

IN THE MATTER OF: A grievance filed on April 4, 2011 on behalf of Sergeant James Jewell alleging wrongful transfer from the Homicide Unit, contrary to the collective agreement.

BETWEEN:

**THE CITY OF WINNIPEG,
(WINNIPEG POLICE SERVICE)**

Employer,

- and -

THE WINNIPEG POLICE ASSOCIATION,

Union.

AWARD

Appearances

- Michael Jack, Legal Counsel; Inspector Scot Halley, Duty Office; for the Employer.
- Keith LaBossiere and Scott Hoepfner, Legal Counsel; Mike Sutherland, Association President; Mark Pellerin, Association Vice-President; for the Union.

Nature of the proceedings

Sergeant James Jewell, the grievor, was one of two Supervising Sergeants in the Winnipeg Police Service Homicide Unit when he was involuntarily transferred out of the Unit with minimal notice in March 2011. He assumed new duties as Supervisor, Uniform Patrol in District 2 (St. James), an assignment carrying far less responsibility, status and overtime remuneration.

Initially there were no reasons given except that pursuant to the Transfer Policy (Ex. 4, “the Policy”) of the Winnipeg Police Service (“WPS” or “the Service”), his position was a one-year assignment unless extended (referred to as “1+1”), subject to transfer at any time. In practice, involuntary transfers prior to completion of a member’s designated assignment term have only dealt with serious personality conflict, accommodation for disability or succession planning (Stipulations, Ex. 44). It was agreed that none of those considerations applied in the present case. It was also agreed that normally there is a lengthy period of notice prior to the effective date of a transfer.

The Association alleged that the transfer was punitive, in purpose or effect, and was imposed without just cause. In the alternative, the transfer was unreasonable, arbitrary, unfair and made in bad faith (Grievance dated April 4, 2011, Ex. 1, and Final Argument). Given the past practice, the WPS should be estopped from relying on its strict legal rights under the Policy to transfer at any time.

The grievor was a vocal advocate within the WPS for longer assignment tenures in the Homicide Unit (“the Unit”). In opposition to the impending transfer of two investigators out of his platoon, he went over his Inspector’s head to see the Chief of Police and argue his position. This tactic was consistent with the Chief’s declared open door policy and the grievor had communicated directly with the Chief in the past on policy issues. The grievor said (in contested evidence) that he was warned by his Staff Sergeant that “certain people won’t be impressed if you go over their heads” but he approached the Chief anyway.

The Chief deferred to his Divisional Commander’s judgement. Four days later, the grievor was informed by his Inspector and Staff Sergeant that he would be transferred effective April 10, 2011, eleven working days hence. On the evidence, the transfer decision can fairly be described as a bombshell within the Homicide Unit. The grievor was a very highly regarded

officer and leader in Homicide. Transfer in these circumstances was unprecedented.

The WPS submitted that nothing in the collective agreement provided any entitlement to maintain a particular assignment. Neither did the agreement prescribe any required process or criteria before a transfer can be directed. Thus, the grievor's transfer, even if without precedent and controversial within the Service, was within the discretionary authority of management. The duty of fairness cited by the Union was inapplicable in the absence of an operative collective agreement clause dealing with transfer. The transfer decision was made in good faith and no basis was shown for an estoppel.

The Service relied on the terms of the Policy, which expressly states that all Sergeant assignments are for a single year, subject to transfer at any time, unless extended. The grievor knew or ought to have known in January 2011, when the Service issued Routine Order 020 pursuant to the Policy (Ex. 5), that he may not be extended as Homicide Sergeant, in accordance with the "1+1" rule. The Service emphasized that the wisdom of its decision to transfer the grievor was not in issue. No matter how proficient the grievor may have been as a Homicide Sergeant, an arbitrator has no jurisdiction to overturn the transfer in the absence of a collective agreement violation.

At the Association's request, WPS provided written reasons for the transfer on March 22, 2011 (Ex. 23), prepared by Inspector Rick Guyader and vetted by in-house legal counsel for the Service, as follows:

In February 2011 the writer met with D/Chief Hart and S/Sgt. Stephens to discuss the replacement for Sgt Shipley who was assigned to the homicide unit and retiring from the service.

Upon deciding his replacement there was further discussion as to the future of the homicide unit and its evolution. It was further discussed

that the unit needed to go in a new direction. I felt that the second sergeant in the unit should be someone who had not been in the homicide unit in the past, someone who would bring fresh ideas and a new perspective.

We were unable to identify a suitable candidate from the existing sergeants list but did identify a member we were interested in from the newly promoted list which was published March 14, 2011.

March 14, 2011 I contacted this member and confirmed they would be interested in the position.

March 15, 2011 the writer and S/Sgt. Stephens met with Sgt. Jewell and he was informed that he was not being extended as per the transfer policy.

Had we not identified anyone we felt suitable for this position or if that person had not shown an interest Sgt. Jewell would have been extended.

In closing I will add that there are no performance issues related to Sergeant Jewell, this decision was made for the reasons noted above. The decision to bring a second sergeant into the unit without any past experience in homicide was made well before any meeting that Sergeant Jewell had with Chief McCaskill and the meeting played no part in my decision.

The member referred to by Inspector Guyader was Sergeant Cheryl Larson. Immediately upon her promotion to Sergeant on March 14, 2011, she was designated for assignment to the Homicide Unit in place of the grievor. Both Inspector Guyader and Staff Sergeant Stephens testified that the grievor's transfer was based solely on a management decision to introduce fresh perspectives into the operation of the Unit. It was "just business." Deputy Chief Shelley Hart had a limited role in the transfer but she too insisted in her evidence that there was no element of punishment. For its part, the Association rejected the ostensible reason for the transfer and sharply criticized the conduct of Inspector Guyader and Staff Sergeant Stephens as deceptive and lacking in candour. In any event, given the unequivocal past practice, the Service failed to act fairly and *bona fides* in making a decision which had

significant employment consequences for the grievor, said the Association. The current grievance therefore presented significant issues, including the credibility of key participants, which must be addressed in reaching a final determination.

This was a very hard fought case. There were strong emotions and high stakes. I wish to note for the record that all legal counsel maintained a very professional and cooperative approach throughout the proceedings, reaching a number of stipulations to reduce the length of the hearing and providing mutual disclosures which facilitated an orderly process. The witnesses maintained a respectful demeanour as well, notwithstanding strongly held opinions about the events in question. For this, all concerned are to be commended. Life in the Winnipeg Police Service must go on notwithstanding this unsettling dispute and I was impressed by the obvious shared commitment to public service and community safety.

The Association grievance was filed on April 4, 2011 and referred for expedited arbitration under section 130 of *The Labour Relations Act* on May 18, 2011. I was appointed as sole arbitrator and the hearing commenced on July 5, 2011, continuing for a total of six sitting days. At the outset, my jurisdiction was affirmed by the parties and no preliminary issues were raised. I was asked to remain seized if the grievance should be upheld in order to allow the parties to discuss an appropriate remedy.

Witnesses and other relevant personnel

The Association called four witnesses. **The grievor, Sergeant James Jewell**, has 24 years of service with the WPS including over 17 years in Plain Clothes Investigation, highlighted by three years in Robbery/Homicide and 5 years as a Homicide Unit Investigator (Ex. 3). He was promoted to Detective/Sergeant in 2003 and promoted again to the rank of Sergeant in 2005. The grievor was assigned to the Homicide Unit in April 2009 as one of two

Sergeants who serve as supervisors and case coordinators. He testified that this position was his ultimate career goal and he hoped to remain there until he could retire from the Service in two years. He said that homicide work was his passion. The evidence was uncontradicted that the grievor excelled in the position and was widely recognized for his zeal and his effectiveness.

The grievor worked alongside **Sergeant Ken Shipley (“Shipley”)**, the second Homicide Supervisor. Shipley retired from the Service and was replaced by **Sergeant Ross Read (“Read”)** in April 2011. The grievor was replaced by **Sergeant Cheryl Larson (“Larson”)**. **Sergeant Robert Tycholiz (“Tycholiz”)** was considered as one of the potential replacements in Homicide during the 2011 transfer cycle. Shipley, Read, Larson and Tycholiz did not testify.

Detective Sergeant Wes Rommel (“Rommel”) has 15 years of service with the WPS and appeared as a witness for the Association under subpoena. He joined the Homicide Unit in November 2008 and continues to serve there currently. Prior to Homicide he was assigned for a period of time to Human Resources where he assisted in the development of amendments to the Transfer Policy.

Detective Sergeant Darryl Kostiuk (“Kostiuk”) has 17 years of service with the WPS and also appeared as a witness for the Association under subpoena. He joined the Homicide Unit in April 2007 and among other duties served as a Unit Affiant preparing applications to a Judicial Justice of the Peace or a Judge for warrants and court authorizations required during investigations. The Affiant role requires specialized training and involves complex, intensive writing assignments.

Detective Sergeant Brent Black (“Black”) has 15 years of service with the WPS and has

been working in the Homicide Unit since April 2010. He appeared under subpoena as an Association rebuttal witness to contradict testimony given by Staff Sergeant Stephens.

Other members of the 2009/2010 Homicide Unit who figured in the events in question, but did not testify were as follows: **Plain Clothes Constable (“PCC”) Jarett Reid (“Reid”); PCC Bill Kehler (“Kehler”); Det./Sgt. John O’Donovan (“O’Donovan”)** (left in October 2009); **Det./Sgt. Wade McDonald (“McDonald”)** (replaced O’Donovan); **PCC Warren Yerex (“Yerex”); Det./Sgt. Mark Mirwaldt (“Mirwaldt”); Det./Sgt. Lyle Loehmer (“Loehmer”); PCC Curtis Penner (“Penner”); Det./Sgt. Shawn Pike (“Pike”).**

Det./Sgt. Robert Stephanson (“Stephanson”) was initially selected for transfer to Homicide in April 2011 when the rank structure was changed, but there was conflict over the selection process and he did not move.

Sergeant Gord Perrier (“Perrier”) led an Operational Review of the Homicide Unit which reported in May 2010. He did not testify.

The Service called four witnesses. **Inspector Richard (Rick) Guyader (“Guyader”)** has 33 years of service in numerous capacities with the WPS including two years in Professional Standards. Effective February 27, 2011, he was assigned to Division 40 with responsibility for the Homicide Unit as well as the Major Crimes Unit (“MCU”), the Organized Crime Unit (“OCU”) and Marijuana Grow Ops. Each of these units has its own Staff/Sergeant responsible for operations, reporting to him as Inspector. His role is to serve as the last decision-maker for the unit and to interact with the senior ranks. He received notice of his Division 40 assignment on January 30, 2011 and began a process of personnel planning during the month of February, prior to his formal appointment. In his testimony, he explained the rationale and process behind the grievor’s transfer.

Guyader replaced **Insp. Jim McIsaac (“McIsaac”)**, who did not testify. McIsaac chaired the Review Panel appointed to consider the Operational Review of the Homicide Unit.

Staff Sergeant Michael Stephens (“Stephens”) has 22 years of service with the WPS and was promoted to Sergeant in 2007. He worked in recruiting and in the spring of 2010 was promoted again to Staff Sergeant assigned to Human Resources. He was transferred to Division 40 in late March 2011 with responsibility for Homicide, MCU and Cold Cases. As Staff Sergeant, his role is to serve as an administrator for his units, each of which has its own internal rank structure. He ensures that reporting and issues such as overtime are properly handled. He testified that he implements his ideas “if it is just.” Stephens said he reports to Guyader and “keeps him in the loop on everything, so he is not blind sided.” Although he assumed formal responsibility in late March 2011, there were rumours that he would be moving to Division 40 during 2010 so Stephens began researching and preparing for the new assignment long before the formal move. By mid-February 2011, his new position was virtually confirmed and he became actively involved along with Guyader in personnel planning for Homicide, which ultimately included the decision to transfer the grievor.

Stephens replaced **Staff Sergeant Rhyse Hanson (“Hanson”)** and said he kept in touch with Hanson during the transition period as a courtesy. Hanson did not testify.

Inspector Michael Herman (“Herman”) has 25 years of service with the WPS, equally divided between criminal investigation, administration and operations. As a Staff Sergeant assigned to Human Resources from 2006 to 2009, he was involved in changes to the Transfer Policy including the introduction of “1+1” and testified to the benefits of staff rotation. He left Human Resources in the spring of 2009 and therefore did not actually participate in the first cycle of the new “1+1” policy but he was consulted about issues from time to time after his departure.

Deputy Chief-Operations Shelley Hart (“Hart”) testified that she has 33 years of service in a variety of areas within the WPS, including a period as Inspector for Division 40 and a two-year secondment to the City of Winnipeg on the 311 Project. She was promoted to her current position in 2008. Two Superintendents report to her regarding the Criminal Investigation Bureau and General Patrol. Her role is to oversee Operations, which includes a number of policy areas including the Transfer Policy.

Chief Keith McCaskill (“**McCaskill**” or “**the Chief**”) is the head of the Winnipeg Police Service. He did not testify.

The Homicide Unit

The current written mandate of the Homicide Unit (“the Unit”) is as follows, although the 2010 Operational Review (“the Review”) by Perrier suggested that in practice the Unit’s scope was somewhat more limited (Ex. 8, p. 5, 14):

Criminal Investigation Bureau, Homicide Unit

Coordinates all confirmed, suspected and attempted homicides, murder conspiracies, manslaughters, deaths by criminal negligence, excluding motor vehicle collisions, and all life threatening crimes. The Homicide Unit determines resources to be utilized in the ensuing investigations.

The unit investigates all shootings by Winnipeg Police Service personnel, evaluates all sudden deaths, suspicious deaths, and suicides to confirm the absence of criminal activities in the death, and liaises with the Crown Attorney, Medical Examiner and Public Trustee.

The Unit is divided into two platoons, each comprised of a Sergeant and four investigators. In the spring of 2011, the grievor led one platoon and Shipley led the other. At that time

there were five Detective/Sergeants and three Plain Clothes Constables serving as investigators. Thus, the grievor directly supervised four WPS staff members. The Sergeants report to a Staff/Sergeant on administrative and financial matters, and generally provide information on the progress of investigations, but the Homicide Unit Sergeants have direct conduct of and responsibility for each investigation. The grievor testified that he worked a nine hour day shift with on-call duty every second week, shared with the second Sergeant. While on call, the Sergeant is obligated to answer the phone at any time, sober and service-ready, and capable of attending at the Public Safety Building within one hour. Such calls are frequent and commonly result in 20 hours on duty at a time, or even as much as 40 hours straight. The grievor testified that the Unit is under considerable scrutiny, the work is intense and stressful, and the stakes are very high. His characterization was not disputed in the present case.

While there is a Division Clerk, the Unit itself has no support staff. This presents a challenge given the constant phone calls to the Unit, onerous disclosure obligations, coordination and management of witnesses, and numerous other duties. The Sergeant's administrative duties include coordinating all of the above as well as managing Unit scheduling, vacation and sick time. A key responsibility of the Sergeant is to identify potential candidates for positions within the Unit and submit names up the chain of command. The grievor testified that normally his proposed selections would be accepted and the evidence confirmed this view. The Sergeant position is regarded as a middle management function. In the Homicide Unit, each Sergeant worked on replacing his own people but the two Sergeants consulted with each other before forwarding names.

