

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2017/103

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:

J.N.,)	Complainant,
)	
)	
- and -)	
)	
Insp. B. M., Cst. J. B.,)	
D/Sgt. N. K., Cst. P. R.,)	Paul McKenna
Sgt. B. H.,)	for the Respondents.
)	
)	Devin Johnston, Counsel for LERA
)	
)	Hearing date: November 8, 2017
)	Decision date: January 26, 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

ROLSTON, P.J.

[1] *The Law Enforcement Review Act (The Act)* governs complaints by citizens against the police. *The Act* creates a structure and process whereby an arm's

length, non-police agency has extensive powers to investigate and determine the extent to which, if at all, a police officer has acted in a manner that should attract disciplinary measures. Mr. N, who is a citizen, attended to the police station to deliver an envelope addressed to someone within the police department. He has made a complaint to the Law Enforcement Review Agency (LERA) and is seeking that officers be disciplined based upon his interaction with several police officers within the reception area whom he alleged breached *The Law Enforcement Review Act*. LERA issued a decision dismissing Mr. N's complaint and Mr. N has requested a review of that decision by the Provincial Court.

[2] Mr. N's written materials and submissions urged this Court to make a number of different orders. It is therefore necessary to outline what the court's role is as a court of review. It is further necessary to identify the issues raised by Mr. N relating to the review of the LERA decision. The Court will then examine which standard of review applies to each of the issues raised. Lastly, the Court will examine the issues raised by Mr. N to determine whether he has established that his complaint should be referred to the LERA commissioner for a hearing.

Jurisdiction of the Court in LERA Matters

[3] The Provincial Court has a limited role in LERA matters. This court does not sit in the role that it most often does on criminal matters. In other words, while the court in a criminal trial is responsible for hearing and determining cases at first instance, section 1(2) of *The Act* stipulates that the court is *not* sitting in this function in a LERA matter. Instead, the court is required to review the decision of the LERA commissioner. This is an important distinction as it provides the Court with a framework in which to consider the matter at issue.

[4] The Provincial Court's jurisdiction is set out in *The Law Enforcement Review Act*. This jurisdiction does *not* include unlimited power to direct, order, undertake or compel people or agencies. Particularly:

- The court cannot re-try or re-investigate the case. There is no jurisdiction, for example, to undertake a judicial inquiry as to the role LERA has played in police disciplinary matters since its inception. Such an undertaking could only be initiated by the legislature;
- The court cannot consider new evidence led by a party to this matter;
- The court cannot make sweeping determinations as to whether there is a “conspiracy by government officials to block disciplinary efforts against the police”;
- The court is not entitled to revisit a previous complaint made by the same complainant;
- The court is not entitled to add parties to the complaint; and
- The court is not entitled to initiate a criminal proceeding.

To do any of these things would be outside of the jurisdiction of this Court by virtue of the jurisdiction afforded to the Court by *The Law Enforcement Review Act*.

[5] What is the role of the Provincial Court in LERA matters? The short and seemingly simple answer is that the court is required to “review” the decision already made by the commissioner to determine whether an error was made in the decision making process.

[6] In order to understand what is meant by “review”, it is necessary to revisit the rationale for judicial review. This was comprehensively done by Chartier, PJC as he then was, in *Rev. R.P.M., v. Cst. S.C., Cst. D.W. The Law Enforcement Review Act Complaint #5643*.

[7] In summary, the existence of *The Act* and LERA, allows for a body with specialized knowledge and specific powers to attend to allegations of misconduct of police officers in a meaningful way. According to *The Act*, when a complaint is received in writing (as it was in the instant case), the LERA commissioner is required to investigate the complaint. Wide discretion is afforded to the commissioner in this process. The commissioner’s roles and powers include:

- Informally resolving complaints (section 15(1));
- Delaying investigation (section 12(1.1)) and extend time for filing (section 6(6));
- Retaining the assistance of additional resources or persons (section 12(6));
- Requiring additional information to be furnished by the complainant (section 10) or the police (section 12(2));
- Investigating facts (section 12(1.1) and 12(6));
- Exercising powers under *The Manitoba Evidence Act* (section 12(1.1));
- Ordering search and seizure (section 12(5)); and
- Dismissing complaints (section 13.1).

