

**ONTARIO CIVILIAN
POLICE COMMISSION**

**COMMISSION CIVILE DE
L'ONTARIO SUR LA POLICE**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: Potter v. Ontario Provincial Police,

2017 ONCPC 20

Date: December 29, 2017

File Number: 16-ADJ-004

Appeal under section 87(1) of the *Police Services Act*, R.S.O. 1990, c. P.15, as
amended

Between:

Cst. Michael Potter

Appellant

and

Ontario Provincial Police

Respondent

DECISION AND ORDER

Panel: D. Stephen Jovanovic, Associate Chair
John Kromkamp, Member
Ted Crljenica, Member

Appearances:

Theresa R. Simone, counsel for the appellant
Norman W. Feaver, counsel for the respondent

Place and date of hearing:

Toronto, Ontario
February 14, 2017

INTRODUCTION

- [1] This is an appeal by Police Constable Michael J. Potter, the appellant, from findings of guilt by OPP Superintendent Robin D. McElary-Downer (the Hearing Officer) of neglect of duty and unlawful or unnecessary exercise of authority.
- [2] The charges arose from an incident involving D.C. The appellant and Cst. Belanger were dispatched to her apartment following a 911 hang-up call. When they arrived, D.C. was intoxicated, in an emotional state and armed with a knife. The appellant and Cst. Belanger had difficulty subduing D.C. both before and after she was in their cruiser. The actions of the appellant in subduing D.C. were the crux of the charges against him.

DISPOSITION

- [3] For the reasons that follow we revoke the decision of the Hearing Officer on the finding of guilt on the charge of unlawful or unnecessary exercise of authority and uphold the finding of guilt on the charge of neglect of duty.

BACKGROUND

- [4] The following is a brief summary of the key facts, as taken from the decision of the Hearing Officer:

On September 4, 2013, PCs Potter and Belanger attended DC's apartment in response to a 911 hang-up. Shortly after arrival, DC, in an intoxicated and emotional state, grabbed a knife. The officers disarmed her, grounded and handcuffed her, and arrested her. DC actively resisted her removal from her apartment and placement in the cruiser. As the officers struggled to secure DC in the cruiser, PC Potter stated he cuffed her in the head area three to four times. DC contends she was punched in the head three times.

- [5] The appellant was charged with, and found guilty of, neglect of duty and unlawful or unnecessary exercise of authority, contrary to sections 2(1)(c)(i) and 2(1)(g)(ii) of the Code of Conduct, contained in the Schedule to Ontario Regulation 268/10.
- [6] The particulars of the unlawful or unnecessary exercise of authority charge read:
- i. On or about September 4, 2013, while on-duty, PC Potter used unlawful force in controlling a prisoner, DC, in that:
 - ii. He struck DC on the head with his hand three or four times while DC was handcuffed and seated in the rear of the police cruiser; and,

- iii. The use of force resulted in a facial injury to DC. He knew or ought reasonably to have known that his conduct was inappropriate.

[7] The particulars of the neglect of duty charge read:

- i. On or about September 4, 2013, while on-duty, PC Potter was neglectful in his duties as a police officer, including that:
- ii. He failed to report the fact he struck DC on the head with his hand three or four times while DC was handcuffed and seated in the rear of the police cruiser by not reporting the truth to his supervisor, not recording it in his notes or in any RMS (Records Management System) report. He knew or ought reasonably to have known that his conduct was inappropriate and neglectful.

[8] PC Belanger was the supervisor referred to in the neglect of duty charge. He was the Acting Sergeant at the time. PC Belanger attended at DC's home with the appellant and was determined by the Hearing Officer to have been in the front seat of the cruiser when the appellant struck DC. PC Belanger was also charged with neglect of duty arising from the events related to the arrest. Those charges were heard by the same Hearing Officer, who found PC Belanger not guilty of neglect of duty.

[9] At the appellant's hearing, rather than having the same witnesses testify again, the parties relied on the transcripts of the testimony of the witnesses in the Belanger hearing. This included the testimony of DC and the appellant. In addition, in the matter that is before us, the prosecution led *viva voce* evidence from Use of Force Expert, O.P.P. Staff Sergeant (S/Sgt.) Morphet.

