IN THE MATTER OF A DUTY OF FAIR REPRESENTATION
ARBITRATION PURSUANT TO *THE POLICE SERVICES ACT*, R.S.O. 1990

BETWEEN

JEFFREY EMMONS
(the "Complainant")

AND

THE BRANTFORD POLICE ASSOCIATION
(the "Association")

ARBITRATOR Diane Brownlee

APPEARANCES

FOR THE COMPLAINANT Jeff Emmons, Complainant

FOR THE ASSOCIATION Caroline (Nini) Jones, Counsel

Written submissions received on April 13, 14, 15, 16, 20, 21 and 22, May 1, July 8, 14, 15, 21, 22, 23, 29, 30, 31 and on August 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 25 and September 9, 2020

INTERIM AWARD No. 3

[1] This is the third Interim Award that I have issued, dealing with procedural and preliminary matters for this duty of fair representation complaint (DFR). Interim Award No. 1 was issued on April 13, 2020 and addressed the following procedural issues:

a) Recording of proceedings
b) Abuse of process
c) Production of documents
d) Issuance of summonses to witness
e) Character of a party pursuant to Section 8 of the SPPA
f) Hearing open to the public pursuant to Section 9 of SPPA
g) Hearing process and admission of evidence

[2] On May 5, 2020, I issued Interim Award No. 2, in which I granted the Complainant's request for an adjournment of the May 22, 2020 hearing date, over the objection of the Association. In light of the many grounds and issues that the Complainant raised in support of his request for an adjournment, the hearing was adjourned *sine die*.

[3] On July 8, 2020, the Complainant requested that I schedule a date to continue the hearing. The Complainant stated that many of the grounds and issues that he had raised in support of his request for an adjournment were now resolved.

[4] This decision addresses those issues that are properly before me that the Complainant has raised since Interim Award No. 1 was issued. This decision also clarifies which issues are not before me.

A. ISSUES PROPERLY BEFORE ME

The Merits of the DFR Complaint

[5] I stated clearly in Interim Award No. 1, at paragraphs 11, 23 and 24, that no evidence has yet been called, and that the merits of the DFR would be addressed after the evidence and submissions were completed. I ordered a streamlined process for the admission of evidence when the hearing continues. Despite this, the Complainant has stated numerous times in his communications and submissions post-Interim Award No. 1, that I have ignored the evidence that he has provided and that I have dismissed his complaint or portions thereof. This is not the case. The merits of the DFR have still not yet been determined. This includes the Complainant's allegations that the Association has acted in a manner that is arbitrary, discriminatory or in bad faith in resolving the issue of the top-up owed to the Complainant by the Employer. It includes the question of whether the Association committed a fraud or a forgery, as alleged by the Complainant. It is not appropriate for me to decide the merits until I have heard all of the evidence and submissions of the parties. The merits will be decided after the evidence is completed and final submissions are made.

In-Person Hearing

[6] In response to the Complainant's request on July 8, 2020 that the hearing resume, the Association requested that the hearing resume by videoconference on the Zoom platform. The Complainant objected, stating that he cannot participate in a Zoom hearing because of his medical condition. The Association disputed that the medical information provided by the Complainant supported his position.

[7] On July 15, 2020, I issued the following ruling, by email:

> "In this email, I am addressing only the issue of whether the hearing should resume in-person or via Zoom.
>
> Mr. Emmons' position is that he cannot participate in a videoconference hearing because of his medical condition. The Association disputes that the medical

> information supports Mr. Emmons' position, and has requested that the hearing resume as a Zoom hearing.
>
> The medical documentation was provided with respect to Mr. Emmons' ability to participate in a conference call. Accordingly, it does not contain a specific restriction with regard to participating in a videoconference.
>
> However, the medical documentation does state: [Redacted to protect the Complainant's personal medical information]
>
> The use of Zoom or other videoconference platforms to conduct hearings is a very recent practice. It is not the same as an in-person hearing. We are not in a position to know with certainty that Mr. Emmons will not be disadvantaged in a Zoom hearing because of his disability. If there is any chance that Mr. Emmons might be disadvantaged in a Zoom hearing because of his disability, that is an outcome that cannot be easily rectified, and that would be unfair to Mr. Emmons. Accordingly, I am accepting his position that his medical condition prohibits his participation in a Zoom hearing.
>
> At this point, it is not appropriate to hold an in-person hearing because of the pandemic. It is not clear when it will be appropriate to resume in-person hearings.
>
> Under the circumstances, I am offering the following dates: January 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 2021. Hopefully by then, it will be safe to hold in-person hearings."

