ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *MN v Edmonton (Police Service)*, 2019 ABLERB 019

Date: 20190913

Appellant: MN[1]

Respondent: Chief of Police, Edmonton Police Service

Officers: Cst. J. Blezy (No. 3583), Cst. D. McFarland (No. 3889), Cst. J. Strickland (No. 3031), Cst. M. Wagner (No. 3476), Cst. M. Li (No. 3307), Cst. S. J. Lee (No. 3305)

Panel Members: Victoria Foster, Rosetta Khalideen, Ahmed Ali

Summary: On February 7, 2017, respondents Blezy and McFarland of the EPS were dispatched to a mental health call relating to the appellant who was threatening suicide with a knife. They alleged he was uncooperative. He was tasered, taken to the ground and arrested. The appellant alleged unnecessary and excessive force and that the respondent officers created false police reports as a result of the incident. On August 5, 2017, respondents Strickland, Wagner and Li, were involved in a physical altercation with the appellant after he allegedly threw his cigarette butt towards an officer and refused to provide identification. The appellant was injured during the arrest and taken to hospital. The appellant made numerous allegations against the respondents. The Chief disposed of an allegation against respondent Strickland for discreditable conduct for his remarks to the appellant as not serious under section 45(4) of the *Police Act* and ordered counselling. He dismissed all other allegations. The appellant submitted on appeal that the Chief applied the incorrect charging threshold and his decision was unreasonable. The Board finds the dismissal of the alleged excessive force on August 5, 2017, was unreasonable. The Board dismisses the remaining grounds of appeal. The appeal is allowed in part.

Authorities Considered: *Land v Alberta (Law Enforcement Review Board)*, 2013 ABCA 435; *Conlin v Edmonton (Police Service)*, 2019 ABCA 863; *Jones v Chaffin,* 2018 ABQB 918; *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 124; Unrau v Cochlin, 2006 CanLII 91179 (AB LERB); *Canadian Civil Liberties Assn v Ontario (Civilian Commission on Police Services, (2002), 61 OR (3d) 349, 220 DLR (4th) 86 (CA); RE v Cst. C. Tagg (No. 2211),* 2012 CanLII 104690 (AB LERB)

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

INTRODUCTION

[1] On February 7, 2017, the appellant had an argument with his father and left his residence with a hunting knife, after stating that he was going to kill himself. The appellant

[1] The decision has been de-personalized of identifiers as the allegations are sensitive in nature.

obtained alcohol and drove to an area where he planned to consume the alcohol and take his life.[2]

[2] Respondents Blezy and Macfarland were dispatched to the appellant's location and arrived 30 to 45 minutes later. They stated that the appellant was searching through his vehicle when they arrived. The appellant stated that he exited his vehicle and advised respondents Blezy and McFarland that he did not have a knife. He stated he began walking towards respondents Blezy and McFarland, while at the same time removing his jacket. Respondent Blezy tasered the appellant, and he was then taken to the ground, arrested, and placed into a police wagon.[3]

[3] The appellant alleged that his handcuffs were tight and after a number of requests, they were loosened. He also alleged that while paramedics were removing the taser probes from his body, respondent McFarland said "nice shot" to respondent Blezy, as the probes were inches away from hitting his testicles. The appellant was taken to the University of Alberta hospital.[4]

[4] During the second incident on August 5, 2017, at approximately 1:00 am, the appellant, who was socializing on Whyte Avenue with friends, walked to the convenience store to purchase cigarettes. He encountered respondents Strickland, Wagner and Li dealing with a group of females. Respondents Strickland, Wagner and Li were giving three females violation tickets for consuming alcohol in public.[5] The appellant questioned whether tickets were necessary, which resulted in a verbal exchange between the appellant and respondents Strickland, Wagner, and Li. The appellant then allegedly flicked his cigarette towards respondent Li, which landed near his boot on the ground and was advised by respondent Wagner that he would be issued a violation ticket for littering.[6]

[5] Respondent Wagner asked the appellant for his identification, which the appellant refused to provide. The appellant allegedly attempted to leave the area but was grabbed on the arm by respondent Wagner. The appellant pulled away, allegedly striking respondent Wagner.[7] Respondent Wagner then advised the appellant that he was under arrest for obstruction and he was taken to the ground. While on the ground, the appellant alleged that he was kneed and struck a number of times. The respondents stated that the appellant was grabbing for

[2] Record at page 9f.
[3] Record at page 9g.
[4] Record at page 9h.
[5] Record at page 9a.
[6] Record at page 515.
[7] Record at pages 262-263.

respondent Wagner's firearm and taser. The appellant was handcuffed and placed in a police wagon.[8]

[6] The appellant stated that while he was being driven to the police station, respondent Lee drove the vehicle in such a way that he was purposely thrown around in the back.[9]

[7] At the police station, the appellant and respondent Strickland had a verbal altercation, during which the appellant alleged that respondent Strickland told him he should kill himself because it would be less paperwork for the police.[10] EMS witness JV stated that he witnessed an EPS member behaving in a rude and unprofessional matter, but did not recall which officer it was.[11]

[8] The appellant was released from police custody and driven to the hospital.[12]

[9] On January 30, 2018, the appellant's counsel filed a formal complaint to the Chief of Police, which the Chief summarized into the following allegations:

- Allegation #1: It is alleged that on February 7, 2017, Cst. Blezy unnecessarily deployed a CEW on you.

