
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 Ms. Cheryl Johnston (the "Appellant") concerning complaints against Cst. T. Shouchuk (No. 2349) (the "Respondent") of the Edmonton Police Service (the "EPS").

JUDGMENT OF THE BOARD

(Parish/Arcand/Callihoo)

THE COMPLAINT

[1] The Appellant appeals parts of the decision by the Chief of Police (the "Chief") of the EPS dated January 10, 2007. The matter raised in this appeal is whether there is a reasonable prospect of establishing that disciplinary offences have been committed by the Respondent, such that the Law Enforcement Review Board (the "Board") should direct the Chief to hold a hearing under section 20(2)(b)(ii) of the *Police Act*. The alleged disciplinary offences are:

- a. The Respondent removed the Appellant from the residence at 120 Avenue and 64 Street without authority (*Police Service Regulation* 5(2)(i)(i)); and
- b. The Respondent used excessive force in removing the Appellant from the above residence (*Police Service Regulation* 5(2)(i)(ii)).

[2] The allegation of Discreditable Conduct, as defined in section 5(2)(e)(iii) of the *Police Service Regulation*, was sustained by the Chief and pursuant to section 19(1) of the *Police Service Regulation* an Official Warning was placed on the Respondent's personnel file. The Appellant does not appeal that decision.

EVIDENCE

[3] On November 25, 2005 the Appellant filed a written complaint against the EPS alleging criminal and police misconduct. The complaint arose from events that took place on July 9, 2005.

[4] The evidence of Jennifer Johnston and the Appellant was as follows: On July 9, 2005 Ms. Johnston and her mother, the Appellant, were in the apartment at 120 Avenue and 64 Street. The Appellant lived there with Jason Turner and her two children. The apartment was rented in Mr. Turner's name. Ms. Johnston stated that she saw her mother have one drink but that she was not drunk. The Appellant stated that she had three drinks (coolers) over the space of six to eight hours.

[5] Mr. Turner came home after drinking at work and was yelling and screaming whilst waving a sword around. Ms. Johnston indicated that an altercation was occurring between her mother and Mr. Turner that involved Mr. Turner being in possession of a knife and unplugging the phones. The Appellant threw a bottle at Mr. Turner.

[6] Ms. Johnston left the apartment to call 911 and report the behaviour of Mr. Turner. Ms. Johnston recalls making the telephone call around 3 or 4 a.m. but does not recall where she called from. The Respondent and EPS officers, Cst. Smith and Cst. Deeks (now Cst. Douziech), responded to the 911 call. In giving evidence, Ms. Johnston was unsure as to exactly how many officers had attended at the apartment that evening.

[7] The evidence of the witnesses varied somewhat as to the subsequent events that transpired following the arrival of the officers. The Board has concluded that where there is discrepancy, the evidence

of the police officers is preferred to the evidence of Ms. Johnston and the Appellant. Ms. Johnston stated to the Board that her recollection of events from 2005 was not good and that was to some extent borne out in the evidence she gave concerning how many police officers were at the apartment that day. The evidence of Ms. Johnston was also, in some areas, at odds with the evidence of the Appellant, for example as to the amount of alcohol consumed by the Appellant that evening. The Appellant did give evidence that she had consumed some degree of alcohol that evening, which also may have affected how effective her memory was of events as they unfolded.

[8] When the police arrived, Mr. Turner was in bed and the Appellant was in the living room. The officers talked to Mr. Turner and then to the Appellant. According to Ms. Johnston, the Respondent called the Appellant a crack whore and told her she had to get out of the apartment. The Respondent then hit the Appellant's head on the side of the couch and put handcuffs on her hand while he had his knees on her back. When Ms. Johnston asked why the officers were doing that, they did not reply to her and showed no interest in seeing the knife used by Mr. Turner. The officers then took the Appellant out to the police car hitting her head on the door as they placed her in the car. In cross-examination, Ms. Johnston acknowledged that her memory of events was not as clear as it was when she had made her statement to the police on March 6, 2006.

[9] The Appellant stated that when the police came they told her she had to leave. The Appellant asked why it had to be her that left and not Mr. Turner. It was at that time that the Respondent grabbed her and slammed her head into the desk at the side of the couch. Once the Appellant was handcuffed, the Respondent lifted her by the cuffs hurting her arms. Once she was placed into the police vehicle, the Respondent told her that Mr. Turner had said she was a crack whore. The Appellant was unclear as to whether the Respondent had told her she was under arrest. At the time of this incident, a no contact Order was in effect between the Appellant and Mr. Turner as a result of a previous incident. When the Appellant arrived to where she was to spend the rest of the night and on leaving the car, the Appellant claims that the Respondent threw her shoes and purse towards her spilling the contents of the purse on the ground.

