LAW ENFORCEMENT REVIEW AGENCY

3037

IN THE MATTER OF: THE LAW ENFORCEMENT REVIEW ACT

BETWEEN:

F. A. S., Applicant

- and -

R. D., Respondent

Reasons for Decision, delivered by His Honour Judge John J. Enns, on the 3rd day of December, 1998 in the City of Winnipeg, Manitoba.

APPEARANCES:

Ms. Diane Dzydz for the Applicant

Mr. Paul R. McKenna for the Respondent

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

[1] Although no request was made pursuant to Section 27(3) of ***the Law Enforcement Review Act*** for written Reasons for this Decision, I deem it to be appropriate under the circumstances of this hearing.

[2] By a Notice dated May 12, 1998, the L.E.R.A. Commissioner referred this complaint to a Provincial Judge for a hearing on the merits of the complaint, pursuant to Section 17 of the *Act*, (Exhibit #1). The Notice refers to Complaint File #3037 made by the Applicant against the Respondent, which was filed on October 31, 1995, and alleges that the Respondent committed certain disciplinary defaults, as defined under Section 29 of the *Act*, namely – that he did:

> "1. Abuse his authority by using unnecessary or excessive force pursuant to Section 29(a)(ii) of the Act."

[3] There is general agreement on the facts leading up to the time of the complaint, at which time the facts become in dispute.

[4] During the evening of October 30th, Ms. S. , the Applicant, met up with her friend K. A. R. and after some time, arrived at the foster home of Ms. R. on X ADDRESS , in the X area of Winnipeg. As a result of Ms. R. causing a commotion at that location by banging on the door, yelling and eventually breaking a window, her foster parent called the police.

[5] Constable R. D. , the Respondent, and his partner, Constable C. G. attended to the call in a police cruiser car. Acting on the complaints of the foster father, and with his assistance, Ms. R, was apprehended and placed into the cruiser car. At that time, both Ms. S. and Ms. R. were in the care of Child and Family Services. Ms. S. was 12 years old. While the attending officers did not want to arrest Ms. S. as there was no complaint about her (although the foster father of Ms. R. had made a remark about her throwing

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

tomates against the house). Nevertheless, either to simply remove her from the scene, or at her own insistence, Ms. S. was also placed in the cruiser car, and then taken to the X District #X Police Station nearby.

[6] It is further agreed that en route, the two girls were more or less continually making obnoxious remarks and yelling at the police officers. In her testimony at this hearing Ms. S., demonstrating a much more mature attitude, and also now being two years older, admitted that "I was freaking out on the police. I was swearing and making jokes about them, screaming, and . . ." (page 57, Vol. 1 – Transcript).

[7] It is what happened once they arrived at the police station that is the area of evidence much in dispute at this hearing. Ms. S. testified that once she had been ushered to an interview room, and her friend to another room, Constable D., who was standing with clipboard and pen in hand at the doorway, attempted to obtain Ms. S.'s name. She alleges when she responded with another obscene response, he struck her in the face twice with his hand, and that there were two blows, one involving a sharp-ended object, which she thinks was the end of the officer's pen, which made contact under her right eye and cheek area. She recalled Constable D. picking up the top of his pen which, she felt, had fallen onto the floor as a result of the blow. After this, she crowded in the corner of the room, and claimed that when Constable G. came into the room and "patted her down" in a brief search, that she told her about Constable D. striking her, but that Constable G. expressed doubt that that had happened.

[8] Mr. E. S. her foster parent was called, and after some time, arrived to take Ms. S. back to the group home. She reported the incident to Mr. S. who, after some discussion and after being home, took her to the Children's Hospital where she was seen by the triage nurse in the Emergency Ward, as well as Dr. T. P. K. These reports have been admitted into evidence – <u>Exhibit #12</u>, <u>Exhibit #13</u>,

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

and Exhibit #14. As well, Mr. S. took several color photographs of Ms. S.'s face (Exhibit #6). Dr. K summarizes his findings as follows:

> "Examination at the time revealed a linear red mark on her right maxillary region. This mark was v-shaped in the most lateral portion and then there is a break in the mark and a more intensely red mark closer to the nose. In addition, she had a abrasion on the inside part of her upper lip.
>
> These injuries are consistent with blows to the face with a fist. The mark in the right maxillary region could be consistent with a blow from a fist with a pen, with the pen producing the more intensely red mark close to the nose. The red color of these bruises and abrasions indicate an acute injury within about 24 hours."

