Peel Regional Police Service – Hearing

In the Matter of

Ontario Regulation 123/98

Made Under the Police Services Act, RSO, 1990c. P.15, as amended

And

In the Matter of

The Peel Regional Police

And

Inspector R. Biring

Penalty Hearing

Before:

Superintendent (Ret.) Robert F. Gould

Waterloo Regional Police Service

Counsel:

Counsel for the Prosecution: Mr. D. Migicovsky and Ms. J. Barrow

Counsel for the Officer: Ms. A. James and Mr. A. Morgan

Penalty Hearing Date: February 20, 2019

Decision Date: March 31, 2019

Penalty with Reasons

Part 1 – OVERVIEW

Introduction

A disciplinary Police Services Act *(PSA*) Hearing regarding Inspector R. Biring (*BIRING*), a sworn police officer with the Peel Regional Police Service, was conducted between October 12, 2017 and February 20, 2019. After much litigation and evidence, a finding of misconduct was rendered by the Tribunal on October 31, 2018 to one count of Discreditable Conduct. A Penalty Hearing was heard on February 20, 2019.

The parties to this Hearing provided this Tribunal with the requisite information and arguments to render a fair and just penalty.

The penalty decision was issued on March 31, 2019, and delivered electronically to the parties.

Finding

Inspector R. Biring, regimental number 1720, having heard the evidence and arguments presented at this Penalty Hearing, and in exploring the fullness of that evidence/argument, I find that the penalty to be imposed by this Tribunal is the forfeiture of 15 days (120 hours) leave, along with a personal letter of apology directed to Mr. Sandeep Kandola with delivery through the office of the Chief of Peel Regional Police.

Further, this Tribunal orders that after a 6-month period following this order you shall meet with the Director of the Peel Regional Police Service Human Resources and your immediate supervisor to undertake an educational session and discuss/reflect on where you are now in your understanding of diversity, inclusion and Human Rights.

Part II - The Penalty Hearing

Summary

On October 31, 2018, after a lengthy *PSA* Hearing, *BIRING* was found to have committed misconduct (one count of Discreditable Conduct). The Penalty Hearing commenced on February 20, 2019, during which evidence and arguments as to sanction were communicated to the Tribunal by the parties. The parties disagreed on the sanction in this case.

I must ensure that the disposition imposed fully accords with the governing principles of an appropriate sanction. I must consider the goals of a discipline process, which include, but are not limited to, considerations of restoring the public's trust, correct errant behavior, deter others from similar misconduct, and assure the behavior will not occur again.

I will rely on the commonly held disposition factors appropriate to this case, as set out in *Krug and Ottawa Police, 2003 ONCPC 1* and as explained in *Ceyssens Legal Aspects of Policing, Earlscourt Legal Press, 1994.*

Both parties presented their respective arguments to penalty and supported their positions with argument and case law references.

BIRING presented one (1) witness who gave sworn testimony before the Tribunal.

- Inspector R. Biring – February 20, 2019

BIRING presented documentary evidence:

- Member's profile – Exhibit #49
- Member's evaluation – Exhibit #50
- Member's Promotional evaluation – Exhibit #51
- Member's CV – Exhibit #52
- Book of Authorities – Exhibit #54

The Peel Regional Police Service (*SERVICE*) presented documentary evidence:

- Book of Authorities – Exhibit # 55

This Tribunal wishes to assert that all documents presented for consideration were reviewed, particular to the highlighted areas identified by the parties, for assistance in the rendering of a penalty decision at this Hearing.

Defence Witness

Evidence in Chief (paraphrased) – Inspector R. Biring

Inspector R. Biring was sworn as a witness to provide testimony to penalty. *BIRING* testified that, in addition to his evidence provided on June 15, 2018 on employment history, two additional exhibits, #49 and #50, were being offered in support of his work history. *BIRING* explained his member's profile, exhibit #49, and outlined his work assignments, awards and education.

The Managers Evaluation (Annual PADP), exhibit, #50, was identified wherein it was explained that *BIRING*'s manager described *BIRING* as meeting standard during his assignment to 22 Division CIB May 6, 2017 to May 6, 2018.

BIRING presented his Staff Sergeant promotional application written by his supervisor July 2009, exhibit #51. Although not signed or dated and no recommendation was identified, it does appear to support *BIRING* for promotion to Staff Sergeant.

In exhibit #52, a memo from Inspector Dave Woodland was identified as supporting *BIRING* to continue his education in a Masters in Leadership program. Lastly, exhibit #53 was identified as *BIRING*'s curriculum vitae (CV).

BIRING apologized for his behaviour to Mr. Kandola by testifying;

> *"As I maintained, it was never my intent to offend Mr. Kandola. I am sorry that he felt offended and had I been given the opportunity to address that at an earlier stage with him directly, I would have been more than happy and pleased to explain what it was I said and why I said it. It was never my intent and for that I apologize"*[1].

