IN THE MATTER OF AN ARBITRATION

BETWEEN:

REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD

(the “Service”)

- and -

WATERLOO REGIONAL POLICE ASSOCIATION

(the “Association”)

AND IN THE MATTER OF A RIGHTS DISPUTE – BEARD POLICY

PAULA KNOPF – SOLE ARBITRATOR

APPEARANCES

For the Service	**Anthea Millikin, Counsel**
For the Association	**Ian Roland, Counsel** **Ghada Sharkawy** **Ted Thornley**

Hearing in this matter was held in Cambridge, Ontario on October 27, 1999

PART 1

INTRODUCTION

The Waterloo Police Services Board (the Service) has a policy prohibiting beards or goatees from being worn by a uniform police officer, except for medical or religious reasons. The Waterloo Regional Police Association (the Association) complained that this is an unreasonable and discriminatory rule and requested that a conciliation officer be appointed under Section 123 of the *Police Services Act.* When conciliation did not resolve the dispute, at the request of the Association, the Solicitor General appointed me to act as an arbitrator pursuant to Section 124 of the *Police Services Act* to hear and determine this "rights dispute" about the beard policy.

The "matter in dispute" which the Association referred to arbitration is set out as follows:

> The dispute . . . . concerns the Waterloo Regional Police Service Board's (the Board) policy with respect to beards for members, and it concerns the Directive of the Chief of Police promulgated in accordance with Board policy, concerning beards for members.
> . . . . . .
>
> The Service "beard policy" has been used for the purpose of disciplining a uniform member.
>
> The Service "beard policy" prohibiting beards and goatees, is in violation of Article 2.01 of the Uniform Collective Agreement between the parties, in that it is an unreasonable and discriminatory employee rule that cannot form the basis of discipline or discharge for reasonable cause.

> The Association requests that the employer rule "that prohibits uniform members of the Service from wearing a beard or goatee" be declared unreasonable and of no force and effect.

At the commencement of the proceedings, counsel for the Service raised preliminary objections regarding my jurisdiction and the appropriateness of the proceeding to resolve this dispute by way of arbitration. Further, objection was raised concerning the timing of the filing of this matter. Submissions were made on the preliminary objections. When it became apparent that both the preliminary matter and the merits could all be heard in one day, I reserved on the preliminary matter and heard evidence and submissions on the merits of the case as well. In the first part of this award, I shall deal with the preliminary objections.

PART 2

THE PRELIMINARY ISSUES

Some factual background is germane to the preliminary arguments.

On January 17, 1994, the Police Services Board adopted bylaw No. 94-1 with annexed regulation 4.29.12, which reads:

> A male member of the Service, while in uniform, will ensure that his hair, sideburns and moustache are kept neat, clean and well

trimmed, and particularly that **. . . .** beards and goatees shall not be worn.

Directive 95-58 from the Chief of Police regarding "personal appearance," effective July 7, 1997, includes the following:

3. Male sworn officer shall **. . . .**

(e) Only wear beards or goatees when sworn officers have received written permission from the Chief of Police. An application shall be submitted to a Unit Commander on the prescribed form. Sworn officers shall comply with the conditions described on the form and shall meet one of the following criteria:

(i) An officer is assigned to a special plainclothes investigative unit and a beard or goatee is required by the special needs of the unit.

(ii) An officer is required to wear a beard as part of religious belief. Officers must be a practising member of a bona fide recognized religion.

(iii) An officer has written documentation from a certified medical practitioner indicating a medical need requirement for growing a beard or goatee.

(f) If meeting the criteria for a beard or goatee,

(i) They shall be grown during leave, unless in a special investigative unit, or grown prior to employment.

(ii) They shall be worn with a moustache. They shall be neatly trimmed, especially with regard to the lower neck and cheekbones, and no less than 0.6 cm ("1/4") and no more than 2.5 cm (1") in length, unless in a special investigative unit.

(iii) They shall meet the unit commander's assessment for neatness and groomed appearance.

In 1998, Constable Matthew Jeary challenged the beard policy by reporting to work in uniform with a growth of beard. He was ordered on three occasions to shave his beard, but he did not comply. He was suspended and remained off work with pay for 40 hours. Then he shaved and returned to work. He was charged with three counts of insubordination and commanded to appear before a Hearing Officer pursuant to Part V of the *Police Services Act.* The hearing involved two days of evidence and submissions. The Hearing Officer issued a decision on April 15, 1999 convicting Officer Jeary of three counts of insubordination. That decision is currently under appeal to the Ontario Civilian Commission on Police Services (OCCOPS). That appeal is scheduled to be heard in early January 2000. The penalty has been stayed pending the outcome of the appeal.

The relevant provisions of the collective agreement between the parties provide:

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The Association and its members recognize and acknowledge that subject to the provisions of the Police Services Act and Regulations thereto, it is the exclusive function of the Board to:

(a) Maintain order, discipline and efficiency;

(b) Hire, discharge, direct, classify, transfer, promote, demote and suspend or otherwise discipline any Police Officer provided that a claim for discriminatory promotion, demotion or transfer or a claim that an employee has been discharged or disciplined without reasonable cause, may be the subject of a grievance and dealt with as hereinafter provided.

ARTICLE 19 - DEPARTMENTAL BY-LAWS

19.01 All future by-laws and regulations proposed by the Board for the government of the Service shall be referred to the Association before enactment and the Association shall be given an opportunity to make submission thereon. This provision shall not limit the absolute authority of the Board to enact by-laws and regulations and the enactments shall not be subject to grievance proceedings except insofar as such enactments offend the provisions of this Agreement or the Police Services Act.

