

IN THE POLICE BOARD

NUKU'ALOFA

SB Application No. 03 (SB03) of 2021

BETWEEN: TONGA POLICE

Applicant

AND:

Acting Sergeant Losipeli PAU'U
Senior Constable To'ofoha FEVALEAKI
Senior Constable Samisoni KALONI
Constable First Class Mikaele TONGA

Respondents

ATTORNEY GENERAL'S OFFICE	
INITIALS: <i>[Signature]</i>	DATE: 15/12/21
<input checked="" type="checkbox"/> File	<input checked="" type="checkbox"/> Website
<input checked="" type="checkbox"/> Database	<input type="checkbox"/> Social Media
<input checked="" type="checkbox"/> Email internal	<input type="checkbox"/>

JUDGMENT

1. This is a Petition from the Police Employment Committee ("PEC") seeking an order under Sections 63 and 66(1) of the Tonga Police Act 2010
 - (i). for the deferral of the Respondents' salary increment for up to 1 year; or
 - (ii). for the Police Board to order any actions as it deems appropriate

on the grounds of Serious Breach of Discipline, in which regard the Applicant has cited breaches of Sections 8.1 and 16.2 of the Code of Conduct, as follows:

"8.1: Tonga Police members shall not act beyond the powers provided to them by the laws of Tonga

16.2: All members of the Tonga Police have an obligation to act and be seen to act by the public in accordance with the spirit and the letter of the law including the terms of the Code of Conduct whether on or off duty”.

2. The matter was heard before the Police Board on the 7th December 2021. Ms. ‘Uta’atu of the Crown Law Office appeared for the Applicant and the Respondents appeared on their own behalf.
3. Before the hearing commenced, the Board made inquiry of the Respondents as to whether they understood the charges made against them and whether they were prepared to accept the recommendation of the PEC for deferment of their salary increment. The Respondents indicated that they did understand the charges but did not wish to accept the recommendation of the PEC.

FACTS

4. On the night of 06 January 2016 the four Respondents were called to respond to an incident on the Taufé’ahau Road in Fanga wherein a Mr. Nifai Malupo had caused a disturbance by making threats against his girlfriend who worked in an ice cream truck at that location, and striking the truck door with a hammer he was carrying, apparently for the purpose of warding off stray dogs. The Respondents proceeded from the Nuku’alofa Police Station to the incident location in a Toyota HiLux police vehicle driven by Officer Fevaleaki.
5. Upon the arrival of the police at the scene Mr. Malupo yielded the hammer to the officers, but objected to the officers’ instruction that he accompany them to the Police Station. This led to a quarrel between the officers and Mr. Malupo.
6. The officers proceeded to attempt to place handcuffs on Mr. Malupo, which he resisted. Mr. Malupo was forced to the ground while the officers restrained him, and,

according to the testimony of one eye witness, Officer Fevaleaki kicked Mr. Malupo on the right side of his face to force him to the ground, whereupon Mr. Malupo, over his objections, was placed in handcuffs and then bundled into the rear of the police vehicle, where he was joined by Officers Pau'u, Kaloni and Tonga, while Officer Fevealaki again took his position behind the wheel. In his sworn testimony given at the hearing Officer Fevealaki averred that he did not kick Mr. Malupo and that the eye witness could not have seen what occurred as his view from his vantage point to the scene was blocked and that it was a very dark evening.

7. The four officers drove Mr. Malupo back to the police station. Mr. Malupo emerged from the vehicle at the Police Station whereupon Officer Fevealaki handed Mr. Malupo over to another Watch Officer, Tu'alau. Mr. Malupo was injured, with cuts and bruises to his face. This is evidenced by photographs provided in the materials submitted to the Board by the Applicant. Officer Fevaleaki, in his testimony before the Board, acknowledged that when Mr. Malupo emerged from the Police vehicle at the station he was injured. The other three officers, who rode in the back of the vehicle with Mr. Malupo, testified that they did not recall seeing any injuries to Mr. Malupo at that time. Mr. Malupo was subsequently taken to Vaiola Hospital where he received treatment for his cuts, bruises and abrasions.

