

1690/J

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PROVINCIAL POLICE

("the OPP" / "the Employer")

- AND -

ONTARIO PROVINCIAL POLICE ASSOCIATION

("the Association" / "the OPPA")

- AND -

Staff Sargeant KEVIN WEBB

("the Grievor")

CONCERNING AN ASSOCIATION POLICY GRIEVANCE REGARDING POSTING
AND ASSIGNMENT

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Association:

Jodi Martin, Counsel

Andy Taylor, Executive Officer, OPPA

Kevin Webb, Grievor

For the Employer:

Cathy Phan, Counsel

Lori MacIntyre, Strategic Issues Advisor

Swey Vishwanath, Human Resources Advisor

Hearing held in TORONTO on August 5, 2016.

Award issued on September 7, 2016.

AWARD

1. This award concerns a jurisdictional challenge by the Employer to the grievance.

What happened?

2. The Grievor is a uniformed staff sergeant, the detachment commander in Manitowaning, Manitoulin Island. That assignment was a duration posting for a fixed term. A duration posting is described below.
3. The Grievor completed his Manitowaning assignment on June 27, 2015. In anticipation of that completion, on January 14, 2015, he requested a transfer to Sudbury once the Manitowaning assignment ended. The Grievor's name was placed on the lateral transfer list, provided for under the Standard Operating Procedure Clearance Process – Uniform Positions issued by the OPP ("the SOP"). Under the SOP, a uniform member has an entitlement, upon completion of a duration posting, to be given a lateral assignment or transfer, under the Uniform Clearance Process.
4. The purpose of the SOP is described as follows (in the January 2016 updated version):

To formally articulate the order in which the Ontario Provincial Police (OPP) assigns a uniform member to a vacancy before a competitive

process is initiated, a member is temporarily assigned or a recruit is placed. This method of staffing a vacancy shall be referred to as the **UNIFORM CLEARANCE PROCESS**.

5. There was a detachment commander vacancy in Sudbury that the Grievor sought, and he could have filled, had he been laterally transferred by the Employer as he had requested. The Employer decided, though, not to transfer the Grievor to that position when his Manitowaning assignment ended. Instead the Employer posted the position. The Grievor applied, but he was not successful.

The grievance

6. The grievance was filed on October 15, 2015.

7. The Association claims that the Employer ought to have used the Uniform Clearance lateral transfer list to ensure that the Grievor obtained the position he sought. The Association says that the failure by the OPP to give the Grievor the lateral transfer he had requested violated Article 33.09 of the uniform collective agreement.

8. Article 33 is a long provision. The relevant portions are quoted below. Its purpose is to encourage uniform members to accept assignments in remote areas, for a specific duration. This is a duration posting. The Grievor's assignment to Manitoulin was of this sort. The Association says that the parties' expectation is that, on completion of such a duration assignment, the uniform member is entitled

to the reassignment described in Article 33.09, which founds the grievance. The relevant portions of Article 33 read:

ARTICLE 33 – DURATION POSTINGS

**NORTHERN INCENTIVE COMPENSATION ENHANCEMENT
(NICE)**

33.01 It is the intent of the Employer to provide incentives to Employees of the OPP in order to attract qualified personnel to locations designated as “duration postings”. All such incentives are contained within this Article. Duration Postings occur when an employee is assigned to a community as listed in Article 33.08.

33.02 NEWLY ASSIGNED TO DURATION POSTING

33.02 Attraction Incentive - ... Employees assigned to a Duration Posting with a Term of Four years will qualify for a \$15,000 payment. ... In order to receive this payment in all cases, the employee must report for duty at the respective Duration Posting and live in the community. This payment will be paid out in equal instalments on an annual basis over the course of their first term in the duration location.

...

...

33.08 This Article names, lists and sets out the length of a “Duration Posting”.

...

33.08.03 **4 YEAR STATUS**

....

Manitowaning

...

33.09 To the extent that it does not interfere with the Commissioner’s right to assign personnel, the Employer undertakes to reassign

an employee at the expiration of the term of the employee's duration posting consistent with the operational requirements of the OPP and the expressed area of preference of the employee.

