

DECISION

File No. 16-0121

NOVA SCOTIA POLICE REVIEW BOARD

IN THE MATTER OF: The *Police Act*, Chapter 31 of the *Acts* of 2004 and the Regulations made pursuant thereto

- and -

IN THE MATTER OF: An appeal filed by **Jeanette Rogers**, Complainant, against **Cst. Ryan Morris, Cst. Justin Murphy and Cst. Donna Lee Paris**, of the Halifax Regional Police, requesting a review of a decision made by Superintendent Colleen Kelly, on November 22, 2018.

BEFORE: Hon. Simon J. MacDonald, Vice-Chair
John Withrow, Board Member
Pat Curran, Board Member

COUNSEL: Jason Cooke & Ashley Hamp-Gonsalves, Counsel for Mrs. Rogers
Brian Bailey, Counsel for Cst. Justin Murphy & Cst. Donna Lee Paris
James Giacomantonio, Counsel for Cst. Ryan Morris
Edward (Ted) Murphy, Counsel for HRP

LAST BRIEF RECEIVED: February 25, 2022

DECISION DATE: May 16, 2022

SUMMARY

[1] In the above captioned matter, the Nova Scotia Police Review Board (the Board) found that on June 15th, 2016, Constables Justin Murphy and Donna Lee Paris both committed disciplinary defaults as a result of their involvement with Corey Rogers contrary to the Regulations made pursuant to the *Police Act*, NS (Regulations) 230/2005.

The disciplinary defaults found against Cst. Murphy were as follows:

- 1) neglected or lacked concern for the health or safety of Cory Rogers in violation of section 24(3)(f) of the Regulations; and
- 2) acted in a disorderly manner or in a manner that is reasonably likely to bring discredit to bring discredit on the reputation of the police department, in violation of section 24(1)(a) of the Regulations.

[2] The Board found Cst. Donna Lee Paris committed a disciplinary default by neglecting or having lacked concern for the health or safety of Cory Rogers, in violation of Section 24(3)(f) of the Regulations on the same date.

[3] As the result of the pandemic, which was in effect at the time, and the inability to hold appropriate hearings, the Board asked for written representations as to the appropriate penalty in this matter for each of the officers.

[4] It has received pre-hearing memos dealing with the penalty from counsel representing all of the parties.

[5] The finding of the disciplinary defaults against Cst. Murphy and Cst. Paris for breach of the regulations arose from their involvement with the spit hood which was put on Cory Rogers. The Board was skeptical about the Constables' argument that they had never seen the warning which was clearly displayed on the packaging. Even if true, however, that argument would not assist the Constables. An officer using a device to control behaviour has to use reasonable care. Reading a warning label is an aspect of reasonable care. Failing to read and heed the warning would be neglecting the health or safety of a person in custody and therefore would be a breach of the Code of Conduct. They had used spit hoods many times before in the course of their employment.

[6] The Board also concluded that both Constables knew that Mr. Rogers had not removed the spit hood himself prior to their leaving the cell and they did not inform the booking officers that he still had the spit hood on. In essence, the Board found that Csts. Murphy and Paris should plainly have seen the warnings on the package because they have used them in the past. The Board found the Constables argument, that they had never seen the warning, was very questionable because of its obvious nature and where this warning was displayed on the spit hood package. It also, as noted above, has a warning which clearly told them to make sure a person with a spit hood on (like Mr. Rogers), not be left alone.

[7] The additional disciplinary default found against Cst. Murphy contrary to Section 24(3)(a) was based on the facts that Cst. Murphy threw Mr. Rogers' shoes into the cell with considerable force and doing so ran the risk of possibly hitting Mr. Rogers. On this occasion they did not but they did fall close to his head. The Board also concluded that there was no deliberate attempt by Cst. Murphy to try to hit Mr. Rogers with the shoes.

[8] This is the penalty decision, which is governed by Section 25 of the Regulations, which provides as follows:

- (a) a recommendation to the Board that the member be dismissed or, if the chief officer has authority to dismiss in accordance with a by-law made under subsection 37(4) of the Act, an order to dismiss the member;
- (b) an order that the member resign from the police department and, if the member does not resign within 7 days after the date of the order, a recommendation to the Board that the member be dismissed or, if the chief officer has authority to dismiss in accordance with a by-law made under subsection 37(4) of the Act, an order to dismiss the member;
- (c) reduction of the member's rank, seniority or pay;
- (d) suspension of the member without pay for no longer than 30 days;
- (e) an order that the member pay a fine in an amount not exceeding the equivalent of 10 days' pay payable to the member as a member, within a time determined by the chief officer;
- (f) an order for a period of close supervision of the member;
- (g) a reprimand of the member;
- (h) an order that the member undergo counseling, treatment or training acceptable to the chief officer, the expense of the counseling, treatment or training to be assumed by the police department;
- (i) any order not included in clauses (a) to (h) that the chief officer considers appropriate

[9] It should be noted that the police Regulations made pursuant to the *Police Act* NS Reg. 230/2005 at Section 25 provides for various penalties which would range from dismissal to simple reprimand. Mr. Bailey, in his brief, stated that the Board ought not to use the penalty phrase because it wasn't appropriate. However, the act governing the Board's legislation actually refers to the matter as penalty. That having been said, the Board does agree that most decisions in recent years tend to use the word disposition.

