

**IN THE MATTER OF:**

*The Law Enforcement Review Act*  
Complaint #2023-12

**AND IN THE MATTER OF:**

A hearing pursuant to section 13 of *The Law Enforcement Review Act*, C.C.S.M. c. L75

**BETWEEN**

**D.B.**

Applicant

) Self-Represented

)

)

)

- and -

)

)

**Constable D.V., Constable A.M. and  
Inspector K.D.**

) Paul McKenna,

) Counsel for the Respondents

Respondents

)

)

) Hearing dates:

) January 8 and March 28, 2024

) Decision: May 13, 2024

**Restriction on Publication:**

Pursuant to section 13(4.1) of *The Law Enforcement Review Act*, no person shall cause the Respondents' names to be published in a newspaper or other periodical publication, or broadcast on radio or television.

**A. Cellitti, P.J.****1) Restriction on Publication**

[1] At the early stages of the proceedings in connection with this matter, an order was made pursuant to section 13(4.1)(a) of *The Law Enforcement Review Act*, C.C.S.M. c. L75 (“the *Act*”), that no person shall cause the Respondents’ names to be published in a newspaper or other periodical publication, or broadcast on radio or television, until a judge has determined the merits of the application for a section 13 review.

**2) Introduction**

[2] This matter came before me for a review pursuant to section 13 of the *Act*.

[3] The subject of the review is a complaint that was made to the Law Enforcement Review Agency (“LERA”) by the Applicant. That complaint arose as a result of a Winnipeg Police Service (“WPS”) investigation into an allegation of domestic violence. The Applicant was charged with assault with a weapon where the named complainant is his wife.

[4] LERA received and investigated this complaint. Upon considering the available evidence, the LERA Commissioner declined to take further action on the complaint and provided reasons for that decision. Pursuant to section 13(1)(c) of the *Act*, the Commissioner found that there was insufficient evidence to support the complaint to justify a public hearing.

[5] The Applicant subsequently applied to have the Commissioner's decision reviewed by a Provincial Court Judge, as permitted by section 13(2) of the *Act*. The matter is now before me for a review of that decision.

### **3) The History of the Complaint**

[6] The Applicant and the complainant on the assault with weapon charge, Y.B., have been married for 15 years and have two young children together.

[7] On January 10, 2023, it is alleged that the Applicant and the complainant got into a verbal argument at their home in Winnipeg. In the course of that argument, it is alleged that things escalated, and that the Applicant grabbed a porcelain mug and struck the complainant above her right eye, causing the mug to break. It is alleged that the complainant sustained three minor scratches just above her right eye.

[8] The WPS was contacted. Members arrived on scene at 8:50 p.m. and commenced an investigation.

[9] Upon arriving at the residence, Cst. D.V. and Cst. A.M. spoke to the Applicant. The Applicant stated that he got into a verbal argument with his wife, that she broke a coffee cup and then held it to her neck. She then fled the scene. He maintained that there was no assault and no threats, and that she was possibly outside.

[10] Cst. D.V. and Cst. A.M. then located the complainant outside. She advised that she got into a verbal argument with the Applicant regarding the children's tutor

while they were in the master bedroom. The Applicant was drinking tea and the argument escalated to the point where he struck her in the head with the cup above her right eye. She then fled the house and called the police. A photograph was taken of the complainant's injuries. The complainant later provided a formal statement to the police. She did not require medical attention or treatment.

[11] At 10:11 p.m., as a result of the information received, the Applicant was placed under arrest for assault with a weapon. He was read his notice of arrest, his right to counsel and the police caution. The Applicant spoke with legal counsel between 10:35 and 10:42 p.m. The Applicant was later released on an undertaking.

[12] On January 18, 2023, the Applicant spoke with Insp. K.D. on the telephone. A variety of things were discussed at that time. During that conversation, the Applicant advised that he was in possession of evidence that may prove his innocence. Insp. K.D. later assigned officers to obtain a statement from the Applicant and to retrieve any evidence that he may want to provide.

[13] On January 28, 2023, Cst. W. and Cst. T. met with the Applicant. He provided the officers with a written statement and a USB drive. These two officers are not the subject of any complaint by the Applicant.

[14] On February 10, 2023, the Applicant filed a 15-page complaint with LERA.

[15] The essence of the Applicant's complaint can be summarized as follows:

- 1) it is clear that the Applicant denies assaulting his wife. His complaint makes it clear that he felt like he was being set up by his wife to make it look like he was abusing her;
- 2) he believes that the officers who were involved in the investigation are incompetent, as he believes that he was arrested without a proper investigation. The Applicant says that the officers who attended to the scene:
  - a) did not seize material evidence;
  - b) did not read him his rights;
  - c) took his belongings at the police station without putting them into a sealed bag;
  - d) did not have the complainant medically examined; and
  - e) did not take into account the complainant's psychiatric condition;
- 3) he believes that the officers who attended to the scene made insulting comments towards him and that this had an impact on his children, who were present at the time;
- 4) he believes that the officers who attended to the scene took his phone and destroyed all of his sound recordings;
- 5) his Canadian Permanent Resident card was missing from his wallet, the suggestion being that the card was taken by the Respondents; and

6) he is concerned about improving policing in future cases of accusations of domestic violence.

