ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *Mutch v Edmonton (Police Service)*, 2018 ABLERB 004

Date: 20180115

Appellant: Justin Lee Mutch

Respondent: Chief of Police, Edmonton Police Service

Officers: S/Sgt. R. Koshowski[1] (No. 1830), S/Sgt. S. Kingma (No. 1829), Sgt. M. Hickey (No. 2245), Cst. M. Davie (No. 2999), Cst. P. Lee (No. 3017), Cst. C. Mulrooney (No. 3442), Cst. D. Smith (No. 2335), Cst. A. Szawlowski (No. 3568), Cst. D. Tames (No. 2545), Cst. T. Van der Loop (No. 3218), Cst. D. Williams (No. 2929), Cst. B. LeBritton (No. 3561), Cst. G. Florence (No. 3341), Cst. A. Melney (No. 3265), Cst. J. Wedman (No. 3477), Cst. S. Baragar (No. 3082)

Panel Members: Geeta Bharadia QC, Archie Arcand, Rosetta Khalideen

Summary: The appellant attended an Edmonton Oilers hockey game where he became intoxicated leading to his arrest and detention by the Edmonton Police Service (EPS). During this time, the appellant struggled and was uncooperative. He made a complaint in which he alleged that the EPS breached a number polices when they arrested and detained him. The appellant also argued his *Charter* rights were violated as he was not cautioned or provided with the opportunity to speak to a lawyer. The Chief of Police dismissed all 24 of the allegations and the appellant appealed to the Board. The appellant further alleged that the Board's civilian oversight mandate is engaged as the PSB investigation was tainted, flawed and grossly inadequate. The Board dismissed the appeal, finding that the PSB investigation was not compromised so as to engage the Board's civilian oversight mandate. The Chief's disposition was within the range of reasonable outcomes on all allegations.

Authorities Considered: *Mutch v Edmonton (Police Service),* 2017 ABLERB AP 06; *Edmonton (Police Service) v Furlong*, 2013 ABCA 121; *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187; *Pelech v Law Enforcement Review Board*, 2010 ABCA 400; *R v Latimer*, [2001] 1 SCR 3; LERB Decision 030-2011; LERB Decision 030-2011; *Campeau v Edmonton (Police Service)*, 2017 ABLERB 15;

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

INTRODUCTION

[1] The appellant and a friend were at an Edmonton Oilers hockey game at Rexall Place on December 28, 2013. The appellant undoubtedly became quite intoxicated during the game. He

[1] At the hearing on September 20, 2017, counsel for the respondents advised that S/Sgt. Koshowski has retired from the EPS. As such, the Board has no jurisdiction regarding S/Sgt. Koshowski.

became frustrated and agitated and, as the game went into overtime, he was escorted out of the rink area by security. He was then passed over to respondents Van der Loop and Lee so he could be escorted out of the building. He was later arrested and detained by the Edmonton Police Service ("EPS").

[2] On March 27, 2014, through his counsel, the appellant made a complaint to the Chief of Police about his treatment, about breaches of policy and the *Charter* during his arrest and detention. The complaint referenced an earlier email of January 8, 2014.[2] The complaint was dismissed by the Chief of Police and the appellant appealed to this Board.

[3] The appellant had later said that he became frustrated that the respondents, who were escorting him out of the building, were not listening to him and not allowing him to contact his friend, who was still at the game. They escorted him out of the building and he allegedly grabbed the lapels of one of the respondents. The respondents decided to "take him down".[3] The appellant believes he was handled roughly by respondent Lee conducting a foot sweep, and the appellant alleges he fell head-first onto a hard surface while respondents were holding each of his arms.[4] The appellant alleged that in the investigation, respondent Van der Loop indicated that he tried to brace the appellant's fall, but this was neither mentioned in his notes or report nor in Respondent Lee's report or interview.[5] As a result of falling face first, the appellant stated his glasses were pushed into his face, causing deep bruises around his eyes. The appellant submitted he likely sustained a concussion. The appellant stated that he was then handcuffed without respondents Van der Loop and Lee advising him of the reason for his arrest or of his *Charter* rights, and he was not given an opportunity to speak to a lawyer.[6]

[4] After he was arrested, the appellant was taken to a holding room in Rexall Place. Respondents Tames, Davie, Smith and Hickey were in the holding room. The appellant stated that none of them advised him why he was being detained or of his *Charter* rights, and he was not permitted to call a lawyer despite his request to do so.[7] It is alleged by the respondents that the appellant tried to bite one of them and was intoxicated, uncooperative and nonsensical. The appellant does not recall being in the holding room.[8] When the appellant was escorted to the police van, the respondents alleged, he refused to walk and had to be dropped to the ground several times. Respondents Davie and Tames indicated that they were unable to get any

[2] Chief's disposition letter at page 1.
[3] Record at page 325.
[4] Appellant's written submissions at para 7.
[5] Appellant's written submissions at para 8.
[6] Appellant's written submissions at para 9.
[7] Appellant's written submission at para 10.
[8] Appellant's written submissions at para 11.

information from the appellant, so he was taken to the downtown EPS cells.[9] The appellant stated that he did not recall this, but did recall being dropped multiple times from the van into the cells.[10] Respondent Hickey submitted a control tactics report outlining that he had used a force method known as a joint manipulation when escorting the appellant to the van. [11]

[5] The appellant stated that once he was in the van he was disoriented. The respondents alleged the appellant was flailing, kicking his legs, and kicked respondent Davie in the face and respondent Szawlowski in the leg.[12] Respondent Davie stated that he responded by conducting elbow drops to the appellant's chest, face and head as hard as he could.[13] The appellant stated that he does not remember elbow strikes and only remembers falling asleep in the van.[14] After the appellant was taken away, he was charged with two counts of assaulting a peace officer.[15]

[6] The appellant arrived at the holding cells at approximately 11:30 p.m. The respondents present removed the appellant from the van. The appellant claimed they placed a spit mask over his head, which caused him to panic.[16] The appellant stated that respondents Szawlowski, Melney, Williams and Wedman responded to him trying to walk by forcefully carrying him by his legs and handcuffs into a cell, which was painful.[17] He alleged, the respondents held him down, and kneeled or stood on the appellant's back, thighs, ankles, legs, and throat, which caused him extreme pain. The appellant stated that he blacked out and woke up to an officer kneeling on his head.[18] The respondents chained the appellant to the wall and left him in the cell with his hands handcuffed behind his back, tied tightly enough to cause pain and loss of sensation in his hands and arms.[19] Respondent Kinsgma approved the charges and the use of the cell chaining.[20]

[7] At approximately 12:00 a.m., the appellant was informed by respondent Mulrooney[21] of the charges against him and was read his section 10(b) *Charter* rights. The appellant stated he

