

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 JAMES SYMINGTON requesting a review of the October 28, 2002 decision by Acting Chief of Police Frank Beazley to dismiss the March 15, 2002 Complaint of CONSTABLE JAMES SYMINGTON against SUPERINTENDENT CHRISTOPHER MACNEIL, all of the Halifax Regional Police

BEFORE: Ms. Marion Ferguson Chair
Mr. Peter James Member
Mr. Lester Jesudason Alternate Chair

COUNSEL: Mr. Joel Pink Q.C. on behalf of Superintendent Christopher MacNeil
Ms. Karen Fitzner on behalf of (then) Acting Chief of Police Frank Beazley
Mr. David J. Bright Q.C. on behalf of Sergeant Timothy Moser (as Intervenor by agreement of the parties)
Mr. William Leahey on behalf of Constable James Symington

DECISION DATE: Decision: August 13, 2003
Written reasons: April 14, 2004

INDEX

1.	Background	3
2.	Issue	6
3.	Approach	6
4.	Process of Statutory Interpretation	10
	(a.) Review Board jurisdiction	10
	(b.) Right of Appeal at Common Law	12
	(c.) Relevant Principles of Statutory Interpretation	15
	(d.) Legislative Context	18
	(i.) Explicit Intent of the <i>Act</i> and Regulations	18
	(ii.) Plain and Ordinary meaning	21
	(a) Section 46(1)(n)	21
	(e.) Submissions of Constable Symington	23
5.	Conclusion	28

On June 9 and 10 2003, the Nova Scotia Police Review Board heard the preliminary objection of Mr. Joel Pink Q.C., on behalf of his client Halifax Regional Police (HRP) Superintendent Christopher MacNeil, in the matter of Symington v. MacNeil (Nova Scotia Police Commission File 02-0029).

Mr. Pink's motion sought a finding that the Review Board has no jurisdiction to consider an application for review of the dismissal of one officer's allegation of disciplinary default against another and challenged the legal authority of the Governor in Council to promulgate section 23(2) of the *Police Act* Regulations.

On August 13, 2003, after considering the submissions of the parties, the Review Board held that it did not have the jurisdiction to hear Constable James Symington's appeal of then-Acting HRP Chief Frank Beazley's October 28, 2002 decision and accordingly, granted Mr. Pink's motion.

In the course of writing the decision, the panel reviewed the decision of the Court of Appeal in *Morine v. L&J Parker Equipment Inc.* (2001) 193 N.S.R.(2d) 51 and the requirement that the Attorney General be given notice under the *Constitutional Questions Act* R.S.N.S., c.89, s.1., where it is submitted the applicability of a regulation is in question. On the Chair's instructions, the Review Board Coordinator wrote to Mr. Pink on December 1, 2003 asking whether notice had been given to the Attorney General. Mr. Pink's December 3, 2003 and subsequent December 5 letters are attached as schedules 1 and 2 to this decision.

On December 24, 2003 the Deputy Minister of Justice, Mr. Douglas Keefe, Q.C. replied to Mr. Pink's letter and provided a copy of this reply to the Chair of the Review Board:

Mr. Keefe wrote:

"Since the Board has made its decision, I would prefer to consider its written reasons before deciding what, if any, action is appropriate."

On January 20, 2004, the Chair wrote a further letter to the Deputy Attorney General advising that should no response be received by January 27, it would be assumed that no submission would be forthcoming from the office of the Deputy Minister. In reply, a January 26 letter from department solicitor Mr. Ed Gores was received advising:

"Under the circumstances, it would appear the submissions of the Crown, if any, ought to be received by the Board no sooner than February 3, 2004. I am presently seeking instructions on whether the Crown wishes to make any submissions in this matter. I will be in touch with you by February 3, 2004."

No further correspondence has been received from the Deputy Minister or his representatives.

At the time of rendering its' August 13, 2003 oral decision, the Review Board advised that written reasons would issue in due course.

Those reasons now follow.

1. Background

On November 7, 2002, Constable James Symington of the Halifax Regional Police filed a Notice of Review in Form 13 which challenged then - Acting Chief, now Chief, Frank Beazley's October 28, 2002 dismissal of allegations the Constable had made against HRP Superintendent Christopher MacNeil. In his review application, Constable Symington alleged that the Superintendent had committed several disciplinary defaults contrary to the *Police Act* Regulations.¹ His application sought to invoke the review process provided by regulation 23(2).