The triage report refers to "an elonged abrasion below right eye and a swollen up-lip".

[9] As indicated at the outset, the complaint was filed on October 31, 1995, and her formal statement made to the L.E.R.A. investigator on November 3, 1995. The timeliness of her complaint is, to that extent, consistent with one who feels aggrieved and adds to her credibility.

[10] A sharply contrasting description of the incident is given by Constable D. He concurs with the general description of events leading to the time he had ushered Ms. S. into the interview room, at which time he was standing in the doorway, perhaps a foot or two away from Ms. S. . He believed he had a clipboard and pen in hand. He recalls having asked her something routine – such as to tell her to take off her jacket, when she suddenly wheeled around flailing at him with her left arm. He claims that in an instantaneous reaction, he grabbed her arm with his right hand (in which he was holding his pen, and jerked her briskly towards himself in order to stop her aggressive action and to control her. He believes that his hand did not make contact with her face, but that his pen likely did as she lurched toward him. It should be pointed out that Constable D. 's a fairly tall and large man with large hands.

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

Ms. S. was much smaller and obviously not as strong, and, according to Constable D. , this motivated him to admonish her, saying something to the effect, "Don't even think about it." (Page 94, Vol. 2 – Transcript). Constable D. categorically denies striking Ms. S. and denies any deliberately aggressive acts towards her. His action, he maintains, was simply to stop her flailing arm from further motion.

[11] In this brief summary of the two versions, I have not commented upon numerous other contentious issues which were elicited in examination and cross-examination. Nor have I commented upon the somewhat different interpretations of the injuries and their possible causes, as shown in the testimony of Dr. K. and Dr. F. – both have eminent qualifications in the area of child abuse and associated injuries.

[12] Another factor that was raised at the outset of this hearing was the delay factor. For various reasons, but not attributable to either the Applicant or the Respondent, a complaint initially filed on October 31, 1995, could not come on for hearing until May 12, 1998. While the Applicant, Ms. S. made her written complaint to L.E.R.A. within days of the incident, Constable D. was first interviewed by Internal Investigation, Winnipeg Police Service, on February 10, 1996, following which he was not informed of a L.E.R.A. investigation until receiving a Notice early in 1997. Such delays are obviously regrettable, both to the Applicant and the Respondent.

[13] It is with this in mind that, in my view, small discrepancies in witnesses' testimony should not be given undue weight. The hearing must attempt to examine the whole evidence, and then attempt to determine whether or not clear and convincing evidence exists to make a finding of a disciplinary default, as those are defined in Section 29.

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

[14] The standard of proof which the Provincial Judge must consider in hearing a complaint is interestingly phrased in a negative and mandatory manner:

> **Section 27(2)**
> "The provincial judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the respondent has committed the disciplinary default."

[15] In the circumstances of this case, I am of the view that the only issue to be resolved is that overriding and primary issue – that of credibility – namely which version shall be believed. If Ms. S. 's version is believed, I am of the view that a disciplinary fault has occurred. On the other hand, if I accept Constable D 's version, then no disciplinary fault has occurred.

[16] While the onus of proof is something less than in a criminal case, but something more stringent than a balance of probabilities as in a civil case, even if the Respondent's version is not accepted but the Applicant's version is not found to be clear and convincing, the allegations must be dismissed. The terms "clear and convincing" have not had the wealth of judicial commentary as the tests for criminal and civil liability. In themselves, the terms are relatively plain, and applying ordinary dictionary definitions, it may be said that the degree of proof must be easy to see or transparent, persuasive of being true, and essentially reliable.

