

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE SAULT STE. MARIE POLICE SERVICES BOARD

(The "Board")

- and -

SAULT STE. MARIE POLICE ASSOCIATION

(The "Association")

AND IN THE MATTER OF THE GRIEVANCE OF JODY GRECO CONCERNING  
INDEMNIFICATION FOR LEGAL EXPENSES

David K.L. Starkman

Arbitrator

APPEARANCES FOR THE BOARD

Mary Pascuzzi  
Bob Davies

Counsel  
Chief of Police

APPEARANCES FOR THE ASSOCIATION

Victoria Chiappetta  
Doug Kiry  
Louise Greco

Counsel  
Association President

A Hearing in this matter was held on September 21, 2000 at Sault Ste. Marie, Ontario

## AWARD

The Association grieves that the Board has violated Article 30 of the collective agreement by not indemnifying the grievor, Jody Greco, for the traveling expenses of his lawyer which amounted to approximately \$7,000.00. In this decision "traveling expenses" refers to both payment for travel time and disbursement costs associated with such travel.

The Board's position is that it never approved the payment of the traveling expenses.

Section 30 provides as follows:

### 30.00 ARTICLE 30.00 - LEGAL INDEMNIFICATION

- 30.01 A member charged with and subsequently acquitted of a criminal or statutory offence arising out of acts committed in the attempted performance in good faith of the member's duties as a Police Officer shall, upon application to the Board, be indemnified for the necessary and reasonable legal costs incurred in the defense of such charges as set out hereinafter.
- 30.02 Where a member is a defender of his conduct in a civil, judicial or any other Bona Fide proceeding arising from acts done in performance in good faith of his duties as a member of the Police Service, or as a result of being a member of the Police Service, he shall be indemnified for the necessary and reasonable legal costs incurred in the defense of such proceedings as set out hereinafter.
- 30.03 A member may apply for indemnification as set out above by applying to the Board for indemnification within 30 days of the charges being laid or proceeding being commenced. The Board must give approval for choice of counsel and must also approve any decision to proceed to a higher level of the judicial system in order for a member to be eligible for indemnification.

In 1996, Constable Greco was charged with a criminal offence. He retained Mr. Doug Gaetz, a lawyer in Sault Ste. Marie, to defend him. Mr. Greco applied to the Police Services Board, pursuant to Article 30 of the collective agreement, for indemnification for his legal expenses, and the Board agreed to indemnify Constable Greco and approved Mr. Gaetz's rate of 1.5 times the legal aid tariff or approximately \$125.00 per hour.

Sometime thereafter, Constable Greco changed lawyers to Mr. Harry Black from Toronto, and Constable Greco applied to the Board for indemnification for Mr. Black's legal expenses. The Board met on February 25, 1997 to, among other matters, consider the request.

Mr. Steve Boniferro, the Chair of the Police Services Board, testified that when the request from Constable Greco for indemnification for Mr. Black's legal expenses was received, the Board's only concern was that there would be no additional costs, over the costs that the Board had agreed to indemnify for Mr. Gaetz's legal expenses.

Specifically, Mr. Boniferro testified that the Board was concerned about the traveling expenses, as they were aware that Mr. Black was from Toronto and that there would be additional expenses.

Mr. Boniferro wanted to be clear about what additional financial obligations the Board would be under if it approved indemnification for the change in solicitors. During the

course of the meeting, the Board found two members of the Association to come and talk with the Board concerning the costs of Mr. Black's representation. Mr. Boniferro could not recall who the members were.

According to Mr. Boniferro, the Board was advised that Mr. Black's hourly rate was 1.5 x the legal aid rate and that therefore there would be no additional costs to the Board. Mr. Boniferro stated that at the meeting on February 25, 1997 there had been an agreement with the Association, that the Board would be responsible for paying 1.5 x the legal aid rate and that there would be no travel time billed to the Board, and that the Association would be responsible for any additional disbursement costs.

Mr. Larry Guerro, a Police Services Board Member present at the February 25, 1997 meeting where Constable Greco's request was considered, testified that he recalled meeting with a member of the Association and being assured that if the request was approved, the Board would not be subject to any additional costs. Mr. Guerro could not recall the Association member's name.

Mr. Brent Ralph, the treasurer of the Association in 1997, and Mr. Norman Payeur the secretary of the Association in 1997, both testified that they did not discuss the payment of Mr. Black's traveling expenses with the grievor or with the Board.

Mr. Joseph Trudeau, the vice-president of the Association in 1997, testified that he advised the grievor that if he wished to change lawyers, he should contact Mr. Black. Mr.

Trudeau stated that at no time did he discuss the payment of the Mr. Black's traveling expenses with either the grievor or with the Board.

Mr. John Parniak, the President of the Association in 1997, testified that he did not have any discussions with the Board concerning the payment of Mr. Black's travel expenses. He stated that he did have discussions with the grievor concerning making application to a Provincial Insurance Plan in which the Association participated for indemnification of the legal fees of an officer, and also had discussions with the grievor about making a request for the payment of his legal costs by the Association.