[10] On July 9, 2005, the Appellant was examined by a doctor. The doctor's report indicates bruising to various parts of her body including, elbow, upper arm, pain to the wrists and swelling to an eyebrow. The doctor states that there was no bony tenderness or indication of any major injuries.

[11] Cst. Smith gave evidence that she had accompanied the Respondent and Cst. Deeks (Douziech) to the call on July 9, 2005. When they entered the residence she stayed in the living room with the Appellant. She had no recollection of seeing any drug paraphernalia. Her recollection of the behaviour of the Appellant was that she was very boisterous, loud and was swearing. When the Respondent talked to the Appellant, he asked her first if she had somewhere to go. The Appellant was yelling in reply. At the point the Respondent put the cuffs on the Appellant, she did not see the Appellant's head hit the couch. In the opinion of Cst. Smith, in domestic situations of this kind, it was appropriate to remove the Appellant from the home as there was a possibility the fight would continue otherwise.

[12] S/Sgt. Ian McKnight gave evidence that on July 27, 2009 he was temporary Acting S/Sgt. in the Family Support Division. The Family Support Division exists to try and keep the peace. Normally in a domestic situation, one party must leave the home. As the situation can be volatile it is important for officers to act quickly.

[13] The Respondent stated that when he entered the residence, he observed two females, empty beer cans and what he concluded as drug paraphernalia. The Respondent was informed that the alleged perpetrator of the violence, Mr. Turner, was in an adjacent bedroom.

[14] The Respondent observed the Appellant as being intoxicated, belligerent, yelling and angry. The Respondent found Mr. Turner sleeping and in searching for a knife they pulled the covers back and he was completely undressed. The Respondent observed a bump on his head and was informed by Mr. Turner that he had been struck on the head with a beer bottle by the Appellant.

[15] The Respondent observed that Mr. Turner had been drinking. Mr. Turner was cooperative and wanted the Appellant to leave the residence. Mr. Turner informed the Respondent that this was his

residence as the lease was in his name and also that he had a no "contact order" between himself and the Appellant.

[16] The Respondent proceeded to the living room and observed the Appellant sitting on a couch, screaming and agitated. He concluded that she was intoxicated. The Appellant was advised by the Respondent that she would have to leave the residence and that he would transport her wherever she wanted to go.

[17] The Appellant refused to leave and claimed that this residence was as much hers as Mr. Turner's. The Appellant further claimed that this is where her children stayed and she had just recently purchased \$800 worth of groceries. The children were not at the home during this incident. The Respondent informed the Appellant that if she did not cooperate she would be arrested and taken to jail.

[18] The Respondent claimed that he asked the Appellant on three occasions to leave this residence and that he would drive her any place she wanted she wanted to go. The Appellant was adamant in not wanting to leave. The Respondent then, finding the Appellant uncooperative, proceeded to use force and physically struggled to handcuff her. Once the Appellant was handcuffed, the Respondent applied upward force on the handcuff so that the Appellant would comply and proceed to the police vehicle. At the police vehicle the Respondent had to use additional force to place the Appellant into the vehicle. In the process of being driven to the residence of her daughter's boy friend, the Appellant removed the handcuffs herself and gave them to the Respondent.

DECISION

[19] The Board finds that there is not a reasonable prospect of establishing that the disciplinary offences have been committed and in accordance with section 20(2)(a)(i) of the *Police Act*, hereby affirms the decision to dismiss the matter, made by the Chief under section 47(4)(a) of the *Police Act* with respect to the following offences:

- a. The Respondent removed the Appellant from the residence at 120 Avenue and 64 Street

without authority (*Police Service Regulation*. 5(2)(i)(i))

- b. The Respondent used excessive force in removing the Appellant from the above residence (*Police Service Regulation* 5(2)(i)(ii))

REASONS

- a. **The Respondent removed the Appellant from the residence at 120 Avenue and 64 Street without authority (*Police Service Regulation* 5(2)(i)(i)):**

[20] The Board concludes that the decision of the Respondent to enter the residence at 120 Avenue and 64 Street was reasonable and that he had the authority to remove the Appellant. The Respondent responded to a 911 call where there was a report of family violence that involved a knife and the potential safety issue of individuals that may have been at risk.

