ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *Sullivan v Edmonton (Police Service)*, 2014 ABLERB 053

Date: 20141106

Appellant: William Sullivan

Respondent: Chief of Police, Edmonton Police Service

Officers: Cst. J. Rosser (No. 3212); Cst. B. Power (No. 3272); Cst. B. Fox (No. 3296); Cst. T. Froma (No. 3095); Cst. C. Klimosko (No. 3155)

Panel Members: David Loukidelis QC, Patricia Mackenzie and Christine S. Enns

Summary: Police were called to the residence of the appellant and his estranged common-law spouse. After they served an emergency protection order on the appellant, he said he would leave but then did not, insisting that he was entitled to take his two children with him. At one point, he took the children into his arms, his manner having become uncooperative and, police considered, aggressive. Two of the respondents used force on the appellant in order to affect his arrest. The appellant alleged excessive use of force, inappropriate comments by the transporting officers (including threats of violence), and failure to provide medical attention at the station. The Chief's decision to dismiss the allegations against all respondents without a disciplinary hearing was reasonable. The appeal is dismissed.

Authorities Considered: *Edmonton (Police Service) v Furlong*, 2013 ABCA 121; *Land v Law Enforcement Review Board*, 2013, ABCA 435

Legislation Considered: *Police Act*, RSA 2000, c P-17; *Police Service Regulation*, Alta Reg 356/1990

INTRODUCTION

[1] On February 9, 2011, respondents Rosser and Fox responded to two 911 calls from the same residence, both reporting a family disturbance. On the way to the residence, it was discovered that an emergency protection order ("EPO") was to be served at the same address. Respondent Power was dispatched to obtain the EPO and bring it to the residence. The common-law spouse of the appellant had obtained the EPO earlier the same day.

[2] The officers requested that the appellant leave the residence. Initially he agreed to leave, but once the EPO was served, the appellant stated he would not leave without his two children. The appellant refused to cooperate with the verbal directions of the respondents and attempted to exit the upper level of the residence, carrying his two children. Respondent

Rosser placed the appellant in a head lock, respondent Power struck the appellant in the head and body and respondent Fox tried to protect the children while the appellant resisted. The officers gained control of the appellant, handcuffed him, placed him in a police car and transported him to the West Division Edmonton Police Service ("EPS") Station.

[3] The appellant was arrested and charged with obstructing a peace officer and disobeying a court order, specifically, the EPO. After processing at the station, the appellant was transferred to the Arrest Processing Unit by respondents Froma and Klimosko.

[4] On February 17, 2011, the appellant complained to the EPS regarding the event and his treatment by the respondents. An investigation into the allegations by the Professional Standards Branch ("PSB") followed and, on March 11, 2014, the Chief of Police notified the appellant that criminal charges against the officers would not proceed, and that his complaints of misconduct by the officers were dismissed.[1]

[5] The Chief's disposition letter set out the allegations against respondents Rosser, Fox and Power, which we summarize as follows:

- Unlawful or unnecessary exercise of authority:
  - Allegation #1 - the officers did not have authority to arrest the appellant;
  - Allegation #2 - the officers used excessive force during the incident;
  - Allegation #3 - handcuffs had been placed so tightly that they caused nerve damage.

- Neglect of duty
  - Allegation #4 - the appellant was denied the right to see a doctor.

[6] Allegation #5, characterized by the Chief as discreditable conduct, concerned respondents Klimosko and Froma. It was in relation to the transportation of the appellant downtown, and the alleged statement by these respondents that the appellant would get another beating if he did not shut up.

[1] Record, Chief's Disposition Letter, pp 783-795.

ISSUE

[7] The issue before the Board is whether it was reasonable for the Chief to conclude that there was no reasonable prospect of obtaining convictions against respondents Rosser, Power and Fox at a disciplinary hearing for unlawful or unnecessary exercise of authority and neglect of duty, given the facts and the law.

[8] The Board must also decide if it was reasonable for the Chief to conclude that there was no reasonable prospect of obtaining a conviction for discreditable conduct against respondents Klimosko and Froma at a disciplinary hearing, given the facts and the law.

