In the Matter of an Arbitration

between

The Durham Regional Police Services Board

and

The Durham Regional Police Association

(Grievance of P.C. Peter Watts)

Before:Richard L. Jackson, Sole Arbitrator

Appearances:

For the Association:

Martin Doane	Counsel
P. C. Peter Watts	Grievor

For the Board:

Bruce Stewart	Counsel
Paul Broad	Counsel
Staff Inspector Fazacherly	Director of Legal Services
Katie Richardson	Assistant to Director

A hearing was held in this matter in Oshawa on October 24, 2000.

Introduction and Arguments

This is the grievance of Constable Peter Watts, of the Durham Regional Police Service. Constable Watts grieves that, over a period from August of 1995 to the present, he has been subjected to "a concerted program of harassment, intimidation and discriminatory and arbitrary treatment, with the intention of forcing him to resign from the Force." The employer takes the position that this grievance is not arbitrable, and the hearing on October 24, 2000, was devoted to the exploration of that issue. Thus, with the consent of the parties, this is an interim award dealing only with the question of my jurisdiction to hear and determine this case.

Perhaps the best way of summarizing the background to this case is to set out parts of two documents. The first is the letter of the Durham Regional Police Association to Inspector Jim Lockwood, dated May 17, 1999.

> May 17, 1999
>
> Inspector Jim Lockwood
> Oshawa Community Policing
> Durham Regional Police Service
> 77 Centre Street North
> Oshawa, ON
> L1G 4B7
>
> Dear Inspector Lockwood:
>
> ***RE: GRIEVANCE OFPETER WATTS***
>
> Pursuant to Step 1 of the Complaint and Grievance Procedure, Appendix "B" of the Collective Agreement, I hereby issue the following grievance on behalf of police constable Peter Watts:
>
> The Durham Regional Police service (the "Force") has, on a continuous basis, since in or around August 1995, subjected P.C. Watts to a concerted program of

harassment, intimidation and discriminatory and arbitrary treatment, with the intention of forcing him to resign from the Force.

This conduct includes the following:

1. Disclosing embarrassing details to the press relating to an incident at the Oshawa A & P in which P. C. Watts was involved, contrary to the Force's policy;

2. Disseminating to members of the Force damaging misinformation about P.C. Watts, in particular, that P.C. Watts had been caught stealing in numerous places around the province;

3. Assigning P.C. Watts to restricted duties between August 1995 and August 1996;

4. Assigning P.C. Watts, while forbidden from carrying a firearm, to hazardous duties where a firearm was necessary in order for him to protect himself;

5. Instructing members of the Force not to associate with P.C. Watts;

6. Informing P.C. Watts that he would never have any chance of advancement with the Force;

7. Refusing to provide P.C. Watts with acting Sergeant duties;

8. Refusing to grant P.C. Watts' requests for overtime;

9. Subjecting P.C. Watts to shift changes with no notification or input from him, contrary to the Force's ordinary practice;

10. Permitting members of the Force to obtain access to P.C. Watts' employment file, contrary to the Force's ordinary practice;

11. Failing to properly maintain P.C. Watts' employment file;

12. Refusing to allow P.C. Watts to attend educational courses;

13. Failing to provide P.C. Watts with performance reviews for three years despite the requirement for an annual review; and

14. Failing to forward relevant and personal document from P.C. Watts' superior officers to P.C. Watts, contrary to the Force's ordinary practice.

The second document is a more recent statement of the grievance that accompanied the Association's request to the Solicitor General for arbitration**:**

4. GENERAL DESCRIPTION OF MATTERS STILL IN DISPUTE AND RELIEF SOUGHT

> Since August 1995, the employer has continuously subjected P.C. Watts to a concerted program of harassment, intimidation and discriminatory and arbitrary treatment, with the intention of forcing him to resign. These actions constitute discipline without reasonable cause under Article 5 of the Uniform Collective Agreement. Further, the Board has exercised its Article 5 powers capriciously, arbitrarily and in bad faith. The Association seeks a declaration that P.C. Watts was disciplined without reasonable cause and/or exercised its powers capriciously, arbitrarily and in bad faith. Further, the Association seeks compensation for P.C. Watts for all missed Acting Sergeant duties, overtime and sick time taken caused by the Force's treatment of P.C. Watts. Finally, the Association seeks an Order to have the Force expurgate P.C. Watts' employment file and to compensate him for mental distress.