[10] The appellant admitted that he cuffed or slapped DC on the head with an open hand three to four times but denied causing the bruising around her right eye. The Hearing Officer accepted the testimony of DC that the appellant punched her in the head three times in such quick succession that she saw "white lightening". Based on this, the Hearing Officer determined that the appellant did not reassess the situation after the first strike and found him guilty on the count.

[11] The finding of guilt of neglect of duty was based on the Hearing Officer's determination that the appellant deliberately misled his supervisor as to the degree of force he used against DC by him, calling it a "soft hands technique", and due to his failure to record in his duty book and the RMS, the use of force against DC.

ISSUES

- [12] In his factum, the appellant raised five issues on the charge of unlawful or unnecessary exercise of authority:
- i. What is the standard of proof for police discipline hearings?
 - ii. Was the evidence relied on by the Hearing Officer sufficiently clear and convincing or weighty and cogent to support a finding of guilt?
 - iii. Did the Hearing Officer err in law in relying on her own experience in place of evidence causing her to misapprehend the evidence?
 - iv. Was the finding of guilt against PC Potter unreasonable because it was irreconcilably inconsistent with the Hearing Officer's findings in PC Belanger's hearing?
 - v. Did the Hearing Officer err in law in misinterpreting section 25 of the Criminal Code and in her application of the use of force model as a legal standard in finding that PC Potter's application of force was not reasonable?
- [13] On the charge of neglect of duty the appellant raised two issues:
- i. Was he untruthful to his supervisor in the manner in which he reported the use of force?
 - ii. Did he have a duty to document the use of force in his notebook and RMS report?

ANALYSIS

Standard of Review by the Commission

- [14] The standard of review to be applied by the Commission is reasonableness on questions of fact, correctness on questions of law and reasonableness on questions of mixed fact and law: *Ottawa Police Services v. Diafwila*, 2016 ONCA 627 (CanLII). In assessing reasonableness, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) stated:

"... Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process".

ISSUE I) *What is the standard of proof for police discipline hearings?*

- [15] The parties agree that the correct standard of proof, as set out in section 84(1) of the *PSA*, is that charges under the *Act* are required to be, "proved on clear and convincing evidence". The Ontario Court of Appeal defined this standard as one

that is higher than the balance of probabilities and lower than proof beyond a reasonable doubt: *Jacobs and Ottawa Police Service*, 2016 ONCA 345.

ISSUE II) *Was the evidence relied on by the Hearing Officer sufficiently clear and convincing or weighty and cogent to support a finding of guilt?*

[16] On page 16 of her decision the Hearing Officer instructed herself on the standard of proof:

. . . The standard of proof is a balance of probabilities based on clear, cogent and weighty evidence. To me, this means it is evidence that produces in my mind a clear conviction the facts sought to be proven are true. This notion will be adhered to throughout my analysis.

[17] The difficulty with this statement is that the Hearing Officer appears to be conflating different principles as to the standard of proof. The court in *Jacobs* clearly indicated that the standard of proof was not the balance of probabilities, but rather the higher standard of “clear and convincing evidence” as found in section 84(2) of the PSA. It is simply not clear from the Hearing Officer’s reasons what standard of proof she applied. In fairness to the Hearing Officer, the Court of Appeal decision in *Jacobs* was not released until after her decision. At the time she rendered her decision the standard of proof was stated by the Divisional Court in *Jacobs* the balance of probabilities.

[18] However, the respondent submitted that not every piece of evidence is required to be subjected to proof on a “clear and convincing” standard and that when one looks at the Hearing Officer’s entire analysis it can be seen that she applied the higher standard of proof of clear and convincing evidence to the entire body of evidence before her.

[19] Having reviewed the entirety of the evidence and the basis of the Hearing Officer’s conclusions, we are not satisfied that the Hearing Officer applied the correct standard of proof on the charge of unlawful or unnecessary exercise of authority.

[20] To explain our conclusion, it is necessary to consider the third and fourth issues raised by the PC Potter in his factum.

ISSUE III) *Did the Hearing Officer err in law in relying on her own experience in place of evidence causing her to misapprehend the evidence?*

[21] The Hearing Officer determined that the appellant caused DC’s black eye. She used this finding, in part, to support her acceptance of DC’s testimony as to the nature and extent of the force applied by the appellant and rejecting his testimony on this point.

