

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 Form 13 Notice of Review filed by **CONSTABLE KEVIN JOHNSON**, requesting a review by the Nova Scotia Police Review Board, of a Decision made by **ACTING DEPUTY CHIEF FRANCIS BURBRIDGE** on the 3rd day of December, 2002

BEFORE: Ms. Marion Ferguson, Chair
Mr. Brian McIntosh, Member
Mr. Peter James, Member

COUNSEL: Mr. Joel Pink, Q.C., on behalf of Constable Kevin Johnson
Ms. Karen Fitzner, on behalf of the Halifax Regional Police, and Acting Deputy Chief Burbridge

HEARING DATE: March 3, 4 and 5, 2003

PLACE: The Acadian Salon, Raddison Suites Hotel, 1649 Hollis Street, Halifax, Nova Scotia

DECISION DATE: Decision - April 29, 2003

Disposition Penalty Decision - August 28, 2003

DECISION: Penalty Varied in Part

On April 29, 2003, the Review Board found Constable Kevin Johnson of the Halifax Regional Police (HRP) guilty of the disciplinary defaults defined as deceit and corrupt practice in *sections 5 (1) (d) (i) and 5 (1) (f) (i) of the Police Act Regulations*.

Counsel for HRP and Constable Johnson agreed that the disposition stage of the hearing would proceed by way of written submissions. These representations of the parties have been carefully reviewed and considered by the Review Board.

Disciplinary Default of Deceit

Section 5(1)(d)(i) of the Police Act Regulations states:

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

(d) engages in deceit by

(i) wilfully or negligently making or signing a false, misleading or inaccurate written statement or entry in an official document or record,

Submission of the Halifax Regional Police

In her submission to the Review Board, HRP counsel Ms. Karen Fitzner referred to the text *Legal Aspects of Policing* in which the author, Paul Ceysens sets out the following list of factors to be considered in the disposition process:

1. Public interest

2. Seriousness of the misconduct
3. Recognition of the seriousness of the misconduct
4. Employment history
5. Need for deterrence
6. Ability to reform or rehabilitate the officer
7. Damage to the reputation of the police force
8. Handicap and other relevant personal circumstances
9. Effect on police officer and police officer's family
10. Management approach to misconduct in question
11. Consistency of disposition
12. Financial loss resulting from unpaid interim administration suspension
13. Effect of publicity

The Review Board has found this list of factors helpful in assessing the appropriate penalty in this case.

1. Public Interest

Clearly the public interest has a dominant and overriding concern that police officers carry out their duties honestly and with integrity. Police effectiveness depends not only on the individual officer's or the force's ability to respond to law enforcement events competently and efficiently but on sustaining public confidence in the legitimacy of police authority. The community has an interest in ensuring that the police force exercises policing responsibilities mindful of, and in accordance with, both the realities and perceptions of the exercise of that power.

In this case, the Review Board found that Constable Johnson effectively attempted to prevent his superiors at HRP, from learning about his having received a World War 11 Luger pistol, in the course of his policing duties. The Review Board reached this conclusion by finding that this offence occurred, in part, because of the officer's personal interest in the artifact.

However, the Review Board also noted that the events giving rise to this conduct occurred in unusual circumstances.

Firstly, there was unequivocal evidence that a gift had, in fact, been made voluntarily to Constable Johnson by the Kents; secondly, that the idea of the gift had arisen when there had been every expectation that the cherished family heirloom would be destroyed; thirdly, that the Constable's dealings with the Kent family originated not solely out of his admitted personal interest in the weapon, but, in the main, from a desire to help the family with what was a very difficult decision for them; namely, the desire to be rid of the souvenir, balanced by the equal hope that it would be preserved.

Ms Fitzner submits that the deceit of Constable Johnson resulted in a "costly and time consuming process which caused members of the public, mainly Mr. and Mrs. Kent, to endure a great deal of anxiety and stress over the weeks they sought to ensure the gun had been removed from Mr. Kent's name."

It is true that the Kents, through no fault of their own, found themselves caught up in an investigative and hearing process which caused them significant worry and inconvenience.

