

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2005/307

AND IN THE MATTER OF:

An Application pursuant to s. 13 of *The Law Enforcement Review Act*, R.S.M. 1987, c.175

BETWEEN:

A.M.,
Applicant

) In Person,
) Self-represented
)

- and -

)

Constable D.R.
Constable G.P.
Constable J.M. and
Detective Sergeant R.L.,
Respondents

) Mr. Paul McKenna,
) for the Respondents
)

) Mr. Denis Guenette, Counsel for L.E.R.A.
)

) July 17, 2009
)

NOTE: These Reasons are subject to a ban on publication of the Respondents' names pursuant to s. 25 of *The Law Enforcement Review Act*.

PRESTON, 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*, in order to allow the investigation of complaints made by citizens about the way the police have treated them. This complaint regime recognizes a belief in the principle that police officers must always treat our citizens with respect, professionalism and evenhandedness. If a police officer is found to have abused this authority, the officer will be penalized.

[2] A.M. filed a written complaint dated October 10th, 2005. In his complaint, he outlined that he had been assaulted by a number of police officers on May 9th,

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

2005. He detailed an allegation of a callous and vicious assault on him by a number of police officers while he was detained in custody. I will now highlight salient details of his complaint to LERA.

THE COMPLAINT

[3] A.M. made a number of claims in his complaint. He claimed that he was arrested for stealing some food from a store in the early afternoon of May 9th, 2005. He said he was held for hours by store security staff and handed over to Winnipeg Police Service officers when the store was closing. The arresting officers took him to the Public Safety Building and placed him in an interview room. He was later escorted to the Identification Section and was printed and photographed and returned to the interview room. He alleged that approximately 15 minutes later he was attacked in the interview room by five or six police officers. The assault included one of the officers forcefully ramming some kind of basket over his head. He alleged that he was then punched in the head, face, ribs and abdomen by other officers. One of the officers kicked him numerous times in the testicles. Another officer came in the room with “some large jug with a pump top” and sprayed abrasive fluid on A.M.’s face and eyes, which he claimed burned him and made him choke.

[4] He said in his complaint that all officers left the room laughing. Later “the older officer” re-entered the interview room and tried to clean him up and told him, when he requested a doctor, that he was not seeing a doctor; he was going directly to lock-up. That officer left him lying on the floor. Other officers came in later and cuffed him and took him downstairs. During the elevator ride, “the older officer” said that if A.M. said anything about what happened, he would “get it twice as bad” when he got to the Remand Centre.

[5] A.M. alleged that the officers accompanying him to the squad car in the basement were pushing him along and telling him that they would slap some sense into him if he did not get moving. He claimed that the police threw him into the cruiser car, his head hit something and he was knocked unconscious.

[6] His next recall is waking up on the floor of the basement of the police station and being placed in an ambulance by paramedics. He was taken to the hospital, where he saw a doctor and told the doctor “what happened”. He was then taken to the local remand centre by two other officers.

[7] He was released from jail and was initially scared to leave his house, but he screwed up the courage to attend his own doctor’s office, because his testicles were

“blue and seriously swollen”. He told his own doctor what had happened to him. The doctor examined him on May 12th, 2005, three days after the alleged assault. His doctor noted injuries, including skin irritation to his chin and lower lip which might have been “dermatitis” and a tender, swollen and slightly bruised left scrotum.

[8] His complaint concluded with his wish to charge the officers.

[9] After A.M.’s complaint was filed at LERA, an investigation commenced.

LERA INVESTIGATION

[10] The Winnipeg Police Service was advised of the complaint. The police took the allegation very seriously. The Professional Standards Unit of the Winnipeg Police Service thoroughly investigated the complaint. They interviewed all the people who had contact with A.M. during the relevant times. These people all gave an account of their involvement. These witnesses’ version of events, both police and lay witnesses, differed, sometimes radically, from A.M.’s version of events.

[11] For instance, A.M. had claimed in his written complaint that he went out for a smoke with a security officer on a couple of occasions while they were both waiting for the Winnipeg Police Service to arrive. The security officer told the investigator that no such thing happened. Indeed, the security officer told the investigator that he kept A.M. in handcuffs until the police arrived, because of A.M.’s violent behaviour during his initial arrest and apprehension. The store security staff reported that they tried to apprehend A.M. after his theft. A.M. resisted arrest and was uncooperative. He fought to try to escape from them. In fact, one of the store security officers was injured. He hurt his arm and shoulder and had to miss some work as a result.

[12] The arresting officers told the investigators that when they arrived at the store at approximately 10:40 p.m. on May 9th, 2005, they were told by store security that A.M. had been fighting with them and was uncooperative. The store security officers reported that they had to physically restrain A.M. before he was apprehended and handcuffed. One of the security officers was injured while trying to apprehend A.M. The arresting officers interviewed said they had absolutely no problem with A.M.

[13] Each of the officers involved with processing A.M. at the police station denied assaulting A.M. and told the investigators that the allegations were a complete fabrication.

