

In the Matter of an Application pursuant to Section 13(2) of the Law Enforcement Review Act, R.S.M. 1987, c L75

H. E. AND M. F. -E.

Complainants,

- and -

CONSTABLE S. K.

Respondent.

The Honourable Judge Robert Lionel Kopstein

Decision Delivered: May 17<sup>th</sup>, 1999

Written Reasons: Dated May 21<sup>st</sup>, 1999

REASONS FOR DECISION

**Introduction:**

[1] As indicated by the Clerk of the Court following my decision on May 17, 1999 written reasons more fully setting out the basis of my decision would be forthcoming. Those reasons are as follows:

[2] This is an application under Section 13(3) of the *Law Enforcement Review Act* R.S.M 1987, c. L75, by H. E. and M. F. -E. for a judicial review of the decision of the Acting Commissioner of the Law Enforcement Review Agency to take no further action respecting their complaint #3232.

### Summary of Complaints:

[3] The complaints lodged by Mr. E. and Ms F. -E. are against Constable S. K., (Officer # ), a member of the Winnipeg Police Service, for his alleged conduct when he attended the premises of a local eye glass boutique, in answer to a call from that establishment. As best I can summarize them, the complaints are as follows:

- (a) that the officer conferred with and colluded with the merchant, while disregarding Mr. E. and Ms F. -E., and failed to listen to their side of the story;
- (b) that Constable K. failed to secure from the merchant or to assist the complainants in retrieving from the merchant an original prescription for eyeglasses, the possession of which Mr. E. claimed as rightful owner;
- (c) that Constable K. said to the E., or one of them, that he was not required to baby sit; and
- (d) that he said he would remove Mr. E.'s "black ass by force, if necessary."

### Disciplinary Default:

[4] The portions of section 29, referring to the conduct of police officers, which could be relevant to these complaints are as follows:

"29. A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or on in the execution of his duties:

- (a) abuse of authority, including
  - (iii) using oppressive or abusive conduct or language,
  - (iv) being discourteous or uncivil,
  - (v) discriminating on the basis of race...."

[5] I have reviewed the material contained in the file, including all the correspondence and notes prepared by the investigator, and I have

considered the oral submissions made before me on April 23<sup>rd</sup>, 1999.

### **Analysis of Law:**

[6] The law respecting applications such as this, as I understand it, is referred to in my decision in the case of *Palmer v. Lea & Hordijk*, delivered January 18<sup>th</sup>, 1999. A copy of that decision is appended hereto.

### **Opinion:**

[7] In my opinion, the Acting Commissioner erred in some respects; firstly by making findings on the merits of the case where the facts were contested, and secondly, by failing to exercise his jurisdiction under section 15(1) of the Act. Finally, in his letter of August 25, 1998, the penultimate paragraph reads, in part, as follows:

"Accordingly, this file is being closed pursuant to Section 13(1)(a) of the Law Enforcement Review Act as your allegations do not fall within the scope of section 29 because no disciplinary offences were committed by the Winnipeg Police Officers involved."

Some of the complaints do fall within the ambit of section 29. Whether there is sufficient evidence to justify a public hearing is a separate matter.

[8] Respecting the findings on the merits, the Act under Section 13(1), requires the Commissioner to decline to take further action in one of four circumstances:

- a. where the complaint is frivolous and vexatious,
- b. where it does not within the scope of section 29,
- c. where it has been abandoned, or
- d. where there is insufficient evidence supporting the complaint to justify a public hearing.

[9] Nowhere in the exercise of his jurisdiction is the Commissioner required or empowered to judge the complaint itself, on its merits. If the complaint does not fall within one of those categories, regardless of his or her opinion of the merits, he or she is bound to take further action under the terms of the Act, unless it can be resolved under section 15 or 16. It is

necessary, then, to deal with the Acting Commissioner's treatment of each of the complaints.

### **Remark Concerning Babysitting:**

[10] The Acting Commissioner is required to decline to take further action if he is satisfied that a complaint is frivolous and vexatious. One of the complaints against Constable K. is that he said he did not have to baby sit, a remark which I understand to be admitted. Uncivil or discourteous conduct is a disciplinary default under section 29, and such a remark made to an adult who is troubled by a belief that he or she is being badly treated, may be viewed as discourteous. Pursuant to section 13(1)(a), however, the Acting Commissioner was entitled to find that complaint to be frivolous and vexatious. He declined to take further action, incorrectly, in my view, on another ground. Nonetheless, viewed properly, given the fact that the remark was uttered, and given that it may come within the scope of section 29, it was by no means a serious affront. Therefore, I cannot find that he erred in declining to take further action.

