IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE POLICE SERVICES ACT

B E T W E E N :

DURHAM REGIONAL POLICE ASSOCIATION
(The Association)

- and -

DURHAM REGIONAL POLICE SERVICES BOARD
(The Board)

Re: 2006 and 2007 Collective Agreements
(Uniform and Civilian)

AWARD

PAULA KNOPF - Sole Arbitrator

APPEARANCES:

For the Association:	Ian J. Roland and Nini Jones
For the Board:	Glenn P. Christie and Gregory J. Power

The hearings into this matter were held in Oshawa on May 28, 29; August 27, September 13 and October 2, 2007

Part A - INTRODUCTION

The Durham Region encompasses the towns, cities and municipalities of Oshawa, Pickering, Whitby, Ajax, Clarington, Brock, Scugog and Uxbridge. This is a beautiful and interesting area of approximately 1,000 square miles with an estimated population of 561,258. It is protected by the Durham Regional Police Service, with 811 uniform and 271 civilian members. The most recent Collective Agreement expired in December 2005. The parties were unable to negotiate a successor Collective Agreement and referred the outstanding issues to mediation/arbitration. Attempts at mediation were unsuccessful at resolving any outstanding issues. However, the parties did agree to submit the issues of both their 2006 and 2007 Collective Agreements to this arbitrator. Accordingly, this Award resolves their terms and conditions from January 2006 to December 2007.

A threshold issue concerning the arbitrability of the Staffing provision (Article 19) was raised at the outset of the arbitration and has been dealt with in an interim award released July 13, 2007.

In determining the merits of the remaining outstanding issues, I have been guided by both the governing statute and the principle of replication. In order to do this, I have given regard to the materials submitted by the parties and analyzed the parties' positions and proposals in the context of their applicable comparators. In this case, the parties have traditionally compared themselves with the Police Services in Halton, OPP, Peel, Toronto, and York. I have then applied a "total compensation" approach wherever sufficient data was available. Finally I have attempted to apply the wisdom and objectives articulated by the following leading authorities in this area:

> The ideal of interest arbitration is to come as close as possible to what the parties would have achieved by way of free collective bargaining in the sense that to do more would affect an unwarranted subsidization of . . . employees by the public and to do less would result in . . . employees subsidizing the public. . . . While wages are "discussed" at the bargaining table in terms of cost of living trends, productivity, justifications for the

> catch-up and overall compensation, such arguments are ultimately subject to the inherent bargaining power of parties to impose their wills on each other. It is this aspect of free collective bargaining that interest arbitration cannot reproduce. But, because there is no exact litmus test for bargaining power, the boards of arbitration try to set out in detail a rational justification for their economic awards. *Beacon Hill Lodges and SEIU,* George Adams at pp.4-5 (June 25, 1982)
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> The replication principle requires the [arbitration] panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain. *University of Toronto (Governing Council) and University of Toronto Faculty Association* (2006) 148 L.A.C. (4th) 193 (Winker R.S.J)

Therefore, the adjudicative task in this dispute is to start by taking the positions of the parties as the "matrix" of their dispute and then to apply the principles of replication to their historical comparators within the context of the overlapping criteria set out in Section 122(5) of the Police Services Act.

This is particularly difficult in this case because the parties were singularly unsuccessful in their negotiations and referred an inordinately large number of items to arbitration. In addition, the items that were referred left the parties taking widely divergent positions and revealing polar differences in objectives. This suggests that if the parties' respective positions had been more refined, reasonable or focused, the parameters for resolution might have been more apparent. Each side blames the other for their failure to resolve more issues. This arbitrator and this Award cannot and will not lay the blame on either party. Suffice to say, the resulting situation is very unfortunate. Too much was left to be resolved through arbitration.

Interest arbitration serves a valuable function in that it can objectively resolve the terms and conditions of a collective agreement. It is mandatory in

this sector where there is no right to strike or lock out. But interest arbitration is not a substitute for collective bargaining. It is not a forum that any party should approach with the hopes of gaining what it could not achieve through collective bargaining. The application of the rectification principle means that parties should understand that arbitration can and should only award what the parties could reasonably expect to achieve through full, functional and principled bargaining. Interest arbitration should then be understood as the forum of last resort. It should only be invoked when real impasse has been reached and only after the parties have given themselves the opportunity to engage in informed explorations of the rationale and implications of their respective positions. Parties in this sector should come to bargaining with the same mind set as a party has with the right to bargain freely. They would then push their interests to the limits that would apply if they had the right to strike or lock out. In that way they should be able to explore and resolve the issues that divide them. That is the only way that they can maintain control over the outcomes and create a healthy foundation for the operation of their Collective Agreement. If they fail to exercise their right to bargain to its fullest extent, they lose too much control over their own process and leave too much in the hands of arbitrators.

Unfortunately, the submissions of the parties to this dispute reveal that they have not fully explored or understood each others' positions on many items and they often failed to take the opportunities to consider more modified proposals. By referring so many and such polarized items to arbitration, they have failed to engage in functional collective bargaining and have thereby done a disservice to their statutory opportunity to bargain collectively.

The Award that follows is structured in the way the parties presented their case. Article 19 and staffing was central to both parties' positions. After the determination in the Interim Award that this issue was arbitrable, the parties addressed their arguments on the merits of this article separately from the rest of their items in dispute. The parties also presented separate, yet sometimes overlapping, submissions on their 2006 and 2007 contracts. Accordingly, this Award shall follow that order.

Part B - Article 19 - STAFFING - Uniform

The current provision is as follows:

STAFFING

19.01 (a) Units deployed for uniform patrol function will be staffed, at minimum, by one fully qualified Member. A minimum of thirty-eight (38) such units will be deployed from the Day Shift complement.

(b) Units deployed for two-Member uniform patrol function will be staffed, at minimum, by one fully qualified Member and one fully trained Member who has completed a minimum of eight (8) shifts with a Qualified Coach Officer. A minimum of nineteen (19) such units will be deployed from the Night Shift complement between the hours of 2000 hours and 0400 hours.

CONSTABLE DEPOYMENT

	DAYS	NIGHTS	2 OFFICER UNITS
From Night Shift Complement			
	0600-1800 0700-1900	1600-0400 1800-0600 1900-0700	2000-0400
Clarington	6	8	3
Oshawa	12	18	6
Whitby	6	8	3
A/P	8	12	4
N. Durham	6	8	3
REGION	**38**	**54**	**19**

The Submissions of the Board:

The Board is proposing, in the strongest possible manner, that Article 19.01 be deleted from the Collective Agreement. The Board argues that these provisions are a "significant obstacle to the effective deployment of officers in the Region." The Board's submissions were detailed and passionate. Its main points can be summarized as follows:

1. The geographic model mandated by the provision is outdated because it dictates where police officers work in a way that ignores current imperatives that would indicate more effective and efficient measures for the deployment of police services.
2. The provision unduly interferes with the Chief of Police's statutory mandate to direct day-to-day operations and the activities of any officer, including deployment.
3. The definition of "uniform services" does not take into consideration the newer, specialized officers who are available for deployment. It also serves as a "disincentive" to add resources other than in the "uniform service" because no other form of officer is "credited" for purposes of "staffing" in this Article.
4. The Association is not able to point to any evidence to demonstrate that there is a continuing or valid rationale to support any safety concerns that may have been the historical basis for the insertion of this language into the contract.
5. The continued inclusion of this provision will result in limited police resources not being properly utilized.
6. Current communication tools and technology, including global positioning devices, can offer safety protections that were not in place when the clause was initially inserted into the contract.
7. The current provisions were said to be "substantially superior" to all the applicable comparators, so its cost impact should be taken into consideration as a major factor, particularly if the status quo is to be maintained.

