

IN THE MATTER OF AN ARBITRATION

BETWEEN:

METROPOLITAN TORONTO POLICE SERVICES BOARD
(the "Police Services Board")

- and -

METROPOLITAN TORONTO POLICE ASSOCIATION
(the "Association")

- and -

MS. SUSAN CARDWELL
(the "Intervener")

GRIEVANCE OF ED DE SILVA

ARBITRATOR: Michel G. Picher

**APPEARING FOR
THE COMPANY:**

Carolyn Kay-Aggio	-	Counsel
Paula Fairman	-	Labour Relations Analyst
Ray Desjardins	-	Coordinator Freedom of Information and Protection of Privacy

**APPEARING FOR
THE UNION:**

John Monger	-	Counsel
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**APPEARING FOR
THE INTERVENER:**

Ms. Susan Cardwell

Hearings were held in this matter in Toronto on October 31, 1994, June 1, September 19, October 2 and 3, 1995, and February 7 and 27, 1996.

A W A R D

The Association grieves that Mr. Ed de Silva was wrongfully denied a promotion to the position of Supervisor - Freedom of Information pursuant to a job call and competition. It is the Association's position that the grievor is relatively equal in skill, ability and efficiency, as compared with the successful applicant, and that he should therefore have been given the position pursuant to Article 16.02 of the collective agreement. Alternatively, it submits that the grievor was denied the position by the exercise of bad faith, based on his involvement, or potential involvement, in the affairs of the Association. The Police Services Board denies that there was any bad faith shown towards Mr. de Silva, and submits that the provisions of Article 16 of the collective agreement governing appointments and promotions were fully complied with.

Articles 4:08 and 16:02 of the collective agreement, which govern the disposition of this grievance, provide as follows:

4:08 There shall be no discrimination by the Board or the Association against any member in respect of his/her employment because of his/her membership or non-membership or activity or lack of activity in the Association.

16:02 Any member of the Force for whom such vacancy is a promotion shall be entitled to apply for the position. In addition to any specific statutory requirements, the selection shall be made on the basis of skill, ability and efficiency from amongst the applicants, and where such factors are relatively equal, seniority shall govern.

The position which is the subject of this grievance is among the most highly

remunerated in the bargaining unit, being a Class 10 function. The call for applications to the position of Supervisor, Freedom of Information issued on March 29, 1993 and reads, in part, as follows:

SUMMARY OF FUNCTION

Supervises Disclosures Analysts in the Freedom of Information section of Records & Information and ensures prompt and efficient processing of Freedom of Information requests. Assists the Co-ordinator in providing assistance and/or information to Force management.

DUTIES AND RESPONSIBILITIES

Supervises the processing of Freedom of Information requests by the Disclosures Analysts and ensures that the procedures and time limits mandated by the Act are adhered to.

Provides guidance and interpretation of the Freedom of Information Act to Force personnel as required, and acts as a liaison to outside agencies.

Assesses existing policies/procedures to ensure compliance with the Act.

Monitors data collection and retention policies and acts as a liaison to Internal Audit and Policing Standards to monitor Force compliance with the Act.

Maintains a current knowledge of Information and Privacy Commissioner/Ontario Orders and trends in interpretation and application.

Reviews proposed releases of information with Analysts and makes recommendations to the Co-ordinator.

Assists the Co-ordinator and advises the Analysts in the preparation of submission concerning appeals and inquiries.

Provides training to Analysts and staff as required.

Attends meetings related to work assignments.

Performs typical duties inherent to the job.

REQUIREMENTS

Post Secondary School diploma or degree in related field or equivalent combination of education, training and experience. Excellent keyboarding skills required. Experience in supervising Force employees. An analytical mind with proven verbal communication skills and excellent report writing skills required. Budget preparation experience preferable. Experience in interpretation and application of legislations and regulations preferable. Experience in Freedom of Information administration/disclosures work preferable. Qualifying period is one (1) year.

As can be seen from the foregoing, the Supervisor of the Freedom of Information office holds a position of some administrative responsibility overseeing the administration of the Act through the supervision of staff personnel, including Freedom of Information Analysts. The job is obviously a sensitive one which requires a degree of judgment, supervisory skills as well as inter-personal and communication skills.

The record reflects that the Board of Commissioners was faced with two strong candidates, among others, in the person of the grievor and the successful applicant, Ms. Susan Cardwell. At the time of the application, Mr. de Silva had some twenty-two (22) years service with the force. Between February of 1971 and September of 1984 he fulfilled a number of functions in the Payroll Office, including acting as paymaster on occasion, a task which involved the supervision of a staff of some twenty (20) persons. Mr. de Silva's administrative and executive experience continued in his role as Vice President of the Metropolitan Toronto Police Association, a full-time position which he assumed by election in October of 1984 and held until October of 1991. His duties as Vice President of the

Association were extensive, including a primary responsibility for the grievance committee, of which he was chair, chairing the finance committee, with responsibility for administering a budget of some \$3 million, and, generally overseeing all administrative functions of the Association. In addition to serving on all bargaining committees, he was involved in liaison with the Chief of Police and other command officers in matters touching the membership, dealt with provincial and municipal elected officials, was active in conferences and seminars on policing and labour relations matters, occasionally handled media communications, dealt with the chair of the Police Services Board and the Director of Labour Relations in his representational capacity and served as a resource person to the Toronto Mayor's Committee on Community and Race Relations, acting as a voting member on its sub-committee on policing.

As a member of a visible minority of East Asian origin, Mr. de Silva appears to have had considerable success in his involvement in community and race relations. Following his service as Vice President of the Association, Mr. de Silva returned to work for the Chief of Police as the Chief's community liaison officer, a position which he held at the time of his application for the job call which is the subject of this grievance, although its name had then been changed to Community Services Officer. In that capacity he was responsible for liaising with consultative committees of the Black, Chinese and South Asian communities, the preparation and recording of meetings of the Chief of Police and other command officers with those committees, and following up in the resolution of problems raised by the minority community representatives. He also continued to be responsible for representing

the Force at meetings of the Toronto Mayor's Committee on Community and Race Relations and its Access to Services Implementation Committee. Mr. de Silva also functioned as Treasurer of the Greater Toronto Region Working Group on Policing in Multicultural, Multiracial Urban Communities, a body involved in the preparation of guidelines for crisis management and conflict resolution. He also acted as the provincial liaison and Ontario delegate to the Canadian Centre for Police Race Relations in Ottawa, a function which required him to keep the national centre advised of race relations initiatives and programs of all major police forces in Ontario. Mr. de Silva holds a certificate in Business Administration from Ryerson and has also completed some ten courses in political science at the University of Toronto.