BIRING also apologized to the *SERVICE* by testifying;

> *"I would like to apologize to the Peel Regional Police if I have caused any tarnish – tarnished their image at all, it's never been my intention, I'm a very proud member of the Peel Regional Police, a proud member of this community, which I've grown up in and lived in with my family and that was never my intent. My entire career has been that of selling to improve not only the police*

[1] Penalty Transcript Biring, February 20, 2019, p,16.

service but also the community, our relationships within that, and again if I have done anything to tarnish that, I would apologize."[2]

BIRING also testified that he has incurred a financial toll and that the emotional impact of the proceedings has had a negative effect on his health.

Cross Examination

The *SERVICE* asked if the annual evaluation (exhibit #50) was for working in 22 Division CIB and not recruiting. This was confirmed by *BIRING* as a correct statement.

The *SERVICE* asked if *BIRING* was fairly knowledgeable about the field of Human Rights. The reply was "I have an understand, sir". *BIRING* further identified that he did not have a specific course on Human Rights but some of his courses had components on Human Rights.

When questioned by the *SERVICE, BIRING* testified that he was never given the opportunity by the *SERVICE* to apologize to Mr. Kandola. "Today was my first opportunity to apologize". When asked if he was going to send a letter to Mr. Kandola, *BIRING* testified;

"I believe at this stage, sir, I would say this, I am on the record to Mr. Kandola in a public setting, saying it was never my intent to offend him, and if he felt offended, I am sorry. If I had – sorry, sir. If I had the opportunity to see him face to face, I would like to say that to him, yes."[3]

Under some intense questioning from the *SERVICE* related to the apology uttered by *BIRING*, he testified;

Q94 – "Did you do anything wrong in that interview?"

R-"I understand and appreciate the context of what Mr. Kandola felt. I appreciate that he was offended. Again, that was never my intent. And I appreciate that my questions that may have been posed to him based upon the way he took it, he found offensive."

Q99 – "So, I want to be clear that your remorse is because Mr. Kandola was offended?"

R- "My remorse is that I have said something to someone that they felt offended by. It was not my intention to offend him or to anyone else or to affect the reputation of Peel Regional Police."

[2] Penalty Transcript, Biring, February 20, 2019, p, 18.
[3] Penalty Transcript, Biring, February 20, 2019, p32, reply to question 127.

Q174- "And you understand that as a member of the South Asian community, Mr. Kandola found your comments highly offensive."

R- "Yes, I heard that he was highly offended, and I can appreciate what he was saying."

Q175- "Do you understand why?"

R- "I can understand and appreciate that some people may take things out of context and again that was not my intent, and for that I apologize."

Q179- "Mr. Kandola said he found that offensive."

R- "Yes, I appreciate that, but again, it was not – it was taken out of context, and that was not what it was meant to be, and I explained the reasons, and I apologize for that."

Q 180 – "So, essentially what you're apologizing for is that Mr. Kandola took what you said out of context, is that fair?"

R- "I am apologizing and appreciating that over the last three years I've been educated as to how he saw that and had I known then what I know now and how it would have been taken, I would not have done that, that was not my intent, it was something that I had used in the past and I've learned from it. Sir…."[4]

RE-Direct Examination

*W*hen asked by his counsel when he received the complaint letter, *BIRING* indicated just before his *OPP* interview.

POSITION OF THE PARTIES

PROSECUTION SUBMISSIONS

The Service argued that this is a serious misconduct and one that has a lasting effect on Mr. Sandeep Kandola. The *SERVICE* described *BIRING* as a Senior Officer holding the rank of Inspector and the officer in charge (*OIC*) of recruiting at the time of the misconduct. The negative effect on the *SERVICE* is significant as this misconduct involves discrimination, an issue very important to Peel Police Service as they police a multi-ethnic and diverse community.

[4] BIRING Transcript, February 20, 2019, p, 27, 28, and 43.

The *SERVICE* argued that the aggravating factors are impactful. The seriousness of this misconduct, along with the fact that *BIRING* is a long serving senior manager, combine to support a serious penalty.

The *SERVICE* seeks a penalty of 20 days (160 hours) forfeiture.

DEFENCE SUBMISSIONS

BIRING argued that the transgression did not contain a deceit, nor any use of force or a criminal offence, and therefore was only a misconduct against the code of conduct in the *PSA*. *BIRING* has apologized to Mr. Kandola verbally today and to the Peel Regional Police Service. Any damage to the *SERVICE* is limited.

BIRING has suffered a negative effect on his professional and personal life as some of the details of this Hearing have become known to others. *BIRING* has had financial expenses and medical issues associated to the stress of the Hearing.

BIRING did not intend to offend Mr. Kandola. While *BIRING* understands that intent is not an issue in his misconduct, it was argued that it should be a consideration in any sentencing. *BIRING* now understands that the questions were wrong and, although he has used them before, he now understands that they can be offensive.

BIRING identified several cases as outlined in the factors area later in this document in support of the recommended penalty.