ARTICLE 23 - GRIEVANCES

23.01 All complaints or grievances shall be dealt with under the provisions of Appendix "B" to this Agreement.

APPENDIX "B"

COMPLAINT AND GRIEVANCE PROCEDURE

. . . .

2. If the Member of the bargaining unit and the Supervisor fail to resolve the grievance or complaint to the satisfaction of the Member, or if the Supervisor fails to discuss, acknowledge or otherwise deal with the complaint or grievance, the Member may invoke thereafter the following procedure in an attempt to remedy the cause of his or her complaint or grievance.

. . . .

(e) The Board shall cause the complaint or grievance to be investigated or cause an inquiry to be held between the persons involved in the dispute, and shall within thirty (30) days of the receipt of the complaint or grievance, communicate in writing their decision in the matter.

This procedure shall not preclude the Board from referring the complaint to the Ontario Civilian Commission on Police Services where, in the opinion of the Board, the matter can be best determined by such a referral.

(f) If dissatisfied with the decision of the Board, or if the Board fails to acknowledge or act upon the complaint or grievance the Association may:

(1) Where the differences arise from the interpretation, application or administration of the Agreement submit the matter for conciliation and/or arbitration in accordance with Part VIII of the Police Services Act,

or

(2) Where the differences arise from other causes refer the dispute, grievance or complaint to the Ontario Civilian Commission on Police Services for determination.

The first preliminary objection of the Service is regarding the manner that the Association has utilized to convene this arbitration. It was submitted that Appendix B to the collective agreement sets out a complete code for launching a grievance. However, instead of utilizing that procedure, the Association bypassed the collective agreement and launched a Section 123 application for conciliation. Counsel for the Service argues that the Association's actions would suggest that there is no purpose to Appendix B if it can be so readily ignored.

Further, the Service argues that Appendix B, Section 2(f), specifies that only matters involving interpretation, application or administration of the collective agreement can be referred to arbitration. In contrast, where the parties' differences arise for "other causes," the dispute or grievance must be referred to OCCOPS for determination. The Service characterizes the grievance in this case as an "individual grievance arising from the discipline of Constable Jeary." Further, it was said that this dispute should be viewed as essentially a grievance against unjust discipline. However, since the discipline has been stayed, it was submitted that such a grievance was premature. Alternatively, it is submitted that if this case is viewed as a policy grievance as the Association requests, the collective agreement and the *Police Services Act* do not allow for a policy grievance.

Further, and in the alternative, it was submitted that only OCCOPS has jurisdiction to consider the validity of the beard policy. It was argued that Section 126 of the *Police Services Act* excludes grievances for any matters that are dealt with under Part V (the disciplinary section) of the Act because they are not matters that are the subject of collective bargaining. This was said to be consistent with an earlier case concerning Constable Hopviavuri issued by OCCOPS on November 20, 1982 which found that the Service did have the authority to regulate the issue of beards. Yet OCCOPS declared that the Service's approach was not appropriate and that a written policy was required. Accordingly, in 1983 the predecessor of the current beard policy came into play by way of by-law.

Counsel for the Service argues that while the *Police Services Act* allows for collective bargaining of working conditions, this does not include matters of personal appearance. Further, it is suggested that the Association should have grieved the beard policy in 1994 when it was implemented, not 1998. The Service also argues that Article 19.01 of the collective agreement is a complete bar to the Association's case because it makes by-laws such as the one in question immune to grievance.

Most significantly, the Service argues that the beard policy is not reviewable by an arbitrator appointed pursuant to sections 123 and 124 of the Act. Instead, jurisdiction was said to fall within the exclusive authority of the Service which was said to be subject only to the intervention of OCCOPS or the Solicitor General, not an arbitrator.

The Service relies on the decisions in *Deeks v. Saanich (District) Police Board (1995),* 5 WWR 206 (BCSC) and *Carpenter and Vancouver Police Board* (1986), 18 DLR (4^{th}) 585 (BCCA) to submit that the "discipline without cause" provision of the collective agreement was intended to capture those matters that are not punishable under the terms of the disciplinary code. The result of this would be that a contravention of the collective agreement resulting in discipline would be grievable only if it was punishable outside the provisions of the disciplinary code. Accordingly, the Service argues that if the policy behind the discipline issued to Constable Jeary is what the Association wishes to challenge, arbitration is not the

forum with jurisdiction to deal with this matter. The Service's position is that OCCOPS is the appropriate forum to consider the propriety of the beard policy because section 25 of the *Police Services Act* confers jurisdiction on OCCOPS to investigate, inquire into and report upon matters which include the administration of the municipal police force. Similarly, the Ministry of the Solicitor General has powers to issue guidelines respecting policy matters. It was submitted that this creates a statutory scheme that gives OCCOPS and the Solicitor General the exclusive power to review and adjudicate upon matters within the disciplinary code and policy aspects of a Police Service.

