



## ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *Shah v Edmonton (Police Service)*, 2019 ABLERB 017

Date: 20190718

**Appellant:** Abdullah Shah

**Respondent:** Chief of Police, Edmonton Police Service

**Officers:** Cst. M. Zacharuk (No. 2190), Cst. M. Dahl (No. 2840), Cst. D. McDonald (No. 2493), Cst. D. Johnston (No. 3406)

**Panel Members:** Geeta Bharadia, QC, Lise Zarb, Damien Lachat

**Summary:** The appellant was stopped by EPS in a no stopping zone. One passenger, who was sitting behind the appellant was told to remain in the vehicle. One respondent officer allegedly made inappropriate comments while interacting with the appellant and asking for his documents. The respondent allegedly asked to search the vehicle, making false statements about the consequences of not being allowed to search, including arrest. The reason for the traffic stop was in error, as the no stopping zone was not in effect. The Chief investigated eight allegations and dismissed all except one allegation of discreditable conduct which he found to be not serious pursuant to section 45(4) of the *Police Act* and issued an official warning. The Board determined the Chief's disposition was reasonable except with respect to one allegation of unlawful or unnecessary exercise of authority which the Board directed to a disciplinary hearing.

**Authorities Considered:** *Pelech v Law Enforcement Review Board*, 2010 ABCA 400; *Land v Law Enforcement Review Board*, 2013 ABCA 435; *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124; *Simic v Edmonton (Police Service)*, 2015, ABLERB 14; *James v Edmonton (Police Service)* 2014 ABLERB 57

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

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### INTRODUCTION

[1] On February 3, 2017 at approximately 16:24, the appellant was driving his truck, which he stated was stopped in a parking lot, but the respondents stated was in a “no parking zone” near an intersection.

[2] Respondent Zacharuk stated that because he believed the vehicle was parked illegally, he decided to verify the licence plate in the police database.<sup>1</sup> Finding that the vehicle was registered to a numbered company,<sup>2</sup> respondent Zacharuk explained that he initiated a traffic stop of the vehicle.<sup>3</sup>

[3] At the time, respondent Zacharuk was driving a police vehicle with three other officers as passengers, respondents Dahl, McDonald and Johnston.<sup>4</sup>

[4] Once the traffic stop was initiated, respondents Zacharuk and Dahl exited their vehicle. There is no record of respondents McDonald and Johnston leaving the police vehicle. Respondent Zacharuk approached the vehicle from the driver's side, while respondent Dahl approached from the passenger's side.<sup>5</sup>

[5] Two passengers, who were on the passenger's side of the vehicle exited as the traffic stop was initiated, and were not stopped.<sup>6</sup> A third passenger, DH, was seated behind the driver's seat, and respondent Zacharuk asked him to remain seated during the appellant's traffic stop.<sup>7</sup> Respondent Zacharuk then asked the appellant for his identification, which the appellant produced.<sup>8</sup> The appellant claimed that when he asked why he was being stopped, the reason given by respondent Zacharuk for the traffic stop was "because I can".<sup>9</sup> Respondent Zacharuk denied making this statement.<sup>10</sup> Further, respondent Zacharuk allegedly made a statement about "playing games", which is also disputed.<sup>11</sup>

[6] Respondent Zacharuk returned to his vehicle to verify the appellant's identification, at which point the appellant stated respondent Zacharuk ordered him to keep his window down.<sup>12</sup> Respondent Zacharuk stated that he requested the window be lowered only initially in order to communicate with the appellant.<sup>13</sup>

[7] Respondent Zacharuk returned and asked for permission to search the appellant's car, which the appellant refused. Respondent Zacharuk then stated that the appellant had a

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<sup>1</sup> Record at page 61.

<sup>2</sup> Record at page 73.

<sup>3</sup> Record at page 109.

<sup>4</sup> Record at page 65.

<sup>5</sup> Record at page 61.

<sup>6</sup> Record at page 61.

<sup>7</sup> *Ibid.*

<sup>8</sup> Complaint letter dated February 3, 2017 [Complaint letter 1], record at page 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> Record at page 61.

<sup>11</sup> Chief's disposition letter at page 3.

<sup>12</sup> Complaint letter 1, record at page 1.

<sup>13</sup> Record at page 62.

weapons ban and that he could therefore place the appellant under arrest and search him. Respondent Zacharuk also noted that the appellant had weapons prohibitions and was required to submit his cell phone to police upon demand.

