ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *JR and MR v Edmonton (Police Service)*, 2014 ABLERB 058

Date: 2014127

Appellant: JR and MR

Respondent: Chief of Police, Edmonton Police Service

Officers: Cst. J. Zeldenrust (No. 2365); Cst. K. Rakievich (formerly Andruchow) (No. 2769); Cst. L. Bilecki (No. 1875); Cst. D. Brownell (No. 2115); Cst. C. Budynski (No. 2770); Sgt. R. Goss (No. 1651)

Panel Members: David Loukidelis QC, Archie Arcand and Ellen-Anne O'Donnell

Summary: The appellants complained about the manner in which their son was treated by EPS members when he was arrested and detained on allegations of domestic assault, how he was treated in cells, and how a subsequent break and enter complaint regarding his residence was not investigated. The Chief dismissed all three allegations as having no reasonable prospect of a conviction at a disciplinary hearing. The appeal was based on the allegation that the PSB investigation was inadequate and that some of the Chief's conclusions on some of the issues were unreasonable. The investigation was not tainted, flawed or grossly inadequate, and the Chief's decision fell within the range of reasonable outcomes.

Authorities Considered: *MacDonald v Camrose (Police Service)*, 2014 ABLERB 055; *Edmonton (Police Service) v. Furlong* 2013 ABCA 121

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

INTRODUCTION

[1] ML, the appellants' son, was arrested for domestic assault on July 5, 2011. He had allegedly gotten into a physical altercation with his girlfriend and threatened to kill her. She called 911 and police attended. Respondents Zeldenrust and Rakievich (formerly Andruchow) made the arrest. Upon consultation with a staff sergeant, it was determined that ML should be lodged in cells and be required to attend a bail hearing the next day. This was because, the Edmonton Police Service ("EPS") policy on domestic violence cases having been considered, it was decided that release on a recognizance or promise to appear was not appropriate due to the risk. After his release, ML reported to his girlfriend that he had tried to kill himself while in cells, but that the police "F….him over." Tragically, over three weeks after his arrest and detention, ML took his own life. He left two notes, one of which implied that his actions were

in part due to his treatment by the EPS.

[2] Through an April 13, 2012 letter from their lawyer, the appellants complained to EPS, alleging that ML's arrest was handled improperly, and that he should not have been arrested and incarcerated. They also alleged that ML had been physically mistreated while incarcerated and that he was assaulted by officers. The complaint also alleged that police failed to take ML for "medical treatment or to take other steps to help him when he was clearly suicidal while in their custody."[1] In a follow-up letter of July 19, 2012, the appellants' lawyer clarified the complaint by saying, "there is no reason why the police officers should not have released [ML] on an Undertaking or a Recognizance provided to a Peace Officer, pursuant to the provisions of the *Criminal Code*."[2] PSB investigated, characterizing the allegations as neglect of duty and unlawful or unnecessary exercise of authority.[3] The Chief concluded, in a December 2, 2013 disposition letter, that there was no reasonable prospect of establishing the evidence necessary to obtain a conviction at a disciplinary hearing. He dismissed the complaint.

ISSUES

[3] The appellant abandoned some of the grounds of appeal,[4] and only the following grounds were pursued at the hearing before the Board:

- The respondents were not interviewed, which rendered the investigation inadequate given the seriousness of the outcome;
- The PSB did not determine who made the notation on the Detainee Screening Report, "suicidal", by showing it to all staff who worked that day and asking who made the notation, contributing to the inadequate investigation; and
- The Chief wrongly dismissed the allegation that ML had been left handcuffed and sitting in his own urine for hours, merely on the basis that the appellant did not raise that concern when interviewed.

[4] At the hearing, counsel for the appellants submitted she was not seeking to have the decision of the Chief overturned; rather, the appellants wanted a further investigation in order to get answers to the questions that remained as a result of the investigation allegedly being inadequate.

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[1] Record, p 4.
[2] Record, p 2.
[3] Record p 7.
[4] The grounds abandoned were that ML could have been released on a promise to appear, undertaking or recognizance; that there was an attempted suicide and having no record of it was unreasonable; that ML was not asked, and the officers did not note, his mental health condition.

