

THE LAW ENFORCEMENT REVIEW ACT
LERA COMPLAINT NO. 819
BOARD HEARING NO. 40

B E T W E E N:

H. W. (J.J. H. , Deceased),

Complainant,

- and -

CONSTABLE R. A. C. ,

Respondent.

D E C I S I O N

MAJORITY (CHUCHMAN, FABBRI, CHEGUS):

In the early morning hours of March 9th, 1988, J. J. H.
("J.J. H. ") received a bullet wound which caused his death.
Immediately prior to the incident Constable R. A. C. of the
City of Winnipeg Police Department had in the course of his duty
been acting in response to a reported stolen vehicle.

Constable C. and his partner came on the scene in the vicinity
of X ADDRESS , in the City of Winnipeg and subsequently
Constable C. separated from his partner. Fellow officers

joined in the search for the car thief suspect who was described as wearing a grey jacket, native and approximately 22 years of age. A suspect was apprehended at 2:39 a.m. and placed into custody. Constable C. did not participate in the actual arrest of the suspect but was, during the course of the pursuit, carrying and using his portable radio.

At approximately 2:41 a.m. a loud noise was heard followed by radio communication from Constable C. asking for assistance and a request for an ambulance. Constable C. was found with his service revolver in his right hand standing over the body of a man later identified as J. J. H. Mr. H. received a mortal gunshot wound in the chest area. He was given medical attention at the scene and conveyed to hospital whereupon he subsequently died.

The Complainant, H. W. brother of the deceased, J. J. H. filed a complaint against Constable R. A. C. alleging certain disciplinary defaults pursuant to Section 29 of The Law Enforcement Review Act ("the Act"). Mr. W. made his complaint as a third party and as a person aggrieved by his brother's death as contemplated by section 6(2) of the Act. Mr. H., the person affected under the complaint was not competent to give consent to the processing of the complaint, by virtue of his demise.

Therefore section 9(2) did not apply.

The alleged disciplinary defaults set out in the Notice of Alleged Disciplinary Default, (Exhibit 1), and forming the basis of the complaint were as follows:

(1) On or about March 9, 1988 abuse his authority by committing an assault and/or battery upon the person of J. J. H. in contravention of Section 29(a) of The Law Enforcement Review Act.

(2) On or about March 9, 1988 abuse his authority by using unnecessary violence or excessive force towards J. J. H. in contravention of Section 29(a)(ii) of The Law Enforcement Review Act.

(3) On or about March 9, 1988 abuse his authority by using oppressive or abusive conduct or language towards J. J. H. in contravention of Section 29(a)(iii) of The Law Enforcement Review Act.

(4) On or about March 9, 1988 abuse his authority by failing to exercise discretion or restraint in the use and care of firearms in contravention of Section 29(d) of The Law Enforcement Review Act.

Act.

The Board dealt with a preliminary motion put forward prior to commencement of the hearing and determined that it had jurisdiction to hear the complaint. Further, the Board decided that the alleged disciplinary defaults itemized under (1) above should be struck out thereby leaving the remaining alleged defaults itemized in (2), (3) and (4), as the basis on which the hearing would proceed.

At the hearing upon completion of the evidence for the Complainant, a further motion was made that the complaint should be dismissed for lack of any evidence. The Board decided that there was no evidence to support the disciplinary defaults alleged under (3) above but that there was evidence for the complaint to proceed in respect of the disciplinary defaults itemized in (2) and (4) above.

When the hearing resumed, counsel for the Respondent Officer chose not to call any witnesses. The hearing concluded with argument from counsel for both parties.

As an initial consideration the Board reviewed the argument of counsel for the Complainant that the matter be referred to the Attorney-General for the possible laying of criminal charges. The circumstances of the incident giving rise to this complaint have

been subject to previous reviews. A referral at this time pursuant to section 35(1) of the Act would only be warranted if new and relevant evidence was disclosed during the hearing which was not available at the previous reviews. We find that no such evidence has been disclosed.

The Board must consider whether the essential elements of the alleged disciplinary defaults now before this Board have been proven. In facing the alleged disciplinary defaults, the Respondent Officer is presumed innocent of such action until proven otherwise. Section 27(2) of the Act imposes upon the Complainant the burden of proving the alleged disciplinary default beyond a reasonable doubt.

In argument, Counsel for the Respondent Officer has again raised the issue of identity and contends that this element has not been proven beyond a reasonable doubt. This argument was first put forward by Respondent's Counsel in his motion at the conclusion of the Complainant's case. In Law Enforcement Review Board proceedings the Respondent is neither compellable to testify nor required to attend the proceedings. As a result of the non-attendance of the Respondent, the Board did not have the benefit of direct identification evidence, however in considering the Respondent's said motion, the Board was satisfied that identity had

been proven, based on the evidence adduced. There is no basis for this Board to reach a contrary conclusion.

