

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 **Adam LeRue and Kerry Morris**, Complainants, against Cst. Kenneth O'Brien and Cst. Brent Woodworth, of the Halifax Regional Police, requesting a review of a decision made by Superintendent Colleen Kelly dated June 19, 2019

BEFORE: Jean McKenna, Chair
Hon. Simon J. MacDonald, Vice-Chair
Stephen Johnson, Board Member

COUNSEL: Jason T. Cooke, KC & Ashley Hamp-Gonsalves, Counsel for Mr. LeRue & Ms. Morris
James Giacomantonio, Counsel for Cst. O'Brien
Edward Murphy, Counsel for Halifax Regional Police

ORAL SUBMISSIONS: June 22, 2023

DECISION DATE: February 3, 2024

[1] The matter came before the Board as a result of a complaint by Adam LeRue and Kerry Morris against Constables Kenneth O'Brien and Brent Woodworth. The Board held hearings on October 8, 9, 27 and December 8, 2020.

[2] A brief outline of these complaints can be summarized by Mr. LeRue and Ms. Morris' evidence. It revealed they were parked in their motor vehicle at a parking lot in the Dingle Park on February 12, 2018, after 10:00 p.m. Constable O'Brien was on duty with Constable Woodworth. Constable O'Brien approached the LeRue/Morris vehicle and asked Adam LeRue for identification. Adam LeRue was concerned about providing his identification. He wanted to know why he had to do so. An argument ensued, there was a scuffle and Mr. LeRue was charged with a by-law offence, a motor vehicle offence and a criminal code offence. He was taken to the holding cells in Halifax where he remained for approximately 15 hours until he was released the following day after a court appearance. A more detailed summary of the facts can be found in the Board's decision at paragraphs 1 to 53 filed on June 18, 2021.

[3] In its decision, the Board found Constable O'Brien was in breach of the code of conduct required of police officer's contrary to sections 24(1)(a) and 24(7)(a) and (c). The Board dismissed the allegations against Constable Woodworth. It also pointed out that it did not find Constable O'Brien's conduct was triggered by race, which was alleged during the hearing.

[4] Constable O'Brien filed a Notice of Judicial Review of the Board's decision on July 26, 2021.

[5] The Judicial Review was heard by Justice Mona Lynch on December 6, 2022. In her written decision she dismissed the Judicial Review. The matter has been now referred to the Board for disposition.

[6] The Board heard oral arguments by the parties on June 22, 2023.

[7] This is the relevant disposition hearing 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

[8] 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.

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

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

[10] These foundational principles have been adopted by the Board in previous decisions; **Morris et al. (Re)**, 2022 Can LII 44276 (NSPRB); **Rutherford (Re)** 2017 Can LII 74692 (NSPRB); **Gilbert (Re)**, 2012 Can LII 100594 (NSPRB); and **Heighton (Re)**, 2012 Can LII 19109 (NSPRB). We agree with Counsel for the parties these principles should also apply to this matter.

[11] In dealing with the first principle, the Board is required to comply with the purposes of the police discipline process. *Ceyssens, supra*, 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.

[12] There is no doubt in dealing with the roles of the 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.

[13] As the 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*).

[14] 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.

[15] The fourth principle deals with proportionality. *Ceyssens, supra*, sets forth 15 different aggravating and mitigating factors that should be considered in police disciplinary cases at 5-322. 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
15. Loss resulting from unpaid interim administrative suspension

[16] The Board had 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.

[17] 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 the actions of Constable O'Brien placing Mr. LeRue in jail overnight in the facts as found in the circumstances here has committed a serious default. It is true that Constable O'Brien did not take accountability for this misconduct and never apologized nor acknowledged that his actions could have amounted to misconduct. However, the Board is aware that Constable O'Brien is entitled to full answer and defence. It is aware that there are many cases where police officers follow the instructions of their counsel.

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

[19] Mr. Giacomantonio, on behalf of Constable O'Brien spoke in detail about the various courses that Constable O'Brien has taken to try to improve himself and, as he said, to make himself a better police officer. He told the Board about Constable O'Brien attending the Journey to Change program, amongst others. This, and other courses, primarily provide education to police officers on issues in dealing with black people. It dealt with how they should interact with black people.

[20] Mr. Giacomantonio also emphasized before the Board when Constable O'Brien was not quite sure what to do in the situation that particular night, he sought help. He also told the Board that Cst. O'Brien wants to learn and seeks training to do so.

[21] Mr. Giacomantonio referred the Board to the large amount of publicity this case garnered and to the public humiliation Constable O'Brien went through during the course of this matter. He suggested Constable O'Brien was prepared to deal with the matter through Restorative Justice before the complaint became formal, but Mr. LeRue was not interested. Furthermore, as an indication of Constable O'Brien's fairness, he told the Board that when Constable O'Brien realized it was the wrong ticket and he was asked to change the ticket to another offence he made the decision to let the matter go; that everyone had suffered enough. He reminded the Board Constable O'Brien has been a police officer for 15 years and has had no prior involvement with complaints before the Police Complaints Commissioner. He urged the Board to provide a disposition in this matter that was both proportional and reasonable in this situation.

