

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint # 2020/53

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:

M. M.,)	Jordan Smith for the Complainant,
)	
)	
- and -)	
)	
Constable N. H.,)	
)	Paul McKenna
)	for the Respondents.
)	
)	Devin Johnston, Counsel for LERA
)	
)	Hearing date: August 30, 2021
)	Decision date: October 12, 2021

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.

Introduction

[1] M.M.'s young children were the central witnesses in a sexual assault complaint against M.M.'s ex-husband that was being prosecuted in court, but was

ultimately dropped by the Crown. Around the same time, another young daughter made comments to M.M.'s mother giving different details of abuse about the same accused person. M.M. called the police to report these new details. The police declined to act on the new details on advice from the Crown.

[2] M.M. initiated a complaint to the Law Enforcement Review Agency (LERA), saying that the police refused to investigate her complaint. LERA dismissed M.M.'s complaint on the basis that her concerns raised an issue about the level of service she had received and were not an issue that raised disciplinary action under LERA's jurisdiction. M.M. has applied to this Court for a review of LERA's decision not to act on her complaint.

[3] M.M. frames the issue before the Court as a refusal by police to investigate, which amounts to an abuse of power by refusing to act. Counsel for Constable N.H. (N.H.) argues that the complaint was investigated and N.H. decided not to proceed on the complaint, but regardless, a failure to act is not a disciplinary matter under LERA's jurisdiction. Therefore, N.H. asks me to conclude that LERA's decision to dismiss M.M.'s claim was reasonable.

[4] I must determine the reasonableness of LERA's decision that it had no jurisdiction over the police's decision to take no action on M.M.'s complaint. In order to do so, the following questions have been raised by this application:

- Can a refusal to act be considered an abuse of power that falls within the jurisdiction of LERA?
- Did the police do anything to investigate the allegations?

The answer to these two questions form the premise on which LERA decided not to act, and therefore assist in determining the ultimate question which is whether the

LERA Commissioner's decision was reasonable. Prior to delving into these questions, it is necessary to set out the framework of LERA matters.

Framework of LERA matters

[5] It should be noted at the outset that Devin Johnston, counsel for LERA appeared by consent of the other parties. He did not advocate for either party and his role was limited to providing submissions as to how LERA functions.

[6] *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.

[7] 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, I am 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.

[8] 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.* (Complaint #2004/5643). 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, the LERA commissioner is required to investigate the complaint and wide discretion is afforded to the commissioner in this process to determine the outcome of the complaint.

[9] 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). 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 discretion to screen and investigate each complaint and determine which ones should proceed further (see Complaint #2016/114, at page 9, line 25). That being the case, the Provincial 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. In other words, my role in reviewing the decision is limited to deciding whether the LERA commissioner’s decision was reasonable.

[10] Therefore, my task is to focus on the reasonableness of the LERA decision to **not** intervene, as opposed to the decision of the police to not proceed with charges against the alleged abuser.

Can a refusal to act be considered an abuse of power that falls within the jurisdiction of LERA?

[11] M.M. maintains that failure to investigate a complaint amounts to dereliction of duty, and breaches section 29(a) of *The Act* which reads, in part:

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

Subsections 29(a) (i) – (vii) list various ways that an officer may abuse authority. M.M. argues one manner of abusing authority is for a police officer to refuse to investigate an allegation, which is an “omission”, even though “failing to investigate” is not specifically listed.

[12] Counsel for N.H. argues that failure to investigate is a service issue that falls outside of the scope of *The Act*. Counsel conceded that a failure to act may be a disciplinary issue where there is an active threat to the safety of a person in the community that an officer has a duty to act to protect. Counsel says the present case is very different, and argues that the police decision not to investigate a complaint falls under a level of service concern which should be reported to and dealt with by the chief of police.

[13] One particular case provided by N.H. supports her position in this matter. In *M.S. v. Cst. P.B., and Cst. G.D.* (Complaint #2004/172), the complaint alleged that officers failed to investigate security staff for allegations surrounding an incident. The Commissioner found that the officer dealt with the incident and had direct knowledge of it when the complainant later returned to try to make a statement. The officer felt that the complainant’s version was not accurate, and refused to take his formal statement. The commissioner concluded that the officer had not committed any defaults under *The Act* (see page 6 of that decision). Judge Joyal (as he then was) concluded at paragraph 23:

Insofar as the Commissioner seems to accept the police officer’s view (for the reasons given) that there was no reasonable basis for charges as against the

security staff at the St. Regis Hotel, the Commissioner's analysis and decision properly reaffirms the reality that complaints in respect of the utilization of police discretion, are usually cases more appropriately described as "service issues" rather than LERA issues. Moreover, the specifics of the Commissioner's decision recognize that the police officers in question acted reasonably and within their discretion in choosing to not begin a formal investigation or prosecution as against the security staff at the St. Regis Hotel.

