

IN THE MATTER OF: *The Law Enforcement Review Act, Complaint #2006-362*

AND IN THE MATTER OF: *A hearing pursuant to s. 17 of The Law Enforcement Review Act R.S.M. 1987, c.L75*

BETWEEN:

A.D.,)	Self-represented
Complainant)	
)	
- and -)	
)	
Sergeant W.T. and)	Paul McKenna,
Constable M.D.)	Counsel for the Respondents
)	
)	February 25, 2010
)	

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

Elliott, P.J.

- [1] This is my decision following a hearing on the merits of allegations:
- that Sergeant W.T. and Constable M.D. did abuse their authority by using oppressive or abusive conduct or language, contrary to s. 29(a)(iii) of *The Law Enforcement Review Act*; and
 - that Constable M.D. did abuse his authority by improperly disclosing information acquired as a member of the police department contrary to s. 29(c) of *The Law Enforcement Review Act*.

The Facts:

[2] All the evidence I heard came through A.D. The Respondents elected to call no evidence.

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

[3] A.D. was pulled over by Constable M.D. in the parking lot at the Canadian Superstore on Sargent Avenue in Winnipeg. A.D. had, even according to his testimony, not come to a complete stop at a four-way stop sign in the parking lot. A.D. testified that the reason for this was that his power steering was not working properly. However, Constable M.D. would have had no way of knowing this. In the meantime, A.D. was, in his words, having “a bad day”. He had a low front passenger tire and problems with his power steering. His testimony was that he was coming to the Superstore gas bar to fill up his low tire and to have his power steering checked. Constable M.D. obviously did not know about either of these problems. When he pulled A.D. over, A.D. jumped out of his truck so fast that he forgot to put it into “Park”, and the truck rolled forward, causing him to have to get back in quickly in order to stop it. Constable M.D. believed that A.D. did not have a seatbelt on. A.D. said that he did. A.D. came toward Constable M.D., saying, “What the hell are you pulling me over for?” A.D. attributed his actions and words to his having a bad day, having had bad experiences with police officers in the past from having grown up in the North End, and his normal manner of speaking. Constable M.D. responded, “You better get back into your car if you know what is good for you.” A.D. answered, “Holy fuck, take it easy.” He got back into his vehicle. When the officer advised him that he was being stopped for running a stop sign and not wearing a seat belt, A.D. said, “What do you mean I ran a stop sign?” He was asked where he was going and when he told the officer he was going to get air in his tires, the officer apparently did not believe him, voicing a belief that A.D. was cutting through the parking lot to avoid a red light and get on to St. James Street. A.D. responded, “Are you calling me a fucking liar?” and exited his vehicle in an attempt to show the constable his low front tire. However, the officer did not walk around the car to take a look, instead, according to A.D., laughing and/or smirking at A.D. A.D. then walked up to him and said, “Why are you calling me a fucking liar?” The constable replied, “I never called you a liar.” An argument ensued about that. Then the officer said, “Get back in your vehicle before I charge you criminally.” A.D. said “For what?” The officer said “For causing a disturbance.” A.D. responded, “Go ahead, I don’t give a fuck. Do it - charge me.” He testified that he said several times that the officer should charge him. According to A.D., the officer just stared at him, smiling. A.D. got back into his vehicle and handed the officer his driver’s licence and registration. The officer returned to his vehicle and, according to A.D.’s observations, punched some information into the computer. Then he appeared to receive some information and picked up his phone and phoned someone. Sergeant W.T. showed up in approximately one minute. The two officers spoke in their vehicle and then Constable M.D. came over and handed A.D. two tickets. He was trying to explain the options listed on the tickets, presumably A.D.’s option to either pay or contest

