

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**TORONTO POLICE SERVICES BOARD**  
(Hereinafter referred to as the Board)

**AND**

**TORONTO POLICE ASSOCIATION**  
(Hereinafter referred to as the Association)

**AND IN THE MATTER OF THE GRIEVANCE OF DETECTIVE G. ROSSI**

**ARBITRATOR:**

Gail Brent

**APPEARANCES:**

**FOR THE BOARD:**

Bruce Stewart, counsel  
Superintendent Paul Gottschalk  
Maria Ciani, Manager, Labour Relations

**FOR THE ASSOCIATION:**

Roger Aveling, counsel  
Martin Weatherall, Director Legal Services  
G. (John) Rossi, Grievor

Hearings held at Toronto, Ontario on February 2, 3, 4; November 29, 30;  
December 11, 12, 13, 15, 2000; May 30; June 25; October 9, 10, 12 & 16, 2001.

**DECISION**

The originating grievance document is dated June 11, 1998 (Ex. 1, part) and reads as follows:

In October of 1997 I was charged with an offence under the Police Act.  
At the time I was told by my Unit Commander that as a result of this allegation he had lost confidence in my supervisory abilities and that I was being transferred out of the unit that I

was seconded to (Ontario Illegal Gaming Enforcement Unit).

I was told that I would be coming back to the building at SIS to work in a more controlled and restricted environment.

I disagreed with the action being taken and believed that I should be returned to my Unit.

During the time I was awaiting trial I was lead to believe that pending a positive outcome for me in the matter I would be returned to the Ontario Illegal Gaming Enforcement Unit.

On April 9<sup>th</sup>, 1998 I was totally exonerated of the Police Act allegation.

On June 4<sup>th</sup>, 1998 I was told by Inspector GOTTSCHALK that he had made a final decision to not return me to the Gaming Unit and that I would be transferred out of SIS.

I am therefore grieving this matter.

The grievor's removal from the Ontario Illegal Gaming Enforcement Unit (hereinafter referred to as OIGEU) which ultimately turned out to be permanent, his movement from Special Investigation Services (hereinafter referred to as SIS) to 12 Division CIB, and whether the actions were disciplinary in nature are the broad areas raised by the Association for consideration in this case. At the outset of the case the Board stated that none of the actions taken were disciplinary or intended to be disciplinary, and that it was prepared to do anything reasonable to make it clear on the grievor's record that the actions were not disciplinary. It stated that this was an "open offer" to re-assure the grievor or anyone looking at his record that there was no disciplinary action taken against him. At no time in the course of this hearing did the Board ever resile from this offer and I take it as still being open.

It should also be stated that there is absolutely no dispute between the parties about the fact that the grievor is and was at all material times a good and valued officer of the Toronto Police Service (hereinafter referred to as the TPS). He has been a member of the TPS since 1975, and has

spent a significant portion of his career investigating gaming offences. It is conceded for the record that he is a very experienced officer, particularly in the field of gaming investigations. He has had specialized formal training regarding gaming machines and has been qualified as an expert witness several times in regard to gaming machines and other gaming matters. He has acted as an in-house resource and trainer in gaming matters for the TPS and has also assisted officers from other police organizations in relation to gaming matters.

This case was heard in fifteen days spread over a period of twenty months. A great deal of evidence was heard; not surprisingly, a lot of facts were not in dispute. Important issues were raised in argument; issues which have significance beyond the particular grievance before me. I am indebted to both Mr. Stewart and Mr. Aveling for the assistance they have given me in stating the issues clearly and in arguing the positions of their clients so forcefully. In preparing to write this award I have tried to do a thorough review of the evidence presented, the submissions made by counsel, the collective agreement and the authorities cited, and have considered all of them. In writing this award, I have attempted to summarize as much as possible in order to try to keep its length reasonable. Rather than simply setting out my findings of fact and then dealing with the arguments, I will first set out the positions of the parties on the issues and then proceed to make my findings while dealing with those arguments. I have listed all of the authorities cited to me in the appendix attached to this award.

Here, then, is an extremely abbreviated version of the positions taken by the parties in argument. The Association's position, in summary, is that the grievor's removal from OIGEU was a "transfer" within the meaning of Article 3.01 of the collective agreement (Ex. 2) and as such was without "reasonable cause" as required by that provision. It argued that there was no "reasonable

cause" to refuse to return the grievor to OIGEU once the Police Services Act (hereinafter referred to as the Act) charges against him were dismissed. It also asserted that the grievor's transfer from SIS to 12 Division CIB was a violation of Article 3.01 as being without "reasonable cause". It argued that any policy justification for that transfer cannot be used to excuse the Board from failing to do what it should have done in the first place. The Association also argued that the grievor's removal from OIGEU in response to the charges made under the Act was disciplinary in nature and both contrary to the Act and beyond the jurisdiction of the Board.

The Board argued that the grievor's removal from OIGEU is not a "transfer" but a removal from secondment or re-assignment within SIS which is not covered by the collective agreement, and in any event is not an action of the Board. It also argued that the grievor's move from SIS to 12 Division CIB was a "transfer" but was not an action of the Board and therefore not covered by the collective agreement. It argued that the collective agreement could not be interpreted as interfering with the power of the Chief of Police to make decisions regarding the day to day operations of the TPS. That power is to be found in s. 31(4) of the Act. It further argued that any collective agreement provision that was interpreted as interfering with the Chief's decisions made under s. 31(4) of the Act would be of no effect. In the alternative, it asserted that the grievor's transfer to 12 Division CIB was for "reasonable cause" because it was made pursuant to a policy which served the legitimate interests and objectives of the TPS and should be accepted at face value because it met the criteria of the policy. It also argued that the actions taken were not disciplinary in nature because in order to be found to be disciplinary actions must meet an objective rather than subjective test. It also asserted that there was no violation of the Act when the grievor was removed from OIGEU.

The Association took issue with the Board's interpretation of the Chief's power under

s. 31(4) of the Act. It argued that given the overall scheme of the Act it could not be argued that the Chief can ignore the collective agreement. It also said that there was no guidance given to me concerning the distinction between "policy" and "operational" and that it was sensible to interpret the situation as an operational decision implementing a policy directive.

For the purposes of this case the TPS can be said to be organized into Commands, two of which, Area Field Command and Central Field Command, encompass all of the Divisions which are responsible for policing in certain geographical areas, one of these is I2 Division, where the grievor is now assigned. Each Division has a detective office which deals with investigations. Each Division is headed by a Unit Commander and is considered to be a unit in the TPS. According to Deputy Chief Joseph Hunter, a unit is that part of the service where people are assigned, where they report for duty, where they are assigned duties and where, for administrative purposes, they are denoted; it is the entity which reports to a Command.

Another Command of the TPS is the Detective Support Command, which Hunter has headed since September 1997. According to the relevant organizational chart (Ex. 5) that Command is made up of eight units, each of which was headed by a Unit Commander. One of those units is SIS. At all material times the Unit Commander of SIS was Paul Gottschalk, who currently holds the rank of Superintendent in the TPS. Within the SIS there are several sub-units, two of which are Morality Squad and Fugitive Squad. Morality was further subdivided into Prostitution, Gambling, Property Crimes Investigation, Pornography, Liquor, and Break and Enter. At all material times each sub-unit was under the direction of a Detective Sergeant who reported to the Unit Commander. At the relevant times the Detective Sergeant for Morality was Chris Hobson, and the Detective Sergeant for Fugitive Squad was Don Campbell. At the relevant time the Unit Commander and the Detective

Sergeants made up the management team of SIS.

Detective Support Command is made up of units which are specialized in nature and which provide investigative expertise. Detective Support Command jobs are highly sought after and getting them is very competitive. Speaking of SIS in particular, officers who lack excellent investigative skills would probably not be accepted into the unit. The Division CIB is a good place to develop investigative skills, and in those offices there are also detectives who have worked in the Detective Support Command and whose expertise can benefit the less experienced officers in the Division.