- Allegation #2: It is alleged that on February 7, 2017, Cst. McFarland and Cst. Blezy used unnecessary and excessive force while apprehending you pursuant to Form 10 of the *Mental Health Act*.

- Allegation #3: It is alleged that Cst. Blezy and Cst. McFarland authored false police reports regarding their involvement with you on February 7, 2017.

- Allegation #4: It is alleged that on August 5, 2017, Cst. Li, Cst. Wagner and Cst. Strickland used unnecessary and excessive force while arresting you.

- Allegation #5: It is alleged that Cst. Li, Cst. Wagner and/or Cst. Strickland lied when they told their supervisor that you flicked a cigarette at them.

[8] Record at pages 9a-9b and pages 243-246.
[9] Record at page 9c.
[10] Record at page 9c.
[11] Record at page 453.
[12] Record at page 9d.

- Allegation #6: It is alleged that Cst. Strickland made inappropriate remarks to you such as if you would kill yourself there would be less paperwork to do.

- Allegation #7: It is alleged that Cst. Li, Cst. Wagner and Cst. Strickland authored false police reports regarding their interactions with you on August 5, 2017.

- Allegation #8: It is alleged that on August 5, 2017, Cst. Lee purposely drove the police van with you in the back, in a manner that threw you around while you were being transported to the police station.[13]

[10] In his disposition letter dated September 19, 2018, the Chief dismissed allegations #1-5 and #7-8 by stating that there was insufficient evidence that would allow a presiding officer at hearing to conclude that the actions of the respondents would meet the threshold of misconduct under the Police Service Regulation ("PSR"). The Chief stated that he was of the opinion "…that there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a Disciplinary Hearing."[14]

[11] With respect to allegation #6, the Chief found that there was sufficient evidence that respondent Strickland made inappropriate comments to the appellant at the police station and therefore there was a reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing for Discreditable Conduct. The Chief concluded that the matter was not serious pursuant to section 45(4) of the *Police Act* ("Act") and ordered Supervisor Counselling.[15] This disposition cannot be appealed.

[12] On October 17, 2018, an appeal was filed with the Board on the following summarized grounds:

- The Chief used the incorrect standard. The standard that should have been used and applied is: Is there evidence before the Chief that, if believed, could lead a reasonable and properly instructed person to convict the police officer at a disciplinary hearing?

- The Chief weighed the appellant's evidence and the civilian witness evidence against the respondent officers' evidence in performing his screening function, which is an extricable error of law and was unreasonable. There was some evidence that, if

[13] Disposition letter at pages 7, 9, 13, 14, 15.
[14] Disposition letter at pages 9, 13, 14, 15, 16.
[15] Disposition letter at page 15.

believed, could lead a reasonable and properly instructed person to convict the respondent officers.

- The Chief failed to relate his finding against respondent Strickland, which was that the disciplinary contravention was not a serious matter thereby disposing of it without a hearing, to the other allegations against respondent Strickland.[16]

ISSUES

[13] The issue we must decide is whether the Chief's disposition was reasonable based on the facts and law before him.

DISCUSSION

Standard of Review

[14] The Courts have stated that the Board must generally apply the reasonableness standard of review to the Chief's disposition of the allegations. This standard of review requires us to determine whether the Chief's disposition was within the range of acceptable, reasonable outcomes based on the facts and the law before him. 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 preferred range of reasonable outcomes.

