

**IN THE MATTER OF:**

*The Law Enforcement Review Act*  
**Complaint No. 2012-128**

**AND IN THE MATTER OF:**

**An application for review pursuant to  
s. 13(2) of *The Law Enforcement Review Act* R.S.M. 1987, c. L75**

**BETWEEN:**

**R. W.**

**Applicant**

**- and -**

**Constable S.S., Constable T.F.,  
Constable S.H., Constable M.P., and  
Constable E.J.**

**Respondents**

**Self-Represented**

**Richard Wolson**  
for the Respondents

**Devin Johnston**  
for the LERA Commissioner

**Hearing Date: March 31<sup>st</sup>, 2015**  
**Decision Released: April 10<sup>th</sup>, 2015**

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

**HARAPIAK, P.J.**

[1] R.W. ("The Applicant") was asleep on a couch on July 2<sup>nd</sup>, 2012 when he woke up to find five Brandon Police Officers wanting him to give up his keys and leave the premises. After a discussion he was forcibly taken to the ground. He says the officers used profane language and unnecessary force which resulted in injury.

[2] The Applicant made a complaint to the Commissioner under *The Law Enforcement Review Act*, **R.S.M. 1987, c. L75** (the "*Act*") about this incident.

[3] After conducting an investigation the Commissioner declined to take action as he was of the view that there was "insufficient evidence supporting the complaint to justify a public hearing." R.W. has applied, pursuant to s. 13(2) of the *Act*, for a Provincial Judge to review the Commissioner's decision.

[4] Although the burden of proof is on the Applicant to show that the Commissioner erred in declining to take further action (s. 13(4) of the *Act*) it is incumbent on the reviewing judge when dealing with an unrepresented individual, "as a matter of both fairness and legal orderliness"... "to try to clarify and or discern the nature of the alleged error." (paragraph 4 of 2004 L.E.R.A. Complaint #172)

[5] The Applicant raised several issues. Essentially he took issue with the breadth of the investigation and the conclusion reached. He argued

that the Commissioner made credibility findings and that inconsistent information, particularly around the question of his sobriety, warranted a full hearing. As others were personally interviewed he thought he should have been as well. He raised this concern with the Commissioner in a telephone call post-decision on October 1<sup>st</sup>, 2013 and was told that his complaint was on file, he had spoken to the investigator several times on the phone and provided no new information or said he had more to provide.

### **The Standard of Review**

[6] The first step for a reviewing court in cases of judicial review is to determine the appropriate standard. How much deference should the Commissioner's decision be given? The most onerous standard of review is correctness – to be used only when the Commissioner has committed a jurisdictional error. As Judge Joyal (as he then was) wrote in L.E.R.A. Complaint 2004/172 (*supra*); “[i]ts exacting standard derives from the assumption that the issues to which it applies, permit of a clear, single right answer in law.”

[7] The Applicant's concerns here revolve around the Commissioner's evaluation of the evidence. This is not a jurisdictional error and the standard of correctness does not apply.

[8] Judge Joyal confirmed, in L.E.R.A. Complaint 2004/172, *supra*, that:

"an alleged error in the Commissioner's evaluation of the evidence (and his or her resulting conclusion respecting sufficiency), seldom permit of a similarly stark review. In other words, given the limited but still necessary weighing of the evidence that must occur on the part of the Commissioner, the reviewing judge can seldom categorically say the Commissioner was right or wrong. It is for that reason that absent jurisdictional error, 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." (L.E.R.A. 2004/172 para 21 *supra*)

[9] Was the Commissioner's conclusion sound, with this test in mind?

### **The Evidence**

[10] The Investigation started with R.W.'s detailed complaint. He advised that he was asleep on his couch after a very long day due to an aborted camping trip owing to engine trouble. He says he woke up to five police officers surrounding him and that it took him a few minutes to come out of

a deep sleep. The officers, he said, were trying to secure his keys and telling him he needed to leave the house or be arrested. He questioned their authority to take his keys and refused to provide them.

[11] R.W. indicated the officers swore at him which he pointed out to them was inappropriate for police officers. At that point he was forcibly taken to the ground, resulting, he said, in a severe pain to his left shoulder. He indicated he was kept there until the keys that the homeowner (who he characterized as his common-law spouse) wanted were obtained. He offered no reason why the homeowner might want the keys. He was arrested for breaching the peace and taken to the Brandon Correctional Centre, having no further contact with the officers in question. He was held until the following morning and no charges were laid.

