

**IN THE MATTER OF:**

*The Law Enforcement Review Act*  
Complaint #2017-156

**AND IN THE MATTER OF:**

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

**BETWEEN:**

██████████  
Complainant/Applicant

- and -

**Constables N.G. and K.T.**  
Respondents

) R. McElhoes  
) For the Applicant  
)  
)  
)  
) P. McKenna  
) for the Respondents  
)  
) D. Johnston, on a watching brief for  
) Law Enforcement Review Agency  
)  
) Hearing: November 19, 2018  
) Decision: January 25, 2019

**NOTE: These Reasons are subject to a ban on publication of the Respondents' names pursuant to s. 13 (4.1)(b) of *The Law Enforcement Review Act*, R.S.M. 1987, c. L75.**

**L.M. MARTIN, P.J.**

**INTRODUCTION**

[1] ██████████ (██████████) applies to have a decision of *The Law Enforcement Review Act* (LERA) Commissioner reviewed pursuant to section 13 of *The Law Enforcement Review Act*, R.S.M. 1987, c. L75 (*Act*). For the reasons that follow, I am dismissing the application.

## **BACKGROUND**

[2] On November 3, 2017, [REDACTED] filed a LERA complaint alleging members of the Winnipeg Police Service (WPS) abused their authority on October 11, 2017, by arresting her without grounds.

[3] On October 11, 2017, shortly after midnight, [REDACTED] and her sub-tenant each called 911 in regards to a tenancy dispute they were having. Eleven days earlier, [REDACTED] had sublet a room from her rental property to her sub-tenant. That room was unavailable to the sub-tenant until October 6 as the previous sub-tenant still had his belongings in that room. As a result, [REDACTED] allowed this sub-tenant to stay in one of her spare bedrooms that contained a bed which belonged to her. By October 11, 2017 this sub-tenant had still not made plans to have his belongings moved in and [REDACTED] had seemingly lost patience, wanting him removed immediately.

[4] At approximately 12:30 a.m. on October 11, 2017, the sub-tenant called 911 twice complaining [REDACTED] was trying to gain entry into his room and his foot was becoming sore from trying to keep the door closed. He added that [REDACTED] was intoxicated.

[5] [REDACTED] made a similar 911 call. She admitted to drinking but added that the sub-tenant was under the influence and had talked in past about owning a Colt 45 with “a bunch of bullets”. She wanted the sub-tenant forcibly removed.

[6] Members of the WPS were dispatched to [REDACTED] residence shortly after 1:30 a.m. When they arrived, they investigated the dispute, garnering information from both the sub-tenant and [REDACTED]. The members noted that the sub-tenant was sober and that [REDACTED] showed signs of having consumed alcohol. Despite trying to negotiate a peaceable outcome, namely allowing the sub-tenant to stay the night, [REDACTED] refused. The officers advised her that they could not forcibly remove the

sub-tenant if [REDACTED] had not followed the eviction process set out in *The Residential Tenancies Act*, S.M.1990-91, c. 11.

[7] [REDACTED] then began yelling, becoming rude and aggressive and now accusing the sub-tenant of threatening her. When the members inquired as to the nature of the threats, [REDACTED] advised that the sub-tenant would come out of the bedroom saying “surprise, surprise.” She also advised he was using “poor man’s heroin.” She continued to remain adamant that the sub-tenant needed to be removed. She told the officers that she had the right to burn the bed the sub-tenant was using as it was her property. She then began to make her way to the bedroom. The members cautioned her that if she burned the bed, they would charge her with arson. [REDACTED] then advised she would urinate on the bed and pushed past the members. This is when the members detained [REDACTED] for breach of the peace. The sub-tenant was from out of town and had no car or place to go. In their view, someone needed to leave that night since they could not seem to calm things down and [REDACTED] threatening behaviour was continuing to escalate the situation, making it potentially unsafe.

[8] [REDACTED] was handcuffed and removed from her residence and placed in the back of the cruiser. In addition to her behaviour, the members noted that [REDACTED] was unsteady on her feet and had a smell of liquor on her breath.

[9] [REDACTED] was provided with her *Charter* rights. The officers then attended back inside the residence to interview two individuals who were present during the interaction. They indicated that they did not want to be involved and were leaving.

[10] The members returned to the cruiser and advised [REDACTED] they were exercising their discretion to instead detain her under *The Intoxicated Persons Detention Act* (IPDA), RSM 1987, c. I90 and drove her to 75 Martha Street where she was admitted for approximately two hours, then released.

[11] On March 6, 2018, after an investigation into [REDACTED] complaint, the LERA Commissioner determined there was insufficient evidence of an abuse of authority to refer [REDACTED] complaint to a public hearing and declined to take further action. After outlining all of the evidence garnered from an investigation into the complaint, the LERA Commissioner noted:

Police officers are, on a regular basis, confronted with situations where parties involved in a dispute have very different accounts of what is taking place. When intoxication is involved, it further complicates the matter. It appears that given the circumstances facing them in the early hours of the morning, they made a proper choice in detaining you for a breach of the peace. They also handled it in the best way possible, in that you were held for a period of time to sober up a little and cool down, while not be subjected to any criminal charges.