With respect to the element of jurisdiction, the Board heard evidence from a number of witnesses as to the date, time and location of the incident giving rise to the alleged disciplinary defaults. It is noteworthy that these witnesses were professional witnesses and we are satisfied that jurisdiction has been proven.

Finally, the Board must consider whether the commission of each disciplinary default has been proven beyond a reasonable doubt. We find that with respect to the alleged disciplinary defaults of failing to exercise discretion or restraint in the use of firearms, there is not sufficient evidence before the Board to find beyond a reasonable doubt, that the said disciplinary defaults have been committed. They are therefore dismissed.

The Board has considered the remaining alleged disciplinary defaults of abuse of authority by using unnecessary violence and abuse of authority by using excessive force towards J. J. H. Based on the evidence adduced we find that the allegation of abuse of authority by using unnecessary violence has not been proven beyond a reasonable doubt and therefore dismiss same. The majority of the Board came to a different conclusion when dealing

with the allegation of abuse of authority in use of excessive force.

It is important to note that the alleged disciplinary default occurred in the presence of two individuals - the Respondent Officer and an adult male civilian. The civilian died shortly after the incident at issue, and the Respondent Officer did not give evidence during the hearing. Section 24(10) of the Act guarantees the Respondent Officer the right to refuse to testify, with section 24(9) allowing the Board to conduct its hearing in the absence of the Respondent Officer.

With the Respondent Officer having the right to be presumed innocent of the alleged disciplinary default, the Complainant is required to prove the alleged disciplinary default beyond a reasonable doubt. In doing so, the evidence may be highly circumstantial, but the actual facts are known to the Respondent Officer, and he has the right to explain any justification with regard to his actions when discharging his duties.

From an overall analysis of the evidence, what became clear to the Board is the fact that discharging a firearm so as to lodge a bullet into the body of a person is a measure of excessive force. Moreover, the use of excessive force, without justification,

amounts to an abuse of authority. With the only living witness to the actual facts surrounding the incident at issue being the Respondent Officer, and the Respondent Officer not being compellable as a witness, the Complainant faced a heavy onus in proving the alleged disciplinary default beyond a reasonable doubt.

What evidence did the Complainant put forward on the issue of excessive force? From the testimony of Constable D. S. , we learned that after he heard a loud "report" (sound), he recognized Constable C. voice over the radio asking for his (C.) partner's assistance and an ambulance at a certain location on X ADDRESS Constable S. and his partner, Constable H. attended at the location in question on the north side of X ADDRESS, east of X ADDRESS , at which location Constable S. encountered Constable C. standing at the feet of an adult male lying on the ground, which individual would later be identified as J. J. H.

In his testimony, Constable S. recalled his conversation with Constable C. immediately upon attending at the scene of the incident. After asking whether Constable C. was "okay" Constable S. asked "Is this guy (J. J. H.) shot?". According to Constable S. , Constable C. responded "Ya, he went for my gun and I shot him".

From the statement made by Constable C. and the subsequent Autopsy Report (Exhibit No. 26), it is certain that J. J. H. sustained a gunshot wound during the time at issue. From other evidence during the hearing, it is clear that the gunshot wound was from a revolver issued to Constable C. . It is equally clear from the evidence of several police officers called, that discharging the firearm and lodging a bullet into the body of a person is the ultimate method of force in the continuum of force.

From the evidence of several different police officers it is also apparent that the ultimate force would be applied only in a case where it appeared no other application of force would be appropriate in the circumstances. In other words, application of the ultimate force, regardless of its excessive nature, would be appropriate or justified in exceptional cases. In the present case, the statement "He went for my gun and I shot him" could be the basis of a claim that the actions of the Respondent police officer were justified. However, on its own, that evidence does not substantiate justification for the use of the ultimate or excessive force. Indeed, several police officers testified that a number of actions are available to a police officer if someone goes for an officer's revolver, and that other methods should be applied before resulting to the ultimate force. Accordingly, in the absence of some clear explanation, the Board is faced with

evidence from a number of different sources that the use of the ultimate or excessive force is not warranted simply because someone went for an officer's gun.

In the present case, the Board must determine whether the application of the ultimate force by the Respondent Officer amounted to excessive force within the meaning of subsection 29(a)(ii). From an overall analysis of the evidence the majority of the Board is satisfied that the Complainant has proven beyond a reasonable doubt that the Respondent Officer's discharging of his firearm and lodging a bullet into the person of the late J. J. H. amounted to an act of excessive force.