Other evidence submitted at the hearing reveals that the incident at the A & P mentioned under Part 1 of the list of allegations (in the letter of May 17, 1999) resulted in both a criminal trial and internal discipline. In oral argument at the hearing, two other specific allegations were added to the original list: refusal to allow the grievor "paid duties" and requiring (in effect) the grievor to use up large amounts of sick-bank time.

From the beginning, the Police Services Board has taken the position that this matter was not covered by the collective agreement and, thus, was not subject to arbitration. The case was referred to mediation, pursuant to s. 123 of the *Police Services Act*, but the conciliator was unable to help the parties reach a settlement. The parties could not agree on an arbitrator, with the result that I was appointed by the Solicitor General, the Honourable David Tsubouchi, on October 3, 2000, as arbitrator. A hearing was held at Oshawa on October 24, 2000.

The grievance, as set out *supra*, outlines the essential structure of the grievor's case, but there were several other components that I will set out very briefly in this introduction. They will be dealt with in more depth as required later in the award. First, on behalf of Constable Watts, Mr. Doane argued that s. 124 (2) of the *Police Services Act* (set out below) means that his client has an absolute right to go through the arbitration process, including the full evidentiary and argument phases on the merits; I may ultimately find that I don't have jurisdiction, but I cannot do that until I have heard the merits. Not surprisingly, Mr. Stewart, on behalf of the Police Services Board, disagreed, arguing that I have jurisdiction only if the grievor's complaint arises out of the collective agreement (which, in his view, it does not) and that I may decide that question without first hearing the merits.

> **124 (1)** If the conciliation officer reports that the dispute cannot be resolved by conciliation, either party may give the Solicitor General and the other party a written notice referring the dispute to arbitration.
>
> **(2)** The procedure provided by subsection (1) is available in addition to any grievance or arbitration procedure provided by the agreement…

Second, Mr. Doane argued that the Board's actions amount to unjust discipline and that I can and should deal with that under Article 5 of the collective agreement in place between the parties.

> **Article 5 – Reservation of Administrative Rights**
>
> The Association acknowledges that it is the exclusive function of the Board to: Maintain order and discipline, promote, demote or discipline members, provided that a claim of discriminatory promotion or demotion, or a claim that a member has been discharged or disciplined without reasonable cause, may be subject to an inquiry in accordance with the Police Services Act and amendments thereto, supervise and administer the affairs of the Durham Regional Police Service.

Mr. Stewart takes the position that Article 5 means, not that allegations of unjust dismissal are grievable under it but, rather, that they should be dealt with under s. 25 of the *Police Services Act*.

Finally, Mr. Doane argued on behalf of his client that the Board's actions were unreasonable and, indeed, capricious, arbitrary, discriminatory, and in bad faith and that that fact gives me grounds to take jurisdiction. Mr. Stewart countered that there was no general duty of reasonableness under this collective agreement.

Award

It is important to note, right at the outset, that Constable Watts's grievance exists at two levels. At what might be described as the "micro" level, there are some sixteen specific allegations – fourteen listed in the Association's letter and two more raised orally at the hearing – for example, assigning Constable Watts to restricted duties and instructing other members of the Force not to associate with him. However, the allegations that are the *real* grievance in this situation – and that might be described as the "macro" level – are the conclusions which flow out of the micro – namely, that he was disciplined

unjustly, harassed, discriminated against, and subjected to attempted constructive dismissal. The analysis that follows will deal with the grievance at these two levels, and to the relationship between each of the macro- and micro-level allegations and the collective agreement.

