

IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint #6323

AND IN THE MATTER OF: An Application pursuant to s.13(2) of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

D.B)	Self-represented
Applicant)	
)	
- and -)	
)	
Cst. C. G. #2053, Cst. G K. #1766,)	Josh Weinstein
Cst. A. W. #2082 and Cst. W. L.)	
#2222)	
)	
Respondents)	Counsel for the Respondents and the Winnipeg Police Association
)	
)	Sean D. Boyd, Counsel for L.E.R.A.
<i>Note: These reasons are subject to a ban</i>)	
<i>on publication of the Respondents' names</i>)	Hearing date: January 25, 2007
<i>pursuant to s.13(4.1).</i>)	Decision delivered: February 26, 2007

CHAMPAGNE, P.J.

I. INTRODUCTION

1. Pursuant to s.13 of *The Law Enforcement Review Act*, R.S.M. 1987, c.L75 (hereafter referred to as the Act), the Applicant (who is self-represented) has asked the Court to review the decision of the Commissioner, wherein the Commissioner determined that notwithstanding his investigation and consideration of the Applicant's complaint, there was insufficient evidence to proceed further pursuant to section 13(1)(c) of the Act.

2. On January 25, 2007 I heard a thoughtful and articulate submission from the applicant and the response from counsel for the respondents and counsel for LERA commissioner. I begin my decision by reviewing the relevant legislation.

II. SECTION 13 OF THE ACT

3. This case involves a review of the Commissioner's decision taken pursuant to s.13 of the Act. That section reads:

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.

Notice to complainant

13(1.1) A complainant may be informed of a decision not to take further action under subsection (1) by the Commissioner's sending a notice, by registered mail, to the complainant at the complainant's last address contained in the Commissioner's records.

Application to provincial judge

13(2) Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.

Procedure on application

13(3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

(a) to refer the complaint for a hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

Burden of proof on complainant

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.

Ban on publication

13(4.1) Notwithstanding that all or part of a hearing under this section is public, the provincial judge hearing the matter shall, unless satisfied that such an order would be ineffectual,

(a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;

(b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and

(c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act.

Decision of provincial judge final

13(5) The decision of the provincial judge on an application under subsection (2) is final and shall not be subject to appeal or review of any kind.

4. Section 13 of the Act is the legislative framework that guides the Court when reviewing the decision of the Commissioner not to proceed on the basis of insufficient evidence.

5. In the last few years, there have been a number of cases written respecting the standard of review the Court is to apply and the test for sufficiency of evidence when considering section 13(1)(c) of the Act. Some of the cases referred to include:

LERA Complaint #3597 delivered May 30, 2000 by Chartier PJ.

LERA Complaint #3771 delivered July 3, 2002 by Smith PJ.

LERA Complaint #5643 delivered February 12, 2004 by Chartier PJ.

LERA Complaint #2004/172 delivered June 21, 2006 by Joyal PJ. (I note that Mr. B. has been provided a copy of these cases and others.)

6. In June, 2006 Joyal PJ thoroughly reviewed this area of the law in LERA complaint # 2004/172. I agree with and adopt Judge Joyal's reasoning and analysis on these two issues as he carefully considered, clarified and reconciled the manner in which standards of review associated with the principles of administrative law need be applied in a judicial review of the section 13(1)(c) screening process respecting the sufficiency or insufficiency of the evidence to proceed further.

7. As stated by Judge Joyal the most demanding standard of review to be imposed upon a Commissioner in a s.13 LERA Review, is the standard of correctness. That standard is to be imposed only in those cases where the Commissioner has committed an identifiable jurisdictional error.

8. A jurisdictional error in the context of a Commissioner's initial decision can be committed in three ways:

1. The Commissioner has failed to act as required by his jurisdiction.

2. The Commissioner has failed to act within the limits of his jurisdiction.

3. The Commissioner has reached his decision by applying the wrong test or by misapplying the right test (either of which may involve an error of mixed fact and law). See *Southam Inc. v. Director of Investigation and Research* [1997] 1 S.C.R. 748 at 766-767.

9. If the reviewing court determines that none of the above three jurisdictional errors have been committed, the court must move to the next step of the review analysis where the determination will involve a standard of review different from that of correctness.

