

IN THE MATTER OF AN INTEREST ARBITRATION

B E T W E E N:

THE WINDSOR POLICE ASSOCIATION
(Hereinafter referred to as “the Association” or “WPA”)

-and-

THE WINDSOR POLICE SERVICES BOARD
(Hereinafter referred to as “the Board”)

ARBITRATOR: Richard H. McLaren, C.Arb.

CO-COUNSEL FOR THE ASSOCIATION: Nini Jones, Counsel
Paliare Roland Rosenberg Rothstein, LLP, Toronto
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APPEARANCES: Edward Parent Administrator, WPA
Jason DeJong, President WPA
Al Thompson, Chair WPA
Shane Miles, Director WPA

CO-COUNSEL FOR THE BOARD: Glenn Christie, Counsel
Craig R. Lawrence, Counsel
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APPEARANCES: Mayor Eddie Francis
Ron Doherty, Board Member
Al Frederick, Deputy Chief of Police
John Lehicky City of Windsor Human Resources

Hearings in relation to this matter were held at Windsor, Ontario on 15 & 16 September and 25 October 2011.

A W A R D

Background

1. Pursuant to section 122(1) of the *Police Services Act* (“the Act”), the 2010 terms and conditions of employment of the Uniform and Civilian members of the WPA have been referred to mediation-arbitration. This is the first time in 30 years that these parties have gone to a mediation-arbitration interest proceeding.
2. The Association represents 610 Uniform and Civilian members of the Windsor Police Service (“WPS”). One Collective Agreement covers the 470 Uniform members and another agreement covers the 140 Civilian members. These agreements were negotiated concurrently and are both subject to the mediation-arbitration proceeding.
3. The previous Collective Agreements were negotiated for a 3 year period ending on 31 December 2009. The current mediation-arbitration proceeding was only established to determine the 2010 Collective Agreements between the parties. My attempts to mediate a longer term agreement were unsuccessful and as a consequence, a one year agreement is imposed by this Award as provided for by the Act.
4. Notice to Bargain was delivered on 22 October 2009 with the parties exchanging proposals in January 2010. As far as I can determine, there was no effective bargaining between the parties whatsoever. The Board perceives the Association as having a view of “business as usual”; while the Board’s assessment of the situation is that there are dire local economic conditions which require recognition in the Collective Agreements. The Association’s view of itself is that it is ready to negotiate. The Board only put its salary proposal to the Association on the third day of the mediation-arbitration proceeding and refused to reveal a wage proposal during the mediation aspects of this procedure.

5. The parties are in disagreement because the Board's view of the local conditions is that they are fundamentally changing. The Association's view is that Windsor's (also referred to as the "City") economic situation is historically volatile, yet even so, is consistent with the economic trends throughout Ontario and nothing unique is occurring in Windsor right now to justify not paying a pay increase.

Issues in Dispute

6. The Association has a single issue to be determined by this procedure. That is the salaries for both its Uniform and Civilian members.
7. The Board has brought four issues to be determined by this procedure. They are:
 - a. Post-Retirement Benefits -- Uniform and Civilian
 - b. Court Time -- Uniform
 - c. Lay-off Language -- Civilian
 - d. Criminal Investigation Division Schedule -- Uniform

Statutory Considerations under the Act s. 122(5)

8. The Board submits that it has an inability to pay due to economic conditions which the Association vigorously disputes.
9. Windsor has one of the highest unemployment rates in Canada. The unemployment rate peaked at 14%. In May 2011, Windsor had the highest unemployment rate in the country at 10.7%, almost 3% higher than the Ontario rate of 7.9%. New road construction in the summer of 2011 reduced the unemployment rate to 8.5%, however today the unemployment rate remains above the Ontario rate at 8.1%¹. The Association submits data to suggest that

¹ The Association notes that consistent with provincial trends the rate had fallen to 11.3% in August 2010.

over a longer time frame, the position of Windsor relative to that of the rest of the province is not fundamentally different today than it was in previous years. It is on this longer time frame that the pattern of police pay in Windsor, relative to that in the rest of the province, was established.