[10] There has been guidance provided as to the foundational principles applicable to the police discipline process. Paul Ceyskens in *Legal Aspects of Policing* (Looseleaf, Update 31 December 2017) (Ceyskens), 5-268 to 5-271 sets forth five foundational principles as follows:

1. Compliance with purposes of the police discipline process;
2. Corrective dispositions should prevail, where possible;
3. Presumption of the least onerous disposition;
4. Proportionality; and
5. Higher standard applicable to the constabulary.

[11] These foundational principles have been adopted by the Board in previous decisions; *Rutherford (Re)* 2017 Can L11 74692 (NSPRB); *Gilbert (Re)*, 2012 Can L11 100594 (NSPRB); and *Heighton (Re)*, 2012 CanL11 19109 (NSPRB). We agree with Counsel for the parties these principles should also apply to this matter.

[12] In dealing with the first principle, the Board is required to comply with the purposes of the police discipline process. Ceyskens at 5-309 + 5-310 sets forth what these principles ought to be as follows:

- 1) the public interest: ensuring a high standard of conduct in the constabulary, and public confidence in the constabulary;
- 2) the employer's dual interest in maintaining discipline in the police workplace and as "a public body responsible for the security of the public;"
- 3) the rights of a respondent police officer suspected of misconduct [to] being treated fairly; and
- 4) where individual members of the public are involved whether or not they register a formal complaint, the process should ensure that the interests of those individuals are protected.

[13] There is no doubt in dealing with the roles of a police officer in society that he/she is held to a higher standard of conduct than the average citizen. They have a special role to play in society with special powers given to them. In that regard, we must look at public interest as it has to do with the well being of the public and it is that interest of the public that must be protected.

[14] As police discipline process has evolved throughout the years it has developed a more remedial philosophy. It has become a stated general presumption that corrective or remedial dispositions should prevail where possible. However, it has also been recognized that there are cases where a punitive disposition should prevail or be combined with a corrective or remedial disposition. This can be seen in the Rutherford case (*supra*).

[15] The third principle presumes that the least onerous disposition should be imposed where possible. However, this can be overridden where it would undermine public confidence in the administration of police discipline.

[16] The fourth principle deals with proportionality. Ceysens sets forth 15 different aggravating and mitigating factors that should be considered in police disciplinary cases at 5-322 and these were adopted in Gilbert, *supra*. They are:

1. Public interest
2. Seriousness of the misconduct;
3. Recognition of the seriousness of the misconduct;
4. Handicap and other relevant personal circumstances;
5. Provocation;
6. Procedural fairness considerations;
7. Employment history;
8. Potential to reform or rehabilitate the police officer;
9. Effect on police officer and police officer's family;
10. Consistency of disposition;

11. Specific and general deterrence;
12. Employer approach to misconduct in question;
13. Damage to reputation of the police force;
14. Effect of Publicity; and
15. Loss resulting from unpaid interim administrative suspension

[17] The Board has considered the above factors and has weighed those that deal with the mitigating and aggravating circumstances of the facts as found by the Board in its decision. It has also concluded that several of the items listed are not of great relevance in this case and they would be numbers four, five, six, nine, 10, 14 and 15.

[18] The Board in its review of this case is satisfied that the public interest referred to in the first factor deals with the well-being of the public namely, the citizens. There is no doubt that Constables Paris and Murphy, by leaving Mr. Rogers unattended with a spit hood over his head in the circumstances here, committed a serious default. It is true that none of the officers took accountability for their misconduct and never apologized nor acknowledged that their actions created a material risk for Mr. Rogers or even that their conduct could have amounted to misconduct. Mr. Bailey in his brief instead tries to make such effort but his comments are not evidence. However, the Board is aware that as accused officers they are entitled to full answer and defence. It is aware that there are many cases they follow the instructions of their counsel.

[19] We take the position as taken in criminal matters that lack of remorse is not an aggravating factor (see: *Rv. Sharif*, 2019 ABQB 954; *Rv. Valentini (D) et al*, Feb. 5, 1999, Ont. C.A. 1).

