

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *POLICE SERVICES ACT*
R.S.O. 1990 as amended

B E T W E E N:

THE NIAGARA REGION POLICE ASSOCIATION
(Hereinafter referred to as “the Association”)

-and-

THE REGIONAL MUNICIPALITY OF NIAGARA POLICE SERVICES BOARD
(Hereinafter referred to as “the Employer or the Board”)

GRIEVANCE OF SGT. CLIFF PRIEST: (Hereinafter “the Grievor”)

SOLE ARBITRATOR: Richard H. McLaren, C.Arb.

COUNSEL FOR THE ASSOCIATION: Gary Hopkinson

COUNSEL FOR THE BOARD: Woodward B. McKaig

HEARINGS in RELATION to this MATTER WERE HELD at THOROLD, ONTARIO,
on 23 May; 29 & 30 November; 13 & 14 December 2012 and 27 March; 10, 11 & 23 April; and
15 May 2013

INTERIM AWARD

There are two grievances before me. The first involves a grievance alleging that the transfer of Sergeant Priest from the Accident Reconstruction Unit to the Quartermasters Stores was carried out by the Employer in a “*manner that is considered arbitrary, discriminatory and done in bad faith*” in violation of Article 5.1 of the Uniform Collective Agreement. The second grievance involves a job posting for the Quartermasters Stores alleging that the Employer violated the Letter of Understanding regarding Job Postings within the Uniform Collective Agreement “*by failing to post the position in accordance with the provisions of the Letter of Understanding and General Order 189.05*”. This latter grievance has been held in suspension pending the outcome of the one which is the subject matter of this award.

At the time of the first day of hearings in this matter, the parties agreed that I was properly appointed as the arbitrator and had the authority to issue a final and binding decision as provided for in the *Police Services Act*, R.S.O. 1990, c. P15 as amended. There were no preliminary objections concerning jurisdiction or arbitrability of this matter.

The remedy which may arise from this decision is left initially to the parties to determine. I have retained jurisdiction over the remedy in this matter which is why this is an Interim Award. The hearings will be reconvened on the written request of either party to determine the remedy in the event the parties are unable to successfully complete the remedies which may arise from this Interim Award.

Background

1. Sergeant Priest was the Detective Sergeant in charge of Traffic Administration. He had won that position in 1999 as a detective constable and was promoted to Sergeant in 2007. He is 54 years old with 36 years police experience, 21 years of which is with the Board and the balance with the Metropolitan Police in London, England. He was at the time of the grievance, the Vice-President of the Association. Since the commencement

of these proceedings, he was in 2013, elected the President of the Association.

2. As the Detective Sergeant in charge of Traffic Administration, he was the supervisor of the Traffic Reconstruction Team. That Team is a highly trained group of 5 detective constables that conduct technical collision investigation work for all fatal and life-threatening collisions. In addition, they often assist at other scenes that require technical drawings. As the supervisor, the Grievor was required to attend and assist at some of the more complex collisions or when the unit was short staffed.
3. The Niagara Regional Police Service (“NRPS”) has a division known as Investigative Support and Emergency Services. Superintendent Cliff Sexton is in charge of that division. The Traffic Sergeant position falls under the Emergency Services unit of that division. Sergeant Priest reported to the Unit Commander of Emergency Services, Inspector Richard Coulis (now retired). The current Unit Commander is Inspector George Bench who had been the Officer in Charge of the Training Unit for the period 4 October 2009 until 1 May 2011 and at that time was a Staff Sergeant.
4. Every police officer in the Province of Ontario is required under the *Police Services Act*, to complete their “Use of Force and Firearms” requalification annually. The Training Unit of the Board offers courses related to this requalification. These mandatory training courses are required within every 12 month period for an officer who may be required to use force in the execution of their duties. The nature of the training is described by the *Police Services Act* and the related regulations thereto. The instructors who develop the course lesson plans and assess performance for the Board have completed necessary training and been qualified by the Ontario Police College as “Use of Force Instructors”. The instructors prepare lesson plans for all components of the Use of Force course.
5. Use of Force has Defensive Tactics and Firearms training components. In 2011, the Defensive Tactics component at the NRPS included a session to evaluate a police officer’s understanding of certain defensive techniques and

included a “gauntlet” exercise. The purpose was to be able to assess the effectiveness of an officer’s physical defensive tactics. Each person was expected to complete the gauntlet once.