By letter dated January 13, 2003, Mr. Pink raised the preliminary objection that the Review Board lacked jurisdiction to entertain Constable Symington's application, maintaining that the matter, in its entirety, was out of time as contemplated by the *Act*². Constable Symington, who had initially appeared on his own behalf and by this time was represented by counsel, Mr. William Leahey, (although later in the proceeding the Constable did return to being self-represented) and Chief Beazley, represented by Ms. Karen Fitzner, opposed Mr. Pink's position.

¹ section 4(2); section 5(1)(a)(i); section 5(1)(a)(ii); section 5(1)(a)(vi); section 5(1)(e)(i); section 5(1)(f)(i); section 5(1)(g)(ii); section 5(1)(k).

² Briefly, this objection was that by reason of the conceded failure of the HRP to serve a notice of disciplinary default, by way of the Form 8 Notice of Allegation, within the statutory limitation period of six months, and the Review Board's jurisdictional authority to hear the matter was questioned. The objection revolved around the interpretation of regulations 20(2) and 20(3) of the *Police Act* Regulations. The Review Board has not found it necessary to entertain oral argument or rule on the matter for the purpose of the hearing.

Mr. Pink's objection was set down for hearing and the parties' written submissions forwarded for the Review Board's consideration. A more detailed history of the relevant procedural aspects of the matter is found in the Review Board's rulings in this proceeding and are also attached as schedules to this decision. (See schedules 3-8)

Then on April 16, Superintendent MacNeil, again through Mr. Pink as counsel, gave notice that he would be raising a new and further preliminary objection to the Review Board's jurisdiction to consider Constable Symington's request for review.

This new contention was subsequently particularized as the submission that the regulation- making authority constituted by section 46 of the *Police Act*, does not authorize a regulation which purports to allow the dismissal of one officer's allegation of disciplinary default against another member, to be reviewed by the Review Board. The motion challenged the system established by the Review Board under regulation 23(2) and would effectively preclude the right to appeal the dismissal of disciplinary proceedings instituted by the officer against another officer and alleging a disciplinary default. (*Ms. Fitzner was subsequently identified by Mr. Pink as the originator of the argument.*)

The objection was supported by the Respondent Chief Beazley.

Finally, with the consent of the parties, the Review Board permitted HRP Sergeant Timothy Moser, who was a Respondent in a separate complaint, Police Commission File

Number 02-0028 (coincidentally in which the Applicant was also Constable Symington and who had similar procedural concerns in his proceeding to those raised by Superintendent MacNeil), to participate in the argument on the Review Board's jurisdiction. To accommodate this, the Review Board, with the agreement of the parties, adjourned the substantive matter in File Number 02-0028, pending the decision in the present application.

Sergeant Moser was represented by Mr. David Bright Q.C..

At hearing, Mr. Leahey, on behalf of Constable Symington, supported regulation 23(2) authorizing his client's application for review.

On the date set for the hearing of the motion, the Review Board convened and heard oral submissions with respect to the section 35 argument. At the conclusion of the argument on this point, the Review Board advised the parties that the original "Form 8" regulation 20(3) argument was being adjourned until the Review Board had ruled on the section 35 argument.

On August 13, the Review Board wrote the parties and informed them that it had granted the Respondent MacNeil's motion that it did not have jurisdiction to hear the matter and that reasons would follow in due course.

2. Issue

The position of Superintendent MacNeil, Chief Beazley and Sergeant Moser (collectively referred to for convenience, although given Sergeant Moser's status not entirely accurately, as "the Respondents") was that section 46(1)(n) of the *Act* is not sufficiently broad to authorize the promulgation of regulation 23(2), and that the balance of the regulation-making powers contained in section 46(1) of the *Act* do not provide an alternative authority which might authorize it.

In the result they submitted, the Review Board was without jurisdiction to entertain Constable Symington's application for review of Acting Chief Beazley's decision to dismiss the Constable's allegations against Superintendent MacNeil.

3. Approach

The subject matter of the application before the Review Board was an allegation by one police officer, Constable Symington, that another police officer, Superintendent MacNeil, had committed certain disciplinary defaults.

Acting Chief Beazley dismissed these allegations and Constable Symington maintained that in doing so, the Acting Chief was in error and so Constable Symington initiated a review of that decision under regulation 23(2).