[9] Appellant's written submissions at para 12.
[10] Appellant's written submissions at para 12.
[11] Appellant's written submissions at para 13.
[12] Appellant's written subissions at para 15.
[13] Appellant's written submissions at para 15.
[14] Appellant's written submissions at para 16.
[15] Appellant's written submissions at para 17.
[16] Appellant's written submissions at para 19. It was noted in the submissions from counsel at the hearing that there is conflicting information in the record of when the spit mask was likely placed on the appellant *i.e*. whether it was at Rexall Place or when the appellant arrived at the downtown holding cells.
[17] Appellant's written submissions at paras 19-20.
[18] Appellant's written submissions at para 22.
[19] Appellant's written submissions at para 23.
[20] Appellant's written submissions at para 24.
[21] Respondent Mulrooney now goes by the last name Dickner, however, for the purposes of this matter the Board will use her maiden name which she was known by at the time the complaint was made.

wanted to speak with a lawyer. He was given this opportunity at 3:20 a.m.[22] At 12:30 a.m., the appellant said that he needed to use the washroom, but despite his requests he was not permitted to do so, which led him to urinate on himself in the cell.[23]

[8] The appellant stated that he was left in the cell for nearly three hours, in breach of EPS policy.[24] He eventually signed an undertaking and a promise to appear, and was released from police custody at approximately 4:30 a.m.[25]

[9] The appellant further stated that he was described by the respondents in a dehumanizing way, as they called him "zoo animal" and "gorilla", and the respondents were laughing at him.[26]

[10] The Chief identified the following allegations for investigation:

- Allegation 1: Unlawful and unnecessary exercise of authority – use of force due to rough handling by respondents Van der Loop and Lee on the detention of the appellant at Rexall Place;

- Allegation 2: Unlawful and unnecessary exercise of authority – respondents Van der Loop and Lee did not have the authority to arrest the appellant;

- Allegation 3: Unlawful and unnecessary exercise of authority – unidentified officer tackled the appellant from behind while being escorted out of Rexall Place;

- Allegation 4: Unnecessary use of force – respondents Hickey and Davie used unnecessary force while the appellant was in the holding room in Rexall Place;

- Allegation 5: Unlawful and unnecessary exercise of authority – unlawful detention by respondents Hickey, Tames, Davie and Smith at Rexall Place;

- Allegation 6: Unlawful and unnecessary exercise of authority – unknown officer tried to "taze" the appellant while inside the police van at Rexall Place;

[22] Appellant's written submissions at para 25.
[23] Appellant's written submissions at para 26.
[24] Appellant's written submissions at para 27.
[25] Appellant's written submissions at para 28.
[26] Appellant's written submissions at para 29.

- Allegation 7: Unlawful and unnecessary exercise of authority – unknown officer placed a "bag", *i.e*. a spit mask over the appellant's head when he arrived at Downtown Division;

- Allegation 8: Discreditable conduct – unknown officer kneed the appellant in the back of the legs while being escorted to Downtown Division;

- Allegation 9: Unknown officers laughing at the appellant while being escorted to Downtown Division cells;

- Allegation 10: Unlawful and unnecessary exercise of authority – unknown officers carrying the appellant by the legs and handcuffs to Downtown Division cells;

- Allegation 11: Unlawful and unnecessary exercise of authority – unknown officers unnecessarily knelt on the appellant's back, thighs, ankles, legs, throat and head while he was being searched;

- Allegation 12: Unlawful and unnecessary exercise of authority – respondents Mulrooney and Szawlowski created cruel and unusual conditions for the appellant's detention, which included being handcuffed to the wall for three hours and denying him the use of a toilet;

- Allegation 13 : Neglect of duty – the appellant was not immediately informed of his *Charter* rights while detained at Rexall Place by respondent Van der Loop or other officers he was handed over to;

- Allegation 14: Neglect of duty – the appellant was not immediately advised of his *Charter* rights when he was taken to Downtown Division;

- Allegation 15: Neglect of duty – the appellant was not provided the opportunity to speak to counsel until approximately three hours after he was arrested;

- Allegation 16: Neglect of duty – use of force review conducted by respondent Hickey was inadequate;

- Allegation 17: Insubordination – respondent Hickey violated policy by conducting a use of force review in a matter where he used force and was directly involved in the use of force;

- Allegation 18: Neglect of Duty – respondents Koshowski and Kingma violated EPS policy by approving the use of force review done by respondent Hickey;

- Allegation 19: Neglect of duty – some respondents involved in the incident failed to make proper notes and reports;

- Allegation 20: Deceit – some respondents included false information in their notes or reports;

- Allegation 21: Neglect of duty – some of the respondents' reports were not submitted in a timely manner;

- Allegation 22: Deceit – the police caused a prosecution to proceed despite knowing there were no reasonable grounds to believe an offence had been committed by the appellant;

- Allegation 23: Neglect of duty – the respondents involved with the appellant failed to collect and preserve CCTV footage from Rexall Place; and

- Allegation 24: Discreditable conduct – the police officers at Rexall Place, respondents Van der Loop and Lee told the appellant they would notify his friends about what had happened, but they did not.

[11] On completion of the investigation, the Chief, in his disposition dated August 28, 2015, concluded that no reasonable prospect of establishing the facts for a conviction existed with respect to any of the subject officers on any of the allegations. The appellant appealed the decision to the Board by way of letter from his counsel on October 5, 2015, with respect to all allegations.

[12] Given the number of allegations, the appellant's counsel grouped the allegations differently in their written and oral submissions. Both counsel for the respondents and the Chief provided their submissions in accordance with the appellant's gouping of the allegations. This decision will follow the grouping of the allegations for ease of reference.

ISSUES

[13] The issues before the Board are:

1. Whether the investigation conducted by EPS's Professional Standards Branch ("PSB") was tainted, flawed or grossly inadequate, such that the Board's civilian oversight mandate is engaged; and
2. Whether the Chief's decision to dismiss the allegations was reasonable.

DISCUSSION

Compromised investigation

[14] The Board's function in considering an allegation of a tainted, flawed or grossly inadequate investigation is not to review the reasonableness of a decision of the Chief but to determine if its civilian oversight mandate is engaged. As directed in the Board's earlier fresh evidence application decision in this matter, the trial transcript of *R v Mutch* was entered as evidence only with respect to the argument related to whether the Board's civilian oversight mandate is engaged.[27] The Board's civilian oversight mandate is engaged where it concludes that the investigation was tainted, flawed or grossly inadequate. It will only be triggered where there is a lack of transparency in or some compromise of the process, or some other reason that may trigger the mandate.[28] The mere fact that standard of police conduct or use of force are at issue is not sufficient to trigger the mandate.[29]

[15] The appellant argued that there were several flaws in the PSB investigation that compromised the integrity and outcome, thereby engaging the Board's civilian oversight mandate.[30] The appellant's submissions and the parties' responses are discussed below.

