

[3] The notice of alleged disciplinary default and referral to a Provincial Court Judge was filed as Exhibit #1. The date of the alleged disciplinary default is set out in the notice as June 17, 2011. The complaint alleges that the respondent officer abused his authority by:

1. making an arrest without reasonable and probable grounds; and
2. using unnecessary violence or excessive force.

[4] “Abuse of authority” has been considered in many cases, and after reviewing several authorities, was summarized succinctly by my colleague Martin, P.J. in her decision of November 25, 2010 *J.W. v. Constable K.G.* as conduct that is:

- burdensome, harsh or wrongful or which lacks probity or fair dealing;
- indicative of lack of fair dealing or bad faith or improper motive;
- treating badly or injuriously; and
- exploitive in the sense that it is inappropriate and unjustifiable, controlling, intimidating or inhibiting.

[5] The burden of proof in these proceedings is on the complainant to prove that the respondent officer committed the alleged disciplinary defaults. The standard of proof is set out in section 27(2) of the *Law Enforcement Review Act* as follows:

“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.”
(Emphasis added.)

[6] The phrase “clear and convincing evidence” has been the subject of some judicial consideration. Ultimately the authorities, particularly from Manitoba, agree that the standard is higher than proof on a balance of probabilities, but less than proof beyond a reasonable doubt. As stated by R. Chartier, P.J. (as he then was) in his October 26, 2000 unreported L.E.R.A decision *Anderson v. Constables D. & K.*:

“The evidence must be clear; it must be free from confusion. It must also be convincing, which, when combined with the word ‘clear’, in my view means that it must be compelling.”

[7] As noted earlier, the only evidence was that of the complainant, [REDACTED] Mr. [REDACTED] testified that on the morning of Friday, June 17, 2011, he was riding his bicycle from his home at [REDACTED] Avenue, near Main Street and Inkster Boulevard in Winnipeg, to [REDACTED] School at [REDACTED] Avenue, where he taught. He was an experienced rider, wearing typical riding gear, including riding shoes clipped into the pedals.

[8] As he rode southbound on Isabel Street approaching the intersection with Notre Dame Avenue, an intersection he felt was dangerous in rush hour traffic, he decided to ride briefly on the sidewalk until just past Notre Dame Avenue nearing Cumberland Avenue. After crossing Notre Dame Avenue on a green light, and approaching the back lane between Notre Dame Avenue and Cumberland Avenue, Mr. [REDACTED] testified that he heard someone “*scream out Hey*”.

[9] Mr. [REDACTED] said that he looked to his left and saw a uniformed City of Winnipeg police officer on a mountain bike, pedalling hard to go around him near the back lane. Mr. [REDACTED] said that he stopped and unclipped his right shoe for balance and that the police officer “*got very close, within about a foot*” and told him that it was illegal to ride on a sidewalk. Mr. [REDACTED] advised him that riding a bike near that intersection was dangerous.

[10] After a brief discussion, Mr. [REDACTED] testified that the officer said “*Give me your ID, you’re going to get a ticket,*” a request Mr. [REDACTED] described as “*strange*” because “*often when I’m riding my bike I don’t have ID with me*”. He testified that he told the officer that “*I don’t think I have to give you my ID,*” to which he says the officer replied “*This goes a lot easier for you if you give me your ID,*” a comment with seemingly ominous overtones. Mr. [REDACTED] said that he repeated his position regarding not having to produce his identification (ID), and said that the officer replied by saying either “*I’m gonna throw you against that*

tree and search you for ID,” or “I’m gonna throw you against that tree and arrest you.”

[11] Mr. ██████ testified that at that point he took his cell phone from his pocket, stating, *“I’m a teacher just down the street and I need to call them to say I need a substitute.”* He said that the officer replied by saying *“You can’t do that,”* and punched his hand with a closed fist, knocking the cell phone from his hand and onto the ground. Mr. ██████ said that he instinctively moved to pick up his phone, at which point he was placed in an arm bar behind his back and forcibly pushed to the ground, while still straddling his bicycle and with one foot clipped into the pedal. He described being virtually bent in half with the officer’s weight on his body, and his arm being twisted painfully upward toward his head.

