IN THE MATTER OF AN INTEREST ARBITRATION

B e t w e e n:

THE OTTAWA POLICE SERVICES BOARD

(the "Employer")

- and -

THE OTTAWA POLICE ASSOCIATION

(the "Association")

and in the matter of renewal Collective Agreements covering uniform and civilian personnel for the period January 1, 2011 through December 31, 2012.

Russell Goodfellow – Sole Arbitrator

APPEARANCES FOR THE EMPLOYER:

Dan Palayew, counsel
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APPEARANCES FOR THE ASSOCIATION:

Bill Cole, counsel
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Hearing held on October 23, 2012. Written submissions completed on December 3, 2012

AWARD

This award concerns two renewal Collective Agreements for the period January 1, 2011 through December 31, 2012 – a period that has already expired – covering approximately 1,340 uniform and 646 civilian employees, respectively.

The parties were able to reach agreement on most issues but remained apart on several others, including wages. The disputed matters were the subject of verbal presentations, accompanied by detailed written briefs, on October 23, 2012, followed by written reply submissions completed on December 3, 2012. Personal circumstances of the Arbitrator made it difficult to provide a decision before now. The parties' patience is appreciated.

Proposals

The Association made the following proposals:

1. Wages

An across-the-board increase to base salary of 2.99% for the year 2011, followed by a further increase of 2.95% for the year 2012.

2. Payment in Lieu of Interest on Wages

$125.00 to each employee to cover the period from the date of notice to bargain to the date of arbitration.

3. Letter of Understanding – Extended Health Care

Incorporation of the terms of the existing Letter in the Uniform Agreement within the body of the Agreement rather than maintaining it as an Appendix to the Agreement.

4. "Direct Entry Officers" – Vacation/Annual Leave

Inclusion of language in the Uniform Agreement that would credit employees for years of service with prior police forces for vacation/annual leave purposes.

5. Service or Responsibility Pay for Civilian Members

Amending the existing provision so as to provide for certain specified lump-sum payments to commence after the fifth year, and continuing annually thereafter, with increases to those payments at five year intervals – rather than payments that commence only at the 20 year mark, and annually thereafter, without any further increases, as exists at present.

6. Two-Person Patrol Cars

The formation of a Joint Committee to meet, consider, and report on the possible need for two-person patrol cars, as a health and safety issue, which may result in a referral of that issue to the next interest arbitration board, if there is one.

The Employer's response to the Association's proposals was as follows:

1. Wages

An across-the-board increase to base salary of 2.5% in 2011 and 2.5% in 2012 provided all of the Association's proposals are rejected except as set out below.

2. Payment in Lieu of Interest on Wages

Rejected.

3. Letter of Understanding – Extended Health Care

Non-renewal (*i.e.* deletion) of the existing Letter.

4. "Direct Entry Officers" – Vacation/Annual Leave

Substantial agreement to the Association's proposal, but without retroactive application.

5. Service or Responsibility Pay for Civilian Members

Rejected.

6. Two-Person Patrol Cars

Agreed, except as regards the timing of the start-up of the Committee, approvals for the establishment of the terms of reference, and to whom the Committee's report would be released.

The Employer also made the following proposals of its own:

1. Pro-ration of Vacation in Year of Retirement for Uniform and Civilian Members

Replace the existing provision that entitles retiring employees to an entire year's vacation allotment in the year of retirement (in either time off or pay) with one that is calculated only up to the date of retirement.

2. Compensation for Out-of-Town Trips – Re-defining the Geographic Area

Replace the existing references to the "Regional Municipality of Ottawa - Carleton" in the existing compensation provision in the Uniform Agreement with the words "Ottawa and Gatineau area".

3. Introduction of a Probationary Period for Civilian Personnel

Introduction of a new clause establishing a probationary period of three months for all employees other than those working in the Communications Centre, where it would be 12 months, subject, in both cases, to a possible three-month extension on agreement of the Association, and providing that terminations would only be grievable for arbitrary or discriminatory decision-making.

4. Introduction of an On-Call Provision for Civilian Personnel

Introduction of a new clause that would provide a different method for compensating employees, particularly IT personnel, who may be "required to provide professional services over the telephone without returning to the workplace".

The Association's response to the Employer's proposals was as follows:

1. Pro-ration of Vacation in Year of Retirement for Uniform and Civilian Members

Rejected.

2. Compensation for Out-of-Town Trips – Re-defining the Geographic Area

Rejected, but with a counter-proposal.

