
LAW ENFORCEMENT REVIEW BOARD

IN THE MATTER OF the Police Act, R.S.A. 2000, c.P-17, and the Police Service Regulation.

AND IN THE MATTER OF the Appeal of Mr. A. Vergara (the “Appellant”) concerning complaints against Det. T. Gon (No. 999) (the “Respondent”) of the Edmonton Police Service (the “EPS”).

JUDGMENT OF THE BOARD

(Phillips/Johnson/McKall)

BACKGROUND:

[1] On July 16, 2000, a disturbance at the Edmonton Remand Centre (“ERC”) resulted in complaints against members of the “Extraction Team” of that facility. Included in those complaints was a complaint by the Appellant that he had been criminally assaulted. The EPS was called upon to investigate that complaint and a member of the EPS conducted an investigation into that complaint. The Respondent was then designated by the Chief of the EPS to re-investigate that same complaint. The Respondent did his investigation and submitted his report on January 11, 2001. In his report to the Chief, the Respondent recommended against laying charges against any ERC staff member(s).

[2] The Respondent’s investigation was then itself the subject of a complaint by the Appellant. This complaint was investigated by Det. Ferguson (now retired), who reviewed the Respondent’s investigation of

the Appellant's original allegation. Specifically, Det. Ferguson investigated allegations that the Respondent had committed the criminal offences of perjury and extortion, as well as the complaints that the Respondent had violated EPS regulations.

[3] The criminal allegations of perjury and extortion were dismissed in a disposition letter dated July 5, 2004, authored by S/Sgt. P. Bailey of Internal Affairs. The Chief of Police dismissed the conduct complaints in a disposition letter dated August 26, 2004. The Appellant's appeal to the Law Enforcement Review Board (the "Board") is an appeal of the decision of the Chief of Police about the conduct complaints.

GROUND OF APPEAL

[4] In an e-mail dated January 23, 2009, counsel for the Appellant particularized the grounds of the Appellant's appeal. Those grounds are as follows:

1. *Application of the incorrect charging threshold (LERB 003-2006 and see our letter of appeal September 21, ground 3). A correct application would have resulted in charges against Bok, Scott and Gon for neglect of duty, discreditable conduct, and deceit.*
2. *Unreasonable findings of fact (see Chief's letter of August 26/04 and the interpretations of the evidence that he made in relation to Allegations #2, #3, #4, #5, #6, #7).*
3. *Failure to deal, in the Service investigation, with the complaints by Vergara that Gon lied when he said under oath that he obtained the names of the ERC Tactical Team members, that he had failed to record the information if he did get it, that he threatened witnesses and complainants. Those allegations were dealt with in the disposition letter of July 5/04 dealing with the Criminal complaints but there was no mention of them in the August 26/04 Police Act disposition.*

ARGUMENTS, DECISION, AND REASONS

[5] The Board was provided with a number of documents related to this appeal, and was also able to view a videotape taken in the ERC elevator on the day of the alleged assault. In addition, the Appellant called as witnesses the Respondent and two individuals who, at the time of the incident, were management

employees at the ERC. Neither the Appellant nor his inmate witnesses attended the hearing, or provided evidence before the Board. In the circumstances of this case, the Board found the Respondent to be a candid and credible witness, whose evidence was not shaken in cross-examination. In addition, much of his evidence was corroborated by documentary or videotape evidence.

Incorrect threshold

[6] Counsel for the Appellant argued with respect to the first ground of appeal that the Chief applied the incorrect charging threshold. The Appellant argued that the Chief should have applied the *Unrau* test (Board Judgment No. 003-2006), but that that was not the test applied by the Chief in making his determination. The Board agrees that Section 45 of the *Police Act* (“the Act”) sets out the investigation process to be followed by the Chief of Police, and the test for whether to lay disciplinary charges against a police officer. The Board also agrees that the interpretation of that section was decided in *Unrau*. At paragraph 89 of *Unrau*, the Board states:

This then brings the Board to the threshold issue, not only as it relates to the threshold which should be employed by a chief of police in arriving at a decision as to whether or not a hearing should be conducted at the service level, but also the threshold to be employed by the Board in determining whether or not it agrees with the decision of a chief of police. It is the Board’s conclusion that the threshold to be employed by both a chief of police and the Board is the same. It is not proof on a balance of probabilities as that is the standard which is applicable to a determination of the merits of the allegations at a hearing before either a presiding officer or the Board. A chief of police and the Board, in assessing the decision of the chief of police, are deciding the same issue – that is, whether there is sufficient evidence to require the holding of a disciplinary hearing before a presiding officer.

