

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2008/82

AND IN THE MATTER OF:

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

BETWEEN:

S.H.,
Complainant

) In Person,
) Self-represented

- and -

)
)
)

Constable D.B.
Respondent

) Mr. Paul McKenna, for the Respondent

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)
)

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

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February 16, 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] The Law Enforcement Review Agency, more commonly known as LERA, is a provincial entity created by statute, *The Law Enforcement Review Act* (the Act), in order to allow the investigation of citizen complaints about police behaviour. This complaint regime recognizes a belief in the principle that police officers are to treat citizens with respect, professionalism and evenhandedness. If a police officer is found to have committed a “disciplinary default” under the Act, the officer can be penalized.

[2] S.H. was, and continues to be, under the belief that he was not treated according to the standards required. His frustration stems from two events which were occurring side by side in March and April of 2008. S.H. was involved in a dispute with his business partner, C.K. S.H. and C.K. had been in a night club business together at an address on Main Street in Winnipeg. For security reasons a security camera had been installed. A murder had occurred at a nearby hotel on March 17, 2008. The victim's body was located on the back fire escape of the hotel. The police were interested in the video surveillance tape from the building where S.H. and C.K. ran their night club, believing that it might provide evidence. C.K. provided police with surveillance footage which captured the image of another male descending the fire escape of the building where the homicide occurred. This male was a possible suspect in the murder. Further investigation by police identified the need to have an extended time frame of the surveillance from that camera. In the meantime, S.H. and C.K. had been having issues in regard to their business, and C.K. had been locked out. Constable D.B. requested and received a search warrant from a judicial officer. The search warrant was authorized for execution on April 15, 2008 and the surveillance system and related computer equipment was seized by Constable D.B. on that date. There was later a considerable delay in that equipment being returned to S.H., which cost him not only inconvenience but also financial loss and security concerns.

THE COMPLAINT

[3] S.H. filed a written complaint with LERA on April 25, 2008.

[4] The complaint was witnessed and signed by S.H.'s brother and the bar manager, J.G. It was entitled, "In Regards to a Search Warrant issued April 15th". The first sentence reads, "I would like to file a complaint against Detective D.B."

[5] In his complaint, S. H. outlined a number of issues. He said that on Tuesday, April 15, 2008 Constable D.B. had called him and came to one of his businesses with a search warrant and seized security equipment. Constable D.B. informed him that he had been in continued communication with C.K., a terminated disgruntled employee of a numbered company which owns the building where the security system was lodged. Constable D.B. said that the warrant was necessary due to a lack of cooperation with the murder investigation. S.H. was in "absolute shock as to the investigative incompetence of this detective". He went on to attribute this belief in the Respondent's incompetence at least partly to interactions he had had with police officers the day after the homicide took place. About noon that day C.K. was terminated from the numbered company that owns the building and the

security system, and was the legal occupant of the second floor. Several police officers who were outside that day investigating the murder were given S.H.'s telephone number and asked to contact him if they needed any video of that date. They were also informed of C.K.'s termination and that he was no longer allowed on the premises. However, C.K. reentered the building and engaged in what appeared to be providing evidence to the police on the murder investigation. In reality, C.K. deleted videos of himself removing thousands of dollars of construction equipment from the building. When S.H. witnessed this he asked several officers at the scene to stop C.K. They informed him, rudely, that he had fired C.K. for helping the police, which was a lie propitiated by C.K. to gain police favor. The police officers present indicated that because of that they would not stop C.K., also stating it was a civil matter. Those officers made it very clear to S. H. that he would receive no police help in preventing C.K. from removing items that did not belong to him from the building in question, because of what C.K. had told them regarding his termination. Although the officers witnessed C.K. pulling up at noon they did not appear to understand that he was to have started at 9:00 a.m. and had a history of being late. S.H. asked for the name and badge number of the officer with whom he was speaking. The first officer refused to provide this and threatened to arrest him, to which S.H. told him to "go ahead". That officer walked away. A second officer came up to S.H. and handed him a card with what S.H. believed were their two badge numbers, but refused to provide S.H. with their names. S.H. asked for a report to be made on the theft but they refused. (It now appears to me that S.H. received Constable D.B.'s badge number and mistakenly believed that he was one of the uniformed officers. However, on the day of the hearing, the Respondent's counsel informed me, as an officer of the Court, that his client had not been in uniform on the day or during the time period in question.)