[16] The Applicant's complaint was investigated by a LERA Investigator. Statements were taken from the complainant Y.B., Cst. D.V., Cst. A.M., Insp. K.D. and J.G., a civilian witness to the Applicant's call to Insp. K.D.

[17] These statements were provided to the Commissioner along with other information that was generated as part of the original investigation in relation to the domestic violence allegation. This information included the arrest report, the narrative reports, police notes, the prisoner log sheet and the statement taken from Y.B.

[18] The Commissioner reviewed the Applicant's complaint with a view to the following possible disciplinary defaults:

- 1) that the Respondents had abused their authority by making an arrest without reasonable and probable grounds [s. 29(a)(i) of the *Act*];
- 2) that the Respondents had abused their authority by using oppressive or abusive conduct or language [s. 29(a)(iii) of the *Act*];
- 3) that the Respondents had abused their authority by being discourteous or uncivil [s. 29(a)(iv) of the *Act*]; and

- 4) that the Respondents had abused their authority by making false statements or destroying, concealing or altering an official document or record [s. 29(b) of the *Act*].

[19] After reviewing the available evidence before him, the Commissioner informed the Applicant via letter dated June 21, 2023 that he assessed that there was insufficient evidence to refer the matter to a public hearing and that, therefore, he was declining to take any further action on the complaint.

[20] It is from this decision that the Applicant seeks judicial review pursuant to section 13(2) of the *Act*.

#### **4) The Hearing Dates for this Review**

[21] The matter came before me for a half-day hearing on January 8, 2024. At that time, the Applicant attended, as did counsel for the Respondents. The Applicant had counsel assisting him at the early stages of this matter, but counsel was granted leave to withdraw on December 11, 2023. The Applicant proceeded with the review without counsel.

[22] The Applicant did not file a brief in advance of January 8, 2024, but counsel for the Respondents did. Prior to the hearing, I was also provided with a copy of the 83-page LERA file. The file contains correspondence, witness statements, reports and the Commissioner's 12-page written decision. Counsel for the Commissioner

was not present, nor was a brief filed on his behalf. This is understandable given that it is the Commissioner's decision that is the subject of this review.

[23] At that hearing, the Applicant made submissions. As it turns out, the Applicant's submissions took the majority of the half day that was scheduled. During the course of those submissions, the Applicant began to refer to evidence that was not previously provided to the LERA investigator or to the Commissioner, and therefore was not considered by the Commissioner when making his decision. This new evidence was described as being photographs, audio evidence and video evidence (collectively, the "new evidence"). At the hearing, a few of those photographs were provided to me to review. Counsel for the Respondent was provided with these photographs for the first time at the hearing and took the position that this evidence was not before the Commissioner when he made his decision and therefore ought not to be considered on the review. I returned the photographs to the Applicant and asked that he provide copies of those along with the audio and video evidence to counsel for the Respondents and counsel for the Commissioner, who was of course not present in the courtroom. The matter was adjourned for a further half-day hearing to be scheduled, at which time I asked that counsel for the LERA Commissioner attend to make submissions on the new evidence issue. To be clear, I was never provided with the audio or video evidence, nor was it ever played in open court.



[24] On March 28, 2024, the matter came back before me for a further half-day hearing. Counsel for the Respondents and counsel for the Commissioner both provided briefs in advance on the new evidence issue. The Applicant also provided a brief, which I received less than one hour before the commencement of the hearing.

[25] After hearing the brief submissions of counsel on the new evidence issue, I heard further submissions from the Applicant, who again spoke for the majority of the half-day hearing.

[26] At the conclusion of the hearing, I adjourned the matter *sine die* and reserved my decision, with an indication that counsel and the Applicant would be provided with a copy of my written decision in due course.

## **5) Issues**

[27] The issues that are presently before me are as follows:

- 1) Should new evidence that was not before the Commissioner be considered on this Section 13 review?
- 2) Did the Commissioner err in declining to take further action on the Applicant's complaint?

## **6) The New Evidence**

[28] Counsel for the Respondents and counsel for the Commissioner take the position that the new evidence ought not to be considered on this review.

[29] In order to put the new evidence issue into the proper context, I will first outline the applicable law as it relates to section 13 reviews.

