

## THE HIGH COURT

[2004 No. 116 J.R.]

BETWEEN

THOMAS NOONAN

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

**Judgment of Mr. Justice McKechnie delivered on the 17th July, 2007.**

1. By order of this Court made on the 6th December, 2004, the applicant in the above entitled proceedings was granted leave to apply, by way of an application for judicial review, for the reliefs specified at para. D of the statement grounding the application and was so on the grounds outlined in para. E thereof. His application is grounded upon the principal affidavit of Daniel Murphy, solicitor sworn on the 6th December, 2004 and the secondary affidavit of Mr. Noonan himself sworn on the 12th December of that year. In support of the statement of opposition, Chief Superintendent John Carey swore an affidavit on behalf of the respondent on the 18th February, 2005. Both parties filed written submissions which were spoken to by verbal presentations. There was no oral evidence and thus the case was determined on affidavit evidence only.

2. In essence the applicant seeks an order of *certiorari* quashing the decision and recommendation of the Garda Síochána Disciplinary Inquiry made on the 15th October, 2004 and a similar order in respect of the Commissioner's decision which as an alternative to dismissal required the applicant to resign from the force with effect as and from midnight on the 7th December, 2004.

3. Garda Noonan, who is married with one child, joined An Garda Síochána in 1975 and has been stationed in Listowel, Co. Kerry since July, 1980. With the rank of garda, he continued in active service until the 17th May, 2001 when he went absent on sick leave. The reasons advanced by him for so doing relate to a traffic accident which occurred in January, 1999. Whilst on duty his patrol car was rammed by a lorry as a result of which he suffered neck and back injuries. These injuries were later compounded by anxiety and depression. He has been seen by many doctors in the intervening period. Some of these have advised him to participate in physical exercise as an aid to recovery. To that end he is a registered course designer with the Show Jumping Association of Ireland and as well as organising and planning the design of show jumping courses, he occasionally does some manual work at pony shows. In any event he has never returned to duty and presently stands suspended awaiting the finality of the disciplinary action taken against him. It is this action which gives rise to the above mentioned judicial review proceedings.

In addition to this case he also has another action against the Commissioner (2005 No. 136 J.R.), which arises out of the decision of a second Disciplinary Inquiry. A separate judgment is given in respect of this course of action.

4. In June, 2003 Garda Noonan was served with documents in which he was charged with eight alleged breaches of discipline under An Garda Síochána (Discipline) Regulations, 1989, S.I. 94/1989 ("The 1989 Regulations" or "The Regulations"). In August of that year the total number of charges asserted against him had been increased to 22. A three man inquiry team was established to inquire into these matters. Ultimately it commenced an oral hearing on the 7th September, 1994 and concluded on the 15th October of that year. It found the applicant to have been in breach of four of the charges namely, those numbered 15, 16, 21 and 22 (Form B30 dated 8th August, 2003) and not in breach on the remainder of the charges. The inquiry made a recommendation under Regulation 20(1)(c)(ii) of the 1989 Regulations to the Commissioner on the question of sanction. The latter accepted that recommendation and by letter requested the member concerned to resign from the force by the 7th December, 2004, failing which he would stand dismissed with effect from midnight on that date. Hence the date of the leave application being the 6th December, 2004.

5. In order to follow the issues raised in this case it would be helpful at this stage to refer to the 1989 Regulations, and in particular to those sections thereof which are directly relevant to the matters in issue. These are paraphrased as follows:-

Regulation 8: When it is felt that a breach of discipline may have occurred an officer not below the rank of Chief Superintendent may appoint a member not below the rank of Inspector to investigate such matter. The latter is known as the 'investigating officer' with the former being known as the 'appointing officer'. This Regulation 8 Form is also known as Form B33.

Regulation 9: After his appointment, the investigating officer must inform the member concerned that he may have been in breach of discipline and that an investigation is being conducted in respect thereof. This is done by way of Form B33A.

Regulation 10: On completion of an investigation, a report is sent to the appointing officer who decides whether or not to continue with the proceedings. If he decides to so do, he must set out the particulars of the alleged breach(s) in such manner as will leave the member concerned in no doubt as to the precise nature of what is been alleged. The form thus created is known as the "discipline form" or Form B30.

