



Report Regarding the Conduct of a Member of the Administrative Penalty Tribunal

**Valerie Jepson
Integrity Commissioner**

October 21, 2019

Procedural Overview

A party that appeared before the Administrative Penalty Tribunal (the APT) in May 2019 filed a complaint with this Office alleging that the hearing officer presiding over his hearing, discriminated against him based on a ground protected by the *Ontario Human Rights Code* and accordingly acted contrary to Article XVII of the *Code of Conduct for Members of Adjudicative Boards* (the Code of Conduct). The party, referred to in this report as the Complainant, pointed to the Member's characterization of his pronunciation of his name and reference to his accent in support of his complaint. He provided a copy of the correspondence between himself and the Chair of the APT regarding the same matter and a digital recording of the hearing.

The Member was notified of the complaint and given an opportunity to provide a written response. In addition to reviewing the complaint and speaking with the Complainant, I interviewed the Chair of the APT, visited the APT to observe its ordinary operations and interviewed the Member. I requested and received records from the Chair of the APT. I also received additional written materials from the Member. Part of the Member's explanation for her statements and conduct was that the hearing at issue followed immediately after a contentious or "argumentative" hearing. I accordingly obtained a copy of the digital recording of the hearing that occurred immediately prior to the Complainant's. This recording was provided to the Member for her review.

Prior to finalizing this report, I provided the Member with a Proposed Statement of Findings in compliance with the Complaint and Application Procedures of this Office. The Member provided a response, and those submissions have been considered in this report.

Findings

The APT

The APT is a quasi-judicial tribunal that reviews administrative penalties assessed to individuals. The most common type of penalty assessed is a parking ticket. The APT has the authority to affirm, reduce, or cancel administrative penalties based on the merits of the case. It is common for a party appearing before the APT to become emotional.

APT hearings take place at a specially-designed facility. Hearing officers stand or sit behind one of several kiosks that have a glass barrier between them and the parties

that come before them. Parties who appeal to the APT are assigned a date and time to attend. When they arrive at the hearing facility, parties are checked in and are randomly assigned to the next available hearing officer on duty. While waiting to be assigned to a hearing officer, parties wait in a room that is adjacent to the kiosks. Because there are several hearing kiosks, multiple hearings can occur at the same time. There is a slight physical separation between each hearing kiosk but the noise from one hearing can be heard by other parties at other kiosks or in the waiting area. There is a security guard on site at the APT.

The Complainant's Hearing

The Complainant attended for a hearing at the APT and was assigned to the Member. The Member commenced the hearing by asking for the Complainant to state and spell his name as she is required to do. Instead of saying his name, the Complainant spelled his first and last name. The Member could not reconcile the name stated with the written record before her, so she again asked the Complainant to say his name and he did. The Member still could not reconcile the Complainant's name with the written record before her, a requirement, so she asked the Complainant to state his name again. The Complainant asked how many times he needed to say his name. At this point, a conflict arose between the Member and the Complainant.

The Member says that the Complainant was using aggressive body language toward her. For reasons explained below, I have not investigated and make no findings about the Complainant's alleged body language.

The recording is as follows:

[Time on tape: 0.00]

Member: My name is [The Member stated her first and last name]. I'm your appeal hearing officer today. Before we start, a few things you need to know. Everything you say is being recorded... the public has a right of access.... [...]
And, lastly the decision that I make today is a final one. There's no appeal past me.

For the record then, please tell me your name and spell it.

Complainant: [The Complainant spelled his name.]

Member: And say it?

Complainant: [The Complainant said his first and last name. The Complainant's name, when stated, does not sound the same as an identically-spelled English word.]

Member: Sorry

Complainant: [The Complainant said his first and last name. The Complainant's name, when stated, does not sound the same as an identically-spelled English word.]

Member: that's your full name? Say your full name for me.

Complainant: How many times I need to repeat it. I said already twice. And I don't know, do you have some issues and why... can you hear me from here or what? Do I need to yell here my name...

Member: Sir...

Complainant: Yes.