[6] S.H.'s understanding as of April 25, 2008, the date of his written complaint, was that C.K. had been in continued communication with Constable D.B. and provided him with false information as to S.H.'s willingness to cooperate with the police, and as to the legal ownership of the video recording equipment, as well as its legal location. S.H. believed that C.K. had been doing so because he was a disgruntled employee of the numbered company and was looking for methods to gain police favor in order to facilitate his theft of the construction equipment from the second floor of the building in question. All the video equipment was the property of the numbered company and located on the second floor, in an area not rented or controlled by the nightclub. The warrant was specific as to the rented property of the nightclub. However, S.H. understood the seriousness of a murder investigation and therefore did not hesitate to turn over the equipment and cooperate, even though he had spoken to his lawyer and had been advised as to

deficiencies in the warrant. He wrote that being shown firearms by the police officers executing the warrant made it difficult for him to disagree with them.

[7] S H. complained that the legal ownership of this equipment could have been easily determined had Constable D.B. called him, or done a search as to the registered owner of the location. Constable D.B. was aware of C.K.'s termination and not taking five minutes out of his day to make a phone call and clarify the situation lead S.H. to seriously question Constable D.B.'s investigative ability.

[8] The nightclub's bar manager, J.G., also asked several police officers who came through the night club over the next couple of weeks if the police needed any video of the incident. However, no telephone calls were received.

[9] In the weeks that followed S.H. and the bar manager, J.G., filed several reports of threats of violence with the city police. These involved threats made by C.K. against S.H. C.K. was spoken to by a police officer in regard to this, and admitted to these threats, but told the officer he would not follow through on them. J.G. and S.H. believed these threats to be credible.

[10] Constable D.B. was made aware of these reports when he seized the video recording equipment and was asked not to inform C.K. of its removal because of safety concerns. Although he was quite rude about it, Constable D.B. agreed to this in front of S.H.'s brother, G.H.

[11] Later J.G. informed S.H. that C.K. had informed him that police owed him a favor and would be coming for S.H. and would make it difficult for the night club to operate. C.K. also told J.G. he had informed the police that he was terminated for helping the police in the murder investigation, and that by doing so police would return a favor to him. C.K. also left several messages to S.H. in this regard.

[12] Although S.H. and J.G. informed police that C.K. had said that the police would be repaying him a favor they did not really believe that would happen. However, after the video equipment had been seized by officers who informed S.H. that they were in continued communication with C.K., S.H. was "in shock. Please understand that alone would not bring me to file this report. Police need to do their job, and in a murder investigation they may get rude as an investigative technique which I'm okay with. What is forcing me to file this report is that Detective (DB), after seizing the equipment with no problems, THEN called (C.K.) to inform him of the seizure. Why would he do this? Knowing (C.K.) has admitted to and there is a police report a plan of a violent attack on (S.H.) and a plan to rob

(the night club). I feel betrayed and abandoned by Detective (D.B.) and the city of Winnipeg Police.”

[13] In over 20 years experience in night club security, April 25, 2008 (this must be the wrong date – April 25 was a date after the written statement signed April 22, 2008) was the first time in J.G.’s career that he felt it was necessary to wear a bulletproof vest while on duty. Constable D.B. had informed S.H. that because of the removal of the video surveillance equipment special attention would be placed on the night club for Friday and Saturday, with additional patrols coming by. S.H. hired additional security to compensate for the lack of video surveillance, at additional cost. J.G. and S.H. felt abandoned and betrayed when they apparently did not receive any police protection those evenings. (Again, this is a service issue – Constable D.B. may have asked for additional patrols, they may or may not have been assigned and/or come, but Constable D.B. cannot be held responsible for this.)

