IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Regional Municipality of Peel Police Services Board
(the "Board")

-AND-

Peel Regional Police Association
(the "Association")

Grievances of Constable Caicas

Appearing for the Board:

Glenn P. Christie, Counsel
Fred Biro, Executive Director
Dave Jarvis, Deputy Chief of Police
Doug Bowman, Director, Human Resources
Tamara Wilson, Manager, Labour Relations

Appearing for the Association:

Gay Hopkinson, Counsel
Pierre Bernard, Member Representative
Cezar Caicas, Grievor

Hearing held on October 22, 2015 in Mississauga, Ontario

Decision issued: November 2, 2015

INTERIM DECISION

1. I have been appointed pursuant to the collective agreement between the parties to hear two job posting grievances filed by the Association on behalf of its member, Constable Cezar Caicas. Grievance #14/2013 was filed on September 13, 2013, and claims that the selection process for a job vacancy for a Bicycle Patrol Officer position was unfair, that the grievor was not properly considered in the competition, and that he was therefore improperly denied a position (the "2013 job vacancy process"). Grievance #2-2014, filed on May 1, 2014, is a second grievance claiming that the grievor was not properly considered in another competition for a Bicycle Patrol Officer position, and that his elimination from the competition before the interview process was unfair, arbitrary, without reasonable cause, and was discriminatory (the "2014 job vacancy process").

2. This decision concerns the Association's request for production of all applications and related material for each applicant in each of the two job vacancy processes, including applications for transfer; Personal Development Forms (PDF) for all applicants in the two processes; all materials relevant to the scoring of each applicant in both processes, including the rating and scores assigned by the selection panel members for each candidate, scoring summaries for each applicant, notebook evaluation notes for each applicant, performance indicators (including monthly Field Operations performance statistics) and any other statistics; divisional averages; the debrief notes for all applicants; and, in respect of the first grievance, the Association is also seeking the questions asked during the interviews and the scoring attributed to each response for those candidates interviews.

3. I was advised that the Board has already provided the Association with some information and documents, including the scoring matrix used in the two job vacancy processes; Cst. Caicas' Application for Transfer, PDF, performance indicators and 12 Division averages; and his pre-interview and interview scores in both job vacancy processes.

4. The Board has also advised the Association that in the 2013 job vacancy process positions were awarded to the top three candidates; and has provided the Association with the Application for Transfer, PDF, performance indicators and 12 Division averages, pre-interview and interview scores for one candidate, Cst. A. Chircop, in the 2013 process; as well as providing the interview notes of the panel members in assessing the grievor and Cst. Chircop. It has provided documents relating to Cst. Chircop because she was the successful candidate most proximate to the grievor in the first job vacancy process.

5. In respect of the 2014 job vacancy process, the Board has advised the Association that thirteen candidates were short listed for interviews based on their respective pre-interview scores, and seven positions were filled. The grievor was apparently not granted an interview based on his score. The Board has provided the

Association with the grievor's debrief notes from that process, as well as the Applications for Transfer, PDFs, performance indicators and 12 Division averages, pre-interview and interview scores, and debrief notes, for two applicants who scored most proximately ahead of the grievor. Unlike the disclosure in the first instance, in respect of the 2014 job vacancy process, the Board has anonymized the identities of the two candidates, and referred to them as "Applicant #1" and "Applicant #2".

6. The Association is claiming a breach of Article 4.01 in the two grievances, with a particular emphasis on the last paragraph of the article. The provision states:

> 4.01 The Association acknowledges that, subject to the Police Services Act, 1990, as amended and the Regulations, as amended and made pursuant thereto, it is the function of the Board to:
>
> a) Maintain order, discipline and efficiency.
> b) To hire, discharge, classify, promote, demote or otherwise discipline any member of the Service.
> c) To transfer employees subject to Bill 138, Section 73-3(e).
>
> Without limiting the generality of the foregoing, generally to supervise and administer the affairs of the Service.
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> The Board agrees that no member will be dealt with adversely without reasonable cause and that it will exercise the functions outlined in Article 4 fairly, and in a manner consistent with the Agreement, the Police Services Act, and the Regulations made there under by the Lieutenant Governor in Council.

As these are not grievances regarding promotional opportunities, there is no other specific language in the collective agreement being relied upon.

7. Although this is a preliminary motion, and no evidence has been called at this stage of the proceeding, in making its arguments the Association relied in part on particulars it has provided to the Board regarding the two grievances.

