

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

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

AND IN THE MATTER OF

**PROVINCIAL CONSTABLE DAVID J. HOGUE, #13661
AND THE ONTARIO PROVINCIAL POLICE**

CHARGE: DECEIT

DECISION WITH REASONS

Before: **Superintendent Robin D. McElary-Downer**
Ontario Provincial Police

Appearances:

Counsel for the Prosecution: **Ms. Jordana Joseph**
Legal Services Branch, MCSCS

Counsel for the Defence: **Mr. Gavin May**
Ontario Provincial Police Association

Public Complainant: **Mr. Mark Weston**

Hearing Date: **February 25, 2015**

DECISION WITH REASONS

Note: This decision is divided into four parts: PART I: OVERVIEW; PART II: THE HEARING; PART III: ANALYSIS / FINDINGS; and, PART IV: DECISION.

PART I: OVERVIEW

Allegation of Misconduct

Provincial Constable David J. Hogue (PC HOGUE), #13661, being a member of the Ontario Provincial Police (OPP), faces one allegation of misconduct which alleges he committed deceit, contrary to section 2(1)(d)(ii) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended. The edited particulars of the allegation are:

- On or about June 8, 2013, while on-duty, he attended an incident involving Mark Weston.
- Subsequent to his involvement, he provided testimony at two trials. The first, being the *Liquor License Act (LLA)* trial of Mark Weston on August 20, 2013. The second, being a care or control of a motor vehicle trial of witness #1 on January 14, 2014.
- His statements during his evidence at the trials were contradictory in nature as they related to his observations and thoughts surrounding the consumption of alcohol by Mark Weston.

Plea

On February 25, 2015 PC HOGUE pleaded not guilty to the allegation.

Decision

After examining and weighing the evidence, I find PC HOGUE not guilty. My reasons for this are as follows:

PART II: THE HEARING

Representation

In this matter, Mr. May represented PC HOGUE and Ms. Joseph represented the OPP. The public complainant, Mr. Weston was self-represented.

Exhibits

The following exhibits were tendered:

Exhibit 7: Prosecutor's Designation

Exhibit 8: Agreed Statement of Facts

Exhibit 9: *R v. Weston*, Provincial Offences Court, August 20, 2013 (trial transcript)

Exhibit 10: *R v. Hobbs*, Ontario Court of Justice, January 14 and 28, 2014 (trial transcripts)

Exhibit 11: PC HOGUE's interview with the Office of the Independent Police Review Director

Exhibit 12: Legal Aspects of Policing, Paul Ceyskens, excerpt from Chapter 6

Exhibit 13: *Leaney v. Stewart (Edmonton Police Service)*, Law Enforcement Review Board, #020-93, 1993

Exhibit 14: *Precious v. Hamilton Police Service*, OCCPS, May 10, 2002

Exhibit 15: *Geske v. Hamilton Police Service*, OCCPS, July 3, 2003

Exhibit 16: *Perry v. York Regional Police*, Police Commission, November 15, 1972

Exhibit 17: *Leeder v. Metropolitan Toronto Police*, Police Commission, August 14, 1970

Exhibit 18: *Lloyd v. London Police Service*, OCCPS, May 20, 1999

Exhibit 19: *Cate v. Peel Regional Police Service*, OCCPS, December 5, 2002

Agreed Statement of Facts

The facts of this matter are agreed upon by the parties. The edited Agreed Statement of Facts (ASoF), filed as Exhibit 8, states:

On June 8, 2013, PC HOGUE began his tour of duty at 6 pm and was scheduled to work until 6 am on June 9, 2013. While on-duty, working at the West Parry Sound Detachment, he was accompanied by an auxiliary member in a fully marked OPP vehicle. At approximately 11:01 pm they responded to what was reported as a possible personal injury collision on Highway 400.

Provincial Constable (PC) David Lalonde had already arrived at the scene. He was interacting with a male who had been the driver of the motor vehicle. When PC Hogue arrived, he spoke briefly with PC Lalonde and then approached a second male who had been the passenger in the motor vehicle. The male identified himself to PC Hogue as Mark Weston.

Investigation resulted in the driver being arrested and charged with care and control of a motor vehicle. PC Hogue also charged Mr. Weston for open liquor contrary to the *LLA*. Both males

were also arrested for possession of a controlled substance.

Prior to their release, both males were advised that no charges would be initiated regarding the possession of a controlled substance.

As a result of the charges laid against the two males, PC Hogue attended and provided testimony at the criminal and *LLA* proceedings.

