July 29, 2015

MEMORANDUM

Purpose: Action ☐ Information ☒

TO: Chair and Members of the Commission

CC: Joe Rodgers, Executive Director

FROM: Bonnie Bokenfohr, Public Complaint Director & Legal Counsel

SUBJECT: ***Simic v Edmonton (Police Service)*, 2015 ABLERB 014**

The incident that forms the basis of this complaint occurred in April 2011. The complaint was submitted on April 13, 2011. The Chief dismissed the complaint on July 4, 2014. The Complainant appealed. The LERB decision was issued July 7, 2015.

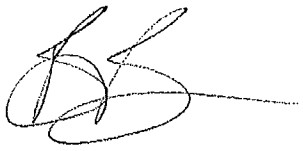
The LERB concluded as follows:

- The Chief's decision was reasonable with respect to three allegations;
- The Chief failed to fully or reasonably articulate what he actually decided with respect to two allegations. These two allegations were remitted back to the Chief for reasons on the allegations;
- The Chief exceeded his screening role and reached an unreasonable decision with respect to three allegations. The LERB directed the Chief to charge Cst. Woodburn with the following disciplinary charges:
    - Cst. D. Woodburn committed unlawful or unnecessary exercise of authority when he detained and arrested AB when he knew, ought to have known, or was wilfully blind, as to whether AB was demonstrating signs of impairment sufficient to constitute lawful grounds for the arrest;
    - Cst. D. Woodburn committed discreditable when he arrested AB for a personal motive related to his previous interaction with AB; and
    - Cst. D. Woodburn committed discreditable conduct when he arrested AB in a manner deliberately intended to cause embarrassment to AB, for a personal motive related to his previous interaction with AB.

The facts are summarized by the Board as follows:

> AB, an Edmonton lawyer, was socializing with other lawyers and friends. One of those present was an off-duty EPS officer. At some point in the evening, he texted respondent Woodburn, who was on-duty, to ask whether AB was the same lawyer he had arrested and charged a few years before (the charges later being dropped by Crown counsel). The off-duty officer told respondent Woodburn that AB had consumed alcohol and might drive to another venue. Although he was undercover at the time, the respondent went to where AB was going to drive, saw him driving into the parking lot of the venue, spoke to him, arrested him for suspected impaired driving and took him to an EPS station. The respondent did not attempt to conduct a road-side breath test. He arranged for a breath analysis technician to perform a breath test on AB at the station, but instead released AB without conducting the test and issued a 24-hour driving suspension based on "investigation". The appellant, an acquaintance of AB, who witnessed the interaction between respondent Woodburn and AB, complained about the respondent's conduct. She also complained about the conduct of other officers at the scene.

Sincerely,



Bonnie Bokenfohr
Public Complaint Director & Legal Counsel
Edmonton Police Commission

Attachment

ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *Simic v Edmonton (Police Service)*, 2015 ABLERB 014

Date: 20150707

Appellant: Aleksandra Simic

Respondent: Chief of Police, Edmonton Police Service

Officers: Cst. D. Woodburn (No. 2045), Cst. R. Davis (No. 1906), Cst. B. Countryman (No. 2392)

Panel Members: David Loukidelis QC, Archie Arcand, Robert Johnson

Summary: AB, an Edmonton lawyer, was socializing with other lawyers and friends. One of those present was an off-duty EPS officer. At some point in the evening, he texted respondent Woodburn, who was on-duty, to ask whether AB was the same lawyer he had arrested and charged a few years before (the charges later being dropped by Crown counsel). The off-duty officer told respondent Woodburn that AB had consumed alcohol and might drive to another venue. Although he was undercover at the time, the respondent went to where AB was going to drive, saw him driving into the parking lot of the venue, spoke to him, arrested him for suspected impaired driving and took him to an EPS station. The respondent did not attempt to conduct a road-side breath test. He arranged for a breath analysis technician to perform a breath test on AB at the station, but instead released AB without conducting the test and issued a 24-hour driving suspension based on "investigation". The appellant, an acquaintance of AB, who witnessed the interaction between respondent Woodburn and AB, complained about the respondent's conduct. She also complained about the conduct of other officers at the scene. The Chief dismissed her complaint without a disciplinary hearing, although he did direct the respondent and other officers to undergo supervisory review in light of certain aspects of the incident. In dealing with some of the allegations, the Chief exceeded his proper screening function and his decision was not reasonable. In others, the Chief's decision was reasonable and his finding confirmed. In yet another instance, the matter is remitted to the Chief to say what he actually decided. A disciplinary hearing is ordered for respondent Woodburn on charges set out in this decision.

Authorities Considered: *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124; *Lloyd v Edmonton (Police Service),* 2014 ABLERB 014; *R v Storrey,* [1990] 1 SCR 241; *R v Waters,* 2010 ABQB 607

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

INTRODUCTION

[1] In April of 2011 a group of Edmonton lawyers and others were socializing at a

downtown Edmonton lounge.

[2] During the course of the evening, an off-duty EPS officer, who was one of the group socializing with AB, texted respondent Woodburn. He gave him AB's name and asked whether he was the same lawyer whom the respondent had arrested and charged three years earlier. Respondent Woodburn, a police officer with the Edmonton Police Service ("EPS"), had arrested AB, one of the lawyers.[1] He had charged AB with obstruction of justice because AB had allegedly given an accused person legal advice about his right to silence, as protected under s 7 of the *Canadian Charter of Rights and Freedoms*.[2] Crown counsel later stayed the charge in December 2009. Respondent Woodburn confirmed this, adding that he was "just off at Police Headquarters".[3] Sometime later, the off-duty officer again texted respondent Woodburn, telling him that AB had consumed alcohol and might possibly drive impaired.[4] He provided the make and colour of AB's car. He also told respondent Woodburn where AB was heading next.[5]

[3] The off-duty officer did not attempt to give this information to EPS patrol units. Instead, he communicated directly and solely with respondent Woodburn. At the time, respondent Woodburn was on duty as an undercover member of an anti-gang unit. Rather than refer the

---

[1] The identity of this lawyer and others present during the incident, all of whom had consumed alcohol, is not relevant to our decision. We identify the appellant because it is clear on the evidence that she had not consumed alcohol that night and her actions are not in issue.

[2] The Chief's disposition letter says AB contacted "witnesses in an assault complaint and directed them not to cooperate with the police investigation". We note that the record refers to AB having advised the accused in that case of his right to remain silent, record, p 15, footnote 2, and p 462. Nothing turns on this discrepancy for the purposes of this appeal.

[3] This is what the off-duty officer told PSB that respondent Woodburn had told him by text at the time, record, p 304. In his written statement to PSB, respondent Woodburn said that he was "located at Jasper Ave. and 82nd Street" when the off-duty officer contacted him by telephone: record, p 86. Later in that same statement he told PSB that, having been told by the off-duty officer that AB might be driving while impaired, he radioed his undercover colleagues, who proceeded to the second venue and told him where it was. Respondent Woodburn then said "I was also in close proximity to that area and began driving northbound on 118th St. I was approximately two blocks from [the second venue]. … I saw a white BMW which fit the description given to me … driving southbound on 118th St. The white BMW was driving in the middle of the road and I was forced to pull over to the east side parking lane of 118 St. as the Complainants [*sic*] white BMW drove past me.", record, p 87. It is not our role to make findings, of course, but we note in passing that 118th Street—which is some 36 blocks west of where respondent Woodburn said he was located when the off-duty officer first contacted him—appears from publicly available maps to extend only about one block south of Jasper Avenue. It would therefore appear that respondent Woodburn would have had to be driving north of Jasper Avenue on 118ht Street—and thus north of the second venue's location—for the events to unfold as he detailed them, with AB by chance driving south on 118th Street on his way to the second venue.