6. The gauntlet exercise was to be done with a partner who was to encourage the officer to engage a threat with certain specified physical techniques. At one point, the officers were to adopt a prone position to simulate slipping or being knocked down and then were required to re-engage the threat. This exercise was no more than 40 seconds in duration and officers adopted the prone position at the 20 second mark. After the first target was engaged, officers transitioned to a second target (bag). Before engaging the second target, officers were asked to grab hold of a wall mounted bar and raise themselves to simulate looking over a fence. They could do this under their own power using any method they wished or could rely on assistance from their partner. In all there were four targets – meaning an officer was expected to go prone 4 times and perform a lift on the bar three times.
7. The Use of Force Requalification Course for the NRPS began in mid-January of 2011. Rumours were circulating within the force that the Use of Force course for that year required members to complete “chin-ups”. In January of 2011 then Staff Sergeant George Bench in charge of the Training Unit accompanied Sergeant Paul Di Simoni (then President of the Association) to view the gauntlet aspect of the course. The two officers agreed that the gauntlet was not a “chin-up”. In discussions that followed their viewing, Staff Sergeant Bench (his rank at the time) indicated that a best effort at the lift portion of the gauntlet was all that was required and that no one would be deemed unsuccessful for failing to complete the lift portion of the gauntlet.
8. Sergeant Priest attended the facility where the requalification course was offered on 2 June 2011. He was unsuccessful at the Defensive Tactics portion of the requalification course. The consequence was that he had to surrender his Use of Force equipment at the end of the day. Throughout the period until the transfer decision near the end of the calendar year to a different position, he had not retried the course.

9. On 3 November 2011, a transfer meeting was held at which it was decided that Sergeant Priest would be transferred to the Quartermasters Stores position with the NRPS effective 1 January 2012. This position does not require Use of Force qualifications and retesting which to that date, Sergeant Priest had not undertaken.
10. The grievance was filed on 22 November 2011 and reads as follows:
“... the employer acted in a manner that is considered arbitrary, discriminatory and done in bad faith. Therefore, the employer has violated Article 1.5 of the Uniform Collective Agreement...”

Evidence

- (i) Use of Force Requalification 2 June 2011
11. Sergeant Priest attended the training facility in full uniform. His partner for the gauntlet exercise was Superintendent Geoff Skaftfeld. Sergeant Priest was in a prone position on the floor and his partner assisted him in getting up. He proceeded to the “bar” where his partner knelt on the ground and Sergeant Priest stepped up onto the bent knee of his partner and pulled himself up to look over the wall as required. On descending from the wall and dismounting from his partner’s bent knee he felt “pain and uncomfortable sensation” and his right knee “felt not as steady as it should be”. He turned to his partner and said he hurt his knee. He then continued with the course despite having done something to his knee, thinking he had re-aggravated an old injury. He describes himself as right knee dominant.
12. Sergeant Priest carried on with the course as best he could, a part of which involved doing strikes and kicks. He testifies that he knew the techniques and how to deliver a kick and strike, but admits he did not have the power he would desire.
13. At the end of the course, the instructors asked if anyone had any injuries. Sergeant Priest advised that his knee hurt but not to worry about it. He testified that normally all his knee needs is icing and rest.