...

...

9. The Association claims that Article 33.09 must be read in conjunction with the SOP concerning assignments. The relevant portions of the SOP read:

III. Clear the Position Using the Clearance Process

Before advertising a uniform vacancy, temporarily or permanently filling the vacancy or posting a recruit to fill a vacancy, the vacancy must be "cleared", i.e., it must be determined that there are no members who are qualified and eligible for direct assignment in accordance with this SOP.

The Staffing Advisor in consultation with the Deployment Coordinator shall consider eligible and qualified members for direct assignment to a vacancy in the following order, subject to the direct assignment eligibility criteria set out in Appendix 1:

- 1) *Members who have completed their duration commitment.* ...

...

IV. Assigning Members to Available Positions

If a member is identified for placement into a vacancy, the position is not deemed to be "cleared".

...

The Manager, Recruitment and Staffing Unit, CDB shall, in consultation with Regional/Bureau command staff, directly assign the member in accordance with the provisions set out in this SOP.

The hiring manager must forward a business rationale (through chain of command) to the Commander, CDB, if he/she has operational concerns relating to the assignment of a member through the clearance process. Such matters shall be assessed on a case by case basis by the Commander CDB (in consultation with Regional/Bureau/Provincial Command, as required), subject to the specific concerns identified, and the supporting business rationale.

V. Commissioner's Prerogative to Assign Members

The Commissioner maintains the prerogative to assign members as required to meet organizational needs.

10. In the Association's written grievance an explanation is given for why the Employer apparently failed to follow its SOP. "The OPPA has been advised that the Deputy Commissioner has directed that the Uniform Clearance Policy shall not apply to Staff Sergeants who are detachment commanders."

The Employer's jurisdictional challenge

11. For the purposes of its jurisdictional argument, the Employer accepts that the Grievor was qualified and eligible for direct assignment in accordance with the SOP, and that it did not comply with Section III of the SOP, described above. So, for the purposes of argument, under the SOP, the OPP should have directly assigned the Grievor rather than advertised the vacancy.

12. A policy grievance must concern a difference between the parties arising from the interpretation, application, administration or alleged contravention of the collective agreement. The Employer says that the Association cannot point to a contravention of the collective agreement. If the Employer breached the SOP, that breach cannot amount to a breach of the collective agreement. The Employer submits that the Association's claim is really about the application of the SOP, and not to enforce a right under the collective agreement. The Association's claim amounts to an assertion that the OPP did not apply its own policy. That, the

Employer argues, cannot found an Association grievance; the SOP has not been incorporated into the collective agreement and it cannot be relied upon as part of the collective agreement. Further, there can be no policy grievance arising from a SOP, which is wholly within the Employer's management discretion to alter, amend or apply as it chooses.

13. The Employer relies on the provisions of s. 2(3) of the *Ontario Provincial Police Collective Bargaining Act, 2006*, SO 2006, c 35, Sch B ("the Act"), as those provisions applied at the time of the filing of the grievance. (The provisions have changed subsequently. The Employer's management rights are now subject to bargaining with the Association). At that time the relevant provision read:

Exclusive functions of employer

(3) Except in relation to matters governed by or under the *Police Services Act*, every collective agreement is deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine employment, appointment, complement, organization, work methods and procedures, kinds and location of equipment, discipline and termination of employment, assignment, classification, job evaluation system, merit system, training and development, appraisal and the principles and standards governing promotion, demotion, transfer, lay-off and reappointment, and that such matters will not be the subject of collective bargaining nor come within the jurisdiction of the Negotiating Committee or an arbitration board.

14. This provision was repealed on December 20, 2015. The Employer relies on it because it makes clear that, at the relevant time, "assignment" fell within the Employer's exclusive function. Accordingly, the Employer argues, its failure to assign an employee under the SOP cannot be within an arbitrator's jurisdiction to decide.

15. Furthermore, the Employer submits that Article 33 gives officers only a right to express a preference to be reassigned, but no right to a reassignment. The right of reassignment rests wholly with the Employer, subject to operational requirements.

