and applied the applicable legal tests. Her findings of fact are supported by the evidence and are reasonable.

At paragraph 80, the Commission stated:

This finding of credibility is reasonable and supported by the evidence. Taking the reasons for the Hearing Officer's decision in their entirety, we conclude that

there has been no misapprehension of the evidence, no misapplication of the law or other manifest error that would justify our intervention.

There is no question that Mr. Francis was arrested and that his arrest was unlawful and/or unnecessary. There is no disputing PC Vogelzang's role in that arrest. I have the ASoF to rely upon for clarity with regard to PC MacKinnon's role in the arrest of Mr. Francis.

The ASoF submitted in this matter clearly rely upon the findings in Superintendent McElary-Downer's decision and are an accurate reflection of the events. The ASoF includes the fact "PCs Vogelzang and MacKinnon agreed they had to arrest Mr. Francis to prevent a breach of the peace." Based on the ASoF, shortly following their conversation and subsequent agreement, it was PC MacKinnon who first asked Mr. Francis to exit the vehicle. I can think of no other reason for PC MacKinnon to make this request other than to affect the arrest of Mr. Francis. The fact that PC Vogelzang beat him to the punch and verbally advised Mr. Francis he was under arrest before PC MacKinnon did, does not lessen PC MacKinnon's involvement in the arrest. Following the arrest, PC MacKinnon then fully participated in the procedure of handcuffing Mr. Francis and thereby detaining him.

The Notice of Hearing reads PC MacKinnon is charged with unlawful or unnecessary exercise of authority in that without good and sufficient cause, he made an unlawful or unnecessary arrest. The particulars of allegations go on to state that on or about November 14, 2010, PC MacKinnon was involved in the unlawful and/or unnecessary arrest of Robert Francis.

I find the facts satisfy the particular of allegation which asserts PC MacKinnon was "involved" in the arrest of Mr. Francis. I am also satisfied that PC MacKinnon's participation and involvement in the arrest as outlined, effectively means he made an unlawful or unnecessary arrest. Both officers conferred and agreed Mr. Francis was to be arrested. They approached the car together, PC MacKinnon asked Mr. Francis to exit the vehicle and although it was PC Vogelzang who advised Mr. Francis he was under arrest, the officers were both involved in the arrest and securing of Mr. Francis. Because I find PC MacKinnon was directly involved in the arrest of Mr. Francis, I must adhere to the decision of Superintendent McElary-Downer; the facts of this case mirror the facts of that particular hearing.

Decision

Based on the evidence, I find PC MacKinnon guilty of unlawful or unnecessary exercise of authority.

Positions on Penalty

Following the finding of guilt, Mr. Diana and Mr. Nelson submitted a joint penalty position of a forfeiture of 16 hours to be applied only upon PC MacKinnon's return to work. Mr. Diana advised that the public complainant had been consulted and agreed with this position as well. Mr. Diana submitted that having the public complainant in agreement is a significant factor and that this tribunal ought to respect this when considering the appropriate sanction.

Disposition

After reviewing the evidence and considering the submissions, I order PC MacKinnon to forfeit 16 hours.

Submissions and Analysis

Any sanction to be assessed in a *PSA* proceeding must strike a balance between community expectations, fairness to the officer and the needs of the organization. Mr. Diana submitted that PC Vogelzang received a penalty of 24 hours for misconduct which was derived from the same set of circumstances. The prosecution had sought a penalty of 24 hours in that case, the public complainant sought 40 hours and defence counsel sought a reprimand. Superintendent McElary-Downer thoroughly reviewed the sentencing criteria and jurisprudence in coming to that disposition. The disposition of 24 hours was supported in the decision by OCPC.

Mr. Diana submitted that the disparity in sentence between the two officers is based on the fact PC Vogelzang was more of the aggressor than PC MacKinnon. PC Vogelzang made extremely inappropriate comments which made his conduct more severe and PC Vogelzang had one previous finding of discreditable conduct which was an aggravating factor. This difference amounts to a reduction in penalty of 25 percent or in this case, eight hours. Rather than review all the penalty principles ordinarily considered in this instance, both counsels relied on the assessments by Superintendent McElary-Downer already set out in the Vogelzang matter.

