IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint No. 5251

AND IN THE MATTER OF: An Application pursuant to s. 13(2) of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

C. N.,	)	Mr. Norman H. Sims, Q.C.,
Complainant	)	for the Complainant
	)	
- and -	)	
	)	
Sergeant F.,	)	
Respondent	)	Mr. Brian Mayes,
	)	for the Respondents
Constable S.,	)	
Respondent	)	
	)	
	)	Mr. Denis Guénette,
	)	on behalf of L.E.R.A.
	)	
	)	
NOTE: These reasons are subject to a	)	
ban on publication of the Respondents'	)	Decision delivered January 29th,
names pursuant to s. 13(4.1)(a).	)	2004

Peters, P.J.

[1] This is an application under section 13(2) of *The Law Enforcement Review Act* by Ms. N. for a judicial review of the decision of the Commissioner of the Law Enforcement Review Agency to decline to take any further action on her complaint numbered 5251. Her typewritten complaint dated September 30, 2001 alleges as follows:

> Sept. 25, 2001 at 3:30 p.m. I was brutally arrested by the above officers and ACO L. H. This is a discipline code complaint of abuse of authority for making an arrest without reasonable or probable grounds, using unnecessary violence and excessive force, using oppressive and abusive conduct and language, being discourteous and uncivil, discrimination on the basis of source of income and making a false statement.

[2] The Commissioner informed the Complainant by letter April 16, 2002 as follows:

> In light of the circumstances surrounding this complaint, and in light of your prior complaints against members of the Brandon Police Service, it is my view your complaint is abusive, unwarranted, and is vexatious. I am therefore required pursuant to Section 13(1)(a) of *The Law Enforcement Review Act* to decline to take any further action on the complaint.

[3] The circumstances surrounding this application are quite unique compared to the circumstances surrounding all other L.E.R.A. applications referred to and relied upon by all counsel and also quite different and distinguishable from the circumstances in the domestic and civil cases referred to and relied upon by Mr. Guenette, addressing this Court on behalf of the Commissioner and Mr. Mayes, both in their submissions regarding the law on frivolous and vexatious proceedings.

[4] The circumstances surrounding this application for my purposes in determining whether or not the Commissioner erred in declining to take further action on the complaint, as gleaned from all material filed, including the allegations in the complaint and statements of the Respondents, are as follows.

[5] The Complainant, age 50, a resident of and living in a house in the City of Brandon, in Manitoba, had complained on several occasions to the local authorities, it seems to no avail, that her neighbour's dog was running at large, entering her property and harassing her own dog. Again, on September 11, 2001, the same dog was running at large on the Complainant's property and in an attempt to leash the dog, the dog's collar came off, the Complainant keeping same, agreeing to release the collar upon charges being laid against the dog's owner for allowing the dog to run at large. The dog was again found running at large on September 21, 2001 and in the Complainant's yard. Finally, upon this latest running at large being reported, the Complainant was advised that charges were laid against the dog's owner.

[6] Between the morning of September 24, 2001 and September 25, 2001, the Complainant says she attempted to return the dog's collar on several occasions to the City Manager's office, the Mayor's office and the Licencing Department, none of whom would accept it.

[7] On September 24, 2001, the owner of the dog reported in writing to the Brandon City Police that the Complainant had stolen the dog's collar, valued at $25.00, plus the licence tags attached to the collar.

[8] On the same date, September 24, 2001, the Brandon Police Service Special By-law Enforcement Office took the apparently unusual step of issuing a By-law Enforcement Notice to the Complainant and serving it at 1333 hours by placing same in her mailbox. The Notice advises the occupant at 331-17th Street (no name given) that a charge will be laid against the owner of the dog that had been running at large on September 21st. The Notice also states:

> You however still have the collar. Please return it immediately to the Brandon Police Service or you will be charged for breach of probation and theft.

[9] This Notice made in accordance with the provisions of some unnamed by-law further required the addressee of the Notice "to make the necessary corrections to rectify this matter within immediately…" and "Failure to comply with this notice may result in PROSECUTION".

[10] In the morning of September 25, 2001, the Complainant attempted to return the collar to the City Manager's office "and was again refused". She also claims efforts made through the City Hall Licencing Department on the same date were to no avail.

