

IN THE MATTER OF:

The Law Enforcement Review Act
Complaint #2023/15

AND IN THE MATTER OF:

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

BETWEEN

S.B.
Applicant

) Cory Tokar
) for the Applicant
)
)

– and –

)
)
)

Cst. M.S.
Respondent

) Paul McKenna
) Counsel for the Respondent
)

) Hearing Date: January 23, 2024
) Decision: May 24, 2024

Restriction on Publication:

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

FREDERICKSON, P.J.

[1] S.B.'s son, D.B., completed suicide on February 6, 2023. He was despondent following the breakdown of his relationship with his intimate partner, M.S. M.S. is a police officer with the Winnipeg Police Service (WPS). She was on duty at the time of D.B.'s death.

[2] S.B. filed a complaint with the Law Enforcement Review Agency (LERA). She alleged that M.S. committed a disciplinary default, by failing to take steps to alert others of D.B.'s intention to end his life. Commissioner Minor of LERA investigated S.B.'s complaint and determined that the evidence to justify a referral of the complaint to a public hearing on the merits was insufficient. Accordingly, he declined to take further action. S.B. has requested a review of Commissioner Minor's decision.

[3] Counsel for S.B. and M.S. filed written material, and I heard submissions on January 23, 2024. In addition, I have reviewed the LERA file provided to me.

[4] For the reasons more fully set out below, I find that the decision of Commissioner Minor was reasonable, and that procedural fairness was not breached.

Background

[5] D.B. and M.S. were in an intimate relationship. Their relationship broke down sometime around or after Christmas of 2022. D.B. moved out of their shared apartment and into his mother's home in the R.M. of Rosser.

[6] Based on the copies of text and email messages filed both with LERA and the Court, D.B. was struggling with the breakup. He sent several messages to M.S., expressing feelings that alternated between sadness and anger. M.S. responded to some, but not all, of the messages. In contrast to D.B.'s communications, her responses were generally brief.

[7] Between 5:45 a.m. and 5:52 a.m. on February 6, 2023, D.B. sent M.S. four email messages to her personal Gmail account. D.B.'s friend, J.W. and D.B.'s sister, S.G. were also recipients of these emails.

[8] In addition to the emails, D.B. texted M.S. on her personal phone between 5:42 a.m. and 5:46 a.m. He sent M.S. a photograph using the Snapchat app. M.S. responded to his text messages at 6:14 a.m. It was clear from her response that she had not read the full contents of the texts and emails.

[9] Approximately 40 minutes later, she texted D.B. to ask if he had gone to work. She did not receive a response. She reached out to his friend J.W., to better understand what she was reading in the text and email messages.

[10] J.W. called 911 after speaking with M.S. and reading the emails. Before police arrived, S.B. and her daughter T.B. found D.B. in a shed on their property. D.B. had hung himself.

LERA Application

[11] S.B. filed an application with LERA on March 6, 2023, in her role as Administrator of D.B.'s estate. Her application noted that M.S. was a police officer with the WPS, and she was on duty and communicating with D.B. on the morning of his death. The complaint statement asked why M.S. didn't notify someone to do a wellness check. The complaint statement further noted that the family is hoping for some answers as to what preventative steps were taken by M.S., as the family was questioning her actions regarding D.B.'s death.

[12] Putting the complaint in the language of *The Law Enforcement Review Act* (the LERA Act), the complaint was investigated as an alleged disciplinary default arising out of M.S.'s duties as a police officer, by being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person (s.29(f)).

Commissioner Minor's Decision

[13] On August 25, 2023, Commissioner Minor emailed S.B. to advise that the investigation into her complaint was completed, that the findings were being reviewed, and that she would receive a decision "shortly". On September 14, 2023, his written reasons for decision were sent to S.B. by registered mail.

[14] In the decision letter, Commissioner Minor reviewed the investigative steps that he took and the materials that he reviewed. He noted that while M.S. was on

duty during the time leading up to D.B.'s death, D.B. was located in a different jurisdiction or service area than that of the WPS.

[15] Commissioner Minor found that although M.S. was not physically present, it could be inferred that she was virtually present and had contact with D.B. However, he found that her attendance did not arise out of her police duties, but rather arose in relation to her personal relationship with D.B. He also found that there was insufficient information to determine that M.S. failed to assist D.B. While she did respond to his texts, the communication was disjointed through the form of asynchronous texting. Finally, he found that based on the analysis of the emails, texts and other circumstances, there was insufficient evidence to conclude that there was a clear danger to the safety of D.B.

[16] Based on these findings, he concluded that “the evidence required to establish an abuse of authority (sic) to justify a referral to this complaint to a public hearing is insufficient and as such, pursuant to Section 13(1)(c) of the Act, I must decline taking further action and the file is closed.”

