

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2007/291

AND IN THE MATTER OF:

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

BETWEEN:

K.A.,
Applicant

)
)

Mr. P.A.,
as agent on behalf of his son

- and -

)
)

Sergeant S.P.,
Respondent

)
)

Mr. Paul McKenna,
for the Respondent and the
Winnipeg Police Association

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)

Mr. Mark Stonyk,
for the Commissioner

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October 15th, 2009

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NOTE: These Reasons are subject to a ban on publication of the Respondent's name pursuant to section 13(4.1) of *The Law Enforcement Review Act*.

CURTIS, P.J.

Introduction

[1] Mr. A., who is acting on behalf of his son, K.A., has asked the Court to review the decision of the Commissioner pursuant to section 13(2) of *The Law Enforcement Review Act*. The Commissioner had determined that there was insufficient evidence supporting a complaint made to justify taking the complaint to a public hearing and therefore declined to take any further action.

[2] The initial complaint contained a number of concerns around the arrest of Mr. A.'s son, K.A., as well as the investigation into that matter. The Commissioner quite correctly noted that a number of the concerns expressed were not within his jurisdiction. One aspect of the complaint with which we are dealing, is the allegation that Sergeant S.P. was rude and/or uncivil when dealing with Mr. A., his wife and his son at the District 4 police station where his son was processed after he was arrested on December 5th, 2007. It is also alleged that Sergeant P abused his authority by putting unrealistic conditions on K.A.'s release. It was further alleged that Mr. A. and his family were treated differentially based on race.

[3] K.A. was arrested on December 5th, 2007 following an allegation that he had uttered threats to another boy at his school.

[4] K.A. was arrested at his residence and transported along with his mother to the District 4 police station. There he was processed and given contact with a lawyer.

[5] Mr. A. was also present at the District 4 police station. Sergeant P.'s involvement was as the reviewing officer. He explained the promise to appear and undertaking to both K.A. and Mr. and Mrs. A.

[6] Before leaving, Mr. A. wanted police to take a complaint and charge the other boy. Mr. A. was asked if he had any information or evidence that would assist in supporting the basis for laying a charge. Neither Mr. A. nor his son provided any further information. When Mr. A. continued to ask that the other boy be charged, Sergeant P. asked officers to escort Mr. A. and his family from the police station.

[7] The complaint alleges that Sergeant P. was rude when he would not take their complaint and he ordered police officers to escort them out.

Legislation

[8] The pertinent section of *The Law Enforcement Review Act* which applies in this particular case is section 13 which provides:

Commissioner not to act on certain complaints

13(1) Where the Commissioner is satisfied

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

(b) that a complaint has been abandoned; or

(c) that there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

Notice to complainant

13(1.1) A complainant may be informed of a decision not to take further action under subsection (1) by the Commissioner's sending a notice, by registered mail, to the complainant at the complainant's last address contained in the Commissioner's records.

Application to provincial judge

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.

Procedure on application

13(3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

(a) to refer the complaint for a hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

Burden of proof on complainant

13(4) Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

Ban on publication

13(4.1) Notwithstanding that all or part of a hearing under this section is public, the provincial judge hearing the matter shall, unless satisfied that such an order would be ineffectual,

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

(a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;

(b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and

(c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act.

Decision of provincial judge final

13(5) The decision of the provincial judge on an application under subsection (2) is final and shall not be subject to appeal or review of any kind.

Standard of Review

[9] A review by the Court under this section does not involve a hearing on the merits of the case. It is a review of the process, the investigation, and the information the Commissioner had to consider when he made his decision. In this case, the decision was not to proceed any further as there was insufficient evidence to support the complaint. This Court's review is not to determine the "correctness" of the Commissioner's decision, but whether it was a reasonable conclusion for him to arrive at based on the information he had before him.

[10] "Correctness" as a standard of review applies only to the issue of whether the Commissioner acted within the limits of his jurisdiction. This particular complaint had a number of issues raised. The Commissioner identified and explained to Mr. A. what the appropriate venue would be to address some of his concerns which did not fall under the purview of the Commissioner's office. The complaint with respect to Sergeant P.'s conduct was something that was within his jurisdiction to investigate and address, and he did so.

[11] The next step then is to determine whether or not the Commissioner's decision was rationally arrived at based on the information he had. Section 13(4) puts the onus on the applicant to show the Commissioner erred in declining to take further action on a complaint.

[12] The standard for review of the Commissioner's decision is that of "reasonableness". That is defined by the Supreme Court of Canada in the 2008 decision *Dunsmuir v. New Brunswick*, [2008] S.C.C. 9 at paragraph 47 wherein the Supreme Court sets out:

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, 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.

[13] The Supreme Court goes on to say in paragraph 49:

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision-makers.

[14] They go on to note that most decision makers involved in administrative schemes have experience and expertise in the administrative framework of the legislative regime within which they operate.

Position of the Parties

[15] The Commissioner's position is that there is insufficient evidence to take this matter any further.

Sergeant S.P.

