

**IN THE MATTER OF:**            *The Law Enforcement Review Act*  
**Complaint #2005/49**

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

<b>BETWEEN:</b>	)	
	)	
<b>T.T.</b>	)	<b>Mr. Sean Boyd</b>
	)	<b>for the Commissioner.</b>
<b>Complainant,</b>	)	
	)	
<b>-and-</b>	)	
	)	
<b>CST. Z.B., SGT. R.Z. and</b>		
<b>WINNIPEG POLICE</b>		
<b>ASSOCIATION</b>	)	<b>Mr. Josh Weinstein</b>
	)	<b>for the Respondents.</b>
<b>Respondents.</b>	)	

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

**REASONS FOR DECISION**

**CARLSON, P.J.**

**INTRODUCTION**

- [1] This is an application under section 13(2) of *The Law Enforcement Review Act* (the “Act” or “L.E.R.A.”).
- [2] The application is brought by the Complainant, for a review of the decision of the Commissioner to decline to take further action on his complaint.
- [3] The Complainant made his complaint orally to an investigator appointed by the Commissioner on February 24, 2005. The investigator made written notes of what was said to him by the Complainant. Those notes were attached to a L.E.R.A. Complaint form, which was signed by the Complainant. Those notes, with the attached L.E.R.A. Complaint form, constitute L.E.R.A. Complaint number 2005/49 (the “Complaint”).

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

[4] On March 10, 2005, the Commissioner wrote to the Complainant advising that he declined to take further action on the Complaint, on the basis that the Complaint did not fall within the scope of any one of the disciplinary defaults set out in section 29 of the Act.

[5] On April 8, 2005, the Complainant, by correspondence with the Commissioner, requested a review of the Commissioner's decision pursuant to section 13(2) of the Act.

[6] On April 25, 2005, the Commissioner referred the Complaint for a review of his decision, pursuant to section 13(3) of the Act, to a judge of the Provincial Court of Manitoba.

[7] The review came on for hearing before me on October 23, 2007.

[8] Present at the hearing was Mr. Josh Weinstein, counsel for the Winnipeg Police Association and the respondent officers. The Complaint mentions two respondent officers by name, but also refers to other, unnamed members of the Winnipeg Police Association. Mr. Sean Boyd, counsel for the Commissioner, was also present. The Complainant, who is unrepresented, did not appear at the hearing, but did provide me with typed materials. These were received by fax during the evening of October 22, 2007. Prior to the hearing, I provided Mr. Weinstein and Mr. Boyd with a copy of the materials that had been faxed to me by the Complainant.

[9] The ultimate issue for me to decide on this review is whether the Commissioner erred in his decision to decline to take further action on the Complaint.

### **PRELIMINARY MATTERS**

[10] It was necessary for me to rule on three preliminary matters, prior to hearing submissions on the substantive review application.

#### **1. Should the review application be dismissed without hearing due to the Complainant's non attendance?**

[11] Mr. Weinstein submitted that since the burden of proof on this application is on the Complainant to show that the Commissioner erred in declining to take further action on the Complaint, and since the Complainant was not present to identify any alleged errors the Commissioner made, the Complainant cannot discharge his onus and the Complaint should be dismissed without hearing.

[12] Mr. Boyd did not take any position on the request by Mr. Weinstein for a dismissal without hearing.

[13] Counsel referred me to the decision of my colleague, Provincial Court Judge Lerner of May 11, 2005 in *D.D. v. D/S. D.B.* (L.E.R.A. Complaint No. 5845). Judge Lerner considered other cases in which the Court dismissed section 13(2) review applications when complainants did not attend for the hearing of their applications. Judge Lerner, relying on section 13(4) of the Act, found that in failing to appear for the hearing of the matter and in failing thereby to identify any error on the part of the Commissioner in reaching his decision, the complainant had failed to discharge the onus upon him pursuant to section 13(4) of the Act, and he dismissed the section 13(2) application without hearing. Mr. Weinstein urged me to follow this procedure.

[14] In this case, the reason stated by the Commissioner for declining to take further action on the Complaint was that he found that none of the allegations made in the Complaint fell within the scope of section 29 of the Act – in other words, that the allegations made against police officers in the Complaint were not allegations of “disciplinary defaults” as defined in section 29.

[15] There may be section 13(2) review hearings at which, by simply looking at a L.E.R.A. complaint and a Commissioner’s letter declining to take further action on such complaint, a Provincial Court Judge can be satisfied that the Commissioner erred in declining to take further action on the complaint. Whether or not a complainant in a particular case can discharge his onus on a section 13(2) review hearing without making submissions will depend on the nature of the allegations set out in the complaint (which will determine the type of error that is to be considered), the standard of review to be applied and the circumstances of the particular case.

