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THE LAW ENFORCEMENT REVIEW ACT - R.S.M. 1987, c.L.75

BETWEEN:

G. H.

Complainant

- and -

M. S.

Respondent

REASONS FOR JUDGMENT

The complaint brought against the Respondent is as follows:

"That the Respondent did abuse his authority by using oppressive or abusive conduct contrary to Section 29(a)(III) of *The Law Enforcement Review Act*."

The complaint arose as a result of events which occurred on April 18th, 1995. At the conclusion of the hearing, I advised the parties that the complaint was dismissed. The following are my reasons.

Gordon H. the Complainant, made a right turn on a red light from the centre lane of Osborne Street onto Corydon Avenue and in so doing cut in front of a marked police vehicle operated by the Respondent which was stopped at the same red light in the curb lane.

The Complainant was stopped a short distance from the intersection. He immediately got out of his vehicle and came to the police vehicle where he and the Respondent had a brief conversation. The Respondent told the Complainant to return to his vehicle. According to the evidence of both the Complainant and Respondent, the Complainant believed that his right turn was not improper and he argued that with the Respondent. The Respondent's partner had prepared the Traffic Offense Notice for the infraction and attempted to explain the options in the notice to the Complainant who would not listen to that officer. The Complainant was late for an appointment and by his own admission was upset and argumentative with the police officers.

The Complainant left the scene, rapidly accelerating and spraying gravel on the police vehicle as well as squealing the tires on his vehicle. The Complainant was stopped a second time. Again he got out of his vehicle and approached the police vehicle. The Respondent told the Complainant that he was being stopped for squealing his tires. The Complainant was argumentative and spoke in a loud voice and in so doing moved about in a manner which the Respondent described as "a stutter step". I note that during this hearing the Complainant moved back and forth and sideways

frequently when questioning witnesses. According to the Respondent, the Complainant was moving close to the vehicular traffic on Corydon Avenue as a result of which the Respondent took the Complainant by the shoulder and moved the Complainant toward the Respondent and away from traffic. The Respondent testified that he had told the Complainant a number of times to move back from the line of traffic. The Complainant was close to the Respondent who detected an odour of what he described as alcohol on the Complainant's breath. The Complainant was told by the Respondent an Approved Screening Device (A.S.D.) would be called for so that the Complainant could be tested to determine if there was alcohol in his body. The Respondent testified that he considered the Complainant's manner of driving, the repeated request to move from the line of traffic and that the Complainant wanted to talk and not listen together with what he detected as the smell of alcohol as grounds for demanding the test.

The Respondent radioed for an A.S.D. which was brought to the scene a short while later. According to both the Complainant and Respondent, the Complainant wanted to be tested so as to exonerate himself from any possible drinking and driving offence as he claimed he had not had a drink in 20 years or at least since the past New Years.

Sergeant B. arrived with the A.S.D. and tested the Complainant for alcohol. The test resulted in a "pass". Sergeant B. explained that an alcohol level from 0 to .0499 milligrams percent would result in a pass, 0.05 to 0.99 in a "warn" and above that level to a "fail". The Complainant testified and in fact was adamant that he had not consumed alcohol that day and had not had a drink since New Years. Sergeant B. testified that he did not smell alcohol on the Complainant although he, B., had a slight cold which he allowed may have prevented him from detecting such odour. The Complainant was given a Traffic Offence Notice for the second offence and he left the scene, again quickly accelerating into traffic.

The Complainant appeared in Provincial Court on July 19th, 1995 when he was tried and found guilty on both *Highway Traffic Act* charges arising from this incident. He was fined on the first incident and reprimanded on the second. He was not charged with any drinking and driving offence. I note that the Complainant made his complaint to the Law Enforcement Review Agency after he was convicted. I am satisfied that this hearing would not have taken place if the Complainant had been acquitted.

The Complainant in his submission argued that the Respondent's oppressive conduct was an excessive exercise of power and burdening of another person. The trial and conviction of the Complainant on

the traffic offenses demonstrates that the Respondent's conduct with respect to issuing the Traffic Offence Notices was not an excessive exercise of power. However, what has to be considered is whether or not detaining the Complainant for the A.S.D. test was either oppressive or abusive.

The Respondent's authority for ordering the Approved Screening Device test is found in Section 254(2) of *The Criminal Code of Canada* which is as follows:

"Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken."

The Respondent's counsel called as a witness Constable R. S. who has been with the City of Winnipeg Police Force Traffic Division for the past 25 years. He described his function as the Special Co-ordinator for Alcohol Counter-Measures and he elaborated on his duties.

Constable S, testified as to a number of indicators which may be looked for when attempting to establish if a person has consumed alcohol. Some of these are red or watery eyes, slow or slurred speech, rapid speech, manner of walking and balance, loss of fine motor skills in searching for documents, behaviour, mannerism of driving and odour of alcohol. He also testified that it is more difficult to detect the odour of alcohol in open spaces.

The Respondent testified that when stopping the Complainant for a second time, he was close to the Complainant and detected what he thought was an odour of alcohol on the Complainant's breath. The Respondent considered as well the manner of driving, repeated unheeded requests to move from the line of traffic and the fact that the Complainant wanted to talk rather than to listen. The Respondent testified that he considered that the Complainant "was not in control". All of these factors formed the basis for requesting the test on the A.S.D. I also note that the Respondent's partner testified that at one point she thought that she smelled liquor on the Complainant, but was not certain. The Respondent must "reasonably suspect" that the Complainant had alcohol in his body before making a request for the test on the A.S.D.

Counsel for the Respondent referred to the case of R v. Thomsen 40 C.C.C.(3d) 411 (S.C.C.) which approved the decision of R. v. Seo (Ontario Court of Appeal) 25 C.C.C.(3d) 385 where use of an

A.L.E.R.T. device was discussed and to show the difficulty that police officers have in detecting drivers with alcohol in their body.

In the case of R. v. Trent 47 C.C.C.(2d) 321 Scullion Provincial Judge considered what was then Section 234.1(1) of The Criminal Code which is now Section 254(2) at page 328 he states:

"From the above authorities it is apparent that the grounds for belief in s.234.1 are less than the grounds for belief in s. 235 and furthermore, that the Court need not be concerned whether that belief is the more probable inference to be drawn from the facts as long as the officer's belief is *bona fide*."

The indicators that the Respondent considered in deciding to have the Complainant tested on the A.S.D. are not the most compelling that may occur and are at best, borderline. However, the onus is on the Complainant by virtue of Section 27(2) of the Act to show by clear and convincing evidence that the allegation occurred. There was no evidence that the Respondent was abusive in his manner of speaking to or dealing with the Complainant at any time.

In the case of Weselake v. Kenttger (unreported) I adopted the definition of the term "oppressive" to mean "conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing". Oppressive conduct may also be equated with bad faith. The Complainant has not satisfied the onus to establish the alleged disciplinary default and accordingly the complaint is dismissed.

June 26, 1996


Provincial Judge

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