



to retrieve her cigarettes. When she was at her front gate, a WPS officer came from behind some lilac bushes asking to speak to her. When she declined, the officer smashed her head into the pole of the front gate. She recalls asking the officer why he did that. The next thing she remembers is waking up at the Grace Hospital. In support of her complaint, [REDACTED] provided photographs of the pole of her front gate and sidewalk that appear to be stained with blood, as well as names of individuals who could confirm that her intention that night was to meet up with a friend.

[3] The LERA investigator reviewed [REDACTED] medical file from Grace Hospital, as well as the patient care report prepared by the Winnipeg Fire Paramedic Service (WFPS), notes from two WPS members and the unit history of those officers' police cruiser and the audio from a 911 call. The LERA investigator also conducted interviews of two independent witnesses and the two officers involved in dealing with [REDACTED] on the evening in question. The investigator tried contacting other potential witnesses without success. It does not appear as though he tried to contact the people who [REDACTED] stated could confirm her intentions on the night in question.

[4] The results of the investigation revealed the following:

- Shortly before 2 a.m., [REDACTED] was at Classic Billiards on Portage Avenue. She was severely intoxicated, talking incomprehensibly and displaying poor balance and aggressive behavior, going so far as to bite a patron on the arm. At that time, [REDACTED] had no visible injuries;
- At some point after that, [REDACTED] was asked to leave Classic Billiards;
- When the aforementioned patron from Classic Billiards left the premises, he saw [REDACTED] sitting on the sidewalk, then rolling around on the ground. WFPS members were attending to her. There were still no visible injuries to her face;
- WFPS members had a difficult time treating [REDACTED] as she was intoxicated, refusing treatment and being aggressive. At one point,

██████ tried to hit a WFPS member, tripped and fell on her face, causing bleeding from her nose and face;

- WFPS members called for police assistance at 4 a.m. The patron from Classic Billiards also called 911 around this time;
- WPS members arrived on scene at 4:17 a.m. to assist WFPS members. ██████ was described as heavily intoxicated, refusing to accept medical assistance and being belligerent;
- She was transported to the Grace Hospital where she was found to have suffered a broken nose. Her blood alcohol level was described as toxic.

[5] On December 7, 2017, the LERA Commissioner found that the evidence was insufficient to justify referral of ██████ complaint of abuse of authority to a public hearing and declined to take further action.

### **STANDARD OF REVIEW**

[6] Section 13(2) of the *Act* provides that when the Commissioner declines to take further action on a complaint, the complainant can apply to have that decision reviewed by a provincial court judge.<sup>1</sup>

[7] At the review hearing, the onus is on the applicant, on a balance of probabilities, to show the reviewing judge that the Commissioner erred in declining to take further action on the complaint.

[8] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 states that the standard of review of a decision by an administrative agency acting in a decision-making capacity is one of “reasonableness”. The reasonableness standard is defined as follows:

[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one-specific, particular result. Instead, they may give rise to a number of possible,

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<sup>1</sup> S. 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.

reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[9] In other words, when reviewing a decision of an administrative agency acting in a decision-making capacity, a court must look at whether the reasons for decision are clear and transparent and whether the outcome or ultimate decision is tenable based on those articulated reasons. If an administrative decision contains articulated reasons and a tenable outcome, then the decision will be reasonable, regardless of whether the reviewing court disagrees or would have come to a different conclusion.

[10] As stated by Preston, P.J. in *B.J.P. v. Constable G.H., Constable B.Z. and Sergeant G.M., LERA Complaint No. 2005-186* (November 14, 2008):

[25] 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?

[26]...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 reasonably be drawn on the facts of this case.

### **POSITION OF THE PARTIES**

[11] ██████████ says that the Commissioner's decision is unreasonable for two reasons:

- It is based on an insufficient investigation which does not cover the entire timeframe of the allegations rendering the decision, on its face, unreasonable; and
- It fails to acknowledge that there are credibility issues and evidence that corroborates the applicant's version of events such that a hearing is the only reasonable outcome.

[12] Counsel for the officers disagrees, submitting that the decision clearly and transparently articulates the very fulsome results of the investigation and the reasons for declining to take further action on ██████████ complaint.

## ANALYSIS

[14] I find the Commissioner's decision a reasonable one. Not only did the Commissioner articulate his reasons in a reasonable manner such that they are explained in a transparent and intelligible manner, but the outcome is also reasonable in that it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

[13] The *Act* requires the Commissioner to investigate all complaints. It grants the Commissioner all powers under Part V of *The Manitoba Evidence Act*, R.S.M. 1987, c. E150 to meaningfully fulfill this mandate. It does not however, describe the scope of the Commissioner's investigative mandate.

[14] There has been scant case law on the confines of a LERA investigation and nothing that squarely addresses this issue. Most of the case law refers to "reasonable assessment of the evidence" (*LERA Complaint No. 2004/172*) or "done [what he is required to do] reasonably" (*LERA Complaint B.L. and Patrol Sergeant E.R., Constable W.C. and Constable J.B.* delivered October 11, 2011). In this latter decision, Judge Chapman comments on the Commissioner's screening function. This screening function seemingly comprises all aspects of the Commissioner's mandate, including the investigation proper and the assessment of the evidence garnered from that investigation, to the decision itself explaining the conclusions drawn.

[15] In this case, the investigation appears to be very fulsome. Although the investigator does not examine the officers' whereabouts from 2:30 a.m. to 4 a.m., the period of time [REDACTED] alleges she was assaulted by them, the investigator does garner evidence from an independent witness from approximately 2 a.m., which goes to her state of extreme intoxication, as well as from the WFPS members who witness [REDACTED] fall and resulting facial injuries, all before her interaction with the officers at 4 a.m.

[16] Based on this investigation, it is clear that the Commissioner drew certain conclusions. As noted by Judge Heinrichs in *LERA Complaint No. 2017-105*:

[11] The Commissioner is to investigate the complaint, weight all the evidence gathered and make a rational conclusion with respect to it. This does include, to some extent, the weighing of disputed evidence...

[17] In my view, the Commissioner's decision to not investigate further and draw the conclusions he did was reasonable in the circumstances of this case. While [REDACTED] takes a different view of what happened to her that night, differing views

entailing a credibility assessment do not result in an automatic referral to a provincial court judge for a hearing. As noted by Chartier, ACPJ, as he then was, in *LERA complaint No. 2006-233*:

[21]...a LERA Commissioner can and does possess a limited, but significant power to weigh evidence gathered by a LERA investigation. The Commissioner is mandated through the legislation to weigh all of the evidence received through the investigation in order to determine its sufficiency. This includes the weighing of sometimes contradictory evidence to determine if there is a reasonable basis to proceed with a public hearing. If the Commissioner was not allowed such a power, each and every time any controversial issue or any credibility issue arose, the Commissioner would be obliged to refer this matter to a Provincial Court Judge.

[18] For all of these reasons, I am dismissing [REDACTED] application.

  

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**L. M. Martin, P.J.**