[8] The appellant refused a search of the vehicle without a warrant, and noted that his phone could only be seized on condition of suspected drug activity.<sup>14</sup> The appellant alleged that respondent Zacharuk then said “I’m suspecting a lot of things” and took the documents back that he had just returned to the appellant, thereby prolonging the detention.<sup>15</sup> Respondent Zacharuk denied this, asserting that he and respondent Dahl only removed the appellant’s documents once, including his driver’s license.<sup>16</sup>

[9] The appellant claimed that upon returning to speak to him a second time, respondent Zacharuk berated him with racially loaded comments, effectively expressing hate for the appellant based on his identity, presence in this country, and his ownership of “fancy cars”.<sup>17</sup> Respondent Zacharuk denied making racist comments and stated that the comment about “fancy cars” had to do with how business owners were allowed to register their vehicles to numbered companies, but might then be more likely to be stopped.<sup>18</sup> Respondent Dahl remembered hearing the words, “fancy cars”, but could provide no additional evidence on this point.<sup>19</sup>

[10] Finding that the vehicle was insured and that no conditions of the appellant’s recognizance had been breached, respondents Zacharuk and Dahl returned to the appellant’s vehicle, returned his phone and did not proceed with a search of the vehicle.<sup>20</sup>

[11] The incident concluded at 16:37, with respondent Zacharuk issuing a warning to the appellant about parking in a “no stopping” zone, and the vehicle being linked to previous seizures. The reason for the stop was later found to be a mistake, as the “no stopping” zone was not in force at the time of the stop.<sup>21</sup>

[12] Respondents McDonald and Johnston did not exit the police vehicle during the interaction. They stated that they adopted the street check report<sup>22</sup> as their responses to the

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<sup>14</sup> Complaint letter 1, record at page 1.

<sup>15</sup> Second letter of complaint dated February 16, 2017 [Complaint Letter 2], record at page 4.

<sup>16</sup> Record at page 63.

<sup>17</sup> Complaint letter 1, record at page 2.

<sup>18</sup> Record at pages 63-64.

<sup>19</sup> Record at page 67.

<sup>20</sup> Record at page 110.

<sup>21</sup> Record at page 125.

<sup>22</sup> Record at pages 73-75.

allegations and could not corroborate any of the accusations made by the appellant.<sup>23</sup>

[13] The appellant made eight allegations of misconduct.<sup>24</sup> In his disposition, the Chief dismissed allegations 1, 2, 3, 4, 5, 7, and 8 as having no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing against the respondent(s). However, the Chief did find that there was a reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing for discreditable conduct with respect to allegation 6, which was that on February 3, 2017, respondent Zacharuk took back the appellant's documents for the sole purpose of prolonging his detention and he made comments about the appellant "playing games."<sup>25</sup> However, the Chief found that the alleged disciplinary contraventions were not of a serious nature and thus disposed of them under section 45(4) of the *Police Act* ("Act").<sup>26</sup> Respondent Zacharuk was issued an official warning<sup>27</sup> pursuant to section 19(1)(a)(ii) of the *Police Service Regulation* ("PSR").<sup>28</sup> Under section 45(4.1) of the Act, this decision is final and cannot be appealed to the Board.

[14] On August 29, 2018 the appellant filed a notice of appeal on the grounds that the investigation was unreasonable and inadequate, and that the Chief had exceeded his legitimate screening function under the PSR by electing not to send the matter to a disciplinary hearing. In particular, the notice of appeal stated that the Chief erred in his application of the law with respect to the grounds to conduct a traffic stop and in concluding that the subject officers had the authority to order the vehicle occupants to remain inside the vehicle during the traffic stop. Further, the appellant alleged that the Chief considered irrelevant factors such as the fact that DH did not make his own complaint in regards to the detention and the respondent's lack of previous disciplinary matters and cooperation with the EPS's Professional Standards Branch ("PSB"). The Chief mischaracterized respondent Zacharuk as having acted in good faith and erred in concluding that the respondent's statement to the appellant that he could be arrested if he did not consent to a vehicle search, did not meet the threshold of misconduct.<sup>29</sup>

## ISSUES

[15] The issues we must decide are as follows:

1. Whether the investigation conducted was adequate; and

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<sup>23</sup> Record at pages 57-60.

<sup>24</sup> Complaint letter 2, record at pages 4-5.

<sup>25</sup> Record at page 142.

<sup>26</sup> *Police Act*, RSA 2000, Chapter P-17.

<sup>27</sup> Record at page 143.

<sup>28</sup> *Police Service Regulation*, Alberta Regulation 356/1990.

<sup>29</sup> Notice of Appeal at pages 1-2.

2. Whether the Chief's disposition of allegations 1, 2, 3, 4, 5, 7 and 8 was reasonable.

## DISCUSSION

### Standard of Review

[16] The Courts have stated that the Board must generally apply the reasonableness standard to the chief's decision to dismiss a complaint without a hearing, which requires us to determine whether the chief's disposition was within the range of acceptable reasonable outcomes based on the facts and the law.<sup>30</sup> In considering the reasonableness of the decision, we also review it for justification, intelligibility and transparency. The Board will not substitute one reasonable outcome for another or impose its own preferred outcome.<sup>31</sup> However, if the chief exceeded his proper screening function pursuant to section 45(3) of the Act, his decision will be unreasonable.