As already mentioned, Gambling is a part of the Morality sub-unit within SIS. At all material times there were six officers working in Gambling, one of whom was the grievor. The grievor had been there effectively since February 1982. He had been temporarily transferred out twice: once in 1984 for around six months and again in 1987 for six months. In 1989 he transferred to 55 Division in connection with his promotion and then returned to Gambling after a year. As already stated, there is no doubt that he was an experienced and effective gaming investigator. Further, it is clear that he was intellectually engaged in and devoted to his work.

In February 1996 Gottschalk became Unit Commander of SIS. Gottschalk's expertise was in management rather than in any of the investigative areas dealt with by SIS. In March 1996 Deputy Chief Boyd relayed a plan to him which had been devised by Command. There was a concern in the TPS about staffing strengths in the uniform function, and a decision had been made to redeploy officers back into uniform. There was also a need to reduce complement because of the Social Contract. In addition, there was a pension package coming that could deplete the complement. Boyd told Gottschalk to reduce SIS by nineteen officers in various ranks who would

have to go back to uniform. That was to be effective in April 1996.

At the time there were approximately one hundred and thirty officers in SIS. Over a two week period Gottschalk and his management team met to try to identify the nineteen who would go. Gottschalk described it as one of the most trying experiences of his career. The criteria used to identify the nineteen were the skill levels in the unit and the impact on the sub-units if certain people left. There was a great deal of debate. Eventually nineteen were chosen. Some of them chose to retire and, in addition, some other officers beyond the nineteen retired so that in the end more than nineteen people were lost to the unit.

The effect of this exercise on Gottschalk was to bring home the vulnerability of SIS. He realized that the loss of highly skilled people could adversely affect the ability of SIS to fulfill its mandate. He also was aware that further downsizing could result in the need to close some of the sub-units in SIS. Gottschalk determined that in view of this it was necessary to manage the situation by developing a tenure policy which would protect the interests of the unit and serve the interests of its members.

One way in which the interests of the unit were not being served was that there was no succession plan. People were not being brought in to acquire the skills needed. When he had tried to move people to uniform assignments on Boyd's order, Gottschalk had encountered the unfair perception that he was trying to get rid of burnt-out members. He also believed that there was a high degree of stress involved when officers were working in a sophisticated environment doing specialized investigations for a long period of time, and Gottschalk was concerned about the effect it would have on them. He was also mindful of burn out.

Gottschalk invited his management team to assist in designing a structured process to move

people out of SIS. In the course of doing this the Detective Sergeants were asked to do an inventory of critical skills in the sub-units and to determine how the sub-unit would operate without the person possessing those skills. Where there were critical specialized skills which would take years to develop, the Detective Sergeants were asked to start training successors. It was realized that in order to start the process it was necessary to make room for new people by moving some people out. The Detective Sergeants were told to identify people in the unit whose time had come to move, looking at: (1) length of time in SIS, (2) wellness considerations, and (3) skill levels and the ease with which jobs could be transferred.

The Detective Sergeants were asked to discuss the notion of tenure with the members and to have Gottschalk attend those meetings for the discussion so that the members would understand the process. Those meetings were held in late 1996 and early 1997. Under that policy eleven members were transferred from SIS (see Ex. 10). The length of service in SIS of those transferred members covered officers who had come to SIS in August 1979 and extended to some who had come in October 1992. The evidence indicates that prior to Gottschalk's initiative there was no tenure policy in place.

In September 1997 Hunter came to Detective Support Command. Shortly after his arrival he initiated a policy (Ex. 6) which required that officers be transferred out of the Command on a regular basis. The policy is reproduced below:

### **DETECTIVE SUPPORT COMMAND**

#### **ANNUAL ROTATION OF PERSONNEL**

**Unit Commanders within Detective Support Command are required to facilitate uniform personnel development through the use of permanent transfers with other Commands based on the following standards:**

During the Annual Reporting Period, June 1 to June 1

- Each unit within Detective Support Command will rotate a minimum of ten percent (10%) of their uniform personnel to other Commands by way of permanent transfers.
- Transfers within Detective Support Command during the reporting period will not ordinarily qualify as a portion of the ten percent.
- Unless otherwise approved by the Deputy Chief, unit commanders will achieve or exceed their 10% target by June 1 of each year and will so advise the Deputy Chief in their mid year report.
- Regular attrition (promotions, retirements, resignations) must be reported to the Deputy Chief during the year, if it is to qualify as a portion of the ten percent.
- This policy does not preclude a return to Detective Support Command at an appropriate future date.

**When considering this policy the following criteria will be used:**

Uniform member's

- Contribution to unit mandate
- Performance
- Personal Risk
- Time in Unit
- Nature of current assignment; and

Any other relevant consideration.

Hunter explained that Detective Support Command was seen by many in the field as the "glory group" because they were always at major crime scenes and had the authority to take over any investigation. He said that there was also a perception in the field that that authority was being abused and that the Detective Support Command took the best people from the field and left the field divisions with less expertise than they needed. The Detective Support Command was seen as a

privileged position where officers were shielded in positions which they held forever. The lack of opportunity to move into Detective Support Command precluded younger, eager officers from gaining expertise and experience. Hunter believed that the perceptions needed to be addressed and that the Detective Support Command needed to become true support to the field. Hunter also believed that by transferring members out of Detective Support Command back to the field, information would become available to the Divisions which they had previously lacked and the expertise and knowledge of those members would be useful in training officers in the Divisions.

It was Hunter's objective that transfer out of Detective Support Command would become the norm and not the exception. He wanted a system whereby officers would learn their craft in the Divisions and gain the skills there which would eventually lead to their entering Detective Support Command to hone their skills and gain more skills. Those officers would then leave Detective Support Command and return to a Division where their skills could be used in investigations and training other officers.

Another reason for this policy was Hunter's concern that when large numbers of people were left in the units for years there was an increased possibility that a large number would be leaving at the same time because of retirement incentives and the ability to retire at age fifty with thirty years of service. The transfer policy would allow younger officers to be brought in to gain expertise and guarantee that the sub-units would not be as top heavy as they had been.

By "contribution to unit mandate" the policy referred to the fact that some people contributed so much or had such specific skills that the unit could not manage without them and there was nobody who could replace them. "Time in unit" meant the time spent in Detective Support Command or the specific unit. The issue was whether the officers have had all of the opportunities

to develop that the TPS could give them. "Wellness" as a criterion was based on Hunter's own observation and experience as well as anecdotal evidence; he said that when the issue was put on the table, there was general acceptance that people would experience personal risk. Hunter did not intend the policy to be a means of getting rid of poor performers. He indicated that poor performance could be addressed through training or discipline. It was also not the intent of the policy to compare officers to each other and the Detective Sergeants were so instructed. The officers were to be considered individually and compared to the needs of the unit.

Hunter introduced the policy to his Unit Commanders during the fall of 1997. He acknowledged that they had a lot of reservations about losing such significant numbers of experienced officers. Copies of the policy (Ex. 6) were given to each Unit Commander. It was to become operational on June 1, 1998 so that the Unit Commanders would have sufficient lead time to implement it; however, he also encouraged them to begin applying it as soon as possible. Hunter indicated that he knew that some people would not be happy with the policy because they thought that they would be in Detective Support Command forever and that, following the institution of the policy, a number of people were transferred against their will. The policy is still in operation.

Hunter directed that each Unit Commander articulate the policy and distribute Exhibit 6 to their units. That occurred in late 1997 or early 1998. Hunter also visited each unit to discuss the policy with the members. He indicated that there was some hostility to the policy. His direction to the Unit Commanders was that they had to talk to the officers and to facilitate their personal development. He acknowledged that in the short term a transfer could have a profound effect on an officer.

