

DECISION

File No. 03-0077

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 **AHIGBE JAMES**, Complainant against **SERGEANT KEVIN SMITH**, of the Halifax Regional Police, requesting a review of a decision made by Deputy Chief Chris McNeil on February 10, 2004

BEFORE: Mr. Lester Jesudason, Alternate Chair
Mr. Peter James, Member
Mr. Charles Schafer, Member

COUNSEL: Mr. Ahigbe James on behalf of himself
Mr. Patrick Duncan on behalf of Sergeant Kevin Smith
Ms. Karen Brown on behalf of the Halifax Regional Municipality

HEARING DATE: June 29, 2005

PLACE: Nova Scotia Police Commission Office, Halifax, Nova Scotia

DECISION DATE: October 28, 2005

DECISION: Appeal dismissed

This matter came before the Nova Scotia Police Review Board sitting at Halifax, Nova Scotia on June 29, 2004 by way of an appeal filed by Ahigbe James, Complainant, requesting a review of the Decision made by Deputy Chief Chris McNeil of the Halifax Regional Police Department on February 10, 2004 which dismissed Mr. James' complaint against Sergeant Kevin Smith of the Halifax Regional Police.

In that decision, Deputy Chief McNeil found that Sergeant Smith did not engage in discreditable conduct by 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 contrary to s. 5(1)(a)(i) of the Regulations passed pursuant to the *Police Act* and did not engage in discreditable conduct by being discourteous or uncivil to any member of the public having regard to all the circumstances contrary to s. 5(1)(a)(v) of the regulations made pursuant to the *Police Act*.

EVIDENCE:

The Board heard evidence from Denice Irene Chiasson, Mr. James, Derrick Burgess, Sgt. Smith and Constable Paul DesRochers. Their evidence is briefly summarized as follows:

Denice Irene Chiasson:

Ms. Chiasson has been the Records Supervisor at the Halifax Regional Police Department for approximately two years. In 2003, she was approached by Mr. James who

requested that his records be purged in relation to an uttering threats charge. She processed that request and it took approximately eight months for the records to be purged from the nation-wide computer based records system known as CPIC. Ms. Chiasson indicated that while the CPIC records were purged, the internal records of the Halifax Police Department known as RAPID would still note that Mr. James had been charged with uttering threats.

The Board was advised that Mr. James was acquitted in relation to a charge of uttering threats. Indeed, Mr. Duncan stipulated that Mr. James' uttering threats charge was dismissed and was collateral to the matter at hand. The Board fully accepts that this charge is not an issue to the incident in question and considers it of no relevance whatsoever in relation to the matter before it.

Ahigbe James:

During his direct evidence, Mr. James indicated that on the evening of May 24, 2005, he was at a night club. At approximately 2:30 a.m. on May 25th, he received a call from a friend of his who was at the Liquor Dome who requested that Mr. James pick him up. Mr. James indicated he drove his vehicle to Argyle Street and discovered there was no parking on both sides of the street. He therefore decided to park in front of the Argyle Bar and Grill hoping to see his friend. He indicated that he had his music turned on in his car and that it was quite loud.

At this point, Mr. James testified that Sergeant Smith came over to his vehicle and said words to the effect of, “move your fucking car” three times. Mr. James indicated that he eventually replied with words to the effect of “screw you” and drove off. He left the area and, as he arrived near the Delta Barrington, he noticed a police car behind him. The police car pulled him over and Constable DesRochers came over and asked to see his driver’s license, registration and insurance papers. Mr. James inquired as to why he was being pulled over to which Constable DesRochers replied that Mr. James had made an illegal left-hand turn and also indicated that he had been asked to pull Mr. James over by another officer.

At this point, Mr. James decided to turn on a recording device he carried with him. Mr. James recorded his conversation with Cst. DesRochers and that recording was played into the record of these proceedings during this hearing. Mr. James gave Constable DesRochers his license and was issued a ticket for failing to comply with the directions of a police officer. Mr. James claimed that he extended his hand to take the ticket at which point Constable DesRochers shone a flashlight in his eyes. Mr. James testified that he asked Constable DesRochers to stop shining the flashlight in his eyes and was eventually given a ticket by Constable DesRochers.

During cross-examination, Mr. James acknowledged that the Liquor Dome area in the early morning hours is very busy and that when he arrived in the area, the parking spaces on both sides of Argyle Street were full. Mr. James indicated that he parked parallel to one of the cars

and had his car stopped in a full lane of traffic. He agreed that his music was quite loud and he had to turn it down to hear Sergeant Smith.

Mr. James indicated that Sergeant Smith approached his passenger side and that the first words out of his mouth were “move the fucking car” which he subsequently repeated. He agreed that he was upset during his conversation with Constable DesRochers and raised his voice somewhat. He also agreed that he was upset by the way Sergeant Smith spoke to him.

After being stopped by Constable DesRochers and receiving the ticket, Mr. James indicated that he went back to Argyle Street to discuss the matter with Sergeant Smith. He indicated that he asked Sergeant Smith if he had requested that Constable DesRochers give him a ticket and that Sergeant Smith acknowledged that he did.

