

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #5969

AND IN THE MATTER OF:

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

BETWEEN:

Mr. X.
Complainant

) Mr. Odaro Omonuwa
) For the Complainant
)
)

- and -

) Mr. Josh Weinstein
) For the Respondents
)

Cst. L. B.
Sgt. S. M.
Cst. C. P.
Respondents

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

) Hearing date: February 24th, 2005
) Decision date: July 11th, 2005

Note: These reasons are subject to a ban on publication of the Respondents' names pursuant to s. 13(4.1).

Lismer, P.J.

DECISION ON REVIEW

[1] Under s. 6 of **The Law Enforcement Review Act** (L.E.R.A.) every person who feels aggrieved by a disciplinary default committed by a member of a police department may file a complaint under the Act.

[2] The complaint by Mr. X arises out of an incident on November 12th, 2002, from about 11:30 p.m. Sunday - Mother's Day - in his apartment, Suite X - X Maryland Street, Winnipeg, Manitoba, to about 2:20 a.m. the following morning when he was arrested by the Winnipeg Police.

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

[3] On or about 11:30 p.m. the caretaker, Mr. V., attended at Mr. X.'s suite on a loud music complaint by tenants and asked him to turn his stereo down. The volume was toned down. However a short time later the caretaker attended at this suite again and warned Mr. X. that unless the volume was permanently turned down the police would be called.

[4] The police were called. The Winnipeg Police attended at the suite at 1:30 a.m. They tried to reason with him to turn his stereo down until 2:30 a.m. when he was arrested, charged with mischief and taken to the Public Safety Building.

[5] Apparently the caretaker and police were able to hear Mr. X.'s music outside the suite and down the hall. According to the police had the "complainant simply complied that would have been the end of the matter". The complainant, however, was insistent that he had the right to play his stereo in his suite at that time at the volume level he chose to do so.

[6] Mr. X. filed with the Commissioner a three page letter of complaint dated July 31st, 2002. In his complaint Mr. X. alleges that members of the Winnipeg Police Service abused their authority, arrested him without reasonable and probable grounds, used unnecessary violence or excessive force, used oppressive or abusive conduct or language and discriminated against him when dealing with him on May 12th, 2002.

[7] This complaint described the disciplinary default under s. 29(1)(a) of L.E.R.A which reads:

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 exercise of his duties:

- (a) abuse of authority, including
 - (i) making an arrest without reasonable or probable grounds;
 - (ii) using unnecessary violence or excessive force;
 - (iii) using oppressive or abusive conduct or language;
 - (iv) being discourteous or uncivil....

[8] Upon completion of the investigation into the complaint Commissioner George V. Wright reported his determination to the complainant by registered letter dated November 27th, 2002, that on a review of the investigation there is insufficient evidence supporting the complaint to justify a public hearing and that therefore pursuant to s. 13(1)(c) L.E.R.A. he must decline to take further action on this complaint.

In this four page letter the Commissioner summarizes fully and accurately the information on the investigation contained in the Commission file #5969.

[9] In an eight page letter dated January 5th, 2003 to the Commissioner Mr. X. requested a review under s. 13(2) of L.E.R.A.

[10] The Commissioner by letter to Mr. X. dated February 3rd, 2003, confirmed compliance with the review request under s. 13(3) of L.E.R.A. and suggested that in preparation for that review he may want to examine the Commissioner's file 5969 as well as retain counsel as under s. 13(4) the burden of proof that the Commissioner erred in declining to take further action on the complaint is on the complainant.

[11] Section 13(3) of L.E.R.A. provides that the provincial judge, who after hearing any submissions in support or in a position 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; or
- (b) to take such other action under the Act respecting the complaint as the provincial judge directs.

[12] The hearing was held February 24th, 2005 when submissions by counsel were made. The material filed, read and thoroughly considered included:

- 1) brief for L.E.R.A. Commissioner by Sean Boyd, Crown Counsel;
- 2) brief for the Respondents by Josh Weinstein;
- 3) brief for the Applicant/Complainant by Odaro Omonuwa;
- 4) supplemental brief for the Commission by Sean Boyd.