Regulation 23(2) provides:

Where a decision is made ... that no disciplinary default has been committed by the member, the person who filed the allegation may, within fourteen days after receiving the decision initiate a review of the decision by the Review Board by filing with the Registrar a Notice of Review in Form 13 of the schedule³.” (emphasis supplied)

There can be no dispute that - in its terms- regulation 23(2) purports to allow for an application for review in circumstances such as this.

However, the Respondents challenge Constable Symington’s review application on the ground that regulation 23(2) is unauthorized by the statute and is therefore not capable of granting the Review Board the jurisdiction to entertain the review it purports to create.

The position of the Respondents is aptly summarized in the language of the May 9 brief on behalf of Acting Chief Beazley, at page 3 “...the regulation making authority conferred on the Governor in Council does not disclose the ground of conferral of any power to grant, by regulation, the substantive right of appeal to a complainant in an internal disciplinary matter.”

The general power to make regulations under the *Police Act* is vested in the Governor in Council and set out by section 46(1). In more specific terms, the immediately apparent, although

³ Form 13, also promulgated under the Regulations, is a general form provided to initiate a review application which, in the terms prescribed by Regulation 23(2) provides that it is to be used by an officer disciplined who seeks review, by a public complainant who seeks review of the disposition of his complaint and by a disappointed police complainant who seeks review of the force’s decision not to find a disciplinary default. (The relevant language of the Form is Notice of Review (Public Complaint or Internal Disciplinary Matter) [Sections 13(1), 14(1) and 23(1),(2)]

not singular candidate as a potential authority facilitating the making of regulation 23(2), is section 46(1)(n).

Section 46(1) (n) provides:

The Governor in Council may make regulations,

- (n) *respecting internal discipline procedures including the disciplinary authority, disciplinary hearings, investigations, time limit for commencing a proceeding, right to representation, reasons for decisions, notice of review to the Police Review Board, the time limit for a review, procedures for the internal discipline of a chief officer, participation by the Commission in discipline matters, classification of disciplinary defaults and penalties for defaults. (emphasis supplied).*

Superintendent MacNeil's objection is a significant one, with the direct implication of eliminating a significant component of a jurisdiction which up to now, has been assumed and exercised by the Review Board and at the same time, involving a challenge to the exercise of authority by the Governor-in-Council.

The Review Board has considered the submissions of the Respondents carefully and in detail.

In considering the objection, the Review Board has firstly identified generally applicable principles of statutory interpretation. It has then reviewed its own jurisdictional authority as a statutory tribunal and considered how its authority is to be exercised. From there, the Review

Board next addressed what legal basis at common law is necessary to establish the right or opportunity for statutory review or appeal.

Against this backdrop, the Review Board accordingly applied the principles of statutory interpretation to provisions of the *Police Act* potentially capable of supporting regulation 23(2); considering first the plain and ordinary meaning of the statutory language and then, the place of that language in the context of the statute itself.

Lastly, the Review Board concluded with a consideration of the language of the relevant statutory provisions in light of the purpose of the statute and the balance, which in the Review Board's view, its relevant provisions intend to create.

Having conducted this analysis, the Review Board came to the conclusion that it does not have the jurisdiction which Constable Symington's application seeks to invoke.

4. Process of Statutory Interpretation

Effectively, the question raised by the objection is one of statutory interpretation of relevant regulation-making powers established by the *Police Act*. The appropriate departure point for consideration of the matter is firstly a review of the Review Board's power to consider its own jurisdiction.

(a) Review Board Jurisdiction

MacAulay and Sprague in *Practice and Procedure Before Administrative Tribunals* (Carswell: Toronto) state:

“There is no doubt that an agency has the authority to determine whether it has jurisdiction in a matter.” (page 12-120)

Notwithstanding this, it is clear that whatever deference otherwise might be afforded the Review Board when it acts within its own jurisdiction or however vigorously the Review Board might lawfully apply its jurisdiction while acting within it, in construing the extent of its own jurisdiction, the Review Board must be correct.

It also bears stating, whether otherwise obvious or not, that in the exercise of its legislated responsibilities, the Review Board has no original or inherent jurisdiction. To the contrary, the Review Board is an authority constituted by statute to determine issues of fact and

to apply principles of law in certain police-related matters. Its legislated authority derives entirely from the express or necessarily implicit powers conferred on it by the *Police Act* and because of specific provisions of the that *Act*, from regulations made under it by the Governor in Council.

