

**IN THE MATTER OF:**

*The Law Enforcement Review Act*  
Complaint # 2008/55

**AND IN THE MATTER OF:**

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

**BETWEEN:**

**R.D.,**  
Complainant

) In Person,  
) Self-represented

- and -

)  
)  
)

**Constables E.L., J.B.**  
**and B.F.,**  
Respondents

)  
) Mr. Paul McKenna, for the Respondents

)  
)  
) Mr. Sean Boyd, Counsel for L.E.R.A.

)  
)  
) February 24, 2010

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

**ELLIOTT, P.J.**

[1] This is my decision on a review pursuant to s. 13 of *The Law Enforcement Review Act*, (the Act).

[2] Section 13(1)(c) reads, “Where the Commissioner is satisfied that there is insufficient evidence supporting the complaint to justify a public hearing the Commissioner shall decline to take further action on the complaint...”

[3] Section 13(2) allows the complainant to have that decision reviewed by a provincial judge.

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

[5] The Law Enforcement Review Agency, more commonly known as LERA, is the provincial entity created by the Act to investigate citizen complaints regarding police behaviour.

## **THE COMPLAINT**

[6] R.D. filed a written complaint with the Law Enforcement Review Agency on March 11, 2008. It reads as follows:

“Re: an incident that occurred on May (!) 8, 2008

I (R.D.) was approached by two Winnipeg police officers. They had knocked on my apartment door (xxxxxxx) on the date mentioned above, in the early evening hours. I had opened the door to ask them about why they were there. They or one of them had mentioned that I had warrant for my arrest of which I was shocked to hear, for in August of 2007 I had went to the Main Street near Redwood Police Station location and filed a complaint (regarding an unrelated matter) of which then I was told that I had a warrant. Then I asked in surprise “for what”. The officer had said, “To make a long story short” an incident that occurred such and such a date. The matter that I had went to court already about, I forget when, but it was resolved with a stay of charges. The officer said then “okay, don’t worry about it then, our computers were not updated”. I said okay are you sure, let’s take care of it now since I am here, but it was said again don’t worry about it, if the computers are down and the matter seems to have been resolved. So, I had thought everything was okay and just to make sure when I had made it back to my apartment suite, then xxxxx Avenue made a call to the Winnipeg Police Services resulting in the answer that I had no warrants.

On the evening of March 8, 2008 the Police I thought were making a mistake or harassment. My children (S, T and N) of whom I was alone with, I did not want to leave alone, of which either officer seemed not to care at all about. Next thing I know, I was on the floor having uncontrollable seizure like movement (arms moving uncontrollably and my legs as well) from the several dry taser zaps I had received. I do remember being knocked out at least once and then waken up from being tased several more times after when the handcuffs were already on my wrists. Then my back felt like it broke, from I guess an officer’s knee. Then I was dragged out of the apartment suite and then the building. I was knocked out again then came through where as the officer slammed the brakes to the car, hoping I guess my head would slam into the divider? After arriving to District 4 one of the officers had said there are no cameras here in the back, then had picked me up

with the hand-cuffs behind my back, by the hand-cuffs, several feet in the air, then landing on the left side of my head to the snow-covered pavement, then choking me to the point of blacking out, then picking me up by the handcuffs again, waking me up then slamming me into the door, then opening the door and placing me in a holding cell. I was punched in the back, threatened and smashed in the face with handcuffs where as I believe my teeth may have been chipped.”

On the complaint form R.D.’s injuries were listed; “Bruising by right eye, below left ear, right shoulder, (? indecipherable), knocked out, teeth chipped, seizure from taser, sore back, mark on right thigh, mark from handcuffs on right wrist, bruise on back of left hand.”

Under the heading “Witnesses(s)” is written, “P.?? Some lady????”

### **THE INVESTIGATION**

[7] In order to determine whether the Commissioner investigated the complaint properly and arrived at a reasonable conclusion, I must look at the investigation itself.

[8] The investigator met R.D. at the Winnipeg Remand Centre on March 11, 2008. The summary of his interview reiterates the written complaint. The investigator noted:

“there was only one abusive officer although there were three initially but many later as he was taken to the station. No description. His spouse S.B. may have names of some persons in the apartment block that may have seen and/or heard what the officers did to him.”

