IN THE MATTER OF: ***The Law Enforcement Review Act*** Complaint #6180

AND IN THE MATTER OF: An Application pursuant to s.17(1) of ***The Law Enforcement Review Act*** R.S.M. 1987, c.L75

B E T W E E N:

S.H.	)	Self-represented
Complainant/Appellant	)	
	)	
- and –	)	
	)	
Cst. B. S. #1893	)	William G. Haight
Sergeant S. B. #1259	)	Counsel for the Respondents
Respondents	)	
	)	Sean D. Boyd,
	)	Counsel for L.E.R.A.
	)	
	)	Judgment delivered orally
	)	January 31, 2007.
	)	Judgment released March 26, 2007.

SMITH, P.J.

1. The history of these proceedings is such that on August 18th, 2006, I found the respondent officer, Constable S., to have committed a disciplinary default under **The Law Enforcement Review Act** when he abused his authority towards N.H.-C. and his mother, S.H., in failing to offer the child food, drink, bathroom facilities, and other considerations. The abuse of authority took place while the mother and child were confined in a cruiser car with the officer for a lengthy period of time in relation to the execution of a search warrant at Mrs. H.'s home on March 23rd, 2003.

2. On the same date, August 18th, 2006, I found that the respondent officer, Sergeant B., as the senior officer at the scene, committed a disciplinary default when he abused his authority by failing to provide Ms. S.H. with her Charter section 10(a) and 10(b) rights while she was confined at his direction in a police cruiser for a lengthy period of time. **The Canadian Charter of Rights and Freedoms** provides that everyone has the right on arrest or detention, and I pause to emphasize "or detention", (a) to be informed promptly of the reasons for their detention; and (b) to retain and instruct counsel without delay and to be informed of that right.

3. Written reasons for my findings were issued on August 18, 2006.

4. Having heard and considered the submissions today and the service records filed as Exhibit 1, section 28 of **The Law Enforcement Review Act** R.S.M. 1987, cL75 obliges me to order one or more of the penalties set out in section 30 for each disciplinary default. While I am charged with the responsibility of ordering the penalty, under section 28(4), the Chief of Police of the respondent officers is the person obliged to actually impose it.

5. The penalties are set out in section 30 in diminishing order of seriousness and they are as follows:

(a) dismissal;

(b) permission to resign and in default of resignation within seven days, summary dismissal;

(c) reduction in rank;

(d) suspension without pay up to a maximum of 30 days;

(e) forfeiture of pay up to a maximum of 10 days pay;

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(f) forfeiture of leave or days off not to exceed 10 days;

(g) a written reprimand;

(h) a verbal reprimand; and

(i) an admonition.

6. Obviously, the most serious of the penalties is dismissal and the least serious is an admonition and there are a number of penalties in between. The penalties set out are the only ones a judge is empowered to order. There is authority under section 30(2) to make an order of restitution for any loss or property or damage to property in certain circumstances, but that authority is not relevant to the disciplinary defaults before me.

7. Today, I heard submissions from the complainant, Ms. H., as well as from counsel on behalf of the respondent officers. I also heard the evidence from Staff Sergeant T. of the Winnipeg Police Service who provided the service records of the respondent officers.

8. Under section 32 of L.E.R.A. the Chief of Police is obliged to record on the service records: (a) all disciplinary defaults under L.E.R.A. and penalties; (b) all internal disciplinary offences and penalties; and (c) all official commendations given to the member.

9. I note that the Act goes on to provide in section 32(4) however, that where the only penalty imposed under **The Law Enforcement Review Act** is an admonition, the disciplinary default or the admonition is not in fact to be recorded. Moreover, section 32(5) allows officers to apply to expunge certain penalties following periods of good service. I will comment further on those provisions later in these reasons.

10. Mr. Haight., counsel for the respondents, relies on the decision of Judge Chartier (as he then was) in L.E.R.A. complaint number 3704, *Pats v. Lawson.* He relies on that decision for the framework for approaching the question of what discipline is appropriate. Mr. Haight argues both of the defaults are among the least serious that could be contemplated. He points to the exemplary record and good conduct of the officers and submits that an admonition is the appropriate remedy in both cases. He also points to mitigating features that are present in both situations.