[15] The appellant submitted that the Chief applied the incorrect charging threshold to the allegations. He argued that the Board should apply the correctness standard of review to the charging threshold issue because, according to *Land v Alberta (Law Enforcement Review Board)*[17] and *Conlin v Edmonton (Police Service),*[18] a misstatement of the charging threshold is an inextricable error of law or jurisdiction.[19] The Chief and the respondents submitted that the reasonableness standard of review applies to all issues before the Board.[20]

[16] In *Jones v Chaffin*,[21] the Calgary Police Service's Chief of Police misstated and misapplied the proper test for determining whether or not a complaint was serious enough to warrant an oral hearing. The Court of Queen's Bench found that the standard of review on this issue is

[16] Notice of Appeal.
[17] *Land v Alberta (Law Enforcement Review Board)*, 2013 ABCA 435 [*Land*].
[18] *Conlin v Edmonton (Police Service)*, 2019 ABCA 863.
[19] Appellant's written submission at page 2, para 8.
[20] Chief's written submission at page at page 6, para 21 and respondents' submissions at page 24, para 41.
[21] *Jones v Chaffin,* 2018 ABQB 918 [*Jones*].

reasonableness.[22] The Court stated that:

> [The] error does not itself attract a different standard. This is not a jurisdictional error nor is it a question of law of central importance to the legal system; *Dunsmuir, supra* at para 55. The Chief was interpreting his own statute and operating within his own expertise. That he managed to misstate the test is reviewable but still under a standard of reasonableness. This is completed within the direction of the Court of Appeal in *Newton v Criminal Trial Lawyers Association*, 2010 ABCA 399 (CanLII) at para 32.[23]

[17] Counsel for the respondent referred the Board to *Cody,* wherein the court stated:

> …the chief of police is not required to send every complaint to a hearing. The chief plays a legitimate screening role, and may decline to send a matter to a hearing. [24]

[18] In *Cody,* the Court of Appeal found that despite the Chief exceeding his screening role, the Board's standard of review did not change. The Court found that the question the Board should have asked itself "…if the decision of the Chief of Police was unreasonable because he asked the wrong question."[25] The Court found that the Board did not properly state its standard of review and remitted the matter to be considered applying the reasonableness standard.

[19] Consistent with *Cody*, we have concluded that the standard of review that the Board must apply to this appeal is reasonableness. In the context of the reasonableness standard of review, the Board must consider whether "the decision of the Chief of Police was unreasonable because he asked the wrong question."

The Test to Be Applied By the Chief in Determining Whether to Send a Matter to a Hearing

[20] This case, like multiple other recent cases before the Board, requires consideration of the test to be applied by the Chief in determining whether to send a matter to a hearing. Despite the Court of Appeal's rulings in *Cody* and *Land* some uncertainty remains, particularly with respect to the issue of whether the Chief can consider evidence that contradicts the complainant's evidence and conduct a limited weighing of the evidence.[26]

[21] The starting point for the analysis is section 45(3) of the *Act*. Section 45(3) governs when

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[22] *Jones* at para 10.
[23] *Jones* at para 11.
[24] *Calgary (Police Service) v Alberta (Law Enforcement Review Board),* 2013 ABCA 124 [*Cody*] at para 24.
[25] *Cody* at para 26.
[26] The Board notes that leave to appeal to the Alberta Court of Appeal has been granted in *Conlin v Edmonton (Police Service)*, 2019 ABCA 63, on the question of whether the Board erred in its articulation or application of the charging threshold under section 45(3) in that case.

the Chief is required to conduct a hearing into an alleged contravention of the regulations governing police discipline. Section 45(3) provides that the chief of police shall conduct a hearing where the chief is of the opinion "that the actions of a police officer constitute a contravention of the regulations."

[22] The case law has confirmed that section 45(3) cannot be read literally so as to require the chief to have actually concluded that a contravention has occurred before sending a matter to a hearing. Such a requirement would undermine the need for a hearing. Rather, section 45(3) requires the Chief to perform a screening function aimed at determining whether there is sufficient evidence to justify a hearing.[27]

[23] The test that the Chief is to apply in determining whether there is sufficient evidence to justify a hearing is whether there is a "reasonable prospect of conviction."[28] This test "involves an evidentiary threshold akin to the test for a preliminary inquiry: is there enough evidence which, if believed, could lead a reasonable and properly instructed person to convict?"[29]

[24] The reasonable prospect of conviction test does not require a determination that a conviction be reasonably probable or likely. Rather, it denotes something close to reasonable chance, reasonable basis, or arguable merit.[30]

[25] The dispute between the parties in the application of the section 45(3) test in this case turns upon whether the test permits a limited weighing of the evidence in its totality, or whether, as the appellant submits, once the appellant has given direct evidence on a point the Chief must order a disciplinary hearing if the appellant's evidence, if believed, could lead to a conviction.

[26] We acknowledge that there is some wording within *Land* that supports the appellant's position, including reference to the screening test being "akin" to a preliminary inquiry, and the reference to "enough evidence which, if believed." On the whole though, we do not read *Land* as restrictively as the appellant invites us to. In our view, *Land* leaves it open to the Chief to conduct a limited assessment of the evidence as a whole to determine whether a hearing is warranted. We have come to this conclusion for five reasons.