### Civilian Oversight

[17] The Courts have stated that the Board has an independent civilian oversight mandate, which is triggered where the Board concludes that the complaint investigation process was tainted, flawed or grossly inadequate. At the same time, the Court of Appeal has made it clear that the Board owes some deference to the police chief in assessing the adequacy of the investigation.<sup>32</sup> An investigation is not required to be perfect. Just because an investigation did not turn over every stone does not make it unreasonable, in other words, tainted, flawed or grossly inadequate.<sup>33</sup>

### Whether the investigation was adequate

[18] The appellant alleged in his submissions that the investigation was tainted or biased.

[19] The Board has reviewed the investigative steps taken, which were extensive, and finds that there is no evidence of a compromised investigation. The Chief took reasonable steps to investigate the appellant's complaints. These steps were detailed in the Chief's submissions.<sup>34</sup> Specifically, explanatory reports were obtained from respondents Johnson, McDonald, Zacharuk and Dahl; further information was obtained from respondents Zacharuk and Dahl and from the appellant via telephone and email; the street check report, event chronology and motor vehicle information were reviewed; EPS procedures on Street Checks and Street Check Reporting, Bias Awareness and Management, Fair and Equitable Policing, and Discretion to

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<sup>30</sup> *Pelech v Law Enforcement Review Board*, 2010 ABCA 400 [*Pelech*] at para 25.

<sup>31</sup> *Pelech* at para 26.

<sup>32</sup> *Pelech* at paras 26 and 36.

<sup>33</sup> *Pelech* at para 40.

<sup>34</sup> Chief's submissions at pages 9-11.

Change and Alternatives were reviewed; the CPIC Query with recognizance conditions of May 3, 2018 were reviewed and the street sign restrictions were also reviewed. Further, attempts were made to get in touch with DH, the passenger in the vehicle, a key witness, but he could not be located. In the Board's view, the PSB and the Chief reasonably allocated public resources and conducted an adequate investigation. The investigation addressed the substance of the appellant's complaints.

[20] Although it is noted the investigation did take longer than would be expected, considering the record as a whole, the Board concludes that the investigation conducted by the Chief was reasonable and was not tainted, flawed, grossly inadequate or biased.

### **Was the Chief's disposition of allegations 1, 2, 3, 4, 5, 7 and 8 reasonable?**

[21] In *Land*, the Court of Appeal stated that the threshold that the chief must apply in determining whether an officer should be charged with a disciplinary offence is whether there is enough evidence before the chief that, if believed could lead a reasonable and properly instructed person to convict a police officer at a disciplinary hearing.<sup>35</sup>

[22] In *Cody*, the Court of Appeal held that the chief's screening role allows the chief to decline to send a matter to a hearing where there is no reasonable prospect of a conviction in that the evidence is so weak, contradictory, or incomplete that it is not in the public interest to hold a hearing. The Court has opined that in unusual circumstances policy reasons might dictate that a hearing is not warranted and in those circumstances the policy considerations should be set out clearly in the decision.<sup>36</sup> Below we consider whether the Chief applied the charging threshold reasonably and whether the outcome of each allegation was reasonable.

*Allegation 1: Respondents Zacharuk, McDonald, Dahl and Johnston conducted a traffic stop of the appellant's vehicle without a valid law enforcement reason.*

[23] In his disposition, the Chief reviewed the circumstances of the traffic stop. He noted that respondent Zacharuk believed the vehicle was stopped in a "no-stopping zone", and he needed to confirm the driver's identity as a search of the vehicle's licence plate yielded a registration "to a numbered company with previous vehicle seizures."<sup>37</sup> The PSB investigation confirmed that the location was a designated no-stopping zone. Respondents McDonald and Johnston adopted the street check report of respondent Zacharuk and respondent Dahl stated he was on

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<sup>35</sup> *Land v Law Enforcement Review Board*, 2013 ABCA 435 [*Land*].

<sup>36</sup> *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124.

<sup>37</sup> Chief's disposition letter at page 2.

his computer and did not see why the traffic stop was conducted.<sup>38</sup> Although it was found that the no-stopping zone was no longer in effect at the time of the traffic stop, the Chief noted this “mistaken belief [...] does not rise to the level of misconduct” and as such did not have a reasonable prospect of conviction.<sup>39</sup> He further stated that case law and common law authorized a random traffic stop in this case.<sup>40</sup>

[24] In his follow-up-letter to the original complaint, the appellant submitted that the respondents blocked the vehicle being driven by the appellant while he was parked on private property and engaged in an unlawful or unnecessary exercise of authority by conducting a traffic stop of the vehicle being driven.<sup>41</sup>

[25] The appellant submitted that the Chief “failed to specify which case law and common law supported his conclusion that Cst. Zacharuk was authorized to conduct a random traffic stop in the circumstances of the case.”<sup>42</sup> Further, he argued that the Chief failed to properly consider whether the respondents were within the scope of their authority in conducting a random traffic stop.<sup>43</sup>

[26] The appellant submitted that there was evidence that the respondents were not forthright in their motivations for the traffic stop alleging that it was in fact conducted for intelligence gathering rather than the lawful reason of a traffic stop, and in not considering this, the Chief was unreasonable in his decision.<sup>44</sup> The appellant submitted that:

1. Respondent Zacharuk initiated a “Street Check” for the purpose of intelligence gathering.<sup>45</sup>
2. Respondent Zacharuk held a personal bias against the appellant as evidenced by his comment about “fancy cars”.<sup>46</sup>
3. The respondents were part of a “Community Action Team, Violence Reduction section”,<sup>47</sup> whose mandate should have been further considered regarding its

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<sup>38</sup> Chief’s disposition letter at pages 3-4.

