#1757

IN THE MATTER OF: The Law Enforcement Review Act

BETWEEN:

D. R.

Complainant,

- and -

Sgt S. F. C.

Cst D. K. T.

Respondents.

DECISION DELIVERED AT THE CITY OF BRANDON
IN THE PROVINCE OF MANITOBA
ON THE 09th DAY OF MARCH A.D. 1994
BY THE HONOURABLE JUDGE D.D.S. COPPLEMAN

APPEARANCES:

J. Janzen - for the Respondents

D. R.

Note: For the purposes of distribution, personal information has been removed by the Commissioner.

This is an appeal under Section 13(2) of The Law Enforcement Review Act (ACT).

The commissioner dismissed the complaint under paragraph 13(1)(a) and 13(1)(c) of the Act.

This is not a hearing into the merits of the complaint. Under subsection 13(3) only submissions may be made on the review. No witnesses may be called or additional evidence given. The Act provides as follows:

> "On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner
>
> (a) to refer the complaint for a hearing; or
>
> (b) to take such action under this Act respecting the complaint as the provincial judge directs."

Under subsection 13(4) the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action. The standard of proof is the civil standard - on a balance or preponderance of probabilities.

Despite a reference in subsection 13(4.1) to a hearing, this is not a hearing as defined in subsection 1(1) of the Act.

Unless I am satisfied that an Order would be ineffectual I am required to order a ban on the publication of the respondents' names. After inquiring of the parties as to their positions regarding such a ban it was so ordered.

Section 29 of the Act enumerates the complaints that may be made against police officers. The complainant enumerated the following complaints against the respondents. As numbered in the Act they are as follows:

(a) Abuse of authority

- (i) making an arrest without reasonable and probable grounds
- (iii) using oppressive or abusive conduct or language
- (iv) being discourteous or uncivil

FACTS

A review of the circumstances leading up to the incidents which precipitated the complaint would be useful.

In August of 1991 the complainant received an Offence Notice or parking ticket under the City of Brandon by-law for a parking meter violation. The time on the meter had expired. The ticket indicated that the fine would be $5.00 if paid within seven days and if paid within the next seven days the fine would be $10.00, otherwise the fine was $20.00.

In January of 1992 the complainant received a second parking ticket for facing the wrong direction on the street. Again the ticket indicated that if paid within seven days the fine would be $10.00 and if paid within the next seven days, the fine would be $20.00 otherwise the fine would be $40.00.

The complainant did not pay the fines and default convictions were recorded against him in both matters. The complainant received notice of both default convictions. This notice indicated that the Fine Option Program was available to him. It was also indicated that failure to pay the fines may result in alternate action being taken.

The complainant still did not pay the fines and warrants of arrest and committal were issued. The complainant was notified in a letter by a Justice of the Peace that the warrants were issued and suggested that if he would pay the fines or register for the Fine Option Program that the warrants would not be executed.

There is evidence on the Commissioner's file to indicate that the complainant was notified by the police on at least one occasion prior to his arrest that the police had the warrants and would be executing them unless the fines were paid.

On November 09, 1992 at around 11:30 am Cst. T. of the Brandon Police Service then called Brandon City Police, attended the residence of the complainant. The total amount owing at the time was $60.00 and in default a maximum of nine days incarceration. There is evidence that Cst. T. perceived Mr. R. to be extremely

uncooperative and belligerent in his manner. When Cst. T. was advised by Mr. R that young children were expected for lunch he telephoned his superior for advice. Cst. T. apparently was under the impression that the oldest of the two children was twelve years old. He so advised his superior who made a comment to the effect that the constable should go ahead and arrest Mr. R. because under the current Child and Family Services Act, a twelve year old child could be left alone for lunch.

It should be noted that Mr. R. 's wife was away at classes in Brandon and he declined to call her out of classes to advise her of his situation.

In any event, Mr. R. left a note for the children and went with Cst. Thompson. By that time another constable had arrived but he played no part in the proceedings.

Mr. R. was taken to the Brandon Police Station where he was again given the option of paying the fines or registering for the Fine Option Program. He declined to do either.

