

DECISION

File No. 20-0092

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 **Kayla Borden**, Complainant, against **Cst. Scott Martin and Cst. Jason Meisner**, of the Halifax Regional Police, requesting a review of a decision made by Inspector Derrick Boyd dated December 10, 2020

BEFORE: Jean McKenna, Chair
Kimberly Ross, Board Member
Stephen Johnson, Board Member

COUNSEL: Devin Maxwell, Counsel for Ms. Borden
Nasha Nijhawan, Counsel for Cst. Martin & Cst. Meisner
Katherine Salsman, Counsel for Halifax Regional Police

HEARING DATE: Written Submissions

DECISION DATE: August 9, 2021

[1] On July 28, 2020, the Complainant in this matter, Kayla Borden was stopped while driving her vehicle on Windmill Road, in Dartmouth. The incident was triggered by an initial, abandoned, pursuit of a vehicle in Bedford. A short time later, another officer observed what he believed to be the subject vehicle, he began to follow, and eventually the matter involved a number of police vehicles responding to assist. Ms. Borden's vehicle was stopped a short time later in Dartmouth. She was arrested however, it very quickly became apparent that the officers had the wrong vehicle and wrong individual, and she was "un-arrested" at the scene.

[2] Ms. Borden is a woman of colour, and that day, she filed a formal complaint. The initial Form 5 names only Cst. Stuart McCully. Cst. McCully was the officer who initiated the first vehicle pursuit, which was abandoned. He had requested assistance and provided a description of the subject vehicle and driver. His only further involvement was his arrival at the scene of the stop, where he advised that this was the wrong vehicle and driver.

[3] Ms. Borden was provided with his name by staff at Dartmouth Police Headquarters. He was identified on the report as the lead investigator, as he had made the initial attempt to stop the suspect vehicle. Apparently, Ms. Borden had some difficulty obtaining information from staff at HRP, but the file was found, and this was the name she was initially given.

[4] Halifax Regional Police (HRP) assigned Sgt. Jonathan Jefferies to investigate the complaint. After an initial review, including a meeting with Ms. Borden and her counsel, Devin Maxwell, he concluded that the named officers should be Cst. Jason Meisner (the second pursuit), and Cst. Scott Martin (the arresting officer), and they were served with Form 8, Notice of Allegation. Cst. McCully was not named.

[5] Other officers who had been at the scene of the stop and arrest included Constables Andrew Nicholson, Anil Rana, Sym Dewar, Andrew Joudrey, Jeffrey Pulsifer, Tanya Lambert and Scott Martin.

[6] Sgt. Jefferies completed his investigation on November 20, 2020, and Form 9, Notice of Completion of Investigation, was given to Constables Meisner and Martin. It does not appear that a copy was provided to Ms. Borden. However, HRP in its submissions on preliminary matters, says that at the conclusion of the interview with Ms. Borden and her counsel, she was advised who the "named" officers were, and that other officers would be interviewed as witnesses. Apparently, neither Ms. Borden or her counsel raised any concerns about the focusing of the complaint at that time, nor did they mention framing the complaint as against HRP as a whole.

[7] On December 6, 2020, Inspector Derrick Boyd, the Disciplinary Authority, released his decision. He concluded that the complaints were “not sustained”. Ms. Borden has filed this appeal from that decision. In the course of a conference call on March 26, 2021, to set hearing dates for this matter, Ms. Borden's counsel raised several preliminary matters. It was determined that those issues should be dealt with by way of written submissions by the parties. All submissions have now been received.

[8] Mr. Maxwell submits several issues on behalf of Ms. Borden, which we will attempt to summarize as follows:

1. The appeal should be broadened to deal with the conduct of all officers involved in her arrest.
2. The appeal should be broadened to include a complaint against HRP as a whole.
3. The appeal should consider the manner in which Ms. Borden's complaint was handled by the HRP, including: a) efforts to suppress the production of information relevant to her arrest, and b) the manner in which the investigation of her complaint was conducted.
4. The appeal is about an entire police department with a long history of racial bias and stopping the racial profiling and victimization of Black Nova Scotians.
5. Non-disclosure of information by HRP (the employment files of the subject officers).
6. Delay in processing the complaint.

