

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2004/145

AND IN THE MATTER OF:

An Application pursuant to s.13 of
The Law Enforcement Review Act
R.S.M. 1987, c.L75

B E T W E E N:

D. B.,
Complainant

) In person, unrepresented by
) Counsel

- and -

CST. S. F.
CST. C. D.
Respondents

)
)
)
)
) Mr. Paul McKenna
) Counsel for the Respondents
)
) Mr. Sean Boyd
) Counsel for L.E.R.A.
)
) Hearing date: April 7th, 2005
) Decision date: April 21st, 2005

*Note: These reasons are subject to a ban on
publication of the Respondents' names
pursuant to s. 13(4.1).*

C. N. Rubin, P.J.

DECISION ON REVIEW

[1] The applicant, Mr. D. B., made a complaint pursuant to the *Law Enforcement Review Act*, CCSM c.L75, (hereinafter referred to as L.E.R.A.) against the respondent police officers S. F. and C. D. in relation to the officers'

actions and behaviour in their capacities as members of the Winnipeg Police Services.

[2] The complaint dated the 27th day of May, 2004 was received on the 31st day of May, 2004 by the Commissioner appointed pursuant to **L.E.R.A.** who therefore caused it to be investigated, in accordance with section 13(1)(a) of **L.E.R.A.**:

“Commissioner not to act on certain complaints

13(1) Where the Commissioner is satisfied

- (a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;*
- (b) that a complaint has been abandoned; or*
- (c) that there is insufficient evidence supporting the complaint to justify a public hearing.*

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.”

[3] The Commissioner then advised of his decision indicating that the complaint file was being closed. That being the case by operation of section 13(1), the Commissioner was obliged to decline to take further action on the complaint.

[4] Thereafter, the complainant applied to have the Commissioner's decision reviewed by a Provincial Judge, pursuant to section 13(2) of **L.E.R.A.**

[5] The application was set for hearing and in due course, I received written material and heard oral submissions from the complainant, as well as from counsel for both respondent officers. In addition, I was provided the file compiled by the Commissioner in the course of the investigation, which he had caused to be undertaken.

[6] Pursuant to the Commissioner's request, I had granted the Commissioner standing before the hearing to be heard in the event that became necessary, which ultimately did not.

[7] The issue now to be determined is whether or not I am satisfied that the Commissioner erred in declining to take further action with respect to Mr. B.'s complaint. In applying the appropriate test, if I am satisfied, I must direct the Commissioner either:

*13(3)(a) refer the complaint for a hearing, or
(b) take such other action under L.E.R.A. respecting
the complaint as the provincial judge directs.*

In the event that upon applying the appropriate test, I am satisfied that the Commissioner has not erred, the matter is effectively concluded.

[8] The complaint basically alleges the officers committed disciplinary defaults as defined in the ***Law Enforcement Review*** Act by being discourteous or uncivil and by improperly disclosing information acquired as a police officer, and that the comments made to the complainant by the officers showed a bias towards him and were unprofessional.

[9] The Commissioner undertook an investigation of the complaint and, in due course, the officers were interviewed and statements were taken from them with respect to this incident. The officers named were eventually interviewed by the Commissioner and confirmed their dealing with Mr. B. Upon completion of the investigation, the Commissioner reviewed the materials and informed Mr. B. in writing of his conclusion as follows:

After reviewing the information available, it is my view the evidence supporting your complaint is insufficient to justify a public hearing. Therefore, pursuant to section 13(1)(c) of the Law Enforcement Review Act I must decline from taking any further action in this matter.

[10] In his reporting letter to the Chief of Police, Mr. J. Ewatski, the Commissioner wrote as follows:

I am satisfied that there is insufficient evidence supporting this complaint to justify my office taking any further action on this matter. As a consequence, this file will be closed pursuant to section 13(1)(c) of the Law Enforcement Review Act.

THE REVIEW HEARING

[11] At the hearing, Mr. B. was given an opportunity to make his submissions and relate his concerns to the Court which he did.

[12] The test to be applied at a Review Hearing as previously stated in the procedure and review application is found in section 13(3) of *L.E.R.A.*, in order for a provincial judge to determine whether or not the Commissioner erred in declining to take further action, what standard of review is to be applied?

[13] The Supreme Court of Canada has recognized that depending upon a consideration of certain express factors, the applicable test will vary. For example, in **Southam Inc. et al v. Director of Investigation and Research** [1997] 1 S.C.R. 748 it was stated:

Depending on how the factors play out in a particular instance, the standard may fall somewhere between correctness, at the more exacting end of the spectrum, and patently unreasonable at the more deferential end.

[14] In the subsequent case of **Pushpanathan v. Minister of Citizenship and Immigration** [1998] 1 S.C.R. 982, a third standard was confirmed to exist. At page 1005 the Court stated:

*Traditionally, the ‘correctness’ standard and the ‘patent unreasonableness’ standard were the only two approaches available to a review court. But in **Southam** a ‘reasonableness simpliciter’ standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator.*

[15] Where more deference is to be shown to the decision at first instance, the more applicable the test of the “patent unreasonableness”. When

comparatively less deference is required, the test of “correctness” is appropriate. The third test, “reasonable simpliciter”, lies between the other two and is properly applied in certain instances after the factors highlighted by the Supreme Court have been addressed. Those factors include:

1. The existence of a privative clause;
2. The expertise of the tribunal at first instance;
3. The purpose and intent of the statute as a whole and the provision in particular.
4. The nature of the problem – a question of law or of fact or of mixed law and fact.

[16] I have previously noted that in his reporting letter to Mr. B. (October 18th, 2004), the Commissioner advised that pursuant to section 13(1)(a) of the *L.E.R.A.*, he was declining to take further action.

REVIEW OF THE DECISION OF THE COMMISSIONER

[17] I have had the benefit of hearing oral representations as well as reviewing the entire file compiled by the Commissioner which included the complaint of Mr. B. and all other relevant material.

[18] I believe that the Commissioner effectively determined that the subject matter of the complaint did fall within the scope of section 29. However, in his view, the evidence supporting the complaint was insufficient to justify a public hearing.

[19] It is also noteworthy that pursuant to section 13(4) of the *L.E.R.A.* in these proceedings “the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint”.

[20] With all due respect to Mr. B., having regard to all of the facts, I am satisfied that the Commissioner did not err in declining to take further action in respect of complaint #2004/145.

[21] In respect of this complaint, it is hereby further ordered that the ban on publication of the respondents’ names originally imposed pursuant to section

13(4.1(a) of the L.E.R.A. will continue in accordance with the provisions of section 13(4.1)(b).

SIGNED at Winnipeg, Manitoba, this 21st, day of April, 2005.

Original signed by:

Judge Charles N. Rubin