

Date: June 2, 2014

IN THE MATTER OF AN ARBITRATION UNDER THE POLICE SERVICES ACT

Christopher Shaw

and

Windsor Police Association

BEFORE: Ian R. Mackenzie, Arbitrator

For Christopher Shaw: Jim Dean, Counsel

For the Windsor Police Association: Jeff Hewitt, Counsel

Heard at Windsor, Ontario, May 22, 2014

Introduction

[1] Constable Christopher Shaw has filed a complaint against the Windsor Police Association (“WPA” or “the Association”) alleging that it has breached its duty of fair representation in failing to pursue his grievance related to a promotion process.

[2] The Windsor Police Services Board (WPS) did not participate in the hearing.

Summary of Evidence

[3] Constable Shaw testified on his own behalf. Ed Parent, the administrator of the WPA, and Jason DeJong, the president of the WPA, testified on behalf of the Association.

[4] Constable Shaw has been employed by the WPS since 1995. He participated in a number of promotion processes, including in 2010 and 2011.

[5] The WPS promotion process is set out in Promotional Policy #352-01. For the purposes of this proceeding, the procedure related to the top 17 eligible members is relevant. Paragraphs 1(g) and (j) under Part IV of the Policy are as follows:

g) The top 17 eligible members from the previous years Promotional List shall maintain their ranking positions provided they have a recommendation of suitability from their Superintendent after consultation with the inspector, supervisors and review of the performance management file. The recommendation shall be submitted on the suitability for promotion form...

...

j) The Promotional List for Level "A" [promotion from constable to sergeant] shall be ranked as follows:

- Positions 1 thru 17 from the previous year's Promotional List (provided the member has remained eligible and recommended as suitable);
- Remaining candidates as ranked from the Eligibility List;
- Members in the Top 17 positions shall be placed in Preferred jobs as available.

[6] "Preferred jobs" are special positions (often plainclothes positions) that receive allowances or specialist pay, in addition to a constable's regular salary.

[7] Constable Dorothy Nesbeth was in the number 9 position on the Promotional Eligibility List in 2010. She was in a preferred job and was in receipt of an allowance in addition to her salary. On August 24, 2010, she was suspended from duty pursuant to the *Police Services Act*, for alleged misconduct. She was not permitted to exercise any police officer powers, to wear or use any uniform or equipment provided to her, and prevented from attending any Windsor Police property.

[8] Mr. Parent testified that the WPA made representations to the police administration to get Constable Nesbeth back to work, pending the disciplinary proceedings under the *Police Services Act*. The WPA was ultimately unsuccessful and

Constable Nesbeth remains suspended with pay. (The WPA is not representing Constable Nesbeth in the disciplinary proceedings.) Mr. Parent also testified that the WPA and the WPS entered into an agreement that, should she be vindicated in the disciplinary proceedings, Constable Nesbeth would be promoted retroactively as of 2011.

[9] Constable Shaw was in position number 32 on the 2010 Promotional Eligibility list.

[10] Constable Nesbeth moved into the number one position on the 2011 Promotional Eligibility List (issued on September 22, 2011), as a result of promotions of others on the list.

[11] Constable Ed Parent was number 7 on the same list. Early in 2011, he became the full-time administrator for the WPA in an acting capacity. He had been the president of the WPA from 2007 until 2011. He was not in a preferred job.

[12] Constable Shaw was number 20 on the 2011 Promotional Eligibility List. When the constable in the number two position was promoted (on October 23, 2011) past Constable Nesbeth, Constable L. Cheney moved into the number 18 position and Constable Shaw moved into the number 19 position.

[13] In December of 2011, Constables Cheney and Shaw both filed grievances in relation to the Promotional Eligibility List. They argued that since Constables Parent and Nesbeth were “stayed” in the promotional process (in other words, not subject to promotion) the list had been effectively reduced from 17 to 15 “active” positions and that the list should be expanded (to include those in positions 18 and 19).

[14] The WPA met with the Windsor Police chief and others to discuss the matter on December 21, 2011. As a result of those discussions, and after the resolution of his secondment agreement, Constable Parent was “stayed” on the Promotional Eligibility List, which meant that others lower on the list could be promoted past him but he would

be guaranteed the slot at number 7 on his return to the WPS. This resolved the grievance of Constable Cheney, since she was in the number 18 position.

