



ONTARIO CIVILIAN POLICE COMMISSION

DATE: 22 November 2016
FILE: OCPC-15-ADJ-010
CASE NAME: GRYCHTCHENKO, CONSTABLE MCCARTNEY
#10174 AND TORONTO POLICE SERVICE

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

BETWEEN:

ANNA GRYCHTCHENKO
APPELLANT/COMPLAINANT

-and-

CONSTABLE MATTHEW MCCARTNEY
RESPONDENT

-and-

TORONTO POLICE SERVICE
RESPONDENT

-and-

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR
INTERVENER

DECISION

Panel: Roy Conacher, Q.C., Vice Chair
Katie Osborne, Member
John Kromkamp, Member

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3

Hearing Date: 20 June 2016

Appearances

Ben Snow, Counsel for the Appellant/Complainant, Anna Grychtchenko

Harry Black, Q.C., Counsel for the Respondent, Constable Matthew McCartney

Sharon Wilmot, Counsel for the Respondent Toronto Police Service

Miriam Saksznajder, Counsel for the Statutory Intervener, the Office of the Independent Police Review Director

I. Introduction

1. Anna Grychtchenko, a public complainant, (the "appellant") appeals to the Commission from an Order made by Justice Walter S. Gonet, (Ret.), (the "Hearing Officer") dated June 1, 2015. That Order stayed disciplinary proceedings against the respondent, Constable Matthew McCartney ("Const. McCartney" or "respondent Officer") on a charge of misconduct under section 2 (1)(g)(ii) of the Code of Conduct, Ontario Regulation 123/98 (now Regulation 268/10), of 'using unnecessary force against a prisoner or other person contacted in the execution of duty' thereby constituting misconduct contrary to section 80 (1)(a) of the *Police Services Act*, R.S.O. 1990, c.P.15, as amended (the "PSA").

2. This appeal raises novel and important issues related to the interpretation of section 83 subsections (17) and (18) of the PSA.
3. A discipline hearing was held with evidence completed; however, as a result of a motion brought by the respondent Officer during final submissions, the proceedings were ordered stayed.

II. Decision

4. Pursuant to section 87(8) of the PSA, the Commission revokes the Order of the Hearing Officer dated June 1, 2015 and orders that the matter be remitted to the Chief of the Toronto Police Service or his designate to arrange a re-hearing of the disciplinary charge against Const. McCartney on an expedited basis.

III. Background

The Complaint

5. The appellant alleges that Const. McCartney used unnecessary force by punching her while assisting other officers in trying to arrest her during the time of the G20 summit meeting in Toronto on June 26, 2010. She claims that she was not resisting. As a result of that incident, the appellant filed a formal complaint with the Office of the Independent Police Review Director (the "Director" or "IPRD").
6. In accordance with section 61 (5) (c) of the PSA, on August 25, 2010, the Director decided to retain the complaint and caused an investigation to be conducted. An investigative report was prepared outlining the IPRD's findings that the complaint was substantiated and serious, and the Director referred the matter to the Chief of the Toronto Police Service (the "TPS") to conduct a disciplinary hearing into the conduct of Const. McCartney.

The Delay Application

7. Unfortunately, the time required to complete the IPRD's investigation, the report and the TPS's review and preparation of a notice of hearing, exceeded the six-month limitation period prescribed and calculated under section 83 (17) and (18) of the PSA for service of the notice of hearing.
8. Because the six months had elapsed, in order to commence disciplinary proceedings, the Chief was required to bring an application under section 83 (17) to the Toronto Police Services Board (the "Board") for the Board's opinion on whether the delay in serving a Notice of Hearing upon Const. McCartney was reasonable under the circumstances.
9. The delay application (the "application" or "Chief's application") was prepared setting out in extensive detail the information from the IPRD investigative report and supplementary correspondence elaborating upon the reasons for the delay. The circumstances described in the application stated: "On Saturday, June 26, 2010, Constable Matthew McCartney was on duty assigned to the G20 Summit detail. Constable McCartney arrested the complainant Anna G near the intersection of University Avenue and College Street for the offence of "Breach of the Peace". Ms. G alleges that during her arrest she was taken to the ground and received injuries consisting of bruising to her face and thigh as well as a chipped tooth. It is therefore alleged that Constable McCartney has committed misconduct in that he used unnecessary force against a prisoner in the execution of his duty."
10. Attached to the application was a Notice of Hearing, marked "draft" on its face (the "draft Notice") setting out the provisions of section 2(1)(g)(ii) of the Code of Conduct alleged to have been breached. In the section of the draft Notice outlining the "particulars", the allegation was that the respondent Officer "came in contact with A.G. and used unnecessary force **by striking A.G.**" [emphasis added]