Beyond that, Mr. Diana made reference to the employment history of PC MacKinnon who began his career in 2001. He has received a number of commendations and letters of acknowledgement and appreciation from the public. PC MacKinnon has no previous issues of misconduct.

At tab 17 of Exhibit #28 is PC MacKinnon's Performance Learning and Development Plan (PLDP) for 2010/2011. PC MacKinnon received seven scores of "exceeds standard" and was assessed "meets standard" in the remaining eight categories. Sergeant (Sgt.) Gerrie stated:

PC MacKinnon has assumed the role of a recruit training officer consecutively, coaching three recruits back to back. As well as these duties he is also the 2OIC [second officer in charge] for the platoon. PC MacKinnon has demonstrated excellent leadership qualities and skills in both roles. He provides guidance and advice to members on a regular basis and is a highly respected member of the detachment. PC MacKinnon accepted an acting Sergeant position during this evaluation period....He assumed these Sergeant roles with ease and completed his duties in a professional and competent manner.

Those sentiments were echoed by Staff Sergeant Bolton.

His 2011/2012 PLDP is located at tab 18 of Exhibit #28. PC MacKinnon received four scores of "exceeds standard" and "meets standard" in the remaining 11 categories. Once again PC MacKinnon accepted acting sergeant roles and he was commended for his commitment to team goals and development. Clearly Sgt. Gerrie was very pleased with PC MacKinnon's initiative, work proficiency and teamwork.

Employment history is a significant mitigating factor. Police misconduct of this nature is concerning, but I take solace in the fact this appears to be an isolated incident. PC MacKinnon's employment history certainly suggests that is the case and there are no previous instances of misconduct.

Although not specifically referenced by counsel, I have taken my mind to other penalty principles. While the conduct of PC MacKinnon and PC Vogelzang would be considered offensive by the public, I am of the view the public would be satisfied with this resolution. The public complainant is content and this sanction demonstrates to the public that the OPP will hold officers accountable and there will be firm consequences for this type of conduct.

Similarly, the proposed sanction also sends a clear message to PC MacKinnon and to the members of the OPP that this type of behaviour will not be tolerated and will be

taken seriously. All officers must appreciate the fact they are responsible for their professional conduct at all times.

I am satisfied based on the OCPC decision that the proposed sanction of 16 hours falls within the range of consistent and appropriate penalties. By all accounts, PC Vogelzang was the aggressor and PC MacKinnon has had no prior discipline issues. Additionally, he has a strong employment record, all of which suggests the sanction for PC MacKinnon ought to be less than the 24 hours received by PC Vogelzang.

I also acknowledge the fact that PC MacKinnon remains off work for medical reasons and opted to have this hearing to bring this matter to a conclusion. I applaud him for this undertaking which speaks to his strong character. I have no doubt that should he return to work, he will learn from this experience, put it past him and be a better officer for it.

Conclusion:

A forfeiture of 16 hours strikes a balance between community expectations, fairness to PC MacKinnon and the needs of the organization. I acknowledge the fact that officers Vogelzang and MacKinnon were dealing with a very agitated individual, but that does not justify their actions.

Disposition

After considering all the factors, I find the forfeiture of 16 hours provides a fair and balanced approach. Logically, this sanction will only be enforced upon PC MacKinnon's return to work.

I order PC MacKinnon forfeit 16 hours. Specifically, upon his return to work, PC MacKinnon is required to work an additional 16 hours to be completed at the earliest opportunity in consultation and agreement with his Detachment Commander, pursuant to section 85(1)(e) of the *Police Services Act*, R.S.O. 1990.



Greg Walton
Superintendent
OPP Adjudicator

Date electronically delivered: October 10, 2017