[9] In his submissions of June 4, 2021, Mr. Maxwell states that “Her complaint is against all of the officers that were present on the morning that she was arrested. They all participated in her arrest and any one of them could have stopped it”.

[10] Mr. Maxwell's position is somewhat confusing; in his reply submission of June 21, 2021, he states that “Her position is not that 'the appeal should be broadened', or to 'add officers to her complaint'” (the latter in reference to submissions by Ms. Nasha Nijhawan, counsel for the subject officers). He goes on to say “Kayla's complaint was always against the entire HRP and all of the officers that were involved with her arrest. It was never simply about a sloppy arrest by Constables Martin and Meisner – until Sgt. Jeffries decided it was”.

[11] The Nova Scotia police complaint process is described in detail in the *Police Act* and Regulations. Specific officers can be named, and as well, a complaint can be made regarding a police department itself. There are certain steps that must be followed, at the department level, and, in the event of an appeal, the office of The Nova Scotia Police Complaints Commissioner has the authority to have a further investigation, and to screen out an appeal deemed frivolous and vexatious. If not screened out, the Commissioner forwards the matter to the Review Board for a hearing *de novo*.

[12] The powers of the Review Board are set out in the *Act*, S. 79:

Powers of Review Board at hearing and decision

79 (1) At a hearing under this Act, the Review Board may

- (a) determine all questions of fact and law;
- (b) dismiss the matter;
- (c) find that the matter under review has validity and recommend to the body responsible for the member of the municipal police department what should be done in the circumstances;
- (d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the municipal police department or the suspension of the member with or without pay;
- (e) affirm the penalty imposed;
- (f) substitute a finding that in its opinion should have been reached;
- (g) award or fix costs where appropriate, including ordering costs against the person making the complaint, where the complaint is without merit;
- (h) supersede a disciplinary procedure or provision in a contract or collective agreement

[13] Those powers are broad enough to allow the Board to hear full and complete evidence surrounding an incident in question, including evidence as to the conduct of all officers involved, whether subject officers or witness officers. The Board has the power to comment on for example, policies, procedures, and practices of a department, if it appears that those matters may underlie the event complained of. It has in the past, considered minor procedural irregularities. However, the Board cannot make a finding of disciplinary default against an officer who is not the named subject of the complaint.

[14] In **LeRue (Re)**, 2020 CanLii 71703 (NSPRB), the completion of the investigation by the HRP was out of time. The complainants initially argued the result of that failure was that the determination by the disciplinary authority to dismiss the complaint was a nullity, and therefore their complaint must be sustained. That argument was abandoned when the complainants retained counsel. The Board found that

the minor procedural deficit was not such that it would result in either the termination, or the allowance of the complaint. Either result would be procedurally unfair to both the complainants and the officers.

[15] Dealing with the several arguments put forward on behalf of Ms. Borden:

1. The appeal should be broadened to deal with the conduct of all officers involved in her arrest.
2. The appeal should be broadened to include a complaint against HRP as a whole.
3. The appeal should consider the manner in which Ms. Borden's complaint was handled by the HRP, including: a) efforts to suppress the production of information relevant to her arrest, and b) the manner in which the investigation of her complaint was conducted.

[16] In Ms. Borden's complaint, to add further officers to the review at this stage would not constitute a minor procedural defect. Both Ms. Borden and the officers are allowed procedural fairness, and to now add individuals who were witness officers as subject officers would deny them access to all of the earlier steps in the statutory process. Likewise, a complaint against the investigator (Sgt. Jefferies) would require a separate complaint.