8. In respect of the 2013 grievance, the Association claims that Cst. Caicas had the required qualifications, was granted an interview by the selection panel, but was not successful in the competition. In his debrief after the process, the grievor was apparently advised that he had scored second last amongst all the candidates. The competition apparently comprised of a pre-interview assessment of the grievor's application and work performance for a total of 70%, and an interview mark that comprised the remaining 30% of the marks. The Association claims that it has evidence of arbitrariness and unfairness, as well as evidence of inconsistent application of assessment factors, scoring principles and practices between candidates. In its particulars, the Association has outlined in some detail the

evidence it will seek to rely upon in respect of the grievor and Cst. Chircop to show why it believes that the assessment was unreasonable, unfair and arbitrary.

9. As regards the 2014 grievance, the Association claims that Cst. Caicas was improperly denied an interview, and was therefore not properly considered in the competition. In his debrief, the Association claims that the grievor was told that while he had "good stats", he was not fit for the bike unit. As such, the Association claims that the Board's assessment of the grievor was based in whole, or in part, on the Board's assessment of Cst. Caicas in the 2013 competition, and that therefore the unfairness associated with that job vacancy process impacted the grievor in the 2014 job vacancy process.

10. The Association argues that in the comparative, if not competitive, process of filling the positions in the two job vacancy processes, it would be a breach of the rules of natural justice for it to be deprived of production of the information the Board relied upon for all candidates in the two processes. It argues that even on its review of the documents provided so far there are inconsistencies in the marking process, which begs the question regarding inconsistencies regarding other candidates. The Association argues that in the interest of fairness, and in order to properly prepare for this arbitration, it needs to be able to review the documents it is seeking.

11. The Board argues that it has provided sufficient documentation to permit the Association to argue these grievances, and that no further production should be ordered. It claims that the Association is "fishing" for more information to support its grievances, and that it should be prevented from doing so. It argues that the arbitrator should consider the proportionality between the Association's request for documents and the issues in dispute, and that arguable relevance without constraint is not acceptable. In particular, the Board argues that the only relevant comparison is between the grievor and the successful applicant most proximate to him in each job vacancy process.

12. The Association responded to this argument by stating that it was not up to the Board to frame the Association's case, or the issue in dispute, and that the issue of arguable relevance cannot be decided on the basis of one party's view of what the case should be about. According to the Association, it is arguably relevant whether other candidates were scored in a different manner from how the grievor was scored on the same matters or answers, and therefore having production only in relation to the one or two most proximate successful candidates is not sufficient.

13. With respect to the debrief notes sought for all candidates, the Board argues that they should not be ordered produced as the debriefing followed the selection process, only relates to what candidates may have been told in the aftermath of each competition, and are therefore not relevant to the selection processes themselves.

14. The Association argued in reply to this point that the debrief notes were relevant as they showed what candidates were told after the process was completed. The debrief was about how a candidate had fared, and why they fared as they did. As an example of the potential use of the debrief notes, the Association pointed out that if it finds that what the grievor was told in his debrief is not actually reflected in the evaluation of his application materials, that would be the subject of vigorous cross-examination. According to the Association, the debriefs occurred prior to the filing of the grievance, and even if the arbitrator is ultimately of the view that evidence regarding the debrief notes should not be admitted into evidence, or that limited weight should be given to such evidence, at the stage of pre-hearing production, those notes are arguably relevant.

15. The Board argues that these job vacancy processes are not job competitions as there is no difference in the wage rate of the position that a constable holds, whether in the Bicycle Unit or elsewhere.

16. Finally, the Board claims it is entitled to hide the identity of successful candidates in the second process to maintain their respective confidentiality. However, it concedes that those who considered all applicants did not review the application packages in an anonymized manner: the panel dealt with fully identified individuals in each of the job vacancy processes.

DECISION

17. In the preparation of this award I have reviewed the parties' submissions and the jurisprudence relied upon in those submissions. Reference will only be made to the case law that I have found most relevant in reaching a decision.

18. The parties agreed that the standard of review on issues of pre-hearing disclosure or production was best articulated in *West Park Hospital v. Ontario Nurses' Association* (1993), 37 L.A.C. (4th) 160 (P. Knopf). In that case the arbitration board considered an employer's motion for pre-hearing disclosure of medical information, and noted that did not require a determination regarding what would be relevant evidence in the hearing (at para. 18).