[8] Consistent with the ruling above, this hearing will continue in-person when it is appropriate to do so. The parties have confirmed that January 29, 2021 is a suitable date for the hearing to resume. If by January 2021 it is still not appropriate to resume in-person hearings, we will address the issue at that time.

Reconsideration of Orders in Interim Award No. 1 pertaining to Abuse of Process, Production of Documents and Summons to Witness

[9] Immediately following the issuance of Interim Award No. 1, the Complainant asked that I reconsider the Orders that I issued on the issues of: Abuse of Process, Production of Documents, and Summonses to Witness. The basis of the Complaint's request for reconsideration is that he disagrees with the Orders that I made. He requested that I change the Orders that I made in Interim Award No. 1 and instead issue the Orders that he requested in his submissions made in January and February, 2020.

[10] The Association submitted that both parties had ample opportunity to make submissions on the various preliminary Orders that were requested. The Association submitted that Interim Award No. 1 addressed all of the Orders that were requested and that accordingly, these matters are resolved. The Association submitted that Interim Award No. 1 is binding on the parties and that it is inappropriate for the Complainant to make further submissions at this point.

[11] In making the Orders in Interim Award No. 1, I considered all of parties' submissions on the Orders requested. Although I am not required to provide reasons in an Interim decision (See the *Statutory Powers and Procedures Act,* Section 16.1 (3)), I did provide brief reasons for all of the Orders I issued. There is no basis for me to amend the Orders I issued in Interim Award No. 1 concerning Abuse of Process, Production of Documents or Summons to Witness and I decline to do so.

Compliance with Production Obligations

[12] In Interim Award No. 1, I addressed the Complainant's request that the Association produce an accounting report that was prepared for the Employer. I did not order the Association to produce this report, for the reasons given in Interim Award No. 1. I will not repeat those reasons here. The Complainant has requested again that the accounting report be produced and has also requested that the Association provide the name of the accounting firm. The Complainant submitted that the Association has not complied with its production obligations, because the Association redacted the name of the accounting firm from it production of Mr. Baxter's notes of a meeting. The Association submitted that the name of the accounting firm is irrelevant to the issues before me.

[13] The Complainant's assertions that he is entitled to the accounting report and the name of the accounting firm are a foundational part of the Complainant's DFR complaint. He believes strongly that he was entitled to receive this document from the Association. As I stated in Interim Award No. 1, the undisputed facts that 1) the accounting report exists; 2) the Complainant asked the Association to acquire a copy

and provide it to him; and 3) the Association refused to comply with the Complainant's request are sufficient for me to address whether the Association's decision not to acquire and provide the report is a breach of the Association's duty of fair representation. The name of the accounting firm that the Employer engaged is not at all relevant to the issues before me.

[14] I do not find that the Association is in breach of my Order that the parties produce arguably relevant documents.

Clarification re Witnesses

[15] The Complainant has raised a concern that Mr. Mark Baxter will be the only witness in this proceeding. I did not make an Order that Mr. Baxter would be the only witness. I expect that, at least, the Complainant will also be a witness. I declined to issue a summons for Mr. Baxter based on the Association's undertaking to call Mr. Mark Baxter as a witness. The Complainant has raised a further concern that despite the Association's undertaking, that the Association will not call Mr. Baxter to testify as a witness. An undertaking is a promise. This means that the Association has promised to call Mr. Baxter. I fully expect that the Association will call Mr. Baxter to testify at the hearing about the allegations raised by the Complainant with regard to the Association's representation of the Complainant.

Prior Settlement - MOS between the Complainant and the Employer

[16] As I discussed in Interim Award No. 1, at paragraphs 26 through 29, one of the issues before me is whether I should dismiss the DFR complaint, in whole or in part, because it is already covered by comprehensive Minutes of Settlement (MOS) that the Complainant entered into with the Employer. The MOS is a confidential document. For the reasons outlined in Interim Award No. 1, I ordered that the MOS be produced only for the purpose of determining the issue before me. I placed conditions on the production of the MOS to protect the confidential nature of it.