[7] The Board in *Unrau* also made reference to and adopted comments by the Alberta Court of Queen’s Bench decision of *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519. In that case, the Court clarified the test to be applied by the Chief when making a determination pursuant to Section 45(2) and 45(3) of the *Act*. The Court stated, at para. 159:

When the Act says in s. 45(2) that the chief of police must be of “of the opinion” that the complaint “may constitute” a disciplinary offence, the chief of police must be satisfied that

the matter complained of, as a matter of law, is capable of constituting a disciplinary complaint. In other words the complaint must disclose a disciplinary charge known to the law. No issue of proof arises at this stage.

*When s. 45(3) says that the chief of police must be of the opinion that the complaint “constitutes” an offence, that does not mean that the chief of police must be satisfied that the complaint is “proven”: the chief of police must effectively determine whether there is enough evidence which if believed could result in a conviction on those charges. As was said in *Canadian Civil Liberties*, supra, at para. 61: “the role of the Chief is to decide whether a hearing should be held and not what the result of the hearing should be.” The section says that the chief of police must determine “in his opinion” that the offence is made out. Thus the chief of police does not adjudicate, he merely forms a personal opinion. The context under which the chief of police forms that opinion must not be forgotten. He comes to that opinion without a hearing, and having considered only the documentary evidence put before him. He does not hear from live witnesses, and he is unable to assess the credibility of the witnesses. There is no cross-examination. There is no defence case put forward, and there are no submissions from counsel. When the statute says that the chief of police decides that the complaint “constitutes” a contravention, it is only in that limited and preliminary context. [Emphasis mine].*

The fact that under s. 45 (3) the chief of police can himself hold a hearing shows that he need not finally conclude that the charges are well founded at the screening stage. If he was required to do so at the screening level, the hearing would be redundant. Indeed if the chief of police was required to find the charges were proven at the screening level, any hearing would be redundant. The fact that the chief of police can dispose of the complaint without a hearing (under subs. (4)) does not presuppose a finding of guilt at the screening level. The statute requires the chief of police to determine if the charges on their face are serious enough to call for a hearing, and if not it enables him to proceed to determine normally if they are “proven”.

[8] In the disposition letters, the Chief said that he had considered whether there was “sufficient evidence to support the specific allegations” against the Respondent. The proper test, set out in the *Unrau* case (supra) at para. 94 and 95, is whether there “is something more than a prima facie case but less than a likelihood of conviction”. It is not clear from the words used by the Chief in the disposition letters (i.e. “sufficient evidence to support the specific allegations”) that the Chief used the correct test in making his determination in this case.

[9] Having said this, the Board is not required to decide whether the words used by the Chief could be interpreted to have a meaning consistent with the *Unrau* test. The Board does note that the Chief arguably

considered the incorrect test. However, because the disposition of the Appellant's complaint is now before this Board, it will now simply apply the correct test to the facts of this case.

Unreasonable findings of fact

[10] The second ground of appeal is that the Chief made unreasonable findings of fact with regard to several of the allegations and that these unreasonable findings of fact are demonstrated by a review of his disposition letter of August 26, 2004. The Board notes, first, that the Board is now only required to deal with the allegations set out in #3 and #5 of the appeal particulars because the members referred to in the remaining allegations have since retired. Accordingly, the Board has considered whether the Chief made unreasonable findings of fact with regard to #3 and #5.