14. Constables Gorsky and Davies were the course instructors the day that Sergeant Priest did the course. Constable Gorsky remembers hearing something from Sergeant Priest about this knee during the course but could provide no specific detail. He testifies that saying you hurt yourself does not in his mind, equate to an injury. If someone is injured, the test is stopped for them and redone. The two instructors reached the conclusion that Sergeant Priest did not meet standard because of the struggle he had to rise from a prone position; avoiding the gauntlet on the second go around; and being unable to do effective strikes against the weighted bags. When Sergeant Priest was informed of the failure at the end of the day, he stated that they were taking his job away and he intended to grieve the decision.
15. Staff Sergeant Elliot was the officer who informed Sergeant Priest of his failing the Use of Force training. He did so in the presence of Constables Gorsky and Davies, the individuals who had made the failure recommendation to the Staff Sergeant. On 2 June 2011, the Staff Sergeant sent an e-mail to Superintendent Wright that notified him that Sergeant Priest had failed his Use of Force requalification. He was informed that the Sergeant was unable to defend himself or others and it was a safety issue.
16. Superintendent Wright reports directly to the Chief of Police. On 3 June 2011, at a meeting convened for other purposes, Superintendent Wright informed Deputy Chief Matthews about Sergeant Priest's failed requalification. Deputy Chief Matthews then instructed Superintendent Wright to ensure appropriate documentation was completed and that Sergeant Priest was properly deployed. He testifies in cross-examination that he did not know or have a clear picture that the injury to the knee caused Sergeant Priest to fail.
17. Superintendent Wright proceeded to satisfy himself that Sergeant Priest was treated fairly and the physical activity required during the testing was reasonable. He also satisfied himself that the proficiency demonstrated by Sergeant Priest justified the failure. A personal meeting between the two occurred on 27 June 2011 in which Superintendent Wright told Sergeant

Priest his findings set out above. He advised Sergeant Priest that to remain in an operational position, he must complete his Use of Force retraining. Superintendent Wright also advised that Sergeant Priest would not be moved immediately but would have an opportunity to redo his Use of Force testing.

18. Superintendent Wright met with members of the Association to discuss options regarding Sergeant Priest's retesting on two occasions. Superintendent Wright expressed concern to the Association regarding Sergeant Priest's health and that he did not want to endanger his health. Superintendent Wright was advised that the Association would ask the Grievor to get checked by a doctor prior to the second re-test. After this time, Superintendent Wright had very little involvement with the matter.

(ii) Continuing in Charge of Traffic Administration

19. Following his failure to requalify for his Use of Force, Sergeant Priest continued his work as Detective Sergeant in charge of Traffic Administration until his transfer to Quartermasters Stores effective 1 January 2012 but not actually moved until later.
20. Superintendent Cliff Sexton testifies that he was made aware in mid-2011 that Sergeant Priest had not passed his Use of Force training believing that he had been so advised by Superintendent Wright. Superintendent Sexton understood that Sergeant Priest was to reattempt his Use of Force training. He further testifies that Inspector Coulis left him with the understanding that Sergeant Priest was not to be deployed in an operational capacity where he might have to use force. Coulis had advised him that on a few occasions, Sergeant Priest had been deployed in an operational capacity, and that discussions to this effect took place between the two officers.
21. Sergeant Priest testifies that he is required by the NRPS General Order to attend the scene of an accident when there is a double fatality. Typically, he would also attend the scene when there was a fatality or there were complex issues involved.

22. After the loss of his Use of Force qualification, Sergeant Priest's first recollection of being told not to attend a scene was on 3 August 2011. After that date, to the end of the year, there were 12 accidents and he dealt with all of them without going to the scene. He emphasized in his testimony that there was not a change in his job duties but in how the duties were carried out by him.
23. Inspector Coulis in contrast recalls having conversations prior to that and in particular recalls a specific incident on 18 July 2011 where he advised the Grievor that he was not to attend field calls until he regained his Use of Force. According to Inspector Coulis, the Grievor inquired whether he could attend field calls if he remained on the perimeter of the reconstruction calls. Inspector Coulis instructed the Grievor that this was not acceptable and that he had to remain in the building.
24. Inspector Coulis testifies that despite his instructions to the Grievor, he heard on occasions that the Grievor continued to attend at certain scenes. Despite this understanding, Inspector Coulis could not confirm the truth or accuracy of these rumours. He did not enquire further.
25. Sergeant Priest states that his goal throughout the autumn of 2011 was that as soon as his knee was better, he would redo his Use of Force testing requalification.