DISCUSSION

Standard of review

[5] The reasonableness standard of review is to be applied by the Board in hearing an appeal from a decision of the Chief. This is how the Board recently put it:

> [19] Applying the standard of reasonableness entails our asking whether the decision to dismiss the appellant fell within the range of acceptable, reasonable results on the facts and law before the Presiding Officer. We have previously referred to the Board's task in reviewing penalty decisions as "organic" in nature, requiring us to assess the reasonableness of the decision "as a whole in terms of its overall transparency and intelligibility and in terms of whether, overall, it is an acceptable, reasonable, outcome on the facts and the law".
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> [21] Further, as the Court observed in *MacDonald*, even if the Board were to conclude that a particular finding of fact or law by the Presiding Officer was unreasonable, this would not mean his decision was, viewed overall, unreasonable. In discharging our appellate review role, we look for "justification, transparency and intelligibility within the decision-making process." The Presiding Officer's "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." We look for "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes". In reviewing a decision, if the Board "find[s] it necessary, we may look to the record for the purpose of assessing the reasonableness of the outcome."[5]

[6] The appellant submitted that the Board's civilian oversight role is engaged in this case because there was a compromised investigation, in that a number of investigative avenues should have been pursued but were not, citing this passage from *Edmonton (Police Service) v Furlong*[6]:

> …Where the real issue is whether the investigation or processing of the complaint have been undermined or corrupted in some way, issues of civilian [oversight] are at the forefront…In many such cases the presiding officer will not have ruled on the issue. If

[5] *MacDonald v Camrose (Police Service)*, 2014 ABLERB 055.
[6] *Edmonton (Police Service) v Furlong,* 2013 ABCA 121 [*Furlong*].

> the presiding officer has expressed an opinion on the integrity of the investigation or the process, the Board should not ignore that, but deference is a less compelling factor.[7]

[7] The appellant argued that the Chief in this instance failed to make a finding regarding the integrity of the investigation, that he therefore did not turn his mind to it, and thus less deference is owed to his disposition.

[8] The chief—or a presiding officer—for that matter, is not, in our view, required to comment on the adequacy of the investigation in his findings, but may express an opinion or make a finding if he chooses. The above-cited passage from *Furlong* does not support the view that a presiding officer—or a chief in a case such as this—has a positive duty to, in all cases, rule on the integrity or adequacy of the investigation.

[9] The appellants further submitted that the Board's function is, in essence, to perform an audit of the whole disciplinary system engaged in this investigation and disposition, relying on the following passage from *Furlong*:

> Where its civilian oversight is engaged, it is not applying a higher standard of review; it is in fact exercising a separate but parallel jurisdiction. It is not helpful to describe that as more "robust" standard of review, because it engages a different type of process altogether. In those situations the Board is performing type of audit function on the system as a whole.[8]

[10] The Board interprets the appellants' argument to be that the failure to adequately investigate the issues raised in grounds one and two means the Chief's decision on these grounds is owed less deference, as the Board's civilian oversight is engaged, thus triggering a separate but parallel inquiry into the reasonableness of the investigation. Regarding the third and fourth grounds, the test is ordinary reasonableness.

[11] For the reasons given below, the Board concludes that the usual standard of reasonableness applies to all grounds of appeal because there is no evidence sufficient to trigger the Board's civilian oversight mandate. In considering this issue, we have kept in mind that the Court of Appeal has underscored that a chief of police is not required, in investigating a complaint, to exhaust all avenues of inquiry, or as the Court put it, "turn over every stone."[9]

[12] A brief comment is in order here. It is sometimes argued that, where the Board's civilian

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[7] *Furlong* at para 17.
[8] *Furlong* para 19.
[9] *Pelech v Law Enforcement Review Board*, 2010 ABCA 400 at para 40.

oversight mandate is triggered, it entails application of the correctness standard of review. We leave that issue for decision in a case in which it squarely arises, but note that, as the Board noted in *AS and KS v Edmonton (Police Service)*[10] the Board's civilian oversight mandate is an original mandate and it is doubtful that it involves, strictly a review on the record of proceedings below.

Failure to interview all officers

[13] The *Police Act* does not require that subject police officers always be interviewed in person. They are required to give explanatory reports if directed to do so. In this case, all officers who came into contact with ML on the night of his arrest were identified and required to provide explanatory reports.[11] How the investigation is conducted is, so long as there is no taint, flaw or compromise, within the Chief's discretion. There are cases where interviewing the officers would be beneficial, or even clearly necessary, to have a proper, good-faith investigation and understanding of what occurred. There are cases where it is not necessary. The appellants submit that, because ML was not available to give his version of events, the respondents and other officers should have been interviewed.