[12] The Applicant claimed to have recurring pain in his left shoulder, constant pain in his back and temporary headaches as well as healed bruising and swelling of his face as of early August 2012 when he filed the complaint.

[13] The Investigator reached out to the Brandon Police Service, the hospital, the five officers, the civilian witnesses and eight Brandon Correctional Centre guards. Review of material provided and personal interviews revealed further information; some of it contradictory to R. W.'s application. Important points included:

- a) Homeowner L.C. understood that R.W., who she characterized as a defaulting tenant, was moving out that day and when he did not she was afraid to return to her home;
- b) L.C., tearful and distraught, complained to the Brandon Police Service, advising R.W. had been threatening her and she wanted police assistance to remove him;
- c) L.C. indicated the Applicant was a police hater and may be violent.
- d) The officers accompanied L.C. to her home and gave R.W. 15 – 20 opportunities to leave;
- e) When R.W. refused to comply he was warned he could leave on his own or with the officers;
- f) Noting lack of compliance Constable T.F. moved to arrest R.W. R.W. pulled back and Constables T.F. and E.J. took him to the floor.

They advised that R.W. resisted their attempts to place handcuffs on him. The house keys were forcibly removed at this time.

g) L.C. advised that the officers acted with respect while in her home and that all questions and directions were clear and concise.

h) BCC guard M.W. advised that R.W. had a lot of personal property with him on release and did not appear to have difficulty physically managing it. Guard D.R. remembered R.W. saying he and his girlfriend had broken up and that is why he had a suitcase with him. Guard K.P. recalled R.W. complaining of a sore shoulder on admission.

i) R.W. sought medical treatment at the Brandon Regional Health Authority on July 3<sup>rd</sup>. Notes state he suffered a mild concussion and some muscle tenderness after an altercation with police but indicated no obvious bruising or marks present.

### **Weighing the Evidence**

[14] R.W. was concerned that the Commissioner made credibility findings without speaking to him directly or letting him respond to all evidence gathered.

[15] Judge Chartier, (as he then was) addressed this point extensively in ***L.E.R.A.*** Complaint #5643/2004. He noted that:

“it is not the job of the Commissioner to determine if the complaint is made out nor is he to weigh the information as in a judicial proceeding. This means that the Commissioner cannot determine credibility, draw inferences or make definitive findings of fact.”

[16] The Commissioner was clearly alive to these restrictions and referenced them in his report to the Applicant. Although credibility findings are not permitted, in order to effectively fulfill his screening function the Commissioner, as noted by Judge Chartier in the same decision:

“can...in a limited way, weigh all the evidence to determine whether it registers on the scales as sufficient evidence (in the face of other opposing evidence or information gathered by the investigators) so as to constitute a reasonable basis to proceed further. For example, in the face of what appears to be a coherent complaint, there may be nonetheless, after a thorough investigation, an overwhelming case to either contradict or seriously weaken what at first blush appears to be a strong complaint.”

[17] That is the function the Commissioner undertook when assessing the material gathered from both the complaint and the investigation. He advised the Applicant that, in light of the information about threats being made, L.C.'s fear, the officers' failed attempt to have R.W. leave voluntarily and the degree of force used (based on medical evidence) in the face of



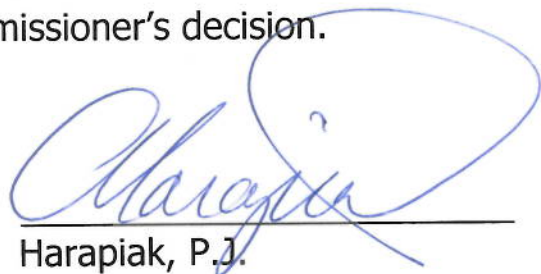
his non-compliance with direction that the evidence supporting the complaint was insufficient to justify a public hearing. It is important to note that the lack of compliance was evidenced in both the complaint (refusing to provide the keys) and in the officers' evidence.

[18] To review, it is not my function to determine if this is the correct decision and the one I would have arrived at if I was the decision maker.

My role is to assess whether:

"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." (L.E.R.A. 2004/172 para 21 *supra*)

[19] After a careful review of the L.E.R.A. file, the legal brief and submissions from both counsel and R.W. I am satisfied that the conclusion reached is a rational one made after a reasonable assessment of the evidence. I will not interfere with the Commissioner's decision.



Harapiak, P.J.