No. 033-2009

LAW ENFORCEMENT REVIEW BOARD

IN THE MATTER OF the Police Act, R.S.A. 2000, c.P-17, and the Police Service Regulation.

AND THE MATTER OF THE Appeal of James Best concerning complaints against Cst. B. Pearce (No. 2083) and Cst. D. McIntyre (No. 2044) of the Edmonton Police Service

AND THE MATTER OF THE Appeal of Cst. B. Pearce (No. 2083) concerning the disposition of a disciplinary action by the Chief of Police of the Edmonton Police Service (the "EPS")

JUDGMENT OF THE BOARD

(Phillips/Parish/Johnson)

MATTERS BEING APPEALED

[1] There are two appeals that have been consolidated in this decision.

[2] On December 2, 2004 Chief Rayner of the EPS issued a decision following an investigation into complaints of alleged misconduct against Csts. Pearce, McIntyre and Jones. The alleged misconduct was the subject of a complaint by James Best arising from an incident on February 7, 2004. The decision of Chief Rayner found that the allegations of misconduct against Csts. McIntyre and Jones were not sustained. With regard to Cst. Pearce, one allegation of Breach of Confidence was sustained and a direction given for an Official Warning to be placed on his file for three years.

[3] Cst. Pearce filed a Notice of Appeal on January 20, 2005 from the Chief's decision of December 2, 2004 on the basis that the Chief's findings were unreasonable and without merit.

[4] James Best filed a Notice of Appeal on December 30, 2004 from the decision of December 2, 2004 on the basis that the Chief's decision did not deal with all of the original complaints, that the punishment given to Cst. Pearce was inadequate, unreasonable findings and inadequate investigation, failure to apply the proper legal threshold in determining whether charges should be laid, and other grounds to be determined following disclosure.

[5] Counsel for Mr. Best advised the Board in October 2008 that the appeal against Cst. Jones would be discontinued. As a result, Cst. Jones was not considered a Respondent in this appeal.

APPEAL BY CST. PEARCE

[6] The Law Enforcement Review Board (the "Board") was presented with Agreed Facts and Consent of the Parties regarding the appeal by Cst. Pearce. These had been prepared and agreed to arising from the circumstances that the Notice of Service Investigation had not adequately described the allegations that Cst. Pearce had to respond to, so that he was deprived of an aspect of procedural fairness. It was therefore agreed that:

- James Best lodged complaints about a number of EPS members through his legal counsel on February 12, 2004.
- His complaints encompassed a series of incidents he had with EPS members between November 2003 and February 2004.
- One of Mr. Best's complaints was that certain EPS members, including Cst. Pearce, told him that they did not want him living in that suite, and that they would contact the landlord to tell him that. Mr. Best alleged that such a contact took place, and that it led to his eviction from his apartment.
- The then-Chief of Police, Fred Rayner, determined that an investigation of these complaints was warranted. A Notice of Service Investigation was issued to Cst. Pearce on March 17, 2004. The allegation under investigation was stated as follows:

*"On or about February 7, 2004 at 21:44 hours you, along with Cst. Dan Jones and Cst. Derek McIntyre, had dealings with James Alexander Best at 107 Ave. And 104 Street. BEST alleges that he was taken to his residence at (*address*) and his apartment was searched by yourself and Cst. McIntryre. When the police left, BEST was told that the police did not want him living there and they would notify his landlord. As a result, BEST was evicted from his apartment on January 30, 2004."*

- Cst. Pearce responded to the Notice by memorandum on April 28, 2004.

- Following the completion of the final investigation report by Professional Standards Branch, Chief Rayner issued a disposition letter on December 2, 2004. His finding was that the other complaints against the officers were unfounded; however, he determined that Cst. Pearce had engaged in conversations with Mr. Best's landlord that constituted a breach of confidence under the *Police Service Regulation*. He therefore issued Cst. Pearce an Official Warning under Section 19(1)(b) of the *Police Service Regulation*, using the following language:

  "*On February 7, 2004 at approximately 21:44 hours you, along with Reg. No. 2052 Constable D. Jones and Reg. No. 2044 Constable D. McIntyre, had occasion to have contact with James Alexander BEST and his female companion in the area of 107 Avenue and 104 Street. Subsequent to discussions with Mr. BEST, he informed you that he had several days earlier rented an apartment at (*address*). Mr. Best voluntarily accompanied you and Constable McIntyre to the apartment complex and voluntarily disclosed his new address was apartment #2, at this noted address.*

  Upon a thorough review of Mr. BEST'S concerns and the circumstances involved, it has been shown that on February 10, 2004 you had two conversations with the apartment owner (Mr. NGUYEN), at which time you provided information to Mr. NGUYEN concerning Mr. BEST'S previous known history, inferring that Mr. BEST associated with gang members and that he may sell drugs. It has been determined that sufficient grounds exist to prove that your disclosure to Mr. NGUYEN was a breach of EPS Policy and Procedure, Part 16, Chapter A. Page 1(B)(2).