11. The application together with the draft Notice attached were served on Const. McCartney and filed with the Board in March, 2012.
12. In his application to the Board, the Chief recommended that the Board approve the service of the "**attached Notice of Hearing**" against Const. McCartney in accordance with section 83 (17) of the Police Services Act. [emphasis added].

The Board Meeting

13. The Board considered the Chief's application at an 'in camera' meeting on May 18, 2012. In addition to the application, the Board received confirmation of service of the application on the respondent Officer and also written submissions from counsel for Const. McCartney responding to the application.
14. The Board was of the opinion that the delay was reasonable in the circumstances. The extract from the Minutes of that meeting stated:

"...after reviewing the written submissions from both parties, the Board had a discussion and taking into consideration its responsibilities under sections 83(17) and (18) of the Police Services Act, approved the following motions:

1. THAT, having given careful consideration to all of the circumstances related to the investigation of this matter by the Ontario Independent Police Review Director, and the submissions made on behalf of the officers (sic), the Board is satisfied that the delay in serving the Notice of Hearing on Police Constable McCartney was reasonable in the circumstances.

The exceptional situation arising from the volume and complexity of complaints flowing from the G20 Summit created circumstances that lead to the conclusion that the delay on these facts was reasonable. While, in

usual circumstances, lack of staff and resources may not generally lead to a finding of reasonable delay, these specific circumstances are sufficiently unusual to lead to a different conclusion in the present case.

2. THAT the Board approve the Chief's report dated March 13, 2012; receive the Chief's report dated March 26, 2012; and receive the written submissions from Ms. Mulcahy."

15. On June 8, 2012, the Board released its decision.
16. On June 29, 2012, a Notice of Hearing (the "June 29, 2012 Notice" or "Notice") was served on Const. McCartney who signed acknowledging service. That Notice was identical in all respects to the draft Notice attached to the Chief's application except that the words **"by striking A.G."** after the word **"force"** in the second paragraph of the "particulars" in the draft Notice were replaced by the words **"on A.G."**.

The Disciplinary Hearing

17. A disciplinary hearing began on July 21, 2014. The Notice of Hearing dated June 29, 2012 was filed as Exhibit No. 1. The respondent Officer waived reading of the charge and pled not guilty. The draft Notice of Hearing was not entered as an exhibit and was never explicitly referred to until it was raised in the course of concluding submissions.
18. Evidence was adduced by the parties and in the context of making those final submissions, the issue concerning the change in wording between the draft Notice attached to the Chief's application, which application had been approved by the Board, and the June 29, 2012 Notice, came to the attention of and was raised for the first time by counsel for the respondent Officer.