[Time on tape: 0.47]

Member: ... you're going to talk disrespectful to me, you can go back to the waiting room. I'm not going to take disrespect like this. I'm asking you a clear question because I'm trying to figure out what your name is because I don't understand it with your accent. That is why I asked you to repeat it. Now, can you please for the record say your name?

Complainant: excuse me, before I say that, did you say that you have problems with my accent? Did you...

Member: I couldn't understand it because...

Complainant: ... did you disrespect me because of my immigration... because of my immigrant background are you saying then...

Member: Go back, go back to the room. We're done here sir.

Complainant: Why are we done here? Sorry.

Member: Because you're being ignorant to me. I won't take disrespect. I explained to you that when you said your name, I didn't understand it because

you said your name with an accent. So I had to say it again to make sure I knew what you were saying. I did not say anything that I was being disrespectful to your accent or to you. I was trying to straighten out. A lot of people who come in from another country, when they say their name, they use their home accent on it.

Complainant: yes

Member: Yes. And that's normal. When you're talking to me now, I hear very little accent. When you said your name, it was so thick, I couldn't hear your name.

I'm the hearing officer here, not you. If you don't want to answer my questions go back to the waiting room and I'll send you to someone else...

Complainant: I answered your questions ...

Member: Now are you going to be respectful or not?

Complainant: Yes, I am.

Member: Alright then be quiet.

Complainant: Yes.

[Time on Tape: 2.02]

The hearing continued and concluded. The approximate total time of the hearing was about 10 to 12 minutes. (An exact number is not available because a portion of the hearing occurred "off the record".) The balance of the hearing was tense, but the discussion focused on the Complainant's submissions and the Member's response to those, as well as an explanation about the jurisdiction and the burden of proof that the Complainant must meet.

As noted, as part of her response to this complaint the Member said that her behaviour could be explained, in part, because she had just concluded a hearing with another party who was argumentative. I reviewed the audio recording of the hearing that occurred immediately prior to the Complainant's hearing and conclude that there was no notable conflict or argument between the Member and that party. The Member says that the conflict occurred at a time when the recording device was turned off. I am

unable to make a factual finding about whether the hearing that occurred prior to the Complainant was argumentative.

Discussion

The Complainant's main allegation is that the Member acted contrary to Article XVII of the Code of Conduct because the Member discriminated against him on the basis of his ethnic origin by referring to his accent.

Article XVII states:

XVII. Discreditable Conduct

All members have a duty to treat members of the public, one another and staff appropriately and without abuse, bullying or intimidation, and to ensure that their proceedings and work environment is free from discrimination and harassment. The *Ontario Human Rights Code* applies and if applicable, the City's *Human Rights and Anti-harassment Policy*, and *Hate Activity Policy*.

Jurisdiction of the Integrity Commissioner

This is the first decision of the Integrity Commissioner regarding the application of Article XVII of the Code of Conduct to a member of one of the City's adjudicative boards. It is, therefore, necessary to describe and state the limits of the Integrity Commissioner's jurisdiction.

This is not a complaint about whether the decision rendered by the APT in the Complainant's case was correct or reasonable. The Integrity Commissioner has no jurisdiction to determine the reasonableness or correctness of a matter before one of the City's tribunals. Consistent with the procedures in some of Ontario's tribunals and the Ontario Judicial Council, if the decision was outstanding, I would have declined jurisdiction until it was concluded.

In any event, in this case, the Complainant seeks no different outcome and has accepted the penalty imposed. Therefore, this is a complaint about whether an individual member of the APT contravened Article XVII of the Code of Conduct. Article XVII contains a broad obligation to treat parties that come before the APT appropriately and without abuse, bullying or intimidation, and to ensure that their proceedings are free from discrimination and harassment. Article XVII includes reference to the *Ontario Human Rights Code* and the City's Human Rights and Anti-Harassment Policy. The

primary question in this case is whether the Member met her personal obligations set out in the Article. In making that finding, I am free to refer to the *Human Rights Code* and the City's Human Rights and Anti-Harassment Policy in interpreting and applying the Code of Conduct, but I do not have jurisdiction to make any findings about whether the APT itself contravened the *Ontario Human Rights Code* nor do I have jurisdiction to impose remedies under the *Ontario Human Rights Code*.

