

NOVA SCOTIA COURT OF APPEAL

**Cite as: Levandier v. Nova Scotia (Police Review Board), 1994 NSCA 97**

Clarke, C.J.N.S., Matthews and Pugsley, J.J.A.

**BETWEEN:**

CONSTABLE DAVID LEVANDIER

)  
David W. Fisher  
) for the Appellant

)  
Appellant  
)

- and - )

)  
Michael Moreash  
) for the Respondents

)  
THE POLICE REVIEW BOARD AND  
BARRY J. ALEXANDER, GARY R. MILLER,  
MACMASTER, Chairman and members  
respectively of the Police Review Board and )  
THE CITY OF DARTMOUTH AND THE )  
DARTMOUTH MUNICIPAL BOARD OF )  
POLICE COMMISSIONERS )

)  
Respondents )

)  
Appeal Heard:  
June 8, 1994  
)

)  
Judgment Delivered:  
June 27, 1994  
)

**THE COURT:** Appeal dismissed per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

MATTHEWS, J.A.:

This appeal concerns the interpretation of certain clauses of the Regulations made pursuant to the **Police Act**, c. 348, R.S. 1989.

The Regulations (R) are far from clear. They present difficulties in interpretation. Both counsel expressed problems in working with them and in attempting to explain them and their effect on the facts of this appeal. They are confusing to all concerned.

The appellant, then a police officer with the Dartmouth City Police Force, was suspended without pay from that force by reason of a decision of the Police Review Board of that city dated May 10, 1993. That decision was upheld by a decision of a Supreme Court justice dated January 7, 1994. He now appeals to this Court:

The Board proceeded on the basis of an agreed statement of facts:

1. On June 8, 1991, Constable David Levandier (Levandier) of the Dartmouth City Police Department came into contact with a 23 year old female (X).
2. On the evening of June 8, 1991, X filed a complaint of sexual assault against Levandier.
3. On June 8, 1991, Inspector Gordon Naugler of the Dartmouth City Police took a statement from X with respect to the alleged sexual assault.
4. On June 8, 1991, Levandier was suspended from his duties as a Dartmouth City Police Officer.
5. In a letter dated June 12, 1991, the Chairman for the Board of Police Commissioners for the City of Dartmouth advised Levandier that his suspension was to continue.
6. Levandier was subsequently charged with sexual assault contrary to s. 27(1)(a) of the **Criminal Code**. [Note: the reference to s. 27(1)(a) is in error. The correct section is 271(1)(a).]
7. X was provided with a public complaint under the **Police Act**, which she refused to sign against Levandier.
8. In a letter dated August 6, 1991, Levandier was advised that his pay and allowances would cease as of August 8, 1991.
9. Levandier went to trial on a charge of sexual assault, and the trial ended on December 24, 1992 with Levandier's acquittal.
10. On January 5, 1993, Levandier filed a Form 14 with respect to his original suspension without pay.

11. Between Levandier's acquittal and January 11, 1993, the Dartmouth City Police Department obtained a copy of the trial transcript and reviewed/investigated the trial evidence with respect to Levandier's conduct on June 8, 1991.

12. On January 12, 1993 Levandier was dismissed pursuant to a Form 12 issued under the Regulations to the **Police Act**.

13. On January 12, 1993, the Dartmouth Police Department issued a press release with respect to Levandier's dismissal.

14. A written decision with respect to the dismissal was received January 13, 1993.

15. On January 13, 1993, Levandier filed a Form 14 with respect to his continued suspension without pay commencing on December 24, 1992.

16. On January 13, 1993, Levandier filed a Form 13 with respect to his dismissal from the Dartmouth City Police Department.

17. Levandier was not served with a Form 11.

18. No appeal filed in regard to Levandier's acquittal.

The forms to which reference is made are those set out in the schedule to the Regulations.

Sections 34 and 35 of the **Act** are relevant:

34 No member of a municipal police force is subject to reduction in rank, to dismissal or to any other penalty for breach of the code of discipline except after proceedings have been taken in accordance with this **Act** and the regulations. 1985, c. 33, s. 17.

35 After a disciplinary decision has been made in accordance with this **Act** and the regulations, a police officer who is the subject of the disciplinary decision may initiate a review of the decision by filing a notice of review with the Registrar of the Review Board within the time determined by regulation.