The Motion to Stay Proceedings

19. The respondent Officer brought a motion before the Hearing Officer on May 14, 2015 for an order dismissing or staying the proceedings on the ground that the Board had approved the Chief's application based upon the information contained in the application including the draft Notice.
20. The respondent Officer made a number of submissions on the motion, most of which his counsel repeated on this appeal. Counsel stated that the June 29, 2012 Notice served on Const. McCartney had not been approved by the Board in its decision of June 8, 2012 for service beyond the six month limitation period. Therefore, that second amended Notice and resulting disciplinary proceeding did not comply with section 83 (17) of the PSA and there was no authority to proceed with the hearing.
21. The respondent Officer's counsel submitted that when the Board had approved the draft Notice containing the specific wording of the particulars, there was no authority in the Chief to have altered that wording afterwards. He submitted there must be strict compliance in exercising disciplinary action under Part V of the Act: ***Henderson v. College of Physicians and Surgeons***, (2003) 65 O.R. (3rd) 146, [2003] O.J. No. 2213 (C.A.). Since there was non-compliance, the Hearing Officer was without jurisdiction to hold the hearing based upon the June 29, 2012 Notice.
22. He submitted that it would be procedurally unfair to Const. McCartney to proceed since reliance had been placed upon the hearing being held based upon the wording of the draft Notice approved by the Board. The amended wording of the June 29, 2012 Notice broadened the scope of the possible grounds for the misconduct charge to other forms of force besides "striking" the complainant. Const. McCartney was thereby prejudiced by the alteration of the particulars.
23. On this appeal, the appellant and IPRD responded by submitting that a proper interpretation of section 83 (17) makes it clear the Board has no responsibility for approving the form and content of a notice of hearing. Its function under the section is to consider

whether a delay in commencing a disciplinary matter against an officer beyond the statutory time limit is reasonable and the Board has no role in drafting or approving the specific language of allegations in the statement of particulars.

24. The appellant further submitted that appropriate process for drafting and issuing a notice of hearing is governed by section 83 (4) of the PSA and sections 6 and 8 of the Statutory Powers Procedure Act (the "SPPA"). Particulars supplied to an officer are for the purpose of providing fair warning as to what transaction(s) are to be the subject of the hearing and what specific provisions of the Code of Conduct are alleged to have been violated.
25. The appellant, the TPS and IPRD disputed the assumption that the only available remedy was a stay of proceedings. This remedy is at odds with the policy of the PSA that requires a public complaint to proceed to adjudication in a transparent manner as a matter of public interest.
26. They submitted that the June 29, 2012 Notice was the first and only proper statutory Notice served under section 83 (17). The disciplinary hearing was, therefore, properly authorized and the Hearing Officer did have jurisdiction to continue the hearing.
27. Alternatively, they stated that the Hearing Officer had power to make minor amendments to the June 29, 2012 Notice.
28. Remedies, other than a stay, were available to resolve any issue of unfairness to the respondent Officer. A stay is a draconian remedy and ought to be reserved for the clearest of cases.
29. TPS pointed out that in the Board's decision, it did not explicitly approve the contents of a specific notice of hearing. It found that the delay in service beyond the six-month time frame was, in this case, reasonable under the circumstances outlined in the application.
30. The appellant, the TPS and IPRD stated that the respondent

Officer had been served with the June 29, 2012 Notice, had acknowledged service and waived reading of the charge. Therefore, there was no indication that Const. McCartney could have been confused as to which Notice was the basis for the disciplinary hearing.

Hearing Officer's Findings on Motion

31. In his decision on the motion, the Hearing Officer made the following findings:
- The Chief of Police recommended that the Board approve the service of the attached Notice of Hearing against the applicant in accordance with section 83 (17) of the *Police Services Act* [para. 9.];
 - The Notice of Hearing attached to the delay application was the sole Notice of Hearing served upon the applicant. [para. 10]; [emphasis added];
 - It was therefore recommended that the Board approve the service of the attached Notice of Hearing against Police Constable Matthew McCartney in accordance with section 83 (17) of the *Police Services Act*. [pPara. 12];
 - On June 29, 2012 a second Notice of Hearing was served upon the applicant. The date of service of this Notice of Hearing was well outside the six month limitation period for service as set out in section 83(17) of the *Police Services Act* and no delay application was made to nor granted by the Police Services Board for this Notice of Hearing as served. [para. 13];
 - On July 21, 2014, a hearing was commenced before this Hearing Officer based upon the allegations as set forth in the second Notice of Hearing. The existence of two Notices of Hearing was not discovered until the time of making final arguments on March 19, 2015. [para. 15].

- The Police Services Board approved service of a Notice of Hearing alleging: ..."You came in contact with A.G.and used unnecessary force by striking A.G."

