



ALBERTA
LAW ENFORCEMENT REVIEW BOARD

December 19, 2014

Michael Reilly

Cst. Wayne Haltli (No. 2667), c/o Edmonton Police Service
Cst. Terry Shouchuk (No. 2349), c/o Edmonton Police Service

Re: Appeal of Michael Reilly (EPS File No.: PSB2013-0436) LERB Appeal 2014-027
Oral Decision of December 15, 2014

Further to the December 15, 2014 letter to the parties from the Board office, this letter constitutes the reasons and decision of the Board in the above appeal. For the written reasons set out in the appendix to this letter, which are a transcription of the oral reasons given by the Board on December 15, 2014, the appeal by Mr. Reilly from the April 25, 2014 decision of Acting Chief Brian Simpson is hereby dismissed.

David Loukidelis QC
Board Chair

Benjamin Ayorech
Member

Patricia Mackenzie
Member

cc: Teresa Magee, Counsel for the Chief of Police, Edmonton Police Service
Michelle Wolowidnyk, Counsel for the Respondents
Edmonton Police Commission
Edmonton Police Association
Alberta Federation of Police Associations

APPENDIX
Transcript of Oral Reasons Given by the Law Enforcement Review Board
On December 15, 2014 at Edmonton, Alberta

Note: This transcript has been slightly edited for clarity. The original recording is in the Board's custody

Summary: The appellant alleged that the two respondents had committed deceit by lying during court testimony about the presence of construction workers at the time they stopped him for speeding in a construction zone with workers present. He also alleged that they committed deceit by inflating the speeding ticket they issued to him, falsely alleging that he was going faster than he actually was. The Chief's decision not to order a disciplinary hearing, on the basis that there was no reasonable prospect of conviction at a disciplinary hearing, was reasonable and the appeal is dismissed.

David Loukidelis QC (Chair) on behalf of the Board:

[1] The Board having had an opportunity to consider the appeal further is prepared now to give its decision. As indicated earlier, the entire panel of course has read the record in the appeal and the parties' written submissions. We have also had the benefit of the oral arguments heard today and, having had the benefit of all of that, we will now give our decision.

[2] Of course, this is an appeal from the April 25, 2014 decision of Brian Simpson, as Acting Chief of the Edmonton Police Service, to dismiss without a hearing the June 10, 2013 complaint by the appellant, Michael Reilly, about the conduct of two EPS officers, the respondents Constable Wayne Haltli and Constable Terry Shouchuk.

[3] Now, Mr. Reilly alleged that the respondents had committed deceit in testifying at his trial for speeding in a construction zone. Both respondents at the trial had testified that there were construction workers present in the construction zone at the time they had ticketed Mr. Reilly on October 29, 2012. Second, Mr. Reilly alleged that the ticket he was issued was, and I am quoting here, "drastically inflated", by alleging that he had been travelling at 122 kilometres-per-hour in a 70 kilometre-per-hour zone when that was not the case. As with the allegation relating to the respondent's court testimony, this allegation was treated as an allegation of deceit, and was investigated by the Professional Standards Branch of the EPS.

[4] Ultimately, in dismissing the first allegation, the Acting Chief assessed the involuntary statements of both respondents. Both had said that there were work trucks and workers present at the time. During their court testimony, both had testified that there were workers present in

the construction zone at the time of the traffic stop. As was indicated this morning during argument, PSB had obtained information from the contractor on-site, Earthwise Contracting. As is shown at pages 57-59 of the record, there is a transcript of the telephone conversation between the original PSB investigator, Grant McCurdy, and Ms. Katherine Chung, of Earthwise. That transcript indicates that Ms. Chung provided information to the effect that, while it might have been only one or two workers that were present on that date, and I am quoting here, "I do have people working there up until about 6 to 7", at page 57 of the record.

[5] Now, Mr. Reilly has indicated, as he did to Mr. McCurdy, that he spoke to someone else at Earthwise, referred to in the record as Susan, who had told him that there were no workers at that site on the day in question. And Mr. Reilly himself had indicated that there had not been workers present because he mentioned to the PSB investigator that he drove the road several times up to several times a day for some week to week and a half before he was stopped. Mr. Reilly indicated that this individual at Earthwise had told him there were no workers present on the day in question, but as far as the Board can see from the record, no evidence has been provided to support this contention (and we'll return to that in a moment).

[6] Ultimately, the Acting Chief concluded, in light of the information from Earthwise and all of the other information available to him, including the testimony of the officers in court and the involuntary statements of the officers and Mr. Reilly's evidence, that there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing into this allegation of deceit, namely false testimony in the court proceeding. And, in dismissing the second allegation, the Acting Chief noted that respondent Shouchuk recorded a speed of 122 kilometres-an-hour upon initially, and I am using the colloquial term, "clocking" the appellant, but that the actual ticket obtained by PSB during the investigation, as well as the radar sheet, disclosed that the ticket was for 109 kilometres-per-hour.

