



# ONTARIO CIVILIAN POLICE COMMISSION

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DATE: 31 March 2017  
FILE: OCPC 16-ADJ-001  
CASE NAME: MULVILLE AND AZARYEV AND YORK REGIONAL  
POLICE SERVICE

**IN THE MATTER OF AN APPEAL UNDER SECTION 87(1) OF  
THE *POLICE SERVICES ACT*, R.S.O. 1990, C.P.15, AS  
AMENDED**

BETWEEN:

**CONSTABLES SHANNON MULVILLE AND MYKHAYLO AZARYEV**

APPELLANTS

-and-

**YORK REGIONAL POLICE SERVICE**

RESPONDENT

-and-

**THE INDEPENDENT POLICE REVIEW DIRECTOR**

INTERVENER

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**DECISION**

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Panel: D. Stephen Jovanovic, Associate Chair  
Roy B. Conacher, Q.C., Vice-Chair  
Jacqueline Castel, Member

Hearing Date: 25 January 2017

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

### **Appearances:**

Pamela Machado, Counsel for the appellants

Kathleen S. MacDonald, Counsel for the respondent

Carla Goncalves, Counsel for the intervener

## **I. Introduction**

1. Police Constables Shannon Mulville and Mykhaylo Azaryev are appealing the November 5, 2015 Decision of Superintendent Graeme Turl (the "Hearing Officer") finding them each guilty of one count of Unlawful or Unnecessary Arrest contrary to section 2.(1)(a)(g)(i) of the Code of Conduct, Ont. Reg. 268/10 (the "Code") and finding Constable Mulville also guilty of one count of Discreditable Conduct, contrary to section 2.(1)(a)(xi) of the Code, being misconduct pursuant to section 80 of the Police Services Act, R.S.O. 1990, c.P.15 (PSA).
2. Should the Commission uphold the convictions, P.C. Mulville and P.C. Azaryev appeal the penalties imposed by the Hearing Officer. P.C. Mulville is seeking that the penalty

of forfeiture of 12 hours be varied to a reprimand, and P.C. Azaryev is seeking that a reprimand be varied to training.

3. The respondent opposes the appeal on the findings of misconduct and penalties imposed.
4. The intervener takes no position on the ultimate outcome of the appeal on the convictions or the penalties, but makes certain submissions in response to sections of the Appellants' factums dealing with the Hearing Officer's findings.
5. The public complainant did not participate in the hearing of the appeal.

## **II. Background**

6. On September 15, 2013 P.C. Mulville and Azaryev were dispatched to respond to two complaints resulting from the same party at a residence on Barberry Cr. in Richmond Hill. The first call for service came at 12:45 a.m. and the second call came approximately 1 hour later.
7. Upon arrival at the residence in response to the first call, P.C. Mulville observed beer bottles and red plastic cups scattered on the ground. P.C. Mulville and Azaryev attended the residence and spoke with a female at the house, D.M., who told them that she lived at the location, her friends were at the house and her aunt was upstairs sleeping. P.C. Mulville told D.M. that her friends needed to leave. D.M. assured her that cabs were being called and the party was coming to an end. At this point, P.C.s Mulville and Azaryev departed.

8. The second call was dispatched as a mischief complaint. The caller, a neighbour, reported that youths were throwing beer bottles and other unknown objects at neighbouring houses.
9. When P.C. Mulville arrived on scene, she observed several youths running from a neighbour's residence into the Barberry Cr. House where the party had been or was being held. She did not observe anyone throwing beer bottles.
10. The front door of the house was open and P.C. Mulville entered the threshold.
11. When approached by D.M., P.C. Mulville told her to get her aunt right away. D.M. eventually admitted that her aunt was not upstairs so it appeared to P.C. Mulville that there was no adult supervision at the party and that there were underage youths consuming alcohol.
12. P.C. Azaryev arrived soon after and joined P.C. Mulville inside the residence.
13. While P.C. Mulville was speaking to D.M. another youth, N.R., the daughter of the public complainant, came down the stairs with a cell phone in her hand and began recording the interaction. N.R. told P.C. Mulville that she had no right to be there and asked for her badge number. P.C. Mulville responded:

"You! If you're filming me right now, you need to stop or I am going to seize your phone for best evidence. Do you understand that?"