[17] In considering what may constitute a disciplinary default under Section 29, there are a number of acts or omissions that are considered to be an abuse of authority, which have also not received extensive judicial interpretation. For instance, the clause here under consideration:

> "**29(a)(ii)** using unnecessary violence or excessive force"

or other clauses such as

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

"**29(a)(iii)** being discourteous or uncivil"

or

"**29(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"

Other clauses such as 29(a)(I) (improper arrest) or 29(a)(vi) (accepting bribes) and several others, have either been considered in criminal or civil cases and commented upon.

[18] The disciplinary default here under consideration – that is "using unnecessary violence or excessive force" has received indirect consideration in cases involving the interpretation of Sections 25 and 26 of the ***Criminal Code***. Repeatedly the phrase "no more force than is necessary" appears, and this phrase has been frequently interpreted in judicial proceedings. If the force used by a peace officer engaged in his duty does not exceed more force than is necessary in the circumstances of the case, it would follow that there would not be an abuse of authority by the use of unnecessary violence or excessive force.

[19] Constables D. and G. , in this case, were acting under the authority of the provisions of ***Child and Family Services Act***, which authorizes the apprehension of a child (under 18 years of age) without warrant, if the child is found to be in need of protection. One of the examples of what constitutes a need of protection is defined as follows:

"1. Without restricting the generality of the foregoing a child is in need of protection where the child

a. is without adequate care, supervision or control; or

b. is beyond the control of a person who has the care, custody or control or charge of the child."

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

[20] As no issue was raised by the Applicant as to the lawfulness or not of the apprehension of the Applicant and her friend near the home of her friend on X Street, and in the circumstances outlined above, I am of the view that the apprehension was indeed lawful. This finding, however, does not absolve the peace officers from both the liability imposed under the ***Law Enforcement Review Act*** or Section 26 of the ***Criminal Code***.

> "**Sec. 26.** Every one who is authorized to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."

[21] It is with these considerations in mind that I return to my earlier assertions to the effect that the fundamental decision to be made at this hearing is to determine the issue of credibility of the two conflicting versions of the events. If Constable D. struck out at Ms. S. as she describes, that is at a moment when the officer was not being assaulted, or when no aggressive act towards him was taking place requiring his defence, then, in my view, there would have been an unnecessary use of violence and excessive force. On the other hand, if indeed the officer was merely using force to control sudden aggression by the complainant, even if that causes certain injury to her face, that, in my view, would not constitute an abuse of authority by the use of unnecessary violence or excessive force.

[22] In considering the issue of credibility, courts and tribunals have often reviewed factors such as the following:

- The demeanour of a witness on the witness stand.
- The behaviour and manner of the witness at the time of the incident being described.
- Whether or not a witness is under the influence of alcohol or drugs.
- Whether or not a witness's actions are consistent with his or her words.
- The degree of maturity of a witness
- The emotional state of a witness

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

- The time which has elapsed since the occurrence and the recounting of it.
- Any possible improper motive for coloring one's evidence as a witness.
- The simplicity or complexity of the sequence of events being described by a witness and his or her ability to observe and accurately recall the events.
- Inconsistencies in a witness's testimony, and
- Other indications, often very subtle and hard to discern, of prevarication or deception.

[23] In attempting to fairly apply these factors to the key witnesses in this hearing, I am not able to say that Ms. S. 's demeanour was deceptive or prevaricative in nature, nor that her conduct on the witness stand was not candid and co-operative. The general impression I received from her was that of a concerned young person who sincerely believed in the truth of her allegations.

[24] What must be borne in mind, however, is that the conduct and demeanour of Ms. S , by her own description, was quite different three years ago, on October 30, 1995 when these events occurred. Repeatedly, she admits and was described by other witnesses as freaking out, screaming and yelling at the police, trying to bug them, being very abusive, insulting, sarcastic and making derogatory jokes about them. In addition, her foster parent, Mr. S. , testified that Ms. S , "had a busy history with social services because of her escalating behaviour", and "had incidents where she has acted out and attacked people . . ." (Page 149, Vol. 1 – Transcript).

[25] Ms. S maintained that those were incidents in her past, but that on the evening in question, she knew what she was doing and was in control of herself, despite the abusive language and taunts.