BIRING identified a prior Human Rights case involving another Peel Officer and expressed that he faced several issues that were identified in the *B.J Sandhu case in April 2017*. This was the reason he asked the questions he did of Mr. Kandola.

BIRING submits that a penalty of 3-5 days is appropriate based on the mitigating factors.

Rebuttal

The *SERVICE* described the argument advanced by *BIRING,* in which it was stated that he was never given an opportunity by the *SERVICE* to apologize to Mr. Kandola, as remarkable. *BIRING* could have apologized at any time and did not need the *SERVICE* to arrange it.

The *SERVICE* questioned how it is possible that *BIRING* did not intend to offend when we see how and what was asked of Mr. Kandola in the interview in 2016.

The *SERVICE* argued that the *B.J Sandhu* case referenced by *BIRING* is not appropriate for the Tribunal to review as it has no relevance to this case. No legal principle was identified. It was simply an attempt to justify the actions of *BIRING*.

Analysis – Part III

Case law

BIRING identified in *Krug and Ottawa Police Service, 2003 ONCPC* 1 that this case stands for the concept that consistency in sentencing makes for public confidence in the discipline process.

The *SERVICE* argued that public interest and consistency in penalty are not the same factors. In *Ceyssens Legal Aspects of Policing,* and in many case law decisions and appeals, it has been established that public interest and consistency of penalty are expressed as distinct factors.

Ceyssens describes consistency at 5-287 as; *"Consistency represents one of the "basic principles of the discipline process, and flows from the philosophy that similar misconduct should be treated in similar fashion…The Ontario Police Commission summarized the law in Schofield and Metropolitan Toronto Police 'Consistency in discipline process is often the earmark of fairness'. The penalty must be consistent with the facts, and consistent with similar cases that have been dealt with on earlier occasion."*

Ceyssens describes public interest at 5-248 as, "*The public interest must be carefully considered in each case to determine whether this factor is engaged, given that one of the objectives of the police complaint and discipline process is protection of the public."*

I found the argument interesting and intently read this decision in *Krug* in order to clarify whether there was support for the idea that consistency is a marker for public interest. I could not find any reference to this concept. As no other information was presented by *BIRING* and I did not glean much from reading

KRUG, I find I cannot make the connection as described. In *Ceyssens Legal Aspects of Policing,* these two factors are separate and distinguishable, as I believe appropriate.

What I can acknowledge is that consistency in penalty is a hallmark of a fair Hearing. Any sanction so ordered by a Tribunal must have been analysed (consistent) with other cases that are similar. Each case must also be adjudicated on the facts particular to it. *Ceyssens* states at 5-289 in *Legal Aspects of Policing*, "that Consistency is not absolute in the sense that particular findings of misconduct will generate a range of dispositions because other mitigating and aggravating factors vary considerably among cases."

BIRING identified, in *Mowers and Hamilton – Wentworth Police Service, OCPC 1999,* that progressive discipline is a factor to consider. In *BIRING* there is no need for progressive discipline as this is a first transgression.

The *SERVICE* countered that if there had been any prior discipline in this case, they would be seeking a demotion.

Mowers did assist the Tribunal with the understanding that prior discipline could be a factor for consideration. It is not in this case.

BIRING presented the case of *Tapp and OPP, OCPC 2018* and outlined that this case was similar. It involved a police officer who called another officer a racist. *Tapp* received a 12-hour penalty.

The *SERVICE* argued that this highlighted case involves a Constable calling his supervisor a racist and did not involve offending language as we have in this case.

I find this case was distinguishable and was not on point to the *BIRING* matter. *Tapp* was a Constable and did not hold rank, the misconduct did not involve a member of the public, and it did not involve a recruitment situation. I do note that the penalty in the *Tapp* case was 12 hours on each of 2 counts for a total of 24 hours.

BIRING outlined the case of *Monaghan and Toronto Police, OCPC 2003* and identified that this involved a supervising officer who made racial slurs. There was no remorse identified and this was a factor in the penalty. *BIRING* has apologized and has indicated remorse. The penalty in the *Monaghan* case was six (6) days.

The *SERVICE* argued that there is a significant difference between a supervisor (Non-Commissioned Officer NCO) and a senior manager.

I note that a senior manager, holding the rank of Inspector and above, can be referred to as a commissioned rank. This occurs in the military and within some police organizations, including those in Ontario. This case was helpful as it did establish that the rank of the officer is a factor for consideration. The elevation from a junior rank, which are inclusive of NCOs, to that of a senior manager can be aggravating to any misconduct. In my opinion, each and every rank advancement is subject to further consideration of aggravation to any misconduct. The higher the rank the greater the expectation.

This case was distinguishable as *Monaghan* involved another member of the police service, an unwillingness to accept that he had done anything wrong, and the language uttered was not at the same magnitude as we have in *BIRING*. The penalty was six (6) days.