The successful applicant, Ms. Susan Cardwell, is also an impressive candidate. Having completed a diploma in Food Technology at Humber College, she joined the Force in December of 1982. Since that time she has also completed courses in management skills, computers and word processing, supervisory principles as well as ethnicity and race relations. Ms. Cardwell worked initially as an Occurrences Clerk in the Records Bureau from May of 1981 to March of 1985. Thereafter she spent two years as a station operator in the Intelligence Services, with responsibilities for operating a front-desk switchboard. From July of 1987 to October of 1989 she was a clerk with the Five District Drug Squad and, most significantly, from October of 1989 to the time of the job competition, functioned as Administrative Co-ordinator for 52 Division, described as one of the busiest police divisions in Canada. Ms. Cardwell's responsibilities as Administrative Co-ordinator involved the

supervision of four administrative clerks, assisting in the preparation of the annual budget totalling some \$27 million in 1993, ongoing control and monitoring of expenditures, involvement in the preparation of unit strategies and objectives, the overseeing of inventory, the preparation of correspondence and performing the duties of a Commissioner of Oaths. Ms. Cardwell's responsibilities at 52 Division, which employed some 466 people at the time, included participation in the budget committee, the audit committee and the strategy committee, a body involved in the preparation of a yearly mission statement of objectives and goals. Her record discloses that she came to the job competition with a positive record in both the day-to-day administration of a substantial budget and inventory, and the medium to long-term planning process central to the operation of a busy police station, a role which involved ongoing involvement with officers at the most senior level.

The job competition for the position of Supervisor in the Freedom of Information unit was overseen by the unit co-ordinator, Staff Sergeant Ray Desjardins. His evidence discloses that after an initial screening of applicants, eleven finalists were scheduled for interviews and written tests. The selection committee was comprised of three persons: Staff Sergeant Desjardins, Mr. M. J. Dear, Director of the Records and Information Security unit, which oversees the Freedom of Information section and Ms. Marinella Black, a representative of the Forces Employment Office. The interviews and written tests were conducted on April 14 and 15, 1993. The candidates, who had previously been provided photocopied excerpts of the Privacy Act and pamphlets from the office of Privacy Commissioner, were first given a written test, which was eventually marked by Staff Sergeant

Desjardins. The interview consisted of two parts. The first involved general questions of the candidate with respect to their budget experience, supervision experience, education, and general experience, with an assessment of their verbal communication skills and overall board performance. The second part of the interview consisted of specific problem questions to be answered verbally. The evidence discloses that both the written test and the verbal interview were highly structured, with a pre-established marking scheme. The interviews were conducted in a consistent fashion, with the same questions being asked of each candidate by the same panel member.

The average score for all candidates, based on the results of their interview and a written test was 73.3. Only two candidates scored above 80, Ms. Cardwell with a result of 85.5 and Mr. de Silva with 81.3. The evidence further discloses that on the interview portion of the selection process, which involved all three of the assessors, there was very little distinction between the scores registered for the grievor and for Ms. Cardwell. On that portion Mr. de Silva registered 63.3 percent while Ms. Cardwell stood at 64.5 percent. The greater part of the ultimate difference between them flows from the combined scores of the written test and educational background, which were done by Staff Sergeant Desjardins, although they were reviewed by the other members of the selection committee. On that portion Ms. Cardwell scored a total of 21 points while Mr. de Silva was given 18 points.

The Association's attack upon the selection process is three-fold. It does not suggest that the structure of the process, the factors considered and the questions put to the

candidates both with respect to their own experience and their knowledge of the Freedom of Information material provided to them was in any way inappropriate. Its counsel argues, however, that when regard is had to the scores of the two candidates, they should be found to be relatively equal within the meaning of Article 16:02 of the collective agreement. Secondly, he asserts that certain of the marks assigned to Mr. de Silva, particularly with respect to his experience and prior qualifications, are unduly low as compared with Ms. Cardwell. Finally, the Association asserts that Staff Sergeant Desjardins engaged in deliberate discrimination against Mr. de Silva, by reason of his involvement in the Association, contrary to Article 4:08 of the collective agreement.

The Association's allegation of anti-union discrimination is based on the evidence of Ms. Deborah Kelford. Ms. Kelford, who had worked as a Disclosure Analyst in the Freedom of Information unit for some two and a half years at the time of the job posting, was one of the applicants who made it to the final interview stage. The evidence discloses that she worked in the office under Ms. Paula Wilson, Ms. Cardwell's predecessor in the position of Supervisor, Freedom of Information.

Ms. Kelford testified that when she did not succeed in the competition she spoke with Staff Sergeant Desjardins to go over her marks and general performance. During the course of their discussion, according to her testimony, Staff Sergeant Desjardins disclosed that Mr. de Silva had placed second in the competition. She relates that Staff Sergeant Desjardins stated that he had marked Mr. de Silva lower because he had concerns that the grievor

might be re-elected as Vice President of the Association in the 1994 elections, causing Staff Sergeant Desjardins to lose his services. According to her evidence, Staff Sergeant Desjardins related that Ms. Black and Mr. Dear had in fact marked Mr. de Silva high, but that he had deliberately marked him lower to avoid the possible problem of awarding the position to someone who might not remain in it for very long. According to Ms. Kelford's evidence, she then questioned Staff Sergeant Desjardins' rationale, noting that Ms. Cardwell was pregnant and would also be on leave from the position, by reason of maternity. She states that Staff Sergeant Desjardins seemed surprised by that information.