Regulations 11 and 12: Two copies of the discipline form must be given to the member concerned. In addition he must be supplied with a list of proposed witnesses together with their intended statements. Moreover the member must also be given details of any favourable information which may have come to light during the course of the inquiry. Having been supplied with the discipline form the member is asked to admit or deny the breaches or otherwise respond to it. If he fails to do so, that is treated as constituting a denial of the breach(s) of discipline alleged. The notice under Regulations 11 and 12 is known as Form B33B.

Regulation 14: After one copy of the discipline form has been returned or after the expiry of fourteen days from the date of service, the appointing officer must forward to the Commissioner all documents in his possession relating to the alleged breach(s) of discipline. On receipt of such documentation the Commissioner, unless he decides not to continue with the proceedings, must establish an inquiry to be held on a specified date in relation to the said alleged breaches.

Regulation 15: An inquiry may consist of one or three members and if the latter the 'presiding officer' shall have a rank of not lower than Chief Superintendent. That officer may 'alter' the date of the inquiry but without agreement cannot abridge the minimum notice period of 21 days. The Regulation 14 and 15 order, establishing the board of inquiry, is known as Form B32.

Regulation 16 and 17: These Regulations provide for various procedural matters leading up to the commencement of the inquiry itself.

Regulation 18: Under subpara. (g) of this Regulation, the presiding officer may, in the absence of the member concerned, or a witness, or for any other reason, adjourn the inquiry to a specified date and in such circumstances shall if practicable notify the member or the witness, as the case may be, of the adjourned date.

Regulation 19: At the inquiry, the board so appointed must decide whether or not the member has been in breach of discipline as alleged.

Regulation 20: Where a member has been found guilty of a breach of discipline, the board has a range of options available to it with regard to sanction. These include the making of a recommendation to the Commissioner that the member concerned be dismissed, or required to retire or resign as an alternative to dismissal, or be reduced in rank. This type of recommendation is provided for in Regulation 20(1)(c)(ii).

Regulation 23: If the Commissioner should receive a recommendation under the Regulation last mentioned he must decide on what the particular sanction should be. That sanction is then communicated in writing to the member concerned.

Regulation 34: If due to the absence of the member concerned it is not possible to comply with a requirement of the Regulations, the inquiry or an Appeal Board as the case may be, may nevertheless commence or continue if it is reasonable to do so.

6. In addition to the above provisions, the Regulation 26 (1) also specifies that a member found guilty of a breach of discipline may apply to an Appeal Board for a review of the inquiry's decision or the decision of the Commissioner under Regulation 23(1). Detailed rules are then specified in Regulation 26 as to the composition of that Appeal Board and how the review should be conducted. In addition, as I have said, there are Regulations dealing with the power of an inquiry or an Appeal Board to determine the matters before it, even if the member concerned should not be present. Finally, the acts or omissions which are capable of constituting a breach of discipline are set out in numerical form in the Schedule to the Regulations.

7. As can therefore be seen, these Regulations provide a clear framework, as to the process and procedure, when it is decided that an alleged breach of discipline against a member should be investigated. In the first instance an investigating officer is nominated to carry out an inquiry into certain specified matters. He so informs the member of such matters. On completion of his investigation he sends a report to the appointing officer. That officer has a decision to make. He may continue with or else terminate the proceedings. If he decides upon the former he must serve a discipline form on the member setting out in detail the precise nature of the matters in issue. Subject to Regulation 13 (dealing with admitted breaches) that appointing officer then forwards all documents to the Commissioner who also has a decision to make. If he decides to continue with the proceedings he establishes a board of inquiry (consisting of either one or three members) which, having heard the evidence adduced against the member concerned and his defence in respect thereof, determines the guilt or innocence of that person. If found guilty the inquiry makes a recommendation as to punishment. The Commissioner ultimately decides on what the precise penalty should be. Thereafter there is a review in accordance with Regulations 24 and 26, to an independent Appeal Board. The final decision of the Appeal Board terminates all proceedings under the Regulations.

