



Green & Chercover

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We welcome your ideas, suggestions and feedback regarding this newsletter. Please direct your comments to David Wright. Special thanks to Ray Hainsworth of the Toronto Police Association for suggesting an article on the *Commercial Bakeries* case.

Fer-get it! The Recommendations of the Ferguson Report

BY SIMON BLACKSTONE

In the wake of recent allegations surrounding the Toronto Police Service (TPS), Chief Julian Fantino commissioned and received a report from Mr. Justice George Ferguson into various aspects of how the TPS responds to allegations of police misconduct. The report shows little regard for the rights collectively bargained by police officers in Ontario, and its proposals would create a number of significant infringements on the privacy rights of serving officers.

While Ferguson's report in no way binds either the TPS or any other Ontario police service, it

may serve to provoke police management across the province to review their practices on the handling and prevention of police misconduct. Police associations would be well advised to monitor developments on this front carefully, and be vigilant about possible "Ferguson Creep" into the management practices of their Services.

Privacy/Disclosure Issues

Ferguson's first set of recommendations relates to the disclosure to defence counsel of the misconduct of a police officer, where that officer is a witness or is otherwise involved in a case

before a court. At present, as set out by the Supreme Court of Canada in *R. v. O'Connor*, in order to determine whether a prior incident is relevant to a case, defence counsel must satisfy a Court that the records are likely relevant to an issue at trial, and have the Court determine the appropriate extent of such disclosure. In designing this test, the Court attempted to balance the rights of the accused with the legitimate privacy interests of third parties.

If implemented, the recommendations of Mr. Ferguson in this

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Court Denies Leave to Appeal s. 49 Decision

BY MARY BYBERG

The Toronto Police Services Board made application for leave to appeal the decision of the Divisional Court in *Toronto Police Association v. Toronto Police Services Board*, which was discussed in detail in the last Police Law Update. The Board's application was dismissed, and as

a result the decision of the Divisional Court upholding the grievance stands.

The decision concerned a rule of Toronto Police Services Board which required members to disclose and obtain approval for all paid secondary activities, whether the activity fell under the categories set out in s. 49 of

the Police Services Act or not. Arbitrator Richard McLaren found the rule inconsistent with s. 49, and the Divisional Court upheld his decision.

Our detailed discussion of the case in the Spring 2004 issue can be accessed through our website: www.greenchercover.com/whats_new.

Ferguson Report

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regard would tip the balance set in O'Connor, and threaten the privacy rights of officers. Ferguson recommends that whenever requested by defence counsel, the Service should provide all personal information related to misconduct as requested to the Crown, and the Crown would then reach a determination as to which documents are relevant, and whether, on balance, they should then be shared with defence counsel. This alteration of present practices would transfer the "gatekeeper" function presently performed by the Court to Crown counsel. Further, Ferguson would include in the information forwarded to Crown counsel details regarding public complaints, including complaints dismissed without a hearing, thereby increasing the volume of material being shared outside the police service.

As Crown counsel operate in an environment of onerous disclosure obligations, this proposed system would serve to increase the volume of officer's personal information disclosed at trial. Crown counsel will likely simply pass such information along to the defence, rather than carefully examining its likely relevance. As the Ferguson report itself notes, the effect of over-disclosure "may lead to a deterioration of trust by the police in the Crown and... the unnecessary and potentially harmful disclosure of personal information".

We recommend strong action should an employer propose to release employment information to Crown counsel. Associations should consider utilizing the provincial *Municipal Freedom of Information and Protection of Privacy Act* to challenge such disclosure, and file grievances alleging the imposition of an unreasonable and unfair exercise of management's discretion, contrary to the duty to exercise management rights in a fair and reasonable manner.

Drug/Alcohol Testing

Ferguson recommends that a drug testing program be made a prerequisite for promotion or transfer to sensitive or high-risk duties, including drug squads, major crime

units, SWAT teams, containment units, bomb squads, mobile support units, and professional standards and/or Internal Affairs, and that applicants for positions in such areas be required to consent to such testing.

The leading case on drug and alcohol testing in Ontario is *Entrop v. Imperial Oil*, a 2000 decision of the Ontario Court of Appeal. The Court found that random alcohol testing was appropriate for employees in "safety-sensitive" positions, but that random drug testing for such persons is flawed, as such testing cannot determine the quantity of drugs used or when they were taken.

