

IN THE MATTER OF: **Law Enforcement Review Act
Complaint No. 2005/40**

BETWEEN:

R.E.,

Complainant,

- and -

CONSTABLE S,

Respondent.

REASONS FOR DECISION delivered by The Honourable Judge Tarwid, held at the Brandon Courthouse, 1104 Princess Avenue, in the City of Brandon, Province of Manitoba, on the 15th day of February, 2006.

APPEARANCES:

MR. D. GUENETTE, for the Commissioner.

MR. J. JANZEN, for the Brandon Police Services.

MR. R. E., in person.

I N D E X

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THE JUDGE: All right. Thank you.

The factual background is that on the 16th of February,

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

2005, the Law Enforcement Review Agency received a written complaint from Mr. E. where he made allegations of excessive use of force by a member of the Brandon Police Services. The Complainant alleges that on the 19th of January he was assaulted by Constable S at the admissions desk at the Brandon Correctional Centre while the Complainant had handcuffs on and was threatened with being thrown over the "f'n [sic] desk if I didn't respond". No one from the jail nor police attempted to pull Constable S off the Complainant. When his handcuffs were removed, his arm was straight and pressure was put on it by the police officer and the Complainant's ankles were stepped on at the same time. The Complainant said he sustained bruising to his arm, wrists and muscles and that he stated he saw Dr. Benning.

In a letter dated the 3rd of June, 2005, the Commissioner informed Mr. E. the results of his investigation. The Commissioner felt there was insufficient evidence supporting the complaint to justify a public hearing and declined to take further action.

The Complainant has applied, pursuant to *Section 13(2)* of the *L.E.R.A. Act* to have a Provincial Judge review the Commissioner's decision.

The standards of review are covered by Judge Chartier in his written decision on a L.E.R.A. complaint number 3597 starting at page 17, *The Appropriate Standard for Issues*, and I quote,

Having now carefully considered each of the four factors identified by the Supreme Court of Canada, I must now relate them to the review to be conducted by the Provincial Judge. I have tried to

categorize the issues facing the Commissioner when conducting his investigation of the complaint pursuant to *Section 13(1)*. I have found three. With respect to those issues, I find that the appropriate standard of review will be as follows:

1) 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.A. Act* as same is found in clause 13(1)(a) of the *L.E.R.A. Act*, the standard of review will tend to be "the correctness" of the decision made by the Commissioner.

2) Where the review is related to an error of law or an error of mixed facts and law within the jurisdiction of the Commissioner and more specifically, when the Commissioner has to decide whether or not "there is insufficient evidence supporting the complaint to justify a public hearing" as same is found in clause *Section 13(1)(c)* of the *L.E.R.A. Act*, the standard of review will tend to be "the correctness" of the decision made by the Commissioner.

3) Where the review is related to finding of fact within the

jurisdiction of the Commissioner, the standard of review to be applied to the decision of the Commissioner will be closer to a "reasonableness simpliciter".

The correctness standard is the most exacting of the three standards. The Commissioner's decision can be overturned on the basis of simple error.

The reasonableness simpliciter standard allows the Commissioner's decision to stand if the Provincial Judge finds the Commissioner's decision was reasonable under the circumstances.

The third standard is the one of patent unreasonableness. The Provincial Judge can overturn the Commissioner's decision if the Judge finds the Commissioner acted in excess of his jurisdiction or acted with bias.

The correctness standard was followed by Judge Chartier in the L.E.R.A. complaint number 3597, by Provincial Judge Miller in L.E.R.A. complaint number 3208, Provincial Judge Smith in L.E.R.A. complaint number 3771, Provincial Judge Swail in L.E.R.A. complaint number 5792.

This Court will be following the standard of correctness in this case. As noted previously, this is the most exacting standard.

The burden of proof is on the Complainant, that being Mr. E., to show that the Commissioner erred in declining to take further action. This is found under *Section 13(4)* of the Act.

The standard of proof is for clear and convincing evidence that the Respondent has committed the disciplinary default. This is found under *Section 27(2)* of the Act.

How is the Commissioner to evaluate the information when he reaches a decision under *Section 13(1)(c)*?

In coming to his decision, the Commissioner may decide not to act on certain complaints:

- 1) If the subject matter of the complaint is frivolous and vexatious. This is under *Section 13(1)(a)*.
- 2) If the subject matter of the complaint does not fall within the scope of *Section 29*. This is under *Section 13(1)(a)* or
- 3) If there is insufficient evidence supporting the complaint to justify a public hearing, [*Section 13(1)(c)*].

