

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2007-73

AND IN THE MATTER OF:

An Application pursuant to s. 17(1) of *The Law Enforcement Review Act* R.S.M. 1987, c.175

BETWEEN:

D.H.)	In Person,
Complainant,)	Self-represented
)	
– and –)	
)	
Constable S.M.)	Mr. Paul R. McKenna,
Respondent.)	For the Respondent
)	
)	Mr. Sean D. Boyd, Counsel for L.E.R.A.
)	
)	March 1, 2011

NOTE: These Reasons are subject to a ban on publication of the Respondents’ names pursuant to s. 25 of *The Law Enforcement Review Act*.

ROLLER, P.J.

[1] The Respondent, S.M., has brought a preliminary application seeking the following relief:

- a. a declaration that the Law Enforcement Review Agency and the Commissioner of the Law Enforcement Review Agency acted without jurisdiction in receiving and processing complaint #2007-73 from the complainant, D.H.;
- b. declaration that Law Enforcement Review Agency and the Commissioner acted without jurisdiction in referring the Complaint to this court for a hearing on its merits;
- c. a declaration that a provincial court judge has no jurisdiction to conduct a hearing into the merits of complaint #2007-73.

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[2] The Complainant, D.H., opposes this application and counsel for the Commissioner made submissions on the issue of the Commissioner's jurisdiction, and the jurisdiction of this Court.

[3] This is my ruling on this preliminary application.

BACKGROUND

[4] The matter has proceeded on the basis of affidavit evidence only. Because of the specific issue before me, it was unnecessary to have a *viva voce* hearing. I was able to rely on the written complaint and the affidavit of the Respondent to determine the matter.

[5] It was agreed by all parties that my jurisdiction to consider disciplinary default of a police officer arises from s. 17 and s. 29(a) of *The Law Enforcement Review Act* ("the Act") which read as follows:

Referral for hearing

17(1) The Commissioner shall refer a complaint to a provincial judge for a hearing on the merits of the complaint when

- (a) a provincial judge has under section 13 ordered the Commissioner to refer the complaint for a hearing; or
- (b) disposition of the complaint within the terms of section 15 or 16 is not possible.

Notice of alleged disciplinary default

17(2) Where the Commissioner refers a complaint to a provincial judge under subsection (1), the Commissioner shall serve the respondent with notice of each alleged disciplinary default in the form prescribed by the regulations, and the Commissioner shall forward a copy of the notice of each alleged disciplinary default to the provincial judge.

Discipline Code

29 A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

- (a) abuse of authority, including
 - (i) making an arrest without reasonable or probable grounds,

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- (ii) using unnecessary violence or excessive force,
 - (iii) using oppressive or abusive conduct or language,
 - (iv) being discourteous or uncivil,
 - (v) seeking improper pecuniary or personal advantage,
 - (vi) without authorization, serving or executing documents in a civil process, and
 - (vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of The Human Rights Code;
- (b) making a false statement, or destroying, concealing, or altering any official document or record;
- (c) improperly disclosing any information acquired as a member of the police department;
- (d) failing to exercise discretion or restraint in the use and care of firearms;
- (e) damaging property or failing to report the damage;
- (f) being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person or the security of that person's property;
- (g) violating the privacy of any person within the meaning of *The Privacy Act*;
- (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
- (i) assisting any person in committing a disciplinary default, or counselling or procuring another person to commit a disciplinary default.

THE COMPLAINT

[6] Counsel for the Commissioner characterized this complaint as an allegation that the Respondent, an off-duty police officer driving his spouse's vehicle with his 4 year old son inside, "brandished his badge during an exchange arising out of an altercation with the Complainant while both were driving on a roadway."

[7] In his written complaint, the Complainant describes his contact with the Respondent as follows:

I have taken a Defensive Driving Course, and decided to take my foot off the accelerator to increase the distance with the vehicle in front of me. I was going approximately 20 – 25 kph and the van [later determined to be driven by the Respondent] remained close behind me and I gestured for the driver to pass me on the right. The driver of the van was making gestures of some sort. I maintained this speed westbound for approximately one block until I approached the STOP sign at the corner of Scurfield Blvd and Columbia Dr.