[11] Allegation #3 is that the Respondent failed to obtain adequate medical evidence in the course of his investigation of the Appellant's complaint. In the Board's view, the Respondent adequately investigated the Appellant's medical circumstances and the Board is, therefore, unable to agree with the Appellant about this aspect of the appeal. The Chief, in his disposition letter, made reference to the interview with and statement taken by the Respondent from the first medical person to deal with the Appellant following the alleged assault, that being the ERC nurse, and to the fact that the Respondent also reviewed the treatment notes of the physician who examined the Appellant and interviewed both the Appellant and his witnesses. The Respondent confirmed, in his testimony before this Board, that he had obtained medical information from the ERC nurse, and that he found it to be reliable. The Respondent also viewed the videotape of the Appellant when he was in the elevator with members of the extraction team and spoke with the A/Director of the ERC. The Respondent candidly testified that he did not proceed to interview the medical doctor and the dentist who had examined the Appellant (as he had initially planned in his "to do" list). His explanation for that change in his planned investigation was that he had by then made a determination that the complaint of the Appellant was "grossly inconsistent" with the information obtained from the ERC nurse and that any injuries the Appellant may have sustained while being extracted from his cell were "minor". The Respondent had concluded that "this was non-criminal." The Respondent did not believe that any of the injuries had occurred in the manner described by the Appellant; nor, after viewing the videotape did the Respondent believe that excessive force had been used by the extraction team, or that the extraction team

had caused any physical and/or dental injury.

[12] When the Chief considered whether or not the Respondent had failed to obtain adequate medical evidence, the Chief took into account the statement provided by the ERC nurse, the treatment notes later provided by the doctor who examined the Appellant, the complaints made by the Appellant regarding his injuries, and the statements provided by his witnesses. The Chief properly considered the conclusion reached by the Respondent and his reasons for having reached that conclusion. The Chief properly noted that what constitutes “adequate” with regard to the collection of medical evidence is subjective. The Chief concluded that the collection of medical information in this case was “adequate” and did not sustain the allegation of Neglect of Duty on the part of the Respondent.

[13] The Board does not find that this was an unreasonable finding of fact. The statement of the ERC nurse established that she was aware of and had recorded each of the Appellant’s complaints. She had examined the Appellant in light of his complaints and she had concluded that the Appellant did not require medical treatment. The ERC nurse did refer the Appellant to a dentist and she stated that he would be seen by a doctor, in accordance with policy. The Respondent accepted the evidence of the ERC nurse as having been reliable and credible, but he did not reach that same conclusion with regard to the information supplied by the Appellant and his witnesses. The Respondent also obtained and reviewed the treatment notes of the physician who had examined the Appellant. The Board does not find that the Respondent’s decision to rely on the medical evidence obtained from the ERC nurse was at all unreasonable. Accordingly, the Board does not agree that the Chief’s finding of fact related to medical evidence was unreasonable. The Chief’s conclusion that the Respondent adequately investigated the Appellant’s alleged injuries was, in the Board’s view, reasonable and correct.

[14] The Board has also considered the Chief’s findings of fact regarding finding #5, as stated in the Chief’s disposition letter of August 26, 2004. That finding of fact related to whether or not the Respondent deliberately or improperly concluded that the videotape of the Appellant in the elevator with members of the ERC Extraction Team contradicted the Appellant’s allegations of assault. The Chief properly took into account the inconsistencies in the allegations made by the Appellant in his initial complaint, the complaint the Appellant presented through his counsel, and the testimony the Appellant provided during a hearing

before Mr. Justice Marceau. The Chief decided that those inconsistencies put into question the allegation that the Respondent had drawn the wrong conclusion about whether the videotape contradicted the Appellant's complaint of assault. The Chief also properly took into account Det. Ferguson's conclusion that the videotape did not support the allegations made by the Appellant, and also Det. Ferguson's conclusion that the physical appearance of the Appellant as he left the elevator did not support the Appellant's recollection of the harm the alleged assault had caused. The Chief further and properly considered that Inspector Jones had viewed the tape and reached the same conclusion, and that the Crown who reviewed that investigation did not recommend the laying of charges. Having reviewed all of that evidence, the Chief concluded that while there could be interpretive variances in what the tape showed that, tape did not contain evidence in support of the Appellant's allegation of assault.