[14] Although it took Constable D.B. a month to come after the video equipment, a time frame that S.H. questioned since this was a murder investigation, S.H. was left wondering why his video equipment was the only equipment seized and not that of the Garrick Hotel, where the murder happened. (It was clear that his camera had a good view of the back of the hotel and the fire escape - whether another video system was not seized is irrelevant.)

[15] S.H. was further frustrated to find that Constable S.N., the officer who was responsible for forensic examination of the video equipment, was, at the time of his complaint, on vacation and the Forensic Video department was telling him that they had no idea when he would receive his video equipment back. This placed him at additional liability operating his night club. He complained “It takes less than two hours for ANY competent technician to copy a hard drive.” (Return of the equipment would again appear to be a service issue, and would not have been within the control of Constable D.B.)

[16] S.H. finished by stating, “I would like to request to get my video equipment back as soon as possible. I pray there have been no video deletions in regards to the removal of items by (C.K.). But primarily I would like to request a written explanation as to why Detective (D.B.) felt it was necessary to endanger my life by informing (C.K.) of the removal of the video recording equipment. Especially when (D.B.) stated to me that he would not do so and he was aware of the police reports of threats of violence against me by (C.K.).”

[17] It does not appear that S.H. received a written explanation from Constable D.B. about his actions, something which, in my opinion, may have resolved the matter.

THE INVESTIGATION

[18] S.H. was interviewed by an investigator from LERA on April 30, 2008.

[19] S.H. was informed at that time that the Law Enforcement Review Agency did not have jurisdiction to investigate the quality of investigations conducted by the police or the service provided by officers. According to the LERA Commissioner those were service issues and fell within the jurisdiction of the Chief of Police. S.H. was told by the investigator that only the issue of Constable D.B. improperly releasing information to C.K. was something that would fall within the scope of the Agency's jurisdiction. Although I have not been asked to and will not rule on that issue, the Commissioner's position is in accord with Judge Carlson's ruling in *T.T. v. Cst. A.B., Sgt. R.Z. and the Winnipeg Police Association* (L.E.R.A. Complaint No. 2005/49). S.H. was therefore referred to the Chief of Police on the service issues.

[20] S.H. was advised that only the allegation to be investigated was that Constable D.B. committed a disciplinary default under s. 29(c) of the Act by "improperly disclosing information acquired as a member of the police department." S.H. told the investigator that that was his main concern. Therefore, that was the only allegation investigated; Constable D.B. was the only officer named, and he and his counsel were only given notice and details of that allegation.

[21] It was clear to me that S.H., by both his written brief and his oral submissions, was still upset about service issues. He believed that his complaints against C.K. had not been acted upon and as a result C.K. had taken thousands of dollars worth of money and equipment from his building. He indicated that he had contacted the office of the Chief of Police as he was told to, but that he had been referred back to LERA. There were other service, or lack of service, or lack of communication issues. For example, other officers did not communicate information provided to them to Constable (D.B); S.H. apparently did not receive additional police patrols at his night club after the equipment was seized and he had to wait some months for the forensic examination of that equipment before it was returned to him. I am sympathetic to S.H. in regards to both the service and jurisdictional issues. The Winnipeg Police Service deals with complaints as separate issues and separate investigators are assigned to them. This must be

difficult for a citizen who wishes to have his global situation looked at and desires assistance. Also, S.H. was justifiably frustrated if he was referred to the Chief of Police and then referred back to LERA.

[22] However, I have determined that I must only review the investigation and conclusion regarding the one allegation, that Constable D.B. “improperly disclosed information”. In regard to that allegation, the Commissioner concluded that he was, in the wording of s. 13(1)(c) of *The Law Enforcement Review Act*, “satisfied that there is insufficient evidence supporting the complaint to justify a public hearing”.

[23] In reaching such a conclusion, it is required that the Commissioner “review all of the evidence”.

[24] If the matter had been referred for a hearing or was to be referred for a hearing by this Court, the standard of proof required to prove a disciplinary default is relatively onerous. Section 27(2) reads “The provincial judge hearing a matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the respondent has committed the disciplinary default.”