- [22] The appellant submitted that the Hearing Officer erred in her determination that he caused DC's black eye because her finding was based on her personal experience regarding how people with whom she has interacted in her role as a police officer had or had not suffered black eyes.
- [23] The respondent submitted that the Hearing Officer did not err as she merely used her experience as a police officer as a lens through which she evaluated the evidence.
- [24] The Hearing Officer based her finding that DC's black eye was likely caused by the appellant because, in her experience, she has witnessed subjects hit their heads on cruiser partitions and on cell walls, but none has resulted in a black eye. This can be found on page 16 of her decision where she wrote:
- DC suffered a black eye. I found in the *Belanger* decision she most likely incurred the facial injury . . . after she was taken into custody and before lodged in the detachment cell. I accepted the officers' evidence that she banged her head against the cruiser's centre partition while on route to the detachment. No medical evidence has been proffered to support that her blackened eye was a consequence of PC Potter's strikes. Notwithstanding, the balance of probabilities clearly point to not a self-inflicted injury from the partition, but rather PC Potter's first strike to DC's face which was hard enough to cause "white lightning". While I have witnessed subjects bang their head on the cruiser partition, and for that matter the walls of a cell, the most injury that has resulted is marks and redness to the forehead, not a blackened eye. I therefore rely on my own experience and of the evidence presented, when I find a causal link has been established between PC Potter's strikes and DC's black eye.
- [25] Section 16(a) and (b) of the *Statutory Powers Procedures Act (SPPA)* allows a tribunal to take notice of facts that may be judicially noticed and to take notice of generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge. In our view neither this section of the SPPA, nor the case law on judicial notice generally allowed the Hearing Officer to make this finding of fact. The Hearing Officer once again referred to the balance of probabilities which reinforces our concerns with whether she applied the correct standards of proof.
- [26] The question of whether a person is likely or unlikely to suffer a black eye as a result of striking one's head on either the cruiser partition or cell wall is not so notorious and generally accepted as not to be subject of debate among reasonable persons, nor is it capable of immediate and accurate demonstration by resort to readily accessible sources of undisputed accuracy. See *R. v. Perkins*, 2007 ONCA.
- [27] Further, the use the Hearing Officer made of this conclusion is central to her determination that the prosecution had proved that the appellant's use of force

caused a facial injury to DC. As in *R. v. Perkins* this finding all but decided the case against the appellant on this charge.

[28] We agree with the appellant that the Hearing Officer erred by relying on her own experience in place of evidence to determine that DC's black eye was not self-inflicted and therefore was caused by his actions. Our conclusion is consistent with the Commission's decision in *Stevenson v. York Regional Police Service*, 2013 CanLII 101389 (ONCPC), where it was held that Hearing Officer's cannot use their personal experience to fill in any gaps in the evidence. This aspect of the Hearing Officer's analysis cannot stand.

ISSUE IV) *Was the finding of guilt against the appellant unreasonable because it was irreconcilably inconsistent with the Hearing Officer's findings in PC Belanger's hearing?*

[29] In finding the appellant guilty of unlawful or unnecessary exercise of authority, the Hearing Officer accepted DC's testimony from the *Belanger* hearing that the appellant punched her in the head 3 times, and accepted DC's characterization of the striking as pounding, hitting, hard punching, punching DC out, hitting her with all his force, and that he thumped her. The Hearing Officer also determined that the application of force described by DC was the cause of the black eye. She rejected the testimony of the appellant that he cuffed or slapped DC on the head three to four times with an open hand and that he did not cause the black eye. There were no other witnesses who saw the appellant strike DC.

[30] In making her findings of fact in the *Belanger* hearing, the Hearing Officer assessed the reliability of the appellant's and DC's testimony:

- [DC] delivered her testimony in a frank and candid manner. She shared with the tribunal some very personal challenges and difficulties in her life and I credit her for doing so. Notwithstanding, I found her evidence confusing and contradictory on several points. Some examples include:
- She said after her call to 911 she was fine and she was just going to sit with Terry and talk. On the PCC audio however, she is heard yelling angrily at him and he testified she had taken swings at him.
- She said after she hung up from 911, she walked into her living room and the officers were there, which contradicted the officers' testimony she was seated cross-legged on the floor when they entered. I found this pointed to the distortion alcohol was playing on her mind.
- By her tone and mannerism, [DC] led me to believe her use of marijuana was in the past and it had only amounted to a few puffs. According to Mr. Matton her use was more recent and frequent. Although she may have not intended to do so, [DC] had the ability to convincingly downplay an issue.