Why did the Member Refer to the Complainant's Accent?

Based on the complaint materials, I was concerned by the Member's reference to the Complainant's accent and her overall response to the Complainant's question about why he needed to repeat his name. When the Complainant asked why the Member was asking him to repeat his name so many times, the Member *first* accused the Complainant of being disrespectful and *then* provided an explanation that included her characterization that the Complainant had an accent.

A person's accent is a personal characteristic encompassed within either or both of two grounds protected by the *Ontario Human Rights Code*: a person's place of origin and ethnic origin. It is contrary to the *Ontario Human Rights Code* to discriminate against any person on the basis of a protected ground. There are some acts that are discriminatory on their face, such as the use of certain derogatory words (see Integrity Commissioner Report regarding then-Mayor Rob Ford, March 25, 2015).

The Member said that she genuinely could not correlate the Complainant's stated name with the record. I accept that explanation and find that it was difficult to correlate the Complainant's stated name with the written record, so her request for the Complainant to repeat his name was understandable and necessary. I also accept the Member's explanation that she referred to the Complainant's accent as a way to explain why she made the repeated requests. I have concluded that although the Member's references to the Complainant's accent were unnecessary, they were made in good faith.

I am not aware of any prior determinations by the Ontario Human Rights Tribunal or any other relevant body that deems a mere reference to a person's accent to be a discriminatory act contrary to the *Ontario Human Rights Code*. Accordingly, in the absence of any such jurisprudence and taking into account the explanation offered by the Member, it is my view that the Member did not act in a discriminatory manner within the meaning of the *Ontario Human Rights Code* when she referenced the fact that the Complainant had an accent.

Was the Member's Response to the Complainant's Question Appropriate?

This leaves the other concern about the Member's overall response to the Complainant's question about why he had to repeat his name so many times. In consideration of the words used and the Member's explanation offered in this inquiry, I find the Member's response to the Complainant's question to be defensive, argumentative and confrontational. The issue for me to decide is whether the Member's conduct – which took place over the course of a single minute – is sufficient for me to conclude that the member contravened Article XVII of the Code of Conduct. What follows is a discussion of the explanations offered by the Member.

The Member's Submissions about Volume

As a general response to this complaint, the Member submitted that the volume of her voice is misleadingly amplified on the digital recording because of the proximity of her microphone to her in the hearing kiosk. Further, the Member submitted that the tone and volume of her voice are her inherent personal attributes, that she has faced criticism in the past about her manner and that the volume and tone that she took with the Complainant are consistent with her ordinary way of being and should not be interpreted as evidence of her emotion. I accept that the volume of the Member's voice in the recording is not an accurate measure when contrasting it with the volume of the Complainant's voice. Accordingly, I have made no findings about whether the Member or the Complainant raised their voices.

The Member's Submissions about Controlling the Hearing

The Member said that as the hearing officer, it is her job to control the hearing before her, including making sure that the hearing is conducted in an orderly manner and at a volume that permits the other ongoing hearings nearby to proceed uninterrupted.

The Complainant asked why he needed to repeat his name so many times and, indeed, he challenged and criticized the Member. The Member's *immediate* response, with only 44 seconds having elapsed in the hearing, was to accuse the Complainant of being disrespectful towards her and then to lecture the Complainant about why she would not tolerate disrespect. I do not accept the Member's submission that because of her duty to control the hearing, her actions were appropriate. While I accept that it is the Member's role to control the hearing, it is my view that the actions of the Member *escalated* the conflict and disorder that occurred in the hearing.

The Member's Submissions about the Complainant's Conduct

The Member also responded to this complaint in a general way by saying that in addition to the words he said, the Complainant acted aggressively toward her through his body language. The Member said that she felt threatened, but she did not alert security to the alleged actions of the Complainant.