[14] Their explanatory reports and notes indicate that, when respondents Rakievich and Zeldenrust arrested ML, he complained of a sore ankle, but made no other complaints, that he was offered medical attention and refused it, and that there were no indications of suicidal thought or mental illness communicated to them during their interactions with him. It was determined that ML could not be released on his own recognizance or on a promise to appear because he had allegedly assaulted his girlfriend and uttered threats to kill her if she contacted police. Therefore, pursuant to EPS policy, he was lodged in cells until a bail hearing could be held. Respondents Rakievich and Zeldenrust turned ML over to the Detainee Management Unit ("DMU") for processing and detention pending a bail hearing, and had no further dealings with him on the night of his arrest and detention.

[15] The written evidence of these respondents was detailed, consistent and clear. We conclude that the statements provided a sufficient basis for the Chief reasonably to conclude, in relation to his screening role, that the respondents Rakievich and Zeldenrust had proper grounds to arrest ML. These reports, we similarly conclude, were a sufficient basis for the Chief to assess, in his screening role, what interactions occurred between them and ML, and why they turned ML over to DMU instead of releasing him.

[10] 2014 ABLERB 049
[11] Record, p 624.

[16] As regards the DMU, respondent Bilecki gave a detailed statement regarding her shift as acting sergeant on the night in question.[12] She said that she was able to reconstruct from the records, and from her practises, her memory of what transpired on the evening in question in relation to ML. This was both with respect to her own involvement and that of the others who had made entries on the DMU forms. The notation "suicidal" had been made on the Detainee Screening Report. She stated that the entry on the log could have been made by any one of the four community peace officers ("CPOs") on duty at the time. She stated with certainty that ML had been asked and refused medical attention, that she did not make the notation "suicidal" on the Detainee Screening Report (and did not know who did), that ML did not make any suicide attempt while in cells, that ML was not handcuffed while in cells, and that nothing out of the ordinary transpired on the shift.[13]

[17] The evidence of respondents Goss and Budynski, who were working in the DMU on the night in question, was that neither had any recollection of ever having seen or dealt with ML. Respondent Brownell had no memory of ML.

[18] We are, on the material before us, unable to come to any other conclusion than that the investigation provided adequate information upon which the Chief's determination properly could be made. We are not persuaded that there are any inconsistencies within or among the various statements, or any gaps, that could reasonably be said to require in-person interviews in addition to the statements to avoid taint, gross inadequacy or compromise to the process. This is not, in other words, a case in which it is reasonable to expect that any additional cogent evidence could be gleaned from interviewing the respondent officers, as opposed to the compelling of written statements, as was done here. We conclude that there is no basis on this ground alone—or, as will be seen, in combination with other grounds—to conclude that there was a taint, flaw, inadequacy or compromise in the investigation sufficient to trigger our civilian oversight mandate.

Inadequate steps regarding "suicidal" notation

[19] As already indicated, the investigation revealed that there was a handwritten notation on the Detainee Screening Report, seemingly beside ML's name, "Suicidal."[14] The PSB investigator attempted to identify who made the notation, requiring all officers who came into

[12] Record, p 633.
[13] Record, pp 634-635, referencing information respondent Bilecki took from the Detainee Screening Report, the Arrest Booking Report and the Sergeant's Daily Activity Report
[14] Record, p 429.

contact with ML that night to give written statements. An attempt was made to locate and interview all the CPOs who were on duty as well to try to identify who had made the notation.[15] The PSB did not establish who made the notation.

[20] We make no finding on the issue, of course, but it is not clear to the Board, from a review of the notation, that it could positively be characterized as being in reference to ML, as there had been an erasure obscuring the line on the form where the notation belonged. By the same token, the Board does not accept respondents' counsel's submission that the entry was likely just a mistake. It is also somewhat disconcerting that EPS was not able to properly track this significant notation to the appropriate individual who had been incarcerated on that night.

[21] The PSB, we nonetheless conclude, made reasonable efforts to determine who made the "suicidal" notation in the Detainee Screening Report. Again, in addition to getting the reports of all the officers on shift that night at the DMU, the investigation included the CPOs and endeavoured to interview them. Two were no longer employed by the EPS, and one could not be located at his forwarding address, but three CPOs of the four were interviewed.