As noted, counsel for Constable Watts advanced several lines of argument. First, he argued that s. 124 (2) of the Police Services Act makes it necessary for me to at least hear the merits; that is, while I can decide that I lack jurisdiction to deal with this case, I cannot do that until after the evidence and arguments are concluded.

With respect, I disagree with this argument. S. 124 (2) provides the parties an absolute right to refer a grievance to arbitration, notwithstanding the fact that the time limits in the grievance procedure might have been violated, the steps of the procedure might not have been properly exhausted, or the grievance provision may not even provide for arbitration. On the other hand, it does not change the definition of "grievance" – which is, as set out in s. 123 (1), "a difference between the parties concerning an agreement…or if it is alleged that an agreement…has been violated". It might be noted, parenthetically, that in the context of labour relations – and s. 124 is found in Part VIII ("Labour Relations") of the *Police Services Act* – this is the common, everyday definition of "grievance": an allegation by one party that the other party has violated the collective agreement. In other words, what the parties have an absolute right to refer to arbitration under s. 124 (2) is a dispute that arises out of the collective agreement. But that is the very issue that this preliminary award is dealing with: Is P.C. Watts's situation one of which it can be said that – assuming that all of his allegations are true – it arises out of the collective agreement? If it is, then s. 124 (2) clearly gives the Association an absolute right to have it arbitrated, notwithstanding the grievance procedure in their collective agreement. If it is not, then s. 124 (2) gives the Association no such right. For reasons that will become clear, I can find nothing in the law, the logic, or the facts of the situation that prevents an arbitrator from making such a determination prior to hearing the merits.

A second line of argument advanced by Mr. Doane was that, taken as a whole, the acts of which P.C. Watts complains can be considered to be discipline and that he is therefore entitled under Article 5 of the Durham collective agreement to arbitration. (This is the macro-level grievance.) Mr. Doane argued that Article 5, if read in a

purposive way and in proper context, can be interpreted to mean that discipline – aside from that under Part V of the *Police Services* Act or the Code of Conduct – is arbitrable under it. Mr. Stewart, on the other hand, argued that Article 5 should be interpreted on the plain meaning of its words – namely, as referring certain types of allegations to inquiries in accordance with the *Police Services Act*, but not the collective agreement.

While I agree that the process of grievance arbitration *could* be embraced in the term "inquiry", I cannot conclude that that is the case in this situation. An arbitration can be construed as an inquiry only with the very broadest interpretation of the term "arbitration" – so broad, in fact, as to stretch it almost out of recognizable form. On the other hand, the facts make such a stretch both unnecessary and inappropriate. The *Police Services Act* mentions the word "inquiry" frequently – not under "Labour Relations" in Part VIII, but under Part II, which deals with the Ontario Civilian Commission on Police Services (OCCOPS). Specifically, s. 22(1) (e) and s. 25 (1) as follows.

> **22.** (1) The Commission's powers and duties include,
>
> > (e) conducting inquiries, on its own motion, in respect of a complaint or complaints made about the policies or services provided by a police force or about the conduct of a police officer and the disposition of such complaint or complaints by a chief or police or board;
>
> **25.** (1) The Commission may, at the Solicitor General's request, at a municipal council's request, at a board's request or of its own motion, investigate, inquire into and report on,
>
> > (a) the conduct or the performance of duties of a police officer, a municipal chief of police, an auxiliary member of a police force, a municipal law enforcement officer or a member of a board;
> >
> > (b) the administration of a municipal police force….

The fundamental job of the grievance arbitrator is to determine a dispute arising out of a collective agreement; that is the universal (in the sense of the labour-relations universe) definition, and it is clearly one to which these two parties have subscribed. Appendix C of the collective agreement sets out the Complaint and Grievance Procedure, and Step 5 of that procedure reads, in part, as follows.