PC Hogue appeared in Provincial Offences Court on August 20, 2013, on the *LLA* matter. At this trial (page 19 of the transcript), PC HOGUE was asked whether he noticed if Mr. Weston had consumed alcohol. PC HOGUE responded, "As from my point of view, he had consumed alcohol at the time." When asked how he knew this, PC HOGUE responded, "I could smell it off his breath while we were standing there. And at the time, he just appeared, there were some symptoms, like his glassy eyes. They both had the same kind of symptoms, with him being the passenger; we didn't look into him as much. I could tell that they were drinking, so."

PC Hogue appeared in the Ontario Court of Justice on January 14, 2014, on the care and control of a motor vehicle criminal matter. At this trial (page 60 of the transcript), when asked whether Mr. Weston displayed any signs of alcohol consumption, PC HOGUE responded, "He appeared very tired, but alcohol at the time, no, it was not in my thought."

When subsequently interviewed by investigators from the Office of the Independent Police Review Director (OIPRD), PC Hogue reviewed his specific testimony in the two court transcripts and could not explain why he stated that Mr. Weston smelled of alcohol at one hearing and not at the other one. He said it could have been the way that he was asked the questions. When asked which response was correct, he stated he could not recall Mr. Weston smelling of alcohol, but he confirmed that Mr. Weston had glassy eyes.

The Auxiliary member, Kyle Biloski (now a Constable with the Hamilton Police Service), advised OIPRD investigators that he detected an odour of alcohol emanating from Mr. Weston when he was arresting him. He also advised Mr. Weston was calm and had glassy eyes.

Prosecutor's Submissions

The following is a summary of Ms. Joseph's submissions.

Ms. Joseph began by stating the issue to be determined is: Did the contradictory comments made by PC HOGUE constitute deceit? The case is straight forward; the facts are clear and not in dispute. She submitted PC HOGUE's comments did constitute deceit.

She submitted PC HOGUE willfully and negligently made a false statement. During the *LLA* trial, PC HOGUE testified Mr. Weston had been drinking (Exhibit 9, page 19):

“As from my point of view, he had consumed alcohol at the time. ...I could smell it off his breath while we were standing there.”

Four months later during the criminal trial, PC HOGUE testified Mr. Weston had not been drinking (Exhibit 10, page 60):

“He appeared very tired, but alcohol at the time, no, it was not in my thought.”

Ms. Joseph pointed to Paul Ceysens' Legal Aspects (Exhibit 12, page 6-106):

The central issue concerning this category of deceit involves discerning the point beyond which a false, misleading or inaccurate statement is culpable, as the law is clear that inaccuracy alone is not sufficient to establish this category of deceit.

Ms. Joseph advised the tribunal needs to determine if PC HOGUE's testimony was willful or negligent. It was reckless for PC HOGUE to give contradictory statements and this amounted to deceit. The time lapse between his statements is significant, because only four months had passed between the two trials, not years. PC HOGUE had a duty to be prepared. The facts have established he was not, which resulted in his false testimony. She submitted it was PC HOGUE's obligation to give accurate statements, and pointed again to Paul Ceysens' Legal Aspects (Exhibit 12, page 6-106):

One legislative objective involves the need for public protection that arises from the potential consequences of inaccurate statements by police officers. The mental element in most legislation therefore captures more than actual intention to deceive, falsify or mislead (“intentionally”, “willfully”, “knowingly”), to also include reckless or even negligent behavior.

Ms. Joseph referred the tribunal to the Board's comments in *Leaney v. Stewart, (Edmonton Police Service)*, (Exhibit 13) and submitted much is at stake when a police officer gives sworn evidence. A police officer is expected to meet a higher standard of performance than an ordinary citizen. She

contended PC HOGUE testified in a frivolous manner with little regard to the consequence. This cannot be tolerated because there is no room in police work to accommodate lackadaisicalness.

Ms. Joseph submitted an officer is required to give truthful evidence. PC HOGUE could not explain his contradictory statements when he was interviewed by OIPRD, (Exhibit 11):

“I can’t give you – I can’t give you a definitive answer why I said that he smelled of alcohol at one point and then not in the next.”

Ms. Joseph pointed to page 15 of *Precious* (Exhibit 14) where the Commission stated:

Willful requires an analysis of intent which could include motive while negligence would give rise to an analysis of behaviour and if such behaviour resulted in a breach of a duty of care.

She submitted that when analyzing the behaviour of PC HOGUE, he failed in his duty in the highest regard.

Ms. Joseph pointed to page 10 of *Geske* (Exhibit 15), where it stated deceit requires the clearest of evidence. She referred the tribunal to page 90 of *Perry*, (Exhibit 16) where the Commission defined deceit:

[T]o prove a charge of deceit, the clearest evidence is required to establish that there was no possibility of consistency between the allegedly inconsistent statements upon which the charge is founded.

