

May 19, 2021

Mr. Selwyn A. Pieters
Lawyer & Notary Public
181 University Ave., Suite 2200
Toronto, Ontario, M5H 3M7
selwyn@selwynpieters.com

Mr. Lawrence Gridin
Brauti Thorning LLP
161 Bay Street, Suite 2900
Toronto, ON M5J 2S1
lgridin@btlegal.ca

Ms. Alexandra Ciobotaru
Toronto Police Service
40 College Street, 8th floor
Toronto, ON M5G 2J3
Alexandra.Ciobotaru@torontopolice.on.ca

Dear Counsel:

**Re: Public complainants: Faye Stanley et al.,
Respondent Officer: Police Constable Christopher Howes
OIPRD Complaints: E-201407032114380296, E-201407032125500703,
E-201407032130570421 and E-201407032120350734**

Further to my letter of March 5, 2021, I thank Mr. Pieters and Mr. Gridin for providing submissions on behalf of their respective clients on whether it is in the public interest to reconsider the former Director's decision of March 4, 2015.

For the following reasons, I find that it is in the public interest to reconsider the former Director's decision. I have done so and have concluded that there are reasonable grounds to believe misconduct occurred.

Background

The complainants challenged the former Director's actions and on April 15, 2020, the Court of Appeal quashed the former Director's second decision, finding that, at the time he engaged in the reconsideration process, he lacked the common law or statutory

jurisdiction to do so.¹ However, the Court of Appeal found that, since the OIPRD had since created a Rule regarding reconsiderations, that authority now existed.² Consequently, the matter was remitted to me to determine whether, in accordance with Rule 17 of the OIPRD Rules of Procedure, it is in the public interest to reconsider the former Director's original decision.³

Preliminary Issue

What should I rely in making the above determination? I have considered only the evidence gathered during the initial investigation, the original investigative report and the parties' submissions on the issue of reconsideration. I have not considered any of the evidence gathered during the subsequent investigation because the Court of Appeal found that the former Director lacked jurisdiction to conduct it.

The Court of Appeal found that the former Director was *functus officio* following his original decision, which means that the subsequent investigation was conducted without any statutory or common law authority. The Court of Appeal made it clear that I cannot rely on or defend the reasonableness of the former Director's second decision because that decision – and its underlying investigation – were undertaken without lawful common law or statutory authority.

Original Investigative Report

On April 25, 2014, members of the TPS executed a search warrant at the Stanleys' house. Constable Howes breached the door and loudly announced police presence. Constable Howes proceeded to go to the second floor, where Yasin and Faye were located. At Constable Howes' verbal direction, Yasin got down on the ground in a prone position.

Both Yasin and Faye stated that Yasin was handcuffed when he was down on the ground. Constable Howes disagreed that Yasin was handcuffed at this time, and both he and Constable Shanghi stated that Yasin was handcuffed later.

While down on the ground, Yasin made a movement. Yasin described it as a slight lifting of his head, whereas Constable Howes stated that he felt Yasin grab his boot and torque his body, in what Constable Howes perceived to be an effort to lift himself up.

¹ *Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252 [*Stanley*].

² See: *Stanley*, supra at note 1; OIPRD Rules of Procedure, r. 17.

³ *Ibid*, at para 77.

Constable Howes used his foot to push Yasin's head/neck down once because he believed Yasin's actions posed a safety threat. Conversely, Yasin and Faye stated that Constable Howes stepped on Yasin's head twice. The medical evidence suggested that Yasin suffered a "contusion/minor head injury".

Accordingly, the former Director was faced with different versions of events on several important points. He concluded that the evidence as to whether Yasin was handcuffed at the time Constable Howes used force was inconclusive. He also made no findings as to whether Yasin touched Constable Howes' boot or the extent to which he moved while on the ground.

The former Director accepted that Constable Howes stepped on Yasin's head twice, as can be seen from the original investigative report:

There is also the question of whether Constable Howes pressed Yasin's neck once or twice. None of the officers upstairs saw any officers press a foot to Yasin's head. Constable Howes acknowledged he had done so one time. The only other person who witnessed the second application of force from an officer's boot was Faye. Both Faye and Yasin stated that the second time the ETF officer pushed Yasin's head to the ground, he utilised more force and this resulted in Yasin's body or legs jerking.

There is no dispute that shortly thereafter, Yasin complained that his head hurt. Constable Howes said he heard Yasin groan and complain of pain to his head. Constable Shanghi said Yasin complained of pain to his head when he handcuffed him.

The available information indicates that Constable Howes stepped on Yasin's head/neck area twice and in doing so used an unreasonable and unnecessary amount of force. [emphasis added]⁴

Based on this and other findings – including an inaccurate representation of Constable Howes' statement as to whether he felt Yasin posed a safety threat – the former Director substantiated misconduct of a serious nature.

Upon learning of the inaccurate representation of Constable Howes' statement, the former Director re-opened his investigation and reconsidered his original decision because he thought he had the authority to do so.

⁴ OIPRD Investigative Report, dated March 4, 2015, at page 95-96.

