Citation: Brewer v. Toronto Police Service, 2022 ONCPC 09

Date: 2022-08-08
File: 21-ADJ-012

Between:

Cst. M. Brewer

Appellant

and

Toronto Police Service

Respondent

Decision

Panel: E. Morton, Vice Chair
L. Hodgson, Vice Chair
S. Zwicker Slavens, Member

Participants:
D. Butt and D. Reeve, counsel for the appellant
A. Ciobotaru, counsel for the respondent

Held by Videoconference: April 26, 2022

INTRODUCTION

[1] On March 10, 2020, the appellant, Constable Matthew Brewer, pleaded guilty before the Hearing Officer, Superintendent Hussein, to three counts of discreditable conduct and one count of using profane, abusive or insulting language contrary to the Code of Conduct contained in Ontario Regulation 268/10, pursuant to the *Police Services Act* (the *PSA).*

[2] In the penalty decision dated July 29, 2021, the Hearing Officer ordered that the appellant be dismissed in seven days unless he resigned.

[3] The appellant has appealed to the Commission the penalty imposed by the Hearing Officer.

DISPOSITION

[4] For the reasons that follow, the appeal is dismissed.

FACTUAL BACKGROUND

[5] The appellant began serving as a Toronto Police Service (TPS) court officer in 2002. He was sworn in as a police constable in 2008. The events that form the subject matter of the four current and two prior misconduct counts occurred in September of 2016 through to May of 2019. Two of these incidents also resulted in criminal convictions. During these times the appellant was in the throes of concurrent posttraumatic stress disorder (PTSD) and severe alcohol misuse disorders. The appellant had undergone treatment for these disorders before and after the current misconducts. The applicant's concurrent disorders and his treatment progress and prognosis were a focus at the penalty hearing.

Current Misconducts

[6] The parties filed an agreed statement of facts before the Hearing Officer in support of the appellant's guilty pleas to the four misconduct counts that were the subject matter of the penalty hearing.

[7] The first count of discreditable conduct related to events that took place on September 25, 2016, in Toronto. The appellant was involved in arresting a male who had confronted and stabbed a restaurant patron. The male resisted violently when the appellant and his partner pursued him. The male was placed in the back of the police cruiser. On route to the police station the male pushed at the back door with his legs. The appellant stopped the vehicle. He cautioned the male, using profanity, and deployed pepper spray to gain compliance. At the male's criminal trial, the Crown conceded, and the judge agreed the use of the pepper spray was excessive

force and stayed the charges against the accused for assaulting the arresting officers. The trial judge rejected evidence the appellant gave at the stay application.

[8] The use of profane, abusive, or insulting language count arose from a phone conversation and text message exchange the appellant had with a Toronto Police Service staff sergeant between July 6 and 7, 2018. The appellant had information that caused him to believe the staff sergeant had been intimate with his common law partner. The appellant sent a series of text messages, some of which used profanity and threats, to the staff sergeant confronting him and asking him to talk about these suspicions.

[9] The second count of discreditable misconduct took place on July 7, 2018. The appellant attended his common law partner's gym. He yelled abusive, insulting language at her, threw her belongings at a wall and kicked over a garbage can on the way out of the gym. Members of the public witnessed this, said the appellant smelled of alcohol and was impaired and confirmed his vehicle had been in the gym parking lot.

[10] The third discreditable conduct count arises from events related to the appellant's impaired and dangerous driving convictions. There was a serious car accident in the Durham Region on Sunday, May 5, 2019, with the appellant as one of the drivers. Durham Regional Police officers observed the appellant in a noticeable state of impairment. He was rude and belligerent to first responders at the scene and identified himself as an off-duty TPS member. Breath tests taken after his arrest provided readings of 291 and 287 milligrams of alcohol in 100 millilitres of blood. The appellant pleaded guilty to dangerous driving and impaired driving and on November 21, 2019, received probation, a fine and a driving prohibition.

Prior Misconducts

[11] The appellant had pleaded guilty to a count of discreditable conduct in October of 2018. On December 1, 2016, the appellant was under the influence of alcohol and prescription drugs and in a state of crisis. The appellant brought a handgun into the room where his spouse was sleeping, followed her through the home with it, placed it in his mouth and then fired it into the air when outside. The appellant was convicted of the criminal offences of common nuisance and unauthorized possession of a firearm. He was ordered to serve a suspended sentence with probation in September of 2017. In November 2018, following his plea to the PSA discreditable conduct charge, he was ordered to forfeit five days of pay. Though the penalty disposition was based on a joint submission, the Hearing Officer (a different Hearing Officer) conducted a thorough analysis of the issues, including the appellant's PTSD, substance use disorder and his prospects for rehabilitation in ruling to accept the joint submission.