The Board did not approve service of a Notice of Hearing alleging: ..."You came in contact with A.G.and used unnecessary force on A.G." [para. 18]

32. As stated above, the Hearing Officer framed his analysis based upon the following issues:

(a) Did he have jurisdiction to hear the allegations as set out in the Notice of Hearing served upon the applicant on June 29, 2012?

(b) Did he have power to amend the Notice of Hearing?

33. He answered both issues in the negative.

34. In granting the motion to stay the proceedings, the Hearing Officer stated that the power to discipline an officer comes from compliance with the conditions in the conferring statute, namely, the PSA. He referred to ***Giles and Halton Regional Police Force et al.***, (1981) 33 O.R. (2nd) 666 (Div. Ct.); ***Henderson v. College of Physicians and Surgeons of Ontario, supra***; ***Ramsay v. Toronto (city) Commissioners of Police***, (1988), 66 O.R. (2nd) 99 (Div. Ct.).

35. Since there was non-compliance with the provisions of the PSA in proceeding on the unapproved June 29, 2012 Notice of Hearing, the Hearing Officer found that he did not have jurisdiction nor power to amend the Notice. In consequence, he granted a stay of the proceeding and did not consider any alternative remedy.

36. On this appeal, the parties made similar submissions to those made on the motion before the Hearing Officer but provided additional submissions.

Additional Submissions of Appellant

37. The appellant made the following additional submissions:

- The issues raised are primarily questions of law and the proper standard of review is correctness. **Wong and Toronto Police Services**, 2015 ONCPC 15; **Terry v. Durham Regional Police Service**, 12015 ONCPC 1.
- The issues were decided on narrow jurisdictional grounds.
- The only proper “statutory” notice served in this case was the June 29, 2012 Notice. Prior drafts have no jurisdictional significance nor are they required under the provisions of section 83 (17) and (18) of the PSA.
- The Hearing Officer erred in attaching any jurisdictional significance to the prior draft Notice.
- The Board approval of the delay application is prospective not retrospective. The section 83 (17) wording stating “no notice of hearing shall be served”, unambiguously makes the timing of service of a notice of hearing prospective to a Board’s decision on the delay application: **Stewart v. Office of the Independent Police Review Director**, 2014 ONSC 6150 (Div. Ct.); **Ackerman v. Ontario (Provincial Police)**, 2010 ONSC 910 (Div. Ct.).
- By applying a retrospective interpretation to the Board’s decision under section 83 (17), the Hearing Officer tainted his entire analysis leading to his finding that there was a second amended unapproved Notice and he had no jurisdiction to proceed.
- There is a well-established principle of statutory interpretation of applying the plain and ordinary meaning to the language used in the statute.
- Applying that principle, it is clear that the Board performs a limited administrative function focused exclusively on the issue of the reasonableness of the delay. The wording of the

section does not support an interpretation that the Board is to be involved in any consideration of the substance or merits of allegations of misconduct and, by extension, the content of any notice of hearing to be served.

- Disclosure of information to the Board in an application need only be of a sufficient nature to identify the circumstances giving rise to the alleged misconduct, the type of alleged misconduct and, more specifically, the reasons for delay: ***Forestall v. Toronto Police Services Board***, [2007] O.J. No. 3059 (Div. Ct.); ***George v. Anishinabek Police Service et al.***, 2013 ONSC 1417 (Div. Ct.).
- There is no statutory authority for requiring that information provided to the Board be in the form of a draft notice.
- The discretion as to the form and content of a notice of hearing resides with the Chief, subject to the caveat that the notice of hearing subsequently served should not be materially inconsistent with the characterization of the misconduct as described in the delay application. This must be the case as there may be an ongoing investigation into the circumstances of the incident after the Board's decision: ***Izzett v. Chief of Police***, 2010 ONSC 2262.
- There is a compelling public interest in ensuring that the provisions of the PSA involving the resolution of public complaints are carried out and complaints are resolved on their merits: ***Wall v. Office of the Independent Police Review Director***, 2014 ONCA 884.

Additional Submissions of the Respondent Officer

38. Counsel for the respondent Officer made the following additional submissions on this appeal:
 - He admitted that he had proceeded on the mistaken assumption that the disciplinary hearing was being held based on the draft Notice.