(iii) The Injury

26. At first, Sergeant Priest thought he had aggravated an old injury. When it had not sorted itself out after a couple of weeks, he sought the advice of his family physician in July 2011. In September he saw a specialist where he was advised that it would take 6 months to clear up. The Grievor underwent physiotherapy from July 2011 to February 2012.
27. On 6 June 2011, Human Resources received an "Employee Accident Report" regarding the injury to Sergeant Priest's knee during a defensive tactics exercise on 3 June 2011. Sergeant Priest was advised on 7 June 2011

that the claim was entered as a “First Aid” claim. This confirms that the examining officers did not have an understanding that the Grievor had an injury which had occurred at work.

28. The injury was diagnosed as a deep bone bruise caused by the drop from the bar of the gauntlet. On a visit with the specialist, in November 2011, he was provided with some forms for a work related accident. He was also advised to avoid the bar in any retesting.

(iv) Accommodation

29. Donna Marlow is a Disability Management Specialist in the Human Resources Unit of the NRPS. She testifies that after e-mail communications from Sergeant Priest a “Form 7 for Healthcare” was submitted to the *Workplace Safety and Insurance Board* (“WSIB”) with a copy and an explanatory memo being forwarded to Sergeant Priest. She testifies that after a WSIB claim is filed, the NRPS typically receives little medical information because the reports go directly to the WSIB because they relate to the claim.
30. On 12 October 2011, a progress report was received by NRPS from WSIB. It indicated that there was no lost time on the claim and that Sergeant Priest was performing his regular duties. Ms. Marlow testifies that HR was unaware of any change in duties. She testifies that had she been made aware of the fact that Sergeant Priest was not able to perform all aspects of his duties, then she would have advised Sergeant Priest’s Supervisor that a Personnel Order should be issued placing him on modified duties.
31. It was not until November of 2011 that a Personnel Order was issued in conjunction with the annual changes. That Order did not show that Sergeant Priest was being moved to Quartermasters in a modified capacity. Ms. Marlow being under the impression from WSIB that he was performing his full duties contacted Deputy Chief Carl Scott on 24 November 2011 to see if the transfer was meant to have been because of modified duties. This is the first time that she knew that Sergeant Priest was working in modified duties.

32. Ms. Marlow stated that she provided Sergeant Priest with the Physical Demands Analysis for the Use of Force training and the Confirmation of Medical Assessment to Participate in Use of Force Training which needed to be completed by Sergeant Priest's physician. To date, the form has not been returned to HR.
33. Superintendent Wright testified in cross-examination that Human Resources ("HR") had the expertise in accommodation matters and the necessary medical information goes through HR. The operations side of the force does not formulate what accommodations may or may not be required; it is done in HR and Operations is told of the physical limitation on a need to know basis.

(v) Use of Force in a deployable position

34. Acting Deputy Chief in charge of Police Operations, Carl Scott, testifies that at the Fall Transfer Meeting,¹ the vacant position in the Quartermaster Stores was discussed. In that connection, Sergeant Priest was considered as a possible candidate for the position. Those in attendance all agreed Sergeant Priest had the skill to act on behalf of the Service with outside vendors and to manage that area with the required interaction with service members. Carl Scott testifies that in considering Sergeant Priest for this position, it was understood that he was not qualified to carry out his Use of Force options since June 2011. According to Deputy Chief Scott, there was no indication that Sergeant Priest was going to attempt to requalify in the immediate future. The position of Collision Reconstruction Sergeant was considered a deployable position and he was not deployable. Therefore he could be, and should be, moved.
35. All deployable positions in the NRPS are required to have Use of Force qualification and equipment. The Use of Force equipment provides options for officers to engage the public with a range of Use of Force options

¹¹ An annual meeting held to consider requests for transfer by members and to move personnel as required by the NRPS in advance of the annual leave selection process for the coming year.

allowing the officer to defend himself/herself, protect the public and resolve whatever incident they are involved in.

