

IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint # 2012/189.

AND IN THE MATTER OF: **An Application pursuant to s. 13 of *The Law Enforcement Review Act*, R.S.M. 1987 c. L 75.**

BETWEEN:

O.O.,)	
<i>Complainant/ Applicant,</i>)	Self-represented
)	
and -)	
)	
Constable R.M. and)	Mr. P. McKenna
Constable R. C.)	Counsel for the Respondents
)	
)	Mr. Devin Johnston
)	For the Commissioner of the Law
)	Enforcement Review Agency
)	
)	Hearing dates: October 8th, 2013
)	Decision delivered: December 19,
)	2013

NOTE: These reasons are subject to a ban on publication of the respondents' names pursuant to Sec 25 of the Law Enforcement Review Act.

Guy, A.C. J.

[1] This is a decision on an application for review of the Law Enforcement Review Agency Commissioner's decision not to take any further action on a complaint filed by O.O.

[2] On October 23, 2012, O.O. filed a complaint with the Commissioner alleging numerous abuses of authority by members of the Winnipeg Police Service.

[3] By letter dated April 22, 2013, the Commissioner advised O.O. that he was not taking any further action on the complaint as it was his opinion that the evidence supporting the complaint was insufficient. Section 13(1) says:

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.

[4] O.O. has applied to have this decision reviewed by a provincial court judge. The hearing took place on October 8, 2013.

[5] The onus is on O.O. to show the Commissioner erred in declining to take further action (section 13(4) of the Act).

13(4) Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

- [6] First of all, I think it is important to note what the Court, in the context of this legislation, can and cannot deal with. In my view, it is not the Court's role to comment upon the adequacy or the inadequacy of the legislation. The legislation falls within the purview of the legislative assembly. For example, whether the legislation should have more mandatory procedural requirements and less discretion resting with the Commissioner is up to the legislature. I cannot correct the possible imbalance between a complainant and the police. I think it is fairly obvious the legislation is not a process for mediation. It is to determine whether or not a disciplinary default has been committed. If such a default is established it can obviously have serious consequences for a law enforcement member. Therefore there may appear to be an imbalance because of the safeguards built into the legislation.
- [7] It is also clear from the case law, with which I concur, that I cannot merely replace the commissioner's decision with my opinion or my view should it differ from the Commissioner. Therefore it is appropriate that the standard of review of the Commissioner's decision be one of reasonableness.

- [8] The first issue argued by the complainant was the duty of fairness that should apply in such cases. I need not definitively decide that question but will say that the intent of the legislation is to draw a balance between promoting professional conduct by law enforcement and providing a mechanism for citizen complaint. If that is not done in an equitable and fair manner neither side will respect the process and the legislation will not achieve its purpose and will become worthless. For example, although no evidence was presented, if law enforcement officers are allowed to be interviewed together can the investigator properly assess the evidence? I would be surprised if several complainants to the same incident would be interviewed together. Perception is very important if the process is to be respected.
- [9] With respect to the content of the duty of fairness, the complainant raises issues, three of which I wish to comment upon. First, is whether the Commissioner accepted the report and its contents. Since he signed off on the report the assumption is that he accepted its contents. There is no evidence to the contrary.
- [10] Secondly, the use of the word “erratically” in the report rather than “quickly” as was the evidence. In these circumstances, the word used, in

my view, has no legal context. It is merely a descriptor of which a number could have been used to describe why the complainant's vehicle came to their attention. In light of the circumstances the officers described, I expect any vehicle driving "different" from other vehicles might have caught their attention.

[11] Finally, the most strenuously argued issue was that of why the officer's response was not forwarded to the complainant so he might have commented upon it and point out what he thought were inaccuracies. There apparently is no procedure for doing so and I do accept that there must be some finality to the investigation. If there is some confusion with respect to either side's position the Commissioner has the ability to request further information from either party in order to clarify the situation. This is consistent with the purpose of the Act, the screening function of the Commissioner and the role of the Court's review.

[12] The second major issue raised by the complainant is the standard of review. The complainant argues that the standard review should be correction rather than reasonableness. A great deal of case law was submitted and argued. Unfortunately, it is difficult to compare since the standard of review may vary significantly depending on the administrative

body, its function and procedure it has set for itself. I disagree with the complainant's position that because some legal issue is involved that it is outside of the Commissioner's purview. The subject matter of this legislation i.e. professional police conduct, will always involve some legal issues, *Charter of Rights*, human rights and evidentiary issues. The facts and issues involved will never be incontrovertible and one might think of the balancing process involved under section 24(2) of the *Charter* as an analogy.

- [13] I accept, in light of the legislation and its purpose involving the Commissioner that the standard of review should be reasonableness.
- [14] In conclusion, in many of these cases the interpretation of the facts is going to be made through the respective eyes of those involved. Unfortunately, rarely do the participants step back and see the circumstances from the other's point of view and how there can be another explanation or interpretation.
- [15] Therefore, often the Commissioner is left with a number of possible outcomes. Was the outcome he came to in these particular circumstances a reasonable one, in the sense of being rationally articulated, transparent and intelligible? Was it reasonable to conclude there was insufficient

evidence supporting the complaint to justify a public hearing? The answers to both of these questions must be answered in the affirmative.

[16] After reviewing the evidence before me and considering the submission of O.O., in the presence of counsel for the Commissioner who has been granted standing to deal with the application, and in the presence of counsel for the respondents, I am dismissing O.O.'s application for the reasons set out above.

“Original signed by:”

Guy, John P., A.C.J.