

IN THE MATTER OF: *The Law Enforcement Review Act*, Complaint #5705

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

B E T W E E N:

R. L.,)	Mr. Norman Boudreau,
Complainant)	Counsel for the Complainant
)	
- and -)	
)	
Constable R. H.,)	Mr. Rocky Pollack, Q.C.,
Winnipeg Police Service, Respondent)	Counsel for the Respondent
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)	
<i>NOTE: These reasons are subject to a ban on publication of the respondent's name pursuant to s. 13(4.1).</i>)	August 13, 2004

Elliott, P.J.

[1] The subject matter of this hearing is a complaint made by Mr. R. L. against Constable R.H. It concerns alleged behaviour of the respondent on May 31, 2001.

[2] On May 8, 2002, the Law Enforcement Review Commissioner made a referral to a Provincial Court Judge for a hearing to determine the merits of the complaint.

[3] It is alleged that on May 31, 2001 Constable H. committed disciplinary defaults in that he did:

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

- (a) Abuse his authority by using oppressive or abusive conduct or language towards R. L., contrary to section 29(a)(iii) of *The Law Enforcement Review Act*;
- (b) Abuse his authority by being discourteous or uncivil towards R. L. contrary to section 29(a)(iv) of *The Law Enforcement Review Act*.

[4] The hearing of evidence took place February 17 and 18, 2004. Mr. L. testified. Also called on behalf of the complainant were Mr. A. S. and Ms. M. V. Constable H. testified on his own behalf.

[5] The matter was then adjourned for argument until May 6, 2004. On that date counsel for the complainant filed written argument with the Court. Counsel for the respondent indicated that he, too, would like to submit argument in writing. The matter was therefore adjourned until June 24, 2004. Oral argument was also heard on that date.

[6] To put the matter into context, it is significant that there had been some prior contact between the parties:

- (a) At the Fringe Festival during the summer of 2000 - The respondent approached the complainant, informing him that the spiked wristband he was wearing was a prohibited weapon. He asked the complainant to give him the wristband, which the complainant did. According to the complainant, he was told that if he did not turn it over he would be taken to the Public Safety Building and charged with possession of an illegal weapon. The complainant believes that he was treated unfairly during this incident because a Fringe Festival performer was wearing a similar spiked “dog collar”. Despite the fact that the complainant pointed this out to the respondent, the performer was not similarly dealt with.
- (b) August 11, 2000 – The respondent stopped the complainant and told him he was breaking the law by putting up posters on City-owned light posts. The posters were for the “International Day of Action against Police Brutality”. The respondent took the complainant back to the community police office on Portage Avenue, photocopied the relevant section of the By-law for him, and sent him away with all but one of the posters. However, the complainant continued to believe that his constitutional rights were being violated.

As the result of those two incidents the complainant had complained to his friend, A. S., that the respondent had been “bugging” him.

- (c) March 15, 2001 - The complainant attended the previously mentioned “Police Brutality” protest. According to him, he did not take part, but was delivering a child to his or her mother. Unbeknownst to him, the respondent was inside the Public Safety Building, where he made a videotape of the protest, and initiated charges against the complainant under *The Highway Traffic Act*. The charges were for: “pedestrian obstruct traffic”, “walk on a roadway where sidewalk provided”, and “pedestrian walk more than two abreast”. The complainant was the only one the respondent decided to charge that day, according to the respondent, because the complainant was the only “protester” he knew by name. The charges were never served on the complainant. The respondent explained that he did not serve the summonses because he was too busy, and then later because he believed he had a stronger case arising out of the complainant’s actions on May 31, 2001.
- (d) May 31, 2001 - The third actual encounter was on the day of the protest which occurred during a dinner for Prime Minister Jean Chrétien at the Winnipeg Convention Centre. It is the alleged behaviour of the respondent on that date which gave rise to this complaint.

[7] The complainant and the respondent gave very different accounts of what happened May 31, 2001.

[8] According to the complainant, he was walking on the east side of the Winnipeg Convention Centre (the “Convention Centre”) with two other persons. He heard someone saying in a sarcastic voice, “R. L., R. L., I want to talk to you.” The complainant testified that he goes by the name of “R.”. The complainant kept walking but the respondent ran after him and said in a sarcastic tone, “R. L., we’ve been looking for you – we’ve got three summons. I’m warning you, R. L., if you break any more laws I’m charging you.” Later, when the complainant was walking by the same area, the respondent was still there and said, “I’m warning you, R. L., I’m going to charge you.” The complainant told him to “shut up and charge me”. The respondent then made an obscene gesture, simulating an act of masturbation. The complainant again left. Later, when he walked by the respondent a third time, the respondent again said he was going to charge the complainant. The complainant responded “shut up – grow a brain”. The respondent then said, “R. L., you’re my hero.”, making kissing noises in the direction of the complainant. The

complainant made his complaint the following day, although he said nothing in his written statement about the act of simulated masturbation. When questioned about this on cross-examination, he said he was waiting to find a witness who could corroborate it.