**a) The role of a Provincial Court Judge on section 13 reviews**

[30] Upon receiving and investigating a complaint, the Commissioner has the discretion to refer that complaint to a section 17 public hearing on the merits of that complaint. However, section 13(1)(c) of the *Act* provides the Commissioner with a discretion to decline to take further action on a complaint if satisfied that there is insufficient evidence to support the complaint to justify a public hearing. If the Commissioner's decision is based on a reasonable assessment of the evidence and if that conclusion is one of the rational conclusions that could be arrived at, the Commissioner's determination is entitled to deference and it ought not to be disturbed:

*M.S. v. Cst. P.B. and Cst. G.D., LERA Complaint #2004-172* (Joyal J., June 21, 2006);

*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65;

*P.S. v. Cst. S.T., LERA Complaint #2020-82* (Choy J., January 28, 2022);

*C.B. v. Cst. D.D. and P/Sgt. C.W., LERA Complaint #2020-47* (Rolston J., February 28, 2022).

[31] The Commissioner is allowed to engage in a limited weighing of the evidence before him to determine if the evidence is insufficient to justify a public hearing:

*P.S. v. Cst. S.T., LERA Complaint #2020-82* (Choy J., January 28, 2022).

**b) What evidence should be considered on section 13 reviews?**

[32] A section 13(2) review is not a hearing *de novo*. Rather, it is a review of the decision of the Commissioner made pursuant to section 13(1), based on the information and evidence available to him at the time the decision was made. It is therefore not appropriate to consider new evidence that was not before the Commissioner. In arriving at this conclusion, I rely on two decisions of Provincial Court Judges:

*P.P. and P. Sgt. E.S. and Cst. B.S. and Cst. R.R., LERA Complaint #2017-105* (Heinrichs J., September 6, 2018);

*N.K. and Cst. F.D. and Cst. A.Z., LERA Complaint #2019-10* (Killeen J., July 31, 2020).

**c) Should the new evidence be admitted and considered on this section 13 review?**

[33] As I have already mentioned, other than reviewing a few photographs at the first half-day hearing, I have not reviewed the new evidence. The few photographs that were shown to me were returned to the Applicant on January 8, 2024.

[34] I recognize that the Applicant is self-represented. I provided him with a full opportunity to make submissions on whether I should admit and consider the new evidence in assessing this review. I have not received any satisfactory explanation as to why the Applicant did not provide this new evidence at the time of his initial complaint or at any time prior to the Commissioner making his decision.

[35] After considering the submissions made by the Applicant, I am not clear on what is contained in the photographs and on the audio and video that bears any relevance to the Applicant's criminal case, the investigation conducted by the police in relation to the criminal charge or to the Commissioner's decision. I recognize that those accused of criminal offences may have evidence at their disposal that can call into question the credibility and reliability of a particular Crown witness. Accused persons have no obligation to disclose such information to the police at any stage of the investigation, and, in fact, as a matter of strategy, they might decide to hold on to such information until trial and use it to impugn that witness' credibility and reliability. This hold back of information is not unusual, as police officers do not make credibility findings of witnesses, nor do they assess the reliability of witnesses based on the evidence that they collect. Prosecutors do, however, assess criminal cases based on the fruits of a police investigation. When criminal cases proceed to trial, the trier of fact will ultimately determine whether a conviction or convictions should result based on the evidence before them and based on the law that they are required to apply. This may require findings of credibility and reliability of witnesses that testify.

[36] On March 28, 2024, I asked the Applicant directly what difference the new evidence would have made to the police investigation and on whether it would have changed anything, including whether the police would not have charged him at all

with any offences arising out of the events of January 10, 2023. The answers provided to me by the Applicant in oral argument do not persuade me that there is any relevance to the new evidence. It appears to me that the Applicant's concerns are grounded in the fact that the police did a less than thorough investigation by not collecting every piece of available evidence that they should have, including taking photographs and collecting any audio or video evidence, regardless of whether that evidence bore any relevance or importance to the investigation.

[37] Based on the circumstances before me, I am not persuaded that this is a case where I should admit or consider the new evidence, nor have I been persuaded that new evidence that was not before the Commissioner should be considered on this section 13 review. It is simply not appropriate to do so when my role on a section 13 review is to determine the reasonableness of the Commissioner's decision, based on the information and evidence before him at the time that he made his decision. To be clear, I am of the view that the proper approach is to limit my decision on this review to the information and evidence that was before the Commissioner.

## **7) The Section 13 Review**

### **a) Analysis**

[38] Pursuant to section 13(4) of the *Act*, the Applicant bears the burden of proof to show that the Commissioner erred in his decision in declining to take further action on the Applicant's complaint.

[39] The hearing in relation to this complaint was the equivalent of one full day. The Applicant used most of that time to make his submissions. The Applicant was asked questions to explain and clarify his position. While the Applicant was not represented by counsel, it is clear that he spent a great deal of time preparing and considering his application for review. It is also clear that the Applicant was given every opportunity to make submissions in support of his position.