3. Introduction of a Probationary Period for Civilian Personnel

Rejected, but with a counter-proposal.

4. Introduction of an On-Call Provision for Civilian Personnel

Rejected.

Reasons

1. Wages

Not surprisingly, this is the principal issue in dispute. Somewhat more surprisingly, the parties were not particularly far apart on the issue, at least when the Employer's caveat is taken into account.

The Association is seeking wage improvements of 2.99% and 2.95% and the Employer is offering increases of 2.5% and 2.5% (again subject to its caveat) – a difference of less than one half of one percent in each year. In terms of salary, the difference in the parties' positions for first class constables is approximately $399.00 in year 1 and $784.00 in year 2. In terms of costs to the Employer, the Employer estimates an increase of 0.5% to be roughly $1,000,000.00 in the context of an operating budget with expenditure totals in those years in excess of $260,000,000.00 and $270,000,000, respectively. While far from trivial, to be sure, these are the kinds of differences that parties are often able to resolve on their own, with or without the benefit of mediation. Such efforts were unsuccessful here, however.

The explanation for that lack of success, it seems to me, is in what underlies the differences. Although many arguments were presented (particularly by the Employer), the dispute focuses on the Association's desire to maintain the same relative ranking amongst the "Big 12" Police Services that the parties themselves freely negotiated in the last round of bargaining, on the one hand, versus a desire on the part of the Employer to

comply with City Council's directives (which it then voted to adopt) of limiting any and all wage increases to 2.5% - a limit which all other City bargaining units (save Fire, which is also at interest arbitration) managed to fall within. That limit, in turn, was the product of Council's undertaking not to increase property taxes beyond that amount. And, as the Employer pointed out, all of the other municipal bargaining units received increases of 2% or less.

As the parties well know, the fundamental goal of interest arbitration is "replication"; that is, to produce the kind of outcome that the parties would themselves have achieved had they been able to conclude an agreement on their own. As a practical matter, especially where clear patterns have already been established, that typically involves an exercise in "comparability" – of finding, and applying, the best possible comparators for the particular workplace and the particular workers. Generally speaking again, that involves comparing nurses to nurses, support workers to support workers, teachers to teachers, firefighters to firefighters, police to police, and so on. And, where workplaces are concerned, it typically involves comparing institutions or employers of similar size and/or in a similar field or setting, *i.e.* public hospitals to public hospitals, nursing homes to nursing homes, and municipalities (especially of a similar-size) to municipalities. The presumption (albeit rebuttable) is that, across such comparison groups, the work is sufficiently similar, the sources of funding sufficiently comparable and the real ability to pay not substantially different as to warrant similar, if not identical, treatment. This means that nurses end up being paid like nurses (not like hospital support workers) and that police constables will be paid like police constables (not like municipal water meter readers). This approach also has the benefit of making bargaining more

predictable and, therefore, efficient. Absent exceptional circumstances, established patterns will be followed.

Support for this "comparability" approach can be found in these parties' own experience. In the last round of bargaining, for example, which produced voluntary Agreements, the parties continued a process begun earlier of moving the salaries of first class constables up to a point in the ranking amongst the "Big 12" that corresponds to the relative size of the municipality or police service – placing Ottawa slightly behind Toronto, Peel and York, but slightly ahead of Hamilton and London (to take the next two). Now, with *all* of the relevant data in for 2011, as well as most for 2012, the Association, through its proposed increases, seeks to maintain *but not improve* its relative position. Necessarily, the proposed percentage increases in both years also correspond to the kinds of percentage increases that were awarded or agreed to at the other municipalities. So, for example, in 2011, the first year of this Agreement, the increase in Toronto was 3.19%, in Peel it was 3.05%, in York it was 2.75%, and in Hamilton and London it was 3.075% and in 2.98%, respectively. Settlements and awards in 2012, the second year of this Agreement, follow a similar pattern, with a norm of roughly 3.0%. Thus, what the Association is proposing falls squarely within the objective and subjective (based on the parties' own past decision-making) comparators.

The Employer seeks a different outcome, however. It proposes percentage increases in both years that differ from those paid to police constables almost everywhere else and that would place first class constables in Ottawa at or very near the back of the pack, behind such forces as Niagara, Durham and Halton. Thus, the question is what is

there (or was there) about Ottawa in 2011 and 2012 that would justify the proposed departure from the established police sector norms and that would require its police constables to be paid at below standard rates relative to constables in other similar-sized municipalities. I have examined the economic data with care and there is, quite simply, no convincing answer to this question. Apart from the resolution adopted by City Council, there would appear to be no less (indeed, there may be somewhat greater – if levels of employment/unemployment are considered) ability to pay in Ottawa than elsewhere. Ottawa, in other words, is not uniquely negatively situated, or uniquely unable to pay its constables like other constables, among the "Big 12" Police Services.