[8] The role of the LERA commissioner has been described as a “screening function” (see *R.P.M., v. Cst. S.C., Cst. D.W., supra*, and in principle, *Cooper v.*

Canada, [1996] 3 S.C.R. 854). The purpose of these roles and extensive powers is to allow LERA to screen complaints in a comprehensive manner, so as to determine whether the complaints warrant further action. Judge Garreck astutely (and in this Court's respectful view, correctly) observed that not all complaints justify a public hearing. This is why the commissioner has been given the discretion to screen and investigate each complaint and determine which ones should proceed further (see *The Law Enforcement Review Act* Complaint No. 2016/114, at page 9, line 25).

[9] In summary, LERA has a role that affords wide latitude to investigate and determine matters of police discipline. LERA has specialized knowledge in that regard, given that *The Act* specifically mandates police disciplinary matters as their one and only function. That being the case, the court's role in reviewing the decisions of LERA should be limited to ensuring the principles of justice have been followed, as opposed to inserting its own views in the place of the commissioner's.

The Standard of Review

[10] The extent to which the court reviews a decision of LERA is often referred to as the "standard of review". This refers to the level of scrutiny that this court is to apply to the Commissioner's decision. A reviewing court can look at a decision in one of two ways. On one hand, the court can ask itself, "Was the decision correct?", and on the other hand, the court can ask, "Was the decision reasonable?" (See *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9.) This choice is not an arbitrary one. In other words, which of these questions the court asks itself is dependent on the type of question raised in appeal. Generally speaking, a question of legal interpretation should be considered by asking, "Was that decision correct?" On the other hand, a question as to how the commissioner applied *The*

Act to the facts should be considered by asking, “Was that decision reasonable?” This standard reflects the fact that the commissioner has expansive powers under *The Act* and there are many different ways that any investigation could be conducted. The court is not to insert its own views as to whether the outcome should have been different, only whether the actions taken were reasonable in the circumstances (see *Dunsmuir, supra*, and *B.J.P. v. Cst. G.H., Cst., B.Z. and Sgt. G.H.*, LERA Complaint #2005-186).

[11] In order to determine the appropriate standard of review, the Court must look at each of the issues raised by Mr. N to determine which question should be asked.

Issue Raised on Appeal

[12] The difficulty in the present case is that while Mr. N has exercised his right to initiate a review, he has not articulated a precise basis on which he wishes the decision to be reviewed. I note in making this observation that Mr. N has asserted a number of areas that I have already mentioned that are outside of the jurisdiction of this Court to consider.

[13] After significant discussion at the hearing, several issues were identified and argued by Mr. N as areas for appeal.

[14] Firstly, Mr. N states that his complaints were not treated as separate complaints by the Commissioner and were dealt with at once in summary fashion. This is an issue with how *The Act* was applied to the facts. Accordingly, the Court must first ask, “Was the decision to investigate all of Mr. N’s letter of July 19, 2017, as one complaint reasonable?” However, the issue of whether all of the complaints were considered is different. If a complaint was ignored, the Court must ask, “Was the decision to ignore a complaint correct?” If a legitimate

complaint was simply ignored, the Commissioner did not fulfill his function and as such would be an issue of correctness. Both will be considered in this decision.

[15] Secondly, Mr. N contends that many of his complaints were defined as “out of scope” by the Commissioner. This terminology is another way of saying that a certain complaint is not within the jurisdiction of LERA because *The Act* does not give LERA the power to address the particular complaint. Whether something is within the jurisdiction or outside of the jurisdiction of LERA is a legal question. That being the case, the Court must ask itself, “Is the Commissioner’s decision that a complaint is “out of scope” a correct decision?” If the answer is that it is not a correct decision, the matter should be referred to the Commissioner for reconsideration.

[16] Thirdly, Mr. N suggests that the Commissioner conducted “no investigation” into his complaint. The extent to which the Commissioner exercises the many powers that have been articulated already is a question of how *The Act* was applied, therefore the appropriate question to be asked is, “Was the Commissioner’s decision reasonable?”