> The Association, may after receipt of the written decisions of the Board [at Step 4], require that the complaint and/or grievance be submitted to a single Arbitrator by notifying the Board in writing of its desire to do so. If the Board and the

> Association do not, within ten (10) days, agree upon a single arbitrator, the appointment of a single arbitrator shall be made by the Solicitor General of Ontario upon request of either party. The decision of the arbitrator is final and binding upon the parties. An arbitrator set up under Step 5 of the Grievance Procedure shall not have power to add to, subtract from, alter, modify or amend any part of this Agreement, nor otherwise make any decision inconsistent with this Agreement. Either party to this Agreement may lodge a grievance in writing with the other party on any difference between the parties concerning the interpretation, application or administration of this Agreement, including any question as to whether a matter is arbitrable….

These words, and in particular, the "final and binding" nature of the arbitrator's award, the parties' admonition to the arbitrator not to venture beyond the boundaries of their collective agreement when arbitrating, and the last sentence quoted, strongly suggest that these two parties intended the term "arbitration" to have its normal, universal (in the labour-relations sense) definition – namely, the binding decision by a neutral third party of a dispute arising out of the interpretation, application or administration of the collective agreement.

The *Police Services Act* also appears to square with this definition. S. 123 (1) reads as follows:

> **123.** (1) The Solicitor General shall appoint a conciliation officer, at a party's request, if a difference arises between the parties…if it is alleged that an agreement…has been violated.

S. 124 (1) reads as follows:

> **124.** (1) If the conciliation officer reports that the dispute cannot be resolved by conciliation, either party may give the Solicitor General and the other party a written notice referring the dispute to arbitration.

And s. 128 is as follows:

> **128** awards made under this Part bind the board and the members of the police force.

So the parties' own words in the Agreement, as well as the *Police Services Act*, appear to fit squarely with the common and universal labour-relations definition of rights arbitration as the binding settlement of a dispute arising out of the application, etc., of a collective agreement by a neutral third party.

Perhaps the most fundamental tenet of collective-agreement construction is that the wording of the agreement should be taken to reflect the parties' intent. When that

principle is applied to the wording of Article 5, together with the canon of construction that words and phrases should be given their everyday, normal meaning (unless otherwise indicated somewhere in the agreement), there can be little doubt that the phrase "inquiry in accordance with the Police Services Act and amendments thereto" does not mean an arbitration pursuant to s. 124, but an inquiry pursuant to s. 25 or, possibly, s. 22.

The meanings of the terms "inquiry" and "arbitration" are distinctively and fundamentally dissimilar. "Inquiry", for example, is defined by *Webster's Ninth New Collegiate Dictionary* to be "a request for information" or "a systematic investigation into a matter of public interest", and by the *Oxford English Reference Dictionary* as "an investigation, esp. an official one". On the other hand, "arbitration" is defined by these two references as, respectively, "the hearing and determination of a case in controversy by a person chosen by the parties or appointed under statutory authority" and "the settlement of a dispute by an arbitrator" (where "arbitrator" is defined to be "a person appointed to settle a dispute"). Placed in the context of the Ontario police culture and, in particular, the Ontario *Police Services Act*, these terms have exactly the same meanings as set out above: an "inquiry" is a systematic investigation, while an "arbitration" is the settlement of a dispute between a police association and its police services board by a third-party neutral, consensually appointed by those parties or, as in this case, appointed by the Minister.

Given that there is little or no argument here for ambiguity – and, therefore, no grounds on which to conclude that the parties' intent was (or might have been) actually something other than what Article 5 states – this part of Article 5 cannot be taken to mean something other than it says: that "a claim that a member has been… disciplined without reasonable cause, may be subject to an inquiry in accordance with the Police Services Act…." Hence, I conclude that, if the Board's alleged actions do amount to discipline, they are not arbitrable under Article 5.

But what of the grievor's argument that management's actions towards him since 1995 amount to an unreasonable and, indeed, capricious, arbitrary, bad-faith, and discriminatory exercise of management rights under the collective agreement, and that that fact should support an interpretation of Article 5 broad enough to allow these actions to be referred to arbitration pursuant to Appendix C of the collective agreement?