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

The Investigation

[26] LERA obtained and reviewed police reports about the murder investigation, including the affidavit sworn by Constable D.B. on April 15, 2008, when he applied for a search warrant to seize the video surveillance equipment, and a copy of the search warrant issued by a judicial officer. LERA received information from police reports that the Winnipeg Police Service had become involved in a homicide investigation on March 17, 2008. The victim’s body was located on a fire escape of the Garrick Hotel at 287 Garry Street. During the initial stages of the investigation, officers canvassed businesses in the area for surveillance cameras and any footage that may have been obtained. The night club in question had video equipment that showed the hotel’s rear lane fire escape. The footage captured the image of a male descending the fire escape, going to the front street and reentering the hotel. A co-owner of the night club, C.K., copied this particular portion of the surveillance footage to a disk and turned it over to the police. Further investigation by police identified the need to have an extended time frame of the surveillance in

the back lane area. C.K. was again contacted and informed that he would have no problem in consenting to provide the additional footage. He did tell Constable D.B, the officer who contacted him, that due to his assisting the police initially, he and his partner, S.H., had had a dispute and that he had been locked out of the business. He also said that he had been told not to attend there or there would be consequences. Constable D.B noted that this appeared to be a civil dispute between C.K. and S.H. and that the Winnipeg Police Service was not involved. On March 29, 2008 C.K. contacted Constable D.B. and informed him that the surveillance cameras did have the further information the police required. Constable D.B. was told that the bar manager, J.G., had saved the images to the system's hard drive, but that he did not know how to download or copy the images to disk. On April 4, 2008, C.K. informed Constable D.B. that S.H. had fired all the night club staff and closed the business for an unknown reason. As a result, it was not possible to obtain the surveillance video footage. C.K. informed the officer that the surveillance system was a sky view system with DVD ROM and monitor, located within the premises of the night club. Constable D.B. swore an affidavit and requested a search warrant to search and seize the security surveillance system. The search warrant authorized a search of the premises of the night club. The items to be searched for were "a sky view surveillance system, including DVD ROM, monitor, power supply, chords, associated cables, user manual, and associated use names or passwords, any applicable computer installation CDs or viewing programs, and, if applicable, any related external hard drives or personal computers used to store record or capture images from the surveillance system."

[27] The affidavit sworn to obtain the search warrant is instructive because on April 15, 2008, at least one week before the complaint in this matter, Constable D.B. referred constantly to C.K. as "the co-owner" of the (night club). He also stated that C.K. had told him that as the result of his assisting the Winnipeg Police Service at the onset of the investigation, he and his partner, S.H., had had a dispute which resulted in his being locked out of the business. He further indicated that this "appears to be a civil dispute between (C.K. and S.H.)", and "no WPS involvement has occurred".

[28] The search warrant application was reviewed and the search warrant granted by an independent judicial officer on April 15, 2008.

[29] When Constable D.B. was interviewed by the LERA investigator on September 16, 2008 (after the interview had had to be rescheduled due to conflicting commitments), Constable D.B. told the investigator that C.K. had provided video footage for both this murder investigation and a previous matter.

C.K. had told him that there was a dispute because he had assisted police with the murder investigation and that he had been locked out as a result. (As Constable D.B. had not been one of the uniformed officers who had been in conversation with S.H. on an earlier date (I accept Mr. McKenna's word, as an officer of the Court, that Constable D.B. was never in uniform during the time period in question), it was reasonable for Constable D.B. to take C.K. at his word on this point.)