[17] Fourthly, Mr. N raised the fact that the Commissioner “just wiped out all of what happened, even though I framed these all as section 29 violations”. After some discussion, Mr. N submitted that what he meant by this complaint was that the Commissioner wrongly labelled some complaints as “out of scope” (which will be dealt with separately), or that he did not explain why certain complaints were deemed to be non-actionable on the basis of being “frivolous and/or vexatious”. This issue is a matter of the sufficiency of reasons given. The Court was directed to *Nurses’ Union v. Newfoundland and Labrador*, 2011 SCC 62 to discern that the Court must ask whether the reasons for decision were reasonable.

Was the Decision to Consider the Complaints Together Reasonable and were all Complaints Considered?

[18] In his letter of September 27, 2017, which initiated the Court's involvement, Mr. N wrote,

I note for you my complaint which is actually a number of separate complaints which [the Commissioner] has lumped together is id'ed as complaint 103 for the year 2017 to LERA by citizens of Manitoba made to LERA this year.

[19] It should be noted that pursuant to section 6(3) of *The Act*, the complaint made must be made in writing, signed by the complainant and setting out the particulars of the complaint. The only such complaint is contained in the letter of July 19, 2017, and therefore is the only complaint raised for this Court's consideration.

[20] The several complaints identified by Mr. N as being "lumped together as one complaint" were, in fact, "lumped together" by Mr. N in his letter to LERA. This is not surprising given that the number of complaints that he identified have emanated from one attendance at the police station on June 20, 2017. In other words, Mr. N's complaint is that several officers contravened *The Act* in short order on that date.

[21] LERA is responsible for investigating and determining instances of misconduct of police officers. How matters are investigated is wholly up to the commissioner under *The Act*. It is natural and reasonable for an investigation of several allegations of misconduct that arose out of the same time and place to be investigated together, as the issues that gave rise to the complaints would be common to one another. On the other hand, investigating many complaints separately that arise out of one incident would likely result in additional time and

resources being expended. There is nothing before the Court that suggests that the fact that the incident was investigated as one complaint is unreasonable.

[22] As stated, the letter of complaint describes several different complaints resulting from an incident that allegedly occurred on June 20, 2017. Mr. N specified certain actions or inactions that he viewed to be contrary to *The Act*. These were itemized by the Commissioner in his response dated July 25, 2017, in which each is numbered and identified from 1 to 8. The Commissioner then analysed the merits of them in dismissing the overall complaint pursuant to section 13 of *The Act*.

[23] The Court has reviewed Mr. N's letter of June 20, 2017. After comparing the complaints that were set out in that letter and the responses from the Commissioner, it is clear that each have been addressed. In other words, there is no complaint outlined in Mr. N's letter of June 20, 2017, that was not considered and responded to by the agency. Therefore, Mr. N's complaint was fully considered and therefore no jurisdictional error was made.

Was the Decision that Certain Parts of Mr. N's Complaint was "Out of Scope" Correct?

[24] The Commissioner advised Mr. N that LERA does "not investigate complaints made about the quality of the police service or investigations conducted by the police". He advised Mr. N that his complaints are therefore "outside the scope of section 29 of the *Law Enforcement Review Act*".

[25] *The Act* deals with police misconduct. LERA has authority to deal with infractions of section 29 of *The Act* which reads:

Discipline Code

29 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 execution 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,
 - (v) seeking improper pecuniary or personal advantage,
 - (vi) without authorization, serving or executing documents in a civil process, and
 - (vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of *The Human Rights Code*;
- (b) making a false statement, or destroying, concealing, or altering any official document or record;
- (c) improperly disclosing any information acquired as a member of the police service;
- (d) failing to exercise discretion or restraint in the use and care of firearms;
- (e) damaging property or failing to report the damage;
- (f) being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person or the security of that person's property;
- (g) violating the privacy of any person within the meaning of *The Privacy Act*;
- (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
- (i) assisting any person in committing a disciplinary default, or counselling or procuring another person to commit a disciplinary default.