[4] In his written statement to PSB, respondent Woodburn appears to have suggested that the information about possible impairment followed close on the heels of the first contact from the off-duty officer: "[he] then went on to inform me that … he had seen the Complainant [*sic*: AB] consume six alcoholic drinks during that time period", record, p 87.

[5] Record, p 87.

matter to a patrol unit, the respondent relayed the information to his under-cover colleagues.[6] The respondent was at that time "in close proximity" to, and began driving toward the second venue. He told his undercover colleagues, who had told him they were in the vicinity of the second venue, to be on the lookout for a car matching the description he had received. AB's vehicle passed him on his way to the second venue, he later told investigators. He told them that AB was driving down the centre of 118th Street NW, in downtown Edmonton. He added that he had to pull over to let AB pass. He then drove to the second venue, where he believed AB was heading.[7]

[4] Respondent Woodburn told Professional Standards Branch ("PSB") that he saw AB stop his vehicle in the middle of the second venue's parking lot and that he then pulled into the parking lot.[8] He later told investigators that he observed AB leave his vehicle and stagger back somewhat, unsteady on his feet. He told them that he approached AB, and observed that his eyes were red and glassy and his speech slurred. AB produced his licence and registration, allegedly unsteadily. Based on this, and the information he had received from his off-duty colleague, respondent Woodburn decided to arrest AB and take him to EPS West Division station where he arranged for a technician to conduct a breath analysis. West Division is some distance away from the second venue. In addition, respondent Woodburn did not attempt to obtain a road-side alcohol screening device at the scene and he did not then seek the assistance of EPS patrol units.

[5] Respondent Woodburn put AB into his undercover police car and drove him to the West Division station. On arrival, he left AB alone and unsupervised for some time, then released him without conducting the breath analysis that he had arranged. He instead issued a road-side licence suspension to AB under the *Traffic Safety Act* ("TSA").[9] When releasing AB, respondent Woodburn told him it was because the two of them had had a good conversation on the way to West Division and "he had been extremely cooperative and due to external matters I have

---

[6] In his written statement to PSB, respondent Woodburn said that, because the second venue was some 25 blocks from the first, he "concluded that there would be no likelihood of contacting a normal police patrol unit to intercept" AB's vehicle, and that he believed it was his "duty to investigate" himself, record, p 87. As noted earlier, at least one statement by respondent Woodburn suggests that he was at that time more than 10 blocks further away than the 25 blocks he cited as a reason for not having tried to call for a patrol car.

[7] See the passing observation in footnote 3 regarding where the respondent was when contacted by the off-duty officer and how it was that he encountered AB's vehicle on 118th Street.

[8] It appears from the record that the appellant intended to leave at once for the airport, to pick someone up. This may be why AB stopped where he did, to make it easier to switch drivers and ease the appellant's departure. The fact remains, however, that the respondent observed the odd way of parking and understood it to be a sign of impairment.

[9] He did not conduct a road-side screening test before doing so: the TSA suspension form indicates that the suspension was based on "investigation", with no particulars provided, record, p 588.

decided to give him a break and give him a 24 hour suspension instead of continuing with the impaired investigation."[10]

[6] The appellant was one of the group socializing at the first venue. She was also a passenger in AB's car on the way to the second venue. She was present in the parking lot at the second venue and witnessed what happened. Just days after the event, she complained to the Chief about respondent Woodburn's conduct; she also complained about the conduct of respondents Davis and Countryman, who had also been present.[11] The appellant alleged that respondent Woodburn was deceitful and conducted himself discreditably by providing a misleading statement about where the information regarding AB's alcohol consumption came from. She alleged that respondent Woodburn committed deceit in issuing the TSA suspension and in relation to the accuracy of his incident notes. She also alleged his actions were criminal in nature, alleging assault, unlawful restraint, unlawful confinement, obstruction of justice and public mischief.[12]

[7] The Chief summarized in the following way what he saw as the substance of the appellant's allegations:

> While the specific allegations will be addressed below, in general the complaints alleged that Cst. Woodburn unlawfully detained and arrested [AB] for impaired driving, in that there were no reasonable grounds to do so. The complaint asserts that Cst. Woodburn's investigation, detention and arrest were improperly motivated by personal bias, and that Cst. Woodburn failed to properly execute his duties by neglecting to give reasons for the detention to [AB] or his counsel, failing to disclose that he was an officer, and on duty, then ignoring requests by [AB] to address the issues elsewhere and cause him less embarrassment. The complaint alleges that Cst. Woodburn created false documents relating to this incident, and that he falsely indicated he had source information with respect to [AB] alleged impaired driving. Last, the complaint alleges an inappropriate application of force by Cst. Woodburn on [AB].
>
> In addition, the complaint alleges that Constables Davis and Countryman unlawfully told [BC] that he would be arrested for obstruction of justice or public intoxication when [BC] requested reasons for [AB]'s detention. The complaint also asserts that both Constables unlawfully assisted Cst. Woodburn in arresting [AB].[13]

[8] While there are nuances not captured here, which we discuss below, this summary

---

[10] Record, p 90, para 4.
[11] The April 13, 2011 complaint letter, which was supplemented by a May 7, 2011 letter, is found at pp 1-23 of the record.
[12] The allegations of criminal wrongdoing were investigated. No charges were laid against the respondent, record, p 921.
[13] Chief's disposition letter, record, p 2.

accurately conveys the main thrust of the appellant's complaints.

[9] The Chief characterized the appellant's allegations against both respondents Davis and Countryman as two alleged instances of unlawful or unnecessary exercise of authority. The first stemmed from the respondents both having allegedly told BC, another lawyer who was present at the scene and representing AB, that he could be arrested for obstruction and public intoxication. The second was investigated on the basis that respondents had assisted respondent Woodburn in arresting AB.

[10] The Chief dismissed all of the allegations against all three respondents on the basis that there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing. However, the Chief also directed all three respondents to undergo a supervisory review "to receive further instruction and guidance on the role of legal counsel and an officer's obligations to counsel, particularly in detention situations."[14] This was in relation to each officer's failure to tell AB's legal counsel at the scene, BC, the reasons for AB's detention.

[11] The appellant appealed the Chief's disposition on a number of grounds:

1. The Chief made unreasonable findings of fact;
2. The Chief conducted an unreasonable investigation of the complaint;
3. The Chief overstepped the screening role assigned to him under the *Police Act*;
4. The Chief either did not consider or unreasonably disregarded the evidence given by Aleksandra Simic, [BC] and [AB];
5. The Chief unreasonably concluded that the "misjudgment" on the part of Cst. Woodburn, Cst. Davis and Cst. Countryman in refusing to inform [AB]'s counsel of the reason for his detention, and threatening to arrest [BC], did not constitute misconduct under the *Police Service Regulation*; and
6. The Chief failed to dispose of all aspects of the complaint.[15]

[12] At the start of the appeal hearing, counsel for the appellant confirmed that her appeal was abandoned regarding respondents Davis and Countryman. We, therefore, deal only with the Chief's decision as it relates to respondent Woodburn.