However, it is important to remember that the issue of whether or not Constable Johnson actually possessed a firearms acquisition certificate (FAC) founded the disciplinary default of discreditable conduct as set out in *section 5(1)(a)(i)* of the *Regulations*. In its April 29, 2003 decision, the Review Board held that the contention that the officer had consciously misrepresented his certification to receive and have custody of firearms to the Kents was not established by the evidence.

As well, by appealing the findings of the internal HRP review, Constable Johnson was exercising his statutory right of appeal under the *Police Act*. The fact that he chose to pursue this right cannot be held against him.

2. Seriousness of Misconduct

The Review Board finding that the unit history entries written by Constable Johnson were false and made in an effort to avoid notice of the event coming to the attention of HRP is serious. The administration of justice requires the truthful and accurate reporting in official police documents. These documents are relied upon by fellow officers, by senior levels of the

force in the overseeing and direction of the particular authority and by other public agencies, in discharging police and public security functions.

From Constable Johnson's choice of wording in the unit history ("comp does not wish weapon destroyed due to historic piece. comp (sic) will be looking at other options for weapon disposition"), to identifying the call as "NFA" ("no further action") and "NBK" ("notebook ..meaning no follow up"), a pattern of vague, misleading and false information was established. Placing the Luger in the exhibit locker without the usual companion paper work, thereby alerting others at HRP to its presence, not advising anyone of the Luger's existence, and retaining the key himself instead of placing it in the drop box, continued this pattern.

3. Recognition of the Seriousness of the Misconduct

Ms. Fitzner submits that Constable Johnson has never recognized the seriousness of his misconduct, as was evidenced by his maintaining throughout his evidence that his entry in the unit history was "truthful" and that he had done nothing wrong in recording the information as he had.

It is true that, in the view of the majority of the Review Board, Constable Johnson's evidence at times, did appear more like a rationalization than unvarnished representation of fact

and as the Review Board has already found, such evidence is rejected. This is a matter of gravity and the Review Board is in no way, dismissive of its significance.

With deference however, the Review Board does not entirely accept the conclusiveness with which counsel for HRP presents this argument.

The Review Board has accepted that, from the beginning of his contact with the Kents, Constable Johnson was acting in the course of a set of events commenced by a routine request for policing assistance to a family. That police response then shifted to the acceptance of a gift; a circumstance which only later gave rise to the events amounting to the facts of this complaint. There is no basis for any suggestion that the officer's contact with the Kents or his acceptance of the gift of the firearm originated out of a purpose, that was either planned or deliberate.

The Review Board also notes the complete absence of any submission that the gift might have been accompanied by the expectation of influencing Constable Johnson in the discharge of his subsequent policing responsibilities to or for the Kents.

Moreover, there was some evidence that, albeit late, Constable Johnson did attempt to contact the Kent family to discuss the matter and, it is assumed, to make amends.

Finally, the Review Board notes the practice of HRP with respect to the documentation of shift events and calls attended to by the service may have been going under some revision at the time.

Inspector Murphy, one of the witnesses for the HRP, told the Review Board that at the time of the incident, all calls regardless of how minor in nature, were to be given an incident number, therefore recorded and capable of review by a supervisor.

However, there was also some evidence, largely unchallenged, to the effect that the “NBK” (notebook) notation used by Constable Johnson (which avoids the recording of the events in the force’s departmental information system) had been used by officers, and was continuing at the time giving rise to the complaint, to cover off and avoid detailed reporting of a variety of very minor incidents.

4. Employment History

Constable Johnson is thirty-two years old having joined the HRP in 1998 and so by the July 8, 2002 incident date, had been a police officer for four years.

In its earlier decision on the merits, the Review Board noted the testimony of the Constable’s fellow police officers who found him to be “up front and beyond reproach” and

“very truthful and forthright”. The Review Board was impressed with this evidence, founded as it was on the experience of fellow officers with this officer, reached over some length of time and through a shared working relationship.

Additional evidence with respect to his work ethic and dedication to the HRP was submitted by his counsel, Mr. Joel Pink Q.C. and attested to by fellow members of the force. As well, Constable Johnson testified with respect to his extra-curricular activities aimed at improving the public profile of HRP.

5. Need for Deterrence

The Review Board is satisfied that the finding of the two disciplinary defaults of deceit and corrupt practice will provide the necessary deterrence.