The evidence before me in Exhibit 10 shows that transfers were made pursuant to the Hunter

policy. In relation to SIS in particular during the period 1998/99, the first reporting period under the policy, twenty-two people left SIS permanently. Their tenure in SIS ranged from periods beginning in February 1982 to November 1997. The grievor was one of those people, and as already indicated he first came to SIS in February 1982. This will be dealt with in greater detail later. The evidence also indicates that the Hunter policy as set out in Exhibit 6 has continued to operate and a minimum of 10% of officers have been transferred annually from Detective Support Command since it came into effect. Since the beginning a number of the transfers have been management initiated.

The only significant difference between the Gottschalk and Hunter policies as it affected SIS is the presence of the 10% requirement. Both policies were publicized in SIS and made known to the members there. They are part of the background of what was in place in Detective Support Command while the events were unfolding that gave rise to this grievance.

In November 1996 the provincial government approved funding for the creation of an Ontario Provincial Police (hereinafter referred to as the OPP) province-wide initiative with a mandate to "provide coordinated provincial enforcement to combat organized crime involvement in illegal gambling" (see Ex. 26), the Ontario Illegal Gaming Enforcement Unit (hereinafter referred to as OIGEU). OIGEU was to be set up with OPP officers and the participation of officers from the major police services in Ontario, including the TPS. At that time the TPS had the most experienced gaming investigators in the province, and the participation of such experienced officers was certainly vital in allowing OIGEU to get up to speed quickly. In late 1996 Gottschalk was directed by Boyd to act on behalf of the TPS with Deputy Superintendent Frechette of the OPP to work out an agreement for the secondment of Toronto officers to OIGEU. There had been some informal discussions before Gottschalk's involvement. At the time there were six officers in the gaming

section of Morality within SIS (three Detectives and three Detective Constables). The OPP wanted all six of the Toronto officers to be attached to OIGEU; however, funding and other concerns were an issue.

Eventually an agreement was reached (Ex. 4) which was approved by the Board in June 1997. That agreement provided for the secondment of four TPS officers to OIGEU; one of those named officers was the grievor. Gottschalk and Detective Inspector Moodie of the OPP were named the representatives of the parties to the agreement. Under the terms of the agreement the secondment period was to be one year from the date the officer reported for duty, but it could be terminated on thirty days' notice by either party (see Ex. 4, paragraphs 2 and 3). The agreement could be renewed, and it was evaluated by the Board in May 1998 and renewed for a further two years.

In addition, Gottschalk and Moodie had agreed that the other two TPS gaming investigators would be sent to work at OIGEU on a loan arrangement. Essentially the TPS would continue to pay their base salaries while the OPP would cover things like overtime. The arrangement was essentially that the two loaned officers would remain under the direct control of Hobson and would be available to the TPS to deal with any gaming issues which arose in Toronto. If and when such issues arose OIGEU would participate in those gaming investigations through the deployment of the four seconded TPS officers and any others deemed necessary.

There is no doubt that the grievor's participation in OIGEU as one of the named seconded officers was very significant to Moodie. He wanted the grievor because of his experience and expertise as a gaming investigator. The grievor was named team leader of the Toronto contingent primarily on Moodie's initiative.

Even though the formal agreement (Ex. 4) was not to be effective until July 1997, the six

TPS officers, including the grievor, were working with OIGEU from January or February 1997. This was because it was recognized that an agreement was inevitable and Gottschalk wanted to have them involved right away. Boyd agreed to this.

It was the undisputed evidence of Gottschalk that he told Moodie that the TPS officers would be subject to being transferred out of OIGEU under the Hunter policy (Ex. 6). Gottschalk also considered the term of the secondment agreement to be separate and distinct from the review of any officer's tenure. It is difficult to say given the state of Hobson's memory and Gottschalk's vague recollection of discussions he had with Hobson around the time OIGEU was being set up; however, it is possible that the grievor's name was being discussed as a possible subject of transfer prior to the secondment. In any event, Gottschalk made a conscious decision to let the grievor be seconded to OIGEU in order to give OIGEU the best chance for success.

As team leader for the Toronto team at OIGEU the grievor was responsible for the administration of the team. Included in administration is monitoring overtime, checking expense records, ensuring vehicles are used in accordance with government policy, attending meetings, etc. The team leader also conducts investigations, sets priorities, and offers assistance to other teams. In addition, as team leader, the grievor was responsible for liaising between the OPP management team and the officers working with him, and also for liaising between the OPP management team and his managers at SIS.

In 1997 the TPS Internal Affairs (hereinafter referred to as IA) was involved in investigating some TPS officers who had done some undercover work for OIGEU. None of those officers being investigated were part of the Toronto team at OIGEU. IA is a unit of the TPS which reports directly to the Chief of Police and which conducts investigations involving possible wrongdoing by either

civilian or uniform members of the TPS. By September 1997 the IA investigation had reached the stage where IA wanted to interview the grievor as team leader of the Toronto team at OIGEU, as well as other members of the Toronto team. Depending on what was learned in those interviews IA might decide to interview more officers or it could even expand the investigation to include more subject officers. However, in September IA had no reason to believe that any of the Toronto team at OIGEU were involved in any wrongdoing.

Inspector Robert Qualtrough from IA went to OIGEU and spoke to Moodie. He informed Moodie that IA was investigating some TPS officers in connection with allegations regarding the misappropriation of funds. The grievor, as team leader, would be responsible for accounting for funds given to undercover officers. The OPP conducted an audit which showed that none of its money was unaccounted for. Moodie spoke to the grievor about being interviewed by IA and instructed him to disclose only "OIGEU information and documentation that was deemed necessary to assist in the internal investigation" (see Ex. 25).

On September 25, 1997 Qualtrough called Gottschalk to inform him that he was having trouble reaching the grievor in connection with an investigation. He told Gottschalk that the grievor was not the subject of the investigation but rather a witness officer. Gottschalk was also informed that the officers being investigated were TPS officers who had worked under the grievor. Gottschalk said that he would call Moodie and have the grievor report to IA. He also asked Qualtrough to have the grievor contact him after he reported to IA.

On September 26<sup>th</sup> the grievor reported to Gottschalk and tried to explain the difficulties he was having regarding the interview related to the retention of counsel. It is clear that they had a very short conversation and that Gottschalk was not willing to get into a detailed discussion about the IA

investigation. In the end Gottschalk simply advised the grievor to obey all lawful commands. Gottschalk was reluctant to do anything that might interfere with the IA investigation. As Unit Commander he was not entitled to know anything about the details of the IA investigation particularly if, as here, the investigation was generated outside his unit. The practice is for Unit Commanders to assist IA as requested but not to interfere or intrude in the investigation unless requested.

Gottschalk heard nothing more about the matter until October 2<sup>nd</sup>. On that day Staff Inspector Cleveland, the Unit Commander of IA, called him and said that he was sending over some documentation regarding the grievor. The documentation in question (Ex. 13) set out the history of IA's attempts to interview the grievor, and asserted that the grievor did not comply "with an order to account for his actions while a supervisor with" OIGEU. He was also told by Cleveland that the report could possibly lead to charges against the grievor under the Act. Gottschalk received the actual documentation on October 6<sup>th</sup>.

Gottschalk was concerned about the situation. He knew that the grievor was not the subject of an investigation but he did not know much else. He said that his concern was that the grievor's supervision might have contributed to the problem and that TPS officers under the grievor's supervision were in "some sort of peril". Gottschalk said that he was concerned about the grievor's supervisory abilities and that he had lost some confidence in the grievor's ability to supervise in such an unstructured situation. He said that he felt completely blocked in his ability to gain a full understanding about what was going on and tried to imagine what could possibly happen to other officers under the grievor's supervision if they were not being properly supervised. Gottschalk reached the conclusion that to leave the grievor at OIGEU without knowledge of what was going on

could possibly be perilous to other TPS officers. He therefore decided to remove the grievor from OIGEU and return him to SIS.

