IN THE MATTER OF AN ARBITRATION

BETWEEN:

Helder DaCosta,

Grievor,

- and -

Brantford Police Association,

Association

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Grievor:

Helder DaCosta, representing himself

For the Association:

Caroline V. (Nini) Jones, Counsel
Lauren Pearce, Counsel
Mark Baxter, President
Keith Tollar, Vice-President

Heard in Brantford, Ontario, on June 12, 2019.

ARBITRAL AWARD

I

Mr. Helder DaCosta, the grievor, employed as a police constable by Brantford Police Services Board ("the Board"), has presented a "duty of fair representation grievance". He claims that the Association breached this duty in its handling of his dispute with the Board concerning compensation due to him while in receipt of benefits from the Workplace Safety and Insurance Board (the "WSIB"). His main allegation is about the Association's refusal to submit his dispute to rights arbitration.

Notice of these proceedings was provided by the Association to the Board.

It should be noted that the Police Services Act, R.S.O. 1990, c. P.15 ("the Act"), is silent on the duty of fair representation. The Ontario Court of Appeal, however, has decided that, since the Act was intended to establish a comprehensive scheme to govern all aspects of the relationship between members of police forces and municipal police services boards, the grievance provisions of the Act should be interpreted as allowing complaints of violation of the duty of fair representation to be processed as grievances: see Renaud v. Lasalle (Town of) Police Association (2006), 216 OAC 1 (Ont. C.A.) and Cumming v. Peterborough Police Association 2013 ONCA 670 (CanLII). On the basis of those decisions, neither party questioned my jurisdiction to deal with this complaint. Like the arbitrator in Re Alessandroni and Toronto Police Association (unreported award of arbitrator Anderson, dated July 15, 2016), I am prepared to proceed in the manner endorsed by the Ontario Court of Appeal.

II

No evidence was presented formally at the hearing, nor was any statement of agreed facts filed. However, there was no serious dispute as to the facts relevant to this grievance and, on consent, both parties filed with me numerous documents, mostly e-mail communications.

In 2017, the Board and the Association were unable to agree on all the terms of a new collective agreement to replace the one that had expired on December 30, 2016. They agreed, however, to refer certain outstanding items to interest arbitration, including the question of the compensation due to employees receiving WSIB benefits. The Board's position on this last question was that the net income being received by such employees, whose WSIB benefits were "topped up" by the Board, had been substantially more than they would have earned while working and receiving a salary, which was contrary to the express terms of the old collective agreement. In an award dated July 25, 2017, ("Interest Arbitration Award"), arbitrator Trachuk had the following to say on that item:

> The Board seeks to change the way it pays employees receiving Workplace Safety and Insurance Board (WSIB) benefits. After considering the materials and arguments provided by the parties, I find that the current payment model provides members with greater compensation than they would receive if they continued to work. That is not consistent with the language of Article 10.04 (Sworn) and 7.09 (Civilian) and could not have been the parties' intention. The current language already provides that employees injured at work will not be paid more or less than their regular salaries. Therefore, it is unnecessary for me to order a change in that language. The Board has the ability to rectify this situation by adjusting the way it administers payment for employees receiving WSIB benefits. It gave notice to the Association that it was ending its previous payment practice during negotiations and, therefore, may now do so. Nevertheless, the Board has agreed to wait until January 1, 2018, to begin the new payment model for members of the bargaining units receiving WSIB benefits. That model will consist of the following:
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> > As of January 1, 2018, members in receipt of benefits will receive them directly from the Workplace Safety and Insurance Board. The Board will provide a biweekly cheque or direct deposit to the member in the amount required to supplement the WSIB benefit up to the net pay the member would receive from their [sic] regular salary.

The following provision will be added to Article 14.04 (Sworn) and 7.09 (Civilian) and effective as of the date of this award:

> Employees in receipt of WSIB benefits must apply for an OMERS disability waiver in accordance with their earliest eligibility date for such waiver.

As a result of the Interest Arbitration Award, Article 10.04 (a) and (b) of the collective agreement was amended to read as follows:

> (a) Any employee off duty as a result of an accident incurred while the employee is engaged in the lawful execution of their [sic] duties shall be paid full salary during such period the employee is off duty, and shall continue to be covered by all benefits during such period off duty. It is agreed that the employee's income shall be no more or [sic] no less than their [sic] regular salary. As of January 1, 2018, members in receipt of benefits will receive them directly from the Workplace Safety and Insurance Board. The Board will provide a bi-weekly cheque or direct deposit to the member in the amount required to supplement the WSIB benefit up to the net pay the member would receive from their [sic] regular salary.
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> (b) Employees in receipt of WSIB benefits must apply for an OMERS disability waiver in accordance with their earliest eligibility date for such waiver.