It was submitted that a labour arbitrator ought to defer to OCCOPS because it should be recognized as the specialized tribunal with expertise on police and policy matters as suggested in *British Columbia v. Tozer [1998], B.C.J. No. 2594.*

In response to the preliminary objections raised by the Service, counsel for the Association submitted that the jurisdiction of an arbitrator to hear this case arises from section 124(2) of the *Police Services Act* which creates a process parallel and "in addition" to the grievance procedure created by the parties in the collective agreement. Therefore, it was submitted that the Association has the statutory right to refer a "difference" under the collective agreement directly to conciliation and arbitration without resorting to the parallel process available under the collective agreement as was recognized in a previous case between these

parties: *Waterloo Regional Police Services Board and Waterloo Regional Police Association (O'Reilly – nee Moule)* grievance, unreported decision of Paul Haefling dated April 16, 1998. That case followed previous jurisprudence accepting that the statutory process under the *Police Services Act* is in addition to whatever processes are created under collective agreements between a Police Association and a Police Service Board. Further, it held that the collective agreement could not "derogate" from the independent statutory rights available to police officers or the Association.

The Association strenuously disagreed with the suggestion that this case should be viewed as a challenge of the discipline issued to Constable Jeary. On the contrary, the Association asserts that the dispute that it wants to present in this hearing does not involve a challenge to the legitimacy of Constable Jeary's discipline. It was stressed that the case the Association wants to present involves a policy dispute concerning the reasonableness of the policy that prohibits the wearing of beards. It was submitted that characterized as such, this should be seen as a dispute arising under article 2.01 of the collective agreement. It was submitted that since the decision in *Metropolitan Toronto (Municipality) v. CUPE* (1990), 74 O.R. (2d) 239, it has been clear that the reasonableness of a rule can be challenged at arbitration before or without discipline having been issued. In addition, that case was relied on for the proposition that an arbitrator can rule upon the reasonableness of a policy that can form the foundation of discipline, even in the face of a management rights clause granting an employer the "exclusive function" to manage the work place.

Counsel for the Association further stressed that the issue it seeks to present in this arbitration is very different from the issue of whether Constable Jeary is guilty of insubordination. The relief being sought by the Association does not include anything relating to Constable Jeary. It was conceded there might be some overlapping of issues that OCCOPS and the arbitrator may consider. However, it was submitted that the overlap of jurisdiction is not unusual for tribunals in this province, nor does it preclude an arbitrator from adjudicating on the general issue of the reasonableness of the beard policy or rule.

An interesting exchange took place at this point of the Association's submissions. Counsel for the Service made an entirely appropriate intervention to stress that the Service takes the position that OCCOPS has jurisdiction to deal with the reasonableness of the beard policy or rule in the context of Constable Jeary's appeal. It suggested that the parties ought to proceed to have the questions of the validity of the beard policy and the appropriateness of Officer Jeary's discipline determined in the one forum of the OCCOPS appeal. The question then arose as to why the Association wishes to proceed with this separate policy grievance before an arbitrator. The concern of the Service is that if the case proceeds before two tribunals, there may be a risk of inconsistent rulings on the question of the reasonableness of the beard policy.

Even having heard the Service's position that OCCOPS has jurisdiction over the question that the Association wants to submit regarding reasonableness, the Association maintained that an arbitrator can and should adjudicate upon this matter. The Association asserts that the grievance is timely because the grievance was prompted in 1998 at the first instance when the policy was being applied. Further, it was asserted that the timing of the grievance was appropriate because it is a continuing policy grievance and there are no time limits for the filing of grievances under section 123 or 124 of the *Police Services Act.* Further, there is no prejudice to the Service.

In addition, it was stressed that the question of whether the policy is reasonable is squarely within the jurisdiction of an arbitrator pursuant to the *Metropolitan Toronto and CUPE* case, *supra.* It was submitted that this policy falls within what the Court of Appeal described as "the broad compass" of working conditions that can be the subject of collective bargaining and which must be "reasonable" if they have disciplinary consequences in a collective agreement with language such as is found in article 2.01.

It was acknowledged that the legislature has removed the disciplinary process in policing from collective bargaining. But the "process" was said to be different from the question of whether a rule was reasonable because the validity of a rule can be determined without regard to any discipline that may have been imposed. The Association stressed that the Service had successfully argued that

the Hearings Officer considering Officer Jeary's discipline case had no jurisdiction to decide upon the question of the reasonableness of the rule. The Association argued that it would be "novel" and inappropriate for an appeal tribunal to take jurisdiction over a question that was not considered at the original hearing.
It was also suggested that if the Service is correct that OCCOPS can and should take jurisdiction over that question in the context of an appeal of discipline, this would force a police officer to put himself forth as a "sacrificial lamb" to test the reasonableness of a rule in the context of a disciplinary appeal. This would mean that the officer would have to subject himself to the risk of discipline in order to test the validity of a rule or policy. The Association submits that such a result is exactly the situation that the Court of Appeal determined would be unnecessary and contrary to public policy in the *Metropolitan Toronto and CUPE* case, *supra.*
Further, it was submitted that if the Service succeeded in its position, the Association would be precluded from challenging the reasonableness of any rule unless a police officer had discipline imposed upon him/her.

In addition, counsel for the Association argued that section 25 of the *Police Services Act* gives neither the Association nor a member any standing to ask OCCOPS to determine the reasonableness of a rule. Therefore, section 25 should not be viewed as a "labour relations instrument" to determine the rights and interest of the Association or police officers. It was stressed that the Association's policy grievance belongs before an arbitrator because it is essentially a labour relations matter which is being brought forward. Reliance was placed on the decisions in

Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R. (3d) 671 S.C.C. and *Trumbley et al. and Fleming et al.* (1986), 55 O.R. (2d) 570 (C.A.) for the proposition that police officers are both statutory office holders and employees entitled to resolution of disputes with their employer about working conditions in the form of an arbitration. It was stressed that this policy grievance falls squarely within the jurisdiction and expertise of a labour arbitrator interpreting collective bargaining regimes. Therefore it was said that an arbitrator not only has the jurisdiction, but is also best placed to decide a matter such as the one brought forward by the Association.

