

DECISION

File No. 03-0001

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 RODNEY MACDONALD**, Member, of the Amherst Police Department, requesting a review of a decision made by Chief Charles Rushton on the 13th day of May, 2003 in relation to a public complaint made by Kathy Farrell.

BEFORE: Mr. Lester Jesudason - Alternate Chair
Mr. Brian McIntosh - Member
Mr. Orville Symonds - Member

COUNSEL: Mr. David Fisher on behalf of Constable Rodney MacDonald
Mr. Brian Creighton on behalf of Chief Charles Rushton
Mr. Jack Farrell on behalf of Ms. Kathy Farrell

HEARING DATE: February 5, 2004

PLACE: Town Council Chambers, 5 Ratchford Street, Amherst, Nova Scotia.

DECISION DATE: February 25, 2004

DECISION: Appeal granted.

On February 5, 2004, the Nova Scotia Police Review Board met to consider the appeal filed by Constable Rodney MacDonald of the Amherst Police Department requesting a review of a decision made by Chief Charles Rushton on May 13, 2003, in relation to a public complaint made by Kathy Farrel on January 7, 2003.

In that decision, Chief Rushton found Constable MacDonald guilty of committing a disciplinary default by engaging in discreditable conduct contrary to Section 5(1)(a)(i) of the *Police Act* Regulations. Chief Rushton imposed a penalty consisting of a reprimand and counselling.

The parties who appeared before the Board were Chief Charles Rushton, represented by Mr. Brian Creighton, and Constable Rodney MacDonald represented by Mr. David Fisher. The Complainant, Kathy Farrell, did not participate in the hearing in person. The Board was advised by Mr. Creighton, and also by the Complainant's husband, Jack Farrell, that she was not intending to appear before the Board but was content to leave the appeal in the hands of the remaining parties. In addition, Ms. Farrell sent a letter to the Board dated February 4, 2004 (Exhibit 1) indicating that she was consenting to the hearing before the Board being restricted to an incident which occurred in the parking lot at the Amherst Court House, on December 19, 2002. All parties, including Ms. Farrell, therefore agreed that the Board was not to consider the portions of Ms. Farrell's original complaint which related to matters which transpired inside of the Court House on December 19, 2002.

At the outset, the Board wishes to express its gratitude to both Mr. Creighton and Mr. Fisher for the professional and efficient manner in which the hearing was conducted and for their

helpful submissions. The Board also wishes to particularly thank Mr. Jack Farrell for his assistance in coordinating matters with Kathy Farrell and for acting on her behalf during the hearing.

At the beginning of the hearing, the parties agreed that the Board had jurisdiction to hear the appeal. The Board heard evidence from Enid Craft, Office Manager for KC Realty Limited (the property manager for the Court House property), Jack Farrell, Constable MacDonald and Deputy Chief Ian Naylor. The Board found all of the witnesses to be credible and forthright and, to the extent that there were any discrepancies between their evidence, the Board attributes this to normal expected discrepancies between witnesses' testimony and not to any deliberate attempt to mislead the Board. Based on the evidence, the Board makes the following findings of fact:

1. On December 19, 2002 at around 4:00 p.m., Jack Farrell and his son, Michael, arrived at the Court House property to pick up Kathy Farrell who worked at the Court House. Mr. Farrell parked his vehicle and observed Constable MacDonald park his police car by the Court House.

2. The area in which Constable MacDonald parked his car was a "no parking area" although it was not enforced as such. Specifically, it was common practice for police officers, especially those from the Springhill Police Department, to park there without there being any objection from Court staff, the Sheriff or the property manager. The area where Constable MacDonald parked his vehicle was depicted in Exhibits 4 and 5.

3. On the day in question, the Amherst Police Department was short-staffed. Specifically, Constable MacDonald's regular platoon of four members was short two regular members. However, there was another part-time member working that day.

4. Constable MacDonald was having a busy day and was going to the Court House to swear documents before a Justice of the Peace. While he was not exceedingly pressed for time, the Board accepts that he was concerned about getting his documents sworn before the Court House closed. The Board also accepts that Constable MacDonald had some concern about getting these documents sworn before Court staff went on Christmas vacation since the documents related to matters which would be coming up in the New Year.

5. Jack Farrell was approximately 110 feet away from Constable MacDonald when he observed Constable MacDonald leaving his vehicle and walking towards the Court House. At this point, a brief exchange occurred between the two individuals. According to Jack Farrell, he was in clear view of Constable MacDonald and said, "You're in a tow away zone" to which Constable MacDonald replied, "it appears to be" and kept walking. Constable MacDonald, on the other hand, states he merely heard a voice coming from the parking lot area which said words to the effect of, "you're in a tow away zone" to which he replied, "maybe it is". He claims he did not know who made the comment to him though he noticed one person leaning over his car in the parking lot. Constable MacDonald then indicated the voice said, "maybe I should call someone", to which he replied, "maybe you should". According to Constable MacDonald, he thought that the person who was making the comments to him was simply joking and likely an

acquaintance. He indicated that he made no attempt to ascertain who it was because he was in a hurry to get to the Court House and get his documents sworn.

6. The Board is unable to conclude on the evidence which of Mr. Farrell's version or Constable MacDonald's version of their verbal exchange is correct. However, the Board finds that resolving this issue is not key to the disposition of this matter for the reasons which will follow. Suffice it to say that all parties agreed that the exchange between Jack Farrell and Constable MacDonald was fairly matter of fact with no shouting or yelling.

