

DECISION

File No.: 00-0043 and 00-0044

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:

A Notice of Review, in Form 13, filed by **CONSTABLE HUGH MACLEAN**, Member, requesting a review of Decisions made by Deputy Chief Robert Barsz on the 7th day of July, 2000 before the Nova Scotia Police Review Board.

BEFORE:

Mr. Brian Creighton
Mr. Brian McIntosh
Mr. Orville Symonds

COUNSEL:

Mr. David Bright - on behalf of Hugh MacLean
Ms. Sandra Arab - on behalf of Halifax Regional Police

HEARING DATE:

March 27 & 28, 2002

PLACE

Hearing Room of the Utility & Review Board, 1601 Lower Water Street, Suite 300, Halifax, Nova Scotia

DECISION DATE:

May 29, 2002

DECISION:

Dismissal Overturned - 5 days pay

This decision is further to an appeal filed by Constable Hugh MacLean in relation to a decision made by Deputy Chief Robert Barss on July 7, 2000. Mr. David Bright, counsel on behalf of Constable MacLean, and Ms. Sandra Arab Clarke, counsel on behalf of the Halifax Regional Police, both agreed the hearing into this matter would be divided into two separate hearings before the Board. The first session dealt with the merits of the defaults as alleged by the department against Constable MacLean, and by a decision dated the 19th day of February, 2002, this Board found that Constable Hugh MacLean of the Halifax Regional Police had neglected his duty as defined under Regulation 5(1)(c)(i) of the *Police Act* Regulations.

5 (l) A member of a police force commits a disciplinary default where the member

(c) neglects duty by

(i) neglecting to or, without adequate reason, failing to promptly, properly or diligently perform a duty as a member of a police force,

This decision determines the penalty to be assessed against Constable MacLean, and, as agreed to by the parties, the Board proceeded to this portion of Constable MacLean's appeal in the following manner. Evidence already before the Board on the issue of an appropriate penalty would be considered at a further hearing. This hearing occurred on March 27 and 28, 2002. Prior to that hearing Mr. Bright and Ms. Arab Clarke were directed to provide written briefs to the Board on the law in relation to the evidence the Board should consider. These briefs were provided as directed,

and on March 22, 2002 a written decision was rendered guiding the parties on the evidence the Board would consider during the additional hearings days to render its decision on the appropriate penalty against Constable MacLean.

The Board indicated in its February 19, 2002 decision that, "... Constable MacLean simply forgot to deliver some files to the Sergeant and in that respect was neglectful." The Board also indicated that although an individual act of forgetfulness is not in itself serious, a pattern of forgetfulness is more serious.

There are two fundamental issues that the Board considered in relation to the case files that are the subject matter of Constable MacLean's neglect of duty.

First, the Board finds that the majority of the case files that were the subject matter of the defaults were straightforward. Constable MacLean should have completed them before the end of his shift, or certainly within a day or so afterwards. The remainder of the files required some further followup, but were well within Constable MacLean's abilities and experience to accomplish.

The Board recognizes the failure to process these files could have had significant repercussions in the administration of justice. In one case there was an alleged domestic assault. The Justice Department's policy in regards to family violence is well known to all peace officers in the

province. The failure of Constable MacLean to properly complete his investigations had potentially very serious ramifications.

Secondly, the Halifax Regional Police has a Case Management Policy. Under this policy, it is the responsibility of the Shift Sergeants to ensure that all officers' case files are completed before being forwarded to the courts or closed. At the time of these incidents, Sergeant Wayne Wooden was responsible for ensuring Constable MacLean's case files were properly completed. As was indicated in the Board's February 19th decision, "If an officer is inattentive or preoccupied and forgets to physically deliver a file to the patrol sergeant, there is no mechanism to remind him to do so unless the squad sergeant does it". Therefore, the Board finds that if Sergeant Wooden had not neglected his case management duties, Constable MacLean's neglect or forgetfulness would have been corrected immediately. There would have been no possibility of this type of neglect to have occurred without adequate warnings of neglect and progressive discipline.

The Board emphasizes that each default of Constable MacLean on a stand-alone basis would not have resulted in more than minor reprimands. The Case Management system should have alerted senior management of any deficiencies on the part of individual officers. The Department and the public should have been protected against habits of forgetfulness and neglects of duty. The failure of Sergeant Wooden compounded the situation dramatically and led to Constable MacLean's dismissal.