19. In outlining the factors to be considered where disclosure is contested, the majority of the *West Park* board of arbitration stated as follows:

> 19. ... Let us start with the principle that labour arbitration is effective in providing a speedy and efficient resolution for the parties of important issues in a forum that they can control and which they have designed. Boards of arbitration exist to assist the parties. The decision evolves from concepts which are intended to foster fairness, harmony and sensible labour relations. Anything which can assist in the preparation of cases, the refining of issues or which will facilitate settlement should be encouraged. As a general proposition, pre-hearing disclosure will assist with all these matters and should occur wherever

> possible. Indeed, parties do as a matter of course provide pre-hearing disclosure to each other for these very reasons.
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> 20. However, where the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the board of arbitration should be satisfied that the information is not being requested as a "fishing expedition". Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the hearing. Further, the board should be satisfied that disclosure will not cause undue prejudice.

20. As was noted earlier, the Board has made some pre-hearing disclosure to the Association. However, it has only produced what it believes to be relevant for consideration in these grievances: the Association does not agree, and as such seeks broader production of documents in preparation of its case.

21. The first factor to be considered is whether the documents the Association is requesting be produced are arguably relevant to the issues in dispute. In *Laurentian University (Board of Governors) v. Laurentian University Faculty Assn. (Galiano-Riveros Grievance)*, [2011] O.L.A.A. No. 660 (G.T. Surdykowski), the arbitrator noted that "the arbitral test universally applied for production and admissibility purposes is arguable relevance (as opposed to actual relevance, which is the test the arbitrator must use when he makes the determination(s) required)" (at para. 20).

22. In discussing the concept of arguable relevance and the scope of production, Arbitrator Surdykowski, in *Laurentian University*, cited above, quoted as follows from another decision of his in *Re Kaiser Aluminum & Chemical of Canada Ltd. v. United Steelworkers of America, Local 4885*, 2004 CanLII 66487 (ON. L.A.):

> Over the years, the grievance arbitration process has become more formal, sophisticated and legalistic, and concomitantly the trend is to more rather than less production. As a matter of fairness and hearing management, the developing principle is that all arguably relevant documents should be produced to assist the search for the truth, whether or not the party that has possession, power or control of the documents (broadly defined) intends to rely on them or use them for any purpose at the hearing. Full disclosure has become the rule rather than the exception (quite rightly in my view), regardless of who bears the onus or who proceeds first. Producing all arguably relevant non-privileged documents is a litigation obligation, whether or not complying with the obligation assists a party adverse in interest or otherwise has a negative effect on the party making production. The risk that parties take when they decide to litigate rather than settle is that they may have to produce a document that may be helpful to the case of the party opposite. No party is entitled to conceal evidence, or to lie in ambush. And it is simply unfair to require only the party that bears the burden of proof or who proceeds first as a matter of hearing efficiency to make full disclosure before the hearing on the merits begins. Further, the

> obligation to produce is a continuing one, such that documents that a party did not know it had, or which did not previously appear to be arguably relevant, must be disclosed at the first opportunity after they are discovered.

23. Broadly speaking, the grievances before me claim that the selection processes in 2013 and 2014 for Bicycle Patrol Officers were unfair to Cst. Caicas, and that he was not properly assessed in each process. As such, the Association is claiming that Cst. Caicas was dealt with adversely without reasonable cause. In order to prove its case in each process, the Association is seeking production of all applications in each of the processes, along with various documents that the Board would have considered for each applicant. It wants to see the scoring for each applicant so that it may assess for itself, and on behalf of the grievor, whether the scoring was done fairly. In respect of the first grievance, and since the grievor was interviewed in the 2013 process, the Association is seeking production of all the interview questions and the scoring for each candidate who was interviewed. Finally, the Association seeks the debrief notes for all applicants in both processes.

24. In my view, with the exception of the debrief notes for all applicants in both processes, the documents the Association is seeking are arguably relevant to the issues in dispute. Addressing first the exception, it is not clear to me how in these grievances the debrief notes for all applicants could be arguably relevant to whether the grievor's applications were treated fairly during the 2013 and 2014 processes. Whether or not the debrief notes for other applicants properly reflect what their respective test scores were does not appear to be material as those individual's grievances, if any, are not the subject of litigation before me. I would have found that the grievor's own debrief notes were arguably relevant, but note that the Board has already released to the Association the grievor's debrief notes, and in my view that should be sufficient.

25. With respect to my finding that the rest of the documents the Association is seeking are arguably relevant to the litigation of the grievances before me, it is worth reiterating that the test to establish relevance at this stage of the proceeding is broader than it would be at a hearing. It may be that once the Association has received production of the documents it is seeking, it may find that it is not all useful. However, at this juncture, all that is needed is that there be a clear link between the information requested and the issue in dispute, which is whether the grievor was treated unfairly in the two processes.