It is quite likely that the majority, if not all of the job descriptions specified by Ferguson would be found to be "safety-sensitive". However, it must be noted that the Court in *Entrop* cautions against overzealousness in response to a positive test, stating that a standard requiring no presence of drugs on employees was "too arbitrary, since a positive drug test does not demonstrate incapacity to perform work safely". At present, it should be noted that the Toronto Police Service treats a single positive result as a disqualifying factor for assignment to any of the aforementioned "safety-sensitive" positions.

Associations whose employers attempt to implement tighter drug or alcohol testing regimes should be careful that proposed schemes remain focussed on "safety-sensitive" positions, and do not attempt to impose a "blanket" approach on all employees. Such policies must remain sensitive to employees' privacy and human rights interests, as it is now settled law that alcohol or drug addictions constitute disabilities which require accommodation by an employer. However, it should be noted that the ultimate determination of whether such a program is reasonable remains that of a court or arbitrator, and associations in services where employer policies imperil privacy or human rights interests should pursue such claims aggressively.

Psychological Testing and Assessment

More troublingly, the Ferguson Report recommends that TPS Officers seeking promo-

tion within or transfer to a "safety-sensitive" unit be required to submit to psychological testing and assessment.

The proposed program suggests that, for those positions deemed "sensitive or high-risk" applicants undergo a psychological evaluation, which may include written responses and/or interviews with clinicians. The psychologist would then report the results of the evaluation (a finding of "suitable" or "not suitable") to the Service. The applicant would then either move forward in the transfer process, or be excluded from further consideration and, should it prove necessary, be referred for counselling or treatment.

Most collective agreements include provisions stipulating that management has the right to transfer or to decide not to transfer, but that this right is qualified by the obligation that such decisions cannot be unreasonable, discriminatory or without cause. While these provisions may include specific wording to that effect, some, but not all arbitrators have found this obligation implicitly present in management's rights clauses which are silent on the issue.

Associations faced with the introduction of a psychological evaluation process should challenge transfer decisions where such an assessment is employed. Possible grounds for such challenge include, but are not limited to violation of privacy rights, an insufficient nexus between the assessment and the job in question, misapplication of the findings of such a test and/or unreliable/irrelevant considerations employed in the determination of the test's findings.

As stated throughout, the Ferguson Report poses a number of significant challenges to the privacy rights of officers. As potential avenues of response exist through the Courts, administrative tribunals and at arbitration, Associations must remain attuned to potential introduction of its recommendations within their Services, and should consider taking action before new practices become entrenched.

Police Staffing Issues: Promoting Fair Promotion

This is the second in a series of articles dealing with police staffing issues.

BY TERRI HILBORN

Promotional opportunities with police services are limited. For police officers there is a predetermined career path. Once an officer reaches first class constable status, the number of positions to which an officer can aspire is restricted. This is especially true in smaller police services where there are few sergeant positions or special team opportunities.

Civilians, too, have fewer opportunities for career growth than in other workplaces. The contracting out of some traditional civilian positions has led to very few civilian classifications in many police services. These classifications can be quite diverse requiring different skills and abilities. Although movement between diverse classifications is possible with additional training, it has not occurred frequently.

As a result of the limited opportunities, it is vitally important that the promotion process followed by a police service be fair and transparent. In an ideal world, internal candidates would be considered first and all applicants would be given a fair opportunity, in order of seniority, to have their qualifications evaluated based on the minimum posted job qualifications. Career training and career development positions would be available and encouraged for all members.

Unfortunately, this is not the norm in most police services. In many cases, associations have failed to negotiate any provisions dealing with job postings or promotions, leaving such decisions entirely to management discretion. Often this discretion has been misused. Frequently, officer and civilian promotions are simply "hand-picked" by the Chief with little attention to seniority or even, in some cases, skill and ability. Existing civilian members are by-passed when promotions or new positions go to outside applicants. Even where job posting and promotion provisions exist, their vague wording sometimes allows management to use subjective scoring methods, to consider irrelevant factors, or to misuse other provisions to ensure that man-

agement's preferred candidates have received the opportunities necessary to qualify for desired promotions.

Associations can use the collective agreement to limit management discretion and to ensure that promotions and new positions are awarded on a fair basis. The starting point is to ensure that provisions dealing with internal posting, promotions, transfers, and career development are in the collective agreement. Promotion *policies*, no matter how fair, are not enforceable and are generally subject to change without input from the association.