[12] The appellant was also subject to discipline for an October 29, 2016, incident. He was observed in a police car outside a hospital in downtown Toronto consuming an alcoholic beverage, swearing, and behaving erratically. The matter was disposed of without a hearing. Allegations of consuming drugs or alcohol in a manner prejudicial to duty and discreditable conduct were found to be substantiated, with the appellant receiving a penalty of eight hours forfeiture.

The Hearing

[13] The appellant entered his guilty pleas to the misconduct charges on March 10, 2020. The penalty proceedings took place on September 10, 2020. The prosecutor took the position the appellant should be dismissed, while the appellant sought a significant demotion.

[14] No *viva voce* evidence was called at the penalty hearing and the Hearing Officer relied on exhibits, including transcripts and reports of the prior misconducts. The Hearing Officer had before him the appellant's internal resume, a number of award recommendations, internal operational plans and other documents confirming the appellant's positive acts of public service throughout his policing career. The Hearing Officer received medical evidence relating to the appellant's concurrent alcohol misuse and PTSD disorders and his history of treatment and relapse leading up to August of 2020.

[15] Later in 2020, while his decision was reserved, the Hearing Officer requested an updated medical assessment. Counsel for the appellant provided an updated medical report of Dr. Bobrowski, dated February 25, 2021. The Hearing Officer's reasons state both the prosecution and defence were asked if they wished to make any further submissions regarding the updated assessment and both indicated they had nothing further to offer.

Evidence About the Appellant's PTSD and Alcohol Misuse Disorder

[16] The evidence before the Hearing Officer was that almost all of the current and prior police discipline issues were related to the appellant's use of alcohol, complicated by concurrent symptoms of PTSD and mood impairment. In all but the September 2016 pepper spray incident, the applicant had consumed alcohol. The applicant had been diagnosed with PTSD in 2017 by a registered psychologist, Dr. Challis. This diagnosis along with a diagnosis for severe alcohol use disorder were confirmed by other practitioners. The most recent medical report, February 25, 2021, also confirmed these diagnoses. The uncontradicted evidence was the appellant's PTSD is related to his service as a police officer.

[17] The appellant had lived with severe alcohol use disorder for 20 years. He completed a three-week residential treatment for his substance use disorders in 2016, shortly after the December 1, 2016, domestic incident that gave rise to discipline and criminal convictions. He participated in aftercare treatment but relapsed in August of 2017. He had returned to work in November of 2017 and the discipline issues continued up to the May 19, 2019, impaired driving offence. The appellant has been on paid suspension since that date.

[18] Following the May 2019 impaired and dangerous driving offence, the appellant returned to residential treatment. He attended the Homewood Health Centre Addiction Medicine Services – Trauma Program between June 4, 2019, to July 30, 2019, for treatment of his substance use disorder and PTSD symptoms. The most recent information before the Hearing Officer was that since this discharge the appellant had remained sober and stable for 20 months.

[19] The discharge summary from Homewood dated July 30, 2019, confirmed the severe alcohol use disorder and post-traumatic stress diagnoses. The recommended discharge plan included complete abstinence from alcohol, attendance at daily 12-step meetings for 90 days and maintenance of connection with 12-step recovery supports in the community along with attendance at a weekly abstinence-based group aftercare or relapse prevention. It was also recommended the appellant have regular follow up with his psychologist for ongoing therapy for management of PTSD.

[20] The Hearing Officer had before him, and references in his reasons, a letter and reports discussing the complexity of the appellant's concurrent alcohol use disorder and PTSD in both its nature and treatment prospects as a first responder. This included the 2019 *Staying Visible, Staying Connected, For Life: Report of the Ontario Chief Coroner's expert Panel on Police Officer Deaths by Suicide* and a report on the role of concurrent disorders in police discipline matters, with information specific to the appellant and his progress with treatment for his concurrent disorders titled *Service Members with Concurrent Disorders and Discipline.*

[21] The psychologist who diagnosed the appellant with PTSD provided letters dated August 26, 2020, and October 8, 2019. The latter confirms the appellant returned to regular therapy appointments following his discharge from residential treatment at Homewood. The August 2020 letter states the appellant has made notable progress in maintaining sobriety, his motivation and focus on recovery, sustaining remission and making lifestyle adjustments to support the positive changes. This letter reiterates the PTSD diagnosis made in January of 2017. It states the appellant

"continues to maintain our contacts and has made healthy lifestyle choices and interpersonal and social changes to aid him in maintain his direction."