[27] First*, Land* appears to endorse, or at the very least, not question other authorities which

[27] See *Land* at paras 34-35, and the authorities cited therein.
[28] *Land* at para 33.
[29] *Land* at para 57.
[30] *Land* at paras 41-42.

accept that the Chief may conduct a limited weighing of the evidence. The Court in *Land* quotes from the Board's decision in *Unrau*[31] to the effect that "it is important that the initial determination be made with the benefit of reviewing all of the evidence, not only the evidence

[31] Unrau v Cochlin, 2006 CanLII 91179 (AB LERB).

related to the allegations but also the evidence responding to the allegations."[32] The Court in *Land* also appears to endorse the finding in *Canadian Civil Liberties Assn v Ontario (Civilian Commission on Police Services*[33] that there needs to be an "air of reality" to the evidence, and a bare assertion or bald allegation would not suffice.[34]

[28] Second, the Court in *Land* draws an analogy between the Chief's screening function and the function of the Alberta Human Rights Commission, and notes that the Court has held that the Chief Commissioner is able to conduct some assessment of the evidence as a whole to properly determine whether a hearing is warranted.[35] The Court's comments on this point do include a reference to "circumstantial evidence," but do not exclude the application of the principle to direct evidence.

[29] Third, and of considerable importance in the Board's view, the result in *Land* makes it clear that the Court considered it important that the Chief consider all of the evidence before ordering a hearing. In *RE v Cst. C. Tagg*[36], the complainant alleged that the respondents had pushed and punched AE and hit his head against a light pole and a police vehicle. The Board concluded that the investigation into the complaint was flawed, and the Chief's decision to dismiss the complaint was unreasonable. The Board therefore, ordered a disciplinary hearing.

[30] On appeal, the Court of Appeal set aside the Board's order directing a hearing and instead directed that the matter be investigated further. The Court reasoned:

> We can understand the Board's inclination towards having a hearing, given the documented evidence of [AE's] injuries. However, without first obtaining some sort of explanation from Constables Tagg and Land, we are unable to satisfy ourselves whether or not this is the case.[37]

[31] Fourth, *Cody*, which the Alberta Court of Appeal decided a few months before *Land,* expressly holds that the chief may decline to send a matter to hearing when the evidence "is so weak, contradictory, or incomplete that it is not in the public interest to have a hearing."[38] The reference to "weak" and "contradictory" evidence suggests the Chief is entitled to conduct a

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[32] *Land* at para 35.
[33] (2002), 61 OR (3d) 349, 220 DLR (4th) 86 (CA).
[34] *Land* at paras 36-37.
[35] *Land* at para. 61.
[36] *RE v Cst. C. Tagg (No. 2211)*, 2012 CanLII 104690 (AB LERB).
[37] *Land* at para 77.
[38] *Cody* at para. 24. *Cody* also holds that the Chief may decline to send a matter to hearing when there are other policy reasons, independent from the strength of the evidence, why a prosecution is not in the public interest. This part of the test to send a matter to hearing is not at issue in this case.

limited weighing of the evidence. *Land* refers to *Cody* without raising any concerns or suggesting that it is not good law.[39]

[32] Fifth, in our view, the appellant's proposed reading of *Land's* interpretation of section 45(3) would render the chief's screening function almost meaningless, a result that *Land* does not support.[40] The appellant's proposed reading requires the Chief to engage the full disciplinary hearing process against an officer in essentially all circumstances in which a complainant alleges conduct falling within the bounds of the regulations on police discipline. It would mean, for example, that an officer would be subject to a disciplinary hearing when a complainant alleges that the officer used unlawful force, even in circumstances where extensive, independent, credible evidence shows that no force was used, or that the subject officer wasn't even present at the scene.

[33] In summary, in our view, *Land* requires the Chief to look at the evidence as a whole in determining whether there is a reasonable prospect of conviction. In doing so, however, the chief must remember that the charge threshold is a relatively low one that only requires a reasonable chance or basis of conviction, not that a conviction be reasonably probable or likely. The chief can consider whether the evidence is weak or contradictory, but difficult questions of credibility cannot be decided at the screening stage and must be sent to a hearing.

[34] Lastly, the appellant took issue with the wording used by the Chief in stating the charging threshold. Instead of using the word "enough" to describe the amount of evidence required, the Chief used the word "sufficient." Furthermore, instead of using the words "reasonable and properly instructed person" to describe who would consider the evidence, the Chief used the words "Presiding Officer." As the Board has previously stated, we focus on the substance of what the Chief did, not on the precise language he used in stating the charging threshold.

[35] The Board will review the Chief's screening and disposition of each of the allegations below, to assess the reasonableness of the Chief's decision with respect to each of the allegations.

[39] *Land* at para 30.