Public Interest in Reconsidering the Former Director's Decision

As noted above, the Court of Appeal found that although the former Director did not have authority to reopen his investigation and reconsider his original decision, I now have the authority to do so pursuant to Rule 17 of the OIPRD's procedural rules.

RULE 17 RECONSIDERATIONS

17.1 The Director may, at any time, correct a typographical error, error of calculation, misstatement, ambiguity, technical error or other similar error made in his or her decision or determination.

17.2 The Director may reconsider his or her decision when it is in the public interest to do so, and having regard to any relevant considerations including, but not limited to, the following:

- (i) the need to correct an error of fact or law, defect in procedure or improper application of its mandate or jurisdiction
- (ii) there is new information which was not available at the time of the original decision that may have reasonably affected the outcome
- (iii) the extent to which any party has relied on the original decision
- (iv) the extent to which any party or person has been affected by the original decision
- (v) the balancing of interests between the need for finality of decisions and the prejudice to all parties.

Rule 17.1 is not applicable because the inaccurate representation of Constable Howes' statement as to whether he felt Yasin posed a threat is an error of fact captured by Rule 17.2(i).

Further, pursuant to Rule 17.2(ii)(iii)(iv) an accurate representation of Constable Howes' statement is new information, which may have reasonably affected the outcome, and

based on the submissions from the complainants and Constable Howe, they both relied on the original decision, and have been affected by it.

Rule 17.2(v) requires the balancing of interests between the need for finality of decisions and the prejudice to all parties.

The complainants submit that, given the former Director's original decision that there were reasonable grounds to believe misconduct occurred, confidence in police oversight would be undermined if that decision were reconsidered and reversed.

Constable Howes submits that the public interest requires me to reconsider the decision because if the original decision stands, the prosecutor will be ethically obligated to withdraw the charges, or alternatively the matter will be dismissed for abuse of process. He points out that neither the Divisional Court nor the Court of Appeal found the Director's second decision to be unreasonable, despite being asked to do so by the complainants. He also highlights that the OIPRD has consistently defended the thoroughness of its re-investigation and the reasonableness of its second decision, and to reverse that conclusion would undermine the credibility of the OIPRD and in turn damage public confidence in the agency.

Constable Howes' submissions reflect a misunderstanding of the Director's statutory obligation, which is determining if there are reasonable grounds to believe misconduct occurred. Considerations of whether a hearing officer would dismiss the charges for abuse of process are beyond my statutory jurisdiction.

Contrary to Constable Howes' submissions, the Court of Appeal's observation that the case is not "transported back to 2015" is not an endorsement of the validity of the OIPRD's second investigation, but a reference to the application of the OIPRD's new reconsideration rule to this case.

Pursuant to Rule 17.2(v), I find that failing to reconsider the error regarding Constable Howes' apprehension of a threat would be prejudicial. Further, I find no evidence of prejudice to the complainants. Lastly, in balancing prejudice and the need for finality of decisions, I find that the prejudice to Constable Howes posed by the error outweighs the need for finality of decisions.

Accordingly, I find that it is in the public interest to reconsider the former Director's decision of March 4, 2015 for the purpose of determining the impact of the error on the decision.

Reconsideration

After considering the error and accepting that Constable Howes believed Yasin posed a potential threat, I find there are reasonable grounds disclosed during the original investigation to believe misconduct may have been committed. Specifically, I find that, even with an apprehension of threat, the second application of force, which utilized more force and resulted in Yasin's body or legs jerking, was unnecessary and unreasonable.

Conclusion

In summary, it is in the public interest to reconsider the former Director's decision of March 4, 2015. In doing so, I find that despite the error in the original report, there are reasonable grounds to believe misconduct occurred.

Pursuant to subsection 68(3) of the *Police Services Act* (Act), I am referring this matter back to you to determine whether the matter is of a serious nature. I direct that you advise me of your determination within seven days of this letter.

By operation of subsection 68(5) of the Act, you are required to hold a hearing into this matter unless you determine that the misconduct is not of a serious nature.

If you determine the misconduct is not of a serious nature, subsection 68(6) of the Act permits you to resolve the matter informally without a hearing if Constable Howes and the complainants consent to the proposed resolution. If you informally resolve this matter, you must notify my office in writing and provide a copy of the Informal Resolution Agreement Form.

Where this matter is not resolved informally, you may resolve this matter by way of disposition without a hearing. You must notify my office of any penalty imposed or action taken. Finally, you must notify the complainants of the fact that the matter has been informally resolved.

If you determine that this matter should proceed to a hearing – either because you determine the matter is serious or because it cannot be resolved in the manner referred to above – an application pursuant to subsection 83(17) of the Act is required before a notice of hearing can be served on Constable Howes. In such case, within a week of your determination the agency will provide you with submissions for this application.

If the subsection 83(17) application is successful, I would ask that you notify me of the date upon which this matter appears before the tribunal. I also request that you provide me with any pre-hearing motions and any accompanying materials and remind you that the complainants would be parties to the tribunal proceedings, and you are obliged to keep them similarly apprised.

Stephen Leach
Independent Police Review Director