[26] In court, Mr. N argued that his complaint should extend to the Chief of Police and to the Professional Standards Unit because no one has been responding to his complaints regarding the way he has been treated by the police. He suggested that this failure to address his concerns falls under section 29(b) and (h) of *The Act*. However, he could not adequately identify how the impugned conduct contravened “this *Act* or any regulation under this *Act*”, nor articulate how the

failure to deal with his complaint qualified as “making a false statement, or destroying, concealing, or altering any official document or record” in a satisfactory way.

[27] The Court agrees that the allegation of failure to address a complaint related to quality of service as opposed to misconduct. There is a difference between poor service (an employer’s issue) and police misconduct (a LERA issue). While it is true that a poor response to a member of the public may be unprofessional, not *every* instance of unprofessional behaviour amounts to police misconduct. LERA does not deal every allegation of poor service to the public because these are sometimes employment issues that are properly dealt with by the employer. On the other hand, the implications of a finding of guilt in the LERA process are far reaching to a police officer’s career. As stated, not every instance of lack of professionalism reaches the level in which it is actionable by LERA.

[28] It is clear that the Commissioner regarded the lack of response by the Chiefs of Police (both D.C. and D.S.), the Professional Standards Unit, N. K., A.S. and certain other officers on June 20, 2017, in the same manner. In other words, the non-responsiveness of those members, the alleged failure to deal with Mr. N when it was his turn in line and the unspecified uncivil responses from the “female in the pink cast” were regarded as issues regarding level of service. In the Court’s view, the characterization of these issues as being quality of service issues and therefore outside of the scope of LERA was correct, and therefore the Commissioner acted within his jurisdiction in coming to the same conclusion.

Was the Extent of the Investigation Inadequate?

[29] The Commissioner’s decision did not state what steps he took to investigate Mr. N’s complaint. However, as stated, he did identify much of Mr. N’s complaint

as “out of scope”. Since those matters were deemed out of scope, they were no longer within the Commissioner’s jurisdiction. In other words, there was nothing to investigate.

[30] It is evident from the Commissioner’s decision that Mr. N’s prior interactions with LERA provided context to the complaint before him. In the crucial paragraph in his decision, the Commissioner observed that Mr. N has come to “interpret every contact with police officers and supporting staff as confrontational”. The letter goes on to suggest that each action of whatever police officer Mr. N has encountered is “dissected and slotted into a potential default under section 29 of *The Act*”.

[31] These comments reflect a finding of credibility made against Mr. N. The law does allow for such findings to be made, in a limited sense, by a commissioner in this context. The commissioner is required to engage in a limited weighing of the evidence to fulfill his role (see: *C.B. v. Cst. C.E. and Cst. J.N.* LERA Complaint #2013-134). As was stated by Chapman, J in *B.L. v. P/Sgt. E.R., Cst. W.C. and Cst. J.B.*, LERA Complaint #2011-26:

...the commissioner has discretion to screen complaints and investigate them to determine if they warrant a public hearing. Not all complaints justify a public hearing so the government enacted a screening provision to allow the commissioner to do just that.

[32] The Court must determine whether the conclusion reached by LERA is one of a number of possible reasonable conclusions that could be reached. The response of the Commissioner reflects that there has been an ongoing series of complaints made by Mr. N. While one possibility is that Mr. N was treated in a discourteous manner, the Commissioner did not find that was the case. The Commissioner had the background of the circumstances of this event, as well as the history with Mr. N in the context of his role as commissioner for LERA. This

context clearly informed his view of the circumstances. However, at the same time his findings were one of a number of possible rational conclusions one can arrive at in consideration of the complaint made.

Sufficiency of Reasons

[33] Part of Mr. N's concerns on the present review is that the Commissioner "wiped out his complaints" that were properly framed as complaints under section 29 of *The Act*. In the letter of July 25, 2017, which set out the Commissioner's decision, the Commissioner wrote:

It appears that your frustration has now percolated to the point that you interpret every contact with police and supporting staff as confrontational. You then dissect every action and word, slotting them into a potential default under Section 29 of the Act. Such allegations only serve to detract from your credibility that may have been otherwise afforded your complaint(s).