<sup>39</sup> *Ibid* at page 2.

<sup>40</sup> *Ibid* at page 4.

<sup>41</sup> Record at page 4.

<sup>42</sup> Appellant’s written submission at para 17.

<sup>43</sup> Appellant’s written submission at para 19.

<sup>44</sup> Appellant’s written submission at paras 28-29.

<sup>45</sup> Appellant’s written submission at para 31.

<sup>46</sup> *Ibid* at paras 32-33.

<sup>47</sup> *Ibid* at para 37.



relevance to the motivation for the stop.<sup>48</sup>

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<sup>48</sup> *Ibid* at paras 39-44.

4. Respondent Zacharuk was not acting in good faith, as evidenced by his request to search the appellant's vehicle, and by his use of profanity.<sup>49</sup>

[27] The evidence before the Chief was that the respondents believed the appellant's vehicle was stopped in a designated no-stopping zone and that given the registration of the vehicle to a corporation, verification of the driver's identity was not unreasonable.

[28] In addition to the four factors outlined above, the Board notes the appellant asserted that the fact that respondent Zacharuk made an error does not lead to the inescapable conclusion that respondent Zacharuk was acting in good faith, as the Chief appears to have reasoned; and, the use of profanity by respondent Zacharuk, taken together with his out-of-context reference to the appellant's "fancy cars," do not support a finding of good faith.<sup>50</sup>

[29] The Board agrees that respondent Zacharuk's evidence should have been considered with some caution, given the totality of the circumstances. However, being that we may only interfere with a chief's decision if it was unreasonable, and cannot substitute our own preferred outcome for the chief's disposition, we conclude that there was not enough evidence before the Chief, which if believed, could lead a reasonable and properly instructed person to convict at a disciplinary hearing. Although the appellant believed that the combination of all of these factors indicated the Chief's decision may have been unreasonable, the allegations of personal bias and intelligence gathering were not supported by the record before the Chief. As such, it is the Board's determination that the Chief's decision to dismiss this allegation falls within the scope of reasonableness.

*Allegation 2: On February 3, 2017 respondent Zacharuk unlawfully and unnecessarily ordered a passenger to remain inside your vehicle.*

[30] The complaint stated that the passenger, DH, opened the door of the vehicle but was ordered by respondent Zacharuk to stay inside the vehicle, which he did. The Chief noted that several attempts in the investigation were made to contact and interview DH, but they were unable to reach him. It was also noted that DH did not file a complaint.<sup>51</sup> The Chief found that given the respondents were in the middle of a traffic stop, which respondent Zacharuk believed to be in effect, it was reasonable for respondent Zacharuk to ask DH to stay in the vehicle for a few minutes. The traffic stop lasted for approximately 13 minutes. The Chief's view was that respondent Zacharuk was acting in good faith and there was no unlawful or unnecessary exercise of authority as no evidence on the record that the traffic stop was conducted for any

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<sup>49</sup> Appellant's written submission at paras 49-54.

<sup>50</sup> Appellant's written submission at paras 26-54.

<sup>51</sup> Record at page 139.

improper reason.<sup>52</sup> He noted that having occupants remain in the vehicle is a fundamental officer safety measure which is paramount when stopping any vehicle where the risk to officer safety is unknown. The fact that he told DH to remain in the vehicle does not amount to misconduct.<sup>53</sup>

[31] The appellant submitted that although the respondent's reasoning that DH was asked to stay in the vehicle while talking to the driver for the reason of officer safety may have been reasonable, the fact that he was required to stay for the entirety of the 13 minute incident exceeded the scope of reasonableness.<sup>54</sup>

[32] The appellant submitted that while DH himself may not have submitted a complaint on the matter, the appellant's complaint should have been investigated under section 45 of the Act.<sup>55</sup>

[33] Upon reviewing the record, there was nothing in the evidence before the Chief to indicate anything untoward occurred in relation to DH, or that the DH was kept in the vehicle for an excessive period of time. The Board's view is that the evidence supports that a reasonable effort was made to locate and interview DH and that there was no evidence before the Chief to corroborate a potential misconduct which might cause a reasonable and properly instructed person to convict at a disciplinary hearing.<sup>56</sup> In addition, the conduct in question might not rise to the level of misconduct under section 5 of the PSR that would warrant a hearing. As such, the Board finds that the Chief's decision to dismiss this allegation remains in the range of reasonableness.