Posting provisions for vacancies and new positions are of real importance to civilians who are often locked into certain job classifications with little room for movement. Without posting provisions, vacancies and new positions may be filled from outside the association before interested members even know there is an opening. Posting provisions should apply as broadly as possible to include promotional positions, new jobs, career development positions and vacancies caused by pregnancy or parental leave, illness, or other leaves. Transfers within a classification or to a different shift assignment can also be made subject to posting provisions.

Consideration should also be given to the nuts and bolts of the posting process. Where must the position be posted and for how long? The content of the posting should be specific. The posting should include a job description, required qualifications, wage rates, and the deadline by which applications must be received. The more specific the provision, the less likelihood there is for abuse.

However, posting provisions are only one piece of the puzzle. Collective agreement provisions should also spell out how the successful applicant will be selected. The factors that can be considered, including seniority, qualifications and ability, should be set out clearly, as should the relative weight given to each of these factors.

Historically, employers, including police services, have preferred to give no consideration to seniority, arguing that the "best can-

didate" ought to be selected in all cases. Provisions that allow management unfettered discretion to select the "best candidate" provide almost no protection to association members. Inserting seniority as the primary or key factor in selecting candidates restricts the likelihood that favouritism will guide the process.

Seniority can be used in a number of ways. The strongest provision for association members is one that ensures the most senior candidate with the minimum necessary qualifications will be selected. As long as the qualifications have been spelled out clearly and they relate to the position at issue, a provision of this type provides the least room for favouritism or abuse.

An alternative approach negotiated in a number of agreements has been called the "relative equality" approach. Under a provision of this sort, the most senior candidate is chosen from candidates that are "relatively equal" in terms of their qualifications. This provision allows the employer to assess the qualifications and ability of each applicant and rank them accordingly. Only if a number of candidates fall into a similar ranking does seniority play a role. Although arbitrators have held that provisions of this type require management to assess abilities in a reasonable manner, "relative ability" provisions allow much greater room for management discretion and potential abuse.

Some of this risk can be tempered by defining as clearly as possible the required qualifications and the concept of "relative equality". Associations should avoid clauses in which the assessment of ability depends on the opinion of the Chief. Where promotional tests are required, what mark meets the qualification? What mark spread constitutes "unequal" qualifications. Are performance appraisals to be considered and, if so, how much weight are they to be given? Even where a "relative equality" provision is used as between members, associations should consider a provision that ensures a member

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Recent Cases: Accommodation of Disabled Officers

BY DAVID A. WRIGHT AND MARY BYBERG

This article will highlight two recent cases that address the roles and rights of police associations, members with disabilities, and police employers when members are accommodated under the *Human Rights Code*. The first, although not involving a police workplace, reaffirms the right of bargaining agents to represent their members when management meets with them to discuss accommodation. The second applies the general principles of accommodation under the *Human Rights Code* in the police context in a manner that is troubling for police associations and their members.

Under the *Human Rights Code*, employers must accommodate employees with disabilities unless to do so would constitute "undue hardship" upon the employer and the bargaining agent. This obligation is specifically affirmed for police employers in s. 47 of the *Police Services Act*. Examples of factors considered in determining whether there would be undue hardship in accommodating the employee include financial costs, disruption of the collective agreement, interchangeability of the workforce and facilities, the size of employer's operation, and risks to health and safety.

The case law has emphasized that the duty to accommodate includes both a procedural and a substantive aspect. To fulfil its procedural obligations, the employer must discuss and work with the disabled employee to attempt to find an accommodation that will meet his or her needs. Substantively, the employer must offer an appropriate accommodation unless to do so would constitute undue hardship. There are also specific obligations in relation to workers injured on the job under the *Workplace Safety and Insurance Act*.

Representing Members in the Accommodation Process: *Commercial Bakeries*

In *Commercial Bakeries Corp. and Retail Wholesale Canada, Div. of C.A.W., Loc. 462* (2003), 121 L.A.C. (4th) 398 (Shime), the Union filed a policy grievance claiming that the employer's universal return to work procedures for workers on W.S.I.B. benefits violated the collective agreement. The return to work procedures did not include representation or attendance by the Union at return to work meetings between employees and management, and Union argued that this undermined its ability to represent its members and interfered with its statutory obligations pursuant to the *Human Rights Code*.

Arbitrator Shime confirmed that employees are entitled to have Union representation when engaged in discussions with the employer concerning their return to work, and that a Union is entitled to represent its members in their dealings with the employer whenever there are attempts to accommodate the employee by modifying his or her working conditions. A union or association, he found, is therefore entitled to be present when the employer meets with an employee to discuss the employee's return to work.