8. Within this legal framework the following events and circumstances have occurred relative to the applicant.

(i) On both 1st May, 2003 and the 20th June, 2003, Chief Superintendent Garvey, from the Kerry Garda Division, appointed Superintendent P. Sullivan as the 'investigating officer' into eight breaches of discipline alleged against Garda Noonan. These were set forth in two Regulation 8 forms (Form B33) bearing the same date.

(ii) On the 15th June, Superintendent Sullivan served a Regulation 9 notice (Form B33A) on the applicant specifying two of the eight alleged breaches and on the 29th June, served a similar form outlining the remaining six other charges.

(iii) These charges were grouped in four pairs with each pair having a "neglect of health" and a "discreditable conduct" allegation. Although the wording of each charge differed as to date and location, the following example of the charges contained in the first Regulation 9 notice of the 15th June, 2003, will give a flavour of the overall:

**'Neglect of Health'** that is to say that you conducted yourself in a manner calculated to delay your return to work, in that, you were engaged in other work during the year 2002 and 2003 and in particular at Millstreet, Co. Cork Pony Show on the 12th April, 2003, while on certified sick leave.

**'Discreditable Conduct':** that is to day conducting yourself in a manner on the 12th April, 2003, at Millstreet, Co. Cork and other dates during the years 2002 and 2003, which you knew or ought to know would be prejudicial to discipline or reasonably likely to bring discredit on An Garda Síochána.

(iv) The remaining six charges differed in three ways firstly, there was no reference to the year 2002, secondly the locations specified were at Middleton and at Newmarket, Co. Cork on two occasions, and thirdly the specified dates were the 25th May, 8th June and the 15th June in 2003. Save for these variations all charges were in substance similar.

9. On the 8th August, 2003, the appointing officer, having received and considered the report from the investigating officer, created and issued a discipline form (Form B30) under Regulation 10(2)(b). In that form there were 22 alleged breaches of discipline levelled against Garda Noonan, which included the eight breaches above mentioned. The remaining fourteen charges however had not previously been subject to any Regulation 9 (Form B33A) notice. The additional charges, which included allegations of 'neglect of health' and 'discreditable conduct', were similarly worded to those above mentioned save in respect of dates and locations. Whilst the majority of such charges were said to have occurred in the County of Cork, numbers 5 and 6 had Co. Limerick as their designated location with numbers 7 and 8 being attributable to the show grounds at Castleisland in the County of Kerry.

10. In either late August or early September, 2003 the Commissioner established a three person board to conduct a sworn inquiry into all 22 alleged breaches. These persons were Chief Superintendent John Carey, who was the Presiding Officer and Superintendents Duggan and Kerin. The 14th October, 2003, was specified as the commencement date for such inquiry but the same did not in fact commence until the 7th September, 2004. The reason for this delay was the numerous adjournments sought by the applicant and granted at his request.

11. On the 7th September, 2004, the inquiry opened, with the applicant's counsel making a number of submissions. The presenting

officer then completed his evidence, after which counsel on behalf of Garda Noonan was asked if his client wished to give evidence. Having consulted with the applicant, counsel indicated that Mr. Noonan was feeling unwell and would not be in a position to instruct his legal team or answer any questions put to him. As a result the hearing was adjourned to the agreed date of 15th October, 2004.

12. On the 13th October, 2004, Messrs. Daniel Murphy and Co. Solicitors wrote to the presiding officer and sought a further deferment of the inquiry. He did so on the basis that since the 1st September, 2004, Mr. Noonan was on certain medication which caused the following side effects, namely dizziness, tiredness, memory impairment, difficulty in speaking, difficulty in thinking, blurred vision, vertigo and a number of other unspecified consequences. It was therefore accordingly to Mr. Murphy impossible for the applicant to attend on the 15th of October, 2004. By fax reply of the same date, Chief Superintendent Carey refused the application and indicated that any representations with regard to the applicant's health would have been made to the inquiry itself.

