

NOVA SCOTIA POLICE REVIEW BOARD

IN THE MATTER OF: *The Police Act, R.S.N.S. 1989, Chapter 348 and the Regulations made pursuant thereto*

- and -

IN THE MATTER OF: An appeal filed by **CONSTABLE HANFORD TIMMONS**, Member, requesting a review of a Decision made by Chief Edgar MacLeod on the 9th day of July, 1997.

BEFORE: Brian Creighton - Chair
Jean McKenna - Alternate Chair
Gordon Patterson- Member

COUNSEL: Mr. David Fisher - Solicitor on behalf of Constable Hanford Timmons
Mr. Robin Campbell and Mr. Demetri Kachafanas on behalf of C.B. Regional Municipality & Chief Edgar MacLeod

HEARING DATE: Wednesday, October 1, 1997

PLACE Cape Breton Regional Municipality Council Chambers, 320 Esplanade, Sydney.

DECISION DATE: Written Decision - April , 1998

DECISION: Appeal Granted

PART I - JURISDICTIONAL ISSUES

This matter was originated by a public complaint in Form 5 filed by Suzanne Burton on January 21, 1997, against Constable Hanford Timmons of the Cape Breton Regional Police. The matter was dealt with by the Chief of Police, and on March 20, 1997, he dismissed Constable Timmons. The officer initiated a review, and on May 16, 1997, a hearing was held, and by virtue of the decision of the Board of June 16, 1997, Constable Timmons was re-instated. The basis for the Order of the Board was that there had been no attempt at informal resolution pursuant to the Regulations made pursuant to Section 46 of the *Police Act*, R.S.N.S. 1989, c. 348.

Section 11 of the Regulations reads as follows:

- (1) The person to which a complaint is referred for investigation **shall** consider whether the complaint can be resolved informally and, with the consent of the person making the complaint and the member concerned, shall attempt to resolve the complaint;
- (2) A complaint is resolved informally where,
 - (a) a resolution of the complaint is proposed; and
 - (b) the member to whom the complaint relates and the complainant agree in writing with the proposed resolution by signing an informal resolution in Form 7 of the Schedule.

- (3) Where a complaint is resolved informally,
 - (a) the complaint shall not be proceeded with further; and
 - (b) the complaint shall not appear in the surface record of the member to whom it relates."

As is noted above, because there was no attempt at informal resolution, the steps leading to the dismissal of Constable Timmons were incomplete and the Board was of the view that it did not have jurisdiction to hear the matter.

Following the decision of the Board, informal resolution was successfully attempted. An apology was made by Constable Timmons. In addition, there was an acknowledgement of compensation for the amount of an N.S.F. cheque which had been the subject of the complaint. That resolution was signed by Sergeant John McInnis on June 4, 1997, and Constable Hanford Timmons on the same date. Suzanne Burton, the Complainant, endorsed it on June 9, 1997.

Notwithstanding the informal resolution of the matter, the Cape Breton Regional Police Service initiated an internal investigation by issuing a Form 8 on the 4th day of June, 1997. The matter proceeded pursuant to the Regulations governing internal discipline with a Notice of Allegation in Form 8 served pursuant to Regulation 20(3), and a Notice of Meeting in Form 10

pursuant to 21(8). Ultimately, the Chief Officer imposed a penalty pursuant to Regulation 21(9); he imposed the following sanctions:

1. Suspension without pay for a period of thirty (30) days;
2. Payment of a fine consisting of ten (10) days' pay;
3. A requirement to undergo counselling treatment or training for gambling addiction and to continue with the employee assistance program for a period of time to be determined by program staff in conjunction with the Chief Officer and/or delegate;
4. Twelve (12) months close supervision;
5. Reduction in rank from first class constable to third class constable.

