

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2016/47

AND IN THE MATTER OF:

A Hearing pursuant to section 13(2) of *The Law Enforcement Review Act*, C.C.S.M. 1987, c. L75

THE PROVINCIAL COURT OF MANITOBA

BETWEEN:

R.E.,) Complainant,
)
)
- and -)
)
)
Cst. D.D. and Cst. D. P.) Paul McKenna
) For the Respondents
)
)
) Devin Johnston, Counsel for LERA
)
) Hearing date: January 15, 2018
) Decision date: February 20, 2018

Note: These reasons are subject to a ban on publication of the Respondents' names pursuant to section 13(4.1) of The Law Enforcement Review Act

KILLEEN, P.J.

[1] The applicant, R.E., filed a complaint with the Law Enforcement Review Agency on April 4, 2016, alleging an abuse of authority by two members of the

Winnipeg Police Service on March 31, 2016. At that point, the applicant was living with a roommate and the son of the roommate had also moved into the home. An argument with the roommate about moving out had taken place and the police were called.

[2] When the police arrived, the officers discussed things, at least with the roommate. The applicant says that he was told that he had to pay the roommate some money. The applicant disputed that he owed the roommate anything and took the position that any damage deposit was payable only at the end of the next month. One of the officers was in a room with him while the other officer was in another room with the roommate. He says that he demanded the badge numbers of the officers involved but the officer refused to tell him the numbers. He could not see the number of the officer with whom he was dealing as a piece of the officer's jacket was folded and blocked his view. He touched the officer to move the cloth so that he could see the number. The officer struck Mr. E. and then arrested him. Mr. E. was then charged with some criminal charges arising out of the event.

[3] Part of the complaint related to the actions of the officer in using excessive force or unnecessary violence as well as oppressive or abusive conduct. The Commissioner reviewed this aspect of the investigation in a lengthy letter and found that the evidence of an abuse of authority was insufficient to justify taking this matter to a public hearing. The letter set out the substance of the investigation and commented on the admitted use of force by the officer. The Commissioner found that the force was in response to what appeared to be an attempt by the applicant to strike the officer. That conclusion is consistent with the investigation and largely consistent with the position of the applicant.

[4] The other aspect of the complaint was in relation to the money issue between the applicant and roommate. The Commissioner decided that that dispute involved

rent and other expenses and that part of the complaint was outside the scope of the Law Enforcement Review Agency.

[5] The review by the Provincial Court is under section 13 of the *Law Enforcement Review Act*, C.C.S.M. c. L75. Section 13 states:

Commissioner not to act on certain complaints

13(1) Where the Commissioner is satisfied

- (a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;
- (b) that a complaint has been abandoned; or
- (c) that there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

Notice to complainant

13(1.1) A complainant may be informed of a decision not to take further action under subsection (1) by the Commissioner's sending a notice, by registered mail, to the complainant at the complainant's last address contained in the Commissioner's records.

Application to provincial judge

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.

Procedure on application

13(3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, 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; or
- (b) to take such other action under this Act respecting the complaint as the provincial judge directs.

Burden of proof on complainant

13(4) 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.

Ban on publication

13(4.1) Notwithstanding that all or part of a hearing under this section is public, the provincial judge hearing the matter shall, unless satisfied that such an order would be ineffectual,

- (a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;
- (b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and
- (c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act.

Decision of provincial judge final

13(5) The decision of the provincial judge on an application under subsection (2) is final and shall not be subject to appeal or review of any kind.

S.M. 1992, c. 45, s. 5.

[6] The initial complaint of Mr. E. was filed. The complaint dealt with the two aspects mentioned: the officer using excessive force in striking him and the officer intervening in the monetary dispute between the roommate and Mr. E.

[7] At the time of filing the original complaint, the position with respect to the money was:

The female officer said she believed her and not me. The officer said I had to give her \$300.00. He kept asking if I had \$300.00 and I said no. She'll get it at the end of the month. He said she wants it now. But she already took it.

Q. Did the officer say what would or could happen if you did not return the \$300.00 or give her the money?

A. No.

Q. What did you think the officer meant when he said you have to give the money to your roommate?

A. I interpreted she (roommate) wanted it now.

Q. So did you give them or her the money?

A. No, did she take it? Yes. She took \$150.00 and then took \$300.00 - another \$150.00.

Q. So did the officer do anything to you when you did not give her more money as you said he told you to do?

A. No.

[8] On this review, the issue was only about the dispute with the roommate. The submission of Mr. E was:

The reason I was so argumentative was because the Residential Tenancies Act states

That deposits do not have to be returned if no claim is against the tenant that I do not have to return until 14 days after the tenant moves out. Please read Res Act on return of deposit 32(1) After having previous roommates who have stolen thousands of dollars of personal property of mine, I decided to have deposits implemented to protect myself from theft of personal property with a deposit from roommates.

In the departure of D. and her son I am missing, an electric hand mixer, laundry soap and laundry softener (Fleecy), phone was damaged (had to get new one) was hidden for 2 weeks and finally found and doors on desk were locked, keys were thrown away.

After D. took 150.00 and giving notice to move out, she also took another 150.00 which was the rent money from her to cover her son's partial rent until he returned from Comox, BC. The deal was for both of us to cover his rent till he returned from BC. As shown rent was paid in full by me, and D. rent was also paid in full where D. and I would chip in each to cover her son's rent until he returned. She admits return of deposit to be returned after she moved out. To me this is theft and the police did nothing to return the rent money to me.

At the same time she wanted free rent for her son and her son agreed to pay rent for the time he was away. One story from her and another from her son (C.H.)

Also copy of my lease was stolen [sic] (Names changed to initials.)

[9] The material filed on the review did not relate to the use of force. Instead, the submission of Mr. E. and other exhibits filed by Mr. E all focused on the money issue.

[10] On the original complaint, it was not clear that there was a specific complaint about the police officers exceeding their authority by demanding a payment by Mr. E to the roommate. The actions described are consistent with officers explaining the position of the other party in an argument. They are consistent with trying to mediate a dispute, perhaps to avoid both further arguments and the need to arrest. On the review, the suggestion was that the officers overstepped and told Mr. E to do something that he was not required to do under legislation. It also appears that Mr. E is complaining that the officers did not act on his report of a theft by the roommate. That complaint of theft would have required resolution of a civil dispute. The issue would have been whether the roommate was entitled to the return of a damage deposit at that time, not at a later time.

[11] The Commissioner based his decision upon the complaint filed, the responses and the investigation. Nothing would have alerted him to the additional complaint about the money issue. The position of Mr. E was that there was nothing further done by the officers when he refused to return the money or agree to having it taken by the roommate.

[12] The Provincial Court is not entitled to substitute a decision for the decision of the Commissioner. The Court is only entitled to the material presented and is then required to judicially review the decision of the Commissioner.

[13] The Supreme Court of Canada considered the issue of judicial review in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management*, 2008 SCC 9. Pursuant to that

decision, a judge on a review of the decision of the Commissioner is not entitled to substitute their own decision on the matter, if the decision of the Commissioner was reasonable in light of the facts of the case and the applicable law.

[14] The issue of the force has apparently been abandoned, but if not, the decision of the Commissioner was reasonable. The money issue was dealt with on the basis that it exceeded the jurisdiction of the Commissioner. That was also a reasonable decision. Even if the officers had advanced a position to try to resolve a dispute, nothing that they did could be characterized as improper.

[15] I am satisfied that the decision of the Commissioner was reasonable and no further action is required.

“Original signed by:”
KILLEEN, P.J.