[22] The appellant tendered a letter dated October 3, 2019, from the facilitator for the Toronto Police Service Employee and Family Assistance Program (a police officer support group also called H.E.A.R.T.). It details the appellant's involvement with this group from the date of his first attendance at group meetings on January 11, 2017, following his discharge from his first residential treatment program. The letter states the appellant attended H.E.A.R.T. on a "fairly regular basis" and called or texted when unable to attend, up to May of 2018. Contact from May to December 2018 was by text or telephone. He returned to group meetings in January and February of 2019 but then did not return until after his discharge from Homewood in July of 2019. He then attended regularly and continued to be an active participant, as of the date of the letter.

[23] In response to the Hearing Officer's request for updated medical information, the appellant provided a report from Dr. Bobrowski dated February 25, 2021. As noted, the contents of this report were uncontradicted and the appellant and respondent declined to provide further submissions. The appellant met with Dr. Bobrowski virtually on three occasions in December 2020 and January 2021. Dr. Bobrowski also considered the discharge summary from Homewood Health of July 29, 2019, background information from the Toronto Police Association and the August 26, 2020, letter from Dr. Challis.

[24] The February 25, 2021, report reviews the appellant's history of alcohol and prescription drug use as well as his history of treatment and relapse. It confirms the diagnosis of severe alcohol use disorder which was in full sustained remission as of the date of that report, as well as the diagnosis of PTSD. The report states there is a unique and robust interconnectedness between PTSD and substance use disorders, along with a complex causal relationship between these comorbid disorders. Dr. Bobrowski's opinion was:

> Given the severity of these circumstances and risk factors, it is therefore primarily important for Mr. Brewer to remain abstinent from alcohol and compliant with the discharge plan he was provided at Homewood. To his credit, Mr. Brewer has demonstrated a commitment to ongoing sobriety from alcohol and other psychoactive drugs of abuse, and he has continued to see Dr. Challis at least twice a month for monitoring of his addiction and PTSD. However, he has not attended 12 step meetings, and there is no evidence he has followed up with regular attendance at the HEART Group.

[25] Dr. Bobrowski also emphasizes the bloodwork performed on the appellant for the completion of the report demonstrated concurrent use of anabolic androgenic steroids. The appellant acknowledged use for the purpose of body building since 2015. The report cites the appellant's explanation that this form of substance use was adjacent to his work as a police officer. In his view, an enhancement of his physical stature and strength are augmented by this medication which complements his professional duties and responsibilities. Dr. Bobrowski included the following observations in his report:

> Anabolic androgenic steroid use is no longer a specified diagnosis in the DSM-V and is instead coded as "other substance use". The evidence supporting tolerance is not strong, and there are a few detailed reports of clear signs of withdrawal from this class of drugs. Having said this, studies have reported symptoms of craving, fatigue, depressed mood, restlessness, anorexia, insomnia, decreased libido and headache upon cessation of anabolic androgenic steroids. Side effects are generally reversible, and are primarily related to lipid metabolism, blood chemistry, endocrine function, liver, cardiovascular and nervous system effects. There are case reports of "roid rage", cognitive difficulties and impulsivity, as well as verbal and direct aggression. Studies have also documented an association between anabolic androgenic steroid use and the use of other licit and illicit drugs such as alcohol, cocaine, pain killers, methylphenidate, ketamine, and legal performance enhancing agents.

The Hearing Officer's Decision

[26] The Hearing Officer instructed himself on the principles to be applied at the penalty phase, and in the particular context of dismissal. Citing *Williams and the Ontario Provincial Police* (1995) 2 O.P.R. 1047 (OCCPS) he noted he was required to consider the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer and the damage of the reputation to the police office that could occur should the officer remain on the force. He also considered and applied each of the fuller list of factors relevant to penalty disposition from *Ceyssens* and Childs*, Legal Aspects of Policing*, Earlscourt Legal Press, (Update 31 – December 2017) at 5-280, a list of disposition factors approved by this Commission.

[27] The Hearing Officer identified the test for dismissal of an officer set out in *Trumbley and Metro Toronto Police Service* (1986) 55 O.R. (2d) 570 (ONCA) and *Venables v. York Regional Police Service*, 2008 ONCPC 8. The basic object of dismissing a police employee is not to punish them in the usual sense of the word, but rather to rid the employer of the burden of an employee who has shown that they are no longer fit to remain an employee. The Hearing Officer instructed himself that "a proper balance must be struck between a fair consideration of the officer's past

misconduct, sought treatment, current state of wellness and potential to continue and future usefulness to the TPS."