13. On the 15th October, the inquiry reconvened and a medical report, from Dr. Dinan dated 14th October, was relied upon as supporting a further application for an adjournment. This was refused and sometime later that morning the applicant attended in person and remained for the duration of the hearing. He produced a type prepared statement which was read into evidence. He was asked certain questions by the inquiry and thereafter was re-examined by his own counsel. Other persons, including a Mr. Hurley and a Mr. Hennessy, were called and gave evidence on behalf of the applicant. Medical reports were produced and relied upon. After the conclusion of the evidence and having heard submissions from counsel on behalf of the applicant, the inquiry team adjourned and on its return found that the applicant was in breach of discipline at numbers 15, 16, 21 and 22 of the discipline form (Form B30) but was not in breach in respect of the remaining eighteen charges. In respect of sanction the inquiry then made a recommendation to the Commissioner under Regulation 20(1)(c)(ii) of the 1989 Regulations, which if accepted, required the member concerned to retire or resign as an alternative to dismissal.

14. Having considered the report of the inquiry the Commissioner accepted the recommendation aforesaid and required the applicant to resign from the force with effect of the 7th December, 2004, failing which he would stand dismissed as and from midnight on that date. Hence the leave application on the 6th December of that year.

15. Arising out of the foregoing, the applicant raises three issues for this Court's determination. The first is an allegation that by reason of the inclusion in the discipline form, (Form B30: dated the 8th August, 2003), of the fourteen alleged breaches which had not previously been notified, then every step taken thereafter was *ultra vires* and accordingly the decisions of both the inquiry and the Commissioner were void as lacking in jurisdiction. The second point is an assertion that the nomination of Superintendent Sullivan from the Kerry Division, to act as 'the investigating officer' was contrary to the Garda Síochána code of conduct and as a result there was never a lawful investigation into the matters complained of. And thirdly it is claimed that the inquiry acted unlawfully and/or irrationally in both refusing to adjourn the inquiry on the 15th October and in finding the applicant guilty as it did.

#### **16. Issue No. 1**

As will be recalled from the above summary of the Regulations, the process envisaged, is that an investigating officer is appointed to carry out an investigation into acts or omissions which it is thought could constitute a breach of discipline. That officer "as soon as practicable" after his appointment must inform the member concerned that he may be in breach of discipline and that an investigation is being conducted into such matters. Having carried out that investigation a report is then sent to the appointing officer who has a decision to make under Regulation 10(2)(b). The decision is whether or not "to continue" with the proceedings. If he decides to do so then he must create a discipline form in which full particulars of the alleged breach(s) of discipline are set forth. That form is served on the member in question. Finally, subject to Regulation 13, the appointing officer submits all relevant documentation to the Commissioner who thereafter proceeds as the Regulations require.

17. In this case Superintendent Sullivan was appointed by way of two warrants, one dated the 1st May, 2003 and the second the 20th June, 2003. He was asked to look into the matters which later, effectively because charges numbered 15, 16, 17, 18, 19, 20, 21 and 22 in the discipline form, B30. He duly served notice of those alleged breaches on the applicant. He conducted an investigation into them, and reported on this investigation to his appointing officer. Whilst this report has not been produced in evidence, and therefore I am unaware of its contents, I must assume however that it is in conformity with the Regulations and accordingly is confined to the eight alleged breaches in respect of which Superintendent Sullivan was appointed to investigate. Up to this point there is no reference in the documentation to the other fourteen charges. Having received this report, the appointing officer is obliged to decide whether "to continue with the proceedings or not". He is given no power to insert new charges into the process at this stage. He is not permitted to proceed with new charges as if the same had previously been notified to the member concerned and had been investigated into and reported on, by the investigating officer. Regulations 8 to 10 inclusive are quite clear in this regard and in my view beg of no ambiguity. I am therefore quite satisfied that in adding the further fourteen charges to the discipline form the appointing officer was in breach of the Regulations just mentioned.