10. The Board submits data to establish that the labour force and the population have declined since February 2009 despite the fact that the provincial labour force grew at 4.9% and the population at 3.1%. The Board submits the contrast is a demonstration of the precarious economy in Windsor. There is decline in population, size of the labour force, number of employed people and the labour force participation rate.
11. The Association's position is that the City and its Police Services Board is not "unable" to pay but is politically unwilling to pay appropriate wage increases.
12. The Association submits that to the extent that Windsor has a revenue problem, it is self inflicted due to a political choice of the municipality to freeze taxes. The Association's position is that the Windsor Police Force should not be burdened by political choices to freeze taxes and that there is no basis on which an arbitrator should favour political choices over comparative norms. The only reason to make such an unorthodox decision, the Association states, would be if there was a significant change in Windsor, which is not the case since Windsor's unemployment and participation rate in the labour force has always been volatile.

By comparison to the Board statistics it was noted that in August 2011 the unemployment rate was 8.5%, (lower than the rate for the same period in both London (9.3%) and Toronto (8.9%) and only 0.4% higher than the rate for the Province (8.1%).

Resolution of Issues in Dispute

1. Wages

13. The Association proposes what it describes as a normative wage increase across the board for both bargaining units, effective January 1, 2010 of 3.05%. The Board on the third day of these proceedings proposed a wage increase of 1.5% on the rationale that this was the percentage increase after a lengthy strike for the CUPE outside workers.

(i) Parties' Positions

14. The Association submits that the Board has not made a case for special treatment. According to the Association, the rationale for the Board's proposed deviation from decades of police bargaining norms is inadequate, incomplete and lacking in compelling logic.

15. The Board submits that because of the rate of unemployment, Windsor's economy is in a weakened state. Therefore, the ability of Windsor's taxpayers to shoulder the burden of an increased wage rate is reduced.

16. The Association refutes the idea of a community's ability to pay as being meaningless, and only has meaning at the level of the individual or household. The Association points to the data presented by the Board and notes that while the ability of some Windsor residents to pay has been reduced, the ability of the majority has not.

17. The Board makes reference to Windsor's tax revenue to demonstrate that Windsor has an inability to pay. Taxes have been frozen for the past several years. There has only been a 1.3% increase in net property taxes for Windsor for 2005 to 2011. The Association in contrast argues that these budgetary restrictions are self-inflicted and represent a political choice and unwillingness to pay rather than an

inability to pay. The Association submits that it is inappropriate to expect that police officers should have to endure reductions in their pay due to political commitments and moreover, that it is inappropriate for an interest arbitrator to validate and privilege those political commitments by imposing part of their cost on police officers.

18. The Association submits that the economic position of Windsor relative to that of the rest of the province is not fundamentally different today than it was in previous years when the pattern of police pay in Windsor, relative to that in the rest of the province, was established. The Association references a chart outlining the unemployment rate from 1987 to 2011 on page 8 of Tab 1 in their responding brief. This chart demonstrates that Windsor's unemployment rate has been significantly more volatile than that of Ontario as a whole for many years. The Association also provides a chart at page 9 of Tab 1 which demonstrates that the labour force participation rate in Windsor has also been consistently lower than that of Ontario for a marked amount of time.
19. The Association criticizes the Board's data regarding the economic situation in Windsor as "cherry-picking" only the most recent years to disguise the continuing trend of volatility.
20. The Association responds to the Board's submission regarding reduced casino revenue, the decline in value of building permits, as well as the spike of employment insurance (EI) recipients in Windsor between 2008 and 2009. Regarding casino revenue, the Association submits that simply because Windsor has relied upon the casino as a source of ongoing operating revenue in the past, this does not warrant police being paid less because the casino's revenue is weakening now. Regarding the value of building permits and the increased number of Windsor citizens receiving EI, the Association submits that these were both caused by the economic recession which began in 2008, and in fact, both have rebounded in the recovery, a scenario which has been consistent across

Ontario as a whole.

21. The Association submits that Windsor's economic situation is consistently volatile and there is nothing unique occurring now in Windsor's economy to justify deviating from a normative wage increase.

(ii) Ruling

22. *Much* of the Board's data reveals a city which is mature and not a growing municipality.

23. Windsor has been part of the "Big 12" comparator group for many years. The Association presents historical salary information that supports that fact dating back to the year 1990. Windsor has historically maintained a salary level at or very near the average for the Big 12. The Board claims the socio-economic conditions in Windsor mandate a wage increase lower than the historical norm. The issue to be resolved is the sufficiency of the rationale for any proposed deviation from the decades of police bargaining norms. The question to be asked is: would a freely negotiated agreement, which is what this procedure is trying to replicate, have taken into account, the socio-economic conditions?