10. At this next stage of its analysis, the court must determine whether, after what should have been a thorough investigation, the Commissioner has assessed and evaluated the evidence “reasonably”. It is at this stage that the judge must recognize and expect that in the course of the Commissioner’s assessment and evaluation of the evidence, the Commissioner will have engaged in a limited but necessary “weighing of the evidence”. If the court determines that the Commissioner undertook his assessment and evaluation of the evidence reasonably, it must then turn to the “rationality” of the Commissioner’s conclusion.

11. In addressing the question of “rationality”, the Court is required to determine whether the Commissioner’s decision to not proceed further, is a decision that can be seen as rationally consistent or coherent vis-à-vis the Commissioner’s presumably reasonable assessment of the evidence. If such rationality does exist, the Commissioner’s decision should not be disturbed.

III. BACKGROUND OF THE COMPLAINT

12. On August 9, 2003 the Winnipeg Police Service received a call indicating that there was a disturbance at (address removed) as a person was smashing things in suite (# removed). The caller indicated that screams could be heard inside the suite and they sounded like a female or child. A second call indicated that a male was going crazy at this address. The four respondent officers attended the address, heard loud yelling and screaming from the suite and forced open the door. Mr. B. was taken to the floor, restrained and handcuffed. The officers indicate that he was naked and the apartment was trashed. He appeared to be talking and acting in a bizarre fashion. The officers noted a small cut on the head of Mr. B. An ambulance was called and Mr. B. was transported to the Heath Sciences Centre for treatment of the injury and a mental health assessment. Mr. B. was released from hospital and returned to his residence. Approximately two hours later, there was a second episode that involved Mr. B. and Winnipeg Police Officers. There was a call regarding a naked person running around the area. Police attended and apprehended Mr. B. In his oral submission to the Court, Mr. B. confirms his involvement in this second incident and indicates that he has no complaint about the way he was treated at that time.

13. On August 20, 2003 Mr. B. filed a written LERA complaint. In this complaint, he alleges that the respondent officers who attended his residence for the first incident abused their authority by using unnecessary violence or excessive force, using oppressive or abusive conduct or language, being discourteous or uncivil and by discriminating against him.

14. In his complaint, Mr. B. confirms that on August 9, 2003 he was in his suite destroying his own property when the police attended. He indicates that he could not locate his keys to let the officers in and they broke his door down. He goes on to state that he was cooperative with the officers by answering all their questions and followed their directions but the officers used excessive force and unnecessary violence by clubbing him on the head while in the suite and then striking his knee and dragging him along the ground outside of the building. Mr. B. also complained that the officers were discourteous, made masturbation gestures, accused him of devil worship and witchcraft and discriminated against him on the basis of his sexual orientation.

15. Mr. B.'s one page written complaint was received by LERA investigator, Jim Haslam. I note that Mr. Haslam fleshed out the complaint by asking Mr. B. a series of questions and answers covering an additional two pages. When asked, Mr. B. provided the names of two potential witnesses, G. & P. V. from suite (address removed).

16. Mr. Haslam was tasked with investigating this complaint and in my view, he did a thorough job. First, he fleshed out the details of the incident during his interview with Mr. B.

He met with and spoke to the witness G.V., who is the caretaker of the building. Mr. V. provided a statement and confirmed that P.V. was not present and had no information about this incident.

He identified two other possible witnesses, a neighbor, P.P. and the property manager, I.M. and obtained their statements.

He obtained the medical records from Health Sciences Centre that detail the presentation and treatment of Mr. B. from the date in question.

He obtained the Winnipeg Police Service call history and police reports generated from this incident.

He met with and interviewed all four respondent police officers who completely deny the allegations as set out by Mr. B.

17. After the investigation was complete there was discussion with Mr. B. and an attempt at an informal resolution of this matter. The informal resolution meeting occurred on April 25, 2005. That meeting was unsuccessful.

18. To his credit, Mr. B. attempted another informal resolution of this matter by way of a proposal in a letter dated August 17, 2005. The proposal would have the officers make payment to the Nine Circles Community Health Centre Persons Living with HIV/AIDS emergency fund to cover the cost of the ambulance service from August 9, 2003. This proposal was sent to the respondent officers for consideration but was found unacceptable.

19. This matter was then referred to the Commissioner of LERA who reviewed the entire file and authored a detailed decision on June 16, 2006.