18. This view, which is not only based on the 1989 Regulations, but which is also demanded by fair procedures and constitutional justice, is fully supported by the decision of McCracken J. in *Hughes v. Commissioner of An Garda Síochána* (Unreported, High Court, McCracken J., 23rd July, 1996). The procedures in both cases were similar. Sergeant Hughes, who received intelligence about the intentions and activities of an unlawful organisation towards a fellow member, informed that member of the intelligence which he had received. This it was claimed was contrary to specific instructions. On the 21st October, 1993 an investigating officer was appointed to investigate this alleged breach of discipline. He served a Regulation 9 Notice (Form B 33A) on the applicant which referred to this alleged breach. Thereafter in accordance with Regulation 10 the investigating officer sent a report to the appointing officer after he had conducted his investigation. That officer, who made a decision to continue with the proceedings, served on the applicant a discipline form (Form B30) specifying this alleged breach. Some time later however a second discipline form was served on Sergeant Hughes which not only contained the allegation last mentioned but also a further allegation that he had refused to disclose the identity of his informant. An inquiry was established which found the member concerned guilty of both breaches and made a recommendation as to sanction. The applicant then instituted High Court proceedings challenging the validity of what had occurred. At pp. 13-15 of this judgment (extracted from *Jill*) the learned judge said:

"There is no doubt that Superintendent Carthy was only appointed under Regulation 8 to investigate the allegation that the applicant informed Detective Garda X about the intentions and activities of an unlawful organisation towards him, and was never asked to investigate what would be a totally different breach of discipline, namely the refusal by the applicant to disclose the name of his informant. The Regulations set out a procedure to be followed if there is an allegation of breach of discipline. Under Regulation 8 an investigating officer is to be appointed and "the matter shall be investigated" by the investigating officer. The only matter which was investigated in the present case was the disclosure made to Detective Garda X and there was no investigation of the applicant's refusal to disclose the name of his informant. Similarly under Regulation 9 there is an obligation by the investigating officer to notify the member concerned that there may have been a breach of discipline and that it is being investigated. The applicant was never notified that there may have been a breach of discipline in failing to disclose the name of his informant and more importantly he was never informed that the

matter was being investigated. Regulation 10 refers to the making of a report by the investigating officer, which, as no investigating officer was ever appointed in relation to the second allegation, of course did not take place. Regulation 10(2) is in my view particularly important, as the power to decide whether proceedings shall be continued, and particulars of the breach of discipline given to the member concerned, is a power given to the appointing officer, in this case Chief Superintendent Shiel, upon receipt of the report of the investigating officer. Chief Superintendent Shiel took a decision in the present case to serve a discipline form on the applicant without having received a report under the Regulation. ... The second breach of discipline was never investigated, and the applicant was never made aware of the fact that allegations of this breach of discipline were going to be made. The whole scheme of the Regulations is quite clear, in that it is designed to put a member on notice of any investigation being made into his conduct, so that he may make such representations as he thinks fit before a decision is made as to whether disciplinary proceedings shall be brought or continued. Regulation 10(2) is only open to one construction. It provides that, after the appointing officer has received a written report of an investigation, he shall without avoidable delay decide whether or not "to continue the proceedings under these regulations". The Regulation does not say he makes a decision whether to commence proceedings, (emphasis added) and the only proceedings which could be continued within the meaning of that Regulation are the proceedings or matter which was under investigation by the investigating officer. Therefore, both on the only reasonable construction of the Regulations, and on what can only be described as the system of natural justice set up by the Regulation, whereby a member must be made aware of an investigation, I am of the view that the Regulations have not been complied with."

That passage is entirely applicable to this case and accordingly I am quite satisfied that the Regulations have been breached in this instance.

19. It should be said that this case was not run on the basis that the fourteen additional charges were "discovered" during the course of the initial investigation and therefore could not have been within the contemplation of the appointing officer at the time. Nor was it suggested that the discipline form could in some way be treated as having amended the original notification (Form B33A) served on the member concerned. Even however if the additional charges were so discovered, then fair procedures would in such circumstances mandate the commencement of a new inquiry which of course would involve due compliance with the specified Regulation procedures. In addition paragraph 6.6(5) of the Garda Code is apposite where it states:

"If the investigation reveals that the breaches suggested in the notice (Form B 33A) have not been committed but that other unrelated breaches have been committed, it would be quite wrong to continue with the investigation without informing the member in writing that it has ended insofar as the original allegation is concerned, but that other matters have come to light. This, in effect, would be a completely fresh investigation and the investigating officer has no authority to continue with it without permission from the appointing officer. However, other breaches arising from the same set of facts with the same date and places as the original incident need not to be referred back to the appointing officer."