24. As an answer to that question, the Board has regard to the strike that followed failed negotiations and ultimately resulted in a settlement between CUPE outside workers and the City of 1.5%. It is that very situation that is the basis of the Board's offer at this arbitration. In contrast to that negotiated deal, is the Big 12 police comparator group where 9 of the 11 agreements other than Windsor were settled by the parties and are considered to be freely negotiated agreements. Therefore, the average of the comparator group is reflective in large measure of freely negotiated agreements.

25. The Board's proposition about the regional economy ought to have some bearing on the outcome of this proceeding. I have taken account of their position by a

phased-in series of increases so that by December 31, 2010, the employees end rate is at that of the comparator group but the total cost of the wage changed is reduced by the phasing-in. Therefore, I order that the wages of the Association be increased by 1.00% on 1 January 2010, a further 1.00% on 1 May 2010 and then a further 1.05% on 1 September 2010.

26. In making the foregoing order, I note that the next round of bargaining will begin immediately, and the propositions about regional down turn on the Board's side and return of the indicators to the provincial trend line will be more clearly established in favour of one side's proposition or the other. Whichever way that data turns out to be ought to provide the platform from which to negotiate the current calendar year agreement. I would hope the parties will not get so far behind in bringing their bargaining to a conclusion.

2. *Post-Retirement Benefits – Uniform and Civilian*

27. The By-Law Respecting "Medical, Hospital and Drug Prescription Services for Employees and their Families" is contained in Appendix 2 to the Collective Agreements of both the Uniform and Civilian agreements. The Board proposes that for members retiring on or after January 1, 2019 the provision of retiree benefits after age 65 should be eliminated. In its place would be a new provision for those between 65 and 70; following January 1st of 2019 they would receive a "health spending account" in the amount of \$2,200 per year. Under the Board proposal those older than 70 at that date would receive nothing.
28. The Association is opposed to an action today that would have the effect of eliminating a benefit that would occur eight years after the contract established by these proceedings had expired.
29. The Board's rationale is that the provision of "benefits for life" in Appendix 2 is "overly generous, expensive and uncommon". Therefore they propose a

generous, less expensive and normative provision of a health care spending account.

(i) Parties' Positions

30. The Board's rationale for its proposal is that some of the other comparators do not have such a "generous" benefit. Indeed, only Windsor Police and the Ontario Provincial Police ("OPP") have benefits for life. Furthermore, in 2009, a City of Windsor CUPE local agreed to a change in its post-retirement benefits.
31. The Board submits that the other comparators that have a post-retirement benefit have a different version of the benefit and that would be a more acceptable approach for the Board. Thus, the Board proposes the insertion of the non-cumulative health spending account after age 65 until a retiree reaches age 70.
32. The Association submits that there is no demonstrated need for this change. It notes that, aside from the OPP and Windsor, two other comparators provide continuing benefit coverage in varying forms to retirees after the age of 65. However, perhaps more importantly, while 8 comparators do not provide over 65 coverage for benefits, they did negotiate or arbitrate improvements to their collective agreements in respect of retiree benefits through the introduction of a health spending account. The value for all of those accounts is greater than the Board offers here and in some cases extends to persons up to the age of 75.

Finally, the Association submits that the amendment to this benefit is without any economic or actuarial information. The information provided was aggregated and failed to differentiate between types of persons making the claim and thus could not be used to determine the costs associated with the current provision.

(ii) Ruling

33. First, the fact that a CUPE local gave up post-retirement benefits is not helpful as CUPE members are not a comparator to police employees. More importantly, the

Board did not provide information regarding the current cost of the provision of this benefit, thus making a financial evaluation of the proposal impossible. Whatever the cost savings may be, presumably they would have no impact on the 2010 budget or any budget prior to 2019 when the new provision would take effect. The fact that the Board is seeking to tie down future events in this contract is of great significance. A major part of the Board's position on wages is based on the idea that times are changing and the agreement must reflect that fact. I cannot in 2011 determine what the times will be like in 2019. Therefore, in the absence of financial information, demonstrated need and a suitable time frame for providing the change, this proposal is rejected.

3. Court Time – Uniform

34. The applicable Court Time provisions of the Collective Agreement are found in articles 16.01 to 16.09. The Board proposes language changes to parts of article 16.09. The balance of article 16 would remain unchanged and is not affected by the proposal. Suffice it to say that under the Board's proposal, there would be reductions of at least one hour's pay in a variety of circumstances depending upon which platoon, day and work scenario the court testimony was required.