[17] The Complainant submitted on April 13, 2020 and in subsequent submissions throughout July and August 2020 that I misstated his position about the MOS in Interim Award No. 1. The Complainant's position is that he never requested that the MOS be admitted into evidence in this hearing, as I stated in Interim Award No. 1, but rather that he objected to the MOS being produced because the MOS is confidential and privileged. The Complainant is correct that if the MOS is privileged, then it is not admissible.

[18] Given the Complainant's position that I failed to consider his submission that the MOS is privileged, I thoroughly reviewed the submissions that the Complainant provided in January and February, 2020 pertaining to the issues addressed in Interim Award No. 1. These submissions were voluminous, totalling 74 single spaced pages of submissions.

[19] On January 30, 2020, the Complainant's requested this Order:

> "2. Order for the full MOS to be opened up in an in-camera meeting between the Applicant arbitrator Brownlee, and union representative, that will show the presentation by the union mischaracterized the actual events as they unfolded. Arbitrator Brownlee consider all evidence from the union cannot be entered as there was a violation of law with issues relied upon, within the MOS. The union was provided a copy of the MOS, unlawfully from the employer, and the applicant cannot respond to any and all matters:"

[20] The predominant concerns raised by the Complainant throughout his submissions about the MOS were 1) that the Association was not a party to the MOS; 2) that he alleges that the Association had obtained a copy of the MOS unlawfully; and 3) that there were ambiguities within the MOS that the Association would not understand. This latter point was the primary reason that the Complainant requested that the MOS be "opened up in-camera", so that he could explain the ambiguities.

[21] In the Complainant's submissions, there are two references to the word "privilege". At page 23 of the Complainant's document marked "1", the Complainant

quotes from Section 15(2) of the SPPA. Section 15(2) of the SPPA states that privileged documents are not admissible. At page 20 of the Complainant's document marked "2", under the broad heading of "Abuse of Process" and the sub-heading "Evidence Provided at hearing to show representation of facts", the Complainant quoted from a Supreme Court of Canada decision referring to "settlement privilege". However, nowhere in his submissions does the Complainant state clearly that his position is that the MOS is inadmissible because it is privileged.

[22] Finally, in response to the Association's position that the confidentiality portions of the MOS be abridged so that the MOS can be admitted for purposes of this hearing, the Complainant stated in his February 28, 2020 response:

> "I note for the record, my entire MOS need to be provided, in its entirely if Ms. Jones request is permitted, however, I would rather keep my MOS closed. I have been placed in a difficult position, as Ms. Jones unlawfully was provided a copy, and the matter will be pursued against the employer for breach of MOS. Simply why was Ms. Jones provided an unlawful copy of MOS she did not assist in developing. However, seems to be able to bring up matters while I am bound by confidentiality, simply unfair.
>
> I am of the opinion it is either opened up in camera for both sides to expose what they feel is relevant, or leave well enough alone and proceed to a hearing with witnesses."

[23] Based on the totality of these submissions, my understanding of the Complainant's position was that he wished to open up the MOS "in camera", to explain the ambiguities and to "expose what [he felt] was relevant, or leave well enough alone and proceed to a hearing with witnesses". Since the MOS is relevant to an issue that is before me, it would not be appropriate to "leave well enough alone", or to "open up the MOS in camera". Clearly, the MOS cannot be "opened up in camera" without being produced. However, now that the Complainant has clearly stated his position that the MOS is privileged, and inadmissible, it is appropriate that I address this issue.

[24] The Complainant has also raised, post Interim Award No. 1, that the MOS contains confidential information about his spouse that is not relevant to the issue

before me. I have not been provided a copy of the MOS and I am not aware of its contents. If the MOS does contain confidential information about the Complainant's spouse that is not relevant to the issue before me, it is appropriate to redact this information from the MOS. I also note that at the January 24, 2020 hearing date, the Association suggested that the settlement portion of the MOS could be redacted because it is not relevant. As I understand it, the only portion of the MOS that the Association is relying upon is the comprehensive release. The Complainant did not agree with the Association's suggestion in this regard, and objected to redacting any portion of the MOS. However, it is apparent to me, in the event that I rule that the MOS is admissible, that redacting the irrelevant portions of the MOS is appropriate and addresses the Complainant's concerns about the confidential aspects of the MOS.