While still moving and slowing to stop at the intersection, the van finally moved into the curb lane and came up beside my vehicle. He had rolled his window down and was yelling at me (unintelligibly) and showing me a badge of some kind. I, nor my daughter could readily recognize the badge. Still moving to the intersection, I yelled to him that he illegally went thru the intersection and illegally followed me too close and he had the gall to show me a badge, then I said – “Give me your badge number”.

He dropped the badge to his lap and said “FUCK OFF” and hit the accelerator kicking up rocks at my vehicle. He did not stop for the STOP sign at the intersection, and turned illegally right at the corner (there was a right turn island – do not know the proper name) directly to the median lane, and proceeded at a fast speed north on Columbia Drive.

[8] The Respondent characterized the incident in his affidavit as follows:

5) I recall observing an individual whom I now know as D.H. driving in a car in front of my van. We were both westbound on Scurfield Boulevard, at the intersection with Kenaston Boulevard.

6) Mr. H was gesturing to me as he states in the Complaint. I pulled up on his passenger side and had my badge out in case he required assistance.

7) Mr. H and I exchanged words and it was clear that he did not require or wish to have any assistance from me. Our vehicles were only side-by-side for an extremely brief period of time, and then I immediately continued on with my personal affairs, turning right on Columbia Drive and leaving Mr. H at the intersection.

8) During our entire encounter, which lasted only a few seconds, I did not exit or attempt to exit my personal vehicle, and I do not believe I ever came to a complete stop. I did not issue any commands or instructions to Mr. H, nor did I exercise or attempt to exercise any control or authority over Mr. H or his vehicle.

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ISSUE

[9] The preliminary issue raised by the Respondent is whether the conduct complained of by D.H. falls within the mandate of the Law Enforcement Review Act. If it does not, the Respondent argues, it cannot be the subject of consideration by the Commissioner and similarly cannot be the subject of a hearing in Provincial Court. There is no dispute that the mandate of the Commissioner and this Court is strictly statutory. Neither the Commissioner nor I have any inherent jurisdiction.

[10] The scheme of the Act provides that upon receipt of a complaint, the Commissioner “shall forthwith cause the complaint to be investigated.” (see s. 12(1))

[11] The Commissioner then determines whether the complaint is frivolous or vexatious, or “does not fall within the scope of section 29” and if he makes that finding, “the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent’s Chief of Police of his reasons for declining to take further action.” (s. 13(1))

[12] The Respondent argues that this is what the Commissioner should have done after investigating this complaint. His counsel points out that the wording of s. 13(1) is mandatory and directive (i.e., *shall* decline to take further action) and as such, the Commissioner was without the jurisdiction to refer the complaint to the Provincial Court for a hearing pursuant to s. 17.

[13] Section 1 of the Act defines “complaint” as a “complaint made by a person in respect of a disciplinary default allegedly committed by a member of a police department.”

[14] A “disciplinary default” is defined in that same section as “any act or omission referred to in section 29.”

[15] Section 29, as quoted above, limits the acts or omissions that can be considered disciplinary defaults to “acts or omissions arising out of or in the execution of his duties.”

[16] It is therefore necessary for the Commissioner to determine that the Respondent’s actions complained of by the complainant arose out of or in the execution of the Respondent’s duties as a police officer in order for the complaint to be referred to this court for a hearing.

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[17] This Court's jurisdiction is limited by the same section, being s. 29, so the relevant question is whether the acts complained of by the complainant can be reasonably seen as arising out of or in the execution of the respondent's duties as a police officer.

POSITION OF THE PARTIES

[18] The Respondent denies that his actions vis-à-vis this Complainant arose out of or in the execution of his duties. His counsel argues that more is required before an off-duty officer can be found to be acting in execution of his or her police duties.