Provincial Judge Chartier, in the 2000 L.E.R.A. number 3597, considered *Section 13(1)(c)* of the *L.E.R.A. Act*. He referred to the Supreme Court of Canada in the Cooper case and quoted Justice La Forest at page 891,

When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the *Act*, an inquiry is warranted having regard to all the facts. The central component of the Commission's role then, is that of assessing the sufficiency of the evidence before it.

And then it goes on further,

It is not intended that this be a

determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

In effect, the test described is the Commissioner determining whether there is a reasonable basis in the evidence for proceeding to the next stage. This point was clarified by Judge Chartier in the L.E.R.A. complaint number 5643, decision delivered February 2004.

Mr. E.' position is that he was never directly contacted by the Commissioner and, in effect, had to track the Commissioner down through the secretary before he could speak to him directly. By then, the decision had been made by the Commissioner. He questions why no video tape was provided and why all the jail staff and police versions are the same.

The Respondent accepted that the standard of review will tend to be one of correctness, which is the highest standard. The question for the Commissioner is, "Is there sufficient evidence supporting the complaint to justify a public hearing"? In answering the question, the Commissioner has to consider all of the evidence gathered by his office and in a limited way, weigh it to see if there is sufficient evidence to constitute a reasonable basis to proceed.

Counsel states a thorough investigation was conducted based on the initial information given in the complaint by Mr. E.. As well, he states there was a thorough review of the evidence provided by the Commissioner in his letter that he sent to Mr. E. in June of '05.

The Commissioner had made a request for standing at the

hearing. This is a discretionary matter for the Provincial Judge as the Commissioner is not automatically entitled to make submissions at a hearing. I note that there were any number of cases where this occurred and counsel for the Commissioner was granted standing. I note that the Commissioner is not siding with either the Complainant or the Respondent. Counsel provided an overview to the Court of the evolution of reviews and what test is to be applied in reviewing the Commissioner's decision.

The issue for this Court is determining the correctness of the Commissioner's decision.

The receipt of Mr. E.' complaint set out the complaint and who were the witnesses: jail guards and police officers. There was no mention in this complaint of any other individuals by Mr. E.. This was received on the 16th of February by the Commissioner.

The L.E.R.A. investigator, Mr. H., wrote to Superintendent, Brian McVicar, at the Brandon Correctional Centre on the 22nd of February requesting to speak to the guards that were present when the officers dealt with Mr. E..

The Commissioner also wrote to the Chief of Police, Mr. Bruce, of the Brandon Police Services on the 22nd of February requesting all documents, statements and materials relevant to the complaint.

Constable S was also provided with a letter from the Commissioner regarding the complaint, the circumstances and was given an opportunity to provide his version of events.

An authorization for release of medical information was sent to Mr. E. along with information that the investigation had started. A brochure was sent regarding the L.E.R.A. procedure and the Commissioner's phone number was placed in the letter and this letter was sent the 22nd of February, 2005.

The superintendent at the Brandon Correctional Centre, Mr. M., e-mailed staff and requested that if there was a video tape of the admission, to advise the investigator and provide same or have him view it. He also indicated on the 4th of March he would provide a copy of the staff incident report number 44690 to the investigator.

Correctional Officers R. C., R. R. and A. B. were to contact the L.E.R.A. officer as requested.

I note that the Correctional Officer A. B. provided a report on the 22nd of January, 2005, indicating that Brandon Police had arrived with an intoxicated person. There was a call for assistance so she attended the admissions area. She indicated Mr. E. was being non-compliant while being questioned and was restrained by Correctional Officer R. and C. Upon completion of the questioning, the subject was escorted back to the cell number three by those two Correctional Officers. The Complainant was placed in a corner where Ms. B. took his right arm, using a gooseneck and a C-clamp. He was then searched by Mr. C. and all of them left the cell except for Mr. E..

Correctional Officer R. R. provided a report on the 20th of January, 2005. Mr. R. indicated that he arrived to help at the admissions area and noted police were holding Mr. E. against the counter. Mr. R. helped in restraining Mr. E.' left arm. Mr. E. continued to struggle. He was escorted to cell number three by correctional staff where his restrains were removed.