DISCUSSION

Standard of review

[9] The reasonableness standard of review requires us to determine whether the outcome falls within the range of reasonable, acceptable outcomes on the facts and the law. Our review is also concerned with the transparency, justification and intelligibility of the Chief's decision.[2]

Appellant's submissions

[10] The appellant contended that the respondents did not advise him of the EPO when they first arrived, and detained him illegally. They did not listen to information the appellant said he had received from the "Child Protection Agency" during a phone call earlier that evening regarding his ability to take his children from the residence. He was willing to leave the home with his children, as he was their father and primary care-giver. He stated he already had a safe living place for himself and the children, and the children wanted to go with him. The appellant contended that he did not need permission to take his children from the hostile environment.

[2] *Edmonton (Police Service) v Furlong*, 2013 ABCA 121. As we explain further below, we do not consider there is evidence that the investigation of this matter was tainted, flawed or grossly inadequate. As such, our civilian oversight role is not engaged.

[11] The appellant believed the respondents had taken sides before understanding the situation and facts. He noted that his common-law spouse admitted during an interview with PSB that she had hit him,[3] and she defamed his character.[4] The appellant admitted that he had become agitated, but stated that this was a result of the respondents prolonging and escalating the situation. If he had been allowed to leave before the EPO arrived, the altercation would never have occurred.

[12] The appellant argued that the EPO did not specifically mention the names of his two children, just the names of his common-law spouse and her other two children. He therefore felt he should have been allowed to take his children. He maintained that the respondents used excessive force in physically detaining him and that he submitted to the arrest when it became apparent the respondents themselves were becoming a danger to the children.

[13] Regarding the allegation that he had been denied a doctor, at the LERB hearing on September 18, 2014, the appellant stated that he may have gotten the details "messed up" after the arrest. The sign posted at the police station may have said that medical attention was available, namely Emergency Medical Services ("EMS").

Respondent officers' submissions

[14] Counsel for the respondents submitted that it is clear from the appellant's submissions that he does not agree with the Chief's decision to dismiss the complaint and continued to present his belief that he ought to have been able to leave the residence with the children that evening. An appeal to the Board, argued counsel, is not the forum for the appellant to have his complaint reconsidered, as the onus is on him to demonstrate that the Chief's decision was unreasonable based on the facts and evidence gathered, or that the Chief's investigation was tainted, flawed or grossly inadequate. Counsel suggested that the appellant had failed to meet the onus on him, and had instead, again, presented his view that he ought to have been able to take the children with him.

[15] Counsel argued that the record supports the view that the Chief took the appellant's complaints very seriously and addressed them thoroughly in the investigation, including through the respondents being exposed to disciplinary and potential criminal charges. Significant resources were put into the investigation and each of the appellant's complaints were addressed, including his belief that the respondents did not have authority to prevent him from leaving with the children.

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[3] Record, p 374.
[4] Record, p 388 lines 494-501.

[16] Counsel for the respondents submitted that there was little factual dispute regarding what occurred at the residence. Two 911 calls brought the respondents to the home the appellant initially agreed to leave the home, but not without his two children. He was served the EPO. His common-law spouse did not want the children to leave with him. An altercation occurred when the appellant tried to carry his two children down the stairs. Respondent Rosser placed the appellant in a headlock and respondent Power struck the appellant in the head and body.[5] Subsequently, the appellant was handcuffed, escorted to a police vehicle and charged with obstructing a peace officer and disobeying a court order.

[17] Counsel noted that the respondents were legally placed in the residence, as they were responding to 911 calls. The appellant was free to leave the premises, both before and after the EPO was served, but chose not to leave without the children. Force was only used when the appellant ignored verbal directions to put the children down and the respondents became concerned for the safety of the children and themselves. Counsel argued that the respondents were responding to a volatile and escalating situation, where the appellant was becoming more aggressive and not following verbal instructions. The level of force escalated according to the dynamic situation and no policies were breached. Full accounts of the head lock and strikes to the head and body were reported following the event.[6]

[18] The common-law spouse had obtained the EPO, and advised the respondents that she did not want the children to go with the appellant. The EPO applied to "the Claimant and any other family members who reside with the Claimant"[7]. It also directed that "A peace officer shall remove the respondent," "immediately or within 24 hours". Counsel argued the respondents were legally obliged to serve and enforce the court order.

[19] In considering the respondents' conduct, counsel argued that the Chief would have to put himself in the shoes of the respondents. Although the appellant said he was not violent, the EPO references violence, and it is not the respondents' role to question or go behind the court order. The appellant demonstrated that he was not going to leave the residence, as initially agreed, threw the EPO on the floor, and refused to follow the verbal directions given. The respondents had to deal with what they were faced with that evening, in the context of the EPO being granted earlier that day, and were not in a position to question the order or do anything but try to enforce it.