[16] None of the respondents in supervisory roles were interviewed in person (respondents Hickey, Koshowski and Kingma) despite having played major roles in the incident. Having only written statements shows a double standard with an appearance of bias, structured to provide additional protection to supervisory officers and PSB detectives are reluctant to investigate officers of equal or greater rank.[31] The Chief submitted the Board has held that this type of

[27] *Mutch v Edmonton (Police Service),* 2017 ABLERB AP 06.
[28] *Edmonton (Police Service) v Furlong*, 2013 ABCA 121 [*Furlong*] at para 24; Chief's submissions at para 23.
[29] *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187 at paragraph 43. Chief's submissions at para 24.
[30] Appellant's written submissions at para 95.
[31] Appellant's written submissions at paras 96-97.

report is perfectly acceptable. The roles of the supervisory officers, respondents Hickey, Koshowski and Kingma, were not significant. The record shows they had marginal involvement and there is no rationale provided by the appellant as to how the use of explanatory reports has resulted in an inadequate investigation.[32]

[17] The investigator did not question why respondent Van der Loop did not say in his notes that he braced the appellant's fall after conducting a foot sweep.[33] The Chief submitted that this was not in the notes but the appellant did not suggest this omission contravened EPS policy, or why asking the question would have any bearing on the investigation.[34]

[18] At trial, the officers were each asked whether they laughed at the appellant while he was detained. In the Chief's disposition it is only mentioned that one of the respondents "chuckled" at the appellant.[35] At trial evidence was elicited whereby it was admitted that several officers were laughing and smirking during the appellant's detention. There was also evidence that officers were laughing and smiling while the appellant was being handcuffed to the wall.[36] The Chief's submissions note that the laughing issue was not set out in the appellant's letter of complaint, rather, it came up in his interview, and therefore it was added to the allegations to be investigated. The relevant officers were asked whether they laughed or smiled during the detention.[37] The trial transcript indicates that respondents Szawlowski and Williams gave evidence under cross-examination that they could not recall anyone laughing, which is consistent with their PSB interviews. There is no evidence that the investigation was deficient on this issue.[38]

[19] There was a failure to challenge or question the respondent about his version of events when respondent Davie was asked about the degree of force he used on the appellant. In the investigation he was asked about frequency and locations of the force he applied, but not the degree of force used.[39] At trial, he testified he hit the appellant as hard as he could and that, if the appellant was unconscious, that would have satisfied him as he wanted him to stop flailing. The Chief submitted that, on a standard of perfection, it may have been desirable for the investigation to have asked how hard respondent Davie struck the appellant. However, this

[32] Chief's written submissions at paras 30-31.
[33] Appellant's written submissions at para 98.
[34] Chief's written submissions at para 32.
[35] Appellant's written submissions at para 99.
[36] Appellant's written submissions at para 100.
[37] Chief's written submissions at para 34, referring also to the record at pages 552, 313, 356, 440-441, 486, 628. Respondent Davie was not asked about laughing or smiling, but his involvement ended before the detention.
[38] Chief's written submissions at paras 35-36.
[39] Appellant's written submissions at para 101.

does not render the investigation grossly inadequate.[40]

[20] Respondent Davie's dehumanizing comments about the appellant were part of the testimony at trial and in the investigation, *e.g.*, that he was a "zoo animal" and not acting "like a human being", but not mentioned in the Chief's disposition related to discreditable conduct.[41] The Chief submitted that the appellant did not complain about these comments and there was no reason for PSB to have analyzed these comments as an allegation of misconduct. [42]

[21] Despite the appellant advising PSB of the availability of the trial transcript in his letter of August 6, 2015, it was never obtained. The appellant argued that the Chief had the opportunity to retrieve it and make it part of his disposition dated August 28, 2015, and the failure to do so amounted to a negligent investigation.[43] The Chief submitted that disciplinary matters should not be delayed to await the result of related criminal trial proceedings. There is no logical relationship between criminal and civil determinations, which have different evidentiary issues and choices. The investigation was completed on January 19, 2015, long before the criminal trial in this matter started, in April 2015. The PSB had gathered all the evidence and it had been under review by outside counsel for quite some time.[44] Where PSB had comprehensive evidence on the disciplinary allegations, it is entirely reasonable not to incur the cost and delay of obtaining a trial transcript. Although the appellant's counsel wrote to PSB on August 6, 2015, suggesting the trial transcript be ordered and included, he did not say they were determinative of anything or provide PSB with a copy, so PSB did not believe it would add anything of substance to the already complicated investigation. The mere fact the transcripts were not ordered does not render the investigation grossly inadequate.[45]

[22] The Board concludes that the investigation was not tainted, flawed or grossly inadequate. There is no evidence to support lack of transparency or significant compromise. The Board notes the following:

- Explanatory notes are acceptable, especially when the supervisory officers did not have a significant or direct role in the complaint, which in the Board's view in this case they did not.

[40] Chief's written submissions at para 38.
[41] Appellant's written submissions at para 102.
[42] Chief's written submissions at para 39.
[43] Appellant's written submissions at para 103.
[44] Chief's written submissions at para 43.
[45] Chief's written submissions at paras 44-45.

- It was explained at the hearing that the issue around respondent Van der Loop's foot sweep did not become apparent until later, and when it did, the explanation that he braced the appellant's fall was provided. Although it may have been preferable for the reference to bracing the appellant to have been in respondent Van der Loop's notes, its absence did not significantly compromise this investigation.

- With respect to officers laughing at the appellant while detained, the Chief addressed this issue in his disposition in his review of allegation nine, and he did put his mind to the video in the cells. He noted that the appellant could not attribute the laughter to any particular officer or officers, and the appellant could not see which officers were laughing.[46] Further, the evidence on cross-examination at the criminal trial of the two respondent officers is consistent with their statements. In the Board's view, the investigation was not deficient with respect to this allegation.

- The Board agrees that it would have been desirable for PSB to ask respondent Davie about how hard he hit the appellant. However, questions were asked about frequency and location of the hits. Respondent Davie's interview provided details about how he hit the appellant, how many times and his statement that his elbow definitely dropped on the appellant's head. It also referenced that, after the strikes, the appellant continued to scream, yell and thrash around, resisting arrest.[47] The Chief had both the interview with respondent Davie and the use of force review of respondent Hickey as part of the record. In the Board's view, although the information may have been relevant, the omission does not render the investigation compromised.

- With respect to the alleged dehumanizing comments, the Chief noted this did not form part of the complaint and therefore, the investigation did not delve into the matter.