In support of its arguments, the Board pointed out that the current demands for police service are no longer reflected by the geographic framework that is dictated by the Article. Population levels and demographics have changed dramatically, propelling a change in the distribution demands for police services within the Region. Statistics demonstrating the changing pattern of calls for service over the last ten years in the various divisions were presented. It was also said that the imperatives of this provision lead to substantially more "uncommitted" patrol time for officers in some divisions over others.

The Board also argues that the Chief of Police has encountered operational problems as a result of the application of Article 19 because it interferes with his statutory discretion to determine when, if and where two officer units are necessary. Examples that were given include:

- Restricting deployment decisions to geographic, rather than operational, requirements
- Restricting the ability to reallocate resources to address disparity in call volumes and operational needs
- Requiring the reallocation of resources from heavy demand areas in order to meet minimum staffing levels in other areas regardless of lower call volumes
- Two officer units are not necessary to address safety concerns, especially where other specialized units and equipment can be more effectively deployed
- Two officer units tie up valuable resources, especially where there are insufficient calls requiring two member units
- Minimum staffing levels

The Board also submits that there is no reliable research that supports the Association's contention that two officer units are justifiable on the basis of officer safety. The Board tabled studies that suggest the opposite: the Australian Centre for Policing Research, *One-and two-person patrol: Summary Report, Report Series N., 108,* Dr. Carlene Wilson and Dr. Neil Brewer, National Police Research Unit (1991) and *Research on one- and two-person patrols: Distinguishing fact from fiction, Report Series No. 94,* Dr. Carlene Wilson, National Police Research Unit (1990). The study summary indicates that patrol staff generally prefer a two-officer patrol system and express concerns regarding possible dangers and dispatch difficulties associated with the deployment of single officer units. However, it was said that the available data on officer safety raises questions as to the accuracy of the "contention" that officers patrolling alone are exposed to significantly greater risk of injury than those in two-officer units. The Board suggests that it is very significant that there is a marked lack of any definitive data to support the Association's contention that Article 19 is necessary for the protection of officers.

In addition, the Board pointed to the recent decision of Arbitrator Howard Snow where he declined to rule on a Police Service Board's proposal to alter the shift schedule and instead remitted the matter back to the parties for further discussion, with the following comments:

> While I am sympathetic to the Employer's concerns about the additional costs associated with the existing schedule and its desire to remedy that, a shift schedule for police officers is not one based simply on costs. The Employer data outlines the average number of calls for service received during each one hour time period throughout the week. There are clearly 'busy' times and 'slow' times in policing. A shift schedule should reflect that reality. In addition, there are manning levels in the collective agreement and statutory provisions on staffing that must be considered [see *Sault Ste. Marie Police Services Board and Sault Ste. Marie Police Association*, decision of Howard Snow, 2007, at p. 11].

Therefore, in a nutshell, the Board argued that Article 19.01 unduly restricts the Chief's statutory discretion over operational issues, results in an inefficient and outmoded model of service and is no longer supportable on the basis of officer safety concerns. Therefore, it was said that the provision should be deleted and that the Chief should be left to make the unfettered operational decisions that are necessary to ensure effective policing in the Region.

The Submissions of the Association:

The Association responded to the Board's proposal to delete Article 19.01 with an equally impassioned argument to support its retention. First, it was pointed out that the current provision was not imposed upon the parties, but is instead the result of the parties' own construction in negotiations six years ago and then renewed in their last Collective Agreement. It was admitted that the provision initially arose from language imposed 30 years ago by Arbitrator Egan for the parties' 1976-77 contract. But it was emphasized that the rationale for the award was concerns for risk and officer safety. The staffing clause then evolved to the current language of today that was recently adopted by the parties. It was pointed out that during the years since the provision was imposed, the parties have addressed evolving needs through their various incarnations of staffing Committees and modifications of Article 19 itself. Further, the Association

emphasizes that it has never taken the position that this provision should impair the Service's or officers' ability to respond to emergencies outside of the geographic areas. Therefore, it was said that the minimum staffing provisions of this clause remain valid and important to the bargaining unit and need not be deleted in order to provide an efficient police service to the Region.

The Association also argues that the Board has failed to provide "any compelling reason" for deleting or changing the provision. The Association concedes that a case may arise where the Article may by subject to change or modification, but objects to the Board's position that it should be deleted completely. The Association suggests that adjustments would more productively be discussed or adopted after the Board completes the "comprehensive staffing study" that is currently underway. The Association expressed "confidence" in the study and suggests that it could form the basis for informed discussions about how to modify Article 19 to best meet the parties' collective interests.

The Association indicated that it was clear from the Board's submissions that its major concern with the current Article 19.01 is the geographic restrictions. Counsel for the Association suggested that the solution to this would be to allow the parties to use the results of the current study as the basis for discussing adjustments to the boundaries or other solutions. It was argued that there is simply insufficient factual data at this point for this arbitrator to make any significant or appropriate changes to the article. Therefore, it was said that the Board's proposal for changes to Article 19 is premature and that arbitration is an "inappropriate" forum to address what may be complex and important staffing issues.

The Association also argues that the statistics filed by the Board fail to demonstrate a need for a change in the Article and instead reveal a situation of "understaffing" that dictates that there should be a move to address the changing demographics and population growth in the Region. To support this argument, the Association relies on the report commissioned by the Board itself from the "Front Line Service Delivery Task Force" in 2002. That Report concluded that the minimum staffing levels in place at that time were inadequate to meet the

Region's needs. Further, in 2005 the Board produced a Front Line Five Year Staffing Plan that did not identify any problems or challenges posed by Article 19.01.

The Association submitted that changes to a staffing provision in a Collective Agreement should only be imposed by an arbitrator with extreme caution, where there is a demonstrated need for the modification. It was said that an arbitrator's authority to alter a two-officer patrol car provision should only be exercised "with extreme care and only after a thorough understanding of the need for a change in staffing is obtained." See *Sandwich West Police Service and Sandwich West Police Service Association,* 22 November 1990 (Joyce) at p. 7.

The Association took umbrage with the Board's suggestion that the minimum staffing provisions in Article 19.01 result in undue "uncommitted time" in some divisions. The Association stressed that officers remain productive, attending to meetings and other proactive police duties that are consistent with the Service's objectives.

The Association stressed that the two-officer component of Article 19 arose out of a demonstrated need for protecting officer safety. It was said that the Australian studies tabled by the Board do nothing to diminish the rationale behind that concern and are inadequate to form the basis for any changes to this Region. In addition, those reports detail that solo patrols are a feasible deployment option "under circumscribed conditions and where appropriate safeguards are applied."[1] Therefore, it was said that this Report supports the Association's contention that there is a safety rationale for the provision. Further, the Association points to the Board's own operational practices that mandate two officer units be deployed to the highest priority calls. This was said to demonstrate that there is heightened safety protections with two officer units.

The Association attacks the Board's assertion that the geographic component of Article 19 is no longer appropriate by arguing that the Board's materials reveal that it has effectively been able to change and adjust staffing

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[1] One and Two Person Patrols, 1991, supra, p.4

levels in the Region's divisions proportionate to the calls for service so there is no need to change the minimum staffing levels prescribed in the contract.

The Association also stresses that Article 19 in not unique. Forty police services in this province have similar provisions. Clauses such as this one have been a factor in collective bargaining in this sector since their introduction by arbitration 30 years ago in the case concerning *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.) at p. 293, aff'd (1975), 8 O.R. (2d) 65 (C.A.). It was argued that removing such a provision from the contract would take away all the safety considerations that were found to be legitimate enough to form the foundation of the arbitral awards and consensual language that has evolved over the last three decades on this issue. Despite all the modern technology and safety measures that are now in place, it was stressed that single car units continue to put police officers at risk because one officer will inevitably arrive at a scene before another. This may require the first officer to risk "going in alone" in order to fulfill his/her sworn duty to protect the public. It was argued that the parties' current collective agreement has achieved the necessary "balance" between efficiency and safety concerns with Article 19. It was suggested that the Employer's desire to remove Article 19 would tip the balance completely in favour of efficiency, at the cost of legitimate safety concerns.