The grievor said that the most important skill for a homicide investigator is the ability to conduct effective interrogations. It is vital to get the truth from witnesses and particularly to elicit confessions from suspects. Unit members must be team players, dedicated, willing

to set aside their egos and prepared to devote as much time as necessary to the investigation. The rule is unwritten but the expectation is that an investigator “will be there when needed”, despite the requirements of his or her personal life. “You must be prepared to work at any time. Family comes second.” The grievor observed that working in this environment requires a highly motivated person and not everyone is willing to make the commitment.

A contentious factual issue in the present case was the significance of related experience for prospective Homicide Unit members and leaders. The grievor’s views were well known within the Service and plainly stated during his testimony. “You don’t train at the Homicide Unit.” Stephens agreed with the grievor to an extent, stating in his evidence that “Homicide is not a training ground for investigators. In that respect, it is unique among specialty units.”

The grievor emphasized that in a homicide case, there is no room for mistakes in court. All actions taken during the course of an investigation must be explained before a judge and often a jury. Errors will appear in the newspaper, frequently on the front page, and will become known to the whole world. It is common for officers to be publicly chastised by the judge when mistakes occur. In the grievor’s opinion, even seasoned investigators entering the Homicide Unit face a two year learning curve before they are fully comfortable and productive in the position. This was his personal experience when he first joined the Unit as a PCC in 2000 for a five year term. By then, he had 13 years experience with the Service including six years in plain clothes. Yet he still found himself climbing a two-year learning curve. In their evidence, Rommel and Kostiuk both concurred based on their own experience in joining the Unit with significant investigative backgrounds. Stephens too agreed that there is a steep learning curve which can surprise even experienced investigators. He declined to comment on the two-year duration, saying those more closely involved would have a better sense, but he called Homicide the most challenging investigative assignment in the Service. Herman said he could not dispute reports of a two year learning curve.

The grievor described work in the Unit as unique. Investigating death is different. There are numerous scientific and medical issues to deal with and a range of new skills to acquire, ranging from working on video to grief counseling. While all units in the Service require their own special expertise, the grievor argued that only Homicide deals with the most serious Criminal Code offences. Only murder cases have attracted wrongful conviction applications and intense after-the-fact review. Hence the Unit has traditionally been staffed by the best and the brightest. It is the hardest unit to transfer into, which, according to the grievor, is entirely appropriate.

Pressed in cross examination, the grievor insisted that the distinguishing feature for Homicide is the high level of scrutiny. He conceded that good interrogation skills are needed in many units but pointed to the consequences of failing with a homicide suspect, especially where no body has been found. Beyond that, there is no victim statement available in cases of death. And investigators typically face the top criminal defence counsel in the court room. He maintained that his views about the paramount importance of homicide work are widely shared across the Service. In terms of the difficulty of transition, he agreed that moving into the Organized Crime Unit (“OCU”) was even harder than Homicide, due to the need for detailed historical knowledge of criminal groups.

Hart testified that Homicide requires good investigative and interrogation skills, but would not concede that the Unit is unique in this regard. Every unit needs these skills, she said, and members develop their skills as they move along a career path. Moreover, other units also investigate deaths - for example, the Child Abuse Unit, the Cold Case Unit, the Task Force on Missing Women. Courtroom experience can be gained in many different fields. In her opinion, good investigators come from diverse backgrounds. She herself has worked in Robbery-Homicide but not in the Homicide Unit *per se* and she agreed that those who have coordinated homicide investigations can speak to these needs with more authority than her.

Rommel described the Homicide Sergeant role as “more involved” than any other Sergeant assignment in the Service. Kostiuik said it is the most difficult Sergeant position. In Homicide, the Sergeant coordinates each investigation and makes ongoing detailed decisions which drive the case, effectively performing all functions except for the actual interviews. Every day there is a lineup of officers at the Sergeant’s door needing answers and direction. Contact and coordination with other units is also the Sergeant’s responsibility. Rommel said that the grievor was widely recognized for “top notch” work in all his roles as a Homicide Sergeant and the Unit was especially appreciative of his good communication and consultation practices. Kostiuik said the grievor was “outstanding” as a leader in the Unit.

The Service did not dispute this evidence and acknowledged the grievor’s skill, passion and reputation. Rather WPS said that the transfer had nothing to do with performance and took the position that it was entitled to rotate capable members as determined in the Commander’s discretion. This includes the Homicide Sergeant position. Stephens agreed that experience is vital for the Sergeant position but was “conflicted” on whether this position could be a training ground. In his view, a Homicide Sergeant needs a solid base of experience but not necessarily a specific background in the Homicide Unit. Pressed under cross examination, he would not agree that his own lack of career experience in homicide investigation disqualified him from forming a judgement on this issue.

The solve rate presently and in recent years has been very high in the WPS Homicide Unit. Different witnesses cited somewhat different rates but taking Stephens’ evidence, the Unit has solved between 77% and 93% of homicides over the past three years. The grievor said the rate was 100% in 2011 up until his transfer. By contrast, the reported solve rates in other comparable Western Canadian police departments (Calgary, Edmonton, Vancouver) were

much lower, ranging from 34% to 86% at various times since 2007 (Ex. 8, at p. 39, 41, 43).

The Transfer Policy and past practice

Much of the hearing was consumed by debate and contention over WPS practice since the adoption of the "1+1" rule in 2009. Under the Transfer Policy, "1+1+1 etc. - means that the position referred to is a one year position that may be extended for additional years up to the stated maximum" (1.F). In particular, the Association asserted that no one other than the grievor has been transferred under 1+1 prior to the end of their normal term, except in circumstances not relevant to the grievor's situation. Witnesses for the Services resisted any such admission. Herman denied it and Hart said it was too soon to make general statements. Guyader and Stephens both said they did not know. Based on stipulations drafted and agreed by the parties towards the end of the hearing (Ex. 44), it is evident that the Association's factual claim has been established. Since the stipulations refer to personal situations involving a number members not involved in any way in the present dispute, I will not reproduce the stipulations or recite any particulars in this award.

It will suffice to say that the grievor was the first member to be involuntarily transferred from his assignment under 1+1 before the normal end of his term, despite the absence of any performance, personality, succession or accommodation issues. Nevertheless, WPS insisted that its managerial authority to effect such a transfer was clear under the Policy, whether or not the power has been used in the past. As Hart testified, there has to be a first case when a new policy is adopted. The object of the Policy changes was explicitly to give commanders a freer hand to make personnel transfers. Herman suggested that this would be helpful in a variety of situations including cases where the member desired a change. The thrust of the Association's complaint, however, was that the grievor was singled out for punishment without cause, or in the alternative, was treated unfairly.

Key provisions of the Policy are as follows:

2. Purpose

- A. To create opportunities for members to broaden the collective experience of the Service.
- B. To ensure experienced members are cycled into an operational capacity to provide leadership to the front line members.
- C. To ensure an appropriate work/life balance.
- D. To provide breadth of experience for members who move into supervisory positions.

3. Principles

- A. Members holding the rank of Constable, Detective/Patrol Sergeant and Sergeant, are subject to transfer at any time.
- B. Generally, dependent on the member's specific function, training, skills and performance, the practice of the Service is to assign a member for a reasonable length of time to allow them to further the development of their police career.
- C. The Human Resources Division facilitates the selection and transfer of members within the Service.

...

5. Mandatory Transfers

- A. General Information
 - 1) Annually, a Routine Order will be published, listing all members who are designated for mandatory transfer, including those who have served their maximum assignment length.
 - 2) Generally, newly promoted Patrol/Detective Sergeants shall be designated for mandatory transfer and will transfer to

Uniform Operations.

- 3) Generally, newly promoted Sergeants shall be designated for mandatory transfer.

...

6. Assignment Length

A. General Information

- 1) The length of time a member is assigned to duties within a specific organizational area is dependent upon the operational needs of the Service, and the member's assigned duties and job performance.
- 2) Due to the level of expertise required, some specialized positions within an organizational area have longer assignment lengths.
- 3) Assignment length, which is reflective of the maximum time a member may be assigned to a specific organizational area/position, is outlined in the following tables:

...

Under the Policy, Constables in the Criminal Investigation Bureau ("CIB", Division 40, 41 and 42) have a maximum assignment length stated as follows: "3 years (1+1+1)". Patrol/Detective Sergeants in CIB are stated as "4 years (1+1+1+1)" and Sergeants are also "4 years (1+1+1+1)". Article 7 of the policy provides for a one-time retirement exemption from mandatory transfer. Commanders are to review such requests and after considering the long-term impact on their operational area, forward the request to the Superintendent with a recommendation. Commanders may also entertain extensions to standard assignment length and recommend them to their Superintendent, with the decision to be made by the Deputy Chief-Operations. Approval is limited to extraordinary circumstances based on the member's specific skills and the best interest of the Service.

As part of her duties, Hart makes all decisions on requests to extend a maximum term. She stated that the objective in giving this decision to a single executive member was to achieve greater consistency. When Superintendents had jurisdiction for extensions, there was an unreasonable degree of variability. Some members were able to keep their positions for many years “just by asking.” The result was that highly coveted assignments could become basically unavailable.

The General Procedures indicate that members designated for mandatory transfer must submit a Transfer Request Report (P-241) with three transfer choices in order of preference.

The annual transfer process is described as follows in the Policy under the duties of the Human Resources Division Staffing Sergeant:

C. Annual Transfers Selection Process

- 1) Provide Commanders with the list of members who have applied for transfer into their division.
- 2) Coordinate meetings with the applicable Commanders to facilitate selection of replacement members.
- 3) Prior to scheduled transfer dates, issue a Routine Order listing transferred members and their new assignments.
- 4) Issue a Routine Order listing transfer credits and deficits for transferred members.
- 5) Accept all Transfer Request Reports (P-241) and process accordingly.

According to the Policy, it is the Commander’s responsibility to ensure that the transfer of members is based on the foregoing transfer process.

Herman testified that the 2009 changes to the Policy were intended to address the Service's high level of inexperience in the front lines, as well as providing greater fairness for members overall. Other policy objectives were to facilitate career planning, to improve work/life balance and to develop new leadership with a broad base of experience (the inverted triangle concept). The essence of the current Policy is that assignments are annual (1+1) up to a stated maximum term. He stressed that the Policy is a living document which is subject to ongoing review.

Long assignment tenures can close off desirable positions to entry by other members, something which Herman said was a frequently reported cause of member frustration in the past. Adopting set terms also helps address work/life balance concerns. Whether due to dedication or financial benefit or both, some members find it hard to walk away from assignments with heavy overtime. The Policy provides a means of ensuring reasonable rotation.

Due to the significance of these changes for the Service, the Chief wrote to all members in January 2009 (Ex. 42) to explain the rationale for the new policy, citing his "vision of moving more resources to front line policing". He noted that the maximum assignment length for Sergeants in specialty units was being reduced by one year (to four years) to increase rotation and ensure that future leaders are exposed to a variety of policing functions. Succession plans were also mandated for each unit so that as rotation occurs, a transition of skills and experience also takes place. After receiving member feedback, the Chief postponed the reduction for Detective Sergeants and Sergeants (Ex. 43, February 2, 2009) for one year. This was intended to allow those members a further year to prepare for transfer in the spring of 2010. Herman stated that "in fairness, as part of change management," more time was allowed for members who did not know the maximum term length was being reduced.

The express adoption of "1+1", said Herman, was designed to give Commanders more flexibility to plan their staffing and succession, while at the same time demanding accountability for decisions taken. The intent was to have all moves occur at the same time, although this can be varied. There are no stated criteria for transfers under the Policy. Everyone is mandatory every year. Hart confirmed this point. Herman noted that this means no one knows the reason for any particular transfer which helps provide confidentiality to members. However, he conceded that despite their ostensible mandatory status, many members in fact *do not* move.

Guyader testified that when the Routine Order is issued, members listed on it should realize that transfer is a possibility and take it as notice. He acknowledged that there were more than 60 members in Division 40 who were eligible for transfer under "1+1" under the January 2011 Order. Only the grievor was transferred and this was Guyader's decision, he stated. By contrast, Herman testified that just because a member's name appears on the list, this is "not outright" notice of transfer. When a transfer is actually expected, Herman said, there should be a discussion about the transfer with the member as soon as possible, both for planning purposes and for the member's well-being. Hart testified that the expectation of plain clothes members is that they will remain to the end of their maximum terms, which was also the practice prior to 2009.

Regarding succession, Herman acknowledged under cross examination that preserving experience and knowledge in a unit is an important consideration in planning for transfers, but it is not the sole consideration. There may be many variables in particular cases. Guyader also recognized the importance of succession, especially in the Homicide Unit where the Sergeants carry so much information about ongoing cases in their heads. Institutional memory in the Unit has to be preserved.

Herman said the Service has also tried to coordinate transfers with promotions so that members can anticipate when movements will occur and have a better idea of what positions may be available. He noted that promotion and transfer decisions may occur in close proximity, resulting in a short time crunch, on some occasions as little as two days. In cross examination, both he and Hart agreed that these are situations where a member has achieved a promotion and as a result is required to transfer. Transfer on short notice is a trade-off for success in the promotion process and career advancement. Otherwise such notice would be rare.

All witnesses in the present case testified that Sergeants and the ranks below Sergeant generally know well in advance when a transfer under the Policy is actually going to be made. The grievor noted that he knew in the fall of 2008 he was being assigned as the new Homicide Sergeant effective April 2009. It was his perception that he had a commitment to this effect. Rommel referred to these arrangements as “informal commitments.” In the normal course, there is a active process of networking and meetings during which members facing transfer seek to sell themselves to new Commanders as good candidates. Commanders themselves look around for new personnel. Usually there is a notice period of several months. The grievor viewed adequate notice as a WPS obligation and testified that he was “blind sided” in this case. “We celebrate transfers, we honour and welcome each other.” He expressed bitter disappointment over the manner of his removal from Homicide.

Hart clarified that while Division Commanders may express to members during networking that they are a “first choice”, the Service has been clear that binding commitments shall not be made until the formal process is complete with executive approval. Guyader too was adamant concerning his practice on this point. “Transfers can change above me.”

All the WPS witnesses were cross examined on whether management has a duty to act fairly,

reasonably, consistently and without arbitrary or discriminatory effect under the Policy. Reference was made to the WPS list of Service Competencies, which includes the following (Ex. 31, “Fairness Competency”):

Fairness to Direct Reports

Treats direct reports equitably; acts fairly; has candid discussions; doesn't have a hidden agenda; doesn't give preferential treatment.

Herman agreed that transfer decisions must be made fairly and reasonably but insisted that consistency cannot always be achieved since conditions change over time and each case has unique features. Consistency is an objective which the Service strives to achieve. The Policy is a guideline. He accepted that decision makers should consider all relevant matters and ignore irrelevant factors. Among the relevant considerations would be the needs of the unit, the public interest and impact on the member. A transfer could impact the member but it might not. Herman agreed with the stated content of the “Fairness Competency” but maintained that candor is not always possible. There are numerous variables at play in transfer decisions. He added that transfers are part of succession planning by Commanders and annual written reports are supposed to be submitted.

Similarly Hart agreed that there is an obligation to act fairly and reasonably but said consistency must yield to the need for exceptions, depending on the specific circumstances. Pressed on the point, she conceded that the Service should apply consistent criteria in making transfer decisions. Relevant considerations should be taken into account - the needs of the unit, impact on the member, and as a governing factor, the best interests of the Service overall. Hart observed that at the unit level, members can become highly invested in their role and work, but the broad needs of the Service take priority.

