

IN THE MATTER OF: **The Law Enforcement Review Act Complaint
#5845**

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

BETWEEN:

D. D.)	Mr. Sean Boyd
Complainant/Appellant)	For the Commissioner
)	
)	
- and -)	
)	
D/S. D. B.)	Mr. Paul McKenna
Respondent)	For the Respondent
)	
)	

LERNER, P.J.

REASONS FOR DECISION

[1] This matter arises as a review of a decision of the LERA Commissioner, pursuant to s. 13(2) of the **Law Enforcement Review Act**.

[2] The matter ultimately came on for hearing before me on September 27, 2004 at 1:00 p.m. in courtroom 409. Present at the hearing was counsel for the respondent, Mr. McKenna. The complainant did not appear for the hearing.

[3] A summary of the background to the September 27th hearing is relevant.

[4] The matter first appeared before me for hearing on October 9, 2003. At that time, the complainant sought an adjournment of the hearing as he had received the

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

Commissioner's brief two days before the hearing, leaving him, he submitted, insufficient time to review same. The matter was adjourned at the complainant's request for a new hearing date.

[5] Thereafter, repeated efforts to contact the complainant to reschedule the hearing date proved unsuccessful. The noted efforts included telephone messages, as well as letters sent by mail to a number of addresses at which it was believed Mr. D. might be residing, including the address from which the complaint was originally forwarded to the L.E.R.A. Commissioner. Several unsuccessful efforts were also made by the Sheriff's office to serve the complainant with a letter advising him of potential hearing dates, and requesting that he contact the court to arrange same.

[6] Ultimately, contact with the complainant was established by way of letter forwarded to him via his counsel (Mr. Phillip Cramer) on another matter. The noted letter, dated June 17, 2004 from Marilyn Baron, judicial assistant to the Provincial Court, was directed to the complainant at an address on Pacific Avenue in Selkirk, Manitoba. I note that the Pacific Avenue address was one at which various previous efforts had been made to contact Mr. D. The letter proposed a hearing date in this matter of October 4, 2004, and requested a response from the complainant by July 14, 2004. Inter alia, the June 17th letter also advised the complainant that "if you do not contact me within the specified period to arrange a new hearing date in this matter, your application to review the L.E.R.A. Commissioner's decision may be dismissed in your absence."

[7] In his only contact with the court with respect to this matter since the October 2003 adjournment, the complainant replied to the June 17th letter in a letter dated July 27, 2004. In that letter, the complainant acknowledged receipt of the letter of June 17th, advised that he was unavailable for a hearing on October 4, 2004, and sought an earlier hearing date. The noted reply included a return address that matched the address in the letter to the complainant of June 17, 2004; that is, the Pacific Avenue address.

[8] In a reply from Ms. Baron dated August 6, 2004, and addressed to the complainant at the noted Pacific Avenue address, alternative hearing dates of September 8th and 23rd 2004 were proposed. The complainant was asked to reply to the proposed dates by August 16th, 2004. Once again, the complainant was advised that "if you do not contact me within the specified period to arrange a new hearing date in this matter, your application to review the L.E.R.A. Commissioner's decision may be dismissed in your absence."

[9] On August 26th, 2004, in the absence of a reply from the complainant, a further letter was sent to the Pacific Avenue address by way of registered mail. The August 26th letter recapped the contents of the August 6th letter, and went on to advise the complainant that his appearance was required on September 3, 2004 at 1:00 p.m. in courtroom 409 at 408 York Avenue. The complainant was further advised that “The matter will not proceed to final hearing at that time. The purpose of the September 3, 2004 appearance is to confirm a hearing date, or should you fail to appear, for the Court to hear submissions on dismissal of your application.”

[10] The accused did not appear for the September 3rd hearing. Although counsel for the respondent made application for dismissal, the matter was adjourned to September 27, 2004 for further correspondence to be forwarded to the complainant.

[11] On September 7, 2004, a further letter was sent to the complainant at the Pacific Avenue address. The letter advised the complainant of the September 27th hearing date, and “that if you wish to make any submission with respect to your complainant/appeal you must attend at that time. If you do not appear, your complainant/appeal will be heard and decided in your absence.”

[12] The complainant did not appear for the September 27th hearing. Counsel for the respondent moved for dismissal of the complainant’s application without the necessity of a hearing on the merits.

[13] In deciding this matter, I have had the benefit of considering the procedure followed by other judges of this court in similar circumstances. In the matter of L.E.R.A. complaint No. 1740, dated August 6, 1993, the appeal was dismissed without hearing following the failure of the complainant to appear. In L.E.R.A. complaint no. 3144, decided October 26, 2000, Norton P.J. dismissed the application before him without a hearing in similar circumstances. Similarly, in L.E.R.A. complaint No. 3862, a decision of Howell J. dated April 5, 2001, the appeal was dismissed without the requirement of a hearing following the failure of the complainant/appellant to attend the hearing. I have also had the benefit of considering the decisions of Devine J. and Curtis J. in L.E.R.A. complaints Nos. 5920 and 5927 respectively, dismissing s. 13 (2) applications without a hearing on the merits following the non-appearance of the complainants on the dates set for hearing in those cases.

[14] Section 13(4) of the Law Enforcement Review Act states:

Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

[15] I find that in failing to appear for the hearing of this matter, and in failing thereby to identify any error on the part the Commissioner in reaching his decision, the accused has failed to discharge the onus upon him pursuant to s. 13 (4) of the **Law Enforcement Review Act** to demonstrate that the Commissioner erred in declining to take further action on the complaint herein. I therefore dismiss the application of the complainant to review the decision of the Commissioner in this matter.

[16] The order banning publication of the respondent's name is continued.

Sidney B. Lerner, P.J.