

**ONTARIO CIVILIAN
POLICE COMMISSION**

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

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

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



Citation: 2018 ONCPC 2501

Date: January 8, 2018
File Number: 18-ADJ-001

**IN THE MATTER OF A HEARING UNDER S. 25 OF THE POLICE SERVICES ACT
INTO THE CONDUCT OF LLOYD FERGUSON, CHAIR OF THE HAMILTON
POLICE SERVICES BOARD**

DECISION

- Panel:** D. Stephen Jovanovic, Associate Chair
- Submissions:** Written Submissions received January 5, 2018
- Appearances:** Robert Edwards, counsel for Lloyd Ferguson
Benson Cowan, counsel for the Ontario Civilian Police
Commission

OVERVIEW

- [1] Mr. Lloyd Ferguson has been a member of the Hamilton Police Services Board (the Board) since 2013 and the Chair of the Board since January, 2014. He has also served as the councillor for Hamilton's Ward 12 since 2006.
- [2] On September 6, 2017, the Commission received information from Matthew Green, the councillor for Hamilton's Ward 3, alleging that Mr. Ferguson made comments during two appearances on the Bill Kelly radio show on CHML that breached the *Members of Police Services Boards - Code of Conduct (the Code)* enacted under the *Police Services Act, R.S.O. 1990 c.P.15 (the PSA)*.

- [3] The Executive Chair of the Safety, Licensing Appeals and Standards Tribunals Ontario (SLASTO) determined that, based on the information received, an investigation under section 25 of the *PSA* was warranted. Mr. Ferguson was advised of this decision on December 18, 2017 and in accordance with section 14(1) of the *Code* he was required to decline to exercise his duties as a member or Chair of the Board for the duration of the investigation or enquiry or hearing by the Commission.
- [4] During the course of the Commission's investigation, an agreement was reached between Commission counsel and Mr. Ferguson as to the disposition of the section 25 investigation. The matter has now been referred to the Commission for adjudication to be conducted on the basis of a hearing in writing. It is important to note that the Commission's adjudicative function is entirely independent of its investigative functions.
- [5] Commission counsel and Mr. Ferguson, who was also represented by counsel, submitted for consideration an Agreed Statement of Facts (an ASF) a copy of which is attached to this decision as Schedule "A".

ANALYSIS

- [6] As the facts are fully set out in the attached ASF, they need not be repeated here. Briefly, the subject matter of Mr. Ferguson's comments was the contentious practice by some police officers conducting of "street checks" otherwise known as "carding". Mr. Green was stopped and questioned by an officer of the Hamilton Police Service in April 2016. He subsequently filed a complaint with the Office of the Independent Police Review Director which determined that there was sufficient evidence to proceed with a disciplinary proceeding against the officer involved.
- [7] According to the ASF, Mr. Ferguson made comments on the Kelly radio show suggesting that there was no merit to the disciplinary hearing against the officer because he was simply "doing his job". He also indicated that O. Reg. 58/16, passed by the Province to regulate street checks, made Hamilton less safe by curtailing the ability of police officers to gain information by talking to the public.
- [8] Mr. Ferguson agreed with Commission counsel that his conduct breached section 13 of the *Code*, which reads as follows:

Board members shall refrain from engaging in conduct that would discredit or compromise the integrity of the board or of the police force.

- [9] Commission counsel and Mr. Ferguson have submitted Minutes of Settlement which include a proposed joint submission as to the appropriate disposition of this proceeding. A joint submission is not binding on the Commission as the Commission has the discretion to accept or reject it in order to ensure public confidence in the proceeding. The requested disposition is that Mr. Ferguson be suspended from his duties on the Board from December 18, 2017 to January 8, 2018.
- [10] Mr. Ferguson has agreed to issue both a public retraction of his comments and a public apology for making the comments. He has admitted responsibility and expressed remorse for his comments. He acknowledged that his comments constituted misconduct under the *Code* shortly after the Commission commenced its investigation.
- [11] Taking into account all of the foregoing, in my view the joint submission is reasonable, will preserve the public's confidence in this proceeding and in all of the circumstances should be accepted.

DECISION

- [12] Pursuant to section 25(5) of the *Police Services Act*, the Commission orders that Mr. Ferguson be suspended from his duties on the Hamilton Police Services Board from December 18, 2017 until January 8, 2018.