16. Further, the Employer argues, there is nothing in the job posting provisions of the collective agreement that requires the Employer to reassign rather than to post a position. In the absence of clear language in the collective agreement to limit its right to post vacancies, there can be no enforceable right to a reassignment.

17. The Employer relies on a decision between the parties, *The Crown in Right of Ontario (The Ontario Provincial Police) and the Ontario Provincial Police Association (Richardson)*, unreported, December 15, 2011 (Abramsky). In that case the arbitrator found, correctly in my view, that the essential character of the dispute was discipline, which fell outside of her jurisdiction as arbitrator.

18. The Employer refers to another matter between the parties, *Ontario (Provincial Police) v. Ontario (Provincial Police) Assn. (Policy Grievance)*, [2012] O.L.A.A. No. 660 (Johnston). Arbitrator Johnston found she had no jurisdiction to consider an Association policy grievance over the transfer of uniform members because there was no reference in the grievance to a particular Article of the collective agreement being violated.

19. The Employer refers also to *Ontario Public Service Employees Union v. Ontario (Labour)*, 2008 CanLII 70535 (ON GSB) (Dissanayake), for the proposition that an arbitrator has no jurisdiction to review the exercise of a management right, “in the absence of a claim that such exercise ... affected a right of the grievor under the collective agreement” (para. 19).

The Association’s response

20. The Association first explains the purpose of Article 33 of the collective agreement. It is designed to persuade officers to accept assignments in remote or isolated areas. This is made clear in Article 33.01, above, which describes duration postings. There are attractive incentives offered to take these assignments. Article 33.09 is part of the incentive system.

21. The Association says that, in this incentivized context, the Employer’s undertaking in Article 33.09, to reassign an employee consistent with the SOP and the requested area of preference, is enforceable. The Employer cannot ignore its obligation under this Article to reassign, such as the Grievor sought when he completed his duration posting.

22. The Association argues that the SOP is consistent with Article 33, and must be read with it. The OPP must reassign an employee who has accepted an assignment under Article 33 before it posts the position sought. That is expressly provided for in the SOP. Before the Employer advertises a position, the position must be cleared according with the procedure set out in the SOP; the sequence set

out must be followed. Once an officer has completed their duration posting, they get first opportunity to fill a vacancy. A purpose of the policy, and of the parties' agreement in Article 33, is to articulate the order in which the OPP assigns a uniform officer to a vacancy before the competitive process is initiated. The SOP makes clear, at p.5, that if the re-assignment process is not to occur, and a competition is to be run, the hiring manager must provide a business rational, "if [there are] operational concerns relating to the assignment through the clearance process".

23. As to the Act at the time the grievance was filed, the Association refers to Article 2(2). It read:

Bargaining authority

(2) The Association is the exclusive bargaining agent authorized to represent the employees who are part of a bargaining unit referred to in subsection (1) in bargaining with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection (3), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when the employee is required to use his or her own automobile on the employer's business, benefits pertaining to time not worked by employees, including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, the procedures applicable to the processing of grievances, the methods of effecting promotions, demotions, transfers, lay-offs or reappointments and the conditions applicable to leaves of absence for other than any elective public office, political activities or training and development.

24. But for the reference to subsection (3), repealed on December 20, 2015,

this provision continues to apply. The Association draws attention to it being entitled to bargain over “the methods of effecting ... transfers”. It argues that the agreement with the Employer, to have reassignments under Article 33 take precedence over job postings, falls within its bargaining authority.

25. The Association concedes that under what was s. 2(3), the Employer had control over “assignment” and “the principles and standards governing ... transfer”, but, it claims, the grievance and the issue affecting the Grievor involve “the method of effective transfers”. Accordingly, an arbitrator has jurisdiction to hear the matter.

26. The Association argues alternatively that, if the reassignment of the Grievor fell within management’s exclusive right, management still had an obligation to exercise that right reasonably, in good faith and not arbitrarily. The Association contends that the failure to follow its own procedure, its SOP, makes the decision unreasonable or arbitrary, which the Union can challenge at arbitration. It refers to: *Ottawa Police Services Board v Ottawa Police Association*, 2013 CanLII 6049 (ON LA) (Marcotte) and *Bell Canada v Unifor, Local 34-0*, 2016 CanLII 11573 (ON LA) (Surdykowski).