[40] The test set out in *Land* addresses the evidentiary threshold to determine whether the chief can and must hold a hearing, not just the evidentiary threshold to determine whether the chief can hold a hearing.

Was the Chief's disposition reasonable based on the facts and law before him?

> *Allegations 1 & 2 – February 7, 2017, Respondent Blezy unnecessarily deployed a CEW on the appellant; February 7, 2017, Respondents McFarland and Blezy used unnecessary and excessive force while apprehending the appellant.*

[36] The appellant complained that the use of the CEW ("taser") was unnecessary and that the respondents were untruthful regarding the grounds for using it.

[37] In his disposition, we observe that the Chief performed a use of force analysis under section 25 of the *Criminal Code of Canada* and determined that the respondents were lawfully placed in response to a call regarding a suicidal male, and that their use of force was objectively reasonable and necessary.

[38] The Chief considered the appellant's PSB interview, his written statement, the respondents' reports and privileged responses, and the Police Communications Branch ("PCB") recording of the events of February 7, 2017. The Chief noted that in his written statement, the appellant alleged the respondents came up to the truck and banged on his window. However, in his PSB interview he indicated that the respondents never approached the truck, but that he exited the vehicle and advised the officers he did not have a knife. The appellant alleged that he did not have any warning before respondent Blezy deployed her taser as he was removing his jacket.[41]

[39] The PCB recording supported the respondents' statements that they observed the appellant searching for a knife in his vehicle, and when he exited the vehicle, was told to show his hands. However, the appellant disregarded the respondent officers' demands, proceeded to remove his jacket, and was then given a verbal warning before the taser was deployed.[42] As a result of the recorded evidence, some contradictions by the appellant in his written statement and PSB interview regarding whether or not the respondents approached his vehicle, and the consistency of the respondents' occurrence reports and interviews, the Chief found there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing for misconduct.[43]

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[41] Record at page 318.
[42] Record at page 994.
[43] Appellant's written submission at page 19.

[40] The Board has reviewed the record and notes that respondents Blezy and McFarland were the only two officers responding to the call "…in the middle of the street", with conditions described as "dark out…icy…snowy."[44] The respondents were aware that the appellant had a knife and observed him searching around in his vehicle. Respondent McFarland advised respondent Blezy that he heard the appellant state that he was looking for a knife.[45] According to respondent Blezy's interview, she stated that the appellant then exited his vehicle, screaming that he was "…gonna slit [his] throat."[46] Respondent Blezy further noted that she was concerned about the appellant's threat of suicide and his easy access to a vehicle, and consequently she advised the control centre by radio that she had her CEW drawn. The appellant then removed his jacket and threw it on the ground and proceeded to "…charge at [her]"[47]. Respondent Blezy estimated that her taser deployed approximately five to seven feet in front of her, which meant that the appellant had been approaching her, as she was initially approximately fifteen feet away from him when he first exited his vehicle.[48]

[41] The Board also notes that there is no evidence that Respondent McFarland deployed his CEW or any other piece of equipment during the arrest. Respondent McFarland assisted respondent Blezy with the appellant's arrest after the taser deployment only.

[42] Although there is some wording within the Chief's decision on this point that could support a finding that the Chief misunderstood his screening role and drew final conclusions on the evidence, other passages indicate that the Chief was aware of his screening function and considered the evidence insufficient to meet the charging threshold. Ultimately, the Board concludes that the Chief's decision that there was no reasonable prospect of conviction ["no reasonable prospect of establishing the facts necessary to obtain a conviction," as the Chief put it] was reasonable. The evidence in support of this allegation is both weak and contradictory, and the Chief's conclusion that there was no reasonable likelihood of obtaining a conviction at a disciplinary hearing for excessive force was reasonable.

[44] Record at page 144.
[45] Record at page 143.
[46] Record at page 144.
[47] Record at page 145.
[48] Record at page 145.

Allegation 3 – February 7, 2017, Respondents Blezy and McFarland authored false police reports.

[43] In his letter to PSB dated April 3, 2018, counsel for the appellant stated: "Generally, where ever the officers' accounts differ with the complainant, the allegation is that their written accounts are false." He went on to list each respondent's statements that the appellant alleged was false. [49]

[44] The Chief noted that the respondents' police reports were consistent with each other and with the PCB recording of the incident. He further noted that there was no additional evidence provided by the appellant to corroborate any falsehoods in the reporting. For example, respondent McFarland's initial report outlined his conversations with the incident reporters, which are consistent with the audio recordings available in the record.[50] Consequently, the Chief found that there was insufficient evidence before him that would allow a presiding officer at a hearing to convict the respondents of misconduct.

