

LAW ENFORCEMENT REVIEW BOARD

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

AND IN THE MATTER OF the Appeal of Phil Malott (the "Appellant") concerning complaints against Sgt. D. LeBlanc (No. 1451), Cst. R. Owen (No. 1705), Cst. D. Boyer (No. 1678), Cst. B. Edwards (No. 1770), Cst. D. Yacey (No. 2645) and Cst. J. Matsune (No. 1831) (the "Respondents") of the Edmonton Police Service (the "EPS").

JUDGMENT OF THE BOARD (Jacques/ Grieve)

BACKGROUND

[1] On February 25, 1999, the EPS conducted a drug raid on two inner city houses. Events unfolded quickly as the Tactical Squad led the charge into the premises. Evidence was collected and three people were charged and arrested.

[2] In the fall of 2000, the Appellant went to trial. Police officers testified that a coloured foil containing crack cocaine was discovered on the door frame of one of the houses (the "drug house"). Another foil-wrapped cocaine bundle was found hidden in the snow in the rear yard of the drug house.

[3] Eight days into the trial the case took a turn when the Crown withdrew the charges after viewing an EPS video that had been recorded during the raid.

[4] On January 3, 2001, Mr. C. Davison filed a series of allegations with the Crown Prosecutor and the Chief of the Edmonton Police Service (the "Chief") involving officer conduct during the raid. On January 31, 2001, the Appellant joined the complaint.

[5] In the Chief's disposition letter of January 21, 2003, the Appellant was advised that:

- Alberta Justice determined there was insufficient evidence on which to support the laying of any criminal charges against the police officers.
- Under the heading "Drugs-Single Item-Placement" (the "placement"), the EPS internal investigation determined no misconduct was perpetrated by any of the police officers and the Chief concluded the allegation was "Not Justified".
- Under the heading "Drugs (II)-Single Item-Discovery" (the "discovery"), Cst. Matsune breached *Police Service Regulation ("PSR")* Section 5(1), Discreditable Conduct, in providing disingenuous testimony during the trial, and he was issued an Official Warning.
- Under the heading "Residency Documents in 10323 - Names of Addressees", Cst. Matsune breached *PSR* Section(51), Deceit, for errors perpetrated, and he was issued an Official Warning.

[6] Other allegations were also addressed in the Chief's letter but those were abandoned by the Appellant in the early stages of the Law Enforcement Review Board (the "Board") hearing.

[7] On January 27, 2003, the Appellant appealed the Chief's disposition and on March 5, 2003, Cst. Matsune appealed his two official warnings. The parties agreed to conduct the appeals concurrently before the Board. The Board decision of Cst. Matsune's appeal is found in LERB Judgment No. 024-2009.

THE RESPONDENT OFFICERS

[8] Identification of the Respondent officers was the subject of preliminary decisions No. 025-2005 and No. 030-2005, as well as discussion in the early stages of the appeal. It was finally agreed that the Respondent officers were: Cst. Leblanc; Cst. Owen; Cst. Boyer; Cst. Edwards; Cst. Yacey; and Cst. Matsune.

THE ISSUE

[9] The issue is whether or not, any or all of the Respondent officers involved in the raid planted, or conspired to plant, drug evidence on an interior door frame of the residence.

THE LAW

[10] Where, as was the case here, no hearing was conducted by the Chief, the Board must assess the evidence before it and determine whether there is a reasonable prospect of establishing the facts necessary to conclude that a disciplinary offence was committed. If so, the matter must be remitted to the Chief for a hearing. The *Unrau* case (LERB Judgment No. 003-2006) sets out that the standard to be applied by the Board is “more than a *prima facie* case but less than a likelihood of conviction”.

PRELIMINARY MATTERS

[11] Board Judgment No. 025-2005 concluded that:

- Officers Cst. Bruni-Bossio, Cst. Yacey, Cst. Edwards, Cst. Owen, and Cst. Kushniruk were identified as the Respondents but paragraph 8 of this Judgment contains the amended and final list of the Appellants.
- The Board had no jurisdiction over Cst. Stiles as he was no longer with the EPS.