36. Acting Deputy Chief Scott acknowledged that he learned after it had occurred, that Sergeant Priest was assigned to be a bearer in a funeral. He was, as a result, in full uniform after he lost his Use of Force qualification. He also attended the Rick Hansen Charity function through the Chief but the Acting Deputy Chief was only made aware of it later.

(vi) Coulis Evidence

37. Prior to his retirement in February of 2013, Inspector Coulis was the Unit Commander of Emergency Services. His role was to provide managerial oversight to emergency planning. Sergeant Priest reported to him and when he lost his Use of Force qualification, Inspector Coulis drew from the instructions of Inspector Sexton, that Sergeant Priest was to be doing “meaningful work”. Inspector Coulis ensured that was the case. He testifies that he took no issues with the quantity or the quality of the work Sergeant Priest did.
38. Inspector Coulis lost his own Use of Force qualification in March of 2012 and never regained the qualification before he retired. He remained in his position until retirement close to one year later. On occasion, he would be in the field in the course of his duties in a command post some distance from the scene which might involve a barricaded person or a drug trafficking raid.

PARTIES SUBMISSIONS

(i) The Grievor & the Association

39. The Association submits there was a failure to accommodate after the loss of the Use of Force as a result of the requalification testing. Knee pain can constitute a disability under the *Human Rights Code* (“HRC”) as discussed in *Boyce*, and the *Ontario Jockey Club* cases.

40. Sections 11 (1) & (2) of the HRC are to be read in conjunction and are similar to s. 17 (1) & (2). Both sets of sections are subject to accommodation without undue hardship.
41. The leading case for accommodation is the Supreme Court of Canada's decision in the *Meiorin* grievance, cited below. The *Meiorin* grievance sets out the analysis of what is a bona fide occupational requirement ("BFOR"). It is a three (3) step analysis and it is the third step, being the standard that is reasonably necessary to accomplish the legitimate work-related purpose which is in dispute in this case.
42. According to the Association, the person overseeing the training component did not have a clear picture as to why the Grievor failed his Use of Force. There was never a connection made by the NRPS between the injury of the knee and the failure to pass the Use of Force Requalification Test. The operational side of the force was not aware of the 6 month recovery period.
43. The proposition that someone in a deployable position has to have Use of Force applies to able body individuals. This is an inflexible position or rule that is not justified. Despite Inspector Coulis' injury, he was permitted to remain in his position for almost one year before retirement. What was required in Sergeant Priest's case was a detailed accommodation analysis before he was transferred to the Quartermaster position. He too might well have been able to be accommodated in his position until his recovery period was over in February 2013 and he could requalify for his Use of Force.
44. In support of its position, the Association made reference to the following authorities:

Human Rights Code, R.S.O. 1990, c. H.19 as am. S.O. 1993, c. 27, Sched.; 1993, c. 35, s. 56; 1994, c. 10, s. 22; 1994, c. 27, s. 65 [s. 65(7) not in force at date of publication.]; 1995, c. 4, s. 3; 1997, c. 16, s. 8; 1997, c. 24, s. 212; 1999, c. 6, s. 28; 2001, c. 13, s. 19; 2001, c. 32, s. 27; 2002, c. 18, Sched. C; 2005, c. 5, s. 32, 2005, c. 18, s. 17; 2005, c. 29, s. 1; 2006, c. 19, Sched. B, s. 10 (Fr.); 2006, c. 21, Sched. F, ss. 136(2), Table 2, 137; 2006,