Could Gottschalk have learned anything more? Qualtrough testified that Unit Commanders never ask for information about an investigation because they know that they will not get it. He said that if Gottschalk had made any inquiries about whether he should have any concerns about the grievor's supervisory abilities, he would have referred the question to Cleveland. Certainly Gottschalk considered that he could not ask anything without interfering in the investigation and he made no inquiries of either Qualtrough or Cleveland. All Moodie could have told him was that the OPP had conducted an internal audit and found that none of its funds were missing. That, however, would not be determinative of anything since, as we now know, one aspect of the investigation was that the subject officers were keeping winnings rather than accounting for them. Gottschalk also knew from Moodie that the latter was willing to keep the grievor on as team leader at OIGEU, so presumably Moodie had not lost confidence in the grievor's ability to supervise in that environment.

On October 6<sup>th</sup> Gottschalk informed the grievor that he was being removed from OIGEU and being returned to the SIS office. He told the grievor that he had lost confidence in the grievor's ability to supervise in an unstructured work environment. Whatever was said about the grievor's eventual return to OIGEU, it is clear that Gottschalk made no commitment to the grievor about that. The grievor was also informed that the allegations in Exhibit 13 would be forwarded to the Professional Standards Review Committee in accordance with TPS policy and that Detective Sergeant Parise would be preparing the brief. The grievor was told that he had ten days to file a reply if he wanted to do so.

Was the grievor's return to SIS from OIGEU a transfer?

Leaving aside the question of the applicability of s. 31(4) of the Act for the time being, and assuming without deciding that the collective agreement would apply if this were a "transfer", it is necessary to determine whether or not this move was a "transfer" as the parties have used the term in the collective agreement (Ex. 2). Article 3.01 of the collective agreement is set out below:

- 3:01 (a) The Association and its members recognize and acknowledge that, subject to the provisions of the Police Services Act and the Regulations thereto, it is the exclusive function of the Board to:
- (i) maintain order, discipline and efficiency;
  - (ii) discharge, direct, classify, transfer, promote, demote or suspend, or otherwise discipline any member;
  - (iii) hire.
- (b) If a member claims that the Board has exercised any of the functions outlined in paragraph (a) (ii) in a discriminatory manner or without reasonable cause, then such a claim may be the subject of a grievance under the provisions of the grievance procedure outlined in this Collective Agreement or dealt with under procedures within the exclusive jurisdiction of the Ontario Civilian Commission on Police Services, as prescribed by the Police Services Act.
- (c) The Board agrees that it will not exercise any of the functions set out in this Article in a manner inconsistent with the provisions of this Collective Agreement or the Police Services Act of Ontario and the Regulations thereto.

The only other parts of the collective agreement where the word "transfer" appears are in Article 18, specifically in Article 18.03, and in Appendix A, paragraph .04. Those provision are set out below:

- 18:03 (a) A member of the Civilian Branch who is transferred to the Uniform Branch will continue to have his/her service with the Civilian Branch counted on such transfer for the calculation of vacation benefits, sick pay, sick pay gratuities and welfare benefits only.

- (b) A member of the Uniform Branch who is transferred to the Civilian Branch will continue to have his/her service with the Uniform Branch counted on such transfer for the calculation of vacation benefits, sick pay, sick pay gratuities, welfare benefits and service pay.

#### APPENDIX "A"

- .04 The Board and the Association agree that it may be desirable to have the benefits heretofore provided by P.B.F., the administration of such benefits, and the provision of future changes to benefits and contributions administered under the O.M.E.R.S. Act and Regulations to the extent possible rather than under the Police Benefit Fund but have not agreed on the terms and conditions on which such transfer may be made. The parties through their bargaining committees will continue to attempt to negotiate a satisfactory basis for such transfer subject to the approval of the Board, the Association Bargaining Committee and only with the approval of a majority of the members of the Association who are members of the P.B.F. in which event the Collective Agreement may be so amended as provided in s. 7(2)(a)(ii) of O.M.E.R.S. Regulations.

If the only type of transfers contemplated by the collective agreement are what is set out in Article 18:03 and Appendix "A", then clearly this was not a transfer. However, there is Rule 6.9.0 in the TPS (Ex. 15) which is set out below:

#### **6.9.0 TRANSFERS AND SECONDMENTS - POLICE OFFICERS**

##### **6.9.1 TRANSFER APPLICATIONS**

Police officers desiring a transfer shall make application on the appropriate form.

##### **6.9.2 MEMBERS TO BE NOTIFIED OF TRANSFER**

Police officers who have applied for a transfer shall be notified in writing within a reasonable time of the status of their application.

##### **6.9.3 SECONDMENTS**

Secondments shall only be made with the approval of the Board. The unit commander, Personnel Services, shall be responsible for the co-ordination and administration of secondments.

Requests to and from outside agencies to second police officers shall be made in writing to the chief of police. Such requests shall contain all particulars including the reason for the secondment, the term and, if requested, the name of the police officer. The term of a secondment shall not exceed a three year period.

#### 6.9.4 ANNOUNCED ON ROUTINE ORDERS

Permanent and temporary transfers, and secondments, shall be announced on Routine Orders.

The cases cited to me which dealt with the definition of "transfer" were *Ottawa General Hospital, Dominion Stores, Canada Bread, and Ottawa Civic Hospital*. It is a matter of agreement between the parties that within the context of a police agreement a "transfer" is not a reclassification. Further, it is obvious from the above passages in the collective agreement where the word "transfer" is used, that the collective agreement does not give a lot of direction as to what the parties intended by "transfer" in Article 3.01.

In *Ottawa General* the collective agreement classifications for nurses did not differentiate between programs or areas of the hospital. There was a provision in the agreement which said that transfers, promotions and demotions should be governed by seniority if skill, ability, etc. were relatively equal. Arbitrator P. Picher held that if "transfer" were to be given any meaning in the context of the clause and the collective agreement it must include lateral moves within a classification. In this context, I would agree that "transfer", whatever else it means in this collective agreement, does include a lateral move of some sort.

The *Ottawa Civic Hospital* case involved a situation where there were distinct job descriptions and the same job was being performed in different locations. There Arbitrator Carter determined that "transfer" did not include an assignment to do the same job in a different location.

Again, I agree that a change in assignment within the same job is not necessarily a "transfer".

In Rule 6.9.0 the TPS has dealt with the subjects of transfer and secondment within the same rule, but they have clearly distinguished between them. This is confirmed by the fact that the See-Fax (Ex. 11) lists transfers, and the grievor's secondment to OIGEU does not appear under that heading. What then is a "transfer" as the parties seem to understand the concept and as the term is used within the TPS? It would appear from the evidence before me that a "transfer" is considered to be movement between units. That is what is clearly contemplated by the transfer application form attached to the rule (Ex. 15).

In *Canada Bread* it was found that where there are a number of jobs without distinct job descriptions within a classification the employer can shift employees between jobs without facing the claim that it has created a new job classification. Where "transfer" means movement between classifications, the movement within the classification to a new set of duties is not a transfer. Similarly, where there is a culture that regards some movement within the classification to be a "transfer" and some to be simply a re-assignment, as is the case here, it is necessary to differentiate between the two types of lateral movement.

It is my view that "transfer" as contemplated by Article 3.01 means lateral movement between units. A secondment does not change the officer's assignment within the TPS. It is an assignment to work under the temporary direction of another agency. Based on the evidence before me it would appear that the managers in the TPS, under whom the officers served at the time of the secondment, continue to exercise some sort of control or contact with the seconded officers. Certainly, for the purposes of implementing Hunter's policy (Ex. 6) the TPS officers seconded to OIGEU were considered to be part of the SIS unit. Hence, I find that a "secondment" is not a

“transfer” within the TPS and there is no good reason to interpret Article 3.01 of the collective agreement as being at odds with the usage within the service. Quite the contrary, it seems reasonable to contemplate that the parties would have understood “transfer” to have the meaning commonly used in the TPS.