*Allegation 3: Respondent Zacharuk engaged in discreditable conduct by saying "because I can" in response to the appellant's inquiry about the reason for a traffic stop.*

[34] The appellant alleged that when he asked the respondent Zacharuk why he was stopped, respondent Zacharuk stated, "because I can". Respondent Zacharuk denied making this statement. Respondents Dahl, who was on the passenger side of the vehicle, did not hear the statement being made. Respondents Johnston and McDonald remained in the police car, and it was their evidence that they did not hear respondent Zaharuk make this statement.<sup>57</sup>

[35] The appellant submitted that in choosing to prefer respondent Zacharuk's denial of the

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<sup>52</sup> Record at pages 139-140.

<sup>53</sup> Record at page 140.

<sup>54</sup> Appellant's written submission at paras 59-62.

<sup>55</sup> Appellant's written submission at para 65.

<sup>56</sup> Record at page 101.

<sup>57</sup> Record at page 140.

statement having occurred, rather than the appellant's evidence that the statement was made, the Chief was unreasonable in his decision to dismiss this allegation.<sup>58</sup> The Chief considered the respondent's evidence that the appellant was wearing a headset at the time the statement was allegedly made.

[36] There are several factors a chief is entitled to consider in order to determine whether a matter should proceed to a disciplinary hearing. In the Board's view, independent corroborating evidence is not always required and is but one factor among others to be considered by the chief in his determination. The Board's role, on appeal, is to review the chief's disposition, including the factors he has considered in reaching his disposition and the record, and determine whether the decision was reasonable. The Board cannot substitute one reasonable outcome for another or impose its own preferred outcome.<sup>59</sup>

[37] On this allegation, there were no corroborating accounts from either the respondents or other witnesses, including DH, to justify sending the matter to a hearing. In addition, the question again arises for the Board as to whether this allegation, on its own, could rise to the level of misconduct warranting a disciplinary hearing. If the statement was made, it might be considered at the less serious end of discreditable conduct, possibly warranting counselling. The Chief performed a limited and reasonable weighing of the evidence on this allegation before him, which was weak and contradictory, and found that there was no reasonable likelihood of obtaining a conviction at a disciplinary hearing for this allegation.<sup>60</sup> The Board finds that Chief's decision on this allegation was within the range of reasonable outcomes.

*Allegation 4: Respondent Zacharuk engaged in an unlawful or unnecessary exercise of authority by ordering the appellant to leave his window down.*

[38] The appellant alleged that respondent Zacharuk told him to "keep the window rolled down". The Chief considered that respondent Zacharuk stated when he approached the vehicle the appellant was wearing a headset and talking on his cell phone. He initially told the appellant to roll down his window as it was only open a few inches, and that he needed to communicate with him. Respondent Zacharuk denied telling the appellant to keep the window rolled down as he went back to his police vehicle.<sup>61</sup> The Chief concluded that the traffic stop was conducted in good faith and the allegation of directing the appellant to roll down his window in order to better communicate, did not amount to misconduct, such that a conviction could be obtained

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<sup>58</sup> Appellant's written submission at paras 68-69.

<sup>59</sup> *Pelech* at para 26.

<sup>60</sup> Record at page 140.

<sup>61</sup> Chief's disposition letter at page 5.

at a disciplinary hearing.<sup>62</sup>

[39] The appellant submitted that although none of the other respondents acknowledged hearing respondent Zacharuk tell the appellant to keep his window rolled down, the Chief's statement that their evidence "supported" respondent Zacharuk's evidence is misleading. The evidence of the other respondents was of no assistance whatsoever as they were in the police vehicle. However, this is an insufficient basis upon which to conclude that the Chief exceeded his screening role. Again, the Board questions whether such a statement, if made, could amount to misconduct under the PSR. At best, it may be considered a very minor misconduct, which on its own would not warrant a disciplinary hearing.

[40] Given the two different versions of events and no other evidence in support, and given the minor nature of the allegation, the Board's analysis leads us to the conclusion that the Chief's disposition of this allegation was within the range of reasonable outcomes.

*Allegation 5: Respondent Zacharuk committed an unlawful and unnecessary exercise of authority by informing the appellant, falsely, that he could arrest him after the appellant declined to grant him permission to search his vehicle.*

[41] In his original letter of complaint, the appellant stated that respondent Zacharuk's comment that he had the power to arrest was false and deceitful as well as an unnecessary and inappropriate exercise of authority.<sup>63</sup> In the second letter of complaint, the appellant alleged he had "committed deceit by informing [the appellant], falsely that he could arrest him".<sup>64</sup>

[42] In his disposition, the Chief acknowledged respondent Zacharuk's statement that the appellant could be arrested if he did not consent to a search of his vehicle for weapons, was a misinterpretation of the conditions of the appellant's Recognizance. The appellant was bound by a condition to turn over his cell phone together with the pass code, but the Chief stated respondent Zacharuk "would not have had the grounds to search the vehicle for weapons" as there was no search provision in the Recognizance.<sup>65</sup>

[43] The Chief went on to state that in determining the disposition of this allegation, he took into account "Cst. Zacharuk's cooperation with PSB and his lack of any previous disciplinary matters", and that it was relevant that the appellant's vehicle was not searched by respondent Zacharuk.<sup>66</sup>

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<sup>62</sup> Chief's disposition letter at page 6.