[19] The Complainant argues that by showing him a "badge of some kind", the respondent was acting in the execution of his duties as a police officer. He argues that a "badge means 'on duty'."

[20] Counsel for the Commissioner made submissions and filed case law to assist this Court in determining whether the acts complained of amount to actions arising out of or in the execution of the respondent's duties.

[21] *Blakeney v Nova Scotia (Police Review Board)*, [1997] N.S.J. No. 307 was provided by counsel for the Commissioner for the following passage:

14. It goes without saying that a police officer can be called out at any time and essentially is never off duty. If his action or words are inappropriate and involve a member of the public, even in a private dispute, they can be in breach of authority.

[22] This does not assist this court in determining whether the complained acts amount to acts in the execution of a police officer's duties, however. The acts or omissions of the officer must arise "out of or in the execution of his duties" to fall within the purview of s. 29. The Act does not purport to provide the Commissioner, or this Court, with jurisdiction to consider all conduct of police officers; only actions or omissions arising out of or in the execution of their duties are to be the subject of hearings.

[23] This is not the only example of such a delineation; another can be found in criminal law in the offences of assault (s. 265) and assaulting a peace officer (s. 270). There is a substantive difference between an assault and an assault against a police officer “engaged in the execution of his duty.” It is well-established in criminal law that an offender can be acquitted of assaulting a peace officer and convicted instead of a common assault if the facts do not support the finding that the victim officer was engaged in the execution of his duty at the time of the assault. (See, for example, *R v. Corrier* (1972), 4 N.B.R. (2d) 775 (N.B.C.A.).)

[24] The cases provided by counsel provide other examples of situations where the Courts have concluded that the actions of “off duty” officers were such as to amount to the exercise of their police duties.

[25] In *R v Crimeni*, [1992] B.C.J. No. 2217 the B.C. Supreme Court concluded that an off-duty police officer acted in his capacity as a police officer when he approached the driver of a vehicle, identified himself as an officer, demanded the driver’s licence and registration, took the keys from the ignition of the car and waited with the driver until the on-duty police arrived to take the driver into custody.

[26] The actions of this respondent subject to the complaint before me fall far short of those described in *R. v. Crimeni*.

[27] In *R v Blackburn*, [2004] O.J. No. 1527, the Ontario Court of Appeal upheld the conviction of an off-duty police officer who was convicted of dangerous driving on the following facts:

2. On the evening of October 27, 1997, the appellant, an off duty police officer, was driving an unmarked car eastbound on Highway 401. [He] was not in uniform. The complainant... was also driving in the same direction. The appellant approached [the complainant’s] vehicle from the rear, driving at a high speed. The appellant flashed his lights and moved his vehicle back and forth from lane to lane, in an attempt to pass [the complainant]. When the appellant passed [the complainant’s] vehicle, he was driving at speeds between 120 to 130 kilometers per hour. After passing [the complainant] the appellant pulled quickly in front of her and lightly touched his brakes, causing [the complainant] to react by hitting her own brakes.

3. Afterwards, when the appellant found himself again driving behind [the complainant’s] vehicle, he passed her a second time on the right, abruptly and without signaling. On this occasion, the appellant brought his vehicle to a full stop in front of [the complainant’s] vehicle while they were both in the passing

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lane of Highway 401. This maneuvering caused a minor collision between the two cars. When the appellant got out of his car and tried to open the door of [the complainant's] car, [she] pulled around him and drove forward on the highway. The appellant then drove up beside her and flashed his police badge. [The complainant] panicked, and called 911 from her car for assistance...

[28] That appellant admitted he used his police badge in an effort to compel the complainant to stop her vehicle, and the Court of Appeal found at paragraph 23, that his use of his badge was “clearly intended to engage his status as a police officer for the purpose of exercising control over another person during a serious outburst of road ‘rage’. Its use in the circumstances was a clear abuse of the appellant’s position of authority and trust as a police officer.”