[7] In coming to these conclusions the Acting Chief reviewed, again, the statements of both respondents on this point. He noted that respondent Shouchuk had clocked the [appellant's] vehicle at 122 kilometres-per-hour in a 100 kilometre-per-hour zone and continued to follow the appellant into the construction zone, which had a 70 kilometre-per-hour speed limit, and that the vehicle slowed to 109 kilometres-per-hour, and this is the speed at which the ticket was issued. As with the first allegation, the Acting Chief concluded there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing on the second allegation, that of deceit by overinflating the speed at which the appellant had been travelling (and, as was noted earlier, the ticket, as originally issued, was for \$510-odd dollars – I'm not sure I have the amount precisely correct—but in the end Mr. Reilly pleaded guilty to a lesser offence and

was fined \$136).

[8] Now, to build on what the panel indicated at the outset of the hearing as to the role of the Board and the standard of review that we apply, I think it is worth underscoring that it is well-established the we review decisions such as this—that is, not to hold a disciplinary hearing and instead to dismiss a complaint—applying the standard of reasonableness. Here, the Acting Chief’s decision to dismiss the complaint without a hearing will stand unless it can be shown that the outcome is not within the range of acceptable or reasonable outcomes on the facts and law. And as I mentioned earlier, at the outset of today’s hearing, we also assess the reasons given by the Acting Chief to determine if they demonstrate justification, intelligibility and transparency: are the reasons themselves defensible? Where reasons for decision do not, when read together with the outcome, serve the purpose of showing that the result falls within the range of reasonable outcomes, the decision may be held to be unreasonable. We also have to take care when assessing whether a decision lies within the range of reasonable outcomes, because the reasonableness review standard that the Court of Appeal has required us to apply is motivated by deference. The case law offers relatively few signposts to guide the assessment of whether a decision is or is not unreasonable. We have to have regard to the regulatory context for the decision, and in this case, the Chief’s decision was in the nature of a threshold screening decision that formed part of the regulatory framework for police conduct in Alberta. We therefore must keep in mind to some degree the fact that in the discipline system here, the expertise and experience of a police chief are relevant factors.

[9] And in regard to the type of decision under appeal here, deciding whether to direct that a hearing be held, a police chief is charged with performing a screening function that is in some ways comparable to the function of a Crown prosecutor in deciding whether to press forward with criminal charges. The Chief’s task is not to adjudicate, or reach a final decision on the merits of, allegations, but to decide whether there is enough evidence that a reasonable and properly instructed person—that would be the presiding officer at a disciplinary hearing—could convict the respondents of the charges of deceit. In performing this role, the Chief may engage in a limited weighing of the evidence, but without straying beyond the screening function and disposing of the complaint merits without a hearing.

[10] As to the merits of the case at hand, I think we ought to begin by making it very clear that we have concluded that the Acting Chief did not stray outside the proper bounds of his screening, or threshold, role, as I have just described it, in assessing the complaint allegations and determining whether they should proceed to a disciplinary hearing.

[11] The question for us, therefore, is whether his decision to dismiss Mr. Reilly's complaint on the basis that there was no reasonable prospect of conviction was reasonable on the facts and law. It is in fact clear to us that the central question is factual or evidentiary, in the sense that the reasonableness of the Acting Chief's decision turns on whether there was a reasonable prospect of conviction. We ultimately find that the Acting Chief's decision does fall within the range of reasonable outcomes, that his decision that there was no reasonable prospect of conviction was a reasonable outcome.

[12] As we have outlined, Mr. Reilly has alleged that the two respondents gave false testimony in court as to the presence of construction workers in the area where he was pulled over and ticketed for speeding in a construction zone with workers present. We note first that the Acting Chief had before him the statements of the respondents, each of whom had said that there were workers present. He had also the information obtained from Earthwise Contracting that the company had workers on-site on the day in question and, again, this information was in the form of a recorded telephone conversation with Ms. Chung on July 10, 2013 and a follow-up confirming e-mail from her to PSB on that same date, found at page 61 of the record. (We should note here that the number of workers that she said were present on the site is not really to the point.)