Guyader and Stephens both readily agreed that the Policy must be applied fairly, reasonably, consistently, in good faith and without discrimination. Relevant factors must be considered and irrelevant matters excluded. The needs of the unit, the Service and the public are relevant to a transfer decision. Admittedly a transfer can have a big impact on the member's life and this too should be considered. Both agreed with the "Fairness Competency" and said that candor is an element of acting fairly. They accepted the suggestion that as a member rises in the ranks, these performance expectations increase.

The tenure issue in Homicide

A significant backdrop to the dispute in the present case was the grievor's advocacy in support of longer assignment tenure for Homicide Unit members. As outlined above, the 2009 changes to the Transfer Policy capped service in the Unit at three years for PCC's and four years for Sergeants and Detective Sergeants. The grievor saw this as a serious error which would impair the effectiveness of homicide investigation. Never a shrinking violet, he argued forcefully against the new tenure limits while accepting "1+1" as a concept (Ex. 25, 26).

In February 2010, as the changes were just coming into effect, the grievor submitted a detailed 10-page Special Report to the Chief (Ex. 6) advising that the new policy was "extremely detrimental to the operations of the Homicide Unit." He requested a review and revision of the Policy as applied to the Unit. His Inspector at the time, McIsaac, supported the request. In his report, the grievor emphasized the special value of experience in Homicide and stressed the long learning curve for investigators. "Experience, it seems, is an undervalued commodity in the WPS ..." (at p. 3). He wrote that more frequent transfers would mean that "Homicide Unit members remain in a constant state of transition" (at p. 4). Conducting his own research, he showed that comparable Western Canadian police

departments operate their homicide units with less restrictive rotation policies and many services do not rotate homicide investigators at all (at p. 6-7). He argued that a flexible five year cap is the industry standard (at p. 9) and urged the Chief to implement such a provision for all ranks in the WPS Homicide Unit on a "1+1+1+1+1" basis.

In his testimony, the grievor stated that the new Policy was Hart's document and he knew that the Deputy Chief would be rigid on the subject. For this reason, he went directly to the Chief. He characterized the tenure limits as "completely unreasonable and untenable". He saw the policy as a "failure to properly support the members and the Unit" and also a failure in the WPS obligation to the public. There was no direct response from the Chief but Insp. Keith Walker, the Chief's Executive Assistant, conveyed a message to the grievor that tenure and other issues would be part of an upcoming Homicide Review (Ex. 7). The grievor encountered the Chief outside the building a few months later and cornered him, asking for support to increase tenure in the Unit. To the grievor, the Chief seemed supportive but cautious. The Chief told the grievor that Hart was dealing with the issue.

Sparked by cost overruns in the Unit, an Operational Review of the Homicide Unit was in fact conducted (Ex. 8) and the report by Perrier was filed in May 2010. The grievor was appointed to serve as a team member and "subject expert". Tenure was not included in the formal terms of reference but the report considered and addressed the subject anyway, apparently at the urging of the grievor. Although the Review was not mandated to make recommendations, Perrier commented that there was strong support for a five year term and suggested further consideration of the issue (at p. 49-51). Occupational health issues and the hazards of sleep deprivation were explored in depth (at p. 25-30). Burnout in Homicide was another concern raised during the review process and Perrier reported (at p. 50) that a five year tenure was endorsed by many stakeholders as a good balance, taking into account the demands of homicide investigation, personal well-being and family needs.

In August 2010, the Service convened a Review Panel (“the Panel”) to prepare recommendations based on the findings of Perrier’s report (Ex. 9). McIsaac chaired the panel and again the grievor was named as a participant. Stephens was appointed in his capacity (at that time) as a Staff Sergeant from Human Resources. The grievor attended the Panel sessions and also submitted his own memorandum (Ex. 10) dealing with a series of issues including tenure. He urged that a five year term be adopted. During Panel discussion of a draft report, Stephens circulated an email stating that “the tenure piece is not a strong argument” (Ex. 11) but when the time came for a decision, the group was unanimous in recommending a five year assignment length for Homicide members (Ex. 12, November 21, 2010). “This would address case experience, court processes and investigational risks as identified in the ORR.”

The Panel recommendations were forwarded to the WPS Executive in late 2010 but no decision had been announced by the time of the spring 2011 transfer cycle. Neither was there any indication of a change in policy regarding Homicide tenure at the time of the arbitration hearing.

Stephens was present at the final Panel meeting held to approve recommendations and he joined in the consensus on a change to five-year tenure. Stephens testified that “part of me didn’t agree, but it wasn’t a big issue then.” Reflecting back, he said that he should have considered the matter in greater depth. He did not doubt the reality of a learning curve in Homicide “but there is also the HR piece, it skipped over me then.” He now believes that the Panel did not sufficiently address the work/life balance issue and the extent of overtime hours. Stephens testified that he was prompted to reconsider his opinion on tenure when he spoke to O’Donovan, a former Homicide Unit member, who told Stephens he didn’t realize how burned out he really was until after he left the Unit. In my discretion, I accepted this evidence over the Association’s hearsay objection.

Challenged in cross examination on his change of heart, Stephens admitted that occupational health concerns were addressed extensively during the Review and considered by the McIsaac panel. But he called the five year position “silo thinking.” He denied the suggestion that his new point of view was related to defending the grievor’s transfer, now under grievance litigation.

Hart declined to express a firm view on the Homicide tenure question during her testimony but observed that the work/life balance problem is a serious issue. She added that the high solve rate in the Unit might actually be the *result of rotation*, rather than an impediment to effectiveness as argued by the grievor and others. In other words, the three and four year caps help mitigate fatigue and allow for the introduction of new people and new energy into the Unit. She said the Service may return to five year terms at some stage but for now, the priority is to encourage more experience on the front lines.

Chronology of events

The grievor’s advocacy efforts to retain his investigators

The ongoing Homicide tenure issue became a pressing priority for the grievor in late 2010 as he looked ahead to the 2011 cycle of transfers. On September 10, 2010, he forwarded his succession plan for the Unit to Hanson (then Staff Sergeant) and McIsaac (then Inspector) (Ex. 27), noting that the Unit expected to lose five members in the spring of 2011. Shipley would retire. O’Donovan would reach four years and be transferred. Kostiuk, Reid and Kehler were also slated for transfer under the Policy but the grievor’s plan recommended extending and retaining these members for the benefit of the Unit. The grievor noted that the transfer date was still many months away but he was raising the succession question early

because of the need to consider extensions.

In his testimony at the arbitration hearing, the grievor said that in the spring transfer cycle that year the Unit had lost three investigators - Mirwaldt and Loehmer (from Shipley's platoon) and Yerex. After the September 2010 memo to Hanson was written, O'Donovan was moved unexpectedly in October due to a special investigation assignment to the Chief. Based on the Policy, Kostiuk, Kehler and Reid would all be mandatory transfers. This amounted to a 70% turnover in the Unit, which to the grievor was simply unacceptable. If the Panel recommendation for five year tenures was accepted and implemented by the Executive, the turnover problem would be addressed, but unfortunately the tenure question was still unresolved.

On December 8, 2010, the grievor wrote to Hanson again recommending extensions for Kostiuk, Kehler and Reid (Ex. 13). Kostiuk was the only affiant remaining in the Unit since O'Donovan's departure. The two PCC's had served a year in Major Crimes before joining Homicide so a return on investment in those members would only begin to flow in 2011, reasoned the grievor. The Unit needed to retain these three members to uphold its operational capacity. The authority to extend rested well above Hanson and there was no response by the time Hanson himself was transferred in early 2011. Stephens replaced Hanson as Staff Sergeant for the Unit effective March 27, 2011, but it was widely known much earlier that Stephens and Guyader were taking over responsibility for Division 40.

On January 21, 2011, Routine Order 020 was issued dealing with Spring Transfers for 2011 (Ex. 5, "the Order"). As expected, on the Division 40 list, Kostiuk, Reid and Kehler were bolded names, meaning they had reached their maximum assignment duration and were subject to mandatory transfer. In accordance with practice, some 61 other members were also listed in Division 40 as eligible for mandatory transfers, but these names were non-

bolded, meaning that under "1+1", they could be transferred but might be allowed to continue in their current assignments. The grievor himself was a non-bold listing but testified that he fully expected to remain another year. In his perception, subject to good performance, members would continue until their maximum assignment length and this had always been the practice.

The Order stated as follows with respect to transfers:

The following members are considered mandatory and are eligible to be transferred by virtue of the guidelines indicated in the Transfer Policy. Those members whose names appear in bold are considered mandatory and have reached their maximum Assignment Length within their Division.

Members are reminded that many positions are subject to the one plus one policy and that vacancies may occur as a result of members transferring prior to reaching their maximum assignment lengths within the Division. Members are encouraged to contact the Division Commander of any Division to which they are interested in transferring to determine if there may be vacancies in addition to those created by members reaching the maximum assignment length. (Emphasis in original)

The grievor disagreed with the maximum assignment periods embedded in the Policy and was determined to press his case for extending the three outgoing Homicide members. Beginning in February 2011, his advocacy was directed at Stephens and Guyader. According to Rommel and Kostiuk, the grievor was conscientious about maintaining good communication with his staff and they were well aware of his efforts toward extending the three members. Kehler was Rommel's partner. Reid was Kostiuk's partner.

The Homicide extensions and Stephens' alleged warning not to see the Chief

The grievor and Stephens have different recollections about their discussions in February 2011 relating to Homicide Unit staffing. The grievor remembers two initial meetings. Stephens said they met once. More significantly, the grievor said he was warned by Stephens against going to see the Chief. Stephens denies it.

According to the grievor, Stephens came to the Homicide office in early February to introduce himself to the Sergeants and explain his philosophy of leadership. Shipley, Stephens and the grievor sat down together. Stephens told them he preferred an open door, a team approach, timely sharing of information and an informal style of discussion. The grievor immediately raised the three extensions. Shipley mentioned his impending retirement. Regarding Shipley's replacement, Stephens asked for suggested names on the spot and a number of possible candidates were tossed around. Stephens said that his preference was Read due to Read's experience in homicide investigation. The grievor had compatibility issues with Read but Stephens asked that these be put aside.

Stephens expressed concern about whether the grievor might retire and leave the Unit with a succession problem. With this in mind, Stephens asked the grievor to mentor Read during Read's transition as a new Homicide Sergeant. In reply, the grievor said he would probably seek a retirement exemption and stay for two more years (until 2013). Thus, the grievor suggested Read's move could be delayed. The meeting ended without any commitments.

The grievor recalled that Stephens returned to Homicide during the week of February 14 for a second meeting, this time with the grievor alone, and announced that Read would replace Shipley effective April 10. The conversation turned to extension of the three investigators and the issue of succession. Stephens said he felt there had been a planning failure by the

Sergeants. The grievor disagreed. "You can't plan for everything." Then Stephens commented, "I don't feel the argument to keep these guys." This annoyed the grievor and struck him as hypocritical. As a Review Panel member, Stephens had only recently supported five year tenures in Homicide. The grievor replied, "Then who will feel it? I need support. I'll have to take this to the Chief." To the grievor, tenure had been a live issue for the past year and he had made direct representations to the Chief several times. He was not about to give up.

The grievor testified that Stephens responded as follows: "Certain people won't be impressed if you go over their heads." The grievor asked, "Who? You? Hart? Guyader?" He did not perceive Stephens' comment as a threat but it was clearly a warning. He told Stephens, "I have an obligation to the members, the unit and the community." Stephens replied, "Do what you got to do."

Rommel testified that the grievor told him about Stephens' warning comment shortly after it happened. The grievor was very upset. Although the Service objected to Rommel's evidence on this point as being hearsay, I admitted it for the fact that the grievor made the statement, rather than the truth of the content. This is a non-hearsay use. Evidence that the grievor was upset and talking about a warning by Stephens goes to the assessment of credibility on this issue.

Stephens gave the following contrasting version of events in his evidence. Rumours began to surface in late 2010 that he was moving to Division 40 so he began "doing his homework" in anticipation of a transfer. It was impractical to wait for the formal decision. It was also expected that Guyader would become the Division Commander. Stephens made inquiries and learned that Homicide was working very well. There were no problematic personnel issues. He was told that Shipley was retiring. Guyader advised that the Staff Sergeant picks

the Sergeant, so Stephens began to work on identifying a replacement. He researched a number of candidates and narrowed it down to Read. He met with Read on February 16 for about an hour and was favourably impressed. Read's reference from his Staff Sergeant was excellent. Meanwhile, also on February 16, the grievor emailed Stephens to reiterate his request, previously filed with Hanson in December, that the three Homicide extensions be granted. As a result, Stephens arranged a meeting for the next day at Homicide with both the grievor and Shipley. He can be sure about the date because he checked his Outlook Calendar.

According to Stephens, the February 17 meeting was a "get to know" session. The grievor was very passionate about the extension requests. They discussed the affiant problem caused by O'Donovan's departure and Kostiuk's scheduled transfer. Without meaning to be critical, Stephens asked about affiant training and remarked that the Sergeants had left all their eggs in one basket. Stephens listened and told the grievor the extension argument on Kostiuk seemed reasonable but he "wasn't feeling the argument" for the PCC's.

Stephens testified that the grievor replied, "I need you to feel that." Stephens told the grievor he was leaving on vacation and there would be no quick decision. Then the grievor stated he would speak to the Chief about it. Stephens was well aware of the Chief's open door policy and said he is quite comfortable and secure with this approach. He was not offended by the grievor's announcement. But he responded that he didn't understand going to the Chief. It would be better to see Guyader and Hart. The Chief would defer to them since they are the decision makers for extensions. Then Shipley asked about his replacement and Stephens invited suggestions. They discussed a number of names including Read, who was in fact the prime candidate, but Stephens did not reveal his preference. Immediately after the meeting at Homicide, Stephens had lunch at the City Hall Café with Hart and Guyader to inform the Deputy Chief about the selection of Read.

Under cross examination, Stephens was certain that there was only a single meeting with both Sergeants and that it took place on February 17. He had no recollection of asking the grievor to mentor Read. He agreed that Read's prior Homicide experience was important in the selection. He stated that at this point, there was no thought of replacing the grievor.

Pressed under cross examination to admit that he warned the grievor against going to see the Chief, Stephens answered, "I don't recall that I said that." Could it be that he did say it? "It's not me, I wouldn't say that." Was it possible? "No, it's not possible." The only advice he gave was to meet with Guyader and invite Hart, but it was advice, not a warning. Responding during his own testimony to this characterization, the grievor was dismissive. He noted that Stephens has considerable HR experience in the Service. Surely, argued the grievor, if Stephens was referring to management roles and responsibilities, he could have done a better job of articulating his point.

Stephens testified that the next day, February 18, he notified Read that he was the proposed selection for Sergeant to replace Shipley. Read was very pleased. Stephens also informed the grievor about Read to ensure that the grievor did not hear it elsewhere.