[28] The penalty decision cites a number of aggravating factors, including the seriousness of the appellant's misconducts and the violation of the public trust, the cumulative impact of the multiple incidents of misconduct at issue. The Hearing Officer agreed with the prosecutor that the appellant's employment history, notwithstanding positive reports up to 2016, was an aggravating factor due to the prior misconducts, one of which resulted in a criminal conviction. The Hearing Officer also gave some weight to the factors of specific and general deterrence in his analysis.

[29] The Hearing Officer noted that a key issue to consider in considering whether dismissal was an appropriate penalty was the appellant's potential to reform or rehabilitate. He held he was obliged to consider the appellant's PTSD and cited relevant principles. He noted that he was obliged to take this issue seriously and engage in meaningful analysis of the evidence on the role that PTSD might have played in the misconduct. The Hearing Officer accepted that the medical evidence substantiated disability issues and that "there is a nexus between PC Brewer's personal circumstance and his misconduct that might support mitigation." The Hearing Officer agreed with the appellant's submission there is a restrictive connection between "police culture and its traditional impact" on officers seeking professional help and timely treatment. The Hearing Officer agreed with the submission "that policing can no longer remain insensitive to the realities and existence of legitimate and medically established mental health of its members" documented in the *Staying Visible, Staying Connected* report and would be "incongruent with the greater contemporary social norms." The Hearing Officer wrote:

> [P]unishment in the face of established mental illness is not the most appropriate approach. Certainly not, in the current environment where Policing is under acute public scrutiny to demonstrate reform and reflect contemporary values. However, this does not preclude an appropriate penalty up to and including dismissal for misconduct committed, and in full consideration of all aggravating and mitigating factors.

[30] The Hearing Officer then considered the uncontradicted medical evidence regarding the appellant's disorders and the progress of his treatment and applied what he described as the "forward looking proposition" of the appellant's future suitability as a police officer. In this section of his analysis, the Hearing Officer found the uncontradicted February 25, 2021, report of Dr. Bobrowski raised "two insurmountable concerns regarding the member's continued usefulness as a member of the TPS."

[31] First, the Hearing Officer placed weight on the report's statement that the appellant had failed to utilize all the resources recommended to him by health care professionals to ensure his continued sobriety. He noted the appellant's reported reluctance to participate in 12-step programs and what, according to the February 25, 2021, report, was the appellant's irregular attendance at the H.E.A.R.T. program. The Hearing Officer relied on Dr. Bobrowski's evidence and found it aggravating that the appellant:

> [B]egan to attend 12-step meetings in 2016 after his attendance at the Renascent program. He reported that he found Alcoholics Anonymous to be somewhat helpful when these mutual support groups were held in-person prior to March of 2020, but collateral data indicates that he did not commit to this modality. He has not attended virtual meetings on Zoom, and he stopped AA attendance entirely following the onset of the Covid pandemic. He does not have a sponsor…Mr. Brewer also attended the police only support group known as the HEART Group dating to January of 2017, but his attendance was irregular at best…he has not attended 12 step meetings and there is no evidence that he has followed up with regular attendance at the HEART group.

[32] Second, the Hearing Officer found Dr. Bobrowksi's evidence about the appellant's continued use of anabolic steroids "most troubling and aggravating, upon harm to the reputation of the Service." The Hearing Officer found Dr. Bobrowski's uncontradicted evidence on this point was relevant to the appellant's future and continued usefulness as a police officer, the risk to the TPS and the potential to rehabilitate. The Hearing Officer held that the nexus, as described in the report, between use of steroids, which the appellant continued to use and the use of alcohol "poses a risk to the member's future sobriety."

[33] The Hearing Officer held the issues identified in Dr. Bobrowski's report significantly undermined the appellant's ability to reform or rehabilitate. Though the Hearing Officer found these issues raised insurmountable doubts about the appellant's future suitability as a police officer, they were considered along with the cumulative impact of the multiple misconducts, the seriousness of the misconduct and the damage to the reputation of the TPS in concluding dismissal was the appropriate penalty.

STANDARD OF REVIEW

[34] In *Constable I. Karklins v. The Chief of Police-Toronto,* 2010 ONSC 747 the Divisional Court adopted the description of the Commission's role in reviewing a penalty disposition of a hearing officer:

> The role of the Commission on a penalty is well established. Our 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.