BIRING outlined the cases of *Andrews and Peel Regional Police, Cate and Peel Regional Police, Gauthier and Timmins Police,* and *Stock and Windsor Police* as examples of decisions that involve a much lesser penalty than what the *SERVICE* had suggested.

These cases were all distinguishable from *BIRING* and I did not find them particularly helpful.

The *SERVICE* identified for the Tribunal the case of *Williams and OPP, December 4, 1995 (OCCP)* and pointed to three areas for consideration in determining usefulness of an officer who has committed misconduct. They are: the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer, and the damage to the reputation of the police force that would occur should the officer remain on the force.

I find this case was helpful and I consider this leading case particularly instructive when dismissal is sought. Dismissal is not sought in *BIRING.*

These factors outlined in *Williams* are important and will be addressed by this Tribunal.

The *SERVICE* outlined the case of *Velikov and Peel Regional Police, December 6, 2010* and noted that this was a new officer, a joint submission was made to penalty, and the racial remark was made to a person with whom the officer was in a previous personal relationship. The penalty confirmed by the Commission was the forfeiture of three (3) days pay. *BIRING* is notably different with many more aggravating factors for consideration.

I find that this case is distinguishable from *BIRING* and does not support a finding of a similar penalty as announced in *Velikov*. Among the factors I consider aggravating in *BIRING* are his rank, his position of authority as the *OIC* of recruiting, his experience and education, along with the biases contained in the misconduct voiced towards a member of the public.

The *SERVICE* identified the case of *Ottley and Peel Regional Police, May 20, 2005* and argued that *Ottley* was a Sergeant who made sexual advances towards other employees. Any rank can be an aggravating factor in misconduct and this officer was demoted.

I find that this case was helpful in establishing that rank does come in to play on sentencing for misconduct. The misconduct is different than in *BIRING* but the power differential and rank identified in *Ottley* can be transferred and assist this Tribunal.

The *SERVICE* explained that in the case of *Venables and York Regional Police, October 3, 2008 (OCCP)* this Constable made a racial slur toward a member of the public and committed an assault that resulted in dismissal from the police service.

I find this case helpful in establishing from the Commission that any bias demonstrated towards a community is a serious matter for consideration. This case is distinguishable from *BIRING* as the officer was convicted in criminal court and clearly we do not have such a situation here.

The *SERVICE* argued that the case of *O'Farrell and Wlodarek and Metropolitan Toronto Police, February 4, 1976 (OPC)* indicates that when a service is policing an area which is multi-racial officers must conform to the highest standards of conduct. The Commission acknowledged that when Human Rights are infringed dismissal and demotion are within the range of dispositions available to a Tribunal. This case involved racial slurs directed to another officer and his wife. The Commission ordered a variation on the penalty from dismissal to demotion on one and a reduction on demotion for the other.

I find this case was instructive in outlining the importance that members of police services uphold the laws of Human Rights and do not infringe upon or be biased towards any group. It further establishes that a high standard of conduct is expected of police officers in Ontario. This case is distinguishable in many ways from *BIRING* but does drive home the need to denunciate any bias by an officer toward a person or group.

In the case of *Brayshaw and OPP*, the *SERVICE* argued that, as the detachment commander, Staff Sergeant *Brayshaw's* rank was a factor for consideration and resulted in his demotion of two ranks.

Additionally, the effect of the misconduct on a victim is an appropriate consideration for the Hearings Officer.

I find that this case is different from *BIRING* as it involved sexual harassment by the *OIC* of the *OPP* Detachment. It was helpful in establishing that, again, rank plays a role in any consideration on sanction. It was also impactful as the Commission identified, "*That the effect of such behaviour on the victim is an appropriate consideration when imposing penalty"*.

The *SERVICE* outlined that in the case of *Deviney and Toronto Police* this Constable made a racial slur towards one of his fellow officers. The sanction imposed was the forfeiture of fifteen (15) days pay.

I find that *Deviney* was helpful in establishing that, in cases involving racial slurs, a sanction of days off and even demotions are appropriate. Such cases involving racially bias circumstances are appropriately considered as serious. "*The Commission stated at paragraph 62; 'These cases suggest to us that the penalty of forfeiture of days off is available for cases of discreditable conduct involving racially insulting language. As well, in certain situations demotion is an option'."*

This case is dissimilar to *BIRING* as it did not involve a member of the public and no rank was involved.

Factors for Consideration

In order to determine an appropriate penalty for this misconduct, the parties submitted exhibits and authorities for consideration by the Tribunal. The Prosecution offered a book of authorities, exhibit #55. The Defence offered a book of authorities, exhibit #54, and additional exhibits #49 - #53. I have reviewed this material and, while I may not reference all aspects of the material presented, my decision has taken all submissions into consideration. I have considered the mitigating and aggravating factors as they relate to the principles of discipline as outlined in *Ceyssens Legal Aspect of Policing Chapter 5*.