- The timing of the completion of the investigation was such that it was completed and forwarded to counsel for review before the letter from the appellant's counsel dated August 6, 2015, was received by PSB. The suggested importance of the transcript was not flagged by appellant's counsel and a copy was not provided to PSB or the Chief. There is no evidence on the record of lack of transparency or that the or the Chief deliberately ignored information in the trial transcript that was

[46] Chief's disposition letter at pages 12 and 15.
[47] Chief's written submissions at para 38.

> decisive of an important issue. The fact that they did not order the transcript does not render the investigation grossly inadequate.

[23] In the Board's view, although not every stone was turned, the investigation was not compromised and the Board's civilian oversight mandate is not triggered. The Chief is entitled to exercise discretion regarding the conduct and scope of the investigation, allocation of limited resources and the direction of investigative resources. The Court of Appeal in *Pelech v Law Enforcement Review Board* stated:

> Not every complaint justifies an investigation that exhausts every possible lead, and the Chief is entitled to allocate his limited resources in a reasonable way. Simply because the investigation failed to turn over every stone does not make it unreasonable. Not every complaint justifies an investigation that exhausts every possible lead, and the Chief is entitled to allocate his limited resources in a reasonable way. Simply because the investigation failed to turn over every stone does not make it unreasonable. Neither the complainant nor the Board are entitled to take over every investigation; the Chief is the one granted jurisdiction to investigate complaints. [48]

[24] The Board notes, that, as submitted by the respondents, the vast majority of the evidence in the trial transcript was included in the record and that if every piece of information is not duplicated in the record, that does not automatically render the investigation compromised. The Board concludes that the investigation conducted by the Chief was reasonable and not tainted, flawed, grossly inadequate or compromised.

[25] We will now assess the reasonableness of the Chief's disposition.

Review of Chief's decision

Standard of review

[26] The Board reviews a chief's decision to determine whether the decision falls within the range of acceptable, reasonable outcomes on the facts and law before the Chief. In reviewing a decision for reasonableness, we also look for justification, transparency and intelligibility within the decision-making process. The Chief's reasons must be read together with the outcome, as his reasons serve the purpose of helping to show whether the result falls within a range of reasonable outcomes. The Board will not substitute one reasonable outcome for another, or impose its preferred outcome.

[48] 2010 ABCA 400 at para 40.

Failure to Advise of Charter Rights and Right to Counsel (Allegations 13, 14, 15)

[27] The appellant submitted that, contrary to section 10(a) and (b) of the *Charte*r, he was not informed of the reasons for his arrest and detention at Rexall Place by any of the respondents. Further, it is alleged that the appellant was not immediately advised of his *Charter* rights upon arrival at the Downtown Division, and that he was not provided the opportunity to speak to counsel until approximately three hours after his arrest. He was not informed of the reasons for his detention and arrest until he arrived at the Downtown Division police station. It was submitted that it is well-established that a person must be told of the reasons for his arrest and detention in a timely manner as it is a gross interference of the individual liberty to have to submit to arrest without knowing the reason for it.[49]

[28] The Chief, in his disposition, stated that respondent Van der Loop advised the appellant he was under arrest and that it was for public intoxication when the initial arrest occurred at 10:47 p.m. He noted that respondent Van der Loop acknowledged that he did not advise the appellant of his right to counsel at the time as the appellant was actively resisting arrest and continued to resist when handed over to respondents Hickey, Davis and Smith, none of whom advised him of his right to counsel.[50] The Chief acknowledged that respondent Van der Loop should either have advised him of his rights to counsel at the time of arrest, or if the appellant's conduct prevented him from doing so, should have notified the officers to whom custody was being transferred to so that this would be done as soon as possible in the circumstances keeping in mind the appellant's conduct.[51]

[29] However, the Chief stated that there was no indication that the failure to advise the appellant of his right to counsel was done to facilitate any attempt to gather information from the appellant, as there were no attempts made to do so. Also, the failure to advise the appellant of his *Charter* rights did not delay the appellant's exercise of those rights, since the appellant's conduct would have precluded the exercise of those rights at Rexall Place, and at all times up to the point when he did exercise that right at Downtown Division. Noting that not every breach of rights under the *Charter* will necessarily amount to a disciplinary offence, the Chief dismissed this allegation of neglect of duty. Similarly, he stated, as respondents Hickey, Davie, Smith or Tames were not involved in the original arrest and were unaware the appellant had not been advised of his *Charter* rights, there is no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing for neglect of duty against them

[49] Appellant's written submissions at paras 39-43, with reference to *R v Latimer*, [2001]1 SCR 3 at para 28.
[50] Chief's disposition letter at page 15.
[51] Chief's disposition letter at page 15.

in the circumstances.[52]

[30] The Chief also stated that, after the appellant was placed in the cells at Downtown Division, respondent Mulrooney spoke to respondent Hickey and determined he would be charged with two counts of assault on a peace officer. He stated at that time, respondent Mulrooney indicated she attended with the appellant to advise him of the additional charges and notify him of his rights under the *Charter*. The Chief noted this is set out in her notes and corroborated by the CCTV video at the cells. While the appellant does not recall this happening, it is clear there are areas of his recollection of the events that night that are not complete or accurate.[53] There was no change in the appellant's legal jeopardy while transferred to the cells. This would not trigger the legal duty to advise the appellant of his *Charter* rights at the time of transfer. The appellant was advised of his *Charter* rights as soon as there was a significant change in his legal jeopardy.[54]

[31] The Chief submitted that the courts have recognized that not every breach of the *Charter* will result in a disciplinary offence.[55] There must be "some meaningful level of moral culpability to warrant disciplinary penalties".[56] The appellant argued that the context of the breaches and the effect on him rises to this level of moral culpability.[57]

[32] The initial arrest took place at approximately 10:55 p.m. on December 28, 2013, and the appellant was not given the opportunity to speak to counsel until 3:15 am on December 29, 2013. However, the Chief noted it is clear from the evidence that the appellant was intoxicated and aggressive until well after midnight. In order to permit the appellant to consult with counsel in private, the officers would have had to remove him from the cell, remove handcuffs and place him in a private area. The Chief stated that while a person is entitled to consult with counsel without delay, that right is subject to certain limits, including officer safety. Given the appellant's behaviour and the fact that the respondents did not seek to interview or elicit information from him prior to access to counsel, it was reasonable for them to postpone access to counsel until the appellant settled down and sobered up.[58]

[52] Chief's disposition letter at page 16.
[53] Chief's disposition letter at page 16.
[54] Chief's disposition letter at page 16.
[55] Chief's disposition letter at page 15. In the Chief's written submissions this is identified as the *Allen* case, at para 33.
[56] *Allen* at para 33.
[57] Appellant's written submissions at para 47.
[58] Chief's disposition letter at page 17.