PRELIMINARY MOTION: FRESH EVIDENCE APPLICATION

[35] Two days prior to the appeal, in a notice of motion dated April 24, 2022, the appellant sought to adduce fresh evidence. The respondent objected to the admissibility of the evidence, as it had not been given proper notice (rule 15.2 of the *Ontario Civilian Police Commission Rules of Practice)* and had no time to review and potentially respond to the application. The Respondent asked that the motion be dismissed, and the appeal proceed on its merits.

[36] At the hearing the appellant acknowledged that as the proposed fresh evidence addressed progress that post-dated the penalty decision, it was not relevant to the issue of whether the Hearing Officer erred in dismissing the appellant. The appellant further acknowledged that the fresh evidence application would only be relevant in the event that the Commission found the Hearing Officer erred such that the Commission would be required to determine an appropriate penalty itself. This is consistent with the approach taken by the Commission in *Moraru v. Ottawa Police Service*, 2008 ONCPC 1 (CanLII)).

[37] The Commission declined to hear the fresh evidence motion on April 26, 2022, due to the appellant's non-compliance with Rule 15. Given the Commission's disposition dismissing the appeal and the appellant's concession that the fresh evidence would only be relevant if the appeal were to be allowed, it is not necessary for the Commission to take any further steps in relation to the fresh evidence application filed by the appellant on April 24, 2022.

ISSUES ON APPEAL

[38] The appellant submits the Hearing Officer's decision was infected with multiple errors and as a result was not entitled to deference. The appellant stresses the larger contextual issue in this penalty disposition was the complex interrelationship between PTSD and substance misuse as it affects first responders. The appellant argues the Hearing Officer made several interrelated errors in principle that, at their heart, arise from a failure to grasp the realities of the recovery process and the

ongoing usefulness of a police officer to their employer where meaningful but imperfect steps to recovery are taken.

[39] The specific errors alleged are that the Hearing Officer:

- misapprehended and misapplied uncontradicted expert evidence that the appellant was in full, sustained remission at the time of the penalty hearing;
- placed undue weight on subsidiary aspects of the uncontradicted report concerning the appellant's ongoing anabolic steroid use and his failure to use all recommended resources to treat his disorders;
- misapplied the legal test for dismissal;
- relied on the principle of specific deterrence; and,
- placed inappropriate weight on the appellant's prior discipline history.

[40] The appellant submits the cumulative effect of these errors led the Hearing Officer to erroneously conclude that the appellant was beyond reform or rehabilitation and his usefulness as a police officer had thus been spent.

ANALYSIS

Did the Hearing Officer Misapprehend the Evidence of the Appellant's Remission and Place Undue Weight on Other Evidence?

[41] The first two issues raised by the appellant can be dealt with together. The appellant submits the Hearing Officer, though finding there was a nexus between the misconduct and the appellant's diagnoses, did not "fully acknowledge the significance of the evidence relating to full sustained remission" as it related to the appellant's potential for rehabilitation or continued usefulness to the police force. He further submits the Hearing Officer placed an inappropriate amount of weight on "secondary" issues of meeting attendance and steroid use, set out in Dr. Bobrowski's report.

[42] As set out in detail above, the Hearing Officer received a number of exhibits relevant to the appellant's health issues as well as his recovery and recommended treatment. Significant among this evidence was the February 25, 2021, report of Dr. Bobrowski confirming earlier assessments that the appellant was in full, sustained remission from severe alcohol misuse disorder as of the date of the report. It was not contested at the hearing the appellant had been in remission (i.e., abstinent) from his severe alcohol use disorder for the sustained period of 16 months by the time of the hearing, and 20 months by the date of Dr. Bobrowski's report. The Hearing Officer did not ignore or overlook the stated diagnosis of "full sustained remission" in

Dr. Bobrowksi's report and thus did not misapprehend this aspect of the uncontradicted evidence.

[43] A core issue the Hearing Officer grappled with when applying the test for dismissal was the appellant's ongoing usefulness, or his potential to rehabilitate and reform. Even with the evidence of full sustained remission, the Hearing Officer engaged in a "forward-looking" analysis to consider the future usefulness of the appellant as a police officer. It was in that context the Hearing Officer found the appellant's failure to utilize meeting resources and his continued use of steroids to be "two insurmountable concerns regarding the member's continued usefulness as a member of the TPS."