BIRING identified a Human Rights case (*B.J. Sandhu and Peel Regional Police*) and suggested that *BIRING* has experienced similar issues as identified in this case. No specific references were made and a case brief was not presented to the Tribunal. The *SERVICE* expressed that this case is not relevant to the Tribunal and that the Defence has not identified the legal principle being relied upon.

In short, I find that the *Sandhu* case was presented by *BIRING* without documents and with little or no specific reference with which I could even consider what the impact may have been to *BIRING* and why

he used the language he did with Mr. Kandola. I did not seek out this case, nor did I read it. It would be unfair to do so without any reference as to what I may glean, if anything, from the case to mitigate the sanction in the *BIRING* matter.

Public interest

Submissions

BIRING offered that public confidence is measured by the consistency of penalty. The Tribunal was taken to the cases of *Mowers v. Hamilton Wentworth Police, Tapp v. OPP, Monaghan v. Toronto, Stock v. Windsor, Gauthier v. Timmins Police, Andrews v. Peel Police,* and *Cate v. Peel Regional Police*, all of which had penalties less than what the *SERVICE* was seeking. It is not in the public interest to have a penalty that is at odds with consistency.

The *SERVICE* explained that Mr. Sandeep Kandola was a victim of discrimination by a high-ranking Officer who, by his own admission in testimony and supported in documents (exhibits) provided, indicated that he promotes diversity and has cultural awareness. The *SERVICE* argued that *BIRING* knew that what he asked in the recruiting interview was aggressive and inappropriate.

Analysis

It behooves me to understand that, in the 21st century, a Police Officer holding the rank of Inspector and being the *OIC* of the Recruiting Branch could consider having a conversation with a member of the community (potential recruit) and ask the questions and lead conversations as have been described during this Hearing. The public demands that these kinds of interviews are well in the past and ought not to occur in contemporary Canadian society. The expectations on *BIRING* are well above what was displayed by him on March 24, 2016. I find that *BIRING* is an experienced and a well-educated senior police officer. It cannot be said that *BIRING* did not know that the conversations were offensive. Therefore, I find that the discreditable conduct by *BIRING* was offensive to public interest and was equally unexpected of a ranking police officer.

The public must be assured that the *SERVICE* will seek considerable sanctions on those who do not respect Human Rights and who offend in the manner disclosed during the Hearing proper. It is imperative that Peel Regional Police maintains the confidence of the public that policing services will be delivered in an unbiased manner.

I find that public interest is a highly aggravating factor in this case.

Seriousness of the misconduct

Submissions

BIRING indicated that he understands that this misconduct was serious now that he was found to have committed misconduct. He has reflected and sees how the questions/interview could be offensive. It was never his intent to offend. He only wanted to hire the best candidates for the position of police constable.

The *SERVICE* identified the policies of the *SERVICE,* exhibit #37, #39, #40, as indicative of the importance of bias-free recruitment and diversity to the *SERVICE*. *BIRING* is a senior member and a representative of the *SERVICE* to the community. Clearly this misconduct was important to the *SERVICE*. His status as an Inspector makes the misconduct much more serious. The *SERVICE* pointed out that *BIRING* violated three (3) of the declarations of principle as outlined in section 1 of the Police Services Act (*PSA*);

- *The Importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.*
- *The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.*
- *The need to ensure that police forces are representative of the communities they serve.*

Further, the *SERVICE* argued that *BIRING* is not only experienced but knowledgeable in diversity related matters as identified in exhibit #44, page 1 and 15.

The *SERVICE* contends that Mr. Kandola was a victim of discrimination and his pain was evident during his testimony at the Hearing proper. The *SERVICE* argued that the cases of *Velikov v. Peel, Ottley v. Peel, Venables v. York, O'Farrell v. Metropolitan Toronto, Brayshaw v. OPP, Deviney v. Toronto, Lewin v. Toronto, Herridge v. St. Thomas, Andrews v. Midland, Toronto City v. IAFF,* and *MVT Canadian Bus v. ATU* are all cases that are indicative of either infringing Human Rights or misconduct by a supervisor, or both.

Analysis

This misconduct is framed by several impacting and intersecting issues. When I examine the totality of the evidence, I can say with confidence that bias was evident. I believe that a *PSA* Hearing is a court of competent jurisdiction and, as such, if Human Rights has a part to play in the misconduct, as it does in this case, this alone would command that the behaviour be expressed as very serious.

The interview of Mr. Sandeep Kandola, conducted by *BIRING* on March 24, 2016, was aggressive and inappropriate. I found this to be the case and articulated this in the disposition with reasons on the finding of misconduct. This in itself is serious, but when factored with three occasions where Human Rights bias was evident, along with the face to face nature of the interview with a member of the public that challenged both religious and cultural beliefs outwardly evident in Mr. Kandola, I must find that the interview was offensive.

Without listing the plethora of policy that the *SERVICE* has in place, it is very evident that much understanding and effort has gone into the contents of the policy that surrounds Bias-free policing, Human Rights, and multi-culturalism in the Region of Peel. *BIRING* is expected to know these policies, respect them, and uphold them. He did not.