[16] Accordingly, even though the Complainant was not present to make submissions, in the interests of fairness, given the particulars of the Complaint, in my view, I have a duty to deal with the review application, by considering the Complaint itself and the Commissioner’s letter, and hearing submissions made at the hearing.

[17] Accordingly, I declined Mr. Weinstein’s request to dismiss the review application without hearing.

## **2. Should the review application be adjourned ?**

[18] The Complainant, in the materials he faxed to the Court prior to the hearing, requested an adjournment of the hearing.

[19] Mr. Boyd took no position with respect to the Complainant’s request for an adjournment.

[20] Mr. Weinstein opposed the request for the adjournment.

[21] The Complainant's reason for his non-attendance, stated in the materials he faxed to the Court, was that his health condition had worsened. No information was provided as to how such condition prevented him from attending court. No medical information or confirmation was provided. The reason provided for his non-attendance is the same reason that the Complainant gave for not attending at a previously set date on this matter for January 8, 2007(although not for the substantive hearing). In the materials submitted for the January 8, 2007 court appearance, (which he included with his faxed materials sent for this hearing) he stated that he would try to attend on that date but, that

“...anything can happen that could prevent me to be present, e.g. I could get the cold or flu or kidney stones again, or something could happen on my way to the hearing.”

[22] The Complainant knew about the hearing date. He had much correspondence with the Court office for the purpose of setting this hearing date.

[23] In all the circumstances, I cannot have any confidence that if the matter were adjourned to another date, the Complainant would attend on that date. While the Complainant certainly deserves an opportunity to have his review application dealt with, the Respondents also deserve the opportunity to have this matter finally dealt with.

[24] I denied the request for an adjournment and ordered that the hearing of the review application proceed.

**3. Can the written materials faxed to the Court prior to the hearing by the Complainant be considered by the Court on the review application?**

[25] The faxed materials included copies of LERA decisions, namely:

- Blair v. Soltys [1999] M.J. No. 470
- Sgt. F. and Constable S. v. Peters, J. and Nichol 2004 MBQB 259 (CanLII)
- Transcript of proceedings in C.F.N., and Cst. K.L. (LERA Complaint No. 2895)

[26] Neither Mr. Weinstein nor Mr. Boyd objected to those cases being reviewed by me.

[27] Mr. Weinstein objected to the remainder of the written materials faxed by the Complainant being considered by me for the purpose of the hearing. Mr. Weinstein said that the Act does not contemplate written submissions replacing oral submissions on a review application, and, in any event, that the materials do not constitute submissions on the merits of the review application.

[28] Mr. Boyd did not take a position with respect to the materials faxed by the Complainant being considered by the Court.

[29] Without the Complainant being present at the hearing, it is unclear whether the materials were sent by the Complainant for the purpose of tendering them as evidence, as submissions or both. A section 13(2) review is for the purpose of determining whether or not the Commissioner erred in making his decision. It is not a hearing “de novo” at which the parties may submit new material that was not presented to the Commissioner when he made his decision. A Provincial Court Judge has the discretion to grant leave to a party to call or tender new evidence at a review hearing, but such new evidence would have to be limited to evidence that was unavailable to the Commissioner when he made his decision and/or related to alleged bias of the Commissioner. The Complainant was not present to request leave to introduce the materials as evidence, nor to explain on what basis leave should be granted. Accordingly, I do not accept the materials as evidence.

[30] The materials consist of statements, opinion, explanations and requests that, frankly, in my view, have no relevance to the issue before me – namely whether the Commissioner erred in making his decision not to take further action on the Complaint. Accordingly, even without deciding whether I could accept written submissions in place of oral submissions, I find that the materials will not be considered on this hearing as submissions because they do not constitute submissions and are not relevant to the issue I must decide.

[31] Accordingly, I have read the cases submitted by the Complainant, but have not taken into consideration the other typed materials provided by fax to the Court by the Complainant, for the purpose of the review application.

### **THE HEARING – DID THE COMMISSIONER ERR IN DECLINING TO TAKE FURTHER ACTION ON THE COMPLAINT?**

#### **The Commissioner’s Jurisdiction**

[32] The Commissioner declined to take further action on the Complaint on the basis that the police actions complained of were not within the scope of section 29 of the Act – in other words, the nature of the police conduct complained of did not constitute “disciplinary defaults” as defined in the *Act*.