[14] Chief's July 4, 2014 disposition letter, record, p 927 (Woodburn), p 929 (David) and p 930 (Countryman).
[15] Appeal letter, p 1.

ISSUES

[13] Although the appellant's arguments to some degree dealt with the adequacy of the investigation, it is fair to say she mainly focused on whether the Chief had overstepped his screening role in dismissing the allegations and on the reasonableness of the Chief's decision on each of the allegations. The Chief and respondent Woodburn joined issue on these points.

DISCUSSION

Standard of review

[14] There is no dispute that the standard of review that we must apply is reasonableness. The Board has discussed in many decisions what this entails. In a nutshell, we review the Chief's decision to determine whether the outcome falls within the range of acceptable, reasonable outcomes on the facts and law before the Chief. We also consider the decision from the perspective of transparency, justifiability and intelligibility, which is another aspect of reasonableness review.[16] Consistent with previous decisions, we approach this appeal on the basis that, if the Chief exceeded his proper screening function under s 45(3) of the *Police Act* ("Act"), his decision was unreasonable.[17]

Tainted and unreasonable investigation

[15] We will first deal with the appellant's argument that the investigation of her complaint was tainted, triggering our civilian oversight mandate. She based her point on the fact that she had asked for an investigation of the text messages between the respondent and the officer who was socializing with AB. She said this was both a reasonable request and an "obvious measure" for such an investigation.[18] Yet PSB did not, she argued, do this. It took no steps to obtain text messages or ask what happened to them. It did not engage experts to examine the respondent's Blackberry, "which would have enabled PSB to determine whether the BBM [Blackberry Messenger] messages" could be retrieved or had been deleted. At a minimum, she submitted, this failure means the Chief should be directed to investigate further.[19]

---

[16] The Board's approach to reasonableness review, which we apply here is discussed in more detail in Board decisions such as, to give only two examples, *James v Edmonton (Police Service)*, 2014 ABLERB 57 [*James*], at paras 12-15, and *MacDonald v Camrose (Police Service)*, 2014 ABLERB 055, at para 19.

[17] See *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124 [*Cody*]. This is the approach the Board took in *James*, for example, as well as *Cahill v Brookes*, 2014 ABLERB 009, and *Lloyd v Edmonton (Police Service)*, 2014 ABLERB 014.

[18] Appellant's submissions, paras 77-78.

[19] Appellant's submissions, paras 79-82.

[16] However, as was confirmed in a November 4, 2014 letter to the Board from counsel to the Chief, [20] PSB did attempt to retrieve messages, both from the off-duty officer's phone and the respondent's phone. During PSB's interview of the off-duty officer, his phone was seized and a new one was given to him. It was examined for BBM messages. A May 25, 2011 Tasking Report, indicates that Det. Bourgeois made inquiries to Telus and Rogers, but that neither carrier had kept the content of SMS or BBM text messages.[21] A further inquiry with Blackberry indicated that Blackberry did not keep message content, but did keep SMS text logs (time and dates of messages) for 90 days. Blackberry indicated it would provide this information, but only if a production order was made by a court. The investigation report indicates that PSB's Investigative Manager, Bradley Siddell, was advised of this issue. He indicated that EPS's Technological Crimes Unit was in possession of the other officer's cell phone and would determine what information could be obtained from it before deciding whether to seek this information from Blackberry. We see nothing in the record to suggest that this was done.

[17] In light of this, the only basis on which our civilian oversight mandate might come into play is the fact that PSB did not appear to follow up with the Technological Crimes Unit to determine if it found messages relating to the incident on the other officer's phone. To say the least, PSB's failure to follow up with that unit is unfortunate. We are not, however, prepared to find that this constitutes a flaw or taint that is sufficiently serious to compromise the investigation, such that we ought to intervene and direct further investigation. Moreover, given the passage of time and the outcome here, we cannot see how further investigation of this aspect of the matter could reasonably be expected to bear any fruit.

[18] Two other aspects of the appellant's arguments bear mention. First, as a result of the respondent's actions, S/Sgt. Jim Peebles wrote a memorandum that concluded with several actions to be taken. Three of these were about "review of policy". The appellant argued there is no evidence that PSB made any attempt to review these matters. She argued that the record on appeal includes no policies, which indicates that PSB failed to review policies, something that should have been done before the Chief dismissed the complaint.[22] S/Sgt. Peebles signed his memorandum in his capacity as a member of the Alberta Law Enforcement Team/Combined Forces Special Enforcement Unit. It was expressly stated to be for the information of the Chief. This memorandum clearly did not relate to any disciplinary investigation. We fail to see how this memorandum, which spoke to policy and not issues of possible misconduct by the

[20] Neither counsel for the appellant nor counsel for the respondent objected to the Chief providing this information in this manner.
[21] Record, p 652.
[22] Appellant's submissions, paras 83 and 84.

respondent, renders the complaint investigation or disciplinary process overall tainted, flawed or compromised.

[19] Second, the appellant pointed to the respondent's statement to PSB that he was given a punitive transfer after the incident.[23] She said that "it follows that there was a determination by one or more of his supervisors that he had acted inappropriately" in the matter and a record of this determination ought to have been before the Chief (and the Board in this appeal).[24] We leave aside the fact that no application for production of records related to any alleged "determination" was made, and note that this is what the respondent said in his statement concerning this incident:

> After 3 years of stress, ridicule, embarrassment at my work place and in court, a punitive transfer, financial loss, loss of opportunity on courses and loss of ability to submit for promotion I do not recall the exact phrases, terminology or words used the night in question.[25]

[20] The respondent's perception of what he thought were negative consequences for his actions is not germane to disposition of the issues before us.

The Chief's s 45(3) screening role

[21] This is what the Board said in *James* in summarizing the case law on the nature and limits of the s 45(3) screening function:

> [14] In deciding whether to direct that a disciplinary hearing be held, a police chief is charged with performing a screening function in some ways analogous to the function of Crown counsel in deciding whether to press forward with criminal charges. The chief's task is to decide whether there is enough evidence that a reasonable and properly instructed person could convict the officer. The chief may, in performing this role, engage in a limited weighing of evidence, but must not stray beyond the screening function and dispose of the complaint's merits without a hearing.[26]

[22] The appellant argues that the Chief did stray out of bounds by, in substance, deciding the merits of the allegations. After careful deliberation, we conclude that the Chief did, in substance, exceed his proper screening role. Before giving reasons for this conclusion, some

---

[23] Respondent Woodburn was here referring to the allegation that he was deceitful about the source of his information about AB, record, p 84.

[24] Appellant's submissions, record, para 85.

[25] Record, p 84.

[26] Citing *Cody*. We note here that *Cody* lays down a second factor for s 45(3) purposes, allowing a chief to decline to direct a hearing where the public interest does not in his or her opinion require it, even if there is a prospect of conviction. That factor does not figure in this appeal.

general observations about the screening function and the Board's role are in order.