11. Ms. H. argues that written reprimands are appropriate for both officers. She says the defaults were serious, and call for more than an admonition. She also emphasized that corrective measures need to be taken for better training related to special consideration in dealing with children, and to affording Charter rights.

12. I have reviewed the authorities filed consisting of a decision *G. v. Constable K.*, by Judge Kopstein, my former colleague, and a second decision involving the same officer with respect to the penalty phase. I have considered the decision in *Pats v. Lawson* referred to earlier and also the L.E.R.A. complaint decision by Judge L. Giesbrecht, *Morgan v. Priestley and Turner*, and finally the decision in *Edworthy v. Steinthorson*, January 21st, 2002, a decision by my late colleague, Acting Chief Judge Miller.

13. I agree with the list of factors of significance set out by my former colleague, Judge Chartier, in the *Pats* decision. As he suggested, in analyzing this type of question, I ought to consider:

(a) the seriousness of the default;

(b) the respondent's service record, including the length of service, all prior internal disciplinary offences and penalties, all prior disciplinary defaults under L.E.R.A. and the penalties imposed, all official commendations given to the respondent;

(c) the penalties imposed on other police officers in similar circumstances; and

(d) the respondent's conduct since the incident.

14. I also agree with Judge Chartier's suggestion that this list is not an exhaustive list, although I do agree it is a useful framework and I found it helpful today.

15. I also agree with the comments of my colleague, Judge Linda Giesbrecht, that the broad purposes and framework of **The Law Enforcement Review Act** must be kept in mind when assessing which penalty is appropriate. In her decision in *Morgan v. Priestley and Turner,* June 13th, 2005, she reiterated the view she expressed in paragraph 1 of a preliminary ruling in that same case, which she rendered February 10th, 2004. I adopt her comments in that decision. She ruled that the act has a broad public purpose and was more than a simple internal disciplinary regime. She states:

> I agree with counsel for the commissioner that the Law Enforcement Review Act fulfills a broad public interest and that this purpose must be kept in mind when interpreting s.6(6) of the Act. This public interest purpose was recognized by the court in *Blair v. Soltys* [1999] M.J. No. 470, a decision of the Manitoba Court of Queen's Bench.

16. Judge Giesbrecht then observed:

> In that case the respondent police officer argued that there was no jurisdiction to conduct a hearing because he had resigned and he was no longer a member of the police force. It was his position that the Act was exclusively disciplinary in nature. Mykle, J. on appeal adopts the reasons of the hearing judge, Giesbrecht, Associate Chief Judge, who had concluded that the scope and purpose of the Act was much wider than simply being a disciplinary vehicle. Giesbrecht, ACJ had stated:
>
> > "Law makers have wrestled for years with the problem of trying to find a balance between an open and fair system for responding to complaints from citizens about possible police abuses on the one hand while at the same time not hampering the vital work the police do. The complainant, the police officer, the police service, and the province all have an interest. From the individual police officers perspective the Act may appear to be purely disciplinary in nature but it has a much broader public purpose as well. It is designed to promote both respect for the police and respect for the individual."

17. I agree with those comments. I also agree that the act is disciplinary rather than penal, as pointed out by Judge Chartier, but in my view, the appropriate discipline must be gauged with the recognition that police owe important duties not simply to their employer but to the public at large. L.E.R.A. recognizes that reality. The police perform a vital, and dare I say difficult and demanding public function in a democracy based on the rule of law, and in recognition of that they have significant and necessary powers to interfere with the ordinary rights of Canadians. The powers they exercise cannot meaningfully be divorced from the duties to the public they are bound to observe. Thus it is fitting that the discipline meted out under L.E.R.A. must recognize this important feature of policing.

18. So I agree with Judge Giesbrecht when she concludes in *Morgan v. Priestley and Turner, supra* that:

> The purpose of the Act contemplates something more than mere concerns for correcting one particular officer's behaviour. The process under L.E.R.A., including the penalty phase, can perform an educational role to the officer concerned, the public generally, and the police force at large.

19. She posed an apt question at page 8 of her June 13th, 2005 decision: *What kind of corrective discipline might be imposed that would result in some impact on the other members of the public, including other police officers and police forces as well?* That is a useful question for a judge to ask herself when considering this type of issue.