14. N.R. told the officers that she was not filming them when she, in fact, was doing so.
15. P.C. Mulville proceeded to speak to D.M. but was interrupted by N.R. P.C. Mulville told N.R. to stop interrupting her investigation and that it did not concern her.
16. After multiple interruptions, P.C. Mulville took N.R. aside to the living room and instructed her to “stay out of it and stop interrupting the investigation”. P.C. Mulville also instructed N.R. to go to the kitchen. N.R. went to the kitchen, where a number of other youths were engaged in discussions about the presence of the police in the home. Much of this was captured on cell phone recordings entered as exhibits at the hearing.
17. During this time, P.C. Azaryev was in the hallway, monitoring P.C. Mulville and the group of youths in the kitchen and hallway area.
18. Five or ten minutes later, N.R. returned saying the police had no right to be there and telling D.M. to stop speaking to them. P.C. Azaryev asked N.R. if she was recording the interaction. N.R. responded, “I can record whatever I want to. You’re not allowed to walk into this household without permission”. N.R. then put her cell phone in the back pocket of her shorts.
19. At that point, P.C. Mulville and P.C. Azaryev arrested N.R. They did not tell her the reason for the arrest, identify what she was being charged with or inform her of her rights. This interaction was also captured on video.

20. After the arrest, P.C. Mulville and a then unidentified male youth (U.M.) had the following exchange, which was captured on video:

P.C. Mulville: You're not listening to us guys. We've been here twice and don't need this attitude. This is what happens when you give attitude to police and we have to come back multiple times. Does anyone else want to be arrested or does everyone just want to be quiet? Anyone? You laugh but you guys don't understand how serious this shit is. I have better things to be doing with my time than wasting my time with 15-year-olds.

U.M.: We're not 15.

P.C. Mulville: 16. I don't give two shits how old you are!

U.M.: 17... actually.

P.C. Mulville: You're a young punk and I don't give two shits.

21. P.C. Mulville then brought N.R. to the police vehicle, handcuffed her and had her sit in the backseat of the cruiser. N.R. was able to access her cell phone and call her father (the public complainant), S.R., on speaker phone.

22. When S.R. arrived, P.C. Mulville told him that she had arrested N.R. and asked for her phone. S.R. shouted for

N.R. to lock her phone. When P.C. Mulville opened the door of the vehicle, N.R. managed to throw the phone to S.R.

23. P.C. Mulville informed S.R. that she needed the phone for evidence and that if it was not turned over S.R. could be arrested for "obstruct police". S.R. turned the cell phone over and was given a property receipt for the item.
24. N.R. was released on a "Form 9" (i.e., an appearance notice) for the offences of "obstruct police and "cause disturbance".
25. No other party-goers were investigated or arrested.
26. A hearing into the matter was directed by the Office of the Independent Police Review Director (the intervener) as a result of a complaint by S.R. concerning the actions of the appellants relating to his daughter.

### **III. Decision**

27. The appeals of the findings of Unlawful or Unnecessary Arrest are dismissed. The appeal by P.C. Mulville of the finding of Discreditable Conduct is allowed. The penalty for the Unlawful or Unnecessary Arrest is varied from forfeiture of 12 hours to a reprimand with training in arrest powers for P.C. Mulville and from a reprimand to training in arrest powers for P.C. Azaryev. Our reasons follow.

### **IV. Issues on Appeal**

28. 1) Did the Hearing Officer err in convicting the officers of Unlawful or Unnecessary Arrest?

- 2) Did the Hearing Officer err in finding that P.C. Mulville's conduct fell within the charge laid for discreditable conduct?
- 3) Were the penalties imposed consistent with the penalties imposed in other similar circumstances?