  You are further informed that it is the opinion of the Chief of Police that your action amounts to a Misconduct of Breach of Confidence contrary to Section 5(1)(a) of the Police Service Regulation, as defined in Section 5(2)(a)(1) of the Police Service Regulation."

- Cst. Pearce filed an appeal of the Official Warning with the Board on January 20, 2005.

- The parties to Cst. Pearce's appeal agreed on the following:

  (a) Cst. Pearce's appeal will be allowed, by consent of the parties;

  (b) The allegations contained in the Official Warning, which comprise part of Mr. Best's original complaint, will be returned to the Chief of Police for re-investigation and disposition, pursuant to Section 20(2)(b)(iv) of the *Police Act*;

(c) There will be no prejudice to the right of any party to appeal under the Chief's disposition of these re-investigated allegations;

(d) Cst. Pearce waives any objection to the timeliness of these re-investigated allegations or the investigation thereof to date;

(e) This agreement is without prejudice to Mr. Best's ability to proceed with the remainder of his appeal before the Board; and

(f) There shall be no costs payable by any party to any other for Cst. Pearce's appeal.

DECISION OF THE BOARD

[7] The Board accepts as established the Agreed Facts set out by the parties pertaining to the appeal by Cst. Pearce wherein the Respondent was deprived of procedural fairness in that the Notice of Service Investigation did not adequately describe the allegations that he had to respond to.

[8] Accordingly, the Board allows the appeal and orders under Section 20(2)(iv)(a) of the *Police Act* that this matter be remitted to the Chief of Police for re-investigation of the allegations contained in the Official Warning.

APPEAL BY JAMES BEST

[9] For the purposes of the appeal filed by Mr. Best, Mr. Best will be referred to as the "Appellant" and Csts. Pearce and McIntyre as the "Respondents".

[10] The Board heard the appeal from the Appellant. Counsel for the Appellant submitted that the issue for the Board to determine is whether the Appellant consented to showing the police his apartment on February 7, 2004.

EVIDENCE

[11] The Board heard from the Appellant who testified to the following points:

- In February 2004 he arranged to rent an apartment in Edmonton.

- Although he did not recall exact dates he indicated that on the day of the incident he was at a pay phone across the street from his apartment with his girlfriend, identified herein as DB. The Respondents and Cst. Jones arrived at the location by car and spoke to Best and his girlfriend. They proceeded to check their identification and determined from a search on CPIC that DB was wanted in respect of an outstanding warrant and she was arrested by Cst. Jones.

- The Appellant felt it was morally and ethically wrong that his name and DB were linked on CPIC. He had never mentioned this before to anyone.

- The Respondents inquired about the Appellant's address and were informed by the Appellant of the address. They indicated they were looking for two individuals and wanted to determine if they were in the Appellant's apartment. The Appellant accompanied them to his apartment and opened the door for them. They proceeded to search the apartment with their firearms drawn and determined that there was no one in the apartment.

- The Appellant testified that he felt that he had no choice but to allow the Respondents to search his apartment. He stated that he was afraid he would be arrested if he did not allow their search. He told them repeatedly that no one was in the apartment.

- On previous occasions when the Appellant denied police entry to his residence he had been physically assaulted.

- The Appellant did not know the Respondents prior to this incident. He did know Cst. Jones from contact at a previous residence.

- The Appellant knows other members of EPS and has filed complaints about other members.

- The Appellant's evidence was somewhat confused on the issue of whether or not he understood that the Respondents had warrants to arrest the individuals they were looking for. At first he stated that he had felt under duress to allow the officers into his apartment because he thought the officers had warrants for the wanted individuals they were searching for. He then stated that he was not sure if the officers actually informed him there were warrants for these individuals. He finally stated that the officers may or may not have had warrants but he was under the impression that there were warrants for the arrest of the two individuals and that he had to let the officers in to search.