[33] As such, he found there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing against any officer for neglect of duty as alleged with respect to allegations 13, 14 and 15.[59]

[34] The Board concludes that the Chief's decision on these allegations related to failure to advise the appellant of his *Charter* rights and the right to counsel falls within the parameters of reasonableness. Although respondent Van der Loop did not advise the appellant of his rights immediately at Rexall Place, the record does not indicate that this was done deliberately or to facilitate any attempt to gather information from the appellant, and did not delay the exercise of those rights. The circumstances were evolving quickly and the appellant was not only resisting arrest but was also being aggressive towards the officers. In this situation, it is reasonable to conclude that advising the appellant of his *Charter* rights immediately was an oversight and not a neglect of duty. The appellant was advised of the reason for his arrest at Rexall Place. He was advised at Downtown Division of the charges against him and his *Charter* rights immediately by respondent Mulrooney, as soon as the nature of the charges was known and his legal jeopardy had therefore, changed.

[35] A person is entitled to consult with counsel "without delay". However, given the context, including the appellant's conduct and lack of sobriety, it is reasonable that his access to counsel was provided when he had settled down and sobered up so he could have a conversation with counsel and not put officers at risk. There is nothing to suggest that the appellant's legal position was compromised in that the respondents did not seek to interview him or elicit information from him during the three hours before he was given the opportunity to call counsel. The Chief's dismissal of these allegations was within the range of reasonableness.

Excessive Force (Allegations 1, 2, 3, 4, 5, 6 and 8)

[36] The Chief reviewed the various allegations of excessive or unnecessary use of force and disposed of the allegations on the following bases.

[37] It was alleged that respondents Van der Loop and Lee handled the appellant roughly while inside Rexall Place by grabbing him by the biceps, causing pain and discomfort. Respondent Van der Loop indicated he placed the appellant in the escort position as he appeared intoxicated and was not cooperating. The information was that the appellant was asked by security to leave the seating area and then police became involved. All three indicated the appellant was refusing to cooperate and the appellant's own statement indicated that

[59] Chief's disposition letter at pages 15-17.

respondent Lee described him as "unruly" in a radio transmission and that he was "pretty upset" as he was being escorted out.[60] The Chief concluded that the escort out of the premises involved a relatively low level of force and no unlawful or unnecessary force was used in the circumstances.

[38] The allegation was that he was tackled from behind by a police officer and subsequently handcuffed and placed in the back of the police van. Respondents Van der Loop and Lee stated that, while being escorted out, the appellant broke free of their grasp and was grabbing at respondent Van der Loop's uniform. At that point, they reported the appellant was taken to the ground by respondents Van der Loop and Lee, arrested for intoxication and taken to the holding room at Rexall Place to be transported in the van. The Chief stated that the appellant's version of events is inconsistent with the evidence of a number of officers who all indicated that a police van had to be called to transport the appellant and that the van was not there prior to his arrest. The Chief therefore, concluded there was no reasonable prospect of establishing that the appellant was allowed to leave Rexall Place and then tackled from behind and arrested. Further, with respect to being taken to the ground, both respondents Van der Loop and Lee indicated that the appellant was resisting their attempts to remove him from the building and was assaultive. The appellant's conduct is consistent with the information provided by security as well as other respondents. The Chief concluded that given the appellant had pulled loose while being escorted out of the building, the end of the game was imminent and the difficulty the officers were having in controlling the appellant, there could have been a significant safety risk to the public, the officers and the appellant if the respondents did not promptly effect an arrest and take physical custody of the appellant. In light of these circumstances, the Chief dismissed the allegation that the appellant was tackled from behind as there was no evidence to support this claim and thus, dismissed the allegations of excessive use of force by respondents Van der Loop and Lee in the appellant's arrest and being taken to the ground.[61]

[39] It was alleged that respondents Hickey and Davie used unnecessary force while the appellant was in the holding room at Rexall Place. Respondent Hickey indicated the only force he used while in the holding room was to push down on the appellant's shoulders to keep him seated. Respondent Davie denied using any force on the appellant in the holding room. The appellant had no recollection of being held in the holding room, so the only evidence was from the respondents. The Chief dismissed this allegation as having no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing.[62]

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[60] Chief's disposition letter at page 6.
[61] Chief's disposition letter at pages 7-8.
[62] Chief's disposition letter at pages 8-9.

[40] It was alleged that respondents Hickey, Tames, Davie and Smith did not have authority to detain the appellant inside Rexall Place. The Chief stated that he reviewed the discrepancies in evidence as to whether the appellant was detained in the holding room and indicated that, if the respondents had grounds to arrest him, the respondents would have had grounds to continue to detain the appellant where it was necessary to prevent the continuation of the offence. Each of these respondents described the appellant's intoxication and ongoing aggressive behaviour while in the holding room, circumstances which justified the continued detention.[63]

[41] It was alleged that an unknown officer threatened to "taze" the appellant while in the police van. The appellant indicated the unidentified male officer told him to stop kicking at the doors of the van, but the respondents, two of whom were female, denied making that statement or that they heard any of the other respondents make the statement. Even if such a statement was made, it cannot be attributed to any particular respondent and this allegation was dismissed.[64]

[42] With respect to the allegation that the appellant was kneed in the back of the legs while being escorted to the cell, the appellant complained that another officer laughed and then kneed him in the left leg. The Chief stated that the CCTV video does not support this. The video shows that the appellant was carried into the building immediately from the van. Respondents Williams, LeBritton, Florence, and Melney who assisted in bringing him into the building, deny kicking or kneeing the appellant in the legs. Respondents Mulrooney and Szawlowski also deny kneeing the appellant in the legs. The respondents' version of events was confirmed by the video.

[43] Concerning the allegations against respondent Davie and his response to the appellant kicking him in the van, the Chief addresses this by referring to the use of force review by respondent Hickey. He stated that, other than the allegation that respondent Hickey should not have done the review, the appellant did not specify the way in which the review was inadequate. He stated the review set out the force used, the circumstances in which it was used as well, and the appropriateness of the force used, all of which forms part of the police reports. The Chief did not comment on any concerns with the use of force review other than the allegation that the review should not have been conducted by respondent Hickey. No other specific concerns were raised.

[63] Chief's disposition letter at page 9.
[64] Chief's disposition letter at pages 9-10.