As it could not be said that the additional charges are covered by this last mentioned proviso, it seems to be that this representation is entirely consistent with, and takes due cognisance of the principles of natural and constitutional justice.

20. Counsel on behalf of the respondent has referred me to a number of decisions including *C. v. Court Marshall*, (Supreme Court, 15/2/1994), *Scariff v. Taylor* [1996] 1 I.R. 242 and *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469. I cannot see however how any of these judgments have a direct relevance to this issue much less one that casts any doubt upon the conclusion above reached.

21. In further attempting to distinguish *Hughes* from the instant case, it is suggested that Form B33A (served under Regulation 9) was sufficient to inform the applicant in a general way of the breaches of discipline alleged against him. It did so by claiming that he worked during 2002 and 2003. Accordingly it is said that he was always on notice that the investigation would consider his conduct during the entirety of this period. I respectfully disagree with this submission and would reject any suggestion that the incorporation of the fourteen additional charges into Form B30 could be justified by reference to the generalisation of the wording used in relation to the eight charges contained in the two Form B33As. Taking one of the 'original charges' as an example, being the only one contained in the form of the 15th June, 2003, it reads:

**"Neglect of Health:** That you conducted yourself in a manner calculated to delay your return to work, in that, you were engaged in other work during the year 2002 and 2003 and in particular at Millstreet, Co. Cork Pony Show on the 12th April, 2003 while on certified sick leave."

22. In my view if the notified wording of an alleged breach of discipline under Regulation 9, could be so general and so vague, then serious doubts could exist about the validity of the Regulation itself. Even at that early stage of the process such a document would be vulnerable as lacking specificity. In any event, the member concerned, who would not as yet have received witness statements or other relevant information could find it impossible to defend himself when faced with that level of generality. How could such an individual prepare to meet such an allegation? How could he seek to establish an alibi, or identify witnesses or indeed even, in any meaningful way, to instruct his legal advisors. In my opinion such a Regulation 9 notice cannot be so claimed. What saves both of these forms in this case, is the reference to a specific date on which it is claimed that an alleged breach of discipline occurred. In my view the true focus of the original eight charges relate to the specific dates mentioned and not to the broader time frame so given. I therefore do not accept the respondents' submission in this regard.

23. The above findings however (in particular those at paras. 17 and 18) are of no benefit to the applicant in the particular circumstances of this case. This is because the inquiry found him not guilty on all of the additional charges and therefore he has suffered no detriment by reason of their wrongful incorporation into Form B30. Whilst it might be said that he suffered stress and anxiety in having to face these charges and that he may have incurred costs and expenses in dealing with them, nevertheless these matters are not such, as would invalidate any of the steps taken relative to the original eight charges. In particular I am satisfied that the establishment of an inquiry, the holding, findings and recommendation of that inquiry and the sanction imposed by the Commissioner were steps all validly taken in respect of such charges. I am therefore satisfied that in these circumstances no relief can be given to the applicant on this issue.

## 24. Issue No. 2

This point arises in the manner following:

An Garda Síochána has a code which is the internal manual for its members. Chapter 6 is headed "Discipline and Appeals". Paragraph 3 states that:

"The non observance of an Order or Regulation (issued by the Commissioner for the guidance of the service) as set out herein or elsewhere, is a breach of discipline under No. 4 of the Schedule to the Garda Síochána Discipline (Regulations) 1989."

Paragraph 6.8(4) is also referred to and is in fact particularly relied upon. That reads:

"Where a member is believed to be in breach of discipline arising out of an incident which occurred in a division other than that to which the member is attached the Divisional Officer where the incident occurred will be the Appointing Officer and will appoint an Investigating Officer from within that division..."