The Association pointed out that the parties are about to embark on negotiations for their 2008 Collective Agreement. It was said, "We are prepared to bargain this in 2008" and offer refinements if appropriate. It was suggested that direction should be given to the parties. However, it was stressed that the Article should remain unchanged for the contracts under consideration in this Award so that the health and safety of police officers are not put at risk.

The Board's Reply Submissions:

Counsel for the Board expressed skepticism regarding the Association's professed sincerity about its willingness to negotiate modifications to Article 19.01 in 2008. The Board argued that the history of negotiations between these

parties suggests that arbitration is the Board's only hope of obtaining relief from the minimum staffing provisions of the article. It was said that the "worst possible result" of this arbitration process would be to leave the article "as is". At a very minimum, it was said that the geographic limitations within the provision have to be removed in order to allow the Chief to make the operational decisions that are necessary for effective policing.

Decision: The Board has demonstrated that the current provisions of Article 19.01 impact upon deployment and operational decisions. This is true of many provisions in a collective agreement. Many negotiated terms and conditions of employment have cost, operational and practical consequences. The current provisions are, in fact, the results of a negotiated resolution of staffing concerns between these parties. They reflect the parties' joint decision to balance operational, safety and efficiency concerns together with the other items being negotiated in their last two collective agreements. As such, these terms must be respected as being the product of the parties' joint wisdom, their respective assignment to priorities and the consequence of their relative bargaining strengths. Thus, they represent the fruits of the relevant factors that compelled the parties to reach their negotiated contracts.

As such, the current language forms the norm from which we must start; but it is not sacrosanct. Where a compelling need for change is demonstrated or where legitimate trade-offs suggest appropriate modifications, interest arbitration can and must replicate what collective bargaining can do so well - i.e. respond to the need or opportunity for change.

In the case at hand, the Board has provided a great deal of material that suggests that operational efficiencies and effectiveness could be improved by the removal of Article 19.01. That may well be the case. The Board has also shown that the safety concerns can be addressed not only by two officer units, but also by newer specializations, technology and equipment that did not exist when these provisions were first adopted. This too is a legitimate factor to consider. No one suggests that two officer units are the only way to protect officers.

Thankfully, new measures will continue to be developed that protect officers in better ways and to the greatest extent possible.

However, it must also be emphasized that an interest arbitration is not an efficiency device or an organizational "fix-it" mechanism. An interest arbitrator must rely on the materials presented at the hearing and use them to rationally and objectively determine what the parties may have done with this provision if they had been able to functionally and successfully bargain this to resolution. In this case it is very difficult because the Board has taken a very "hard line" approach, asking for a complete deletion of a longstanding provision that the Association values greatly. Further, the Board has not demonstrated the need for the drastic changes that it has proposed. The Board's internal documents prepared for other purposes expose no operational log-jams or striking inefficiencies arising because of the application of this Article. The Australian studies submitted are not definitive and they too recognize that two-member units are perceived to address the safety concerns of officers. Therefore, the Board has not presented convincing or clear evidence to support the need to remove Article 19.01 from the Collective Agreement.

History also suggests that the Association would never have relinquished their hard won language promising two-officer units under situations unless something substantial was offered in its stead. No such "trade-off" or alternative safety measure was offered by the Board in this round of bargaining. Therefore, it is easy to conclude that free bargaining would not have resulted in the Association agreeing to the deletion of the concept of minimum staffing for the patrol functions, two-officer units and the language of Articles 19.01 (a) and (b). **Accordingly, I decline to award any changes to the minimum staffing or two-member uniform patrol staffing paragraphs in Article 19.01 (a) and (b).**

However, reason also suggests that if the parties allowed themselves to bargain this issue beyond impasse, they might have adopted some adjustments or modifications to the details of the constable deployment provisions. This has occurred in this and other regions as demographics, regional borders and populations have changed. Had the parties engaged in meaningful and informed

dialogue regarding the needs of each geographic division, the availability of staffing resources and the call-volume/priority level experiences, it may well be that a better balance would have been achieved between the safety and efficiency concerns addressed by the current "constable deployment" chart that completes Article 19.01. The Association itself suggested that it was willing to contemplate appropriate adjustments.

At the same time, I am also mindful of the realities of the situation. It is now October of the second year of the two years that I have authority to determine. Obviously, a new shift schedule cannot have retroactive effect. The contracts resulting from this Award will expire in December of this year. Further, these parties do not have the benefit of the staffing study that is currently underway. The easiest thing for me to do would be to do nothing and to hope or trust that the parties would deal with this effectively in their next round of negotiations. However, the Board does not believe that it can achieve any change without the intervention of an arbitrator and this arbitrator is not confident in these parties' ability to communicate or negotiate effectively. **Therefore, I am ordering that the parties engage in the following process:**

1. **The Board should produce to the Association as soon as possible any information and/or results that exist regarding the current staffing study, including when it is expected to be completed, as well as any existing and relevant data, research, studies and/or statistics pertaining to call volumes, priority ratings, response times, absences, uncommitted time and any other issues that pertain to officer safety, deployment, effectiveness and efficiency.**
2. **Upon delivery and receipt of such material, the parties are directed to reconvene bargaining on the sole issue of the geographic allocation of two officer units in Article 19.01(b).**
3. **If no such materials are available or produced within the next 30 days, the requirement to reconvene bargaining shall expire**

and the existing provision shall remain unchanged in the periods governed by this Award.

4. **If the materials are produced and the parties are still unable to reach agreement on the allocation of the two officer units within 30 days of the receipt of the Board's productions (or any other time mutually agreed upon by the parties), they can either agree to defer the issue to the 2008 round of bargaining, or at the request of either party, I will reconvene this hearing and determine this sole remaining issue on an expedited basis in light of the other provisions that are included in this Award.**

Part C - THE 2006 COLLECTIVE AGREEMENT

Article 7.01 - LEGAL INDEMNIFICATION - Uniform and Civilian

The current language promises that a member will be reimbursed for any "reasonable legal expenses" incurred as a result of being charged with and acquitted of a criminal or statutory offence flowing from his or her police duties. Further, it provides that a member who is the subject of an S.I.U investigation will be provided with a lawyer for the initial investigation with the approval of the Chief.

The Board is seeking amendments to this language, proposing much more detailed language providing for indemnification only for the "necessary and reasonable" costs when there is both an acquittal and the member was acting "in the good faith performance of his/her duties." The Board would also have the contract provide that indemnification could be refused where the officer's actions amounted to "bad faith, dereliction of duty, or an abuse of his/her powers as a police officer." In the case of a civil suit, the Board wishes to establish "sole discretion to defend the action." Finally, the proposal would provide that "necessary and reasonable legal costs" would be determined by the Chief "at his

sole discretion" and would not include an appeal unless the Chief deems it to be warranted.

The Board's rationale for the proposed changes are that the current provisions are too vague and leave the Board in a situation where it has little or no control over the expenses it may have to incur on behalf of members. The Board submits that it has patterned its proposed changes upon the language of the Metropolitan Toronto Police Service. The Board submits that the current language is inadequate to protect the necessary balance between the need to protect tax dollars and the need to provide protection to members who are carrying out their duties in good faith. Counsel for the Board suggested that if this arbitrator were to indicate the fundamental principles that should be contained in the Indemnification clause, the parties could then fashion the appropriate language to capture those concepts. However, it was stressed that the language should be amended before any difficult situation arises that the current language does not cover.