20. With these general comments in mind, I turn to the two complaints. As will be seen, in my view the disciplinary defaults are quite different in nature. I will deal with each in turn.

21. First, dealing with Constable S.'s default, in this case the police, as I noted in my earlier decision, were dealing with a little nine-year-old boy and his mother who had been awakened and forced to leave their house early in the morning at a time when guns were visible. The officers could not help but realize that such an event could be frightening and upsetting, that a child might be hungry or thirsty, or might need to use the bathroom.

22. Constable S., as the senior officer of the two who dealt with Ms. H. and her child, should have taken steps to reassure the child and offer to take the boy and his mother somewhere to get something to eat or drink and made sure a bathroom was available. Certainly the two of them should not have been confined to a police car for two-and-a-half hours without such offers being made.

23. In assessing all this and analyzing the seriousness of the default, the only excuse offered was that Constable S. did not realize that it would take that long until the family was allowed back into the home.

24. Now, I have no doubt that Constable S. was genuine in his belief that it would not take as long as it did and based on his past experience, it was not an unreasonable belief. But I did, nonetheless, find that Constable S.'s omissions to do these things did amount to uncivil and discourteous conduct, which constituted an abuse of his authority.

25. While the situation was very upsetting, understandably, to Ms. H. and her son, I find that Constable S.'s abuse of authority, although it was wrongful, cannot be characterized as a particularly serious one. Although discourteous and uncivil, it was an act of omission, not of commission. It was not an act of malice or deliberate incivility. In mitigation, I accept Constable S.'s view that he thought the incident would be soon over, and most importantly, I also find that this default was in fact out of character for Constable S.

26. In fact, I accept that he usually employs a high degree of consideration when dealing with children in the course of duty. I found in my decision that N. was entitled to the same thoughtful treatment and kindness he has extended to other children.

27. I am also taking into account that the entire confinement was unlikely to have lasted as long as it did had Sergeant B. discharged his duty to Ms. H. to advise her of her 10(a) and 10(b) rights.

28. With respect to his record, Constable S. clearly has an exemplary record as a police officer. He has been on the police force since 1994 and consistently periodically received conduct forms for good work performed in 1997, 2000, and 2001. Recently in 2003 he received a conduct form regarding his good work performed, which was exceptional enough to result in a certificate of commendation.

29. I must say, having heard him testify at the hearing, I was not surprised to find such a positive service record, and I will return to that in a moment.

30. With respect to penalties imposed on other officers in similar circumstances, which I have to consider as well, the decisions of Judge Kopstein in *G. v. Constable K., supra* and Acting Chief Judge Miller in *Edworthy v. Steinthorson, supra* were situations where officers were found to have committed discourteous or uncivil conduct. These officers received admonitions. While the conduct was different in each of those cases, as it invariably is, the fact remains that for that type of disciplinary default an admonition has been a remedy frequently considered appropriate.

31. The other point I wish to consider is the respondent's conduct since the incident. There has not been any reason to think there has been any improper behaviour since. At the hearing, I was impressed by his attitude and approach. He accepted responsibility. He expressed regret directly to Ms. H., and he said, indeed as the senior person in the car doing those things should have been his responsibility. He conceded that those were the sorts of questions he should have asked and he expressed his regret at not having done so.

32. As I noted earlier, he testified that he has experience dealing with children and he would often buy children chocolate bars or take them to get something to eat.

33. I can also take into account in assessing the appropriate penalty the fact of the proceedings themselves with their attendant publicity, I think provided a significant corrective mechanism. I do have no doubt that the impact on the child may have been quite stressful, but luckily children are resilient and it is the hope and expectation that the child will rebound from this incident.

34. In sum, I find that taking into account the nature of the breach, Constable S.'s exemplary record, penalties in similar cases, his conduct since the hearing and at the hearing, the appropriate penalty to order for Constable S. is admonishment, that is, a gentle reprove along with some advice and direction.