[11] Meanwhile, the Brandon Police Service obtained a "Search Warrant" on September 25, 2001 based on the grounds that the Complainant on September 11, 2001 did steal a dog collar, the property of one P. R. of a value not exceeding $5,000 contrary to section 334(b) of the *Criminal Code*, authorizing the Brandon Police Service to enter the Complainant's premises "and to search for the said things and to bring same before me or some other justice", the "me" therein referring to the magistrate who signed the Search Warrant.

[12] At about 3:37 p.m. on said September 25, 2001, the two Respondents and a third officer, Constable H., attended at the Complainant's residence in two separate police cars to execute the Search Warrant. Up to this point the circumstances referred to above are pretty well straightforward and cannot be said to be contradicted.

[13] Upon gaining entry into the Complainant's residence, there is some disagreement between the parties as to what actually took place – even some discrepancy among the three officers.

[14] There is some agreement that upon entry and handing the Warrant to the Complainant to read, she made "a comment to the effect that this was crazy. I commented that it certainly was" (per Sergeant F.). Constable S. recalled that when the Complainant read the Warrant "her reply was that we were all crazy".

[15] There can be no doubt that the three peace offices were not welcome in the house. Some verbal exchange took place both in and outside the house. A demand was made for the dog collar. The Complainant produced it but refused to hand it over. Constable H. reports:

> …she refused saying she wanted Sergeant F. to sign for it. Constable S. informed Ms. N. she would be under arrest if she did not hand over the collar. Again, she insisted that we sign for it saying she did not trust the police.

Neither of the other two officers reported that the Complainant insisted on getting a signature before handing the collar over. No signature was given and the collar was grabbed from the Complainant by Constable S. and handed or thrown to Sergeant F.

[16] Having now seized the collar as authorized by the Search Warrant, Constable S. and Sergeant F. proceeded to arrest the Complainant. A struggle ensued while handcuffs were being put on the Complainant behind her back. She screamed, saying they were hurting her. The handcuffs were "double locked" and the Complainant placed in a patrol car and taken to

the Brandon police station, complaining along the way that the handcuffs were on too tight and hurting her. She was processed, released and driven home at about 4:35 p.m.

[17] The Complainant then attended at her doctor's office to be examined for injuries. No report from the doctor has been filed in these proceedings thus far, to my knowledge.

[18] In an attempt to resolve the problem in the earlier stages, on September13, 2001 Sergeant F. contacted the Complainant's lawyer agreeing not to take any further action until the 24th day of September, 2001.

[19] On September 30, 2001, the Complainant completed and delivered her L.E.R.A. Complaint No. 5251 in this matter. It does not appear that a charge of theft of the collar was ever laid against the Complainant. An Information charging the Complainant with possession on September 25, 2001 of stolen property was sworn more than a month later on October 29, 2001 and later stayed by the Crown.

[20] On February 25, 2002, the Law Enforcement Review Agency office reported that the Complainant's complaint dated and filed September 30, 2001 was not received by their office until February 22, 2002.

[21] On April 16, 2002, the Commissioner reported by registered letter to the Complainant that he declines to take any further action on the complaint in the wording set out in paragraph numbered 2 above.

[22] The matter has now, under section 13(2) of *The Law Enforcement Review Act*, been referred to a provincial judge to have the Commissioner's decision reviewed. By definition 1(2) of the said Act "a provincial judge acts as *persona designata* and not as a court when performing a duty or exercising a power under this Act".

[23] Under section 13(3) of the Act, the provincial judge:

> …after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner
>
> (a) to refer the complaint for a hearing; and
>
> (b) to take such other action under this Act respecting the complaint as the provincial judge directs.

[24] Section 13(4) further provides that "the burden of proof is on the complainant to show that the Commissioner erred…".

[25] The role of a provincial judge acting as a "persona designata" has been thoroughly discussed by my colleagues in earlier L.E.R.A. complaints such as:

Complaint #5792 – His Honour Judge Swail, and
Complaint #3771 – Her Honour Judge Smith.

This being the case and my agreeing with their conclusions, I feel it unnecessary to go into the law on that point again.