Constable Timmons' appeal from that penalty came before the Board on October 1, 1997, by way of Agreed Statement of Facts. At the outset, Counsel for Constable Timmons submitted that there was no jurisdiction to proceed with the matter as the Cape Breton Regional Police Service lacked the authority to proceed with an internal investigation following an informal resolution. The Board decided to hear the evidence on the appeal, but reserved disposition pending submission on the jurisdictional issue from counsel for Constable Timmons, as well as Counsel for the Cape Breton Regional Police. Those submissions have now been received.

On behalf of Constable Timmons, Mr. Fisher relies on Regulation 11(3)(a) which, using mandatory language, provides that in circumstances where a complaint is resolved informally, the complaint **shall** not be proceeded with further:

- "11. (3) Where a complaint is resolved informally,
- (a) the complaint shall not be proceeded with further;"

He further relies upon Regulation 16 which provides as follows:

- “(1) A complainant may withdraw a complaint at any time by giving notice of withdrawal of complaint in Form 6 of the Schedule, to the complaints officer of the police force of which the person complained of is a member, the Board, or the Commission;
- (3) Despite Subsection (1) where the authority to whom a complaint is to be referred for consideration and investigation is of the opinion, for any good or sufficient reason, that the complainant should not have withdrawn the complaint, **the authority may**, not later than thirty (30) days after the date the complaint is withdrawn, **commence internal disciplinary proceedings against the member** by serving a Notice of Meeting in Form 10 of the Schedule upon the member.”

The reading of Regulation 11 and Regulation 16 suggests that only in the event a complaint is withdrawn may internal proceedings be commenced.

The Board has been provided with excellent briefs on the issues by Mr. Fisher for Constable Timmons, as well as Mr. Campbell on behalf of the Cape Breton Regional Police Service. However, a further examination of the Regulations provides additional authority for proceeding with an internal investigation. Regulation 27(1) provides as follows:

- “(1) **Despite any provision of these Regulations** a chief officer may suspend from duty a member of a police force who, on reasonable grounds, the chief officer believes to have committed an indictable offence, or an offence punishable on summary conviction pursuant to an act of the Province of Nova Scotia, a province or territory of Canada, or the Government of Canada, or a Regulation made thereunder, or a disciplinary default pursuant to these Regulations that in the opinion of the chief officer renders the member unfit for duty;
- (5) Where the chief or the Board determines that it is appropriate to do so, the chief officer or the Board may commence internal disciplinary proceedings against the member.”

The specific wording, "despite any provision of these Regulations", in the opinion of the Board, clearly overcomes Regulation 11(3)(a) which we would otherwise agree, would prevent any further hearing of the issue. At least where the chief orders a suspension, he or she may proceed with internal disciplinary proceedings pursuant to 27(5), notwithstanding any other provision in the Regulations.

While, as Mr. Fisher has argued, to proceed following informal resolution may have the effect of discouraging resolution, the language of Section 27 is clear. Accordingly, in this case, the Chief Officer had authority to commence internal disciplinary proceedings pursuant to 27(5). He proceeded appropriately pursuant to Regulation 19, and the appeal is therefore properly before the Board.

PART II - REVIEW OF DISCIPLINE AND PENALTY

The Board heard evidence of Suzanne Burton with respect to the incident giving rise to the public complaint. Ms. Burton testified that she was working in Needs Convenience Store in January of 1997, when Constable Timmons asked her to cash a cheque for \$100.00. She said that she knew he was a police officer and that was the reason she cashed the cheque. She said that she herself was personally responsible to her employer for any cheque that she would cash.

When the cheque was returned N.S.F., she contacted Constable Timmons and was promptly repaid. In addition, she received a written apology, although the written apology was not presented until May 5, 1997.

It seems that she had only contacted the Cape Breton Regional Police Service when she was unable to contact Constable Timmons at his personal number; she did not see her contact as constituting a complaint.

The incident was subsequently investigated by the Cape Breton Regional Police as a criminal investigation, however, ultimately it was determined that charges would not be laid pursuant to the Criminal Code.