Mr. R. was given all the normal Charter and other warnings while in the police car and while at the Brandon Police station attempted to contact his lawyer on at least one occasion but without success. He was then taken to Brandon Correctional Institute and lodged.

After his release from Brandon Correctional Institution he apparently returned home and took his wife to a doctor's appointment. On returning home again Sgt. C. and another officer were in his yard. Sgt. C. advised Mr. R. that he was unaware that Mr. R had been released and that he was going to explain to Mrs. R where her husband was taken. He also said that he was concerned about the children. There was an argument about the children's welfare and other matters. Sgt. C. is alleged to have said words which if true would be at least discourteous and uncivil within the meaning of the Act.

Mr. R. lodged a complaint under the Act and it was filed December 2, 1992. The incident had occurred November 9, 1992 and the complaint was lodged within the required period. It would appear from the Commissioner's file that the investigator, Mr. D H. first interviewed Mr. R. on December 15, 1992.

There are notes on the file, not apparently in Mr. H. handwriting of an interview with Cst. T. in March of 1993. Mr. H. again interviewed Mr. R. on March 11, 1993. Mr. H. 's notes indicate Sgt. C. was off work with leg injuries at that time. There is no other indication that any attempt had been made to interview Sgt. C.

On March 26, 1993 the Commissioner wrote to Mr. R. advising him that the complaint was being dismissed pursuant to subsection 13(1) of the Act "as vexatious and without sufficient evidence in support of the complaint to justify referral to a public hearing".

As indicated earlier Mr. R. appealed by way of letter to the Commissioner on April 6, 1993. On May 7, 1993 the Commissioner wrote to the Chief Judge of the Provincial Court requesting that a judge be assigned for hearing the review. On June 3, 1993 the Commissioner wrote to the Chief of Police of Brandon Police Services advising of the filing of the appeal and also the Commissioner wrote to Mr. R. advising that he had referred the matter to the Chief Judge of the Provincial Court for his consideration. The next item on the Commissioner's file is a note dated October 14, 1993, indicating that the file is being sent to C. A. the Director of Judicial Support for information of the judge at the hearing of the review. And lastly a letter from C. A. to Mr. R dated October 18, 1993 advising him that the appeal had been scheduled for Tuesday, January 18, 1994 at 2 p.m. in Courtroom 210 in the Brandon Court House. The appeal began on that date and was continued and concluded in the afternoon of January 27, 1994.

COMPLAINANT'S POSITION

Mr. R. contended that the decision of the Commissioner did not address the following three areas:

(a) The lack of due process

(b) The officer's behaviour

(c) Violation of his rights in that the incarceration took place only weeks before the law was changed.

Mr. R. also complained that the investigator, Mr. D. H. produced findings which were misleading, inaccurate and biased position

of the respondents. He pointed out that the investigator interviewed him twice and appears not to have interviewed Sgt. C. at all nor perhaps Cst. T. . He takes issue with the characterization of his actions by the investigator.

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The complainant did not seriously press the argument that due process was not followed, except to note the subsequent change in legislation deleting the imposition of jail in default of paying a fine under the Highway Traffic Act. This he says violates his rights, since the new legislation took effect only a few weeks after these events.

RESPONDENT'S POSITION

The respondents were represented by Mr. J. J. who provided for the Review Hearing a copy of the judgment of the Supreme Court of Canada in re *Maple Lodge Farms Ltd and Government of Canada et al* reported at 137 DLR 3rd p 558 and also a copy of the decision of the Honourable A. R. Rich, Provincial Judge, after a hearing on a review of a commissioner's decision. The judge's decision is dated August 9, 1993.

Mr. J. 's position on behalf of the respondents was that the standard of proof, while on the balance of probabilities, must be high on that standard even although it is not standard of proof required in criminal

matters. Mr. J. submitted that the Commissioner has a discretion given to him by the wording of the Act and as long as he did not err in the exercise of his discretion, the review must uphold his decision. Mr. J. also submitted that the conduct of the complainant is a proper matter for the Commissioner to consider in arriving at his decision.

