

**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 application by the Town of Kentville for an extension  
of time pursuant to regulation 21(3) of the *Police Act* to  
investigate the March 10, 1999 Form 8 complaint against  
Constable Fred Young alleging contravention of  
*Regulations 5(1)(a)(i) and 5(1)(a)(ii)* of the *Police Act*

**BEFORE:**                               Ms. Marion Ferguson, Chair

**COUNSEL:**                           Mr. David Fisher on behalf of Constable Fred Young  
Mr. Geoffrey Muttart on behalf of Chief MacLean and the  
Town of Kentville

**DECISION DATE:**                   Written Decision - February       2004

**DECISION:**                           Application Denied

This is an application by the Town of Kentville, to the Chair of the Police Review Board, pursuant to *Regulation 21(3)* of the *Police Act*, to extend time for the completion of an investigation.

The *Police Act* investigation into the original complaint against Constable Frederick Young was commenced in March 1999, then suspended pending completion of a criminal investigation involving the same officer, recommenced in May 2000, and subsequently followed on July 20, 2000, by the Constable's dismissal from the Town of Kentville Police Service.

The present application to the Chair to extend the time to complete the investigation of the March 10, 1999 Form 8 complaint, follows the July 31, 2002 decision of the Police Review Board in the matter of *Constable Young and Chief Brian MacLean and the Kentville Board of Police Commissioners File No. 99-0038* (hereinafter referred to as "*Young*").

As the right to investigate the alleged contraventions of the Police Act had expired on February 28, 2000, under this application, the Town seeks an extension to cover the time period "from February 28, 2000 to June 5, 2000," in its own words, "to bring the investigation into compliance with the Regulations." This application is made with a view to resurrecting the jurisdiction of the Review Board to entertain an application concerning the dismissal of Constable Fred Young by the Kentville Board of Police Commissioners.

The Chair notes the Town of Kentville's extension request has been made necessary against the background of a series of events.

***Background***

In 1999 Constable Young was charged with three criminal offences, and disciplinary proceedings under the *Police Act* were initiated against him in March of that same year. On March 17, 1999 the Registrar of the Review Board, granted a suspension of the investigation of the alleged *Police Act* disciplinary defaults, while the concurrent criminal investigation was underway, as provided under *Regulation 24(4)* of the *Act*.

- (4) *Despite subsection (3), the Registrar may suspend the investigation of an internal disciplinary matter which is also the subject of a criminal investigation until the completion of the criminal investigation.*

The effect of the Registrar's decision was to appear to have extended the time for the completion of the investigation of the allegations and, as a consequence, to extend the time for further procedural steps under the *Act*, including the time for a Review Board appeal by Constable Young.

However, on March 4, 2002, a year and a half after the Registrar's decision, the Nova Scotia Supreme Court released a decision in the case of *Reid v. Rushton [2002] N.S. J. No.92*, which had significant consequences for the present matter and which are fully set out in *Young*.

In brief terms, however, the Court's decision had the effect of pointing out an error in the Registrar's interpretation of *regulation 24(4)* and, as a matter of law, placed the completion of the *Police Act* investigation in this case, out of time under the 60 day limit provided in *regulation 21(3)*.

*Young* had commenced as the Constable's application for review of the decision of Kentville Police Chief to recommend dismissal and the decision of the Town's Board of Police Commissioners to dismiss him from the force. It ended, as a consequence of the determination in *Reid v. Rushton*, with the conclusion, in the words of the Review Board decision in *Young*, that these steps had been taken "without jurisdiction," rendering "the entire matter" of Young's dismissal a "nullity."

It is not without significance that the Review Board's decision in *Young*, although made on a preliminary basis, was reached when the Review Board had been convened to hear the Constable's substantive application for review and that the decision of the Review Board resulted in the final disposition of the matter.

### ***The Positions of the Parties***

Following the Review Board's July 31, 2002 release of its reasons in *Young v. Kentville* and following what are submitted to have been "ongoing discussions about the case, a number of

issues, and possible resolution”<sup>1</sup> between the parties, in June 2003, this present application was made to the Chair of the Review Board and followed up with the subsequent exchange of briefs.