Counsel for the Association submitted that there remains a real question of whether OCCOPS has jurisdiction to deal with the issue of reasonableness. Despite the Service's willingness to allow OCCOPS to exercise such jurisdiction, the Association points out that OCCOPS can only confirm, alter or revoke a decision of the Hearing Officer under section 70 of the *Police Services Act.* The standard of review is "correctness." It was submitted that as an appeal tribunal, OCCOPS might not be authorized to go beyond the jurisdiction of the Hearing Officer to inquire *de novo* into the question of reasonableness of the rule.

The Association also argues that its approach does no disservice to the jurisdiction of OCCOPS in that the disciplinary process is being respected and it remains the forum to determine issues concerning police officers carrying out their statutory duties. But it was said that an arbitrator may still be utilized to determine

issues regarding the interpretation and administration of the management rights clause of the collective agreement.

The parties allowed themselves liberal rights of reply and counter reply.

Counsel for the Service distinguishes this case from *Metropolitan Toronto and CUPE*, *supra*, because it was said that the beard policy is not a working condition. Instead, it was submitted that the policy is within the sole prerogative of the Service to determine. Further it was stressed that this preliminary objection is not the proper forum to decide this jurisdiction of OCCOPS.

It was also emphasized that under this statutory scheme, the discipline Constable Jeary received cannot be grieved because it arises under the discipline code. Therefore, this arbitrator was cautioned against making a decision that would create two grievance schemes. Reference was made again to *Deeks v. Saanich (District) Police Board, supra.* Specifically, concern was raised over the prospect that an arbitrator could decide that the rule was unreasonable and what impact that would have on OCCOPS hearing an appeal of a refusal to abide by such a rule. It was also submitted that the case of *Metropolitan Toronto and CUPE*, *supra*, is no longer applicable because of the changes to the *Police Services Act.*

Counsel for the Association responded by arguing that that the current section 126 of the *Police Services Act* corresponds with section 29(1) of the previous legislation in place when the *Metropolitan Toronto and CUPE* decision, *supra,* was decided. Further, it was conceded that section 126 only allows the collective agreement to deal with working conditions that are not determined by the *Act*. But it was stressed that the Police Services Board relies on section 31(c) of the Act as its authority to establish a rule such as the beard policy. The Association points out that section 31(c) is not excluded under section 126. Accordingly, the Association argues that the subject matter of this case remains within the realm of collective bargaining and arbitration.

PART 3

THE DECISION ON THE PRELIMINARY OBJECTIONS

The determination of the preliminary objection with regard to jurisdiction is dependent on the scheme of legislation governing the statutory arbitration proceeding. While the result may have public policy ramifications, this preliminary award is not a public policy decision. Instead, it is simply an analysis of the statutory scheme to determine if this arbitration forum has statutory authority to determine the case put forward by the Association.

It is also important to emphasize that this analysis is solely a determination of an arbitrator's jurisdiction in a situation like this. This decision does not bind or determine the extent or limits of OCCOPS' jurisdiction. The question of OCCOPS' jurisdiction will be discussed for purposes of the analysis of the jurisdiction of this arbitrator. But this award does not attempt to define the other tribunal's jurisdiction.

The first aspect of the preliminary objection is the easiest to resolve. If this was an arbitration under the *Labour Relations Act* and the union attempted to refer a case to a statutory arbitration process without first referring the dispute through the grievance step process in its collective agreement, I would decline jurisdiction for policy reasons alone. The grievance step process in a collective agreement provides valuable opportunities for the parties to identify, narrow and/or resolve their differences themselves. Indeed, Appendix B to this very collective agreement sets out a detailed and enlightened complaint and grievance procedure that the parties have jointly crafted and adopted. Attempts by either side to circumvent this process are often shortsighted and counter productive. Arbitration should be a last resort, not a forum of first choice.

But this is not an arbitration under the *Labour Relations Act*. Section 124(2) if the *Police Services Act* has specifically created a dispute resolution scheme that is "in addition" to the grievance procedures under the

collective agreement. Unlike under the *Labour Relations Act*, access to arbitration is not dependent upon completion of the grievance step process. This was recognized in the *O'Reilly* case, *supra,* between these very parties. Therefore, the fact that this complaint was directly submitted to the statutory resolution process is not a bar to its proceeding.

Further, the timing of the referral is not problematic. While it is true that a policy grievance can be raised at any time, this complaint was referred when the beard policy was enforced and challenged. No prejudice is alleged and the Service has not been impeded in the presentation of its case by any timing factors. Accordingly, there is no procedural bar to this statutory arbitration proceeding.

The more complex question is whether I have jurisdiction as a statutory arbitrator to determine a policy grievance about the beard policy and to decide whether the policy is reasonable. The source of jurisdiction for an arbitrator under this *Act* arises from section 1*23*(1). The *Act* allows for matters concerning an allegation of a violation of the collective agreement to be referred to conciliation and arbitration. In order for the Association to get this case to "first base" before an arbitrator, it must be established that the Association's complaint is tied to and can be found to be a violation of its collective agreement.

The request for arbitration in this case alleges that the beard policy violates article 2.01 of the collective agreement in that it is said to be "an

unreasonable and discriminatory employee rule that cannot form the basis of discipline or discharge for reasonable cause." Therefore, the first question becomes whether the request for arbitration even discloses an issue that falls within the concept of a violation of this collective agreement.