Regardless of the foregoing, there was an established pattern of forgetfulness in completing files by Constable MacLean. The Board must consider this neglect in assessing an appropriate penalty. The Board has not made a finding that Constable MacLean had a reckless disregard for his duties. He simply did not know about his neglect of duty until all of his files were reviewed when S/Sergeant Fox audited his files. If one disciplinary default had led to a reprimand, followed by a second disciplinary default leading to further penalty, and so on, the Board could have considered this to be an accumulation of disciplinary defaults and might have been inclined to believe Constable MacLean was reckless in neglecting his duty.

Service Record

In considering an appropriate penalty, the Board is required to, and has considered the service record of Constable MacLean. Police Act Regulations Section 26(1) and (2) states as follows:

- 26 (1)** Where there has been no further entry of a disciplinary default upon the service record of a member since the date a penalty has been imposed, the disciplinary default is and is deemed to be expunged from the member's record if
- (a)** three years have expired since the date of reduction in rank where the penalty was a reduction in rank;
 - (b)** two years have expired from the date a fine was paid or a period of suspension completed where the penalty was a fine or a period of suspension;
 - (c)** two years have expired since the completion of a period of close supervision where the penalty imposed was a period of close supervision;
 - (d)** one year has expired from the completion of counselling, treatment or

training where the penalty was an order to undergo counselling, treatment or training;

(e) one year has expired since the date of reprimand where the penalty was a reprimand;

(f) one year has expired from the date the order was made, fulfilled or completed where the authority has made any other order the authority deems fit pursuant to clause 5(3)(i) or clause 5(4)(f).

Clause 26(1)(f) added: O.I.C. 96-27, N.S. Reg. 8/96.

(2) When a combination of penalties is ordered pursuant to clause 5(3)(i) or 5(4)(f), the time periods set out in clauses 26(1)(a) to (e) run and are deemed to run concurrently. **Section 26 replaced: O.I.C. 94-646, N.S. Reg. 135/94.**

If Constable MacLean had committed disciplinary defaults and reprimands or other penalties had been meted in the manner directed by the Regulations they could have been considered by this Board. The Board was advised by the Department and Constable MacLean that there were no disciplinary defaults on Constable MacLean's service record except to the extent that the seven matters which form the subject matter of these proceedings are part of his service record. These defaults were all dealt with in a single meeting with Constable MacLean by Deputy Chief Barss.

Performance Evaluations

Mr. Bright introduced performance evaluation forms completed by the former Dartmouth Police Department. These evaluation forms begin with Constable MacLean's appointment as a Dartmouth Police Officer on October 31, 1985 and continued through to April 25, 1995. The

Dartmouth Police Department's performance evaluation system ranked performance of officers from below standard to outstanding. Constable MacLean never fell below the category "Meets Standard" in any category during the ten years covered by these performance evaluation forms. In some categories he exceeded standard, and in the latest performance evaluation (1995) recorded by the Dartmouth Police Department, he greatly exceeded the standard in a number of categories.

There is no evidence during the time that Constable MacLean was with the Dartmouth Police Department that he was not meeting reasonable performance standards. The evidence also supports that Constable MacLean was not an exceptional officer, although he did exceed the standard in some cases and more recently, he greatly exceeded the standards in some categories. Constable MacLean completed required training courses and some optional training courses. There were some commendations and requests for commendations.

Sergeant Wooden's evidence was that he considered Constable MacLean a very competent street officer, both in his dealings with the public and his ability to respond to difficult and dangerous situations.

The Dartmouth Police Department was amalgamated into the Halifax Regional Police Service on April 1, 1995. On and from the date of amalgamation, there was no performance review process or performance evaluation completed by any of Constable MacLean's supervisors until the

14th day of April 2000, evaluated by Sergeant Wayne Wooden. The Board found that this performance evaluation was confusing and the rankings contained therein not consistent with a disciplined consideration of Constable MacLean's performance.