Derrick Burgess:

Mr. Derrick Burgess was running a rickshaw in the Liquor Dome area on the morning in question. He did not know Sergeant Smith or Mr. James but observed their interaction.

According to Mr. Burgess, he noticed that Mr. James’ vehicle was parked in the middle of Argyle Street for a few minutes. At that point, Sergeant Smith approached Mr. James’ vehicle and, according to Mr. Burgess, politely said to the driver, “could you please move your vehicle”.

Mr. Burgess indicates that he subsequently heard shouting from inside the vehicle and the driver using the word, “fuck”. The driver then drove away from the area.

Mr. Burgess indicated that the driver came back a second time and walked towards the Liquor Dome doors. However, he did not recall any further interaction between the driver and Sergeant Smith after this.

Mr. Burgess testified that he and his rickshaw partner were discussing the incident when Sergeant Smith approached him and asked him if he had observed what had happened. Mr. Burgess indicated that he did and gave a statement to Sergeant Smith as to what he had observed.

During cross-examination, Mr. Burgess indicated he was approximately thirty feet away from Mr. James’ vehicle. He indicated that his rickshaw partner had not been paying attention to the incident and that Sergeant Smith did not ask his partner about it.

Apparently, Mr. Burgess failed to show up for the Court appearance in relation to the ticket issued to Mr. James but denied that he had ever been threatened by the police to be arrested if he failed to show. He indicated that he wrote down what happened and gave the statement to Sergeant Smith. He again confirmed that he clearly heard the ‘F’ word being used

by Mr. James and disagreed with Mr. James' assertion that Sergeant Smith had told him what to say in his statement.

Sergeant Kevin Smith:

During his direct examination, Sergeant Smith indicated that he has been a member of the Halifax Police Department for seventeen years. In the early morning of May 25th, he was working an extra duty job as a patrol officer in front of the drinking establishments known as My Apartment and Lawrence of Oreganos. He indicated that the vehicle and pedestrian traffic in that area is heavy at that time of the day since the Liquor Dome area is open later than some of the other drinking establishments.

As an extra duty officer, he indicated that he would often have to deal with problems in keeping the traffic area clear. According to Sergeant Smith, when he notices that a vehicle has been in the area parked for an excessive period of time, he steps in to get the driver to move the vehicle. Typically, he gets compliance which is his objective.

In the case involving Mr. James, he noted that the vehicle was double parked and had been there for several minutes. He indicated that his concern was for pedestrians who cross the lane and that Mr. James' vehicle made it a very narrow lane of traffic. He was concerned that

intoxicated pedestrians could walk out into the lane of traffic without providing adequate notice to drivers. He therefore decided to get Mr. James to move his vehicle.

Sergeant Smith approached Mr. James vehicle which had its stereo up loud. He told Mr. James he could not park his vehicle in the area and had to move it. According to Sergeant Smith, he had to raise his voice because of the stereo volume and, while he could not remember his specific words, he used words to the effect of, “could you please move your vehicle” or “you can’t park there, sir”. Mr. James did not respond, or even acknowledge his presence, so Sergeant Smith repeated his words. Again, he received no acknowledgment and he therefore concluded that Mr. James was deliberately ignoring him.

At that point, Sergeant Smith whistled and Mr. James turned to face him and said, “What do you want?”. Sergeant Smith replied that Mr. James would have to move his vehicle and requested that he move his vehicle to some parking spaces which were in front of the National Bank. According to Sergeant Smith, Mr. James then told him to “go away”. Sergeant Smith indicated that he was somewhat taken back by this comment but raised his voice and said he would go away but it might be with a ticket in his hand and Mr. James’ vehicle being towed. At that point, Sergeant Smith indicated that Mr. James said words to the effect of, “you don’t know who you are fucking dealing with” to which Sergeant Smith again asked him to move his

vehicle. Again, Mr. James said, “you don’t know who you are fucking dealing with”.

Since he did not receive compliance, Sergeant Smith decided he would have to do a formal traffic stop and asked Mr. James to pull his vehicle out ahead to the curb. Mr. James did not agree to this request so Sergeant Smith attempted to walk in front of Mr. James’ vehicle.

Sergeant Smith then claims that Mr. James sped off clipping him on his left hip area. Sergeant Smith took the license plate number and called it in on the radio requesting that other vehicles respond. Constable DesRochers responded and Sergeant Smith requested that he stop Mr. James’ vehicle. The transcript of the radio communication between Sergeant Smith and Constable DesRochers was introduced as Exhibit “6”.

Sergeant Smith indicated that he was approached again by Mr. James a few minutes later at which time Mr. James asked him if he was the person who had asked Constable DesRochers to issue him the ticket. When Sergeant Smith acknowledged that he was, Mr. James indicated that he was going to beat him in Court and embarrass him. After this, Mr. James left the area.