Nothing in the collective agreement between the parties specifically obliges the Service to make reasonable rules. Nothing in the collective agreement deals specifically with issues of personal appearance. Further, article 19.01 confers "absolute authority" to the Service to adopt by-laws and regulations "which shall not be subject to grievance proceedings" unless they offend other provisions in the collective agreement or the Act.

The Association alleges that the beard policy "offends" or violates article 2.01 because it subjects a police officer to discipline "without reasonable cause." Essentially, the Association is arguing that article 2.01 must be interpreted and applied in such a way that a police officer cannot be subjected to discipline for disobeying an unreasonable rule.

The position of the Association is essentially the same position taken by the union in the *Metropolitan Toronto and CUPE* case, *supra*. In that situation an employer had the exclusive right to manage the operation of the Corporation except it could not discipline or discharge without just cause. The Employer adopted a policy which bargaining unit members felt was unreasonable and challenged it by

way of a policy grievance instead of waiting for an employee to disobey the rule and fight the consequent discipline. The Ontario Court of Appeal decided that this was a properly arbitrable issue at page 254:

> **....** it seems clear that under an "obey now, grieve later, rule, an arbitrator is practically *required* to take jurisdiction to hear a grievance against a directive, at least in a case where a breach is likely to constitute insubordination and subject the employee to disciplinary action. In my respectful opinion the Board [of arbitration], in taking jurisdiction, acted in accordance with both the letter and spirit of the collective agreement; its actions were neither patently unreasonable nor (using the more interventionist test) wrong in law. To decide otherwise would be to invite anarchy in the workplace**....**

At page 256:

> In other words, it is not patently unreasonable for an arbitrator to oblige management to exercise its discretion reasonably, where to do so unreasonably would be to create a conflict with or undermine the rights conferred by some other provision in the collective agreement.

At page 259:

> Nonetheless, it is true that a collective agreement is an intricate contract, which attempts to reflect the outcome of bargaining on a myriad of issues. It is also true that parties intent on reaching a settlement do not always have the time, the incentive, or the resources to consider the full implications of each and every phrase. There is, therefore, a place for some creativity, some recourse to arbitral principles, and some overall notion of reasonableness.

The Court of Appeal also directly addresses the question of implying the duty of reasonableness upon an employer where there is no explicit duty stated in the collective agreement. It was concluded at page 257:

> **....** it does not seem patently unreasonable to view the collective agreement in a holistic manner, where even management rights may be circumscribed in order to avoid negating or unduly limiting the scope of other provisions.

Accordingly, the contractual obligation to impose discipline for just cause was seen as the basis for prohibiting an employer from passing a rule that was unreasonable if disobedience could result in discipline.

In the case at hand, articles 19 and 2.01 give this employer wide-ranging powers. But article 2.01 does prescribe article 19 and the Employer's ability to discipline or discharge by imposing a standard of just cause. This aspect of article 2.01 has been accepted by the Court of Appeal and the arbitral cases cited with approval in that decision are standing for the principle that all company rules with disciplinary consequences must be reasonable. Therefore, as a matter of labour relations and arbitral jurisprudence, the question of the reasonableness of a rule that has disciplinary consequences in a collective agreement such as this is arbitrable. Accordingly, it can be seen that the complaint or policy grievance about the beard policy arises out of the collective agreement between these parties.

Further, Appendix B, Section 2(f)(1) of the collective agreement allows the Association to submit matters to arbitration that involve a "difference" arising from the interpretation, application or administration of the collective agreement. Differences arising from "other causes" can be referred to OCCOPS. The

Association alleges a difference here regarding the administration of this collective agreement and seeks a ruling declaring the policy to be unreasonable and unenforceable. Under the collective agreement, a difference or dispute about the interpretation and administration of a policy with disciplinary impact is arbitrable.

The issue then becomes whether anything in the statutory context of a police rights arbitration makes this situation different in terms of arbitrability.

For the sake of simplicity, I will accept without determining the Service's proposition that OCCOPS does have jurisdiction to determine the question of reasonableness of the beard policy within the context of a disciplinary appeal. But that does not end the matter. The real question is whether OCCOPS has exclusive jurisdiction over such a question. As stated above, the purpose of this preliminary ruling is not to determine or adjudicate upon the scope of OCCOPS' jurisdiction. But if I assume OCCOPS does have jurisdiction over the question of reasonableness, I must then explore whether anything in the statutory framework makes that jurisdiction exclusive or precludes an arbitrator from asserting parallel or similar jurisdiction.

Section 126 of the *Police Services Act* does preclude an arbitrator from making an award that affects working conditions determined by sections 42 to 49, 50(3) and Parts V and VII of the Act. This clearly precludes an arbitrator from taking jurisdiction over any discipline issued to a police officer because it is

covered by Part V. But nothing in the restrictions under section 126 precludes an arbitrator from asserting jurisdiction over working conditions in the general sense. Therefore, it is clear that I have no jurisdiction over the question of the propriety of any discipline arising from the beard policy. But nothing in section 126 precludes my jurisdiction to determine the reasonableness of the policy itself.