<sup>63</sup> Record at page 2.

<sup>64</sup> Record at page 4.

<sup>65</sup> Chief's disposition letter at page 6.

<sup>66</sup> Chief's disposition letter at page 6.

[44] This allegation was articulated and investigated by the Chief as falsely stating that the appellant could be arrested after he declined permission to search. He then disposed of the allegation as having no reasonable prospect of establishing the facts necessary to obtain a conviction for unlawful and unnecessary exercise of authority rather than deceit.<sup>67</sup>

[45] The Chief's submissions stated that the Chief is the one granted jurisdiction to investigate complaints and he has the primary role in conducting investigations and further, that it is his role to characterize the complaints under the various types of misconduct set out in the PSR.<sup>68</sup> It states that an allegation of falsely stating police powers falls within the misconduct of unlawful or unnecessary exercise of authority and therefore, it was reasonable for the Chief to frame it this way.<sup>69</sup>

[46] The appellant argued that the Chief's disposition of allegation 5 was not reasonable on the following grounds:

1. Respondent Zacharuk stated incorrectly that the appellant could be arrested for denying permission to search the vehicle, which fell under the PSB's definition of deceit in section 5(2)(d)(ii): "willing fully or negligently making or signing a false, misleading or inaccurate statement pertaining to the police officer's official duties (emphasis added)."<sup>70</sup> The Chief did not consider the allegation of deceit even though it was specifically set out in the complaint. The definition of deceit under the PSR encompasses an inaccurate statement that was made negligently and is not limited to a wilful statement.<sup>71</sup> Regardless of whether respondent Zacharuk was intentionally misleading the appellant as to his obligation to submit to a search or whether this a result of ignorance on his part, such misleading statement amount to "deceit" under the PSR.<sup>72</sup>
2. Further, the conduct also amounted to "unlawful or unnecessary exercise of authority" on the part of respondent Zacharuk – as the Chief chose to frame the allegation. Respondent Zacharuk based his search request on the appellant's release conditions to provide access to his cell phone and not possess any weapons, which did not reasonably support the need for a vehicle search.<sup>73</sup> The alleged statement

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<sup>67</sup> Chief's written submission at para 31.

<sup>68</sup> Chief's written submission at para 32

<sup>69</sup> Chief's written submission at para 33

<sup>70</sup> Appellant's written submission at paras 76-80.

<sup>71</sup> Appellant's written submission at para 80.

<sup>72</sup> Appellant's written submission at para 84-85

<sup>73</sup> Appellant's written submission at para 84.

made by respondent Zacharuk served no other purpose but to demonstrate police authority over, and power to arrest the appellant.

3. The Chief erred in his decision to further describe the incident as a “misinterpretation”, rather than an unlawful or unnecessary exercise of authority, using respondent Zacharuk’s “cooperation with PSB and lack of previous disciplinary matters” as the basis for his dismissal of the allegation.<sup>74</sup> The Chief, therefore, implicitly concluded that it was a simple mistake without moral culpability rather than remitting the matter of whether respondent Zacharuk’s false statement to a presiding officer for a hearing.<sup>75</sup>
4. The appellant submitted that respondent Zacharuk could not have been said to be cooperative as he originally agreed to mediation with the appellant, only to withdraw his participation when it was confirmed that no recording of the incident was present.<sup>76</sup>
5. Further, the appellant submitted that there had been previous accounts of respondent Zacharuk exhibiting unprofessional behaviour to marginalized groups, and that as such, he could not have been said to have had no previous disciplinary matters.<sup>77</sup>
6. The Chief did not show any signs of following the PSB investigator’s recommendation that respondent Zacharuk receive additional training and guidance in regards to interpreting Recognizance conditions, which called into question respondent Zacharuk learning to avoid such mistakes reliably.<sup>78</sup>

[47] In *Simic*, the Board adopted the following analysis of the Chief’s screening role:

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 the evidence but must not stray beyond the screening function and

<sup>74</sup> Appellant’s written submission at paras 86-91.

<sup>75</sup> Appellant’s written submission at paras 86-90.

<sup>76</sup> *Ibid* at paras 92-97.

<sup>77</sup> *Ibid* at paras 98-101.

<sup>78</sup> *Ibid* at para 103.

dispose of a complaint's merits without a hearing.<sup>79</sup>

[48] In his investigation and disposition, the Chief chose to characterize respondent Zacharuk's alleged act of falsely informing the appellant that he could arrest him after the appellant declined to grant him permission to search his vehicle as "unlawful or unnecessary exercise of authority" under section 5(2)(i) of the PSR rather than 'deceit', as defined in section 5(2)(d) of the PSR. The Board notes that proving unlawful exercise of authority as opposed to deceit, would arguably be easier for an appellant.