The Regulations are divided into several parts.

Part 1, R. 1 to 4 inclusive is entitled "General" and includes the interpretation section.

Part 2, R. 5, contains the "Code of Conduct and Discipline".

Part 3, entitled "Public Complaints, Internal Discipline and Suspension" is in turn, divided into three segments: R. 6-14 inclusive; "Public Complaint"; R. 15 to 18 inclusive, "Internal Discipline"; and R. 19 to 22 inclusive, "Suspension".

The remaining Parts are not, in my opinion, relevant to this appeal.

The initial suspension of the appellant occurred on June 8, 1991 (fact 4) as a result of a complaint that same day (fact 2). R. 1(e) defines a complaint for the purposes of the Regulations:

(e) "complaint" means any communication received from a member of the public in writing, or given orally to the chief officer or the chief officer's delegate and reduced to writing and signed by the complainant, which criticizes the behaviour of a member of the force or alleges the failure of the force itself to meet public expectations;

In order to proceed by way of a public complaint, it is necessary for the person to whom the complaint is made to record the complaint in form 5. That form sets out a place for the signature of the complainant certifying that the information given is true. The complainant refused to sign that form (fact 7). Not having a formal complaint as required by R. 1(e) the authorities could not proceed pursuant to Regulations 6 to 14. They did proceed under R. 19 to 22 inclusive: "Suspension". R. 19(1) is relevant:

19(1) Notwithstanding any provision of these regulations, a chief officer may suspend a member of a municipal police force from duty who, on reasonable and probable grounds, the chief officer believes to have committed an offence under a statute enacted by the Legislature or the Parliament of Canada or a disciplinary default pursuant to these regulations that, in the opinion of the chief officer, renders the member unfit for duty.

The suspension of June 8, 1991 was reviewed by the Police Commissioners on June 11, 1991, resulting in a letter dated June 12, 1991, from the chairman of the Commission to the appellant:

Dear Constable Levandier:

As Chairman of the Dartmouth Board of Police Commissioners, it is my duty to inform you that the Board met on June 11th, 1991 at 7:00 p.m. to review your suspension from all Police duties by the Chief of Police, resulting from a citizen complaint rendering you unfit for duty under Section 19(1) of the Regulations made pursuant to the Nova Scotia Police Act.

I therefore must inform you that the Dartmouth Board of Police Commissioners confirmed the decision taken by the Chief of Police on June 9th, 1991 to suspend Constable David Levandier, a member of the Dartmouth Police Department, as set out in Section 19(1) and 19(3) of the Regulations made pursuant to the Nova Scotia Police Act and further that the Dartmouth Board of Police Commissioners has authorized all pay and allowances as set out in Section 22(1) of the Regulations be paid to Constable David Levandier for the first sixty (60) days of suspension and to review the continuation of all pay and allowances after sixty (60) days. That written notice of this decision as set out in Section 22(2) be served on Constable David Levandier by the Chief of Police or his delegate.

It was thus made clear to the appellant that not only was he suspended, but that was as a result of a citizen complaint rendering him unfit for duty and that the Commissioners were proceeding under the provisions of R. 19 to 22.

Had the appellant desired to have that suspension reviewed he could have done so pursuant to R. 22(3). That regulation permits a member suspended to initiate a review of the decision within sixty days after receiving a notice of the decision by filing a notice in form 14. He did not do so within that time. He did file a notice in form 14 on January 5, 1993. (fact 10).

As noted in fact 6, subsequent to the suspension, the appellant was charged with the criminal offence of sexual assault. No further action was taken in respect to the suspension during the hiatus between the laying of that charge and the rendering of the decision in respect to it. That decision was filed on December 24, 1992.

It is clear from the decision that the appellant had sexual relations with X in a police cruiser. It was confirmed to this Court that there is no dispute, that act took place and it occurred while the appellant was on duty.

The issue before the criminal court was not that the act took place as and where alleged, but whether the Crown had proved beyond a reasonable doubt lack of consent on the part of X, a necessary ingredient to prove the offence. Upon determination that the Crown had not, the trial judge acquitted the appellant.