Legislative Framework

[17] The LERA Act provides a mechanism for individuals who feel aggrieved by a disciplinary default committed by a member of a police force to make a complaint to the Commissioner. What constitutes a disciplinary default is set out at section 29.

[18] A review of LERA decisions reveals that disciplinary default complaints regarding an abuse of authority (see s.29(a)(i)-(vii)) are the most common allegation that the Court sees as part of a review of a Commissioner's decision. In this case, although Commissioner Minor referred to an "abuse of authority" in his decision letter, the disciplinary default complained of by S.B. pertains to M.S. failing to provide assistance, which is set out at s.29(f) of the LERA Act:

"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:
... (f) being present and failing to assist any person in the circumstances where there is a clear danger to the safety of that person or the security of that person's property;"

[19] The Commissioner is required to investigate complaints received. They must give a copy of the complaint to the respondent officer and their Chief of Police. They are granted powers under Part V of *The Manitoba Evidence Act*, which include powers such as the ability to summon or subpoena witnesses, receive evidence under oath, issue warrants and retain the services of experts.

[20] This investigative stage has been referred to as a screening mechanism. In performing the investigation, the Commissioner engages in a limited screening of the evidence (see for example, *B.J.P v. Cst. G.H., Cst. B.Z. and Sgt. G.M.*, LERA Complaint #2005-186 (November 14, 2008)).

[21] If, following the investigation, the Commissioner determines that any one of the circumstances set out in s. 13(1)(a)-(c) apply, they are required to not take any

further action. In this case, the Commissioner determined that s. 13(1)(c) applied. Accordingly, he declined to take further action.

[22] S.B. applied for a review of the Commissioner's decision. Section 13(4) of the LERA Act places the burden of proof on her.

Issues

[23] S.B. has identified two issues on review:

1. Was Commissioner Minor's decision reasonable?
2. Was there a breach of procedural fairness?

Was Commissioner Minor's Decision Reasonable?

[24] In articulating the concerns regarding the reasonableness of the decision, S.B. argued that the decision contained "a failure of rationality internal to the reasoning process, and is in some respect untenable in light of the relevant factual and legal constraints that bear on it." In support of this position, S.B. argued three points:

1. That the decision failed to consider or refer to the Code of Ethics that police officers are bound by.
2. In the alternative, that it was unreasonable to hold that a "clear danger" means imminent death.
3. In the further alternative, that the reasons provided were insufficient.

[25] What makes a decision reasonable?

[26] In reviewing Commissioner Minor’s decision, I do so from a standard of reasonableness. I must consider whether the decision bears the hallmarks of reasonableness: justification, transparency, and intelligibility (see *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65). In applying the standard of reasonableness, it is not my role to consider whether the decision was one I would have made, but rather to consider whether the decision was one that could have rationally been made.

[27] This articulation of reasonableness has been applied in several LERA review decisions, both pre-and post *Vavilov* (see *M.S and Cst. P.B. and Cst. G.D.*, LERA Complaint #2004/172; *P.S. and Cst. S.T.*, LERA Complaint #2020-82 as examples.)

1. Should the Code of Ethics have been considered or referred to?

[28] S.B. strenuously argued that because the decision did not consider or refer to the Code of Ethics, the decision is not reasonable.

[29] The Code of Ethics is created and established under *The Police Services Act*. That Act provides for the reporting of complaints regarding a breach of the Code of Ethics, and for remedies associated with such a breach. If S.B. has a complaint regarding S.B.’s adherence to the Code of Ethics, there is a process and remedy available under *The Police Services Act*.

[30] By contrast, the subject matter of complaints under the LERA Act are in relation to disciplinary defaults, which are defined in s.1(1) as an act or omission

referred to in section 29 of the Act. There are several different ways that a disciplinary default may arise as set out in section 29, including a contravention of “this Act” referring specifically to the LERA Act.

[31] While section 29 does incorporate other legislation as forming the basis for acts of disciplinary default – for example, at s.29(2)(vii) by reference to *The Human Rights Code*, and at s.29(g) by reference to *The Privacy Act* - there is no reference in section 29 to incorporating *The Police Services Act* or the Code of Ethics as an act of disciplinary default.

[32] Certain definitions set out in *The Police Services Act* are incorporated in some definitions in the LERA Act. The definitions incorporated do not include the Code of Ethics. Had the intent been to incorporate the Code of Ethics in the LERA Act, whether as a disciplinary default or as an overall consideration for the Commissioner, the legislative drafters would have expressly done so, just as they did in incorporating specific provisions of *The Human Rights Code* and *The Privacy Act* in section 29 of the LERA Act.

[33] As an administrative decision maker, the Commissioner’s statutory authority is constrained by what is set out in the LERA Act. Because the Code of Ethics is not established under the LERA Act, nor is it incorporated by reference, it would have been unreasonable for the Commissioner to consider it or refer to it in coming to his decision regarding a disciplinary default.