Submissions made by some of the Respondents in this matter sought a “declaration” by the Review Board that regulation 23(2) is *ultra vires* the regulation making power conferred on the Governor in Council.

The Review Board does not consider it necessary to make such a “declaration” nor to consider whether or not it might have authority to do so.

Rather, as follows from the authorities cited, the Review Board not only may, but must consider its own constating legislation and regulations made under it closely and correctly, in order to properly exercise its jurisdiction under the *Act*.

In this case, the inquiry is whether or not the regulation which Constable Symington invokes is legislatively authorized to confer jurisdiction on the Review Board to entertain his request for review.

(b) Right of Appeal at Common Law

Common law authorities more generally address the nature of a right of “appeal” as opposed to matters of “review.” However, in considering whether sections of the *Police Act* specifically empower the creation of regulations establishing the right to review asserted in this case, the Review Board has found it helpful to refer to the status of a right of appeal at law.

In *Tidewater Construction Co. v. Nova Scotia (Minister of Environment)* (1986) 77 N.S.R. (2d) 368 (NSSC-AD), Pace J.A. at page 369 held:

“There is no appeal except by statute, as an appeal is unknown to the common law. The right to appeal cannot be implied, but must be given by statute in clear and explicit language.” [citations omitted] (emphasis supplied)

In the view of the Review Board, it is clear that excepting where there is some explicit or necessarily implied provision of the statute or an authorized regulation, there is no basis for the generalized implication of a generalized right of review in a statutory regulatory scheme such as that established under the *Police Act*.

It is clear that such a right should not lightly be found to have been implied.⁴

⁴ There is always, of course, the possibility of judicial review of the decision or decision-making process of a decision-maker constituted by statute.

Indeed, even an implicit, albeit indirect, reference to a right of appeal in a statute creating a regulatory regime has been found ineffective to implicate its existence.

Thus, in *Halifax Municipality of the County of Halifax v. Halifax City of and Board of Commissioners of Public Utilities (1983) 59 N.S.R.(2d) 253*, the Nova Scotia Court of Appeal considered an argument that legislation of general application authorizing appeals to the Court from the Board of Commissioners of Public Utilities (the *Public Utilities Act*), could equally create a right of appeal to a Court from a decision of the Board sitting under a statute of specific application (the *Municipal Boundaries and Representation Act*.) The latter statute was silent in expressly creating a right of appeal but contained what was characterized by the Court as an “oblique reference to an appeal,”⁵ [para 4] and was considered to be insufficiently broad, in the Court’s view, to recognize a right of appeal in the municipal boundary legislation.

In reaching this conclusion, the Court cited its own decision from an earlier case noting, “*No express right of appeal is granted under s. 97 of the Public Utilities Act from any order made under the Motor Carrier Act...Section 24 of the Public Utilities Act which confers the power to make rules and regulations regarding the practice and procedure of the Board makes no reference to appeals.*” [emphasis supplied]

⁵ A section of the *Municipal Act* declared that decision made under it was to be “... final and not open to objection or appeal except on a question of law or jurisdiction.”

In sum, the Court concluded that at least in the context of the statute at issue in that case, neither an oblique statutory reference to an appeal nor simply a statutory provision which grants power to make regulations respecting rules and procedure, can serve as authority to create a right of appeal.

Similarly, in *Goulden v. Workers' Compensation Appeals Tribunal and Taylor* [1999] N.S.J. No. 175, Freeman J.A. for the Court of Appeal considered whether a right of appeal to the Supreme Court, (a right created under legislation in force at the time the cause of the dispute arose), or to a Tribunal (the forum for appeal under legislation in force at the time the matter of the appeal itself had arisen) was a substantive right or a procedural right only- a determination which would decide whether the establishment of the Tribunal as the venue for appeal was retrospective in operation or not.

Justice Freeman held:

[para 17] In the present circumstances the right to a determination by a Supreme Court judge must be considered a substantive right vested in the appellant at the time of the accident because the right of appeal which attaches to the determination of the judge, but not of the commissioner, is a substantive right. [emphasis supplied].