Correctional Officer C. provided a report on the 18th of January 2005. He responded to the admissions area and found Mr. E. was being restrained over the counter by the Brandon Police Service officers. Mr. E. was struggling and had to be restrained by staff against the counter while being questioned by police. Mr. E. continued to struggle and was then escorted to the admissions cell number three by Mr. C.

and officer R. for searching and to remove the restraints. He noted no apparent or stated injuries to Mr. E. or the staff.

Then on the 7th of March, 2005, Mr. R. called and indicated that it was the BCC staff that removed the handcuffs from Mr. E., not the police and he didn't observe any obvious injuries or hear any complaints of injuries from Mr. E..

On the 10th of March, the investigator H. noted there was a call from Brandon but the caller didn't identify himself. It was Mr. E.' phone number.

On the 22nd of March, the investigator spoke to Correctional Officer A. B. She stated Mr. E. was restrained by guards and was being belligerent. He was taken to a cell area and the cuffs were removed by correctional staff. She did not see any injuries or hear of a complaint of any injuries from Mr. E.. Mr. E. was intoxicated.

Constable P's notes were provided. Mr. E. had been arrested for breach of undertaking and assault, was then given his right to counsel. A booking in sheet was provided as well as the police report by Constable P. It indicated Mr. E. was lodged at the Brandon Correctional Centre pending his bail hearing.

On the 29th of May, the investigator spoke with Correctional Officer C. Mr. C. indicated he was the one that removed the handcuffs. This was done in the cell area due to Mr. E.' fighting and scrapping. He indicated Mr. E. was intoxicated.

Staff had dealt with him before. Apparently Mr. E. had behaved in this fashion on other occasions. Staff are well aware of his fighting and resistance when being admitted.

Mr. C. said Mr. E. was bent over the counter only for control. Constable S at no time threatened him or used excessive force. Mr. C. said force would be used by police

and Brandon guards only to restrain Mr. E. and do their jobs safely.

On the 7th of April, the investigator spoke to Constable S. He was standing at the counter with Mr. E.. Mr. E. felt he could walk around and was doing so. Constable S told him to stand in front of the counter and when he didn't, Constable S took him by the arm and told him to stand there. Mr. E. said, "fuck you". Said he was nothing more than a badge and a gun. When Mr. E. started to walk away, Constable S grabbed him by the arm and held him there. Mr. E. then started saying that it was an assault and he would have the officer's job. The guards took over at this point and they removed the cuffs.

On the 15th of April, 2005, the file was reviewed.

On the 26th of April Mr. E.' medical release arrived.

On the 1st of June the file review was completed and the file was closed. A letter was sent to Mr. E. on the 3rd of June outlining the information that was reviewed and the conclusion of the Commissioner.

Has the Applicant met the burden and the standard of proof?

I have had oral submissions from all parties as well as written submissions from counsel for the Respondent and counsel for the Commissioner. The consistent theme of the police officers S and P, and the Correctional staff was that there was no excessive force used by Constable S.

At the time of his booking at the Brandon Correctional Centre, Mr. E. was being belligerent and was drunk.

When the cuffs were removed, it was by the Brandon Correctional staff and in a cell area removed from admissions.

It would be entirely appropriate, on the information received from witnesses, for the Commissioner to conclude that there was insufficient evidence to proceed to a public

hearing.

It is not the role of the Commissioner to make any final or binding decisions as to what occurred or did not occur, nor did he do so.

Mr. E. has not met the onus or the standard of proof required here. I find that on the basis of all the facts before me, using the more stringent...

THE COMPLAINANT: Bullshit.

THE JUDGE: ...standard of correctness, the Commissioner did not err in declining to take further action. I hereby dismiss Mr. E.' application and order that the ban on the Respondent's name continue under *Section 13(4.1)(b)* of the *L.E.R.A. Act*.

Thank you.

THE COMPLAINANT: So what you're saying is the L.E.R.A. is allowed to question certain people and not question others.

THE JUDGE: What I'm saying is that...

THE COMPLAINANT: In other words, you can question the police's witnesses...

THE JUDGE: ...your application is dismissed.

THE COMPLAINANT: ...but you can't question my witnesses.

THE JUDGE: Thank you. We're closing Court.

[PROCEEDINGS CONCLUDED]

CERTIFICATE OF TRANSCRIPT

I, **CHRISTIN N. D. PHINNEY**, hereby certify that the foregoing pages of printed matter, numbered 1 to 10, are a true and accurate transcript of the proceedings recorded by a sound recording device that has been approved by the Attorney-General and has been transcribed by me to the best of my skill, understanding and ability.

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