The Association stressed that there is no actual or demonstrated need to amend the current language. It was suggested that the Board is tabling this proposal simply because it encountered a problem with what appeared to be an excessive bill from a lawyer representing one of its members. The Association argued that a problem of that nature can more appropriately be dealt with by an Assessment Officer who could expertly review and determine the appropriateness of the lawyer's bill. In terms of the Board's actual proposed clause, the Association argues that the proposal leaves far too much discretion in the hands of the Chief, particularly the provisions that would give him/her the sole discretion to determine what are "necessary and reasonable" legal costs. Further, while the Association accepts that the contract should only offer indemnification for "reasonable" legal costs, it argues that adding the term "necessary" would lead to ambiguity and conflict that could precipitate litigation between the Association and the Board. The Association is also concerned that the proposed language would eliminate coverage for public inquiries and coroners' inquests where members often need indemnification. While this Board

has provided such coverage in the past voluntarily, the Association is concerned that the proposed language could suggest a different approach in the future. Therefore the Association rejects the Board's proposals and suggests that a more "wholesome and thorough" balance can and should be devised.

Decision: It is hard to imagine how any "reasonable" legal expenses would also be anything other than "necessary", so it is difficult to see the need for the inclusion of this word in the indemnification clause. Nevertheless, the word "necessary" can be found in all the indemnification clauses contained in the contracts of the comparator Services. Further, the notion of "good faith performance of duties" is found in all but one of the comparators. It is clear that indemnification is intended to cover policing duties. Any actions outside of "good faith performance" may take a member outside of the scope of their duties. Therefore, **Article 7.01 should be amended to provide indemnification for any reasonable and necessary legal costs incurred as a result of acts done in the good faith performance of his/her duties. The Board's proposal to have the determination of what are reasonable and necessary legal costs left at the Chief's sole discretion is unprecedented and would make the concept of indemnification illusory and virtually unenforceable. Therefore, the clause should not contain any such discretion.** This does not suggest any disrespect or distrust of a Chief's ability to apply discretion appropriately. But the indemnification clause should provide real and enforceable protections. To that end, it is in the parties' mutual interests to better define the extent of coverage of the clause. The comparators' agreements contain some detailed provisions outlining both inclusions and exclusions of coverage. I trust that these parties can define the scope of appropriate coverage for themselves. Therefore, **I direct the parties to meet and determine the nature of proceedings that the indemnification clause will cover, having regard to their comparators. If the parties fail to reach agreement on this, the matter shall be referred back to me for final determination on an expedited basis.**

Article 10(a), (b) - BENEFITS and
Article 15.05/06 - RETIREES - Uniform and Civilian

The Board offered improvements to the level and extent of dental, extended health and LTD benefits. The Association had asked for greater improvement, but did accept the Board's proposal including the proviso that coverage would cease at the age of 65. However, in return the Association wants to provide protection to those over 65 by amending Article 15.05 so that it will provide that the current Health Care Spending Account may be used by employees between the ages of 65 and 70 to purchase premiums for a private Extended Health Care Insurance Plan. This would enable that group to be eligible for an individual health care spending account of $2000 to purchase such a plan. I note also that the Association has withdrawn its attempts to increase the amount to $3000 that would have matched the York Region settlement.

Decision: The costs of benefits are escalating and have significant monetary impact on the total cost of a Collective Agreement. Further, the removal of mandatory retirement may have an even greater impact on the cost of those benefits. **The Board's proposal regarding the extent and level of coverage to employees under the age of 65 is reasonable and I so award. Similarly, the Association's proposal to extend the entitlement to the Health Care Spending Account (H.S.A,) in Article 15.05/06 to employees over the age of 65, but to leave it at the present level, is also reasonable and provides a rational way to deal with an emerging issue. Therefore, the Article must be amended to reflect this modification. For purposes of clarity, the H.S.A. should also be stated to be available for the purchase of premiums for a private Extended Health Care Insurance Plan and Article 15.05/6(d) will have to be deleted. I so award.**

Article 11.04 - PREGNANCY AND PARENTAL LEAVE - Uniform and Civilian

Currently, members accrue statutory holiday credits during pregnancy and parental leave. They also accrue vacation credits. The Board is proposing the

removal of the statutory holiday credits because it was said that members who are already on such leaves are able to enjoy those holidays as they arise. It was said that the real purpose of statutory holiday credits is to compensate members who have to work on those days and that the current language of 11.04 creates a costly and unnecessary benefit.

The Association opposes any amendments to this provision, arguing that this is a negotiated term achieved in the last round of bargaining that should not be eroded.

Decision: Given the replication principle and the fact that the contract has recently recognized the accrual of statutory and vacation credits alike, there is no reason to modify this language at this time. **Therefore, the status quo shall be maintained with regard to the language of this clause.**

Article 15.02 - RETIREE BENEFITS - Uniform and Civilian

The current contract provides that retirees shall be provided a paid-up life insurance policy in the amount of $8000. The Board proposes that this provision be removed from the Collective Agreement. It argues that its retiree benefits are superior to those in the comparator Services and that this provision represents a "substantial and escalating cost", especially given the rising ages of retirees.

The Association concedes that this benefit is significantly richer than what is provided in the comparator contracts. However, it was stressed that this is a negotiated benefit that essentially represents the costs of a member's funeral. It was said that "there is no justification for taking it away."

Decision: One can only hope that the parties can cooperate in finding ways to minimize the costs of such a benefit. The costs associated with this provision can be significant and must be factored into the concept of total compensation. However, they are costs that the parties have accepted in earlier negotiations as part of the give and take of bargaining, so **there is no convincing reason for the removal of this benefit at this time.**

Article 17.01 - SALARY - Uniform and Civilian

The Association submitted that it needed a "substantial salary increase to keep up with the salaries of Durham's comparators, as well as inflation." At the same time, the Association accepted that any increase should place this bargaining unit at the level of the "average" of the comparators. Accordingly, the Association sought a 3.5% increase across the board, for both bargaining units. Counsel for the Association also stressed that its members have endured a long delay in reaching resolution of their contract and are still working at 2005 rates in late 2007 while the Employer has had benefit of the use of the monies in the interim.

The Employer argues that the salary issue should be informed by economic conditions, the local municipal settlements and the historical comparators. The Employer's analysis of the comparators leads it to suggest that Durham has often come in at slightly below the average salary rate, so it was proposed that the rate be increased by 3.12%. It was also said that this increase properly takes into account the other aspects of this Collective Agreement where the employees enjoy higher benefits in some provisions that are not available elsewhere.

Decision: The parties are not far apart on the issue of salary and there is legitimacy in both parties' positions. Taking into consideration the comparators, the parties' history of bargaining and the other cost items that follow, **I award a 3.33% salary increase.**

Article 21 - OVERTIME & RECALL TO DUTY - Uniform and Civilian

The Association has proposed that a new clause be included in the Collective Agreement that would provide 1/3 of an hour pay for each hour that a member is designated to be on standby by being immediately accessible by pager or telephone. If actually called in, the existing "callback" provision would

then apply. At the same time, the Association asks that the current language be amended by removing the provision that "members will not be required to work on a stand-by basis" and replacing it with the application of the new "standby" pay for those required to remain available.

The rationale for the Association's position is that members who are on standby must forgo any personal plans, and this has a huge impact on their personal and family lives. In the specialty units, one of the posted job requirements is that those members must carry a pager and be able to respond to calls on a 24-hour basis. It was pointed out that many of the comparator Services have on-call provisions, although not many are at the rate suggested in this proposal. It was also stressed that its members are often required to be on call despite the contract's prohibition against this. The Association expressed understanding that members may have to be available, and it is therefore reluctant to initiate the grievance process to complain about this practice. However, it was said that the current situation is "intolerable", and unless on call pay is awarded, the Association will have no alternative other than to enforce the current language.

The Employer's response to this request is to stress that the totality of the contract must be considered. It was pointed out that specialty units who are required to be "on call" receive an 8% premium on their salary. This is the highest specialty premium paid within the comparator Services. It was said that this rate was determined and agreed upon by the parties in recognition of the on call aspect of the specialty units' responsibilities. It was stressed that members apply for the specialty units accepting the on call aspects of their duties and understanding that the 8% premium is, in part, compensation for this. The Employer argues that any additional "on call" rate in the contract would improperly inflate the specialty premium. Accordingly, the Employer asks that the status quo be maintained.

