

DECISION

File No. 02-0142

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 **Doreen Stokdijk**, requesting a review by the Nova Scotia Police Review Board of the January 13, 2003 decision of Chief Ambrose J. Heighton of the Stellarton Police Service

BEFORE: Ms. Marion Ferguson, Chair
Mr. Lester Jesudason, Alternate Chair
Mr. Orville Symonds, Member

COUNSEL: Ms. Doreen Stokdijk assisted by her husband Mr. Peter Stokdijk
Mr. David Fisher on behalf of Constable David Fulton

HEARING DATE: January 22, 2004

PLACE: Stellarton Council Chambers

DECISION DATE: Oral decision: January 22, 2004
Written Decision: July 30, 2004

This matter came before the Nova Scotia Police Review Board by way of a Notice of Review filed by Ms. Doreen Stokdijk, appealing Stellarton Police Chief Ambrose J. Heighton's January 23, 2003 decision that Constable David Fulton of the same police service had not breached the *Police Act* Code of Conduct in relation to an August 30, 2002 incident involving Ms. Stokdijk.

Prior to this matter coming to hearing, Constable Fulton's solicitor, Mr. David Fisher, raised a preliminary objection to the Review Board's jurisdiction to hear the complaint.

In particular, Mr. Fisher submitted that as the investigator appointed by the Chief had failed to serve a Form 8 (Notice of Allegation) on Constable Fulton, the Board is deprived of jurisdiction to hear this matter.

On January 22, 2004, after hearing the oral submissions of the parties, the Review Board denied the application and advised that written reasons would follow. Those reasons now follow.

Issue

Does the failure to serve a Form 8 deprive the Board of jurisdiction to consider this appeal?

Background

On October 28, 2002 Ms. Stokdijk filed a Form 5 public complaint against Constable Fulton in relation to the incident noted.

Regulation 7 of the *Act* provides that a member of the public may make a complaint against a police officer “ *within 30 days after the occurrence which gave rise to the complaint.*” As Ms. Stokdijk was outside that statutory 30 days for filing, at the same time she made her complaint, she also made an extension application under *Regulation 8* which provides:

- 8 (1) Despite Section 7, a complaint may be filed following the thirty-day period referred to in Section 7, but the complaint shall not be proceeded with unless the Review Board orders that the complaint be proceeded with.

On October 30 the Registrar of the Review Board wrote Chief Heighton, advising that if no response to the extension request were received by November 13, concurrence would be assumed. A copy of the complaint was included with the letter and all the parties (Ms. Stokdijk, Constable Fulton and his counsel) were copied on the correspondence.

No objection was received and so on November 14, the Registrar in her concurrent capacity as Chair of the Nova Scotia Police Commission, wrote the Chief setting out

the schedule for the processing of the complaint and its investigation; again with copies to the parties.

The Chief then appointed Sergeant Robert Stewart of the Westville Police Department to investigate the matter and his conclusion that no disciplinary default had occurred was subsequently upheld by the Chief, as set out in the January 13, 2003 Form 11 Disposition of Public Complaint.

It is from that decision that Ms. Stokdijk appeals to this Board.

Analysis

Regulation 12(4) of the Police Act states:

The investigator shall serve a notice of allegation in Form 8 of the Schedule on the member complained of at the time of the initial contact with the member and a copy of the notice shall be sent to the authority and the Commission. [emphasis supplied]

Constable Fulton's objection raises the issue of whether the language of the regulation imposes a mandatory or discretionary requirement and what effect non-compliance has on the Board's jurisdiction.

A review of the file materials confirms that a Form 8 was not served on Constable Fulton until March 10, 2003, more than four months following October 28, 2002 (*the date the complaint was made*) and more than six months after the alleged August 30, 2002 incident. Moreover, the Board notes that it was actually the Police Commission's investigator who ultimately served the Form 8 and not Sergeant Stewart.

In his evidence before the Board, Sergeant Stewart confirmed that he did not serve the Form 8 and that it was an "oversight" on his part. He testified that shortly after being appointed as the investigator, he spoke with both Ms. Stokdijk and Constable Fulton individually, "a number of times" by phone, in an effort to achieve an informal resolution. When these efforts failed, he met with the parties individually.

On December 23, 2002 he interviewed Constable Fulton at his home where he again reviewed the contents of the complaint with him, as he had previously done via telephone. At this time he also took a statement from the officer.

It was Sergeant Stewart's evidence that other than the non-service of the Form 8 he felt that he had completed the investigation "properly."

A reading of *Regulation 12(4)* clearly establishes that, on its terms, there is no discretion in the investigator not to issue a Form 8, as the provision states: "*The investigator*

shall serve a notice of allegation in Form 8 on the member complained of at the time of the initial contact with the member...”