[30] Constable D.B., believing what he had been told by (the perhaps dishonest) C.K., was uncertain as to what might happen to the video footage were S.H. to be contacted. Constable D.B. was later contacted by C.K. and told that the night club had been closed and the locks changed. Constable D.B. thanked C.K. for his assistance and told him that he would deal with this "in his own way". He then sought and obtained the search warrant. According to Constable D.B., when he executed the search warrant in S.H.'s presence, S.H. did not raise any concern about the validity of the search warrant, the name of the night club or the areas to be searched. He did report that S.H. had been upset and had said that he was in a dispute with C.K. Constable D.B. reported that he had told S.H. that it was a civil matter and that police would not be involved. S.H. told Constable D.B. that he had been speaking to a lawyer about it. Constable D.B. told the investigator that he was not provided with any information that C.K. was not the co-owner of the business. Constable D.B. reported that during the search he had a telephone conversation with C.K. He reported that the only information that was provided to C.K. was that he had obtained the video footage he required and that C.K. did not have to worry about assisting the police any further. He told the investigator that he did not tell C.K. what items were seized or that anything had been seized. He said that he at no time told C.K. that the video system was down or that it was not able to record. Constable D.B. said that when he left with the items seized he provided S.H. with information as to how he could be reached. He told S.H. that he did not know how long it would take to download the footage, but that he could call Constable D.B. in a couple of days and he would make inquiries as to when it would be finished. He also advised S.H. that he could try to obtain temporary equipment and that he would only need the recording equipment, as the cameras and wiring were intact. There were other issues canvassed by the investigator in his interview with Constable D.B., but they were not directly related to the allegation being investigated.

[31] LERA also requested and received records regarding the dates when S.H. had requested police assistance from the Winnipeg Police Service regarding C.K. These records indicated that he had contacted police requesting assistance on

[32] The investigator received the results of a Companies Office search regarding the ownership of the night club in question. Those records revealed that on May 13, 2008, approximately three weeks after the complaint, C.K. was listed as a director of the night club. Therefore, even if Constable D.B. had checked in advance, he would have seen him as a Director of the night club business, which he believed owned and operated the security system. Not knowing at the time of the numbered company and the ownership control of various parts of the building in question, he might at that point even arguably have had a duty to disclose to C.K. the seizure of the equipment, which at least apparently belonged to the night club.

DISMISSAL OF THE COMPLAINT

[33] *The Law Enforcement Review Act* provides the LERA Commissioner the power to dismiss certain types of complaints. This form of screening mechanism has been upheld by our courts as a valid function and process: to prevent unnecessary court hearings.

[34] After the investigation detailed above, the LERA Commissioner concluded that there was “insufficient evidence” supporting S.H.’s complaint to justify taking the matter to a public hearing. In a lengthy letter dated October 2, 2008 the Commissioner dismissed the complaint.

REASONS GIVEN BY COMMISSIONER FOR DISMISSING COMPLAINT

[35] Part of what the Commissioner wrote was as follows:

As noted in your complaint, the issue that forced you to report this was the fact that Detective (D.B.) contacted (C.K.) and informed him of the seizure of the equipment. You said that Detective (D.B.) knew that (C.K.) had admitted to making a threat against you and had planned to attack you or to rob the (night club). This information was provided to the officer when the search was conducted and you asked him at that time not to inform (C.K.) of the removal of the equipment due to safety concerns.

Detective (D.B.) initially contacted (C.K.) as he is the person who first provided video footage to the uniform officers. He was told by (C.K.) that he had been terminated for assisting the police in this matter. When the officer was made aware that (C.K.) could not obtain the video footage he was interested in, he then applied for and was granted a search warrant. Detective (D.B.) did not know the situation between (C.K.) and you and reportedly told (C.K.) that it was a civil matter. As he had not had any contact with you and did not know if you would

cooperate with the police, it was his view a search warrant was necessary to ensure the possible evidence was obtained. Obtaining a search warrant, whether it was needed or not, is not a disciplinary default under *The Law Enforcement Review Act*.

In regard to informing (C.K.) of the execution of the warrant, Detective (D.B.) said that he only told (C.K.) that the video footage he required was obtained. He said at no time did he specifically tell (C.K.) that the surveillance system was removed or inoperable. This was done as (C.K.) had given the officer information on the business, i.e. name and address used, and Detective (D.B.) was under the belief that (C.K.) was a co-owner of the business and had a right to be informed. He denies this was done as a favour to (C.K.) for cooperating with the police. Detective (D.B.) said he told you when you informed him that you had made complaints to the police about (C.K.), that he was not involved in those investigations and they would be handled by the respective members assigned to handle them. He said he also told you that if you had problems with (C.K.) to dial 911.

