

**DECISION**

File No.: PC-21-0031

**NOVA SCOTIA POLICE REVIEW BOARD**

**IN THE MATTER OF:**

The *Police Act*, Chapter 31 of the *Acts* of 2004 and the Regulations made pursuant thereto

**-and-**

**IN THE MATTER OF:**

An appeal filed by **Arlene Whiffen**, Complainant, against **Cst. Ronald Popwell** of the Cape Breton Regional Police Service, requesting a review of a decision made by Deputy Chief J. Stephen MacKinnon, on November 14<sup>th</sup>, 2021.

**BEFORE:**

Hon. Simon J. MacDonald, Vice-Chair  
Peter Mancini KC, Member  
John Withrow, Member

**COUNSEL:**

Arlene Whiffen, Self-Represented  
David Roberts, Counsel for Cst. Ronald Popwell  
Demetri Kachafanas KC, Counsel for CBRPS

**LAST BRIEF RECEIVED:**

November 4, 2022

**DECISION DATE:**

March 3, 2023

[1] This matter comes before the Nova Scotia Police Review Board (the Board) as a result of a complaint filed by Arlene Whiffen (Whiffen) against Cst. Ronald Popwell (Popwell) dated February 15, 2021. In her Form 5 public complaint Whiffen attached a letter outlining the basis of her complaint.

[2] The essence of Whiffen's complaint is Popwell acted in a fashion that he assaulted and sexually assaulted her and that he caused property damage to her cell phone at 80 Duffell Drive, Sydney, NS, on February 14, 2021, contrary to section 24(1)(a) and (b) as well as section 24(7)(b) of the *Police Act* Regulations, 2004 c.31 (the Act).

[3] Popwell is an officer of the Cape Breton Regional Police Service (CBRPS). After the complaint was made, it was assigned to Sergeant Greg MacKinnon to investigate Whiffen's allegations. D/Chief J. Stephen MacKinnon, the Disciplinary Authority, filed a decision dated November 14, 2021. In his decision, he found there was no evidence to support any of Whiffen's complaints against Popwell.

[4] Whiffen filed a Form 13 (Notice of Review) with the Office of the Police Complaints Commissioner on December 17, 2021.

[5] The matter was heard by the Board as a hearing *de novo* under Section 78 of the *Act* on September 12-15, 2022. Section 78 of the *Act* states as follows:

A hearing by the Review Board shall be a hearing *de novo* and the parties to the proceeding may:

- (a) appear and be heard and be represented by counsel; and
- (b) call witnesses and examine or cross-examine all witnesses.

[6] It should also be noted that under Section 79(3) of the *Act*, the decision of the Board is final.

[7] At the conclusion of the hearing, the Board consulted with one another and made a finding that there was no evidence presented where it could find there was a sexual assault committed by Popwell against Whiffen. The Board advised the parties of same and thus there was no need to make any argument in their closing written submissions on this issue.

[8] The Board points this out because Whiffen, in her final submissions, referred once again to being sexually assaulted by Popwell and the Board reiterates it found no evidence that Popwell sexually assaulted Whiffen.

[9] In fact, the only time the word sexual assault was used in the course of the hearing was when Counsel for Popwell asked him if he, at any time, committed a sexual assault on Whiffen on the 14<sup>th</sup> of February and his response was “absolutely not.”

[10] The Board also wishes to clarify the matter of Tanya Whiffen (Tanya) who is a sister of both Brenda MacInnis (MacInnis) and Whiffen. Tanya was present during the events of February 14<sup>th</sup>, 2021. The Board asked the parties, in particular Whiffen, if she wished to call Tanya as a witness. The Board pointed out she had not been called. Whiffen advised she was not going to call Tanya. This point is mentioned at this time because, after the filing of post-trial briefs, Whiffen sent a letter to the Board wanting to file an affidavit from Tanya. The Board advised Whiffen that the matter of evidence was closed and the only thing remaining were the closing written submissions to be considered.

[11] The allegations of disciplinary default against Popwell fall under sections 24(1)(a) and (b) of the Act, which states as follows:

24(1) A member who engages in discreditable conduct any of the following ways commits a disciplinary default:

(a) Acting in a disorderly manner or in a manner that is reasonably likely to bring discredit on the reputation of the police department.

(b) contravening an enactment of the province, a province or territory of Canada or the Government of Canada that is likely to bring discredit on the reputation of the police department.

As well as under section 24(7)(b), which states as follows:

24(7) A member abuses their authority in any of the following ways commits a disciplinary default:

(b) Using unnecessary force on or cruelly treating any prisoner or other person with whom the member may brought into contact in the course of their duty.