20. In his decision, the Commissioner states that there is insufficient evidence supporting the complaint to justify sending the matter to a public hearing and therefore pursuant to section 13(1)(c) of the Act the Commissioner declines to take any further action.

21. On June 17, 2006 Mr. B. wrote to the Commissioner requesting a review of his decision by a Provincial Court Judge. I heard oral submissions by all parties to this application on January 25, 2007.

22. In his thorough submission to the Court, Mr. B. went on at some length and in some detail about the evidence that was available to the Commissioner and his current recollection of the events from August 9, 2003. He focused his submission on three aspects. First the verbal abuse and discourteous conduct of the officers, second, the physical abuse and finally the investigation and decision of the Commissioner. The entire submission from Mr. B. involves the facts of this incident. There is no suggestion that the Commissioner made a jurisdictional error.

IV. THE STANDARD OF REVIEW TO BE APPLIED IN THIS DECISION

23. As stated earlier, I agree with and adopt Judge Joyal's reasoning from his decision in LERA complaint #2004/172. As stated by Judge Joyal the most demanding standard of review to be imposed upon a Commissioner in a s.13 LERA Review, is the standard of correctness. That standard is to be imposed only in those cases where the Commissioner has committed an identifiable jurisdictional error.

24. In this case, there has been no suggestion nor have I identified any jurisdictional error on the part of the Commissioner so the standard of correctness does not apply to this review.

25. Rather, the Court must examine whether or not the Commissioner's assessment and evaluation of the evidence was "reasonable". If the answer to that question is yes then the Court must determine whether or not the Commissioner's conclusion with respect to the assessment of the evidence was a "rational" conclusion available to the Commissioner. If the Commissioner's conclusion is based on a reasonable assessment of the evidence and if that conclusion is one of the rational conclusions that could be arrived at, the Commissioner's determination is entitled to deference and it ought not to be disturbed.

V. DECISION ON THIS REVIEW

26. I have reviewed the information from the LERA report and the decision of the Commissioner dated June 16, 2006.

In Part I of his detailed decision, the Commissioner reviews the complaint and statement of the Applicant.

In Part II of the decision the Commissioner reviews the details of the investigation including the medical evidence, the witness statements, the police reports and the officer interviews.

Part III of the decision contains the Commissioner's analysis and conclusion. It is clear that the Commissioner was mindful of his role and duty in reviewing the evidence.

It is my view that the Commissioner's assessment and evaluation of the evidence was reasonable. Mr. B. suggested that the Commissioner should have considered photographs of his injury and consulted a wound expert to look for support to his assertion that the cut to his head was caused by a baton strike. In my view that was unnecessary as the Commissioner had the complete medical report which included a diagram of the injury.

27. The Commissioner states the obvious when he notes that the officers and Mr. B. do not agree about what took place during this incident. The Commissioner goes on to consider the evidence that may or may not support the allegations and complaint made by Mr. B. and in my view reaches a rational conclusion available to him.

28. It is clear that the Commissioner considered the evidence that was capable of supporting the complaint. Including the report from Mr. B. The head injury suffered by Mr. B. and the comments from I.M. who reported that he heard officers laughing and talking but for the most part he could not hear what was being said. Mr. M. did report hearing the officers tell Mr. B. to calm down, keep quiet and to just sit down.

29. The Commissioner also considered the evidence that doesn't support Mr. B.'s complaint. Evidence such as the statements from the respondents and the evidence from the witnesses. Mr. B. stated that C.V. and P.V. were present. It is clear that Mrs. V. was not there at the time of this incident. Mr. B. stated that Mr. V. would have seen the officers strike his knee with the baton and drag him down the stairs. Mr. V. did not witness such behavior by the respondents although it is clear that he was present when the respondents removed Mr. B. from the building. I also note that when Mr. B. was in the hospital he denied having any injury other than the cut to the head. There was no complaint of a knee injury at that time. I also note that Mr. B. concedes that he was in an altered state at the time of this incident.

30. In reviewing the information in the report and the Commissioner's decision that there was insufficient evidence to take further action, I am of the view that the Commissioner came to a decision that was indeed

rationality based upon a reasonable assessment of the evidence. Accordingly, I find that the Commissioner did not err in declining to take further action.

Ken Champagne, PJ

Note: For the purpose of distribution, personal information has been removed by the Commissioner.