Decision: I accept the Employer's argument that the specialty premium of 8% was arrived at with the on call aspects of those duties factored into the rate. A

comparison of the premium rates for the comparable units bears this out. **Therefore, there is no demonstrated need or rationale for awarding a further "on call" rate.** However, there is also some difficulty with the current language of the contract that says that members cannot be required to work on a stand-by basis. The parties' submissions make it clear that everyone recognizes that the specialty units need to be available on a stand-by basis, so **the language of Article 18.03 must be amended to indicate that this prohibition against stand-by does not apply to the specialty units.**

It is not clear that there is any other significant practice of asking members outside of the specialty units to remain on stand-by. Accordingly, I decline to order any other changes to Article 18.03.

Article 22.03 (e) - POLICE SENIORITY PREMIUM - Statutory Holiday Pay – Uniform Agreement

Currently, this premium is considered as pensionable earnings and is included in computing statutory holiday pay, pregnancy/parental leave entitlements, sick leave pay, WSIB and secondments. The Board proposes that the statutory holiday pay would not be included as part of the calculation for the seniority premium.

Decision: For the same reasons as set out with regard to Article 11.04, **the status quo shall be maintained.**

Article 22.04 - SENIORITY PREMIUM - Civilian

While the Uniform Collective Agreement introduced the Seniority Premium for members in the last round of bargaining, the Civilian contract has no equivalent. The Association is proposing a corresponding 3/6/9 benefit for its civilian members. The Association provided detailed costing of the request and argued that it should be awarded as a matter of equity. The Board opposes this

proposal, pointing out that no other civilian police contract in the province has such a provision.

Decision: Applying the replication principle, **the Association's proposal is denied.**

Article 22.05 - SPECIAL PAY - COACH OFFICERS - Civilian and Uniform

Currently, members who are appointed to perform "coaching duties" receive a $1.00 premium. The Association proposed an increase to $2.00 that was accepted as part of a "total package" offer by the Board, but withdrawn when the total package was rejected.

Decision: The Association's proposal is modest and reasonable. Accordingly, this provision **shall be amended to provide for a $2.00 per hour coaching premium.**

Article 22.06(a) (v) - SPECIALTY PAY - SPECIALTY UNITS - Uniform

The contract currently recognizes a number of specialty units that qualify for an additional premium. They are:

- Homicide, Robbery, Major Fraud, Sexual Assault, Forensic Identification, and Electronic Crime Units within the Major Crimes Branch.
- The Gang Enforcement Units, Mobile Surveillance, Drug Enforcement, Technical Support, standing Provincial and Federal Joint Forces operations, and General Assignment Criminal Intelligence Officers within the Intelligence Services Branch.
- The Criminal Investigations Branch with Community Offices
- The Traffic Management Unit within the Traffic Services Branch
- The Tactical Support Unit
- Warrant Liaison and Polygraph Units within the Crime Administrative Branch

The Association is proposing that three additional units be recognized as being equally eligible for specialty status and "specialist pay": the Canine, Air Support and Nuclear Security Divisions. It was argued that these three units are

comprised of constables with special training, qualifications and responsibilities that equate to the units that already have "specialty" recognition and status. The rationale for each additional unit was presented as follows.

The Canine Unit - This unit's primary responsibility is to respond to canine calls for service, as well as the daily maintenance, training and integrity of the dogs and their kennels. These constables have specialty training. They often play a supervisory role and act as the "first support unit" at major incidents. They are designated and recognized as expert witnesses by the courts, and they perform teaching functions. They are on call 24/7 with no "off-call" status. They must also personally provide appropriate accommodation and vehicles for the dogs.

The Air Support Unit - The two Air Support Officers work with two civilian pilots who are contracted from an outside agency. These Air Support Officers have extensive specialized training in areas that range from infrared theory and operations, to meteorology, aerial photography and flight principles. Their skills and technical knowledge must continually be updated. This unit is often called upon to act as leaders during search efforts. Officers work a 50-hour flight week and are on call for the balance of the time 24/7. The airborne operations also incur what was said to be "an increase in the risk to personal safety" due to bird strikes and collisions with other air traffic.

The Nuclear Security Division - Members of the Durham Police Service serve as Nuclear Response Force Officers (NRFOs) for the two nuclear plants in the region. The training and standards for NRFOs are set and enforced by the Canadian Nuclear Safety Commission. Officers are given specific training and are tested yearly in order to work at the nuclear plants. Successful completion of that training places members in the category as "Federal Level 2 security cleared anti-terrorist unit members." There was also said to be a "danger" component to these positions due to risk of radiation exposure. They are required to maintain provincial standards that are similar to the Tactical Support Unit. It was said that

compensation for the Durham constables should reflect parity with the NRF unit at the Bruce Generating Plant where salaries are in the range of $85,000 per year. These positions do not have an on-call component; instead there is a five platoon, twelve hour shift schedule. The Association also stressed that the salaries and benefits of this Unit are funded entirely by the Ontario Power Generation, with the Board receiving an administration fee. Accordingly, it was argued that this unit deserves specialty pay, and the funding arrangements mean that the granting of the status would not be a cost item to the Service.

The Board responded to the Association's requests in this area generally by stressing that there are no retention or recruitment issues with regard to these units, that the Association's demands were out of line with the comparators and that any compensation increases would be better applied across the board, rather than to these discrete units. Further, it was said that the existing specialties have already been determined and accepted by the parties so that there is no demonstrated reason to make any changes.

With regard to the *Nuclear Security Division* in particular, it was pointed out that unlike any of the other recognized specialty units, 2nd and 3rd Class constables can be posted to this unit. All the other specialty units are composed of first class constables with more extensive experience. It was said that the members of this unit do not meet the threshold of other specialized divisions such as Major Crimes.

Decision: The parties did not agree to include these three units in their contract as specialty units in the past. Therefore, one has to ask why they should be included now. It would be easy to retain the status quo because the parties were content with it in the past. However, the submissions reveal that the current situation creates some inequities. The Canine and the Air Support Unit constables are required to remain on call 24/7. They have specialized training, they undertake leadership functions in difficult situations and they have additional responsibilities above and beyond the duties of their colleagues with regular patrol duties who do not have to remain on call. To assume these additional

training, responsibility and time commitments without any corresponding compensation creates an internal inequity within the bargaining unit. I must note that the Tactical Support Team was included as a specialty unit in the last round of negotiations based on the rationale that they operate on an "on-call" basis. The "threshold" for recognition as a specialty unit within this Service seems to be

- the achievement of a higher level and focus of education, training and experience that results in expertise and leadership capabilities
- the acceptance of on call status to ensure availability
- the skills and ability to be able to respond to situations requiring specialized skills

On the materials presented to me, it has been demonstrated that the Canine and the Air Support Units meet this definition of specialized units as it has been applied by these parties. Accordingly, **I order that the Canine and Air Support units be included in Article 22.06 (a) (v).**

I accept that the members of the Nuclear Security Division also undertake additional training. They are also tested regularly to ensure that they maintain the required levels of knowledge and fitness. However, they do not operate on an on-call basis, they are not recognized as experts by the courts and they do not have to be first class constables. **Therefore, I do not order that the Nuclear Security Division be designated as a specialty unit at this time.**

Article 24.04 - TRAVEL, MEAL & ACCOMMODATION ALLOWANCE – Uniform and Civilian

The current contract provides for travel allowances for members assigned to certain workplaces who are required to attend court in Whitby or Oshawa in certain circumstances. The Board has proposed the deletion of this article, arguing that members who are at court are doing so either on duty and are being paid for that or they are off duty and receiving premium pay for their time. Therefore, it was said that they should not also receive "additional reimbursement".