- The PSA intends that the notice of hearing that the Chief seeks to have served on the officer will be before the Board for consideration of the application under section 83. The language of section 83 (17) makes it clear by stating: “it was reasonable under the circumstances to delay serving **the** notice of hearing”. [Emphasis added]
- There is no provision in the PSA to allow the Chief to add, remove, alter or amend any wording in the notice after extension of service has been approved by the Board.
- Hearing Officers and Chiefs of Police have no inherent powers.
- There is no authority in the PSA or the SPPA for the Chief to change what the Board has authorized. The Chief has no discretion to alter the particulars on a notice of hearing to be served after Board approval.
- The TPS policy has always required the draft notice of hearing to be placed before the Board for consideration of the delay application.
- Since the June 29, 2012 Notice did not comply with section 83 (17) there was no jurisdiction to proceed and any consideration of alternate remedies was irrelevant: . ***Gough v. Peel Regional Police Service***, [2009] O.J. 1155 (Div. Ct.).

Additional Submissions of IPRD

39. The IPRD pointed out that where an investigation is completed within the six-month limitation period and a notice of hearing is being prepared, the Chief has the discretion regarding the wording or particularization of the charge. There is no reason, simply by virtue of the passage of time, necessitating a section 83 (17) application, that the Chief’s discretion could or should be fettered by the Board. To decide otherwise would necessitate a

section 83 (17) application every time a minor change in wording was required even though there was no material change to the circumstances.

40. The IPRD further submitted that section 31 of the PSA provides the Board with general supervisory powers over the Chief but does not give authority to direct the Chief with respect to day-to-day operation of the police force.
41. Consistent with its general oversight supervisory powers, section 83 (17) of the PSA provides the Board with specific oversight to ensure reasonable timeliness of the service of notices of hearing arising from public complaints. This authority has been characterized as administrative and procedural in nature: *Forestell, supra*. It is supervision at a policy level. Therefore, it is submitted that the sole issue for the Board to determine on a delay application brought under section 83 (17) is whether the delay in serving the notice of hearing on an officer is reasonable. The Board does not have authority to determine substantive issues or the merits of the allegations. Consequently, the PSA does not empower the Board to approve the form or substance of the notice of hearing.
42. In the alternative, the IPRD submitted that the Hearing Officer did have the power to amend the Notice of Hearing given the intent of the PSA to enhance public confidence in policing by dealing with public complaints through a transparent and independent process. It would be contrary to the public interest to stay proceedings on a technicality.

IV. Analysis

43. This appeal raises an important and novel issue focusing upon the legislative interpretation of the role of a police services Board in the exercise of a Board's function under section 83 (17) of the PSA.

The Issues

44. The appellant has framed the issues in the following manner: (a) whether there was an amendment of the draft Notice originally served pursuant to section 83 (17) and, (b) if so, whether that resulted in a loss of jurisdiction or caused such prejudice to justify the drastic remedy of a stay.
45. In his decision, the Hearing Officer framed the issues differently: (a) Did he have jurisdiction to hear the allegations as set out in the Notice of Hearing served upon the applicant [officer] on June 29, 2012, and, (b), did he have power to amend the Notice of Hearing?
46. In the Commission's view, the central issue on this appeal is: Did the Hearing Officer err in law in his interpretation of the role and responsibility of the Board in dealing with the delay application under section 83 (17) of the PSA?
47. The standard of review to be applied is reasonableness on questions of fact and correctness on questions of law: **Purbrick v. Ontario Provincial Police**, 2013 ONSC 2276 (Div. Ct.), 3017 O.A.C. 97; **Ottawa Police Services and Diafwila**, 2016 ONCA 627; **Wong and Toronto Police Service, supra**.
48. The PSA is the home statute of the Commission, as well as the Chief and his or her designate; however, the Commission owes no deference to the Chief or the designate on questions of law: **Ottawa Police Service and Diafwila, supra**. As the issue on this appeal involves a question of law regarding the interpretation of section 83 of the PSA, the standard of review is correctness.
49. The sections of the PSA relevant to a consideration of the issue raised are:
31. (1) A board is responsible for the provision of adequate and effective police services in the municipality and shall,
- (i) establish guidelines for dealing with complaints under Part V, subject to subsection (1.1);