Ms. Kelford's evidence further discloses that she communicated what she allegedly learned from Staff Sergeant Desjardins to Mr. de Silva during a subsequent conversation between them. Ms. Kelford also testified that she had observed Ms. Cardwell meeting with Staff Sergeant Desjardins at the Freedom of Information office in the company of Paula Wilson, some time prior to the job call, noting that Ms. Cardwell had succeeded Ms. Wilson in the position of Administrative Co-ordinator at 52 Division.

During the course of cross-examination Ms. Kelford stated that she recalled vividly the incident involving Ms. Cardwell's visit to Staff Sergeant Desjardins' office before the job call was posted. She relates that she knew Ms. Cardwell from a prior contact when she worked in the court system. According to her evidence, Ms. Cardwell came to visit Staff Sergeant Desjardins shortly after it became known that supervisor Paula Wilson had obtained another job and would be leaving. She states that a few days afterwards she saw

Miss Cardwell go into Staff Sergeant Desjardins' office where, by her estimate, she spent some two hours in conversation with him. She testified that, "It didn't hit me until I found out she did apply. Then it really hit home."

Staff Sergeant Desjardins squarely denies the conversation alleged to have taken place between himself and Ms. Kelford with respect to deliberately marking down Mr. de Silva. According to his evidence, following the job competition he asked Ms. Kelford if she wanted a post mortem on her application, to discuss her strengths and weaknesses. This, he states, was an offer he made to all unsuccessful candidates. According to Staff Sergeant Desjardins' recollection, the disclosure as to Mr. de Silva being second in the competition arose in the context of a question from Ms. Kelford as to whether she might have placed second or third. He states that he can recall telling Ms. Kelford that he did tend to mark the candidates lower than did the other interviewers, Mr. Dear and Ms. Black. He also agreed that there was mention of Ms. Cardwell's pregnancy in the conversation with Ms. Kelford. He states that he believes that that topic came up with respect to the possibility of the Freedom of Information office being without a Class 10 supervisor because of her impending pregnancy leave. According to Staff Sergeant Desjardins he was already aware of Ms. Cardwell's pregnancy, as she had told him about it during an earlier interview at his office, apparently the same interview which had been observed by Ms. Kelford. He states that he feigned surprise when it was raised by Ms. Kelford, as it was a matter which he had received and treated as confidential. During the course of his testimony Staff Sergeant Desjardins also recalled that he was somewhat angry at the time of the post-selection

interviews, as there had been rumours, communicated to him by several unsuccessful candidates, to the effect that the competition had been fixed. According to his evidence those rumours did not, however, involve allegations of deliberate unfair treatment towards Mr. de Silva. He states that upon consulting with Mr. Dear and Ms. Black as to whether he should initiate a complaint with the Internal Affairs Department he was advised to let it pass, as such rumours were not uncommon in job competitions.

Staff Sergeant Desjardins also gave evidence of his recollection of meeting with Ms. Cardwell in his office. By his recall, that meeting occurred sometime during the currency of the job call, between March 11 and March 29, 1993. He states that Ms. Cardwell phoned him and asked to meet. He relates that when she came to his office she stated that she had something personal and private to disclose. She went on to explain that she had been giving some thought to applying for the Supervisor's position in the Freedom of Information Unit, but had concerns because she was pregnant, and did not want to place the office in a position where, if she was the successful candidate, she might shortly take a pregnancy leave, and, in Staff Sergeant Desjardins' words, "Leave us in the lurch". He states that he assured Ms. Cardwell that that would not be a consideration, and that indeed any contrary view would be against both internal policy and the provisions of the Ontario Human Rights Code. On that basis he encouraged her to go ahead to proceed with her application. He characterized the meeting as being very short, perhaps "ten minutes at the outside."

The evidence of Ms. Cardwell, whom the Arbitrator judges to be an honest and

candid witness, generally confirms the version of events related by Staff Sergeant Desjardins with respect to her visit to his office at the College Street headquarters. By her recollection, however, her telephone call to Staff Sergeant Desjardins, and their meeting, was in late February or early March of 1993, in advance of the actual posting of the job call. She states that, being aware that the job was opening up, she wanted to find out more about it, and wanted to advise Staff Sergeant Desjardins that she was pregnant, should that have any possible adverse impact if she should be the successful candidate. According to her testimony their conversation, which took place during her lunch break, totalled approximately twenty minutes. During that time Staff Sergeant Desjardins explained the outlines of the functions of the office and the supervisor's responsibilities. She also testified that when she did disclose her pregnancy, and was assured by him that it would not be a factor, she asked Staff Sergeant Desjardins not to repeat that information as, "At that stage I was keeping it quiet." She further states that after her meeting with Staff Sergeant Desjardins she may have had a brief encounter with Ms. Wilson, the departing incumbent, and could not recall the substance of their conversation, save to speculate that she probably had indicated the reason for her visit to Staff Sergeant Desjardins.

The Arbitrator deems it appropriate to dispose of the issue of alleged discrimination at this point. The merits of that issue plainly turn on the credibility of the testimony of Ms. Kelford. It is axiomatic that serious allegations, including such matters as fraud or bad faith, must be supported by evidence of commensurate weight. (*Indusmin Ltd.* (1978), 20 L.A.C. (2d) 87 (M.G. Picher); *Alberta (Province)* (1994), 51 L.A.C. (4th) 397 (McPettridge);

Embassy Suites Hotel (1995), 48 L.A.C. (4th) 150 (Knopf). It therefore becomes necessary to examine very closely the testimony of Ms. Kelford, as it relates to her allegations that, on the one hand, Staff Sergeant Desjardins openly admitted to her that he deliberately marked down Mr. de Silva because of his possible involvement in the affairs of the Association, and that there was preferential treatment or collusion with respect to the successful candidacy of Ms. Cardwell. There is reason to conclude that the evidence of Ms. Kelford is less than reliable. During the course of cross-examination by counsel for the Board of Commissioners, Ms. Kelford stated that when Ms. Cardwell came to visit Staff Sergeant Desjardins in his office the two of them spoke "for a couple of hours". When asked how she could be so certain as to the time she stated, "I'd heard that she was going to apply, so when I saw her there I took notice. I looked at my watch, and it was a couple of hours." However, shortly thereafter, she gave a different version as to why the visit drew her attention. She stated that the job call had not yet come out yet when Ms. Cardwell visited Staff Sergeant Desjardins. After it came out, she asserted, "The picture fit together... It didn't hit me until I found out she did apply - then it really hit home."