I find that the behaviour exhibited by *BIRING* was not in congruence with the principles and expectations set out in the Charter of Rights and Freedoms, the Ontario Human Rights Code, the *PSA*, and the policy of Peel Police. As a guardian of these principles, as all Police Officers are expected to be, *BIRING* must safeguard these laws and not violate them. To violate these principles is unexpected of an officer holding rank and open to sanction. *Ceyssens* identifies that: "Rank, especially high rank"[5] may be an aggravating consideration.

I must announce with some vigor that this misconduct is a serious matter and not a trivial breach of the Code of Conduct in the *PSA*.

In weighing these issues, I find this factor very aggravating.

[5] Ceyssens Legal Aspects of Policing, Earlscourt, 1999, 5-265.

Recognition of the seriousness of the misconduct

Submissions

In his testimony under oath, *BIRING* has acknowledged the seriousness of the misconduct and apologized to both the *SERVICE* and Mr. Kandola (although Mr. Kandola was not present when the apology was offered).

BIRING suggested that he was only asking questions to test Mr. Kandola, similar to the operational questions that previous witnesses, Sgt. Adore and Cst. Rozich, had described under oath at the Hearing proper.

The *SERVICE* identified that *BIRING*'s apology was hollow and trite in nature. *BIRING* did not acknowledge his culpability until February 20, 2019 after being found to have committed misconduct at the Hearing proper. This Hearing began on October 12, 2017, and the date at issue was March 24, 2016. Until this Penalty Hearing, never once has *BIRING* apologized. He is entitled to enter a plea of not guilty and this is not aggravating, but he cannot expect any mitigation for acknowledging guilt and apologizing this late in the process.

The *SERVICE* argued that the comment that *BIRING* was only asking questions similar to those posed by other recruiters about operational scenarios is just an excuse and an attempt to justify his actions.

Analysis

I still find myself unimpressed with the degree of acknowledgement by *BIRING*. I find it difficult to support that *BIRING* has understood the seriousness of the misconduct and accepted his role in this incident. I rely on the passages from his testimony on February 20, 2019, outlined in the evidence in chief and cross examination particular to his apology (as outlined on page 4 - 6). The language used by *BIRING* was a scripted and well-rehearsed apology to Mr. Kandola and the *SERVICE*. The apology did not resonate with me to a degree that I could recognize sincerity. The apology made by *BIRING* on February 20, 2019 included language that suggested Mr. Kandola's perception was to blame in whole or in part for finding the interview offensive.

I want to be clear - Mr. Kandola is not to blame, and it is not his sensitivity to the conversations that are the nexus to the misconduct. *BIRING* bears sole responsibility for this misconduct.

Additionally, the language used by *BIRING* in the apology to the *SERVICE* was equally unmoving. The text infers the suggestion, if embarrassment was caused, *BIRING* apologizes.

These passages are hollow in my view and do not ring as a sincere apology which would give support to an understanding of the seriousness of the misconduct on *BIRING*'s part. I fully understand that the apology was delivered while under oath, and I acknowledge this as mitigating.

In no way do I support the suggestion by *BIRING* that the Kandola/*BIRING* interview conversations were in any manner similar to those operational scenarios asked of potential recruits in the local focused interview as described by Sgt. Adore and Constable Rozich in prior testimony. To suggest so was not well contemplated.

I find this factor to be less than mitigating and more aligned with neutrality.

<u>Damage to the reputation of the police service</u>

Submissions

BIRING offers that the damage to the police service was minimal because he is still working and remains a positive employee.

The *SERVICE* contends that the conduct by *BIRING* is so unexpected that, should it become known, the harm to the *SERVICE* would be great. This is conduct involving Human Rights and the poor and disrespectful treatment of a member of the community by a senior officer. *BIRING* was at the time of the offending behavior the *OIC* of the recruitment branch.

Analysis

I find that this matter has garnered some considerable public interest as several members of the community, including purported media, have attended the Hearing proper. *BIRING* has contributed to a negative public perception of the professionalism of the Peel Regional Police Service, who strive to emphasize their positive image with the multiracial and diverse population of the Region of Peel. I am reminded that potential consequences that flow from the misconduct are a consideration for any Tribunal, as explained at *5-294 of Legal Aspects of Policing*.

Strong support was presented by the Prosecution that the *SERVICE* is a leader in policing a very diverse community. I do not think I would be out of line indicating that the Region of Peel is considerably diverse. Much policy was directed to this understanding and the need for the *SERVICE* to be inclusive.

BIRING is a member of the senior ranks and represented the organization directly to the community as the *OIC* of recruiting. *BIRING* is management.

I find that the interview conducted by *BIRING* had a negative effect on the victim, Mr. Kandola, a member of the community, and as such is an important consideration to the disposition.

I find that damage was done to the reputation of the *SERVICE*. My hope is that the community understands that the *SERVICE* took the matter very seriously and took steps to correct the behaviour on the part of *BIRING*. I further hope that it would not occur again.