[44] The Commission has reviewed the record and we do not agree that the Hearing Officer misapprehended the evidence concerning the appellant's meeting attendance. The Hearing Officer placed weight on the uncontradicted evidence of Dr. Bobrowski that the appellant was not, at the time of that report, availing himself of recommended supports, including 12-step meetings and the H.E.A.R.T. group. The report provides uncontradicted evidence that the appellant had not followed through with the recommendation to engage with 12-step meetings. It also clearly states the appellant's attendance at H.E.A.R.T. meetings were irregular. The report is based in part on three interviews with the appellant. The only other evidence before the Hearing Officer regarding attendance at H.E.A.R.T. meetings was from October 2019, almost a year before the penalty hearing and even then, it does not describe regular attendance from the date the appellant was referred to this group. Dr. Bobrowski's report, dated 14 months later, and based in part with interviews with the appellant, describes irregular attendance. There is no basis to say the Hearing Officer misapprehended the evidence concerning meeting attendance on the appellant's part.

[45] The appellant also argued that any nonattendance at A.A. or the H.E.A.R.T. meetings were "harmless" or "inconsequential deficiencies" in his recovery. As this treatment formed part of the appellant's discharge recommendations from residential rehabilitation in 2019 the Commission disagrees with this characterization.

[46] The appellant further submits the Hearing Officer erred or misapprehended evidence concerning the appellant's steroid use. He submits there is "no evidence" establishing a connection between the misconducts and steroid use. The appellant also suggested that there was an "easy fix" as the appellant's steroid use could be managed by a condition prohibiting steroid use.

[47] The appellant is correct that there is "no evidence" establishing a connection between the misconducts and steroid use. There is nothing in the reasons for disposition suggesting that the Hearing Officer held otherwise. Rather the Hearing

Officer relied on Dr. Bobrowski's comments about the interaction between the appellant's ongoing illicit steroid use and the appellant's rationalization of it's use. The Hearing Officer found this was an area of concern for the appellant's ongoing rehabilitation. He was entitled to do so. With respect to any concern about steroid use being mitigated by conditions, as noted by the respondent, this was never proposed by the appellant, who declined to make further submissions on the topic after the report was received.

[48] The Commission does not agree the Hearing Officer misapprehended the evidence on any of these points. Dr. Bobrowski's report was the most recent piece of evidence concerning the appellant's progress in recovery and it was uncontradicted. It refers to the appellant's severe alcohol misuse disorder (along with other mild disorders) as fully in sustained remission. There is no one dispositive factor, as noted in the cases cited above on penalty in the context of dismissal. Further, the Hearing Officer was not required to take this clinical term and elevate it above all others in his analysis.

[49] The Commission does not view this as a situation where the Hearing Officer chose to accept some, but not all, of an expert's evidence, which he was also entitled to do. The Hearing Officer did accept the evidence the appellant was in full sustained remission up to the date of the expert's report. He also accepted the evidence about two key obstacles to sustaining remission that the expert identified in that report. In his submissions on appeal, it is the appellant who places weight selectively on different aspects of the uncontradicted report.

[50] The appellant urges the Commission to find the Hearing Officer fell into the same error as in *Moraru v. Ottawa Police Service*. In *Moraru* the officer was found guilty of criminal offences (thefts) and related professional misconduct. The Hearing Officer ordered he be dismissed from the police service. The Hearing Officer had heard evidence from experts that the officer suffered from PTSD. This Commission found that the Hearing Officer erred in not considering whether PTSD was a mitigating factor when assessing the appropriate penalty.

[51] In the current case, the Hearing Officer's clearly considered the connection of the applicant's concurrent disorders and much of the discreditable conduct and also considered the disabilities as a mitigating factor. The Hearing Officer also considered the appellant's progress in treatment for PTSD and alcohol use disorder in his assessment of the "usefulness" or rehabilitation aspect of the test for dismissal. He ultimately found the issues identified in Dr. Bobrowski's report presented obstacles to sustained recovery There is no basis for the Commission to interfere with this conclusion.

Did the Hearing Officer Misapply the Test for Dismissal?

[52] The Hearing Officer correctly identified the legal principles governing dismissal of a police officer. There are a variety of factors taken from the jurisprudence that govern this test. The Hearing Officer instructed himself on the tests set out in *Wiliams, Venebles* and *Trumbley*, as set out above. The Hearing Officer did not lose sight of the need to make reformation, or the likelihood the appellant would continue similar conduct in the future, a major consideration (*Constable Gordon Trumbley v. Metropolitan Toronto Police Service*, 1991 CanLII 11280 (ONCPC) at para. 59). He also considered the factors outlined in *Williams* which, again, involve analysis of the nature and seriousness of the misconduct, the ability the appellant to reform or rehabilitate and the damage to the reputation of the police force.

[53] The appellant submits the Hearing Officer's misapprehension and misapplication of the uncontradicted expert evidence caused him to misapply the legal test for dismissal. As noted, we do not agree the Hearing Officer misapprehended this uncontested evidence. The Hearing Officer refers to the appellant's sustained period of remission (again, 20 months by the time of Dr. Bobrowski's report) but also looked to the uncontradicted concerns raised in this report about the stability of the appellant's recovery. He did not misstate or misapprehend this expert evidence.