In rebuttal testimony for the Association, Black testified that he was a reluctant witness who was appearing under subpoena. He and Stephens used to be partners in MCU and still remain good friends. Their families travel together. Black said he himself was "a victim of a 1+1 transfer" which was grieved and resolved, but as a result he was worried about repercussions from his testimony. Turning to February 2011, Black said he was very much aware of the grievor's efforts to retain the three investigators in Homicide. The whole issue was topical because of the Panel which had supported the grievor's position on tenure. The grievor confided to Black that Stephens might agree on Kostiuik but probably would not keep the two PCC's. The grievor told Black he would take it to the Chief if the Commander did

not support him. As well, the grievor told Black that Stephens said he should not do that, as certain people wouldn't like it.

Black also testified to a conversation he had directly with Stephens. The conversation occurred sometime after the foregoing exchange with the grievor but before the grievor's transfer. Black expressed to Stephens his own concern that the PCC's should stay and his surprise about Stephens' lack of support, given that Stephens joined in the Panel tenure recommendation. Black said to Stephens, "Without a doubt, Jewell will go see the Chief." According to Black, Stephens replied, "Perhaps he shouldn't do that, certain people won't like it." Under cross examination, Black said he could not be certain of the verbatim conversation but basically Stephens was saying the grievor should not go to the Chief because some people would not like it. Stephens was not angry in making this remark and Black did not understand it as being a threat. Black agreed there was no suggestion by Stephens of any consequences.

Stephens and Guyader select Read to replace Shipley on February 16

Guyader testified that as he turned to his new responsibilities for Division 40, the first issue in Homicide was the need to replace Shipley. He canvassed a number of potential candidates from various parts of the Service. He spoke with Read and Sgt. Robert Tycholiz (Division 13). However, he concluded that Read was the best choice after meeting him on February 16 and receiving positive recommendations from Read's Inspector and Staff Sergeant. Read had good related experience for an assignment to Homicide. Guyader was careful not to make any firm promises when he met with Read. Later the same day, Stephens also met Read. Guyader testified that the Staff Sergeant makes the pick, subject to consultation. Guyader and Stephens spoke after their respective sessions with Read and confirmed he would be their selection.

The Café Meeting on February 17: “fresh eyes” for Homicide

Guyader arranged a lunch meeting for the following day (February 17) with Hart and Stephens to discuss the Sergeant position in Homicide and to inform Hart of their choice. Normally the Superintendent would have been involved but Supt. Scott was on leave and Hart was covering. The meeting was held at the Café in City Hall (“the Café meeting”). The purpose of the meeting was merely to inform Hart of the selection, not seek her approval.

Guyader testified that after dealing with Read, discussion turned to the second Homicide Sergeant position. Historically, he said, Homicide has always been filled from MCU. Sometimes these members are at the end of their careers and once placed in Homicide, they do not serve their full term, which is a disadvantage to the Unit. He told Hart that he wanted to try something new and bring in people with a different background. They would come with a “fresh set of eyes” and new ideas, which Guyader believed would benefit the Homicide Unit. It was his initiative but he felt it was his responsibility as Division Commander. The concept was to look for members with valuable experience who had not previously served in Homicide or MCU.

Stephens was supportive. In his testimony, he explained his view that there are many competent members who can flourish in Homicide, even without the traditional background. He strongly believes that “the best teams are made with diversity.” This was not a criticism of the current Homicide complement. But change and growth can occur when a variety of different experiences are melded together. There can be benefits achieved which are not available when everyone is using a common thought process. He cited his personal experience at the Volleyball Association as an example. Stephens acknowledged that the Café discussion was about whether the grievor would stay another year as Sergeant or be replaced by someone who could bring another direction. He stressed there was no performance issue

raised about the grievor. Neither was there anything personal involved. "It was just business, for the future of the Unit." As he recalled, it was a lengthy discussion.

According to Guyader, there was a general conversation about these issues at the Café meeting. In response, Hart said that "1+1" gave Guyader the flexibility to implement his idea if he chose to do so. He said Hart had no specific reaction to the notion of bringing in a new second Sergeant. It was clear that this would be his call as Inspector.

In her evidence, Hart said the Café meeting was probably her first awareness of any issue relating to the grievor's transfer. She listened to the information about Read and concluded that Guyader and Stephens had "done their homework." It was an update for her benefit but not her decision. There was also "a little bit" of conversation about changes Guyader and Stephens might make in the Division given that they were newly appointed and were researching various issues. The grievor's name came up "as a position they would also look at, whether he met their needs." She told them "1+1" afforded flexibility to make changes but in saying this, she was not referring specifically to the grievor. She maintained she had no input to the transfer decision.

Guyader acknowledged that there is no mention in any WPS documentation or notes dated prior to the grievor's transfer of the "fresh ideas" approach to staffing in Homicide.

Both Guyader and Stephens testified that they have "no history" or prior involvement with the grievor.

Larson is identified for Homicide Sergeant

From February 28 to March 14, Guyader was preoccupied with the Sergeant promotion

process. He sat on an oral interview panel with Herman (the panel chair) and an external panelist. Stephens and Guyader spoke from time to time about the second Sergeant position in Homicide and reviewed the current Sergeant list. They did not see anyone suitable among the 80 names on the list. Guyader said “No one jumped out.” So they decided to look at the candidate promotion list for Sergeant.

Guyader noticed Larson’s name as an applicant for promotion and concluded that she would be a good choice for Homicide if promoted. Stephens said her name “popped off the page.” Guyader testified that he had worked with Larson in the Professional Standards Unit (“PSU”). She was very competent in her handling of complex investigations at PSU. Guyader knew that Larson had investigative experience in Sex Crimes and Child Deaths. “I had a high comfort level with her work,” he said in his evidence. He never spoke with any other potential candidate except Larson during the selection process and did not instruct Stephens to make any other contacts.

Stephens said Larson seemed right for the position even though she had not yet been promoted and had no supervisory experience. He said Guyader suggested Larson but as it was officially his pick, he checked into her background and was well satisfied. “There was nothing but accolades.” She had related investigative experience but would bring a different perspective. She had handled high profile cases, court room appearances and crucial interrogations. Stephens felt they should not be constrained by “silo thinking.” However, he admitted that he did not speak to anyone on the existing Sergeant list. He agreed that there were a number of other members who were experienced investigators and who could also meet the requirement for a fresh direction. “Yes, but they didn’t seem to fit. For this change, it had to feel right.”

Under cross examination, Stephens denied that the selection of Larson and transfer of the

grievor was Guyader's decision. He insisted that he made the decision and he stood by his choices. He agreed that once Read was selected, with his deep experience, it became more feasible to bring in a second Sergeant with less background to meet the diversity objective. Guyader confirmed this thinking in his evidence. Both Stephens and Guyader admitted that they could have chosen to fill Shipley's position with an outsider for fresh perspectives, retaining the grievor for stability and experience in the Unit. There was no explanation for why the latter approach was declined. Guyader stated, "I didn't consider it." Both denied they had created a problem of succession and investigative continuity for the Unit with the two incumbent Sergeants leaving at the same time. Guyader agreed that a year of overlap for Sergeants would be "ideal" for continuity but said that if necessary the departing Sergeant would act as a resource to the new Sergeant.

Stephens insisted that introducing PSU investigators in Homicide for the first time was a promising change, even though he disavowed any criticism of the Unit's current performance. He conceded that since Guyader took over, all the new selections had a PSU background and worked under Guyader.

The extensions for Kostiuk, Reid and Kehler

Meanwhile the future of Kostiuk, Kehler and Reid remained up in the air. On March 3, the grievor emailed Stephens (Ex. 14), with copies to Guyader, Shipley and Read, asking when there would be a response to his request for extensions. Stephens replied somewhat testily that he was just back from vacation and had been involved in promotion interviews all week, as was Guyader. "I didn't feel that I had to explain this but apparently it needs to be said," he wrote. He added that he and Guyader would be meeting the following day.

In fact Stephens had just sent Guyader a lengthy memo (Ex. 15, dated March 1, 2011, "the

March 1 Memo”) dealing with the Homicide extension requests. After summarizing the grievor’s arguments, he recommended extending Kostiuk because of the pressing need for an affiant but did not recommend keeping the constables. He discounted the gravity of the grievor’s concerns. He expressed the view that the team was doing well overall and had an adequate level of experience, even with further transfers. He noted that Read’s arrival “brings a wealth of experience” and would minimize the concern about turnover. Moreover, Stephens raised the issue of rank structure in Homicide and argued for a transition to all-Detective Sergeants. As an interim step, the mix would change from 5-3 to 6-2. With the departure of Reid and Kehler, only one new PCC would be named and an additional Detective Sergeant would be acquired.

The March 1 Memo was first disclosed to the Association during the arbitration process. The grievor was incensed by a number of statements contained in the memo and construed the tone and content as highly critical of himself. He testified that Stephens was not qualified to make the assessments expressed in the memo and said the conclusions were “outrageous.”

Replying in his testimony, Stephens initially rejected the suggestion that he had been critical. He had given advice along the same lines during his meeting with the grievor. He was just saying “you get your ducks in a row.” Under cross examination, however, he conceded the point to a degree. He had accused the grievor of failing to deal adequately with affiant transition but he was unaware of the full background and why affiant training was not accessed. He conceded that O’Donovan left unexpectedly in October. He had written that the grievor “greatly misrepresented” the risk from losing investigators, another critical comment. He had accused the grievor of acting on assumptions and lacking understanding. Nevertheless, Stephens defended his memo as representing his own opinions and assumptions based on the information available to him. Whether investigator work is “task driven”, whether there is adequate return on the PCC investment - these are matters of opinion, he said.

Guyader testified that the March 1 Memo was in fact critical of the grievor and since he himself had no personal knowledge of the various matters discussed in the memo, he took it at face value and relied on Stephens' advice. But he did not conclude that the grievor had done anything wrong, only that in Stephens' view the grievor could have done more. In any case, it was a small piece in the extension decision. The grievor and Stephens had differing interpretations of the same circumstances. In the end, Guyader accepted that Kostiuk should be extended and the PCC's should be transferred, and this was the recommendation he forwarded up the ranks. He knew the grievor would be unhappy with the decision and would take it to the Chief. There is an open door policy and Guyader testified that he had no problem with the grievor going upstairs.

Stephens called Read and the grievor to a meeting on March 7 in Guyader's office to announce a decision on extensions. Kostiuk was extended. Reid and Kehler would be transferred. The Sergeants were directed to look for two new PCC's, preferably from outside the Division. The grievor said there was no mention of rank changes. Neither was there any hint that he himself would be transferred.

Rank structure changes in Homicide

Unknown to the grievor, Guyader had in fact agreed with Stephens' analysis of rank structure as set forth in the March 1 Memo and Hart had quickly taken the issue to the Chief for approval. The Association was also consulted and agreed with the change. While PCC's Reid and Kehler were slated to move out, PCC Penner had a term expiry of 2013 in Homicide. It was decided to leave Penner in Homicide even though constables were no longer to be part of the team going forward (Ex. 30, March 9, 2011). In her testimony, Hart agreed that Penner too could have been transferred out of Homicide using "1+1" but he was allowed to

remain. In effect he was grandfathered. She could not explain the rationale for the decision. When asked in his testimony, Guyader said that Hart made the decision.

Stephens sent an email to Read and the grievor two days later (Ex. 17, Wednesday March 9, 2011) advising of a change in plans. The Detective Sergeant complement was being increased to six and Det./Sgt. Rob Stephanson had been selected. This left one constable spot open. The Sergeants were instructed to come up with options for a constable by Friday morning. The grievor was very concerned by this development since the Homicide Sergeant traditionally picks his own investigators. He would have expected consultation if the staffing process was being changed. He felt that his authority had been undermined as he had no role whatsoever in Stephanson's selection for the Unit. It was without precedent in his experience although he conceded under cross examination that there is nothing formally confirming the Sergeant's role in this regard.

The grievor and Read did their best on short notice. The Unit was consulted and according to Rommel, the consensus pick was Constable Jay Degroot. The next day, the grievor forwarded DeGroot's name as their selection for Homicide PCC (Ex. 18). Stephens replied "Looks good" but later the grievor learned that DeGroot was not in fact transferred.

In his evidence, Guyader said that it was a communication failure that led to Stephanson being named to Homicide without the involvement of the Sergeants. He acknowledged that Stephanson formerly worked under him at PSU. But Guyader said Stephanson had approached him about joining Homicide and told Guyader that he had already spoken to the grievor and McIsaac sometime around the past Christmas. Guyader disclaimed any intent to select a Detective Sergeant for the Unit. He thought Stephanson was the Unit's pick and this is what he told Stephens. As it turned out, OCU was upset about losing Stephanson and he did not transfer at that time.

This explanation was forcefully challenged in cross examination. Guyader conceded that the grievor was unaware of the rank structure change until a memo from Stephens dated March 9, 2011 (Ex. 17). Why would the grievor be looking for a Detective Sergeant months before? Guyader was silent in response to the question. When asked again, he said “I can’t explain it.” He rejected the suggestion that he simply wanted to bring in Stephanson as another former PSU colleague. In his evidence, Stephens also stated that Stephanson was “our misunderstanding”. Guyader told him the Sergeants wanted Stephanson. Pressed on the illogic, he conceded, “OK, it doesn’t make sense.”

Candour and fairness

Beginning on February 17 with the Café meeting, Guyader and Stephens were actively considering a new, outside person as the second Sergeant to work alongside Read, replacing the grievor. This was seen as bringing greater diversity and new perspectives to the Unit. Stephens and Guyader both admitted they never discussed their views on diversity with the grievor. The grievor’s reaction to the concept was not solicited. Nor did they ask what ideas the grievor might have for pursuing diversity or new perspectives in Homicide.

According to both Guyader and Stephens, the grievor was deliberately not informed about the potential for transfer out of Homicide. Stephens explained that if Larson did not achieve promotion or declined the Homicide position, they intended that the grievor would continue in the Unit. Was this unfair to the grievor? Stephens admitted it may have been unfair but he also wanted to avoid causing stress to the grievor, who might be unnecessarily anxious for a month while the process played out. It was “unfortunate” that things happened as they did, leaving the grievor with little time to secure a new assignment. In hindsight, he acknowledged, it would have been fair to tell the grievor what was going on even though this would have created stress. Stephens admitted that he was not candid in dealing with the

grievor and kept a hidden agenda, contrary to the requirements of the “Fairness Competency.”
“Larson knew what was going on. Sgt. Jewell did not.”

Guyader testified that he did not involve the grievor in any discussion about the future of the Unit because if Larson could not assume the Sergeant position, he wanted to keep the grievor. If the grievor was informed about the potential for losing his position, he would be an unhappy employee and he could leave the Unit. Guyader admitted he was not candid with the grievor on this issue. Under cross examination, he initially denied any unfairness, saying this was simply a business decision for the betterment of the Unit. Pressed further, he conceded that “perhaps” it was not fair. It was suggested to Guyader that without talking to the grievor about the new direction, he could not be sure that the grievor was incompatible with the plan? Guyader answered, “Yes, but I wanted someone new.”

At the conclusion of his testimony, I asked Insp. Guyader to elaborate on his concept that fresh ideas were needed in Homicide. He answered that he was seeking people who had never been in the Division in order to bring a different perspective. I asked him to explain what in substance this would mean for the operation of the Unit. He replied that he wanted to bring in people from different backgrounds. “It’s out of the box thinking. I think there’s a benefit to it. I’m accountable for the decision. There is a benefit to having people who did not work in the unit together.”