[26] The above referred to and other like decisions reflect precisely the judicious approach which the legislation evidently contemplates in the exercise of this administrative function. The Commissioner should approach the question of sufficiency of evidence under section 13(1)(c) in a fashion akin to that of a judge at a preliminary inquiry and considering whether there is sufficient evidence to commit an accused for trial. His Honour Judge Swail further concludes "that if the Commissioner strays from this test on a question of sufficiency of evidence under Section 13(1)(c) of the Act he does so at the risk of falling into irreversible (sic) error".

[27] Recalling at this juncture that the written complaint of the Complainant dated September 25, 2001 specifically stated that her complaint was a "discipline code complaint of abuse of authority", the exact wording from section 29(a) of the Act, and then giving the details citing the grounds contained in (i), (ii), (iii), (iv) and (vii). Then recalling the Commissioner's decision of April 16, 2002 wherein he states:

> In light of the circumstances surrounding this complaint, and in light of your prior complaints against members of the Brandon Police Service, it is my view your complaint is abusive, unwarranted, and is vexatious. I am therefore required pursuant to Section 13(1)(a) of *The Law Enforcement Review Act* to decline to take any further action on the complaint.

And then considering the circumstances surrounding this application as I have summed up above, am I satisfied or not satisfied "that the Commissioner erred in declining to take further action in the complaint"?

[28] In arriving at my decision, I have considered the following:

(a) Although the Complainant had made prior complaints against members of the Brandon Police Service, the subject matter of this complaint #5251 was apparently totally unrelated and dissimilar. Did the Commissioner err in his conclusion based on "the circumstances surrounding this complaint" and basing his decision also on "prior complaints" that were unrelated?

(b) In stating that the Complainant's complaint was "abusive, unwarranted", was he concluding:

(i) that the complaint did not fall within the scope of section 29? or

(ii) that there is insufficient evidence supporting the complaint to justify a public hearing?

There does not seem to me anything in his decision from which an answer to either (i) or (ii) above can be reasonably inferred. I am not convinced by Crown counsel's submission that the "frivolous or vexatious" test was met.

[29] At all material times prior to the execution of the Search Warrant, the Complainant admitted to all and sundry to having in her possession the dog collar in question as of September 11, 2001, stating that it came into her possession when the dog was found running at large again on her property, stating further that she was prepared to turn it over to the proper authorities on conditions, including a signed receipt for same. Was there not some evidence that her explanation was reasonable enough under the circumstances to remove any suggestion of an indictable offence having been committed?

[30] On the 25th day of September, 2001, the Brandon Police Service obtained the Search Warrant of the Complainant's residence on the grounds that she had stolen the dog collar on September 11, 2001, authorizing the Brandon Police Service "to enter into the said premises and to search for the said things and to bring same before me or some other Justice". The said Search Warrant was executed by the three officers mentioned in the circumstances described earlier. Upon seizing the dog collar, the subject matter of the Warrant, the officers proceed to arrest, handcuff and remove the Complainant from her home, taking her to the Brandon Police Station.

[31] This action begs the question not only from a legal standpoint but an ordinary citizen: The Warrant was for search and seizure. It did not authorize an arrest. Such authority in a search warrant was no longer spelled out after the enactment of the *Criminal Code* in 1892. Nowadays it would appear that whether or not a person found in the premises being searched should be arrested will depend on whether the officers conclude that they are justified in doing so under their general powers of arrest without warrant for theft or possession under $5,000 as set out, for example, in sections 495 and 553 of the *Criminal Code*.

[32] The question then is, was there any evidence before the Commissioner indicating that the arresting officers, the Respondents herein, had reasonable and probable grounds to make the arrest in the Complainant's own home, detain her, handcuff her and escort her from her home to the police station?

[33] Since the Complainant was offering to hand over the collar for a signature, was it necessary to apply any force at all to arrest and handcuff her? Sergeant F. states in his report that "in making the arrest S. was very soft with" the Complainant. Constable H. reports that "As Constable S. was trying to grab hold of her wrist she started screaming saying he was hurting her. I observed he was treating her very delicately and gently, due to the fact she kept getting away from him…" And further in the H. report "…again gentle attempts were made to handcuff Ms. N.…". In the S. report he states "…I put her right arm in a mild arm bar…as I was attempting to place her in handcuffs…Sergeant F. had to place his hand on her shoulder to assist me…at this time I double locked her handcuffs".

