

OCCPS Decision # 09-09 (BGT # 09-01)

REGIONAL MUNICIPALITY OF NIAGARA POLICE SERVICES
BOARD

Applicant (Respondent on Motion)

AND

REGIONAL MUNICIPALITY OF NIAGARA
Respondent (Moving Party on Motion)

Presiding OCCPS Members:

Murray W. Chitra, Chair

Roy B. Conacher, Member

Appearances:

Brian Gover and Patricia Latimer, for Regional
Municipality of Niagara

Woodward B. McKaig, for Regional Municipality of
Niagara Police Services
Board

Heard:

June 29, 2009

Date of Decision:

July 8, 2009

BUDGET DISPUTES - Core issues - Applicant Board requested hearing pursuant to s. 39 of *Police Services Act* - Both operating and capital budgets in dispute - Two questions at the center of any budget dispute - Whether budget established by municipal council provides adequate staffing, facilities and equipment for service and if not, how much additional money required to ensure adequacy - Pre-hearing conference convened at Board's request - Issue

concerning proper characterization of pre-hearing conference - Pre-hearing conference in this case dealt with procedural matters designed to identify, clarify and focus issues in dispute - Since substantive issues not dealt with, Commission Rule s. 19.1 and s. 5.3(4) of *Statutory Powers Procedure Act* not applicable - Member presiding at pre-hearing conference not disqualified from presiding at budget hearing - Preliminary motion dismissed.

PRE-HEARING CONFERENCE - Budget dispute - Commission Rule s. 19.1 stating that member who presides at pre-hearing conference in which parties attempt to settle the issues shall not be a member at hearing - Preliminary motion concerning proper characterization of pre-hearing conference in this case - Board requested pre-hearing conference - Commission held pre-hearing conference and issued memorandum - Clear from both memorandum as well as exchange of correspondence that pre-hearing conference was intended to deal and did deal with procedural matters only - No attempt to settle substantive issues - Presiding member not disqualified from presiding at hearing - Rule 19.1 not applicable - Preliminary motion dismissed.

PROCEDURAL ISSUES - Budget dispute - Proper characterization of pre-hearing conference - Whether presiding member at pre-hearing conference disqualified from presiding at hearing - In the course of pre-hearing conference Commission asked parties to identify relief sought, issues in dispute and whether particular defence would be raised - Preliminary matters dealt with during pre-hearing conference were procedural - No substantive issues settled within the meaning of Commission Rule 19.1 or s. 5.3(4) of *Statutory Powers Procedure Act* - Preliminary motion dismissed.

Summary of Reasons for Decision

This decision dealt with a preliminary motion by counsel for the Municipality seeking a declaration that Mr. Chitra was disqualified from presiding at a hearing into a budget dispute, on the ground that Mr. Chitra had presided at a pre-hearing conference which allegedly involved attempts to settle the dispute.

On January 28, 2009 the Board filed an application requesting a budget hearing pursuant to s. 39 of the *Police Services Act*. At issue was the capital budget for the police service.

On February 11, 2009 counsel for the Board wrote to the Commission requesting a pre-hearing conference "...to discuss issues, the exchange of documents and set a tentative or firm hearing dates...so that these budget issues can move toward a resolution at a Section 39 hearing."

Commission counsel responded by agreeing to a pre-hearing conference, indicating "preliminary matters to be discussed" which included identifying and possibly narrowing the areas in dispute, the type of information to be presented at the hearing, a timetable for disclosure, identifying any preliminary motions and the anticipated length of the hearing.

An exchange of correspondence and e-mails followed. On March 31, 2009 Board counsel requested that a s. 39 hearing also be convened to deal with the service's operating budget.

The pre-hearing conference commenced on April 23, 2009 with Mr. Chitra presiding. Not all of the issues identified could be dealt with, so the pre-hearing conference reconvened on May 1, 2009. In advance of the second date the Board was asked to clarify how much money it was seeking for capital improvements, while the Municipality was

asked to articulate its position on the adequacy of current facilities and to indicate whether it intended to raise an issue of "affordability" at the hearing.