[12] Board Judgment No. 030-2005 found:

- It was not the Appellant’s intention to abandon his allegations against Cst. Yacey and the failure to include Cst. Yacey in paragraph 5 of the particulars was an oversight.
- The Appellant had withdrawn any allegations against Cst. Bruni-Bossio and Cst. Kushniruk.
- The allegation related to the creation of overtime was not the subject of the original complaint and was not properly before the Board.
- The concern(s) raised in the original complaint is broad and “extends to any planting of

evidence whether prior to, at the time or following any planting of evidence, if it occurred, including any direct and indirect actions of any individuals who might have participated in, facilitated or covered up any such activity”.

RULING ON EVIDENCE

[13] During the hearing, the Board ruled on the admissibility of demonstrative evidence as proposed by the Appellant. The first evidence (Exhibit A) dealt was a reconstruction model (the “model”) of the drug house’s doorframe where the cocaine was alleged to have been found. In contemplating the admissibility of the model the Board considered that there were two purposes for the model. One was to confirm the accuracy of the video (Exhibit No.1) of the scene at the drug house. The second purpose was to establish the extent to which the green foil wrapped piece of cocaine was visible the night of the incident.

[14] The model would allow Board members, outside of the hearing room, and with the aid of measuring tool, to mark off various heights being that of Cst. Matsune and the hip level of the videographer in order to determine the accuracy of the video and the visibility of the object above the door.

[15] The Board also understood the Appellant wanted the model to be used in conjunction with the cross-examination of witnesses with the caveat that it would be restricted to the visibility issue.

[16] The Board ruled it would be an error for Board members to experiment with the model outside of the hearing thereby creating evidence without the ability of the parties to question the witnesses who created the evidence.

[17] The Board also ruled the model could not be used to validate the accuracy of the video. There was no certainty that the model was identical to the doorframe at the premises nor was there confidence that it was even approximating the actual doorframe dimensions. Asking the other parties, like witnesses, to eye the model that at best could approximate the actual doorframe, presented too large a margin of error to create sufficient accuracy needed to validate the video.

[18] Further, was the model demonstrative of the visibility of the foil wrapped cocaine? As noted above, the Board considered that eliminating the model as a determinant of validity of the video’s accuracy meant

that all the variables related to the video tape, like camera type, shutter speed, focus, direction and speed of the camera, etc., coupled with the lack of an expert witness, led the Board to conclude that the model lacks the degree of accuracy needed to use it as demonstrative evidence. Since there was no certainty that the model was sufficiently similar to the drug house doorframe, the Board concluded that Exhibit "A" would not be entered as demonstrative evidence.

[19] Similarly, no useful purpose would be served by allowing Exhibit "B", the reconstruction of drug exhibits as evidence. The Board concluded the drug reproduction would only be useful when used in conjunction with the model. Since the model was not admissible evidence, the reconstruction of drug evidence became moot.

[20] The Appellant requested three other items be produced. Those were: a print of Photo # 33 from the original contact sheet, a redevelopment of the Photo # 17 from Exhibit No. 2 to eliminate glare or adjust the photo's lighting and the production of a report related to the earlier attendance of members of the EPS at the drug house. Although the Respondents had some initial reluctance to produce these items, they stated their concerns had been addressed and that they would produce the items. In particular, the Respondents noted that they would produce the requested Internal Affairs file with some expunged segments as they related to individuals not the subject of the hearing. They also agreed to provide some papers relating to the file that dealt with pending litigation concerning money seized from the premises and damage to the property. Subsequently, the Internal Affairs file was entered as Exhibit No. 19 and the photographs entered as Exhibit No. 20.

[21] Upon completion of the *voir dire* segment of the hearing, the parties agreed that all *voir dire* evidence was before the Board.

RULING ON NON SUIT APPLICATION

[22] At the conclusion of evidence being admitted, Respondent Matsune submitted a non-suit application and contended that there was no evidence implicating him in drug planting and therefore the allegation should be dismissed.

[23] The Board found the test had not been met for the non-suit application. There must be evidence that would at least raise a prima facie case. Respondent Matsune's own evidence said that he had something to do with the drug evidence. He testified he stood on a chair, reached up and seized the drug evidence over the doorframe. That action alone satisfies the prima facie test. Given the allegation that somebody interacted with a piece of crack cocaine wrapped in foil on the doorway frame puts Respondent Matsune squarely in the category of somebody who may have planted the evidence, if indeed it occurred.