The next question to address is whether the Board's policy is akin to a company rule or whether it has a different status because of its genesis as a regulation under a by-law passed by a Police Service. A Service derives its jurisdiction to make such by-laws under section 31(c) of the *Police Services Act* that gives it the responsibility and the authority to "establish policies for the effective management of the police force." While the Service's ability and responsibility to enact by-laws and regulations has this statutory basis, this legislative empowerment does not leave the resulting rules or policies immune from challenges. I am very mindful of the Service's concern that any and all policies could be subject to challenge in the future. The answer to that concern is that not all policies could be so challenged. The Service has the power and duty to make policies to effectively manage the police force. The scope of an arbitrator to adjudicate upon policies would arise only under the narrow window available that is created by the interplay of sections 123, 124 and 126 of Act. Therefore, any policy falling within the restrictions of section 126 could not proceed to arbitration. However, a policy that violates a provision of the collective agreement may be arbitrable. Indeed, this seems to be recognized by the parties themselves in section 19.01 and

section 2(f)(1) of Appendix B of the collective agreement that allows differences regarding the interpretation and administration of the agreement to proceed to arbitration.

This analysis does not ignore the *Deeks* and *Carpenter* cases, *supra.* Those cases were said to stand for the proposition that arbitrators can only take jurisdiction over discipline imposed for matters not punishable under the terms of the disciplinary code. The Association does not dispute that proposition in this case. But that is not in issue here. There is no request for this adjudicator to take jurisdiction over or award any remedy that affects the question of whether discipline was appropriate. The question that I take jurisdiction over is the policy behind discipline that may or may not be issued in the future.

It is true that the *Police Services Act* gives OCCOPS and the Solicitor General the power to oversee activities of a municipal police force. Further, OCCOPS can be viewed as a tribunal with specialized knowledge of police matters. But an arbitrator is also a specialized tribunal with expertise in labour relations. On the question of whether discipline is warranted for failure to abide by a direct order about wearing a beard, an arbitrator under the *Police Services Act* has no expertise, jurisdiction or authority. But a question of whether the policy violates the collective agreement is a question of interpretation and administration of a collective bargaining agreement. Accordingly, it fits within the realm of a labour relations arbitrator's expertise.

For all these reasons, I have concluded that I have authority and jurisdiction to arbitrate the difference between these parties about the reasonableness of the beard policy. I do not have any jurisdiction over the question of whether Constable Jeary was disciplined without just cause. Regardless of what ruling I make on the reasonableness of the beard policy, OCCOPS will still have the power and ability to hear the appeal of the discipline issued to Constable Jeary for insubordination. Given the complexities of the questions of insubordination in the context of policing, I see no conflict in jurisdiction resulting from this approach.

Accordingly, I shall now turn to the merits of the grievance.

PART 4

SUBMISSIONS REGARDING THE MERITS OF THE CASE

The Association challenges the Service's beard policy alleging that the policy is discriminatory and unreasonable. The facts are not in dispute.

The statutory basis for the policy is set out on pages 3 and 4 above. The policy itself is annexed hereto as Appendix A to this award. The policy has been in effect for some years. This policy grievance was filed when the policy became part of the foundation for disciplinary issues against a police officer. In

addition, in 1997 the Chief issued a directive which incorporates the beard policy and which, stipulates:

> 1. Whether in uniform or plain clothes, an officer's personal appearance shall be consistent with the uniform and office. A good corporate profile builds trust and confidence. People we serve, both victims and clients, must view our commitment to professionalism.
>
> 2. Clothing, accessories and hairstyles shall be consistent with the range of duties that an officer may be called upon to perform. Health and Safety considerations shall be a priority when setting guidelines for personal appearance.

The beard policy has attracted some public attention and coverage. Deputy Chief Roger Hollingsworth was quoted in the Kitchener-Waterloo Record as a spokesperson for the Service saying, "We think (a clean shaven officer) probably looks better. It is just the way we want the department to look." [sic]

An editorial in the Kitchener-Waterloo Record published June 4, 1988 stated:

> If the department wants officers to be clean-shaven, why does it allow some of them to have beards? And if it really wants clean-shaven officers, why does it allow moustaches? One might have hoped that the department's policy would be based on safety factors. Perhaps a case could be made that beards would interfere with equipment that police might have to wear in emergency situations, but apparently this argument has not been advanced in Jeary's case.
>
> Presumably, a strong case could also be made that a long beard would be particularly unsuitable for a policeman trying to

> wrestle a fleeing suspect to the ground. No one wants to see an officer injured because of his beard.
>
> Surely the key questions about a police officer wearing a beard are not about principles but are pragmatic: Does the beard look neat and does it pose a safety problem? If the answer to the first question is yes, and the answer to the second question is no, there is no reason why an officer should not be allowed to wear a beard.

The Association also filed photographs of public officials in the Waterloo community who wear full beards. Those photographs depicted the Chair of the Regional Municipality of Waterloo Police Services Board, four judges and a regional and city councilor.

Several forces in Ontario have beard policies. Of the 21 municipal forces surveyed for this case by the Association, only three have prohibitions against beards. The remainder have policies with regard to grooming and appearance, with no absolute prohibition against uniform officers wearing beards. The Association calculates that 83.65% of police officers in Ontario are allowed beards. If the O.P.P. are also included, 93.56% of the police officers in Ontario are allowed to wear beards.

At the time of the hearing, there was no equipment that officers would be called upon to wear that would be impeded by beards. At the time the grievance arose, there was an air pack that could have posed difficulties if a police officer had a beard. But only two units were trained for that equipment.