The memorandum which was drafted pursuant to s. 16.3 of the Commission's Rules of Practice summarized: the parties' agreement on several issues such as disclosure; the intention to deal with both operating and capital disputes in a single hearing; and the amounts in dispute. The Commission determined that it lacked jurisdiction to grant certain orders requested by the Municipality such as a direction to submit to mediation. Both preliminary motion dates and hearing dates were set.

Prior to the first date for the hearing of preliminary motions, counsel for the Municipality raised concerns about Mr. Chitra presiding at the remaining preliminary motions and the eventual hearing.

Counsel for the Municipality did not assert bias or an apprehension of bias on the part of Mr. Chitra. Instead he relied on s. 5.3(4) of the *Statutory Powers Procedure Act* and s. 19.1 of the Commission's Rules of Practice in support of his motion to disqualify. Section 5.3(4) of the *SPPA* stated: "A member who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent." Rule 19.1 echoed this requirement. Counsel asserted that the pre-hearing conference in this case attempted to settle three issues: the adequacy of service facilities, the funds necessary to address any inadequacies and the amount of money in dispute. Given the attempt to settle, Mr. Chitra was precluded from presiding at the remaining motions and the hearing.

Counsel for the Board argued that ss. 5.3(4) of the *SPPA* and 19.1 of the Commission's Rules had no application in this case. He asserted that the pre-hearing conference dealt

with the simplification and clarification of issues and other procedural matters which did not involve the settlement or attempted settlement of substantive issues.

Held, motion dismissed.

Two questions were at the center of any budget dispute under s. 39 of the *PSA*: whether the budget established by the municipality provided for adequate staffing, facilities and equipment for the service; and if not, how much additional money would be needed to make the budget adequate.

Pre-hearing conferences were authorized under s. 16 of the Commission's Rules. Those rules flowed from the tribunal's authority under s. 25.1 of the *SPPA* to make rules. Sections 5.3(1) to (3) of the *SPPA* specified matters which could be dealt with at a pre-hearing conference. Section 5.3(1)(a) referred to "the settlement of any or all of the issues" while ss. (b) to (e) referred to procedural matters including simplification of the issues, agreed upon facts or evidence, establishing dates and the estimated duration of a hearing. Section 5.3(1)(f) referred to "any other matter that may assist in the just and most expeditious disposition of the proceeding".

Thus a pre-hearing conference could deal with a wide range of issues. Normally participation in a pre-hearing conference would not disqualify a member from presiding at subsequent motions or hearings arising from an application. However, an exception existed: where a member was involved in the settlement or attempted settlement of issues [per s. 5.3(4) of the *SPPA* and Rule 19.1). This was to encourage the parties to speak freely and frankly during serious settlement discussions.

In this case, it was clear that the pre-hearing conference focused on procedural matters of a preliminary nature. It was directed at simplifying, clarifying and focusing the

issues in dispute, as a means of ensuring an effective and efficient hearing. All of the items dealt with fell within the scope of subsections 5.3(1) (b) to (f) of the *SPPA*. Instructing clients were not invited to attend and did not attend. Neither of the parties included in their summaries any proposals for settlement. Moreover, among the directions sought by the Municipality was an order to engage in mediation, an order which the Commission advised it lacked jurisdiction to grant.

The information sought in advance of the second pre-hearing conference date was a request for the Board to identify how much money it was seeking, and a request for the Municipality to outline its position on adequacy and to indicate whether it intended to raise the defence of "affordability". This information had an obvious bearing on the possible duration of the hearing and disclosure requirements. To seek such information was not to "settle issues" within the meaning of s. 5.3(4) or Rule 19.1. The type of information contemplated in these provisions must be substantive. The information sought in this case, by contrast, concerned procedural matters.

Accordingly ss. 5.3(4) and Rule 19.1 did not apply, and Mr. Chitra was not disqualified.

Statutes cited:

Police Services Act R.S.O. 1990, c. P. 15 as amended, s. 39
Statutory Powers Procedure Act R.S.O. 1990, c. S. 22 as amended, ss. 5.3(1) to (4) and 25.1

Rules and Regulations cited:

Ontario Civilian Commission on Police Services, Rules of Practice ss. 16 and 19