- When asked if his prior dealings with EPS members made him feel he had no choice in allowing the search of his apartment, the Appellant was clear that it was this specific incident with the Respondents that made him feel under duress. Although he was clear in his testimony that he does not like the police and he felt they do not like him, he was also clear that it was the specific actions of the Respondents during this incident that led to this complaint.

[12] The Respondents called no evidence and therefore there was no evidence to contradict the position of the Appellant. The Board therefore accepts the evidence of the Appellant and finds the facts as set out in his testimony.

SUBMISSIONS

[13] Submissions on behalf of the Appellant can be summarized as follows:

- He was never told that he had the right to refuse the search of his apartment. The Respondents demanded that he open his apartment for them. He feared arrest if he did not comply. The officers drew their firearms and proceeded with the search. A number of legal authorites were submitted regarding common understanding of police authority. (R. v Therens (1985) 1 S.C.R. 613 Paragraph 57; R v Fash, 1999 ABCA 267 para. 125,128,130; R v Wills 12 C.R. (4th) 58 para. 44-47).

- EPS Policy at the time of the incident (Part 1 Chapter D- Authority and Responsibilities- Heading 12) reflects the case law. The Appellant was never told he had the right to decline the search in contravention of the Policy. The Chief had dismissed the allegations on the basis that the Appellant had allowed the police to enter his apartment. However, if the Appellant had not been advised that he could refuse, there was a risk of violation of his rights under Section 8 of the Charter of Human Rights and Freedoms.

- The EPS Policy states:

> *"12. Search Conducted with Informed Consent*
>
> *(A) Lawful rights against search and seizure may be waived in some cases. For example, a suspect can give a member permission to search their person, home, car, effects, etc. But this waiver will not be valid unless it is given voluntarily be the person having the necessary legal authority to make such a disposition and who has been informed that:*
>
> *(1) they have the right to decline the search, and*
>
> *(2) any evidence of an offence found during the course of the search can be seized and used against them to prove a charge that might be laid.*
>
> *(B) Thus without restricting the generality of the foregoing, there will be no valid waiver:*
>
> *(1) where the consenter is under any form of coercion at the time of the*

purported consent,

(2) where the consenter complies with the command of a member who is pretending to act within an official authority they do not possess,

(3) where a search of leased or rented premises is made without the consent of the lessor or landlord, and not with the consent of the lessees or renter,

(4) where the search of a home is made with the consent of a child, guest or domestic who has no lawful authority to so consent, or,

(5) where the consent is gained by pretense or fraud

(C) In respect of searches which may not be contemplated or authorized by statute, members must therefore always seek to obtain the informed consent of the individual or subject wherever possible. The absence of consent will ordinarily constitute any subsequent search to be unlawful and in violation of Section 8 of the Canadian Charter of Rights and Freedoms. In such circumstances, the evidence obtained as a result of the unlawful search will be unlikely to be admitted."

The Appellant particularly relied on Section 12(A)(1), 12(B)(1) and (12)(C).

[14] The submission from Counsel on behalf of the Chief of Police addressed the standard of review to be applied by the Board, and the EPS Search Policy.

[15] On the standard of review it was submitted that the test the Board should apply to the decision of Chief Rayner was one of reasonableness and that deference should be given to the decision of Chief Rayner. There is a tension between that argument and the fact that the Board hears cases *de novo* when the evidence before the Board differs from the evidence considered by the Chief.

[16] The Chief dismissed the case based on the information he was presented with. There is a discrepancy between the terms of the Appellant's original complaint and evidence before the Board. Evidence given pertaining to the possible existence of a warrant is new evidence before the Board and not previously presented to the Chief. Upon review it is not fair to assume the Chief was unreasonable if he did not address information he did not have at the time. It is the Appellant's onus to demonstrate unreasonableness and if it cannot be demonstrated then the Board cannot direct the matter back to the Chief.

[17] Regarding the EPS Search Policy, counsel for the Chief argued that the policy is directed towards insubordination. Breach of the policy does not necessarily mean that the Respondents acted with an unnecessary exercise of authority contrary to the *Police Service Regulation*.