[23] First, we acknowledge that it can be difficult for a chief of police to stay on the right side of the line when conducting his or her screening role. The Board also must take care when reviewing a chief's decision not to overstep the proper bounds of the Board's role. How the roles mesh is well illustrated by our decision in *Lloyd v Edmonton (Police Service)*.[27]

[24] In *Lloyd*, the appellant had been stopped on the sidewalk by two police officers, one of whom attempted to restrain the appellant. The appellant said he had been shoved face-first into a wall, hitting the front of his head, was spun around and then shoved against the wall again, striking the back of his head. Both officers denied this account. One of them readily acknowledged that he had used his elbow to strike the appellant in the head, causing him to fall forward into the wall. This was noted in the incident reports at the time. The appellant was not able to say which of the officers had twice shoved him into the wall. When the appellant visited a doctor the next day, he had injuries to his head, but told the treating doctor that he could not recall what happened. The chief dismissed the complaint without a hearing and we upheld that decision.

[25] The evidence in *Lloyd* was in conflict on several points, but we decided in the end that the chief had not over-stepped his role. Acknowledging that "a police chief must not make findings of fact and dispose of a complaint on its merits", and despite the chief using language that the appellant argued amounted to findings on the merits, we found that the chief's "analysis, reasoning and conclusions in light of the evidence before him did not stray beyond his permitted screening function."[28] The evidence of both officers was internally consistent, while the appellant's conflicting evidence was vague and uncertain. The circumstances of the incident, but also the appellant's inability the very next morning to recall with any precision what he thought had happened, and uncertainty in his statements to PSB, no doubt were factors in the chief's and the Board's analyses.

[26] We conclude that, in contrast to *Lloyd*, the Chief in this case went further, and, in our view, exceeded his proper s 45(3) role. We elaborate on this conclusion below.

[27] 2014 ABLERB 014 [*Lloyd*].
[28] *Lloyd*, at para 21.

Structure of allegations and Chief's decision

[27] The Chief made separate findings on each of nine allegations. In our view, the decision to separate the appellant's complaint into nine discrete allegations was problematic. By so doing, the Chief failed to consider the complaint as a whole. The result was that the Chief considered some of the discrete allegations without taking into account all of the relevant information. We will elaborate on this point in our discussion of the various allegations. In addition, we will deal with several of the allegations together, rather than separately.

Unlawful or unnecessary exercise of authority in arresting AB (allegations 1 and 3)

[28] Allegations 1 and 3 related to the respondent's arrest of AB. Allegation 1 was that the respondent did not have lawful authority to arrest AB and allegation 3 was that the respondent had an improper, personal, motive for the arrest.

[29] The primary issue for the Chief, in relation to these allegations, was whether there was sufficient evidence that a reasonable, properly instructed person could convict the respondent on a charge of unlawful or unnecessary exercise of authority.

Legal grounds to arrest

[30] The appellant argued that the Chief had to determine whether the respondent had reasonable and probable grounds to arrest AB, and also whether those grounds were justifiable from an objective point of view. A police officer, she argued, must have "reasonable and probable grounds" to arrest someone without warrant in a case such as this. As Cory J put it *R v Storrey*:

> It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist, that is to say, a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.[29]

[31] Put another way, "an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest", but those grounds must, in addition, be justifiable from an objective point of view".[30] As Cory J noted more than once in *Storrey*, neither the common

[29] [1990] 1 SCR 241 [*Storrey*], at para 16.
[30] *Storrey*, at para 17.

law nor the *Criminal Code* require more; they do not require that police have a *prima facie* case for conviction before they can arrest.

[32] The appellant argued that the Chief did not reasonably make the determination about whether the respondent had grounds to arrest AB, and therefore made an unreasonable decision about allegations 1 and 3. The appellant points to information before the Chief that undermined the respondent's assertion about why he believed he had grounds to arrest AB. First, the appellant submitted, the Chief had ample information from witnesses to AB's detention and arrest to put into question the respondent's observations about whether AB showed signs of impairment. This information was provided to PSB by the appellant, AB, BC, other officers at the scene, and the breathalyzer technician at West Division.

[33] The Chief had evidence from AB, the appellant and BC that AB had consumed alcohol, but had three drinks, if that, at most.[31] The appellant and BC said that they had been seated close to AB throughout the evening and that he had none of the indicia of impairment at the lounge where they were socializing. Nor did AB exhibit any signs during the drive to the second lounge or on arrival. Before us, the appellant noted that, of all of the officers at the scene, only the respondent noted signs of impairment.[32] She noted that the breath analysis officer at West Division did not observe any signs. For the Chief to discount this evidence, it was said, amounted to an error, with the Chief improperly preferring contrary evidence. Secondly, the appellant argued, the only possible contrary information came from the officer who had been socializing with AB's group, and that evidence was inconsistent. There was some dispute as to whether this officer mentioned four or five drinks to the respondent, or six, or any number of drinks at all.

[34] In his interviews with PSB, the off-duty officer who had socialized with AB's group said that AB "definitely had a few drinks there", though he "wouldn't be able to say how many he had but he was definitely drinking".[33] Later in his PSB interview, the officer said that, while he could not say how much AB drank while the officer was present, "he was drinking the whole time I was there" and, if he were going to guess, he "would say maybe 4 or 5 drinks"[34] while he was there with AB.[35] He had earlier characterized the amount AB drank as a "few drinks". He also told PSB that, when AB's group prepared to leave for the second lounge, "just looking at"

[31] This is detailed in the appellant's May 7, 2011 addendum to her complaint, record, p 2.
[32] Appellant's Submission, pp 14-15, paras 35-39.
[33] Record, p 304.
[34] Record, p 312. The respondent told PSB that the off-duty officer had told him that AB had had six drinks. The other officer did not tell PSB that he said this, or that this was the number of drinks of alcohol AB had consumed. As noted above, the other officer said "a few drinks" and then later "maybe 4 or 5 drinks".
[35] Record, p 312.

AB, "like there was, he could possibly be impaired", "had definitely had a few drinks", though not "staggering or stumbling on his feet…he wasn't really sharp either. Like he had bloodshot eyes and that sort of thing so…uhm, I kind of thought that he shouldn't be driving if that was the case so at that time I had texted Cst. WOODBURN to say that [AB] was leaving...and he could possibly be impaired".[36] The officer also volunteered to PSB that AB's bloodshot eyes might have been due to the late hour.[37] He added that he texted the respondent "to tell him that AB is probably impaired and that he's going to [be] driving"[38], or that "[AB] was leaving...and he could possibly be impaired".[39] The officer also told the respondent where AB was going and described the vehicle he was driving.[40]

[35] The appellant further argued that the Chief improperly relied on this evidence. She observed that the Chief referred to the officer's evidence as "opinion", and argued that this is not properly a matter of opinion. She also noted that at one point the other officer told PSB that it was a "guess" that AB had consumed four or five drinks, and that he would not be able to say how many drinks AB had consumed. It was, she argued, unreasonable for the Chief to rely on a mere guess, especially in the face of the "competing, credible evidence" that AB was not impaired.[41] The Chief also failed to consider the fact that a roadside screening test was not requested and the breathalyzer test was not completed. There was evidence that the respondent did not request assistance from EPS resources in the area and that he had instead requested that a breathalyzer technician be available. The appellant also argued that the Chief failed to grapple with why the breathalyzer was not used to determine the intoxication level of AB and the evidence that the respondent decided to release AB because of a good conversation in the car.