2. Does clear danger mean imminent death?

[34] S.B. argued that it was unreasonable to hold that clear danger meant imminent death.

[35] Section 29(f) of the LERA Act uses the words “clear danger” in referring to the safety of a person. The words “imminent death” do not appear in the legislation.

[36] In his decision, Commissioner Minor incorporates the legislative language of s.29(f):

“Finally, from an analysis of the email, text communications and other circumstances, there is not sufficient evidence to conclude that there was a clear danger to the safety of Mr. [B.]”.

[37] The decision letter set out the materials that were reviewed by the Commissioner as part of his investigation. Those materials did not state or suggest that a clear danger meant imminent death.

[38] Reading the decision letter as a whole, including the materials reviewed by the Commissioner, it does not appear that he considered that there must have been evidence of imminent death when coming to his conclusion regarding whether there was sufficient evidence of a clear danger to D.B.’s safety. From a reasonableness standpoint, the reasons on this point are rational, transparent, and justified.

3. Were the reasons insufficient?

[39] The final argument is about the sufficiency of the reasons. S.B. says they simply repeat statutory language, summarize arguments, and state a peremptory conclusion.

[39] The decision letter set out the Complaint Statement as written and included a detailed list and contents of the text messages and emails that were provided to the Commissioner as part of the Complaint Statement.

[40] It listed the questions posed by the Commissioner to S.B. and the responses she provided. It set out the investigative steps taken, including confirmation that M.S. is an officer with the WPS and was on duty at the time of the incident. It confirmed that there were no WPS reports in relation to the incident.

[41] The decision letter referred to the review taken of the RCMP file in relation to the incident, and noted additional electronic communications not included with S.B.'s Complaint Statement. It also contained a detailed recitation of the interviews conducted with Constable Warkentin of the R.C.M.P., J.W. and M.S.

[42] The analysis and conclusion section referred to the statutory and legal constraints on the Commissioner in making a determination. It identified the disciplinary default under investigation, and applied the information gathered as part of the investigation to the disciplinary default criteria.

[43] The reasons as written are not without error.

[44] There is a repeated characterization of the disciplinary default as an “abuse of authority”, which was not the correct reference. Despite this mischaracterization, it was clear that the correct disciplinary default clause was considered and applied.

[45] The analysis and conclusion section is brief. However, the reasons demonstrate that the Commissioner applied the information he received as part of the investigation to the applicable disciplinary default. His findings articulated why and how he came to the decisions he did.

[46] The decision addressed the preamble of section 29; namely whether M.S. was a member as that term is defined in the LERA Act and whether the acts or omissions arose out of the execution of her duties. It addressed the requirements of clause (g): whether M.S. was present and whether she failed to assist where there was clear danger to the safety of D.B.

[47] In finding that M.S. was present at the applicable time despite not being in the same physical location, he referred to the emails and text messages between M.S. and D.B. to establish that she was virtually present. Based on the content of the same email and text messages, he determined that M.S.’s presence was not in relation to her police duties, but rather in relation to the previous personal relationship between the two.

[48] In making the finding that M.S. was not in attendance in relation to her police duties, the Commissioner’s analysis should have ended. A disciplinary default only

arises as a result of acts or omissions arising out of the execution of police duties. In finding that M.S.'s presence was in her personal capacity, and not as an officer, no disciplinary default under the LERA Act arises.

[49] Despite making the finding that M.S. was not acting in relation to her police duties, the Commissioner went on to consider whether M.S. failed to assist D.B., and whether there was evidence that there was clear danger to D.B. On these aspects, he found that there was insufficient evidence to justify a public hearing.

[50] In concluding that M.S. was not present in her capacity as an officer, and in concluding that there was not sufficient evidence to justify a public hearing, clauses 13(1)(a) and (c) of the LERA Act were both engaged. If either of these clauses apply, the Commissioner is required to take no further action. The Commissioner made his decision based on s.13(1)(c).

[51] Despite the shortcomings in how the reasons were articulated, these shortcomings are not “sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para 100). It was still possible to understand why and how the Commissioner reached his decision. The decision reached was within the range of possible outcomes that could reasonably be drawn on the facts of the case. The reasons were sufficient.

Was There a Breach of Procedural Fairness?

[52] S.B. argued that procedural fairness was breached in several ways, including Commissioner Minor's failure to interview her in person; his failure to interview S.G.; and her inability to make any further requests or replies. In addition, she argued that there was a breach of procedural fairness when Commissioner Minor failed to exercise all the powers available to him under *The Manitoba Evidence Act*.

[53] The doctrine of procedural fairness has been a fundamental component of Canadian administrative law for more than four decades. Procedural fairness applies to every public authority making an administrative decision that is not of a legislative nature and which affects the rights, privileges, or interests of an individual, subject to clear statutory language or necessary implication to the contrary (see *R. v. Mavi*, 2011 SCC 30).