c. 30; 2006, c. 35, Sched. C, ss. 54(1), 132; 2009, c. 33, Sched. 2, s. 35; *Boyce v. New Westminster (City)* [1994] B.C.C.H.R.D. No. 33, 24 C.H.R.R. D/441; *Hotel Employees, Restaurant Employees Union, Local 75 v. Ontario Jockey Club (Szelba Grievance)* [2000] O.L.A.A. No. 681, 91 L.A.C. (4th) 146; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46; *ADGA Group Consultants Inc. v. Lane* [2008] O.J. No. 3076; *Lane v. ADGA Group Consultants Inc.* [2007] O.H.R.T.D. No. 34; *Halifax (Regional Municipality) and Municipal Assn. of Police Personnel (Re)* [2002] N.S.L.A.A. No. 19, 105 L.A.C. (4th) 232; *Jeppesen v. Ancaster (Town)* [2001] O.H.R.B.I.D. No. 1; *Backs v. Ottawa (City)* [2011] HRTO 959; *Essex Police Services Board v. Essex Police Assn. (Horoky Grievance)* [2002] O.L.A.A. No. 944, 105 L.A.C. (4th) 193; *Ontario Public Service Employees Union v. Ontario (Human Rights Commission) (Kerna Grievance)* [2005] O.G.S.B.A. No. 30; *Brewer's Distributor Ltd. v. Brewery, Winery and Distillery Workers' Union, Local 300 (Peebles Grievance)* [2011] B.C.C.A.A.A. No. 49, 208 L.A.C. (4th) 274; *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75; *Krznic v. Chevrette* [1997] O.J. No. 4712, 154 D.L.R. (4th) 527; *Lethbridge (Regional) Police Service v. Lethbridge Police Assn. (Lester Grievance)* [2011] A.G.A.A. No. 42; *Halifax (Regional Municipality) and Municipal Assn. of Police Personnel (Re)* [2002] N.S.L.A.A. No. 19, 105 L.A.C. (4th) 232; *Coupal v. Canada (Attorney General)* [2006] F.C.J. No. 325, [2006] A.C.F. No. 325; *Hamilton Police Assn. v. Hamilton (City) Police Services Board* [2005] O.J. No. 2357, 200 O.A.C. 7; *Hamilton Police Services Board and Hamilton Police Assn. (Re)* [2004] O.L.A.A. No. 920, 124 L.A.C. (4th) 116; *Brant (County) v. Ontario Public Service Employees Union, Local 256 (Cunnane Grievance)* [2012] O.L.A.A. No. 117.

(ii) The Board

45. The Board submitted that there were four issues to be dealt with. The first of which is to determine if Sergeant Priest was properly failed in his Use of Force training. The test promotes officer and public safety of both suspects and victims. The trainers made a correct determination and it was reviewed by management and accepted as being fair and appropriate.
46. The second issue involves answering why did the Grievor fail the Use of Force. The evidence is that he had trouble getting up from a prone position and did a number of ineffective strikes. The bar may have been the cause of an injury but it was not the reason for the failed test.
47. The third issue is centred on the testing day. Was there a duty to accommodate while the test was on-going? The Grievor did not think he needed accommodation and did not ask for it. He felt the injury was minor and was the result of aggravating an old injury.
48. The fourth issue is what accommodations were required or given after 2 June 2011. The NRPS states that it took the appropriate steps.
49. In support of its submissions the Board made reference to the following cases:

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance) [1999] S.C.J. 46; Ontario Public Service Employees Union v. Ontario (Human Rights Commission) (Kerna Grievance) [2005] O.G.S.B.A. No. 30; Catholic District School Board of Eastern Ontario v. Ontario English Catholic Teachers' Assn. (Elderkin Grievance) [2008] O.L.A.A. No. 459, 176 L.A.C. (4th) 193; Emergency Health and Services Commission v. Cassidy [2011] B.C.J. No. 1426; Power v. Wabush Mines [1995] N.J.

No. 314; R. v. McNeill, 2000 CanLII 4897 (ON CA); R. v. Lyttle, 2004 SCC 5, [2004] 1 SCR 193.