them, when A.D. grabbed the tickets out of his hands and told him, in A.D.'s own words, "to go fuck himself" and that "the tickets were crap". A.D. then drove to the air pumps to fill up his tire. He got out and was filling his tire when both officers sped over to his vehicle. Sergeant W.T. came over to A.D. and approached him in an attempt, according to A.D., to reprimand him for this conduct toward Constable M.D. He asked A.D., "what way that was to talk to an officer after just getting a ticket?" A.D. said "I don't give a shit." Sergeant W.T. said, "You have a real attitude problem don't you?" A.D. then stood up and said "I don't appreciate being threatened or called a liar." Sergeant W.T. then noticed the Winnipeg Airport Authority (WAA) security pass on A.D.'s dashboard and the fact that he was wearing a WAA helmet. He asked A.D., "Do you work for the WAA?" A.D.'s view was/is that this was "irrelevant" and he did not answer the question, instead saying, "The problem is your guy. He threatened me and called me a liar". Sergeant W.T. repeated, in a loud voice, "I said, do you work for the WAA?" Worried now about his employment, A.D. again did not respond. Sergeant W.T. then leaned in, with a smirk on his face, and said, "Well, I'll be contacting them and we'll see how you like that", pointing his finger at A.D. as he said it. A.D. said, "Fuck you man, fuck you" as Sergeant W.T. walked away "smirking".

[4] Following the confrontation A.D. returned to work and told his supervisor what had happened. Constable M.D. went to the airport and told the project manager about the incident and that it would be formally reported to the WAA. However, in his report submitted to the Winnipeg Police Service the day of the incident, Constable M.D. wrote "As a result this report is being submitted due to the accused violent behaviour and Violent Criminal Record in relation to his Security Clearance." Constable M.D. ended his report with two paragraphs: "The writer was contacted by the Vice President of Operations of the Airport Authority a M.O. who was advised of the incident and that they would be dealing with the matter at their level in regards to the incident as it relates to the representation of his organization. This concludes the writers involvement."

[5] Based on the evidence then, although his report mentioned a "formal" report which would be made to the WAA, there is no evidence that such was ever in fact made.

[6] That constitutes all the evidence before me about the police "disclosure of information."

[7] From A.D.'s testimony I know he was asked to submit an incident report but was allowed to stay on at the WAA, employed by his then and present employer

for the next two years, although he said he was “walking on eggshells” during that whole period.

[8] A.D. made his LERA complaint very soon after the incident. The only document forwarded by LERA was a very short incident report, which leaves me confused about where at least one of the charges came from. It also appears that a witness, whose name and employment phone number A.D. provided, was never interviewed. She could not be located for service of the subpoena he requested; not surprisingly having left her employment at Superstore by the time attempts were made to serve a subpoena three years later. While it is not my role in these proceedings to question the investigation done by LERA, and there may well be reasons for neither apparently being interviewed, I accept counsel’s word as an Officer of the Court, that there was not even an interview of the Complainant on the file, something which would have amplified the details of his complaint and provided them by way of notice to the Respondents.

[9] The only evidence adduced in this case came in through the Complainant and through documents introduced either by him or by counsel for the Respondents, who had A.D. agree that those were probably the documents in question. Although A.D. would have liked to have cross-examined the Respondent officers, under the legislation they are not compellable as witnesses. At the end of A.D.’s case they elected to call no evidence.

The Law

[10] Counsel for the Respondents filed a case book. It contains decisions on previous hearings by members of my Court, as well as other cases concerning police disciplinary breaches in Quebec and labour relations. It is clear from the case law that in order for an action to constitute a disciplinary default that involves an “abuse of authority”, both the terms “abuse of authority” and the specifics of the alleged default must be given meaning.

[11] I noticed following the hearing that although the charge of improperly disclosing information is also laid as an “abuse of authority”, those words are not part of a charge under 29(c), as they are under s. 29(a). That therefore raises the question as to whether the dicta that deals with “abuse of authority” applies to that charge. However, I do not believe that the facts in his case require me to deal with that issue.