The promotion of Sergeant Larson

The Police Promotion Plan (Ex. 33, “the Promotion Plan”) is a supplementary agreement between the Service and the Association pursuant to Article II-3 of the collective agreement and is deemed to be part of the collective agreement. The parties have agreed that the promotion process will maintain fairness and allow an equal opportunity to all participants

(Art. 1©)). Persons involved in administering the plan will ensure that they remain above reproach (Art. 1). The Promotion Plan specifies that in promotion from Detective Sergeant to Sergeant, each candidate will be scored by a panel on the following basis and vacancies will be filled based on the highest overall scores (Art 6):

Seniority	20 points
Exam	30 points
Oral presentation rating	50 points
TOTAL:	100 points

In the event of a tie, seniority will determine the promotion, and if required beyond that, the higher oral presentation rating will govern.

The conflict of interest clause (Art. 13) directs that if any panel member identifies circumstances which could bring the promotion process into disrepute, the chair will be advised and may arrange for an alternate member. The panel members are responsible to assess the candidates fairly and accurately, striving to be objective. “The integrity and credibility of the panel is paramount” (Art. 14).

The Sergeant panel was comprised of Herman (as chair), Guyader and Tina Moss, a Winnipeg Transit Supervisor, as the external member. The schedule (Ex. 34) called for eight days of personal interviews to assess 27 candidates for promotion. Larson was slated for March 4, 2011. Guyader described the promotion interview process as extremely time consuming. Each session was scheduled for 90 minutes. After hearing the presentation of an applicant, the panel members each graded the applicant and then discussed their assessments in order to come to a consensus grade which would be submitted to HR. It was not disputed that during the period of the Sergeant promotion competition, Larson was the

Guyader/Stephens pick for Homicide Sergeant to replace the grievor, subject to her achieving promotion.

Guyader testified that he met with Larson on Friday March 11, a week after her interview, to discuss the Homicide position. She told him that she was not interested. Guyader said he passed this information to Stephens and then Stephens too contacted her. Stephens reported back to Guyader that Larson was still not interested. That same day, true to his word, the grievor was meeting with the Chief to plead for extensions on behalf of PCC's Reid and Kehler.

During the arbitration hearing, the Association vigorously challenged Guyader on the propriety of his involvement in the promotion panel process while actively endorsing Larson for the Sergeant position in Homicide. He denied that he was in a conflict of interest or that his conduct undermined the integrity of the process. He saw no reason to request that another panel handle the Larson interview. He agreed that the oral component is the most significant and said that he graded Larson highly on this component. However, he pointed out that the panel discussed all the grades and submitted a consensus grade for each candidate. It was not solely his determination.

Under cross examination, the other WPS witnesses were asked about the appropriateness of Guyader's involvement as a panel member in these circumstances. Stephens said that it is not uncommon to discuss a new position with a member subject to a promotion being approved. In this case, where Guyader was also judging Larson's promotion application, Stephens conceded "it doesn't look good." He agreed it would be reasonable for others to be concerned about the promotion decision in such circumstances.

Similarly Herman testified that for years Commanders have approached candidates to ask

about their interest in a position should they be successful in promotion. But was it inappropriate for Guyader to offer one of the candidates a job during an interview process he himself was conducting? Was this unfair to the other candidates? Herman replied, "I would not do it."

Hart agreed that these facts would create a perception of conflict. She pointed out, however, that Guyader was not alone on the panel and there are a number of factors taken into account in the promotion decision. She said it was unlikely Guyader could influence the ultimate result. She conceded that because Guyader was Larson's former supervisor and knew her work well, he could be particularly persuasive as a panel member, even though he was only one of three persons on the panel.

On Sunday March 13, Guyader and Stephens both attended a funeral for a member's mother. Later in the day, Stephens phoned Larson to ask again if she would consider Homicide, in the event that she was promoted. The answer was no. It was not of interest to her. Stephens said he mentioned the positives she could bring to the role but she just did not seem interested. Stephens then called Guyader to report on the conversation. Guyader recalled that Stephens said "Cheryl is not in fact interested." He and Stephens discussed the situation and concluded that the status quo would continue in Homicide.

Then at 6:25 pm on Sunday night, Larson emailed Guyader as follows (Ex. 38):

Fine I'll do it fuck.

I'll call you tomorrow morning.

Cheryl

Guyader testified he was pleased to hear that Larson would take the position but he made it

clear to her that there were no guarantees. Transfers can change above his rank. While he approached Larson during the promotion process, he insisted he did not push her very hard to accept. He denied trying to convince her to take the position. Despite the tone of Larson's Sunday night email, Guyader maintained that he had not applied any pressure on her to join Homicide. He said the email was in response to Stephens' conversation with her earlier in the day. "Obviously she changed her mind."

On Monday March 14, the Sergeant Promotion Order was released (Ex. 35) and Larson was promoted to Sergeant, along with 12 other candidates, effective April 10, 2011.

Guyader testified that he did not grade Larson any differently as a panel member because of his plans to have her join Homicide as the new Sergeant. He said his role did not permit him to affect the promotion decision. He pointed out that he knows people on all the promotion lists that were under review in March 2011 and has personal or work friendships with several members. His common law partner was on the Detective Sergeant list. He had no choice in his assignment as a member of the interviewing panel for the Sergeant promotion.

Guyader stated that Larson moved to Homicide in April and "she is doing the job to the best of her abilities. Sgt. Read is there to mentor her. It won't be long before she's up to snuff."

The grievor meets with Chief McCaskill: March 11, 2011

Friday March 11, 2011 was a day off for the grievor but he was in the building at 1:30 pm for his appointment with Chief McCaskill to discuss the Homicide extensions. The fact of the meeting was widely known. "I don't like to go behind anyone's back," the grievor stated in his testimony.

In preparation, the grievor had drafted a Special Report (Ex. 19, dated March 8, 2011) and provided it to the Chief's Office. The report was blunt. Transfer of the two PCC's would be "extremely detrimental" to the operation of the Homicide Unit. By the grievor's calculations, the transfers would result in a 60% turnover rate in one calendar year. He argued this was "extremely short sighted" and contrary to the spirit and intent of the Transfer Policy. The grievor cited the work of the Review and the Panel, including the ultimate recommendation for five year tenures, which Stephens supported at the time. He then wrote:

I was extremely disappointed when I was advised that the panel recommendation regarding tenure was to be "off the table" for the 2011 transfers.

I was further disappointed and perplexed when Ssgt Stevens remarked that he wasn't moved by the argument to extend the assignments of Detectives Kehler & Reid in the Homicide Unit.

I can assure you that the members of the Homicide Unit are devastated and that morale has been severely impacted by this decision.

It is my strong opinion that, with the panel recommendations in mind, the decision to transfer these members is completely morally corrupt.

The transfer of any functioning member of the Homicide Unit after a two (2) year assignment is extremely shortsighted and borders on lunacy. The complexities of Homicide investigation, the learning curve and the enduring nature of work underlines the need for extended assignments.

These proposed transfers not only undermine our investment in these members but also deprives the members of a full and fair investigative experience in the Homicide Unit. (Emphasis in original)

According to the grievor, he had a chance to fully argue his case but the Chief said he would not overrule staffing decisions by his Commanders. The grievor submitted that this was an

exception because Stephens had acted unethically in light of the Review Panel recommendation for extended tenure. The Chief respectfully disagreed. The grievor complained about the rank structure change and the manner in which Stephanson had been named to the Unit without the Sergeants' involvement. To this, the Chief reacted and offered to intervene, but the grievor declined. They shook hands and the Chief thanked the grievor for his passion and commitment.

Hart saw the grievor going into the meeting, or heard about it right away, and called Guyader the same day. Guyader testified that Hart suggested he should check with the Chief before any decision to move the grievor. He agreed it was not the norm to transfer a member this way. The grievor had not finished his term in Homicide. It was also very late in the cycle. "I don't know of it ever being done before," said Guyader

In her evidence, Hart said she was leaving the country on vacation the day after the grievor's meeting with the Chief. She advised Guyader to check with McCaskill to be sure that nothing had come up as a result of the meeting which might affect Guyader's staffing plans in Homicide. She herself had no negative reaction to the grievor's action. She fully accepts the open door concept and said it is very common to see members including civilians up in the executive office with something to tell the Chief. As for the grievor, he is very passionate about those elements of the Transfer Policy he does not agree with, and the issue has been going on for the past two years.

Under cross examination, Hart clarified her initial evidence about why she called Guyader, admitting that her real concern was about the controversy likely to result from pulling the grievor out of Homicide. She knew there would be scrutiny. "Yes, correct, I wanted to be sure it was all OK." They needed to know the Chief would not see the grievor's transfer in a negative way. In re-examination she added that there have been cases where the Chief has

intervened to overturn Inspector-level decisions. Since some early negative experience doing so, however, the Chief usually has deferred to his Commanders.

Guyader maintained in his testimony that he had no problem with the grievor going over his head to the Chief about the extensions. There is an open door policy and he himself utilized it once under the previous chief. Guyader was insistent that he was not angry about it and declared that it had nothing to do with the grievor's transfer.

The transfer decision and its aftermath: March 14-15-16, 2011

On Monday March 14, having learned the night before that Larson would take the Homicide position, Guyader went to see the Chief, as suggested by Hart. He told McCaskill that he planned to transfer the grievor and assured him that the move had nothing to do with the grievor's appeal over the constable extensions. The Chief was supportive. The promotions came out the same day as a Routine Order from the Chief (Ex. 35) and Larson was made Sergeant. Guyader emailed Hart (Ex. 39) to inform her that the following day he would inform the grievor of the transfer. Larson would be the new Homicide Sergeant. Hart responded she was "Glad to hear the Chief supported you. Let me know how it goes. At least it won't be a long wait." In her testimony, she was unsure what precisely she meant by this last comment. Under cross examination, she agreed it referred to the elapsed time until the grievor would move to his new assignment. "It would be difficult, because this was not anticipated by Jewell, this occurs so rarely."

Stephens and Guyader met to plan the encounter with the grievor. They decided to keep it basic and refer only to "1+1". Guyader conceded that the grievor deserved to have a full explanation but felt it would have been confrontational to attempt a discussion at the time of notification.

On Tuesday March 15 the grievor was called in to Guyader's office to meet them. As the grievor described the scene, Stephens was sitting at a table with his arms on his knees, looking at the floor and not moving. Guyader stated, "I am invoking 1+1, you are being transferred." The grievor said, "Really?!" It was immediately obvious to him what happened. "I had crossed the wrong guy," he thought to himself. He knew there could be unhappiness over going to see the Chief but never dreamed of such consequences. He walked out of Guyader's office. These were "prehistoric tactics" in his view.

Guyader and Stephens gave a roughly similar account of the meeting. Guyader said he was invoking 1+1 to transfer the grievor. The grievor asked, "I'm not extended?" Then in a sarcastic tone, the grievor said "Excellent" and left. It was obvious he was surprised and shocked. No voices were raised.

The grievor testified that he returned to the Homicide office in a state of shock. He told the investigators what happened and sat down. Everyone was incredulous. Black testified he felt sick to his stomach. The grievor believed he had been transferred because he "had the balls to go over Guyader's head." He felt palpitations in his chest. He emailed the Chief and wrote "Retribution is swift around here ... Not even I could have imagined that our leadership could stoop this low ..." (Ex. 20). He went to see a cardiologist, had an EKG and was told he had an arrhythmia.

The Chief replied by email the same morning, expressing support and sympathy but reminding the grievor that it was his policy to allow the Divisional Commanders to make personnel decisions. He offered to discuss a new position with the grievor. This insulted the grievor. The Policy was being "used as a sledgehammer." He responded by email that to him, the transfer was "completely punitive" and arose from his meeting over the PCC extensions. He called the decision "an abuse of power" and an "atrocious". The Chief in turn emailed a reply

that he was advised the transfer had nothing to do with their meeting but he would now leave the matter with the Association. The next day, closing the exchange, the grievor sent a long, angry message back to the Chief, reviewing the past course of events and complaining that he received no explanation except “1+1.” In the first 24 hours, said the grievor, he had about 300 communications expressing disgust over the transfer and condemning the WPS Executive.

The grievor contacted Guyader by email and asked for confirmation that job performance was not an issue (Ex. 21). Guyader replied that since the Association had become involved, he had referred the matter to the Chief’s Executive Assistant, Insp. Walker. As a last resort, the grievor submitted a request to the Chief for retirement exemption (Ex. 22) but it was quickly rejected. There was mass indignation among the grievor’s co-workers but he urged them not to go public about the issue, promising he would fight the transfer through arbitration.

The grievor received no further information about the reason for his transfer on March 15. He was at work all day but neither Guyader nor Stephenson felt it was sensible to have a meeting with the grievor on such a sensitive topic at that stage. They wanted the grievor to cool down first. Guyader also testified he “felt he was on shaky ground,” meaning inexperienced in labour relations protocol, because WPA was quickly brought into the case. In due course written reasons were provided to the Association but Guyader denied that the delay was due to the absence of any satisfactory justification. He and Hart rejected any suggestion of a scripted response when formal reasons were eventually given to the Association. Guyader said the reasons (Ex. 23) were prepared by him and represented his own words notwithstanding screening by counsel. Guyader and Hart agreed that the preferred approach would be to provide a transferred employee with an explanation for the decision up front.

Guyader and Stephens called a meeting of Homicide Unit members for the following day, March 16, and arranged to hold it at the HR office, away from other Division 40 staff. The grievor was not included. Guyader testified that he knew the members were upset and had some concern they would all request transfers out of Homicide.

Unit members were unsure what to think. Rommel testified he wondered if he too was going to be transferred. Kostiuk felt guilty that the grievor had been punished for his efforts to keep investigators including himself. No one could see the sense of the transfer and there had been no warning or explanation. Kostiuk testified there was anger about the unfairness of it along with a general feeling of shock.

The parties stipulated (Ex. 29) the following facts:

Inspector Guyader and Staff Sergeant Stephens convened a meeting of the remaining members of the Homicide Unit after Sergeant Jewell was transferred.

The meeting took place on March 16th.

In attendance, along with Inspector Guyader and Staff Sergeant Stephens were Detective Sergeants Kostiuk, Black, Rommel, Pike, McDonald and Constable Penner.

Inspector Guyader started the meeting by saying that there would be no discussion about the transfer of Sgt. Jewell.

However, Inspector Guyader suggested he wanted to address a number of rumors. He said first that he wanted all the members in the room to stay in the Unit. He said he hoped no one would leave.

The group of Detective Sergeants and Constable expressed their concerns. In particular, the group raised with Guyader and Stephens that:

- There was a rumor the unit was motivated by OT dollars. Guyader assured them that was not the perception or a concern;

- They wanted to know who was coming in to replace Jewell. Cheryl Larson's name was mentioned. Concerns were raised with respect to her lack of experience and the fact that not only did she not have experience in homicide or major crimes, but she did not have any experience in the rank. She was newly promoted. Guyader and/or Stephens said that she was being considered. However, no selection was made and Guyader and/or Stephens mentioned other names including Sergeants Williams and Tycholiz as possible replacements. Guyader and/or Stephens advised they would let them know of their decision. All of the Detective Sergeants and the Constable understood that no selection or decision was made with respect to Jewell's replacement. Guyader thanked the group for the input and said he would consider the concerns.
- Rob Stephanson was selected to be brought into the Unit without input from the Sergeants. Guyader and/or Stephens said that they believed the selection of Stephanson was made by the Sergeants and denied that they had made the selection.