[33] By Section 13(1) the Commissioner must decline to take further action on a Complaint if he is satisfied that any of the following circumstances apply:

- (a) the subject matter of a Complaint is frivolous or vexatious or does not fall within the scope of section 29;

- (b) a Complaint has been abandoned; or
- (c) there is insufficient evidence supporting the Complaint to justify a public hearing.

[34] The Commissioner derives his jurisdiction from the Act. He has no authority to decide the merits of a Complaint. If the Commissioner is satisfied that the subject matter of a Complaint does not fall within the scope of section 29 (namely, that it does not fall within the definition of a disciplinary default), he has no discretion to do anything other than to decline to take further action. On the other hand, if the Complaint does not fall into one of the circumstances set out in section 13(1), the Commissioner must take further action on the Complaint, barring resolution pursuant to sections 15 or 16 of the Act.

### **Burden and Standard of Proof**

[35] Section 13(4) of the Act places the burden of proof on the Complainant to show that the Commissioner erred in declining to take further action on the Complaint.

[36] The standard of proof is a civil standard – on a balance of probabilities.

### **Scope of Review**

[37] A review by a Provincial Court Judge under section 13(3) of the Act is limited in its scope. It is not an appeal on the merits of a Complaint. It is only to decide whether the Commissioner, in deciding to decline to take further action on the Complaint, acted within the jurisdiction given to him by the Act.

### **Standard of Review**

[38] The nature of the alleged error is important because it determines what standard of review will be applied to the Commissioner's decision.

[39] Judge Chartier (as he then was), in *B. v. S and A* (L.E.R.A. Complaint No. 3597), after consideration of full argument and authorities, set out the applicable standards of review to be applied by a Provincial Court judge conducting a section 13(2) review under the Act. Judge Chartier stated the following:

“Where the review is one which relates to the jurisdiction of the Commissioner and more specifically, does the Complaint “fall within the scope of section 29” of the L.E.R. Act as same is found in clause 13(1)(a) of the L.E.R. Act, the standard of review will tend to be “the correctness” of the decision made by the commissioner...”

[40] That is exactly the situation here. The Commissioner's decision was that the Complaint did not fall within the scope of section 29. Accordingly, it is an alleged

error of jurisdiction that is at issue and the appropriate standard of review to be applied to the Commissioner's decision is the standard of correctness.

[41] I confirm that I have reviewed the material contained in the Commissioner's file, specifically the Complaint (Exhibit 1) and the Commissioner's letter to the Complainant dated March 10, 2005, and that I have considered the oral submissions made before me on October 23, 2007.

### **The Complaint**

[42] The Complaint arises from the Complainant's contact with various members of the Winnipeg Police Service following a theft he alleges of his personal possessions.

[43] The Complainant is a client of the Public Trustee's Office of Manitoba. The Public Trustee's Office orchestrated a move of the Complainant from one residence to another. The Complainant alleges that, during this move, employees of the Public Trustee's Office stole many of his possessions. The Complainant also alleged that his former landlord and/or tenants at the premises where he had formerly lived had blown some sort of white dust into his apartment to make him sick.

[44] The Complainant's allegations were summarized by the Commissioner in his letter to the Complainant dated March 10, 2005 (Exhibit 2) as follows:

- (1) That the police failed and/or refused to listen to all the details of the Complaint;
- (2) That the police would not and/or did not investigate the alleged theft of the Complainant's property; and
- (3) That the police did not take action against the persons responsible for the alleged theft of the Complainant's property.

### **Application of Standard of Correctness to Commissioner's Decision**

[45] The standard of correctness is the most demanding of review standards. Judge Joyal (as he then was) stated in his June 21, 2006 decision, *M.S. v. Cst. P.B. and Cst. G.D.* (L.E.R.A. Complaint # 2004/172), at page 8:

“Its exacting standard derives from the assumption that the issues to which it applies, permits of a clear, single right answer in law. Accordingly, the application of this standard results in the reviewing

provincial judge according the least amount of deference to the Commissioner's decision. When the standard of correctness is applied, the Commissioner's decision can be overturned on the basis of simple error".

[46] The Complaint is that police officers of the Winnipeg Police Service failed to listen to all details of the Complaint that the Complainant wished to give, failed to investigate the alleged theft and failed to prosecute the alleged theft. The Commissioner said that these did not fall within the scope of section 29 of the Act because they were not in the nature of "disciplinary defaults".