At the time this performance competency review was completed, Sergeant Wooden was subject to disciplinary complaint for his neglect of not reviewing Constable MacLean's case files. These are the same case files that form the subject matter of these proceedings. Although the Board has difficulty giving much weight to the performance review completed by Sergeant Wooden, the Board notes that Sergeant Wooden did not use the review to blame Constable MacLean entirely for the failure to complete investigative files. Sergeant Wooden acknowledged he also bears a part of the responsibility in relation to Constable MacLean's disciplinary default. There are a couple of comments in the performance competency review by Sergeant Wooden that the Board did find helpful. Under the heading Personal Effectiveness, Sergeant Wooden makes the following comment in relation to Constable MacLean, "He does have a problem with the ability to learn from his mistakes, as in diary dates with follow up. He does complete the same after the writer makes an issue of the due dates." Under the heading Organization/Planning, Sergeant Wooden comments as follows: "It appears he recognizes he has shortcomings in his personal management of investigations. This has been addressed with him on a number of occasions with his assurance that the problem would improve. To some degree it has, but still further improvement is needed."

The Board does accept that from a performance point of view as distinguished from a misconduct perspective, there was evidence available to the management of the Halifax Regional Police that Constable MacLean was having some performance problems. The forgetfulness in relation to the investigative files which are the subject matter of these proceedings is evidence of this and management of the Halifax Regional Police, by way of its supervisors, who did not address these concerns. It is the obligation of supervisors to review the performance of officers under their command. Regular, objective performance evaluations help to identify problems and help officers address those problems.

At the time of Constable MacLean's dismissal, no action had been taken by either Sergeant Wooden or any other senior manager in the Halifax Regional Police to address the issue as to whether or not Constable MacLean had any performance shortcomings. Because Management had not addressed whether there were any shortcomings, management evidently did not put a plan into place to overcome the shortcomings.

In assessing a penalty against Constable MacLean, the Board considered the issues as identified in recent jurisprudence. The Board canvassed the issues as outline by Paul Ceyssans' *Legal Aspects of Policing*, C. 5, p. 101. The Board points out that these same issues were canvassed in the Wooden decision.

Public Interest

It is, of course, in the public interest to ensure that all case files are processed to completion or closure. If Sergeant Wooden had completed his supervisory and case management responsibilities in accordance with department policy, Constable MacLean's missing and neglected files would have been discovered and completed as required. The Halifax Regional Police have a quality Case Management program. However, Sergeant Wooden neglected his duty by not reviewing Constable MacLean's files. It was Sergeant Wooden who failed to protect the public interest.

Seriousness of Misconduct

The Board cannot consider Constable MacLean's conduct in these matters to be cumulative. It is the Board's position that on an individual basis, none of these matters would have constituted dismissal but a much lesser penalty.

Recognition of Seriousness of Misconduct

The Board has no difficulty in stating that Constable MacLean knows, and did know before these proceedings, of the obligation to complete his case files.

Employment History

Constable MacLean's employment history is consistently average and, as noted before, on occasion, above average. There is no indication from Constable MacLean's employment history to believe that he will not continue to be a police officer of average competency.

Need for Deterrence

The Board is satisfied that the deterrence is essentially irrelevant as regards Constable MacLean. Forgetfulness/minor negligence is not an act of commission but one of omission. The dislocation and stress that this entire process has brought upon Constable MacLean is in itself more than enough to deter him to the extent that a disciplinary proceeding will deter forgetfulness. By far the best deterrent is for Constable MacLean to be subject to future thorough performance evaluations and reviews.

Ability to Reform or Rehabilitate the Police Officer

There is no evidence before this Board that would indicate that Constable MacLean does not have the ability to be a competent police officer. There is an issue of potential abuse of alcohol which the Board will address at the end of the decision and must be handled as a separate issue.

Handicap or Relevant Personal Circumstance

Alcohol abuse is a relevant personal circumstance. The issue of alcohol abuse and Constable MacLean's personal circumstance will be addressed at the end of this decision.

Effect on Police Officer and Police Officer's Family

Constable MacLean was charged by the Department and found to have committed the default of being deceitful as well as neglect of duty. This Board did not find Constable MacLean guilty of deceit. It must have been difficult for Constable MacLean to explain his dismissal to his family in light of his beliefs that he had never been deceitful and his many years of satisfactory performance reviews. The stress too for his wife and children would understandably be very significant.

Management Approach to Misconduct in Question

If the Board had sustained Chief Barss' decision that Constable MacLean was deceitful, then there could have been grounds for dismissal. In the absence of findings of deceit, there was no basis for dismissal. The Department neglected to allow Constable MacLean an opportunity to improve his performance.

