

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2013-143

AND IN THE MATTER OF:

An Application pursuant to s. 13(1) of
The Law Enforcement Review Act C.C.S.M. c. L75

BETWEEN:

C.B.

Complainant,

- and -

Constable A.B.

Respondent.

) In person

) Self-represented

) Paul McKenna

) For the Respondent

) Devin Johnston, Counsel for L.E.R.A.

) Reasons for Decision delivered:

) October 11, 2016

Restriction on Publication

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

HEINRICHS P.J.

INTRODUCTION

[1] C.B. is the complainant and applicant in this *Law Enforcement Review Act* matter. He filed a complaint about the alleged conduct, on September 17, 2013, of a Winnipeg Police Service officer, Constable A.B. His complaint was that Constable A.B. used unnecessary violence or excessive force, and oppressive or abusive conduct or language toward him.

[2] The L.E.R.A. Commissioner's office investigated and on December 15, 2014, the Commissioner sent C.B. a letter which stated that his investigation had been completed and, based on all of the information he had available to him, he was satisfied that the evidence supporting C.B.'s complaint was insufficient to justify taking this matter to a hearing; therefore, the complaint was dismissed.

[3] C.B. then asked, pursuant to section 13(2) of the *Law Enforcement Review Act*, that a Provincial Court Judge review the decision of the Commissioner.

PROVINCIAL COURT PROCEEDINGS

[4] This matter proceeded to a hearing before Judge Chartier of this Court. He received and reviewed some filed materials and, on May 5, 2015, heard submissions from C.B., counsel for the officer and counsel for the Commissioner. At the conclusion of the Court proceedings that day, Judge Chartier requested that the Commissioner obtain and provide some further information for the Court.

[5] The matter next appeared before Judge Chartier on January 18, 2016. He had received and reviewed the information which he had previously requested. C.B., however, advised the Court that he had received the further information as well, but had not been able to view the video contained on the CD. So the matter was adjourned to make arrangements for C.B. to view the video.

[6] On the next Court date, February 10, 2016, C.B. confirmed that he had been able to view the contents of the CD. As well, C.B. and counsel were given the opportunity to make any additional submissions they wanted. Judge Chartier then adjourned the matter, advising that he would be sending out his decision in due

course. However, before his decision was given, Judge Chartier resigned from his position as a Provincial Court Judge.

[7] As a result of this, a Case Management Conference was arranged. C.B. and counsel met with Associate Chief Judge Krahn to discuss how to proceed. It was agreed that a new judge would be assigned and would be advised to read and view all of the materials filed; in addition, transcripts of all of the court proceedings before Judge Chartier would be reviewed as part of the record. I am the judge that was assigned. I reviewed all of the materials filed and on September 20, 2016, I gave C.B. and counsel the opportunity to appear before me to provide any further submissions they wished. This, then, is my decision.

JUDICIAL REVIEW OF THE COMMISSIONER'S DISMISSAL

[8] The *Law Enforcement Review Act* sets out that the burden – or onus – on this review is on the complainant, C.B., to satisfy me that the Commissioner made an error in declining to take any further action, in not ordering that a hearing take place before a judge.

[9] In reviewing the decision of the Commissioner, it is important to note that the *Law Enforcement Review Act* requires the Commissioner to perform a screening function, which is to make sure that only those complaints that he believes merit a public hearing get one. In coming to his decision, the Commissioner is not to determine credibility, draw inferences, or make definitive findings of fact; at the same time, however, the Commissioner is to consider all of the evidence gathered by his office and weigh any disputed evidence in order to determine its sufficiency. (See *Rev. R.P.M. v. Cst. S.C. & Cst. D.W.*, LERA

Complaint #5643 and *A.M. v. Cst. D.R., Cst. G.P., Cst. J.M. & Det. Sgt. R.L.*, LERA complaint #2005/307.)

[10] In reviewing the Commissioner's decision, the Court must first determine if he has committed an identifiable jurisdictional error; that is, did he apply the wrong test or misapply the right test? The Commissioner, in his December 15, 2014 letter to C.B., outlined what he was required to determine, what evidence he looked at, how he viewed the evidence gathered and why he was coming to the decision not to send the matter on to a public hearing. C.B., in his submissions to this Court, never pointed to any part of the Commissioner's decision wherein he believed that the wrong test was applied or that the right test was misapplied, and I do not find that the Commissioner committed a jurisdictional error in his decision.

[11] Next, this Court must determine the "reasonableness" of the Commissioner's decision. The task I must undertake was aptly set out by Judge Preston in *B.J.P. v. Cst. G.H., Cst. B.Z & Sgt. G.M.*, LERA Complaint #2005-186, where he stated:

The question to be answered is this: did the Commissioner assess the evidence reasonably? In other words, have the Commissioner's reasons been transparently, intelligently and rationally articulated?

... My function is to see if the Commissioner has made a reasonable assessment of the evidence. In other words, I must examine whether the Commissioner drew a rational conclusion, one that could reasonable be drawn on the facts of this case.

[12] This means that if my own opinion or view of the evidence happens to differ from that of the Commissioner, I do not replace his decision with my own. Rather, what I have to determine is whether the Commissioner's decision is one that "falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law." (To quote the second part of the definition of

“reasonableness” given to us by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9.)