[12] Some of the decisions provided have allowed some room for police officers to react to civilians who abuse them, although of course we expect police officers to restrain themselves and act professionally, even when provoked. There is no

doubt that A.D. was extremely abusive toward the officers in question. In regard to Constable M.D., the constable had every right, in fact an obligation, to stop A.D. for proceeding through a stop sign without coming to a full stop. However, A.D. was immediately on the offensive and was abusive. An argument was taking place in a public place that was heated and involved swearing. This could indeed have resulted in charges for “causing a disturbance” under the *Criminal Code of Canada*. The wording of that offence, found at s. 175 of the *Code*, is “Every one who...causes a disturbance in or near a public place,...by racing, screaming, shouting, swearing, singing or using insulting or obscene language,...is guilty of an offence....” Constable M.D. was therefore within his rights to warn A.D. to get back into his vehicle or he could be charged criminally. In fact, when A.D. asked, Constable M.D. advised him which criminal offence. There is no evidence of “a clear and convincing nature”, as required by the statute, that Constable M.D. called A.D. a liar. Being skeptical of A.D.’s explanation for going through the parking lot was simply a voicing of his suspicion that A.D. was trying to avoid waiting for a red light. Having seen A.D. not come to a complete stop at a stop sign, and then exit his vehicle so quickly that he forgot to put it in “Park”, could certainly have made Constable M.D. believe that A.D. was in a hurry and thus was taking a shortcut through the parking lot. In any event, that was not the offence charged. Whether Constable M.D. smirked or laughed at A.D. I do not know. If he did, it might not have been an unreasonable response to A.D.’s extreme behavior. A.D. also said that Constable M.D. made a threat by saying “we’ll see you around”. That comment was not noted in A.D.’s written complaint, so the officer would not have had notice of it. If it was said, it could have been an innocuous comment. I cannot therefore say that it was a threat, and if it were, it would not be unreasonable for the police to keep an eye on A.D., given his extreme behavior. I do not find that Constable M.D. “abused his authority by using oppressive or abusive conduct or language.”

[13] In regard to Sergeant W.T., the allegation against him involves his comment that they were going to see A.D.’s employer and they would see “how you like that”, pointing his finger at A.D. at the same time. Even if this happened and constituted “sub par” behaviour as described in the case law, in view of A.D.’s extreme behaviour, I do not believe it would amount to Sergeant W.D. “abusing his authority by using oppressive or abusive language.”

[14] As it happened, it was actually Constable M.D. who reported the incident to the WAA. There is no evidence that he did this under the direction of Sergeant W.T., although this is likely, as it appears that Sergeant W.T. was his supervisor. This was the most difficult issue from my point of view - whether a

member of the Winnipeg Police Service had any right to go to the employer. However, A.D. was at the time apparently working. He was driving a vehicle with its beacon flashing, wearing a Winnipeg Airport Authority hard hat and having a WAA security clearance pass on his dashboard. I have decided that, whether Constable M.D. did have the authority or not, reporting the incident to A.D.'s ostensible employer does not constitute a disciplinary default. There is no evidence that he was not acting in good faith, believing that the employer would wish to be informed, which was apparently true. A.D.'s behavior was extreme and he had all appearances of being employed at the Winnipeg Airport Authority under its security clearance. He apparently has some kind of criminal record that involves violence and behaved in a way that at least bordered on violent. Therefore, I do not believe that the officer acted in bad faith by reporting the incident. There is no evidence that they informed the employer of A.D.'s previous criminal record. The employer was apparently interested enough that various people were contacted and that A.D. was asked to provide an incident report. While I still have questions in my mind about when the Winnipeg Police Service is justified in contacting an employer, that is not the issue before me. The issue is whether Constable M.D. "improperly disclosed information acquired as a member of the police department." I was not provided with any Winnipeg Police Service disclosure policy. I do not know if one exists. I am not convinced that what Constable M.D. did was improper.

[15] As a result, I am dismissing all three allegations.

Original signed by Judge J.A. Elliott

P.J.