There is no evidence offered by the Respondent Officer as to an explanation or justification for application of such force. Based on the evidence presented, and in the absence of any actual direct evidence as to justification, the majority of the Board is satisfied that the Complainant has proven beyond a reasonable doubt that Constable R. A. C. did on March 9, 1988, commit a disciplinary default of abusing his authority by using excessive force towards the late J. J. H.

MINORITY (MEIGHEN, RAE):

We agree with our fellow Board Members that:

1. There is insufficient evidence with respect to the allegations of the use of unnecessary violence, a failure to exercise discretion in the use and care of a firearm and that these alleged disciplinary defaults must be dismissed.

2. We also agree that a referral to the Attorney-General under Section 35 would be redundant at this stage.

In arriving at this Minority Decision we are mindful that the Law Enforcement Review Board is a quasi-criminal administrative board. We are restricted to the powers contained in our enabling statute. We are subject to the following specific provisions:

- (a) Section 27(2) mandates the Board to dismiss a complaint in respect of an alleged disciplinary default unless satisfied beyond a reasonable doubt that the Respondent has committed the disciplinary default;

- (b) Section 24(4) provides that basically the rules of procedure that apply are those applicable to summary conviction proceedings;
- (c) Section 24(1) provides the Respondent is not compellable as a witness.

The obvious starting point in considering this matter is the presumption of the Respondent's innocence. The Complainant argues a shifting onus and that once a "prima facie" case is established the onus switches to the Respondent to justify the conduct complained of, namely whether there was the use of excessive force. With respect, we disagree with the notion of this shifting onus and believe that the Complainant maintains the onus to establish the alleged disciplinary default beyond a reasonable doubt.

It is alarming that after all the time that has been devoted to this complaint, the Board has little concrete evidence before it as to what really occurred on the early morning of March 9, 1988. Basically what we know and what is germane are the following:

- (i) we have the statement against interest "he went for my gun and I shot him";

- (ii) J. J. H. died from a fatal gunshot wound from the gun of Constable R. C.

We also have evidence as to what is a theoretical continuum of force and we have evidence from three witnesses called by the Complainant who, with respect to this continuum of force, have testified as follows:

- (a) Constable I. gave evidence that there are no holds barred to gain control of a firearm and that you use whatever force you think is necessary in the circumstances with respect to a fight over your gun. He also gave evidence to the effect that it was almost endless the number of factors involved that would influence what steps should be taken to protect your firearm.
- (b) Constable S. testified that if he felt his life was threatened (with respect to control of his firearm) there would be no holds barred in taking steps to maintain control.
- (c) Deputy Chief G, testified that an officer isn't encouraged to run around with

his gun out. He testified that an officer must use common sense and his own discretion as to if and when he draws his revolver.

What we don't know is the circumstances surrounding the encounter between the deceased and the Respondent on March 9, 1988.

D. R. gave evidence that the Respondent said words to him to the effect "of course we had our guns out". We are not able, on that evidence alone, to determine conclusively whether the Respondent had his gun out when he encountered the deceased. We don't know what happened between the Respondent and the deceased. There is little physical evidence of a struggle between the deceased and the Respondent, except that it appears probable that the deceased did knock the Respondent "on his butt".

Shooting someone fatally is obviously at the top end of the spectrum in the continuum of force. What precipitated this tragedy, however, is not clear. Counsel for the Complainant in his argument at page 33 says "Why C. used his weapon against citizen H. remains a mystery" and at page 41 "What happened from the time C. went down to the moment he shot H. remains a mystery".

Without knowing what did happen, we feel this Board is left in a position of uncertainty and doubt as to the circumstances surrounding the conduct complained of. There is insufficient evidence to allow us to determine whether the force used by the Respondent was excessive. We are of the view that the onus of proving this fact is on the Complainant.

Based on the foregoing, we are unable to conclude beyond a reasonable doubt that the Respondent abused his authority by using excessive force and we would dismiss the last allegation of the complaint.

In making the above findings, we acknowledge the difficulty that the Complainant finds himself in, namely being unable to compel the attendance of the Respondent. That statutory provision in circumstances such as were found in this case goes a long way to frustrate what we perceive to be the intent of the legislation, that is, to review the conduct of Peace Officers to determine whether they have abused their authority.

It is hoped that the replacement legislation is better thought out, better worded and more workable than the present statute.

Without being able to make reasonable conclusions as to the facts surrounding the alleged incident, the ability of the Board to make a reasoned decision is severely handicapped.

DATED this 1st day of September, 1992.

THE LAW ENFORCEMENT REVIEW BOARD:

Martha I. Chuchman

MARTHA I. CHUCHMAN

Charles O. Meighen

CHARLES O. MEIGHEN, Q.C.

Robert R. Fabbri

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