27. The Association also submits that the former s. 2(3), which applied at the time of the grievance, is unconstitutional, in violation of the Association’s right to freedom of association under the *Charter*. (The parties agree that this argument will be pursued only if, but for this argument, the Employer succeeds with its jurisdictional objection.)

Decision

28. Article 33.09 appears to give an employee more than a right to express a preference to be re-assigned, as the Employer argues. It contains an undertaking by the Employer to reassign an employee on the expiry of the term of their duration posting to their expressed area of preference. There are qualifications to this: the reassignment must not interfere with the Commissioner's right to assign personnel and the reassignment must be consistent with the operating requirements of the OPP. Assuming these qualifications are met, which is necessary for the purpose of the Employer's jurisdictional motion, there appears to be an obligation to reassign or laterally transfer an employee to their selected preference. In this case, that would mean that the OPP had an obligation to transfer the Grievor to the Sudbury detachment commander position once his duration posting at Manitowaning ended.

29. So, *prima facie*, the Association has a valid claim under the collective agreement. The method of effecting the lateral transfer has been negotiated and agreed by the parties in the collective agreement¹. The Association is not, therefore, relying on the SOP to found its grievance. The Association's reference to the SOP is intended to bolster its collective agreement claim on the basis that the SOP is to be read consistently with the terms of the collective agreement. The SOP explains how the Employer's obligation to reassign is to be done in relation

¹ This is what distinguishes the circumstances in this case from those in the case cited by the Employer, decided by Arbitrator Johnston.

to a potential job posting. It provides the procedure by which the Employer's obligation in Article 33.09 is to be accomplished in relation to the Employer's obligation to post vacancies.

30. Whether the Employer can ignore the requirements of its SOP, as the Employer submits, is not at issue in this jurisdictional determination. If it can, and that affects the Association's entitlement under Article 33.09, those are issues to be addressed if I have jurisdiction over the grievance. They arise after establishing jurisdiction when the merits of the grievance are to be considered.

31. This leaves the Employer's reliance on the Act, on the portion of the Act now repealed. For the Employer's argument to succeed (to nullify the obligation it undertook to the Association in Article 33.09, when concluding that provision), it must itself have acted *ultra vires* by agreeing to a limitation on its exclusive function to manage, as set out in s. 2(3) of the Act, as it then was.

32. In *Regina Police Association Inc. and City of Regina Board of Police Commissioners* [2000] 1 SCR 360 (SCC), the Court explained that, to determine whether a dispute arose out of a collective agreement, or whether it fell within the exclusive jurisdiction of the police service, the essential character of the dispute must be determined in the context of the statutory regime. "This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed" (para. 25) and "The task, therefore, is to determine whether the essential character of the dispute ... falls within the ambit of the collective agreement, or whether it falls within the

statutory scheme ..” (para. 27). What then is the essential character of the dispute, and does it fall within the ambit of the collective agreement or exclusively within the Employer’s prerogative under the Act?

33. The essential character of the dispute concerns whether a uniform member, upon the completion of a duration posting, has a right to reassignment to the member’s expressed area of preference. This clearly falls within the ambit of Article 33.09 of the collective agreement.

34. But what of s. 2(2) and s. 2(3) of the Act? The Association may bargain over terms and conditions of employment, including “the methods for effecting ... transfers” (s. 2(2)), but such bargaining is subject to the Employer’s exclusive management function, which includes “assignment” and “the principles and standards governing ... transfer”, under s. 2(3).

35. For the issue in dispute, the first sentence of Article 33.09 articulates the overriding impact of the management right under s. 2(3) of the Act: “To the extent that it does not interfere with the Commissioner’s right to assign personnel, ...”. This expresses the Commissioner’s overall rights to assign and to set the principles and standards of transfers. But, subject to those rights, and pursuant to s. 2(2) of the Act, the parties have agreed to a particular method for effecting the transfer of a uniform member who has completed a duration posting. As the Association argues, that falls within the subject matter which it is entitled to bargain over with the Employer. Article 33.09 therefore applies the provisions of the statute as they were intended: management’s overall right to manage is

described and, subject to that right, the method for effecting a transfer is agreed. Accordingly, the issue in the grievance is one that properly falls under s. 2(2) of the Act, with due regard to the provisions of s. 2(3) of the Act.