[18] Counsel for the Respondent submitted that the Board heard evidence at the hearing that was different than that presented to the Chief, specifically that the officers had warrants for the individuals searched for in the apartment and that they compelled access to the Appellant's apartment. The Chief could not be found to be in error because of new allegations which the Chief was not able to question. A *de novo* hearing might consider new witnesses or new evidence but not new allegations which the Respondents had not been presented with. The Chief made his decision properly on the complaint. Allegations concerning whether the Respondents had lied when they said they had warrants or that they had search warrants that they were going to execute, were not before the Chief and were not tested. They should be dealt with as a separate complaint to the Chief.

[19] It was further submitted that nothing in the Appellant's testimony suggests that the Respondents did anything wrong in compelling the Appellant to let them into the apartment. They did not shake him down, and made no offers or threats. The Appellant stated that it was the "order of law" that had made him open the door for the Respondents, not misconduct.

[20] Counsel for the Respondents also argued that a second new allegation that had been entered through testimony at this hearing was the linking of DB's CPIC to the Appellant. The Board cannot send matters back when someone comes forward five years later and provides evidence that was not part of the original complaint. It is impossible for the Respondents to respond adequately to such a situation.

[21] In response to arguments for the Respondents and the Chief of Police, counsel for the Appellant argued that the existence or absence of warrants for the arrest of individuals thought to be in the Appellant's residence does not constitute a new complaint. The complaint by the Appellant alleges that the search of his residence was without consent. The only evidence presented to the Board is that of the Appellant. The new allegation pertaining to CPIC is irrelevant in this matter and is not as serious as the entry into the apartment with weapons drawn. Appellant's counsel referred to the Statement of Agreed

Facts presented on behalf of Respondent Pearce. The search is the precise issue identified in the Notice of Service Investigation contained in the Agreed Statement of Facts. The Respondents had an opportunity to respond to the allegation and did not take it.

[22] Appellant's counsel submitted that with regard to standard of review, the Board is deciding on the basis of evidence presented to it at this hearing. The EPS Policy and the law shape the legality of the Respondents' actions in this matter. Deference should only be given where the Board has only the evidence upon which the Chief based his decision. The details of the Service Investigation were not before the Board and, therefore, it was impossible for the Board to say whether the decision was reasonable or correct. The appropriate test for the Board is that stated in *Unrau* (Board Judgment No. 003-2006).

DECISION AND REASONS

Standard of Review

[23] The Board finds that the appropriate standard of review in this case where there has been no hearing by the Chief of Police, is that set out in *Unrau*. In the *Unrau* decision, the Board gives a full analysis of the various routes set out in the *Police Act* by which disciplinary matters come before the Board. In the situation where the Board is considering an appeal under Section 48 of the *Police Act* where there has been no previous hearing the Board states at para. 88:

> *"What the Board is called upon to do at a hearing in which there has been no hearing at the service level is mainly to decide whether the Board agrees with the chief's decision not to lay charges or to conduct a hearing before a presiding officer. In order to make that determination the Board conducts a hearing, which may include receiving extensive evidence regarding the misconduct in question. It is clear that an appeal on the record is only possible, pursuant to section 20(1)(p), where the parties consent. Unlike the chief of police, who bases his or her initial decision on written materials, the Board has the benefit of receiving viva voce evidence. As the parties, including the public complainant if one is involved, determine what evidence to put before the Board, the Board may receive additional evidence than what was available to the chief and will have the benefit of assessing the credibility of witnesses where there is contradictory evidence. The process employed by the Board in determining whether charges should be directed or a disciplinary*

> *hearing should be held differs in significant ways from the process employed by the chief of police in reaching a decision on the same issues. This may result in a different conclusion."*

[24] The Board in *Unrau* reached the conclusion that taking into account the context of the entire disciplinary regime, the threshold test for the Board and the Chief is the same and that is to ascertain whether there is there is a reasonable prospect of establishing the facts necessary to obtain a conviction on some type of disciplinary charge.

[25] The Board exists to provide independent civilian oversight to the police disciplinary regime. The process allows a complainant an opportunity to have an internal police decision reviewed by an independent civilian body. However, in the case of appeals where there has been no hearing, the Board has no power to impose disciplinary penalties. The Board can only send the matter back for hearing, affirm the decision of the Chief, direct the Chief to lay a charge or direct the Chief to have the matter re-investigated.