Let me deal first with the higher of these two standards – the proposition that management has an implied duty to act fairly in exercising its rights under a collective agreement; this is useful because an analysis of this argument requires a close examination of the relationship between the grievor's allegations and the provisions of the collective agreement, and that relationship is central to this case.

In reviewing the case law dealing with the issue of the duty of fairness, I have concluded that, with the qualifications set forth below, there is no general duty of management fairness that arbitrators can read into a collective agreement. However, there are obvious limits to this proposition. First, of course, where a collective agreement contains an explicit fairness requirement, the employer obviously must act fairly. Second, where to act unfairly under the management-rights clause would be to undermine the other party's vital substantive rights under the agreement in a completely different area, there is a requirement of fairness (as found, for example, in *Council of Printing Industries and Printing Pressmen (149 D.L.R.(3d) 53* and *Re Metropolitan Metropolitan Toronto and Canadian Union of Public Employees, Local* 43, 69 D.L.R. (4th), 268, the so-called "lights-and-sirens case"). Third, where there is a specific contract term that allows management to make decisions in a certain area pertinent to its employees, there is an expectation that it will do so fairly (see *Bridge Steel Inc. v. U.S.W.A., Local* 3345, [1990], 98 A.R. 9).

In the instant case, neither Article 5 nor any other provision of the Durham Police collective agreement contains any explicit requirement that the Board will exercise its managerial prerogatives fairly.

If we look at the specific elements of Constable Watts's allegations, there is only a very tenuous linkage with the collective agreement for some of them, and no linkage at all with most. It is instructive, for example, to take each of the particulars in turn and to see if they relate to the collective agreement. The following allegations deal with subject matter that is not mentioned or covered in any way under the collective agreement: (1) disclosing embarrassing information to the press, (2) disseminating damaging information to members of the force, (3) assigning him to restricted duties, (4) instructing other members of the force not to associate with the grievor, (5) allowing other members of the force access to the grievor's file, (6) telling him that he would never progress in

rank, (7) failing to properly maintain the grievor's file, (8) refusing the grievor educational opportunities, (9) failing to provide the grievor with regular performance appraisals, and (10) failing to forward relevant documents to the grievor from his superiors.

The following specific allegations *do* (or at least may) deal, directly or indirectly, with subjects that *are* referred to in the collective agreement: assigning the grievor to hazardous duties without a firearm (Article 31), refusing the grievor Acting Sergeant duties (Article 30), refusing overtime ((Article 19), changing his shifts without notice (Article 14 or 31), not allowing the grievor his share of paid duties (Article 20), forcing the grievor to use inordinate quantities of sick leave and therefore, in effect, reducing his pension entitlement (Article 21).

Thus, of the sixteen particular allegations, ten deal with subject matter that is not mentioned in the collective agreement, while six touch on matters that are referred to in some way. However, even if all of the grievor's allegations were proven on the evidence, it is far from clear that the Board would be found to have violated any provisions of the agreement. For example, Article 30 provides, amongst other things, for special acting pay for those who serve in an acting capacity in a higher rank; it in no way provides any guarantee of acting duty. Similarly, Article 19 provides a regime for the compensation of those who perform overtime duties, but there is no provision or even suggestion that there is an entitlement to such duties. In the same vein, while Article 14 sets out the parameters of the Durham police working-hours regime and Article 31.04 requires the posting of shift schedules, nothing in either of these provisions prohibits a change of shifts for one particular officer. The one specific allegation where the grievor is perhaps most likely to have a solid foothold on a possible violation of a collective-agreement provision – depending on the facts as proven – is that he was assigned to hazardous duties without a firearm; Articles 31.01 and 31.02 both require "armed officers" in all patrol cars between 7:00 p.m. and 3:00 a.m. and on prisoner-escort duty respectively, and the Letter of Understanding attached to the collective agreement as Appendix D requires that Young Offenders be transferred to or from court by one armed officer and another person who must be a Court Security Officer, Cadet, or Officer-in-Training.