FINDINGS

[24] In the early stages of the hearing, the Appellant abandoned all allegations "save those relating to the cocaine found over the doorway." The Appellant contended that the Respondents planted the cocaine evidence and the Respondents also gave false testimony concerning finding the cocaine. In particular, the Appellant focused his appeal on the two allegations the Chief outlined in his disposition letter i.e., "Drugs-Single - Placement" and "Drugs (II) -Single Item-Discovery".

[25] The parties concur that the property where the drug raid occurred was a drug house. They agree about the identity of the owner of the property, that the owner was a drug dealer and that the Appellant was at the drug house at the request of the owner. However, that is where their agreement ends.

[26] Prior to any testimony, the Appellant entered five exhibits: No. 1 - a copy of the Beta video tape shown at the trial; No. 2 - the Internal Affairs investigative report; No. 3 - three audio tapes from the Downtown Division Dispatch Channel of February 25, 1999; No. 4 - a booklet prepared by Cst. Short that contains five photographs of drug exhibits; and No. 5 - a copy of July 14, 2005, letter from Mr. Peterson to Sgt. Schreiner.

[27] When shown his criminal record, the Appellant acknowledged his 2002 conviction for trafficking narcotics but stated he was not directly involved in trafficking drugs. Upon cross-examination when confronted with his May-Say-Statement of May 18, 2005, the Appellant agreed that the statement, "he did not have any trafficking or possession charges on his record" was false.

[28] The Appellant described himself as an 'enforcer' and testified he was hired by the owner of the property to assault two persons who were harassing the owner. This type of work is known as "body work" and he was to receive \$3,000 for the job.

[29] The Appellant said that as a personal rule he would not work where there would be drugs, drug money and or drug sales. But he did know it was a drug house. His general practice was to search a house before he began his work to ensure there were no drugs or cash on the premises. He testified he entered the drug house around 6:00 p.m., give or take 45 minutes, searched the house upstairs and down looking for drugs or drug paraphernalia and found none. He did not witness any drug transactions while in the house but between fifteen and twenty people came to the door prior to the police raid. When asked how long he was there from the time of his arrival until the police entered he replied "about two, maybe three hours. I don't know, two hours."

[30] When asked about photograph #12 and #17 of Exhibit No. 2 that show an article wrapped in foil, above a door-frame, that the police allege was crack cocaine, the Appellant stated he did not see it. He testified he is six foot four and recalls standing in front of the areas depicted in the photos and if the article had been on top of the door-frame it would have been clearly in his vision but it was not. When cross-examined about his knowledge of the way drugs were packaged at this particular drug house, the Appellant said he had no knowledge.

[31] On cross-examination, the Appellant was shown photographs taken inside the drug house that show a brass mug containing \$10 and \$20 bills. He maintained he did not see the brass mug in the drug house even though his testimony acknowledged he started to eat his dinner at the table upon which the mug appears.

[32] The Appellant testified that after being taken to the police station he was told a drug was found above the doorframe. He then called his sister to contact an EPS police officer, Daryl Mahoney ("Det. Mahoney"), who had been his friend when he worked at a bar called Seaweeds. The Appellant said that Det. Mahoney came to the police station and tried to vouch for him because when the Appellant worked at Seaweeds he would not allow drug sales to happen in the bar. He also said Det. Mahoney had written on

his behalf to the security officer ("IPSO") at the Drumheller Penitentiary.

[33] Det. Mahoney confirmed that he knew the Appellant from when he was a bouncer at Seaweeds but he did not notice any change in the drug problem while the Appellant was there. He recalled speaking with the Appellant after his arrest and that the Appellant was very concerned about being charged with trafficking. The Appellant told him he had been contracted by a person identified as O.J. to beat up one of his competitors and that he had gone to the house to collect his payment for his half of the deal. Det. Mahoney's memory was vague as to how he was contacted after the Appellant's arrest but he was adamant that it was not by the Appellant's sister. He confirmed he had written a letter to the IPSO officer advising that the Appellant might be at risk at Stony Mountain due to the Appellant running afoul of aboriginal gangs in the past.

[34] The Appellant denied that it was not until his May 18, 2005, May-Say-Statement that he said he was at the drug house there for the purpose of body work when, in fact, he had told Det. Mahoney at the police station.

