IN THE MATTER OF AN ARBITRATION PURSUANT TO THE
POLICE SERVICES ACT

B E T W E E N:

THE KINGSTON POLICE SERVICES BOARD

(The"Employer" or the "Board")

- and -

THE KINGSTON CITY POLICE ASSOCIATION

(The "Association")

AND IN THE MATTER OF A SUPPLEMENTARY AWARD CONCERNING THE GRIEVANCE OF STEVEN SAUNDERS AND CONCERNING AN AWARD OF DAMAGES

David K.L. Starkman	Arbitrator

APPEARANCES FOR THE BOARD

Lynda Bordeleau	Counsel

APPEARANCES FOR THE ASSOCIATION

Steven Welcher	Counsel
Brad Booker	Advisor
Gerry Doherty	Association President

A Hearing in this matter was held on December 4, 2003 at Kingston, Ontario

SUPPLEMENTARY AWARD

In a decision dated September 9, 2003 this Board of Arbitration determined that the Employer had violated the provisions of the collective agreement by treating the grievor adversely and without just cause in the manner in which he was excluded from the process for selecting a canine officer.

The parties were unable to agree on a remedy for this violation and the hearing was reconvened to hear submissions concerning this issue.

The Association submitted that the remedy flows from a flawed competition process. In the normal course, by way of remedy for such violations, arbitrators have either placed the grievor directly into the position, or have referred the matter back to the Employer to re-run the competition.

In this case however, it was submitted that neither remedy is appropriate because the competition was for candidates to participate in a ten day selection course, and ,only if a candidate completed the course would they be eligible to be considered for the position of canine handler.

In the Association's view therefore the grievor should be entitled to damages for the lost opportunity to compete for the canine officer position, and the measure of damages should be the difference between the overtime earned by the grievor in his position as a

first class constable and the overtime earned by the incumbent in the position of canine officer. Reference was made to the decisions in *Northwood Pulp and Paper Ltd. (Houston) v. Industrial Wood and Allied workers of Canada, Local 1-424* (Karsten Grievance [1995] B.C.C.A.A.A. No. 33, *Catholic District School Board of Education of Eastern Ontario and Ontario English Catholic Teachers' Assn. (Audette Grievance)* [1999] O.L.A.A. No. 396

The Employer submitted that, recognizing that there was no job posting provision in the collective agreement, the original award found a violation of the management rights clause of the collective agreement, insofar as the Employer had not treated the grievor with procedural fairness in selecting candidates to attend the canine selection course.

In its submission, the appropriate remedy would be a direction to the Employer to reconsider the grievor's suitability for the candidate selection process, or alternatively, that the Employer be directed to send the grievor on a candidate selection course.

In its view, the critical question was the true nature of the grievor's entitlement, and, since it cannot be said with any certainty that the grievor would have been successful in the selection course, it would be entirely inappropriate to award the grievor money because to do so would be to presume that there was some form of entitlement to the position. Reference was made to the decisions in *Canadian Pacific Forest Products Limited* [1990] O.L.R.B. Rep. May 492, *C.U.P.E. v. Riverside Hospital* [1999] O.L.A.A. No. 579 (O'Neil), and *School District No. 75 (Mission) and Mission Teacher's Union*

(1977) 61 L.A.C. (4th) 8 (D.L. Larson)

DECISION

In determining this matter, I am endeavouring to bring closure to an issue which had its origins in 2000, and in doing so, do not wish to minimize the importance and effect of a finding that the Employer has violated the provisions of the collective bargaining agreement.

After considering the submissions of the parties concerning the issue of remedy, I have not accepted the Employer's suggested remedy of requiring the police service to re-consider the grievor's candidacy because this has the possibility of leading to further disputes. Further, even if the grievor is determined to be a suitable candidate to be sent on the candidate selection course, I was not advised of any courses that were imminent, nor was the Employer prepared to commit to only sending the grievor on the course to the exclusion of other candidates. In addition, the Employer was not prepared to commit to giving the grievor the position of canine handler, when and if it became vacant, should the grievor successfully complete the selection course.

At the present time, there is only one canine handler in the Kingston police service, and when the incumbent assumed the position in 2002 it was for a minimum period of five years and therefore, barring unforseen circumstances, there would not be any vacancy

until at least 2007 which is too long a time horizon, considering the uncertainties, to be utilized to fashion a remedy for a breach of a collective agreement in 2001. Further, as noted by the Association in its submissions, if the police service seeks candidates in the future to go on a canine candidate selection course, the grievor, like other officers, can apply at that time for consideration, and therefore an award which directs the Employer to re-consider his candidacy, or even to send him on the course, gives the grievor little more than he would be entitled to in any case.

Thus, in order to fashion an appropriate remedy in this case, I am persuaded that the grievor should be compensated for the loss of opportunity to compete for the position of canine handler in 2001.

Both civil courts and labour arbitrators have awarded damages for loss of opportunity in appropriate circumstances. In *Eastwalsh Homes Ltd. v. Anatal Developments Ltd*, 12 O.R. (3d) 675, the Ontario Court of Appeal at p. 679 stated:

> A second fundamental principle is that where it is clear that the breach of contract caused loss to the plaintiff, but it is very difficult to quantify that loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour. One of the frequent difficulties in assessing damages is that the plaintiff is unable to prove loss of a definite benefit but only the "chance" of receiving a benefit had the contract been performed . In those circumstances, rather than refusing to award damages the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis.

