IN THE MATTER OF: LAW ENFORCEMENT REVIEW ACT
COMPLAINT #5688

BETWEEN:

D.N.,

Complainant,

- and -

CONSTABLE D.T.and
CONSTABLE D.L.,

Respondents.

EXCERPT FROM PROCEEDINGS, RULING BY THE COURT, before The Honourable Judge Elliott, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 27th day of June, 2007.

APPEARANCES:

MR. S. BOYD, for the Commissioner

MR. R. NADEAU, for the complainant

R. POLLACK, Q.C. and MR. P. MCKENNA, for the respondents

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

EXCERPT FROM JUNE 27, 2006

THE COURT:. Well, in the interests of finality, because this matter arose from an incident that occurred at the end of 2000, and we are now almost at the summer of 2006, I had hoped to give my decision today, and read the materials carefully and considered them with that intention, and I am able to give a decision at this time. I intend to deal with only the issue of the Section 7(2) notification by way of a ruling and comment but not rule on the other issues, because I do not feel that I have to, and I am reluctant to make a precedent, if it is not necessary.

This legislation I have to say is, because it deals with competing interests, the employment and disciplinary rights of police officers, the rights of citizens to make complaints about what they see as improper conduct by police officers and the public interest all competing in some ways against each other. It requires a balancing of those rights. I am going to refer to the timeframe and then the LERA provisions and then make my comments.

The incident that gives rise to this complaint was December 24th of 2000. On May 8th of 2001, the complainant initiated a complaint. There were interviews and a formal complaint was taken on May 9th, 2001.

On May 10th of 2001, the commissioner extended the time for the making of the complaint. There was then a letter June 22nd of 2001 asking the Chief of Police for the names of the officers involved in the incident. July 9th, 2001, those names were made available. It was not clear whether the four officers named were witnesses or respondents; however, the normal procedure seemed to have been that there would then be letters sent to each of the

officers named with copies of the complaint and setting up times for interviews. And in fact, that direction was made on the file July 26th of 2001 by the investigator. The letters could have been sent then. I understand though that there was a support person away on holiday during the month of August, and it is understandable that they were not sent at that time.

August 27th of 2001, the office of the Commissioner became aware that there was a criminal investigation also I guess resulting out of the complaints from the complainant, and as a result of that, the initial letters were cancelled and there was to have been a substitute letter, a notification abeyance letter, as we have been referring to it, sent which would have indicated that there was a complaint. It would have given a copy of the complaint and it would have indicated that the LERA investigation was on hold pending the investigation of the criminal matters. However, that was not sent, and I think that is where the problem begins. It could have been sent, but I think probably due to inadvertence, it was not.

During the course, the following number of months in late 2001 and early 2002, there were a number of letters written to the Chief of Police asking for an update on the criminal investigation, and then on October 15th of 2002, a letter was received from the Winnipeg Police Service just again giving the names of the four officers, not indicating that the criminal investigation was over or narrowing down who was a respondent or who was a witness. Nevertheless, the letters finally were sent out on October the 17th of 2002 giving the officers notice from LERA for the first time of the complaint, some 15 months after the complaint had been accepted.

In my opinion, notice was not given as soon as

practicable, and that is what I am going to be ruling on. Later on there was a letter from the police department or PSU indicating that the complaint was not sustained. That was received on December 6th of 2002. Interview letters were sent January 29th of 2003 to all four officers. July 30th of 2004 a letter went to respondent officers indicating the charges that they were facing and asking if they wished to admit to the disciplinary defaults.

The provisions, as I have indicated, Section 6(3) indicates that every complaint shall be submitted not later than 30 days after the date of the alleged disciplinary default.

Section 6(6) indicates that when the complainant has had no reasonable opportunity to file a complaint within the time period set out in subsection (3), the Commissioner may extend the time for filing the complaint to a date not later than six months after the date of the alleged disciplinary default.

Section 7(2) indicates that upon receiving the complaint, the Commissioner shall as soon as practicable provide the respondent with a copy of the complaint.

Section 12(1.1) indicates that notwithstanding subsection (1), if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with the ongoing criminal investigation, the Commissioner may delay the investigation of a complaint for such period as the Commissioner considers reasonable in the circumstances.

As I have indicated, in regards to the Section 7(2) argument, I do not believe that the copy of the complaint was forwarded to the officers as soon as practicable. Then the question becomes whether that is fatal to the jurisdiction of the Commissioner and then to

this court, or whether there has to be prejudice, as argued by the Commissioner. One might infer prejudice. Prejudice was not specifically set out in the officers' affidavit.