Counsel for the Association defines the issue in dispute as being whether the Service's beard policy is reasonable in that it requires uniform police officers to be clean-shaven except for religious beliefs, medical concerns or special investigations. Essentially, the argument of the Association is that the rationale put forward by the Service to justify the prohibition against beards has no basis. The Association attacks paragraph 1.1 of the beard policy that purports to justify the prohibition on the basis of the "requirement" to wear protective gas masks, respiratory devices or self-contained breathing apparatus. It was pointed out that this equipment is not used by regular uniformed officers and is not available to them. Accordingly, there was said to be no need for an absolute prohibition. Further, the public safety issues referred to in paragraph 1.2 of the policy were said to be unreasonable in that a beard would not impede or delay an officer from responding to a life-threatening situation in a timely and professional manner. The Association further argues that a beard would not diminish the ability of members of the community to readily identify uniformed police officers.

The Association concedes that the Employer has the statutory entitlement under section 31.1(c) of the *Police Services Act* to manage the work force. However, it was submitted that the *Metropolitan Toronto (Municipality) and CUPE* case, *supra,* establishes that an employer such as this Service has the obligation to exercise its power to introduce rules with disciplinary consequences in a reasonable manner. The Association relies on the decision of Arbitrator Shime in the *Borough of Scarborough and the International Association of Fire Fighters,*

Local 626 (1972), 24 L.A.C. 78, wherein it was concluded that, *prima facie*, an employer has no authority to impose its personal views of appearance or dress upon an employee. The exceptions to that proposition are matters of health and safety or a legitimate business interest of the employer. However, this imposes an onus on the employer to establish that there are legitimate and cogent business reasons that objectively demonstrate that the appearance would adversely affect the enterprise. The Association argues that the Employer has failed to meet that onus in this case. It is said that there was no evidence, apart from the subjective view of the Employer, that there is any legitimate business reason or community rationale for the absolute prohibition of beards. Indeed, the Association suggests that there is evidence to the contrary in that the community newspaper contains an article supporting the Association in its position and there are several public officials, including the Chair of the Police Services Board, who enjoy the respect of the community and who wear beards.

The Association also argues that the Service has failed to demonstrate that the policy is a justifiable intrusion on a person's personal time or that is required to satisfy public opinion. Reliance was placed on the cases of *Canadian Freightways and Office & Technical Employees Union* (1995), 49 L.A.C. (4th) 328 (Korbin), *Dominion Stores and United Steelworkers of America* (1976), 11 L.A.C. (2d) 401 (Shime); and *Union Carbide Corporation and Oil Chemical and Atomic Workers International Union Local 3-550, 82* L.A. 1084 (Goldman).

In summary, the Association argues that the Employer has failed to demonstrate that there is anything that justifies or legitimates the beard policy as reasonable. Instead, it was said that the evidence is to the contrary in that persons involved with the administration of justice at the highest levels in this community wear beards. Further, the vast majority of communities in the province accept that their uniform police officers can have beards. The remedy that the Association requests is a declaration that the policy is unreasonable.

Counsel for the Association argues that the beard policy "meets the test of reasonableness." It was said that it has been well established since the case of Constable Alexander (*Ontario Police Commission* decision dated October 15, 1993) that the Service has the authority to regulate hair and appearance. Further, once the Service passes such a policy, the Chief can pass orders for administrative reasons that are consistent with that policy. That is what has been done in this case. Further, the case of *Murphy v. Metropolitan Toronto (*Ontario Police decision dated September 2, 1983) establishes that a Service has the power to enact by-laws regulating dress and personal appearance regardless of whether the Association has input with respect to the by-law.

It was stressed that the Chief had the authority to issue the directive about personal appearance pursuant to section 41(1)(a) of the *Police Services Act.* Further, the evidence filed shows that the policy was achieved after input was received from the Association. It was also stressed that the Police Services Board

is a civilian body that speaks on behalf of the community in the governance of the Police Service. It consists of individuals who have been elected or appointed by the Lieutenant Governor in Council. Accordingly, its policy should be seen as reflective of the particular community. This is consistent with the concept that the legislature has given the local Service the authority and responsibility to set local policies. Accordingly, it is submitted that the statistical evidence about what other community standards may be is irrelevant to the situation in the Waterloo region.

Counsel for the Service relies on the decision in *Charlottetown (City) and Charlottetown Police Association*, P.E.I. Supreme Court dated August 15, 1996. In that case, a board of arbitration had held that the City had failed to establish any reasonable or legitimate interest for its policy that required employees to live within the City. The court held that the "legitimate interest" was too narrow a criterion for the board of arbitration to apply. Instead, it was held that the appropriate standard would be the City's legitimate interests which include a general question of law and a wide range of social implications. Further, the Court held that the arbitration board had erred when it imposed a qualification of reasonability that was beyond what the parties had bargained in their collective agreement. In that aspect of the decision, the Court relied on *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1981), 124 D.L.R. (3d) 684.

Further it was submitted that Article 19.01 of this collective agreement limits the capacity of this Arbitrator to rule on anything other than whether the rule offends the collective agreement. It was submitted that the beard policy does not. It was argued that nothing in this collective agreement requires that the policies passed by management have to be reasonable. Accordingly, it was submitted that the grievance ought to be dismissed.

In addition, counsel for the Service relied upon the following OCCOPS decisions: *Thompson v. Chatham,* 1977, *Murphy v. Metro Toronto,* 1983, *Cameron v. Ottawa*, 1975, *Alexander v. Metro Toronto*, 1973, *Hopiavuori v. Waterloo*, 1982.