[34] During the arrest, the Complainant cried: "All this for a collar?" In the heat of the moment described even by the Respondents, can the explanation of "very gently and

delicately" and "softly" in the handcuffing process be plausible? More importantly, why was her arrest necessary and justified?

[35] As of November 20, 2003, the Clerk's office of the Brandon Provincial Court advised that no report to a justice had been filed after the execution of the Warrant, the Warrant providing that the things seized be brought before the signing magistrate or some other justice.

[36] The Commissioner's report dated April 16, 2002 opens as follows:

> This letter is to advise you that the investigation into your complaint dated September 30, 2001 has been completed.

[37] Section 15(1) of *The Law Enforcement Review Act* provides that:

> Where the investigation has been completed, the Commissioner shall consult with the complainant, the respondent and the respondent's Chief of Police for the purpose of resolving the complaint informally.

There is no report or evidence that I have been able to find in the material filed or in the submissions of counsel that any such consultations took place.

[38] At the end of his report, the Commissioner concludes, saying:

> In light of the circumstances surrounding this complaint, and in light of your prior complaints against members of the Brandon Police Services…I decline to take further action on the complaint.

[39] In dealing first of all with the "circumstances surrounding this complaint", I am referred to the case of *B. v. S.(C.)* unrep. May 30, 2002 (Man. P.C.) wherein my colleague, Chartier P.J., extensively analyzed the standards applicable to a section 13(2) review of a Commissioner's decision to decline further action.

[40] I am likewise referred to the case of *R. v. M. & V.* of my colleague, Smith P.J., delivered July 3, 2002, and the case of *T.G. v. D.B. and J.S.* of my colleague, Swail P.J., delivered February 19, 2003.

[41] As I see it, the problem in this, as in many cases, is a question of mixed fact and law and the issue is whether the Commissioner applied the appropriate "sufficiency of evidence" test, that is, a legal test to the available evidence before him. The decided cases I have referred to above are consistent with one another in holding that the Commissioner's role is not to weigh the evidence as a judge in a criminal case. The question of sufficiency of evidence under section 13(2) should be approached in a fashion akin to that of a judge hearing a preliminary inquiry and considering whether there is sufficient evidence to commit an accused for trial. Likewise, determinations of credibility should be left for a hearing before a judge, particularly making findings on contested facts as we have here. Should not the contested

facts we have here in this complaint, as crucial as they are, have been sufficient for referral to a judge?

[42] Next, as regards to the second basis of the Commissioner's conclusion, that is, "in light of your prior complaints against members of the Brandon Police Service…", counsel for the L.E.R.A. Commissioner argues on page 11 of his brief under the heading "C. The Application of the Standard in this Instance (sic)" that the Commissioner's decision was to take no further action for the reason that it was considered "abusive, unwarranted and is vexatious". In short, he argues that this means the Commissioner concluded that the "frivolous or vexatious" test in clause (a) was met. He further argues that Associate Chief Judge Miller in L.E.R.A. Complaint #3208 addressed this very point, holding that it met the "reasonableness simpliciter" test and counsel quotes part of Judge Miller's reasoning on this point at paragraph 23 of counsel's brief. But he omits what I believe is a more important statement of Judge Miller's found on page 10 of his decision under the heading "VI Review of the Decision of the Commissioner". That statement reads:

> I believe that the Commissioner effectively determined that the subject matter of the complaint did fall within the scope of section 29 but, thereafter, on its facts, was found by him to be frivolous and unsupportable.

[43] The complaint in Judge Miller's case was twofold: 1) harassment by the officers, and 2) their tardiness in responding to the original emergency call. The circumstances were much different and the subject matter far simpler to investigate, it would seem, than in the case before us enabling him, on the facts, to find the complaint frivolous and unsupportable.

[44] The grounds of the complaint before us falling within some of the more serious acts or omissions listed within section 29 and the evidence of both parties being so contradictory to one another required same to be weighed which is not within the role of the Commissioner. On this point alone it would appear that there might be sufficient evidence supporting the complaint to justify a hearing.

[45] In investigating the subject matter of this particular complaint, an entirely new issue based on rather serious allegations never before made or determined, and with a reasonable chance of success should the disputed facts be weighed in the Complainant's favour, one questions the correctness of a finding by the Commissioner that the complaint was abusive, unwarranted and vexatious.