## V. Analysis

### *Standard of Review*

29. The Court of Appeal recently confirmed that the standard of review to be applied by the Commission in reviewing the decisions of Hearing officers. Writing for the Court in **Ottawa Police Services v. Diafwila**, 2016 ONCA 627 (CanLII), Miller J.A. stated:

[62] However, I would accept the Commission's position, consistent with *Purbrick*, that it owes no deference on questions of law. It is true that the [Regulation](#) is the home statute of both the Commission and the Hearing Officer, and that both receive their powers from the same statute, but there are significant institutional differences between the two bodies. In addition, the Chief of Police lacks expertise in the application of general legal principles, such as the requirements of procedural fairness. By contrast, members of the Commission are generally appointed through a competitive, merit-based process where the criteria to be applied in assessing candidates include experience, knowledge or training in the relevant subject matter and legal issues ([Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sch. 5, s. 14\(1\)](#)). Finally, a purpose of the [Act](#) is to provide for independent civilian oversight of police. Significantly, the Hearing Officer is not

independent from the Chief of Police, at whose direction both the investigation and the hearing are ordered. That oversight would be greatly reduced if the Commission were required to defer to a chief of police or his delegate on questions of law.

[63] In conclusion, I would affirm the standard of review set out in *Purbrick*.

30. An appeal to the Commission is an appeal on the record. Unlike the trier of fact, we do not have the advantage of hearing and observing the witnesses as they testify. Deference must be accorded to the Hearing Officer's findings, unless an examination of the record shows that the Hearing Officer's conclusions cannot reasonably be supported by the evidence: see **Blowes-Aybar and Toronto (City) Police Service**, 2004 Carswell Ont. 1583 (Div. Ct.).
  
31. The standard of review for a Hearing Officer's penalty disposition is that of reasonableness. In a review of a penalty, the Commission reviews the Hearing Officer's findings and the evidence to ensure that the penalty imposed is supportable by that evidence, is not based on an error in principle and is within the appropriate range of penalties for the offence committed. As affirmed in **Karklins v. Toronto (City) Police Service**, 2010 Carswell Ont. 567 (Div. Ct.) at para 9:

"[The Commission's] function is not to second guess the Hearing Officer or substitute our opinion. Rather, it is to assess whether or not the Hearing Officer fairly and impartially applied the relevant dispositional principles to the case before him or her. We can only vary a penalty decision where there is a clear error in principle or

relevant material facts are not considered. This is not something done lightly.”

***Did the Hearing Officer err in convicting the officers of Unnecessary or Unlawful Arrest?***

32. Ms. Machado submitted that the Hearing Officer made errors with respect to his analysis of “hot pursuit” and exigent circumstances. She argued that it was not necessary for P.C. Mulville to have witnessed an offence or to have been able to identify the youths she was pursuing.
33. In **R v. Maccooh**, [1993] 2 S.C.R. 802 the Supreme Court of Canada confirmed that the right to enter residential premises, without a warrant, and to make an arrest in hot or fresh pursuit exists at common law for indictable offences and for other types of offences. The court accepted the following definition of hot pursuit found in **R.E. Salhany** in Canadian Criminal Procedures (5<sup>th</sup> ed. 1989) at p. 44:

Generally, the essence of fresh pursuit is that it must be a continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction. (at para. 24)

Accordingly, in the absence of a warrant, there must be an offence or circumstances which would allow the police to make an arrest without a warrant.

34. In the present case the Hearing Officer concluded, based on the evidence, that there was only a suspicion that an

unspecified offence took place before the officers arrived on the scene. They did not observe a crime in progress, nor did they observe whether there was any damage to the neighbours' property. The call history tendered as evidence also stated that it was unknown if there was any damage to property. P.C. Mulville simply observed youths running into the Barberry Cr. Residence where the party was taking place, after they saw the marked police vehicle arrive.