[15] On March 9, 2012, Constable Cheney was advised by the Director of Human Resources that a position in the Top 17 list would be backfilled as a result of the secondment of Constable Parent to the WPA and that, consequently, she was now number 17 on the Promotional Eligibility List.

[16] Prior to a regular meeting of the WPA Board of Directors scheduled for January of 2012, Mr. DeJong reviewed Constable Shaw's grievance and its potential impact on other members on the promotions list. He also reviewed case law relating to promotion status for police officers on suspension under the *Police Services Act*. He concluded that a police officer cannot be adversely impacted by allegations of misconduct. He also concluded that management was acting reasonably in maintaining Constable Nesbeth on the promotions list.

[17] The WPA Board of Directors met on January 24, 2012 to discuss Constable Shaw's grievance. Mr. DeJong testified that the Board was provided with the case law that he had reviewed. The Board decided not to pursue the grievance. Mr. DeJong testified that the Board concluded that it was not fair to have a member facing allegations of misconduct be disadvantaged. He outlined the Board's reasons for not pursuing the grievance in a letter to Constable Shaw, dated January 25, 2012:

...

The Executive Board, including the grievance committee, discussed this matter extensively. It is the position of the Association that the two members who are presently stayed on the list are as a result of two different scenarios; one as a result of a secondment, and one as a result of pending disciplinary action under the *Police Services Act*. As you are aware, your grievance is dependent on the latter of these two explanations. ...

The Association is of the opinion that Constable Nesbeth is facing *allegations* [emphasis in original], none of which have been proven. Thus, the Association does not believe she should be removed from the

Promotional Eligibility List unless this flows from the resolution of the pending *Police Services Act* matter. Similarly, the Association further believes that the list should not be expanded to advantage one member as a result of the disadvantage of another. The Board concedes, as is consistent with case law and the *Police Services Act*, that the promotion of a member who subject to pending *Police Services Act* charges, can be delayed until the matter is properly adjudicated.

Furthermore, the Board noted that there has not been a moratorium on promotions since this member's suspension. In fact, members have been promoted past Constable Nesbeth, thereby providing advantage to a member who has been promoted in her place. Thus, by increasing the list by an additional person it would, in essence, advantage two members as a result of her disciplinary proceedings.

[18] The letter continued with a lengthy summary of case law and concluded:

Based on these cases, it is the position of the Association that the Police Services Board has acted in a manner consistent with the legislation. Further, as discussed earlier, there is the expectation from previous case law that the employer will act in a manner which is "reasonable". From the discussion with Administration, it is their position that they are acting in a manner which is, in fact, reasonable given the present situation.

...

In conclusion, the Association believes for the aforementioned reasons the Windsor Police Services Board and Administration have acted in a manner which is consistent with the governing legislation and thus would be interpreted as reasonable by an arbitrator. Accordingly, the Association will not pursue your grievance.

...

[19] Mr. DeJong testified that the WPA had reached an agreement with the WPS that Constable Nesbeth was to remain on the list. He testified that to proceed with Constable Shaw's grievance the WPA would have had to advocate her removal from one of the 17 preferred jobs, resulting in a loss of compensation for her. In addition, he testified that pursuing Constable Shaw's grievance would have been contradictory, since the WPA had been advocating that Constable Nesbeth should return to work.

[20] Mr. DeJong testified that he did not consult legal counsel in preparing this letter or at any time prior to receiving the duty of fair representation complaint from Constable Shaw.

[21] Constable Shaw's counsel wrote a letter to the WPA on March 12, 2012, requesting that a grievance be filed with respect to the promotional process. In the letter, he noted that according to the promotional policy, Constable Nesbeth was not suitable for promotion and should not be on the Top 17 list.

[22] Mr. DeJong brought the letter to the attention of the WPA Board on March 22, 2012. The Board confirmed its earlier decision. Mr. DeJong wrote to Constable Shaw's counsel on April 5, 2012:

...

The Association is aware of its duty to fairly represent our members and has done so in the case of Constable Shaw. As I am sure you would agree this duty extends to all members, including those facing disciplinary actions. To advocate for, or allow the removal of a member from a promotional process based on allegations not yet proven, would arguably call into question the Association's fair representation of that member.

...

... Constable Shaw's grievance has been considered at length by the Association and the decision was made not to pursue the matter. Despite your insinuation that the Board's conclusion is discriminatory, you can be assured it is a well-reasoned decision based upon all the information available. As a result, the Association will not bring this matter to Administration as suggested in your letter.