[22] The appellants submitted that the investigation was inadequate because greater attempts were not made by the PSB to locate the fourth CPO, especially given the EPS's expertise in locating people. The appellants' suggestion was that the investigation should have entailed questioning every individual who interacted with ML, however minor their interactions with him might have been, in a manner akin to an "audit" of the system as a whole. We conclude that the investigative steps taken to determine who made the "suicide" notation were reasonable in the circumstances.

[23] Counsel for the appellant submitted that there was a "quality issue" with the Chief's investigation because not everyone was interviewed and not every question was asked. The Chief should have conducted the fullest investigation possible because they want answers to what happened that day. A "quality issue" is not, however, the test. The test is whether the investigation was "tainted, flawed or grossly inadequate" or compromised in some way. In the Board's view, EPS pursued reasonable avenues of investigation and scrutiny, and could find no evidence to reasonably support any of the allegations of misconduct.

[24] There was evidence before the Chief that ML had not reported the alleged suicide attempt in jail to his mother or his doctor, only his girlfriend. It is also apparent from the record that his girlfriend told EPS investigators she doubted the truth of several of the allegations ML

[15] We note here that, as part of the PSB investigation, the appellant, MR, was also interviewed, as was ML's former girlfriend.

made to her. He had not reported to his doctor that he had any injuries other than the sprained ankle, incurred before his arrest, which was inconsistent with his report to his girlfriend, and his note that the police had "F…..ed him up". Further, ML did not report to his mother that he was allegedly handcuffed and made to sit in his own urine, despite having spent time living with her after his release. Given all of the evidence before the Chief, it was reasonable to pursue the avenues of investigation that were undertaken here without a full "audit" of ML's time in jail and of everyone who came into contact with him and how.

[25] The Chief is not, again, required to turn over every stone. There is no basis in the material before us to plausibly suggest that the Board's civilian oversight mandate is invoked.

Dismissal of allegation of wrongful detention

[26] The Board received, as part of the appeal, the EPS policies regarding domestic violence and the charge and release of an accused person.[16] With respect to a domestic violence charge, the latter policy states:

> …If there is any concern about the safety of the complainant or the continuation of the offence, the member shall lodge the accused person in DMU for a bail hearing unless those concerns can be addressed by releasing the accused on a PTA with an Undertaking that imposes appropriate conditions.[17]

[27] The Chief reasonably concluded, in our view, that ML's detention was appropriate given the policies in place, the consultation with a staff sergeant, and in light of the alleged conduct of ML towards his girlfriend, including the alleged threats.

Dismissal of allegation of handcuffing

[28] The Board observes that there was no evidence in the record corroborating the appellant's allegation that ML was handcuffed, let alone left sitting in his own urine for hours. He had reported this claim to his girlfriend, but not to the appellants or his doctor. There is the evidence of respondent Bilecki that ML was not handcuffed while in custody in the DMU, and that otherwise it would have been recorded on ML's Arrest Booking Report and the Sergeant's Daily Activity report.[18] The Board finds no reason to interfere with the Chief's determination that there was no reasonable prospect of proving this allegation at a disciplinary hearing. On the facts and law, this conclusion was reasonable.

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[16] Record, p 384-398.
[17] Record, p 396.
[18] Record, p 636.

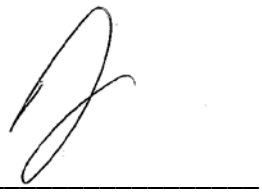
CONCLUSION

[29] ML's death some weeks after his arrest was undoubtedly tragic. It has no doubt, and understandably, caused MR and JR great grief. The Board sympathizes with them and extends its condolences. This is, however, all that the Board is able, in all sincerity, to do in the circumstances. As explained above, the Board has concluded that the EPS's investigation into ML's arrest and detention did not suffer from any taint, flaw, inadequacy or compromise sufficient to engage the Board's civilian oversight mandate. The Board also finds reasonable the Chief's disposition of the matter on the facts before him.

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

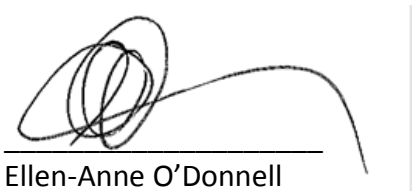
Edmonton, Alberta

December 17, 2014



David Loukidelis QC
Chair

Archie Arcand
Member



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