[14] The officers assigned to escort A.M. to remand custody were not involved in the processing of A.M. at the police station, but were simply tasked with transporting A.M. to jail. They told the investigators that while A.M. was being taken down to the basement area of the police station, he swayed, hunched over, appeared to lose consciousness, fell against one officer and fell down some stairs onto the concrete floor. The officer took A.M.'s handcuffs off and brought him to the police car, leaned him up against the vehicle and immediately called for an ambulance. The officers thought that A.M. was having a seizure. The ambulance attended to the police station and A.M. was taken to hospital. The escorting officers told the investigators that it was when A.M. regained consciousness in the ambulance that he seemed to conclude that they had assaulted him.

[15] A.M. made no specific complaint to the attending physician at the Health Sciences Centre about any injury to his testicles. Similarly, A.M. made no specific complaint about injury or irritation to his eyes. The medical records from the hospital make no mention of any such injuries, although the hospital staff performed a thorough physical examination of A.M. and documented their observations of A.M.'s injuries at that time.

DISMISSAL OF THE COMPLAINT

[16] 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. Moreover, the discretionary power given by statute to the LERA Commissioner to dismiss certain complaints recognizes and endorses the fact that the Commissioner possesses the expertise to assess the merit of a complaint made by a citizen against the police.

[17] In that regard, after a thorough investigation, the LERA Commissioner concluded that there was "insufficient evidence" supporting A.M.'s complaint to justify taking the matter to a public hearing. In a comprehensive letter dated January 3rd, 2008, the LERA Commissioner dismissed the complaint made by A.M.

JUDICIAL REVIEW OF THE DISMISSAL

[18] As is his right, A.M. has asked a provincial court judge to review the decision of the Commissioner. A hearing was held before me on June 17th, 2009. A.M. represented himself at his hearing and spoke on his own behalf. At the

hearing, A.M. made a series of comments that, in a sense, supplemented his original, written complaint:

- A.M. told me that he has never had a seizure, ever, and it is fraudulent to say that he had a seizure. No one in his family has had seizures. Nor, he said, is he “borderline diabetic” as was also noted in the hospital medical record.
- A.M. also claimed that the LERA Commissioner did not go into any depth into his medical history or the medical information that existed about him. A.M. told me that he still has a lump on his testes to this day. He made a point of seeing his own doctor as soon as he was released from jail and the doctor observed a swollen testicle. A.M. maintained that he does not suffer from any type of dermatitis and the dermatitis or redness to his face noted on the hospital medical record was a result of the police officer spraying his face. He claimed that due to his eye being sprayed by an officer with an abrasive substance, the eye still waters to this day.
- A.M. also claimed that on the evening in question, when he was at the hospital, there were several police officers present and they were “in cahoots” and they were “conspiring”.

[19] At the hearing before me, counsel for the police officers made submissions in response to each of these complaints.

[20] Counsel for the police pointed out that the officers called for an ambulance because they had watched A.M. collapse and fall while they were escorting him to the police cruiser. They assumed he had suffered a seizure and they so advised the emergency operator in their call for an ambulance.

[21] Counsel also pointed out that A.M. has never followed up on his own doctor’s referral to an eye doctor. A.M. was initially not able to follow that through, because he was in custody shortly thereafter. However, no complaint about injury to his eye seems to have been made by A.M. while in custody. Parenthetically, at the hearing before me, A.M. maintained that his eye still waters up. He claimed that he was not aware that he had to tell Professional Standards if he had followed up on his eye appointment.

[22] Furthermore, counsel pointed to the hospital records made on the night in question when A.M. was examined physically by hospital staff. The medical record contains a category “EENT”, which is a blank space for the medical examiner to outline any injury or medical issue with respect to A.M.’s ears, eyes,

nose or throat. There are no entries whatsoever. The category “EENT” is left blank. Indeed, to date there is no verification of any damage to A.M.’s eyes nor any dermatological issue other than the redness noted around his chin on the night in question. Counsel for the police pointed out that some or all of the documented injuries to A.M., being contusions and injuries to his face, neck, chest and left knee, could all have occurred during the struggle with the store security. On the other hand, all or some of the injuries might have been caused in his fall at the police station.

[23] Furthermore, counsel pointed out that the “mug shot”, the photograph of A.M.’s head and shoulders, taken at the jail after A.M. had visited the hospital and been lodged in custody, showed no obvious injuries, scars or bruises.

[24] The Emergency Nursing Assessment from the hospital records shows an entry of “borderline diabetes”. Counsel for the police correctly points out that this would have been told by A.M. to the nurse and that is why it was noted. A.M.’s response to this fact was to the effect that he told the nurse that diabetes ran in his family and did not pertain to him.

[25] Finally, counsel responded that A.M.’s allegation that he observed the police to “conspire” against him at the hospital is not something he alleged in his original complaint, but the police, in any event, have told the investigators that A.M. has fabricated the entire allegation that any of them assaulted him.