35. The Hearing Officer found, based on the evidence, that there was no "continuous action" on the part of P.C. Mulville when she entered the residence without a warrant. On entering the residence, and at no time after that, did P.C. Mulville or P.C. Azaryev attempt "to continue to determine where or who those youths were that ran". There was no evidence that the officers investigated any of the occupants of the home for the unspecified offence for which they purported to have been in hot pursuit.
36. We find that the Hearing Officer's conclusions that there was no hot pursuit, that the officers exceeded their authority in entering the residence without a warrant, and that making the arrest was, therefore, unlawful, were based on the facts and law. He explained and justified his conclusions in an intelligible manner, referencing both the law and the evidence. The conclusions he reached fell within a range of possible, acceptable outcomes defensible in respect of the facts and law and were therefore reasonable.

***Did the Hearing Officer err in finding P.C. Mulville's conduct fell within the charge laid for discreditable conduct?***

37. Ms. Machado submitted that P.C. Mulville's conduct did not fall within the definition of the charge laid – "acting in a disorderly manner", under s. 2(1)(a)(xi) of the Code. She noted that P.C. Mulville was not charged under s. 2(1)(a)(v) for "using profane, abusive or insulting language or otherwise being uncivil to a member of the public". As such, she argued that the particulars of the offence as set out by the Hearing Officer in his decision are not rationally connected to the charge itself. Ms. Machado also submitted that the Hearing Officer erred in failing to apply an objective, reasonable person standard when finding that P.C. Mulville's conduct was discreditable.
38. Ms. MacDonald submitted that the issue of P.C. Mulville being charged under the wrong subsection of the Code was not raised before the Hearing Officer or in the Notice of Appeal and asked the Commission not to consider this issue. She also submitted that P.C. Mulville's discreditable conduct included not only her language, but also her unlawful entry into the residence and arrest of N.R. Ms. MacDonald acknowledged that P.C. Mulville's language was not derogatory, racist, sexist or abusive, and that it fell at the very low end of the range of profane. In her factum, Ms. MacDonald did not address the conviction for discreditable conduct.
39. Ms. Goncalves stated that the intervener would be adopting the respondent's oral submissions on discreditable conduct. However, in her factum, she also submitted that the

Hearing Officer applied an objective, reasonable person standard to his finding that P.C. Mulville's conduct was discreditable.

40. Although Ms. Machado did not raise the "subsection error" in the charge for discreditable conduct as one of the grounds for appeal, we find that it is open to us to consider this issue in the context of assessing the reasonableness of the finding of discreditable conduct. We also considered the respondent's oral submissions on the discreditable conduct finding even though Ms. MacDonald did not make any submissions on this finding in her factum.
41. We agree with Ms. Machado that neither the Hearing Officer's reasons, nor the evidence, support a finding of Discreditable Conduct under s. 2(1)(a)(xi) of the Code. The conduct in question involved P.C. Mulville using the words "shit" or "shits" three times while speaking to an unidentified male and also calling this male a "punk".
42. The Hearing Officer's reasons do not support Ms. MacDonald's submission that he also considered the unlawful entry and arrest when concluding that P.C. Mulville's conduct was discreditable, for the purpose of s. 2(1)(a)(xi). He dealt with the allegations of discreditable conduct in a cursory manner, in one paragraph of the decision; in this paragraph, he only addressed P.C. Mulville's language and conversation with the other youths and not N.R.
43. At no time did the Hearing Officer explain or address how the language and conversation he concluded to be discreditable fell within the definition of the charge, i.e.,

acting in a disorderly manner. As such, the Hearing Officer's conclusion that P.C. Mulville's conduct was discreditable does not fall within a range of possible, acceptable outcomes, defensible in respect of the facts and law.

44. The Hearing Officer was required to apply an objective test when considering the actions of P.C. Mulville.
45. The objective test would require that the Hearing Officer place a dispassionate reasonable citizen fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether the officer's language was discreditable. See: **Toy v. Edmonton (City) Police Service**, [2014] A.J. No. 1191 at para. 11.
46. The Hearing Officer did not define or identify the objective, reasonable person test or include any type of reasonable person analysis of P.C. Mulville's language or conversation with the youths, language which Ms. MacDonald acknowledged was not racist, sexist, derogatory or abusive. The Hearing Officer also did not measure P.C. Mulville's language or conversation with the youths in the context of the events happening or against the reasonable expectations of the community.
47. Rather, the Hearing Officer made the subjective conclusion that he found her language to be "inappropriate" and "not reflective of the values of the York Regional Police Service" because he did not consider the youths to be disrespectful or aggressive.

