

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION ON PRELIMINARY MOTION

DURHAM REGIONAL POLICE SENIOR OFFICERS' ASSOCIATION

Applicant
(Respondent on Motion)

DURHAM REGIONAL POLICE SERVICES BOARD

Respondent
(Applicant on Motion)

Presiding Members:

Murray W. Chitra, Chair
Hyacinthe Miller, Member

Appearances:

Brian Fazackerley, Agent for the Applicant (Respondent on Motion)
Kevin Inwood, Counsel for the Respondent (Applicant on Motion)

Hearing Date: February 17, 2009

This is a preliminary motion, brought by the Durham Regional Police Services Board (the "Board"), in response to an application by the Durham Regional Police Senior Officers' Association (the "Association") pursuant to section 116 of the Police Services Act R.S.O. 1990, c. P.15 as amended (the "Act").

Background:

On September 15, 2008 the Association filed an application with this Commission under section 116 of the Act. That provision reads:

- 116(1) If there is a dispute as to whether a person is a member of a police force or a senior officer, any affected person may apply to the Commission to hold a hearing and decide the matter.
(2) The Commission's decision is final.

At dispute is the status of one individual, Mr. Stan MacLellan. He currently occupies the position of Strategic Human Resources Officer ("SHRO") for the Durham Regional Police Service (the "Service") under a personal service contract with the Board.

The Association seeks three specific remedies. These include: a declaration that Mr. MacLellan is a “senior officer”, a direction to the Board to divest him of day-to-day operational police responsibilities, and his reappointment to an Association position.

These matters have yet to be heard. In the interim, the Board has brought this motion requesting:

Determination of a question of law, namely: does the [Act] permit a member of a police force, as defined in section 2, to be exempt from the collective bargaining regime in Part VIII if that member will be placed in a conflict of interest in respect to his or her employment duties if included within a bargaining unit?

It is proposed that if we rule that such an exemption is possible, then we should “order a hearing be held pursuant to section 116(1) on the merits of the establishment of the SHRO position.”

Or, in the alternative, if we conclude that such an exemption is not possible, that we order the Board pursuant to section 118(3) be permitted to bargain collectively with the SHRO and Director of Legal Services as a separate category within the Association.

Board’s Position:

Mr. Inwood, on behalf of the Board, argued that it was in the interest of judicial economy, expedience and cost effectiveness that we rule on the above noted point of law prior to hearing evidence.

He noted that the Commission has yet to conclusively decide whether or not the Act requires the inclusion of all members of a police force below the rank of chief and deputy chief in a bargaining unit.

Mr. Inwood asserted that the Act permits the exclusion from collective bargaining of any members who may be placed in a conflict of interest vis-à-vis their employment duties if they were to be included in a bargaining unit. He drew our attention to sections 2, 31, 38, 49, 114, 115, 116, 118, 119 and 126 of the Act. In particular, he asserted that sections 49(1), 119(3) and 126 when read in a broad and purposeful manner require exclusion. Rizzo & Rizzo Shoes Ltd. [1978] 1 S.C.R. 27 (S.C.C.)

Mr. Inwood reviewed the historical evolution of a number of these sections. As well, he noted several Commission decisions: Peel Regional Police Association and Peel Regional Police Services Board (28 January, 2000), Regional Municipality of Niagara Police Services Board and Niagara Police Senior Officers’ Association (16 January, 1996), Orillia Police Services Board and Orillia

Senior Officers' Association (4 August, 1993), Niagara Regional Police Association and Niagara Regional Police Services Board (21 March, 1997) and Chambers and Chatham-Kent Police Services Board (26 February, 2008).

Mr. Inwood also drew our attention to a number of cases from the broader labour relations context to make the point that it is well established that positions with an inherent conflict of interest should be excluded. Bank of Nova Scotia 77 C.L.L.C. 16090 (C.L.R.B.), Bank of Nova Scotia [1978] F.C. 807 (Fed. C.A.) and Corporation of the District of Burnaby [1974] 1 Can. L.R.B.R 1 (B.C.)

In summary, Mr. Inwood asked that we assist the parties to this proceeding by providing the preliminary interpretation requested.

Association's Position:

Mr. Fazackerley, on behalf of the Association, asked that we proceed to the hearing of the application, and not make any rulings in a factual void.

He argued that the Association is an affected party that has properly filed a request for a hearing with the Commission. That application is with respect to an identified person, a particular police service and a specific bargaining unit.

Mr. Fazackerley asserted that the Association is not interested in a ruling in the abstract on the broader question of the possibility of exclusion for conflict of interest. Rather, he stated that the Association's application focused on: "Is this specific employee a member of our police force and/or a senior officer?"

He argued that we should not and cannot properly undertake a hearing without a full exchange of pleadings, disclosure of facts and a testing of evidence. This is so the law can be properly ascertained and applied to the case before us.

In his written material, Mr. Fazackerley also raised the question of the jurisdiction of the Commission to conduct hearings for the purposes of making "general determinations of statutory interpretation regarding provisions or entire Parts of the statute."

Mr. Fazackerley reviewed the various provisions of the Act identified in the Board's submission. He drew to our attention a series of rulings arising from an arbitration dealing with the status of the secretary to the Chief of Police. Board of Commissioners of Police for the City of Brockville and Brockville Police Association (14 December, 1990, O.P.A.C.), Brockville Police Association v. Brockville (City) Commissioners of Police [1992] O.J. 15 (Div. Ct.) and Brockville Police Association v. Brockville (City) Commissioners of Police [1995] O.J. No. 1684 (Ont. C.A.)

In conclusion, Mr. Fazackerly asked that this motion be denied and that the Association's application proceed to a full hearing.

Decision:

The Association, as an affected party, has filed an application with the Commission under section 116 of the Act. It is their right to do so.

Further, the Association is entitled to frame this application and characterize the nature of the dispute as they see fit. In this case, the Association takes the position that a single individual who is currently performing specific functions with the Service must be a member of their bargaining unit.

The Association wishes to proceed to a hearing and submit evidence in furtherance of their position and obtain a final ruling. They are entitled to do so.

The Board, by way of motion seeks to have this Panel rule on a much broader question than the status of one individual. Rather, it is seeking what is in effect a declaration concerning the application of the Act to all individuals employed with police services in Ontario in a situation of potential conflict of interest.

On the face of it, this is a substantial modification of the application before us. It is presented in a factual void without reference to the position in dispute or any other. Further, it is being argued without notice to potentially affected or interested parties. It is not supported by the Association.

Given the above, we are of the view that this motion cannot succeed. We conclude that the Association is entitled to proceed to their hearing and obtain a ruling grounded in fact and based on the application of the law to their particular dispute.

The Board, of course, remains entitled in its response to the Association's case to raise any arguments that they wish with respect to the application of the law to the particular dispute before us.

The Board is to file its Factum and related material as agreed. Further we direct that the Board provide the Association with a brief written synopsis of the proposed evidence of its four identified witnesses.

Finally, we confirm that paragraphs 38 to 42 of the Affidavit of Robert J. Chapman dated 12 September, 2008 will be sealed until such time as the investigation arising from it is concluded.

DATED AT TORONTO THIS 26TH DAY OF FEBRUARY, 2009.

Murray Chitra
Chair, OCCPS

Hyacinthe Miller
Member, OCCPS