Released: January 8, 2018


D. Stephen Jovanovic

Schedule "A"

AGREED STATEMENT OF FACTS

Mr. Ferguson and the Ontario Civilian Police Commission ("OCPC") agree on the following facts for the purposes of deciding the appropriate penalty for Mr. Ferguson's conduct:

1. On September 6, 2017, the OCPC received information from Mr. Matthew Green, councillor for Hamilton's Ward 3 that alleged misconduct by Lloyd Ferguson, Chair of the Hamilton Police Services Board ("the Board"). Mr. Green alleged that comments made by Mr. Ferguson during two appearances on the "Bill Kelly Show" on CHML breached the *Members of Police Services Boards – Code of Conduct*¹ ("Code of Conduct").
2. In April 2016, Mr. Green was stopped and questioned by an officer of the Hamilton Police Service ("HPS"). Mr. Green filed a complaint regarding this incident with the Office of the Independent Police Review Director ("OIPRD"). The OIPRD concluded there was sufficient evidence for the Hamilton Police Service to proceed with disciplinary proceedings, which commenced on October 26, 2016.
3. The essence of Mr. Green's complaint was that he was racially profiled by the officer who had questioned him. This complaint occurred within a context in which there had been significant discussion before the Board about the efficacy of "street checks" or "carding" as a policing tool and its effect on members of racialized communities who felt that they were disproportionately targeted by the practice. The discussion in Hamilton reflected concerns that were shared in other municipalities across the province.
4. Mr. Ferguson was appointed as a Member of the Board in July, 2013 and has been serving as the Chair of the Board since January, 2014. Mr. Ferguson has been the councillor for Hamilton's Ward 12 since his election in 2006. During his tenure both as a member and the Chair of the Board, there was significant discussion about the use of street checks by the HPS.
5. For example, Mr. Joshua Weresch wrote to the Board on June 17, 2015. Mr. Weresch pointed out the practice of street checks affected marginalized and racialized communities disproportionately and called for the abolition of the

¹ O. Reg 421/97

practice. The Board also heard a deputation from Black Brown Red Lives Matter on June 25, 2015 that focused on concerns surrounding profiling, racial bias, HPS's role in public education regarding street checks, and a lack of racial diversity among HPS's senior management. The Board further received two deputations from the Community Coalition Against Racism and Hamilton Community Legal Clinic on October 22, 2015. These deputations focused on the disproportionate impact of carding on racialized communities and means to mitigate this impact.

6. On March 21, 2016, in response to province-wide ongoing concern regarding racial biases in the practice of random street checks, the Government of Ontario passed O. Reg. 58/16 – *Collection of Identifying Information in Certain Circumstances – Prohibition and Duties* (“O. Reg. 58/16”) which bans the arbitrary collection of identifying information, requires police officers to inform individuals from which they are attempting to collect information that the interaction is voluntary, enhances the transparency and accountability regarding the collection of personal information, makes violating these rules or unlawfully detaining someone misconduct, and requires Police Services Boards to implement policies ensuring Police Services are compliant with the regulation.
7. On May 26, 2016, following the passage of O. Reg. 58/16, Hamilton Community Legal Clinic made a further deputation to the Board regarding racial profiling and the practice of street checks in Hamilton. On July 4, 2016, the Board received a memorandum from Deputy Assistant Minister Beckett regarding Board Policy Development Considerations for policies to be developed under section 12 of O. Reg. 58/16. On November 17, 2016, the Board received one more deputation from Community Coalition Against Racism regarding the Board's draft policy for Collection of Identifying Information in Certain Circumstances – Prohibition and Duties Policy. The Board passed this policy on December 15, 2016.
8. Mr. Ferguson has often appeared as a guest on CHML's “The Bill Kelly Show” and has spoken on a range of matters including those relating to his duties as both a member and the Chair of the Hamilton Police Services Board. His appearances are not usually planned in advance and he has little if any notice of the subject of the questions.
9. During an appearance on the radio show on June 19, 2017, Mr. Ferguson, while in a discussion about the new street checks policy, commented on the

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proceeding for which Mr. Green was the complainant. His comments suggested that Mr. Green's complaint was without merit:

Bill Kelly: In 2012 there were 4800 of these so called street checks with Hamilton Police Services and only 6 that were recorded last year. Your concern at that time was with this huge decrease. Are we less safe right now? What was the conversation like when you had this meeting at the Police Services Board?

Ferguson: Well, that's it. Gee. I think you just nailed it. Our concern is, and I've felt this all along. We had lots of special interest groups come before us and ultimately the Province took this matter into their own hands to change the legislation on collection of information. And so our street checks have gone steadily down, since it started to arise. And you know we saw a big drop from 2013 to 2014, 3684 to 192. In 2015 there is 43 and in 2016, 6. So they are virtually non-existent. And of course talking to people is a very big part of policing. That's how you learn information. You know, police are still talking to them but they aren't recording it. They don't get names and addresses. And have that on a file in case someone fits that description later on in a future crime. And so, um, we were told by our senior command that this is a big part of policing and we should resist it. But now they are not doing it and there is only two reasons this could be happening. Number one, the officer has to tell the person that they are speaking to, that you can walk away if you want to. And so, he bad guys aren't going to stick around; they are going to walk away. And secondly you know this has caused a lot of publicity and negative attention towards the police. You know, we had the one situation, and I can't talk about it but it involves a City Councillor and that is going before adjudication. But it ended up in the officer being – having charges placed against him for doing his job.²

10. First instance disciplinary proceedings under the *Police Services Act* are heard before hearing officers appointed by the Chief of Police of the service in question. Hearing officers are tasked with determining whether on the facts before them there is clear and convincing evidence that misconduct has occurred. The hearing is impartial and subject to the procedural safeguards in the *Police Service Act* (the "PSA"), the *Statutory Powers Procedure Act*, and the requirements of natural justice. Ensuring that disciplinary proceedings are fair and effective is an essential element of the oversight of policing and part of the Board's role.