26. In each of the job vacancy processes being challenged there were multiple positions available. The Board's approach to the issue of arguable relevance, and its contention that it is sufficient that it has provided the Association with documents regarding one or two successful applicants, is too narrow when one considers that the Association seeks to challenge the process in each instance, the marking of the candidates on each element the Board considered, and the questions asked as well as the marking in the interview stage in the 2013 process. In preparing its case, it is entitled to review whether candidates were marked more or less generously than

was the grievor, or even the same as the grievor, for the same or similar experience or answers. It is also entitled to review whether all candidates were asked the same questions or not.

27. Having reviewed the Association's particulars, it is apparent that issue is being taken with the marking of one successful applicant in comparison to the grievor in the 2013 process. As such, the Association purports to have already established some basis for its production requests for documents relating to the rest of the applicants, and I am satisfied that its requests, with the exception of the debrief notes, are arguably relevant to the matters in issue in these grievances.

28. There is no dispute that the second *West Park* factor has been met. The Board agreed that the Association has sufficiently particularized the documents it is requesting.

29. The third *West Park* factor is consideration of whether the material requested may be characterized as a "fishing expedition". On the issue of "fishing" through a production request, Arbitrator Surdykowski stated as follows in *Laurentian University*, cited above:

> 28. Fifth, there is no blanket prohibition against "fishing". The parameters of a piece of litigation establish a sort of litigation pond. A party cannot use a production request to discover whether it has a case to be pursued or a defence to be mounted. *Prima facie*, the grieving party should know why it has grieved, and the responding party should know why it took the action complained about. A production request cannot be used as a sort of divining rod to discover whether or where there is a litigation pond. A party is permitted to fish for arguably relevant documents within the litigation pond already established by the allegations and issues in dispute in the particular case, but a party is not permitted to fish for documents to discover a litigation pond or for documents outside of the established litigation pond. This is why litigation parameters have to be established. Arguable relevance cannot be determined in the air. Grievance arbitration litigation parameters are defined by the parties' positions on the merits of a case, and that is why both party's positions provide the context and basis for a determination of arguable relevance.

30. I agree with Arbitrator Surdykowski that arguable relevance and the concept of "fishing" may be related. One must consider what the requesting party's positions are on the merits of their case, what they are seeking to have produced by the opposing party, and how what they are seeking may be arguably relevant to their litigation position. It is not "fishing" if the Association is not seeking to "discover whether it has a case": in this instance, the Association has already asserted that the grievor was allegedly treated unfairly in the Board's consideration of his background experience, notebook, and so on, and has particularized some instances of why it believes that. The documents it wants produced are in order that it may assess whether there is more evidence to support its position. In the context of job

vacancy processes it is difficult to see how the grading of other applicants in the various stages of the selection process could not be arguably relevant, and not a fishing expedition.

31. The fourth *West Park* factor is that there must be a clear nexus between the documents requested and the positions in dispute between the parties. Again, this is a factor that is not dissimilar to what must be considered when determining arguable relevance, and whether a party is on a "fishing expedition" with its production requests. As has already been outlined above, and for the same reasons, I am satisfied that there is a clear nexus between most of the documents requested, and the disputes between the parties in these two grievances. As has already been noted, the debrief notes for all candidates do not appear to be arguably relevant, and I find that there is no clear nexus between those notes and the issues raised by the grievances.

32. The final *West Park* factor is whether the disclosure will cause undue prejudice. The Board made no submissions regarding undue prejudice, so this is a neutral factor. As has been noted earlier, the Board has already provided the Association with some of the documents relating to both the 2013 and the 2014 job vacancy processes, and it apparently had no trouble doing so. Although not argued, the one aspect in which there may be some issue regarding undue prejudice is with respect to the anonymizing of names of successful candidates in the 2014 job vacancy process. In my view there is no basis for shielding the names of any applicants from the Association in these grievances. While it is necessary to ensure that applicants for job competitions have their personal information, and all information regarding how they fared in the job vacancy processes, maintained confidential, it would be unfair for the Association to be hampered in its preparation for its case by anonymizing all names except that of the grievor. It would also likely become unnecessarily unwieldy in the course of the arbitration if witnesses had to try to maintain the charade of discussing candidates by reference to numbers rather than names. Should an issue arise in the course of the hearing regarding the confidentiality of other applicants, that matter may be addressed at that juncture.