- [DC] testified it was PC Potter who disarmed and grounded her and took her to the cruiser while PC Belanger stood by and watched. In contrast, her OIPRD complaint stated both officers grounded her and took her to the cruiser. This pointed to her distorted memory of the facts.
- She said she did not resist getting into the cruiser and yet admitted to grabbing the door frame as she was led out. She admitted she may have resisted a little, then admitted she can be a handful when she is in that state. This illustrated multiple contradictions.
- [DC] is adamant they had left the scene before PC Potter stopped, entered the back seat and punched her several times. This was consistent with her testimony and complaint to OIPRD. The most troubling part of this is five hours after she was released from custody, she indicated to Doctor Sears the officers were outside when PC Potter came around and punched her. Without the benefit of canvassing the doctor, his notes suggest the incident happened before they left the scene.
- At no point did I find [DC] intentionally misled this tribunal. To the contrary, I found her creditable [sic] because I truly believe she believed in her version of events. Unfortunately, however, it seems the level of alcohol she consumed that night left her memory corrupted on some salient points. For this reason I have difficulty accepting her as a reliable source of information [emphasis added].
- PC Potter delivered his testimony with a mix of candidness and guardedness. He admitted he cuffed [DC] in the head area. I found it particularly odd he did not articulate this in his notes or first duty report, but other than this I found his evidence reliable. Of note, PC Potter testified to things that were not in his best interest. He erred on the Prisoner Form and his rationale for moving [DC] to another cell, the fact she was disruptive, did not negate the breach of Prisoner Care policy. I note in the guard's statement, the other reason he did this was so [DC] had a clean toilet. Again while this does not negate the breach in policy, I found this illustrated an element of humanity on PC Potter's part.

[31] As to the application of force on the evening of September 4, 2013, the Hearing Officer determined in the *Belanger* decision that:

There is no dispute on any side that the force applied to [DC] inside the apartment was warranted and justified. I found the removal and placement of [DC] into the cruiser posed a significant challenge to both officers and warranted force. I accept it took all of PC Belanger's strength to accomplish this despite his own level of fitness. [DC] was unquestionably combative and resistant. In her own words she did not want to go and she can be a handful.

I cannot say with absolute certainty if [DC] was struck by PC Potter at the scene or after they left. If it occurred after they left, PC Belanger was duty bound, regardless of being a supervisor or not, to intervene and report the matter accordingly. But I have not been convinced it happened on the road.

Rather, the evidence points to it happening in the yard as the officers struggled to secure [DC] in the back seat. I find it plausible PC Belanger may not have seen it because at one point he moved to the front seat to twist and push [DC] foot through the security window.

[32] To recap, the Hearing Officer found it difficult to accept DC as a reliable source of information and rejected her evidence regarding the events surrounding her interaction with the police officers at her home and in the police cruiser on September 4, 2013. On the other hand, the Hearing Officer found the appellant's evidence to be reliable other than her view that it was particularly odd that he did not record in his notes or first duty report that he "cuffed" DC. In explaining her finding that the appellant's evidence was reliable, she specifically referred to his admission that he "cuffed [DC] in the head area". It is also important to note that when the Hearing Officer made her determination on the reliability of DC's and the appellant's testimony, she was aware of the conflicting testimony regarding the nature and extent of the appellant's application of force by to DC's head.

[33] Notwithstanding her determinations in the *Belanger* decision regarding the reliability of the testimony of DC and the appellant, in the appellant's hearing, the Hearing Officer found:

In contrast to PC Potter's candid, but guarded testimony, DC delivered her evidence concisely and with conviction specific to when she was struck. She knew she had been hit three times. She said the first strike, which hit her face, caused her to see "white lightening". Before she could call him a "bastard" the next two strikes were delivered. She repeatedly said PC Potter yelled, "Are you going to be nice now after the last of the strikes". Unlike her other testimony where I found alcohol interfered with her facts and recall, it was evident to me the striking was crystalized in her memory. Despite the rigorous cross-examination, she never wavered in regard to the how she was struck, the impact upon contact, and the words of PC Potter. To this end, I found her evidence believable.