When the foregoing evidence is examined, there is an arguable inconsistency. The second part of the evidence would suggest that Ms. Kelford had no reason to pay close attention to the meeting between Ms. Cardwell and Staff Sergeant Desjardins at the time that it happened, as its importance only came home to her later. However, the first part of her evidence indicates that she timed the meeting with her watch, as it occurred. It is difficult for the Arbitrator to appreciate, if the meeting had no significance for her until

some later time, why she would time it with her watch as it was unfolding. The evidence of Ms. Cardwell, which the Arbitrator accepts without qualification, is that the meeting occurred during her lunch hour, and lasted no more than twenty minutes. While Staff Sergeant Desjardins' evidence is less than precise in many respects, I am compelled to prefer the testimony of Ms. Cardwell to that of Ms. Kelford. It is, quite frankly, difficult to imagine a two hour meeting of the sort described by Ms. Kelford. The implausibility of her evidence, coupled with the apparent contradiction in her rationale for recalling what occurred, suggests that her recollection of events is less than fully reliable, even if it should be accepted that she did not deliberately intend to give false evidence.

What, then, of the alleged conversation between Ms. Kelford and Staff Sergeant Desjardins? At best, the evidence with respect to that exchange, and the alleged disclosure by Staff Sergeant Desjardins that he deliberately marked down Mr. de Silva, resolves itself to a contest of credibility between two relatively weak witnesses. At most, the conflict in evidence between them remains unresolved by any objective or corroborating testimony. It is, of course, quite possible that Ms. Kelford misconstrued something that was said by Staff Sergeant Desjardins, and is sincere in her belief as to the truth of her testimony. In the Arbitrator's view, the evidence with respect to this issue is at best equivocal, and in relatively equal balance. Bearing in mind that the Association bears the onus of proof on this matter, I cannot find that it is proved, on the balance of probabilities, that Staff Sergeant Desjardins did deliberately mark down Mr. de Silva because of his participation in the activities of the Metropolitan Toronto Police Association. On that basis the

allegation of discriminatory treatment of the grievor and the alleged violation of Article 4:08 of the collective agreement must be dismissed.

I turn to consider the issue of the relative equality of the two candidates, Mr. de Silva and Ms. Cardwell, and the related question of whether, as alleged by the Association, Mr. de Silva should have been scored more highly in respect of certain experience and qualification factors.

Counsel for the Board of Commissioners submits that the job competition and interview process was conducted in an objective and consistent manner. She notes that all of the candidates were given the same test, both written and verbal, in the same format and circumstances. The candidates were also interviewed identically, with questions being put by the same panel member, in accordance with a prearranged script. She notes that each of the three assessors kept his or her own notes and entered their own scores without referring to those of others. She stresses that while it is true that Staff Sergeant Desjardins marked the written test, he did so before doing a tally of the candidates' performance on the oral interview, so he could not have known the degree of mark manipulation that might have been necessary to advantage or disadvantage any candidate. She also notes the evidence of Mr. Dear to the effect that he reviewed the marks on both the written portion, determined by Staff Sergeant Desjardins, and the interview portion.

Counsel points to the overall scores recorded for each of the candidates during the

interview portion, as noted by the three panel members. She stresses that the pattern reflected in those scores is that Staff Sergeant Desjardins tended, as a general matter, to mark candidates lower than Mr. Dean or Ms. Black. She submits that there is no substantial basis on which to conclude that he manipulated scores as to disadvantage the grievor, as compared to any other candidate. She submits that in examining the evidence the Arbitrator should not lightly interfere with the judgment of management in assessing the relative merits of the competing applicants, absent compelling evidence of bad faith or discrimination.

Counsel for the Board of Commissioners stresses that Ms. Cardwell's experience in the critical area of budget preparation and administration was more direct and extensive than that of Mr. de Silva. She notes that his involvement with the budget of the Metropolitan Toronto Police Association was less direct, as a full-time controller was employed by the Association to deal more directly with budgetary matters. She also notes that during the course of the interview, Mr. de Silva was not forthcoming with respect to his own practical experience within the Association, as it might relate to the factors which would support his qualification for the supervisor's position. She notes, for example, that during the course of the interview, he did not make specific mention of his race relations liaison work or his involvement in the Mayor's Committee. In contrast, she submits, Ms. Cardwell was more forceful, thorough and interviewed better, a consideration which the panel felt to be relevant.

Counsel submits that Mr. de Silva was not as articulate and clear in his communication as was Ms. Cardwell. She further points to his failure on one of the written questions, concerning statistical data on drinking driving offences, where the grievor failed to detect a hidden flaw in the question, as a result of which he received no marks. Counsel stresses that, as in any process of evaluation by several persons, there must be an element of subjectivity brought to bear. She stresses that it was for the panel to determine the weight that it would give to the interview, and that in evaluating both the grievor and Ms. Cardwell, to determine what weight should be given to prior experience. She stresses that in these areas the Arbitrator should not lightly interfere with the judgment of the employer's representatives.

Counsel also emphasizes the evidence of the employer's witnesses to the effect that Ms. Cardwell is markedly superior. She notes the testimony of Ms. Black to the effect that, "The winner was clear" indicating that half a point to a point would, in her view, be the margin of relative equality. She also points to the evidence of Staff Sergeant Desjardins who placed the margin at .2 to .3 points.