[23] The 2012 Promotional Eligibility List was issued on June 22, 2012. Constable Nesbeth remained on the list as an asterix, with no number. Constable Parent was in position number 7. Constable Shaw did not put his name forward for competition in 2012. He testified that he felt it was not necessary, given that he should have been in position 17 on the 2011 promotional list (and automatically considered for the following year's promotion process, in accordance with the WPS promotion policy).

[24] Constable Shaw's counsel wrote to the Acting Chief of Police on August 28, 2012 stating that Constable Shaw should have been at position 17 on the 2011 promotional list and position 15 (behind Constable Cheney) on the 2012 promotional list. The Acting Chief of Police replied on September 20, 2012 that Constable Shaw's grievance was not properly before him as the WPA had decided not to pursue the grievance.

[25] Mr. Parent testified that it was his view that there was no provision in the Promotion Policy for the removal of a constable from the list. The only mechanism for removal from the list is part of the remedies available at a disciplinary hearing under the *Police Services Act*, he stated.

[26] The promotional process is currently under review by a committee of the WPS and the WPA. The top 17 on the 2012 list were "grandfathered" and were promoted on January 6, 2014.

[27] Constable Shaw testified that he had no other concerns or disputes with the WPA.

Submissions

[28] Constable Shaw submitted that Constable Nesbeth should not have been on the promotion list, as she did not meet the eligibility requirements under the promotion policy. He submitted that if the WPA had pursued his grievance, he would have been moved onto the list and would therefore have been eligible for a promotion.

[29] He noted that although the WPA stated that it was protecting Constable Nesbeth from further detriment, it was clear that any adverse impact on Constable Nesbeth had already occurred. He submitted that the WPA had already agreed with the WPS that if she was vindicated, she would be made whole and promoted retroactively. He submitted that, therefore, his promotion could not adversely affect her promotion (should she be vindicated).

[30] Constable Shaw submitted that the duty of fair representation requires the consideration of the individual member and of the whole membership. In this case, the WPA only considered one member (Constable Nesbeth) and failed to fully consider his grievance.

[31] Constable Shaw submitted that the WPA failed to seek a legal opinion in making its decision not to pursue his grievance.

[32] Constable Shaw also submitted that the decision not to proceed with his grievance was arbitrary. The WPA made efforts to address the situation of Constable Cheney but did not bother to make the same effort for him. He submitted that this was not a policy-driven decision by the WPA but was the preference of one member over another.

[33] Constable Shaw submitted that the duty of fair representation, as set out in *Canadian Merchant Service Guild v. Gagnon*, [1984] SCR 509 (“*Gagnon*”), requires the union to consider all relevant and conflicting considerations in coming to a decision on a grievance. He submitted that there was no evidence on the research on the merits of his grievance. He submitted that in failing to consider all relevant factors, the Association breached its duty of fair representation.

[34] Constable Shaw submitted that the duty of fair representation does not require a determination that the grievance would have been successful. He submitted that what was required was reasonableness in the decision-making process. He submitted that the evidence was that the Association had “sloughed it off”.

[35] Constable Shaw requested that the complaint be allowed and that the WPA be directed to file a grievance on his behalf. He also requested an order that the WPA be held jointly liable for his loss of income from January 6, 2014 until his promotion. He further requested an award of damages of \$10,000 for the failure to meet the duty of fair representation.

[36] The WPA submitted that the purpose of a duty of fair representation complaint proceeding is not to determine if the grievance was successful or not. As outlined by the Supreme Court in *Gagnon*, a union is required to represent all employees and has considerable discretion in determining whether to proceed with a grievance. This discretion must be exercised in good faith. The Association submitted that there was no evidence of arbitrary, discriminatory or capricious action. It also submitted that there was no evidence of hostility. It further submitted that there was no requirement on the part of the Association to be perfect.

[37] The WPA submitted that it considered all relevant factors in coming to its decision not to pursue Constable Shaw's grievance. It submitted that it was required to look at the "one big picture" and the impact of the grievance on others on the promotion list. It submitted that it was also important to note that Constable Shaw could not get on the promotion list without Constable Nesbeth being removed from the list.

[38] The WPA submitted that the duty of fair representation did not require it to take every grievance to arbitration. It also submitted that the role of an arbitrator in a duty of fair representation proceeding is not to apportion blame: the Association can be wrong in its assessment of a grievance (*Lafrance v. North Bay Police Association*, OPAC, September 2009 (Starkman)).