(i) Parties' Positions

35. The Board justifies its position by comparison to the Toronto Police Services Court appearance provisions.

36. The Association submits that Windsor's court appearance costs are on par with the other police comparators and points out that the Board also admitted this in their own submissions. The Association notes that the Board provided no evidence to support the assertion that Windsor's Court Time provisions result in "excessive" costs to the Board or the City. The Board submits that the cost savings of their proposal would be \$60,000 which would be 0.08% of the \$73,093,858 Police Service Budget. The Association submits that the Board

failed to provide sufficient justification or evidence to support the request to reduce the scope of the members' Court Time compensation, and that the Court Time provisions should remain unchanged.

(ii) Ruling

37. The Board in its “Total Compensation-Detailed Analysis” enabled me to perform the requisite detailed total compensation analysis and seems to confirm at p. 62 that generally, the court appearance costs for Windsor are on par with all other police comparators. On this basis, there is no demonstrated need to change the language and the proposal is rejected.

4. Lay-off Language - Civilian

38. The Board proposes language changes to the Civilian Layoff language. The current provision permits the Board to engage in layoffs where reductions in the WPS civilian staff are required based on seniority alone. The Board has advised the Association by correspondence dated 11th of October 2011 of its intention to reduce WPS civilian staff. The current language does not take account of the possible need to reduce the size of the WPS. This is caused by the fact that without classification layoff, there may be a need to go through a number of layoffs to get to the operative job that needs to be eliminated. Therefore, the current language does not work effectively as a targeted and directed classification based system.
39. The essence of the Board’s position is that if it becomes necessary to reduce the size of the WPS, this is to be accomplished by selecting for layoff, the most junior member in the job classification that is sought to be reduced. Such person may bump a more junior member provided they have the skill and ability to perform the duties of the new position without further training. There would be no upward bumping. Recall from layoff would be in reverse order of layoff with the same skill and ability requirement to perform the available work without further

training. Recall rights would be for 24 months during which seniority would be maintained but not increased if the member is laid off.

(i) Parties' Positions

40. The Association in its responding brief, provided on the third day of the scheduled hearings, submits that it is prepared to agree to an amended civilian layoff provision for classification-based layoff, on the basis of seniority and bumping. However, in exchange, the Association requests an order for additional protections to be built into the language of article 03-08 of the Civilian Collective Agreement to protect members who are giving up their right to straight seniority-based layoff.
41. The Association proposes that the new language of article 03-08 include the following:
 - a. Minimum notice of layoffs.
 - b. Requirement to lay-off temporary and part-time workers before laying off any full time regular members.
 - c. Bumping rights, on the basis of seniority, to classifications at the equivalent or lower pay grade, that the employee has the qualifications at the equivalent or lower pay grade, that the employee has the qualifications to perform or can become qualified in a 3 month period.
 - d. No new hiring until such time as any employees with recall rights are given the opportunity to fill a vacancy provided they are qualified to perform the job or can obtain the requisite skills and abilities in a 3 month period.
42. The Association proposes these changes, especially regarding the qualification period, in order to provide some protection to ensure that seniority actually has value in a bumping system. Without a grace period in which to acquire the necessary skills and abilities, the Association submits that many highly specialized and senior members could be left without any ability to actually engage their right to bumping. The Association submits that other comparator

agreements, such as Durham and Peel contain provisions permitting those employees who have received notice of layoff a period of time in which to retrain for a new classification.

43. The Association proposes the following change to the language to replace the current 03-08:

Article 03-08:

(a) The Board agrees that if it becomes necessary to reduce the Service, this² shall be accomplished in reverse order of seniority among the members in any classification, and further, that any recall from layoff shall be accomplished in order or seniority, further that the member's seniority shall remain intact, if he/she returns within one (1) year, subject to Section 03-08(d).

(b) The Board shall give as much notice of layoff to affected employees as is possible, and in any event, no less than sixty (60) days notice for regular full time and part time employees. Temporary employees shall be provided with thirty (30) days notice of layoff.

(c) The Board shall lay-off temporary members and part time members prior to the layoff of any full time regular member. In the event of lay-off, a member with seniority may move into another classification, displacing a member with less seniority in a position with an equivalent or lower pay grade. Such member will be allowed a maximum of three (3) months to qualify for said classification.