11. A municipal police services board has a complex oversight relationship to police discipline proceedings. The Board is the employer of the Chief and is required to monitor his or her performance including with respect to how the Chief administers complaints about misconduct under Part V of the PSA.

² <https://omny.fm/shows/bill-kelly-show/street-checks-london-attack-and-hitting-cyclists>, at 10:11.



More broadly, the Board is also responsible for establishing guidelines for how complaints should be addressed. With respect to complaints investigated by the OIPRD and referred to the Chief under s. 68(3) of the PSA, the Board's oversight role includes ensuring that the hearing is administered in accordance with the terms of the PSA. In cases where more than six months have passed between the date of the alleged misconduct and the service of a notice of hearing, the Board must decide whether to waive the statutory limitation period.

12. Because of the nature of its role, the Board and all members of the Board must not undermine the functioning or impartiality of the discipline process through statements or actions.
13. Mr. Ferguson's suggestion that the subject officer in the proceeding involving Mr. Green was charged for "doing his job" suggested that he, and perhaps the Board on whose behalf he appeared to be speaking, were not impartial in the disciplinary proceeding. This created a risk that, regardless of the result, the public might lose confidence in the disciplinary proceeding at issue and in the process as a whole. This is especially of concern in a matter that involves a member of a racialized community and a larger policy issue that Mr. Ferguson knew to be of importance to members of that community. Further, it created a perception that Mr. Green's complaint might not have had merit and that he was pursuing an officer for just doing his job. This was unfair to Mr. Green. Later, in September, when given an opportunity to clarify his comments, Mr. Ferguson defended them and communicated that he saw his role as defending the members of the police force.³
14. Mr. Ferguson met with the Commission Counsel and investigators on December 19, 2017. At that meeting he admitted to having made the above statement. He expressed regret for the statement and explained that he had misunderstood his and the Board's role with respect to this proceeding. He assured the Commission that he understood the need for the Board to be neutral and impartial in these matters and that he would exercise more caution and would not comment on ongoing proceedings in the future. He explained that part of his error in judgment was the result of having appeared on the show without much preparation and having to respond quickly to unexpected questions.

³ <http://www.cbc.ca/news/canada/hamilton/green-bokhari-witness-1.4285771>.



15. During his appearance on "The Bill Kelly Show" Mr. Ferguson made other comments that were unfortunate in light of his role as both a member and Chair of the Police Services Board. On June 14⁴ and June 19⁵, he offered what appeared to be his view that O. Reg. 58/16 made Hamilton less safe by curtailing police officers' ability to talk to the public. In his meeting with Commission Counsel, Mr. Ferguson recognised that before making these comments, he should have taken great care to make clear that these were his personal views and not the views of the Board which is tasked with ensuring that this regulation is implemented in Hamilton. He regrets not having done so at the time.
16. On June 14, Mr. Ferguson repeated a comment he had heard that "an officer is most ethical is when they are first out of school until they get hardened."⁶ While Mr. Ferguson did not specifically endorse the comment in the interview, in his meeting with Commission Counsel he has expressed remorse for having made it. He recognises that he should exercise more caution before making statements that could be seen to discredit the Police Service.
17. Commission Counsel and Mr. Ferguson agree that his conduct on June 14 and June 19 breached section 13 of the Code of Conduct:
13. Board members shall refrain from engaging in conduct that would discredit or compromise the integrity of the board or the police force.
18. In responding to the investigation, Mr. Ferguson has admitted responsibility and expressed remorse for his conduct. He offered to participate in a mediation with Mr. Green to resolve his complaint but that offer was not accepted. He has sought to understand the harm that his action may have caused Mr. Green and the broader community in Hamilton. He has agreed to issue a public statement that would both provide a public apology to Mr. Green and a public retraction of his comments. In consideration of this and Mr. Ferguson's long service with the Board, Commission Counsel and Mr. Ferguson agree that an appropriate resolution in this matter would be a finding that Mr. Ferguson's conduct breached section 13 of the Code of Conduct and the imposition of a penalty of three weeks' suspension from the Board.

⁴ <https://omny.fm/shows/bill-kelly-show/use-of-force-religious-courses-and-hate-crimes>, at 3:31.

⁵ See note 2 above, at 10:28.

⁶ See note 4 above, at 7:55.

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19. The Code of Conduct requires that members step down from the roles during the course of any investigation or hearing into their conduct. Mr. Ferguson was required to step down on December 18, 2017. Commission Counsel and Mr. Ferguson agree that, in the circumstances of this case, his suspension should take this time into consideration in effect as "time served."

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