In summary, then, of the sixteen specific allegations, only six relate to matters that are covered by the collective agreement and, for most of those six, the relationship is a very tenuous one where, even if proven, the allegations very probably would not be found to constitute breaches of the agreement. (The hazardous-duty-without-a-weapon allegation is a concern in this respect, but I will deal with that particular ground later in this award.)

Thus, the linkage between the Force's alleged actions and the collective agreement is a very weak and tenuous one: even if proved on the facts, the Force's actions would not be found to have undermined or subverted the Association's rights under the agreement in the sense that the union members' vital seniority rights were found to have been affected as in the *Council of Printing Industries* case or the just-cause-for-discipline protection affected as in the "lights and sirens" case. In summary, then, it is my determination that there is no overall duty of fairness placed on the Board that arises out of the Durham police collective agreement in this particular fact situation.

Let me now deal with the lower standard – Mr. Doane's argument that management's treatment of Constable Watts was not only unreasonable, but that it was capricious, in bad faith, and arbitrary, and that that should allow – and, indeed, require – me to take jurisdiction. This argument, in a general sense, rests on the proposition that, whatever one may think about management's duty of fairness, there must at least be a fundamental assumption that, in actions under a collective agreement, an employer will not act in a capricious, discriminatory or bad-faith manner. This proposition is rooted in the intent of the parties, which is the touchstone that must both guide and discipline the arbitrator: the parties, in working out the terms of their collective agreement over time, cannot possibly have contemplated that one of them would act on its rights in a capricious, discriminatory, or arbitrary procedure, for to do so would be to undermine the very foundation of the agreement. Thus, the argument goes, when an arbitrator has determined that an employer has acted in this way, so as to undermine, subvert or otherwise affect the collective agreement, he or she can take jurisdiction. This is one way of looking at the situation. However, let me now turn to another dimension of the overall argument and, at the end of the award, return to this argument of jurisdiction on the basis of management's capricious, arbitrary, and bad-faith actions.

At the hearing there was a good deal of discussion of the Weber decision of the Supreme Court of Canada (*Weber v. Ontario Hydro,* 125 D.L.R. (4th), 583) and what, if anything, it might mean for this situation. Mr. Doane, on behalf of Constable Watts, argued that *Weber* stands for the proposition that the decision problem as to what body should adjudicate a dispute should not be approached fundamentally as a legal issue but, rather, by looking at what he referred to as "the factual matrix" of the case – which I took to mean to be the essence of the fact situation. He then argued that the factual matrix of this case is such that it belongs under the collective agreement and therefore should be resolved through collective-agreement arbitration. I agree with the thrust of this approach– that the case should be examined in terms of its essential factual character in light of the ambit of the collective agreement – but not with its result when applied in this particular situation.

McLachlin J, writing for the majority in *Weber*, put the problem of determining the appropriate forum for the determination of a dispute between employer and employee this way:

> …the task of the judge or arbitrator ….centers on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> In considering the dispute, the decision-maker must attempt to define its "essential character"…. The fact that the parties are employer and employee may not be determinative….In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less then obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

Applying these tests to the case at hand and looking at both the essential nature of the dispute and the scope of the collective agreement, my conclusion is that Constable Watts's grievance should not, and cannot, be arbitrated under the Durham collective agreement. Quite simply, this grievance is much more of the *police* world than of the *police labour-relations* world.

In applying the reasoning of the majority in *Weber* to the facts of this case, it is particularly important to look at the ambit of the collective agreement; to do this properly, it is important to note that labour relations in Ontario policing is very different

from that of the civilian world, at least for sworn (i.e. uniformed) personnel. Not only may police in this province not strike over collective-bargaining impasses, join civilian trade unions, or engage in political activities, but a significant portion of the police officer's activity and existence on the job is hived off from coverage in police collective agreements and rendered non-grievable and non-arbitrable. Under the Ontario *Police Services Act*, the governing statute for police labour relations in this province, collective agreements are restricted in terms of their coverage by s. 126, which is set out below.

> **126.** Agreements and awards made under this Part do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3), Part V (except as provided in subsection 64(17) and Part VII of this Act and by the regulations.