Decision: While this has been a part of the parties' contract, the Board has demonstrated that the provision may no longer be useful or worthy of retention. Accordingly, **I order that Article 24.04 be deleted from the contract.**

Article 24.07 - MEAL AND ACCOMMODATION ALLOWANCES - Uniform and Civilian

Currently, members assigned to attend training, workshops and learning opportunities outside of the Region are provided specific meal and "ancillary" expenses.

The Board proposes amendments to the provision to indicate that the reimbursements do not apply when the assignment is not at a police facility and to provide that the "ancillary expenses" do not apply for courses at the Ontario or Canadian Police College. The rationale for this proposal is that the Board does not see the need to provide funds when members are already having their meals provided and there are no actual "ancillary expenses".

The Association opposes the amendments, arguing that even when meals are provided, members incur expenses when they are assigned away from the Region, such as telephone calls to home.

Decision: The Association's argument with respect to ancillary expenses resonates as being reasonable when it says that there may be ancillary expenses incurred when a member is away from home while at a police facility, such as the costs of phoning their families or simply arranging for their absences. That is probably why the provision was adopted by the parties originally. The Board's concern that meal allowances only be paid when meals are not being provided is also reasonable, but it is covered by the current language that dictates that the allowances are only payable "where meals are not provided" on such assignments. Accordingly, on the understanding that the meal allowances are only to be claimed where the meals are not being provided to the members, there

is no demonstrated rationale for altering the status quo with regard to this provision.

Part D - THE 2007 COLLECTIVE AGREEMENT

INTRODUCTION

The parties were encouraged to meet and try to resolve issues between the hearing dates scheduled to deal with the 2006 and 2007 agreements. These attempts again left many issues outstanding.

In introducing the case for the Association, its counsel characterized this Local as offering significant concessions while being met in return with demands from the Board to "roll-back" benefits and/or to "pay for" any requests, including pay increases. In response to this, counsel for the Board argued that Association was wrong to characterize its position as being "concessionary". Instead, the Board insisted that it was adopting and urging a "mature approach" to collective bargaining, where what it views as the "superior" provisions in this Region are recognized and credited before any other changes are contemplated. Thus, the parties approached the 2007 year with completely different perspectives.

In order to resolve this contract, the same principles that are set out above have been applied. In addition, I have noted the "concessions" or agreed-upon items that the Association brought to my attention that it says were accepted voluntarily to facilitate collective bargaining. These include the Association's withdrawal of several proposed items, the deletion of statutory holiday pay from the list of benefits provided on pregnancy and parental leave, the deletion of Article 14.05, clarification of allowances under 24.04, and amendments to "sick leave" under 28.07. I have also considered the Board's list of areas where it argued that this Region's contracts are "superior" to their comparables, such as Article 19's staffing formula, WSIB top up, Accidental Death and Disability benefits, sick leave, retirement "gratuity", and legal indemnification.

In this context, several items remained in dispute and shall be resolved as follows:

Article 4.06 (New) - RIGHT TO REPRESENTATION

The Association is proposing a new provision that would provide that the Association "shall act as the representative of its members, upon request by the member, providing that the representative is reasonably available" in respect of matters concerning discipline, labour relations, conduct, attendance, performance, harassment, discrimination or "any meeting or discussion with supervisory personnel in respect" to these matters. The intent of the Association is to ensure that representation is available to a member whose career is in jeopardy. The Association suggests that this kind of provision will "facilitate better and more accurate communications between the parties and would "advance a more mature relationship with the employer."

The Board views this proposal as something that is "designed to substantially interfere with and impair the management of the Durham Police Service" in terms of day to day operations and its management of performance issues. The Board also points out that none of the comparators have any similar provisions, although some do have notification and/or representation rights in situations where discipline is being imposed. The Board suggests that the current recognition clause adequately acknowledges the Association's rights and that there is no demonstrated need for the proposed clause.

Decision: I cannot agree that the Association's proposal amounts to any substantial interference with management rights. The desire to act as a representative to an individual, upon request, does nothing to take away the Chief's or management's right to exercise their authority or powers. Representation rights often result in the clarification of issues early, the avoidance of grievances and the de-escalation of problems. However, the Association's proposal is very broad. It would allow a member to ask for representation in almost any conceivable situation where management wanted or

needed to discuss performance or conduct. Many of these discussions are mere counseling or advisory in nature. They may not be disciplinary and are sometimes better dealt with informally. Therefore the proposal is overbroad. What the parties would benefit from would be a provision that better addresses the goals of improved communication and dispute resolution, while at the same time recognizes the existing and legitimate authority of the Chief and management. **Therefore, with the comparators in mind, I award that the parties introduce a new provision that allows for a member to request and receive the representation of the Association at any meeting where formal discipline may be imposed, subject to the representative being available within a reasonable time.**

Article 10.01 - ONTARIO HEALTH INSURANCE COVERAGE (New) - Uniform and Civilian

The Association is asking for a clause that would have the Board pay for any premium, levy, tax, or cost levied in connection with the provision of public health insurance. This request arises from the fact that a grievance had been filed over the Board's not paying the Ontario Health Premium. When the matter came to arbitration, the parties agreed to adjourn the case in order to discuss the matter in negotiations in the hopes of achieving a "mutually agreeable resolution" of the issue. However, the Association feels that the Board "refused to bargain" this issue during negotiations and simply held to the position that it had no obligation to pay for the OHP. The Association characterized the Board's tactics as "an abuse of the arbitration process" and as an indication of "bad faith". It was said that the Board should never have been allowed to adjourn the arbitration and then "refuse to bargain the issue."

The Board says that if the Association's grievance succeeds, there is no need for any amendments to the contract. Further, it stressed that the cost of what is being sought would amount to $800,000 annually that would have to be

taken out of some other aspect of compensation. Finally, the Board pointed out that none of the comparators have the language that the Association is seeking.

Decision: The evolution of this issue is most unfortunate. If there was no realistic or foreseeable possibility to achieve mutual agreement on this issue, it would have been better for the arbitration to have run its course and given the parties an interpretation of their current rights. By deferring and/or adjourning the arbitration hearing, the parties have wasted the costs of that day, wasted time on the issue at negotiations and left the issue in a legal limbo. I cannot and do not attribute blame to either party. This is not a "bargaining in bad faith" inquiry. I simply mention this history to point out the unfortunate evolution of this issue. That leaves us with the "merits" of the request. When one looks at the comparators, it must be noted that what the Union is now seeking is unprecedented.

Replication principles impede the awarding of a provision that no other parties have adopted. Further, the cost implications are very significant. **Under these circumstances, it is most appropriate to decline to order any changes to the current language. The parties can resume the rights arbitration process if they so choose.**

Article 13 - SICK LEAVE RETIREMENT BENEFIT

Current language provides for a cash payment equal to a member's sick leave retirement credits (in hours) multiplied by one-half the member's regular hourly wage in effect at the time of retirement (Article 13.01(a)). There is no limit to the cash out. Further, where a member gives 90 days' advance notice of his/her retirement date, there is an entitlement to a cash payment calculable on the basis of the accumulated sick leave credits accumulated in the last 36 calendar months prior to the retirement (Article 13.01(b)). The Board is proposing that the benefit in 13.01(a) be "capped" at a maximum of six months, and that the accumulation in Article 13.01(b) be limited to the last 12 months prior to retirement. The rationale for the Board's proposal is that the current provision is a

very costly item. It argues that the proposed changes would bring the parties more in line with their comparators.