[15] The Board has had the benefit of considering the information referred to above, as well as the uncontradicted testimony called on this point during this hearing. Importantly, the Board also itself viewed the videotape in question. The Board agrees with the Respondent's ultimate conclusion that the videotape contradicted the Appellant's allegation of being assaulted by members of the Extraction Team in the elevator. Accordingly, the Board does not agree with the Appellant that the Chief made an unreasonable finding of fact related to finding #5. The Board finds that the Chief's conclusion with respect to allegation #5 in his disposition letter of August 26, 2004 is supported by the evidence.

Dealing with criminal allegations

[16] The third ground of appeal is that the Chief failed to consider the alleged criminal conduct of the Respondent in the disciplinary context; and specifically that the Chief failed to consider the following as potential conduct charges:

- i) that the Respondent lied under oath when he said he had obtained the names of the ERC Tactical Unit (or Extraction Team),
- ii) that the Respondent failed to record the information if he did get it, and
- iii) that he threatened witnesses and complainants.

These allegations were framed by the Appellant as allegation of criminal behaviour, and were investigated as such by the EPS. The Appellant argued that the Chief ought to have also considered whether these allegations ought to have resulted in disciplinary charges.

[17] The Appellant is correct in noting that these issues were not explicitly addressed in the August 26, 2004 disposition letter dealing with the conduct complaints, whereas they were addressed in the disposition letter of July 5, 2004 which dealt with the criminal allegations. It is trite law that criminal allegations involve a higher standard of proof (i.e. proof beyond a reasonable doubt) than civil matters such as discipline complaints or allegations (i.e. proof on a balance of probabilities). The Board recognizes that it could simply return these complaints to the Chief for a determination on a balance of probabilities of whether the facts alleged could support charges in the disciplinary context. The Board, however, has the benefit of knowing the Chief's reasoning and findings on each of the criminal allegations and has also had the benefit of having heard evidence about these allegations. In these circumstances, the Board has considered the evidence about each of these allegations in order to determine whether or not the evidence would support a prima facie case relating to discipline charges.

[18] In allegation i) above, the Appellant stated that the Respondent lied under oath when he said he had obtained the names of the ERC Extraction Team. The Chief concluded that this allegation was unproven. The evidence in question was recorded in the transcript of the March 13, 2001 cross-examination on Affidavit of the Respondent at page 10, lines 16 to 24 as follows:

Q. What did you do to establish the identities of all Remand Centre staff who were present when the incident took place? That is the extraction and the subsequent handling of Mr. Vergara?

A. The extraction team --- I obtained the names of them. That is the extent.

Q. Now the names aren't in the report, the R-2 report, are they?

A. No.

[19] The perjury investigation found that the evidence established that the Respondent had obtained the names verbally, but that he had not recorded them and also found that the Respondent's testimony was

truthful and did not support a charge of perjury.

[20] The Board concurs with that assessment of the perjury investigation by the Chief. The Board additionally was able to consider the testimony provided at this hearing. The Respondent's testimony before the Board reiterated the testimony he provided during the cross-examination on his Affidavit. The Respondent indicated that he had obtained the names verbally from Mr. Terry Garnett of the ERC, but that he had not recorded them in his notes at the time. The Respondent, at the time, thought that if he needed the names at a later time he would obtain them again. That testimony was corroborated by Mr. Garnett, who stated that he released the 15-17 names of the full Extraction Team to an EPS police officer, although he was uncertain which officer he provided them to. When asked what was meant by the term "released", Mr. Garnett stated that he either read the list of names or provided a list of names to the officer. Under these circumstances, the Board is unable to conclude that something more than a prima facie case of falsehood on the part of the Respondent has been made out. This matter will therefore not be referred back to the Chief of Police for a determination about whether disciplinary charges ought to be laid.

[21] Allegation ii) above was that if the Respondent did obtain the names of the Extraction Team, he failed to record the names in his investigation notes. The Board agrees that the matter of note-taking was not fully dealt with in either the July 5, 2004 disposition letter regarding criminal allegations or the August 26, 2004 letter regarding the service investigation. It is evident from the passage quoted above from the examination on Affidavit of the Respondent, as well as from his testimony before the Board, that the Respondent failed to write down the names of the members of the Extraction Team as provided by Mr. Garnett. EPS policy requires a police officer to maintain detailed notes during an investigation. Accordingly, to be consistent with EPS policy, the Respondent would have taken written notes of the names of the members of the Extraction Team.