In reply, counsel for the Association argues that the fact that the Police Service is a public body does not exempt it from standards of reasonableness or give it the mandate to decide community standards. It was submitted that it cannot be said that the rule is reasonable simply because it was adopted by a Police Service. It was stressed that the Service must still satisfy the burden of proof recognized in the case law. Further, counsel for the Association cautioned against reliance on the *Charlottetown* and *Metropolitan Toronto Board of Commissioners of Police* cases, *supra,* stressing that the latter case was significantly narrowed in the later decision by the Court of

Appeal in *Metropolitan Toronto Civic Employees Union and Metropolitan Toronto, supra.*

PART 5

THE DECISION ON THE MERITS OF THE CASE

As set out above, it has been concluded that this collective agreement has a standard of reasonableness that can be implied from the just cause provision of the collective agreement. That standard of reasonableness applies to policies issued by the Service that can form the basis of discipline. Therefore, in determining the merits of the case, the question becomes whether the beard policy is reasonable.

A similar case is that of the *Borough of Scarborough and International Association of Fire Fighters*, *Local 626, supra*. In that decision, Arbitrator Shime directed as follows:

> Initially, I am of the view that the gist of the employment relationship in its unsophisticated form is that the employee is expected to perform a day's work and the employer is required to give him a day's pay for that work. The nature of the industry, the type of employer and the collective agreement may impose certain other expectations and requirements. But, *prima facie*, as long as the employee performs the job or the work for which he has been hired the employer has no authority to impose his personal views of appearance or dress upon the employee. There is no absolute right in an employer to create an employee in his own image.

> There are exceptions to that general proposition. The first exception concerns the matter of health and safety**....**
>
> The second exception involves the legitimate business interest of the employer. In that situation since an employer may be infringing on the basic individual rights and liberties of the employee and may also be jeopardizing his employment, his work record and his compensation, then I am of the view that an employee should only be subjected to the imposition of such standards not on speculation, but on the basis of legitimate and cogent business reasons which objectively demonstrate that an employee's dress or appearance are affecting his work performance or are adversely affecting the employer's business.

The *Borough of Scarborough* case imposes an onus upon an employer to establish that there are health and safety or legitimate and cogent business reasons for a policy affecting an employee's personal appearance. The Association does not challenge the Employer's right to pass policies affecting the appearance of police officers. Indeed, it is recognized that the Service has a mandate to do this. However, the question is whether the beard policy goes beyond the bounds of reasonableness. The answer to that question lies in the analysis of whether the Employer has established cogent business reasons which objectively demonstrate the purpose of the policy.

In order to analyze the Service's reasons, I must look at the reasons that have been given. The Chief's directives on the policy indicate that the Service wishes a police officer's personal appearance to be "consistent with the uniform and office." Also, there is a desire to have a "good corporate profile" consistent with "trust and confidence." The judgment of whether a beard is consistent with a

"corporate profile" may be a subjective matter of taste. The question of whether it is objectively demonstrable is much more difficult and important. In the province of Ontario, in similar communities, other police Services have determined that the wearing of the beard is not inconsistent with a "good corporate profile" of a police Service nor that it would diminish trust and confidence in the public. The Waterloo Police Service has offered no objective evidence that a bearded uniform police officer would be inconsistent with the profile it is trying to project. It is insufficient for the Waterloo Police Services Board to simply offer the justification that it believes that a clean-shaven police officer is necessary to project the type of image it desires.

Further, it is legitimate for an employer, such as the Service, to impose a beard policy if it can be justified on the basis of health and safety considerations. It is clear, from the documentation filed by the Service that this is offered as part of the rationale behind the policy. However, the rationale does not stand up to any careful analysis. The only health and safety concern articulated on behalf of the Service was with regard to the protective mask, respiration devices or breathing apparatus. It would be reasonable for the Service to enact a policy that would prohibit any police officer from wearing a beard who was expected to utilize any of this equipment as part of his regular duties. But the beard policy being challenged in this case does not extend only to officers who are required to use this equipment. Indeed, at the time of the hearing, the Service conceded that officers were not being expected to utilize this equipment. No other health and safety

reasons were suggested as to why the beard policy is necessary. Accordingly, there is a beard policy that does not seem to be justifiable on the basis of any health or safety considerations.

For a policy to be reasonable there must be some objective basis for it. If that policy can form the basis for discipline, and the collective agreement requires that discipline only be issued for just cause, that policy must be reasonable. In the case at hand, we have a beard policy. The Association concedes that the Service has the statutory authority to pass a policy regarding appearance. Further, that extends to the authority to pass a policy with regard to beards and appearance. That is not what is being challenged. What is being challenged is the extent of this policy because it goes beyond what is reasonable.

In the case at hand, we have a beard policy that prohibits the wearing of beards except for religious, medical or investigative purposes. However, the Service has not demonstrated that there is any legitimate rationale for such a broad prohibition. A beard policy which makes allowance for health and safety, religious, medical and investigative purposes would be legitimate and reasonable. Further, a policy, which regulated the appearance and maintenance of beards, would also be reasonable. But an absolute prohibition against wearing beards when no objective rationale has been demonstrated for such a policy leads to the inevitable conclusion

that the policy is unreasonable because it subjects an employee to disciplinary sanctions while it imposes significantly upon their individual rights.

For all these reasons, I declare that the existing beard policy is unreasonable. I retain jurisdiction over the matter if there is any further aspect to the case that arises out of this declaration.

DATED at Toronto, Ontario this 23rd day of November, 1999.

Reissued December 3, 1999 with typographical errors corrected.

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Paula Knopf
Sole Arbitrator