[25] I will amend my Order regarding the MOS to allow the Complainant to make his submission that the MOS is privileged and therefore inadmissible. This submission is to be made at the beginning of the hearing on January 29, 2021, as a preliminary matter. The Complainant must concisely state what type of privilege attaches to the MOS. After hearing the parties' submissions on whether the MOS is privileged and therefore inadmissible, I will make a ruling on this issue. The Complainant must be prepared to produce the MOS, with the confidential information about his spouse redacted, in the event that I rule that the MOS is admissible. The Complainant may also redact the settlement portions of the MOS that are not relevant to the Association's preliminary issue. In the event that the Association takes the position that the redacted MOS produced by the Complainant is deficient, I will determine the matter.

B. ISSUES THAT ARE NOT BEFORE ME

[26] The Complainant has raised various other issues post Interim Award No. 1.

Motion that I Recuse Myself based on a Reasonable Apprehension of Bias

[27] The Complainant stated on April 20, 2020 that he intended to bring a motion that I should recuse myself based on a reasonable apprehension of bias. On July 14, 2020, the Complainant stated that he was not going to bring the motion. Accordingly, I do not need to address this issue.

Allegations of Criminal Offences

[28] The Complainant has raised many allegations that the Association's conduct in relation to his DFR complaint amounts to "numerous criminal offences". Moreover, the Complainant alleged on April 20, 2020 that my failure to find, in Interim Award No. 1, that there was an abuse of process at the January 24, 2020 hearing amounted to "aiding and abetting" criminal activity. In relation to the allegations of criminal activity, one of the bases for the Complainant's request to adjourn the May 22, 2020 hearing date was that he needed to obtain permission from the Solicitor General of Ontario to continue to participate in the hearing. The Complainant has now stated, on July 8, 2020, that he has obtained the necessary clearances required to resume the hearing.

[29] My jurisdiction is limited to the issue of whether the Association's actions constitute a breach of its duty to fairly represent the Complainant. The DFR complaint that is before me is not a criminal matter. Any remaining or future allegations that the Association's conduct amounts to criminal offences are not issues before me, and I will not address any allegation of criminal offences.

Complaints against the Ontario Police Arbitration Commission (OPAC)

[30] The Complainant has made references to a complaint that he has filed or intends to file at OPAC. Any complaint that the Complainant might file at OPAC is not an issue in this proceeding and I will not address any submissions about a complaint

regarding OPAC. For further clarity, any allegations pertaining to the sufficiency of the conciliation process in this matter is not before me and I will not address this issue.

C. DIRECTION TO THE PARTIES CONCERNING FURTHER WRITTEN SUBMISSIONS

[31] At the hearing on January 24, 2020, the parties agreed to address the unresolved procedural issues through written submissions. This agreed process was intended to make the hearing process more efficient. Although the submissions on the procedural matters were voluminous, the process worked reasonably well and I was able to issue Interim Award No. 1 by April 13, 2020. However, since the issuance of Interim Award No. 1 the process has become unwieldy. I have received email submissions on April 13, 14, 15, 16, 20, 21, 22, May 1, July 8, 14, 15, 21, 22, 23, 29, 30, 31 and August 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 25 and September 9, 2020. I direct the parties not to file any further written submissions on any issue by email or in any other manner. In the event that either of the parties wishes to make any further preliminary motion, that will be dealt with at the next hearing date. The only exception to this is in the event of a request for an adjournment of future hearing dates. In the event that either party requests an adjournment, that request may be made by email.

[32] This hearing will continue on the merits on January 29, 2021 and will commence with the Complainant's submissions concerning the admissibility of the MOS and the Association's response, followed by my ruling on this issue. The parties will then proceed to call their evidence and make final submissions. Notice of hearing will be issued in the usual manner.

Dated this 9th day of September, 2020

Diane Brownlee, Sole Arbitrator