Consequently, the steps taken to this point appear to breach the express language of the regulation in these respects: the time of service and by whom.

Moreover, section 34 of the *Police Act* states:

[34] *No member of the municipal police force is subject to reduction in rank, to dismissal, or to any other penalty for breach of the Code of Discipline except after proceedings have been taken in accordance with this Act and the regulations.*

Mr. Fisher argues that because the *Police Act* contains provisions addressing the “fundamental rights” of police officers, strict compliance with the statute and each of its regulations is required. He submits that as the Form 8 provides an officer with notice that he is being investigated and that he is under no obligation to say anything, a failure to comply with this mandatory step deprives the Board of jurisdiction to hear the appeal.

For her part, Ms. Stokdijk argues that this failure was “immaterial” as the officer received copies of the complaint when she filed her appeal and extension application and that he, as testified to by Sergeant Stewart, was similarly advised in telephone conversations with the Sergeant. It was the complainant’s submission that Constable Fulton had suffered no harm as a result of non- service of the Form 8.

In *White v. Dartmouth* (1991), 106 N.S.R. 2d 45, the Nova Scotia Supreme Court reviewed the purpose of the *Police Act*, stating at paragraph 26:

The Police Act does not expressly set out its purpose.

*However, **it is obvious from its broad scope that the Act clearly covers public protection from the abuse of police power, and protection of police officers from unwarranted disciplinary action.** While this dual purpose offers no clear guidance to the interpretive issue facing me, it does suggest a fair and proper balance be maintained between those two laudable objectives.*

The *Police Act Regulations* set out a number of procedures that are, in their language, mandatory and the Board accepts (and indeed has been strongly directed) that in many important aspects, such mandatory language requires absolute compliance with the requirements as set out.

A series of decisions in each of the Court of Appeal and the Supreme Court have repeatedly made clear that 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 the *Act* and that statutory procedural protections afforded the member are to be closely respected.

In *Heighton v. Kingbury* [2003] N.S.J. No. 277, the Court of Appeal had occasion to consider the dismissal of an officer where the Chief had failed to give notice of a meeting with him under Regulation 21(8) and indeed had failed to meet with the officer at all, in advance of a

meeting with the relevant Board of Police Commissioners 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.

At paragraph 96 of that decision Mr. Justice Chipman wrote:

[96] *In my opinion, these cases support the proposition that whenever in the Police Act or Regulations “shall” is used in connection with a material step in the procedure such step is mandatory, not directory. The omission of such step has the effect of depriving the board or the chief officer, as the case may be, of jurisdiction in the matter.These provisions are disciplinary in nature affecting the fundamental rights of the police officer. All material requirements must be complied with. The case law demonstrates that there is a clear statutory intent that a police officer is not to be disciplined except pursuant to the procedures set out in the Police Act and Regulations.*

[97] *I agree with the Chambers judge that the omission of the step in the disciplinary proceedings required by Regulation 21(8) has the effect of depriving the Board of jurisdiction to dismiss the Respondent ...*

Likewise, the earlier decision in *Ans v. Paul* (1980) 41 N.S.R. 2d 256 (S.C.), Morrison J. addressed the case of a police officer, alleged to have committed a disciplinary default, who had been given only 11 days notice of the hearing although the *Act* indicated “not less than 14 days.” Finding that the default was sufficient to deprive subsequent proceedings before the Board of jurisdiction, Morrison J. wrote:

Finally, I am satisfied that regulation 13(2) laid down a procedural rule that Form 3 must be served upon the accused member not less than fourteen days before the first date of hearing. In my opinion, this procedural rule must be considered as being mandatory (subject to the effective waiver under the regulation 41) and not directory only.

*Regulation 13(2) is a regulation authorized by statute and sets down a specific time limit in which notice must be given. **The powers conferred by these regulations are conferred upon the administration of the Halifax Police Department and they affect, because they are disciplinary in nature, the fundamental rights of the police officer affected. In such circumstances, all material requirements as to notice must be closely observed.***

*S. A. DeSmith in his Judicial review of Administrative Action (3rd Edition), says as follows at page 199: **“If procedural rules have been laid down(e.g., for the hearing of disciplinary charges against police officers), those rules will be treated as mandatory except in so far as they are of minor importance; and upon them there will be engrafted the implied requirements of natural justice.”** [emphasis supplied]*

However, in contrast to these identified strict procedural protections, Paul

Ceyssens in *Legal Aspects of Policing volume 2* (Earls court: loose leaf Edition to January 2003)

has also written at page 5-90:

“The Nova Scotia Supreme Court has ruled that a minor deviation was not fatal to the proceedings and emphasized the issue of whether fairness has been affected by the technical deficiency. In White v. Dartmouth(City) , a constable argued that she was convicted of a disciplinary offence for which she had not been charged: the form charging the offence described the correct offence but referred to the incorrect section in the regulation. On application for judicial review the court held the Board did not err in law in substituting the correct section number and finding the

constable guilty. **The error did not materially affect the procedural fairness of the hearing as the constable knew the case to meet and was fully prepared to respond.** [emphasis supplied]

As well, Professor David J. Mullan in *Administrative Law*, 3rd ed.(Carswell, 1996)

offers this commentary at page 318:

"The courts are reluctant to allow non-adherence to formalities and technical requirements to defeat the validity of decisions in a manner that is contrary to the public interest." [emphasis supplied]

In this case, consideration of the issue of the material nature of the failure to serve the Form 8, is central to a determination of whether the Board's jurisdiction has been lost.

Black's Law Dictionary (seventh edition) defines "material" as follows:

adj. 1. *Of or relating to matter; physical < material goods>*
 2. *Having some logical connection with the consequential facts< material evidence>* 3. *Of such nature that knowledge of the item would affect a person's decision making process; significant; essential< material alteration of the document>.*

In this context, the Board notes there is no evidence that had Constable Fulton been given the Form 8 at the time he was initially contacted by Sergeant Stewart, that he would have acted any differently in the subsequent investigation. Equally, while the Constable testified that he had not "seen" a Form 8 to date in his career, nor had he ever been given a copy of the

Police Act, there was no evidence that he did not understand that a complaint had been made against him, that it was under the *Police Act* and that he did not know he was not required to make a statement. He is an officer of 10 years standing.

These facts are the more striking because the evidence of Constable Fulton followed the evidence of investigator Sergeant Stewart that he was satisfied that the officer appeared to fully understand the circumstances of his investigation and, in the investigator's view, the Constable's rights had not been prejudiced.

Indeed, the Board is satisfied that even before the time the notice ought to have been given, the content of the complaint had already been drawn to the attention of the Constable and his counsel by the Police Commission on or about October 30, 2002, 2 days after the complaint was filed. The Constable received further information in early December 2002, when he was contacted by the investigator to discuss possible informal resolution of the matter and thus the Board finds he had de facto notice of the complaint against him, along with its nature and particulars. *(The Board notes that if strict compliance with the Act had been realized, it would have presumably been at this juncture, this time of "initial contact" (which the Board is given to understand was by telephone) that the Form 8 should have been served by Sergeant Stewart, raising other practical difficulties.)*

Moreover, while the officer provided a statement (which was not in evidence before the Board on this proceeding), there is no evidence to suggest either that, the absence of service of the Form 8 in particular, induced him to give the statement or, that the officer would not have given a statement had he been served with the Form. Unlike the officer in *Heighton v. Kingsbury*, Constable Fulton's ability to fairly and fully participate in the subsequent investigation and process, does not appear to have been prejudiced or diminished by the oversight.

In the view of the Board, each of these facts is significant to the assessment of the materiality of the Form 8 notice in this complaint and further finds, that in this particular case, the sole matter to which "material" is relevant, is the protection of the officer; the second "laudable" objective of the *Act*, as stated per Saunders J. in *White* above.

While the Board considers that the failure of the investigator to be informed of the current terms of the statute and the consequent failure to serve the Form 8 is unfortunate, the Board cannot consider that in the circumstances of this case, the failure is "material" as to the term as employed in the passage cited above from *Heighton*. While *Regulation 12* may be attributed to serving the purpose of protecting the rights of a police officer as an office holder, in at least the circumstances of this case, it cannot be said that on the facts as set out above, it has been demonstrated that, unlike the officer in *Heighton*, Constable Fulton's position has been compromised, prejudiced or harmed by the failure to serve the Form 8.

For all the foregoing reasons, the application made by Constable Fulton is denied.

The matter will proceed to hearing of the merits of the appeal.

There will be no award as to costs.

Dated at Halifax, Nova Scotia this 30th day of July, 2004.

MARION FERGUSON
Chair

LESTER JESUDATON
Alternate Chair

ORVILLE SYMONDS
Member

Distribution List

Ms. Doreen Stokdijk - Complainant
Constable David Fulton - Stellarton Police Department
Mr. David Fisher - Solicitor for the named officer
Chief Ambrose Heighton - Stellarton Police Department
Marion Ferguson - Chair, NS Police Review Board
Lester Jesudason - Alternate Chair, NS Police Review Board
Orville Symonds - Member, NS Police Review Board

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