WAS THE COMMISSIONER’S ASSESSMENT OF THE EVIDENCE REASONABLE?

[13] It is clear that C.B.’s version of what happened during the initial confrontation on the Transcona Trail, the detention and subsequent processing and release from the police station differ significantly from what Constable A.B. said happened. Without making any assessment of the credibility of C.B. or the officer, and without any independent witnesses to consider, this is a situation where C.B.’s complaint, as set out, supports the case that Constable A.B. did use excessive force (or unnecessary violence or abusive conduct) and abusive language.

[14] The Commissioner, though, is also required to weigh the disputed evidence to determine its sufficiency. Firstly, in dealing with the officer’s alleged poke, with a finger, in C.B.’s chest, the Commissioner noted that this was alleged to have happened in the presence of other officers and that Constable A.B. denied that it ever happened. The Commissioner then concluded that even if it did occur, this event would not be enough to justify a public hearing. The Commissioner’s conclusion about this alleged incident is clearly explained and I find that it is a reasonable assessment of the evidence.

[15] Secondly, the Commissioner noted that C.B.’s allegation of abusive language was that the officer called C.B. a “loser”, used other “colorful terms” and made a comment about his teeth (although he wasn’t sure of the exact words or what the officer meant by it). Constable A.B. denied saying these things, except

that he did agree that he had asked C.B. why he was “riding like an idiot”. As well, Constable A.B. stated that C.B. was aggressive and verbally abusive to him the entire time. The Commissioner also noted that C.B. admitted to swearing at the officer during the initial stop and pointed out that there had been an earlier reported incident with the Winnipeg Police Service where C.B. had been verbally belligerent with another officer. The Commissioner did not specifically state that these comments would not be enough to justify a public hearing. However, it is clear that they are included in his conclusion where the Commissioner states that this decision is based on “review of all the information available.”

[16] Of greater significance is the confrontation on the trail and the resulting physical injury that C.B. has alleged. The Commissioner, in his decision, summarized in detail the conflicting version of events given by C.B. and Constable A.B. While the Commissioner did not make comments on each and every piece of evidence – for example, on the hearing dates, a lot of discussion focused on the videos and photos taken of the trail – it is clear that the Commissioner did consider all of the evidence before him. This included answering the questions posed at an earlier hearing date and viewing the further DVD material that was filed after his initial decision was made.

[17] Central to the Commissioner’s decision was the medical evidence. In his initial complaint to L.E.R.A., C.B. wrote that his daughter “took me to Emergency at Concordia hospital where I was treat (sp) for an aggravated spinal condition, a soar (sp) shoulder and numbness in my left hand as a result of being attacked by this police officer, cuffed and assaulted . . .”

[18] The Commissioner, in his decision, accurately summarized the Concordia Hospital reports he had received as follows:

You were examined six hours after being admitted. You complained of back pain following an altercation with police earlier in the day. You said you were on a bike path when an officer pulled you from your bicycle from a moving car and reinjured your lower back. You complained of pain radiating down your left thigh. In response to questions by medical personnel, you said you experienced no loss of motor function, tingling, numbness, loss of bowel or bladder function. The pain was similar to previous flare-ups of lower back pain.

You also said that you were experiencing pain in your right shoulder. On examination, there was no tingling or numbness of your right arm and had a normal range of motion. There is a note about numbness of one of your thumbs, but with no loss of normal motor function. The physician described treatment and therapies both past and future for your long-term back pain.

On further examination, the physician noted your right hand is vascularly intact with a good range of motion, but lowered sensation of your thumb. Your right shoulder has no erythema (skin redness) or significant edema (swelling) with a normal range of motion but with pain and diffusely tender with no bony tenderness. Your lower back was diffusely tender but no point tenderness to the spinous process. The physician prescribed Tylenol for pain and directed you to ice your shoulder and follow up with your personal physician if necessary.

[19] Then in his conclusion, in declining to take further action, the Commissioner specifically noted some inconsistencies in C.B.'s own evidence about the resulting injuries. On page 7 of his decision, the Commissioner stated:

The medical evidence supports your statement that you do suffer pain and discomfort from a significant condition prior to September 17, 2013. In my view, I am not convinced based on the medical evidence that the actions of Cst. B. significantly aggravated the condition. The attending physician prescribed Tylenol for pain management.

[20] C.B. did not provide any follow up reports from his own doctor or any other physician or specialist (and appears not to have advised LERA of any other doctors to contact on his behalf) to confirm any ongoing problems with respect to his injuries, even though in his submission before Judge Chartier on May 5, 2015, C.B. stated,

Now as a result of being pulled off my bicycle, tore my rotator cuff and permanently tore the bicep tendon. The doctor was unable to fix that.

[21] In weighing the disputed evidence of the alleged assault or take down of C.B. by the officer on the trail, the Commissioner is entitled to consider this medical evidence – or lack of medical evidence. The Commissioner's assessment of all of the information he had available to him was that this was not a case that merited a public hearing.

[22] The Commissioner made a rational conclusion on the merits of C.B.'s complaint and whether it should proceed to a public hearing. I may not have drawn the same conclusion, but that is not to determine the outcome of this review. The Commissioner performed his role as required by the statute and came to a conclusion which could reasonably be made based on the information he had. As a result, I will not interfere with his decision.



HEINRICHS P.J.