[39] The WPA submitted that obtaining a legal opinion before making a decision on whether to proceed with a grievance is not a requirement under the duty of fair representation.

[40] The WPA submitted that it acted reasonably and was not arbitrary or malicious in its actions. It asked that the complaint be dismissed.

[41] With regards to the remedies requested, the WPA submitted that an award of damages was not warranted and that it could not be held responsible for any loss of wages.

Analysis

[42] The *Police Services Act* does not contain a duty of fair representation provision. The duty of fair representation is a common law duty and the Ontario Court of Appeal has determined that allegations of a breach of this duty must be adjudicated under the arbitration provisions of the *Police Services Act*: *Renaud v. Town of Lasalle Police Association*, 2006 CanLII 23904 (confirmed recently by the Ontario Court of Appeal in *Cumming v. Peterborough Police Association*, 2013 ONCA 670 (CanLII)).

[43] The burden of proving a breach of the duty of fair representation is on the complainant.

[44] The elements of the duty of fair representation have been set out by the Supreme Court of Canada in *Gagnon* at page 527. The SCC noted that the union has “considerable discretion” in determining whether to pursue a grievance on behalf of an employee. This discretion has the following limits:

...

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[45] In *Switzer v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] O.L.R.D. No. 2605 (cited in *LaFrance v. North Bay Police Association*), the Ontario Labour Relations Board provided the following definitions (at paragraph 37):

(a) "arbitrary" means conduct which is capricious, implausible, or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all relevant factors;

(b) "discriminatory" is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing so;

(c) "bad faith" refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

[46] The WPA's decision not to pursue Constable Shaw's grievance was based on the following considerations:

- That the WPA should not pursue a grievance that would provide an advantage to one member over another; and
- That the actions of the WPS were reasonable.

[47] In a duty of fair representation complaint, it is not the role of the arbitrator to determine the correct interpretation of the dispute. In fact, a union is permitted to make the wrong decision on the merits of a grievance, as long as it has acted in a manner that is not arbitrary, discriminatory or in bad faith: *Switzer v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, at paragraph 36. In this case, the concerns of the WPA were legitimate concerns about the impact of its position on the rights of another member on suspension.

[48] Constable Shaw suggested that there was differential treatment of the other constable who filed a grievance. In that case, the situation of Mr. Parent being on the promotion list was resolved, resulting in Constable Cheney moving up to the number 17 position on the list. The situation of Mr. Parent was significantly different than that of Constable Nesbeth. Mr. Parent had reached an agreement with the WPS with regards to his position on the promotion list and his future right of promotion. Mr. Parent was on a secondment, not a suspension, he was not in a preferred job and there was no ongoing proceeding related to his position as a constable.

[49] The WPA did not obtain a legal opinion before making its decision not to pursue the grievance. Obtaining a legal opinion is not a requirement under the duty of fair representation. A “thorough study” of the grievance is required. The study required is not solely a legal analysis, but is rather a labour relations analysis. Union officials, rather than lawyers, are best placed to make labour relations assessments. In this case, Mr. DeJong did conduct an analysis of the grievance and its possible impact on other members of the bargaining unit. In addition, the matter was discussed on two occasions by the WPA Board. Constable Shaw was provided with a comprehensive letter setting out the basis for the WPA decision. The WPA took the grievance request seriously and demonstrated that it conducted a thorough examination of the merits and implications of the grievance.

[50] As required by its duty to all members of the bargaining unit, the WPA Board considered the impact of the grievance on others in the membership, in particular Constable Nesbeth. Their conclusion on the effect of Constable Shaw’s grievance on her rights was not arbitrary, discriminatory or made in bad faith. In addition, the WPA did not rely on irrelevant factors in coming to its conclusion. As I have already noted, it is not my role in this proceeding to determine if the WPA’s conclusion was correct. As phrased in *LaFrance v. North Bay Police Association* (at page 28): “the Association might be wrong in [its] assessment, but it was a conclusion they were entitled to draw”.

[51] There was no evidence of any hostility, animosity or ill-will between the WPA and Constable Shaw.

[52] Constable Shaw has not demonstrated that the actions of the WPA in deciding not to pursue his grievance were arbitrary, discriminatory or in bad faith.

[53] Accordingly, I find that the Association has not breached its duty of fair representation. In light of this conclusion, I do not need to address the remedies requested by Constable Shaw.

Disposition

[54] The complaint is dismissed.

Ian R. Mackenzie, arbitrator

June 2, 2014