This is not to say, however, that the fact that bargaining units of other municipal workers in Ottawa either agreed to or were awarded different levels of increases is an irrelevant consideration. It is to say, however, that where a clear pattern has already been established for the same or similar work amongst the same or similar-sized municipalities, that will not generally be a factor that will be sufficient to support a departure from those clearly established norms, see *e.g*. my decision in *Bridgepoint Hospital and Canadian Union of Public Employees, Local 79*, dated November 2, 2011. And, of course, many of those same local outcomes will have been achieved through a similar kind of comparative analysis. The upshot is that different types of work – as a product of many factors, such as actual or perceived value and actual or perceived bargaining power – may yield different results. There is nothing surprising in that.

All of which brings me to the dictates of City Council. The simple fact is that while the Employer may choose to be bound, or be actually bound, by the resolutions of

Council, adopted at a political level, it is trite to observe that bargaining agents are not, and arbitrators cannot be, so bound. If they were, interest arbitration, as a substitute for the free collective bargaining process and the loss of the ability to strike or lock out, would be a hollow exercise indeed.

The Association's wage proposal is therefore awarded and the Employer's rejected.

2. Payment in Lieu of Interest on Wages

I am sympathetic to the Association's concerns about the length of time it often takes to move matters from the date of notice to bargain to interest arbitration. However, the fact is that "interest", or a lump-sum alternative as proposed by the Association, is something that has been awarded only extremely rarely, and I am unable to see a sufficient basis for deviating from that practice here.

The Association's proposal is therefore rejected.

3. Letter of Understanding – Extended Health Care

This is a somewhat unusual issue, both as to form and substance. As a matter of substance, the Association, rather than the Employer, is the contract holder with the insurance carrier for the benefits funded by the Employer under the Uniform Agreement. This is an exceptional, albeit not unheard of, arrangement outside of police agreements

and within such agreements it may well be unique. As a matter of form, the unusual feature is that it is not embodied in the terms of the Agreement itself but in a Letter of Understanding to the Agreement. The Association's proposal is to incorporate the terms of the Letter into the body of the Agreement, while the Employer wishes to delete the Letter, and terminate the arrangement, altogether.

The Association's proposal stems from its concern about the need to expressly renew the Letter at each round of bargaining *and* about the fact that the Employer, after the nominal expiry date of the existing Agreement, appeared to take the position, for a period of time, that it would not make up a funding deficit until the status of the Letter was resolved in bargaining or at arbitration. In that regard, however, the Association has its remedies, or potential remedies, in the form of a grievance, should it choose to pursue them. As for its appearance in the form of a Letter, and the need to renew that Letter with each new Agreement, it seems to me that that may well be reflective of the unique nature of the arrangement and historical bargain.

For its part, the Employer is concerned about cost and administration, being of the view that it has adequate control over neither. *If* there is a basis for that concern, however, it is not one that is clearly borne out on the material presented to me – material that the Association went to great lengths to rebut. And, I note, there are levers of control and informational opportunities available to the Employer within the terms of the Letter itself, should it wish to deploy them. The Association does not appear to have been an obstacle in that regard. Finally, the Association was at pains to point out that there was little or no discussion of the Employer's proposal in bargaining, generating a certain

alleged "astonishment" on its part that it would be pursued here. As an offset to that assertion, however, the Employer notes that all that was proposed in bargaining by the Association was the renewal of the Letter rather than its incorporation.

In my view, the Employer's proposal for change to this arrangement, which has been in place since the 1960's, is one that demands far more discussion between the parties themselves, a greater demonstration of need, and a fuller understanding of alternatives, than was communicated to me. And, as intimated above, I am also unable to see sufficient reason to alter the status quo in favour of the Association's proposal.

Both parties' proposals are accordingly rejected. The Letter is renewed.

4. "Direct Entry Officers" – Vacation/Annual Leave

Because of the sequence of the parties' presentations (with both sides' initial submissions and then replies being filed simultaneously), it is unclear whether this remains an issue or whether the parties have reached agreement on it. My belief is that there is *substantial* agreement, in the terms that follow; however, if I am wrong in this, and in respect of those few areas where there may continue to be disagreement, the following also constitutes my award on the issue.