***Town of Kentville***

The Applicant Town seeks a time extension for the period “from February 28, 2000 to June 2000” to complete the investigation of alleged *Police Act* defaults related to Constable Young and if granted, would purport retroactively, to validate the process followed in this case. In addition, granting the Town’s application would purport, again retroactively, to give jurisdiction to the Review Board and to two of the processes which preceded it; namely, the Chief’s recommendation to dismiss Constable Young and the Kentville Board of Police Commissioners’ decision to act on that recommendation.

The application follows an observation mooted in *Young*.

Significantly also, the present application itself was initiated and its course fixed, before the release of the decision of the Nova Scotia Court of Appeal in *Kingsbury v. Heighton [2003] N.S.J. No.277*, which suggests a significant reconsideration of aspects of the Police Review Board’s traditional conceptions of limits on its own jurisdiction and how that jurisdiction should be exercised.

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<sup>1</sup> I conclude from the fact that both the officer and the Town made this application without any dispute over the time which had passed between the decision of the Review Board and the time the application to extend time was in fact made, that this delay itself, is condoned by the parties.

The Town rests its legal position, adopted before the release of *Heighton*, on the grounds available under *regulation 21(3)* to seek an extension of time for completion of an investigation under the *Act*.

***Constable Young***

Significantly, the expressed foundation on which Constable Young himself resists the application in this case, is also entirely on statutorily available grounds; i.e., on the “reasonableness” of an extension being granted as requested and “undue prejudice” should the Town’s application be granted.

Thus, like the Town, the Constable’s primarily expressed position, suggests that the matter is to be resolved within the regime for extensions of time and the time restraints imposed by our own statute and regulations. The suggestion seems to be – both by the Town and the Constable – that the *Act* and regulations provide sufficient basis for the determination of this issue, uninformed by the application of common law principles.

The position of the officer does strike at more elemental concerns however.

At page 5 of his July 31, 2003 brief, Mr. David Fisher, counsel to Constable Young writes:

*Jurisdiction cannot be granted retroactively for something as serious and important as the dismissal of a police officer. It was never the intention of the extension provisions under the Regulations to retroactively grant the power to correct the jurisdictional error and allow a police officer to be terminated when the termination was without jurisdiction.*

Previously at page 3 in his initial July 23, 2003 brief, Mr. Fisher references Justice Moir's decision in *Symington v. Halifax (Regional Municipality) Police Service, [2002] N.S.J. No 112*, commenting that the purpose of *regulation 21(3)* is to give the police investigator an opportunity to extend the time limits before or after they expire and "is not and should not be an open-ended invitation to extend the time to investigate at any point."

However, the Constable does not particularize either of these arguments beyond this level.

Constable Young, for example, does not argue that the Chair is without jurisdiction to extend time in this matter because a finding has already been made, or that the decision of the Chief and the Commission is a nullity which cannot be revived. He does not submit that the Chair's jurisdiction to extend time is compromised in this case because the substantive matter has already been before the Review Board; or that he has already been compelled to appear before the Review Board on the substantive matter; or that the Town might have made its application in anticipation of that April 2002 appearance before the Review Board and having exposed him to that jeopardy, is now precluded from pressing to return to the Review Board.

Consequently, it is against the more limited background of the appropriate exercise of the Chair's authority under regulation 21(3) that I propose, therefore, to determine this matter.

Before doing so, however, I wish to point out that every fact to which I am privy points to the clear conclusion that, but for the direction of the Registrar and but for the fact that the force and the Town relied upon or reached the same conclusion as the Registrar, process against Constable Young would have-- and could have -- been executed as contemplated by the *Act* and regulations. Moreover, there is absolutely no evidence to suggest negligence or fault by the force, its officers, investigators or by the Town itself in any matter pertaining to the timing of the investigation at issue in this application.