Asking what is the error of the Commissioner, Mr. J. pointed out that the warrant was properly completed and that due process was indeed observed as it was required at the time. Mr. J. suggested that the police extended courtesies to Mr. R. to which he was not entitled. For example Cst. T. advised him of the alternatives to arrest in that he was able at that point still to pay the fine or to indicate he would register for the fine option program. Cst. T. also contacted Sgt. C. his superior, with respect to the children, implying of course that Cst. T. had no responsibility to be concerned about the children at that time. And the third courtesy extended to Mr. R. was that the officers took Mr. R. to the Brandon Police station where again the alternatives to incarceration were offered.

Mr. J. submitted that there was no bias to be found in the file or in the reports given to the Commissioner and that the evidence before the Commissioner could not lead to any other conclusion than that R. was uncooperative, unreasonable and the Commissioner's decision to dismiss the complaint must be supported.

DISCUSSION AND DECISION

The Act provides that the Commissioner may attempt to resolve the complaint informally. This was suggested to the complainant who declined on the basis that he and the respondents were too far apart as to their respective positions regarding the facts. The Commissioner was then required by the Act either to dismiss the complaint or to order a formal hearing.

There is however one other avenue open to the Commissioner under the Act which may be resorted to in appropriate circumstances. Section 22 of the Act reads as follows:

> "Where the Commissioner identifies any organization or administrative practices of a police department which may have caused or contributed to an alleged disciplinary default, the Commissioner may recommend appropriate changes to the Chief of Police and to the municipal authority which governs the department."

This section seems to be an orphan: that is, the Commissioner does not need to make a determination to dismiss the complaint or refer it to a hearing in order to take action under this section. There need be no determination that there has been a disciplinary default. It is strange however that this section is placed in a position in the Act after sections dealing with the decision to hold a hearing and before the procedural sections dealing with the date, place and time of the hearing.

This section says "alleged disciplinary default". The legislation obviously contemplates that the Commissioner may take this action even

before adjudicating on the allegations of disciplinary default. This action may be taken it seems to me even although there has been no disciplinary default found by the Commissioner. It is also an action which the Commissioner can take and which is referred to under paragraph 13(3)(b) of the Act.

What is the basis for the Commissioner's decision? The Commissioner must be "satisfied" as stated in section 13(1). The respondents submitted that as long as the Commissioner did not err in the exercise of his discretion I must uphold his decision. The decision is based on information the Commissioner gathers in his investigation. If the investigation is deficient in some substantial way then the Commissioner's decision is suspect. Indeed that is the thrust of the complainant's argument. It has some validity in that Sgt. C. does not appear to have been interviewed at all and the notes of the interview of Cst. T. , if that is what they are, are not in the handwriting of the investigator, Mr. H.

Mr. H. seems to have concentrated on trying to placate an irascible complainant rather than objectively searching out facts on which the Commissioner could base his decision.

My task is to determine whether or not the Commissioner erred in arriving at the decision not to proceed further. If on the balance of probabilities I find the Commissioner erred, I can make one of two orders. I can order a full hearing or I can order that the Commissioner take some other action as provided for in the Act.

It seems to me that having based his decision on an incomplete investigation the Commissioner did indeed err. The attitude of the complainant may indeed have been intransigent. That does not provide a basis for deciding not to proceed. What should have been the concern of the investigator and subsequently the Commissioner is the position of the children involved.

Certainly the complainant contributed to the situation by his own actions. The arresting officer was concerned enough to discuss the matter of the children with his immediate superior. Sgt. C. had apparently been given advice that a child of a certain age was able to be left alone and to care for younger children. He passed this information on to Cst. T. instructing him to complete the arrest.

When I questioned the respondent's counsel as to whether or not the Brandon Police Service had any policy regarding a situation where the arrest of a care giver would leave young children without supervision, Mr. J. was somewhat taken by surprise but said he knew of no such policy. He repeated his submission that the complainant was responsible for the children being left alone implying that it was no concern of the police once the officer was told one of the children was twelve years of age. There is no suggestion that the police did not know the other child was under twelve years of age.

The complainant denies telling Cst. T. that the elder of the two children was twelve years of age at the time because she really was only eleven years old. That does not affect my area of concern here.