[36] The appellant argued that the Chief failed to consider whether or not the arrest was "necessary" and instead focused his analysis exclusively on whether the arrest was "lawful". She argued that misconduct under s 5(i) of the *Police Service Regulation* is not limited to authority exercised "unlawfully" but also includes authority exercised "unnecessarily". At a disciplinary hearing, the appellant argued, the question of lawful and necessary arrest would be assessed by a presiding officer based on the whole of the evidence as presented by witnesses.

[37] The Chief argued that the evidence of reasonable grounds to arrest "is described in the disposition letter", and that it does not matter whether the information the respondent had

[36] Record, p 305.
[37] Record, p 312.
[38] Record, p 311.
[39] Record, p 305.
[40] Record, p 305.
[41] Appellant's submissions, para 48.

received was precise, or whether AB might be convicted. These are matters "peripheral to the issue of whether Cst. Woodburn had reasonable grounds to proceed as he did based on his knowledge at the time. The disposition addresses that issue."[42]

[38] Similarly, the respondent argued that, while the record "does display a dispute over whether empirical indicia of alcohol consumption" on AB's part existed at the time of the arrest, there is "no direct evidence" that the respondent did not subjectively believe he had reasonable grounds to arrest, there was "ample evidence" for that subjective belief, and "objective evidence that Cst. Woodburn's belief was reasonable."[43] The respondent concluded by arguing that "the only factor that could possibly negate a finding that Cst. Woodburn had reasonable grounds to arrest [AB] is the fact that there had been a prior engagement between the two and that somehow led to an improper purpose on the part of Cst. Woodburn."[44]

Improper purpose

[39] The appellant argued that the Chief failed to account for what she characterized as evidence of improper purpose on the respondent's part, evidence about his acting outside his "mandate" and evidence that (to paraphrase) the respondent took the matter personally. The Chief ought, she argued, to have considered all of this in assessing whether the respondent had exercised his power of arrest unlawfully or unnecessarily and his failure to do so makes his decision unreasonable[45]. The appellant alleged other "irregularities" in the respondent's investigation. She noted that the respondent did not ask AB about how much alcohol he had consumed until after he arrested him.[46] Nor, apparently, did he consider using a roadside screening device before arresting AB.[47] She cited *R v Waters*,[48] a summary conviction appeal decision in which Kenny J said that the arresting officer should have used physical coordination tests or a screening device to develop grounds to make a formal breath sample demand. The junior officer in that case failed to do this and ultimately was found not to have the requisite grounds to make that demand.

[40] We understand the appellant's point to be that, noting *Waters*, the respondent's failure to use a roadside device meant he did not have reasonable and probable grounds to arrest AB. In *Waters*, the officer saw the accused go through an intersection at night without his lights on.

---

[42] Chief's written submission, para 18.
[43] Respondent's written submission, paras 41-46.
[44] Respondent's written submission, para 49.
[45] Appellant's submissions, at paras 49 and following.
[46] Appellant's submissions, para 73.
[47] Appellant's submissions, para 74.
[48] 2010 ABQB 607 [*Waters*].

The officer stopped the vehicle and, after a brief conversation, during which the accused answered all questions without hesitation or stumbling, the officer made a formal breath demand. He had smelled alcohol and the accused had admitted to consuming two or three beers. Kenny J found this was insufficient to make the formal demand. Each case turns on its facts, of course, and the facts in *Waters* were somewhat different from the evidence that was before the Chief. *Waters* does illustrate, as a general proposition, that a trier of fact and law might conclude, despite evidence of the smell of alcohol and an admission of some alcohol consumption, that objectively reasonable grounds nonetheless did *not* exist. By placing such weight on what the respondent reported in terms of indicia, and on the varying details of what the off-duty officer had allegedly told him about AB's consumption, the appellant argued, the Chief stepped into the trier's shoes and reached a conclusion on the merits of the issue.

[41] The appellant also argued that Chief did not take into account the failure of the respondent to conduct the breath analysis he had arranged solely, the respondent said, because the other officer refused to provide a statement about his observations of AB. However, the appellant argued, the respondent said that he had witnessed AB driving in a manner that caused him some concern. The breath analysis technician was available and the test would have advanced the respondent's investigation.[49]

[42] Further, the appellant argued that the Chief's decision does not address in any meaningful way the evidence that the respondent was at EPS headquarters when he was told by the other officer about AB and that the respondent acted on the information although he was "just off" patrol. Rather than referring the matter to a traffic unit, the respondent and some of his undercover colleagues left EPS headquarters to respond, without attempting to determine if other EPS resources were available to respond.

Board's decision on allegations 1 and 3

[43] To make his decision on these allegations, the Chief first had to assess whether, given the totality of the evidence, a properly instructed presiding officer could convict the respondent on the basis that he did not have the requisite grounds to arrest AB. As *Storrey* affirms, an officer in the respondent's shoes does not need to have a *prima facie* case for conviction in order to arrest someone.

[49] It is not clear to us, we note strictly in passing, why the other officer's statement about AB was a pre-condition to the investigation continuing. The respondent told investigators that he had witnessed AB driving in a manner that, the respondent's statement appeared to imply, was a cause for concern. The respondent also said that he had observed AB to have glassy eyes, to be unsteady on his feet, and to be slurring his words. Why the off-duty officer's statement was the linchpin of the respondent's investigation is not, in this light, at all clear.

[44] The Chief in his decision set out what the respondent "knew" about AB's possible impairment at the time he arrested AB. This information can be summarized as follows:

- Information obtained from the text sent by the officer socializing with AB:
  - that AB was "possibly impaired" and was about to drive; or
  - alternatively that AB had had "a few" drinks, or "4 or 5" drinks, or up to "6 drinks", and was about to drive.
- Information the respondent said he observed:
  - that AB was driving sufficiently badly that the respondent had to pull over to allow AB's car to pass him;
  - that AB parked oddly when he stopped in the parking lot of the second venue; and
  - that AB showed signs of impairment at the second venue (*i.e.*, that AB "shuffled and side-stepped", "was having difficulty standing straight up", smelled of alcohol and had slurred speech).

[45] Based on this information, the Chief's view was that there were both objective and subjective grounds to arrest AB. Further, the Chief said, the fact that the appellant and other witnesses contested the respondent's observations did not change the fact that the respondent "did have information indicating impairment, made his own observations that indicated impairment, and acted on them".[50]

[46] Importantly, of the respondent's "knowledge" cited by the Chief, the only objectively verifiable or undisputed facts are that AB was "possibly impaired" and that he parked oddly in the parking lot at the second venue. The officer socializing with AB was, at best, uncertain about the number of drinks AB had consumed, and equivocal about alleged signs of impairment in AB when he left the first venue. No other witnesses said they had observed signs of erratic driving or signs of impairment at the second venue, including other police officers at the scene, who could not determine if the smell of alcohol emanated from the AB or from a civilian witness.[51]

[47] The Chief, in analyzing whether the respondent had grounds to arrest AB, did not consider whether the respondent reasonably or truthfully formed his reported opinion about AB's impairment. In determining this question, the Board's view is that the Chief went beyond

[50] Record, p 923.

[51] The respondent submitted that the evidence of the five other police officers at the scene is "neutral on the issue of indicia of impairment." Respondent's submission, para 44. The respondent contended at para 44, however, that the evidence of Cst. Davis and Cst. Countryman that AB put a cigarette into his mouth "could be consistent with an attempt to mask his alcohol consumption." This is speculative.

his proper screening role. The Chief did not question the veracity of the respondent's statements about what he had observed; he took those statements fully at face value. The Chief accepted the respondent's reported observations about symptoms of AB's alleged impairment, notwithstanding a significant amount of evidence that these were not reasonably supportable observations. The respondent's knowledge at the time he detained and arrested AB can only reasonably be determined in a hearing, with cross-examination.