In support of her submissions, Counsel for the Board of Commissioners refers the Arbitrator to the following reported awards: *Re Great Atlantic and Pacific Company of Canada Ltd. and Canadian Food and Allied Workers Union, Locals 175 and 633* (1979), 21 L.A.C. (2d) 444 (Weatherill); *Re British Leaf Tobacco Co. of Canada Ltd. and Canadian Union of Operating Engineers & General Workers* (1981), 3 L.A.C. (3d) 235

(Kennedy); *Re The Tribune (Division of Cariboo Press Ltd.) and Communication Workers of America, Local 226* (1989), 4 L.A.C. (4th) 390 (Chertkow); *Re Religious Hospitallers of St. Joseph of Hotel Dieu (Kingston) and Ontario Public Service Employees Union, Local 465* (1994), 43 L.A.C. (4th) 155 (Simmons); *Re Public Utilities Commission of City of Sault Ste. Marie and Canadian Union of Public Employees, Local 3* (1994), 44 L.A.C. (4th) 286 (Hinnegan). Unreported awards which were cited are as follows: *British Columbia Rapid Transit Co. Ltd. and Independent Canadian Transit Union, Local 7*, an unreported award of arbitrator Dalton L. Larson dated August 5, 1992; *Health Sciences Centre and Manitoba Association of Health Care Professionals*, an unreported award of arbitrator of William D. Hamilton and dated February 24, 1993; *The Toronto Hydro-electric System and Canadian Union of Public Employees, Local 1*, an unreported award of arbitrator Victor Solomatenko dated December 20, 1993; *St. Joseph's Health Centre of London and Ontario Nurses' Association*, an unreported award of arbitrator B. Welling dated July 18, 1988.

Counsel for the Association submits that the overall evidence establishes that, in fact, Mr. de Silva and Ms. Cardwell were relatively equal, as reflected in their performance and evaluation in the job competition. He stresses that when those parts of the competition marked and assessed solely by Staff Sergeant Desjardins are set aside, namely the written test and the education evaluation, there is very little numerical difference between the two candidates. The interview score for Ms. Cardwell was 64.5 while for Mr. de Silva it was 63.3.

As a first position, Counsel for the Association submits that the evidence discloses that in fact the three selection panelists did not appreciate the standard of selection contemplated in Article 16:02 of the collective agreement. He submits that they in fact applied a strict equality test, rather than a test of relative equality, giving undue weight to relatively minor numerical differences in scores. In this regard he notes the evidence of Staff Sergeant Desjardins to the effect that the concept of the relative equality of candidates was never in fact discussed among the panel. Referring to prior arbitration awards, he submits that the standard established in cases involving relative equality is that there must be a substantial and demonstrable margin between the candidates before it is concluded that they are not relatively equal. By way of example he refers the Board to the following decisions: *Re Wellesley Hospital and Ontario Nurses' Association* (1989), 5 L.A.C. (4th) 55 (Weatherill) and *Cornwall Police Association and Board of Commissioners of Police for the City of Cornwall*, an unreported award of arbitrator I.G. Thorne dated October 22, 1991. He also refers the Arbitrator to the following decisions of the Grievance Settlement Board: *Mr. Willis Lethbridge and The Crown in Right of Ontario (Ministry of Health)* an award of a panel chaired by P.G. Barton dated July 9, 1981; *OPSEU and The Crown in Right of Ontario (Ministry of Government Services) (Grievance of Miss Judy Worsley)* an award of a panel chaired by P. Draper, dated March 4, 1982; *OPSEU and The Crown in Right of Ontario (Ministry of Transportation and Communications) (Grievance of Ian G. Bullen)*, award of a panel chaired by J.W. Samuels, dated August 3, 1982; *OPSEU and The Crown in Right of Ontario (Ministry of Health) (Savarimuthu Grievance)* an award of a panel chaired by N. Diasanayake dated February 6, 1992.

Counsel further submits that an examination of the interview and test results reflects several instances in which the grievor should have been given higher marks, the result of which would be to bring him still closer to Ms. Cardwell in relative standing.

Counsel points specifically to the assessment of points to both candidates under the heading "Education", which was done entirely by Staff Sergeant Desjardins. That section provides a possible ten points for a post secondary diploma or certificate relevant to the Freedom of Information Supervisor's position, two points for every course that the individual has taken that would benefit directly the candidate and the force in completing the assigned tasks and, thirdly, "two points for every life experience that would be of direct or indirect value in assisting you in the Class 10 task(s)". Counsel notes that in assessing Ms. Cardwell, Staff Sergeant Desjardins assigned her a total of four points for life experiences, two for her experience as an auxiliary police officer and two for her work as the Administrative Coordinator at 52 Division. In dealing with Mr. de Silva, however, he assessed only two points in total for his life experiences, being credit for his work as Vice President of the Metropolitan Toronto Police Association. Counsel stresses that Staff Sergeant Desjardins awarded no life experience marks to Mr. de Silva for a number of experiences and achievements, including his involvement in the Access to Services and Implementation Committee, a minority community liaison group which Staff Sergeant Desjardins described as "a politically correct debating society". Nor, Counsel notes, was any credit for related life experience given for Mr. de Silva's service on the Chief's Liaison Committee on Race Relations, stressing that after the grievor left the Association his job within the force for

almost two years was to be the right hand of the Chief of Police in dealing with high profile race relations issues. Likewise, Counsel stresses, no credit whatever was assessed for Mr. de Silva's experience as the representative of the force on the Mayor's committee. In respect of all of these facts, Counsel points to the testimony of Mr. Dear, one of the selection panelists, who conceded that Mr. de Silva should have been awarded points for his high profile involvement in race relations and community liaison duties. Counsel argues that if only two points had been awarded for all of the grievor's accomplishments in this area, the difference between himself and Ms. Cardwell would be reduced to a two-point spread. Additionally, counsel notes that Staff Sergeant Desjardins attributed no credit to the fact that, for considerable periods of time, Mr. de Silva fulfilled the role of acting paymaster for the entire police force, with responsibility for all issues of pay and benefits, and ongoing involvement with senior officers in the administration of the payroll system. Further, counsel points to the fact that during the course of cross-examination Staff Sergeant Desjardins himself conceded that perhaps one or two points should have been given for the grievor's experience on the Mayor's Committee.