She explained this means that had PC HOGUE been able to explain what caused him to make the contradictory statements; the inconsistency may have not been so inconsistent after all. As seen in *Geske*, the officer provided context for his contradictory statement and the inconsistency was reconciled. None of this happened in the matter at hand. PC HOGUE gave two very different and competing statements. On their face, they were contradictory and he was unable to provide a credible explanation.

Ms. Joseph concluded by saying the legislation for deceit is clear and can be either willful or negligent. As reported in *Leeder*, (Exhibit 17), both do not have to be present. PC HOGUE had no explanation and there was no significant passage of time between his contradictory statements. His statements were inaccurate and untrue. Police officers have a duty to be diligent and prepared and PC HOGUE failed without pause or explanation.

Defence’s Submissions

The following is a summary of Mr. May’s submissions.

Mr. May acknowledged the excerpts from Legal Aspects and submitted it is a good starting point for this matter. He noted the text is meant for a national audience and while Mr. Ceysens is respected, he does not make the law.

Mr. May pointed to page 6-107 of Legal Aspects, where an adjudicator discussed the objectives in the Manitoba provisions:

On the other hand, in interpreting the ambit of this disciplinary default I have no doubt that courts will not find simple error on non-material matter within its scope. Such matters would likely be screened out of the process as frivolous or too trivial to merit a public hearing. Police officers are human and can make errors. In addition, there must be evidence that the false statement *affected* the Applicant in some material way.

Mr. May referred to *Lloyd*, (Exhibit 18), a case where an officer conducted an unauthorized CPIC check. When the officer was asked a year later why, he was unable to provide an explanation. In that matter, the Commission said while they found the misuse of CPIC serious, it was the allegation of deceit that was before them, not misuse of CPIC. Mr. May suggested the more appropriate charge against PC HOGUE perhaps ought to have been neglect of duty, but this is not the case. Like *Lloyd*, this tribunal too has to decide on deceit.

Mr. May pointed to the Commission's reference in *Lloyd* to *Perry* where deceit was defined:

A fraudulent and cheating misrepresentation, artifice, or device, used by one or more person to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon.

Mr. May submitted PC HOGUE's testimony that Mr. Weston had consumed alcohol was immaterial to the charge of open liquor. The Justice of the Peace confirmed this point and reconciled the discrepancy between Mr. Weston and PC HOGUE's testimony.

Mr. May pointed to the Commission's reference to *Burgess and St. Thomas Police Service*, (1989), 2 O.P.R. 822 (OPC), in the *Cate* decision, (Exhibit 19), where they stated:

The above-noted statements which constitute the heart of the charge of deceit can reasonably be said to be inaccurate and incomplete. It is a long mile, however, between the point at which one can find a statement inaccurate and the point at which one can find that a statement was made with intent to mislead or deceive.

The Commission stated there needed to be intent to deceive and concluded that the distance had not been travelled in *Cate*.

Mr. May pointed to the Commission's reference again to *Perry* in *Geske* and their conclusion:

Therefore, an inaccurate statement by itself in the absence of proof of wilfulness or intent will not support a conviction of deceit. Furthermore the evidence must be weighty, cogent and reliable. In our opinion there is no evidence in this case that meets any of these tests.

Mr. May submitted the burden of proof rests with the prosecutor and there must be clear and convincing evidence PC HOGUE intended to deceive. Despite not having to prove his innocence, PC HOGUE consented to sharing his compelled OIPRD interview with this tribunal. PC HOGUE told the investigator he could not give a definitive answer why he said Mr. Weston smelled of alcohol at one point and not the next. Mr. May pointed to PC HOGUE's statement, "Right now, thinking back, I cannot recall him smelling of alcohol..." and submitted it does not mean he did not smell of alcohol, it means he had no recollection of it.

Mr. May submitted the incident happened on June 8, 2013. The driver of the vehicle, James Hobbs, was charged with care and control over 80. The person occupying the passenger seat, Mr. Weston, was charged with possess open liquor. The first trial was Mr. Weston's on August 20, 2013 where PC HOGUE testified, "With him (referring to Mr. Weston) being the passenger we didn't look at him much". PC HOGUE told the court Mr. Weston smelled of alcohol, but had no notes to this effect. At the conclusion, the court determined that whether Mr. Weston had consumed alcohol or not was irrelevant to the charge he faced.

Mr. May submitted that PC HOGUE's evidence about Mr. Weston smelling of alcohol had no significant impact on the charges. It does not make sense for someone to intentionally lie about something that does not matter.