The cases that I think are most important here are the Apostle case, the decision of Justice MacInnes, where he states at paragraph 8, and it was, again it was a review of a LERA provision, but it was not the same provision: In my opinion, the law is clear that limitation or time provisions of the kind set out in Section 6(3) of the act are mandatory and that particularly where, as here, the private rights of the applicant, and that was the police officer, are involved, compliance is a necessary prerequisite to jurisdiction.

He also referred to other decisions, the Manitoba Court of Appeal decision in Vialoux against the Registered Psychiatric Nurses Association of Manitoba, also a disciplinary case where there was a timeline where the Court of Appeal said that jurisdiction was lost. The Court of Appeal spoke of private rights in determining if such time lines are directory or mandatory, and contrasted the Vialoux decision where Chief Justice Freedman had spoken of the degree of hardship, difficulty or public inconvenience that would result from treating it as mandatory, and the rationale for this approach, she said, is that the legislature could not have intended the, and the quote is, widespread chaos, that would result.

In Vialoux, Justice Philp stated at paragraphs 12 and 13: There is an element of public concern in proceedings under Section 37 of the, and it's the Registered Nurses Act. The public has an interest in the standards of practices. However, at stake in the inquiry before the Discipline Committee was the right of Vialoux to practice his profession. This is not a case of widespread chaos. In

my view, the apprehended or potential public concern must yield to the private rights of Vialoux. In my view, the time requirements of the statute ought to be strictly observed involving, as it does, the private rights of an individual. The time requirements were not strictly observed in the proceedings against Vialoux. The procedural deficiency goes to the jurisdiction of the Discipline Committee. It acted without jurisdiction and its order is a nullity.

There was a similar result in the MARN v. Tataryn case, a decision of the then Associate Chief Justice Scott of the Manitoba Queen's Bench. I have decided that this, although it does not refer to a time limit in number of days, it does refer to a time limit. I have decided that the notification was not sent as soon as practicable. It certainly affects the rights, the employment rights, or could have affected the employment rights of the police officers involved, and thus, I think it is fatal to the jurisdiction of the Commissioner and the complaint cannot proceed.

As I said, I am going to comment only on the other arguments. The extension of the 30 day time period pursuant to Section 6(6). Although I do not find it necessary to make a ruling on this issue, I think that Justice Giesbrecht, Linda Giesbrecht in this case, in ruling that the section should be given a liberal interpretation, given the rules of statutory interpretation and the purposes of the legislation as a whole was correct, the reasons given for the extension in that case are somewhat analogous to the ones here.

Having said that, I think that Mr. Wright might be, or the Commissioner, who ever it might be, might wish to have his investigators perhaps obtain more detail from

potential complainants about the reasons for a failure to complain within the 30 days.

In this case, the only question and answer I saw recorded was, Question: Why did you wait until now to make your complaint to LERA? Answer: I was drinking lots so I have been dealing with it that way. I have been sober for a month and now I want to deal with this. My mother is also concerned and she wants me to address it. Also I didn't want to come forward because I was afraid of police retaliation.

There did not seem to be any following through with the questioning of the complainant in regards to the details of his claims. I am not saying that he or she, I think it was a she in this case, necessarily had to go and do an investigation outside, but I think there should have been more documentation involved. But other than that, I am mindful that the Commissioner is dealing with something that is within his discretion to grant an extension, and I think that his decision should be accorded some deference.

I am also not going to make a ruling on the issue of particularization of the charges, except to say that it would seem to me that fairness would require that an officer have notice at the time of being interviewed of the allegations being made against him or her so that he could respond prior to a matter, well before charges of default, disciplinary default are proffered or the matter is referred to a hearing. And again, I do not want to go too far or make a ruling, because I appreciate that there may be cases where matters come to the attention of the Commissioner later, but where the substance of issues is before the Commissioner, I think that the officer should have an opportunity to respond, because I accept what Mr. McKenna said that the officer may be passed over for promotion in

the meantime and may have this over his or her head. I think perhaps that is all I will say at this point.

So the disciplinary proceedings end at this point because of the Section 7(2) motion.

(EXCERPT CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I hereby certify the foregoing pages of printed matter, numbered 1 to 6, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.

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TRACY WIENS
COURT TRANSCRIBER