35. Therefore, as the legislation provides, I ask the Chief of Police to admonish Constable S. that in his dealings with N.H.-C. and his mother, S.H., his failure to offer to the nine-year-old child food, drink or other considerations during the two-and-a-half hours the child was in the police car was discourteous and uncivil and a disciplinary default, and to caution Constable S. that such conduct should not be repeated in the future. While I have included the caution in the admonishment, I feel confident from my assessment of Constable S. that he will display consideration to children in the future. The Act provides such an admonishment is not to appear in his service record.

36. I will now turn to deal with Sergeant B. And again, I am going to apply the same four factors set out by Judge Chartier in *Pats* starting with the seriousness of the breach. Sergeant B. was found to have committed a disciplinary default by failing to provide Charter rights 10(a) and (b) to Ms. H. when she was confined, or failing to ensure that those rights were provided by other officers.

37. As I have mentioned at the outset, officers perform a very difficult role in our society, and in order to do that they have powers and correlative duties. One of the duties that officers have is the obligation to respect rights afforded to Canadians under the Charter. Their responsibilities under the Charter have undoubtedly made their jobs more complex at a time when changes in society have also made the general job of policing with the danger attendant also extremely difficult.

38. Yet, citizens do have a legitimate expectation, as I said in my decision of August 18, 2006 that their fundamental rights under the Charter will be respected. citizens have a right to expect that police as professionals will meet their constitutional obligations. And I have to observe, as I did before, that the protection found in section 10 from being held incommunicado by police is a particularly important protection. It allows a person to obtain independent advice when in police custody. This right of access to counsel when in confinement is vital to a democracy based on the rule of law.

39. And I know that this particular incident is a distinct incident, but I have to put it in the context of a Charter right of considerable importance, and I appreciate that I am stepping back and looking at the big picture, but I think it is important that we do that.

40. Because of the fact that the right to counsel in the Charter is a fundamental right and the important role, the right to counsel plays in a democracy, I cannot agree with the characterization of the default here as at the very lowest end of seriousness, as Mr. Haight argued, nor can I agree that it was equivalent to the default that Constable S. committed.

41. At the same time, and this is what makes this decision so difficult, I totally accept and find that the failure to provide rights to counsel is certainly not based on any malice or ill-will towards Ms. H. rather it was based on the surprising, and to me, somewhat alarming failure on the part of Sergeant B. to even appreciate that Ms. H. was entitled to any such rights in the circumstances.

42. I have no doubt in my mind that Sergeant B., had he appreciated that obligation, is the type of officer who would have provided those rights. But he did not appreciate it. He was ill-informed. It was an erroneous belief held not only by Sergeant B., but a number of other officers. But affording rights is something police are fundamentally obliged to do. I cannot equate the regretful failure by Constable S. to offer to take the child to McDonalds for a hamburger on the same level as the failure to tell a person why they are in police custody and to tell them that they have a right to counsel (or to tell an apparently detained person that they are in fact free to go).

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43. When asked by the court why rights were not afforded, as I said, it seems clear that Sergeant B. did not consider that he or the other officers under his command were obliged to do so. He replied, "*she's not the subject of the search warrant and is not under arrest at that point in time, contrary to her husband who was named on the, on the search warrant*." And I just pause to say that there in black in white since 1982, it says in the Charter of Rights that you have those rights on arrest "or detention".

44. Although Sergeant B. regretted the delays and inconvenience to the family that resulted from the discharge of the firearm, Sergeant B. was not prepared to second guess the handling of the incident. He stated:

> It's unfortunate that we had an incident happen within the house, accidental discharge, which delayed people getting back into the residence for a lengthy period of time. I apologize for that. Unfortunately, I have to say that we would still act as we did with the warrant.

45. Now, I pause to say that the steps the police took in executing the warrant were completely professional and appropriate given that the police were looking for a firearm and in recent weeks we have seen just how dangerous a search can become due to firearms. But at the same time, I did not detect from Sergeant B. any real recognition that Ms. H. had not been afforded rights to which she was entitled, even at the hearing stage.

46. The conclusion seems inescapable that there has been some deficiency in training. And as counsel points out, the lack of malice or intentional wrongdoing does go, I suppose, in Sergeant B.'s favour. But for police officers to be unaware of the law, especially on such a fundamental point, displays a shortcoming in professional competence calling for some corrective measure that will have an impact.