[9] The investigator telephoned Ms B. on March 12, 2008. She confirmed that there was a person named P. who apparently saw some of the interaction between the Complainant and the police and also that there was a female who saw something according to what she had heard. She was going to try and determine who they were although they did not live in the building.

[10] LERA had R.D. sign an “Authorization for Release of Medical Records”, initially for LERA to request medical records from the Winnipeg Remand Centre. Later, apparently after R.D. reported other medical contacts to the investigator, the investigator sought and received R.D.’s consent to add the following to his release form: “Headingley Correctional Centre, Brandon Correctional Centre, Grace Hospital, Dr. E. P.” Letters were sent to those parties.

[11] The Winnipeg Remand Centre responded. Its report indicated that on March 9, 2008 R.D. had been seen upon admission. He reported being tasered and

scattered bruising was observed. No “current health concerns” were noted. Apparently no other responses were received, nor were follow-up contacts made by LERA.

[12] On April 16, 2008, R.D. was interviewed again at his request. He was by that time detained at the Brandon Correctional Institution. He had asked to see the investigator because he had not been able to see a doctor or a counselor. According to what he told the investigator, he did see a doctor while still at Headingly Correctional Institution and was told there was nothing seriously wrong. However, he complained to the investigator that he was having some chest pain and tingling in his left arm and hand. He was also very stressed out and needed to see a counselor. The investigator told him that LERA had no control of these processes but suggested that he ask the medical office again to see a doctor and to be very clear that he is concerned about his health. He received the same advice about seeing a counselor.

[13] The investigator apparently tried to contact R.D. on June 2, 2008, after he had been released from custody. However, he was “at the gym,” according to a later e-mail sent by him on that day. In that e-mail he noted that he was “not in the greatest physical condition as once was.” It would appear that this was the last contact by between R.D. and the LERA investigator, except for a telephone call on June 24, 2008 in which he asked for advice on appealing his guilty plea and told the investigator that he had seen medical staff at Headingley, Brandon, Grace Hospital and has seen Dr. E. P. He approved the investigator adding those contacts to his medical release.

[14] LERA wrote to the Winnipeg Police Service asking for copies of all relevant documents. Many were received and the information contained in them is as follows:

- One indicated that after the incident with the police on March 8, 2008, R.D. faced three charges for breaches of bail conditions, as well as charges of Utter Threats, Assault Peace Officer (two charges), Obstruct/Resist Peace Officer, arising out of the March 8, 2008 incident.
- R.D.’s criminal record showed that on May 29, 2008 he was convicted of Obstruction/Resist Peace Officer from the March 8, 2008 incident. As well as having time in custody noted (76 days plus one day for this charge and two subsequent breaches), R.D. was placed on 18 months supervised probation with counseling. The other charges were stayed on that date.

(R.D. later sought legal advice from the investigator as to how to go about withdrawing what had apparently been guilty pleas.)

- A statement from S. B., R.D.'s wife, dated March 8, 2008, was received. In her statement she indicated that at approximately 4:00 p.m. that date R.D. had gone into the washroom in their apartment and smoked some crack cocaine. When he came out he began to get angry because the kids were being too loud. He told her to keep the kids quiet and started to yell at her. He told her that she had wrecked his "hoot" and that "you better pull up the money fast or I'm going beat you up." She became scared and told him that she was going to get money from her neighbor. She went to the neighbour's and phoned police. He had also threatened to punch her in the mouth and punch her teeth out. She said "I'm scared of him. He was going to hurt me. I think he would have killed me."
- A neighbour with whom Ms B. had sought safety had also given a statement to police. She told them that Ms B. had previously complained about R.D. using "lots of crack." She indicated that Ms B. had told her the day before that she "was getting scared for her life as (R.D.) was getting physical with her." The neighbor also corroborated Ms B.'s statement that on March 8, 2008 R.D. was very "agitated", telling the neighbour that if (Ms B.) did not "come back in one minute", he was going to take the television and sell it for what he "needed".

[15] The Winnipeg Police Service also forwarded copies of officers' notes and summaries.

[16] Copies of the notes of two of the Respondents, the arresting officers, were received. Both constables were female.