The Association's proposal for Articles 15.01(b) and 15.04(a), which relate to vacation and annual leave only, are awarded, effective December 31, 2012, the last day of

the Agreement, so as to be operational for the 2013 calendar year. The definition of "direct entry officers" for this purpose shall be as described at paragraph 308 of the Association's Brief. Finally, there shall be no language, at least in this Agreement, prescribing or limiting the permissible duration of any "break in service" for an individual to qualify as a "direct entry officer, except that it shall not be less than one month.

If, given the timing of this award, the foregoing presents any administrative obstacles that the parties are unable to resolve expeditiously, they may be referred to me for resolution.

5. Service or Responsibility Pay for Civilian Members

The Association's proposal is for a normative provision. As noted by the Association in its submissions, all of the comparators referred to above have collective agreement provisions for lump sum payments to civilian members (which also exist for uniform members), which begin, annually, at the five year mark, with the amount of the payments increasing every five years thereafter year up to and including, in most cases, 35 years (but, in two cases, only to year 30). The parties' expired Agreement, however, only provides for such payments to begin, annually, at the 20-year mark, with no increases at years 25, 30 or 35. Finally, the amount of the payment at the 20-year mark – $500.00 – is below (and, in some instances, substantially below) most of the comparators. The difference, according to numbers provided by the Association, can amount to as much as $18,100.00, or an average of $11,788.00, amongst the various comparators, over

the course of a 35-year career. Further, the Association notes that its proposal would not eliminate this gap but would still leave these employees *slightly* behind. Finally, the Association proposes the removal of language that makes the payment conditional on "satisfactory performance" and that defines its availability to "all eligible employees on strength in December of each year" with those not on strength in December presently receiving only a pro-rata amount.

The Employer does not seek to rebut the Association's comparative data but, instead, points out that it "does not have any retention or recruiting issues" *and* that the Association's proposal would generate an added cost of approximately $122,000.00 in 2011 and $138,000.00 in 2012 – something that, it submits, it "cannot afford under the economic climate of restraint". Further, the Employer notes that the existing provision was introduced only recently (having come into effect under the expired Agreement), representing, therefore, both a recent improvement for employees as well as a recently added cost.

In my view, the appropriate resolution of this issue is for the parties to continue on the path that they have begun but not as quickly or as fully as the Association proposes. The gap that exists here has been part of the Agreement over time, perhaps reflecting choices in other areas, and it is a gap that will therefore take time to close.

Accordingly, I award, effective the last day of this Agreement, a change to the relevant Article – 6 (a) – that would increase the amount payable at the 20 year mark to $700.00 and that would institute annual payments at the 10 and 30 year marks of

$325.00 and 1,000.00 respectively. These payments correspond, roughly, to the average amounts for the other services as at the years in question. The language of the provision shall not otherwise change.

6. Two-Person Patrol Cars

There is substantial agreement on this issue.

The Association's proposal is awarded as amended by the Employer's response at pages 11 & 12 of its Reply Brief, except that the reference to "six (6) months" at page 11 of that Brief shall be replaced by "four (4) months" and the reference to "the President of the Ottawa Police Association" found in the Association's original proposal shall be retained rather than deleted.

7. Pro-ration of Vacation in Year of Retirement for Uniform and Civilian Members

In the year of retirement on pension (*i.e.* not a "mid-career quit") employees receive a full year's vacation allotment (or pay in lieu) regardless of the date of their retirement. The Employer is unable to say how much "excess cost", as it would describe it, this generates in a given year but notes that over the period 2008-2012 it paid out $1,647,000.00 in vacation leave. The Employer would like to reduce its costs by tying the amount of vacation time (or pay) in the year of retirement to the actual retirement date – something, it notes, the Ottawa Senior Officers' Association agreed to in the last agreement.

The Association points out that the Employer's proposal would require the deletion of a long-standing collective agreement provision that expressly addresses the issue and that is also present in the majority (if only by one) of the comparator agreements. (That majority would appear to be eliminated, however, if the OPP is included.) Further, the Association draws attention to a relationship that, it submits, exists between the disputed provision and the so-called "sick leave gratuity" provisions that are *still* found in five comparator agreements but which it agreed to eliminate many years ago (albeit with some degree of offset in the form of a new severance pay provision). Finally, describing this as a monetary benefit like any other, that was freely negotiated, and that rewards employees for a "long policing career in Ottawa", the Association notes that only three comparator agreements are without *both* of the benefits to which it refers.