[47] Without the Complainant present to make any submissions as to the nature of the alleged errors of the Commissioner, I can look only at the Complaint itself and at the Commissioner's decision. The issue for me to decide is whether, looking at those two documents, the Commissioner was right or wrong. If I agree with the Commissioner that failure to listen, investigate and/or prosecute by the police are not disciplinary defaults within section 29 of the Act, then I must find that the Commissioner did not err. If I find that the Commissioner was wrong and that the failure to listen, investigate and/or prosecute (or any of them) by the police do, in fact, constitute disciplinary defaults within section 29 of the Act, then I must order the Commissioner to refer the Complaint for a hearing or take other action.

[48] The Act is limited to dealing with Complaints of police conduct that are "disciplinary defaults" (s. 6(1) of the Act). The reason is simple. The purpose of the Act is to address misconduct of the police.

[49] A "disciplinary default" is defined in s. 1(1) of the Act to mean "any act or omission referred to in s. 29".

[50] Section 29 of the Act reads 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 in the execution of his duties;

(a) abuse of authority, including:

- (i) making an arrest without reasonable or probable grounds,
- (ii) using unnecessary violence or excessive force,
- (iii) using oppressive or abusive conduct or language,
- (iv) being discourteous or uncivil,
- (v) seeking improper pecuniary or personal advantage,



- (vi) without authorization, serving or executing documents in a civil process, and
- (vii) discriminating on the basis of race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, political belief, or ethnic or national origin;
- (b) making a false statement, or destroying, concealing, or altering any official document or record;
- (c) improperly disclosing any information acquired as a member of the police department;
- (d) failing to exercise discretion or restraint in the use and care of firearms;
- (e) damaging property or failing to report the damage
- (f) being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person or the security of that person's property;
- (g) violating the privacy of any person within the meaning of The Privacy Act;
- (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
- (i) assisting any person in committing a disciplinary default, or counseling or procuring another person to commit a disciplinary default.

[51] None of the alleged failures of police officers in the Complaint in this case (failure to investigate, failure to listen, failure to prosecute) fall within the specified acts or omissions cited in section 29. Section 29(a) does use the word “including” before specifying in subsections (i) through (vii) certain acts or omissions which constitute “abuses of authority”. Accordingly, it is possible that other acts or omissions not specifically mentioned in section 29(a)(i) through (vii) may amount to abuses of authority within section 29(a). However the types of acts described in section 29(a) are all acts of police conduct, not of police decisions or service. The allegations made in the Complaint are not of the type that, if proved, could constitute “abuses of authority” within section 29(a) of the Act.

[52] Section 29 makes it clear that disciplinary defaults relate to police conduct only. Police service issues and police decisions are not within the scope of section 29.

[53] In the Complaint itself, the Complainant admits that he alleges a lack of service on the part of the police as opposed to allegations of police conduct.

[54] The decision to listen or not listen to all details of a Complaint is not an “act or omission” that falls within section 29. It is a service issue and involves an officer making a decision to continue to listen to a citizen’s concerns and to decide when enough information has been provided to justify no longer listening and to terminate a meeting with a citizen.

[55] The decisions to investigate an alleged criminal offence, how to investigate it and to what extent to investigate it, are not acts or omissions that fall within section 29. These decisions are the ultimate responsibility of the Chief of Police or his designate. The material before me indicates that in fact, at least one officer did take certain investigative steps in terms of following up with the Public Trustee’s Office regarding the Complainant’s allegedly missing items. The decision not to investigate further the alleged theft and/or the alleged blowing into his apartment of white dust, does not fall within the scope of section 29.

[56] The decision to prosecute an offence in a criminal case is not an act or omission that falls within section 29. Such decision is the ultimate responsibility of the Director of Prosecutions, Manitoba Department of Justice.

[57] None of the matters complained of in the Complaint, even if they were proved on their merits, are in the nature of disciplinary defaults as defined in section 29 of the Act.

[58] Accordingly, the Commissioner did not have any jurisdiction under the Act to decide the Complaint on its merits, namely whether the officers listened, investigated and/or prosecuted.

[59] Under section 13(1) of the Act, having been satisfied that the Complaint did not fall within the scope of section 29 of the Act, the Commissioner had no discretion to take further action on the Complaint.

### **DECISION ON REVIEW**

[60] For the reasons stated above, I am of the view that the Commissioner’s decision that none of the matters in the Complaint fall within the scope of section 29 of the Act was correct. None of the allegations, even if proved, are disciplinary defaults.

[61] Accordingly, I find that the Commissioner did not err in declining to take further action on the Complaint.

[62] In compliance with section 13(14.1)(b) of the Act, I order a continuation of the ban on publication of the Respondents' names.

Dated at the City of Winnipeg, in Manitoba, this 29 day of November, 2007.

“ORIGINAL SIGNED BY”

---

C. CARLSON, P.J.