[29] The acts complained of by this Complainant, by contrast, do not evidence any attempt by this Respondent to exercise control over any other person. The off duty constable was in his private vehicle, in the company of his young son, and despite exchanging words with the complainant - words which the complainant describes as “unintelligible” but for the final profanity – and showing the complainant a “badge of some kind,” the Respondent did not stop his vehicle and made no attempt to stop the Complainant’s vehicle.

[30] The acts complained of by this Complainant, therefore, are markedly different than the facts of *R. v. Blackburn*.

[31] The B.C. Supreme Court considered the issue of what constitutes actions “in the performance or intended performance” of police duties in the civil case of *Cooper v Canada (Royal Canadian Mounted Police)*, [2001] B.C.J. No. 2729. That case involved a motor vehicle accident between a civilian and an on-duty RCMP officer who was driving his unmarked police vehicle to a personal medical appointment. In seeking to defend the negligence claim, the officer and the RCMP argued that the officer was engaged in the performance of his duty at the material time and was therefore exempt from liability by virtue of provisions of the *Police Act*.

[32] Owen-Flood J. reviewed the relevant sections of the legislation and case law and stated the following:

43. The relevant question is whether that general duty is the type of duty that comes within the ambit of the language of s. 21(2) of the *Police Act* when it speaks of “anything done... in the performance or intended performance of his or her duty”. I am persuaded that in law, for [the defendant] to come within the ambit of

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doing or omitting to do something in the performance or intended performance of his duty it has to be established that he was not on general duty but, rather, on a specific duty.

44. In this regard, I concur with the dicta of Ewaschuk J. in *R v Prevost & Lepage* (1985), 22 C.C.C. (3d) 225 (O.C.A.) where, at 228, Ewaschuk J. wrote:

... It seems to me that there are basic distinctions between “being on duty”, “being on a tour of duty” and “acting in the course of duties” as opposed to “acting in the execution of duties”.

45. This distinction was further described by Wood J.A. in *Regina v. Noel* (1995) 101 C.C.C. (3d) 183 (B.C.C.A.) at p. 190:

... the law recognizes a distinction between a peace officer being “engaged in the execution of his duty” and simply being on duty, in the sense that he or she is “at work”. ... Thus a police officer who is eating dinner while on duty is acting in the course of his duties, but that same officer could not then be said to be engaged in the execution of his duty.

46. I find that, at bar, [the defendant] was engaged in a personal errand in that he was going to see his doctor for his own private reasons for a medical check-up. In the result, he was not engaged in the performance of his duty at the time of the accident within the meaning of s. 21(2) of the *Police Act*. In the result, he does not gain the benefit of exemption from liability for simple negligence that he otherwise would have been entitled to had he been engaged in the performance of his duty within the meaning of s. 21.

[33] I agree with this reasoning as well, and it is helpful in the interpretation of scope of s. 29 of the Act in this matter.

[34] The complaint of the Complainant does not allege any acts which can support a finding that the Respondent was acting in execution of his duties as a police officer. I am unable to find the sole act of showing the Complainant a badge while driving past and exchanging unintelligible words is sufficient to be considered activities arising out of or in the execution of his police duties.

[35] As clearly stated in s. 6 of the *Law Enforcement Review Act*, every person who feels aggrieved by a *disciplinary default* allegedly committed by any member of a police department may file a complaint under this Act. That being the case, the wording of s. 29 is determinative and I am not satisfied that s. 29 of the *Law Enforcement Review Act* permits a hearing into this complaint.

[36] Without the jurisdiction to conduct a hearing into the merit of complaint #2007-73, I must grant the Respondent's application.

[37] By way of a final remark, I do not want my reasons to be interpreted as approval of the Respondent's conduct but rather recognition of the limited jurisdiction provided by this legislation. *The Law Enforcement Review Act* is not the only avenue for complaint by members of the public against members of law enforcement agencies. Its mandate and jurisdiction is specifically defined and must be respected by this Court.

C. Roller, P.J.