[48] The Board notes that that the following information about AB's alleged impairment was before the Chief when he made his decision:

- the police officer who had socilaized with AB and others said that AB was "definitely drinking", but that he could not say with certainty how much alcohol he had consumed when he left the first venue;
- this officer also said AB was "not staggering or stumbling on his feet, but [he was] not sharp", and that AB had bloodshot eyes (possibly due to the late hour);
- AB said that he had consumed three drinks, at most, before he drove to the second venue;
- neither the appellant nor BC thought AB showed signs of impairment, and both said that they had sat close to AB throughout the evening;
- the appellant and BC also said that AB had not exhibited any signs of impairment on the drive to the second venue[52];
- Cst. Davis told PSB that he had seen AB driving and saw no irregular driving patterns that would lead him to believe the suspect was driving impaired; [53] and
- the breath analysis officer at West Division did not observe any signs of impairment as AB walked past her.

[49] Of the officers at the scene, only the respondent noted signs that AB was impaired. Of the other officers present, Cst. Davis indicated he had smelled alcohol, but could not say if it was coming from AB, BC or another source.[54]

[52] Record, pp 16, 391,392, 475.
[53] Record, p 190.
[54] Record, p 18, para 3 and appellant's submissions, p 14, para 35.

[50] In addition, as noted by the appellant, there were a number of unorthodox aspects to AB's detention and arrest, including:

- neither the off-duty officer socializing with AB nor the respondent contacted EPS patrol units about the fact that AB may be driving impaired, to see if traffic officers could respond;
- instead the respondent and his undercover colleagues personally carried out the investigation and arrest, notwithstanding that their work for the evening was essentially complete;
- the respondent told his undercover colleagues that he had "source" information that AB may be driving impaired, rather than directly saying from whom he had gotten the information;
- the respondent allegedly misled other officers besides his undercover colleagues, including RCMP Sgt. Feist, about why he did not continue his investigation and charging of AB, saying that he did so in order to protect his "source";
- the respondent did not ask AB how much alcohol he had consumed that evening until after he arrested him;
- the respondent failed to ask for or obtain a roadside screening device before he arrested AB, but instead took AB directly to the West Division for breath analysis; and
- no one ever did a breathalyzer test to determine with accuracy AB's level of impairment, but
- the respondent instead released AB with a 24-hour driving suspension, purportedly because he and AB had had a "good conversation on the way to West Division".

[51] In the Board's view, it was unreasonable for the Chief to prefer, as he did, the respondent's reported observations about AB's impairment over the observations of virtually all others, particularly in light of the oddities in the investigation procedure. A reasonable person, considering the information in the record before the Chief, would have asked if the respondent's previous non-amicable dealings with AB had impacted his perceptions of AB's driving and level of impairment.

[52] Certainly, evidence of personal motive or bias does not alone make a lawful arrest unlawful. However, evidence of personal motive or bias is relevant to a determination of the subjective and objective justification of whether grounds for arrest exist. In this case, there were significant discrepancies between the information provided by the respondent and the information provided by other police officers, the appellant, AB and BC. In preferring the respondent's observations about the events leading to the arrest of AB, the Chief went beyond

his screening function. These discrepancies could only reasonably be resolved by way of a hearing on the merits.

[53] Therefore, in our view, the Chief made an unreasonable decision in his decision about allegations 1 and 3.

Allegations of deceit (allegations 4 and 8)

[54] The appellant alleged in her complaint that the respondent's notes about his perceptions of AB, and the 24-hour suspension notice, were deceitful (allegation 4). She also alleged that the respondent falsely led his colleagues to believe that the information about AB driving impaired had come from a confidential informant, rather than from a fellow police officer (allegation 8).

[55] The Chief concluded that there was nothing to suggest that the respondent's notes of the incident were "anything more than the communication of his own observations and understanding of the information available to him at the time the incident occurred."[55] The fact that the respondent's perceptions or understanding may have differed from the appellant's, notably on the indicia of impairment, did not, the Chief concluded, mean the respondent's documentation was deceptive or false.[56] He found there was no reasonable prospect of establishing the facts necessary to obtain a conviction for deceit.

[56] The Chief's reasonably concluded that the mere fact that the respondent's notes were different from the appellant's, AB's and BC's recollections does not reasonably lead to a conclusion that the respondent was deceitful when writing his notes. Accordingly, we confirm the Chief's decision in relation to allegation 4.

[57] The appellant also alleged that the respondent falsely led colleagues to believe that he had a confidential informant, when in fact his information had come from the officer who had been socializing with AB's group. She referred in her submissions to evidence from Cst. David and Cst. Countryman, colleagues of the respondent who were at the scene, that the respondent had received "source information" about AB's alleged impaired driving.[57] These and others, including a supervisor, were therefore misled by the respondent, she argued, about this "source".

---

[55] Chief's decision, record, p 926.
[56] Chief's decision, record, p 926.
[57] Appellant's submissions, paras 99-107.

[58] The appellant further alleged that the respondent misled other officers by portraying the reason for terminating his investigation of AB as a matter of legal duty, to protect his source.[58] To support this allegation, the appellant pointed out that RCMP Sgt. Feist, the sargeant heading the team of which the respondent was a member,[59]gave information to PSB to the effect that another officer had informed him that the respondent had said he was not in a position to protect his source and that he had no other options because any prosecution for impaired driving was not viable given how he came across the information.[60]

[59] We conclude that the Chief reasonably decided that there was no reasonable prospect of conviction on allegation 8. In the context of this complaint, "deceit" could only plausibly mean intentional, not negligent, deceit. The fact that the respondent used the word "source" in his conversations with fellow officers cannot reasonably be construed as an intentional attempt to mislead others into wrongly believing that he had a formal confidential informant, as opposed to a source who was another officer. Accordingly, in our view, the Chief did not reach an unreasonable conclusion on this allegation.

[60] That said, we note, strictly in passing, that the respondent's use of the term "source" in this context, and the perceptions it raised among his colleagues at EPS and with the RCMP are of concern. We urge all police officers to use words such as this in an accurate manner, so as to not lead to confusion, as occurred in this case.

Neglect of duty (allegations 2, 5 and 6)

[61] The respondent was alleged to have neglected his duty by failing to tell AB why he was being detained (allegation 2), failing to identify himself as a police officer and on-duty (allegation 5), and failing to inform the appellant and BC—who was acting at the scene as AB's legal counsel—of the reason for AB's detention (allegation 6).

[62] The Chief dismissed the first allegation on the basis that, while the respondent could have been more explicit in what he told AB about the reason for his detention, AB was sufficiently aware of the reason for his detention.[61] AB told PSB that the respondent had told him at the scene that he knew "that you [AB] have been drinking".[62] The respondent said that he had told AB that he knew he had been drinking right after AB got out of his car.

[58] Appellant's submissions, para 107.
[59] Record, p 229.
[60] Record, p 243, line 389-391.
[61] Chief's decision, record, p 923.
[62] Chief's decision, record, p 923.