[46] However, the Commissioner in coming to this decision also relied on the number of prior complaints by the same complainant against the same Brandon Police Service. If, as it appears, the prior complaints were under different circumstances, on different unrelated issues, with the odd one, as I understand, even being successful, was the Commissioner correct in relying on such priors in finding the complaint abusive, unwarranted and vexatious. Or, should he have investigated the subject matter of the complaint on its own merits more thoroughly?

[47] Counsel for the Commissioner at the commencement of this hearing made a request before me to make a submission on behalf of the Commissioner for the limited purpose only

on matters that could arise in any questions of jurisdiction, process and statutory interpretation. Counsel further stated: "On the issue of substance, the Commissioner's counsel will let the written record speak for itself…." Permission to make a submission for that limited purpose was granted with the consent of the other counsel.

[48] The Commissioner being so restricted, it was not surprising to find Mr. Mayes, counsel for the Respondents, arguing on behalf of the Commissioner on the issue of substance, i.e., whether the Commissioner erred.

[49] Mr. Mayes spent considerable time both in his written and oral submissions arguing that "The Law Enforcement Review Agency, like all public services, has to operate within budgetary limits. In the ideal world perhaps all complaints would be the subject of lengthy investigations. However, in the real world, the L.E.R.A. office is obliged to consider the worthiness of each complaint within a budgetary framework…Complainants like Ms. N.…should not be surprised if their unsubstantiated allegations against Brandon Police Service members are not fully investigated." (Taken from his written brief, paragraph 7).

[50] In his oral submission, Mr. Mayes also argues on page 22:

> …the Commissioner…does he have unlimited resources in which to investigate? No. Does he have an unlimited amount of time to look at every complaint that comes in? No…

From page 25:

> …In this case, the Commissioner did have knowledge of prior complaints and he considered those in making his decision.

From page 29:

> The Commissioner knowing the history here, says "No, we're not going to do a full investigation because this appears to me to be vexatious."
>
> The Commissioner doesn't have endless resources.

And from page 32:

> However, in reality, the Commissioner has the power to deem something frivolous or vexatious.

[51] The above arguments claiming a lack of resources cannot in this or any other case be accepted as a basis for justifying anything less than a thorough investigation. It is appreciated that the above comments were being made by Respondents' counsel and not the Commissioner's counsel. They were not disclaimed by the Commissioner's counsel who had opportunity to do so.

[52] Regarding the Commissioner's resources, one only needs to refer to *The Law Enforcement Review Act* itself which requires him to conduct a prompt and thorough investigation of all complaints (section 12(6)).

[53] Section 2(2) of the Act provides that the Commissioner "has such powers and shall carry out such duties and functions…as may be required for the purposes of this Act…"

Section 2(3), "The Commissioner shall devote his full time to his responsibilities under this Act…"

Section 5, "The Minister may authorize the Commissioner at the expense of the government to retain the services of counsel and other experts…"

Section 12(1), "…the Commissioner has all the powers of Commissioners under Part V of *The Manitoba Evidence Act*."

Section 12(6), "…the Commissioner may utilize any resources and employ any persons the Commissioner deems necessary for the prompt and thorough investigation of a complaint."

[54] Although, for some unaccountable reason, the complaint was not received in the Commissioner's office until almost five months had elapsed from the time it was made, upon receiving it the Commissioner did act upon it promptly.

CONCLUSION

[55] I am satisfied and conclude:

(a) that the subject matter of the complaint herein falls within the scope of section 29 of *The Law Enforcement Review Act*;

(b) that there is sufficient evidence supporting the complaint to justify a public hearing;

(c) that the proper standard to be applied herein is the one of "correctness";

(d) that the Complainant has satisfied the burden of proof set out in section 13(4) of the Act;

(e) that the Commissioner erred in declining to take further action on the complaint.

ORDER

[56] I order that:

(a) the Commissioner refer the complaint for a hearing under section 13(3)(a) of the Act;

(b) no person shall cause the Respondents' names to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the complaint has been disposed of in accordance with *The Law Enforcement Review Act*.

Dated at Winnipeg, Manitoba, this 29th day of January, 2004.

K. B. Peters
Provincial Judge

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