Counsel further suggests that the marking of Mr. de Silva on verbal communication skills and his overall selection board performance was prejudicial. The evidence discloses that Staff Sergeant Desjardins made the notation "accent" on his evaluation sheet, referring to the fact that Mr. de Silva speaks with a slight South Asian accent. This obviously disturbed Mr. de Silva who, in his own testimony, speculated that a Scottish or Irish accent would not have been noted in that fashion. Counsel suggests that the marking of Mr. de

Silva at six points in verbal communication skills and overall performance, as compared with the nine points assessed to Ms. Cardwell, by all three assessors, raises substantial questions as to the fairness brought to bear in respect of the grievor. Counsel stresses the comment of Staff Sergeant Desjardins made during the course of his cross-examination to the effect that Mr. de Silva might have been awarded eight to ten points in verbal communication skills if he had not been so soft-spoken, if he had more modulation in his voice and if he had no accent.

Counsel also objects to the manner in which Staff Sergeant Desjardins scored Mr. de Silva on one of the written questions. The question, which was number four on the written test, concerned the analysis of a statistical chart relating to drinking and driving offences. The number of "offences" registered for males and females is tabulated for a five year period from 1988 to 1992 inclusive. The candidate is asked, in part, "What conclusions can be drawn about the rate of male and female drinking drivers?", and "... What statistical conclusions can you draw solely from the figures that are presented here?"

The table of data shows a consistently declining number of drinking driving offences for males, and a consistently increasing number of drinking driving offences for females over the five-year period. The total number of offences is seen to decline consistently over the same period, with male offences substantially outnumbering female offences in each year. According to the answer key, a total of seven marks were available for five points which could have been drawn from the data. With respect to the five points, the answer sheet

states the following:

- Point 1 - From 1988 through 1992 the numbers of female charges have increased each year.
- Point 2 - From 1988 through 1992 the number of male drinking driving charges have decreased each year.
- Point 3 - From 1988 through 1992 there were more male drinking drivers than female drinking drivers charged.
- Point 4 - From 1988 through 1992 the total number of drinking/driving charges has increased!
- POINT 5 - However: one cannot say anything concerning the relative percentages of male and female drinking drivers without additional information (e.g. whether in fact there were more drinking/driving females or whether it is simply a matter of fewer males driving, or conversely more (greater percentage of females driving etc. etc.)

Total marks, 7/— 1 point for Pts. #1 through #4, and 3 points for pt. #5) = [7]

Mr. de Silva's response to the question is as follows:

"In the years 1988 to 1992 there is a decline in the number of male drinking drivers. Even though in the same period female drinking drivers are small when compared with the male counterpart there appears to be over a 100 percent increase between 1988 and 1992 of female drinking drivers."

Staff Sergeant Desjardins awarded no points to Mr. de Silva for that response. He

explained his rationale on the basis that Mr. de Silva failed to make any distinction between drinking drivers and drinking drivers who became associated with a recorded offence. Counsel for the Association submits that the grievor should nevertheless have received some points for his answer, as it does reflect some appreciation of the distinctions and trends within the data, even though his nomenclature may not have been as precise as the answer might have called for. He submits that some analytical ability is shown in the grievor's reply, and that to give no marks whatsoever was unduly harsh. By comparison, counsel notes that in another question Ms. Cardwell was given a bonus point, above the limit of points contemplated in the answer key, on a question which involved identifying spelling and grammatical errors in a memorandum. Stressing that all of these questions were marked in the sole discretion of Staff Sergeant Desjardins, counsel raises concerns about the scope for discretion in the marker, and its impact in a competition where the results between the top two candidates are so numerically slight.

On the whole, Counsel submits that the evidence discloses that there were areas in which Mr. de Silva could and should have been given extra marks, particularly in relation to his experience in community race relations, his work on the Mayor's Committee, and his involvement in the preparation and administration of the budget of the Police Association. Counsel also stresses that the marking of Mr. de Silva by Staff Sergeant Desjardins was noticeably more negative for the interview portion than was the marking of him as recorded by the other two panelists. By way of example he points to the marks recorded for the eighth question in the interview, for which Mr. Dear and Ms. Black assessed Mr. de Silva

ten points, the highest given to any candidate, while Staff Sergeant Desjardins awarded seven and a half points, which was lower than the eight points which all three panellists gave Ms. Cardwell.

I turn to consider the merits of the dispute. The point of departure for the Arbitrator's decision is the language of Article 16:02 of the collective agreement. That article plainly mandates that seniority is to be the governing factor in awarding a job vacancy in the event that two competing applicants are "relatively equal" on the basis of skill, ability and efficiency. The first issue of general concern is to determine what that standard means and whether it was properly applied by the panel charged with making the decision for filling the vacancy for the position of Supervisor, Freedom of Information.

Firstly, it should be noted that by their own evidence, the members of the panel did not specifically advert to what would constitute relative equality, during their own deliberations. Staff Sergeant Desjardins said he could not recall any such discussion. In her examination-in-chief, Ms. Black adverted to the testing and interview process and stated, "The person who scored the highest was the successful candidate". Mr. Dear testified that there was one obvious winner based on the points that each of them obtained in the interview and test process. He stated, in chief, that he was aware of the collective agreement provision, and that in his view a point spread of one half to one point would constitute relative equality. There is, however, no reflection in the evidence of Mr. Dear that the panel discussed what would constitute relative equality.

The Arbitrator has substantial difficulty with this aspect of the case presented by the Board of Commissioners. In approaching in this issue it must be recognized, at the outset, that the selection process, including the interviews, oral questions and written questions, as well as assessment for education and experience was extremely complex and painstaking. There is no suggestion that the questions prepared by Staff Sergeant Desjardins, the relative weight given to the answers or points to be covered or the marking scheme prepared by Ms. Black were other than responsive to the duties of the position being assigned, and were developed in good faith and in accordance with the most professional standards. That said, however, it must be recognized that the scoring system attached to the process had two significant features: firstly it contained ample scope for subjective discretion and, secondly, it was entirely open-ended, with no limit to the maximum points which could be scored by any candidate. The combination of open-endedness and subjective discretion is perhaps best reflected in the education and experience portion of the evaluation process. As noted above, under the heading "Education" a part of the possible scoring is stated as follows:

Two points for every life experience that would be of direct or indirect value in assisting you in the CL10 task(s).

