IN THE MATTER OF: ***The Law Enforcement Review Act***
Complaint #2014/125 and
Complaint # 2014/146

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

BETWEEN:

D.N.	)	D.N., acting in person
	)	Self-Represented
Complainant,	)	
-and -	)	
	)	
Cst.'s S.G. & R.L.	)	
	)	
Respondents.	)	Mr. W. Haight
	)	Counsel for the Respondents.
	)	
	)	Decision date: November 2016

Restriction on Publication
This Decision is subject to a ban on publication of the Respondents' names pursuant to s. 13(4.1).

HEINRICHS, P.J.

INTRODUCTION

[1] D.N., the Complainant/Appellant, filed a complaint with the Law Enforcement Review Agency (LERA), concerning the conduct of two Winnipeg Police Service Officers that D.N. says took place on July 14 and 15, 2014. As the complaint concerned the actions of the two officers on two separate dates, LERA opened two separate files. On May 18, 2016, however, the LERA Commissioner sent out one written decision with respect to both files. The Commissioner's

conclusion was that the evidence supporting D.N.'s complaint was insufficient to justify taking either - or both - matters to a public hearing. Pursuant to section 13(1) of the *Law Enforcement Review Act* (the *Act*), the Commissioner therefore declined to take further action on the matters. D.N. then asked that this decision be reviewed by a Provincial Court Judge. Both matters came before me for hearing and, by agreement of D.N. and counsel, were heard together.

JUDICIAL REVIEW OF THE COMMISSIONER'S DISMISSAL

[2] The *Law Enforcement Review Act* sets out that the burden – or onus – on this review is on the Complainant, D.N. 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.

[3] In reviewing the decision of the Commissioner, it is important to note that the *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*.)

[4] In reviewing the Commissioner's decision, I must first determine if he has committed an identifiable jurisdictional error; that is, did he apply the wrong test or misapply the right test? In his May 18, 2016 letter to D.N., the Commissioner 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.

[5] In his submissions to this Court, D.N. 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; I do not find that the Commissioner committed a jurisdictional error in his decision.

[6] Next, I must determine the "reasonableness" of the Commissioner's decision. The task I must undertake was aptly set out by my brother 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."

[7] 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?

[8] The Commissioner, in his decision letter, set out in detailed point form the complaint(s) made by D.N. He then went on to summarize what Constable R.L. had written in the Provincial Offence Notice issued to D.N. for not signaling a turn

on July 14, 2014 and what the officers told the LERA investigator when they were interviewed in person. While the Court is satisfied that this is an accurate summary of what the officers said when answering questions for D. Rohne, the LERA investigator, D.N. had a valid concern about the officer interview notes. The handwritten answers are difficult to read and include abbreviations that are subject to interpretation. All file documents being relied on by LERA should be typewritten as well, when they may be illegible to others. (By way of contrast, in this case, Constable R.L.'s handwritten notes on the back of the Offence Notice are legible, although they too include a few common abbreviations.)

[9] Although not specified by D.N. when he submitted his three page typed complaint for LERA, the substance of his complaint(s) can only fit under section 29(a)(iii) and (iv) of the *Act*, such that D.N.'s complaint is that the officers committed disciplinary defaults in the acts they committed in the execution of their duties:

1. by abusing their authority in using oppressive or abusive conduct or language, and
2. by abusing their authority in being discourteous or uncivil.

[10] The Commissioner noted that a number of the allegations made by D.N. were complaints with respect to quality of service D.N. had received. These allegations included that:

1. The officers were not following police protocol,
2. The officers were not properly conducting an investigation into the *Highway Traffic Act* charge of failing to signal a turn, and
3. The officers were not following the Police Chief's initiative to harmonize the police with the community.

[11] These are all properly under the purview of the Chief of Police and not part of what the LERA Commissioner is legislated to review. The Commissioner was correct to direct D.N. to the Chief of Police if he wanted those matters responded to.

[12] Even though the Commissioner pointed this out in his decision letter, when this matter came before me for hearing I had the 25 point, 6 page (type written) argument from D.N., as well as his oral submissions to consider. In that document, as in court, many of the concerns or questions listed by D.N. again dealt with the police not following "police protocol" and in not conducting a proper or thorough investigation in to the allegation of his charge of failing to signal a turn. The Commissioner was correct in not considering these complaints in making his decision and they do not form part of what I am to consider in determining the reasonableness of the Commissioner's decision.

[13] As well, D.N. was critical of how the LERA investigator and Commissioner handled their own investigation on what was said and done – or not done – by the officers in the two incidents in question. Deference, that is respect for or a yielding to the knowledge and experience of the decision makers, must be given to the investigators and Commissioner of LERA. They deal with complaints about the conduct of police officers day in and day out. In this case, the Commissioner believed that the Law Enforcement Review Agency had the necessary answers and information in order to make the decision.

[14] The focus of D.N.'s complaint about Constable R.L.'s conduct on July 14 was about what happened after D.N. had been given the traffic ticket, got out of his vehicle and approached the cruiser car. Although the exact words or tone were not agreed on, both D.N. and the officers agreed that Constable R.L. ordered D.N. back to his car and that failure to do so could result in a further charge. Without

determining exactly how aggressive and belligerent – or not – D.N. was when approaching the cruiser car, what exactly was said during that confrontation, or what the exact posture of the officer was – and even if some of the comments allegedly made by the officer were discourteous or uncivil - the Commissioner was clearly finding that this was not an abuse of authority. In other words, this did not reach the level of "exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust." (Quoting from Judge Joyal, as he then was in *A.C. v. Cst. G.S.*, LERA Complaint #6100.) The Commissioner concluded that the evidence supporting this part of the complaint did not justify a public hearing.

[15] D.N.'s complaint about the conversation he had with the same officer, Constable R.L., the following night, July 15, at sometime just before 11:00 p.m., is that the officer was being discourteous or uncivil in suggesting that D.N. was "cruising for prostitutes". This alleged comment was given during the time that Constable R.L. and Constable S.G. had called out to a sex trade worker, asking her to approach them and speak with them by their cruiser car. Constable R.L. told the LERA investigator that D.N. was interfering with their police work and what he remembered saying was, "We are dealing with this prostitute right now and you need to leave." Without finding which version of the comments made was true, the Commissioner determined that this was not discourteous or uncivil conduct that merited taking this complaint to a public hearing.

CONCLUSION

[16] In explaining earlier that I am to determine the reasonableness of the Commissioner's decision, I quoted from a decision of my brother Judge Preston. To paraphrase his definition with reference to D.N.'s particular circumstances:

Given the evidence that the Commissioner did have – D.N.'s three page complaint, Constable R.L.'s handwritten notes on the back of the Offence Notice and the LERA investigators notes from his interview with the officers; did the Commissioner make a rational conclusion, reasonably drawn from that information, and is the explanation of his decision transparent, that is, clear and straightforward; intelligent, that is, insightful and apt; and rational, that is, sensible and logical? It does not matter if this was not the only conclusion that could be reached in light of all of the evidence the Commissioner had. Rather, was it a conclusion that could reasonable be made? The onus is on D.N. to satisfy me that the Commissioner's decision was not reasonable. He has not satisfied me that it was not reasonable. Therefore, I will not interfere with the decision the Commissioner has made.

Original signed by:
R. Heinrichs, Judge