I also note that the view of the Registrar as to the duration of a criminal investigation as she expressed it in the originating matter of this case and as later corrected in *Reid v. Rushton*, is a view which is exclusively in the interest of an officer charged contemporaneously with a criminal offence and a default under this *Act*. I would also venture to say that, reviewing the expressed decision of the Registrar, respecting as it did the procedural interests of the subject officer, it is difficult to avoid the conclusion that her direction, although wrong, was reasonable.

I make these observations because written submissions on behalf of Constable Young in this application include the submission that the Town should not have relied on the Registrar "for legal advice," as to its position on the duration of the suspension of the *Police Act*

investigation, by reason of the parallel criminal investigation. The implication of this is that the Town was somehow derelict in its own review of the regulations and the law.

Respectfully, I do not accept this submission.

The Town's conduct and view in respect of this matter was fully reasonable – albeit shown later to have been an incorrect one.

***This application***

Turning to the disposition of this application, I note that the Chair's authority to extend time is stated by regulation 21(3) as follows:

***21 (3) The investigation shall be completed expeditiously and in any case within sixty days of the date the written allegation is filed, except that the chair of the Review Board may, upon request before or after the time limit has expired, extend the time to complete the investigation where the chair of the Review Board is satisfied that there are reasonable grounds for granting the extension and the extension will not unduly prejudice any member.***

The point of departure in my consideration of this matter is the comment of Moir J. in *Symington v. Halifax (supra)* in which Justice Moir considered the complex balancing and counter balancing of interests reflected in the regulations under this *Act*.

Specifically, Justice Moir considered counsel's submission that the then Chair of the Review Board had erred in granting an extension where "...the purpose of the request and of the extension was only to bring the investigation into compliance." The Court found that through the course of the process, "What had to be clear to all was that an extension that would bring the investigation into compliance with s. 21(3) was what was being sought." In considering the Chair's decision to grant the extension in light of its clear effect, the Court concluded that granting an extension for this purpose alone, (provided the requirements of the regulation were otherwise met) was not a patently unreasonable exercise of the Chair's discretion.

This decision acknowledges that the regulations allow for an extension of the time limits imposed for the completion of an "investigation", to the time for the commencement of proceedings for disciplinary default not only in light of the actual requirements of the investigation itself, but can be regarded as having been established to provide flexibility to overcome even mistakes or oversights in the timing of the completion of the investigation. *Symington v. Halifax* also underlines the fact that such an application may be made retroactively.

Beyond this, there is nothing in the express language of *regulation 21(3)* that places any request for an extension of time in any different light by the fact that it is made following the expiry of the time limit sought to be extended. There is, equally, in my view, nothing which automatically compromises an application for an extension of time, even though that application is made some three years after the expiry of the limit fixed by the regulation.

Thus, the decision of the Court in *Symington*, balances the fine lines needed to be drawn to ensure effective processes for the investigation and hearing of alleged police officer defaults, with the strong protections to be afforded by law to police officers faced not only with potential damage to career or possible penalty, but even more importantly with loss of public office.

From this, I would conclude that *prima facie*, all other things being equal, if I consider the confines of *regulation 21(3)* to set out the boundaries of my authority, then I have the discretion whether or not to extend time for the purpose of affording compliance with the statute, provided, of course, that the regulation's requirements, that reasonable excuse for the request and no undue prejudice to the member resulting from its granting, can be demonstrated.

The Town submits that to consider these tests and to apply the result in granting or refusing the application is the sole power which I have under the regulation. It argues that questions which go beyond the plain steps of whether reasonable grounds exist for the granting of the extension and whether an extension might impose undue hardship on the officer under *regulation 21(3)*, do not form part of the authority of the Chair in applying the regulation.

Thus, the Town maintains that my role is exclusively, once the application for extension of time is made, to consider whether it be granted on these tests. At page 4 of its August 22, 2003 submission, the Town argues specifically that as granting the *regulation 21(3)* extension cures potential lost jurisdiction and "...a determination of the effect of this on subsequent steps of the Internal Discipline Process is not an issue that is before you." The brief continues by

stating “indeed, such an issue is likely one for the Review Board since it is beyond the scope of a *regulation 21(3)* application.”