On the other hand, PC Potter framed the strikes as cuffing or slapping. The descriptors he relied upon caused me to envision trifling contact similar to one swatting another about the head – contact that would most likely distract an individual, but not likely to cause injury. I found PC Potter's descriptors downplayed the degree of force he applied to DC. I am satisfied the strikes he applied were hard and fast.

- [34] The Hearing Officer's finding of guilt on the charge of unlawful or unnecessary exercise of authority was only in regard to the strikes subsequent the first strike. This too required her to prefer the testimony of DC over that of the appellant.
- [35] She made a number of findings of fact based on DC's testimony. She found that the punches that the appellant applied to DC came in quick succession without him having reassessed the situation after the first, or the subsequent strikes. At page 19 she stated:

I have not been persuaded the number of blows that followed the first strike were proportionate or necessary in the circumstances. PC Potter departed from his training and failed to assess the effectiveness of his first strike, something I find was fatal on his part. Albeit DC withdrew her feet after PC Potter's final strike, we will never know if it actually took three to four strikes because they came in such quick succession. Simply put, PC Potter did not re-assess and DC had no chance to comply.

On page 20:

If on the alternative PC Potter's testimony truly reflected a valid concern and perception, that DC may bite or raise her arms at him or cause injury to herself or PC Belanger, I have not been persuaded he needed to resort to the quantity of blows he delivered. He never stopped to assess the effectiveness of his first strike.

And on page 21:

The legal standard for use of force is clear in that police officers have the authority to use force if they are in the lawful execution of their duty and the force is necessary. Cited cases extend reasonable latitude, stating officers should not be held to a standard of perfection, nor should they be expected to measure the precise amount of force required. In this matter, I have not held PC Potter to these. Given the dynamics of the situation I can accept that a mistake was made. What I fail to accept, however, is PC Potter's failure to resort to the fundamental basics of use of force training, and that is assess, plan and act. Following the first strike, PC Potter failed to determine the effectiveness of the tactic and it is here his mistake became unforgivable. Based on the legal standard, I find the strikes that followed the first one excessive and unnecessary.

- [36] The Hearing Officer correctly stated that police officers should not be held to a standard of perfection or be expected to measure the precise amount of force required. Based on this standard, she found that the appellant's first strike was a mistake but did not find it to constitute unlawful force when measured against this standard. It was the subsequent strikes that resulted in the finding of guilt on this charge. The crux of the Hearing Officer's determination on this point was

that the appellant failed to continually assess the situation, plan and act, and that DC had no chance to comply. She said that it might not have required three to four strikes for DC to stop kicking: "...we will never know if it actually took three to four strikes because they came in such quick succession"; and "I have not been persuaded he needed to resort to the quantity of blows he delivered. He never stopped to assess the effectiveness of his first strike".

- [37] The appellant's testimony about the nature and extent to which he struck DC begins on page 10 of the transcript of his examination in *Belanger*.

She was able to put both her legs through that open window and began kicking about. All the while we were instructing her to stop, telling her to settle down, please stop kicking. Officer Belanger was trying to push her feet back from the passenger – the front driver's side compartment, but was unsuccessful. . . .

I contemplated all of the use of force options that were assigned to me, none of which seemed to be appropriate at that time. I also felt the need to do something. That's when I used the open hand technique that I described, an open hand that I cuffed her, slapped her across the top of her head, each time saying "stop kicking, stop kicking, [D]. Stop it". And after the third or fourth time she did pull her feet through. She did sit up, and I believe after kicking at the rear passenger door one more – one or two more times, Officer Belanger was able to shut that door.

- [38] The appellant testified that after each slap he told DC to stop kicking and that it was only after the third or fourth slap that she ceased resisting his and PC Belanger's efforts to place her in the back of the cruiser. In *Belanger*, the Hearing Officer did not find this part of the appellant's evidence unreliable.

- [39] He did not specify how much time elapsed between each strike, nor was he asked. Nor was he asked why he felt it was necessary to strike DC the second, third and fourth times, if there was a fourth. However, the evidence was that with each strike he told DC to stop kicking.