Mr. May reviewed case law from other provinces and submitted despite some differences in the legislation, PC HOGUE would not be found guilty.

Public Complaint's Submissions

The following is a summary of Mr. Weston's submissions:

Mr. Weston submitted that whether PC HOGUE's inaccurate statement had bearing or not on the evidence in the *LLA* trial, it should not be viewed as inconsequential. PC HOGUE's evidence, which included the arrest for crack cocaine, painted a picture. He questioned why the officer testified about the cocaine because it was also irrelevant. He submitted this matter is about "all the other stuff" said in the trial. Mr. Weston submitted he was not under the influence. In his opinion PC HOGUE's comments were intentional and willful to influence the Justice of the Peace.

PART III: ANALYSIS / FINDINGS

I have reviewed the evidence and considered the submissions of counsel and the public complainant. While I may not address them specifically or in any set order, they will remain foremost in my mind as I work through my analysis and draw findings.

Summary of misconduct

PC HOGUE's misconduct can be distilled to this:

Subsequent to attending a call-for-service involving Mr. Weston, PC HOGUE testified at two trials: The first being the liquor related trial of Mr. Weston; and, the second being a care and control of a motor vehicle trial faced by Mr. Weston's friend. It is alleged PC HOGUE's testimony was contradictory when he related his observations and thoughts surrounding the alcohol consumption of Mr. Weston.

To find PC HOGUE guilty of misconduct, I must find he willfully or negligently made a false, misleading statement pertaining to his official duty. My examination of this matter will include an overview of the burden of proof, and analysis of the evidence specific to the elements of deceit.

Burden of proof

In police misconduct cases, the civil standard of proof, 'clear and convincing' evidence is relied upon. It is lower than the criminal standard, 'beyond a reasonable doubt', for this reason:

If the bar is set too high, too many legitimate complaints will be dismissed, which would tend to breed public cynicism. Public trust and confidence is essential to policing. At the same time, of course, the bar must not be set too low. Police and other regulated professionals are themselves members of the public and, as such,

inadequate regard for their rights and interests as individuals cannot be in the public interest. Moreover, if complaints are too easily substantiated, it could lead police and other professionals adopting excessively defensive, reactive and risk-adverse approach to their duties. Clearly, this too would be highly detrimental to public interest.¹

So what does ‘clear and convincing’ evidence really mean? I turn to the words of a highly regarded police adjudicator, Superintendent (retired) Robert Fitches for guidance:

Clear and convincing evidence is evidence that produces in my mind a firm belief or conviction that the allegations sought to be proved are true. It is evidence so clear, so direct, so weighty in terms of quality and so convincing as to cause me to come to a clear conviction of the truth of the precise facts in issue. It means the evidence must persuade me that the allegations are true.²

These words capture the essence of my own thought process when deciding matters of alleged police misconduct. The burden of proof and the extent thereof rests with the prosecutor. With this in mind, I will now turn to the evidence (court transcripts and OIPRD transcript) and elements of deceit.

Elements of deceit and transcripts

Pursuant to the *Police Services Act*, Code of Conduct, the offence of deceit, section 2(1)(d)(ii) states:

Any chief of police or other police officer commits misconduct if he or she engages in,
Deceit, in that he or she, willfully or negligently makes a false, misleading or inaccurate statement pertaining to official duties.

This particular section has three elements: First, there must be a willful or negligent act; second, the act must be a false, misleading or inaccurate statement; and third, the statement must pertain to the officer’s official duty. In my view, there are three key issues which need to be explored:

1. Were PC HOGUE’s statements made in relation to his official duties?
2. Were PC HOGUE’s statements false, misleading, or inaccurate?
3. Was PC HOGUE willful or negligent in making the false, misleading, or inaccurate statements?

My analysis and findings will be addressed in this same order.

1. Were PC HOGUE’s statements made in relation to his official duties?

¹ Let’s Be Clear About ‘Clear and Convincing’, by David Goetz, Legal Counsel and Jennifer Sloan, Articling Student, 2007

² *Wills v. Kingston Police Service*, (allegation of misconduct occurred in 2003, however decision was undated)

In my view, the answer to this is obvious. The heart of PC HOGUE's alleged misconduct stems from his testimony delivered in provincial offences court and criminal court. It surrounded the observations and collection of evidence he made, while on-duty, during the incident involving Mr. Weston and his friend, Mr. Hogg, on June 8, 2013. Subsequent to the incident, PC HOGUE testified on August 20, 2013 and January 14, 2014 in the official capacity of his duties in relation this incident.