In summary, from these decisions, each of the principles establishes that:

1. a right of appeal, (or for the purpose of the consideration of this particular case, a right to invoke review), is a substantive right and one not lightly to be implied;
2. a right of appeal is not one of procedure but one of substance; and

3. a statutory provision which authorizes the making of regulations or even regulations regarding practice and procedure, is not sufficient to authorize a Regulation establishing a right of appeal;

The Review Board finds these principles have strong implications for how s. 46(1) of the *Police Act* is to be interpreted.

(c) Relevant Principles of Statutory Interpretation

The process of statutory interpretation is a process often said to be governed by many principles and can be presented as a matter of some complexity.

The Review Board has found the decision of the Nova Scotia Court of Appeal in *Morine v. L & J Parker Equipment Inc. (2001) 193 N.S.R. (2d) 51*, particularly helpful in considering the interpretation of the *Police Act* and the Regulations under it.

While *Morine* dealt with the *Labour Standards Code*, an *Act* materially different in purpose from the *Police Act* and categorized by the Court as a “benefits-conferring statute,” - which the *Police Act* is not-the demonstration of the application of general principles of statutory interpretation provides a useful approach.

At the risk of appearing to over-simplify their priority or mis-representing their actual interdependence in operation, the principles set out in that decision might be summarized as follows:

1. Adopting Driedger's well known formulation of the approach, "*...the words of an Act are to be read in their entire context and in their grammatical and ordinary sense...*" [Driedger *Construction of Statutes* (second edition) at 87]. Thus, in the first instance, the meaning of a provision is to be resolved on the basis of the place of the disputed words in the context of the express language of the statute and any necessary implication from that express language.
2. The words being interpreted are to be read "*...harmoniously with the scheme of the Act...*" [Driedger at 87]. Thus, "*...the interpretation of the Legislation must rely on the words actually used in the context of the scheme as a whole and effect must be given to the words chosen.*" [Morrison, para 28]
3. The words are to be read "*[with a view to]... the intention of Parliament*" (at 87). Effectively, if having considered the express words and their place in the statute the overall meaning of the provision continues to be unclear, any doubt as to the meaning of the provision is to be resolved in accordance with the purposes of the *Act*. In this context, where as here, the statute itself or the scheme it establishes are meant to balance and offset competing statutory interests, the interpretation is to be sensitive to the balances it creates.

Notwithstanding this, techniques of statutory interpretation cannot obscure the reality that it is ultimately the Legislature which has the authority to set out the content of the statute.

Thus, a decision of the Legislature not to supply a provision in a statute, "... is one that the Legislature is entitled to make." [Morrison para 27]. Likewise, whether or not one informed observer or another, might consider some omission from the legislation unfortunate or not, is

irrelevant, if the intention or omission from a piece of legislation is clear; *“Effect must be given to the ordinary meaning of the words chosen and not to speculation as to what might have been intended but was not expressed in the statutory language.”* [Morine, para 29].

Therefore, where a statute, on a clear reading of its language and barring any necessary implications within it, does not provide for a certain power or authority, the conclusion that a right or power is not created, is to be respected.

Finally and in addition to these corollaries, questions of the interpretation of subordinate legislation, such as regulations, raises further considerations.

Blake on *Administrative Law in Canada* (third edition) at 247 notes:

Generally speaking, the laws made by a subordinate legislative body (... “regulations”) under the authority of a statutory power are to be construed according to the same principles as those applicable to the construction of statutes. There is, however, an additional question to be decided, namely, does the regulation come within the scope of the power? [emphasis supplied]

Likewise, Dreidger *Construction of Statutes* (second edition) at 323 provides in a commentary on the interpretation of a particular provision:

“...Thus far it has been assumed that the words of the statute were in themselves wide enough to confer the power to make the impugned regulation, and I have considered whether they must be read subject to some limitation. There still remains the question,

to be decided in all cases, whether the statute has conferred the power.” [emphasis supplied]

This then raises the final consideration applying in the interpretation of a regulation that purports to augment a statute, by creating a new and additional substantive right.

Again Blake on *Administrative Law in Canada* (third edition) at 137 states:

“A regulation cannot change procedural rules prescribed by statute nor may it effectively add to or alter substantive requirements set out in the Act unless the statute expressly authorizes such changes by regulations.”

(d) Legislative Context

(i) Explicit Intent of the Act and Regulations

In express terms, the words of the *Act* itself contemplate only two relevant forms of review to the Police Review Board: the “public complaint” and the review of the finding that an officer has committed a disciplinary default.