The Minutes of the February 25, 1997 Board meeting provide in part as follows:

A letter from Constable J. Greco (1997-02-12) was received as information by the Board. Three letters from the Police Association as well as Chief Davies' replies were also received. Chief Davies will seek a legal opinion on a draft letter from Messrs. Sarlo, O'Neill

After receiving legal advice, by letter dated March 25, 1997, Mr. Steve Boniferro wrote to Constable Greco as follows:

Dear Constable Greco:

Re: Legal Indemnification

Receipt is acknowledged of your letter dated February 12, 1997 in which you

advise that you have changed counsel from Mr. Doug Gaetz to Mr. Harry Black.

As you are aware, pursuant to Article 30.03 of the Police Collective Agreement, the Board **must** give approval for choice of counsel. Our initial approval for indemnification of reasonable legal expenses was based on your advising that you had retained Mr. Doug Gaetz, local counsel, to defend you in these proceedings.

Further, it should be stressed that indemnification will only be provided if the following criteria are satisfied:

1. Your are acquitted of the offences;
2. The offences arise out of acts committed in the attempted performance in good faith of your duties as a Police Officer.

As you have now decided to change counsel and retain counsel from Toronto, the Board must give approval to the same. In order to make a determination as to whether approval will be given, the Board requests that your provide to them an outline of the specific legal costs of Mr. Black that your are requesting indemnification for. As you are aware, the Board will only consider indemnification for the necessary and reasonable legal costs incurred.

We look forward to receiving the requested information so that a proper determination can be made by the Board.

Yours truly,

Steve Boniferro  
Chair

By letter dated April 23, 1997 Constable Greco advised as follows:

I have received your letter dated March 25, 1997 in which you were requesting an outline of the specific legal costs for my current lawyer, Mr. Harry Black, as it related to my legal indemnification. Please be aware that Mr. Black's legal fees are 1.5 x the legal aid rate.

This rate is the same as Mr. Gaetz's fee. I have enclosed a copy of Mr. Black's first billing as well as an invoice from Mr. Gaetz. After reviewing these two submissions I

am certain that you will find Mr. Black's costs are comparable, reasonable and necessary. Please do not hesitate to contact me should you require clarification or further information. Thank you in advance for your attention on this matter and I look forward to hearing from you regarding the Board's decision.

Yours truly

Constable Jody Greco  
Badge #195

At its meeting of December 18, 1997 the Board passed the following resolution, and the grievor was notified by mail of its passage.

RESOLVED that the Board in accordance with Article 30.03 of the Police Collective Agreement agrees to said legal indemnification (Constable J. Greco). Carried.

On November 10, 1998 Mr. Black submitted his account and wrote to Chief Robert Davies, in part, as follows:

Enclosed please find my Statement of Account for legal services rendered in the defence of Police Constable Jody Greco, a member of the Sault Ste. Marie Police Services...PC Greco is required to be indemnified by the Police Services Board for the costs of these legal services pursuant to Article 30 of the Police Contract. P.C. Greco has been exonerated.

Under the circumstances, I am requesting that his account be paid forthwith. I ask that you put this account before the Police Service Board.

With respect to the enclosed account, please be advised that the hourly rates are as follows:

JEM - refers to Joanne Mulcahy, my associate, at \$150.00 per hour;  
HB - refers to myself, at \$250.00 per hour.

If you have any questions, please do not hesitate to contact me directly. Otherwise your prompt attention to this matter is appreciated.

Yours very truly,

Harry G. Black, Q.C.

The Board paid the account at the rate of \$250.00/hr, which is substantially in excess of 1.5 x the legal aid rate that had been agreed to, and also paid the ancillary disbursements. The Board did not pay Mr. Black's billed travel time or the disbursements in traveling from Toronto to Sault Ste. Marie for the trial which amounted to approximately \$7,000.00.

The issues for determination Is whether the Board is responsible for paying the traveling expenses of Mr. Black?

## DECISION

Article 30 of the collective agreement requires the Board to indemnify officers for their necessary and reasonable legal costs provided they meet the eligibility criteria in Article 30 of the collective agreement.

In the Board's view, the retaining of a lawyer from Toronto was not a reasonable and/or necessary cost; that it communicated this concern to the Association; and, that it received the Association's assurance that the Board would not be responsible for the payment of traveling expenses.



Mr. Boniferro characterized his discussions at the meeting of February 25, 1997 as an agreement with the Association that the Board would not pay Mr. Black's travel expenses. Counsel for the Board in her submission argued that, even if I did not find an agreement, Article 30 was clear that the Board's approval was necessary for indemnification of legal expenses, including traveling expenses, and that this approval had not been forthcoming.

It was the Association's view that there had been no agreement with respect to indemnification for travel expenses, and that Article 30 required the Board to pay the traveling expenses, inasmuch as they were reasonable and necessary to the grievor's legal defence.

The following facts are not in dispute. The Board approved indemnification for Mr. Goetz's legal fees @ 1.5 times the legal aid rate. The Board knew that Mr. Goetz practiced law in Sault Ste. Marie. When the Board received a request for indemnification of Mr. Black's legal fees, they were aware that Mr. Black practiced law in Toronto. The Board was concerned about the additional travel expense costs of Mr. Black.