## **ISSUES**

[12] Did Popwell on the 14<sup>th</sup> day of February, 2021, at 80 Duffell Drive, Sydney NS:

1) engage in discreditable conduct by acting in a discreditable manner or in a manner prejudicial to discipline or reasonably likely to bring discredit to the reputation of the CBRPS contrary to Section 24(1)(a) of the *Act*?

2) contravene an enactment of the province, a province or territory of Canada or the Government of Canada that is likely to bring discredit on the reputation of the CBRPS contrary to Section 24(1)(b) of the *Act*?

3) abuse his authority and thereby commit a disciplinary default by using unnecessary force on or cruelly treating Whiffen in the course of his duties contrary to Section 24(7)(b) of the *Act*?

## **FINDINGS AND DISPOSITION**

[13] In order to assess what happened at the property on February 14, 2021, it is necessary to understand the background and the relationship of the parties involved.

[14] The background of this case can be found from the evidence of the witnesses called by both parties. The background had some rationale for the perceptions and actions of the individuals who were present at the property. The history of the parties played an important role in the interaction that occurred on that date.

[15] Whiffen, Tanya and MacInnis were the daughters of Annette and Thomas Whiffen. At the time of this incident, both parents were deceased, and the executrices of the estate were MacInnis and Tanya. Whiffen was not an executrix of the estate. In the course of performing their duties as the executrices of the estate, MacInnis and Tanya determined that their parents' home on the property should be sold and were in the process of preparing it for sale.

[16] It is obvious from the evidence there was clearly tension between the sisters regarding their parents' estate and its disposition. MacInnis, on January 24<sup>th</sup>, 2021, contacted CBRPS regarding the complainant, Whiffen, asking for police direction. MacInnis was claiming that Whiffen was using an online presence in order to disrupt the sale of the Whiffen home at 80 Duffell Drive. Then again, five days later, on January 29<sup>th</sup>, 2021, MacInnis personally went to the CBRPS in Sydney, NS, in her capacity as executrix of the estate and requested a Protection of Property Order against Whiffen. At that time, the officer who spoke to her was Popwell. MacInnis provided information to Popwell and he prepared a Protection of Property Order. Popwell then went to Whiffen on the same day in an attempt to serve her, but she refused to accept service of the order personally and advised him to leave the order in her mailbox.

[17] On February 6<sup>th</sup>, 2021, Popwell became aware the other executrix of the estate, Tanya, did not share MacInnis' concerns about Whiffen. Popwell concluded the order was not appropriate. Popwell then phoned Whiffen to advise her that she could ignore the order. The Board finds from the above summary of interactions that Popwell was well aware of the ongoing hostility between Whiffen and MacInnis.

[18] The CBRPS received a call on February 14<sup>th</sup>, 2021, regarding a disturbance at the property. Cst. Matthew Morrison (Morrison) and Cst. David Abraham (Abraham) responded to the call. The officers were advised that MacInnis and Tanya, along with their spouses, were emptying the home on the property in order to ready it for sale. Whiffen arrived at the home. There is no doubt she was not invited and, from watching her own video which she took on that day, it was obvious she was unwelcome on the property. In fact, in Whiffen's own words, the conversation between her and the others at the property was not friendly. The video evidence from Whiffen's phone, and several of the witnesses who were present at the property that day, supports those findings. Whiffen "wanted to know what was going on." Whiffen attempted to enter the house but her brother-in-law, John Penney, and her sister, MacInnis, blocked her passage into the house. Several witnesses described Whiffen as being aggressive and preventing the executrices and their spouses from performing their work. After arriving on the scene, Csts. Morrison and Abraham came to the conclusion that they wanted to try to diffuse the situation. They reviewed some documentation which was given to them by MacInnis. At the same time, Whiffen was capturing everything on her cell phone by way of video and going closer to the parties at the same time.

[19] Abraham advised the parties that the situation was actually a civil matter and he then asked Whiffen if she would leave the area in order to “keep the peace.” She refused to leave. The Board concludes from the video evidence and the other witnesses, that Whiffen had no intentions of leaving the property despite Abraham’s request. Popwell attended the scene, as he said, as back-up. Popwell stated that he went to the property because he was aware of the situation and the family’s background estate dispute. He had knowledge of the history between the parties. Popwell was the one who personally served the Protection of Property Order on Whiffen and subsequently advised her that it was unenforceable. Popwell had conversations with MacInnis and Whiffen before this time.

