

OCCPS Decision # 09-08 (ST # 09-02)

DURHAM REGIONAL POLICE SENIOR OFFICERS' ASSOCIATION  
Applicant

AND

DURHAM REGIONAL POLICE SERVICES BOARD  
Respondent

Presiding OCCPS Members:

Murray W. Chitra, Chair  
Hyacinthe Miller, Member

Appearances:

Brian Fazackerley, for the Applicant  
Kevin Inwood, for the Respondent  
Ian B. Johnstone, for Stan MacLellan

Heard:

March 31, April 1 and April 2, 2009

Date of Decision:

July 2, 2009

**SENIOR OFFICERS' ASSOCIATION - Member status** - Application seeking declaration that Strategic Human Resources Officer (SHRO) a "senior officer" and member of Senior Officers' Association bargaining unit - For four years SHRO treated as a member of Senior Officers' Association bargaining unit - SHRO then removed from bargaining unit and employed under a fixed term contract with Board - Duties remained essentially the same but SHRO assigned additional duties directed at supporting Board in labour relations matters - *Police Services Act* establishes division of powers as between chiefs and boards - Under *PSA* Board has exclusive responsibilities for collective bargaining - Board may order a chief, but not any other member, to provide it with information to assist in its bargaining role - Board may not by job description create a position and assign specific member of the service the responsibility of supporting an exclusive board function - SHRO remained a member of Senior Officers' Association bargaining unit.

**BARGAINING UNIT - Exclusions** - Whether Strategic Human Resources Officer (SHRO) remained a member of Senior Officers' Association bargaining unit after duties enlarged by the addition of responsibility for assisting Board in collective bargaining - SHRO a "member" of the force pursuant to s. 2 of *Police Services Act* - As a civilian employed in a supervisory or confidential capacity, SHRO also a "senior officer" pursuant to s. 114 - Board not entitled to assign a specific member the responsibility of

supporting an exclusive board function - Section 49 of *PSA* addressing secondary activities - Section 49 not intended to exclude individuals from membership in a police association as part of their primary employment - Interpretation of s. 49 as imposing by implication a “confidentiality exclusion” also inconsistent with recent Supreme Court of Canada decision in which collective bargaining recognized as a constitutionally protected right - SHRO remained a member of Senior Officers’ Association bargaining unit.

**STANDING** - Request to represent SHRO job incumbent during s. 116 hearing - Pursuant to *Statutory Powers Procedure Act*, SHRO as a witness entitled to be advised by a representative - Since SHRO not a party to proceeding, not appropriate for his representative to participate in cross-examination of other witnesses.

**ADJOURNMENT** - Request for adjournment pending Commission’s decision in another proceeding - Other proceeding involved s. 118 application by Board and request to authorize creation of a new category of senior officers - As a non-party to s. 116 proceeding, SHRO lacked standing to request adjournment - Request not filed in a timely manner - Parties ready to proceed with status hearing and Association entitled to a ruling on its s. 116 application - Request for adjournment denied.

#### Summary of Reasons for Decision

The Durham Regional Police Senior Officers’ Association brought an application pursuant to s. 116 of the *Police Services Act*, seeking a determination of the status of Mr. Stan MacLellan. Mr. MacLellan occupied the position of Strategic Human Resources Officer (SHRO) under a personal services contract with the Durham Regional Police Services Board. The Association asked the Commission to declare that Mr. MacLellan was a “senior officer” and a member of their bargaining unit. Alternatively, the Association sought a direction to the Board to divest Mr. MacLellan of day-to-day operational police responsibilities.

Mr. Johnstone, who attended as counsel for Mr. MacLellan, brought two preliminary motions. He requested standing to represent Mr. MacLellan in his capacity as a witness. He also requested an adjournment pending the Commission’s ruling in another proceeding, namely an application by the Board under s. 118(1) of the *PSA* to authorize the creation of a new category of senior officers, which would include Mr. MacLellan.

Mr. MacLellan joined the service in 2003 as Manager of Human Resources. He reported to an inspector and was a civilian member of the service and a member of the Association. In the fall of 2006 he became Director of Human Resources, performing essentially the same HR functions. He remained a civilian member of the service and a member of the Association. In addition to his HR functions, Mr. MacLellan was from time to time assigned by the Chief to assist the Board in labour relations matters, including collective bargaining.

In response to the anticipated departure of its Executive Director, who had served as the Board's negotiating aide, in March 2007 the Board announced the creation of a new excluded position, Strategic Human Resources Officer. Mr. MacLellan then signed an agreement with the Board and became the SHRO, reporting directly to the Chief. The job description for this new position contained basically the same duties as the HR Director held, but also included some new duties, such as assisting the Board in the search for and selection of police executives (a replacement for the Chief, among others), preparing Board responses to grievances, supporting bargaining and participating in negotiations as a member of the Board's team.

The Board's rationale for removing the SHRO position from the Association's bargaining unit was that the SHRO was a confidential excluded position, and to maintain it as part of any bargaining unit would give rise to a conflict of interest.

The Association submitted that the Board could not retain an employee by contract to perform both service operational duties and collective bargaining duties. Consequently, the Association requested that either Mr. MacLellan be returned to the bargaining unit, or divested of his operational functions.

The Board submitted that Mr. MacLellan's removal was necessary to insulate him from an inherent conflict of interest. The Board argued that together ss. 49(1), 119(3) and 126 of the *PSA* permitted the exclusion of persons with potential conflicts of interest from membership in a bargaining unit.

*Held*, Mr. MacLellan remained a member of the Senior Officers' Association bargaining unit.