This factor is aggravating, tempered by the finding of misconduct and penalty imposed.

Rehabilitation of officer

Submission

BIRING suggested that he has been rehabilitated, as exemplified by his good work evaluation dated 2018-05-06, exhibit #50. He continues to be a senior manager and has the support of the organization. Peel Police continue to utilize his extensive knowledge of the South Asian community.

The *SERVICE* argued that this evaluation (exhibit #50) is unsigned and does not take into consideration his time as the *OIC* of recruiting. The *SERVICE* acknowledged that *BIRING* can continue as a member of the *SERVICE* and was never suspended. His rehabilitation was considered in the *SERVICE* position on penalty.

Analysis

I find this factor to be mitigating. However, I would be remiss if I did not take this opportunity to say that one of the hallmarks of rehabilitation in my mind is acknowledging your wrong-doing and setting the record straight. Sincerity in accepting the full culpability of the misconduct is vital.

Employment history

Submission

BIRING identified that he is a long serving member who has a spotless work record with no prior misconduct. Commendations were present in his work history. Both Deputy Chief Andrews and Superintendent Pincivero spoke highly of *BIRING* in testimony at the Hearing proper. *BIRING* expressed that exhibits #49 through #53 supported his good work history and future potential.

The SERVICE agreed that *BIRING* does have a good work history and has not had a prior misconduct. This was part of the rationale behind not seeking demotion as penalty. No support letters were identified by *BIRING* from the *SERVICE*, its members, nor the public. This was suggested as unusual.

Analysis

I find that the work history is positive and supports mitigation. *BIRING* is experienced and holds a junior senior rank. However, mitigating as this may be, in consideration of this factor, it can also be argued that his experience and rank are aggravating factors in a misconduct of the nature we have in this case.

It has been my experience that letters of support from members of the *SERVICE* or the public are regularly submitted for the consideration of the Tribunal. This is not the case here as no letters of support were tendered. I do acknowledge the testimony of Deputy Andrews and Superintendent Pincivero at the Hearing proper which supported *BIRING*. I find that with additional letters of support this mitigation could have been strengthened. The fact that there were no supporting letters filed providing character evidence is not aggravating, but is unusual in my experience.

I find this factor to be mitigating.

Deterrence

Submission

BIRING suggested that he knows what he did wrong and that he has continued to flourish once the negative impact of this complaint on his health passed. He feels supported by the organization and presented a recent performance evaluation dated 2018/05/06, exhibit #50. This evaluation has suggested that he is performing as expected (meets standard). *BIRING* stated that any additional deterrents are not needed.

The *SERVICE* argued that *BIRING* should have known that what he was asking during the March 24th interview with Mr. Kandola was not appropriate and it should never have happened. The *SERVICE* suggested that it was not plausible that *BIRING* was not aware the interview was bias and suggested, instead, that he thought he could get away with asking such questions and having such conversation because he himself was South Asian. Further the *SERVICE* suggested that any apology to date has not indicated that *BIRING* has been deterred.

Analysis

I do not support the suggestion by *BIRING* that specific deterrence does not need to be a consideration in penalty. I believe, however, that this misconduct is one in which general deterrence is not a priority as I'm not aware of a case indicative of a senior officer having done something similar. This only supports how unexpected this misconduct was

I also cannot support the theory the *SERVICE* expressed as the reason *BIRING* undertook the conversation. I do not know why it happened, what I know is that it did.

A clear message must be sent to *BIRING* impressing that such behaviour will not be tolerated. I must loudly denounce this misconduct as offensive and I must be assured that *BIRING* is deterred.

A specific deterrence is required in what I consider a very serious misconduct. I find this factor aggravating.

<u>Consistency</u>

Submission

BIRING argued that a 20-day forfeiture is not consistent with other cases. The Tribunal was reminded of the cases of *Mowers v. Hamilton Wentworth Police, Tapp v. OPP, Monaghan v. Toronto, Stock v. Windsor, Gauthier v. Timmins Police, Andrews v. Peel Police,* and *Cate v. Peel Regional Police*, all of which had penalties less than what the *SERVICE* is seeking.

The *SERVICE* indicated that no other case provided by *BIRING* speaks directly to the issues in this case. What is impactful and worthy of consideration is that this case involves a senior manager who discriminated and violated Human Rights. This case is distinguishable from the cases *BIRING* has referenced and, although some of the cases identified involve a supervisor, this case is about an *OIC*, an Inspector, who is much more than a supervisor.

The *SERVICE* highlighted the cases of *Velikov and Peel Police, Ottley and Peel Police, Venables and York Regional Police, O'Farrell and Metro Toronto Police, Brayshaw and OPP, Deviney and Toronto Police, Lewin and Toronto Police, Herridge and St. Thomas Police,* and *Andrews and Midland Police* in support of their position. Additionally, the *SERVICE* identified some cases from outside of policing, which included *MVT Canadian Bus and ATU local 1775,* and *Toronto City and IAFF* for the consideration of the Tribunal.