[49] The Board considered that the Chief bears the initial responsibility for framing and investigating the allegation and the Board will not lightly interfere. The Chief has discretion to manage the internal disciplinary process under sections 43(4) and 45(1) of the Act which state:

43(4) On receipt of a complaint under subsection (1), the chief of police shall determine whether the complaint or a portion of the complaint is a complaint as to

(a) the policies of or the services provided by the police service, or

(b) the actions of a police officer.

...

45 (1) Where a complaint is a complaint as to the actions of a police officer other than the chief of police, subject to sections 43 and 43.1, the chief shall cause the complaint to be investigated.

[50] In reviewing the Chief's exercise of his authority to categorize complaints, the Board considered whether the Chief captured the crux of the complaint made and whether the investigation included a reasonable inquiry into the substance of the allegation, upon which the Chief could reasonably dispose of it. In the Board's view, the Chief's characterization in this instance, captured the substance of the complaint. The Board will therefore consider the PSR misconduct of "unlawful or unnecessary exercise of authority" in considering the reasonableness of the Chief's disposition of allegation 5.

[51] In performing his screening function, the Chief's role was to determine if there was enough evidence, which if believed, could lead a reasonable and properly instructed person to convict the respondent of "unlawful or unnecessary exercise of authority" for stating that he could search the vehicle or arrest the appellant, when he had no authority to do so. The Board observes that while the Chief did refer to his proper screening function in his disposition, he exceeded his screening function by taking into account factors that were not relevant to the

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<sup>79</sup> *Simic v Edmonton (Police Service)*, 2015, ABLERB 14 at para 21 citing *James v Edmonton (Police Service)*, 2014 ABLERB 57 at para 14 and *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124 [Cody].



allegation. In considering respondent Zacharuk’s cooperation in the investigation and his lack of any previous disciplinary matters, the Chief strayed outside of the investigation into whether there was sufficient evidence to send the matter to a hearing, and considered factors which might be relevant to penalty, not sufficiency of the evidence. Prior history of previous disciplinary matters and cooperation with an investigation are not part of the Chief’s screening function. The test the Chief has been directed by the courts to apply was, “whether there is enough evidence, which, if believed, could lead a reasonable and properly instructed person to convict at a disciplinary hearing.”<sup>80</sup>

[52] The Chief clearly acknowledged that there was a concern with respondent Zacharuk understanding and following the scope of the Recognizance, yet the Chief minimized the seriousness of this evidence and proceeded to dismiss the allegation as a “misinterpretation” issue. In doing so, he favoured and put undue weight on extraneous factors, such as respondent Zacharuk’s cooperation with the investigation and his previous disciplinary record. He seems to have downplayed or dismissed potentially serious and unprofessional conduct. The recommendation of additional training and guidance for respondent Zacharuk as recommended by the PSB investigator, was ignored. In reviewing allegation 5, the Board is concerned that a police officer advising a civilian that he has the power to proceed with an arrest and a search, without a warrant, when he did not have the lawful authority to do so, could potentially cause an unknowing civilian to consent to or comply with an otherwise unreasonable or unjustifiable search, which could lead to a *Charter* breach. Adequate training and supervision of the powers to search and arrest, which are extraordinary powers afforded an officer, should be provided and officers should be trained and counselled to exercise caution and due diligence in exercising such powers.

[53] As a result, even allowing for a limited weighing of the evidence, the Board finds that the Chief exceeded his screening function and unreasonably concluded that there was no reasonable prospect of a conviction for unlawful and unnecessary use of authority for the impugned statements. The Board therefore directs that a disciplinary hearing be held on allegation 5, with respect to the allegation that respondent Zacharuk exercised unlawful and unnecessary use of authority by falsely stating to the appellant that respondent Zacharuk could search the appellant’s vehicle and arrest him, after the appellant declined to grant the respondent permission to search the vehicle.<sup>81</sup>

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<sup>80</sup> *Land* at p. 13.

<sup>81</sup> In the Chief’s disposition letter, he states that allegation 5 is not appealable; however, that appears to be an error as this allegation was disposed of under section 47(5) of the Act.

*Allegation 7: Respondent Zacharuk engaged in discreditable conduct by commenting that “you fucking come to this country ... you will see a lot of me” and “It’s people like you that come to this country that I hate,” thereby differentially applying the law or exercising his authority on the basis of the appellant’s place of origin.*

*Allegation 8: Such comments manifest a blatant disregard for the EPS Policy OP2-1PR “Bias Awareness and Management Procedure”, and amount to insubordination.*

[54] Allegations 7 and 8 were addressed collectively by the appellant and the Chief in their submissions and are addressed by the Board in the same manner.