[13] Commission file #5969 has been filed with me placing before me all the information that appears to have been available to the Commissioner.

[14] The Commissioner's reporting letter of November 27th, 2002, in summarizing the information contained in file #5969 confirms that the Commissioner considered all the information available to him in arriving at his decision to decline to take further action on the complaint.

[15] The complainant submits that the Commissioner should have arranged for the interviews of Mr. X's neighboring tenants, most likely impacted by any loud music from his suite. However, while the complainant himself had neighborly access to these tenants he did not provide any "leads" including identities and anticipated information on the loud noise complaint. File #5969 makes no

reference to any information other than from the police and the caretaker about the loud noise.

The submission by Mr. X's counsel at the hearing did not assert that names and addresses and their anticipated evidence was ever brought to the attention of the Commissioner prior to the hearing.

[16] On February 3rd, 2003, the Commissioner invited the complainant to examine file #5969. Apparently the complainant and his counsel availed themselves of this opportunity. The complainant was accordingly informed prior to the hearing that other persons were not interviewed on the noise complaint.

[17] Should the Commissioner on his own initiative - as the complainant submits - have directed interviews with the neighbors most likely impacted by any of this loud music. In my view the Commissioner on the information in file #5969 was justified in accepting the information from the caretaker - responsible for the welfare of his tenants - and from the attending police officers, as sufficient.

[18] File #5969 is silent about any other source of information. The complainant and his counsel prior to the hearing accessed the contents of file #5969. There is nothing from the complainant at any time up to and including the hearing date of information about any individual with evidence contradicting that of the caretaker and the police. There was no motion at hearing for evidence to be adduced by any person that would suggest that the information on file 5969 failed to present a full and accurate statement of the pertinent evidence or that would entail a more than limited weighing of it.

[19] The only source of Mr. X.'s complaint is the complainant himself, without any corroboration.

[20] The Commissioner is obliged to consider with impartiality all the evidence. His decision letter of November 27, 2002, confirms to me that he did do so. In pages one to four he summarized the evidence of the investigation and articulated that on a review of this investigation there is insufficient evidence supporting the complaint to justify a public hearing. The articulated reasons must suffice to confirm his decision was not arbitrary but rational and based on evidence but not on a more than a limited weighing of that evidence. The Commissioner obviously considered the evidence at its face value. File #5969 discloses no contradictions or inconsistencies necessitating a substantial weighing of it. In effect the Commissioner was saying the evidence before him on file 5969 speaks for itself.

[21] The standard of review - with concurrence of counsel - that I will apply in determining whether the Commissioner erred is correctness, the most exacting of review standards, affording the least amount of deference to the Commissioner's decision. The Commissioner's decision on correctness is overturnable on the basis of simple error and is the standard most favorable to the complainant.

[22] In **Cooper v. Canada** (1996) 3 S.C.C., 854 at p. 891, Justice LaForest adopted the position that the Commission fulfils a screening analysis as a judge at a preliminary inquiry in these words:

When deciding whether a complaint should proceed to be inquired by a tribunal the Commission fulfils a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts the central component of the Commissioner's role then is that of assessing the sufficiency of the evidence before it....

[23] The review under s. 13(3) of L.E.R.A. is a judicial review usually limited to determining whether in law or principle the Commissioner erred in making his finding, in this case, according to the standard of correctness.

[24] Is the review akin to a hearing de novo or simply a review of the evidence considered by the Commissioner? Although usually a review of the evidence before the Commissioner, it can in limited and special circumstances be a hearing de novo. While Section 13(3) requires the reviewing judge to hear submissions on the Commissioner's determination, section 13(4) places the burden of proof on the complainant to show that the Commissioner erred.

Realistically this burden of proof cannot always be discharged by the submissions that the judge must hear. While the Commissioner must impartially and thoroughly consider all the evidence in the Commissioner file the complainant may have additional material contradicting or challenging that evidence, evidence that would necessitate a full weighing of all the evidence to arrive at the truth of it entailing an exercise beyond the limited scope of the Commission.