[17] A complaint against the disciplinary authority (Inspector Boyd) would have to be the subject matter of a fresh complaint, if it is intended that in reaching his decision, he committed a disciplinary default of some nature. Dissatisfaction with his decision is dealt with by way of Ms. Borden's appeal.

[18] The third issue described above appears to be more of a concern about the complaint process itself, not something that should be the subject matter of an appeal. The Board does have the authority (s. 79(1)(c)) to comment on any issues that Ms. Borden may raise.

[19] Mr. Maxwell's further issues are as follows:

4. The appeal is about an entire police department with a long history of racial bias and stopping the racial profiling and victimization of Black Nova Scotians.
5. Non-disclosure of information by HRP (the employment files of the subject officers?).
6. Delay in processing the complaint.

[20] The allegation of racial bias in the entire police department can be argued at the hearing if relevant, such that the conduct of the subject officers (and others present) was driven, or shaped, by the alleged departmental bias. If a connection is established, through evidence lead at the hearing, the powers of the Board are broad enough to make comment pursuant to s. 79(1)(c). However, despite counsel for the Disciplinary Authority not opposing adding the HRP as a party, the Board does not have jurisdiction to proceed on that basis, nor is it necessary in the circumstances.

[21] We emphasize that our role is to deal with Ms. Borden's complaint, as set out in Form 5, and with the conduct of the named officers. We understand that she has an issue with the eventual determination by Sgt. Jefferies as to what officers should have been named, and as noted, we can address that process if it becomes relevant to Ms. Borden's complaint. But we emphasize that this hearing is about Ms. Borden's complaint. That is our statutory mandate.

[22] Regarding disclosure, we completely agree that full disclosure of information surrounding the events of that morning must be disclosed, not only for the benefit of the complainant, but also, for the benefit of the Board. There is no specific direction in the *Act* or in the Regulations governing disclosure, but the Board has always expected full disclosure by both the complainant and the department. Much of the information is in the hands of the department, such as call history, vehicle history, dispatch, including inter-vehicle communication, officer notes, reports, etc. This does not, however, include the employment file of the subject officers, or other officers. That does not prevent, when relevant and not merely a fishing expedition, cross examination of a witness suggesting, for example, a history of race related conduct by a particular individual.

[23] We understand from submissions on behalf of HRP that there has been further disclosure before and since the Notice of Review was filed. If that is not sufficient, we invite the parties to advise us in advance of the hearing, and the Board can order further disclosure.

[24] Concerning Mr. Maxwell's issue regarding delay, we are always concerned with the time taken to bring matters to conclusion, but in this case, there does not appear to be any violation of any legislated timeline.

[25] On behalf of the subject officers, counsel has asked that Ms. Borden provide particulars of the basis for the complaints against them. It appears from the materials so far before the Board, that the substance of her complaints concerning the incident of July 28 are reasonably clear. Should any "surprises" arise (for either party) in the course of the hearing *de novo*, such can be addressed through

adjournment. Parties should attempt to provide a list of possible / expected witnesses to each other in advance of the hearing.

[26] The clerk will now contact parties to set hearing dates.

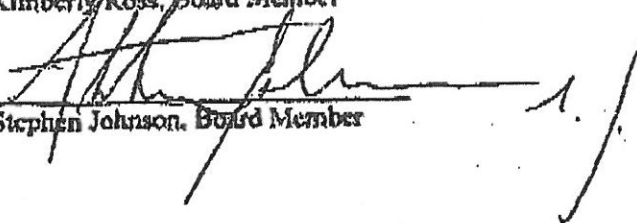
Dated at Halifax, Nova Scotia this 9th day of August 2021.



Jean McKenna, Chair



Kimberly/Ross, Board Member



Stephen Johnson, Board Member

Distribution: Devin Maxwell, Counsel of Ms. Borden
Nasha Nijhawan, Counsel for Cst. Martin & Cst. Meisner
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