MERITS OF DECISION

(i) Use of Force Requalification Test

50. The evidence is unequivocal that Sergeant Priest ought to have failed the Use of Force test on the day he did it. A combination of being unable to arise from a prone position and being unable to make effective strikes was the primary cause of his lack of success. The instructors were unaware that at least the ineffective strikes issue was connected to the knee problem that arose from descending from the bar.
51. The case presented by the Association is about what should have happened after the unsuccessful Use of Force retraining qualification. He was injured in the course of that training. The knee injury is a disability under the *Human Rights Code* R.S.O. 1990, c. H.19 as amended (hereafter the “HRC”). See definition in s.10 (1) (a) through (e).² Ultimately, an injury report was filed under the *Workplace Safety and Insurance Act*, 1997 S.O. and a no time lost injury at work was recognised by the WSIB.

(ii) Injury at Work

52. Sergeant Priest initially thought he had re-aggravated an old injury. When the knee did not improve, he saw his family physician, Dr. Thomas, on 15 July 2011. Dr. Thomas made a referral to a specialist and the earliest available appointment for Sergeant Priest was in September 2011, some three (3) months after the original injury. The specialist diagnosed him with a deep bone bruise which was exacerbated by underlying arthritis. It was definitively determined that there was no role for surgical intervention. It was stated in a medical report of 7 June 2012 that: “*the weight bearing on that leg would be painful and this would limit his ability to, kick, lower*

² See the cases of *Boyce v. New Westminster (City)*, *supra*; and *Hotel Employees, Restaurant Employees Union, Local 75 v. Ontario Jockey Club (Szelba Grievance)*, *supra*.

himself to the floor, knee[l] [sic] on one or both knees, or rise to his feet from a supine or prone position and/or rise from his feet in a kneeling position.”

53. The medical information explains the cause of the failed test and confirms that it was due to the injury at work. Sergeant Priest was in physiotherapy from July 2011 to February 2012. He was notified of the transfer to Quartermasters position in November of 2011.
54. It is apparent on a review of all of the evidence, that the NRPS did not make any connection between the injury and the failure to meet the standard in the Use of Force requalification test.

(iii) Accommodation

55. Where the “Constructive Discrimination” provisions of the HRC in s. 11 or the “Disability” provisions of s. 17 are involved, both sections require an assessment as to whether any action or accommodation is without undue hardship upon the employer who is required to accommodate someone. To undertake that analysis the *Meiorin* case, *supra* comes into play.
56. At paragraph 54 of the *Meiorin* case, a three step analysis is set-out. In this particular matter, the first two steps are not alleged by the Association to have been breached. The issue here is the standard (the Use of Force requirement) reasonably necessary to the accomplishment of the legitimate work-related purpose. The standard must be reasonably necessary by demonstrating that it is impossible to accommodate individual employees sharing the characteristics of the claimant, i.e. having a knee disability without imposing undue hardship upon the employer.
57. There are two standards of the NRPS which arise in this case. First there is the standard that an officer in a deployable position must have their Use of Force qualification at all times. The second standard is that you must pass the re-testing as it is set out, without alteration.

58. Sergeant Priest was performing his duties as supervisor of the Traffic Reconstruction Team after losing his Use of Force qualification by directing the officers under his command at the scene through the use of the telephone. There was no indication that any problems arose by this mode of operation after he was instructed to not attend the scene. He was performing the full range of his duties but for being on site in certain types of accident investigations. There is no evidence the NRPS turned their minds to the issue of accommodation as to there being either an operational impact or a delivery of service to the public impact.
59. Sergeant Priest was in effect, *de facto* accommodated in the position for seven (7) months before the transfer to the Quartermasters stores took effect. Shortly after he was notified of his transfer, he had completed his physiotherapy and might well have been ready to requalify for his Use of Force, particularly if the qualification test was also accommodated. This step never took place. There was no evidence led by the NRPS to the effect that seven (7) months is too long to wait to requalify for Use of Force in that position. The decision to transfer was taken on the basis of the standard that a person in a deployable position requires the Use of Force qualification. Sergeant Priest was a member in a deployable position without the Use of Force. He had the skills to be Quartermaster which would by transfer also place him in a position where Use of Force was no longer a required standard. After the transfer there would be no issue regarding the standard that a person in a deployable position requires the Use of Force qualification.
60. If the Board's action is to be acceptable, it must establish that it cannot accommodate Sgt. Priest without experiencing undue hardship in a fashion that satisfies the legal test of that term. There is very little evidence on this point of undue hardship but the analysis does not have to go there if there was no recognition of the need to accommodate. The Board cannot defend its actions on the basis that if there had been accommodation, which there was not, then it would have been of an undue hardship to the Employer. That is a theoretical defence without a factual foundation when there was no recognition of the need to accommodate.