CRIMINAL CHARGES

8. Police charges were subsequently laid against each of the officers for serious bodily harm, contrary to Section 107 (1) (2) (d), and 5 (a) of the Criminal Offences Act., and the case was referred to the Crown Law Office. However on 10 December 2018 the Crown offered no evidence against the Officers apparently on the basis that:

- (i). The complainant, Mr. Malupo had by then migrated to the United States;

- (ii). The only eye witness to the alleged offences had also migrated to New Zealand;
- (iii). There was insufficient evidence to prove (beyond reasonable doubt) that the officers caused harm to the Complainant; and
- (iv). The available witnesses were briefed and their evidence could not prove the identity of the officers.

INTERNAL INVESTIGATION REPORT

9. It is noted that, from the materials provided to the Board for consideration of this matter, the investigating officer for the PEC internal review reached the same conclusions as the Crown Law Office referred to in paragraph 8 above, with regard to alleged breaches of the Code of Conduct Sections 7.3, 8.1 and 16.2 by the officers, with the exception of Officer Fevaleaki, wherein the investigating officer accepted the evidence of the eye witness that he had seen Officer Fevaleaki kick Mr. Malupo.

REPLY BY RESPONDENTS

10. All the Respondents have responded denying the charges and each gave sworn testimony at the Board Hearing to that effect. With the notable exception of Officer Fevaleaki they each say that they did not observe any injuries to Mr. Malupo when he disembarked from the Police vehicle at the Police Station, and that they did not use any force against him in the course of that journey.
11. Officer Fevaleaki gave testimony that the vehicle that was issued to the officers that evening was not well maintained and suffered from starter motor issues, weak brakes and a faulty passenger side front window. He stated that for these reasons he initially remained in the vehicle while the other three officers, who are of slightly smaller stature than Officer Fevaleaki, addressed Mr. Malupo, as he did not want to shut the vehicle's engine off. However, when it became apparent that the other

officers were having difficulty with Mr. Malupo, Officer Fevaleaki did go to their assistance.

12. Officer Kaloni also gave testimony that the four Officers had one set of handcuffs between them and that Mr. Malupo was of a not insignificant frame. As a consequence attaching the handcuffs behind his back was challenging, and that on not infrequent occasion it takes two sets of handcuffs, joined together, to restrain persons of Mr. Malupo's build. Officer Fevaleaki also gave testimony to this effect. Officer Kaloni also gave testimony that in his view it seemed likely that Mr. Malupo had ingested methamphetamine which, he said, tends to imbue the person with perhaps otherwise unwarranted aggression and confidence.
13. The Board is not in a position to make a determination of the veracity of the testimony of the officers with regard to the condition of the vehicle, or equipment issued to the police officers, (or Mr. Malupo's mental state), although we do make the observation that policing is difficult work, and it is of vital import that police officers be issued with the proper tools for their jobs, and that equipment is well maintained at all times.

DISCUSSION

14. It cannot be said to be entirely clear from the facts and the charges under the Sections of the Police Code of Conduct relied upon which of the Respondents, if any of them, have committed serious breaches of discipline.
15. Officer Fevaleaki's testimony is that Mr. Malupo was suffering from injuries when he emerged from the back of the Police Vehicle at the Police Station. Officer Fevaleaki was driving the vehicle, while Officers Kaloni, Pau'u and Tonga were accompanying Mr. Malupo in the back of the vehicle. Conversely Officers Kaloni, Pau'u and Tonga, perhaps not surprisingly, all deny that they inflicted any injury to

Mr. Malupo while he was in the back of the vehicle, and say that they did not observe any injuries to Mr. Malupo when he exited the vehicle at the Police Station.

16. The Board does find the evidence of Officer Fevaleaki more credible and compelling in this regard. Assuming therefore, that injuries were inflicted upon Mr. Malupo in the back of the vehicle it cannot be determined who amongst the three officers, inflicted these injuries. It is also conceivable that the injuries occurred to Mr. Malupo before he was placed in the vehicle, if reliance is placed upon the evidence of the eyewitness against Officer Fevaleaki.