[9] The complainant was eventually charged with *Highway Traffic Act* offences arising out of the May 31, 2001 demonstration. On the day of his trial he pled “guilty with an explanation” to one charge - “walking on a roadway where a sidewalk was provided”. He went to trial on the other charges and was found guilty and fined for one further offence.

[10] A. S., a friend of the complainant, testified. He is 30 years of age, has known the complainant for 11 years, and has had a hearing problem since birth. His hearing, however, allowed him to hear questions asked of him in court. He testified that the respondent had approached the complainant about summonses, but could not produce them. He believed that mentioning the summonses when he could not produce them constituted “intimidation” by the respondent. He said that when the respondent approached them, the complainant said something to the effect of “that is the person who has come after me so many times before”. Mr. S. corroborated the complainant’s evidence of the remark, “R. L., you’re my hero.”, saying the respondent made that comment two or three times. He was also disturbed that if the complainant was charged for his behaviour May 31, Mr. S. should have been charged with the same thing. Mr. S. did not see the respondent make any gestures, although he was with the complainant virtually the whole time. He could well have missed seeing the gestures. However, he says that a third party, who was not called to testify, said something after the “hero” remark. After the complainant asked something to the effect of “Did you see him make a gesture?”, the third party said, “Yes, he was making a jerking motion of some sort, yeah.” However, according to the complainant, the simulated masturbation gesture was not made after the “hero” remark - the “kissing” gesture was. A. S. referred to the complainant as “R.” throughout his testimony, not “R.”, but not “R.” either.

[11] M. V. also testified. She did not know the complainant. She did, however, say that he was “security”. She testified that the respondent was “yelling” that day and that itself was an act of “instigation”. Given the amount of noise made by the protestors that day, evident from the videotapes filed, I do not find that the fact that the respondent may have been yelling is necessarily of any significance.

[12] R. H. testified on his own behalf. He has been a member of the Winnipeg Police Service for 13 years and has a clean service record. Since the summer of 2000, he has been with the Community Support Unit, working out of a storefront

office. He testified that at the International Day of Action Against Police Brutality - March 15, 2001 - he observed the complainant from his vantage point inside the Public Safety Building, where he was videotaping the protest. He began to take some steps to prosecute the complainant – filling out traffic offence notices under *The Highway Traffic Act*. He was going to charge the complainant, presumably because he believed the complainant was breaking the law, and because he had a limited vantage point from inside and did not know anyone else by name. He then did nothing about serving the traffic offence notices.

[13] On May 31, 2001, the respondent was augmenting the Crowd Control Unit at the Convention Centre and, from 4:00 p.m. until 7:00 p.m., was posted at the east side entrance. He saw the complainant a number of times. On the first occasion, the respondent says he called out to the complainant to get his attention. He agreed he called the complainant “R.” because he had “never called him anything else”. He testified that when he first met the complainant, the complainant had had no identification. He had asked the complainant for his name and he had responded, “R.”. He testified that he did not use the name “R.” sarcastically or to stir up trouble - “absolutely not”. The respondent produced copies of the traffic offence notices he had filled out on or about March 15, 2001, but had not had with him on May 31. The respondent also produced two videotapes that were taken by members of the Winnipeg Police Service during the May 31 protest. Neither shows the complainant and respondent together, nor any significant acts by either of them. They do, however, make evident the high noise level during the demonstration. This was due to both the number of protestors and the musical instruments they made noise on - whistles, electric guitars and drums. Some demonstrators prevented guests from entering the Convention Centre and others made guests in evening clothes get down on their knees and crawl under barriers. One guest was forced to the ground. A window was smashed. Traffic was stopped on Carlton Street by protestors blocking the intersection of York Avenue, backing up rush hour traffic heading from downtown. Police were, as a result, very busy, both with crowd control and redirecting traffic. Despite all of this, police officers seen on videotape appeared remarkably even-tempered, talking and laughing with protestors.

[14] The respondent testified that it appeared the complainant was at the protest in a supervisory role - that he overheard the complainant giving instructions about how to link arms, so that the protestors could not be easily moved. Police instructions were not to interfere with the protest but to keep demonstrators off the roadway. The respondent testified that he told the complainant that it was acceptable to be in the parkade entrance or on the sidewalk, but asked the

complainant to keep people off the roadway. According to the respondent, he wanted to open dialogue, but the complainant became confrontational and “stomped off”. At one point the complainant was urging protestors to move from the parkade entrance onto the street. The respondent testified that he told the complainant not to go on the roadway and obstruct traffic. He says the complainant swore at him. One other time, he said, the complainant was laughing, sneering, and told him to “Fuck off.” The respondent testified that he then said, “Aren’t you the hero.” - not “You’re my hero, R. L..” He responded “absolutely not” when asked if he had made the kissing gesture alleged.

[15] The respondent also denied simulating masturbation. He said that he was surprised that the complainant would say he would make such a gesture on a busy street and in a situation where protestors had video cameras. He had, he said, a good reputation on “Main Street”.