In *Re Burrard Yarrows Corporation, Vancouver Division, and International Brotherhood*

of Painters, Local 138, 1981 30 L.A.C. (2d) 331 (I. Christie), the Union was seeking damages for the employer's failure to consult with the union prior to contracting out certain work. At pp 342-343 the Board comments on the law with respect to damages for the loss of opportunity as follows:

> ...The union as party to this collective agreement thought it worthwhile to bargain for the "opportunity to persuade – to gain the ear of the other" (see Board of School Trustees of School District No. 22 (Vernon), supra, at p. 16) and it is that, and any possible benefit to its member which might flow from it, that has been denied the union by the company here. How then can the company, or this board of arbitration, say that this bargained for opportunity to have their interests considered is valueless to the union and its members?
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> Accepting that the loss of this opportunity is real, we must quantify it for the purposes of a damage award. Brown and Beatty, Canadian Labour Arbitration (1977), state at para. 2:1410, pp. 52-3
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> > As a general matter and unless the agreement provides otherwise, in assessing damages arbitrators have followed and utilized the same common law principles that are applied in breach of contract cases. Thus, the basic purpose of an award of damages in a grievance arbitration is to put the aggrieved party in the same position he would have been in had there been no breach of a collective agreement...But they have recognized that the general principle is subject to three basic qualifying factors. In the first place arbitrators have held that the loss claimed must not be too remote, that is, that it must be "reasonably foreseeable". Secondly, the aggrieved party must act reasonably to mitigate his loss. Finally, the loss or damages must be certain and not speculative.
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> It is the third of these with which we are concerned here. For further elaboration we may turn to the following statement of one of the authors, Donald Brown, in "Developments in the Law of Damages Through Breach of Contract", in Law Society of Upper Canada, Special Lectures on Current Problems in the Law of Contracts (1975), at pp. 3-4:
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> > "Certainty" means two things in the law of damages. In one sense it requires that there be sufficient proof of facts to permit the calculation of damages with reasonable certainty.

> As well a court must be able to conclude with certainty that a pecuniary loss was suffered by the plaintiff. Both expressions of the certainty requirement, however, are often made subject to the caveat that if all of the available facts are proven and it is clear that some loss was suffered, then, notwithstanding the difficulties involved, the Court is obliged to award a sum as damages even though it may be little better than a guess.

This proposition is amply supported by the highest authority in Canada (see. E.g., *Penvidic Contracting Co. Ltd. v. Int'l Nickel Co. of Canada Ltd.* (1975), 53 D.L.R. (3d) 748, [1976] 1 S.C.R. 267, 4 N.R. 1 (S.C.C.) but the leading case continues to be the early English Court of Appeal decision in *Chaplin v. Hicks*, [1911] 2 K.B. 786. In that case the defendant, acting in breach of contract, had denied the plaintiff the opportunity that she had earned to be one of 50 finalists in a contest in which there would be 12 winners, and was held liable to substantial, not nominal damages. Thus, the case stands for the proposition that "where the breach of a contract deprives the plaintiff of an opportunity that might or might not have been profitable, his damages are measured by the value of the chance" (Waddams, The Law of Contract, at p. 452). As Fletcher Moulton L.G. said in *Chaplin v. Hicks* itself, at p. 796:

> I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner.

Similarly in this matter, because of the Employer's violation of the provisions of the collective agreement, the grievor lost the opportunity to compete for the position of canine handler, and should be entitled to damages for the loss of the opportunity. The difficulty however is the measure of the damages. There is some uncertainty about whether the grievor would have successfully completed the ten day course, uncertainty about whether he would have scored better than the incumbent, uncertainty as to whether he would have been chosen by the Employer to be the canine handler, and

uncertainty as to whether he would have remained in the position of canine handler for five years, or perhaps less, or perhaps longer.

As noted however in the arbitral and court decisions to which I was referred, the existence of uncertainty should not, in and of itself, deprive the grievor of an economic remedy. The grievor joined the Kingston police service in May, 1999. In June, 2000 he responded to the first posting for candidates interested in being considered for the canine candidate selection course, and achieved better than an eighty per cent pass mark on his physical fitness test. Thereafter, the grievor spent some time training and attending public canine demonstrations with Constable Keuhl.

Throughout this period Constable Keuhl told the grievor on a number of occasions that, in his opinion, the grievor would do well on the candidate selection course. Ultimately, Constable Keuhl formed the opinion that the grievor was not a suitable candidate for the canine handler position, but this was based on Constable Keuhl's observations of the grievor's work patterns and habits, and not on his conclusion that the grievor would not have succeeded in the candidate selection course, which, as described in the evidence, is principally a course to test the physical and mental endurance of the candidates.

Accordingly, I have determined that the grievor would have probably passed the course. As to whether the grievor would have scored higher than the incumbent, I have no information. As to whether the Employer had committed to giving the position to the candidate who scored highest in the selection course as submitted by the Association,

or whether the Employer retained a residual discretion to choose from amongst those candidates who successfully completed the selection course as submitted by the Employer, is not clear from the evidence. Even if the grievor was granted the position, it is not certain whether he would have remained in the position for five years.

It was acknowledged, by both parties, that the overtime opportunities of the canine officer were greater than the overtime opportunities of other first class constables, although no specific numbers were provided, and there was considerable disagreement as to whether the differences were substantial or minimal, and they would, in any case, vary from year to year.

Considering all these factors, I have determined that the appropriate measure of damages in this matter should be the lost overtime opportunities. Given the considerable uncertainties outlined above however, the Police Services Board is ordered to pay to the grievor fifty per cent of the difference between the grievor's actual overtime payments in the years 2002, and 2003, and the overtime paid to the canine officer in those years. The calculation can be pro-rated if there are factors such as prolonged absences or extremely unusual events which would distort the results. I will remain seized should the parties experience any difficulties in the implementation of this award.

Dated at Maberly, Ontario this 12th day of January, 2004.

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David K.L. Starkman