

OPAC AWARD

ORANGEVILLE
Bendel

DFR
Cst. S. Fisher

#20-001
April 6/20

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Stephen Fisher,

Grievor,

- and -

Orangeville Police Association,

Association

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Grievor:

Darlene Mezzabotta, paralegal

For the Association:

Katie Rowen, counsel
Simon Chartrand, Treasurer

Heard in Orangeville, Ontario, on February 19, 2020. Written submissions completed on March 27, 2020.

INTERIM ARBITRAL AWARD

I

Mr. Stephen Fisher, the grievor, employed as a police constable by Orangeville Police Services Board, has presented a “duty of fair representation grievance” against the Association. He claims that the Association breached this duty by failing to represent him fairly during an investigation under the Police Services Act, R.S.O. 1990, c. P.15 (“the Act”) and by failing to cover the legal costs he had incurred in connection with the investigation.

It should be noted that 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 complaints of breach of the duty of fair representation. As the arbitrator did in Re Alessandroni and Toronto Police Association (unreported award of arbitrator Anderson, dated July 15, 2016), and as I did in Re Dacosta and Brantford Police Association (unreported award dated July 8, 2019), I am prepared to proceed in the manner endorsed by the Ontario Court of Appeal.

However, the Association, while acknowledging that I have jurisdiction to decide complaints of breach of the duty of fair representation, has argued that the duty of fair representation does

not extend to the representation of members charged with breaches of the Act. It has presented a preliminary objection on this question. I ruled that I would seek written submissions on the Association's objection and would issue a decision thereon before examining any other aspects of the complaint.

This interim award is limited to an examination of the Association's preliminary objection.

II

The facts that are relevant to the preliminary objection can be stated quite simply:

- The grievor was given notice in August 2018 that a complaint had been made against him that, without authorization, he had "removed and disclosed property of the Orangeville Police Service";
- During the investigation of this complaint, the Association offered to represent the grievor, but, citing its Constitution, it declined to provide him with legal counsel;
- No charges have been laid against him under the Act, and no hearings have been held or disciplinary proceedings initiated;
- In December 2018, the grievor was charged by the Ontario Provincial Police under the Criminal Code, R.S.C. 1985, c. C-46, with one count of disclosure of a private communication and one count of breach of trust by a public officer, relating to the same facts that were in issue in the complaint under the Act;

- Since being charged, the grievor has made several requests to the Association to pay the costs of his lawyer in defending him against the Criminal Code charges, either by reimbursing him for those costs or by paying the lawyer directly; and
- The Association has refused to comply with his requests.

These proceedings began on May 8, 2019, when the grievor filed a Rights Dispute Conciliation Application (“the Application”), in which the grievor referred to the Association’s refusal to provide him with legal representation in relation to the investigation under the Act. A conciliator, duly appointed by the Ontario Police Arbitration Commission, met with the parties, but that meeting failed to lead to a resolution of the dispute.

In its oral submissions at the hearing and in its subsequent written submissions, the Association has characterized the grievor’s claim as relating primarily to its refusal to finance his defence of the criminal charges brought against him. However, there was no mention of the charges under the Criminal Code in either the grievor’s Application or his written submissions. The grievor’s submissions, not the Association’s, determine the parameters of this grievance. I do not therefore intend to address the question whether the Association owes a duty of fair representation in relation to the criminal charges the grievor is facing. This interim award is limited to considering whether such a duty is owed in respect of the charges under the Act.

III

In her written submissions, Ms Rowen, counsel for the Association, reviewed the decisions of the Ontario Court of Appeal which established that complaints of the violation of the duty of fair representation could be brought as grievances against a police association under the Act. The principal such case was Renaud, supra. In Lafrance v. North Bay Police Services Board, [2009] O.L.A.A. No. 675 (Starkman), the arbitrator concluded that the Court of Appeal in that case had only opened the door to such grievances in situations where the association had the exclusive authority to pursue the dispute between the employee and the police services board. He further held that the police officer's association did not have the exclusive authority to represent her in her defence of a charge under the Act, with the result that the duty of fair representation could not be invoked. According to counsel, this conclusion mirrored the case-law of the Ontario Labour Relations Board: Luis Lopez, [1989] OLRB Rep. May 464, and Toronto District School Board, [2002] O.L.R.D. No. 2560. The Ontario Labour Relations Board had also specifically held that bargaining agents had no statutory duty to represent members at professional disciplinary proceedings, such as the Ontario College of Teachers: Bruce-Grey Catholic District School Board, [2003] O.L.R.D. No. 3081.

In her written submissions, Ms. Mezzabotta, representing the grievor, argued that the preliminary objection should be dismissed. She cited the award of arbitrator Starkman in Lafrance v. North Bay Police Services Board, [2009] O.L.A.A. No. 313, issued on January 9, 2009 (which preceded his award between the same parties cited by Ms. Rowen). In that award, according to Ms. Mezzabotta, the arbitrator had accepted that he had jurisdiction to deal with a complaint of the breach of the duty of fair representation in relation to a charge brought under the Act, in circumstances similar to those in the present case. Ms. Mezzabotta further cited Cumming v. Peterborough (City) Police Assn., 2013 ONSC 1544, in which

Gunsolus J. dismissed a civil action by a police officer against his police association for its alleged failure to provide proper representation to him on charges brought against him under the Act. The learned judge held that the proper forum was not a civil court but an arbitrator appointed under the Act. In the course of her submissions, Ms. Mezzabotta also referred to Sault Ste. Marie Police Association and Sault Ste. Marie Police Services Board [O.P.A.C. #2005-10-14] (Trachuk), and to Canadian Merchant Service Guild v. Gagnon, [1984] S.C.R. 509. She maintained, on the basis of the last two cited cases, that the arbitrator should proceed to a full hearing to determine whether, as alleged, the Association had acted in a manner that was arbitrary, discriminatory or in bad faith.

IV

I have concluded that I have no jurisdiction in respect of the dispute about the Association's representation of the grievor on the charges brought under the Act.

I respectfully agree with the second award of arbitrator Starkman, in which he reached this same conclusion. I would observe that, contrary to Ms. Mezzabotta's submissions, the earlier award of arbitrator Starkman related solely to the question of the proper forum for a dispute between a police officer and his or her police association about the latter's obligation to provide fair representation. It is abundantly clear, as Ms. Rowen observed in her reply submissions, that only in the second award did the arbitrator examine the scope of the duty of fair representation. On that matter, he concluded, in line with other arbitrators and with the Ontario Labour Relations Board, that, in the absence of anything to the contrary in the applicable legislation, the duty of fair representation applied only in respect of matters over which the bargaining agent had the exclusive power of representation.

I respectfully agree with that conclusion, which is entirely consistent with the decision of the Supreme Court of Canada in Gagnon, supra. As the Supreme Court stated at page 526, “[t]he duty of representation arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit.” Although the Supreme Court was not called upon to define the scope of the common law duty, it seems obvious from a reading of the judgment that it extends only to matters over which the union has the exclusive power to represent employees. Several subsequent decisions, including Lafrance, have endorsed this view. I was given no reason to doubt the correctness of the Lafrance award or the applicability of its reasoning to the present case.

The grievance is hereby dismissed.

DATED at Thornhill, Ontario, this 6th day of April 2020.



Michael Bendel,
Arbitrator