[12] A few seconds later, Mr. ██████ heard a woman asking *“Can I help you”* and said that both he and the officer replied, he by saying *“Yes”* and the officer by saying *“Call 911”*.

[13] Mr. ██████ testified that he was then handcuffed behind his back, more officers arrived, and one officer rolled him onto his side and went through his backpack and his pockets, and took out his wallet. He said that a different officer threw down tickets near his head and said *“take it or not”*.

[14] Eventually he described being raised to his feet and the handcuffs were removed. He said that he took off his backpack, put his lunch and change of clothes back into his backpack and got onto his bike and rode to school.

[15] Mr. ██████ was clear that he was asked for his **identification** but never for his name, date of birth, and address.

Did Cst. ██████ abuse his authority by making an arrest without reasonable and probable grounds?

[16] Had Cst. ██████ appeared personally or by counsel, no doubt there could have been an argument made that Mr. ██████ was never actually or formally placed under arrest. While he testified that he was threatened with arrest, he did not say that he was told that he was under arrest.

[17] Regardless, it had to have appeared to any bystander that he in fact was arrested, having been forced to the ground, placed in an arm bar, handcuffed behind his back and searched. So, while he may not have been formally arrested, he clearly was under *de facto* arrest.

[18] It should be noted that Mr. ██████ does not dispute that he committed an infraction for riding his bicycle on the sidewalk (or that the wheel diameter of his bicycle exceeded 410 mm), nor that Cst. ██████ had the authority to issue a Provincial Offence Notice for that infraction. He does take issue with the authority of the officer to arrest him for that infraction.

[19] Under section 76.1(4) of the *Highway Traffic Act* of Manitoba (HTA):

a peace officer may, at any time when a driver is stopped (and there is no issue that the rider of a bicycle falls within the definition of ‘driver’):

- a) require the driver to give his or her name, date of birth and address to the officer;
- b) require the driver to produce his or her licence, and the vehicle’s insurance certificate and registration card and any other document respecting the vehicle that the peace officer considers necessary.

[20] “Vehicle” as defined in the *Highway Traffic Act* does not include a device designed to be moved solely by human muscular power; therefore a bicycle is not a vehicle as defined in the *Act*.

[21] The distinction then between sections 76.1(4) (a) and (b) is obvious. Subsection (a) relates to bicycles and subsection (b) relates to vehicles, being those things not moved solely by human muscular power. Subsection (a) does not require the driver to produce his or her licence, the vehicle’s insurance certificate

or registration card (because there are none for a bicycle) or any other document respecting the vehicle. All that is required of the “driver” of a bicycle is name, date of birth and address, none of which requires production of what we would traditionally consider as “identification, identification papers or identification documents”.

[22] Therefore, Mr. [REDACTED] technically was correct when he believed he was not required to produce his identification at the officer’s request. I say technically because I suspect that most people would not be aware of the distinction between subsections (a) and (b) as to their responsibilities. I suspect also, again because I did not hear from the respondent officer, that such refusal may have been perceived by him as somewhat defiant and obstructive. Regardless, the situation quickly degraded as a consequence.

[23] So, is/was there authority to arrest someone for riding a bicycle on the sidewalk?