- [40] To come to her conclusions that the appellant punched DC with great force in such rapid succession that he did not reassess the situation after each strike, and that he caused DC's black eye the Hearing Officer reversed or ignored the findings of reliability she made in the *Belanger* decision. She relied on her conclusion that the force applied by PC Potter had to have been hard enough to cause injury, that being the black eye. As we determined that the Hearing Officer exceeded the scope of permissible adjudicative notice when she found that the appellant caused the black eye, any findings of fact regarding the nature and extent of the force that he applied to DC has to turn on his testimony and that of DC.

- [41] It is within the discretion of a trier of fact to accept all, none or part of a witness's testimony. However, this is an unusual situation in that in *Belanger* the Hearing

Officer concluded that DC's testimony was unreliable and that the appellant's testimony was reliable except on one point - that point not being about the nature and extent of the force applied to DC.

[42] Her only explanation as to why she accepted DC's evidence on this single point was because DC described the striking as "white lightning" and therefore the Hearing Officer determined that it "crystallized in DC's memory". The Hearing Officer did not make reference to DC's inability to explain how the appellant was able to punch her on the right side of her face despite the fact that he entered the back seat from the left side of the cruiser. Nor did she explain why she now found the appellant's testimony to be unreliable on this point, having found his evidence to be generally reliable in the *Belanger* hearing.

[43] We agree with the appellant's characterization of the conflicting determinations of reliability by the Hearing Officer as being "irreconcilably inconsistent".

[44] Based on the Hearing Officer's:

- determination in the *Belanger* decision that DC's testimony was unreliable and the appellant's was reliable (except on one point related to his recording of his application of force against DC);
- failure to provide a reasonable explanation for accepting DC's testimony, and rejecting the appellant's testimony, on the facts surrounding his application of force;
- having erred in using her experience to determine that DC's black eye was not self-inflicted;
- using that finding to determine that the black eye must therefore have been caused by the appellant punching DC; and
- incorrect statement of the standard of proof as being on a balance of probabilities,

it is our view that the Hearing Officer's determination that the appellant punched DC in the head, that he did so in quick succession and that he caused the black eye cannot stand.

[45] It is also our determination that we do not need to refer this matter back for a new hearing to apply the correct standard of proof to the evidence. We have available to us the transcripts of the *Belanger* hearing on which the Potter decision was made. We also have the Hearing Officer's determinations of reliability from the *Belanger* decision.

[46] The evidence of the appellant was that DC was uncooperative and "thrashing" in the back seat. She had both of her legs through the opening in the partition between the front and back seats and was kicking. The appellant was concerned that DC could injure herself and damage the cruiser and the firearm

located where DC was kicking. PC Belanger was in the front seat trying to push DC's leg back through the partition. The appellant told DC to stop kicking. She did not. He cuffed her in the head with an open hand, and again told her to stop. She did not. He again cuffed her in the head with an open hand and again told her to stop. This happened one or two more times before DC stopped.

- [47] Because of DC's conduct, the Hearing Officer found that the appellant's first strike was reasonable. As this conduct continued after the first strike and each subsequent strike, all of which were followed by the appellant instructing DC to stop, we find those subsequent strikes and the amount of force used also to be reasonable.
- [48] As we have found that the use of force was reasonable in the circumstances, we find that the charge of unlawful or unnecessary exercise of authority has not been proven on clear and convincing evidence.
- [49] As a result we need not consider the other issues raised by the appellant on this charge.

NEGLECT OF DUTY

- [50] On the charge of neglect of duty, the appellant raised two issues:
- i. Was the appellant untruthful to his supervisor in the manner in which he reported the use of force?
 - ii. Did the appellant have a duty to document the use of force in his notebook and RMS report?
- [51] On the first issue, the Hearing Officer wrote in her decision:
- PC Belanger was PC Potter's supervisor the night they arrested DC. PC Belanger testified at his own hearing that once they had returned to the detachment, PC Potter told him he had used 'soft hand techniques' against DC. PC Belanger understood 'soft hand techniques' to mean PC Potter was hands-on controlling her, and he did not make further inquiry. Had this been the only evidence, I would lean on the side of caution and give PC Potter the benefit of the doubt that he did not intend to be untruthful or less than forthcoming with his supervisor – despite it being close to the line. When bundled though with this other evidence, a picture emerges that PC Potter had no intent to divulge the level of force he used against DC.