6. Ability to Reform or Rehabilitate the Police Officer

Counsel for HRP argues that while Constable Johnson’s pre-July 8, 2002 employment record suggested that he had “the ability to develop into a fine member of the Police Force”, the fact that he did not admit his wrong doing during the March 2003 hearing, accept his “reasonable punishment” and “move on with his career,” indicated an inability to learn from his previous mistake. By extension it is submitted that “his ability to reform and rehabilitate” is unclear.

With respect, the Review Board does not accept this argument.

Again as noted in its decision on the merits, the two founded disciplinary defaults of deceit and corrupt practice, while based on individual factual circumstances, still arose out of a singular event on July 8, 2002 and do not show a pattern of disreputable or deceitful behaviour on the Constable's part. Clearly, he is entitled, as a relatively new officer, to show that he has learned from this experience and will go on to make positive contributions to the HRP.

7. Damage to the Reputation of the Police Force

Ms. Fitzner has submitted that while this was an internal disciplinary matter, the participation by Mr. and Mrs. Kent meant that the public became more aware of this misconduct than would normally be the case.

There is no doubt that there will be cases where the conduct found to have been committed will attract public attention and will at the same time warrant the forceful application of the principle of general deterrence in the discipline process. However, respectfully, the Review Board does not accept that what ultimately amounts to the simple vicissitudes of public

notice, or in this case, the relative lack of it, of the Review Board decisions or the police complaint process itself, form a reasonable basis for the application of this consideration.

In a more particular sense, HRP counsel also submitted that the stress caused to “innocent members of the public” in the present case was unacceptable, would negatively affect HRP’s reputation and thereby support a stiffer application of discipline in this case.

The Review Board has previously acknowledged and is also grateful for the participation of the Kents in these disciplinary proceedings. Through absolutely no fault or desire on their part, they have been injected into a process that was obviously foreign and difficult for them; the strain on both Mr. and Mrs. Kent throughout their testimony was evident to the Review Board and the parties.

However, again, the Kents’ evidence was directed primarily towards the discreditable conduct charge under *section 5(1)(a)(i) of the Police Act Regulations*, which the Review Board held could not be sustained on the evidence. The Review Board is constrained to point out that this complaint as established, relates to matter independent of and subsequent to contact between the officer and the Kents. The remaining charges focus on the officer’s conduct in respect of reporting to HRP and the Nova Scotia Department of Justice.

That being said, the Review Board accepts that prosecution of internal matters can rarely be expected to enhance the profile of the police service involved and that it is a logical consequence of any such events that the matter may become a topic of public discussion; people talk.

Equally, the swift, effective application of the police disciplinary authority demonstrated in this case, is in every way in the Review Board's opinion, an effective response and source for public confidence in the direction of the force.

8. Handicap and Other Relevant Characteristics

This is not relevant to the present case.

9. Effect on the Police Officer and the Police Officer's Family

Counsel for HRP submits that this is not a mitigating fact to be considered in this case because Constable Johnson is single and no evidence was introduced to suggest that his being disciplined had resulted in any particular hardship on his family.

Surely, the notion of the impact of discipline on “family” is only one aspect of the more general consideration of the effect of a negative finding on those persons close to the member as mirrored back to him and as experienced by him in the imposition of discipline.

The Review Board accepts that the fact and the duration of this process has been an unpleasant experience for the officer, as it would be for anyone.

10. Management Approach to Misconduct in Question

While the matter is heard by the Review Board by way of *de novo*, there was no evidence led to suggest that disposition of this matter by the HRP was unfair to Constable Johnson and the Review Board finds that the HRP disposition of the deceit charge was within the realm of reasonable penalty for such disciplinary default.

11. Consistency of Penalty

Ms Fitzner forwarded a number of cases for the Review Board’s consideration, where deceit had been found.

In most of these cases, there was either the fact of or the prospect of financial gain of consequence to the the officer. The instant case is far from what might be considered a typical or usual case.

The officer was not responding to a corrupt or self- serving motive on the part of another person - there was no real or expected *quid pro quo* which the Constable created or held out in exchange for the conduct of the Kents; there could not have been. Constable Johnson did not motivate or influence or seek to motivate or influence the Kents at all in their decision to part with the handgun. The crux of the offence was not that.