I do not know the situation between you and (C.K.) concerning the ownership of this business, however it does appear that (C.K.) is or was listed as a director of this business with you. Whether the information provided by (C.K.) to Detective (D.B.) is factual or not, the officer did obtain a search warrant to search for and seize the security equipment. Detective (D.B.) admits he told (C.K.) that he had obtained the information he required, but did not specifically tell him what items had been seized or removed. In my view, there is nothing to support the belief that this was done for a malicious or improper purpose.

I wish to point out that this Agency only has the jurisdiction to deal with the conduct of on duty police officers. Service issues that include the quality of an investigation or service provided by the police are areas that fall within the jurisdiction of the Chief of Police, Mr. Keith McCaskill. This agency does not have the authority to assist you in getting your equipment returned.

JUDICIAL REVIEW OF THE DISMISSAL

[36] As is his right, S.H. has asked a provincial court judge to review the decision of the Commissioner. A hearing was held before me on November 26, 2009. S.H. represented himself at the hearing.

[37] S.H. had filed a brief in advance and spoke very well on his own behalf. I should point out that some of the statements in his brief were not given to the investigator and therefore did not form part of the Commissioner's assessment. I must therefore disregard them. I am, however, very sympathetic to S.H.'s position. Some of the issues he still feels aggrieved by are ones where I understand his feeling of frustration, but cannot deal with. His relationship with C.K. is

probably the one that has hurt him most, especially financially. He has attempted to deal with that in a number of ways. He asked other uniformed police officers to intervene when materials were being taken out of his building. Although he obviously believed that Constable D.B. was one of those officers, having apparently been given his badge number by one of them, it is now clear that he was not in uniform at the time. It must have therefore been the case that the uniformed officers, after refusing themselves to become involved in what they saw and also believed was a civil matter, and then challenged, provided the badge number of Constable D.B., who was that time acting as a detective on the murder investigation. S.H. has since taken the appropriate civil action against C.K., and at least one criminal charge was apparently laid, albeit without concrete results. Finally, as I have said, it is unfortunate that when S.H. contacted the office of the Chief of Police about his service/quality of service issues, he was referred back to LERA. Again, I cannot deal with that issue here.

[38] It appears that, at the time of the execution of the search warrant, only S.H.'s brother was in the vicinity of Constable D.B.'s cell phone conversation with C.K. If a hearing had been ordered, it would have been Constable D.B.'s evidence that he had only told C.K. that he had "the footage" required. Although S.H. put in his brief for the hearing that Constable D.B. told he and his brother that that he had told C.K. that he had seized equipment, I cannot find this in S.H.'s complaint. In fact, the last paragraph of his complaint, apparently signed and witnessed by his brother on April 22, 2008, he wrote "detective (B.) stated to me he would not do so" (regarding informing C.K. of the removal of the equipment). I am satisfied that the Commissioner had no such assertion before him. Therefore, according to what was available to the Commissioner, had he referred the matter for a hearing, it would have been the Respondent's version against, at the most, that of the complainant's brother as to the exact words used. Although C.K. could also testify as to exactly what was said during that conversation, as S.H. believes C.K. to be disreputable, I cannot see him calling C.K. as a witness. The Complainant would have had serious difficulties establishing his case on the "clear and convincing" evidence required.

[39] Further, as a Director, according to Companies Office records, of the night club in question, which had apparently, if not actually, been the owner of the security equipment, it is arguable that Constable D.B. properly believed he was under an obligation to inform C.K. of the seizure of the property. The existence of a numbered company made things confusing. It is unlikely, in my opinion, that the Complainant would have been able to convince the judge hearing the matter that

CONCLUSION

[40] I have reviewed the LERA investigation file and the Commissioner's reasons for not proceeding to a hearing before a judge. I have concluded that the Commissioner assessed the evidence reasonably and drew a rational conclusion on the merits of the complaint.

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

Original signed by Judge J.A. Elliott

P.J.