[13] The Board notes that the evidence before the Chief was that there had been information from Earthwise that workers were present on the site. Now, of course, Mr. Reilly took issue with this, and we note that in his interview by PSB, he said that he drove the road every day and was aware of the construction zone but that there had not been workers present, quote "for the past week and half to two weeks", and that is at page 27 of the record. Again, against this, the Acting Chief had the evidence of both respondents in their compelled statements and in court, and on the ticket itself, that on the day in question, there were workers present. In terms of the interactions between Mr. Reilly and Earthwise, we note that, in his PSB interview, Mr. Reilly mentioned having spoken to Katherine at Earthwise, who we infer was Ms. Chung, but said that, and I quote, "she was giving me a lot of problems originally when I was talking to her" (at page 29 of the record), and that he had later spoken to a Susan at Earthwise, who eventually told him, and I quote "there were no construction workers working", that her, quote, "records indicated that no one was working that day", though she could not say for certain that a site supervisor had not showed up on the day. This qualification on her part as well as the quotes just read out are found at page 30 of the record. Next, we know that Mr. McCurdy as the PSB investigator—original investigator—made it clear during Mr. Reilly's interview that the information obtained from Ms. Chung was information that PSB was going to rely upon, and ultimately the appellant said, while he was under no legal duty or obligation to do so, that he would, quote "do a little bit more digging" and speak to someone at Earthwise and look into the matter. We are referring here to pages 43 and 44 of the

record. Again, as noted already, we do not see any evidence in the record to indicate that evidence to contradict what PSB had obtained from Earthwise, as already summarized, was ever brought forward.

[14] So, ultimately, the only evidence the Acting Chief had before him on the issue of the presence of workers is as I have already summarized it. In the face of this, we can come to no other conclusion but that it was reasonable for the Acting Chief to conclude that there was no reasonable prospect of establishing the facts necessary to obtain a conviction for deceit. The Acting Chief would have been aware that both respondents were certain to testify to that effect—more or less certain—and that they would in their defence likely call evidence from Earthwise to support their testimony. In this light, his conclusion was, given the test of reasonable prospect of conviction and the screening function the Chief discharges, was well within the range of acceptable, reasonable, outcomes on the facts and law, and his reasoning and analysis on this issue were clear, intelligible and transparent.

[15] We also reach the same conclusion regarding the allegation of deceit in allegedly overinflating the speed at which the appellant was driving on the day in question. It is clear that—as the Acting Chief appreciated—the ticket actually was issued for 109 kilometres-an-hour in a 70 kilometre-per-hour construction zone. The appellant has indicated that he was travelling slower than this, but the Acting Chief not only had the ticket but the relevant radar sheet as to the speeds. We therefore conclude that his decision on this allegation was within the range of reasonable and acceptable outcomes on the facts and law, and that his reasoning and analysis were likewise clear, intelligent—intelligible and transparent.

[16] The last issue for us to address relates to the appellant's concerns that, in relation to the PSB investigation, PSB's interactions with Earthwise were inappropriate and there was, as we heard this morning, collusion or conspiracy, or that there was some taint or corruption, in the investigative process. One point the appellant raised is that PSB failed to attempt to speak with Susan, the woman at Earthwise with whom he spoke, and that this shows that they had no desire to find out the truth. We are satisfied that nothing done here supports invoking our civilian oversight mandate, which is invoked in cases where there is some corruption or taint in the investigative process. In this respect, we note that the Court of Appeal has made it plain that the standard of perfection does not apply in investigations of this kind, that the Chief is not required to allocate all resources and turn over every stone—the phrase the Court of Appeal has used—in investigating a matter. It is within the bounds of the Chief's discretion to properly allocate resources to investigations of this kind and only if there is some taint or corruption can the Board intervene. We note in this respect that Mr. McCurdy, the PSB investigator, made it clear to the

appellant during his interview that he, Mr. McCurdy, contacted Earthwise without knowing who the appellant had spoken to, if anyone, that the Earthwise representative who responded to him was Ms. Chung, and that this was the first occasion, we infer, on which they had spoken. It is clear from the interview transcript that Mr. McCurdy was not about to make further inquiries to go behind what he had been told by Earthwise, and it is equally clear the appellant said that he could do so (again, being under no obligation, other than a practical one, perhaps for an incentive—practically—to advance his complaint). In the circumstances we do not think that PSB was required to take further steps and turn over every stone, including in light of the fact of the evidence being fulsome from Earthwise on the question of workers being present, and in light of the other evidence that was in front of PSB and, ultimately, the Acting Chief.

[17] Ultimately, therefore, we see no evidence on the record, despite the able efforts of Mr. Reilly to persuade us that the civilian oversight mandate should be invoked, that there was any taint or corruption in the investigation and, for the reasons already given—and we understand, Mr. Reilly, this outcome will not be congenial to you—your appeal is dismissed.

[18] In closing, we would like to say that we very much appreciate not only the submissions of counsel, but yours Mr. Reilly: you did a very good job of advancing your case, very clear and coherent, and we thank you for that.

[19] We are adjourned.