After reviewing that decision, both the appellant and the Commissioners reacted. As previously mentioned, the appellant filed a form 14 on January 5, 1993 (fact 10). It is of some importance that this form may be filed by a member pursuant to R. 22(3), dealing with "Suspension". It set out that the appellant initiated a review of the decision to suspend and the refusal to extend his pay and allowance more than sixty days beyond the date on which he was suspended. Again, as previously mentioned, under the provisions of R. 22(3), the subregulation which permits the use of form 14, the appellant was out of time.

The Dartmouth Chief of Police on January 13, 1993, wrote to the appellant informing him that effective January 12, 1993 (the date the Chief met with appellant's solicitor) he was dismissed as a member of the Dartmouth Police Department (facts 12 and 14).

That letter mentioned form 12 which had been served upon the appellant on January 12, 1993. That form may be issued pursuant to R. 16(14) and R. 16(22). R. 16 to R. 18 inclusive are concerned with "Internal Discipline". The appellant relies upon that fact to argue that the respondent city authorities proceeded under the provisions of "Internal Discipline", not those concerning "Suspension". Since the internal discipline was not commenced until the serving of form 12 on January 12, 1993, it was out of time and hence a nullity. That was the position taken by the Police Review Board.

As a result of three Notices of Review filed by the appellant, the Police Review

Board considered the matter.

The Board set out the three Notices of Review as:

...one filed on January 5, 1993, to review a decision by Dartmouth Board of Police Commissioners on August 8, 1991, refusing to extend pay and allowances beyond sixty days from date of suspension from the Dartmouth Police Department; the second having been filed on January 13, 1993, to review a decision by Chief of Police Keith Cole on December 24, 1992, refusing to extend pay and allowances beyond sixty days from date of suspension; and the third, also filed on January 13, 1993, to review a decision of Chief of Police Keith Cole on January 12, 1993, relating to the dismissal of Constable David Levandier.

The Board found that it had no authority to deal with the appellant's form 14 Notice of Review filed January 5, 1993, which was in respect to the appellant's suspension without pay which commenced on August 8, 1991. I agree. R. 22(2) and 22(3) are pertinent:

(2) Written notice of a decision pursuant to subregulation (1) by the chief officer and the board to discontinue a member's pay and allowances at the expiration of the first sixty days of the suspension shall be given forthwith to the member who may thereafter appear personally or by counsel or, where a collective agreement so provided, by an agent, before the Board for a review of the decision.

(3) Within sixty days after a notice of a decision pursuant to subsection (2) is received, the member may initiate a review of the decision by filing with the Review Board a notice of review in Form 14 of the Schedule.

Neither the appellant nor his counsel filed a form 14 in time nor did either appear before the Review Board in order to review the decision to suspend without pay within the time limit. The Notice filed January 5, 1993 is clearly out of time.

I also agree with the Board that the Notice of Review filed January 13, 1992 presumes that a decision was made on December 24, 1992 by the Dartmouth Chief of Police to continue the suspension of the appellant without pay and allowances and that the facts do

not support such a conclusion.

The third notice, that filed by or on behalf of the appellant, to review the decision of the chief of police relating to the appellant's dismissal, was not considered by the Board as it concluded that the notice of dismissal was a nullity. That notice was not put in issue before the Court.

Although there were several issues before the Board, the Justice and this Court, the parties agree that the main issue concerns the validity of the dismissal of the appellant.

Briefly put, the Board recognized that under the regulations there are three categories of proceedings: public complaints, internal discipline and suspension.

It also recognized that internal disciplinary proceedings and suspensions "are distinct processes".

It set out the issue in this fashion:

**On a preliminary question, did the City of Dartmouth have jurisdiction to issue a Form 12 to Levandier on January 12, 1993, and dismiss him on the same date?**

Concentrating on form 12 the Board continued:

It is clear from the facts that the events which gave rise to the internal disciplinary proceedings taken against Constable David Levandier occurred as a result of the events on June 8, 1991. The Form 12 commencing the disciplinary proceedings was not filed until January 12, 1993. What this Board must decide is whether the internal disciplinary proceedings taken against Constable David Levandier and his eventual dismissal are valid in light of Regulations 16(2) and 16(3) which state as follows:

16(2) No proceedings for an alleged disciplinary default shall be commenced if more than six months have elapsed since the occurrence of the alleged disciplinary default.

16(3) For the purpose of this regulation proceedings are commenced at the time Form 12 is served on a member, or in the case of a member who is absent without leave or avoiding service, at the time Form 12 is signed by the authority.