[26] As is pointed out in *Unrau,* the Board can only consider an appeal on the record if the parties consent, which did not happen in this case. Most often the Board will be reviewing a matter by way of a hearing, where inevitably, the evidence will be more extensive than that provided by a reading of materials as carried out by the Chief. Even if the witnesses before the Board do no more than read their statements that were read by the Chief, the Board will have more evidence than the Chief by virtue of the benefit of observing the witnesses and their demeanor. More often the evidence in a hearing goes much further by virtue of the evidence in chief and cross examination of the Appellant and Respondent officers and possibly, additional witnesses and documents. As its hearings are conducted on a *de novo* basis, the Board usually has the benefit of additional evidence that was not considered by the Chief.

[27] The Board is aware that the case of *Newton v. Criminal Trial Lawyers' Association* is currently under appeal to the Court of Appeal on the issue of standard of review. However, that case relates to the situation where the appeal to the Board is of a decision made by the Chief of Police following a hearing under Section 20(2)(a) of the *Police Act*. In the current case the Board is dealing with the situation where the Chief made a decision without a hearing under Section 20(2)(b) of the *Police Act*.

[28] Both counsel for the Respondents and the Chief submitted to the Board that the evidence heard by the Board relating to the question of whether the Respondents stated they had warrants and the correlation on the CPIC search of Mr. Best and DB amounted to new allegations. The Board, therefore, should not find the decision of the Chief to be unreasonable because he did not have these allegations before him.

[29] For the reasons given above the Board does not need to address this submission as it is making its decision based upon the threshold test in *Unrau* and not by applying a standard of reasonableness to the decision of the Chief. The Board does find that the central issue in this appeal is whether the search of the Appellant's apartment was conducted without consent.

[30] The Board has no finding at this stage on the whether there were warrants for the individuals searched for in the residence. The evidence before the Board is not clear if the Appellant understood there were warrants or if the Respondents had told him they existed.

[31] The Board finds that the new evidence pertaining to CPIC information on the Appellant and his girlfriend, DB is not relevant in this matter. It was not part of the original complaint and came to light through cross examination during the hearing. The information through CPIC was used to execute a warrant on DB and had no connection to the search of Appellant's residence.

[32] The Board finds that based on the evidence of the Appellant and applying the test as stated in *Unrau,* there is a reasonable prospect of establishing that a disciplinary offence has been committed in this case. It is found that these allegations would be covered by the wording of the original complaint, which was not contradicted by any evidence on behalf of the Respondents, if an adequate investigation would have been conducted. The Appellant's Notice of Appeal lists as a ground of appeal both the failure to deal with all the complaints and that there had not been an adequate investigation of the complaint.

[33] Pursuant to Section 20(2)(b)(ii) of the *Police Act* the Board directs that the Chief conduct a hearing under Section 45(3) regarding the conduct of Respondents Pearce and McIntyre on the following charges:

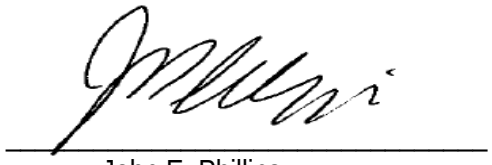
1. Discreditable Conduct pursuant to Section 5(2)(e)(viii) of the *Police Service Regulation* by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service,

the particulars of which are the conduct of the Respondents from the time they apprehended the Appellant on the street until they left his apartment on February 7, 2004;

2. Unlawful or Unnecessary Exercise of Authority pursuant to Section 5(2)(i)(i) of the *Police Service Regulation* by exercising his authority as a police officer when it is unlawful of unnecessary to do so, the particulars of which are whether or not the Respondents entered the Appellant's apartment without consent of the Appellant; and

3. Insubordination pursuant to Section 5(2)(g)(ii) of the *Police Service Regulation* by omitting or neglecting, without adequate reason, to carry out a lawful order, directive, rule or policy of the Commission, the Chief of Police or other person who has the authority to issue or make that order, directive or policy, the particulars of which are whether the EPS Policy in relation to a search conducted without consent was applicable in the circumstances in this case, and if so, was it followed by the Respondents.

[34] Pending the outcome of the disciplinary hearing, it is not appropriate for the Board to provide its specific findings in relation to the credibility of the testimony of the witnesses.



John E. Phillips
Chair

DATED at the City of Edmonton,
in the Province of Alberta, this
9th day of December, 2009.

cc: Board Counsel
Ms. Norheim, Counsel for the Appellant
Mr. Danyluik, Counsel for Cst. B. Pearce and Cst. McIntyre
Mr. Cranna, Counsel for the Chief