[17] Constable B.F.'s notes, which were presumably prepared March 8<sup>th</sup> and/or 9<sup>th</sup>, 2008, indicated as follows. When they went to R.D.'s apartment to arrest him, he at first appeared calm. However, when informed that he was to be arrested on warrants he started to get upset. After the first handcuff was put on, stated, "I am not getting arrested, I'm leaving." He then tried to go to the door. The two officers called for backup and continued to give him commands. He was warned that if he did not get to the ground he would be tasered. He responded, "I don't care. I'm not going you bitches". He was tasered several times in the back and shoulder area in "drive stun" mode. He was still not complying and was trying to get away from police. He was again commanded to get onto the ground. In order to control his right arm he was "tased several times." He still did not comply. After several more

minutes of struggling with police he was finally brought to the ground. He was tasered again as he was still struggling with police and would not put his hands behind his back. Constable B.F. finally got his left arm in an “arm bar” and held him down. She again radioed for backup. R.D. said “you fucken lesbian, you’re not going to take me out of here”. R.D. was held down until backup arrived. One of the backup officers helped to put the second handcuff on. Two of the backup officers took R.D. in to custody and transported him. In the meantime it appears that about four other police vehicles responded. Arrangements were made for the complainant and children to go to Osborne House. Constable B.F. then went to District 4 where R.D. refused treatment from paramedics. She then attended to the interview room and looked at his back for injuries. He started being belligerent and telling her not to touch him and “to fuck off as I was a fucken whore”. The officer had also suffered injuries: they were photographed and she went to the hospital for x-rays. Her wrist was placed in a splint.

[18] Constable E.L. also provided a written statement. Her statement essentially corroborates that of Constable B.F. She suffered a cut to her forehead and went to Misericordia Hospital to have it seen to.

[19] The notes of Constable L.B., who is not named as a respondent, indicated that he or she had arrived on scene and took custody of R.D. from the arresting officers. En route R.D. constantly swore at Constable J.B. and the writer. He stated that he did not like police. He was transported to District 4 where he was viewed by the Sergeant. Handcuffs were left on “due to his aggressive behavior and constant swearing and his assaults on two police officers.” An ambulance was called to check on the status of accused as he was showing signs of “excited delirium” in the rear of the cruiser car and at the station, where he was constantly swearing at officers. His wife had told officers that she had seen him doing crack cocaine and drinking beer and showing some signs of excited delirium. Some of the signs were “sweating, irrational behavior, and aggressive nature.” When the ambulance attended at 18:58 hours attendants attempted to check on R.D. However, he refused medical attention stating “why the fuck are we worried about him.” He was not given a call to a lawyer because of his aggressive nature and for officer safety reasons. At 19:42 he was transported to the Winnipeg Remand Centre for direct lockup as he was violent and had been drinking. On the way he was swearing at police the whole time.

[20] A “Use of Force Summary” was also completed by Constable B.F. She reported that they had used the following force on R.D.: “verbal direction, soft empty hand control: Joint Lock, hard empty hand control: knee, joint lock and, restraints: handcuffs”. Constable B.F. reported that she had used, in addition, an

“intermediate weapon, Taser use”. The Use of Force Summary makes it clear that the Taser was used in “drive stun” mode, the projectile cartridge having been removed. The cartridge had been removed due to the confined space the officers were in, so that the “prong attachment” could not be used. (This mode apparently causes pain in the area where it comes in to contact with the skin and is used in order to gain compliance.)

[21] The Prisoner Log Sheet completed when R.D. was brought in to the police station included a portion completed by the supervising sergeant. Under “Medical”, the sergeant noted, “showing signs of excited dellerium (sp.), paramedics called.” Under “Physical condition” the sergeant listed, “mark on right ear, mark on right eyebrow.” Under “Behaviour” he noted, “showing signs of excited dellerium, combative; intoxicated”. When the sergeant asked R.D., “Do you have any questions or issues regarding your time in custody today?” it was noted, “male is uncooperative, refusing to answer questions.”

[22] The Winnipeg Police Service Prisoner Injury Report indicates as follows: Nature of Injuries - “small contusion of right side cheekbone”. Explanation given by Arresting Members – “possibly occurred during altercation with accused”. Under the heading, “Explanation given by prisoner to shift supervisor”, was noted “prisoner was high on cocaine. Refused to speak to supervisor and was at times incoherent.” Action taken - “paramedics contacted to check on prisoner. The prisoner declined to talk with paramedics and let them examine him.”

[23] The investigator interviewed a number of officers.