[21] The Appellant submitted that the Respondent had no reasonable grounds upon which to believe he had authority to order her to leave the home. The Appellant quoted the decision by the Alberta Court of Appeal in *Crampton v. Walton* (2005) ABCA 81. The issue in *Crampton* was the extent to which a police officer could rely upon section 25 of the *Criminal Code*, which gives protection from criminal liability for actions committed in the course of enforcing or administering the law.

[22] The Respondent submitted that in the particular circumstances of this case, the Respondent had to make a decision as to who needed to be removed from the home. The Respondent had exercised discretion in making that decision, which should not be the subject of a disciplinary matter. At common law the officer had a right to arrest the Appellant if he anticipated she would commit a breach of the peace under section 495(1)(a) of the *Criminal Code*.

[23] In *Crampton* the Court states at Para. 6:

"Section 25(1) contains three branches. In order to access the protection of the section, a police officer must prove that he or she:

(i) was required or authorized by law to perform an action in the administration or

enforcement of the law;

(ii) acted on reasonable grounds in performing that action, and,

(iii) did not use unnecessary force."

[24] There is no question that the Respondent fulfilled section 25(1)(i) in that he is required or authorized by law to make arrests in enforcing the law. In considering the application of section 25(1)(ii) to the present case, the Board found assistance in the testimony of S/Sgt. McNight concerning the role of a police officer in domestic violence situations. S/Sgt. McNight testified that the primary objective in a family violence situation is for the peace and safety of individuals. In almost all domestic violence situations one of the combatants is removed. He further stated that an officer has to make an assessment, has to act decisively, and the person causing the most problem is the one usually removed or who may be arrested or detained until such time as a safe environment is restored.

[25] The Board accepts this evidence and further finds that in a situation such as this where there is the possibility of further violence and harm occurring, the primary goal of the police must be to ensure the safety of those involved.

[26] The Board finds that the decision reached by the Respondent to remove the Appellant from the home was reasonable based upon the following:

- Information the Respondent received that evening of an altercation with weapons taking place;
- The Respondent's assessment on the situation once he attended at the premises; and
- The Respondent's observation of the condition and behaviour of the Appellant and Mr. Turner.

[27] The Respondent's assessment of the alleged perpetrator, Mr. Turner, though in an alleged state of inebriation, was that he was initially found sleeping and subsequently was cooperative with them, non-combative and the only individual that showed an injury. This injury, though apparently not severe, was apparently caused by the Appellant when she struck Mr. Turner on the head with a beer bottle.

[28] The Respondent assessed the Appellant as non-cooperative and belligerent, and concluded that it would be prudent to remove her. In her own words, the Appellant stressed that she did not want to leave and questioned why she had to leave. The Board finds that the Respondent had authority under section 31 of the *Criminal Code* to arrest a person who it is anticipated might commit a further breach of the peace.

[29] Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

**b. The Respondent used excessive force in removing the Appellant from the residence
(Police Service Regulation 5(2)(i)(ii))**

[30] The Board finds that the Respondent did use force but that in the circumstances the force was not excessive. The Board is unable to decisively conclude if all the injuries received by the Appellant were caused by force used by the Respondent. The Board accepts the testimony of the Respondent when he testified that he asked the Appellant a number of times to leave with him and would drive her to a location of her choice where she would be safe.

[31] The Board concludes that the Respondent's verbal direction to the Appellant were not producing the necessary results to achieve the safety of the Appellant and alleged perpetrator, Mr. Turner, and concurs that some force was required. The force used by the Respondent with a physically uncooperative Appellant is deemed reasonable by the Board and was not excessive. The Board realizes that the Appellant suffered injuries, later deemed non serious by the examining doctor. It is unfortunate that any injuries were sustained, however based on the evidence heard by the Board it is unable to conclude that the injuries were sustained as a result of excessive force used by the Respondent. The Board concludes that the force used by the Respondent in the particular circumstances of this incident was reasonable.

CONCLUSION

[32] In summary the Board finds that, considering the *Unrau* threshold test (*Board* Judgment No. 003-2006) there is not a reasonable prospect of establishing that an offence of misconduct under either sections 5(2)(i)(i) or (5)(2)(i)(ii) of the *Police Service Regulation* occurred, and accordingly dismisses the appeal.



Lynn Parish
Acting Chair

DATED at the City of _____,
in the Province of Alberta, this
23rd day of March, 2010.

cc: Board Counsel
Erika Norheim, Counsel for the Appellant
Derek Cranna, Counsel for the Chief of Police
John T. Henderson, Counsel for the Respondent Officers