[20] Popwell had concluded, based on his knowledge of the situation and his experience as a police officer, that the way to diffuse this matter was to have Whiffen leave the property. She refused to do so. She was insistent that she had the right to stay there. When Popwell approached Whiffen to leave the property she put her cell phone in very close proximity to Popwell’s face. Popwell testified that as a result of his training, the manner in which she placed the cell phone in such close proximity to his face, it could be used as a weapon. He then regarded it as a threat and he removed the cell phone from Whiffen’s hand using, what he testified as “three finger snatch.” Other witnesses described the method as a “pluck.” Be it a “pluck” or a “snatch,” he took the cell phone from Whiffen. He then tried to get Whiffen to leave the property by guiding her out.

[21] The transit from the backyard of the property to the sidewalk/street did not go smoothly because Whiffen, as several witnesses testified, including Popwell, would dig her feet into the walkway where the cement blocks were trying to resist and obstruct the progress. Because of this, she stopped suddenly and caused a chain reaction of bumps. She bumped into Popwell and he, in turn, bumped into Abraham. Whiffen continued to be confrontational as she yelled from the road when she got there “you will all be on YouTube.” Even her sister Tanya, the evidence reveals, tried to calm her down, as she was being escorted off the property, so she wouldn’t be arrested.

## DISPOSITION

[22] The Board accepts the test for “discreditable conduct” is primarily an objective one. In the matter of **Reiley v. O’Neill**, a decision of the Nova Scotia Police Review Board dated March 24, 2014 referred to as **O’Neill (Re)**, 2014 CanLII 12845 (NS PRB), the Board adopted the test for discreditable misconduct set forth in its earlier decision of **Ahigbe James v. Sergeant Kevin Smith** [2005]. At paragraph 51 in **Reiley**, *supra* the Board adopted the appropriate test for discreditable conduct as outlined by Paul Ceyssens’ in his text, *Legal Aspect of Policing* wherein he stated at pages 6-16 the following:

Rather than making the difficult choice of which amount these approaches is appropriate for our case, we have combined elements from each and arrived at the following principles:

1. The test primarily is an objective one.
2. The Board must measure the conduct of the officer by the reasonable expectations of the community.
3. In determining the reasonable expectations of the community, the Board may use its own judgement, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.
4. In applying this standard, the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.
5. Because of the objective nature of the test, the subjective elements of good faith (referred to in the Shockness case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.

[23] Whiffen further argues that she was assaulted by Popwell and the court is reminded that although the actions of the police officers in this matter do not resemble those in the case of **R. v. Crocker**, 2017 NLTD(G) 176 and **R. v. Dunne**, 2014 MBPC 60, the Board is cognizant of the words of Anderson J.A. in **Bottrell v. R.** (1981), 1981 CanLII 339 (BC CA), 60 C.C.C. (2d) 211 (B.C. C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

This passage was also referred to in **R. v. Nasogaluak**, 2010 SCC 6, [2010] 1 S.C.R. 206.

[24] In this case, the evidence of Whiffen differs from all the other witnesses called by her and the Respondents about the events that transpired at the property on February 14<sup>th</sup>, 2021. There is no doubt that if the evidence establishes on the balance of probability that Whiffen is correct, then the Board will be inclined to conclude that Popwell's behavior constituted discreditable misconduct.

[25] Whiffen pointed out there were no charges laid during this incident. Although there was a discussion by Popwell that he was going to charge Whiffen for creating a disturbance, he did not do so. Normally, it is in the discretion of the police officers as to what charges they lay. See **R. v. Beaudry** 2007 SCC 5. Given the circumstances existing at the time during this incident, the Board finds that Popwell exercised his discretion honestly and reasonably in not pursuing charges against Whiffen.

[26] The Board has considered all of the evidence including the testimony of the witnesses, reviewed the exhibits which were tendered, including the photos of Whiffen's phone as well as the video taken by her on the date in question. The Board finds from the evidence Whiffen was acting in a passive aggressive manner with her family. She knew she was not welcome on the property of her late parents, and one could say that she appears to know that filming an individual with a camera, in the manner she did, would only add to the tension between them.

[27] She should also know that, by filming police officers the way she did, and her attitude and behavior towards them, for example: 1) Abraham who tried in a respectful manner to ask her to leave in order to try and deescalate the situation, and she said she wouldn't, had to know that this was making matters worse. 2) Whiffen claimed Popwell was creating the problem and that he caused tensions to rise which caused more animosity. She felt he agitated the matter and was very aggressive in his behavior. However, the Board finds that Popwell had background knowledge of the family disagreements and arrived on the scene, acting as backup and knowing the history. The Board finds he



concluded that matters were starting to get out of hand. He concluded the source of the problem seemed to be Whiffen and her actions while on the property towards other members of her family. He decided the only way to solve this problem would be to remove Whiffen from the property and that would diffuse the situation. It should be noted, as stated earlier, that Whiffen had no control over the property or its contents. It was her two sisters who were executrixes of the estate, and they were in the process of performing their duties as required under probate.