[20] The fifth foundational principle recognizes the fact that a higher standard of conduct is applicable to the constabulary than that of the average citizen. Mr. Murphy, in his memorandum

on penalty in this matter, correctly pointed out the appropriate authority and thinking of the Board at paragraph 25 where he said:

“Likewise, in *Schlarbaum v Chatham – Kent Police Service*, 2013 ONCPC 5, the Ontario Civilian Police Commission stated at para. 58: A police officer is rightly held to a higher standard of conduct than members of the public by reason of the position and responsibilities with which officers are entrusted.”.

[21] This case was a tragedy. It resulted in the death of Cory Rogers and has permanently impacted the life of his mother, Mrs. Rogers. No matter what disposition we decide upon, we cannot bring back Cory Rogers.

[22] In this particular matter, Csts. Murphy and Paris were not scheduled to work that particular date but were called out to fill in and help complement the officers needed to cover shift work that night. They then found themselves involved in this serious matter. Csts. Murphy and Paris have a long-standing excellent reputation with the HRP and in fact, Cst. Paris just received an award for her exceptional work while dealing with a national abduction investigation. Csts. Murphy and Paris were not scheduled to work that night but were called in to help fill out the complement of officers needed to cover the shift. They then found themselves involved in this most serious matter.

[23] This disposition is also troubling to the Board because of all the intervening factors which played a role in the ultimate death of Mr. Rogers. First of all, the HRP failed in their duty to give proper instructions to its police officers as to the seriousness and the implications of using a spit hood. The end result of using the spit hood improperly is obviously stated on the container of the spit hood. That is, it could cause death. One might compare that to the use of an officer's firearm. It could cause death. Yet, officers receive training in the use of firearms but none in the use of a

spit hood from their superior officers. Csts. Murphy and Paris did not have any specific training nor did the HRP have any kind of specific policy that would have alerted Csts. Murphy or Paris to the dangers of leaving an intoxicated person unattended with a spit hood over his face and head.

[24] The Board has concluded this was a very serious neglect by superior officers of the HRP. The use of a spit hood could cause death and it did so in this case. The upper echelon of the HRP should have recognized the seriousness of the possibility of death from the misuse of a spit hood. The failure of the HRP to educate or provide instructions on the use of the spit hood is a factor that the Board considers.

[25] However, the absence of a policy by HRP does not let the officers off the hook. There is no doubt they needed to exercise reasonable care in the exercising of their judgement in each particular case and here they failed, as found by the Board.

[26] The Board also concluded that these officers knew Mr. Rogers who was intoxicated had not removed the spit hood himself prior to their leaving the cell. They did not inform the booking officers in the Prisoner Care Facility (PCF) Mr. Rogers still had the spit hood on.

[27] The Board rejects Mr. Bailey's argument put forth in paragraphs 7 to 12 in his brief. The Board is aware HRP policy imposes a duty on an arresting/transporting officer, but that does not relieve other officers of responsibility. Constables Murphy and Paris were more experienced officers, and they did not ask Constable Morris for permission to put the spit hood on Mr. Rogers nor did they wait for Constable Morris to decide about it on his own. The Board is also satisfied

they could have decided to remove the spit hood without the permission up to the time they left Mr. Rogers in the cell. Furthermore, they wouldn't have needed anyone's permission to tell the booking officers that the spit hood was still on Mr. Rogers.

[28] Throughout his brief, Mr. Bailey continued to make arguments against findings that the Board had made. The Board rejects once more his arguments and would say that they are most inappropriate to be making at this stage of the proceedings.

[29] The Board does agree with Mr. Bailey that there is no doubt neither Cst. Murphy or Cst. Paris foresaw the tragic outcome to Mr. Rogers. In the evidence at the hearing, the Board has concluded that the dreadful outcome to Mr. Rogers is not indicative of the usual conduct of either Cst. Murphy or Cst. Paris.

[30] Mr. Cook on behalf of Mrs. Rogers argues the appropriate penalty here is the officers should be dismissed. In the alternative he argues that if they're not being dismissed then the appropriate penalty is the statutory maximum suspension without pay of 30 days for both officers. In addition, he recommends corrective measures should be ordered in the form of mandatory education in:

1. Recognizing the signs of extreme intoxication;
2. Addiction informed approaches to interacting with intoxicated people, and any other form of crisis intervention training that will assist in preparing the Officers for interacting with members of the public living with addiction in the course of their police duties; and
3. De-escalation and conflict management when dealing with civilians, but particularly those who are under the influence of alcohol or drugs.

[31] Mr. Bailey, on behalf of his clients, states that the only disposition even close to being appropriate would be a reprimand, but with the clear acknowledgement and recognition that the employer bears significant responsibility and also an identification by the Board that the officers conduct was inadvertent.

[32] Mr. Murphy argues the appropriate penalty in these circumstances if not dismissal outright then there should be a 10-day suspension for Cst. Murphy and a 9-day suspension for Cst. Paris.