Indeed, the arbitrator noted that a Union has specific duties in the accommodation process. These include ensuring that an injured employee can return to useful employment, cooperating fully in finding accommodation for him or her, and considering whether the impact of accommodation creates an undue hardship for other employees it represents or the employer.

These principles also apply to police associations. An association has the right and the duty, to represent its members when modified work or return to work is being discussed with a Police Service. Associations should ensure that they are included when accommodation is being determined, since

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Chercover's Notebook

BY BARRIE CHERCOVER

Police Associations have a duty to represent all members fairly notwithstanding that the *Labour Relations Act* has no application to police or civilian members of police services.

That does not mean that every member grievance needs to be referred to arbitration. The contractual relationship is between association and the police employer. Therefore, only the association or employer can decide whether a grievance should proceed to arbitration.

In making that decision the association has every right to consider the association's interest, the interests of all members and the interest of the grievor or grievance group. The likelihood of success of a grievance is itself a relevant factor in deciding whether the case should proceed.

You must consider a grievance fairly. The decision to proceed or not to proceed must not be arbitrary, discriminatory or in bad faith. An arbitrary decision is one made without considering all relevant aspects of the

case. So do listen to the grievor's story and check it out. A decision may be discriminatory if it causes one or a group of members to be treated differently than others without justification. It is not discrimination, for example, to cause formal discipline to be imposed on one of ten members who are late when that member has a history of lateness and the others have never been late before. A decision may be seen as one made in bad faith if it is made because the grievor is disliked.

Recent Cases: Accommodation

Fair Promotion

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police management will often attempt to accommodate members in top-down fashion, rather than consulting with the member and the association.

The Duty to Accommodate in Police Services: *Hamilton Police Association*

The general principles on the duty to accommodate were recently applied to a police workplace in *Hamilton Police Services Board and Hamilton Police Association* (2004), 124 L.A.C. (4th) 116 (Barton). Management transferred several disabled uniform officers, who at the time were being successfully accommodated in uniform positions, to jobs in the radio room covered by the Civilian Collective Agreement. They went mostly unwillingly, and the transfers were made without consultation with the Association or the members concerned. The Union grieved the unilateral transfers and the failure to post the Communications positions in accordance with the Civilian Agreement.

Arbitrator Peter Barton dismissed the grievance. He found that the general cases on accommodation of disability are less applicable in the police context, on the basis of a number of factors that he said make it different from other workplaces. He held that "the Board has gone as far as it can to accommodate within the [police officer] unit", and found that it was appropriate for management to have a certain amount of "wiggle room" in accommodating officers. He held

that, on balance, there was no "substantial interference" with the rights in the Civilian Agreement, and that therefore there was no violation of the agreement or the *Human Rights Code* in the unilateral transfers of the officers.

The arbitrator failed to consider the fact that the transfers had been made without consultation with the association or the disabled members, that the members had already been successfully accommodated in jobs under the uniform agreement, that the involuntary transfer to civilian positions might have discriminated against the uniform members concerned, or the definition of the concept of "undue hardship".

At present, this decision is being judicially reviewed. In light of this, because it contains various inconsistencies with existing case law, and because it depended on the specific facts of the Hamilton situation, other associations should not assume that it will be followed by another arbitrator if management transfers uniform officers to civilian positions without agreement from the association.

Associations should be vigilant to protect the rights of disabled uniform members to continue to work in police officer jobs, as well as the rights in civilian and uniform collective agreements. Such rights should not be infringed as a result of accommodation unless no other reasonable alternative is available. Moreover, associations should grieve any "accommodation" that is not reached with their involvement and consent.

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with the minimum qualifications shall have priority over non-members.

There are a variety of other types of provisions associations should review to ensure their members have the widest possible opportunity for career advancement. Does the police service reimburse members for courses that relate to policing? Are training opportunities available to everyone? Are career development positions used to enhance fair promotion policies or to undermine them?

The opportunity for career advancement is a key factor for job satisfaction in any workplace. However, the process must be fair, reasonable and attainable and members must have an understanding of how the process works. This is even more important for police services where promotional opportunities are more limited. If police associations want to ensure these opportunities are not left entirely to the discretion of management, they must take steps to ensure that a fair and transparent process is clearly set out in the collective agreement.

When collective agreement negotiations are upcoming, therefore, Associations should take a serious look at the provisions, if any, dealing with promotions in both civilian and uniform agreements. Examine whether these provisions are adequate to meet the needs of your members, and if not, consider proposing improved language, and taking such proposals to interest arbitration if necessary.



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