[Examples given by the commissioner.]

Therefore, I am not prepared to take action on any of your alleged defaults noted in your correspondence of July 19, 2017 because they are out of scope and/or frivolous and/or vexatious.

The above passage is the part of the Commissioner's decision that purportedly "wipes out" his complaint.

[34] In light of the fact that Mr. N's argument as to sufficiency of reasons was ascertained from his oral arguments, the respondents were allowed to provide the court with the case of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, *supra*. Submissions were presented by counsel at the hearing and Mr. N was afforded an opportunity to respond in writing. He provided the court a letter and materials dated November 14, 2017, which has been considered by the Court in respect of this issue.

[35] When assessing the sufficiency of reasons, a reviewing court must be mindful of the fact that an administrative decision maker holds specialized

knowledge as to their area of expertise, which is often accompanied by specific language and concepts (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, *supra*). The present case offers one specific and relevant example. The Commissioner here describes Mr. N's complaint as "out of scope". This terminology is perhaps not common parlance in day-to-day life. As already stated, part of the function of LERA is to determine whether the conduct should be left to the discretion of the employer as a "level of service issue" or whether conduct amounts to police misconduct. Where conduct pertains to level of service issues, LERA does not have jurisdiction and therefore the complaint is considered "out of scope". The court, in review of the reasons given by the LERA Commissioner, is required to consider whether the reasons given were justified, transparent and intelligible. In considering whether the decision of the commissioner was reasonably justified, transparent and intelligible the court is required to read the entire decision in the context that it was given rather than parse out certain words or a specific sentence (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, *supra*). These principles must be applied to the decision of the Commissioner in this case.

[36] Was the Commissioner's decision justified, transparent and intelligible? In his letter of July 25, 2017, the Commissioner outlined the allegations put forth by Mr. N. He then distinguished between the role of LERA to deal with disciplinary conduct matters and the role of the police service to deal with the level of service issues. He reviewed the recent history of Mr. N's complaints for the purpose of identifying that such issues are regarded as level of service issues and not as LERA issues (this decision has already dealt with the merits of this position). The Commissioner then observed that Mr. N is, in the Commissioner's view,

attempting to use the wording of *The Act* to portray level of service issues as conduct issues. The Commissioner then dismissed Mr. N's complaints on the same basis as he had before. It is evident that the Commissioner considered the merits of the complaint and applied the provisions of *The Act* to the complaint to the extent that it applied. This Court finds that he was justified in doing so. Additionally, the Commissioner set out the basis on which he was making his decision. He set out the history of the matter and the extent of his credibility finding. In this respect, his decision is transparent. The letter of decision is cogent in that it sets out the reasons for his decision in a comprehensive and intelligible manner. Accordingly, the decision made has satisfied the requirement of the decision maker to provide reasons for his decision.

Additional Issues Raised

[37] It should be noted that Mr. N took issue with the fact that members of LERA were former police officers and therefore, according to Mr. N, LERA is not necessarily a "non-police agency". No evidence was presented to the Court as to the former employment of the LERA Commissioner or any other member of the agency. Even if some evidence was presented in that regard, there is nothing before the court that has been presented or that objectively emerges from the LERA file that suggests that the Commissioner's former employment has tainted the decision making process. The fact that the Commissioner is a former police officer (if that is the case) combined with Mr. N's disagreement with the decision made falls well short of cogent evidence that the decision maker was prejudiced in fulfilling his role.

Conclusion

[38] Mr. N has applied to the court pursuant to section 13(2) of *The Law Enforcement Review Act* to have the court review the decision of the LERA commissioner dated July 25, 2017, arising out of a complaint made about an incident alleged on June 20, 2017. The Commissioner elected to take no action in respect of Mr. N's complaint. The onus is on Mr. N to demonstrate that the conclusion reached was unreasonable. Based upon the reasons stated, pursuant to section 13(2) of *The Law Enforcement Review Act*, the application is dismissed.

“Original signed by:”

ROLSTON, P.J.