[45] The Board does wish to comment that the Chief's disposition regarding this allegation was at best, perfunctory. We note, however, that the respondents were interviewed, denied any falsehoods in their reports and were consistent in their descriptions of what occurred. We have reviewed the record in its entirety and have determined that the lack of evidence before the Chief of false reporting and the lack of evidence advanced by the appellant to support his claim of false reporting supports the Chief's disposition of this allegation; that there was not enough evidence before Chief that, if believed, could lead a reasonable and properly instructed person to convict the police officer at a disciplinary hearing. As a result, the Board finds the Chief's disposition of allegation 3 to be within the range of reasonable outcomes.

Allegation 4 – August 5, 2017, Respondents Li, Wagner and Strickland used unnecessary and excessive force while arresting the appellant

[46] The appellant alleged that his evidence of excessive force, as well as evidence from two independent witnesses that it appeared more force was used than was necessary, amounted to enough evidence that, if believed, could lead a reasonable and properly instructed person to convict the respondents at a disciplinary hearing for excessive use of force.

[49] Letter to PSB from Engel dated April 3 2018.
[50] Record at page 653 and audio recording.

[47] The Chief considered the medical evidence and photographs of the appellant's injuries and summarized the scratches, swelling and abrasions the appellant displayed.[51]

[48] The Chief also considered section 25(1) of the *Criminal Code*, and noted that in order to be justified in their use of force, the respondents must have been acting within their law enforcement duties at the time force was used, the respondents must have acted on reasonable grounds, and the respondents must not have used unnecessary force. The Chief found that the respondents were lawfully placed in the execution of their duties, as they were investigating an incident of illegal consumption of alcohol when the appellant interjected.[52] The appellant did not contest this part of his analysis. The Board does not take issue with this assessment.

[49] The Chief went on to summarize the evidence of four independent witnesses, two of whom indicated that the respondents may have used more force than was necessary in the circumstances. Witness DB stated in her PSB interview that she felt the respondents used too much force when they hit the appellant while he was on the ground.[53] Witness TH stated in her PSB interview that she did not believe the appellant was aggressive with police, but felt the respondents were aggressive during their interactions with the appellant.[54] None of the independent witnesses saw the appellant reach for any of the respondents' guns or tasers, as alleged by the respondents, although they confirmed they heard an officer tell the appellant to stop grabbing his gun. Neither of the independent witnesses referred to the any of the officers specifically.

[50] The Chief further reviewed CCTV footage of the incident and noted that "…due to the position of the camera the images were quite small and the limited lighting conditions, it was difficult to determine what exactly occurred."[55] However, he then proceeded to note that "what was observed was consistent with the subject officers' version of this event."[56]

[51] The Chief determined that the respondents were initially calm with the appellant, but that their interactions with him changed when he flicked a cigarette at them.[57] He then noted that the appellant "…[threw] a punch at Cst. Wagner…," which resulted in him being taken to

[51] Disposition letter at pages 11-12
[52] Disposition letter at page 12.
[53] Record at page 486.
[54] Record at page 473.
[55] Disposition letter at page 11.
[56] Disposition letter at page 11.
[57] Disposition letter at page 12.

the ground, where he "…allegedly attempted to grab Cst. Wagner's gun and duty belt."[58] After dropping or flicking his cigarette on the ground and being advised that he would be issued a littering ticket, the appellant attempted to leave the area.[59] The appellant was then grabbed by respondent Wagner and advised that he was under arrest.[60] The appellant pulled away, and allegedly made contact with respondent Wagner's mouth.[61] Furthermore, as noted above in paragraph 49, none of the independent witnesses saw the appellant attempting to grab any of the respondents' weapons.

[52] The Board is concerned that although the Chief summarized the appellant's and independent witnesses' evidence, in the final analysis, he appeared to exceed his screening role by preferring the evidence of the officers over that of witnesses LH, DB, TH, two of whom indicated that the appellant was struck three times while restrained on the ground, and that the respondents seemed to use more force than was necessary. None of the witnesses saw the appellant trying to reach for respondent Wagner's gun.

[53] Although the Chief's decision does reference his screening role, the Chief's reasons make it clear that he in fact exceeded his screening role on this issue. The Chief's conclusion, for example, that "the force used by the subject officers in the circumstances was objectively reasonable and necessary under the circumstances"[62] suggests that the Chief engaged in final fact finding rather than proper screening.