Judge Joyal's comments seem to leave the question open as to whether a non-investigation is within the jurisdiction of LERA, but moves on to conclude that the Commissioner's decision to find the police actions were a service issue was reasonable in that case.

[14] I agree with Judge Joyal that, "complaints in respect of the utilization of police discretion are usually more appropriately described as "service issues". In my view, conversely, the non-action of police to investigate *could* be considered an abuse of power under *The Act*. In order to determine the issue, more fulsome submissions regarding whether the subsections of section 29 of *The Act* is exhaustive would be required. However, such submissions are not necessary to determine this matter, given my role as a reviewing judge, and in light of the answer to the next question posed by M.M.'s application.

Did the police do anything to investigate the allegations?

[15] M.M. argues that no investigation was done by the police in respect of M.M.'s complaint and that the Commissioner undertook no reasonable evaluation of this issue which was raised by the complaint.

[16] Shortly after the oral hearing in this matter, and by consent of all counsel, Devin Johnston, on behalf of LERA provided the audio recordings of two calls made by M.M. to the police outlining the complaint. I have listened to those recordings.

[17] It is important to account for the context surrounding these calls. M.M.'s other children had already been involved in allegations against their father who was the ex-spouse of M.M. Those allegations had been prosecuted to a certain point but the Crown had recently entered a stay of proceedings, dropping the charges against the accused. The new disclosure being reported by M.M. were allegations from the same period of time as the allegations that were dropped. That time period was when the daughter was two years old. At the time of the phone calls to the police, that daughter who made the statements was four. This background helps explain N.H.'s actions, and are details that were known to the Commissioner.

[18] It should be noted that N.H. took "detailed notes" regarding the new disclosure made by M.M.'s daughter. The term "statement" can apply to all forms of information gathered from a witness. Some statements are taken in a more formal manner than others. In this case, M.M. was interviewed and the details of what was said were taken by the officer to consider. In other words, the officer had a form of a statement as to the allegation.

[19] N.H. did take steps after receiving the information from M.M. She consulted with the Crown attorney assigned to the previous case involving the same accused. This was acknowledged in the decision by the Commissioner. Consultation with the Crown attorney is regular practice in Manitoba. It is true that this consultation typically happens after the investigation is complete. However, this scenario was unique in that there had just been ongoing charges involving the same family and same time period where the charges were dropped, and this was a very young complainant. Based upon that consultation with the Crown attorney and using the information provided to N.H. from M.M., a decision was made to not proceed with a charge. Again this was briefly summarized by the Commissioner.

[20] Typically, much more investigation would likely be done before an opinion is sought from a Crown attorney. Often, a Crown attorney may ask for further investigation to be done before offering an opinion on whether charges should be laid. Typical cases do not come with a dynamic history that this one did. In light of the background context known to N.H. and the Crown attorney, a decision was made to not proceed.

[21] While more investigation could have been done, N.H. decided to end the matter after consultation with the Crown attorney. In this respect, the present case is very much akin to the decision made by police in *M.S.* The course of action taken is, with respect, different from a scenario where no investigation is done at all.

Was LERA's decision that M.M.'s complaint was out of the scope of *The Act* reasonable?

[22] The important issue, in light of the role I have in this proceeding is whether the Commissioner considered whether an investigation had actually been undertaken. I agree with counsel for M.M. that if he had concluded that N.H. did fail to investigate, he should have turned his mind to whether section 29 of *The Act* allowed for abuse of process by omission of any investigation. I am satisfied that the Commissioner did address his mind to the issue of whether N.H. undertook an investigation.

[23] In dismissing M.M.'s complaint, the Commissioner found, "LERA does not investigate complaints made about the quality of the police service or *investigations conducted by the police*" (emphasis added). He concluded that the complaint did not fall within the scope of section 29 of *The Act*. Specifically, he concluded that the actions alleged by M.M. did not qualify as a disciplinary issue, but rather fell into the category of a complaint about the level of service provided by the officer in resolving the issue. While the Commissioner could have provided a more fulsome

explanation of his reasons, it is clear that he found that an investigation had been undertaken. I have already concluded that there was in fact an investigation undertaken by the police. It follows that the findings of the Commissioner were reasonable in the circumstances.

Conclusion

[24] 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.