Sergeant Myles Burke investigated the matter. His initial failure to pursue the matter by way of informal resolution was as a result of his concerns about doing so in circumstances where he was also proceeding with a criminal investigation. Sergeant Burke was aware that Constable Timmons was under certain personal and financial problems; that he was enrolled in the employee assistance program, and that he had made good the cheque. He believed that Constable Timmons had serious problems with gambling.

Staff Sergeant John McInnis also testified. He met with Ms. Burton on June 2, 1997, for the purpose of pursuing the mandatory informal resolution. He understood that she had been repaid, and also that she had received a written apology. He looked at Constable Timmons' disciplinary record for a three year period and felt that it represented a systematic and progressive

contravention of the Code of Professional Conduct. Accordingly, he recommended to the Chief the penalty that was ultimately imposed.

In cross-examination by Mr. Fisher, he confirmed that after a two year period, Constable Timmons would again be returned to first class status. Mr. Fisher also introduced through this witness Exhibit 13, which was a calculation of the cost of the penalty to Constable Timmons.

The cost as calculated on behalf of Constable Timmons is as follows:

a)	reduction in rank/first year:	\$ 7,652.33
b)	reduction in rank/second year:	\$ 2,281.44
c)	30 suspension without pay:	\$ 3,230.50
d)	fine:	<u>\$ 1,615.25</u>
	TOTAL:	<u>\$4,779.52</u>

Mr. Fisher also argued that there was further potential impact of any wage increases during that two year period, as well as any changes to the constable structure.

Chief Edgar MacLeod of the Cape Breton Regional Police Service also testified. He outlined Constable Timmons' disciplinary record as he understood it as follows:

1. August 1, 1995 - On that occasion, Constable Timmons was charged with insubordination and neglect of duty arising out of a single incident whereby he disobeyed the orders of Sergeant O'Rourke in that he,
 - a) refused to patrol a particular area as directed;
 - b) he left the area of duty without permission; and
 - c) neglected to work in Louisbourg after having been so assigned.

According to Chief MacLeod, Constable Timmons was detailed to patrol the Louisbourg area; he made it clear that he was not going to do so. He left the Police Department, he returned and he "booked off sick". For that offence, he was subjected to a 30 day suspension and close supervision for a twelve month period;

2. His next default was on June 21, 1996. This offence involved a disorderly conduct, particularly swearing and cursing while in conversation with a payroll employee, and he was given a verbal reprimand;
3. In 1993, Constable Timmons was also disciplined. He was involved in a car/pedestrian accident on May 31, 1993. At that time, he was charged with impaired driving and failing the breathalyser. He was convicted. He appealed the conviction and it was upheld. For this offence, he was suspended for 30 days without pay.

With respect to the matter before the Police Review Board, Chief MacLeod was of the view that the issue of the N.S.F. cheque was a breach of public trust, and the fact that Constable Timmons was a police officer had been the principal factor in Ms. Burton cashing the cheque in the first place, (although it appears that there was no evidence that Constable Timmons understood that

he was getting special treatment because he was a police officer). Chief MacLeod agreed that he understood that it was the type of mistake that was easily made. Chief MacLeod testified that he did consider this a severe penalty, but he pointed out that only a year previously, he was very concerned with the insubordination and the motor vehicle situation, and that he was providing Constable Timmons with an opportunity to regain his confidence and become a productive police officer. The latest incident led him to severely question the trustworthiness of Constable Timmons.

Counsel for Constable Timmons cross-examined him with respect to the insubordination issue. It appears that it occurred on the first day of the re-organization and creation of the Cape Breton Regional Police Department, and that there was an active labour relations issue on-going with respect to assignment to particular areas.

Chief MacLeod also agreed in cross-examination that although Constable Timmons was convicted of impaired driving, he was not found to be at fault in the motor vehicle accident.