There is no doubt form 12 was not filed within the stipulated six months after "the alleged disciplinary default".

The Board continued:

In conclusion, it is this Board's opinion that Form 12 dated January 12, 1993, commencing internal disciplinary proceedings against Constable David Levandier is a nullity. It was clearly out of time.

However, after further discussion it commented:

Constable Levandier was suspended on June 8, 1991, and that suspension continued. The suspension was not revoked or terminated. The suspension still applied when Constable David Levandier was dismissed on January 12, 1993. It is this Board's opinion that the suspension continues. It is also this Board's opinion that we have no jurisdiction to review the merits of the suspension. Pursuant to Regulation 19(1), the suspension is based upon the opinion of the chief officer who must conclude that the facts and circumstances of the case renders the member unfit for duty.

There does not appear to be anything in the Act which prevents the suspension from continuing indefinitely. There are no time periods in the Act pertaining to the length of a suspension.

It concluded that it had no authority to review whether the appellant's pay and allowance should be continued.

On application for judicial review by the appellant to the Supreme Court, in essence, that Court upheld the decision of the Board.

I agree with the Board that the appellant was suspended on June 8, 1991, and the suspension "still applied" when the appellant was dismissed on January 12, 1993.

For the reasons previously expressed, in my opinion, the suspension was not an "internal discipline" but one under the provisions of R. 19. The issues concerning pay and allowance were dealt with under R. 22. Those provisions are within the context of the "Suspension" regulations, separate and apart from the "Internal Discipline" regulations.

With respect, I cannot accept the appellant's submission that the "suspension

regulations" (19 to 22 inclusive) are intended to apply to "interim" suspensions only. There is nothing in the **Act** or regulations to support that contention. On the contrary a study of the **Act**, regulations and forms leads to the opposite result.

It is of importance that the letter of January 13, 1993 from the chief to the appellant mentions more than form 12. He wrote in part:

On January 12th, 1993 Mr. David W. Fisher Solicitor for P.A.N.S. acting on your behalf, accepted service of Form 12 (attached) setting out the disciplinary defaults and that a major penalty of dismissal as described under Subregulations (3) of Regulation 5 would be imposed and further the Chief of Police has the authority to dismiss a member of the Dartmouth Police Force in accordance with By-Law P-900 made pursuant to subsection (3) of Section 15 of the Act.

In my opinion the service of form 12 upon the appellant and the reference to that form in the letter of January 13, 1993 were due to the particular wording of R.5(3):

(3) Where an authority finds that a member of a municipal police force has committed a disciplinary default and has been notified in Form 12 that a major penalty will be sought, that authority may

(a) dismiss the member from the police force;

...

Thus that form may not only be used when dealing with an internal discipline but when a major penalty is sought. Undoubtedly when the chief of police turned to the regulations to determine how to proceed when he sought "a major penalty", that is, dismissal, he read R. 5(3) and following its dictates served form 12 upon appellant's counsel. The service and mention of that form does not transpose the suspension from one taken under the provisions of R. 19 to one of internal discipline. Neither do those acts render the dismissal one under internal discipline or a nullity. The discipline cannot be categorized as internal. The dismissal was the culmination of the decision to suspend.

Regardless of the standard of review to be applied in proceedings such as this, the

Board erred in concluding that the form 12 dated January 12, 1993 commenced an internal disciplinary proceeding and as it was out of the time restriction concerning internal discipline, it was a nullity. It was within the jurisdiction of the police authority to dismiss the appellant from the force.

In my opinion it is not necessary to consider the other issues before us.

In clarification, form 11 to which reference is made in fact 17 is a Notice of Allegation to be used in matters of internal discipline a member of the force is alleged to have committed a disciplinary default: R. 16(8). It is not relevant.

The appeal is dismissed.

Counsel have agreed that there should be no disposition as to costs.

J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

CONSTABLE DAVID LEVANDIER

Appellant

- and -  
FOR

BY:  
THE POLICE REVIEW BOARD and

BARRY J. ALEXANDER, GARY R. )  
MILLER, EDWARD MACMASTER )  
Chairman and members respectively )  
of the Police Review Board and )  
the City of Dartmouth and the Dartmouth )  
Municipal Board of Poice )  
Commissioners )

Respondents

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) REASONS

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) JUDGMENT

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)  
) MATTHEWS,  
) J.A.