### **POSITION OF THE PARTIES**

[12] [REDACTED] counsel says that the Commissioner's decision is unreasonable because the members' actions in and of themselves constitute an abuse of authority as they did not have grounds to arrest her.

[13] Counsel for the officers submits that the LERA Commissioner appropriately exercised his jurisdiction in determining whether the members' actions constituted an abuse of authority under the *Act*.

### **STANDARD OF REVIEW**

[14] Section 13(2) of the *Act* provides that when the Commissioner declines to take further action on a complaint, the complainant can apply to have that decision reviewed by a provincial court judge.<sup>1</sup>

[15] At the review hearing, the onus is on the applicant to demonstrate that the Commissioner erred in declining to take further action on the complaint.

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<sup>1</sup> Section 13(2): Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.

[16] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 states that the standard of review of a decision by an administrative agency acting in a decision-making capacity is one of “reasonableness”. The reasonableness standard is defined as follows:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] As such, when reviewing a decision of an administrative agency, a court must look at whether the reasons for decision are clear and transparent and whether the outcome or ultimate decision is tenable based on those articulated reasons. If an administrative decision contains articulated reasons and a tenable outcome, then the decision will be reasonable, regardless of whether the reviewing court disagrees or would have come to a different conclusion.

[18] In this case, counsel for the complainant takes issue with the LERA Commissioner’s determination that [REDACTED] detention under *IPDA* did not constitute an abuse of authority. She says that this is clearly wrong given that the provisions of *IPDA* were not complied with as [REDACTED] was not in a public place, therefore making her detention unlawful.<sup>2</sup>

### **ABUSE OF AUTHORITY**

[19] Section 29 of the *Act* provides:

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<sup>2</sup> S. 2(1) of *IPDA* provides: “Where a peace officer finds in a place to which the public has access a person who is intoxicated, he may take that person into custody.”

A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

(a) abuse of authority, including

(i) making an arrest without reasonable and probable grounds...

[20] LERA case law has consistently held that the interpretation of section 29 of the *Act* is nuanced, that the enumeration of conduct not exhaustive, and the conduct listed does not automatically give rise to a finding of an abuse of authority. (See: *A.C. and Constable G.S.*, LERA complaint #6100).

[21] As noted by Joyal P.J. in *A.C. and Constable G.S.*, LERA complaint #6100:

[51] ...It is only the cases where a police officer's behaviour or conduct can be concluded to be abusive of his authority that are sanctionable pursuant to section 29(a). Default is not to be found for absolutely any and all manifestations of the impunable behaviour set out in section 29(a)(i)-(vii). Each case will depend upon its own facts.

[22] Case law dealing with *Charter* breaches by officers in the execution of their duties, which would include an arrest without reasonable and probable grounds, suggests that more than the mere breach is required to constitute an abuse of authority. (See: *J.W.P. and Constable R.L.*, LERA Complaint #3704; *S.B. v. Horyski*, [2008] M.J. No. 476; *A.C. and Constable G.S.*, LERA complaint #6100). Indeed, in *A.C. and Constable G.S.*, LERA complaint #6100, Joyal P.J. finds that an abuse of authority connotes conduct of an exploitative character, noting at paragraph 52

Police conduct which can be properly found as an "abuse of authority" is that 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.

[23] A similar conclusion was reached in *Québec (Comité de déontologie policière) c. Girard*, [2002] C.C.S. No. 1190 where Côté J. found that when there is an allegation of a *Charter* breach by police officers, the court must examine all of the circumstances to determine if there was an abuse of authority, that is, if there was an element of excessive conduct which is reprehensible, bad or immoderate. (See:

*Girard*, paras. 24-25)

## **ANALYSIS**

[24] In this case, the members who responded to the 911 call on October 11, 2017 were faced with a difficult situation: they were unable to resolve a dispute between a sub-tenant and tenant such that it became clear one of them needed to leave the residence and neither was prepared to do so.

[25] The LERA investigation reveals that [REDACTED] was intoxicated and was being belligerent and aggressive and threatening to escalate the situation by either urinating on a bed or worse, burning it. This was the rationale behind the members' decision to detain [REDACTED] for breach of the peace. While removing someone from their own home is certainly not to be encouraged, the members in this case were faced with a seemingly impossible situation that required a judgment call.

[26] The LERA Commissioner's decision indicates that he engaged in a limited weighing of the evidence before him, which he is entitled to do, and determined that there was no indication of abusive or excessive police behaviour that came into play in the members' decision.

[27] As the prior review of the case law indicates, something more than a possible breach is required to constitute an abuse of authority. From the LERA Commissioner's decision, it is clear that he was alive to all of these issues. His decision itself is a reasonable one. Not only did the Commissioner articulate his reasons in a reasonable manner such that they are explained in a transparent and intelligible manner, but the outcome is also reasonable in that it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

[28] For all of these reasons, I am dismissing [REDACTED] application. Pursuant to section 13(4.1)(b) of the *Act*, the ban on publication of the respondents' names shall continue to remain in effect.

“Original signed by:”

**L. M. Martin, P.J.**