

September 2, 2021

Delivered by email to: Kirsten.stevenson@hamilton.ca

Hamilton Police Services Board
155 King William Street
Hamilton, ON L8R 1A7

Attention: Kirsten Stevenson, Administrator

Dear Ms. Stevenson:

Re: Extension of Time

The Hamilton Police Service and Chief Bergen have put forward an application pursuant to section 83(17) of the *Police Services Act* recommending that the Hamilton Police Services Board approve an extension for the time of service beyond the six month statutory time period for a Notice of Hearing.

Police Services Act

Six-month limitation period, exception

(17) If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the board, in the case of a municipal police officer, or the Commissioner, in the case of a member of the Ontario Provincial Police, is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing. 2007, c. 5, s. 10.

Same

(18) The day referred to in subsection (17) is,

(a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,

(i) the day on which the chief of police received the complaint referred to him or her by the Independent Police Review Director under clause 61 (5) (a) or (b), or

(ii) the day on which the complaint was retained by the Independent Police Review Director under clause 61 (5) (c);

(b) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a chief of police or deputy chief of police, the day on which the board received the complaint referred to it by the Independent Police Review Director under subsection 61 (8); or

(c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be. 2007, c. 5, s. 10.

The Police Services Board must consider if the Hamilton Police Professional Standards Branch followed the proper procedure as outlined in the Police Services Act.

The Board must specifically consider the dates put forward by the Hamilton Police Service in their material. The Hamilton Police Service acknowledges that it had knowledge of criminal conviction on December 22, 2020 and that the Notice of Hearing had to be issued by June 22, 2020. The charge of discreditable conduct arises from the criminal conviction itself and not the underlining facts giving rise to the conviction. This was not a complicated investigation and the Chief does not assert it was. An investigation by PSB would have been perfunctory in nature. The investigation could have been completed much earlier. In either case, attempts to effect personal service of the Notice of Hearing should have been effected immediately following the investigation. Instead, the Service waited nearly 6 months after the finding of guilt and more than 4 months after the PSB investigation report was finalized to undertake its first attempt at personal service. There is no reasonable explanation for this. The delay is not reasonable, but unreasonable.

The completion date of the PSB report is February 9, 2021 and the approval of the report February 11, 2021. Those dates are irrelevant in this matter.

In the executive summary of Chief Bergen's report, "The purpose of this report is to comply with the Police Services Act in respect of the service of a Notice of Hearing on a police officer, Police Constable Darren Smith, after 6 months have elapsed from the day on which the facts on which the complaint is based first came to the attention of the chief of police." He admits in writing to know he is outside of the six month statutory service period.

It is the writer's position that the HPS did not exercise reasonable efforts of service. Speaking to a neighbour is not confirmation that writer resides at a residence in Guelph. Writer owns a home in Flamborough and frequents a family cottage during the spring and summer seasons. Writer also owns more than one vehicle, and drives both regularly. Speaking to writer's former partner would have given Hamilton Police with a direct line of communication to writer. That was never attempted by the Hamilton Police.

The dates that should be considered are the dates that Chief Bergen indicates on page 5 of his report, paragraph 4. "Attempts at personal service were made on the following dates: June 14, 2021, June 15, 2021, June 17, 2021, and June 21, 2021." Writer would like to point out that those dates fall suspiciously close to the end of the six month statutory service period as outlined before with a finding of guilt on December 22, 2020. There is no reasonable explanation for the failure to attempt personal service prior to the week the 6 month limitation period expires.

Chief Bergen's report continues with an account of Detective Licop's conversation with Gillian Eaton, writer's probation officer. "Officer Smith is aware that one of the documents is a Notice of Hearing and there must be dates set. If he is not served, the dates will have to be postponed and this will be to his advantage." Writer made no such comments to Mrs. Eaton of being "at an advantage." Of note, It is clear that the writer had been open to his probation officer about the events prior to being notified by Detective Licop.

One thing missing from Chief Bergen's account of Detective Licop's conversation with Gillian Eaton, was the fact that Detective Licop plead with Mrs. Eaton to lay charges of Breach of Probation. It was Detective Licop's position that writer was not currently living at the residence in Flamborough and therefore was in breach of probation conditions. Had he not been told by Mrs. Eaton that she was aware of writer's current living arrangements, further criminal charges against the writer would have been the result. That conversation took place on June 16, 2021, a date also suspiciously close to the six month statutory service period. Writer feels that it is evident that Detective Licop and by virtue the HPS PSB, was frustrated by being unable to serve writer to that point.

With reference to the following Court proceeding, writer would like to put forward some of the comments made by the Hearing Officer in his decision.

Grychtchenko v McCartney, 2016 CanLII 81396 (ON CPC)

- The Police Services Board must consider that the correct interpretation of s 83(17) of the Police Services Act makes it clear that the Board has no responsibility for approving an extension beyond the six month statutory time limit.
- The power to enforce discipline a police officer comes from compliance to the Police Service Act.
- The Police Service Board's approval of the delay is prospective and not retrospective.
- The Board is to perform a limited administrative function focused exclusively on the issue of the reasonableness for the delay. The Board is not to be involved in any consideration of the substance or merits of the allegations of misconduct.
- Based on the plain language range of section 83 (17) in it entire context, there is no ambiguity that the Board is to consider the "circumstances" leading to the delay in service a notice of hearing beyond the six month limitation period.

All of the above statements made by the Hearing Officer are relative to the matter before the Board at this time. Had Chief Bergen come to the Board before July 29, 2021 (with a hearing date of September 16, 2021) then the Board would be able to make a prospective decision for the approval of an extension. Chief Bergen's failure to make such an application to the Board means that the Board must make said decision retrospective. Going backwards to make a decision on how things move forward is not a position the Board would likely take in writer's opinion.

Yours Truly,

Darren Smith