[54] In our view, the evidence on this point cannot reasonably be said to be "so weak or contradictory" that a hearing is not in the public interest. When we consider the evidence as a whole, including the appellant's evidence, the injury evidence, the accounts of the two independent witnesses who indicated the respondents used force on the appellant when he was already restrained and on the ground, and the respondents' own reports outlining their use of force, the Board finds that there was enough evidence before the Chief that, if believed, could lead a reasonable and properly instructed person to convict respondents Li and Wagner at a disciplinary hearing. The Chief exceeded his screening role in preferring the respondents' evidence over the appellant and independent witnesses' evidence. The Board has determined that the Chief's dismissal of this allegation against respondents Li and Wager was unreasonable. The Boards notes, however, that the Chief's dismissal of the allegation against respondent Strickland was reasonable, as the record did not provide enough evidence to suggest that

[58] Disposition letter at page 12.
[59] Record at page 244.
[60] Record at page 244.
[61] Record at page 244.
[62] Disposition letter at page 12.

respondent Strickland used forced against the appellant. None of the independent witnesses named any of the respondents specifically, the appellant did not allege specific use of force by respondent Strickland, and respondent Strickland's police report noted that the only force he used was to hold the appellant's feet to "gain control over his lower body."[63]

> *Allegation 5 – August 5, 2017, Respondents Li, Wagner and/or Strickland lied by telling their supervisor that the appellant flicked a cigarette at them*

[55] The appellant submitted that his evidence, the statements from the independent civilian witnesses and video recording of the incident provide evidence that the appellant did not flick his cigarette at the respondents.[64] He submitted that the Chief weighed the appellant's and an independent civilian witness's evidence against the respondent officers' and video recording evidence, which was an extricable error of law and was unreasonable.[65]

[56] The Chief considered the respondents' police reports and interviews, which described the appellant as flicking or tossing his cigarette. The Chief also considered the video footage, which showed what appeared to be a cigarette landing on the ground near one of the respondents.[66]

[57] The Board has considered the details in the record that were before the Chief when he made his decision, including the appellant's statement that he chucked the cigarette, respondent Li's evidence that the appellant threw the cigarette and it landed at his feet, respondent Wagner's evidence that he saw the appellant flick the cigarette towards respondent Li, and the video evidence. The Chief engaged in acceptable limited weighing of the evidence before him. The Chief concluded that there was not enough evidence, which if believed, could cause a reasonable and properly instructed person to convict at a disciplinary hearing. The Chief's disposition of this allegation was within the range of reasonable outcomes.

> *Allegation 7 – August 5, 2017, Respondents Li, Wagner and Strickland authored false police reports*

[58] The appellant alleged unnecessary use of force by the respondents, while the respondents wrote in their reports that the appellant was aggressive and required use of force

[63] Record at page 523.
[64] Appellant's written submission at para 23.
[65] Appellant's written submission at para 23.
[66] Disposition letter at page 13.

against him. The appellant submitted that the respondents' reports were false.[67] In his written submissions, the appellant stated that "the officers authored reports that [the appellant] was aggressive and that they used only necessary force against him,"[68] which he stated was contradicted by himself and the independent witnesses.

[59] The Board notes the appellant did not deny inserting himself into the police interactions with the witnesses. The evidence before the Chief from a number of witnesses was that the appellant was loud, yelling and resisting, and one witness indicated he took a swing at one of the officers.

[60] In reviewing the record, the Board notes that respondent Wagner stated in his police witness statement report, dated August 5, 2017, that the appellant was yelling and "becoming aggressive."[69] Respondent Wagner continued his report by stating that the appellant "struck [him] in the mouth" and "continued to pull away" from him and respondent Li.[70] Finally, respondent Wagner stated in his report that he felt the appellant "grabbing at [his] duty belt" and that he "felt [his] firearm being pulled on."[71] Respondent Wagner described his use of force as a result of the appellant's actions.

[61] Similarly, respondent Li noted in his police witness statement report, dated August 5, 2017, that the appellant "became more aggressive" following initial verbal interactions and that he continued to yell.[72] Respondent Li stated that the appellant "spun around and punched respondent Wagner in the face with his right hand."[73] Respondent Li outlined his use of force as a result of his interactions with the appellant.

[62] Finally, respondent Strickland noted in his police witness statement report that the appellant "became even louder and more aggressive" after being asked to calm down.[74] Respondent Strickland stated that after being advised that he was getting a ticket for littering, the appellant "[threw] a closed right fist at Respondent Wagner's face."[75] Respondent

[67] Appellant's submissions at para 25. The Board observes that the appellant originally alleged that the respondents had falsified their reports of the incident on April 3, 2018, by letter to the PSB. On appeal, it is unclear what reports the appellant is referring to in this allegation, as he did not reference them specifically. The Board has assumed that the appellant was referring to the occurrence reports authored by the respondents on the night of the incident.
[68] Appellant's written submission at para 25.
[69] Record at page 509.
[70] Record at page 509.
[71] Record at page 510.
[72] Record at page 515.
[73] Record at page 515.
[74] Record at page 523.
[75] Record at page 523.