[24] One case argued by counsel was *Moore v. The Queen*, [1979] 1 S.C.R. 195, which involved a situation somewhat similar to this case, where a bicyclist was observed by police riding through a red light in Victoria, British Columbia. The officer stopped the accused and asked for his name and address, which he refused to give. As a result, he was charged with obstructing a peace officer under the *Criminal Code of Canada*, but not with failing to stop at the light. While the contents of the *Motor Vehicle Act* of British Columbia at the time were different than those of the *Highway Traffic Act* in Manitoba today, the Supreme Court found that under the *Act* at the time, the officer had no authority to arrest Moore without a warrant. But because the *Summary Convictions Act* of British Columbia incorporated the arrest provisions of the *Criminal Code of Canada*, the officer “could only have arrested Moore for the summary conviction offence of proceeding

against a red light if it were necessary to establish his identity” and that the constable therefore was carrying out his duty by attempting to identify the accused and had the authority to arrest him.

[25] The *Summary Convictions Act* of Manitoba, by virtue of section 3(1) incorporates certain provisions of the *Criminal Code of Canada* **but not section 495**; the section entitled **ARREST WITHOUT WARRANT BY PEACE OFFICER**, the similar section that **was** incorporated under the similar *Act* in British Columbia. That is the major distinction between the situation in *Moore* and the situation here.

[26] Absent such authority granted by legislation, the officer had no legal authority to arrest Mr. [REDACTED] for riding his bicycle on the sidewalk. He could ask only for his name, date of birth and address for the purpose of issuing a Provincial Offence Notice. Had he decided to charge Mr. [REDACTED] with *obstructing a peace officer* under the *Criminal Code of Canada*, he would have had the authority to arrest him if *it were necessary to establish his identity*.

[27] Therefore, I am satisfied on clear and convincing evidence that the officer abused his authority by effectively arresting Mr. [REDACTED] without lawful authority, that is, without reasonable and probable grounds to do so. I find that he committed a disciplinary default within the meaning of section 29 of the *Act*.

Did Cst. [REDACTED] abuse his authority by using unnecessary violence or excessive force?

[28] Counsel for Mr. [REDACTED] argued that not only did the officer use unnecessary violence and/or excessive force overall, but also that there were several actions that individually would support such a finding, those being:

1. by knocking the cell phone from his hand;

2. by tackling him off his bicycle;
3. by placing him in an arm bar; and
4. by handcuffing him behind his back and forcing him to lie face down on the ground.

[29] I do not see it as particularly helpful to scrutinize the evidence in consideration of each argument. The answer to the essential question may be found by viewing the evidence globally, from an objective perspective.

[30] I suspect that any reasonable member of the public observing this event, such as the lady who asked if she could help, would have thought he or she was seeing the takedown of a wanted criminal. I am confident that the same reasonable member of the public would be shocked to learn that what happened was the result of Mr. [REDACTED] riding his bicycle on the sidewalk for a short distance. There is rarely a day in Winnipeg, during the months when more people tend to ride bicycles, that we do not see someone riding on a sidewalk. This is particularly so near busier, more congested and dangerous intersections. The fact remains that no one is allowed to ride a bicycle on a sidewalk. The consequence for doing so is getting a traffic ticket; it should not be being tackled off your bicycle, being handcuffed behind your back and left lying on the ground while being searched.

[31] Such action, in my view and I believe in the view of any reasonable person, is excessive and unnecessarily violent.

[32] Accordingly, I am satisfied on clear and convincing evidence that Cst. [REDACTED] abused his authority by using unnecessary violence and excessive force, and thereby committed a disciplinary default.

[33] Given my findings that the respondent officer committed disciplinary defaults, the ban on publication of the respondent officer's name pursuant to

section 25 of the *Act*, granted at the outset of these proceedings, is no longer in effect.

[34] The next stage of the proceedings normally would require arranging a date for submissions pursuant to section 28 of the *Act* regarding the imposition of penalties as set out in section 30 of the *Act*.

[35] Here, however, as discussed at the outset of the hearing, as the respondent is no longer a member of a police service, he may be beyond the jurisdiction of the Court. If so, then the matter will end with these findings. If, however, the Commissioner or counsel wishes to make submissions on the issue, I invite them to contact the Provincial Trial Coordinators to arrange a date for a hearing.

K. Dale Harvey, P.J.