- (1.1) Guidelines in respect of complaints made by members of the public under Part V shall not be established by the Board unless they are consistent with,
- (a) any procedural rules or guidelines for the handling of public complaints established under clause 56 (1) (b) by the Independent Police Review Director.
- (4) The Board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.
- 68.(1). The Independent Police Review Director shall cause every complaint retained by him or her under clause 61 (5) (c) to be investigated and the investigation to be reported on in a written report.
- (3) If at the conclusion of the investigation the Independent Police Review Director believes on reasonable grounds that the conduct of the police officer constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall refer the matter, together with the written report, to the Chief of police of the police force to which the complaint relates.
 - (5) Subject to subsection (6), the Chief of police shall hold a hearing into a matter referred to him or her under subsection (3) by the Independent Police Review Director.
83. (4) The parties to the hearing shall be given reasonable notice of the hearing, and each party may be represented by a person authorized under the Law Society Act to represent the party.

(17) If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the Board... is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing.

(18) The day referred to in subsection (17) is,

(a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,...

(ii) the day on which the complaint was retained by the Independent Police Review Director under clause 61 (5)(c).

50. Based on a plain language reading of section 83 (17) in its entire context, there is no ambiguity that the Board is to consider the “circumstances” leading to the delay in the service of a notice of hearing beyond the six-month limitation period and that from those “circumstances”, the Board is to determine whether the delay was reasonable: ***Stewart v. Office of the Independent Police Review Director, supra.***
51. The intent of the statutory provisions in the PSA regarding the six-month time limitation is to encourage a speedy resolution of a disciplinary matter: ***Izzett, supra.***
52. Section 83 (17) protects an officer from facing an unreasonable delay beyond six months in bringing forward discipline charges. Unless the Chief of police provides reasons satisfactory to the Board for the delay in commencing such discipline process, there can be no further disciplinary action taken.
53. There is no language in section 83 (17) to support an interpretation that the Board has jurisdiction to approve a form of notice of hearing. For a Board to have such jurisdiction, there must be clear legislated authority.

54. Under the PSA, the Board has broad supervisory powers over the Chief; however, it is to act at a policy level and is prohibited from directing the Chief of police with respect to specific operational decisions or with respect to day-to-day operations of the police force. [s. 31(4)]: ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263.
55. Subject to the authority given to the IPRD with respect to initiating investigations of public complaints and disciplinary charges, determining whether a police officer is charged with misconduct and consequently the drafting of a resulting notice of hearing is within the discretion and mandate of the Chief of police under the Act: [(sections 66, 68 and 76)].
56. Any involvement by the Board in directing the Chief with regard to the specific wording or the approval of a notice of hearing would contravene section 31 (4) of the Act as being an attempt to direct the Chief regarding a specific operational decision or with respect to the day-to-day operation of the police force.
57. The wording of section 83 (17) makes it clear that the focus of the Board's consideration must be the reasons for the delay based on a general description of the circumstances.
58. In its decision on the delay application, the Board properly made no reference to the wording of the draft Notice of Hearing.
59. The Board performs the limited administrative function of determining whether the delay in serving a notice of hearing is reasonable. There need only be a disclosure of basic information of a general nature regarding alleged misconduct. The Board is not to be involved with the substantive issues or the merits of any alleged misconduct.
60. The Divisional Court has provided some helpful guidance in the following statements in ***Forestall, supra***:

“It is true that the decision [of the Board] has a serious impact on the officers, because there will be no disciplinary

proceedings if the Board does not find the delay in serving the notices of hearing to be reasonable. However, the Board's decision does not determine the merits of the allegations against the officers and thus does not engage their right to continue in their employment. We conclude that the decision is administrative in nature, directed at the investigation and pre-charge stage and determining only whether the circumstances preceding the service of the notices reasonably warrant the delay. We agree with an earlier statement of this Court that the decision is purely procedural. (**Coombs v. Toronto (Metropolitan) Police Services Board**, [1997] O.J. No. 5260 (Div. Ct.) [para. 44].