[35] During his trial, the Appellant fired his lawyer and began to defend himself. As he began his defence, he brought up the issue of a police video tape that had been shot during the raid. He believed the video would contradict the photographs that showed foil wrapped articles that allegedly contained cocaine. The video was subsequently viewed by the Appellant, the other defendants' lawyer and the prosecutor at the same time. A frame of the video showed the doorframe where the foil wrapped evidence was alleged to have been found. This was followed by a brief recess after which the crown lawyer advised the court they would not be proceeding with the charges.

[36] Following the foregoing testimony, the video was viewed by the Board. The video was paused at a particular point showing the doorframe and the Appellant noted there was nothing on the edge of the doorframe. The Appellant also testified that when the video was played in court they had the ability to both freeze and zoom-in on the subject image.

[37] In an effort to establish the likely construction and height of the door at the drug house where the cocaine wrapped in tin foil was allegedly discovered, the Appellant called an expert witness, Gary Greanya,

a journeyman carpenter for 20 years. Mr. Greanya testified about standard building practices, particularly standard door construction and door heights specific to the time period in which the drug house was constructed. Referring to a folder containing photographs of the drug house, he estimated the top height of the door frame in the photograph as between 78 and 80 inches.

[38] Respondent Matsune was a member of the Downtown Division Special Projects Division at the time of the raid on the drug house. Much of this team's focus was on drug related issues, and as part of his duties, Respondent Matsune seized drugs as exhibits. Seizure of crack or rock cocaine exhibits in the half gram to one gram size was part of his experience. He explained that crack cocaine does not come in uniform shapes and that the same weighted cocaine can look quite different from one another.

[39] Originally assigned to contain the scene at the premises, Respondent Matsune said he was directed, by who he believes was Respondent LeBlanc, to confiscate a green foil wrapped object from the kitchen doorframe on the premises. He identified photograph #12 in Exhibit No. 2 as showing the door from which he seized the drug. Respondent Matsune, standing at 5'6 inches in height, could not see the foil from where he was standing, nor could he reach the top of the doorframe. He took a nearby chair and stood on it to seize the object.

[40] After retrieving the exhibit, Respondent Matsune handed it to Respondent Owen who was the exhibit handler. He said he did not open the item nor did he measure it for depth, height, weight, or width.

[41] At the time of the hearing, Det. Bruni-Bossio had been a member of the EPS for some 14 years. He was acting undercover as a drug buyer that February night in 1999 when the drug house was raided.

[42] Referring to several R2 reports he made concerning the raid, Det. Bruni-Bossio testified that he left his covert vehicle around 5:48 p.m. and a few minutes later approached the drug house on foot and entered the premises to make a drug buy. He said he entered a dimly lit porch where he saw two unknown individuals who made a purchase at the same time as he did. The three of them left together and when they exited he observed four more people waiting to enter. He recognized one of these people as a drug seller to the residence and assumed he wanted to gain entry to the house for purposes other than buying

drugs.

[43] The drugs he purchased that evening were wrapped in two pieces of green foil. He said that he had made about 10 drug buys at this house within a few months prior to that February evening and that the drug items were always wrapped in coloured foil which was unique to that residence.

[44] Another witness, Cst. Darrell Kushniruk, testified that he was a member of the Forensic Unit for the EPS at the time of the incident. On February 25, 1999, he was dispatched to the drug house and his duty was to photograph evidence at the scene both inside and outside. He used a flash to ensure lighting conditions were proper for exposure.

[45] Cst. Kushniruk confirmed that Exhibit No. 7 were the contact sheets of the photographs he took at the scene and that Exhibit No. 2 were some of the photographs he took at the scene. Referring to Exhibit No. 2, he stated photo #12 shows the corner of the room and the relationship of the subject door, photo #11 depicted the kitchen area and that photo #17, which shows a foil wrapped article above a door frame, was taken from an elevated position by using a nearby chair. He estimated that he took the photographs between the time he arrived at 8:30 p.m. and the time he left at 9:45 p.m.

[46] Cst. Kushniruk had reviewed the video tape, Exhibit No. 1, a number of times before this hearing. He spoke about the level of the position of the video camera in relation to the level at which he held his camera. It appeared to him that the video camera was held at waist height because he noticed the camera caught the upper portion of the legs of the tactical squad members.