Following the release of the Interest Arbitration Award, the Association held two meetings with its members to present to them the terms of the Award. There followed extensive discussion between the Association, the Board and certain members about the implementation of the new terms for the payment of employees in receipt of WSIB benefits. The grievor was actively involved in these discussions. Numerous e-mails passed between him and the Association.

The grievor's principal concern was with the Board's conclusion that, under its proposed implementation of the new terms, the income that would be received by these employees would be "no more and no less than their regular salary", which was a basic requirement both of the old collective agreement and of the Interest Arbitration Award. The grievor maintained that, while the way the Board was

planning to implement the Interest Arbitration Award might well lead to "net pay" for employees in receipt of WSIB benefits being the same as they would have received if at work, the collective agreement's basic principle in this area, that income be equal to "regular salary", would be violated. The Board, he contended, had wrongly interpreted the agreement, which required that "regular salary" had to be the same as before, as meaning that "net pay" had to be the same as before.

The grievor's other main concern seemed to be that, with no premiums being paid to the Ontario Municipal Employees' Retirement System ("OMERS") by the Board (or, for that matter, by the employees) in respect of those in receipt of WSIB benefits, the Board was benefiting from a saving which should have somehow been reflected in the calculation of the top-up of WSIB benefits. Some discussion also revolved around the tax treatment of the WSIB loss of earnings ("LOE") benefits and around the fact that deductions in respect of income tax were greater for employees in receipt of benefits than for other employees (although this was rectified by refunds from the Canada Revenue Agency when income tax for the previous tax year was assessed). The grievor alleged that the Board, in its correspondence with him and with the Association, had "manipulated" the numbers to try to justify its conclusions. He thanked the Association on several occasions for its careful consideration of his interests and of his points of view.

In July 2018, the Board and the Association agreed to ask arbitrator Trachuk to rule on the outstanding dispute between them arising from the application and implementation of the changes ordered in the Interest Arbitration Award to Articles 10.04 (Sworn) and 7.09 (Civilian). That dispute related essentially to the concerns the grievor had expressed.

In a Supplementary Award dated August 28, 2018, ("Supplementary Award"), the arbitrator reviewed the submissions she had received and wrote the following:

> After considering the submissions of the parties, I find that Article 10.04 (b) (7.09 (b) of the Civilian Agreement) is not in conflict with section 25 of the Workplace Safety and Insurance Act. I have also determined that the way the Board has implemented Article 10.04 and 7.09 is not inconsistent with the language of those provisions except, potentially, for its failure to take into account the tax consequences of receiving Canada Pension Plan Disability benefits [sic]. If employees are receiving Canada Pension Plan Disability Benefits [sic] and the Board is taking those benefits into account in determining the amount it must pay to top up their WSIB benefits it may need to take the tax consequences into account to ensure that the employees are receiving the appropriate amount. If there is such a practice, the parties are directed to exchange information about employees who may be affected by it. If, after exchanging information, there continues to be a dispute and the parties are unable to resolve it they may refer it back to me for determination.

The Supplementary Award was very largely a confirmation of the conclusions contained in the Interest Arbitration Award and of the Board's implementation of the new provisions. In particular, although the criticisms and arguments that the grievor had made were incorporated in the Association's brief to the arbitrator, the Supplementary Award provided no validation at all for those criticisms and arguments.

On August 31, 2018, the grievor, without the support or approval of the Association, submitted a grievance to the Board, in which, essentially, he repeated his objections to the way the Board was implementing the changes to Article 10.04 of the applicable collective agreement, as described above.

Following the presentation of the grievance, the grievor resumed his correspondence with the Association, reiterating his earlier arguments and concerns. He also expressed amazement that the Supplementary Award did not specifically address some of the issues that he had raised, notably the unfairness of the Board retaining the benefit of the waiver of OMERS premiums, as well as amazement that no minutes of the arbitration hearing were available. The Association president told the grievor in an e-mail that "we have run this OMERS argument and lost, it's a done deal and we are stuck with it." On September 5, the grievor replied as follows:

> This is not a done deal. It should be appealed but I know you have a bias as you and Keith both have had conversations with me stating that it's not "fair" officers on disability bring home more money than working officers.

As for the grievance the grievor had presented on August 31, the Association president stated the following in an e-mail to him on September 5:

> With regards to your grievance, I wish you the best of luck. I understand the Chief has suggested a meeting on Monday. We have already grieved and arbitrated this matter and cannot assist you with the grievance. I'm not sure how the Chief will proceed because we are your bargaining agent and individual members do not have standing at the Ontario Police Arbitration Commission (OPAC).

On September 7, 2018, the Board rejected the grievance.