Section 27 of the *Act* requires the referral of a “public complaint” to the Review Board where the complaint has not been otherwise resolved in the course of the investigation.

It states:

27 Where the Commission does not satisfactorily resolve the complaint, the complaint shall be referred to the Review Board in accordance with the regulations and the Review Board shall conduct a hearing in respect of the complaint. [emphasis supplied]

The language of the section is complete in authorizing review and entrusts only the mechanics as to how such a review is to be effected procedurally, to the regulations.

The legislation is also consciously restrictive of the definition of the term, “complaint,” as used in the context of the section and otherwise in the *Act*. That term is defined by section 2(e) of the statute, *inter alia*, to mean “...any communication received from a member of the public*which alleges that a member of a force breached the Code of Conduct and Discipline or alleges the failure of the force itself to meet public expectations.*” [emphasis supplied]

Likewise, the second and only other explicit, statutorily created right of access to the Police Review Board set out by the *Act*, applies where discipline has been imposed on a member of a force.

The language of the legislation was drafted specifically to state that an officer *who has been found to be in disciplinary default*, has the express right of seeking review by statute of that finding by the Review Board.

Section 35 accordingly is the relevant section and it provides:

After a disciplinary decision has been made in accordance with this Act and the regulations, a police officer who is the subject of the disciplinary decision may initiate a review of the decision by filing a notice of review with the Registrar of the Review Board within the time determined by regulation. R.S., c. 348, s. 35. [emphasis supplied]

Significantly, the section does not contemplate that a member who has instigated a process considering a finding of disciplinary default, might appeal a finding that no default was committed. Nor indeed does it provide that such a member might appeal the penalty imposed on an officer where the allegation has been considered founded.

In the opinion of the Review Board, this fact that the section provides for only a disciplined officer and not the complaining officer to have a right of review is of sharp significance in the overall interpretation of the *Act*. Indeed, section 35, in the case of a disciplined officer's right to initiate review, like section 27 in the case of a review of a public complaint, which provide for the promulgation of regulations to implement such a review, leaves to the regulations only the imposition of time limits and forms to allow it to become operative.

The silence of the statute on the right of an officer in the position of Constable Symington to have the right to initiate review of a dismissal of his complaint against another officer, Superintendent MacNeil, juxtaposed against the expressly stated right to seek review, given by

the statute to a disciplined officer or to the complainant who has failed in a public complaint, are in the Review Board's opinion, significant in the interpretation of the *Act*.

Finally, the apparent distinction in language the statute creates between matters of complaint and matters of internal discipline are of potential significance in the interpretation of the section.

(ii) Plain and Ordinary Meaning

(a) Section 46(1)(n)

Regulation 20 (1) under the *Act* permits a member to file an allegation of disciplinary default against another member of the force. It is this regulation under which Constable Symington has asserted his allegations against Superintendent MacNeil.

Regulation 20(1) states:

“A member of a police force may allege that another member of that police force has committed a disciplinary default by filing a written allegation...”

Thus, on its face, regulation 20(1) also provides for the hearing of the allegation before the Chief Officer of the force in the same way as though discipline had been imposed in the ordinary line disciplinary authority of the force.

The question is whether section 46(1) (n) -or some other provision of section 46(1)--
authorizes a regulation creating a right of review from this level to the Review Board.

The language of section 46(1)(n) states that regulations may be made:

*“respecting internal discipline procedures including the disciplinary authority, disciplinary hearings, investigations, time limits for commencing a proceeding, right to representation, reasons for decision, notice of review to the Police Review Board, the time limit for review, procedures for the internal discipline of a chief officer, participation by the Commission in discipline matters, classification of disciplinary default and penalties for default.”
(emphasis supplied)*

“Review” is used in the section to describe the notice [of review] to the Police Review Board or in other words a document; or the time limit [for review], a procedural requirement. These differences in their plain meaning, could be taken to suggest that the section draws a distinction between “internal” disciplinary matters, in which the making of regulations is authorized, and “review,” an external function, in which it is not.

Moreover, the section is also silent on the express power to create a right of review of a disciplinary matter. It refers only to “notice of review to the Police Review Board,” and not to the right to create the opportunity for review. It encompasses “notice of review” in the context of an authority to make regulations in respect of “procedures,” not matters of substance, as a right of review is described at common law.