Sections 42 to 49 set out the duties and powers of police officers, the criteria for hiring, probationary periods, oaths, a ban on political activities, accommodation of disabled officers, and restrictions on secondary activities of officers. Section 50 allows for legal indemnification for officers, but 50(3) forbids the paying of indemnification to any officer who is found guilty of a criminal offence. Part V deals with complaints (including complaints against police officers by members of the public or by the Chief of Police) and sets out the process by which such complaints are to be disposed of in terms of hearing procedure, various levels of discipline up to and including dismissal, and finally, appeals. Part VII deals with special investigations. Finally, Regulation 123/98, pursuant to the *Police Services Act*, includes the Code of Conduct, under which most police discipline takes place.

Clearly, then, while a typical civilian collective agreement regulates virtually all of the aspects of the employer-employee relationship and employee treatment and activity on the job, that is simply not true for police collective agreements; a very large number of important aspects of that relationship and on-the-job activity in the Ontario police world remain off limits and are considered to be – for lack of a more apt phrase – matters of policing rather than of labour relations. Of all of the aspects of police life that are off limits to civilianlike labour-relations governance, none is more important in drawing the contrast between the civilian and police labour-relations worlds than discipline and discharge. As noted, under the Ontario scheme, any discipline meted out

under a Code of Discipline or Part V (Complaints) – including dismissal under pursuant to s. 68 – is neither grievable nor arbitrable. It may be appealed, not to a grievance arbitrator but, rather, to the Ontario Civilian Commission on Police Services. While s. 64 (17) of the *Police Services Act* allows discipline *other than* that under the Code of Discipline or Part V, subject to the officer's agreement, and, thus, enables such add-on discipline to be covered by collective-agreement just-cause provisions, such regimes are in the distinct minority across Ontario police services. The Durham collective agreement contains no such provision.

The limited scope of police collective agreements is reflected in the Ontario police arbitral jurisprudence. Of the 414 rights and Section 40[1] awards listed in the index of the Ontario Police Arbitration Commission, covering the period 1989 to the present, only a very tiny minority deal with just-cause-for-discipline grievances of uniformed officers and, in each of these, there was a just-cause provision written explicitly into the agreement for purposes of discipline other than that meted out pursuant to Part V of the *Police Services Act* or a Code of Conduct. As noted, the Durham agreement contains no such clause.

All of this is to illustrate the fact that there is a very significant area of Ontario police worklife that belongs, not to the labour-relations regime, but to the police regime, where the final arbiter is not a labour arbitrator, but the Ontario Civilian Commission on Police Services. Arbitrator Paula Knopf, in a 1999 award [*Re Waterloo Regional Police Services Board and the Waterloo Police Association*], was confronted by this reality and the requirement to properly draw the boundaries of grievance arbitration versus action by the Ontario Civilian Commission on Police Services. Her words capture the question well.

> …the Police Services Act gives OCCOPS and the Solicitor General the power to oversee activities of a municipal police force. Further, OCCOPS can be viewed as a tribunal with specialized knowledge of police matters. But an arbitrator is also a specialized tribunal with expertise in labour relations.

In this context, then, let us examine Constable Watts's grievance. Both parties argued that, taken at the macro level, Constable Watts's various allegations add up to

[1] Termination awards upon disbandment of a police force.

discipline. While not necessarily disagreeing with that, it seems to me that perhaps a more apt overall characterization of the allegations might be that management has engaged in attempted constructive dismissal. Whatever the synergistic result of the various specific allegations – whether unjust discipline or attempted constructive dismissal – Article 5 of the collective agreement does not help because that Article states that allegations of discipline or discharge without reasonable cause are to be referred to an inquiry under the *Police Services Act* and I have determined that that means what it says. Article 5 of the collective agreement is thus not the appropriate forum for appeal.