Because a “secondment” is not a “transfer”, then it would follow that the end of a “secondment” is equally not a “transfer”. It is merely a change in assignment. I therefore find that the grievor’s removal from OIGEU was not a “transfer” within the meaning of Article 3.01. It is therefore not a decision to which the “reasonable cause” standard in the collective agreement can apply.

Was the decision to remove the grievor from OIGEU a violation of the Police Services Act?

The Act sets out a system whereby the Chief of Police must investigate a complaint made against an officer and, if it is concluded that the behaviour may constitute misconduct, hold a hearing. It sets out the manner in which the hearing is to be conducted, and the power of the Chief to impose specified penalties if the misconduct is proven. S. 68(9) of the Act deals with what can be placed on the employment record and the circumstances under which the record must be silent.

s. 68(9) of the Act is set out below:

(9) The chief of police or the board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

- (a) the complaint is proved on clear and convincing evidence; or
- (b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of.

It is argued that the TPS was precluded from taking into account the allegations made against the grievor and the subsequent misconduct charge because that charge was not "proved on clear and convincing evidence". The Association submitted that the only option other than maintaining the status quo was suspending the grievor with pay under the Act.

The one case cited to me between these parties which dealt with the effect of the predecessor to s. 68(9) was the *Barnard* case where Arbitrator Saltman decided that postponing a promotion pending the determination of charges under the *Police Act* was not prohibited. I have been informed that an application for judicial review of that decision has been made.

In this case the reason for the grievor's removal from OIGEU, as indicated by Gottschalk, was not because of the pending charges under the Act but because Gottschalk had lost confidence in the grievor's ability to supervise in an environment like OIGEU. He had concerns that the grievor's supervision may have placed some TPS officers in peril and/or could cause problems for the officers under his supervision, and because of the ongoing IA investigation regarding the subject officers, he believed that he had no way of satisfying his concerns. Had it not been for the problems associated with the grievor's interview, Gottschalk would probably not have learned about the investigation against the subject officers from another unit. Therefore, on the evidence there is a logical connection between the allegations against the grievor and his removal but not a causal one. Hence, there can be no violation of s. 68(9).

I make no finding on whether *Barnard* was correct or whether it should be followed here because I consider that it is irrelevant given the facts before me.

Was the action taken in removing the grievor from OIGEU and/or re-assigning him within SIS punitive or disciplinary in nature?

Before dealing with this question it is also necessary to continue the narration of the facts beyond the grievor's removal from OIGEU. On October 6<sup>th</sup> Gottschalk met with the Detective Sergeants and explained both that he needed to relocate the grievor in SIS and that he had some concerns about the grievor's supervisory abilities, but no knowledge or evidence that anything was wrong with them. Don Campbell, who was in charge of the Fugitive Squad, was in need of help there and requested the grievor be assigned to Fugitive Squad. That was done.

A position in Fugitive Squad is regarded as a sought after position in the TPS. According to Campbell, in the fall of 1997 there were one hundred and three applicants for three positions. At the relevant time the Fugitive Squad was having a major problem fulfilling its mandate because of the incompatibility of its computer system, the Fugitive Extradition System (hereinafter referred to as FES) with the main system used by the TPS, which is known as CIPS. One of the obligations of the Fugitive Squad is to notify the Canadian immigration authorities whenever a person who was not born in Canada is arrested, charged, convicted, etc. In 1996 there had been six hundred of these reports. The reports are known as TPS 250s. When the arrest procedure was automated it was believed that CIPS could automatically generate the TPS 250s and forward them electronically to the Fugitive Squad, thereby entering them on the FES. That did not happen. In September 1997, when CIPS started, the Fugitive Squad began receiving over one hundred TPS 250 forms each day. They had to be manually entered on FES. Campbell said that in the October/November period there were over three thousand five hundred reports generated.

The Fugitive Squad was identifying people who should be removed from Canada by the

immigration authorities, but it was so far behind in reporting to Immigration Canada that that agency could not do its job. The situation had to be addressed. Campbell needed extra help and he made the case to Gottschalk. Campbell made the case for three Detectives in Fugitive Squad and the grievor was assigned there as one of the three.

Gottschalk informed Campbell that while the grievor was in Fugitive Squad he was not to engage in any more gambling investigations but he could meet with the Crown and attend court as necessary to deal with gambling cases in which he had been involved prior to leaving OIGEU.

The grievor reported for duty at Fugitive Squad on October 14<sup>th</sup>. He was assigned the task of entering TPS 250s onto FES. There were two other officers who were assigned this task on a more or less full-time basis as well, and other officers may have assisted from time to time. Campbell testified that he regarded the work as investigatory because he expected that analysis of the data would be done along with the mechanical task of entry. He did not regard it as clerical. It was not a make-work project.

Obviously, though, from the evidence of the grievor and Detective Sylvie Parent, who was then a Detective Constable in Fugitive Squad, the message about the requirement to analyze data was not one that made much of an impact. Clearly the work needed to be done, but it was regarded as being a data entry function by at least two of the people who did it, the grievor and Parent.

I have absolutely no hesitation in accepting the grievor's evidence about the personal effect his removal from OIGEU and his assignment to what he regarded as a data entry function in Fugitive Squad had on him. He went from a position doing active investigations in a field which had become his specialty to a situation where his supervisory abilities were under a cloud and he was confined to an office entering forms onto a computer system. No matter how important or vital that work was,

it is understandable that the grievor would feel that compared to his career as a gaming investigator this was in the "penalty box". This short paragraph cannot do justice to conveying his sense of loss; however, be assured that I realize it was real.

Looking at the actual time that the grievor spent in the office of Fugitive Squad doing the input duties, it is clear that it was not a continuous period from October 14<sup>th</sup> until the beginning of December when the data input stopped because FES crashed. In fact the grievor was away on leave from November 10<sup>th</sup> to 16<sup>th</sup> and again from November 24<sup>th</sup> to 30<sup>th</sup>. He was also out of the office on three days dealing with old gambling cases in court, once dealing with his own charges under the Act, and he did partner with Parent on an investigation out of the office on one day. Therefore, in the first six weeks following the commencement of his assignment he was involved exclusively with the TPS 250 entry for approximately three weeks.

It would appear that there were problems with FES beginning in December. The grievor approached Campbell and requested that he be assigned to do some of the street work that needed to be done in the squad. Campbell had purposely been having the grievor work under his direct supervision in the office and found him to be a good and professional officer. The Fugitive Squad was a more structured environment than OIGEU and so Campbell assigned the grievor to partner with Parent, as her supervisor, and go out and conduct investigations. Campbell also said that he was convinced that the grievor could go on the street in a supervisory role and conduct investigations because he believed that the grievor had gained a sufficient knowledge of investigations done in the squad.

By the end of December or the beginning of January CIPS and FES were compatible and the data input problem disappeared. From that point on for the duration of his assignment in Fugitive

Squad the grievor did investigative work. He agreed that it was good, honourable work and that he enjoyed it. During the entire period he was at Fugitive Squad there was never a complaint received that he was not available to the Crown or anyone else in connection with the court cases which arose from his gaming investigations. The grievor did not indicate to Gottschalk, Campbell or in his testimony that he was not allowed to attend any meetings in connection with prosecutions arising out of his gaming investigations.