(e) Submissions of Constable Symington

Mr. Leahey submitted that an interpretation of the regulation-making provisions of section 46 which ultimately precludes an officer alleging a disciplinary default from the right to seek review at the hands of the alleging officer, would amount to an unfair treatment of that officer. He maintained that because a member of the public is given a right of appeal, so too should an officer in the position of Constable Symington.

In the face of the explicit language of the legislation and the implications for public governance in Nova Scotia, the Review Board does not consider such an argument to be of assistance.

Mr. Leahey also argued that other provisions of section 46 allowing regulations to be made prescribing procedures dealing with complaints could be considered to constitute legislative authority authorizing regulation 23(2). The Review Board considered the other provisions of section 46 and do not consider them to support regulation 23(2).

Finally, in his written submissions, Mr. Leahey also maintained that the use of the term “complaint” in section 46(1)(i) or otherwise, is sufficiently broad to encompass the subject matter of a police on police complaint. Mr. Leahey argued that Constable Symington, while a police officer, is also a “member of the public” and arguably therefore, the broad right of review in the Review Board over a police on police complaint fixed by regulation 23(2), is authorized.

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

“Complaint,” is a term of specific definition under the *Act* (section 2(e) to mean “any communication received from a member of the public ... which alleges that a member of a force breached the Code of Conduct and Discipline or alleges the failure of the force itself to meet public expectations.”

Whether or not Constable Symington could have or might have sought to file his complaint as a member of the public and not as a member of the force is not before us. Moreover, it is important to note that the differences in the two processes are significant⁶.

Having received the advantage in filing a police on police complaint it is now too late for the complainant to elect to characterize his complaint to be treated otherwise.

Other candidates might be considered to determine whether they might be held to support regulation 23(2). Thus, sections 46(1)(a) and (i) respectively authorize regulations to be made “for the government of police forces and governing the conduct, duties, suspension and dismissal of members of police forces” and for “prescribing procedures for dealing with complaints.”

⁶ The public complaint being implemented by a complainant with the following: the complaints officer for a force, a Municipal Board of Police Commissioners or the Nova Scotia Police Commission,(regulation 7(1); the second , the officer’s complaint, by an allegation filed with the chief officer of the force (regulation 20(1)); the first being subject to a prima facie limitation period of thirty days and the second itself subject to no apparent immediate specific period of limitation; the first, controlling access to a review by the Review Board by an investigator for the Commission or the Commission itself (regulation 14(10), 15(1)); the second providing for access to the Review Board putatively as of right (regulation 23(2))

These are not, however, in the opinion of the Review Board, sufficiently broad to do so.

Hence, while section 46(1)(a) allows regulations to be made pertaining to the government of forces and governing either the behaviour (“conduct”), standards for performance (“duties”) or consequences of misconduct (“suspension and dismissal”), it does not reasonably support a power to make regulations dealing with further consideration of the matters in the Review Board process. That process, is, by definition beyond “duties,” “suspension or dismissal” and outside the “government” of the force.

Likewise, the authority afforded by regulation 46(1)(i) authorizing regulations “prescribing the procedures for dealing with complaints” is unable to support a regulation dealing not only with the dismissal of complaint but allowing for an appeal of that dismissal. Finally, it is difficult to see a legislative purpose allowing for an expansive reading to include a right of appeal when the Legislature has explicitly authorized a regulation creating a right of appeal in other instances and expressly passed over the opportunity to create one in this case. As found by the Court of Appeal in *Morine*, the decision not to provide for a right of appeal in such a case as this, is a decision, “...*the Legislature is entitled to make.*”

Mr. Leahey, in his written submission of March 29, 2003 went on to raise hypotheticals, intended – as the Review Board understands it– to raise questions of policy that he submits are to be relevant to the determination of the purpose of the statute and hence its interpretation. He submits at page 2 that, “...*this attempt* {i.e. the argument of the Respondents} *to persuade the*

Board to re-interpret the empowering legislation will create a class of complainants who are powerless to set the complaint investigation machinery in motion against an officer who is also a member of the Force.” At page 7, he concludes by writing that “...given these consequences to the officer of the alternative approach, it is submitted that [a]...broader interpretation is correct and appropriate.”