In my view, a case has not yet been established for the removal of this long-standing provision. For now, it is one that is better left to the parties to attempt to resolve in future negotiations, perhaps having regard to the kind of approach taken by them with respect to the "sick leave gratuity", where trade-offs, or more finely-tuned substitutions, may be possible.

The Employer's proposal is accordingly rejected.

8. Compensation for Out-of-Town Trips – Re-defining the Geographic Area

The Employer proposes to change the area covered by such payments from the "Regional Municipality of Ottawa-Carleton" to the "Ottawa and Gatineau area" both

because the former no longer exists (having been replaced by the "City of Ottawa") and because many trips to Gatineau, which is only a few kilometers distant, do not warrant such payments. While agreeing to change the former language, the Association objects to the use of the word "area" in the Employer's proposal – a term that it describes as ambiguous and, therefore, ripe for both disagreement and inconsistent application.

However, to address the Employer's apparent concern, the Association proposes the substitution of "City of Ottawa" for the "Regional Municipality of Ottawa-Carleton" in Articles 18.04(a) and (b) (which deal with compensation for travel to assignments or courses on off-duty time) and the substitution of the words "a one-hundred kilometer (100 km) radius of the Elgin St. Police Station (Central)" for the same phrase in Article 18.04(c) (which deals with meals, accommodation and expenses associated with out-of-town assignments). The Association describes its counter-proposal as both more precise and "more generous" (to the Employer) than the Employer's proposed language.

Without endorsing the last mentioned aspect of the Association's submissions, I agree with its analysis and, therefore, award its counter-proposal.

9. Introduction of a Probationary Period for Civilian Personnel

There is no probationary period for civilian employees – something that the Employer submits is both atypical and short of its legitimate needs. The proposed three-month period outside of Communications, the Employer notes, is more modest than that

which is found in many comparator agreements, and the proposed 12-month period within Communications is not at all uncommon.

The Association disagrees. It submits that, given the "abundant" opportunities for evaluation and review of an employee's suitability for regular full-time employment that exist in this workplace – in the form of frequently lengthy stints of term employment – there is no need for any such clause. The Association does, however, propose an alternative that seeks to take account of the frequency of such term employment and that would not contain any restrictions on access to the grievance procedure.

In view of the Employer's proposal and the Association's counter-proposal, which appear to rest on differing assessments of factual need and the presence or absence of other evaluative opportunities which do not appear to have been fully explored between them, and which were not fully developed before me, the appropriate resolution is to remit this issue back to the parties on the following terms: the parties shall have ten days within which to agree on language, failing which the Employer shall have the option of accepting, within a further two days, the Association's counter-proposal. If neither of those things happens, neither the Employer's proposal nor the Association's counter-proposal will be awarded; both shall be deemed to have been rejected.

10. Introduction of an On-Call Provision for Civilian Personnel

The Employer proposes that employees who are required to perform services over the telephone, without having to return to the workplace, be compensated at the rate

of time and one half for the first half hour or less and in 15 minute increments thereafter. The Employer sees this as a more realistic way of compensating employees, particularly IT personnel, who may be able to perform any required after hours work remotely and in a matter of minutes than the present method of placing them on standby for an entire shift or calling them in and paying them call-in pay.

The Association rejects the Employer's proposal for "a new form of work outside of the terms of the existing collective agreement" on a number of grounds, chiefly administrative, and as constituting an unwarranted departure from language that was freely negotiated to deal with such situations.

I am not persuaded, on the basis of the material before me, that there is a demonstrated need for change (there is, for example, no information as to the savings that would be realized if such a model were in place instead of, or in addition to, the existing provisions, having regard, for example to the comparative frequency and duration of such services) and I am concerned as to the absence of any clear methodology for administering it. In my view, this matter requires more careful review before any such clause can be sensibly agreed or awarded.

The Employer's proposal is therefore rejected.

Decision

The foregoing, together with any and all agreed upon items, constitutes my award in these matters.

All wage adjustments are to be made retroactively to anyone who was in the bargaining units for any period of time covered by the Agreements, including to any retired employees and to the estates of any deceased employees, with any and all necessary pension adjustments. Such retroactive payments are to be made by way of separate cheque within sixty (60) days of the date of this award.

I will remain seized with respect to the implementation of this award and to correct any inadvertent errors or omissions.

DATED at Toronto this fifth (5th) day of April 2013.

Russell Goodfellow – Sole Arbitrator