47. So I, so I have concluded that it is a serious breach, and I cannot escape that conclusion.

48. The service record, however, speaks volumes about the dedication and professionalism of this officer. He is highly skilled. He is thoughtful. When I heard him testify about the steps they had taken to execute the search warrant, it struck me that along with his fellow officers he exemplifies a high degree of professionalism.

49. When considering his conduct since the hearing - one of the factors outlined in the *Pats* decision, *supra*, - there is really been nothing to criticize him for, except for the one factor at the hearing where I detected, and this notwithstanding counsel's advice that this had been a breach, a reluctance to recognize that that was so.

50. The final factor that I ought to consider is similar cases dispositions in similar circumstances. The fact is there are very few decisions that offer guidance. The closest would be Judge L. Giesbrecht's decision in *Morgan v. Priestley and Turner, supra* where she issued a verbal reprimand for breach of Charter section 8 that she found was a disciplinary default.

51. I cannot accept the submission that an admonition is appropriate. I note that an admonition does not even appear on an officer's service record. In addition, there is a systemic problem in the police force exemplified by what happened in this case. I referred to the fact that Sergeant B. even at the hearing appeared to cling to his mistaken view, even with the benefit of legal counsel and despite the appropriate concession of a breach of rights being made by counsel. Due to its limited impact on any member or Sergeant B., an admonition would be an inadequate corrective measure, in my view.

52. At the same time, Sergeant B.'s exemplary record and his lack of malice or bad faith and his mistaken belief suggests that he should not receive more than a reprimand, and to her credit, Ms. H. did not press me to go any further than a reprimand, although she suggests a written reprimand should be appropriate.

53. I note that in an important sense, a verbal and written reprimand are equivalent under **The Law Enforcement Review Act**. Under section 32(5)(a), both can and in fact must be expunged within two years from the service record upon application of the officer.

54. I just pause to note that I have no reason to doubt that this is the complete service record, but section 32(5) of the Act does in fact allow for expunging the service record of past L.E.R.A. discipline.

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55. Moreover, a "verbal reprimand", apparently does somewhat anomalously, comprise part of the "written record" of the member's service record. I take this from the decision of Judge Giesbrecht in *Morgan v. Priestley and Turner, supra*. So even if an officer is given a verbal reprimand, it appears in written form in the service record. The Act is not really very clear about the difference between a verbal and written reprimand.

56. There must be no ambiguity left about the rights of Canadians detained by the police regardless of the fact that they are not under arrest or suspects. In situations such as this, they have a right to know why they are detained and that they have a right to access a lawyer. The discipline must serve a corrective purpose.

57. I conclude that a verbal reprimand might leave some room for ambiguity, and I have concluded, not without some difficulty, that a written and not a verbal reprimand is appropriate as a corrective measure for Sergeant B. and other officers of the force. I have concluded that a carefully worded written reprimand is needed here, both to provide correction, and to also recognize that the default on Sergeant B.'s fault was in no way malicious.

58. So I am directing that the Chief of Police provide a written reprimand to Sergeant B. for his lack of appreciation of his duty to provide rights under 10(a) and 10(b) of the Charter to Ms. H. while she was detained, and for his subsequent failure to provide those rights, and further, to direct Sergeant B. to afford such rights in such circumstances in future cases.

59. Having made this determination, I also think it is appropriate to call upon the Chief of Police to take steps to ensure that all officers are aware of the meaning of detention as set out in the **Charter of Rights and Freedoms** as outlined by the Supreme Court in the *R. v. Therens*, [1985] 1 S.C.R. 613, a decision rendered 27 years ago, and to ensure that any person under detention by police, regardless of whether the person is a suspect or accused have rights under section 10 of the Charter, (a) to be informed promptly of the reasons for detention; and (b) to be informed of their right to retain and instruct counsel without delay, and that that applies to detention as defined by law and outlined in my August 18, 2006 decision in paragraphs 90, 91 and 93.

60. I am also requesting or recommending that the Chief of Police provide ongoing training to officers respecting their duties, and I suggest to the Chief of Police that he disseminate this information about the meaning of detention and the police obligations as he thinks appropriate but at minimum by a memorandum to all officers.

61. That is my decision on this matter.

'Original signed by:"

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Marva J. Smith, P.J

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