Assuming that there is sufficient ambiguity in the statute, so that an expansive reading of the statute to consider an expansive reading of its terms, the Review Board does not consider that there is a policy justification in this case to do so. The Review Board is not satisfied that there is something inherent in an officer on officer complaint, which warrants or justifies an interpretation of section 46, to support a regulation providing for the appeal of a failed officer on officer complaint, to the Review Board, as of right.

There is no qualitative parallel between the position of a member of a force who has been found to have committed a disciplinary default and a member who has unsuccessfully alleged default by another. The former is lawfully entitled to an objective review of the finding as of right with the Police Review Board—an access to adjudication separate from the command structure of the officer’s force, structurally independent from it and institutionally impartial. The career and employment of such an officer may be in jeopardy by virtue of a finding against him; the alleging officer faces no such institutional risk.

The disciplined officer first has been jeopardized by the system in the authority of his own force; the disappointed complainant in a police on police complaint has not.

Thus while there are strong public policy reasons apparent to the Review Board to validate the legislatively authorized right of a disciplined member to appeal, there are no immediately apparent parallels in the case of the alleging officer.

Effectively allowing a member of the force to deputize himself or herself, to carry an allegation of disciplinary default beyond the authority of the force, independently of the safeguards and possibilities of the statutorily authorized public complaints process under the *Act*, to seek external review of a failed disciplinary complaint within his or her force, would, in the view of the Review Board, require clear statutory authorization.

Such authority, in the respectful view of the Review Board, does not exist for regulation 23(2).

5. Conclusion

The application, which these reasons address, began as an application that the Review Board “declare” regulation 23(2) *ultra vires* on the grounds that section 46(1)(n) does not authorize its promulgation by the Governor-in- Council and, by implication, that there is no other regulation making authority in the statute which could support its making.

The Review Board expressly declines to engage in making such declarations, even assuming that it might otherwise have the jurisdiction to do so. As appears, however, the Review Board has concluded that the section is not sufficiently broad to support jurisdiction in this Review Board and to entertain this appeal.

Equally, the submission has been made that regulation 23(2) conflicts with section 35 of the *Act*, and so the argument goes, because of this putative conflict, regulation 23(2) must be ineffective.

The Review Board expressly finds that there is nothing in the content of section 35 which, of itself, would preclude an effective regulation 23(2) from granting a right of appeal to the Review Board for an officer whose complaint against another officer has been dismissed. As appears from this decision, on other grounds, this decision has come to the same result.

Ultimately, the Review Board has determined that this attempt to invoke a right of appeal by Constable Symington cannot be successful, because the terms of the statute do not support regulation 23(2).

Therefore, considering the nature of the right of review, the language of the *Act* in its grammatical and contextual context, including particularly ss.46(1) (a) (i) and (n) of the *Police Act*, against the purpose of the statute, the Review Board concludes that the statute does not bear an

interpretation founding the authority of regulation 23(2) to provide jurisdiction to hear Constable Symington's application for a review of Acting Chief Beazley's October 28 2002 decision.

Mr. Pink's application is therefore granted.

DATED at Halifax, Nova Scotia this day of April, 2004.

MARION FERGUSON
Chair

LESTER JESUDASON
Alternate Chair

PETER JAMES
Member

Distribution:

Constable James Symington - Complainant
Mr. William Leahey - Solicitor for Complainant
Mr. Joel Pink - Solicitor for Superintendent Christopher McNeil
Mr. David Bright - Solicitor for Sergeant Timothy Moser
Deputy Chief Christopher McNeil - Halifax Regional Police
Chief Frank Beazley - Halifax Regional Police
Ms. Karen Fitzner - Solicitor on behalf of Halifax Regional Police
Ms. Marion Ferguson - Chair, NS Police Review Board
Mr. Lester Jesudason - Alternate Chair, NS Police Review Board
Mr. Peter James - Member, NS Police Review Board

File No.: 02-0029

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 JAMES SYMINGTON
requesting a review of the October 28, 2002
decision by Acting Chief of Police Frank
Beazley to dismiss the March 15, 2002
Complaint of CONSTABLE JAMES
SYMINGTON against SUPERINTENDENT
CHRISTOPHER MACNEIL, all of the Halifax
Regional Police

D E C I S I O N

Before:

Ms. Marion Ferguson
Mr. Lester Jesudason
Mr. Peter James