Disclosure of the case to be met will, of course, be necessary prior to the disciplinary hearings. However, at this stage, the Board's task was to determine whether the delay in serving the notices of hearing was reasonable in the circumstances. In our view, the disclosure provided to the applicants at this pre-charge stage satisfied the requirements of the duty of procedural fairness. The applicants knew the case to be met ...as they had a very detailed document in which he (the Chief) set out his reasons for the delay, as well as his supplementary report [para. 64].

In coming to its opinion on this limited issue, it is for the Board to decide how much weight to give to relevant factors. It was for the Board to evaluate the complexity of the investigation, the potential prejudice to the applicants (officers) and the public interest in seeing serious police misconduct adjudicated. [para. 84].

61. The TPS policy related to delay applications appears to require the Chief to include a draft of the proposed notice of hearing in any application under section 83. There also appears to have been a long-standing practice to follow this policy. It may be argued that, in order for the Board to consider the nature and seriousness of the allegations in its deliberations on the delay

application, the Notice of Hearing must be submitted to the Board. Notwithstanding such policy and the Chief's recommendation to approve the draft Notice of Hearing attached to his application in this case, there is no legislative justification for extending importance to the draft notice of hearing filed with an application. Approval of an application does not, by any inference, extend jurisdictional approval to an attached draft notice of hearing.

62. On its plain and ordinary meaning, the language used in section 83 (17) regarding serving the notice of hearing is to be interpreted prospectively. The formal notice of hearing to be served must follow the approval of the Chief's application by the Board: ***Forestall v. Toronto Police Services Board, supra; Stewart v. Office of the Independent Police Review Director, supra; Ackerman v. Ontario (Provincial Police), supra.***
63. We concur with the submission of the IPRD that where a notice of hearing is served within the six-month period, a Chief has the discretion to determine the wording, including particularization of the allegation(s) of misconduct in the notice of hearing. There is no reason to conclude that the wording of section 83 (17) restricts a Chief's discretion in crafting the content and wording of the Notice to be served after the Board approval, subject only to the caveats, firstly, that the notice of hearing, including the particulars therein, must not be materially inconsistent with the circumstances as described in the information that was considered by the Board and, secondly, the Notice must comply with section 83 (4) of the Act.
64. The June 29, 2012 Notice of Hearing was not materially inconsistent with the circumstances described in the delay application and the information therein was reasonably sufficient to allow the respondent Officer to know the allegations against him. The respondent Officer also had received the Notice well in advance of the hearing: ***Forestall, supra; Golomb v. College of Physicians & Surgeons***, (1976) 12 O.R. (2nd) 73 (Div. Ct.).

65. The Hearing Officer erred in finding that the draft Notice attached to the Chief's application was the sole Notice of Hearing served on Const. McCartney. The proper statutory notice was the Notice of Hearing served on June 29, 2012, after the Board's decision.
66. The Hearing Officer misinterpreted the role of the Board under section 83 (17) by finding that the Board had 'approved' the draft Notice but not the "second" June 29, 2012 Notice.
67. The Hearing Officer consequently made the erroneous finding that he did not have jurisdiction to proceed upon the June 29, 2012 Notice of Hearing.
68. In view of our conclusions related to the initial procedural and jurisdictional issue under section 83 (17) of the PSA, we do not find it necessary to deal with the second issue regarding power to amend the Notice of Hearing.

V. Disposition

69. The errors of law are so significant that the Commission exercises its authority under section 87 (8) and revokes the Order of the Hearing Officer dated June 1, 2015 and orders that the matter be remitted to the Chief of the Toronto Police Service or his designate to arrange a re-hearing of the disciplinary charge against Const. McCartney on an expedited basis.

DATED AT TORONTO THIS 22nd DAY OF NOVEMBER, 2016.



Roy B. Conacher, Q.C.
Vice Chair & Member



Katie Osborne, Member



John Kromkamp, Member