[54] The issue then becomes whether the Hearing Officer's approach of giving weight to the concerns identified in Dr. Bobrowski's report in applying the test for dismissal was unreasonable. The appellant effectively argues that the full, sustained remission of his severe alcohol use disorder should be the paramount factor in applying the test of future usefulness, or rehabilitation, in the penalty analysis. He notes the principle of rehabilitation, or usefulness, takes on heightened importance as professional and societal knowledge has properly evolved. There now exists an improved, more nuanced understanding of the complex interaction between PTSD in first responders and other disorders such as the appellant's alcohol use.

[55] The Hearing Officer did give weight to these important considerations in his analysis. He refers to the nexus between the appellant's misconduct and these disorders. As noted, the Hearing Officer also incorporates into his analysis, the significant findings of the *Staying Connected, Staying Visible* report and insights of the undated TPSA report of Tom Gabriel, *Service Members with Concurrent Disorders and Discipline* filed at the penalty proceedings.

[56] Ultimately, despite the evidence the appellant had achieved full, sustained remission, the Hearing Officer concluded there were insurmountable concerns about the future potential for this ongoing remission. He grounded this conclusion in the uncontradicted evidence of Dr. Bobrowski about meeting attendance and steroid use, as well as the fact the appellant had relapsed and committed three misconducts following a 2017 relapse.

[57] This directly engages the standard of review to be applied in appeals before the Commission. The fact the Commission may have weighed the factors relevant to the "ongoing usefulness as an employee" factor differently to come to a different conclusion does not entitle it to substitute its own view on this issue. The Commission has determined the Hearing Officer did not misapprehend evidence relevant on this point. He was entitled to conclude the concerns noted in the report raised "insurmountable" concerns about the officer's ongoing ability to reform.

[58] Finally, as the respondent submits, the future usefulness/potential reform was not the only factor to be considered in the dismissal analysis. It is only one of a number of factors and is not a "trump card"; it is one of three key factors identified in *Williams* (*Kobayashi and Waterloo Regional Police Service,* 2015 ONCPC 12 at paragraphs 80-82). The Hearing Officer was also required to look to the nature and seriousness of the misconduct and the damage to the reputation of the police force. The Hearing Officer did apply these factors, noting in particular the prior misconduct and the cumulative nature and seriousness of the four misconducts. He also revisited these factors in the context of the updated medical evidence of Dr. Bobrowski, finding in particular that the ongoing use and rationalization of steroid use further damaged the reputation of the police service.

[59] Where, as here, the penalty is supportable by the evidence, absent an error in principle, the Commission owes the Hearing Officer's penalty decision deference. The Commission is particularly reluctant to interfere in the selection of an appropriate penalty: *Nesbeth v. The Windsor Police Service*, 2015 ONCPC 23 at paragraph 24.

Did the Hearing Officer Overemphasize Specific Deterrence?

[60] The Hearing Officer held both general and specific deterrence were aggravating factors in his decision. There is little analysis in his consideration of this penalty factor, which adopts a submission made by the prosecutor "specific deterrence is not satisfied simply because PC Brewer admitted to his behaviour and has sought counselling." His reasons address general, rather than specific, deterrence at greater length, referencing the impact of the publicity of the decision for other TPS members.

[61] The appellant submits the need for specific deterrence in this case is significantly diminished as the Hearing Officer accepted the connection between the medical conditions and misconduct and the rehabilitative steps taken by the appellant. The appellant submits that specific deterrence is best applied to officers who, unlike the appellant, refuse to reform and thus raise significant concerns about their future conduct as police officers.

[62] We do not agree that the Hearing Officer overemphasized the principle of specific deterrence. First, specific deterrence was one of over a dozen penalty factors addressed by the Hearing Officer in his comprehensive reasons and was the subject of little discussion or analysis. This is similar to the situation in *Mulholland v. Peel Regional Police Service*, 2014 ONCPC 19 (at paragraph 29) where "[o]nly one sentence of this decision addresses specific deterrence, and it does so in conjunction with general deterrence."

[63] As well, as in in *Mulholland*, the Hearing Officer had clear concerns about the appellant's commitment and willingness to reform in light of Dr. Bobrowski's observations about meeting attendance and steroid use. The Hearing Officer based these concerns on uncontradicted medical evidence before him. In light of these concerns, it was open to and appropriate for the Hearing Officer to consider specific deterrence among the other dispositional factors. In any event, as noted, minimal emphasis was placed on this factor in the Hearing Officer's lengthy reasons.