On October 30, 2018, the grievor sent a 6-page letter to the members of the Association to explain why, at the membership meeting scheduled for November 15, he would be seeking financial support for pursuing his claim against the Board, adding that he had consulted counsel who agreed that he had been treated unfairly and accepted to represent him in his claim once a retainer had been paid. The bulk of the letter was a reiteration of the views he had expressed to the Association about the compensation he had been receiving while on WSIB. He sent a copy of that letter to arbitrator Trachuk, asking her for advice on his dispute.

On November 15, 2018, following the Association's membership meeting, he wrote a lengthy e-mail to the members, thanking them for attending, and reiterating his position on his ongoing dispute with the president of the Association.

On November 21, 2018, the Association sent a 4-page "open letter" to the members to explain the dispute and confusion about the treatment of employees in receipt of WSIB benefits. After reviewing the old collective agreement, the Interest Arbitration Award and the Supplementary Award, it concluded as follows:

> At the end of the day, the most important thing for our members to know is that members who are disabled from working (and in receipt of WSIB LOE benefits) are provided with a disability benefit that ensures that they will be in receipt of the amount of net pay or "take home pay" as they were [sic] before their injury.
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> While we recognize the frustration some members may feel with the changes implemented at the beginning of the year, the payments being received by our members are those they are entitled to under the collective agreements. The Association continues to address individual challenges as they arise.
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> ...
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> The Association does not believe that any policy grievance challenging the implementation of article 10.04/7.09 would have any reasonable chance of success, given the interest arbitration decisions, and will not be filing a grievance.
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> ...

The very next day, the grievor sent the Association Executive a 3-page reply to the open letter, claiming that it had failed to address his concerns, which he proceeded to explain once again. He added that "[b]ack door bargains, no transparency and lies by President Baxter and the executive/ bargaining committee members are what is causing all the confusion!...[President Baxter] is evasive, secretive and out right bias [sic]..."

On April 5, 2019, the grievor filed with the Ontario Police Arbitration Commission a request for the appointment of a Conciliation Officer under section 123 of the Act in respect of his dispute with the Association, followed, on May 21, 2019, by a request that it be referred to a Rights Dispute Arbitrator.

III

In his submissions, the grievor argued that the Association was ignoring the language of the collective agreement. The Association seemed to be content with an employee receiving the same "net pay" while in receipt of WSIB benefits as he or she had received while at work. The agreement, however, required that the income of such an employee be equal to his or her "regular salary". The Association's obligation to its members was to enforce the collective agreement as written, and not some intent that may have been discussed at the bargaining table or elsewhere. The language of the collective agreement could not have been more clear and precise on the question of the entitlements of employees who were receiving WSIB LOE benefits. The arbitrator should therefore order the Association to take all necessary steps, including filing a grievance and pursuing it to rights arbitration or beyond, to require the Board to comply with the clear and unambiguous language of the collective agreement on this question.

Counsel for the Association replied that if the grievor's argument were accepted, the result would be that employees would receive substantially more income while in receipt of WSIB benefits than while working. That would be a "ridiculous" conclusion, according to counsel. The grievor had originally thanked the Association for its interest and support, although his more recent communications had been peppered with abusive language directed at the president and executive of the Association. While the duty of fair representation required a bargaining agent to give serious and objective consideration to issues brought to its attention by bargaining unit employees, it did not require that every possible grievance be

taken to arbitration or that every possible avenue for redress be exhausted. The Association had gone above and beyond what was required or reasonable in representing the grievor, including referring the Interest Arbitration Award back to the arbitrator, holding a membership meeting (on November 15, 2018), and countless e-mail exchanges. Counsel referred to Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, Re Lafrance and North Bay Police Association (unreported award of arbitrator Starkman, dated September 27, 2009), and Senior, 2016 CanLII 45885 (ON LRB).

IV

The principal question I have to consider is whether the the Association's handling of the grievor's dispute with the Board fell below the standard expected of a bargaining agent. Bargaining agents are manifestly not expected to pursue to arbitration every grievance reported to them by every disgruntled member: they are vested with the power to decide which cases to pursue and how far to pursue them. In exercising this power, bargaining agents are required to act in a manner that is not arbitrary or capricious and that is not tainted by bad faith. These limits on the exercise of their power require them to engage honestly and conscientiously with their members. They have to assess objectively and reasonably the merits of their members' complaints, as well as the extent to which those complaints are important to the members in question. They must also bear in mind the best interests of the bargaining unit as a whole.

It is obvious to me, on the basis of the voluminous e-mail correspondence filed at the hearing, that there has been unusually full and extensive discussion between the grievor and the Association about his dispute with the Board. There is certainly no evidence that the Association has refused to listen to the grievor or to respond to him. However, much of the correspondence suggests there was a "dialogue of the deaf" going on, with the result that, although discussion was abundant, it was rarely fruitful.