[24] The Respondents E.L. and B.F. denied that R.D. was tasered after he was handcuffed. They said that the Taser use was only to get him under control. They denied that he had ever been unconscious or had seizures in their presence. They pointed out that had he been unconscious they would have been able to get the handcuffs on. They did not transport R.D. to the police station.

[25] Constable J.B., who is also a respondent, was interviewed. He was questioned about R.D.’s allegations regarding his treatment upon arrival at the District 4 station. He indicated that, contrary to what R.D. had said, there are cameras at the back of the District 4 station. He said that R.D. had actually fallen; Constable J.B. assumed R.D. slipped as there is a drop-off in the surface. He fell while Constable J.B. had him by the arm and Constable L.B had gone forward to open the door. Constable L.B. came back and helped Constable J.B. to pick up R.D. There are two cameras. Although no footage is kept, the sergeant monitors the cameras and would have seen any thing untoward. Constable J.B. also denied

the other allegations – that he had picked R.D. up by the handcuffs, slammed him into a door and or assaulted him in the holding cell. He said that the only contact he had was picking him up by the arm only. He also said that at no time that he was aware was R.D. unconscious, “in fact he never shut up”.

### **REASONS GIVEN BY COMMISSIONER FOR DISMISSING COMPLAINT**

[26] Before reaching a conclusion, it is required that the Commissioner “review all of the evidence.”

[27] On August 13, 2008 the Commissioner wrote to the Complainant. He indicated that complaints of “making an arrest without reasonable or probable grounds” and “using unnecessary violence or excessive force” had been investigated. In a lengthy letter he summarized the complaints and the investigation. Although medical reports had been requested from a number of sources, it appears that the only one received had been from the Winnipeg Remand Centre. No effort appears to have been made to follow up when there was no response from the others. However, the report from the Remand Centre, the first place where the Complainant would have been checked medically, documented only “scattered bruising to his chest and a mark on his back.” R.D. had not provided any medical information.

[28] The Commissioner noted that despite the Complainant’s claims of being knocked unconscious, he had refused medical assistance when the ambulance attended.

[29] The Commissioner went on to state “in the absence of independent witnesses there is insufficient evidence supporting your complaint to justify a public hearing. I am accordingly required by clause 13(1)(c) to decline taking any further action on this complaint.”

### **JUDICIAL REVIEW OF THE DISMISSAL**

[30] As was his right, R.D. requested that a provincial court judge review the decision of the Commissioner. A hearing was held before me on November 26, 2009. R.D. represented himself at the hearing. R.D. continues to believe that police officers used unnecessary violence and/or excessive force in their dealing with him, causing injuries which he said were ongoing at that time. However, as none of those injuries had been documented, counsel argued they could not have played a role in the Commissioner’s decision, and thus could not be considered on review.



## **CONCLUSION**

[31] I agree with counsel on that point. I do believe that when requested medical reports were not forthcoming LERA should have followed up to try to obtain them. However, I also think that the Complainant, at least once he was released from custody, bore some responsibility for documenting any injuries he claimed to have suffered.

[32] I have some difficulty with the Commissioner's implied view that a complaint cannot proceed without independent witnesses. Such a position would make it almost impossible for a complainant to ever succeed, and is not the law.

[33] However, in this case R.D.'s prospective evidence is contradicted by a number of police officers. Furthermore, the statements given by both his wife and his neighbour would appear to support the police version - that is, that the Complainant was high on crack cocaine at the time and that he was extremely agitated. He also believed, wrongly it appears, that there were no outstanding warrants in existence. The only rational conclusion to be drawn from the totality of the evidence was the R.D. did not want to be arrested and resisted arrest, to the point that police had to use a certain amount of force to arrest him. His version of what happened at the District 4 station is contradicted from a number of sources and is not corroborated in any way.

[34] Were a hearing to be ordered, R.D. would not have the "clear and convincing evidence", required by the wording of s. 27(2) of the Act to establish a disciplinary default.

[35] Therefore, although I have some issues with both the investigation and the stated reason for the conclusion, as indicated above, ultimately I find that it was reasonable for the Commissioner to conclude that there was insufficient evidence supporting the complaint to justify a public hearing.

[36] I therefore uphold the Commissioner's decision not to refer the complaint for a hearing.

*Original signed by Judge J.A. Elliott*

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P.J.