FTR Now

Jurisdiction of an Arbitrator to Examine Procedures Issued by the Chief of Police

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In two recent decisions involving the Toronto Police Services Board ("TPSB") and the Toronto Police Association ("TPA"), Arbitrator Paula Knopf held that she lacked jurisdiction to hear grievances that challenged certain Procedures issued by the Chief of Police. In both cases, the TPSB raised successful preliminary objections and argued that the arbitrator lacked jurisdiction as the Procedures were operational in nature and consequently fell within the statutory prerogative of the Chief of Police. In this *FTR Now*, we discuss the implications of these decisions with respect to the day-to-day management and operation of Police Services Boards.

BACKGROUND

The statutory framework for policing is fundamentally different than the industrial model common to labour relations. Under the *Police Services Act* ("the Act"), the duties and responsibilities of a Police Services Board and a Chief of Police are separate and distinct. A Police Services Board has responsibility over policy and financial matters, is the employer of police officers, and is party to any collective agreement with an association. The Chief of Police, on the other hand, is vested with exclusive authority and responsibility over operational matters, and is not a party to any collective agreement. While a Police Services Board may require a procedure or policy to be established by a Chief of Police as a function of its responsibility over policy, the operational specifics of the resulting procedure or order are typically the prerogative of the Chief of Police.

SPECIFIC PROCEDURES IN DISPUTE AND THE CHIEF'S STATUTORY PREROGATIVE

In the first case, *Toronto Police Services Board and Toronto Police Association*, 2011 CanLII 6172, the TPA challenged Procedure 15-10, which governs a police officer's use of his or her firearm towards the driver of a motor vehicle. The TPA alleged that the Procedure was unreasonable and subjected officers to unwarranted disciplinary sanctions if disobeyed. The TPA argued that the validity and reasonableness of the Procedure should be determined by arbitration as an alleged violation of the management rights provision of the collective agreement. In the second case, *Toronto Police Services Board and Toronto Police Association*, 2012 CanLII 1800, the TPA challenged Procedure 13-08, which requires police officers who are under suspension from the Service to report twice daily to Police Headquarters. Again, the TPA argued that the Procedure constituted an unreasonable exercise of management rights, and should therefore be subject to arbitral review.

In both cases, the TPSB relied upon the bicameral nature of the Act and argued that Arbitrator Knopf had no jurisdiction to assess the "reasonableness" of a Procedure that was implemented at the direction and discretion of the Chief of Police. Rather, the TPSB submitted that the proper question was simply whether or not the orders were "lawful" and that the proper forum for adjudicating such matters is within the Part V disciplinary context and ultimately before the Ontario Civilian Police Commission ("OCPC").

In taking this position, the TPSB distinguished prior decisions, including those of Arbitrator Knopf, which had found that arbitrators had jurisdiction to consider grievances respecting a broad array of "police governance" issues, from the growth of beards by officers to the allocation of patrol resources by a police service. Critically, those cases addressed policies that had either been implemented by a Police Services Board or fell within a Board's jurisdiction under the Act. Conversely, in the present cases the impugned Procedures fell squarely within the duties and responsibilities of the Chief of Police to govern operational matters.

ARBITRATOR KNOPF'S DECISIONS

In considering the competing arguments, Arbitrator Knopf relied heavily upon the express language of the Act itself and accepted the TPSB's argument that the bicameral nature of police governance can insulate the orders and directives of the Chief of Police from arbitral review. As Arbitrator Knopf acknowledged, the Police Services Board is not the master of the Chief of Police nor is the Chief its servant; they are distinct entities and the decisions and actions of one cannot be imputed to the other. As stated by the Court in *Heritage Custom Jewellers v. Metropolitan Toronto Police Services Board* (a case relied upon by Arbitrator Knopf), "the Act incorporates a clear legislative intent that insofar as policing policies and procedures are concerned, the powers of the Board are limited to the *setting* of general policies; the Act prescribes a strict division of powers whereby it is the Chief of Police who bears responsibility for implementation and enforcement through specific procedures and day-to-day operations."

The question, then, was whether the dispute between the parties arose explicitly or implicitly from the interpretation, application, administration or violation of the collective agreement. In both of these cases, Arbitrator Knopf held that the disputes did not arise under the collective agreement. While the two issues were not identical, and while the use of force in Procedure 15-10 clearly had a more direct correlation to the operational duties of active police officers, both grievances nevertheless related to the authority of the Chief of Police to supervise and direct operations of the Service. Consequently, Arbitrator Knopf held that the Procedures were issued by the Chief of Police as an exercise of his exclusive statutory authority, and therefore the proper forum in which the lawfulness or reasonableness of the Procedures could be addressed is in a Part V disciplinary hearing.

IMPLICATIONS FOR THE POLICE COMMUNITY

These decisions are quite helpful to both Police Services Boards and Chiefs of Police, as they recognize that not all working conditions or employment matters fall within the scope of a collective agreement or an arbitrator's jurisdiction. Significantly, these decisions give effect to the unique statutory framework for police governance in which the Police Services Board and the Chief of Police are granted separate and express duties and responsibilities. In particular, these decisions recognize that a Chief of Police has exclusive authority to manage the day-to-day operational matters of his or her Service.

When assessing whether a particular Procedure or Order may be similarly shielded from arbitral review, we recommend that Police Services Boards and Chiefs of Police ask the following questions:

i. Has the Order or Procedure emanated from the Chief or the Board?
ii. Does the Order or Procedure involve the day-to-day operations of the Service?
iii. What would be the adjudicative forum to deal with the matter in the event of non-compliance with the Order or Procedure (e.g. disciplinary hearing, arbitration, etc.)?
iv. Does the matter arise inferentially or expressly from the legally enforceable provisions of the collective agreement?

Where the Order or Procedure emanated from the Chief, involves the day-to-day operations of the Service and would be adjudicated through the Part V process, and if the collective agreement is silent with respect to the issue, it is possible that a grievance respecting the Order or Procedure may be inarbitrable. Even where the collective agreement addresses the matter, it may be possible to argue that the provisions involved are unenforceable.

Finally, it is important to note that the TPA is currently seeking a judicial review of Arbitrator Knopf's second decision respecting Procedure 13-08. We will provide an update should the Court's review expand or alter the analysis or findings of Arbitrator Knopf.

Should you wish to discuss the implications of these decisions for your Service, please contact Michael A. Hines (who argued these two cases) at 416.864.7248, Glenn P. Christie at 519.883.3125 or any other member of the Firm's Police Sector Practice Group, and we would be pleased to answer any questions you have.

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