[54] In *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653, the Court observed at paragraph 45 that "...the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."

[55] The specific context includes the particular statute in question and the rights affected. In *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, five factors were identified by the Court as relevant in determining what is required by the common law duty of fairness in a given set of circumstances.

[56] In recognizing that these factors were non-exhaustive, the Court noted that “[T]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.” (*Baker* at para 28, underlining added)

[57] The purpose and scope of LERA and the role and powers of the Commissioner were extensively canvassed by Chartier J. (as he then was) in *Rev. R.P.M. and Cst. S.C., Cst. D.W.*, LERA Complaint #5643. In that decision, he noted that the LERA Act gives the Commissioner wide investigative powers and interpretive powers.

[58] In reaching a decision pursuant to s.13(1), the Commissioner must be “satisfied” that certain circumstances exist before declining to take further action. This function was described by Chartier J. as fulfilling a screening analysis, based on a limited assessment of credibility and disputed evidence, without any definitive findings of fact or law. The Commissioner does not decide if the complaint is made out, nor does he weigh the information as in a judicial proceeding.

[59] The LERA Act does not prescribe steps that the Commissioner must take in conducting his investigation. One notable exception is the statutory requirement that a copy of the complaint be provided to the respondent officer and their Chief of

Police. The ability of M.S. and her lawyer to review and respond to the complaint prior to being interviewed is consistent with the legislative requirement.

[60] While Commissioners are granted extensive powers under *The Manitoba Evidence Act*, they are not obliged to use any or all of them as part of their investigative process.

[61] In this investigation, Commissioner Minor did not exercise any powers under *The Manitoba Evidence Act*. Although S.B. takes exception to this, he was not required to do so.

[62] Commissioner Minor told S.B. that he would interview her. He asked her questions by email, and received her responses, but he did not follow up with an in-person interview. He did conduct phone interviews with Constable Warkentin, J.W. and an in-person interview and M.S.

[63] Given his comment that he would interview S.B., he ought to have advised her of his decision to not conduct an in-person interview process. To be clear, while he was not obligated to conduct an in-person interview, he did create an expectation that he would do so. It was unfair for him to backtrack on this representation.

[64] Despite this unfairness, the decision reached by Commissioner Minor included the views expressed by S.B. along with those expressed by the other parties. The decision letter set out in detail the steps he took, the people he interviewed and

the evidence he received. His decision did not evidence any areas of confusion regarding the positions of the parties.

[65] I further note that Commissioner Minor told S.B. that his investigation was complete, and that the findings were being reviewed. Although S.B. was not under a positive duty or obligation, she did not seek clarification as to why she was not interviewed between the time she was notified that the investigation was complete (on August 25, 2023) and the decision letter being sent to her (on September 14, 2023).

[66] S.B. argues that the Commissioner did not interview her daughter, S.G., who was one of the recipients of the texts and emails from D.B. on the morning of his death. In response to this argument, I once again note the broad discretion that the Commissioner has investigating complaints. He had copies of the correspondence that S.G. was copied on, and he interviewed two of the three recipients. There was no duty on him to interview S.G.

[67] Regarding the concern expressed that S.B. was not able to rebut or respond to some of the factors relied upon in coming to the decision, I agree with the following from Associate Chief Judge Guy (as he then was) in *O.O. v. Constable R.M. and Constable R.C.*, LERA Complaint #2012/189:

“Finally, the most strenuously argued issue was that of why the officer’s response was not forwarded to the complainant so he might have commented upon it and point out what he thought were inaccuracies. There apparently is no procedure for doing so and I do accept that there must be some finality to the investigation. If

there is some confusion with respect to either side's position, the Commissioner has the ability to clarify the situation. This is consistent with the purpose of the Act, the screening function of the Commissioner and the role of the Court's review."

[68] The decision of Commissioner Minor is undoubtedly very personal to S.B. and her family. While it is of great personal importance, the decision does not affect S.B.'s rights, interests, or privileges. It is simply a conclusion that her complaint about M.S.'s actions or perceived lack thereof do not merit a public hearing in relation to her role as a police officer.

[69] The statutory context of the LERA Act, the role and powers of the Commissioner, and the nature of the decision made by the Commissioner, suggest a lower level of procedural fairness than that for which would be required at a full public hearing into the complaint. In the circumstances, there was no breach of procedural fairness.

Conclusion

[70] As the Commissioner's reasons were reasonable, with no breach of procedural fairness, S.B.'s application is dismissed. Pursuant to s.13(4.1)(b) of the LERA Act, the ban on publication of the Respondent's name shall remain in place.

Original signed by Judge Frederickson
FREDERICKSON, P.J.