[33] Mr. Bailey argues in Cst. Murphy's commission of a disciplinarian default by tossing the sneakers inside Mr. Rogers cell should only be regarded as an extremely low - end default and therefore a monetary penalty would suffice.

[34] There is a presumption that the least onerous disposition ought to be imposed in matters involving the discipline of police officers. However, the Board is satisfied that may be impacted by the facts of a particular case. In this case we consider the actions of Constables Murphy and Paris in the roles they played involving their interaction that night with Mr. Rogers to be serious enough to consider a more severe penalty.

[35] The Board is aware that Mr. Rogers was alive when Constables Murphy and Paris left the PCF. At that stage he had been left under the supervision of the Special Constables in the PCF. It is fair to say that both Constables Murphy and Paris should reasonably be able to rely on the Special Constables to take the appropriate care of Mr. Rogers once they left. It was the duty of the Special

Constables to check prisoners in the PCF every 15 minutes. Corey Rogers died approximately 30 minutes after the departure of Constables Murphy and Paris.

[36] The Board has found that the actions of Constable Murphy in the circumstances were somewhat more serious than those of Constable Paris. It has found that Constable Murphy became annoyed at Mr. Rogers and threw his sneakers in the cell just missing Mr. Rogers.

[37] The Board also considers another significant factor and that is Mr. Rogers was not in the care of either Cst. Murphy nor Cst. Paris at the time of his unfortunate death.

[38] There has been a great deal of public interest in this matter especially surrounding the role of the officers, the use of spit hoods and the treatment of intoxicated prisoners and the death of Mr. Rogers. We are reminded that we are dealing with the roles played by Constable Murphy and Constable Paris in this whole unfortunate tragedy.

[39] The Board can not find any prior cases of a similar nature upon which a disposition in this matter might be based.

[40] The Board has concluded in arriving at a proper disposition that neither Constable Murphy nor Constable Paris had intentionally done anything to deliberately harm Mr. Cory Rogers. The facts in this matter revealed to the Board that they were cooperative with Mr. Rogers and his girlfriend. For example, where Cst. Paris promised Mr. Roger's girlfriend she would make sure she left the cigarettes in the PCF to be given to Mr. Rogers when he woke up the next morning and she did so.

[41] The public must be able to have confidence in the police force. The public expects police officers to act with high standards and to make sound judgments when patrolling. The importance of showing proper concern for the safety of persons in their custody must be impressed upon all officers. This is so especially when those persons are intoxicated and need special help. Police officers should be trained to recognize and assist intoxicated persons.

[42] In crafting our disposition of this matter, the Board is aware in doing so that a member of the public who would be fully apprised of all the circumstances in this particular case would recognize the seriousness of the misconduct before the Board and understand that all parties share the blame for Mr. Rogers death.

[43] Although the evidence is that Constable Murphy no longer follows his former practice of throwing footwear into cells, the Board is dealing with his actions on the night in question and we feel some disciplinary outcome is required.

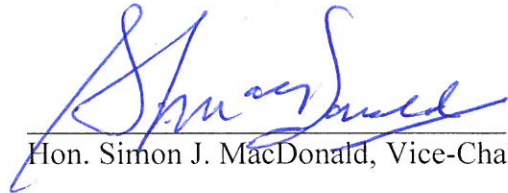
[44] For the above reasons, the Board pursuant to Section 25 of the Regulations imposes the following dispositions or penalties:

- 1) In the case of Cst. Donna Paris, a suspension of 29 days without pay for breach of Section 24 (3)(f) of the Regulations.
- 2) In the case of Cst. Justin Murphy:
 - a) A suspension for 29 days without pay for breach of Section 24 (3)(f) of the Regulations
 - b) A suspension of one day without pay for breach of Section 24 (1)(a) of the Regulations to run consecutive to that imposed for breach of Section 24 (3)(f) of the Regulations.

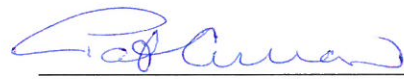
[45] Although HRP are not before the Board, charged with anything, the Board feels after hearing all the evidence obligated to suggest HRP should implement for its officers (if it has not began to do so already) education in:

- 1) Recognizing the signs of extreme intoxication;
- 2) Addiction informed approaches to interacting with intoxicated people, and any other form of crisis intervention training that will assist in preparing the Officers for interacting with members of the public living with addiction in the course of their police duties; and
- 3) De-escalation and conflict management when dealing with civilians, but particularly those who are under the influence of alcohol or drugs.

Dated at Halifax, Nova Scotia this 16th day of May, 2022.


 Hon. Simon J. MacDonald, Vice-Chair


 John Withrow, Board Member


 Pat Curran, Board Member

Distribution: Jeannette Rogers, Complainant
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