[16] According to the materials filed, it appears that Mr. A. wanted to have the other youth charged but was unable to give any information or evidence upon which to base a charge. After explaining this to Mr. A. and K.A. several times, Sergeant P. had the family escorted out of the police station. Sergeant P. explained that the discussion was going nowhere, so to avoid escalating the situation he asked officers to escort the family out of the police station. Mr. A. and K.A. felt Sergeant P. was rude in having them escorted out of the police station but gave no examples of what was meant by rudeness. Sergeant P. denied being rude.

[17] With respect to the conditions on the undertaking, K.A. was restricted from being within 200 meters of the other boy. This created a problem for K.A.'s attendance at school.

The A.'s Position

[18] Mr. A., in his submission, stated that the Commissioner erred in two ways. The first was that "...he never gave us any opportunity to be interviewed..." (transcript, page 3, line 5). Secondly, "We never had seen any MSN messages." (transcript, page 3, lines 26-27).

[19] I will deal with the second issue first. Mr. A. alleges the Commissioner erred because they never saw the MSN messages referred to with respect to the criminal complaint against his son, K.A. That is an issue of disclosure, and entirely outside the jurisdiction of the Commissioner. It is not something he could involve himself in, in any way.

[20] The first submission is that the Commissioner erred when he did not interview Mr. A. and his family although he did interview the officers involved. In fact, the two officers who arrested Mr. A.'s son were not interviewed although their notes were made available to the Commissioner. At this point I make the observation that Mr. Haslam in fact was the investigator from the Commissioner's office who did the investigation and had the communication both with officers and Mr. A.

[21] During the hearing on June 16th, 2009 Mr. A. stated:

MR. A....the commissioner, he interviewed all the parties involved, but he never gave us any opportunity to be interviewed with him....He never made any attempt to call us to ask question about the situation, what happened. But in his report, he interviewed all other parties....We were not given any chance to say our sides of the story.

THE JUDGE: Mr. Haslund (phonetic) wasn't in touch with you?

MR. A.: No, no. Not at all.

THE JUDGE: Mr. Haslund (phonetic) was in touch with you at least by letter was he not?

MR. A.: He never interviewed us.

THE JUDGE: I have copies of correspondence.

MR. A.: Correspond, but he never corresponded himself.

(transcript, page 3, lines 3-20).

[22] In the Commissioner's letter to Mr. A. dated April 23rd, 2008 I note Mr. Haslam wrote to K.A. after receiving the written complaint. Mr. A. spoke to Mr. Haslam on the telephone about the complaint on December 12th, 2007 and at that time the concern about Sergeant P. was discussed. On December 14th, 2007 further correspondence was sent to the Commissioner and Mr. Haslam again contacted Mr. A. by telephone. At that time Sergeant P.'s behaviour was further discussed, including the conditions that had been placed on K.A.'s undertaking when he was released. It is also noted that the letter indicated Mr. A. would not be providing any further information and that Mr. Haslam should close the file as "being out of scope" and that he would then apply to have the decision reviewed by a provincial judge.

[23] I note these contacts as set out in the letter because although it appears no formal "interview" was entered into by the Commissioner's investigator with Mr. A. or his family in terms of being in the same room at the same time, there was in fact contact and discussion about the very issues which were of concern to Mr. A. and his son, K.A., with the Commissioner's investigator.

Conclusion

[24] The purpose of the section 13(2) review is to determine whether the Commissioner erred in his decision not to refer the matter to a public hearing. The Commissioner acts in the capacity of a screening agent. His function is not to determine whether a complaint is made out but whether it warrants further inquiry given the facts before him.

[25] The allegations are serious. The Commissioner took them seriously and conducted an investigation. His assessment of the matter was that there is insufficient evidence to move this complaint forward to a public hearing. In making his decision he took into account the information he had, and the information he did not have. Allegations were made of abuse of power, rudeness, and racial bias.

[26] The April 23, 2008 letter sent by the Commissioner to Mr. A. covers the information available to him in a very detailed fashion.

[27] The allegation of abuse of power was based on the conditions set out on the undertaking attached to the promise to appear when K.A. was released. One of them included a restriction on contact or communication with the complainant, and not to attend within 200 meters of where he "resides, works or may attend". That impacted on K.A.'s ability to attend school, as the other boy and he both attended

the same one. That this is often a standard type of condition with such a charge was explained, as was an option if modification seemed necessary.

[28] Mr. A. and K.A. alleged rudeness on the part of Sergeant S.P. when he told officers to escort them from District 4 station. There appears to be the statement, but nothing offered in support to describe the nature of or how Sergeant P was rude.

[29] Mr. A. felt he was being treated differentially based on race. Mr. A. told Mr. Haslam on December 14, 2007 he would send something in writing to further address his concerns. Nothing that does so is on file.

[30] In the end, the question is whether or not the Commissioner could reasonably and rationally come to the conclusion he did not to take any further action. The onus, as the Act provides in section 13(4) is on the complainant to show he was in error by doing so. Here the Commissioner outlined the investigation and explained the reasons for his conclusion. No error has been shown. Based on the information he had to consider, he made a rational conclusion with which I will not interfere.

Original signed by Judge K. M. Curtis

K. Mary Curtis, P.J.