25. In this case Chief Superintendent Garvey, of the Kerry Garda Division, appointed Superintendent Sullivan from Cahirciveen as the investigating officer. As outlined above he was appointed to investigate eight alleged breaches of discipline. These were all said to have occurred in different parts of Co. Cork. Accordingly, the appointing officer should have been the divisional officer from that area and not Chief Superintendent Garvey who was in charge of a different divisional area.

26. I would accept that in principle members of An Garda Síochána have a legitimate expectation that the provisions of the Gardaí code would be applied unless there was a legal justification for not so doing. In *Glencar Exploration Plc v. Mayo County Council* [2002] 1 I.R. 84, Fennelly J. identified three propositions which must exist or be established before this doctrine of legitimate expectation can be legally relied upon at pp. 162-163:

"Firstly the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. ... Secondly the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons affected actually or potentially... [and] thirdly [that representation must have created] an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine."

In applying these observations it seems to me that the legitimate expectation in this case stems from the existence and publication of the Code and that the applicant's standing to rely upon it arises from his membership of An Garda Síochána to whom the Code is addressed. It does not, as has been suggested, result from any comment which the presiding officer may have made during the course of the inquiry. In fact he would have no competence to apply or disapply it, if otherwise the position under the general law was to the contrary.

27. As I have stated paragraphs 6.8(4) refers to "a breach of discipline arising out of an incident" occurring in a division. Where therefore did the original eight breaches of discipline "occur"? This must be considered in the context of the view which I have expressed about the proper interpretation of the original eight charges and in particular that the same cannot be read as being referable to generalised conduct. It must also be looked at in light of the fact that there is no evidence of Chief Superintendent Garvey having ever appointed Superintendent Sullivan to investigate the remaining fourteen charges. Given this situation therefore, it seems to me that there was a specific complaint alleged against the applicant which was that by reason of activities carried out in County Cork on various diverse dates, he was alleged to have neglected his health and engaged in discreditable conduct. If paragraph 6.8(4), of the Code, is to be interpreted according to its plain wording and clear language, it must in my view mean that the "incidents" in question, are those referable to the applicant's involvement in pony shows all of which took place in the County of Cork. To suggest, as the respondent has, that these breaches "have occurred" in the Kerry division, is a proposition which I cannot agree with. Accordingly I am satisfied that the incidences in question "occurred" in the Garda Division of Cork.

28. It seems to me that most of the legitimate expectation cases which have been reported, do not arise out of a document, statement, promise or representation, which have been made against the backdrop of a law such as the statutory instrument. This type of law, albeit described as secondary legislation, is nonetheless entitled to be status of "law" which applies in this jurisdiction. See *Leontjava v. Director of Public Prosecutions* [2004] 1 I.R. 591 and in particular Keane C.J. at p. 636 of the report. The provisions of the code must therefore be looked at in the context of the statutory instrument. In my view the latter has a status in law superior to that of the former. Accordingly if there is any conflict between both then the statutory instrument must prevail. In addition whilst there might be some validity in the respondent's submission that where multiple breaches have been committed in different divisional areas, the provisions of para. 6.8(4) of the Code have no effect, that point cannot apply in this case given the findings above made. Therefore para. 6.8(4) has to be considered in light of Regulation 8.

29. Regulation 8 in my view permits a member, not below the rank of Chief Superintendent to appoint an investigating officer for the purposes therein mentioned. This power is not restricted, conditional, or otherwise circumscribed. The only specified requirement relates to rank. In this instance it is common case that the appointing officer held a rank of Chief Superintendent and accordingly was qualified to make the appointment which he did. I am therefore satisfied that even if there is a conflict between the Code and Regulation 8, the latter must prevail. This view however should not be taken as meaning that the practice specified in the Code can be routinely disregarded. Best practice and fair procedures may demand its implementation. In this case, however, I do not see any unfairness in the process and Garda Noonan has not been prejudiced. In such circumstances this ground of complaint must also fail.

### **30. Issue No. 3**

It is submitted on behalf of Garda Noonan that the inquiry acted irrationally or unreasonably and therefore unlawfully in its assessment and use of the medical and other evidence tendered before it. It is said that if such evidence was approached in a proper manner then the inquiry should have been adjourned on the 15th October and/or should not have come to the ultimate conclusion which it did.