I find this element has been met.

2. Were PC HOGUE's statements false, misleading or inaccurate?

Although PC HOGUE made notes on the night in question, he did not specifically record his observations of Mr. Weston. He accounted for this during his testimony when he said, "[w]ith him (Mr. Weston) being the passenger, we didn't look into him as much."³ This left PC HOGUE to rely on his memory in regard to Mr. Weston's physical state.

I agree with Mr. May, whether Mr. Weston was under the influence of alcohol or not had no bearing on the open liquor trial, or for that matter, the care and control trial; the officers believed he was a passenger. Justice of the Peace Hilton made a similar finding when she stated, "[i]n this case, it doesn't really matter because this charge does not say you have to be, were consuming liquor".⁴ That said, I concur with Mr. Weston that relevance of an inaccurate statement should not be a determinative factor of deceit.

On August 20, 2013, PC HOGUE testified at the provincial offence trial. He stated in his evidence-in-chief, "As from my point of view, Mr. Weston had consumed alcohol at the time."⁵ When asked how he knew this, PC HOGUE said, "I could smell it on his breath."⁶ I find PC HOGUE's testimony in this instance very clear.

On January 14, 2014, PC HOGUE testified at the criminal trial. It was not until he was cross-examined, that he was asked about his observations of Mr. Weston. PC HOGUE stated, "He (Mr. Weston) appeared very tired, but alcohol at the time, no, it was not in my thought".⁷ While I find this answer rather

³ Exhibit 9: *R. v. Weston*, Provincial Offences Court, August 20, 2013, (transcript), page 19, line 30

⁴ Exhibit 9: " ", page 36, line 16

⁵ Exhibit 9: " ", page 19, line 22

⁶ Exhibit 9: " ", page 19, line 25

⁷ Exhibit 10: *R v. Hobbs*, Ontario Court of Justice, January 14 and 28, 2014 (trial transcripts), page 60, line 25

ambiguous, PC HOGUE gave clarity to it when he told the OIPRD investigators he could not recall Mr. Weston smelling of alcohol to the point where he believed he had been drinking.

I agree with Ms. Joseph that on the ‘face’ of the two statements, contradiction exists.

Based on the transcripts, I find persuasive evidence that PC HOGUE’s statements surrounding Mr. Weston’s consumption of alcohol were contradictory. For this reason, I find the element; ‘makes a false, misleading or inaccurate statement’ has been met.

3. Was PC HOGUE willful or negligent in making the false, misleading, or inaccurate statements?

Other than the two statements, one logically being correct and the other not, no evidence was produced to suggest PC HOGUE willfully or negligently misled the courts. To the contrary, all evidence points to the fact PC HOGUE delivered his testimony in an extremely fair and balanced manner. To be clear, aside from the one inaccurate statement, I have been unable to find a hint of willful or negligent deception, fabrication or embellishment.

I agree with Ms. Joseph that PC HOGUE was unable to explain his contradictory statements to the OIPRD investigators, but I find nothing untoward about this. Mr. Weston’s physical state was not relevant to his friend’s arrest for driving under the influence, nor was it relevant to the LLA charge. It is reasonable to believe this irrelevant piece of information faded from PC HOGUE’s memory with the passage of time. His contradictory statement amounted to nothing more than the result of an honest mistake.

I agree with Mr. Weston that PC HOGUE’s testimony painted a picture. This does not in itself point to deceit. Rather it is a natural way of dispensing evidence in court. PC HOGUE laid out the facts in a fair and balanced manner. His evidence flowed chronologically with a beginning, a middle and an end. As an experienced police officer himself, Mr. Weston ought to be familiar with the manner in which witnesses deliver testimony under the guidance of a prosecutor.

This tribunal is left with one inaccurate statement. I turn my mind to the case law, which is abundantly instructive: One inaccurate statement by itself, in the absence of proof of willfulness or negligence, will not support a finding of deceit.

This leads to me to finding this element of deceit has not been satisfied.

PART IV: DISPOSITION

I found that all elements of deceit have not been fully satisfied. I have not been persuaded based on 'clear and convincing' evidence the burden of proof has been met. For these reasons, I find PC HOGUE not guilty of deceit. The charge is dismissed.

In closing, I recognize this matter has no doubt rested heavily on PC HOGUE's shoulders. Although I have found his erroneous testimony does not give rise to deceit, I do acknowledge the legitimacy of Mr. Weston's complaint. I trust this experience will serve PC HOGUE well in the future. It has been a challenging but valuable lesson regarding the significant importance of a police officer testifying as accurately as humanly possible.



Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Date decision electronically released: March 18, 2015