[44] At the hearing, the appellant submitted that several instances of force were used against him while he was being transported to the van at Rexall Place and then from the van to the cells. The level of force constituted excessive use of force when there were other alternatives available.[65] The appellant also stated that the actions of the relevant respondents while transporting him from the van to the cell, such as dropping him, kneeing or jostling him to the point that it caused the appellant pain and discomfort was also excessive. His submissions state that the video does not show the appellant was resisting, however, he was unable to walk due to leg and back pain.[66] Further, the appellant submitted, the two most concerning instances of excessive use of force were, first, by respondent Lee taking him to the ground and, second, by respondent Davie in the police van. Respondent Lee conducted a foot sweep at Rexall Place, which caused the appellant to fall head first onto a hard surface with nothing to break his fall as each officer was holding one of his arms.[67] Respondent Davie dropped his elbow onto the appellant's face in the back of the van. This, the appellant argued, was an "improper retaliatory" response to the appellant kicking out at respondent Davie, and that respondent Davie should have used more restraint rather than the level of force he used. Based on all the instances alleged, the force used on the appellant during his arrest and detention was therefore disproportionate, unjustified and excessive. [68]

[45] The Board concludes that the decision of the Chief on the allegations was reasonable. There is nothing on the record to suggest that, given the circumstances (including the appellant's lack of cooperation and aggressive behavior), the response by the respondents was disproportionate, unjustified or excessive, based on the record that was before the Chief when he rendered his disposition. In the case of the alleged rough treatment at Rexall Place, being tackled from behind, the threat to "taze" the appellant in the van, kneeing of the appellant in the back of legs and pushing down on the appellant's shoulders in the holding room, the Chief reasonably concluded that the record did not contain sufficient evidence for a reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing.

[46] Specifically, with respect to the two main allegations of excessive force identified by the appellant: being taken to the ground (foot sweep) by respondent Lee, and being elbowed by respondent Davie, while both caused the police to be very physical with the appellant, based on the information that was before the Chief, the appellant was highly intoxicated, uncooperative

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[65] Appellant's written submissions at para 59.
[66] Appellant's submissions at para 56.
[67] Appellant's written submissions at para 58. Although the appellant's submissions refer to the transcript of the July proceedings, the trial transcript was not part of the record before the Chief and was not admitted in the additional evidence application before the Board in this appeal. It is therefore not part of the scope of the Board's reasonableness review in this matter.
[68] Appellant's written submissions at paras 66-68.

(would not walk), loud, belligerent and physically aggressive.[69] The respondents' use of force cannot be viewed in a vacuum but must be viewed taking into account the circumstances they had to respond to at the time in order to subdue the appellant.[70] The Board concludes that, given the dynamic situation and appellant's behaviour, the decision of the Chief was within the range of possible reasonable outcomes.

Treatment at Cells and Detention (Allegations 9, 10, 11 and 12)

[47] The appellant alleged that there was unlawful and unnecessary use of force in his treatment at the Downtown Division Cell. The appellant, in his original statement referred to by the Chief in his disposition, indicated that he kicked out at the respondents when they attempted to remove him from the van. He also stated that he stopped, got out of the van, stood among the officers, and indicated he was going to be cooperative. He stated that the officers walked him into Downtown Division but they repeatedly kneed him, then picked him up by the legs and handcuffs, and carried him into the cell.[71] It was further alleged that a respondent to the appellant's left laughed at him while another respondent was kneeing him in the back of the legs.[72]

[48] Respondents Mulrooney and Szawlowksi indicated that the appellant was kicking out initially. Respondents William, LeBritton, Florence and Baragar attended outside Downtown Division and assisted in removing the appellant from the police van and, when he did not cooperate, respondents Melney and Wedman helped them carry the appellant into Downtown Division by his arms and legs and placed him in the cell.[73] The appellant's claim that he was initially cooperating and walked into the Downtown Division and later carried by his handcuffs is contrary to the video evidence and that of multiple officers.[74] The video does not show the appellant was kneed or laughed at by an officer and this was denied by all respondents involved. The Chief noted that, while carrying an individual may appear undignified or demeaning, it allows officers to maintain control and reduce risk of injury to the individual. The entrance they used in this case was also not designed for use for persons in custody, and so they had to ensure there was no risk if the appellant broke free. There was in his view no evidence of the unlawful and unnecessary use of force.

[69] Record at pages 220-230.
[70] Although the appellant's reference to the severity of the force used by respondent Davie in his written submissions, appellant's counsel acknowledged that this information was contained in the trial transcript which does not form part of the record.
[71] Chief's disposition letter at pages 11-12.
[72] Chief's disposition letter at page 11.
[73] Chief's disposition letter at page 12.
[74] Chief's disposition letter at pages 12-13.

[49] The appellant also alleged that unknown officers knelt on this back, thighs, ankles, legs, throat and head (including a knee drop) while he was being searched in the cell, constituting abuse and causing him pain. Respondent Mulrooney indicated that the appellant was searched by male officers once he was in the cell, which was difficult, as he was kicking and screaming. Respondent Szawlowski indicated that the appellant had to be held down and was unsure what parts of his body were held. Respondent Williams indicated the appellant was thrashing his legs around. Respondent Florence indicated that it is common practice to kneel on parts of the body to keep control. Respondent Melney indicated he assisted in holding down the appellant, but he does not typically kneel on the person's head and does not recall doing so in this case. Respondent Baragar did not recall specifically what force he applied, but did assist in the search. None of the respondents admitted to kneeling on the appellant's throat or head or dropping down on his head with their knees.[75]

[50] The CCTV footage was not clear due the angle of the camera, but it does show the appellant resisting and kicking out at the respondents, even after the search was completed and officers were leaving the cell.[76] The respondents were entitled to search the appellant and use such force as may be reasonably required to affect it. Given the circumstances, it was reasonable for the respondents to use their knees on the appellant's torso, arms or legs to maintain control for the search. The Chief noted there was no evidence to attribute to any specific respondents the allegation that one or more of them knelt on his head, throat or dropped onto him with their knees, if it occurred.[77]

[51] Respondent Mulrooney stated that the appellant was handcuffed to the wall for officer safety reasons and to prevent damage. She advised the appellant that once he calmed down and there was no concern about violence, he would be allowed to use the phone, but she does not recall him asking to use the toilet. Respondent Szawlowski indicated the appellant was handcuffed to the wall for safety and respondent Florence confirmed handcuffing a suspect to the wall in this way is standard practice.[78] CCTV shows the appellant was handcuffed to the wall at 11:45 p.m., that respondent Mulrooney attended at 11:55 p.m., and he was regularly checked on by a commissionaire until 2:30 a.m. The video indicated that the appellant was vigorously resisting officers and kicking out at them. The Chief stated it was therefore reasonable for the respondents to restrain him in the manner they did to ensure safety of the individual and the officers. When the appellant became sober, the handcuffs were removed and he was taken to another cell with facilities.[79] The Chief dismissed the complaint of unlawful

[75] Chief's disposition letter at page 13.
[76] Chief's disposition letter at page 14.
[77] Chief's disposition letter at page 14.
[78] Chief's disposition letter at page 14.
[79] Chief's disposition letter at pages 14-15.

and unnecessary use of force in the cell.