[16] In regards to why he charged only the complainant in regards to actions on May 31, the respondent said that he had reason to believe the complainant was involved in organizing protests – information that had come to light from other officers regarding the complainant’s activities in various protest groups. The complainant committed violations of *The Highway Traffic Act* in front of him. And, it probably goes without saying, he knew the complainant’s name.

[17] By way of historical background, the respondent explained that Sergeant B. S. had tried to open lines of communication with protest organizers, in order to encourage protestors to get parade permits and escorts and to avoid damage and safety issues. Community police were involved, and a number of things were tried but did not work. The respondent, therefore, had the idea of videotaping protests and charging people under *The Highway Traffic Act*. The “Police Brutality” protest was the first time this was to be done - it was to be a test case. However, the respondent believed that he had better evidence, presumably his own *viva voce* evidence, as the result of what occurred on May 31. He, therefore, did not proceed on the March 15, 2001 charges - only those of May 31.

[18] This case hinges on the credibility of the witnesses, the positions of the complainant and the respondent being very different. When the complainant testified, I found him very credible and believed his evidence. I also believed that of A. S. Mr. S. corroborated the complainant’s evidence in terms of one remark alleged to have been made by the respondent - “R. L. you’re my hero.” Mr. S. did not see any obscene gesture, kissing motions, or hear the initial comments made by the respondent. He did say that he heard someone else say that the respondent had made a “jerking off” motion, and heard the complainant confirm at the time that

such a motion had been made. However, that was, according to Mr. S., at the time the “hero” remark was made - at the time when, in contrast, the complainant says, the “kissing motion” was made. Ms. V.’s testimony added little - even if the respondent was yelling, it may have been that the noise level required it.

[19] When the respondent first began to testify, I found his testimony somewhat glib and unconvincing. However, as he explained some of the matters, I began to find him more credible. When he showed excerpts of videotapes of the demonstration of May 31, 2001, and explained what had gone on throughout the demonstration, I saw and heard how large and loud the group of demonstrators was, and how many matters required police attention. I then found it less likely that the respondent would either have had the time to make the gestures he was accused of, or that he would make them with so many people and video cameras present. I also found it less likely that A. S. could be certain as to what he heard. It also became unlikely that the respondent was waging a vendetta against the complainant, especially since he took so long to serve the traffic offence notices.

[20] In the end, I am left with many unresolved credibility issues. According to section 27(2) of *The Law Enforcement Review Act*, I must be satisfied on “clear and convincing evidence” that the disciplinary defaults took place. In regards to the allegation of simulated masturbation, counsel for the complainant has conceded that such clear and convincing evidence does not exist. There is better evidence as to whether the comment, “R. L., you’re my hero.” was made and I tend to believe it was. However, in regards to the kissing gesture that allegedly accompanied it, although Mr. S. corroborated the comment, he said that following it, a third party made a comment about the respondent having made a “jerking off motion”, rather than the kissing motion alleged by the complainant. Therefore, although I tend to believe both the complainant and A. S. about the words uttered on this occasion and about the kissing gesture that the complainant says accompanied them, I have concluded that because of the discrepancies between their testimonies the required “clear and consistent” evidence does not exist. I, therefore, will not making a finding that the respondent made the “kissing “ gesture.

[21] As there is no clear and convincing evidence of the gesture, I am left, at most, with the words, ”R. L. you’re my hero.” Although I do not believe it is appropriate for police officers to call adult citizens by their first names without permission, I do not believe doing so constitutes a disciplinary default. Although the complainant testified that he used the name “R.”, his friend Mr. S. referred to him by the name of “R.”. And although the comment itself may be discourteous, I am not able to find that it did not follow considerable provocative words on the part of the complainant. While we hope that police officers do not react to

provocation, they also experience emotions. Therefore, although the words themselves are inappropriate, they would not in my opinion constitute a disciplinary default such that the respondent deserves disciplinary action.

[22] In regards to the complainant's argument that he was targeted during the protest, I do not find this to be a disciplinary default - even if true. His was the only name known. He was, according to one of his own witnesses, a leader of the protest or "security". He was, in fact, found guilty of one of the three charges, having plead guilty "with an explanation" to the third. He was fined by a judicial officer, who obviously found that the complainant had done something wrong - therefore it cannot be suggested that the prosecution was malicious. Therefore, although I have no doubt that the complainant believes he has been unfairly singled out, and have some sympathy for him, I cannot conclude that he was singled out for any improper reason.

[23] It was also argued that the respondent abused his authority by bringing up the subject of the summonses and threatening the complainant with possible conviction. It was argued that the complainant perceived the comments of the respondent as threats. I do not accept that telling someone that summonses are in existence constitutes a threat or a disciplinary default.

[24] Nor does the practice of using charges under *The Highway Traffic Act* to deter illegal protests constitute such a default. Obviously, the police have problems with some protestors who do not obey traffic or other laws. As a result, not only traffic control problems, but also other problems, can result. Police are entitled to take legal measures to try to prevent future problems.

[25] This complaint is therefore dismissed.

"J.A. Elliott"

Judith A. Elliott, P.J.