In re-direct examination, Chief MacLeod pointed out that no one else had refused work assignments.

When the issue of the bounced cheque is referred to in isolation, it is not a serious matter. Indeed, the Board would not see it as seriously as Chief MacLeod, who seemed to be of the

view that even carelessness or ignorance of one's account balance could constitute a disciplinary default, because of the importance of the public image of a police officer. Mr. Campbell, on behalf of the Cape Breton Regional Police Service argued that while there may be sympathy for the financial impact on Constable Timmons' family, Constable Timmons was a negative role model, and that in the circumstances, considering the impression left with the general public and within the Police Department, it was necessary to, at this point, impose a severe penalty.

On behalf of Constable Timmons, Mr. Fisher argued that with respect to the cheque, there should be some element of intent before there could be a disciplinary default at all. He argued that the previous offences do not make Constable Timmons guilty of a disciplinary fault in this case. He points out that there is no disciplinary record of bounced cheques. He argued that the N.S.F. cheque was simply an honest mistake.

Mr. Fisher also argued that there were three charges against Constable Timmons, and he could not be held accountable for three defaults based on a single act. He maintained that only the first allegation would be appropriate, and he acknowledged that the conduct could constitute a violation of Section 5(1)(a)(i) of the *Police Act* and Regulations, in that it could constitute discreditable conduct reasonably likely to bring discredit on the reputation of the police force.

Mr. Fisher has also raised the jurisdiction of the Cape Breton Regional Police Service to oppose a penalty of reduction in rank.

The Board is of the view that in considering whether or not there has been disciplinary default, the particular act must be considered in isolation, unless there is any evidence that could be construed as similar fact evidence which would go to the question of intent. In this case, while we have evidence of other infractions by Constable Timmons, none of these previous defaults have any relevance to this case before the Board. They would only become relevant at the penalty stage.

When the incident is dealt with in isolation, the Board notes, first of all, that the cheque was for a relatively small sum. In addition, there is no evidence before the Board as to the state of Constable Timmons' bank account at the time the cheque was drawn, and it appears that it was very possible that Constable Timmons was unaware that the cheque would not clear. In the view of the Board, a misunderstanding as to one's account balance, particularly concerning such a small sum, can not of itself constitute a disciplinary default.

There is also no evidence that Ms. Burton thought any the less of Constable Timmons or the Police Department as a result of the failure of this cheque to clear the bank. She did testify that she accepted the cheque because of his position as a police officer, but that of course would

suggest to her that he would have a regular and reasonable income. Ms. Burton also did not contact the Police Department with a view to complain, but rather simply to locate Constable Timmons. Also, at the hearing Ms. Burton left the Board with the impression that she really had no understanding as to why she was testifying in a disciplinary Hearing.

The Board fully understands the concerns of Chief MacLeod with respect to the record of Constable Timmons, however, these concerns have no place in determining whether a disciplinary default has occurred. The Board, in reviewing the matter, determines that the conduct of Constable Timmons in this case does not constitute a disciplinary default. The appeal is therefore allowed.

There will be no costs awarded to either party.

DATED at Halifax, Nova Scotia this day of April, 1998.

Jean McKenna
Alternate Chair

Gordon Patterson
Member

Brian Creighton
Chair

Distribution:

Constable Hanford Timmons - CBRPS

Chief of Police Edgar MacLeod - CBRPS

Mr. David Fisher, Solicitor on behalf of named officer

Mr. Robin Campbell - Solicitor on the behalf of the C.B. Regional Municipality

Mr. Brian Creighton - Chairman - Police Review Board

Mrs. Jean McKenna - Member - Police Review Board

Mr. Gordon Patterson - Member - Police Review Board

FYI - Secretary, Local Board of Police Commissioners

Mr. Bob Barrs - Executive Director, Policing Services

NSPRB-97-0069

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D E C I S I O N

Before:

Brian Creighton - Chair
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Gordon Patterson - Member