In his testimony, Guyader admitted misrepresenting the Larson selection during the meeting. By then, Williams and Tycholiz were not being considered. Guyader had already notified Hart that he had selected newly promoted Larson as Sergeant (Ex. 39). His explanation for this misinformation was that Read was away on leave and as the other Sergeant, he ought to know about the selection before the Unit was told. By contrast, in his testimony, Stephens fairly readily admitted that by that point, Larson was their selection, the decision had been made and the statement made to the Unit at the meeting was untrue.

Guyader initially contradicted the filed stipulations regarding the selection of Stephanson. The stipulation was that he and/or Stephens (1) said they believed the Sergeants selected Stephanson, and (2) denied that they themselves had made the selection. Guyader testified this was only the interpretation put on his words by Unit members attending the meeting. He testified that he actually said, "It is the Sergeants' responsibility to pick Detective Sergeants." Under further cross examination, he admitted to the stipulated fact, *ie*, at the meeting he

denied picking Stephanson. On the evidence before me, Guyader and Stephens did pick Stephanson (Ex. 17, “we ... have selected Rob Stephanson.”)

Guyader testified that at the meeting, the members felt strongly that it was wrong for the Inspector to impose a choice of Detective Sergeant on the Unit. By practice this is a recognized right of the Sergeants, who consult the Unit members. Guyader said he told the meeting that if they felt that way, Stephanson wouldn't join the Unit, and in the end, he did not.

Justification for the transfer and its impact on the grievor

The grievor was scathing in his rejection of the ostensible reason for his transfer – the need for fresh ideas and new perspectives in Homicide. He recounted his contributions as a subject expert during the Homicide review process and suggested that generating new ideas was the essence of his participation. He considers himself an innovator and a leader but it is innovation based on solid experience. For example, in the past two years he introduced task management, a new protocol for notes in shooting reviews, a new document for Crowns to authorize murder charges, a cold case Detective's brief and new procedures for video record storage. Guyader was unaware of those innovations.

The grievor posed this question: why did no one even talk to him before the transfer to see whether *he* might be the person who could best develop new ideas? He pointed to the Unit's 100% solve rate in 2011 up to the point he was moved, asking “what was wrong with Homicide?” The Review showed that the Unit operated at half the cost incurred by comparable police departments. The grievor reiterated that his visit to the Chief, challenging Guyader so soon after his arrival in Division 40, was the “death warrant”. As for the justification now put forward by the Service, “This is a bunch of crap. It is completely

bogus,” he concluded.

The transfer has had a serious impact in a number of ways, said the grievor. His salary dropped almost half due to loss of overtime (\$180,000 to \$97,000). His new responsibilities are minor compared to Homicide. He characterized his current assignment as akin to a Walmart Greeter at times. Because the transfer notification came so late in the process, “there was nothing left”. He chose District 2 simply because it is close to his home. He had hopes of using his retirement exemption to stay in Homicide until 2013 and writing for Inspector, but given what has happened, all that is gone. His WPS career is over, he said, and he will have to move on to something else.

He acknowledged the Chief’s offer to explore a new position but he never followed it up. He found the offer insulting because there is no other job like being a supervisor in Homicide, whether financially or in terms of professional challenge. The parties stipulated (Ex. 44) that McCaskill was referring to the Strategic Initiatives Coordinator position. Overtime for that position would have been considered if necessary. The last officer to fill the position earned no overtime pay.

In his testimony, Guyader was complimentary toward the grievor, readily recognizing his considerable skills and accomplishments. The grievor is a devoted, talented and skilled leader. He has an extensive background in complex criminal investigations. He has been a good mentor and trained many detectives. He excelled at his job. The solve rate in Homicide was impressive and as the grievor claimed, stood at 100% in 2011 before he was transferred.

By contrast, Larson had no prior Homicide experience and had never performed in the Sergeant role, unless she had experience as an Acting Sergeant. Guyader did not know whether she had ever been an Acting Sergeant. But Guyader rejected the suggestion that

Homicide is not a training ground for investigators. It is a unique unit and the learning curve is steeper, but he insisted that every position in the Service is a training ground. He conceded that the Homicide Sergeant should have as much experience as possible given the coordinating role played in the Unit, with multiple simultaneous cases to be run. The position is one of the most challenging in the WPS. Nevertheless he defended the transfer decision.

Guyader acknowledged that the grievor ended up in an assignment which involves much less total pay (the same base pay), fewer decisions, less pressure and fewer consequences for the work performed. It was unfortunate the grievor had so little notice and minimal time to secure another assignment. By then, the process had been ongoing for months but Guyader denied that the impact was unfair to the grievor. He denied that there was any financial or professional hardship in these circumstances. To be a Sergeant in the Winnipeg Police Services, anywhere, is a prestigious position which is well paid.

Herman and Hart also rejected the suggestion that the grievor was harmed by the short notice he received. Given his outstanding credentials, the grievor "could have gone to any Sergeant position, it was wide open," said Herman. He is currently the grievor's Commander in Division 2. Herman said he took the grievor because, with his experience, he offers tremendous benefit to the front line members. He rejected outright the notion that the grievor's skills are wasted now. However, Herman admitted he had no specific information on what search the grievor made and what prior commitments may have existed which limited his choices. Hart stated that with his impressive resume, the grievor could have pushed out others who had informal commitments for desirable positions. "He would be welcome anywhere". Even 11 days was still enough time to take steps. Again, Hart agreed she had no information on the specifics of the grievor's search.

Herman pointed out that by its nature a police career involves change and movement. Every

member should prepare for this reality. The transfer of someone out of a desirable position inevitably means the entry of a new person into the role. The greater frustration for the membership at large is when good assignments are sealed up for long periods of time.

Argument, analysis and conclusions

Findings of credibility and fact

A substantial amount of evidence was presented by the parties in this case and, as outlined above, the general shape of events was not in dispute. However, there was sharp disagreement on a number of critical factual points, and both counsel made comprehensive submissions during final argument relating to necessary findings of credibility and fact. I have carefully reviewed all the arguments in the course of reaching the following conclusions.

Practice under the Transfer Policy. By the end of the hearing, this was no longer a disputed question of fact. On its face, the Policy allows for the transfer of a Sergeant at any time, whether or not the maximum term length stated in the Policy has been reached. Assignments are for one year unless extended. The Policy is "1+1" but that is not the practice. The grievor was the first member to be involuntarily transferred from his assignment under "1+1" before the normal end of his term, despite the absence of any performance, personality, succession or accommodation issues. In practice, members are given substantial notice of a planned transfer, generally several months, and this allows them a meaningful opportunity to canvass the options for a new assignment. There is an exception when a mandatory transfer occurs on very short notice as a result of a member's promotion, but this exception is not material to the grievor's case.

Stephens and the grievor - one meeting or two? Much was said about the conflicting

evidence concerning the initial meetings, sometime in February 2011, between Stephens and the grievor. I accept the Service's submission that the discrepancy as to the number of meetings is not germane. The substance of the respective recollections was reasonably similar, with the significant exception of the alleged warning uttered by Stephens against going to see the Chief over the constable extensions. Also, the grievor testified that Stephens asked about mentoring for Read whereas Stephens did not recall it. Again, either way I do not find the conflict with respect to mentoring to be a significant issue.

The warning by Stephens. I find on a balance of probabilities that Stephens did make a remark to the grievor during their conversation about the extensions in mid-February, essentially warning the grievor that some people within the Service would react negatively if he went over Guyader's head to the Chief. It was never suggested at any time that the remark was cast as a threat. The specific words spoken are not material and a finding in this regard is not necessary. My reasons for accepting the evidence of the grievor on this point are as follows.

The grievor was clear and unwavering that Stephens made the statement. This was a conversation on a topic that was extremely sensitive and important to the grievor. He would likely recall what was said. Moreover, I was struck by the grievor's command of facts and issues. He is a renowned homicide investigator and he remembers things with accuracy. By contrast, Stephens was somewhat equivocal on the point. Under cross examination, first he testified he did not recall it, then he explained "It's not me, I wouldn't say it", rather than declaring an outright denial.

There was corroboration from two witnesses. Rommel said the grievor told him about Stephens' remark shortly after it happened and described the grievor as upset by the exchange. Similarly Black testified that the grievor told him about Stephens' warning comment. Given

the evidence that the grievor kept his team generally well informed, and in particular that he communicated to them in detail on the tenure issue, it is plausible that the grievor would have vented to others within the Unit about a controversial statement by the Staff Sergeant. In addition, Black testified that Stephens made a similar statement in a conversation around this time with Black, namely, that the grievor should not go to the Chief because some people would not like it. Black is a friend of Stephens and testified with reluctance. He was cross examined about the precise words used but he was not shaken on his basic assertion.

This is not a finding that Stephens was untruthful. It may be that he genuinely cannot recall making the statement and on reflection, he may well believe that he would not issue such a warning in these circumstances. Stephens has a high opinion of his own managerial ability. He may recall that he was trying to redirect the grievor towards the actual decision-making level of authority and away from the Chief. He may have been careless with his words. But I find that the warning was delivered substantially as the grievor testified.

The “fresh ideas” explanation for the grievor’s transfer and Larson’s assignment to Homicide. This was the central factual issue in the present case. In formal written reasons explaining the transfer (Ex. 23), Guyader stated that the Unit needed to go in a new direction and he looked for someone without past Homicide service who would bring fresh ideas and a new perspective. Both Guyader and Stephens repeated this rationale in their testimony. The Association outright rejected the “fresh ideas” explanation and asked for a credibility finding against the witnesses for the Service.

The arbitral approach to determining credibility is well established and was not contentious in the present case. The Association cited *Re Burns Meats and U.F.C.W., Local No. 832 (Richard Richot Grievance)*, [1996] M.G.A.D. No. 15 (Hamilton) and the authorities reviewed in that award (at para. 148–153). Credibility “usually comes down to the inherent

probabilities of the evidence and the overall impression created by the witness” (at para. 148). Important considerations include the demeanour of witnesses; the character of their evidence, *ie*, were they forthright and open or evasive and uncertain; the presence of bias, interest or other motive; and the inherent probabilities of their respective accounts (at para. 150). As held in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), a finding of credibility does not turn solely on apparent sincerity in the witness box. The trier of fact must ask whether a witness’ story is in “harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” (at p. 357).

It is commonplace for an enterprise management team to seek out new direction and fresh ideas. It is not my function as an arbitrator to consider the wisdom of particular management approaches or even their implementation as specific staffing decisions such as the one in dispute here. In this regard, I have heard and I accept the caution of the Service against treading on the employer’s domain. I agree as well with the WPS argument that much of the Association’s case consisted of critical commentary on the Commander’s chosen approach to running the Homicide Unit. The grievor and the Association expressed strong reservations about the competency of Guyader and Stephens to make judgments affecting the Unit when they themselves had not lived the experience. I state for the record my disavowal of any such notion as an element of arbitral decision making. Guyader and Stephens were entitled to determine the direction of the Unit, including the crucial question of selecting its leadership, because of the ranks they hold and the responsibility vested in them by the Service. The WPS is not a democracy although it is apparent that the Chief embraces the value of discussion and dissent. In the end, management makes the decision.

In the present case, however, it was asserted that the ostensible reason for the transfer was not the real reason. It therefore becomes my responsibility to evaluate the evidence and determine

this question - why was the grievor transferred? The Association has urged that Guyader and Stephens not be believed. In assessing their credibility, I must be guided by the above-noted jurisprudence and address in particular the inherent probabilities of the overall situation. In this case, the grievor personally has only suspicions and no direct evidence as to the reason for his transfer. So the focus of the analysis remains largely on the actions and words of the two decision makers, Guyader and Stephens.

Returning to the “fresh ideas” rationale, I find this was a flimsy justification in the particular circumstances of the present case. To begin, the WPS witnesses did not describe any aspect of current Homicide Unit operations or results which they found inadequate. Logic dictates that if fresh ideas are needed, there must be something about the current set of ideas which is unsatisfactory. Neither Guyader nor Stephens could articulate any substantive reason for pursuing “fresh ideas”. Both said the Unit was doing very well. This was corroborated by the Operational Review process which had finished only a few months earlier. There was no evidence to the contrary. Pressed in this regard under cross examination, they suggested that “you can always do better.” With due respect, this was a facile justification.

In response to my invitation to elaborate on his concept of “fresh ideas” at the end of his testimony, Guyader did not provide any meaningful information. He said his approach would bring in new people with different backgrounds, which would be a benefit. The question stood unanswered. Stephens extolled the benefits of diversity but it was an entirely abstract point with no connection to the work of the Homicide Unit. To repeat, as arbitrator I am aware that I should avoid intrusion into the management of the Service. But management must put forward some plausible explanation if it expects to receive deference.

The actions taken by Guyader and Stephens from mid-February to the date of the transfer decision on March 15, 2011 were not consistent with a genuine search for “fresh ideas” in the

leadership of the Unit. Both agreed that the demanding mandate of the Unit necessitated a Sergeant with significant related experience albeit not necessarily in Homicide itself. They testified that prior to the March promotions, there were about 80 Sergeants in the Service and a number of those individuals could have met the “fresh ideas” criterion while still bringing solid experience. But none of these potential candidates were researched or interviewed regarding the second Sergeant position. Guyader and Stephens rejected the entire Sergeant list based on a glance. Stephens testified that they were trying to avoid “silo thinking.” But his answer was telling when he was asked to confirm that there were other viable candidates: “Yes, but they didn’t seem to fit. For this change, it had to feel right.” This was a nebulous explanation, not susceptible to any real evaluation.

Having rejected all the current Sergeants, Guyader and Stephens turned to the promotion list where they said Larson’s name jumped out as a prime candidate. Unlike the other possible candidates, Larson’s background was checked and her previous supervisors were contacted. Accepting that Larson presented with impressive credentials and offered the “fresh ideas” being sought for the future of Homicide, neither Guyader nor Stephens could explain why they did not implement the obvious succession plan. This was explored in cross examination. They could have approached Larson instead of Read to fill Shipley’s position and retained the grievor as a mentor for Larson until the end of his normal term. This would have maintained investigative continuity and experience in the Unit under the grievor while allowing for new perspectives from Larson. Read or someone like him could have been brought in once the grievor left a year hence when he reached the four year limit.

In his evidence, Guyader emphasized that succession planning is mandatory under the Policy. But there was no apparent attention to succession in this instance. As arbitrator, I can only ask whether the management rationale was plausible, but in this case, neither Guyader nor Larsen even considered the obvious option. They declined to explain why not. There was no

exercise of managerial judgement for which deference might be claimed. Neither was there any written documentation at any point prior to the transfer about a “fresh ideas” approach. All this undermines the credibility of the claim that the transfer was not aimed at the grievor and was solely based on the need for “fresh ideas.”

In summary, considering the inherent probabilities of the evidence presented by the Service in support of selecting Larson and transferring the grievor, I am left in significant doubt about the credibility of the explanation. This alone might be insufficient to reject the stated rationale for the transfer. However, I agree with the Association’s argument that Guyader and Stephens were deceptive on several occasions during the course of events when dealing with members of the Unit and also gave dubious evidence before me on a number of points. This must be taken into account in making the ultimate finding of credibility.