[40] The decision of the Commissioner in this case was 12 pages long. The decision was detailed, thoughtful and clear. It focussed on the available evidence on each of the possible disciplinary defaults relating to each of the specific complaints raised by the Applicant.

[41] I will address each of the possible disciplinary defaults and the evidence relating to each one.

i) The allegation of an abuse of authority by making an arrest without reasonable and probable grounds [s. 29(a)(i) of the Act]

[42] The complainant Y.B. provided a statement to police that alleges that the Applicant assaulted her by striking her with a cup, causing injuries to her face. These injuries were observed by Cst. D.V. and Cst. A.M. and they were also photographed.

[43] This information provided the officers with reasonable and probable grounds to arrest and charge the Applicant with assault with a weapon.

[44] The Applicant has raised a number of concerns regarding the quality of the investigation in relation to his criminal charge. It will be open to the Applicant to raise those concerns in the context of defending himself at his criminal trial when he argues his case on the merits. That may or may not be helpful to his defence. Deficiencies in how police officers conduct investigations do not automatically equate to police misconduct that is worthy of discipline.

[45] As well, the Applicant will have an opportunity to put forward his defence on the merits of the assault with weapon allegation at trial, at which time the Crown must prove the charge against him beyond a reasonable doubt in order for a conviction to result. This is a much higher standard than the reasonable and probable grounds required to arrest individuals accused of criminal offences.

[46] In my view, the Commissioner's decision to take no further action in relation to this aspect of the complaint was a reasonable one.

ii) The allegation of an abuse of authority by using oppressive or abusive conduct or language [s. 29(a)(iii) of the Act] and/or by being discourteous or uncivil [s. 29(a)(iv) of the Act]

[47] This relates to the Applicant's dealings with Cst. D.V. and Cst. A.M. at the scene, and Insp. K.D. by telephone.

[48] I am not persuaded that the Commissioner erred in not taking further action in relation to this aspect of the complaint. I am not persuaded that the conduct described by the Applicant, even if accepted, amounted to abuses of authority.

[49] In my view, the Commissioner's decision to take no further action in relation to this aspect of the complaint was also reasonable.

iii) The allegation of an abuse of authority by making false statements or destroying, concealing or altering an official document or record [s. 29(b) of the Act]

[50] After considering the available evidence, I am also not persuaded that the Commissioner erred in not taking further action in relation to this aspect of the complaint.

[51] The Commissioner considered the circumstances relating to the Applicant's Permanent Residence card. The Applicant accused Cst. D.V. and Cst. A.M. of stealing the card. The complainant later confirmed that the card was in fact at the residence. The Applicant in fact advised in his oral submissions that he was not pursuing this line of argument given that he later found the card.

[52] In terms of the suggestion that Cst. D.V. and Cst. A.M. failed to provide the Applicant with his rights, I take note of the fact that the Applicant did in fact have an opportunity to speak with legal counsel subsequent to his arrest on January 10, 2023, a fact that the Commissioner found to be a contradiction to the Applicant's allegation.



[53] I am also not persuaded that the other aspects of the Applicant's complaints under this category have any merit.

[54] In my view, the Commissioner's decision to take no further action in relation to this aspect of the complaint was also reasonable.

**b) Conclusion**

[55] In the end result, many of the arguments raised by the Applicant on this review are simply irrelevant to the issues before me.

[56] The Applicant has suggested that the circumstances of his case and the outcome of this review should lead to improved policing in future investigations involving allegations of domestic violence. With respect, this is not the direct purpose of LERA, the *Act* or this specific review. The *Act* exists to allow LERA to take complaints from citizens who allege that the police abused their authority or committed some other disciplinary default outlined in section 29 of the *Act*, and if ultimately one or more disciplinary defaults are found to have been committed, for penalties to be imposed. The *Act* provides a process for the Commissioner to screen complaints that should not proceed to a public hearing.

[57] In this case, in arriving at his decision, I am satisfied that the Commissioner engaged in a limited weighing of the evidence before him and determined that there was insufficient evidence of abuses of authority and therefore insufficient evidence to justify a public hearing. He declined to take any further action on the complaint.

He came to this conclusion without making any credibility assessments or findings. The Commissioner's decision falls within the range of possible outcomes that could reasonably be drawn on the facts of this case, and therefore meets the reasonableness standard.

**8) Conclusion**

[58] Accordingly, for the reasons that I have articulated, the application for review is dismissed.

**9) Continuation of Restriction on Publication**

[59] In light of my decision to dismiss this application, pursuant to section 13(4.1)(b) of the *Act*, the ban on publication referred to in paragraph 1 of this decision will remain in place indefinitely.

*Original signed by Judge Cellitti*

---

A. Cellitti, P.J.