Mr. J. finds support for his position, and that of Sgt. C. in the Child and Family Services Act SM 1985-86 C8 CCSM Cap 80. Presumably he refers to subsection 17(1) which defines a child in need of protection as one who, among others

> "(g) being under the age of twelve years is left unattended and without reasonable provision being made for the supervision and safety of the child."

Is leaving an eight year old child alone with an eleven or twelve child under these circumstances reasonable? The complainant said he had to leave a note for the children suggesting what they could eat for lunch. The children were expecting their father to be home to prepare lunch for them. I find that the respondent's position can take no comfort from this legislation. The Commissioner should take advantage of the provision of section 22 and recommend to Brandon Police Service and the Brandon Chief of Police that a policy be developed in which officers are given guidance in situations where the arrest of an adult, parent or a caregiver would result in children being left alone.

Mr. J. urged me to consider and apply the principles pronounced by The Supreme Court of Canada in *Re Maple Lodge Farms Ltd. and Government of Canada et al* 137 D.L.R. (3rd) p 558 at p 562. Having read and considered the decision it is my opinion that the type of

legislation being considered by the Court in that instance is quite dissimilar to that under consideration here. We are dealing with legislation regarding the adjudicating of complaints against police officers. The actions of the Commissioner under this Act in no way parallel the action of the Federal Minister in deciding whether or not to issue an import permit under the Export and Imports Act R.S.C. 1970 C.E.-17.

The facts related by The Honourable A. A. Rich, J. in considering the complaint of S. N. are so different as to render that decision quite irrelevant here. In that situation there was no dispute as to the facts. In this case there is. In the N. complaint no one was affected by the police officer's actions except the complainant herself. In this situation young children were affected.

Since this is new legislation it would appear to be little if any jurisprudence in which it has been considered. The Commissioner is in a unique position. He must exercise his discretion judicially. He is also to conduct an investigation into the complaint using whatever resources he considers necessary in the process. It seems to me that where a citizen complains about the actions of a police officer, the Commissioner's investigation should be thorough, impartial and expeditious.

As I noted elsewhere, the investigation lacked the depth one would expect in this situation. There are suspicions it lacked impartiality, however, there is insufficient evidence to state with any certainty that the investigator was biased in his reports.

The length of time it took for the complaint to be dealt with by the Commissioner was, relative to the N. complaint, quite excessive. In this situation the complaint was received by the Commissioner December 2, 1992. The Commissioner's adjudication was completed March 26, 1993. Where the greatest delay occurred was in the appeal process. The complainant gave notice of appeal on April 6, 1993. The Commissioner notified the Chief Judge's office on May 7, 1993 and requested that a judge be assigned to hear the appeal. The appeal was not scheduled to be heard until January 18, 1994. It was adjourned to and completed on January 27, 1994.

The length of time between the notification to the Chief Judge's office and the date for hearing is unconscionable, especially in view of the time line of the N. matter. Ms. N. 's complaint was received by the Commissioner February 22, 1993. His decision was rendered May 5, 1993. The complainant appealed May 28, 1993 and the date for hearing was fixed as July 21, 1993. The reasons for this delay should be investigated perhaps more thoroughly and expeditiously than the original complaint.

With respect then to the disposition of the appeal I find therefore as follows:

1. That due process was observed as the law stood at the time of the arrest. The officer had reasonable and probable grounds to execute the arrest warrant.

2. The behaviour of Cst. T. was beyond reproach. Sgt. C. acted in accordance with the information he had as to the state of the law, given the erroneous information as to the age of the eldest child. He apparently acted in accordance with the instructions he had received from his superior. The abuse of authority occurred as a result of this erroneous interpretation of the Child and Family Services Act.

3. The fact that the law was changed shortly after his arrest does not constitute a violation of the rights of the complainant.

The Commissioner is therefore ordered to take action under section 22 of the Act to recommend to the Chief of Police and Brandon Police Service that a policy be formulated to guide officers when arresting parents or caregivers of young children and it appears that as a result of the arrest the children may be at risk.

Dated at the City of Brandon in the Province of Manitoba, this 09th day of March AD 1994.

PJ

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