- PC Potter utilized the same term, 'soft hand techniques' in his first duty report. According to him this term meant he was cuffing her with an open hand. It was not until his second duty report, when he was asked to explain what the term meant, that he reported he cuffed DC in the head.
- PC Potter conceded an individual reading his first duty report would not get an immediate understanding that he cuffed DC. He rationalized he knew he would be interviewed at some point in time, and he imagined he would be asked to expand on it then. I find the foregoing points to a deliberate and conscious attempt to avoid full disclosure.
- PC Potter did not record in his notes either 'soft hand techniques' or 'cuffing'. According to him that by noting 'we struggled with her', it meant force was applied against DC. I find PC Potter's mischief with words, a purposeful attempt to avoid reporting his force exceeded soft physical control techniques.
- PC Potter stated he had never struck a handcuffed person before but added he never made note of it because it was not outside what he would be expected to do.
- PC Potter employed a tactic averse to his training. I find his explanation implausible and it points to his desire not to disclose the truth of the matter.

[52] The Hearing Officer also wrote:

PC Potter did not record in his notes either 'soft hand techniques' or 'cuffing'. According to him that by noting 'we struggled with her' meant force was applied against DC.

[53] She went on to find:

... PC Potter's mischief with words a purposeful attempt to avoid reporting his force exceeded soft physical control techniques. I find the foregoing points to a deliberate and conscious attempt to avoid full disclosure.

[54] This was a reasonable inference that was open for the Hearing Officer to make on the evidence before her and is not affected by her misstatement on the standard of proof. We dismiss this ground of appeal.

[55] We turn now to the second ground on the neglect of duty charge - did PC Potter have a duty to document the use of force in his notebook and RMS report?

[56] In his factum, the appellant submitted:

In order to be found guilty of misconduct there must be some specific policy, regulation etc. that the officer was under an obligation to complete. The prosecution failed to prove its case. There was no evidence submitted to the Hearing Officer regarding notebook and RMS policy.

[57] On this submission, the Hearing Officer wrote at page 23 of the decision:

This tribunal does not require policy to know it is a fundamental duty of officers to complete comprehensive notes and reports which include observations and actions taken when an individual is arrested and/or charged. PC Potter is a seasoned police officer with fifteen years. He apparently made comprehensive notes about DC so it stands to reason he would have known the importance to include his application of force.

The evidence is clear PC Potter had an obligation and duty to make record of his use of force in his notes and RMS report; and I find he did not.

[58] We agree with the respondent that specialized tribunals are expected to have knowledge and experience in the field in which they adjudicate, which they can use and rely on when adjudicating the matters before them. As a specialized tribunal, the Hearing Officer was warranted in relying on her knowledge and experience to determine that the appellant violated the respondent's notebook and RMS policies. Unlike the Hearing Officer's resort to experience to determine the cause of DC's black eye, the accuracy of the respondent's notebook and RMS policies can be determined by resort to readily accessible sources of indisputable accuracy i.e. - the governing policies and or regulations. The appellant would or should know if such a policy existed at the time of the events in question. We note that the appellant did not provide us with any evidence or reason to conclude that the Hearing Officer's conclusion on this point was incorrect or ambiguous.

[59] In any event, we find that the appellant's testimony that he does not record everything that happens on a "blow by blow" basis to be a disingenuous attempt to justify his failure to record that he cuffed DC in the head or that he used hard physical force on her.

[60] The Hearing Officer's finding of guilt on the charge of neglect of duty is confirmed.

[61] The appellant did not appeal the penalty for neglect of duty of forfeiture of 16 hours by working during his regularly scheduled time off, in consultation and upon the approval of his Detachment Commander.

ORDER

[62] Pursuant to section 87(8) of the *Police Services Act*, the Commission orders that the finding of guilt on the charge of unlawful or unnecessary exercise of authority is revoked, along with the penalty imposed on that charge. The finding of guilt on the charge of neglect of duty is confirmed.

Released: December 29, 2017



Ted Crljenica



Stephen Jovanovic



John Kromkamp