[22] During the Respondent's testimony he was candid in stating that when he joined the EPS in April of 1978, he was not trained in investigative techniques and requirements, and that he was not provided "in service" training. Rather, he was trained "on the job". He noted that this approach has changed over the years and that new members are provided considerably more training than he was. He was also candid in stating that he had not, at the time he carried out the investigation of the Appellant's complaint, read the

EPS policy relating to note-taking. The Respondent stated that his own notes were intended as “reminder notes” to himself, and that he used them in the preparation of his R-2 report. He further stated that if he were to conduct this investigation again today, he would make more detailed notes.

[23] There is clearly evidence that the Respondent did not adequately adhere to EPS policy with respect to note-taking. In the Board’s view, however, in light of the relatively minor nature of the possible failing and the explanation it is, therefore, questionable whether the conduct in question could constitute a disciplinary offence. Further, nearly nine years have passed since the date of the Respondent’s notes and he acknowledged the need to take better notes and has changed his practice to do so. The proceedings that the Respondent has been through have further reinforced this need. Accordingly, the Board exercises its discretion as set out in s. 20(2)(b)(v) of the *Act*, and holds that returning the matter to the Chief for the laying of a service charge is not necessary or warranted in the circumstances.

[24] Allegation iii) above relates to the Appellant’s complaint that the Respondent had threatened witnesses and the complainant. In order to assess whether to return this matter to the Chief for the laying of a charge, the Board has examined the reasons set out by S/Sgt. Bailey in his the July 5, 2004 letter. The Board notes that his finding was that, rather than threatening or extorting the Appellant and potential witnesses, the Respondent was adhering to EPS policy and procedure directives by providing this warning. That warning sets out the potential consequences if a witness makes a false statement.

[25] The Board has considered the evidence before it as well as the evidence that was available to the Chief of Police. The Respondent reiterated in his testimony that he intended only to advise the potential witnesses and the complainant of the consequences they could face if they were not truthful in the investigation interviews. The Respondent denied any intention to threaten the Appellant or his witnesses and he expressed surprise that any of them had felt threatened. The Board concludes that the Appellant has failed to establish “more than a prima facie case” that the Respondent did, in fact, threaten witnesses or complainants. The Board concludes that the Respondent gave a simple warning which was not a threat. The matter will therefore not be remitted back to the Chief of Police for a hearing into this allegation.

[26] In conclusion, the Board must make a comment about the investigation that was the subject-matter

of this appeal. During argument, counsel for the Appellant emphasized the importance of addressing complaints by inmates in a fair and unbiased manner. He argued that complaints by inmates are frequently not investigated adequately and that inmates who make complaints are subjected to fear of retaliation. He pointed out that inmates are vulnerable members of society and at the mercy of correctional officers and the correctional system. He argued that prisoners have the same right to a fair investigation of their complaints as do members of society who are not incarcerated. He emphasized the significance of making jailers aware that such complaints will be heeded and taken seriously.

[27] The Board agrees with counsel for the Appellant about the importance of ensuring a fair and unbiased investigation of all complaints, including complaints made by inmates. Entities such as a police service or this Board have the same responsibilities in carrying out an investigation or in exercising independent oversight of actions taken against inmates as they do regarding actions taken against non-incarcerated citizens. Importantly, however, the Board finds that the many investigations conducted into this situation, including the investigation carried out by the Respondent, demonstrate that the complaints made by the Appellant were in fact taken seriously and were investigated fairly.

[28] The appeal is dismissed

A handwritten signature in black ink, appearing to read 'John Phillips', written over a horizontal line.

John Phillips
Chair

DATED at the City of Edmonton,
in the Province of Alberta, this
6th day of May, 2010.

cc. Board counsel
Mr. Engel, Counsel for the Appellant
Mr. Abells, Q.C., Counsel for the Respondent Officer