Strickland did not describe any use of force, other than to state that he held the appellant's feet to "gain control over his lower body."[76]

[63] Civilian witness DB stated in her interview that she felt the respondent officers' interactions with the appellant were reasonable when they restrained the appellant and then became "over the top" when the appellant was on the ground.[77] However, DB did not elaborate on this statement and continued to state that she only observed one officer hit the appellant.[78] DB also stated in her written statement, which was referenced during her interview, that "…[the appellant] jerked really fast or tried to take a swing at one of the officers."[79]

[64] The appellant did not address the allegations by the respondents that he hit one of the officers or that he was grabbing for one of their weapons. These allegations were not confirmed or denied.

[65] The appellant argued that the admission that force was used, proved in and of itself, that there was some evidence that could support conviction of the respondents for false reports and that the matter should go to a hearing.[80]

[66] The appellant seems to be arguing that if the respondents' reports differed from the appellant's version of events, then there was enough evidence of the allegation of falsehood to warrant a hearing. This argument disregards the fact that the respondents did not deny that force was used, which would have been a falsehood, and disregards the Chief's analysis of whether or not they believed they had objective and subjective grounds for the force used.

[67] The Chief noted that the respondents' police reports were consistent with each other. The respondents authored their reports based on their individual experiences of the incident. He also noted that there was no additional evidence provided by the appellant to corroborate the falsehood of this allegation. Consequently, the Chief found that there was insufficient evidence before him that would allow a presiding officer at a hearing to convict the respondents of misconduct.[81]

[68] The Chief concluded that there was not enough evidence before him that, if believed, could lead a reasonable and properly instructed person to convict at a disciplinary hearing. In

[76] Record at page 523.
[77] Record at page 486.
[78] Record at page 487.
[79] Record at page 480
[80] Appellant's written submission at para 25.
[81] Disposition letter at page 16.

the Board's view, the Chief's conclusion on this point is reasonable.

Allegation 8 – August 5, 2017, Respondent Lee purposely drove the police van in a manner that threw the appellant around while he was in the back

[69] The appellant argued that the Chief used the incorrect charging threshold in deciding this allegation.[82] He stated that the Chief weighed the appellant's evidence with the evidence of respondents Li and Strickland in their interviews and respondent Lee in her explanatory report. As a result, the appellant argued that the Chief made an extricable error of law and that his disposition was unreasonable.[83]

[70] The Chief noted that respondent Lee, and respondents Li and Strickland, who were passengers in the police van, all stated in their reports and interviews that the vehicle was driven properly.[84] Respondent Lee stated that although she was unable to recall the exact manner in which the vehicle was operated, she has a "standard practice" of "operating a marked police vehicle in a professional manner and obeying the rules of the road."[85]

[71] Respondent Strickland stated that the van would not have been driven in a manner to purposely throw the appellant back and forth while in the back.[86] He stated that the road travelled has a "high volume traffic in pedestrians" and that the streets are "bumpy in nature." Respondent Strickland stated that he had no notes and no recollection of an intention to drive the police van to purposely throw the appellant around.[87]

[72] Respondent Li indicated that the police van was driven normally and that "there was nothing out of the ordinary".[88] It appears that the only evidence suggesting that the vehicle was driven improperly was provided by the appellant, without corroboration.

[73] The respondents provided separate and independent reports regarding respondent Lee's driving, all of which contradicted the appellant's allegations. The Chief again engaged in limited weighing of the evidence before him in reaching his disposition and found that there was insufficient evidence for a presiding officer to find misconduct at a hearing.

[82] Appellant's written submission at para 26.
[83] Appellant's written submission at para 27.
[84] Disposition letter at page 15.
[85] Record at page 81.
[86] Record at page 116.
[87] Record at page 116.
[88] Record at page 224.

[74] The Board finds the Chief's determination that there is no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing was reasonable.

CONCLUSION

[75] In summary, the Board dismisses all the grounds of appeal except in relation to allegation #4. Under Section 20 of the Act, the Board directs charges be laid and a disciplinary hearing be held in relation to allegation four as follows:

- Charge 1: Respondent Li (No. 3307) committed an unlawful or unnecessary exercise of authority contrary to Section 5(1)(i)(ii) of the PSR by using excessive force against the appellant while arresting him on August 5, 2017;

- Charge 2: Respondent Wagner (No. 3476) committed an unlawful or unnecessary exercise of authority contrary to Section 5(1)(i)(ii) of the PSR by using excessive force against the appellant while arresting him on August 5, 2017.

[76] The appeal is allowed in part.

Edmonton, Alberta

September 13, 2019

_____	_____	_____
Victoria Foster	Rosetta Khalideen	Ahmed Ali
Presiding Member	Member	Member

For the appellant: T. Engel
For the respondents: J. Feraco
For the Chief of Police: K. Agnihotri