17. The applicant has relied, in its assertion of serious breach of discipline, upon Sections 8.1 and 16.2 of the Code of Conduct:

“8.1: Tonga Police members shall not act beyond the powers provided to them by the laws of Tonga

16.2: All members of the Tonga Police have an obligation to act and it be seen to act by the public in accordance with the spirit and the letter of the law including the terms of the Code of Conduct whether on or off duty”.

18. While this Board cannot, and does not in any way, shape or form condone the use of excessive force by members of the Tonga Police in the execution of their duties, and fully endorses the sections of the Police Code of Conduct, the Police Regulations and the Police Act that address this, (including the two sections of the Code referenced above) the facts of the present case do not easily lend themselves to attributing the breaches of these sections to any of the four respondents directly and individually.

19. The Board notes that it would seem far more plausible that, given Officer Fevaleaki's testimony that Mr. Malupo was suffering from injuries when he

disembarked the police vehicle at the Police Station, that a breach of Section 8.2 of the Code of Conduct has, in the circumstances of the case as laid before the Board, been committed by each of the four respondents, that being:

“8.2: Tonga Police Members shall not fail to deal with a contravention of the law that happens in his or her presence, unless it would not be reasonable in the circumstances because of an imminent risk to the police officer’s safety or the safety of another person”

and probably also Regulation 19 (k), under the definition of Serious Breaches of Discipline:

“Withholds a complaint or report against a member of the Tonga Police”.

20. If injuries were inflicted upon Mr. Malupo by just one officer, in the presence of the others, then those other officers had an obligation under Code of Conduct Section 8.2, and under Regulation 19 (k), to report that. Failure to do so would, in the opinion of the Board, constitute a serious breach of discipline. It is noted however, that these sections were not specifically relied upon by the Applicant in this case.
21. The Board also notes, with some concern, that the incident to which this disciplinary action related occurred on the **6th of January 2016**, and the resulting criminal case was concluded on **10 December 2018**, with the Crown offering no evidence. Thereafter the matter was not resolved by PEC until **16 June 2021** when they made the recommendation referred to in paragraph 1 of the Judgment. Regardless of any extenuating circumstances, the Board is firmly of the view that this is simply too long for the process of disciplinary matters that come before us. While the governing legislation does not impose any time frames for exposition of disciplinary proceedings, it is the view of the Board that in most cases the disciplinary process should be able to be addressed within 6 to 7 months of the triggering incident. Should that not be the case then the Board would ask that

reasons for that be addressed to the Board as part of the Applicant's submissions.

CONCLUSION

22. Giving due consideration to all of the matters expressed in the Discussion above, the Board is not of the view that the deferment of the Respondents' salary increases can, in the facts and circumstances of this case, be justified.
23. The Board finds, in accordance with the powers afforded to the Board under Section 66 (1) (b) of the Police Act, that a reprimand in respect of this incident should be given to each of the four respondents
24. In reaching this conclusion the Board wishes to emphasize most emphatically that this decision is consequent upon the facts and circumstances of this case alone. The Board once more emphasizes that the Board cannot, and does not in any way, shape or form condone the use of excessive force by members of the Tonga Police in the execution of their duties, and fully endorses the sections of the Police Code of Conduct, the Police Regulations and the Police Act that address this, and that these provisions will be enforced appropriately.

RULING

25. We order that each of the four respondents, Acting Sergeant Losipeli Pau'u, Senior Constable To'ofuhe Fevaleaki, Senior Constable Samisoni Kaloni, and Constable First Class Mikaeli Tonga be reprimanded in respect of their conduct in this case, in reliance upon Section 8.2 of the Code of Conduct and Regulation 19 (k) of the Police Regulations (Serious Breaches of Discipline).

DATED this 14th day of December 2021



A handwritten signature in blue ink, appearing to read "Ralph Stephenson".

Mr. Ralph Stephenson
Chairman

A handwritten signature in blue ink, appearing to read "Dalgely".

Rt. Hon. Lord Dalgely, QC.

A handwritten signature in blue ink, appearing to read "Alisi Taumoepeau".

Mrs. Alisi Taumoepeau, KC