I have not investigated and make no findings about the Complainant's alleged demeanour. It is my view that the Complainant's demeanour is not a relevant consideration to the complaint at hand for these reasons. First, it is foreseeable that any party before the APT might be upset or emotional, and he was entitled to be treated calmly, dispassionately and respectfully. Second, the APT hearing officers are seated behind a glass barrier so there is little risk of a physical confrontation.

Third, in the conduct of hearings, members of the City's adjudicative boards are expected to adhere to the standards of conduct regardless of the behaviour of the parties that come before them. This is particularly so for the APT. In August 2018, the Chair of the APT issued a Practice Direction, titled Workplace Demeanour, which states (emphasis added):

Demeanor as To Owners:

The Tribunal's role is defined by its governing By-Law, and relevant Statutes, and, put in its most basic terms, involves the adjudication of applications for the Review of Screening Officer Decisions.

As an independent Tribunal, and as independent Hearing Officers, you have considerable latitude in the exercise of your discretion, bounded by the requirements of the laws governing our process.

That discretion does NOT extend to your demeanor in interactions with the Owners who come before us. This is a professional engagement, and you are required to approach your work at the Tribunal professionally and without rancour or sarcasm. .[sic]

A key value of the Tribunal is a firm commitment to treating the Owners who come before us with a high degree of respect and consideration.

The Tribunal has no mandate to berate, deride, criticize, hector, attack, disparage, denigrate, cast aspersions upon, lay into, trash or excoriate Owners

coming before us. This includes both the tone of and the substance of our interactions with Owners. You may find the explanations of Owners lacking credibility, and at times even fanciful. Such observations may determine the outcome of the proceeding, but they do not provide a platform for personal confrontation with the Owner, or derision. Owners have a right to leave our processes with the sense that their narrative has been heard and considered, even if they have been unsuccessful.

You are also reminded that as offences of absolute liability the concept of "guilt" has no place within our lexicon. People may have violated the Parking Regulations, but they are not "guilty" of an offence.

Maintaining a calm, dispassionate and respectful demeanor is a key component of your role as an adjudicator.

Before leaving this topic, it is important to state that there may be other cases or circumstances when the conduct of a party before a City tribunal *is* relevant to a determination under the Code of Conduct. For instance, if a member of an adjudicative board was alleged to have applied improper influence for the private benefit of a party, the actions of the party would be relevant.

The Member offered another explanation relating to the conduct of others: that the hearing that occurred just prior to the Complainant's hearing involved an "argumentative" party and that she did not have sufficient time to regroup between hearings. As described above, I have not been able to make findings about the prior hearing, but I do not need to do so to conclude this issue: in this case, the behaviour of others is not a relevant explanation for the Member's conduct toward the Complainant.

The Member's Submissions Regarding Deployment of a Police De-escalation Tactic

I had particular concern with the Member's admonition that the Complainant "be quiet." The Member explained her direction to the Complainant to "be quiet" as a deployment of a de-escalation tactic commonly used by police officers to defuse a situation. She explained that she has knowledge of police de-escalation tactics and that a sharp, terse command has the effect of defusing a situation, and she says that the Complainant's cooperation was evidence of the success of this tactic. In my view, police de-escalation tactics are an unsuitable method for dealing with conflict in a tribunal setting, and they are plainly inconsistent with the expectations set out in the above-noted Practice Direction. The Member was not carrying out duties similar in nature to police duties. As

explained in the Practice Direction, she is required to carry out her work in a dispassionate and respectful manner. I accordingly reject this explanation.

The Member's Submissions About Work Conditions at the APT

The Member said that she has felt threatened by parties in the past and that at present, she does not believe that she should tolerate such conduct and that she is skeptical of the ability of the security assigned to the APT to address such matters. The Member believes that because she is a woman, she faces a disproportionate amount of abuse from parties that come before the APT. I have given no weight to these submissions because they are not relevant to the complaint before me. The Member may well feel these things and if she does, she should raise them with the APT. These broader concerns are not the concern or responsibility of any individual person who comes before the APT. Turning to the case at hand, these submissions by the Member reveal that the Complainant improperly had to bear the brunt of the Member's perceived mistreatment by prior parties and the APT itself.