As noted earlier, in the disposition of public complaint (Form 11), Chief Rushton found Constable MacDonald engaged in discreditable conduct and imposed a penalty of a reprimand and counselling. The Form 8 which was received by Constable MacDonald on February 21, 2003, made reference to a disciplinary default contrary to Section 5(1)(a)(i) of the Regulations of the *Police Act* of Nova Scotia. That Section reads as follows:

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

(a) engages in discreditable conduct by

(i) acting in a disorderly manner or in a manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the police force,

However, at the hearing, Mr. Creighton requested that the Board also consider whether a disciplinary default was committed contrary to Section 5(1)(a)(v) of the *Police Act* Regulations which reads as follows:

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

(a) engages in discreditable conduct by

(v) being discourteous or uncivil to any member of the public having regard to all the circumstances,

Mr. Fisher, on behalf of Constable MacDonald, did not oppose Mr. Creighton's request. The Board therefore did consider whether or not a disciplinary default was committed in relation to either Section. However, Mr. Creighton went on to ask the Board in its decision to issue clarification as to whether or not, for future reference, sections not specified in the applicable Form 8 could be the subject of a disciplinary default in hearings before the Board. Mr. Creighton suggested that because the hearings before the Board are "de novo" hearings, this issue is unclear and a ruling from the Board at this time would be of assistance to investigating officers which have to complete Form 8 in the future.

While the Board appreciates the concerns expressed by Mr. Creighton, it does not feel it is necessary to decide this issue in the present case since Mr. Fisher conceded that the Board could also consider whether or not Constable MacDonald committed a disciplinary default contrary to Section 5(1)(a)(v) of the Regulations despite the fact that Section was not specified in the Form 8 which had been served on Constable MacDonald. As an aside, however, the Board does encourage any investigating officer who completes a Form 8 in the future to be as thorough as possible when completing it. Whether or not the failure to specify a particular section in a

Form 8 would preclude the Board from considering whether or not a disciplinary default was committed in relation to that section is not presently before the Board. We do, however, suggest that if an officer makes an objection based on such a failure in a future case, the Board's ruling will depend on the facts of that particular case and may well consider issues of prejudice and whether or not the officer had notice of the factual foundation of any alleged disciplinary default despite the fact the particular section was not specified in the Form 8.

Turning to the disposition in the present case, the Board certainly has sympathy for Mr. Farrell's position. That is, the evidence revealed that Mr. Farrell and Constable MacDonald had a previous history. Specifically, the Board heard evidence that, a few months prior to the December 19th incident, Mr. Farrell was assaulted at a hospital where he worked and that Constable MacDonald was assigned to investigate the matter. Apparently, Constable MacDonald laid charges against both Mr. Farrell and the person who assaulted him. However, at the end of the day, Mr. Farrell was completely exonerated of any wrongdoing. While there is no evidence that Constable MacDonald acted inappropriately in the course of that investigation, the Board certainly can understand why Mr. Farrell would feel upset at having been charged criminally in relation to an assault where he was the victim.

Keeping this background in mind, the Board can appreciate why, on December 19, 2002, Mr. Farrell's feelings would be compounded by the fact that he observed Constable MacDonald park in a "no parking zone" when Mr. Farrell was also looking for a free parking spot. From Mr. Farrell's perspective, Constable MacDonald was "breaking the law". It is therefore understandable that, believing that Constable MacDonald was deliberately ignoring him when he

tried to question him about where he parked, Mr. Farrell would subjectively believe that Constable MacDonald was being discourteous to him especially in light of their aforementioned past history.

However, as made clear from the authorities which Mr. Creighton kindly provided to the Board, the test for “discreditable conduct” is primarily an objective one. Specifically, in Paul Ceysens’ Legal Aspects of Policing, the author states on page 6-10:

“Rather than making the difficult choice of which among these approaches is appropriate for our case, we have combined elements from each and arrived at the following principles:

1. The test primarily is an objective one.
2. The Board must measure the conduct of the officer by the reasonable expectations of the community.
3. In determining the reasonable expectations of the community, the Board may use its own judgement, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.
4. In applying this standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.
5. Because of the objective nature of the test, the subjective element of good faith (referred to in the *Shockness* case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.”

While the passage from Legal Aspects of Policing appears to deal with the situation where it is alleged the conduct of an officer brings “discredit upon the reputation of the

police force” (i.e. similar to our Section 5(1)(a)(i) of the *Police Act* Regulations), we note that Section 5(1)(a)(v) also requires the Board to consider whether or not an officer was discourteous or uncivil to any member of the public “having regard to all of the circumstances”.

In looking objectively at “all of the circumstances”, we do not find that Constable MacDonald was parking in an area he considered to be “illegal” and also find that there was no intention on his part to be discourteous to Jack Farrell in any manner. In light of the Board’s finding of facts, it therefore does not find that Constable MacDonald engaged in discreditable conduct pursuant to Section 5(1)(a)(i) or 5(1)(a)(v) of the *Police Act* Regulations.

The Board therefore allows Constable MacDonald’s appeal and finds there was no disciplinary default committed by him. Accordingly, the Board orders that the finding and penalty imposed by Chief Rushton against Constable MacDonald be rescinded. The Board also orders that no costs will be awarded in this matter.

Dated at Halifax, Nova Scotia this day of February, 2004.

LESTER JESUDASON
Alternate Chair

BRIAN MCINTOSH
Member

ORVILLE SYMONDS
Member

Distribution:

Constable Rodney MacDonald - Amherst Police Department
Mr. David Fisher - Solicitor for the named officer
Chief Charles Rushton - Amherst Police Department
Brian Creighton - Solicitor on behalf of Chief Rushton
Lester Jesudason - Chair, NS Police Review Board
Brian McIntosh - Member, NS Police Review Board
Orville Symonds - Member, NS Police Review Board

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D E C I S I O N

Mr. Lester Jesudason, Alternate Chair
Mr. Brian McIntosh, Member
Mr. Orville Symonds, Member