Without commenting on the specifics of assessment awarded to Ms. Cardwell and Mr. de Silva, a matter dealt with in greater detail below, it strikes the Arbitrator that the potential for garnering marks under that heading, in a numerically scored competition where the assessors testified that their notion of relative equality ranged from two tenths of a point to one or one and half points in comparing the total scores of the two candidates, is highly questionable. In a test of this kind, if points are assigned on a strictly objective basis, as for example in responding to questions that require mathematical calculation, accuracy in a

computer exercise or typing speed, reducing relative equality to small fractional mathematical values is perhaps defensible. However, in the Arbitrator's view it becomes a highly doubtful exercise to purport to score something as amorphous and variable as "life experiences" on a mathematical point scale which ultimately finds a half point or a point difference between two candidates to take them beyond relative equality. More fundamentally, a general review of the assessment process followed by the selection panel supports the conclusion, which I feel compelled to draw on the balance of probabilities, that the selection committee in fact viewed the job competition process as one in which, as Ms. Black's evidence indicates, the person who scored the highest mark would be awarded the job. That, however, is not what is contemplated in Article 16:02.

Boards of arbitration have expressed substantial caution in approaching the notion of "relative equality" reflected in job competition provisions in collective agreements. They have very clearly indicated the danger of accepting analysis by the numbers, much less by the fractions of numbers, where candidates are to be assessed for the purposes of relative equality. In the *Re Wellesley Hospital* case, at pp 57-58 Arbitrator Weatherill commented as follows:

For the grievance to succeed, it must be shown that the grievor was "relatively equal" to the successful applicant, in terms of the factors referred to in art. 10.06(c). "Relative equality" is a matter to be determined having regard to the nature of the job to be done: see *Re Great Atlantic & Pacific Co. of Canada Ltd. and Canadian Food & Allied Workers Union, Locals 175 & 633* (1979), 21 L.A.C. (2d) 444 (Weatherill), referring to *Re Lady Galt Towels and Textile Workers Union* (1969), 20 L.A.C. 382 (Christie), where it was said that the test of "relative equality" was really one of determining whether or not one employee was more qualified than another by a "substantial and demonstrable

margin". The board in the A & P case agreed with that, subject to the qualification that the determination is to be made having regard to the particular job in question.

While slight differences between employees must always be "demonstrable" if they are to be relied on, the notion of what is a "substantial" margin of difference is, like the notion of "relative equality" itself, one which calls for judgment in relation to the relevant circumstances. Reference may also be made to *Re Elizabeth Bruyere Health Centre and O.N.A.* (1982), 6 L.A.C. (3d) 119 (Saltman), where it is said, at p. 121, that "Precise equality among individuals is, of course, impossible to measure. Accordingly, the employer cannot seize upon minor differences to defeat the application of seniority ...".

As a general matter, in this Arbitrator's view, where it can be shown that an employer has taken into account all relevant considerations in comparing two candidates for a job promotion and has done so consistently for each of them, a Board of Arbitration should be reluctant to interfere with the result, even if it might have ascribed greater weight or value to a given factor as it might apply to the grieving unsuccessful candidate. Where, however, the evidence clearly demonstrates that substantial areas of experience for one candidate are given no value while points are awarded to similar or comparable types of experience for the successful candidate, a board of arbitration can legitimately examine the correctness of the conclusion drawn as to the relative equality of the two candidates. That, it seems to me, is especially so where numerical points are assigned for prior experience, and by the employer's own standard, relative equality is made to turn on extremely fine numerical differentials.

When the above principles are applied to the evidence in the case at hand there is substantial reason to question the conclusion of the selection panel to the effect that the

grievor was not relatively equal to the successful applicant, Ms. Cardwell. In approaching this issue the Arbitrator is compelled to closely examine the assessment of both candidates done by Staff Sergeant Desjardins, particularly as he was responsible for allotting points in respect of their education and experience. I have also considered closely the argument of counsel for the Board of Commissioners, whose efforts on behalf of her client were extremely thorough and professional, to the effect that Staff Sergeant Desjardins was in fact harder on all of the candidates in respect of his marking, as compared to the other two panel members. When the overall marks for all candidates interviewed are examined, the Arbitrator is compelled to conclude that while it is true that Staff Sergeant Desjardins did generally mark candidates lower than his colleagues did, there are some important distinctions to be noted. Firstly, when regard is had to the interview portion, which is the only part for which all three assessors entered marks, the difference in marking between Staff Sergeant Desjardins and his colleagues, while lower for the Staff Sergeant where all but two candidates are concerned, is substantially lower where Mr. de Silva is concerned. Staff Sergeant Desjardins scored seven candidates, other than Mr. de Silva, lower than did one or more of his panel colleagues on the interview portion. The average differential between his scoring and that of his highest marking colleague among those seven employees is 1.2 marks. Remarkably, the marking differential between himself and both Mr. Dear and Ms. Black, in the interview assessment of Mr. de Silva is almost three times greater, at a margin of 3.5 points. Both Ms. Black and Mr. Dear scored the grievor at 64 1/2 points for the interview portion, the same mark which all three assessors gave to Ms. Cardwell. However, Staff Sergeant Desjardins gave Mr. de Silva only 61 points. At a minimum, it

would appear that while it is true that Staff Sergeant Desjardins was harder on most applicants with respect to scores for the interview, he was substantially harder, as compared with his colleagues, where Mr. de Silva was concerned. It should also be noted that on the written portion of the competition, which was marked exclusively by Staff Sergeant Desjardins, Mr. de Silva, whose interview rating was at the highest level in the eyes of two of the three panel members, scored substantially below the average for all candidates. The scores registered on the written portion ranged from seventeen down to six, for an average of 10.7. Staff Sergeant Desjardins gave Mr. de Silva a mark of 7, which is second lowest and substantially below the average. That scoring, for a candidate who otherwise placed a strong second, is, at the very least, questionable in light of the general pattern of his strong performance.