On February 12<sup>th</sup> there was a meeting of the Fugitive Squad which Campbell chaired. Gottschalk was at the meeting and so was the grievor. There are three documents which deal with that meeting (Exs. 31, 32, & 33). Exhibit 31 is the agenda. I accept that the most probable explanation for Exhibit 32 is that it was the organizational chart distributed at the meeting or with the agenda. It shows the grievor's name as a Detective with no people under him and the word "Temporary" in brackets beneath his name. I further accept that when the minutes (Ex. 33) were prepared for the meeting "Temporary" had been removed from the organizational chart which accompanied it. The minutes indicate at point 8 that the organizational chart was prepared by Campbell and discussed at the meeting. The minutes also indicate that in the meeting the list of duties and the person responsible for each was discussed. The grievor is shown as being assigned responsibility for VICLAS. There is no doubt that VICLAS is a significant responsibility and a mandatory responsibility. It is an initiative which arose after the Bernardo case to help identify serial offenders.

Campbell explained that he never considered the grievor to be temporary, but that the third Detective position was temporary pending approval, which was received. The grievor said that he was embarrassed by the "temporary" designation and by the fact that he was the only Detective

shown without anyone under his supervision. Campbell said that he treated the grievor like any other officer subject to the initial restriction that he was not to go out on the road and he expected the grievor to act like a supervisor. He said that he never had any member of the squad say anything to him to suggest that the grievor was not held in the highest regard.

*The Canadian Oxford Dictionary* defines "punish", "punishment" and "punitive" as follows:

**punish** . . . 1 *tr. & intr.* cause (an offender) to suffer for an offence. 2 *tr.* inflict a penalty for (an offence). 3 *tr. informal* inflict severe blows on (an opponent). 4 *tr. & intr.* subject (someone) to abusive, harsh, or improper treatment. . . .

**punishment** . . . 1 the act or an instance of punishing; the condition of being punished. 2 the loss or suffering inflicted in this. 3 *informal* severe treatment or suffering.

**punitive** . . . *adj.* inflicting or intended to inflict punishment.

Certainly from a subjective point of view, the grievor was punished and the action was punitive. He felt punished, that is clear.

In *Canada Bread*, when considering whether an employee had been demoted when re-assigned, Judge Reville noted that to determine whether there is a demotion it is necessary to look at the objective factors and not how the employee subjectively interpreted the situation. While that was said in a non-disciplinary context, I believe that it is relevant to considering whether or not discipline occurred. It is also necessary to keep in mind the undertakings and statements made by the Board at the commencement of the hearing to the effect that there was no intent to discipline the grievor and that it would do whatever was necessary to ensure that his record reflected that.

In the *Government of Alberta (Michaels)* decision, at page 169, Arbitrator Moreau reviewed some authorities dealing with the question of discipline. The first case cited was a 1989 decision of the Alberta Public Service Grievance Appeal Board in *Re Anderson* and the quote from that as

well as the rest of the review is set out below:

To determine if disciplinary action has occurred it is necessary to examine all the surrounding circumstances and assess whether the necessary objective and subjective elements are present. Indicia of discipline would normally include some affirmative action by the employer which was motivated by the conduct of the employee which the employer wished to correct. The employee would normally be advised of the nature of the unacceptable conduct and the purpose which was to be achieved by the discipline. Normally all this would be in writing and recorded on the employee's personal file.

Further, from Brown and Beatty, *Canadian Labour Arbitration*, 3<sup>rd</sup> ed. (1988), para. 7:4210, *The nature of disciplinary sanctions*:

Traditionally it was said that the essence of a disciplinary sanction lay in its potentially negative impact on an employee's work record. In a similar vein, the view has been expressed that discipline is to be distinguished from non-disciplinary action by the reasons for and purpose of the action. On this view, the essential reason justifying disciplinary action is misconduct and the purpose is to punish. Other arbitrators have suggested that the term discipline is generally referable to "that type of action by an employer which constitutes its response to behaviour which is of a culpable nature and which may be amenable to correction through the institution of some kind of disciplinary penalty".

Further, we note from the decision of *Re Metropolitan Authority of Halifax, Dartmouth & Halifax county and Corrections Officers Assn. of Nova Scotia* (1983), 10 L.A.C.(3d) 265 (Outhouse) at page 271, the words of arbitrator Outhouse:

Moreover, when the authorities are examined, it is apparent that in order to constitute discipline, a letter must directly or indirectly contain allegations of blameworthy conduct or dereliction of duty against the employee. Usually, but not always, these allegations are combined with some form of reprimand or warning of disciplinary action. We find none of these elements in the present case. *The essential ingredient of culpable or corrigible behaviour, or at least its perception by the employer, is lacking.* Accordingly, we find that the employer's response to the grievor's absenteeism, both in terms of the letters and the transfer itself, was non-disciplinary.

In a much blunter statement Mr. Justice Le Dain writing for the majority of the Federal Court of Appeal in *The Queen and Evans* said at page 335 of that decision:

... The fact that the avowed reason for the action taken with respect to Evans's employment may have "resulted" from allegations of "voluntary malfeasance", in the sense that the situation or condition that was the reason for the action was created by the allegations, is not sufficient in law to make the action disciplinary in nature. Disciplinary action is distinguished from non-disciplinary action by the reasons for and purpose of the action. The reason for disciplinary action is misconduct and the purpose is to punish. . . .

Along those lines Arbitrator Swinton in *New Orchard Lodge* rejected as being too wide a definition of discipline as any action that had a detrimental effect on an employee. At page 227 she adopted a narrower concept of discipline in the following words:

... As George Adams states in *Grievance Arbitration of Discharge Cases* (Industrial Relations Centre, Queen's University, 1978) at p. 5: "As an action, discipline constitutes the steps taken to enforce conformity to established substantive rules." That is, there is a sanction aspect to discipline, triggered by some misconduct. Whether the purpose of that sanction is to deter, to punish or to correct, the ultimate goal is to achieve compliance with certain standards of work-place conduct. . . .

I agree that the subjective interpretation of the employee is not to be determinative of whether an action is disciplinary in nature. I accept that discipline is to be determined based on objective criteria, and that it is an action taken to correct, deter, or punish conduct which the employer sees as culpable. I also believe that it is significant to look at the action taken and the nature of the negative impact which it is said to have on the employee's situation.

I have already found that the reason for the grievor's removal from OIGEU was not motivated by the allegation of insubordination which had been made against him. He was removed because of his Unit Commander's concern about his ability to supervise properly in the unstructured OIGEU environment. I have no reason to doubt that the concern was honestly held by Gottschalk. I have no reason to doubt that Gottschalk honestly felt unable to make the sort of inquiries necessary to allay his concerns given the ongoing IA investigation into the conduct of the subject officers. It is possible that he may have been able to do more than he did to determine if his concerns were well

founded; however, that does not change the character of the action taken in removing the grievor from OIGEU. That action does not meet the objective test of discipline. Quite simply, it was not motivated by misconduct and not done to punish the grievor. The mere fact of an allegation of misconduct does not make every subsequent action taken disciplinary. In my view, the action taken was motivated by a sincere attempt on the part of Gottschalk to try to protect the interests of the TPS and the officers under his command; it was not taken to punish or to correct any behaviour seen as culpable.

Further, I do not see anything that occurred while the grievor was in Fugitive Squad as being disciplinary. The grievor was assigned to do necessary and important work, although I have no doubt that entering the TPS 250 forms was boring, it certainly was not a make-work project designed to punish the grievor. He was not prevented from doing what was necessary to participate in his ongoing gaming prosecutions. Other than the weeks of steady work with the TPS 250s, the grievor was performing regular investigatory duties and supervising Parent in a manner that was consistent with his rank. Although I accept that the word "temporary" appeared in the organizational chart that was in existence at the meeting, any suggestion that it was there to demean the grievor is offset by Campbell's explanation and the fact that the grievor was assigned responsibility for VICLAS, which was an important function. None of this strikes me as being indicative of discipline.

Further, there is nothing by way of negative notation on the grievor's employment record as a result of any of this. Certainly, he perceives that he has been "demoted", and he was removed from duties that he enjoyed and excelled at; however, that subjective reaction does not determine the issue.

I therefore hold that neither the action taken in removing the grievor from OIGEU, nor his subsequent treatment in the Fugitive Squad meets the objective test of discipline.