ANALYSIS

[26] I have carefully examined the LERA file and the Commissioner’s reasons for dismissing A.M.’s complaint. The Commissioner’s reasons are thorough and meticulous. He wrote a lengthy set of reasons which clearly outline all of his concerns about the veracity of the complaint.

[27] I will cite one striking example. As I have outlined, A.M. reported to LERA that the police at the station interview room stomped or kicked him in the testicles and groin area. He also complained that some sort of abrasive liquid was squirted onto this face that caused a burning to his face and injury to his eyes. The Commissioner clearly articulated to A.M. his concerns as follows:

In your complaint to this agency and to the Winnipeg Police Service PSU, you reported that you were stomped or kicked several times (more than 20) in the testicles and groin area. You also reported that some sort of liquid was squirted onto your face and that caused a burning to your face and injury to your eyes. When you were seen at the Health Sciences Centre a very short time after these

incidents are alleged to have occurred, you made no mention of them at all to the doctor who examined you. You did tell the doctor you had been assaulted by the police, however the only injuries reported and examined were the injuries to your face, chest and shoulder area and your knee. It would appear to me that if you were kicked or stomped on as indicated, this would also have been brought to the attention of the doctor. The doctor did examine your face and noted some minor abrasions, but did not record any type of injury that would be consistent with your being sprayed in the face with a caustic liquid. The doctor noted on his report that your pupils were examined and reacted equally to the light, so the doctor did look at your eyes as well. The doctor viewed you within a couple of hours of these events occurring and did not see any injury to your face or groin area, and no injury was reported to him. These injuries were not reported to anyone until you saw your doctor three days after this incident occurred.

In your complaint to this agency you reported that you were arrested without incident by the security officers at Safeway. You also told the PSU investigator that you did not get into any altercation with the security officers. The security officers provided information to the police that indicated you did try to run and they had to use physical force in order to restrain you. They placed handcuffs on you and they remained on until the police officers arrived and took custody of you.

While I cannot say with any definitive accuracy how you received the injuries you sustained to your face, chest and leg, it is possible some of the injuries could have been caused by the security officers when you were physically restrained by them. Also, some of the injuries could have occurred when you fell down the steps and land on the concrete floor as described by the officers. It is my view if you were punched and kicked in the manner you describe by at least five or six police officers, the injuries would have been more severe.

There are no independent witnesses who can verify or refute any of the information provided by you or the police. While you also allege improper language on the part of the officers, they deny this allegation and say it was you who was being verbally abusive towards them.

THE LAW

[28] *The Law Enforcement Review Act* codifies and governs the process here.

[29] Firstly, the Act defines how a police officer can commit what is referred to as a “disciplinary default”. In this case, the abuse of authority alleged by A.M. is an assault by police officers upon his person. An assault by any police officer upon any citizen, if established, is an obvious abuse of authority.

[30] Secondly, the Act specifies that the burden is on the complainant, A.M., to satisfy me that the Commissioner has made a mistake in declining to take any further action; in other words, in declining to order a hearing before a judge.

[31] The law in this area of judicial review has quite recently been clarified by the Supreme Court of Canada in the seminal *Dunsmuir* decision, [2008] S.C.J. No. 9. The decision governs me as to how this type of review must proceed. The *Dunsmuir* decision clarifies the test to be applied in this type of judicial review. The approach is contextual.

[32] Two standards of review apply. The first is “correctness”, the most demanding standard of review which can be imposed on the LERA Commissioner. This standard applies only if and when the Commissioner has committed an identifiable jurisdictional error. A jurisdictional error occurs if the Commissioner has failed to act within the parameters of his jurisdiction by either applying a wrong test or misapplying a right test when coming to a decision. Such is not the case here.

[33] The second standard of review is “reasonableness” and this is the standard I must apply. The Supreme Court of Canada in *Dunsmuir* succinctly defines reasonableness in the context of judicial review:

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 the law.

[34] In November of 2008, I recently ruled on this very issue in the decision of *B.J.P. v. Constable G.H., Constable B.Z. and Sergeant G.M., LERA Complaint #2005-186*, when I stated the following:

The question to be answered is this: did the Commissioner assess the evidence reasonably? In other words, have the Commissioner’s reasons been transparently, intelligently and rationally articulated?

...My function is to see if the Commissioner has made a reasonable assessment of the evidence. In other words, I must examine whether the Commissioner drew a rational conclusion, one that could reasonably be drawn on the facts of this case.

[35] It is also important for A.M. and the public to know that the LERA Commissioner does possess a limited but significant power to weigh the evidence gathered during the course of the LERA investigation. *The Law Enforcement Review Act* mandates the Commissioner to weigh all the evidence and to draw a

conclusion on its sufficiency. This includes the weighing of disputed evidence in order to determine its sufficiency. If that were not the case, each time there was a contradiction on any fact in issue, the matter would have to proceed to hearing before a provincial judge.

CONCLUSION

[36] 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 A.M.'s complaint. The Commissioner's reasons have been transparently, intelligently and rationally articulated. I am not prepared to interfere with the decision of the LERA Commissioner.

Timothy J. Preston, P.J.