The respondent said that he had also told AB that he was investigating him for impaired operation.[63]

[63] The Chief said that the law on this aspect of the *Charter of Rights and Freedoms* does not require a "formal statement" of reasons for detention. The issue, he said, is what the person under detention would have understood, and whether AB had enough information to decide whether to retain legal counsel. In determining whether there was a reasonable prospect of conviction for neglecting to inform AB of the reason for his detention, the Chief noted that, as experienced legal counsel, AB was familiar with the requirements for detention and arrest. The Chief concluded that, while the respondent could have done a better job of explaining the reasons to AB, there was no reasonable prospect of conviction for neglect of duty.[64]

[64] We find this reasonable. We agree with the Chief that it would have been preferable for the respondent to be more explicit when he told AB the reason for his detention. The respondent's efforts to inform AB were not sterling, but AB had sufficient information to know why he was being detained, and was sufficiently aware of the reason for detention that he retained BC as his counsel.

[65] Allegation 5 deals with the respondent's failure to identify himself as a police officer and as being on duty. As noted earlier, the respondent was in plain clothes that night and driving an unmarked car. There was evidence before the Chief, however—including from AB himself—that AB immediately recognized the respondent based on their previous dealings. Even though the respondent did not formally identify himself, AB knew that he was a police officer. We also agree with the Chief that a police officer is not obligated to tell a person who is being detained whether the officer is on duty or off duty. In these circumstances, the Chief reasonably concluded that there was no reasonable prospect of conviction on allegation 5.

[66] The last neglect of duty allegation, allegation 6, relates to the respondent's failure to tell the appellant and BC why AB was being detained, despite repeated requests on their part. The Chief's disposition letter says that the respondent had acknowledged that he did not tell the appellant or BC the reason he had detained AB.[65] The Chief concluded that the respondent had no obligation to give this information to the appellant, but that the respondent did have an obligation to tell BC. However, the Chief also concluded that the respondent's failure to tell BC

[63] Record, p 89.
[64] Chief's decision, record, p 923.
[65] Disposition letter, record, p 926. In the hearing of this appeal, the respondent did not dispute that he made this acknowledgment.

the reason AB was detained was a "misjudgment" that "did not "rise to the level of misconduct".[66]

[67] In summary, the Chief therefore made the following "findings" in relation to this allegation:

- there was no dispute that the respondent failed to inform the appellant and BC the reason he had detained AB; the respondent did not do so;
- the respondent had no obligation to tell the appellant why he had detained AB, but the respondent did have a legal obligation to tell BC why he detained AB, because BC was acting as AB's legal counsel in relation to the detention and arrest;
- this failure amounted to a "misjudgement" which does not "rise to the level of misconduct"; and
- there is no reasonable prospect of establishing the fact necessary to obtain a conviction at a disciplinary hearing for failing to advise BC of the reasons for detention of AB, but the respondent must participate in a supervisory review to receive further instruction and guidance on the role of legal counsel and a police officer's obligations to counsel in detention situations.

[68] In these circumstances, the Board is unable to determine what the Chief actually decided. Section 45 of the Act authorizes the Chief to decide:

- there either is or is not a reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing, and therefore either send the allegation to a hearing by a presiding officer or dismiss it (s 45(3) of the Act); or
- the allegation is not serious (s 45(4) of the Act).

[69] If the Chief makes a s 45(3) decision about whether to send an allegation to a hearing, that decision can be appealed to this Board. If, however, the Chief determines under s 45(4) that a matter is not serious, the Chief's decision is final and cannot be appealed to this Board.

[70] However, in this case the Chief purported to dispose of this allegation under s 45(3), but then imposed a penalty on the respondent. A penalty could be imposed under the authority of s 19(1)(a)(iii) of the PSR,[67] but only if the Chief formed the opinion that the allegation was not

[66] Chief's decision, record, p 927.

[67] Section 19(1)(a) authorizes the Chief to impose an official warning or "take any other action that in the opinion of the chief of police is appropriate in the circumstances". If the Chief is to impose a more serious penalty (*i.e.* a

serious.[68] The Chief certainly did not say that he decided that the allegation was not serious; to the contrary, he said there was "no reasonable prospect of establishing the facts necessary to obtain a conviction".[69] If the Chief had explicitly made a finding that this allegation had been proven (based on undisputed facts), but that it was not serious and therefore he was disposing of it under section 45(4) of the Act, the Board would then have no jurisdiction to review the disposition.

[71] The Board cannot, however, reasonably determine what the Chief actually decided here. In these circumstances, and particularly given that, if the Chief did decide that the allegation is not serious, the issue cannot be appealed to the Board. We remit this question to the Chief so that he can say what he actually decided.

Discreditable conduct (allegation 7)

[72] This allegation is that the respondent smirked and ignored requests from AB to move away from the crowd near the lounge to avoid embarrassment. The appellant alleged in her complaint that AB asked the respondent to move his vehicle off the street and out of view of the crowd which had formed in front of the lounge, as the situation was unfolding in front of his colleagues, family and friends. The respondent allegedly smirked and did not accede to the request. The respondent denied this allegation and stated that he did not recall a crowd forming in front of the lounge. In his statement to PSB, the respondent stated that he acted professionally throughout the interaction, and was aware of the scrutiny the investigation might invite due to AB's involvement, his prior history with AB and the presence of other lawyers. He said that he "knew, from the onset that the entire investigation would be under a microscope of scrutiny, and I continued with the investigation knowing that it was lawful."[70] At another point, the respondent told PSB that he was aware that he would, because of his past dealings with AB, be "under a microscope of scrutiny for every action and word I used."[71]

[73] The Chief dismissed this allegation, saying that a failure to minimize a suspect's embarrassment is not a disciplinary offence unless there is evidence that the embarrassment

---

reprimand, forfeiture of hours or short suspension), he may only do so with the agreement of the cited officer: see s 19(1)(b) of the PSR.

[68] We note that the Chief does not have to find that the allegation is proven in order to dispose of it pursuant to s 45(4) of the Act and s 19 of the PSR. Section 45(4) refers to an "alleged contravention" and s 19(1)(a)(i) authorizes the Chief to dismiss the matter. Presumably, while the Chief could "dismiss" a non-proven matter if he determined that it is not serious, he could not impose a penalty unless satisfied that the allegation, while not serious, is nonetheless proven.

[69] This is puzzling, given that "establishing the facts" cannot be difficult when the underlying facts are undisputed.

[70] Record, p 84.

[71] Record, p 89.

was being deliberately inflicted. The Chief addressed the fact that the complaint appeared to be premised on the assumption that the respondent had acted in a biased or partial way against AB due to their previous interaction. He rejected this, indicating that he found insufficient evidence to support such a view. The Chief pointed to evidence that the respondent moved AB to the police vehicle, which was parked on or close to the street. He said that, based on the available evidence, it would be very difficult to prove that the respondent intended to deliberately embarrass AB solely on the basis of subjective interpretations of his tone or facial expressions.

[74] In our view, this conclusion was not reasonable. The Chief recognized that it would be discreditable conduct for the respondent to have deliberately embarrassed AB. However, he did not explore whether there was sufficient information to support a hearing on that issue. There was, in our view, sufficient information before the Chief that such a conclusion could be drawn by a presiding officer. In these circumstances, the Chief unreasonably decided that there was insufficient evidence to support this allegation.