APPELLANT'S ARGUMENT

[47] Situating his argument within the Board's judgment No. 003-2006 (the "threshold decision"), the Appellant noted that the decision addressed the assessment of evidence. He highlighted the following: "there is a reasonable prospect of establishing the facts necessary to obtain a conviction on some type of disciplinary charge then the matter should proceed to a hearing so that the adjudicator has the opportunity to assess the credibility of the witnesses, assess the admissibility of evidence, etc." The Appellant listed a

number of possible combinations of witness testimony available to a Presiding Officer. Any one or combination of these could be reasonably accepted by a Presiding Officer as sufficient evidence to support planting of evidence which insists on charges of deceit and discreditable conduct on the part of all the Respondents.

[48] The lack of note taking on the part of all the Respondents is an important element of the appeal. The contention is that by failing to follow EPS note taking policy the Respondents were guilty of discreditable conduct and insubordination.

RESPONDENT'S ARGUMENT

[50] Paragraph 74 of the threshold decision begins with this sentence, "The threshold must be considered in the context of the entire disciplinary regime established under *the Act*." This is of particular consequence because it refers to the Board's obligation in considering the value of witness's testimony. The Board has had the opportunity to hear witness testimony with the benefit of cross-examination which allows it to weigh the merits of each witness's sworn testimony.

[51] Paragraph 88 of the threshold decision says, "...the Board has the benefit of receiving viva voce testimony. As the parties, including the public complainant if one is involved, determine what evidence to put before the Board, the Board may receive additional evidence than what was available to the chief and will have the benefit of assessing the credibility of the witnesses where there is contradictory evidence." Therefore, the Board has the duty to review witness testimony and determine which, if any are credible.

[52] The threshold decision makes reference to a Court of Queen's Bench decision, *Robertson v. Edmonton Police Service*. It addresses the question of the "level of evidence required before a chief should direct a disciplinary hearing be held." The threshold is not proof on the balance of probabilities. "The Board does not interpret the legislation to require a Chief of Police to hold a hearing in every case in which allegations, if proven, would constitute misconduct. It is not the mere characterization of the type of conduct alleged that precipitates the requirement of a hearing. What is required is something more than a prima facie case but less than a likelihood of conviction." The Respondents contend that there is no evidence

before the Board that establishes that either an individual respondent or any of the Respondents together planted evidence. Although the Appellant characterized the appeal as a case of planting evidence, there is no testimony or other evidence to support that characterization.

[53] The Respondents assert the Appellant's testimony has discrepancies and in fact was contradictory. For example, the Appellant decided to testify some six or seven years later and he presented information that had never been brought up before. He testified at the hearing that he had a rule concerning not working at premises when drugs were being sold. He recalled searching the drug house for evidence to ensure that drugs were not being sold there while he was on the premises. Yet his May-Say Statement of May 18, 2005 said he searched the house for any potentially dangerous weapons. There was no mention in the May-Say-Statement that he searched the house for possible evidence of drug activity.

[54] There are also contradictions between the Appellant's and Det. Mahoney's testimony.

- The Appellant said he worked at Seaweeds bar as a bouncer and that Det. Mahoney would corroborate his testimony that while he was a bouncer, he cleaned up the bar which the Appellant contends proves he has nothing to do with drugs. Det. Mahoney testified he saw no change in the drug problems at the bar while he Appellant was working there.
- The Appellant said the individuals he was to do body work on were not competitors of the drug house dealer but people who were trying to rob him. Det. Mahoney said Appellant told him "he had contracted with a gentleman he identified as O.J. to go out and beat up a competitor, one of O.J.'s competitors and he had gone to that address to be paid at the end of him fulfilling his half of the deal".
- The Appellant said he had rules that no drugs, no money, no sales while he was at the drug house. Det. Maloney said he had never said anything of that nature to him. Also the Appellant never mentioned to Det. Mahoney that he had searched the premises for drugs or drug money or paraphernalia

[55] Other contradictions in the Appellant's testimony include:

- The Appellant did not know how drugs were packaged at that house so how could he know what he was looking for especially since they were packed in bright coloured foil.
- Assumption that the Appellant would view open money as evidence of drug dealing yet he

denied seeing the brass mug containing \$10 and \$20 bills as shown in photographs #9 and #10 of Exhibit No. 2.