61. Indeed, there is evidence to the contrary that there is no undue hardship. Inspector Coulis continued working at his position for one year without his Use of Force qualification. There is no doubt that he was also a person in a deployable position.

a. *Procedural Accommodation*

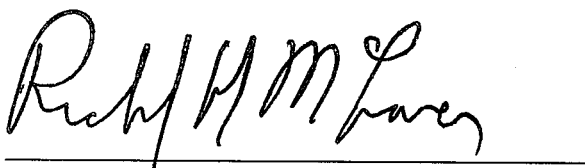
62. The Board through its senior officers, never made the connection at the time of these events between the knee injury and the inability to meet the requirements of the Use of Force test. Its view of the circumstances was primarily one of “the Grievor was just not fit and failed the requalification test.” The Board was unaware of the six month recovery period from the injury. Those in the NRPS who knew about the injury were not aware that it was an on-going problem. This state of affairs was caused by a lack of communication on the part of the Grievor and penetrating inquiry by the senior officers in the chain of command. Thus, the connection was never made between the injury and the failure of the Use of Force requirement. Therefore, there was no procedural accommodation put in place with respect to the re-testing of Sgt. Priest. The senior officers in the chain of command had varying understandings of what was going on but it was largely thought that the problem with Sgt. Priest was in relation to fitness and inability to do the test not disability and unable to do parts of the test.

b. *Substantive Accommodation*

63. The fact is that Sgt. Priest did perform his job despite not having his Use of Force qualification. The Employer ought to have examined how it might have provided accommodation but it never did so. The expertise in the HR department was never activated to provide an analysis of how accommodation might be undertaken and perhaps approved operationally. Instead, the senior officers in the chain of command relied upon the absolute standard that an officer in a deployable position had to have their Use of Force qualification and the Grievor did not have it and had not tried to obtain it.

64. There could have been accommodation to the test for qualification for the Use of Force options. There was no such action. There could have been accommodation by realizing that the disability gave rise to a duty to accommodate in his actual position. There was no such realization. There was a general characterization that his job was a deployable position and that Use of Force was therefore required. On the basis that he did not have his Use of Force qualification Sergeant Priest was transferred. There was no consideration of how the Grievor might have been accommodated to continue in his position until he was sufficiently recovered from his injury at work to re-try his test.
65. I conclude that the NRPS failed to accommodate both on the procedural requirement of accommodation and also on the substantive requirement of accommodation in the Use of Force. Therefore, there has been a breach of the Collective Agreement as alleged in the grievance. I so declare.
66. The parties are directed based on the declaration herein to discuss the remedies which may arise as a result of my declaration of breach. I retain jurisdiction of the matter of appropriate remedies by agreement of the parties. If, within 60 days of the date of this award, there has been no resolution as to the remedies then either party may, by written request to the Arbitrator, seek the reconvening of the hearing in order that I may receive evidence and determine the remedies arising out of the declaration herein. I will thereby complete my award in this matter, which will then become final and binding upon the parties in accordance with the laws of Ontario.

DATED at LONDON, ONTARIO THIS 19th day of SEPTEMBER 2013.



Richard H. McLaren
Arbitrator .