31. There is no dispute in this case but that prior to the 7th September, 2004, the applicant had been notified of the eight alleged breaches of discipline against him, of the establishment of an inquiry to investigate such matters and of his right to make a statement, response or representations in respect thereof. He was furnished with a list of witnesses and their proposed statements, together with certain other relevant documents which the respondent proposed to rely upon as part of the inquiry. He was given several photographs as well as three videos. He was notified well in advance of the commencement date of the inquiry and for almost twelve months he had successfully obtained numerous adjournments of its actual commencement because of ill health. Therefore subject to his specific complaints, I have no doubt but that both natural and constitutional justice had been afforded to Garda Noonan, right throughout this process and for the entirety of this period.

32. The inquiry ultimately commenced on the 7th September, 2004. Evidence was given by the presenting officer. Garda Noonan was both physically present and was represented by a solicitor and counsel. With his full knowledge and consent the matter was adjourned to the 15th October on the basis that late in the afternoon he, the applicant, was feeling unwell. On the 13th October without any supporting medical evidence Garda Noonan's solicitor sought an adjournment of the inquiry. This was refused. On the 15th October the application was renewed and a medical report dated the 14th October was relied upon in support. Dr. Dinan, a local G.P., in the five line report said:

"I have examined the above named person today. He is unfit to give evidence due to sedation/vertigo from his medication. He is unfit to attend on the 15th October, 2004."

33. In rejecting this second application the inquiry, through the presiding officer, stated that despite the existence of medical issues which ran throughout the case, no doctor had ever given oral evidence to the inquiry team. Secondly, the report of Dr. Dinan was general. Thirdly the letter of Mr. Murphy dated the 13th October was not supported by medical evidence. In any event it indicated that the alleged side effects suffered by Garda Noonan arose from medication which he had been on since the 1st September. He was evidently also taking that medication on the 7th September on which occasion he agreed without objection to a continuation of the inquiry on the 15th October. Given these circumstances and the generalised background to this case, the inquiry reached the decision which it did. In my view it was perfectly justified in arriving at such decision. It acted fully within its jurisdiction, when, having considered the evidence placed before it, having heard counsel and having deliberated on the application, it reached the decision to continue. Medical evidence, even if detailed and substantial, could not be determinative in this regard. The decision making body is the inquiry and once it acted reasonably then its decision is not unlawful. Consequently I believe that it was well within its jurisdiction in refusing to further adjourn.

34. This view in fact is fully supported by what subsequently transpired on the day in question. Some short time after making this decision Garda Noonan appeared in person, took the oath, and had a prepared statement read into evidence. That statement, whilst containing many extraneous matters, also engaged with the facts of this case save where the omission to so do was deliberate and calculated. After completing this evidence he was cross examined and later re-examined by his own counsel. His counsel then made closing submissions. I am therefore entirely satisfied that both prospectively and by the events which unfolded, the decision to proceed with the inquiry was fully justified.

35. In addition when one looks at the totality of the evidence given on both the 7th September and the 15th October, 2004, it is abundantly clear that there existed credible evidence upon which the inquiry could come to the conclusion which it arrived at. Moreover there was an engagement on the facts and with the merits of the case insofar as Garda Noonan wished that process to take place. Supporting evidence of his position was also adduced. He was fully represented throughout the process. As a result there is no doubt in my mind but that the principles of natural and constitutional justice have been fully vindicated in this process.

36. Finally there is a suggestion that the penalty imposed was disproportionate to the findings made. I cannot agree that this is so. The penalty in question is specified as an option under Regulation 20 of the 1989 Regulations. The inquiry is therefore clearly empowered to make this recommendation and the Commissioner likewise is empowered to adopt and seek its implementation. Given the findings of the inquiry, the imposition of this penalty was not in my view disproportionate. In addition there is a further safeguard in that both the finding of the inquiry and the imposition of sanction are subject to an application for a review if that process is invoked by the applicant.

In conclusion I refuse the relief claimed.