Was there any ongoing obligation to reconsider the grievor's removal from OIGEU?

In the *Valade* case between these same parties Arbitrator Teplitsky was dealing with a transfer which he found had to meet the "reasonable cause" standard of Article 3.01. He found that although the initial response in transferring the officer was justified under that provision there was an ongoing obligation on the part of management to determine if there was reasonable cause for a permanent transfer.

In this case, I have already determined that the grievor's removal from OIGEU was not a transfer within the meaning of Article 3.01. As a result, there is no collective agreement obligation, either originally or ongoing to meet or to continue to meet the "reasonable cause" test.

Was there a breach of the collective agreement in transferring the grievor from SIS to 12 Division CIB?

This move was definitely a transfer because the grievor was moved from one unit to another. I am mindful of the arguments made concerning the powers of the Chief of Police under the Act; however, I will not deal with them yet.

Continuing with the narrative of the facts as they unfolded, it should be noted that on April 9, 1998 the grievor was completely exonerated of the misconduct charge (see Ex. 3). It is a matter of agreement between the parties that the charges arose out of a scheduling problem.

The evidence shows that ever since the grievor was removed from OIGEU and re-assigned to the Fugitive Squad he had been intent on returning to OIGEU. I have no doubt that this was a most important goal for him. I also have no doubt that he brought up the subject with his supervisors on a regular basis, in that he took advantage of virtually every informal encounter he had with Gottschalk to refer to his preference to return to OIGEU. Certainly, what Gottschalk might have

perceived as casual chit chat could have been taken by the grievor as a remark which he had to examine for significance in light of his desire to return to his preferred career as a gaming investigator. The grievor took notes of virtually every conversation he said he had with Gottschalk and Campbell from October 6<sup>th</sup> onward (see primarily Exs. 39, 39A & 39B). Neither Gottschalk nor Campbell took such notes. There were assertions made by the grievor based on his notes of those conversations that were not put to Gottschalk or Campbell during cross-examination, and that causes a problem in assessing the evidence. There is also a presumption that a witness is telling the truth until the contrary is proven (see *Garden v. Irvine*). That is the presumption on which I will act.

As mentioned at the very beginning of this decision, commencing in late 1996 or early 1997 Gottschalk instituted a transfer policy motivated primarily by his concerns about the vulnerability of his unit. Members were transferred out of SIS under that policy. Then in September 1997 Hunter introduced his transfer policy (Ex. 6) throughout the entire command, establishing a requirement that at least 10% of the members in each unit in the command be transferred each year, preferably to a field unit. The rationale and criteria are set out earlier in this award.

Gottschalk testified that the grievor was being considered for transfer even though he was being seconded to OIGEU. He said that in a review of all of the See-Faxes for the members of his unit, the grievor's length of service in the unit had come to his attention as early as the end of 1996. That is not surprising given the exercise that Gottschalk was undertaking and the grievor's length of service in the unit (see Ex. 11). Indeed, given the evidence, it would be surprising if the grievor's See-Fax had not stood out in view of his tenure in the unit. It was the uncontradicted evidence of Gottschalk that there were other long-serving officers in the unit who had had temporary transfers out of the unit of roughly the same number and length as the grievor.

It would appear that the inception of OIGEU and the critical role the grievor was to play in its set-up put off any consideration of him as a transfer candidate in the immediate future. However, Gottschalk testified that he had decided that the grievor would be transferred after a year in OIGEU. It was his evidence that he thought that after a year OIGEU would be up and running to the point that the grievor's participation would no longer be as crucial. Gottschalk did not tell anyone about his decision, although the evidence does indicate that he told Moodie that people would be transferred out of OIGEU pursuant to Hunter's policy. He said that he kept silent because he wanted to see how things stood with OIGEU after a year, and because of general concerns that officers, upon being told too far in advance that they will be transferred, might tend to shut down. While noting that nobody had any specific concerns that the grievor was this type of officer, Gottschalk's reasons for silence are reasonable.

It is clear from Hunter's evidence that, through his transfer policy, he wanted to create a new norm where expectations were no longer that a position in the command was a position for life. He wanted to have transfers in and out of the command seen as the norm, and wanted to dispel the notion that officers were transferred out of the command because they had done something to displease someone or were burnt-out. Hence, it is not surprising that Hunter, in his cross-examination, said that he would have considered it to be inappropriate to transfer the grievor to a division while the misconduct allegations were outstanding. Therefore, I think that it is a reasonable conclusion that the question of the grievor's transfer under the Hunter policy had to be postponed pending the determination of the misconduct charges. Further, given the universal application of the policy, it would not be unreasonable to have the grievor be considered as a possible candidate for transfer once those charges were disposed of in his favour.

There is also no doubt that both Gottschalk's policy and Hunter's policy were made known to the members of the unit. The grievor was aware of the policy and did not consider that he was exempt from its operation. In fact, the minutes of the Fugitive Squad meeting of February 12, 1998 (Ex. 33), which the grievor attended, show that the following was discussed:

**4. Annual Rotation of Personnel:** The policy for rotation of personnel within Detective Support Command was provided to all present at the meeting. The minimum ten percent (10%) transfer ratio was identified. Regular attrition (promotions, retirements, resignations) can be part of this ten percent makeup, however it must be reported to the Deputy Chief if it is to qualify. The following criteria will be looked at when considering this policy as it relates to uniform members: contribution to unit mandate, performance, personal risk, time in unit, nature of assignment.

I have no doubt that many things were said to the grievor after his removal from OIGEU which he could reasonably have interpreted as giving him hope that he might return to OIGEU. However, since he himself agreed that he had been given no commitment that he would be returning there, I see no reason to parse those statements or to determine what exactly was said, when it was said, and by whom.

Certainly, the grievor had it fixed in his mind that once the misconduct charge was determined in his favour his return to OIGEU should be automatic. Again, although at times Gottschalk may have been vague in his dealings with the grievor, it is acknowledged that there were no commitments to return him to OIGEU. Further, although the grievor had centred on the misconduct allegation and subsequent charge as having caused his removal from OIGEU, Gottschalk's action had been motivated by concerns that were related to the investigation of the subject officers. Certainly while Gottschalk may not have considered the grievor's return to OIGEU to be automatic, it should not really have been surprising to have been confronted by the grievor about returning to OIGEU once the charge was dismissed. Gottschalk also said that he was

concerned that if he returned the grievor to OIGEU for only a few months until the end of the first year of the secondment agreement, his removal then might be seen as punishment rather than as part of the normal rotation. Such a move would also be disruptive since it would mean removing an officer from the team and then having to send in a replacement a few months later when the grievor was transferred.

Gottschalk confirmed that there was consideration given to keeping the grievor in the Fugitive Squad. However, I am unable to conclude on balance that the grievor was told that he would be kept in Fugitive Squad permanently. Such a conclusion would be inconsistent with the new regime that transfer was to be the rule rather than the exception, and that no officer would stay in the Command forever.

As already noted, the grievor was the officer in SIS with the longest period of service in the unit. As such, it is not surprising that he would be considered as a likely candidate for transfer under the Hunter policy. Given that, it is plausible that Campbell put the grievor's name forward as a candidate for transfer sometime in early 1998.

Campbell said that he put the grievor's name forward to be considered as part of the 10% because the grievor was the longest serving member in the unit and because someone in the Fugitive Squad was being promoted, which would have left Campbell with a surplus supervisor. He said that he discussed it with Gottschalk and that Gottschalk's mind was already made up that it was time for the grievor to go.