[28] Whiffen contends that she never refused to leave the property. However, the Board finds from her comments and her actions that she had no intentions of leaving the area on her own.

[29] Whiffen entered photographs into evidence to try and show a scratched cell to support her allegation that Popwell damaged her phone. They were taken by CBRPS, and she blamed them for the poor reproduction of the photos. There were different persons who were in possession of the phone during the incident. She had the phone at the hearing but did not tender it as evidence. When one views all of the evidence from both sides, the Board finds Popwell is not responsible for the alleged damage to the cell phone.

[30] The Board further finds that Whiffen refused to leave the property despite police presence and their request to do so. She had been asked by one of the executrixes of the estate to leave the property. The Board also finds Popwell's manner of removing Whiffen's cell phone was lawful. The Board concludes he had determined, given the close proximity to his face, and its potential use as a weapon from his police education, could be used to cause him bodily harm. Given the attitude of Whiffen that day and at that time, that is a distinct possibility. Even her own witnesses described Popwell as professional, and their evidence supports Popwell that he did not assault Whiffen.

[31] The Board also concludes Popwell was lawful in his actions to remove Whiffen from the property. He determined if she did not leave the property at that time, there could become a substantial and imminent breach of the peace. This can be seen from the evidence of the people who were there and the witnesses who testified that she continually refused to leave the property, argued with almost everybody, was shouting and interrupting people as well.

[32] In conclusion, to accept the evidence that Whiffen on the balance of probability as required to uphold these allegations, the Board would have to refuse to accept almost all the evidence from all the other witnesses.

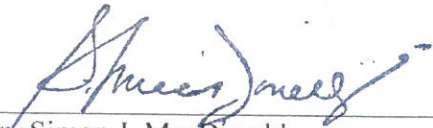
[33] The Board is satisfied that the evidence is overwhelmingly in favor of the actions of Popwell as being professional and appropriate in his dealings given the circumstances at the time. The Board has concluded the reactions of Popwell were lawful at the time and that it was necessary given the actions of Whiffen. For example, her failure to leave, her interaction with the parties on the property, and it sees nothing wrong with the actions of Popwell in trying to direct Ms. Whiffen to leave after her refusal to do so. Use of force by Popwell in the situation was reasonable because, in the view of the Board, he had reasonable grounds to believe this police intervention was necessary in order to remove Whiffen from the property to diffuse the whole situation. The Board wishes to confirm that it found the use of force by Popwell to be proportionate because the only amount of force he used the Board finds to be minimal given the actions of Whiffen and her failure to leave the property while resisting.

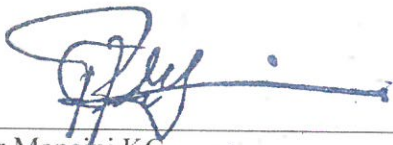
[34] Whiffen has the legal burden of establishing that Popwell committed a disciplinary default on the balance of probabilities. While the Board commends Whiffen for her efforts at the hearing, unfortunately for her, the Board cannot accept her evidence over that of Popwell and particularly that of the other witnesses, Brenda MacInnis, Michael MacInnis, Csts. Abraham and Morrison, John Penney and Yvette Penney. Where there is a conflict in the evidence between Whiffen and the witnesses, the Board accepts their version over hers. As such, the Board finds that Whiffen has not discharged her burden of establishing that Popwell committed a disciplinary default contrary to sections 24(1)(a) and (b) as well as section 24(7)(b) of the *Police Act*.

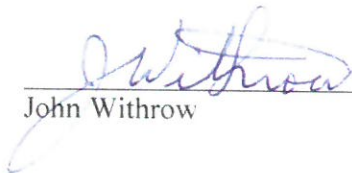
[35] In conclusion, based on the totality of the evidence, the Board finds Popwell was acting in line of duty and did so appropriately. The Board finds no evidence to support charges of assault, sexual assault, damage to property, unlawful seizure of the property. The Board does not sustain the allegations of disciplinary default as described in Section 24(7)(b) alleged against Popwell. The Board finds that Popwell did not engage in any discreditable conduct as required under Section 24(1)(a) and (b) of the *Police Act* Regulations. The Board finds there was also no evidence presented to indicate that Popwell contravened an act of a Province or Territory in Canada as the section requires.

[36] Consequently, Whiffen's complaints are hereby dismissed without costs to any party.

Dated at Halifax, Nova Scotia this 3<sup>rd</sup> day of March, 2023.

  
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Hon. Simon J. MacDonald

  
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Peter Mancini KC

  
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John Withrow

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