When Guyader and Stephens met with the Unit on March 16, 2011, the day after the transfer, they were facing an uproar and worried about a mass exodus. The question of Larson’s selection and suitability was raised right away. Accepting the Commander’s right and responsibility for staffing, pulling the grievor out of Homicide before his term was unprecedented and picking Larson to replace him was unorthodox. This was a time for straight up honesty to explain the decision. Instead, Guyader and Stephens told the Unit that no selection had been made. Sergeants Williams and Tycholiz were mentioned as possible replacements for the grievor. Guyader thanked the group for its input and said he would consider their concerns. None of this was true, according to the evidence of both Guyader and Stephens themselves.

Larson had already been selected. Guyader informed Hart to this effect two days earlier after seeing the Chief. Williams and Tycholiz were not being considered and input from the Unit was meaningless at that point. Under cross examination, Stephens admitted these statements

to the Unit at the meeting were untrue. Guyader did not deny the Unit was misled but offered an explanation - Read as incoming Sergeant should be notified before the members. I do not accept this explanation. If Read needed to be told before the Unit, it was Guyader or Stephens' responsibility to do so, but in any event this did not excuse making untrue statements to the Unit.

Even when formal written reasons were prepared by Guyader and released to the Association the following week, Guyader was misleading with respect to the selection of Larson. Again, his own evidence belies the sequence of events put forward in the formal written explanation for the transfer. Contrary to fact, he did not identify Larson from the "newly promoted list." He picked her from the Sergeant candidate list weeks earlier. He did not contact her on March 14 after she was promoted. He and Stephens contacted her a number of times while the promotion was still in process.

Thus, there was repeated deception by Guyader and Stephens on the controversial subject of Larson's selection. Moreover, at the arbitration hearing, both Guyader and Stephens were evasive or inconsistent on other topics. Guyader testified he did not push Larson to take the Homicide position. Larson's email to Guyader the night before the promotion order says otherwise: "Fine I'll do it fuck." In the absence of testimony from Larson, who was not called by the Service, I infer that she relented under pressure to take the Homicide job, contrary to Guyader's evidence. Stephens testified that he changed his mind on tenure duration after joining in the Panel consensus for five year terms. This allowed him to rationalize his position against the grievor's extension requests. Stephens' explanation that he had neglected to give sufficient thought to the work/life balance issue at the Panel was unconvincing. The issue was explored in depth by the Review and Panel. Stephens had HR experience and was well equipped to form an opinion. His testimony seemed contrived and convenient.

Guyader and Stephens further misled the Homicide Unit on the subject of Stephanson's selection. This was stipulated by the parties. Stephanson was brought into the Unit by Guyader and Stephens without input from the Sergeants but at the Homicide Unit meeting, Guyader and/or Stephens denied they made the selection. They said they believed the selection had been made by the Sergeants. Exacerbating the untruthfulness, Guyader tried to resile from the stipulation during his testimony, suggesting the members misunderstood him at the meeting. In the end he affirmed the stipulation.

This entire course of events, whereby Guyader and Stephens failed to act with candour and openness, is directly relevant to the credibility assessment. As highlighted by the authorities cited above, credibility depends in part of the character of the evidence in question. Were the witnesses forthright and open, or were they evasive and uncertain? Here it has been established that Guyader and Stephens were deceptive and untruthful in dealing with several aspects of the Sergeant selection process and related issues. This is very damaging to their credibility on the core issue - what was the real reason for the transfer?

Considering the combined effect of these two strands of analysis - the inherent probabilities and the character of the evidence - I find that the evidence of Guyader and Stephens lacks credibility insofar as the transfer was justified as a pursuit of fresh ideas for the Homicide Unit. I do not accept this explanation.

With this finding, and given that no other justification for the transfer was put forward by the Service, I turn to the issue of whether the transfer was disciplinary or made in bad faith.

Was the transfer disciplinary or made in bad faith?

The Association argued that the grievor's transfer was disciplinary in purpose or effect, and as such, must be set aside on the basis that there was no just cause for discipline. In addition or in the alternative, the Association maintained that the Service acted in bad faith, which also vitiates the transfer.

To the Association, the facts were compelling. Upon being notified of the transfer, the grievor immediately perceived that he had been punished for challenging Guyader on the constable extensions. The timing made it obvious to the grievor. On March 11 he met with the Chief and on March 15 he was ordered transferred without notice or reasons, based solely on "1+1". He immediately emailed the Chief that "Retribution is swift around here ...". The shock was so great that the grievor experienced palpitations and went to see his cardiologist. The Unit had the same angry and outraged reaction. Everyone saw the transfer as a punitive response to the grievor's advocacy. The warning from Stephens stood out in retrospect as further evidence that this was punishment. The Chief's denial later in the day was only a qualified response: "I am told ... the transfer decision had nothing to do with your meeting with me." No actual reasons were forthcoming from the Service for another week. The Transfer Policy had never been used in this manner before, which further underlined to the grievor and the Association that the purpose must have been punitive.

The Association cited arbitral authority for the point that even without an actual punitive intent by the management decision makers, a transfer can be disciplinary in effect: *Re Prairie Rose School Division and Manitoba Teachers' Society (Hamm Grievance)*, [2010] M.G.A.D. No. 24 (Peltz); *Re Burns Meats and U.F.C.W., Local 832 (Doug Neufeld Grievance)*, [1991] M.G.A.D. No. 6 (Cramer); *Re Campbellford Memorial Hospital and C.U.P.E., Local 2247*, [1990] O.L.A.A. No. 98 (Joyce); *Re Quality Market and U.F.C.W., Locals 175 and 633 (Oldale Grievance)*, [2008] O.L.A.A. No. 559 (Craven); *Re Irvin Aerospace Canada Ltd. and I.A.M.A.W., Local 989 (Bonds Grievance)*, [1999] O.L.A.A. No. 178 (P. Knopf).

In *Campbellford Hospital, supra* (at para. 21), the arbitrator was satisfied that the supervisor, in her own mind, did not intend disciplinary action when she changed the grievor's schedule and work location. This however was not determinative of whether the grievor had in fact been disciplined. Based on the circumstances of the transfer and the tone of the transfer letter, it was "inescapable" that the employer's action was disciplinary in nature (at para. 27) and the grievance was upheld.

In *Burns Meats (Neufeld), supra*, where the transfer dropped the grievor one pay grade, it was held that "the grievor was disciplined with effect to both his pocketbook and to his shift" (at para. 14). It was not enough for the foreman to cite production problems as the rationale for the transfer: "... if he says the Grievor was not producing, it is insufficient to just say it" (at para. 17). The arbitrator must look to the true purpose and effect of the transfer.

The *Prairie Rose* award, *supra*, listed five criteria as a guide to assessing an alleged disciplinary transfer (at para. 137), adapted from *Re St. Clair Catholic District School Board and Ontario English Catholic Teachers Association* (1999), 86 L.A.C. (4th) 252 (P.C. Picher): stated intent, career impact, reserved use for future discipline, an act of culpable behaviour and intent to correct through disapproval or punishment. Similar criteria were enumerated in *Quality Market, supra* (at para. 9). In *Prairie Rose*, it was held as follows (at para. 137):

The Association correctly argued that an arbitrator must look beyond the formalities of a transfer decision in order to discern the true purpose and effect of the action taken by an employer. In the present case, the Board's notification letter referred to the best interests of the Division and the grievor. ... Nevertheless, as noted in *St. Clair Catholic Board, supra* (at para. 5)," ... the manner in which a principal describes his or her recommendations or a School Board describes its own actions is not determinative of the character of the action. Rather, it is one

of a number of elements to be considered in coming to an understanding of the true nature of the action taken.”

The Association argued that the foregoing principles, applied to the present case, lead to the conclusion that Guyader and Stephens, whatever their stated rationale, did in effect impose a disciplinary penalty on the grievor. The impact was severe in a number of dimensions, as testified by the grievor - loss of job challenge and satisfaction, reputation, status, salary and benefits. The evidence of Herman and Hart that the grievor could have found another good position should be rejected because they had no actual facts about the grievor's efforts and prospects.

The Association pointed to the facts in *Irvin Aerospace, supra*, as similar to the present case, especially because the circumstances of the transfer were unprecedented in that particular workplace (at para. 28). The grievor lost her lead hand status in the midst of a project after challenging a manager for performing bargaining unit work. There was a lack of communication from management, failure to follow practice and a serious impact on the grievor. The effect on the grievor was a loss of wage premium and greater vulnerability to layoff. The employer responded that there were valid business reasons for the transfer, but the arbitrator held as follows (at para. 55-56):

The next question that must be addressed is whether or not the removal of the grievor's lead hand status should be considered as a disciplinary action. For purposes of this analysis, I am prepared to accept [B]'s evidence that her decision to assign the grievor back to the Pressure Pack area was directly related to production concerns. The evidence does show that the grievor was the best person for the job under the circumstances and there were several good managerial reasons to transfer her into the area at that time. However, given the evidence before me, I cannot accept that production or business concerns were the only reason why the grievor lost her lead hand status. There are far too many other circumstances and coincidences

surrounding these events to allow me to conclude that the Company was only motivated by operational concerns.

There are many reasons for me reaching this conclusion. Basically, they can be summarized by stating that there are too many unusual and pattern-breaking events surrounding this decision. ...

The grievance was upheld in *Irvin Aerospace* because the transfer in question was not exclusively based on operational considerations but was disciplinary in part (at para. 67):

... While there may have been some legitimate business reasons for wanting to transfer the grievor, it has also been established that these reasons are overshadowed by all the other uncharacteristic and unexplained circumstances surrounding the events. Further, the impact of the decision upon the grievor was certainly disciplinary in nature. She was penalized by the decision. Her employment status was jeopardized. Her wage entitlement was reduced. While the lead hand assignment is not viewed as permanent, the loss of the status in these circumstances had a potentially profound effect on the grievor that outweighed the benefits the Company hoped to achieve over the few weeks ahead. Accordingly, the evidence leads to a conclusion that the Union has succeeded in establishing, on a balance of probabilities, that the removal of the grievor's lead hand status was, in part, a disciplinary response to her conduct.

The Association submitted that in the present case, the grievor was a passionate and unrelenting advocate on issues such as Homicide tenure. He was a thorn in the side of Service management. These actions triggered critical responses from his superiors, as in the case of the March 1 Memo written by Stephens. In his evidence, Stephens denied that he had been critical of the grievor in the memo, but to the Association, the denial was designed to hide the fact that the transfer decision was disciplinary in nature. Moreover, the grievor was explicitly warned by Stephens that he should not see the Chief. Sure enough, there were adverse consequences within a few days.

The Association further argued that Hart's reaction upon learning of the grievor's visit to the

Chief - scrambling to be sure the Chief was on side - can only be explained as evidence that she and Guyader knew that the transfer was wrong. Finally, management's lack of candour throughout their dealings with the grievor, the surprise transfer notification and the long delay in offering an explanation all point to disciplinary intent and effect.

In reply, the Service submitted that the burden of proving discipline lay upon the Association, and whatever the appearances and perceptions, there was no proof that the grievor was subjected to punitive or disciplinary treatment. In particular, the evidence showed that Guyader was intending to select Larson and transfer the grievor for some time prior to the March 11 meeting with Chief McCaskill. Guyader explained his reasons and they were legitimate management considerations. The Association's criticism of Guyader's role in the promotion process was a red herring. Guyader knew the high quality of Larson's work from PSU and wanted to select her, subject to her promotion. The timing of the grievor's transfer notification, a few days after the Chief's meeting, was therefore not significant. This was just the sequence of events as they turned out. As for Hart's role, it was sensible for her to inquire and direct Guyader as she did, since there had been past occasions where the Chief overruled Commanders after receiving input from the ranks. The grievor had an opportunity to make representations to the Chief and no one held it against him.

The Service cited *Re Columbia Forest Products and I.W.A.-Canada, Local 2995* (2001), 96 L.A.C. (4th) 1 (Starkman) for the principle that employers are free to move employees between jobs within a classification, absent an express prohibition in the collective agreement (at p. 9). In the end, the Association's complaint amounted to an objection that the grievor was moved from one Sergeant assignment to another, each carrying exactly the same base pay. There is no proprietary entitlement to a particular job. The employer right to transfer within a classification is subject to good faith but the onus rested with the Association to prove bad faith in this instance. There was no such proof, argued the Service.

I am unable to accept the submission of the Service. Considering the evidence in its totality and the factors suggested by the arbitral authorities, I find that the transfer in the present case was essentially disciplinary. The analysis does not depend on the employer's characterization or the formal appearance of the decision. In this case, the stated intent of the Service carries no weight in its favour because I have expressly rejected it. For the reasons set forth above, I found the transfer was not based on a policy decision to pursue a new direction and introduce fresh ideas into the Homicide Unit. As argued by the Association, I find that the grievor was a thorn in management's side with his ongoing advocacy on issues of concern to the Homicide Unit. In his passion, at times he exceeded the bounds of temperate criticism. It is plausible that Guyader or other managers wanted him out of the way. While the transfer may not have been directly linked to the March 11 meeting with the Chief as a singular event, I find that the transfer was responsive to the grievor's continuing course of conduct. Going over Guyader about the constable extensions was only the latest in a series of aggressive challenges by the grievor.

Combined with their desire to rid themselves of the grievor, Guyader and Stephens also apparently acted on a preference for members known to Guyader from the PSU, such as Larson and other former PSU officers. To this extent, the motivation for the transfer was somewhat mixed but I find the predominant purpose was punitive. I further find that "1+1" was adopted as a convenient cover. The flexibility built into the new Policy was used to facilitate a transfer which the Service knew was unprecedented, controversial and not necessarily in the best interest of Homicide Unit succession.

As for the second criterion listed in the arbitral authorities, the negative impact on the grievor's career was massive. I include here both the financial and psychological elements as outlined in the evidence. I reject the suggestion that a star performer like the grievor

should have been able to find another comparable position despite the short notice. This was not consistent with the evidence about how new assignments are arranged in the WPS and in any case, I accept the grievor's statement that there was no other position like Homicide Sergeant. Beyond his personal preference for the work, the evidence established that the job carried higher total remuneration and greater responsibility than any other Sergeant posting. It was challenging but the grievor excelled in it. He was at the pinnacle of his career, doing what he had always aspired to do, and it was snatched away under circumstances the Service must have known would be humiliating.

As for the other standard factors cited in the authorities for assessing purported disciplinary action, they do not directly apply in the circumstances. There was no reservation for future discipline, no culpable act and no express intent to correct future behaviour. However, these features may understandably be missing where discipline is disguised as an ordinary operational change. I accept without hesitation that the Service was free to transfer the grievor within the Sergeant classification, subject always to good faith. (The fairness duty is discussed further below.) But acting on a hidden ulterior motive, as in this case, constitutes bad faith in the legal sense. Thus, the Service forfeited its management right to transfer in this particular instance.

The result in this case should not be taken as an invitation for wholesale challenge to future transfer decisions. Quite the contrary. However, the present case was egregious. The transfer process was infused with punitive intent and tainted by bad faith. I therefore conclude that in substance, the transfer was disciplinary and cannot be sustained.

Jurisdiction to apply the deemed fairness provision

During final argument, for the first time, the Service advanced the argument that the deemed fairness obligation, required in all collective agreements by section 80 of *The Labour Relations Act*, was inapplicable in the present case because the collective agreement contains no express clause dealing with the transfer of employees. Article I(2) of the agreement provides as follows:

2. Deemed Fairness Provision

In administering this Agreement including administering discipline, the City shall act reasonably, fairly, in good faith, and in a manner consistent with the Agreement as a whole and consistent with any other relevant legislation.