I do not believe, however, that this is a complete statement of the discretion which is given to the Chair under *regulation 21(3)*. The Town reads the regulation as requiring the Chair to grant an extension of time for the completion of the investigation wherever there is reasonable excuse and no undue prejudice. I read the regulation as providing that while the Chair has discretion to extend time where these two pre-conditions are satisfied, the Chair is not necessarily obligated to exercise this discretion in granting the extension.

Ordinarily, of course, a principled exercise of discretion will be the predictable result of the two conditions being satisfied. However, the reservation of the power in the Chair to withhold an extension by the use of the word “may” (indeed, instead of a clear, directory “shall”) remains.

In *Kingsbury v. Heighton (supra)* the Court of Appeal had occasion to consider the dismissal of an officer where the Chief had failed to give notice to meet with the Chief under *regulation 21(8)* and had failed to meet with the officer, in advance of a meeting of the Town Police Commission dismissing him. The officer elected not to seek a review of the decision dismissing him to the Review Board but took the matter on judicial review, a process which culminated before the Court of Appeal.

In considering the availability of judicial review in *Heighton*, in light of the existence of the statutory review and appeal process to the Review Board available under the *Police Act*, the Court of Appeal took the occasion to comment on the extent of the Review Board's own authority to consider jurisdictional questions arising in the review and appeal process.

It observed:

“The Review Board’s powers have been set out and *are arguably wide enough to enable it to consider matters of jurisdiction*. The purpose of the legislation is a mandatory set of procedures to be followed in the recognition that police officers as holders of public office are entitled to protection against arbitrary discipline. *The body that the legislature has provided to which disciplined officers can appeal should be able to review and correct those procedures.*”  
[para 125].

Having made this observation and then considered the jurisdictional approach adopted by the Review Board in two earlier cases brought to the court's attention, including that of *Young v. Kentville 2002 NSPRB 99-0038*, the Court observed “...*whatever interpretation one puts on the provisions of the Police Act conferring jurisdiction on the Review Board, the Board has been unwilling to exercise relief akin to judicial review.*”[para 129].

This observation by the Court of Appeal may well have a sharp effect on the Review Board's future interpretation of its power to entertain broad matters of jurisdiction when argued before it. At this point, however, the decision of the Review Board in *Young* might now be decided, or how the decision of the Review Board hypothetically might have been reached in

light of the comments of the Court of Appeal in *Heighton*, the Review Board has exercised its power in rendering that decision. By any normal or usual standard, the Review Board's power to deal with or consider the Young matter is exhausted. The Review Board does not have statutory power to reconsider its own decisions. Likewise, it seems obvious that it cannot properly expect effectively to sit in appeal on itself.

Noting this, as stated above, the discretion which *regulation 21(3)* grants the Chair is one that "may" be exercised where the Chair is "satisfied" on the results of the two tests. It seems to me to be clear that the regulation leaves a residual area for the principled exercise of discretion, albeit something perhaps to be resorted to and arising only in an extraordinary case, even where the other two tests might be capable of being satisfied.

For the purpose of the exercise of discretion in a case such as this, I would conclude that the Chair's exercise of this more general discretion must also respect the objectives of the *Act*, which include, for the purposes of this decision, consciousness of the objective of finality, a measured, ordered process and an avoidance of the potential for conflicting decisions. These are, in my view, necessarily focuses of the Review Board's jurisdiction "to review and correct."

The Chair alone, of course, does not have this breadth of authority whether sitting under regulation 21(3) or otherwise under the *Act*. However, for the purposes of the regulation, in circumstances such as these, the Chair is constituted the gatekeeper to the Review Board's jurisdiction. In my opinion, these are, therefore, also objectives of which I should be mindful in

the exercise of the general discretion which *regulation 21(3)* vests in the Chair whether not to grant the extension.