[64] The Hearing Officer correctly observed there was uncontradicted medical evidence the appellant continued to engage in illicit anabolic steroid use and failed to follow through with all recommended treatment for his concurrent disorders. As set out above he did not misapprehend the uncontradicted evidence on these points. In this context, it was open to the Hearing Officer to conclude the appellant's rehabilitation was compromised by these decisions and specific deterrence was a factor to apply in the penalty analysis.

Prior Discipline History

[65] The appellant submits that the Hearing Officer erred in his consideration of his discipline history. He argues the Hearing Office erred by treating the prior discipline as "lenient" and making that a factor in his analysis. He submits the Hearing Officer failed to apply principles of progressive discipline and, more generally, that the prior discipline should not be given much weight in light of the appellant's current sustained remission.

[66] The appellant was given a penalty of five days forfeiture in relation to the very serious discreditable conduct that arose in his domestic setting in December of 2016. The conduct also resulted in criminal convictions. The forfeiture of five days was the result of a joint submission. The penalty hearing in that case involved full submissions from the parties and a detailed analysis from the Hearing Officer. The reasons for this disposition were before the Hearing Officer.

[67] The impact of the appellant's escalating mental health crisis in 2016 and the role his alcohol use disorder played in his offending were considered at length in the

November 28, 2018, disposition. The Hearing Officer's acceptance of the joint submission as reasonable and in the public interest was predicated to a great extent on what, at the time, was the appellant's demonstrated commitment and potential for recovery and reform.

[68] In the penalty reasons here, the Hearing Officer also considers the prior misconduct and disposition in the context of the appellant's "employment history" and ultimately found this history to be an aggravating factor. The Hearing Officer was entitled to consider the appellant's blemished employment history and assign it some weight as an aggravating factor in his analysis. The Hearing Officer supported his conclusion that the officer's employment history was aggravating by noting past behaviour is often a valid predictor of future conduct. He was entitled to consider the appellant's employment history in weighing the factors to be applied in the test for dismissal.

[69] The appellant further submits the Hearing Officer erred in principle by effectively compensating for what he viewed as a "lenient" disposition given in 2018. At the penalty hearing counsel for the appellant asked the Hearing Officer to disregard the prosecutor's submissions the previous penalty was lenient as it was based on a joint submission and designed to address what at the time was the applicant's potential for future rehabilitation. Instead, the Hearing Officer in paragraphs 170 and 197 concurs with the prosecution's submission the appellant was given "a lenient chance" in 2018 to "reform his behaviour."

[70] The Commission agrees that agreeing with the prosecutor's description of the 2018 disposition as "lenient" was perhaps ill advised. That disposition was based on a joint submission found to be reasonable and in the public interest when it was made. The Hearing Officer appears, however, to be more generally adopting the prosecution's submission that prior disciplinary conduct was an aggravating factor and that while the appellant's disability explained his behaviour, it did not excuse the behaviour. The references in the reasons to the "lenience" of the five-day forfeiture disposition in 2018 are bound up with the Hearing Officer's greater concern the appellant had been given an opportunity at that point to reform and rehabilitate, only to relapse and commit three of the misconducts at issue. The Commission has already concluded the Hearing Officer's analysis of this "reform" aspect of the test for dismissal contained no error in principle and was grounded in a reasonable and fair evaluation of the uncontradicted evidence.

Conclusion

[71] The appellant has failed to establish that the Hearing Officer committed an error in principle or failed to consider relevant material facts. The appellant correctly characterized a key issue at this discipline hearing as the complex nexus between

his concurrent disorders and his misconducts. The Hearing Officer squarely grappled with this issue in his analysis and grounded his factual conclusions in uncontradicted medical evidence. It is not open to the Commission to revaluate and reweigh this evidence. The Hearing Officer weighed the medical evidence along with the other factors relevant to the dismissal analysis. There is no basis to interfere with his conclusion that dismissal was an appropriate penalty as it falls within the range of possible acceptable outcomes that are defensible with respect to the law and the facts.

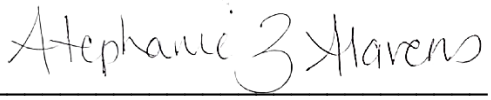
ORDER

[72] Pursuant to s. 87(8)(a) of the *PSA,* the Commission confirms the Hearing Officer's penalty decision.

Released: August 8, 2022

Emily Morton

Laura Hodgson



Stephanie Zwicker Slavens