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[5] Record, pp 436-462, Police notes, narrative reports, control tactic reports, reasonable officer response reports.
[6] *Ibid*.
[7] Record, p 609, EPO.

[20] Regarding the discreditable conduct allegation against respondents Klimosko and Froma, counsel noted that the appellant did not address this allegation in his letter of appeal, his written submission, or at the hearing. The respondents denied the allegation and no witnesses were able to corroborate the appellant's complaint.

[21] Counsel argued there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing against respondents Rosser, Power, Fox, Froma or Klimosko. The Chief's decision was reasonable based on the facts and law before him.

Chief's submissions

[22] The Chief submitted that, in his 12-page disposition letter, he clearly laid out his analysis of whether there was a reasonable prospect of obtaining convictions against the respondents. In his written submission to the Board, he noted that he:

- Reviewed all the evidence from the PSB/criminal investigation;
- Reviewed the elements of a criminal charge of assault and the defence afforded peace officers by s 25(1) of the *Criminal Code*. The Chief explained how it led to his conclusion that no criminal charges should be laid against the arresting officers; and
- Identified the offences investigated pursuant to the *Police Service Regulation* ("PSR"), outlined the evidence and his analysis as to whether there were grounds for a conviction.[8]

[23] Counsel for the Chief stated that, where the EPO states specific names, these are the individuals the appellant is not to have any contact with. The appellant's common-law spouse did not want to keep him from having contact with his own children. However, the Chief argued, the EPO was issued due to alleged violence and it was intended to protect the common-law spouse and any family members living there. While it may be that the EPO should not have been issued - for example, if there was no family violence - the respondents were not in a position to judge that at that point in time.

[24] Further, argued counsel, whatever advice the appellant alleges he was given by Child and Family Services, the respondents had no ability to override the court order.

[25] In response to questions by the panel, counsel for the Chief suggested that it is for the Board to consider whether the Chief has overstepped his screening function by including, and coming to conclusions regarding, the defence available to the respondents in s 25 of the

[8] Written submissions of the Chief, p 9.

Criminal Code regarding their use of force. Whether the Board should interfere, argued counsel, depends on whether, on the evidence, any other result is possible or likely. As the facts of the incident are largely undisputed, this is not really a matter of the Chief improperly weighing evidence or considering varying testimony, but is an analysis based on a set of clear facts. Deference should be given to the Chief's consideration of the evidence and determination of whether a disciplinary matter should go forward, as the Chief knows what is common practice. If the Chief reviews the matter and concludes there is nothing to suggest what occurred is outside of what is reasonable and normal, it would be a waste of resources to send the matter to a hearing.

Was the Chief's decision reasonable?

[26] We have reviewed the record that was before the Chief in its entirety. We note the following pertaining to the PSB investigation that was considered by the Chief:

- The assault/unlawful use of force allegation was investigated both criminally and pursuant to the PSR;
- Interviews were conducted with the appellant (complainant), the arresting officers (Rosser, Fox, Power), and the civilian witnesses (the appellant's common-law spouse, and another individual who was at the residence that evening);
- PSB spoke with Child and Family Services in an attempt to verify that the "Child Protection Agency" had been contacted by the appellant regarding his right to take the children;
- Photographs and medical records of the appellant's injuries;
- Explanatory reports were obtained from respondents Klimosko and Froma; and
- A witness, who had been in the van transporting the appellant downtown, when the alleged incident occurred, was interviewed by telephone.

[27] The appellant did not identify any additional persons as witnesses, nor any additional documents, that should have been obtained and reviewed. The above information was, again, before the Chief when he made his disposition. As we find no basis upon which to conclude that the Chief's investigation was tainted, flawed or grossly inadequate, the Board's civilian oversight role is not engaged.

[28] The Board is of the opinion that the majority of the points raised by the appellant consist of further argument relating to the initial complaints and allegations regarding the respondents' conduct, rather than argument relating to the reasonableness of the Chief's disposition of the matter.

[29] The appellant argued that the Chief did not give sufficient weight to his argument that he had a right to leave the house with his children. The Chief made it clear in his disposition letter that the EPO was issued for the immediate protection of the claimant and other family members, which would include his children. It granted the claimant and other family members exclusive occupation of the residence. The EPO also stated specifically that the appellant was not to have contact with the claimant and her other two children.[9] The respondents were legally obligated to enforce the EPO.