Consistency of Disposition

It is unusual for seven minor disciplinary defaults to come before this Board as one case. It is therefore difficult for this Board to state that its decision herein will be consistent with other Board decisions.

Financial Results of Unpaid Administrative Suspension

The suspension of pay of Constable MacLean until the disposition of these Board proceedings evidently had a serious impact on his life and the welfare of his family.

Effect of Publicity

This matter is an internal disciplinary procedure and therefore these proceedings are not open to the public. The Board is not aware of any press coverage on this matter.

Effect of Alcohol

There was some evidence brought before these proceedings by Constable MacLean that he has an alcohol problem. He filed a letter dated June 2, 2000 with Deputy Chief Barss that was tendered to the Board in which he explains his life stresses, the alcohol problems he had gone through and the treatment he had voluntarily taken for his professed alcohol dependency. Both Mr. Bright and Ms. Arab Clark took the position throughout these proceedings that alcohol was not an issue in these defaults.

Mr. Bright advanced the position that Constable MacLean did not want to make excuses for

having his performance fall below standard in processing investigative files because of alcohol. The Department took the view that Constable MacLean should not be allowed to use his alcohol problem as a crutch, and indeed appeared to challenge the seriousness of the alcohol issue.

Notwithstanding the foregoing, Ms. Arab Clark argued that in lieu of the Board making a decision in favour of dismissal, that a series of relatively punitive measures be imposed to ensure that the Department and the public are protected from Constable MacLean's stated alcohol problem. With all due respect, the position advanced by the Department is contradictory.

The Board's assessment is that over a period of years, because of various personal stresses, Constable MacLean may have come to develop an alcohol dependency. There was no evidence by the department to suggest that this dependency affected his job performance. The Board can speculate (and it is only speculation) that Constable MacLean's forgetfulness in regards to his files could relate to pressures outside work and alcohol abuse. However, as stated, this is only speculation. The Board therefore cannot order a series of punitive measures in regards to Constable MacLean for unproven suggestions that alcohol abuse may be involved.

The Board's perspective is that it will make an order which it expects Deputy Chief Barss would have or should have ordered if he had characterized the disciplinary defaults herein as forgetfulness/neglect of duty in the first instance. Deputy Chief Barss should have ordered that

Constable MacLean be subject to an assessment by competent professionals assigned by the Halifax Regional Police Occupational Health & Safety Department. Those professionals will recommend what treatment, if any, Constable MacLean should undergo to ensure that his possible alcohol addiction is treated.

The Board states that if at any time in the future the professionals who complete the assessment determine there is evidence that alcohol may be affecting Constable MacLean's job performance, senior management has the right and duty to ensure that Constable MacLean is assessed and treated, both for his own benefit and for the protection of the public and proper operation of the Halifax Regional Police. However, there was no evidence before the Board that past alcohol abuse will presently affect his fitness to return to duty.

Conclusion

The Board suspends Constable MacLean without pay for a period of five days, otherwise Constable MacLean's pay during the period of his termination will be reinstated.

DATED at Halifax, Nova Scotia this day of May, 2002

BRIAN CREIGHTON

Chair

BRIAN MCINTOSH

Member

ORVILLE SYMONDS

Member

Distribution:

Constable Hugh MacLean - Member - Halifax Regional Police

Mr. David Bright - Solicitor for the named officer

D/Chief Robert Barss - Halifax Regional Police Service

Chief David P. McKinnon - Halifax Regional Police Service

Ms. Sandra Arab Clarke - Solicitor on behalf of the D/Chief Barss & the Halifax Regional Police

Mr. Brian Creighton - Chair NS Police Review Board

Mr. Orville Symonds - Member, NS Police Review Board

Mr. Brian McIntosh - Member, NS Police Review Board

File No.: 00-0043 and 00-0044

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:

A Notice of Review, in Form 13, filed
by **CONSTABLE HUGH
MACLEAN**, Member, requesting a
review of Decisions made by Deputy
Chief Robert Barss on the 7th day of
July, 2000 before the Nova Scotia
Police Review Board.

D E C I S I O N

Before:

Mr. Brian Creighton
Mr. Brian McIntosh
Mr. Orville Symonds