[52] The appellant questioned the manner in which he was carried to the cell from the van, searched and restrained by his handcuffs, which were fastened behind his back, with a short chain, to the wall for several hours. He further questioned if there were actual visual checks by a commissionaire looking into the cell, although noted in the logbook.[80] Despite several requests, the appellant alleged, he was not allowed to use the washroom and forced to urinate on himself. He submitted these conditions were not temporary and were highly degrading and painful.[81] He further submitted that this constituted an arbitrary infringement of his security of person and cruel and unusual treatment under the *Charter*.[82] In the alternative, he alleged he was being punished for his previous behaviour with the police, contrary to the *Charter* and *Police Service Regulations*.

[53] The decision of the Chief on these allegations was reasonable. It is clear on the record that the context, and in particular, the uncooperative and aggressive behaviour of the appellant, is highly relevant. The appellant was, in the Board's view, putting not only his own safety but also that of others around him at risk due to his high level of intoxication and physical aggression, both while being transported from the van to the cell and while detained in the cell. As the Chief notes, in these circumstances, it is not unreasonable for the officers to have to manage the appellant, hold him down to conduct a search and use the bull ring to mitigate the situation. He was checked on while in the cell and the logbook notes visual checks did occur.[83]

[54] The appellant submitted at the hearing that these checks were not done properly. Even if this was the case, this alone does not make the Chief's disposition unreasonable. There was speculation in submissions at the hearing about whether the appellant urinated on himself in the cell as a toilet was not made available to him or whether this may have occurred before he arrived at the cell. The record does not support the appellant's allegation, as the best information is that of respondent Mulrooney who indicated that she was not aware that the appelllant needed to use the toilet and that once he was sober, he was transferred to a cell with those facilities. The use of the bullring restraining measure was standard practice at Downtown Division, so the appellant was not singled out for its use.

[80] Appellant's submissions at hearing.
[81] Appellant's written submissions at para 74.
[82] Appellant's writtensubmissions at para 74.
[83] Record at page 744.

[55] It is well established that the Chief is entitled to engage in a limited weighing of evidence and determine whether allegations of misconduct are substantiated and may decline to send a complaint to a hearing where there is no reasonable prospect of conviction based on the evidence.[84] The disposition letter does not need to address each and every allegation as long as the Chief reasonably considered the general substance of the complaint.[85] The Board concludes that the Chief's decision to dismiss these allegations of unlawful and unnecessary use of authority regarding the appellant's treatment at the cells and his detention is within the range of reasonableness.

Rexall Place Video (Allegation 23)

[56] With respect to the alleged failure to preserve the video from Rexall Place, the appellant alleged it would have been material, and relevant, and should have been collected and preserved by respondent Davie, and this is a breach of the right to fundamental justice under section 7 of the *Charter*. Respondent Davie knew about the footage and chose not to retrieve it.[86] It was submitted that this amounts to neglect of duty and discreditable conduct and contributed to a negligent investigation. The Chief noted in his disposition that there was communication between respondent Hickey and respondent Davie in this regard and, at the time, respondent Davie did not believe the video would assist the investigation. When he later tried to obtain the video, it was no longer available.[87] The Chief concluded that since the charges against the appellant arose in the police van, which was parked some distance from Rexall Place, respondent Davie's decision that the video would not assist the investigation was reasonable, even if in hindsight it might have been useful. He concluded that, at worst it was an error in judgment but would not rise to the level of discreditable conduct. The Board agrees that this disposition was reasonable. The record does not show this was a deliberate neglect of duty or discreditable conduct and there is no information on the record that this prejudiced the appellant. It was reasonable for the Chief to dismiss this allegation.

Breach of EPS Policies (Allegations 7, 12, 16, 17, 18, 19, 20 and 21)

[57] The appellant alleged several breaches of EPS policy as follows:[88]

- Spit-mask: The Chief failed to acknowledge that no notes were taken about a spit

[84] Chief's written submissions at para 19.
[85] Chief's written submissions at para 18 citing LERB Decision 030-2011 and LERB Decision 030-2011 at paras 38-39.
[86] Appellant's written submissions at para 86.
[87] Chief's disposition letter at page 22.
[88] Appellant's written submissions at paras 89-93.

mask being placed over the appellant's head (EPS policies: writing the report; 7-B-1, Notes and Reports–General; 7-B-4, and Principles of Note-Taking);

- Detention: The appellant was left alone in the cell for nearly three hours, when policy dictates that it should not be longer than two hours. (EPS policy: Division Holding and Temporary Holding Facilities 9-E-10);

- Note-taking and reports: Several officers failed to submit notes and reports in a timely manner and this allegation was disposed of without reference to EPS policy 7-A-8. (Writing the Report).

- Reasonable use of force: Respondent Davie breached the Reasonable Officer Response EPS policy in using more force than was necessary. [89]

- Use of force review: Respondent Hickey conducted the use of force review regarding respondent Davie, in breach of EPS policy as respondent Hickey was involved in the incident by transporting the appellant to the van and the "on-scene pre-planning" and force was used just minutes later.

[58] In reviewing the allegations that EPS policies were breached, a chief is presumed to know the contents and is not obliged to specifically refer to them in his disposition or explain how the policies were considered in rendering a decision.[90] The policies are considered to be part of the chief's expertise in policing and that is brought into his assessment and decision-making role. As such, a disposition of a chief may be reasonable even though specifics of policies are not referred to.

[59] In his disposition letter, the Chief addressed the allegations involving EPS policies as follows:

- Spit-mask: There is conflicting evidence regarding this issue. The appellant indicated the "bag" was put over his head after he was taken out of the van but before he was taken inside Downtown Division and did not identify which officer put the spit mask on him. CCTV footage does not show a spit mask on the appellant at this time. Respondent Mulrooney stated that she was not that officer, although the appellant

[89] It is noted that the fourth noted policy related to the excessive use of force by Respondent Davie is not part of the record as it is based on information from the trial transcript which was not before the Chief when he made his disposition.
[90] *Campeau v Edmonton (Police Service)*, 2017 ABLERB 15 at para 28.

may have had a spit mask. Respondent Szawlowski believes the appellant had the spit mask on at Rexall Place, although the officers at Rexall Place indicate it was not deployed at that time. Other officers deny they placed a spit mask on the appellant and do not recall that it occurred. Respondent Melney denies putting a spit mask on the appellant, but thinks it may have been deployed. Respondent Baragar does not recall a spit mask being put on the appellant.[91] The CCTV footage contradicts the allegation, and even if the spit mask was deployed, there is no evidence to support which officer placed it on the appellant. In the Board's view, this disposition was reasonable, given the contradictory evidence and the fact that the identity of the officer who may have placed any spit mask on the appellant was not submitted or ascertained.