(d) The Board agrees that if a position is declared redundant, and the redundancy does not result in a reduction in the Service, every attempt shall be made to find the affected member another position within the Service that the member is qualified to perform. Where the new position is a lower grade level the member shall suffer no reduction in salary for a period of one year. The Board and the Association further agree that the placement of the member in the new position may include not posting vacant positions as set out in this Agreement.

² The Association's version in its brief uses the word "which" and the current version of the article uses the word "this". I have elected to retain the language as it is in the current version.

(e) No new employees shall be hired while any member with recall rights has not been provided with recall opportunity, unless the available member does not have the qualifications to perform the work, or cannot obtain the requisite skills and abilities within three (3) months.

(ii) Ruling

44. I find that there is a demonstrated need for revisions to the language of Article 03-08. While, the Association has proposed specific language changes, the Board has not. Counsel for the Board made the point that no comparator requires lay-off of part timers first primarily because of the dispatcher position. I find that the proposed language of the Association, set out above, provides the Board with the classification based layoffs they seek while providing fairness and protection for senior members through the revised retraining and notice provisions. The current clause is to be replaced with the one set out in this award with one modification in clause (c) where I accept the Board's proposition. Therefore, the opening words of clause (c) should read as follows: The Board shall lay-off temporary members **but not** part time members prior ...[remainder as set out in paragraph 43 of the Award].

5. Criminal Investigation Division Schedule - Uniform

45. The Board proposes that the hours of work for Investigation Services shall be established in a schedule developed by the parties subject to certain criteria with a deadline of March 1, 2012 after which the matter will be subject to final offer selection interest arbitration.

(i) Parties' Positions

46. The Board claims that the Association has a fixed and rigid stance of "No" when it comes to negotiation on this topic. In the Board's view, there is overlap built into the schedule of the four platoon system. Therefore, the Board would like to move to a three platoon system which would still provide an acceptable level of

investigative coverage. The Board submits that if the proposal is not awarded then the only choices left “... *are to stop staffing some of the existing platoons and create needlessly large holes in the investigative coverage.*”

47. The Association’s position is that it has been working cooperatively with members of senior command to identify and negotiate a new schedule and will continue to do so. The Association and WPS are reviewing other schedule options and are considering the scope of the application of any amended schedule. The Association submits that the arbitrator-mediator should issue an award as follows:

I direct the parties to strike a sub-committee to negotiate the terms of the Investigative Services schedule for inclusion in the collective agreement at Schedule C. If the parties are unable to reach an agreement on the issue of the schedule to 06-07 and Schedule C, then either party may refer this matter to collective bargaining for the 2011 renewal collective agreements.

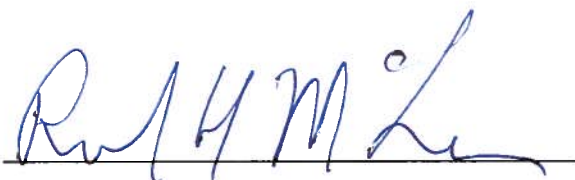
(ii) Ruling

48. The parties have not met in bargaining to discuss this proposal. The first time that language was proposed by the Board was in its brief handed over to the Association at the first day of the mediation-arbitration on 15 September 2011. This is a matter that the parties need to negotiate and not arbitrate. This award is not being released until the final month of the year 2011. Any direction to the parties with an attempt to remain seized of this issue if negotiations fail will only serve to delay the need to serve the notice to bargain and commence bargaining on the 2011 contract. Therefore, I decline to make any award on this proposal. It can be the subject of the negotiations which will follow the final determination of the 2010 contract by this award.

Conclusion

49. The parties are directed to take this Award and implement it by incorporating its provisions into the Collective Agreements in a manner consistent with the contents herein.
50. In respect of the retroactive pay which is ordered in this Award, the Board is directed to take the necessary steps to implement the payments required to each member not later than the second pay cheque following the receipt of this Award.
51. I will remain seized of the implementation of the Award into the Collective Agreement for a period of 45 days. Either party can by written notice to me within the stipulated time frame request that I reconvene the hearings in this matter to complete the process of implementation. If no requests are received from either party within the 45 day period then the Arbitrator will no longer have jurisdiction over this matter and the Award will be final and binding in accordance with the Act.

DATED at LONDON, ONTARIO THIS 5th DAY of December 2011.

A handwritten signature in blue ink, appearing to read 'R. H. McLaren', is written over a horizontal line.

Professor Richard H. McLaren, C.Arb.
Arbitrator