Sometime in April Campbell told the grievor that Detective Constable Borg's promotion was expected and that he had put the grievor's name forward for transfer. Campbell said that he wanted the grievor to know that his name was going forward for transfer under the policy, and that even if

Borg had not been promoted the grievor would still have been transferred. Around that time Detective Dee of the Fugitive Squad applied for transfer in connection with promotion, and his leaving meant that there would not have been a surplus of supervisors even with Borg's promotion and the grievor staying. It is clear that neither Campbell nor Gottschalk ever considered keeping the grievor, even though the supervisory surplus had disappeared, because they both considered that it was time for the grievor to move out of the unit. However, the linkage of the transfer with the surplus and the subsequent disappearance of the surplus situation would only serve to add to the grievor's confusion and disappointment with the way he was being treated. Hindsight is wonderful. If only the grievor had been told clearly when he went to OIGEU what the application of the tenure policy meant for him, then perhaps much of this could have been avoided.

Looking at the criteria in the Hunter policy (Ex. 6) there is no doubt that the grievor was the person with the longest service in the unit. As such he would be a prime candidate for transfer. There is also no evidence before me that, despite his obvious expertise and strengths as a gaming investigator, the work of the unit would be irreparably damaged if he were to be removed. Quite the contrary, the evidence was that OIGEU and the Toronto team there was functioning well. The grievor's skills, although considerable, were not completely irreplaceable. There is no evidence before me of any actual "personal risk". I take the evidence to be a perception that officers who are in one situation too long run certain risks which could endanger them or others. It is not necessary for me to make any finding on the validity of such perception; I only note that I heard nothing to suggest any belief that the grievor was at risk was based on demonstrable evidence.

The grievor agreed that he knew of Hunter's policy and that he understood about the concerns regarding succession planning and considered them to be important considerations for

management. He also agreed that the concept of the policy was valid and that it was desirable to get specialized knowledge into the field. He acknowledged that his experience is valuable to him in his current position. He even conceded that, all else being equal, service in the unit was a valid and good criterion for transfer and that the person who had been there the longest should go to make a spot for someone with less experience. The problem, though, is that the grievor believes that he was treated unfairly. Part of the unfairness is the confusion which he saw around the surplus issue and what was being said to him; however, a large part of it is that he does not really accept the Hunter policy at face value.

The grievor said that his difficulty was not with the concept of the policy but with its application. He indicated that there was always a system of people coming into and going from the unit, and that the concept of succession planning and identifying risk has always been there. He also said that he agrees with the concept of personnel change. His disagreement, as he stated it, was that people should be told where they stand and what the problem is and given time to rectify it. Then, if the problem continues, they should leave the unit. In his view the process should be documented, and transparent and people should know what the problem is. He also said that there should be an appeal process and the process should not be done arbitrarily. The grievor disagreed with the 10% rule because there was no transparency, no documentation, it is difficult to see how people were assessed, and there was no communication with the people affected.

The difficulty with the grievor's perception of the situation is that it is based on the belief that people are being transferred out of Detective Support Command because of problems they are having. That is exactly the perception that Hunter said he wanted to get rid of and hoped he could combat by making transfer the rule rather than the exception. The grievor's view is that tenure in

SIS is fixed unless the officer is performing poorly. That is not the view of management and that is not the assumption underlying Hunter's policy.

Based on the evidence before me, I believe that the most probable conclusion is that the grievor was transferred out of SIS to 12 Division CIB by virtue of the operation of the Hunter policy (Ex. 6) and that, given his tenure in the unit, it was not an obviously unreasonable application of that policy. Looking at all of the evidence before me there is no reason to conclude that the grievor was being punished or that he was being treated in an arbitrary or discriminatory manner or that there was any bad faith involved. The policy itself was implemented for valid management reasons. Accordingly I find that there was reasonable cause to transfer the grievor.

Do I have the jurisdiction to consider any of this in view of s. 31(4) of the Act?

That section reads as follows:

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

This is an extremely interesting and important issue, and the argument of both counsel raised questions which are not easily answered. I was informed that the parties are in the midst of arguing this point as a preliminary issue in a case before Arbitrator Shime, and I look forward with interest to reading his award. However, in view of the conclusions that I have reached, which are based on the assumption that I have jurisdiction to reach them, it is really not necessary for me to consider this jurisdictional issue. If I do not have jurisdiction the matter is at an end, if I do have jurisdiction I have found that there is no basis on which the grievance can succeed.

Conclusion

For all of the reasons set out in this award, I find no basis for interfering with the decisions

taken by management and the grievance is dismissed.

**DATED AT LONDON, ONTARIO THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2001.**

A handwritten signature in cursive script, appearing to read "Gail Brent", written above a horizontal line.

Gail Brent

## APPENDIX

### AUTHORITIES CITED

1. *Police Services Act*, R.S.O., 1990, c P.15, as amended and Regulations thereunder.
2. *Police Act*, R.S.O., 1980, c 381, as amended.
3. *Garden v. Irvine* (1907), 6 E.L.R. 523.
4. *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).
5. *Metropolitan Toronto Police Association and Board of Commissioners of Police (Valade)*, (1982) unreported (Teplitsky).
6. *Re United Steelworkers, Local 3466 and Steep Rock Iron Mines Ltd.* (1961), 12 L.A.C. 148 (Anderson, C.C.J.).
7. *Re Ottawa General Hospital and Ontario Nurses' Association* (1981), 2 L.A.C.(3d) 1 (P. Picher).
8. *Re Dominion Stores Ltd. and Retail, Commercial and Industrial Union, Local 206* (1983), 9 L.A.C.(3d) 47 (Saltman).
9. *Toronto Police Services Board and Toronto Police Association(Barnard)*, (2000) unreported (Saltman).
10. *The Regional Municipality of Metropolitan Toronto Police Services Board and The Metropolitan Toronto Police Association (lieu time and sick time credits)*, (1996) unreported (Jackson).
11. *The Metropolitan Police Services Board and The Metropolitan Police Association (Kuck)*, (1995) unreported (Brent).
12. *The Canadian Oxford Dictionary*, Oxford University Press.
13. *Re A Reference Under The Constitutional Questions Act*, [1957] O.R. 28 (C.A.).
14. *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Police Association* (1975), 8. O.R.(2d) 65 (C.A.).
15. *Re Metropolitan Toronto Police Association and Board of Commissioners of Police for Metropolitan Toronto* (1980), 28 O.R.(2d) 624 (H.C., Div'1 C.).

16. ***Metropolitan Toronto Police Services Board and Metropolitan Toronto Police Association (1995 Early Retirement Incentive Plan)***, (1997) unreported (P. Picher).
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19. ***The Metropolitan Toronto Police Services Board and The Metropolitan Toronto Police Association (Shift Schedule - 31 Division)***, (2000) unreported (Jackson).
20. ***The Board of Commissioners of Police for Metropolitan Toronto and The Metropolitan Toronto Police Association (interim award on arbitrability)***, (1978) unreported (Samuels).
21. ***Re Retail, Wholesale, Bakery & Confectionery Workers, Local 461, and Canada Bread Co. Ltd.*** (1965), 16 L.A.C. 202 (Reville).
22. ***Re Ottawa Civic Hospital and Canadian Union of Public Employees, Local 576*** (1979), 24 L.A.C.(2d) 244 (Carter).
23. ***Re New Orchard Lodge/Extendicare Ltd., Ottawa and Ontario Nurses' Association*** (1983), 12 L.A.C.(3d) 221 (Swinton).
24. ***Re Government of Alberta and Alberta Union of Provincial Employees (Michaels)*** (1990), 15 L.A.C.(4th) 164 (Moreau, Alta.).
25. ***Re The Queen in Right of Canada and Evans et al.*** (1983), 1 D.L.R.(4th) 328 (Fed. C.A.).
26. ***Legal Aspects of Policing***, Ceysens, Earls court Legal Press, Inc.
27. ***Just v. The Queen in right of British Columbia*** (1989), 64 D.L.R.(4th) 689 (Can. S.C.).
28. ***Re Police Services Board of the City of Pembroke and Kidder*** (1995), 22 O.R.(3d) 663 (O.C. Gen. Div.).