[22] Mr. Giacomantonio concluded by urging the Board to consider by way of disposition:

1. A reprimand to Constable O'Brien.
2. That he attend training, other than those courses which he has taken.

He reminded the Board again of the reasoning in the *Act* stating a disposition should be remedial and not punitive based on the situation occurring on that particular evening as well as there being no prior history of discipline against Constable O'Brien.

[23] Mr. Cooke, on behalf of Mr. LeRue and Ms. Morris, argued strongly both the facts of the case and what happened eventually to Mr. LeRue. He formulated his remarks as following two threads:

1. Essence of the case and the exercise of discretion, namely the failure of Cst. O'Brien to de-escalate and that he made conscience choices to escalate the matter rather than de-escalate.
2. There was a lack of real recognition of the seriousness of the conduct by Cst. O'Brien in the actions he made that evening.

[24] In his remarks, Mr. Cooke placed emphasis on the cases of **Gilbert (Re)**, 2012 CanLII 100594 (NSPRB) and **Rutherford (Re)** 2017 CanLII 74692 (NSPRB).

[25] Mr. Cooke reviewed the remarks of Ceysens in detail which has been referred to earlier herein and went through the relationship each one has to the facts in this particular case. The Board concludes from his remarks that he felt a reprimand was not the only thing appropriate in this particular matter. He

spoke in terms of corrective dispositions where the matter would bring the administration of justice into disrepute if the appropriate disposition wasn't a corrective one as he requested in this case.

[26] Mr. Cooke, on behalf of Mr. LeRue and Ms. Morris, urges the Board to impose a disciplinary action:

1. A suspension of Cst. O'Brien for a period of 30 days;
2. A verbal and written reprimand;
3. A payment of a fine;
4. Training and education, more specifically on de-escalation; and
5. A written apology.

[27] Mr. Murphy, on behalf of Halifax Regional Police, went over the training that Constable O'Brien has taken pursuant to their records, and it seemed to coincide with the remarks of Mr. Giacomantonio. Mr. Murphy did not take a position on the matter except to say, in his opinion, a lengthy suspension would not be appropriate in these circumstances.

[28] The Board is mindful of the fact that even though Constable O'Brien applied for Judicial Review of the Board's decision that not ought to be held against him and not a matter to interpret that he did not have any sympathy for Mr. LeRue or Ms. Morris. The Board, as counsel are well aware, concludes that Constable O'Brien had a lawyer, Mr. Giacomantonio, who determined that the Board was wrong and wanted to seek a Judicial Review of the Board's decision. Even though the Court determined that the Board was correct in their decision and Mr. Giacomantonio was wrong, it should not be held against Constable O'Brien and it isn't.

[29] It cannot be forgotten here, however, that Mr. LeRue spent a night in jail and the difficult time he had getting his medication. This could have all been averted had Constable O'Brien de-escalated the situation. Even though one might conclude that Mr. LeRue by his actions did not really help matters. However, this should not have affected the actions of Constable O'Brien.

[30] The Board has considered the facts of this particular case, the comments of Justice Lynch in the Judicial Review, and as well as the remarks of counsel at the disposition hearing. The Board accepts Mr. Giacomantonio's comments when he advised Constable O'Brien is seeking courses to try and make himself a better police officer.

[31] The Board has come to the conclusion, given the ramifications of the escalation by Constable O'Brien, Mr. LeRue spending a night in jail, that some form of punishment ought to be handed out and that a simple reprimand is not the answer.

[32] Thus, the Board imposes the following disciplinary disposition on Constable O'Brien as follows:

1. Suspension for a period of 14 days without pay. On the facts of this case the Board does not agree a 30 day suspension is appropriate.
2. Constable O'Brien attend training in the form of anger management. In that regard there were questions raised at the hearing as to whether or not Halifax Regional Police has such a program. The Board would urge the Halifax Police Commission to set up such a program for its officers if same has not already been implemented.
3. Finally, given what happened and considering the circumstances involving, Mr. LeRue, Ms. Morris and Constable O'Brien, the Board would require a written apology by Constable O'Brien to Mr. LeRue and Ms. Morris and a copy of same be provided to the Board within 30 days of the date of this decision.

Dated at Halifax, Nova Scotia this 3rd day of February, 2024.



Jean McKenna, Chair



Hon. Simon J. MacDonald, Vice-Chair



Stephen Johnson, Board Member

Distribution: Jason T. Cooke KC & Ashley Hamp-Gonsalves, Counsel for Mr. LeRue & Ms. Morris
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