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

[26] Turning to a consideration of Constable D. 's evidence, this hearing must be very mindful of the fact that as he is the one who may suffer serious consequences should disciplinary default be found to have been committed, that he has a strong motive for denying Ms. S. 's allegations. It is also a fact that he was not interrogated by Internal Investigation until February 10, 1996, some two months later, unlike Ms. S. who made her formal complaint on November 3, 1995, just four days after the incident.

[27] During Constable D. 's twenty three years with the Winnipeg Police Service has been on a variety of duties ranging from general patrol, community-store front police duties, core area and other communities, foot patrol, cruiser car and surveillance assignments. He is described by Sgt. J.G. P. as follows:

> "with Constable D. what you see is not what you get, in the sense that for his gruff exterior, he's a surprisingly gentle person. He strikes me as being a rather compassionate person."
> (Page 62, Vol. 2 – Transcript)

[28] Again, one must be mindful of the likelihood of a fellow peace officer being biased in favor of his colleague. I considered, as well, the question as to whether or not Constable D. 's explanation could be consistent with the injuries described by Dr. K. .

[29] After a careful review of Dr. K. 's report and, as well, the fairly extensive report by Dr. F. , I am of the view that the injuries could be consistent with either one or two applications of force to Ms. S. 's face. I am strengthened of this belief that by both accounts, the incident happened so rapidly that what might have felt like two contacts by Ms. S. was simply one that made contact in two areas of her face.

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

[30] That, with Constable D. 's greater size and strength he could have inflicted much more serious injury, goes without saying. I believe Constable D. is mistaken when he alleges only his pen, not his hand or fist made contact with Ms. S. 's face. But like Ms. S. may be mistaken about two blows, in the quickness of the incident, Constable D. may honestly believe his hand or fist did not make contact with her face.

[31] Whether Constable D. inflicted one or two blows does not change the issue. If I accept Ms. S. 's evidence that she did not flail her arm towards Constable D. and that, indeed, it was an unexpected blow from the constable, whether one or two, that, in my view, would still amount to an abuse of authority by the use of unnecessary violence and excessive force.

[32] In summing up my findings on the issue of credibility, I find that in some respects, the evidence of Constable D. not to be correct, perhaps because of the lengthy delay, but nevertheless not completely satisfactory. While I find Ms. S. 's evidence generally believable, and to a certain degree corroborated by other evidence, on the crucial issue as to whether it was a totally unexpected blow or blows from Constable D. which caused the injuries, or on the other hand, a momentary unthinking tantrum, as is sometimes the case with disturbed children, resulted in her flailing at Constable D. , I am not able to say that I am satisfied that the evidence to support Ms. S. 's complaint is clear and convincing. Her admittedly aggravated emotional state at the time of the incident gives me concern about her ability to accurately recall the details of so quick a moment.

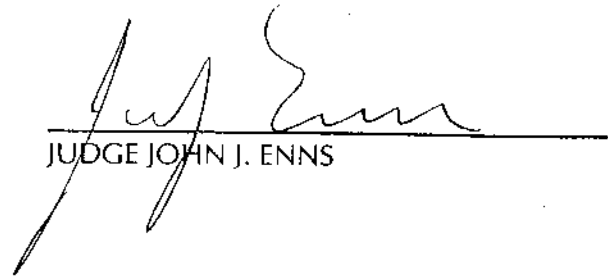
[33] For these reasons, therefore, I find that no disciplinary default occurred and the Applicant's complaint is dismissed. A Ban on publication pursuant to Sec 25 is accordingly also ordered.

[34] Before concluding my Reasons for Decision, I wish to direct a few comments to Ms. S . You will have observed that I did not describe your evidence

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

as untrue. You have exercised your citizen's right to have your complaint investigated and heard by these proceedings. You, together with other citizens who file complaints with L.E.R.A. ensure that peace officers are regularly made to account for their actions – and until a favorable decision is given (if that is the case), the charged officer lives under the worry of serious finding against him. The maturity which you displayed when testifying encourages me to believe that you are a much more thoughtful person now. I encourage you not to lose faith in the justice system in our country, even if some faults exist, and I wish you good luck in your future.

Dated this 3rd day of December, 1998.



JUDGE JOHN J. ENNS

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