### **Collusion:**

[11] Concerning the complaint that Constable K. colluded with the owner or manager of the business establishment in question, presumably contrary to the interests of the complainants, and ignored or discounted their concerns, the facts are disputed. I think the Acting Commissioner erred in accepting as fact, the explanation of the other witnesses and, indeed, in making a finding of fact concerning it. I think he erred in ruling that complaint to be outside the scope of section 29. If it is true that Constable K. was in collusion with the business establishment to defeat the interest of the complainant, there would be, in my opinion, a basis for complaint under the general heading of "abuse of authority" in section 29.

[12] If, in regard to that complaint, however, viewing all the evidence before him, without attempting to make any findings of fact, the Acting Commissioner had found that, in light of the material on his file including the statements and explanations contained in it, and the absence of evidence corroborating the complaint, there was insufficient evidence to justify a public hearing, I could not have found that he erred. Based upon a reading of the record, such a finding would not have been clearly unreasonable or irrational. It was incorrect of him to purport to decide the facts. Applying

the proper test, however, his decision to decline to take further action was not irrational or unreasonable.

### **Failure to Assist Complainants:**

[13] A further complaint appears to be that Constable K. failed to assist in retrieving from the store staff a prescription for eye glasses to the possession of which the complainants claimed entitlement. Section 29(f) of the Act makes it a disciplinary default for a peace officer who, being present, fails to assist any person in circumstances where there is a clear danger to the security of that person's property. That section, however, relates to danger of harm or destruction of property, in my opinion, not to a dispute over the right to possession. This complaint does not come within that section. If it is true, as claimed by the witnesses, that the complainants were told that a dispute over the right to possession was a civil, not a police matter, that advice, it appears to me, was well founded. Concerning that complaint, I cannot find that the Acting Commissioner erred in finding that the complaint did not come within the scope of Section 29.

### **Racist Remark:**

[14] I consider the principal and most serious complaint to be a remark that he would remove the complainant's "black ass by force, if necessary", attributed to Constable K. The Commissioner concludes in respect of that complaint: "he definitely did not make racist comments to you." Again, in my opinion, he was not entitled to make that finding. The most that he was entitled to say under section 13(1)(c) of the Act was that there was insufficient evidence supporting the complaint to justify a public hearing. Contrary to the statement contained in the Commissioner's letter, that complaint is one that clearly comes within the scope of section 29 (a) clause (iii), which includes within the definition of disciplinary default "using oppressive or abusive conduct or language, and clause (vii) which includes discrimination on the basis of race.

[15] Under section 13(4), the burden of proof is upon the applicant. The problem, Mr. E. and Ms F. E., is that before the Commissioner can take action after investigating your complaint, he must be satisfied that there is sufficient evidence in support of your complaint to justify a public hearing. That is, after reading his investigator's report and the statements included, and on balancing your complaint against the evidence to the

contrary in those documents, he must arrive at an opinion that, notwithstanding statements to the contrary, the strength of the evidence of the complaint outweighs statements to the contrary.

### **Declining to Take Further Action on Complaints:**

[16] A Commissioner is not entitled to decide the case on the merits as Mr. Wright has done in this case. He was not entitled to say as he did that the incidents as you described them did not occur. But he was entitled to form the opinion, after weighing all the factors before him, that the evidence was not strong enough to support a successful prosecution of the complaint before a court of law at a public hearing, and upon the basis of that opinion he is required by law to decline to take further action. Again, while, in my opinion, the Commissioner acted outside his jurisdiction in purporting to decide the case on its merits, it appears to me that there were adequate foundations to decline to take further action on the complaint lodged. That is, either that the complaint did not come within the scope of section 29, or that the weight of the evidence would not support a successful prosecution of the complaint in a public hearing. Having read the records on the file, I cannot say that his decisions were clearly unreasonable or irrational. I am, therefore, unable to find that he erred in declining to take further action on the complaints.

[17] Finally, there is no evidence that the Acting Commissioner complied with the mandatory requirements of section 15(1) of the Act. There would be little point in requiring him to do so now. I will not, therefore, order him to do so. By not ordering him to do so, however, I do not wish to be understood as condoning his continued failure to exercise his jurisdiction in that regard. This is the second case I have heard in which Mr. Wright has failed to act under that section.

[18] In compliance with section 13(14.1) of (b) of the Act, I order a continuation of the ban on publication of the respondent's name.