In particular, the grievor appears to have been completely fixated on his claim that employees in receipt of WSIB benefits were entitled to their "regular salary", a claim he repeated, mantra-like, at every opportunity, including at the hearing before me, even though the collective agreement expressly provided that the employer would pay such an employee "the amount required to supplement the WSIB benefit up to the net pay the member would receive from their [sic] regular salary." Accordingly, while the discussion spanning two years between the grievor and the Association was free and uninhibited, it appears that the grievor either was not listening to what he was being told or was willfully blind to certain realities.

In addition to the countless e-mail exchanges between the grievor and the Association, the Association, with the consent of the Board, referred back to arbitrator Trachuk, in July 2018, a dispute about the implementation of the Interest Arbitration Award. That dispute was framed in terms of the grievor's criticisms of the way the Board was compensating employees in receipt of WSIB benefits. The referral back to the arbitrator allowed for a through airing before a neutral third party of the grievor's views. The brief submitted by the Association to arbitrator Trachuk incorporated most, if not all, of the grievor's objections.

Even after the release of the Supplementary Award, the Association allowed a membership meeting to be called (for November 15, 2018) to give the grievor an opportunity to appeal to the membership for financial support for his ongoing campaign about the illegality of what the Board had been doing. I should add that it does not appear from the documents filed at the hearing that there was any constitutional duty on the Association to facilitate the grievor's appeal for financial support.

The grievor, in his written communications with the Association and in his presentation before me, has leveled some serious charges against the Association president, accusing him of "back-

door bargains", "no transparency", "lies" and "bias", and describing him as "evasive" and "secretive". If substantiated, those charges might certainly be relevant to the inquiry about the Association's compliance with the duty of fair representation. However, despite being given the opportunity to have a neutral third party rule on his dispute with the Association, the grievor did not tender a shred of evidence at the hearing in support of these serious accusations. These accusations of impropriety against the president were easy to make, but, unsupported by evidence, not only are they worthless, but they also detract from the credibility of the grievance, as well as from the grievor's personal credibility.

Still on the subject of his personal credibility, I was particularly concerned that the grievor might have been trying to trick me into misreading the language of the collective agreement. In his written "closing arguments", which he filed with me at the hearing, he stated the following (at page 2):

> We are not here to talk about "if's" we are here to talk about facts. The fact is that the contract states officers on WSIB will receive their full salary while off duty. It should be noted that in 2017 I was on WSIB and received my 2017 T4 stating I received my full salary as outlined in Article 10.04 of the Collective Agreement. The wording in Article 10.04...states, **"Any employee off as a result of an accident incurred while the employee is engaged in the lawful execution of their duties *shall be paid full salary* during such period the employee is off duty and shall continue to be covered by all benefits during such period off duty."** This wording did not change between the year 2017 to 2018..."

What he omitted from the extract quoted from Article 10.04, however, is the following, occurring later in that provision:

> As of January 1, 2018, members in receipt of benefits will receive them directly from the Workplace Safety and Insurance Board. The Board will provide a bi-weekly cheque or direct deposit to the member in the amount required to supplement the WSIB benefit up to the net pay the member would receive from their [sic] regular salary.

So, when he wrote the following at page 2 of his closing arguments - "The fact is that the contract states officers on WSIB will receive their full salary while off duty" - he was referring to the language of the collective agreement in effect before January 1, 2018, not the then current one, and he was likely attempting to induce me to read the provision as if the pre-2018 language were still applicable.

In light of all the above, I am satisfied that the Association went well beyond what was required of it in listening to the grievor, replying to his repetitive and endless written diatribes, referring the issue back to the arbitrator, and allowing the membership meeting of November 15 to be held. In its open letter to the members on November 21, 2018, it expressed its views on the grievor's criticisms as follows:

> At the end of the day, the most important thing for our members to know is that members who are disabled from working (and in receipt of WSIB LOE benefits) are provided with a disability benefit that ensures that they will be in receipt of the amount of net pay or "take home pay" as they were [sic] before their injury.
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> ...
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> While we recognize the frustration some members may feel with the changes implemented at the beginning of the year, the payments being received by our members are those they are entitled to under the collective agreements. The Association continues to address individual challenges as they arise.
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> ...
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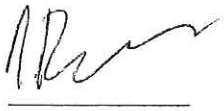
> The Association does not believe that any policy grievance challenging the implementation of article 10.04/7.09 would have any reasonable chance of success, given the interest arbitration decisions, and will not be filing a grievance.

I am satisfied that the Association acted reasonably and honestly in arriving at the conclusions stated in its open letter and that, despite the grievor's provocative accusations of impropriety, it was not actuated by any malice.

The grievance is hereby dismissed.

DATED at Thornhill, Ontario, this 8th day of July 2019.



Michael Bendel,
Arbitrator