On the first preliminary motion, in accordance with s. 11(1) of the *Statutory Powers Procedure Act* it was appropriate to permit Mr. Johnstone to represent Mr. MacLellan. This meant that he was entitled to be present during the proceeding, to hear all testimony, to advise Mr. MacLellan and to clarify any matters arising from Mr. MacLellan's evidence by putting questions to him. However, since Mr. MacLellan was not a party to the proceeding, it was not appropriate for Mr. Johnstone to participate in the cross-examination of other witnesses.

The request for an adjournment was denied for several reasons: as a non-party, Mr. MacLellan did not have standing to request an adjournment; the request was not filed in a timely manner; the parties were ready to proceed; and the parties had already been advised that the Commission would proceed to hear the s. 116 application and that the s. 118 application would be scheduled once the Commission rules were met. In addition, and as noted in the Commission's preliminary decision in this case (OCCPS ST#09-01), the Association was entitled to a ruling and the Board's s. 118 application ought not to receive precedence over the Association's earlier application.

Section 116(1) of the *PSA* provided that an affected party may apply to the Commission for a determination as to whether a person was a member of a police force or a senior

officer. Section 116 had to be read in the context of the definition in s. 2 of a “member of a police force”, which included an employee who was not a police officer, as well as the definition of “senior officer” under s. 114, which referred to a member of a police force who had the rank of inspector or higher or who was employed in a “supervisory or confidential capacity”.

In accordance with s. 2, Mr. MacLellan was a civilian employee and thus a “member” of the Durham Regional Police Service. The issue was whether he was employed in a “supervisory or confidential capacity” and thus had the status of a senior officer.

For four years Mr. MacLellan had senior officer status and was part of the Association’s bargaining unit. That changed in 2007 when he was appointed as the SHRO. Following appointment as the SHRO he retained his previous HR responsibilities but was assigned additional duties aimed at supporting the Board, specifically its collective bargaining obligations. The Association took the position that Mr. MacLellan could not play these dual roles. The Board took the position that there was nothing improper with Mr. MacLellan performing both HR operational functions as well as providing support services to the Board. The Board was of the view that recent changes to the *PSA* permitted “conflict of interest” exclusions for persons employed in sensitive roles.

However, the *PSA* assigned distinct roles and responsibilities to boards and chiefs. Under Part VIII of the *PSA* boards had exclusive responsibility for collective bargaining. Chiefs of police, on the other hand, were responsible for the day-to-day management of the service and its employees. The *PSA* imposed limitations on the board’s capacity to intrude on functions of the chief, and vice versa. In particular, a board had the authority to order a chief to provide it with information to assist in its bargaining role; but a board could not order any other member of the service to perform collective bargaining functions.

Thus a board could not do indirectly what it could not do directly. A board could not by job description create a position assigning to a specific member the responsibility of supporting exclusive board functions. The Board could order the Chief to provide information and advice to assist with labour relations matters such as grievances and collective bargaining, but it was for the Chief to delegate such tasks to members, not the Board. Some of the duties assigned to Mr. MacLellan blurred the statutory delineation of responsibilities. In addition to offending the scheme of the *PSA*, the SHRO job description also offended the spirit of the *Act*, since the SHRO could not be expected to sit as a member of the Board’s bargaining team and at the same time function as an approachable point of contact for day-to-day issues. It was also inappropriate for the SHRO, who reported directly to the Chief, to have any role in the hiring of a new Chief or any role in developing performance measures for that position.

A board was not without the benefit of expert advice and assistance: under s. 30(1) a board could contract and engage staff dedicated to performing board functions; but such staff would not be members of a police force and fall within Part VIII.

The Board suggested that recent amendments to s. 49 imposed a prohibition against engaging in any activity that might create a conflict of interest; and that, by virtue of ss. 119(3) and 126, this prohibition extended to collective bargaining. By implication, this would prevent membership in a bargaining unit where such membership would give rise to a conflict of interest.

However, s. 49 was focused on outside (secondary) activities. The conflict of interest concerns in s. 49 were not intended to limit access to collective bargaining or participation in a police association. Had the Legislature intended to exclude a class of persons from collective bargaining it would have done so clearly, not by implication. Moreover, the “confidentiality exclusion by implication” argument ran counter to the Supreme Court of Canada’s recent decision in **Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia** (2007) S.C.R. 27, in which the Court stated that the process of collective bargaining enjoyed constitutional protection. This argument also appeared to run counter to evolving case law (**Durham Regional Police Assn. and Regional Municipality of Durham Police Services Board**, *infra*). If a constitutionally protected right were to be limited or removed, this had to be done explicitly and prescribed by law.

Accordingly Mr. MacLellan remained a member of the Senior Officers’ Association, employed in a supervisory or confidential capacity within the meaning of s. 114. In light of the statutory division of authority, the Commission strongly advised that his job description be modified to remove any responsibilities that related to exclusive Board functions.

#### Statutes cited

*Police Services Act* R.S.O. 1990, c.P.15 as amended, ss. 2, 31, 41, 49, 74(1)(c), 114, 116, 117, 118, 119, 120 and 126

*Statutory Powers Procedure Act* R.S.O. 1990, c.S.22 as amended, s. 11(1)

*Ontario Provincial Police Collective Bargaining Act* S.O. 2006, c.35, Sch. B, s 2(2)(vi)

#### Authorities cited

**Niagara Regional Police Assn. and Niagara Regional Police Services Board** (March 21, 1997, OCCPS)

**Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia** (2007) S.C.R. 27 (SCC)

**Re Durham (Regional Municipality) Police Services Board and Durham Regional Police Assn.** (2007) 164 L.A.C. (225) (Knopf)

[Further authorities as submitted by the parties may be found at pp. 11-14 of the decision.]