If, on the other hand, the Board's actions are characterized as discrimination, Article 4 of the parties' collective agreement defines "discrimination" only in respect of an officer's "relationship with or connection with the Association", which clearly is not the allegation here. Parenthetically, it should be noted that Article 4 also prohibits interference, restraint and coercion – any of which might also be apt descriptions for the totality of the Force's alleged actions vis-à-vis Constable Watts – but these, too, are defined in the same way as discrimination: "because of [the officer's] relationship or connection with the Association". Finally, the Board's alleged actions against Constable Watts could be characterizable as harassment but, while the Durham Regional Police Services Board has a workplace harassment policy, it is simply an employer policy and neither contained in, nor referred to, in the collective agreement. At the macro level, both in terms of the "essential character" of Constable Watts's grievance as well as the ambit of the collective agreement, then, his grievance is not arbitrable under the Durham collective agreement.

The foregoing macro-level analysis of the arbitrability of the Watts grievance is an excellent illustration of the fundamental difference between Ontario police and civilian collective agreements discussed *supra*. There is little doubt that, had a civilian employee made such allegations against his employer, they would indisputably lie within the jurisdiction of a grievance arbitrator through the just-cause protection of the collective agreement. However, it is at the micro level of the specific allegations that the essential character of this overall situation becomes even more obvious.

Constable Watts complains that he was placed on restricted duties for one year, and that embarrassing details of the incident at the Oshawa A & P (referred to in the

Association's letter of May 17, 1999) were released to the press. He also complains that information that he had been caught stealing numerous places around the province was disseminated to other officers on the Force.

These are issues that a grievance arbitrator is not in a position to properly judge; there is neither any language in the collective agreement nor any benchmark to be found in police labour-arbitral jurisprudence that gives any guidance as to the appropriateness of the Force's actions. While one can always write jurisprudence that moves into a new area, it is difficult to imagine how a grievance arbitrator could properly adjudicate such issues as these, given that they must be judged in a context of police operational procedure, police practice, regulations, and policies. For example, when is it appropriate to place an officer on restricted duties after that officer has been involved in an incident that involved alleged criminal behaviour and a criminal trial? What is it appropriate to say to other officers in such a situation? Under what circumstances should statements be made to the media, and with what level of detail? Even – and perhaps especially – the allegation of having been placed in a hazardous situation without a firearm belongs much more properly to the experienced police specialist than to a labour arbitrator. The latter can, of course, determine that Article 31 or Appendix D has been violated if the grievor was assigned unarmed to a patrol car between 7:00 p.m. and 3 a.m. or to prisoner-escort duties, but there are undoubtedly many other situations that could validly be described as hazardous. The problem is that the collective agreement doesn't require officers to be armed in hazardous situations, but only in the two specific situations noted above. Here again, then, both as a practical and a legal matter, is an issue that must be judged against a benchmark of police operational practice by people with extensive police experience. It is the domain of the police, not a labour arbitrator.

The same can be said of virtually all of the other specific allegations: the question of the probability of promotion in the light of whatever happened to Constable Watts, the denial of Acting Sergeant duties, the question of a detective reviewing the grievor's personal file, the issue of maintenance of the file, the denial of educational courses, the question of performance appraisals – indeed, almost all of the Board actions alleged under the particulars of Constable Watts's grievance are much more the province of specialists in policing matters than of the labour arbitrator. In terms of its essential

character, then, taken both at the macro and micro levels, Constable Watts's grievance lies almost completely outside the ambit of the collective agreement. Rather, it belongs properly under the dominion of police professionals.

Returning to the argument that jurisdiction properly belongs to me as an arbitrator by virtue of the employer's alleged capricious, arbitrary, bad-faith and discriminatory actions, it is my conclusion that this argument contains a fatal flaw: the Board's actions in this case may have been capricious, arbitrary, in bad faith and discriminatory, but even if they were, that has very little to do with the collective agreement.

Applying the *Weber* test in terms of the essential character of this case as measured against the scope of the collective agreement leads me to the conclusion that, taken as a whole, it is not properly before me as a grievance arbitrator and I must therefore decline jurisdiction.

Dated at Kingston, this 2nd day of December, 2000.

R. L. Jackson