[30] The PSB investigation had also determined that there was no evidence to support the appellant's claim that the "Child Protection Agency" had advised him that he had a right to take the children. Child and Family Services advised that they had no record of a call from the appellant, and further, they would not have advised that the children could be taken from the home based on the information present in the EPO. In any case, even if the appellant reasonably believed he had a right to take the children, the issue of the degree of force used turned on his actions at the time, not his motivations for acting as he did. He refused to follow police directions, had his children in his arms and was evidently otherwise not co-operative.

[31] Regarding the allegation that the appellant was refused a doctor, the Chief's decision noted that signage at the police station states "If you require medical attention, please notify any police officer".[10] All the respondents denied that a doctor was requested and noted that EMS would have been called if a request had been made. Prior to leaving the home, officers had retrieved medication for the appellant when he indicated that he suffered from anxiety.

[32] The Chief concluded there was insufficient evidence to support the allegation of discreditable conduct, namely that respondents Klimosko and Froma had stated "I would get another beating if I didn't shut up". The officers denied the allegation and the only witness, another prisoner in the van when the appellant was being transported to the Arrest Processing Unit, stated he heard yelling, but he could not make out, or recall what was said.

[33] The role of the Board is, again, to answer the question of whether the decision of the Chief was reasonable in the sense that it falls within the range of reasonable, acceptable outcomes on the facts and the law. The Board concluded that the Chief reasonably performed his screening role and applied the threshold test as set out under s 45 of the *Police Act* (as clarified by the Alberta Court of Appeal in *Land v Law Enforcement Review Board*).[11] The Chief

[9] Record, EPO, p 609.
[10] Record, pp 612-616.
[11] *Land v Law Enforcement Review Board*, 2013, ABCA 435.

considered the evidence before him to determine if there was a basis for any disciplinary hearings against the respondents.

[34] There is no factual dispute as to what occurred at the residence. The respondents were legally placed in the home. The EPO applied to the claimant who was the common-law spouse, and other family members who reside with the claimant. The respondents were required to serve and enforce the EPO.

[35] The Chief disposed of the appellant's allegations regarding the respondents' allegedly unlawful or unnecessary exercise of authority in relation to authority to arrest the appellant as having no reasonable prospect of establishing the facts necessary to obtain conviction at a disciplinary hearing. We find no basis upon which to conclude that the Chief's disposition of this allegation was unreasonable.[12]

[36] The Chief concluded that the force used by the three respondents Rosser, Power and Fox was appropriate under the volatile circumstances. They had attempted to resolve the situation without use of force, and there was no evidence to suggest the respondents acted rashly or used inappropriate force. No policies were breached and there was a full accounting of the event. On this basis, the Chief disposed of this allegation as having no reasonable prospect of establishing the facts necessary to obtain conviction at a disciplinary hearing. We find no basis upon which to conclude that the Chief's disposition of this allegation was unreasonable.

[37] In reviewing the reasonableness of the Chief's disposition of allegations of neglect of duty, regarding a denial of the appellant's right to see a doctor, we note the appellant's indication during the hearing that he may have been confused and that the sign may have indicated medical attention by EMS was available. As the record supports that the sign reads "if you require medical attention, please notify any police officer",[13] the Board finds the Chief's disposition of this allegation as having no reasonable prospect of establishing the facts necessary to obtain conviction at a disciplinary hearing to be reasonable.

[38] There is no independent evidence available to support the appellant's allegations of discreditable conduct against respondents Froma or Klimosko. The Board, in any case, notes that the appellant did not advance this ground of appeal at the hearing.

[12] We reach the same conclusion regarding the use of hand-cuffs.
[13] Record, pp 613-616.

[39] There is no evidence to support the appellant's allegations that the investigation was unfair, or improper, or that there was a misinterpretation of events. The Board concludes that the Chief's disposition was reasonable based on the facts and law before him.

[40] For the above reasons, the appeal is dismissed.

Edmonton, Alberta

November 6, 2014

David Loukidelis, QC	Christine S. Enns	Patricia Mackenzie
Presiding Member	Member	Member

For the appellant: W. Sullivan
For the respondents: S. Weber
For the Chief of Police: C. Pratt