Apparently, one of the bar door staff had indicated to Sergeant Smith that a witness had observed the interaction. After Mr. James left for the second time, Sergeant Smith decided to find out who the witness was. Upon learning that it was Mr. Burgess, he decided to approach Mr. Burgess to determine what he had observed. He subsequently took a statement from Mr. Burgess and read it back to him.

Sergeant Smith vehemently denied that he ever used the words “move your fucking vehicle” to Mr. James.

During cross-examination, Sergeant Smith indicated that he did not have any tickets on him on the morning in question. He indicated that he usually would not have to write parking tickets and that his main concern was keeping the traffic lanes clear. He indicated the bar door staff had pointed out Mr. Burgess to him and that the reason he did not originally approach Mr. Burgess was because he was not concerned that he might need a witness. He indicated that it was only after Mr. James approached him for the second time that he decided it would be beneficial to have an independent witness.

Sergeant Smith indicated that he did not charge Mr. James with hitting him with his vehicle because he was not injured and did not want to make a big deal about it. Sergeant Smith acknowledged that he has, on other occasions, used the “f” word in the course of his police duties since profanity is sometimes used as a tool by police officers. However, he indicated that, in this particular case, he would have no reason to use the “f” word as doing so would invite a confrontation. According to Sergeant Smith, his sole intention was to simply get Mr. James to move his vehicle.

Constable Paul DesRochers:

Constable DesRochers indicated that he was on patrol on the night in question when he received a broadcast of a license plate number by Sergeant Smith over the radio along with a request to stop the vehicle. He responded to that request. He could not recall if Sergeant Smith advised him of the reason why he wanted the vehicle stopped although he agreed it would be typical to be advised of the reason.

When Mr. James' recording of the traffic stop was played, Constable DesRochers agreed that, on the recording, he advised Mr. James that he had pulled him over for doing an illegal left-hand turn and was not aware of the reason Sergeant Smith asked him to originally pull his vehicle over. He also agreed that Sergeant Smith had never told him that Mr. James had hit him with his vehicle. When he was asked why he did not issue a ticket to Mr. James for doing an illegal left-hand turn, Constable Smith indicated that he used his discretion and simply decided to charge Mr. James for failing to comply with the direction of a police officer. According to Constable DesRochers, Mr. James was very confrontational during the stop. Constable DesRochers said he did not want things to escalate and simply wanted to give Mr. James a ticket. Constable DesRochers said he was simply "doing his job". He also agreed that he did not recall Sergeant Smith ever telling him that Mr. James had used profanity.

ISSUES:

1. Did Sergeant Smith engage in discreditable conduct by acting in a discreditable manner or in a manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the police force contrary to regulation 5(1)(a)(i) of the *Police Act*?
2. Did Sergeant Smith engage in discreditable conduct by being discourteous or uncivil to Mr. James having regard to all the circumstances contrary to s. 5(1)(a)(v) of the *Police Act*?

DISPOSITION:

The test for “discreditable conduct” is primarily an objective one. Specifically, in Paul Ceysens’, Legal Aspects of Policing, the author states on pages 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 judgment, 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.”

In this case, Sergeant Smith and Mr. James have two very different versions of the events which transpired in the early morning hours of May 25th, 2005. Certainly, if the evidence established on a balance of probabilities that Mr. James’ version was correct whereby Sergeant Smith simply came up to his vehicle and proceeded to use profanity with him, the Board would be inclined to conclude that Sergeant Smith’s behavior constituted discreditable conduct. However, Sergeant Smith vehemently denies that, at any time, he used profanity with Mr. James. To the contrary, Sergeant Smith’s evidence suggests that he politely asked Mr. James to move his vehicle and that it was Mr. James who was being non-compliant and made use of profanity. The Board also notes that the one independent witness, Derrick Burgess, gave evidence which largely corroborated Sergeant Smith’s evidence that the request he made to Mr. James to move his vehicle was done in a polite manner.

Mr. James has the legal burden of establishing that Sergeant Smith committed a disciplinary default on the balance of probabilities. While the board commends Mr. James for his efforts at the hearing, unfortunately for him, the Board cannot accept his evidence over that of Sergeant Smith and particularly that of the independent witness, Derrick Burgess. As such the Board finds that Mr. James has not discharged his burden of establishing that Sergeant Smith committed a disciplinary default contrary to the Regulations passed pursuant to the *Police Act*. Consequently, his complaint is hereby dismissed without costs to any party.

Dated at Halifax, Nova Scotia this 28th day of October, 2005.

LESTER JESUDASON

Alternate Chair

PETER JAMES

Member

CHARLES SCHAFFER

Member

Distribution

Mr. Ahigbe James - Complainant

Chief Frank Beazley - HRP

D/Chief Chistopher McNeil - HRP

Constable Kevin Smith - HRP

Mr. Patrick Duncan - Solicitor on behalf of the named officers

Ms. Karen Brown - Solicitor on behalf of the Halifax Regional Municipality

Mr. Charles Schafer - Member, NS Police Review Board

Mr. Lester Jesudason - Alternate Chair, NS Police Review Board

Mr. Peter James - Member, NS Police Review Board

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