From the evidence I am unable to conclude that, on February 25, 1997, the Board reached an agreement with the Association that no claim was being made for Mr. Black's travel expenses. Mr. Boniferro and Mr. Guerro did not have any clear recollection of who they met with on February 25, 1997, and therefore could not be certain whether it was members of the executive or non-executive members of the Association. The principal members of the executive of the Association at that time all

testified that they did not discuss the payment of the grievor's legal fees or legal expenses at any time with members of the Board. Mr. Greco did not give evidence in these proceedings.

While I am unable to conclude that the Association and the Board made an agreement with respect to indemnification for Mr. Black's traveling expenses, there nevertheless remains the issue of whether or not the Board approved such expenses.

In my opinion, an agreement to pay reasonable legal expenses, necessarily includes an agreement to pay the reasonable and necessary disbursement charges. At a minimum this would include payment of such things as photocopying, long distance and courier charges and the like. It would not necessarily however include paying the traveling costs of an out-of-town lawyer. I am not called upon to determine in this arbitration whether, in the circumstances, it would have been reasonable not to approve legal costs for an out-of-town lawyer. Rather, what I am required to do is to determine whether the Board did in fact authorize the indemnification of Mr. Black's legal costs save and except for travel costs.

It is evident that retaining a lawyer from out-of-town would entail traveling expenses. Faced with this knowledge, the Board, following the February 25, 1997 meeting, wrote to the grievor requesting an outline of the specific legal costs of Mr. Black's that Constable Greco was requesting indemnification for. The grievor wrote back indicating that the specific legal costs for Mr. Harry Black, were Mr. Black's legal fees of 1.5 x the legal aid rate.

The Board then passed a resolution that, in accordance with Article 30.03, it agreed to legal indemnification.

The Board's position was that, insofar as the grievor had only requested indemnification for hourly legal fees, and not for traveling expenses, that was all that was approved. In my view, this would be the result if there was some indication or communication with the grievor in the winter/spring of 1997, that indemnification for Mr. Black's traveling expenses would not be considered, or alternatively, some clear indication in the minutes or correspondence of the Board, that indemnification for legal expenses was not being approved.

I have already determined that I cannot conclude that there was an express agreement with the Association to forgo a claim for indemnification for traveling expenses, and there was no evidence that the Executive of the Association or the Board spoke to the grievor concerning this issue.

I am left therefore with the written documents. Mr. Boniferro's letter of March 25, 1997 asking to be advised of the specific legal costs for which Mr. Greco was seeking indemnification, can be read as a request for advice as to legal fees and also as to whether a claim was being made for indemnification for travel costs. In this light, when the grievor responds and only mentions the hourly rate, it might be possible to conclude that the grievor was not claiming indemnification for traveling expenses.

On the other hand, a request for advise as to specific legal costs, can be read as a request for

information as to the hourly rate only, with the assumption that the reasonable and necessary disbursements, which would include the traveling expenses of an out-of-town lawyer, would necessarily be included.

It seems odd that the issue of traveling expenses, which could be considerable, and which was of concern to the Board when it initially considered Constable Greco's request on February 25, 1997, would not be addressed either in the Board's letter of March 23, 1997 or in the Board's minute authorizing indemnification. It would be the normal practice for the Board to indemnify police officers for the reasonable and necessary disbursements associated with legal representation, and since the Board agreed to indemnify Mr. Greco for the reasonable and necessary cost of Mr. Black's legal services knowing that Mr. Black was from Toronto and without expressly notifying Mr. Greco and/or the Association that it was not paying Mr. Black's travel expenses, I have concluded that the Board's agreement to indemnify included indemnification for Mr. Black's reasonable and necessary travel expenses. To have excluded the travel expenses would have required a precise and direct form of notification, which would then have given the Association/grievor the opportunity to challenge the decision, retain a different lawyer or seek indemnification for the traveling expenses from another source.

Accordingly the grievance is allowed.

REMEDY

At the commencement of the hearing, counsel for the Board advised, that in the event the Board was found responsible for indemnifying Constable Greco for Mr. Black's traveling expenses, the Board wanted to raise the issue of the overpayment of Mr. Black's legal fees, in an amount in excess of any monies owing for travel expenses.

This overpayment apparently results from the Board paying Mr. Black's account at an hourly rate of \$250.00 per hour rather than 1.5 x the legal aid rate, or approximately \$125.00 per hour, which had been agreed to. The issue as presented to me is whether the Board can set-off monies owing as payment for travel expenses against an overpayment of the account, and secondly, if they cannot do this, who, at this point in time, is entitled to receive the travel expense reimbursement.

I urge the parties to endeavour to settle this matter, and if it cannot be settled, I will, at the request of either party, make the appropriate arrangements to receive submissions concerning these, or any other issues, which flow from this award.

Dated at Maberly, Ontario this 4<sup>th</sup> day of October, 2000.

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David K.L. Starkman.