The Member's Submissions Regarding Her Role

During the course of the inquiry, the Member did not acknowledge that her behaviour played any role in the conflict that arose between her and the Complainant. However, she stated that in future, if she feels threatened, she would inform security instead of attempting to manage it herself.

After reviewing the Proposed Statement of Findings and reflecting further on the Complainant's hearing, the Member has advised me that she has become more aware of how she can work to de-escalate conflict rather than escalate it.

The Member's Response to this Complaint

The Member's response during the inquiry was confounding to me. She sought to blame the Complainant and the APT and demonstrated a lack of self-awareness about how her actions could have been interpreted. Having said that, the interaction that this complaint is about lasted about two minutes in the course of a very busy docket, and the Member is rightfully concerned about her reputation and vigorously rejected any notion that she acted in a discriminatory manner. These latter factors mitigate her confounding response to some degree. Importantly, however, with the benefit of further reflection after reviewing the Proposed Statement of Findings, the Member now views this experience as an opportunity to learn and improve, and I am hopeful that she will do so.

Conclusion

I have reached the conclusion that the Member's actions during the hearing both caused and escalated the conflict between her and the Complainant. While the Member may have felt disrespected by the Complainant, she did not need to immediately accuse him of being disrespectful and purport to order him out of the hearing room. Her actions were a passionate response that served to escalate the confrontation. By her own admission, the Member later admonished the Complainant into submission, so to speak – an act of intimidation. I have not been satisfied by the Member's explanations for her conduct.

In my view the Member's actions were inappropriate and intended to intimidate and were accordingly contrary to Article XVII of the Code of Conduct. I make this finding in particular reliance on the following evidence:

- the APT Practice Direction, Workplace Demeanour, which provides direction about members' demeanour when conducting hearings and assists with understanding how "appropriately" in Article XVII should be interpreted in the context of the APT,
- that the Member's overall response to the Complainant's question contributed to, and escalated, the conflict that arose in the hearing, and,
- that the Member's use of a police-style de-escalation tactic to admonish and intimidate the Complainant to "be quiet".

I do not make this finding lightly. I have learned through the course of this inquiry that work of the City's APT hearing officers is difficult, and I am very reluctant to second guess the choices made by an experienced hearing officer over the course of an exchange lasting a few minutes. I have also learned that the Member is a knowledgeable and dedicated member of the APT.

However, these considerations must be weighed against the reality that members appointed to the City's boards are required to meet a very high set of conduct standards – in fact the Code of Conduct requires members of the City's tribunals to meet both the letter and spirit of the Code (Preamble to the Code of Conduct). The parties that come before the APT have the very reasonable expectation that they will be treated appropriately and with respect.

The Complainant has reasonably raised such concerns through this complaint. The Complainant sought no personal remedy but to hold the Member accountable to the standards set out in the Code of Conduct, which has occurred.

Penalty or Remedial Action

Upon a finding that a member contravened the Code of Conduct, the Integrity Commissioner may recommend a penalty or other corrective action for imposition by the Tribunal or City Council (section 160(6) of the *City of Toronto Act, 2006*). In my view, the fact of a finding of contravention is sufficiently punitive in this case, and I, therefore, make no recommendation that the APT impose a further penalty.

However, a finding of contravention is an opportunity to improve future behaviour. Toward this end, I recommended that the Member meet with and provide assurance to the Chair about her future commitment to meet the obligations in the Practice Direction and the Code of Conduct. The Member has already had discussions with the Chair and indicated a willingness to engage in future discussions. I, therefore, make no recommendations for further remedial action but remain available to the Chair and the Member if I can be of any assistance or support in these discussions.

This report will be transmitted to the APT for inclusion on the agenda of its next business meeting. I recommend that the APT receive the report for information.

Valerie Jepson
Integrity Commissioner
October 21, 2019