- Detention: The CCTV shows the appellant was placed in cell 6 and handcuffed to the wall at 11:45 p.m. He was checked on by respondent Mulrooney at 11:55 p.m. and then regularly checked on by the commissionaire on duty until approximately 2:30 a.m., when the handcuffs were removed and he was placed in a different cell.[92] All of the officers indicated the appellant was vigorously resisting them and he was kicking out at them, which is confirmed by CCTV footage and to some extent also by the appellant's own evidence.[93] He was moved when it was safe for him to be moved given his conduct. It was reasonable for the Chief to conclude there was no reasonable prospect of conviction on this allegation.

- Note-taking and reports: Several respondents failed to submit notes and reports in a timely manner and this allegation was disposed of without reference to Policy 7-A-8 (Writing the Report). The respondents involved in the original arrest, placing the appellant in the van and transport to Downtown Division prepared either notes or a statement, or both, shortly after their involvement, as did respondent Melney. Respondents Williams, LeBritton, Forence, Wedman and Baragar all had limited involvement in moving the appellant from the van to the cells and did not make any notes or reports. Their involvement was limited and was documented by officers who had custody of the appellant and by CCTV video. Respondent Koshowski and Kingma did not have notes, but they also did not have any direct involvement with the appellant. This issue must be taken in light of all the circumstances and does not rise to the level of disciplinary misconduct.[94] Regarding the timeliness of the notes

[91] Chief's disposition letter at page 10.
[92] Chief's disposition letter at page 14; record at pages 690, 931-932.
[93] Chief's disposition letter at pages 14-15.
[94] Chief's disposition letter at page 19.

and reports, the Chief stated respondents Hickey, Lee, Van der Loop, Mulrooney and Szawlowski completed their reports on either December 29 or 30 2013, and there is no issue of timeliness. Respondents Smith and Tames made notes on December 29, 2013. Their notes and reports were not submitted until Crown's request in April 2014. Although it would have been preferable to have these notes and reports prepared and submitted by the respondents earlier, the delay was not sufficiently serious to rise to the level of disciplinary misconduct.[95] Further, it was also alleged that some of the notes or reports had false information based on the discrepancies in accounts of events, but the appellant did not identify a specific respondent who had included false information in the notes or reports and as such that allegation was seen to duplicate other allegations already reviewed.[96] The Board concludes that the Chief's decision on these allegations is within the range of reasonable outcomes, even though specific policies were not referred to. The Board cautions that the notes of respondents Smith and Tames should have been submitted sooner, but concludes it was reasonable for the Chief to decide that the fact that they were not, without suggestion of any other related misconduct, does not rise to the level of seriousness to be disciplinary misconduct.

- Reasonable use of force: Respondent Davie breached the Reasonable Officer Response EPS Policy in using more force than was necessary. [97]

- Use of force review: The Reasonable Officer Response EPS policy defines an "involved person" as a supervisor who provided guidance or direction during the use of force, participated in on-scene preplanning or direction related to the incident, or participated in or witnessed the use of force. Respondent Hickey was involved in arranging the appellant's transport to Downtown Division and moving him to the police van. He did not participate in placing the appellant in the van or directing the use of force inside the van, and he did not witness that use of force. Therefore, his role did not preclude him from conducting the use of force review. It was also alleged that respondents Koshowski and Kingma violated EPS policy by approving the use of force review. The Chief stated there is no requirement in the policy that the Staff Sergeant "approve" the review, and, the supervisor is simply required to

[95] Chief's disposition letter at page 20.
[96] Chief's disposition letter at page 19.
[97] See footnote 86. This was not before the Chief and did not form part of the record. In the appellant's additional evidence application in this matter, the Board allowed the trial transcript to be admitted only for the limited purpose of addressing the allegation of inadequate investigation and counsel for the appellant acknowledged this at the start of the hearing. See *Mutch v Edmonton Police* (Police Service) ABLERB AP 06. Therefore, the Board cannot address the fourth alleged breach of policy in its reasonableness review.

review the use of force review. Neither of those respondents recall reviewing the use of force review and, even if they had, there is no suggestion that this would have been inappropriate. The Board concludes that the Chief's analysis on these allegations was reasonable.

Remaining Allegations (22 and 24)

[60] The remaining allegations, allegations 22 and 24, were addressed by the Chief as follows:

- It was alleged that the police caused a prosecution to proceed despite knowing there were no reasonable grounds to believe that an offence had been committed. The Chief noted that both respondent Davie and Szawlowski, who allege the appellant assaulted them, provided reports describing the assaults. The evidence of respondent Davie is supported by two other respondents. While no member observed the assault on respondent Szawlowski, his description of the appellant's conduct, kicking out at the respondents, is consistent with information provided by other officers. There are some discrepancies between the appellant's evidence and that of the respondents' about the initial arrest and transport to Downtown Division. However, it would be necessary to show that the respondents fabricated their evidence to be found guilty of deceit. The appellant could not demonstrate this and therefore the Chief dismissed this allegation.[98] The Board agrees that, although there are some discrepancies in the evidence (most of which have been noted in the discussion of other allegations), there is no evidence on the record to support the allegation of deceit. The Chief's disposition was reasonable.

- The appellant alleged that the officer who first approached him at his seat in the arena told him he would notify his friends about what had happened, but did not. The Chief stated that respondents Van der Loop and Lee indicated their first involvement with the appellant was outside the arena when they saw him with security, but had no friends with him at the time. This is confirmed by security and therefore the conversation could not have occurred as alleged.[99] Respondent Davie stated that, while in the holding room, he attempted to find out if there was someone who could take the appellant home but the appellant refused to tell him his address or if he was at the hockey game with anyone. The appellant has no

[98] Chief's disposition at page 21.
[99] Chief's disposition at page 22.

> evidence to the contrary and he has no recollection of being in the holding room.[100] Given this, the Board concludes that the Chief's disposition that there is no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing is reasonable.

[61] Having reviewed the record and the submissions of all parties, the Board concludes that the Chief's disposition was within the range of reasonable outcomes with respect to all allegations made by the appellant.

CONCLUSION

[62] For the reasons given above, the Chief's disposition is affirmed and the appeal is dismissed.

Edmonton, Alberta

January 15, 2018

Geeta Bharadia QC Presiding Member	Archie Arcand Member	Rosetta Khalideen Member

For the appellant: S. Labahn
For the respondents: L. Harris
For the Chief of Police: J. Taylor

[100] Chief's disposition at page 22.