As stated in the Review Board's earlier decision in the matter, there were good intentions behind his offer to take the Luger, thereby allowing the grandfather's legacy to continue. He placed no direct pressure on the Kents to give him this family heirloom and the transfer took place with true relief and gratitude on the part of Mr. Kent. There was no direct financial gain of consequence to Constable Johnson and on that basis alone, this case can be distinguished from the "more typical" deceit and corrupt practices cases.

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12. Financial Loss Resulting From Unpaid Interim Administration

This is not relevant in the present case.

13. Effect of Publicity

As this was an internal matter this is not a relevant consideration in the present case.

Submission by Counsel for Constable Johnson

It was the submission of Mr. Joel Pink Q.C. that this was Constable Johnson's first incident for discipline, that the offences were at the low range of the scale and further that this hearing dealt with important issues not previously decided by the Review Board.

Counsel also directed the Review Board to the Supreme Court of Canada decision in *Kienapple v. R 1975 1 S.C.R. 729* which states that a person should not be convicted of more than one offence arising out of the same matter, with counsel endorsing its applicability to disciplinary proceedings.

The Review Board respectfully rejects the applicability of this significant criminal case to the matter at hand.

This is not a situation where as the courts have determined, the necessary "legal nexus" is present for the rule against multiple findings of guilt where "the same or substantially the same elements" make up the offence. While the two disciplinary defaults of deceit and corrupt practice

arose out of the call to the Kent home on July 8, 2002, the matters for which Constable Johnson is being disciplined are founded on separate and distinct fact situations and the proof of each is different.

Evidence of Constable Johnson's character was introduced at the hearing and as noted above was considered by the Review Board on disposition.

The Review Board has considered these factors in its above discussion of the facts as set out by Ceysens, the submissions of counsel, and the character evidence introduced at the hearing on the merits and after reviewing the foregoing, the Review Board finds that the appropriate penalty in the circumstances is a fine of fifteen hundred dollars (\$1,500.00) to be paid by Constable Johnson within one month of the date of this decision. It is the Review Board's view that this disposition reflects the seriousness of the misconduct, while at the same time taking into account the unusual circumstances of the case.

Disciplinary Default of Corrupt Practice

Section 5(1)(f)(ii) of the Police Act Regulations states:

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

(f) engages in corrupt practice by

(ii) directly or indirectly soliciting or receiving a payment, gift, pass, subscription, testimonial or favour without the consent of the chief officer,

As noted in its April 2003 decision, it is the Review Board's finding that the language of the regulation is "clear and categoric" and consequently, it was not incumbent upon the Review Board to further delineate those acts which might fall within the section. The Luger was clearly a gift and a gift cannot be received by an officer without the Chief officer's consent under the *Act*.

Moreover, the gun came to Constable Johnson as a consequence of his being a police officer.

That being said, as noted above, this was not an overt effort by the Constable to dupe Mr. Kent out of a valuable historic heirloom which was unappreciated by Mr. Kent but rather an effort to help Mr. Kent, while at the same time helping himself.

This was a mutually beneficial transfer done in an open, voluntary way between Mr. Kent and Constable Johnson. The mistake Constable Johnson made was in not reporting the gift to his superiors.

After considering the submissions of counsel on this matter and considering the factors outlined in the Ceyssens excerpt discussed above, the Review Board orders that Constable Johnson receive a reprimand on this finding of corrupt practice.

Costs

There will be no costs to either party.

DATED at Halifax, Nova Scotia this day of August, 2003.

MARION FERGUSON
CHAIR

PETER JAMES
MEMBER

BRIAN McINTOSH
MEMBER

Distribution:

Constable Kevin Johnson - Halifax Regional Police
A/Chief Frank Beazley - Halifax Regional Police
Joel Pink - Solicitor on behalf of Kevin Johnson
Karen Fitzner - Solicitor on behalf of the HRP Authority
Inspector David Murphy - Halifax Regional Police

File No.: 02-0136
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 Form 13 Notice of Review filed by **CONSTABLE KEVIN JOHNSON**, requesting a review by the Nova Scotia Police Review Board, of a Decision made by **ACTING DEPUTY CHIEF FRANCIS BURBRIDGE** on the 3rd day of December, 2002

D E C I S I O N

Marion Ferguson - Chair
Brian McIntosh - Member
Peter James - Member