36. I find, therefore, that the parties were entitled to agree upon the provisions of Article 33.09 because it complies with the Act. Article 33.09 does not violate s. 2(3) of the Act, as it then was. Given that the parties were entitled to reach an agreement on the subject matter in Article 33.09, the Association is entitled to rely upon it for the purposes of the grievance, and the subject matter of the grievance is one that the Association may legitimately pursue to arbitration, over which an arbitrator has jurisdiction.²

37. As to whether an arbitrator has jurisdiction over whether a standard of reasonableness and fairness has been applied by the Employer in the exercise of its management rights (the parties having provided conflicting jurisprudence by arbitrators on this question), assuming there to be no explicit provision in the collective agreement on which the grievance relies, I adopt the views expressed by Arbitrator Surdykowski in the *Bell Canada* decision, above, at paras. 46 and 47:

46. It is clear from the evolution of the jurisprudence following *Brampton Hydro Electric Commission* [1993 CanLII 8488

² I recognize that this conclusion differs from certain comments made in *Richardson*, above, concerning "substantive matters regarding transfer and assignment" (at p.19). Those comments must be seen in the context of the overall conclusion reached that the transfer in that case was essentially, and inextricably linked to, discipline. Also, the arbitrator did not consider transfer and assignment in the context of Article 33.

(ON SC), (1993) 108 D.L.R. (4th) 168 (ON Div. Ct.)), and from the *Bhasin* decision [*Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 (SCC), 2014 SCC 71 (CanLII)], read together and in the context of the applicable legislation (in this case s. 57(1) of the *Canada Labour Code*) and the *Weber* essential character test that:

1. a grievance arbitrator has not only jurisdiction, but exclusive jurisdiction which the arbitrator must exercise, to hear a grievance which raises an issue concerning the interpretation, application, administration, or alleged contravention of a collective agreement in a timely way;
2. a collective agreement “occupies the field” with respect to employment-related matters, whether or not the subject of an express provision in the agreement, unless the matter is expressly excluded from the scope of the agreement, either expressly or by necessary implication;
3. a grievance need not have a specific collective agreement “hook” in addition to a management rights clause, so long as it raises an issue which in its “essential character” is factually and functionally connected to the operation of the agreement;
4. the exercise of management rights, both with respect to a provision in a collective agreement or generally, is an exercise of discretion which lies at the core of collective agreement rights and obligations; that is, the exercise of management rights is fundamental to the operation of a collective agreement;
5. as a matter fundamental to the operation and functioning of a collective agreement, any exercise of management rights discretion must be subject to challenge on the basis of reasonableness, or perhaps more specifically on the basis that the management right was exercised in an arbitrary, discriminatory or bad faith manner (which I believe effectively covers the field unreasonableness and good faith);
6. a grievance arbitrator therefore has not only the exclusive jurisdiction (subject to a possible concurrent jurisdiction of the appropriate human rights tribunal with respect to an allegation that the management right was exercised in a manner contrary to the applicable human rights legislation), but the obligation to hear and determine a

grievance which alleges an improper exercise of management rights, whether or not with respect to an express collective agreement provision.

47. This approach does not permit an arbitrator to alter or amend a collective agreement. But it recognizes that collective agreements do not come out of or exist in the air. A collective agreement must be interpreted and applied with due regard for the statutory framework from which it derives and the bedrock of the common law of contract.

38. On this basis too, I have jurisdiction to determine the grievance.

39. Given these conclusions it is not necessary to address the Association's constitutional argument.

40. I direct that all arguably relevant documents be produced by both parties in a timely manner. The parties are to advise of how many days are required to hear this matter. Scheduling arrangements will then be made.

DATED at TORONTO on September 7, 2016.

A handwritten signature in dark ink, appearing to read 'C. Albertyn', with a horizontal line extending to the right.

Christopher J. Albertyn

Arbitrator