The Association strenuously resists any changes to this provision. It argues that the current language was adopted in 2001 by the parties after being proposed by the Board on the basis of the rationale that it would encourage better attendance, especially for those contemplating retirement. The Association submits that this article serves its intended purpose by creating an economic incentive for going to work. The Association also views this as a major request for an "unwarranted concession". It was said that when the parties' contract is compared with others as a whole, this provision is not as "rich" as the Board would have suggested. The Association pointed out that some of the Regions cited by the Board also provide for pre-retirement leaves, OMERS credits, STD plans and/or severance. The Association suggested that there may well be areas wherein the current provisions between these parties could be "fine tuned", however, it has no willingness to agree to the fundamental changes that the Board was proposing, with nothing offered in return.

Decision: The provision does create a significant liability for the Board that must be recognized in terms of the total compensation. However, the provision is relatively new to the parties. It was arrived at in collective bargaining, after being introduced by the Board and accepted, presumably as a result of a rational negotiation process. There is an obvious mutuality of benefit to the parties contained within the provision. Members are given an economic incentive to remain at work, and the Board achieves the benefit of the active service of its most experienced members. If the Board's request was granted, it might find itself in a position of wondering whether it should have been more careful about what it was hoping to achieve. Under all these circumstances, **there is no demonstrated reason to alter this provision.**

Article 17.01 - SALARIES - Uniform/Civilian

The Association is seeking a 3.25% increase. The Board is offering 3%. Each party presented the same rationales for their positions as they gave with regard to the 2006 contracts.

Decision: The rate increase awarded above for 2006 put the parties at the level of the average for their comparators. In keeping with that same approach and having regard to their comparators who have resolved their contracts at this time, **I award an increase of 3.07%.**

Article 17.01- SALARIES (Uniform) - Rank Differentials

The current rank differential for the Staff Sergeant is 125% and for a Sergeant is 113%. The Association is seeking an increase to 125.5% and 113.5% respectively to put them in line with their counterparts in comparable services.

The Board articulated no philosophical opposition to this request, but simply pointed out that any increase has consequences on monies available in other areas.

Decision: In order to maintain relative placement with the given comparators, **the pay differential for the Staff Sergeant and the Sergeant shall be increased to 125.5% and 113.5% respectively.**

Article 17.01 - SALARIES (Civilian) - Communicators and Communicator Supervisors

The parties agree that the general increase in salaries should be applied to both the Uniform and the Civilian bargaining units. However, the Association is also seeking a special "market adjustment salary increase" for the Communicator and Communicator Supervisor positions. It was submitted that the proposed increase is necessary to bring those positions to the same salary level as the same positions in the comparable regions. The Association filed

charts showing that these positions are indeed the lowest paying of the relevant comparables. Further, similar positions in Halton received what appears to be a "catch-up" adjustment in 2006 and 2007 that brought them from behind Durham to somewhere closer in line with the other comparables.

The Board's response to this proposal was to emphasize that the salary levels in this Region are the result of the complex mix of collective bargaining, their Pay Equity Plan and their Job Evaluation scheme. The Board suggested that if the Association really wants to add market adjustment to the determination of specific positions, this might result in a lowering of salaries in some categories, such as the Court Officers, who are paid more than in other regions. Finally, the Board pointed out that Article 8 of the Civilian Collective Agreement contains a mechanism that allows for market value adjustments when the Service is experiencing difficulties attracting qualified members for a particular position.

Decision: The Association's figures speak for themselves and do appear to show that these positions are receiving lower salaries than are paid in the comparable Services. However, the exact job descriptions were not filed, nor is there any way to evaluate the relative duties and responsibilities of the positions. Further, the current salaries are the result of the parties' application of bargaining, job evaluations and Pay Equity. These create an internal equity that could be dramatically affected by a simple market adjustment to two specific positions. Finally, the wording of Article 8 suggests that there is an existing mechanism to consider market adjustments. For all these reason, **I decline the Association's requested change.**

Article 18 - HOURS OF WORK - Uniform and Civilian

The current language recognizes that there is a compressed work week and that it will continue "for the term of this agreement." The Association has proposed language what would put the compressed work week schedule expressly in the Collective Agreement for both bargaining units and that would recognize the Staff Deployment Committee as the decision making body with

responsibility over any changes. It appears that the reason for this request is concern about potential changes.

The Board characterizes this request as being "completely unnecessary". The Board also points out that the Collective Agreement provides that it can change schedules with ninety days notice and that there is the Staff Deployment Committee mandated to review proposed schedules and to make recommendations.

Decision: I understand the Association's concern is that it has no ability to ensure the continuation of the current shift schedules under the existing language. The Association is content with the actual status quo, and simply wants to ensure its continuance with contractual protections. However, I also understand the Board's concern about enshrining a system into a contractual obligation that may not remain appropriate in the future. The Collective Agreements contain a mechanism to talk about changes in shift schedules. It may not be ideal from the Association's perspective, but at this point in time, given the other contractual protections, **I decline to award the requested changes to this article.**

Article 22 - SPECIAL PAY - POLICE SENIORITY PREMIUM (Uniform)

The Police Seniority Premium is an important component of the members' compensation package. Currently, the premium is calculated on the basis of "continuous active service as a sworn member of the Board, from the date of their oath of office." The contract also allows for credit for members employed as of August 4, 2004 for service as a sworn member of other accredited services.

The Association is seeking to amend this provision to include service as a Durham Region cadet in the calculation of continuous service. The Association argues that the current language creates a "grave, underlying unfairness" because it believes that members transferring from other services have had their cadet service recognized in the calculations of their service premiums.

The Board disputes that any inequities have been created. It states that it has never calculated cadet service for anyone as part of "continuous active service" because it only considers "sworn service" as relevant to the equation. The Board acknowledges that some Services do consider cadet service, but it stresses that such service was not agreed to in this Region when the Premium was introduced. It also disputes the allegation that cadet service with other Regions has been credited for anyone entering this Service. The Board also repeated its request to remove statutory holiday time from the calculation of the premium.

It should be noted that this issue arises out of the fact that the parties failed to follow through on their 2004 Memorandum of Settlement where they agreed to define "continuous active service" in their Collective Agreement. Having "agreed to agree", they were unable to reach any agreement. They then sought to litigate the issue of the meaning of "continuous active service" in a rights arbitration before Owen Shime in 2005. He came to the inevitable conclusion that he was not really being asked to interpret a term; rather, he was being asked to define a term "which the parties themselves have not defined."[2]

Decision: It is entirely within the parties' prerogative to define "continuous active service" any way that they can mutually agree. Their real problem is that they cannot find any mutual agreement. There is no right or wrong, better or worse, definition that can be applied here. The comparables are not helpful here. Other "service" may or may not be relevant to the value of a police officer to a Service. All that is clear to date is that these parties did not agree to include cadet service when the premium was introduced, and that the Board has not intentionally credited it for anyone entering this Service. So since there is no evidence of internal inequities, and the cost implications of this proposal are significant, I **decline the request to amend the contract to include cadet service with this**

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[2] *Durham Regional Police Service and Durham Regional Police Association*, decision of Owen Shime, dated September 15, 2005 at p. 6

Region in the calculation of the Seniority Premium or to remove statutory holiday time from the entitlement.

Article 22.05 - SHIFT PREMIUM (Uniform and Civilian)

The current language provides for shift premiums for certain shift assignments. The Association is seeking an increase in the premiums, arguing that they have been at the same rate for twenty years and that it is time for an increase. The Board opposes any increase and points out that the current premiums are higher than the averages of those paid to comparators.

Decision: When the comparator shift premiums are considered, the case for any increase at this time cannot succeed. Accordingly, **I decline to award a change to this provision.**

Article 28 - SICK LEAVE AND WSIB (Civilian and Uniform)

The current language provides that a member who is absent due to an illness or injury that entitles him/her to WSIB benefits will receive a "top-up" to eliminate the difference between the benefit payment and their regular rate of pay. The Board is proposing that receipt of "top-up" be limited to two years, and that it would be calculated on the basis of the employees' net, rather than gross salary. Finally, the Board wants to add subrogation rights and language to specify that no sick leave credits will accumulate while a member is eligible for WSIB compensation.