[75] In addition, this allegation is a stark example of why the Chief's narrow articulation of the allegations made it difficult for him to examine the complaint as a whole. While the Chief quite reasonably acknowledged that a failure to minimize a suspect's embarrassment is not a disciplinary offence, he also acknowledged that this would be different if "the embarrassment was being deliberately inflicted by an officer" or specifically in the case of the respondent and AB, the behavior was "intended to deliberately embarrass AB". Having said that, however, the Chief then concluded that this portion of the appellant's complaint was "premised in part on the assumption" that the respondent was motivated by bias due to his previous interactions with AB, and discounted that issue as irrelevant because of his earlier disposition on that allegation. However, his earlier disposition on that narrowly-worded allegation was, essentially, that an improper motive could not render a lawful detention or arrest unlawful. By his articulation of this allegation, the Chief made "smirking" the key issue to be considered – a behaviour that, as the Chief noted, would be almost impossible to ever prove. Given the actual complaint made and the information before the Chief, this articulation of the allegation was, in the Board's view, unreasonably narrow.

[76] In our view, the issue of the respondent's motive, or possible bias, and how that could have impacted this entire incident, and specifically whether that motive may have impacted all of the unorthodox events related to the incident, could have been, and ought to have been, part of what the Chief examined for discreditable conduct.

Unnecessary use of force (allegation 13)

[77] This allegation was that the respondent's use of force during AB's arrest was excessive. The appellant argued, first, that the use of any force was unlawful because the respondent did not have grounds to detain or arrest AB, and, second, that there was conflicting evidence about the amount of force used and that the Chief ought not to have weighed this evidence.

[78] AB told PSB that the respondent had touched his right shoulder with enough force to turn him around to face the respondent, but he mentioned nothing more serious than that. The respondent told PSB he had placed a hand on AB to "direct" him, but there was no other physical contact between them. For her part, the appellant alleged that she saw the respondent "grab" AB by his right shoulder and then "restrain" him for handcuffing. There is no dispute that, at one point, the respondent called for handcuffs, but backed off when Cst. Davis and Cst. Countryman did not produce handcuffs and AB said he was not resisting.[72]

[79] The Chief characterized the appellant's main concern as whether the respondent lawfully used force in detaining AB, more so than whether the degree of force used was lawful or necessary.[73] It is clear, however, that the Chief also believed that all of the evidence suggested that any force used was "minimal". Given his conclusion that there was no reasonable prospect of conviction for unlawful arrest, the Chief concluded that there was no such prospect regarding the amount of force used. The Chief concluded that "any force used was minimal" and then concluded that the use of force was justified given the circumstances.

[80] Regarding allegation 13, it is unclear from his disposition letter whether the Chief made a finding of fact about the level of force actually used by the respondent. The Chief did say that the amount of force used was "minimal". However, the Chief primarily made his decision on allegation 13 on the basis of his earlier finding that the respondent had "articulable grounds to proceed with detention and with arrest for a suspected case of impaired driving".

[81] As with allegation 6, it cannot be determined what the Chief actually decided. The Chief purported to have dealt with the allegation pursuant to s 45(3) of the Act (*i.e.* whether there is or is not a reasonable prospect of establishing the facts necessary to obtain a conviction at a hearing), but also suggested he may have formed the opinion necessary to dispose of the complaint pursuant to s 45(4) of the Act (*i.e.* that the alleged allegation is not of a serious nature). Accordingly, as with allegation 6, the Board remits this allegation to the Chief so that he can say what he actually decided.

[72] Record, p 17.
[73] Chief's decision, record, p 932.

CONCLUSION

[82] To sum up, we conclude that the Chief performed his screening role appropriately, and reached a reasonable conclusion in assessing allegations 2, 4, 5, and 8. We also find that his decision on those allegations is reasonable in view of the information before him at the time he made that decision.

[83] We find that the Chief exceeded his screening role and reached an unreasonable decision on the merits of allegations 1, 3, and 7.

[84] In addition, we find that the Chief failed to fully or reasonably articulate what he had actually decided in relation to allegations 6 and 13, and therefore remit the matter to him to that extent, so that he can provide reasons.

[85] Accordingly, under s 20 of the Act, we make the following directions:

1. The Chief's disposition regarding allegations 2 (neglect of duty), 4 (deceit), 5 (neglect of duty), and 8 (deceit) is upheld and the appeal is to that extent dismissed.

2. The Board allows the appeal in part, specifically in relation to allegation 1 (unnecessary or unlawful exercise of authority), allegation 3 (unnecessary or unlawful exercise of authority), and allegation 7 (neglect of duty), and therefore under s 20(2)(b)(iii) of the Act, directs the Chief to lay the following charges against the respondent under the PSR, and under s 20(2)(b)(ii) of the Act further directs that a disciplinary hearing be held under s 45(3) of the Act respecting the following charges:

    (a) Cst. D. Woodburn (No. 2045) committed unlawful or unnecessary exercise of authority contrary to s 5(2)(i)(i) of the *Police Service Regulation*, exercising his authority as a police officer when it is unlawful or unnecessary to do so, when he detained and arrested AB when he knew, ought to have known, or was wilfully blind, as to whether AB was demonstrating signs of impairment sufficient to constitute lawful grounds for the arrest.

(b) Cst. D. Woodburn (No. 2045) committed discreditable conduct contrary to s 5(2)(e)(viii) of the *Police Service Regulation*, by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service, when he arrested AB for a personal motive related to his previous interaction with AB.

(c) Cst. D. Woodburn (No. 2045) committed discreditable conduct contrary to s 5(2)(e)(viii) of the *Police Service Regulation*, by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service, when he arrested AB in a manner deliberately intended to cause embarrassment to AB, for a personal motive related to his previous interaction with AB.

3. The Board allows the appeal in part, specifically in relation to allegation 6 (neglect of duty) and 13 (unlawful or unnecessary exercise of authority), and under s 20(2)(b)(v) of the Act, remits these allegations to the Chief and directs the Chief to provide a further disposition letter pursuant to s 47(5)(d) of the Act, specifically answering the following questions:

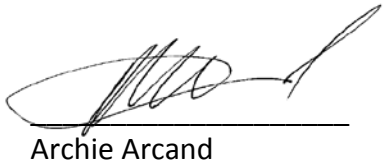
(a) In the Chief's view, was the failure of Cst. D. Woodburn (No. 2045) to tell BC why AB was being detained, despite repeated requests for this information, an alleged contravention that is "not of a serious nature" pursuant to s 45(4) of the Act? Alternatively, what information supports his finding pursuant to s 45(3) of the Act that there was "no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing", in light of the fact that the respondent agreed that he did not provide this information to BC, and did he have jurisdiction to order a supervisory review?;

(b) In the Chief's view, was the level of force used by Cst. D. Woodburn (No. 2045) when he arrested AB so "minimal" that the alleged contravention is "not of a serious nature" pursuant to s 45(4) of the Act? Alternatively, what information supports his finding pursuant to s 45(3) of the Act that there was "no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing"?

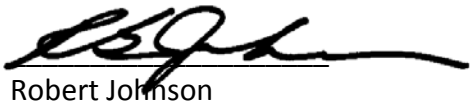
Edmonton, Alberta

July 7, 2015

David Loukidelis QC
Chair



Archie Arcand
Member



Robert Johnson
Member

For the appellant: E. Norheim
For the respondents: L. Harris
For the Chief of Police: D. Cranna