- The Appellant said he was looking for drugs but his previous May-Say-Statement said he was looking for weapons.
- The Appellant said he got to the drug house between 6:00 p.m. and 6:45 p.m. but his May-Say-Statement said between 5:00 p.m. and 6:00 p.m.
- The Appellant said he couldn't see the brass mug, but said he could not have missed a small wrapped piece of foil.

DECISION

[56] The Board upholds the chief's decision.

REASONS

[57] Det. Mahoney had met the Appellant when he was a bouncer at a north end bar, Seaweeds, and the witness was a beat officer in the area. The Appellant testified that when he worked at Seaweeds he would not allow drug sales and that is why Det. Mahoney would vouch for him. Det. Mahoney testified there was definitely a drug problem at Seaweeds and that had not changed when the Appellant worked there. This casts doubt on the Appellant's testimony that he would not work where there would be drugs, drug money or drug sales.

[58] When Det. Mahoney spoke with the Appellant after his arrest on February 15, 1999, the Appellant told Det. Mahoney that he had been contracted by O.J. to beat up one of O.J.'s competitors and he had gone to the drug house to collect payment for his half of the deal. This not only contradicts the Appellant's testimony as to why he was at the drug house, but also contradicts again, the Appellant's testimony that he would not work where there would be drugs, drug money or drug sales.

[59] Notwithstanding the foregoing, it is difficult to accept the witness's rationalization that being an enforcer for a drug dealer is somehow onside with his "personal rule" of not working where there would be drugs, drug money or drug sales.

[60] The credibility of the Appellant's testimony also fails when he acknowledges his May-Say-Statement of May 18, 2005 contained a statement that he was not directly involved in trafficking drugs when in fact he had been convicted in 2002 for trafficking in narcotics.

[61] The Appellant testified his height is 'six feet four inches' and therefore contends he would have seen the foil wrapped package on the door frame. While the Board accepts that expert Gary Greanya has substantial carpentry experience, his "estimates" of the overall height of the doorframe are not verifiable and hence the Board puts little weight on the Appellant's testimony that he would have been in a position to see a relatively small package on the door frame.

[62] The Appellant asserted the video was key evidence that drug placement had occurred after the EPS had entered the drug house. After viewing the video, the Board determined it could not see an article wrapped in foil on the top of the doorframe. But was that entirely conclusive?

[63] The video of the doorframes was incidental in the video. It was obviously a very brief exposure in which the doorframe was not the primary object. What were the lighting conditions? No evidence was presented. What was the distance from the video camera to the top of the doorframe? Again no evidence was presented.

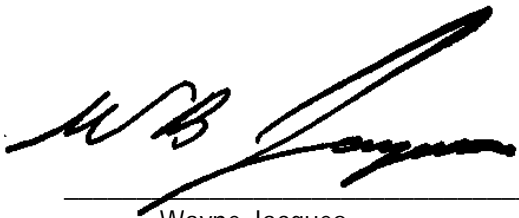
[64] The Board compared the video to the photographs taken by Cst. Kushniruk. Photograph #12 was taken with a flash camera at eye level at what would appear to be a distance similar to the video but no identifiable object can be seen on the doorframe. The only time the foil wrapped article was clearly identifiable was in photograph #17 where the primary object of the flash camera photograph was the door and doorframe, where the camera was closer to the doorframe than that of the video camera and where Cst. Kushniruk was standing on a chair.

[65] Counsel for the Appellant objected to Cst. Kushniruk being asked his opinion as to what height the video camera had been held. It was Cst. Kushniruk's opinion that video camera had been held below waist height as only the upper portion of legs and buttocks of Tactical members were visible when walking in front of the video camera. After viewing the video, the Board reached the same opinion.

[66] When all of the factors are considered, the Board finds the video inconclusive.

CONCLUSION

[67] After consideration of all the evidence, including that mentioned in this judgment, the Board is satisfied that the disposition of the Chief of Police must be affirmed.



Wayne Jacques
Acting Chair

DATED at the City of Edmonton,
In the Province of Alberta, this
5th day of March, 2010.

cc: Board Counsel
Mr. T. Engel, Counsel for the Appellant
Mr. Peterson, Counsel for the Respondents
Mr. Moore, Counsel for Respondent Matsune