

IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint # 2463.

AND IN THE MATTER OF: **An Application pursuant to s. 17 of**
The Law Enforcement Review Act
C.C.S.M., c.L75.

BETWEEN:

W. S.)	
Complainant,)	Self-represented with the
)	assistance of Mrs. S. S.
)	
and -)	
)	
Constable M. D.,)	Josh Weinstein
Badge No. XX and)	Counsel for the Respondents
Constable D. C.)	
Badge No. XX)	Hearing dates: October 26
)	and 27, 2006
)	
)	Decision delivered:
)	October 27, 2006.

CHAMPAGNE P.J.

[1] Referral of this matter has been made by the Commissioner of the Law Enforcement Review Agency to a Provincial Judge to determine the merits of a complaint made against Constable M. D. and Constable D. C. by W. S., alleging the commission of the following disciplinary defaults, namely:

- (1) That on or about the 6th day of April 2003, the Respondents abused their authority by using oppressive or abusive conduct or language on the Complainant contrary to s. 29 (a) (iii) of The Law Enforcement Review Act

[2] By way of background, Mr. S. filed his complaint with the Law Enforcement Review Commissioner on April 21, 2003. The Commissioner was unable to resolve the complaint and referred the matter to Chief Judge Raymond Wyant on May 20, 2005. A pre-hearing conference took place before me on October 5, 2005. The original hearing dates set for this matter were June 5th and June 6th 2006. The Provincial Court Hearing Coordinator was contacted by counsel for the respondents on April 6, 2006 indicating that there was a mix-up and counsel was unavailable for the hearing dates in June 2006. As a result the hearing was reset for October 26, 2006 and October 27, 2006. All of the evidence was heard on October 26, 2006.

THE ALLEGATIONS

[3] Mr. S. alleges that he was subject to oppressive or abusive conduct by the respondents on April 6, 2003 when he attended the Sears department store located at the Kildonan Place Shopping Centre in Winnipeg, Manitoba. He indicates that he was approached by the respondents and was questioned about shoplifting. He responded by telling them he was not a shoplifter and he turned and walked away to use the washroom. Within a few steps he was shocked when one officer grabbed him by the elbow and spun him around and then pushed him in the chest. As a result of being stopped, he was unable to immediately use the washroom and Mr. S. soiled his pants. Mr. S. indicates that store security approached, his identification was provided and the incident ended. However, in his view the damage was done.

THE FACTS

[4] I will now set out the facts as I found them from the evidence presented during testimony. The only witnesses who testified were W. S. and Constable D. C.

[5] W. S. attended the Sears Department store on April 6, 2003 to buy a new freezer. There is no dispute that he was approached by the respondent officers and there was a brief discussion about Mr. S. being a shoplifter. It is absolutely clear that Mr. S. was **not** a shoplifter on that day or any other day.

[6] Constable C admits that he was mistaken when he thought Mr. S. was the same person that he had previously arrested in that same Sears Store for shoplifting. I believe Constable C. when he tells the court that Mr. S.

resembled the appearance of a person that he previously arrested in that store for shoplifting. The officer described the similarities of the previously arrested male and Mr. S. Both were tall, distinguished looking elderly males with the same hair style. I accept that Constable C. approached Mr. S. to confirm his identity and determine if Mr. S. was the same person he had previously arrested and was in fact barred from being in the store.

[7] I accept that Constable C. asked Mr. S. if he lived on Sun Valley Drive. Further, I find that Mr. S. responded “yes”. I certainly appreciate that Mr. S. thought he heard Valley Garden and that is why he said yes, because he does live on Valley Garden. This information effectively cemented Constable C.’s opinion that he was dealing with the same person he had previously arrested because he knew that person lived on Sun Valley Drive because he had driven that person home after arresting him for shoplifting. Constable C. also understood that the person was barred from attending that Sears Store and was therefore trespassing.

[8] When questioned about being a shoplifter, Mr. S. stated he was not a shoplifter, said goodbye and turned to walk away. I certainly understand why Mr. S. would be offended by being questioned about shoplifting as it is clear that he is a long time valued customer at Sears. However, Constable C. truly believed that he was dealing with the same person that he had previously arrested at that store and he truly believed that the person was barred from being in the store. The officer had reasonable grounds to confirm the identification of this person.

[9] Mr. S. testified that he turned and walked away to go and use the washroom. He stated that he was grabbed by the elbow and turned around to face Constable C. and then he was pushed in the chest. The officer testified that he walked past Mr. S., turned and stood in front of him which effectively stopped Mr. S. I accept the evidence of Constable C. on this point. It is clear that Mr. S. was very upset as he felt that he was being accused of shoplifting and he needed the immediate use of the washroom. Further, it is clear that this incident has had a long lasting major impact on him. However, when he testified about being pushed he said the officer pushed him and indicated with two hands on his chest. I asked Mr. S. if he fell or stumbled or was pushed into a wall or any other object. His response was negative. He went on to say that both officers treated him in a gentlemanly fashion. I asked if the officers swore at him, yelled or raised their voices or assaulted him in any way and he replied “no”.

He went on to say that he supposed if he was a shoplifter that the officers acted properly and did the right thing. In my view those comments from Mr. S. are more consistent with the description of events as set out by Constable C.

[10] It is clear that there is no evidence to suggest that Constable M. D. committed any disciplinary default. He had little if any involvement in this matter and he certainly did not use any oppressive or abusive conduct or language with Mr. S. Today, I confirm in writing that I dismissed the complaint against Constable D. yesterday, October 26, 2006.

[11] I now turn to the complaint against Constable D. C.

THE STANDARD OF PROOF

[12] If the complaint against Constable C. is to succeed it can only succeed if Mr. S. satisfies me that there is clear and convincing evidence that the officer has committed the disciplinary default. This is the standard of proof as required by subsection 27(2) of the *Law Enforcement Review Act*, R.S.M. 1987, c. L75.

[13] While a Complainant may feel that this is too onerous a burden to bear, the reasoning for the requirement of this high standard of proof is as stated by my brother Judge Chartier in the matter of K. A. A. and Cst. D. and Cst. R. K. dated October 26, 2000:

.....because the consequences to the careers of the police officers resulting from an adverse decision are very serious. The evidence must be clear; it must be free from confusion. It must also be convincing which, when combined with the word 'clear' in my view means that it must be compelling.

THE FINDINGS

[14] This is an extremely unfortunate incident. Through no fault of his own, Mr. S. was embarrassed and ashamed on April 6, 2003. That incident has had a long lasting emotional impact on Mr. S. and it is clear that his deep respect for the police has been shaken.

[15] It is my duty to determine if Constable C. committed a disciplinary default on April 6, 2003 by using oppressive or abusive conduct or language. It is clear that there was no oppressive or abusive language used by Constable C. so I am left to focus on his conduct from that day.

[16] Constable C. approached Mr. S., pursued Mr. S. and essentially detained Mr. S. so he could confirm his identity to determine if the person was trespassing. The entire contact with Mr. S. took a few minutes. As indicated earlier, I found that Constable C. truly believed that he was dealing with the same person he had arrested previously for shoplifting in that store. Police officers are human, they can make mistakes. Constable C. was mistaken in his belief that this was the same person he had arrested previously. However, he acted in good faith at all times. He was described as being gentlemanly. His conduct was not oppressive or abusive as contemplated by section 29(a)(iii) of the Act.

[17] I find that Constable C. did not commit any disciplinary defaults on April 6, 2003 therefore, the complaint against Constable D. C. is dismissed.

CHAMPAGNE, P.J.