The Board argues that the current provision is superior to the comparables, many of which have caps and are calculated on the basis of net salary, with subrogation. The Board argues that it is important to recognize that WSIB payments are not taxable. Therefore, when the top-up is calculated on the basis of a gross salary, the employee absent on WSIB may conceivably receive more in a year than someone who was actively at work. Finally, the Board proposed a "subrogation" clause to allow it recovery of any monies paid pursuant to this clause in the event that the member becomes entitled to recovery against

a third party. The Board argues that its proposed changes are more in accord with the comparators because Durham's current treatment of this issue is "superior" to the others.

The Association responded by pointing out that while some comparators' Collective Agreements indicate that the WSIB is calculated on the basis of net salary, this is often ignored in practice because of the difficulty of determining a member's net income. More importantly, the Association argued that the rationale behind having the calculation based on gross salary was the intention to try to make up for the fact that injured officers will not be able to accumulate their usual amount of overtime while they are incapable of active duty. Therefore, it was said that this was the way the parties would try to make up for those lost opportunities. The Association also argued strenuously that there should be no cap on the length of time that the top-up should continue, nor should there be any bar to the accumulation of sick leave. It was stressed that police officers are obliged by law to put their personal safety at risk, and only find themselves in receipt of WSIB when they have been injured in the course of their duties. Often these injuries are the result of the intentional and/or criminal acts of others. It was said that this is why the parties had historically agreed to have the sick leave continue to accumulate. The Association argued that police officers should not have to continue to face those risks and then find that they are worse off while on WSIB than at work. Finally, the Association submitted that some of the comparables that the Board tried to rely on to show contracts with caps on the top-ups also have Short Term Disability plans that are not available under this contract.

Decision: Both parties relied on the decision of Arbitrator Kevin Burkett in *The Corporation of the City of Sault Ste. Marie and the Sault Ste. Marie Professional Fire Fighters Association,* dated August 15, 1988. That was an interest arbitration where the City proposed an amendment to the WSIB top-up provision "to account for the fact that the . . . payments are not taxable." The resulting

award concluded that the firefighters should receive full "net" salary while off work. The rationale was as follows:

> We are unable to accept that a fire fighter off work on WCB should receive greater net payment than a fire fighter who is at work. Neither logic nor the equity of such an arrangement has any appeal to us. While we are strongly of the view that a fire fighter off work on WCB should not suffer any loss because of his work related injury or illness we are just as strongly of the view that he should not be the recipient of a windfall not available to his colleague who must work his regular assigned shifts.

I agree with the parties that these principles apply to the case at hand. People injured at work should not suffer losses or achieve a windfall. Police officers and firefighters are more vulnerable than most to workplace injuries because of their statutory duties and the fact that they are required to put their own safety at risk. It would be unconscionable to award a collective agreement that resulted in them incurring losses or being worse off than their colleagues as a result of the exercise of their duties leading to a workplace injury. Precisely because of that, I cannot accept that there should be any cap on the period of top-up. While we can only hope that no one will need the top-up for more than two years, those who remain off work beyond that period will probably be the most in need. Further, I note that while some Services do provide that no sick leave will accumulate while on WSIB. However, this is not the prevailing norm among the comparators and there is often a STD plan in those circumstances. That is not the case here. Therefore, **I decline to order that there should be a limit to the period of WSIB top-up. Similarly, they should continue the ability to accumulate sick leave credits.**

On the other hand, there is an apparent problem with the notion that an employee off work in receipt of WSIB and the top-up might end up with more than an employee at work for the same time. This will occur because of the calculation of the top-up on the gross salary and the effect of income tax rules. It is true that someone actively at work may earn more than someone who is off because of the ability to undertake overtime. That is because s/he is working more than the regular hours that make up the equation of a regular salary. But if we are comparing "the regular rate of pay" in Article 28.03, it is true that the

current use of gross salary may result in the injured worker receiving more than the active employee. The intent of the parties is to put them in the same position. This can never be completely achieved because the monies can never completely compensate for the injury. But if we apply the principles of "logic and equity" quoted above, **it is appropriate to amend Article 28.03 to provide "when the amount paid under this provision is exempt from income tax, the total amount paid to the member for the pay period shall not be more than their normal salary or wages in the pay period, less the proportionate amount of income tax."** I so order.

In addition, the Board's desire to include a subrogation clause is legitimate. It does not take away any entitlements or rights from the members, and it adds proper economic protection to the Board. Accordingly, **I order that Article 28.03 should include a second paragraph with the language contained in the Board's proposed 28.03(a).**

Article 33 - RESIGNATIONS

The contract allows a member 48 hours to withdraw a submitted resignation. The Board wants this 48-hour period to apply to a "notice of retirement" as well. It suggested that there should be no resistance to the proposal. However, the Association does not agree. It points out that officers often give notices of resignation months in advance of the anticipated date and then "life circumstances change", resulting in the officer wanting to revisit the decision to retire.

Decision: The Board's proposal is not unreasonable and it would allow for more certainty in planning. But life does not always follow expectations. The decision to retire is a very profound one. It is all too easy for family, economic and personal circumstances to change overnight and this may have dramatic implications on the initial decision to retire. If the Board's proposal were adopted, there would only be a 48-hour window to withdraw. Given the potential difficulties that could result if the proposal were adopted, and the fact that there does not

seem to be any evidence of problems with the status quo, **I decline to order any changes to this provision.**

Article 38.01 - COMMISSIONERS OF OATH

Members who are assigned the duties of a Commissioner of Oaths are currently receiving an allowance of $450.00. The Association initially proposed that this be increased to $1000, and then withdrew the request when the Board proposed that it be decreased to $250.00.

Decision: **The status quo shall be maintained.**

Article 39 - PART-TIME EMPLOYMENT - (Civilian)

The current contract specifies when and why part-time members will be employed. The Board has proposed changes that would specify that part-timers could not fill a vacancy for more than 12 months but that would remove the current conditions for their hire. It was said that the intention was to provide for emergency or exigent circumstances. The Board argues that this is necessary to allow for the proper operation of the service. The Board also proposed changes to the entitlement for statutory holiday pay.

The Association points out that the Board's proposed language goes far beyond allowing for the hire of part-timers in emergency or exigent circumstances. The proposal could potentially allow for any vacancy to be filled for up to 12 months with a part-timer and would remove existing restrictions on the use of these employees. The Association offered to discuss and consider language that would make provision for emergency or exigent situations. But it resists the proposal as it now stands.

Decision: If the Board wants to address emergency and exigent situations, it can and must do so with language directed for that purpose. Nothing in the proposed clause signals that intent. Instead, the proposed change would fundamentally alter the triggering events for the hiring or retention of part-time

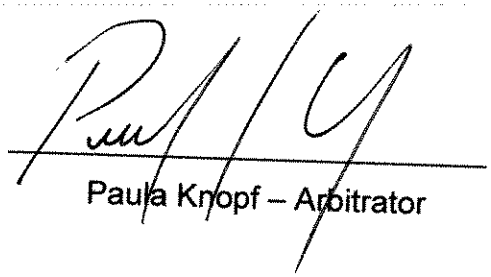
employees. Since the rationale is not reflected in the proposed change, and since there is no demonstrated problem with the existing language, **the status quo shall be maintained. Similarly, the statutory holiday pay shall remain unaltered.**

Part D - CONCLUSION

The parties are ordered to incorporate all their agreed upon items and all the changes awarded above into new collective agreements for the terms specified.

I retain jurisdiction with regard to the implementation of this Award. Further, because of the many items left in dispute and the confusion over the status of some items, I also retain jurisdiction to resolve any other items that remained in dispute but that I inadvertently failed to deal with in this Award.

Dated at Toronto this 23rd day of October, 2007.



Paula Knopf – Arbitrator