Analysis

I would like to assure the parties that I reviewed all of the cases, particular to the highlighted areas, and will comment that it is commonly understood that prior cases will not be identical to the case before a Tribunal, yet they can provide some assistance to a Tribunal. I will not recite all of the cases, but I have identified those that did provide some guidance and support for the sanction in the case law section above.

Negative effect on the officer

Submission

BIRING testified under oath that he has been financially burdened by this Hearing and his health has suffered as a result of having to go through this process.

The *SERVICE* argued that this was an easy statement to make and asked for documentation in support of both claims. None was provided by *BIRING*.

Analysis

I support *BIRING,* as he testified under oath that he has incurred financial loss as a result of his defence to the allegations. That would not surprise me in any way.

Additionally, *BIRING* testified that his health was impacted. Although no documentary evidence was presented nor was any further explanation provided, I can respect that decision as those details are not critical to disclose in this case. I can with some assurance accept that *BIRING* did in fact experience some health consequences. The extent of which I cannot say.

I do accept that *BIRING* has suffered.

This factor is mitigating.

*Note – no other factors were argued by the parties.

Disposition - Part IV

I find this misconduct is on the higher end of seriousness and I would be remiss if I did not identify that the range of penalty available could have included a demotion. The range as argued by *BIRING* is not appropriate given the circumstance of the misconduct as already enunciated in the Hearing proper and in this document. I do find that the 20-day sanction as described by the *SERVICE* is the appropriate starting point. I respect that the *SERVICE* feels *BIRING* has a future with the Peel Regional Police Service.

This conduct by a Police Inspector is unacceptable, unexpected, and offensive to Ontarian society. The entire interview with Mr. Kandola was fraught with offensive and demeaning language and conversations. To know that more interviews like the Kandola interview occurred, as suggested by *BIRING* and by his counsel[6], is disconcerting. I emphasize, however, that my decision in this case involved a single act (interview) and one victim, Mr. Kandola.

I acknowledge the courage of Mr. Kandola for speaking up. The comments and questions pertaining to prohibited grounds under the Ontario Human Rights Code should never have been initiated by *BIRING*. I also want to point out that several other conversations described in testimony surrounding Mr. Kandola's parents and the trucking industry, to identify a few, should not have occurred as well.

This case involves some very questionable language used by *BIRING* and I find that he is solely responsible for his actions. These were conscious acts involving an informed person, who is a professional senior member of a police service. The rank, experience, education, cultural awareness, and the nature of the offending behaviour involved in this case have each contributed to my decision that this conduct merits a serious penalty.

I continue to have some reservations as to *BIRING*'s rehabilitation and whether he has learned from his mistakes and is deterred from committing any such misconduct in the future. I found *BIRING's* apology to be stiff, hollow, and unspecific and not worthy of much mitigation. The cases of *Clough and Peel Regional Police, OCPC, 3 October 2014, at paragraph 107* and *Pinto and Toronto Police, OCPC, 20 May 2011, at paragraph 61,* lend support to this decision.

[6] BIRING Transcript, February 20, 2019, p.,93, para, 2-3.

In order to rectify my concern, I find that a sanction of the forfeiture of time off under *PSA* section 85 (1) (f), combined with the use of *PSA* section 87 (7) (b) and (c) is appropriate. In fairness to *BIRING,* I have reduced the forfeiture of time off from the suggested 20-days as I consider it essential that Mr. Kandola receive a letter of apology and that *BIRING* undertake an educational program as outlined in the order.

It will be important for the *SERVICE* to maintain some vigilance and to assist *BIRING,* when and if necessary, in his future with the *SERVICE*.

Inspector Biring you knew better. I may never understand why you used such language or thought you could with all of your experience and education. The interview was wrong, and you were wrong to lead such conversations. My hope is that you have grown from this experience and that your cultural competence has become that much stronger.

Order

Inspector R. Biring you are hereby ordered pursuant to *PSA* section 85 (1) (f);

> The forfeiture of 15 days (120 hours) off as arranged by you and your supervisor.

In addition, you are hereby ordered pursuant to *PSA* section 85 (7) (b) and (c);

> To participate in a program of reflection by arranging and attending in person a meeting with the Director of Human Resources and your immediate supervisor, to reflect on and discuss the circumstances of the misconduct particular to Human Rights and what was learned in order to internalize this learning. This program is to be commenced six months after the date this order comes into effect and shall be completed within seven months.
>
> To complete a written letter of apology directed to Mr. Sandeep Kandola to be forwarded to the recipient through the office of the Chief of Peel Regional Police.
>
> Note * I cannot tell you what to write but it would be my hope that this letter will contain a sincere apology, free from any suggestion that Mr. Kandola's perceptions had any role to play in your misconduct.

Robert Gould March 31, 2019

_____ _____

Robert Gould, Superintendent (Ret.) Date

Adjudicator