33. It is worth noting that the issue of pre-hearing production in a promotion grievance between these same parties was addressed by Arbitrator Kirkwood in *Peel Police Services Board and Peel Police Association (Niles)*, unreported decision dated February 18, 2011 (to be referred to as "*Niles*"). In that case, as in the present instance, prior to calling any evidence, the Association requested production of the promotional packages submitted by all candidates, as well as the assessments of the packages up to the third stage of the assessment process as the Association was asserting that the assessment had been made unfairly, without reasonable cause, arbitrarily, and discriminatorily in respect of Cst. Niles. Pursuant to a Board directive, the promotion process included four stages, ending with an interview stage. In order to proceed to the interview stage, a Promotion Board had decided that applications had to have a minimum number of points, which the Promotion Board would have assessed in the previous three stages of the process.

34. As in the case before me, the Association in *Niles* was seeking the production of all applicant promotional packages, not only those for successful applicants, as it wished to determine that the criteria had been applied to all candidates in the same manner in which they had been applied to Cst. Niles. As in this case, among other things, the Board argued that the Association was on a "fishing expedition", and was merely seeking production in order to determine whether it had a case.

35. Arbitrator Kirkwood granted the Association's request for production in *Niles* as she found that the Association had sufficiently particularized its requests for production; that there was a nexus between the production sought and the issue in the grievance regarding fairness in the treatment of Cst. Niles' application; the documents sought by the Association were arguably relevant to the issue in dispute; and, the request was not an attempt to determine whether the Association had a case, but rather it was seeking evidence to support its case. On the particular issue of a "fishing expedition", the arbitrator noted at p. 9 that "the attempt to obtain information must not be a "fishing expedition", that is, the party must be seeking evidence to support its case, and not to determine if there is any evidence to found a case, and further, that there must be a clear nexus between the information sought and the issues in dispute".

36. While the production issue before me does not arise in the context of a promotion, but rather in the awarding of a similarly ranked position, albeit of a different type, I have not found that distinction to be material to my consideration of the matter. The *Niles* decision is pertinent in that another arbitrator, in the context of a comparative, if not competitive, process between these same parties, ordered pre-hearing production of similar types of documents to those sought in the present case. While each case turns on its own particular facts or circumstances, in a job vacancy grievance it is not unusual that documents showing how all applicants were treated may be considered to be arguably relevant and having a nexus to the issue in dispute, and may therefore be ordered produced.

37. For all of the reasons outlined above, I substantially uphold the Association's motion for production. I therefore order the Board to produce to the Association within three weeks of the date of this decision the following documents, if they have not already been provided:

1. All applications and related material for each applicant in each of the 2013 and 2014 job vacancy processes, including but not limited to Applications for Transfer;

2. Personal Development Forms for all applicants in both processes;

3. All materials relevant to the scoring of each applicant in both processes, including but not limited to:

(a) the scoring matrix used in the selection process, including but not limited to the Bicycle Patrol Officer Competency Scoring Guide;

(b) the rating and scores assigned by the selection panel members for each candidate;

(c) scoring summaries for each applicant;

(d) notebook evaluation notes for each applicant;

(e) performance indicators (including monthly Field Operations performance statistics) and any other statistics; and,

(f) Divisional averages.

4. In respect of the 2013 job vacancy process:

(a) The questions asked during the interviews; and,

(b) The scoring attributed to each response for those candidates who were interviewed.

38. The parties before me agreed that in the event that I granted the Association's request for production, that I should order the same sorts of confidentiality requirements as Arbitrator Kirkwood did in *Niles*, cited above. As such, subject to any arrangements made between counsel, I direct that all documents produced by the Board to the Association in this proceeding be subject to the following confidentiality undertakings:

a) The documents are to be provided to counsel for the Association, who may make one further copy to be kept by Association counsel for the purposes of taking instructions and preparing the case;

b) Only the Association's advisor in this case, the grievor, and any witness (only to the extent necessary), may see the documents disclosed, but may not be provided with a copy;

c) Those who see the documents are subject to a confidentiality undertaking that they will not disclose the contents except as strictly necessary for the pursuit of these grievances;

d) Once this arbitration is completed, and any legal proceedings arising from the arbitration are complete, all copies of the documents are to be returned to counsel for the Board;

e) The documents produced are not to be disclosed to any other candidates in the job vacancy processes, unless they are to be called as a witness, in which case they too are subject to the confidentiality undertaking outlined here; and,

f) Any documents produced pursuant to this order are only for use in this proceeding, and may not be communicated or used in any manner for any purpose other than the present arbitration.

39. This decision addresses pre-hearing disclosure. The admissibility of documents produced will be dealt with when and if necessary in the course of the hearing.

40. I remain seized.

Dated at Toronto this 2nd day of November, 2015.

"Gail Misra"
Gail Misra, Arbitrator