The grievor's weak performance on the written portion relates, in substantial part, to the fact that Staff Sergeant Desjardins gave him no points whatsoever for the fourth question, relating to statistical conclusions from data on drinking driving offences. In the Arbitrator's view the Staff Sergeant's willingness to be extremely harsh in assessing the grievor's answer is highly doubtful as to its fairness, particularly given the ambiguity of the question itself. Firstly, the question makes no distinction as to whether "offences" means charges or convictions. Neither does the answer key. Secondly, the Staff Sergeant's credibility is not assisted by the fact that the answer key plainly contains an incorrect answer, asserting that the total number of drinking/driving charges has increased. As noted previously, the data does not speak to the distinction between charges and convictions or

the relationship between "charges" and "offences". Most fundamentally, whatever the proper definition, the total numbers reflected on the data chart clearly decreased, and did not increase. The fairness of equating the concept of "offences" with "charges", a link obviously made by the answer sheet, as distinct from convictions, is of itself highly questionable. On balance, I am inclined to agree with counsel for the Association that some part marks should have been awarded on this question to Mr. de Silva, if only for his ability to correctly identify the upward and downward trend in the numbers, as regards males and females who had drinking driving "offences", however that might be defined. In my view the awarding of no marks whatsoever, out of a possible seven marks, is questionable in the circumstances, and the assessment of two marks for his performance on that question would not be unreasonable.

In the Arbitrator's view a still greater concern arises from the handling of the life experience portion of the evaluation by Staff Sergeant Desjardins. By his own admission, he ascribed two marks to Mr. de Silva for that heading, based on his experience as Vice President of the Police Association. No points whatsoever were assigned to the grievor for his experience on the Toronto Mayor's Committee, his work as the Chief's liaison on community race relations or his involvement in the Access to Services Implementation Committee. By contrast, Ms. Cardwell was awarded four points, twice as many as the grievor, with two points being assessed for her experience as a member of the auxiliary police and two points for her then current position of Administrative Co-ordinator at 52 Division. As noted above, Mr. Dear conceded that points should have been assessed for Mr.

de Silva's experience in such endeavours as the Chief's Liaison Committee on Race Relations and the Mayor's Committee. Indeed, if two points had been assessed for that experience, coupled with the awarding of part marks for the grievor's response to the unfortunately worded fourth question of the written test, he would have scored a total of 85.3 marks, as compared with the 85.5 recorded for Ms. Cardwell.

There is more, however. No points were awarded by Staff Sergeant Desjardins for the fact that earlier in his career, prior to his service with the Association, Mr. de Silva spent substantial periods as acting paymaster for the entire police force. No good explanation was forthcoming as to why that responsibility, which obviously concerned handling delicate issues of human relations with respect to inquiries and protests about salary and benefits received by employees, was deemed to be worthy of no points under the heading of life experience of direct or indirect value in the handling of the supervisor's tasks. Equally questionable is the fact that Staff Sergeant Desjardins appears to have given no value to the budget experience of Mr. de Silva in the preparation and administration of the Association's annual budget.

While counsel for the Association attacked the fact that Mr. de Silva was rated lower than Ms. Cardwell in the area of verbal communications, stressing in particular the evidence of Staff Sergeant Desjardins that his accent was held against him to some degree, the Arbitrator is not persuaded that there was any significant unfairness to Mr. de Silva, notwithstanding it was clearly irrelevant to make mention of his accent. Mr. de Silva is

easily understood and, as noted in Ms. Black's assessment, is articulate and speaks extremely good English. Rather, the fact that he was assessed six marks as opposed to nine marks for Ms. Cardwell under this heading, is, in my view, properly based on the fact that he is substantially more soft-spoken and, to some degree, less forthcoming in his conversational style.

In the result, however, the Arbitrator is forced to the conclusion that the marks assessed by Staff Sergeant Desjardins were, as a general matter, substantially lower for Mr. de Silva than for Ms. Cardwell, and that his tendency to mark harder than the other panellists was more pronounced as regards Mr. de Silva, compared to all other candidates. Most significantly, it appears undeniable that a number of important areas of prior life experience were entirely ignored by the panel in attributing marks to the grievor, notably his prior work as acting paymaster for the police force, his budget experience in the Police Association and the high profile liaison work he has done in community and race relations. I am also satisfied that there was questionable marking of at least one of the written questions by Staff Sergeant Desjardins, as discussed above. In the result, the possible addition of two, and perhaps as many as six, marks to Mr. de Silva's assessment would have placed him in numerical equality, if not superiority, to Ms. Cardwell.

For the reasons touched upon above, I am not impressed with the argument of the Board of Commissioners that the difference between a score of 81.3 and 85.5 was, in the circumstances, indicative that the two candidates were not relatively equal. The open-

ended and subjective nature of the scoring system was, quite simply, such that the assessors could not credibly conclude that, as Staff Sergeant Desjardins suggested, a difference must be in the order of 2/10's or 3/10's of a mark to constitute relative equality. More importantly, I am satisfied, on the balance of probabilities, that the panel did not in fact address the issue of relative equality in any significant way. Rather, in a manner inconsistent with intention of Article 16:02, they developed an elaborate interview and testing process, with the general expectation that the person who scored the highest mark would be awarded the position. In so proceeding, they stepped outside the agreed intention of Article 16:02 of the collective agreement. On that basis alone the grievance should be allowed.

Alternatively, for the reasons related above, the Arbitrator must conclude that, largely by reason of the assessment of Mr. de Silva by Staff Sergeant Desjardins, both in respect of his interview, and the factors of the written test and the education/experience of the candidates, the grievor was unduly deprived of marks which should have been assessed in his favour, particularly in respect of his prior experience and achievements in the pay office, in the Police Association and in the high profile community and race relations committees with which he was involved. The failure to award any points whatsoever for the grievor's service and experience as a principal representative on race relations for one of Canada's largest police forces, a matter well-reflected in the documentation before the selection committee, verges on the unconscionable.