[55] The appellant alleged that respondent Zacharuk made the alleged racist comments, whereas the respondent denied making the alleged comments. The Chief noted that respondent Zacharack stated he was aware of the EPS Bias and Awareness Management Procedure and denied that he breached this policy. He further considered that respondent Zacharuk was aware that the appellant once owned luxury type vehicles and respondent Zacharuk stated he advised the appellant that business owners are entitled to register their vehicles to their company, including their fancy cars, and that this could increase “those people’s” chances of being stopped by police. The appellant then asked what respondent Zacharak meant by “those people”.<sup>82</sup>

[56] The appellant submitted that insufficient analysis of the appellant’s evidence was conducted.<sup>83</sup> He further submitted that given the serious nature of the comments, the Chief exceeded his screening function in not allowing the matter to proceed to a hearing. He submitted that only matters that were “incredible” or “baseless” could be dismissed without a hearing.<sup>84</sup>

[57] Further, the appellant pointed to the fact that while none of the respondents could corroborate the details of the aforementioned comments, the responses from respondents Johnston and McDonald were “so evasive that they are useless to ascertain any of the facts”, but that respondent Dahl did recall the comment “fancy cars”.<sup>85</sup> This seemed to indicate that at least some evidence existed to give basis to “unorthodox conduct” as this comment appeared out of place.<sup>86</sup>

[58] Finally, the appellant submitted that given the serious nature of such comments and the

<sup>82</sup> Chief’s disposition letter at page 8.

<sup>83</sup> Appellant’s written submission at paras 106-107.

<sup>84</sup> *Land* in appellant’s written submission at paras 107-111.

<sup>85</sup> Appellant’s written submission at para 115.

<sup>86</sup> *Ibid.*

potential impacts on the broader community if in fact respondent Zacharuk did exhibit on-going

prejudicial behaviour, the Chief should have investigated this matter further, and as such did not act reasonably.<sup>87</sup>

[59] The Chief stated that the alleged racist comments could not be corroborated by any other respondents. Respondent Dahl stated he heard the comment “fancy cars”, although he was unable to offer any context to the comment. As such, there was no independent evidence to support most of this allegation, except to reference the appellant owning fancy cars. The Chief disposed of the matter as lacking sufficient evidence for a reasonable and properly instructed person to convict for discreditable conduct at a disciplinary hearing.<sup>88</sup>

[60] The respondents submitted that the Chief did not exceed his screening function, as “where the evidence is so weak or contradictory that there is no reasonable prospect of conviction, the Chief may dismiss the complaint without a hearing.”<sup>89</sup>

[61] The Chief considered the evidence that respondent Zacharuk was aware of the EPS Bias and Awareness Management Procedure Management policy and denied making the inappropriate racist statements. Although there was evidence that respondent Dahl heard mention of “fancy cars”, there was no other corroborating evidence that the respondent made the other statements. While the comments, if they were made, would indeed be concerning, the Chief is not required to turn over every stone in his investigation, and it is clear that reasonable attempts were made to locate the passenger as a key witness to determine whether there was any corroborating evidence, but none was obtained. Although there may have been “unorthodox conduct” and a reference to “fancy cars”, with evidence that was “so weak and/or contradictory”, it was unlikely that a reasonable and properly instructed person could convict the respondent of discreditable conduct at a disciplinary hearing, it was within the range of reasonable outcomes for the chief to dismiss the allegation.

[62] The Board has determined that, given the limited evidence available on the record, the Chief’s decision fell within the range of reasonable outcomes on the evidence before him.<sup>90</sup>

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<sup>87</sup> *Ibid* at paras 124-128.

<sup>88</sup> Chief’s disposition letter at page 8.

<sup>89</sup> Respondent’s written submission, at paras 35, 102.

<sup>90</sup> The Board wishes to comment that references to ADR or specifically, mediation, having occurred, are acceptable, but any reference to what occurred in these processes, or why they were unsuccessful, such as one party withdrawing, should not be detailed in Chief’s dispositions or in any parties’ submissions on appeal. These processes are confidential and that confidentiality must be protected.

**CONCLUSION**

[63] The appeal of allegations 1, 2, 3, 4, 7 and 8 is dismissed.

[64] With respect to allegation 5, pursuant to section 20 of the Act, the Board directs that the Chief lay the following charge and direct that a disciplinary hearing be held:

Charge 1: Respondent Zacharuk (No. 2190) committed unlawful or unnecessary exercise of authority contrary to section 5(1)(d) of the PSR by falsely stating to the appellant that he could search the appellant’s vehicle and arrest him, after the appellant declined to grant the respondent permission to search his vehicle without a warrant.

[65] For the reasons given above, the appeal is allowed in part.

Edmonton, Alberta

July 18, 2019

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Geeta Bharadia, QC  
Presiding Member

\_\_\_\_\_  
Lise Zarb  
Member

\_\_\_\_\_  
Damien Lachat  
Member

For the appellant: E. Norheim  
For the respondents: L. Harris  
For the Chief of Police: K. Agnihotri