[25] In my opinion, even if the Commissioner's articulated reasons are scanty, the reviewing judge is in the same position as the Commissioner in determining whether the complaint should proceed to a public hearing, that is, the next stage. The record of the evidence supports the Commissioner's decision as correct, according to the standard of correctness.

I find the Commissioner's finding patently reasonable and rational.

[26] The complaint developed from a simple incident only because the complainant refused to turn his music down or keep his voice down on an early Monday morning in total disregard of advance directions and warnings by the caretaker and the police. Three police officers on a loud noise complaint from about 11:30 p.m. showed exemplary forbearance and patience with Mr. X. from 1:30 a.m. to 2:30 a.m. in trying to persuade him to turn down his stereo so as not to disturb the peace and quiet of the neighbouring tenants. Mr. X. refused to comply with what appeared to be reasonable directions and requests. The noise nuisance was abated only by his arrest at 1:22 a.m. and removal from the premises. This protracted obstinacy by Mr. X. for almost one hour in his interaction with three police officers at or near his residence is prima facie inconsistent with his allegation that the police used unreasonable violence or excessive force, or used oppressive conduct or language, or were discourteous and uncivil. In the totality of the circumstances this complaint strikes me as one arguably frivolous and vexatious undeserving of any further action.

ABUSE OF AUTHORITY AND ARREST WITHOUT REASONABLE AND PROBABLE GROUNDS

[27] The Commissioner at page four of his decision letter says:

The disposition of the charges as noted in the police records is that the noise by-law charge was stayed.

The Commissioner misstated the facts here in that it appears that the charge was a mischief charge alleging that on May 13th, 2002, Mr. X. did unlawfully interfere with the lawful use, enjoyment or operation of property of Mr. V., at X - X Maryland Street, contrary to s. 430 (3) of the **Criminal Code**. This charge was apparently stayed in favor of a peace bond under s. 810.

[28] In my view the evidence affirms that the police did have reasonable and probable grounds to arrest the complainant. Under s. 430(3) or (4) mischief in relation to property is a hybrid offence either indictable or punishable on summary conviction.

Section 495(1)(d)(iii) empowers arrest to prevent the continuation or repetition of the offence or the commission of another offence. Section 495(3) of the **Code** provides that notwithstanding subsection (2)(which limits the circumstances of a lawful arrest) a peace officer acting under subsection (1) is deemed to be acting lawfully in the execution of his duty in any proceeding under the **Criminal Code** or any other Act of Parliament. The arrest of the complainant was made after one hour of attempts by the police to persuade Mr. X. to lower his stereo and keep his

voice down, presumably to prevent the continuation or repetition of the offence, that is, his interference with the enjoyment of property by his neighbours and restore peace.

[29] Section 31 of the **Criminal Code** authorizes every peace officer to arrest a person committing a breach of peace.

[30] In the circumstances depicted in the record the police appeared to have reasonable and probable grounds to arrest the complainant.

[31] The provincial judge at a public hearing under s. 29, as distinct from a review under section 13 of the Commissioner's determination, must be satisfied on clear and convincing evidence of the commission of a discipline default.

[32] Is there a reasonable chance of success from clear and convincing evidence, that is, on a fair and reasonable preponderance of credible evidence?

[33] The issue to be decided is that based on the evidence uncovered what actually happened. The evidence will convince the public hearing judge that a certain event did or did not occur.

[34] The Commissioner is not to decide in any conclusive manner whether an event did or did not occur. The Commissioner is limited to looking at evidence to determine whether on the whole of the evidence it is sufficient to allow the provincial judge at a public hearing under section 29 to make the necessary conclusive finding.

[35] Upon reviewing the Commission file 5969, the briefs of counsel, and upon hearing the submissions made, the complainant did not satisfy me that the Commissioner erred in finding insufficient evidence to justify a public hearing and in therefore declining to take further action on the complaint.

[36] In conclusion I ask myself whether in the totality of the evidence and in all the circumstances would the decision not to take further steps on the complaint bring the administration of justice at this investigative stage into disrepute. In my opinion it would not, but proceeding to a public hearing likely would do so.

[37] This complaint therefore is accordingly concluded.

Theodore J. Lismer, P.J.