***Were the penalties imposed consistent with the penalties imposed in other similar circumstances?***

48. Ms. MacDonald submitted that the Hearing Officer addressed consistency of disposition in his penalty decision and referenced the following passage of the decision:

"I am cognizant that in *Gregg and Midland Police Service*, OCPC No. 01-11; we have the Commission reminding us that one of the basic principles of the discipline process is consistency in sentencing as consistency is a hallmark of a fair and just process. The Commission stated: "This principle ... must be applied taking into consideration the unique fact situations in each case. It is therefore, very difficult to assess each case and to apply the fact situation to other cases."

I have reviewed the submissions and cases provided to me by all involved and carefully considered the ranges identified. I acknowledge that I must consider a disposition that is both fair and consistent, based on the facts before me."

49. Despite this acknowledgment that his decision must be consistent with other similar cases, the Hearing Officer did not discuss or attempt to distinguish any of the cases submitted by the defence where the police officer were given a reprimand for the same offence. The Hearing Officer rejected the cases submitted by the prosecution, as they took place during the G20, which he deemed to be a unique fact situation.

50. The cases submitted by the defence (**Gibbs and Toronto Police Service**, No. 98-05 (Board of Inquiry), April 21, 1998; **Elliot v. King and Durham Regional Police**, No.

07-01 (OCCPS); **Pigeau v. Ontario Provincial Police**, No 09-10 (OCCPS); and **Smith v. Batista and Ottawa Police**, No. 07-06 (OCCPS)) all had mitigating factors similar to the present case. These factors included a first offence on the part of an officer who is relatively junior, high prospects of rehabilitation and the absence of premeditation.

51. The circumstances surrounding the unlawful arrest in the present case were no more serious than the circumstances in the cases submitted by the defence. To the contrary, the circumstances in some of these cases were significantly more serious. For instance, in **Elliot**, *supra*, there was a physical altercation between the police officer and member of the public prior to the arrest, which was found to be unlawful. In **Smith**, *supra*, the complainant was passively resisting and was tasered twice *after* he was handcuffed. The present case did not involve any type of physical altercation or the use of any type of force.
52. In all of the cases submitted by the defence, the officer who was directly involved in the unlawful arrest received a reprimand. In our view, the Hearing Officer did err in principle in imposing a penalty that is harsher than the penalty imposed in other similar cases, including some that were more serious.
53. The Hearing Officer also did not explain why P.C. Azaryev should receive a reprimand, when he arrived on the scene after P.C. Mulville, had minimal involvement in the actual arrest, and was hardly mentioned in the facts or reasons of the decision. In imposing the same penalty on P.C. Azaryev as officers who were directly involved in an unlawful arrest,

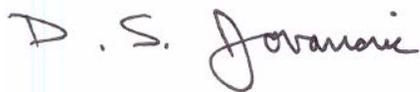
the circumstances of which were in some cases significantly more serious, the Hearing Officer, in our view, also erred in principle.

## **VI. Conclusion**

54. For the reasons set out above, the appeals from both officers' convictions for Unlawful or Unnecessary Arrest are dismissed, and the appeal by P.C. Mulville of the conviction for Discreditable Conduct is allowed.

55. The penalty is varied for P.C. Mulville from the forfeiture of 12 hours to a reprimand and training on arrest powers and lawful entry into dwellings. For P.C. Azaryev the penalty imposed is varied from a reprimand to training on arrest powers and lawful entry into dwellings. The training shall take place as soon as practical after the release of this decision.

DATED AT TORONTO THIS 31<sup>st</sup> DAY OF MARCH, 2017



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D. Stephen Jovanovic



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Roy B. Conacher, Q.C.

J. Castel

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Jacqueline Castel, Member