Applying these principles, I cannot accept that however broadly and generously the power under the regulation to extend time for investigation vested in the Chair might be interpreted, that the discretion it creates, properly can be exercisable even after the matter has been heard and disposed of by the Review Board. I would conclude that such an exercise of discretion in the circumstances which apply here would not fall within the statutory purpose for which the power has been created.

There is value in finality of process under the *Police Act*. The relevant legislative purpose of the regime under the *Police Act* is not only to protect the interests of officers and to regulate the application of the police disciplinary power in the public interest. It is also to demonstrate a principled and predictable application of the discretion it vests in the Review Board, the Chair of the Review Board or any other authorities it empowers to exercise authority.

In coming to this conclusion, I specifically note Mr. Muttart's submission that Constable Young and his legal counsel had met with the Chief on at least two occasions June 21, 2000 and July 17, 2000 and never objected to delays in the completion of the investigation. I note that this simple observation is far from evidence of waiver on the part of the Constable, let alone whether such waiver might be effective to cure such a jurisdictional default.

I do not consider there to be a right to fault and do not consider to be relevant in this case, the mere failure of the officer to have objected to an irregularity in the course of the process against him or her, when considering the principles of whether my general jurisdiction to deny the extension ought to be exercised.

The Court of Appeal and the Supreme Court have repeatedly made clear that the role of the Police Review Board is to be closely conscious of the fact that a member's status as a public officer is in jeopardy in proceedings under this *Act*, and that procedural protections afforded to the member are to be closely respected. I do not accept that the mere failure to object can properly be considered somehow to even the positions of the parties, when considering whether to grant an extension under *regulation 21(3)*.

Manipulation of the *Act's* processes, even in the hard circumstances of this case, cannot be in the public interest. Preservation of a predictable, objective, principled application of the statute to review and correct the process of police oversight which the *Act* establishes, in my opinion, is essential to the legitimacy and effectiveness of the process.

It is not necessary for the purpose of this decision to decide the matter on the "reasonableness" and "undue prejudice" criteria of the regulation and I expressly do not. It may, however, go without saying that the decision of the Town to adopt or follow the legal position of the Registrar as to the duration of a suspension of a *Police Act* investigation was reasonable in this case.

Equally, I expressly do not make a finding on the issue of undue prejudice in this case. I do note Mr. Muttart has suggested that Constable Young would not suffer undue prejudice from an extension in this case because the extension sought is only three months in length. This is not a situation in which the simple duration of the extension of the order sought would, I would have thought, control a finding of whether there is undue prejudice to the member arising from an extension. However, I would also observe that a delay of more than three years in bringing an application to extend time – regardless of the objective reasonableness of the reason for the delay – to me, carries a strong onus to demonstrate no undue prejudice.

Finally, I would also make the observation that, to me, the simple fact that the officer had been suspended without a pay cheque in the intervening time period, as submitted by Mr. Fisher for Constable Young, could not, of itself, amount to undue prejudice (at least where the absence of pay has not demonstrably interfered with the officer's representation by counsel or in the absence of other evidence that the suspension of pay might otherwise practicably have substantially compromised his ability to defend himself).

In summary, therefore, I decline to grant the application to extend time in the exercise of the general discretion granted to the Chair under *regulation 21(3)* on the grounds set out.

Dated at Halifax, NS this 27<sup>th</sup> day of February, 2004.

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**MARION FERGUSON**  
**Chair, NS Police Review Board**

Distribution:

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Ms. Marion Ferguson - Member, NS Police Review Board

**File No.: 99-0038**

**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 application by the Town of Kentville Truro for an extension of time pursuant to regulation 21(3) of the *Police Act* to investigate the March 10, 1999 Form 8 complaint against Constable Fred Young alleging contravention of *Regulations 5(1)(a)(i) and 5(1)(a)(ii)* of the *Police Act*

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**D E C I S I O N**

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Ms. Marion Ferguson, Chair