The Service submitted that the grievor's transfer was an action taken outside the scope of the collective agreement, pursuant to the terms of the Transfer Policy. There is no clause in the agreement referring to transfers and there is no general management rights clause, as in many collective agreements, specifying an overall employer right to manage and operate the organization. Thus, the Service was not administering the agreement when it made the decision to transfer the grievor out of the Homicide Unit. While the Service insisted that it did act fairly and reasonably toward the grievor, it objected to the arbitrability of this aspect of the grievance.

The objection was premised on the position that the impugned transfer was not disciplinary in nature, but as outlined above, I have now upheld the Association's argument that in purpose or effect, the transfer was indeed disciplinary. Article 1(2) of the agreement requires employer fairness in administering discipline. This may constitute an answer to the arbitrability objection, but because the parties made full submissions on the application of the general duty of fairness, I will consider and determine the issue directly.

The Service cited *Re York Region Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association* (1995), 52 L.A.C. (4th) 285, [1995] O.L.A.A. No. 12 (Kaplan) where a promotion grievance was held inarbitrable because there was no clause in the collective agreement speaking to promotion. The arbitrator dismissed the grievance, as follows (at para 20-23):

Without a doubt, as union counsel argued, the Collective Agreement must be viewed in a holistic manner consistent with the presence of an implied principle or term of reasonable contract administration. Where there are specific provisions of a collective agreement which circumscribe management rights, discretion must be exercised reasonably, and must be judged on an objective basis. There must, however, be something in the Collective Agreement upon which such an obligation can rest, and having carefully reviewed the entire Collective Agreement governing relations between these parties, I cannot find any term or provision upon which the above-noted obligation can be fairly applied.

The preamble to the Collective Agreement makes it clear that the parties have entered into an agreement with respect to only "certain" ~~of the terms and conditions of employment. It was up to them to decide what terms and conditions they wished to include in their~~ Collective Agreement, and while the heading to Article 18 refers to promotions, none of the language in the provision that follows evidences any common intention that the merits of promotions be subject to the grievance and arbitration procedure. ...

...

The instant case does not, it should be noted, deal with the reasonableness of rules where such rules had been promulgated by the employer pursuant to its management rights and where the reasonableness or fairness of this rules were brought into issue. If it did, the reasonableness of the exercise of management rights, more likely than not, would have been arbitrable. What this case raises is a question of arbitrability. The parties have decided what matters they wish to have covered by their Collective Agreement, and what matters, inferentially, they wish to exclude from coverage. That was their decision to make, but having made that decision, I have no basis to

take jurisdiction in a case simply because one of the parties claims that certain management actions are unreasonable. That claim does not constitute a "grievance" as defined by this Collective Agreement.

The Service argued that the same reasoning should be applied in the present case. That portion of the grievance which alleges unfair treatment should be dismissed.

In response, the Association distinguished *York Region* based on the fact that the agreement stated expressly the intent of the parties to capture only "certain of the conditions of employment" of teachers (at para. 6). By contrast, the agreement in the present case contains a grievance procedure which is broad in scope, sufficient to include any dispute over terms and conditions of employment, which would encompass a transfer decision. Article V(2) states as follows:

Definition

The word "grievance" used throughout this Article shall mean a complaint involving any matter relating to wages, hours of work, other terms or conditions of employment, or any other working condition of a member of the Police Service, and shall include, without restricting the generality of the foregoing, any difference between the parties relating to the meaning, interpretation, application, or alleged violation of this Agreement, or any part thereof.

The Association asserted that numerous transfer disputes have been previously grieved and resolved between the parties without objection by the Service. If the Service now maintains that a transfer cannot be grieved on grounds of fairness, contrary to past practice, then it should be estopped from asserting such a position until the Association can raise the matter in collective bargaining and seek appropriate revisions to the agreement. The Association also cited *Re Winnipeg Police Service and Winnipeg Police Association (Grant Grievance)*, [2005] M.G.A.D. No. 82 (Werier) where a transfer and removal from the workplace was set aside on

several grounds, including breach of the fairness obligation pursuant to the collective agreement and the Act (at para. 148, 150). As in the present case, there was no operative article of the collective agreement involved. The disputed transfer in that case was governed by an MOU between the WPS and the RCMP, entirely outside the ambit of the collective agreement.

The Association also referred to *Re Durham District School Board and Elementary Teachers' Federation of Ontario (Nelson Grievance)*, [2000] O.L.A.A. No. 171 (Kennedy), another transfer case where there was no language in the collective agreement with regard to transfer of teachers. The grievor was subject to an administrative transfer pursuant to a school board policy and, just as in the present case, the employer objected to arbitrability. The jurisdictional objection was denied on the basis that even without a specific clause in the agreement, the employer was exercising its management rights, and the fairness obligation applied thereto (at para. 21):

In addition to the analysis of the objective evidence, it is also necessary to consider the Collective Agreement context and the specific contractual arrangements entered into between the parties. Article 8 of the Collective Agreement between these parties provides that matters of staff allocation are the responsibility of certain members of management identified by the positions held. I was referred to no other contractual constraints with respect to those management responsibilities. Reference must also be made to the specific policy statement issued by the Board which, while not incorporated as a part of the Collective Agreement, presumably stands as a measure of what would be the reasonable exercise by the Board of the specific management rights involved. The relevant portion of that policy with respect to administrative transfers is its reference to the transfer being in the professional interests of the teacher. However, the specific language of that policy provides for the administrative transfer where in the view of the Area Superintendent the transfer would be in the professional interests of the teacher. It is my view that the effect of the Collective Agreement language and of the Board's transfer policy is that decisions made with respect to staff allocation

and transfers within that policy are within the exclusive purview of management and are subject to arbitral review only if they can be characterized as having been disciplinary in nature or if the management discretion has been exercised in bad faith or in a discriminatory, arbitrary or unreasonable manner. ...

The Association also pointed to *Re Toronto Transit Commission and Amalgamated Transit Union (Stina Grievance)* (2004), 132 L.A.C. (4th) 225, [2004] O.L.A.A. No. 565 (Shime) holding that there is an implied obligation to act reasonably under the agreement (at para. 230-239).

In the alternative, the Association submitted that as a unilateral employer rule, the Policy must be applied reasonably and consistently pursuant to *KVP* principles, and jurisdiction to hear this branch of the grievance could be found in that source, if nowhere else.

In my view, the Association has correctly distinguished *York Region, supra*, on the basis of the expansive grievance definition applicable to the present case. The arbitrator in *York Region* concluded that those parties had intended to leave transfer outside the coverage of their agreement. The wording itself invited a finding that only certain conditions of employment would be governed by the agreement. As a result, the arbitrator said he lacked jurisdiction even to apply the fairness obligation. By contrast, the present collective agreement expressly provides a right to grieve any complaint involving any matter relating to any working conditions of a member. An involuntary transfer logically falls within the broad sweep of this non-exhaustive definition.

Consistent with this reasoning, Arbitrator Werier applied the deemed fairness duty in the *Grant Grievance, supra*. Moreover, as a matter of basic principle, work assignments are an exercise of reserved management rights under a collective agreement, whether or not there is an express management rights clause. Without negotiating additional contract language on

transfer, the Association cannot expect more than the core protection of fairness as defined by statute and by Article I(2). Beyond that, WPS discretion under the Transfer Policy will govern. But core jurisdiction suffices for purposes of the present grievance complaint to be heard and determined.

I therefore hold that the transfer in the present case is subject to arbitral review under the duty to act fairly and reasonably in administering the collective agreement, as set forth in Article I(2).

Was the transfer unfair and unreasonable?

The Association cited arbitral authority detailing the content of an employer's duty to act fairly in implementing a transfer pursuant to managerial policy: *Re Allders International (Canada) Ltd. and Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40 (Ghattas Grievance)*, [1995] B.C.C.A.A.A. No. 300 (Devine); *Re Seven Oaks School Division No. 10 and Seven Oaks Teachers' Association No. 10 (Jim Treller Grievance)*, [2000] M.G.A.D. No. 18 (Graham); *Re Rolling River School Division and Rolling River Teachers' Association (Burgess Grievance)*, [2009] M.G.A.D. No. 41 (Peltz); *Re Burns Meats, Division of Burns Foods (1985) Ltd. and U.F.C.W., Local 832 (Kendel Grievance)*, [1993] M.G.A.D. No. 57 (Hamilton); *Re Ottawa-Carleton Regional Police Services Board and O.C.R.P.A.* (1999), 80 L.A.C. (4th) 309 (Starkman); *Re Regional Municipality of York Police Services Board and Regional Municipality of York Police Association (Amato Grievance)* (Unreported, December 20, 2001; Marcotte); *Winnipeg Police Service (Grant Grievance, supra*. According to the Association, the Service was obligated to act fairly, reasonably, consistently, considering all relevant matters, disregarding irrelevant considerations, making reasonable and appropriate investigations, and maintaining candid and open communications during the process. The Association submitted that the Service failed in all respects in this case.

In *Alders, supra*, the transfer was arbitrary because the grievor was never notified that the employer's concern about her low sales could lead to a change in her assignment (at para. 57, 60). In *Seven Oaks, supra*, an allegation of punitive intent was not proven but the transfer of a senior teacher to a less challenging position was rescinded based on the combined effect of unfairness and the failure to consider a relevant factor (at para. 227). There was a lack of open and candid communication with respect to the voluntariness of the transfer (at para. 217) and inadequate consideration of student educational needs (at para. 225). In *Burns Meats, supra*, management acted on a concern over excessive overtime but did not allow the grievor a chance to correct the problem.

Rolling River, supra, was another teacher transfer which was set aside for failure to consider relevant matters and exclude the irrelevant. In that case, it was held as follows (at para. 98-99):

The Division has a right to transfer teachers but the discretion is case specific and requires an individualized assessment of all relevant circumstances. I concur with thrust of the Division's submission that the transfer decision was open for the Superintendent to make ... The individualized assessment process here was inadequate given the unique circumstances of this case.

Based on the foregoing, I find that the Division considered an irrelevant factor and failed to properly consider relevant factors in the course of deciding on the transfer pursuant to Article 9 of the agreement. As a result, the discretion was not exercised in a fair and reasonable manner.

In *Ottawa-Carleton, supra*, a police officer transfer grievance, the arbitrator held that prior notification was not required (at p. 323) but the transfer still violated the fairness provision of the collective agreement. The published policy contemplated consultation between superintendents and inspectors, with an implicit opportunity for consultation by inspectors

with the affected officers, none of which was done. Moreover no operational reasons were given for the move. The arbitrator held (at para. 50):

In these circumstances I have concluded that it was unfair to the grievor and contrary to article 2.02 [fairness] of the collective agreement to transfer him using a process that was not in conformity with the published transfer policy of the Board in effect at that time, and, when the transfer was grieved, not to offer the grievor an explanation as to why the Board, through its Chief of Police or Superintendent, had felt that such transfer was required to meet operational objectives.

The transfer in *York Police Services, supra*, was found to be arbitrary and unreasonable because performance issues were not documented or investigated (at p. 71, 72), similar to the *Grant Grievance, supra* (at para. 148, 150).

The Association argued that the “fresh ideas” rationale in the present case, if it was genuine, should have been discussed openly with the grievor in a timely way. In fairness, he deserved an opportunity to demonstrate how he himself could deliver a new mandate in Homicide, consistent with proper succession planning. It was unfair for Guyader and Stephens to keep their agenda hidden under the guise of sparing the grievor undue stress. Both admitted as much in their testimony. The lack of notice also harmed the grievor’s chances of securing an alternative position. While the Service relied on “1+1”, the Policy had never been used to move a Sergeant involuntarily before the end of his/her term, and even Penner was grandfathered despite the elimination of PCC’s in the Unit. In the end, the only member ever transferred against his will without notice and reasons under “1+1” was the grievor.

In response on the fairness issue, the Service emphasized the right of management to adopt and implement new policies on matters such as transfer, even if past practices and expectations are changed as a result. The purpose of “1+1” was to ensure greater flexibility

for Commanders in dealing with staffing issues. The wording of the Policy in this regard was very clear and was made known to all members of the Service including the grievor. Assignments are for one year unless extended and the ranks of Sergeant and below are subject to transfer at any time.

The Service argued that when such a new policy is put in place, there must be a first time for its use. If the grievor's case represented a transfer without precedent, this alone could not be grounds for challenge. The Service pointed to the sensible objectives which were being pursued, as outlined in the Policy and elaborated during testimony by witnesses for the Service - to broaden the collective experience of the Service, to cycle experienced members into the front lines, to ensure appropriate work/life balance, to provide breadth of experience for the supervisory group. Nothing in the Policy spoke to an assurance of four full years in Homicide for the grievor. Principle 3B refers to a reasonable length of time in an assignment to allow for career development, but the grievor was well beyond his formative years. His career was fully developed already and it was really the overtime and pension benefits that were at stake in his case. But the four year period for Sergeants in Division 40 was explicitly stated as a maximum, not a minimum guarantee.

The grievor had no entitlement to the position of Homicide Sergeant and no right to any particular notice and hearing process before he could be moved. True, the grievor lost the challenge, status and financial benefit of leading Homicide, but by definition, the transfer allowed another member of the Association to take up the same challenge and enjoy the benefits. In an organization such as the WPS, change is inherent and every member should be aware of this reality. Commanders are vested with the responsibility to direct and manage change. This context must be borne in mind when considering the allegation of unfair and unreasonable treatment.

The Service referred to arbitral authority which holds that notice is not required under the duty of fairness before an employee can be transferred. In *Ottawa-Carleton Regional Police, supra*, the arbitrator held (at para. 49):

The [employer] indicated in its reply to the grievance that it would have been preferable if the grievor had been spoken to and advised of his pending transfer prior to the transfers being announced. While this may have been preferable from a labour relations perspective, it is not mandated by the transfer policy which was presented at the hearing, nor is it unfair, as this term is used in article 2.02 of the collective agreement, to transfer someone without giving them prior notice.

The foregoing principle must be read along with well established authority which allows an employer to transfer employees within a classification, absent specific language in the agreement. There is no claim to a particular job in the classification: *Re Corporation of the City of Victoria and C.U.P.E., Local 50* (1982), 2 L.A.C. (3d) 368 (Brown); *Re Massey-Harris-Ferguson Ltd. and United Automobile Workers, Local 458* (1958), 9 L.A.C. 33 (Cross); *Re Ferranti-Packard Electrical Ltd. and United Electrical Workers, Local 525* (1964), 15 L.A.C. 236 (Reville); *Re Canada Bread Co. Ltd. and Retail, Wholesale, Bakery & Confectionary Workers, Local 461* (1965), 16 L.A.C. 202 (Reville). As stated in *Canada Bread* (at p. 206):

... where an agreement sets out certain job classifications but contains no job descriptions relating to these or any other classifications, there is nothing to cut down the right of the company to control its operations and assign work. (See *Re U.A.W., Local 707 and Ford Motor Co. Ltd.* (1961), 12 L.A.C. 142; *Re U.A.W., Local 222, and Duplate (Canada) Ltd.* (1963), 14 L.A.C. 147, and *Re Sudbury Mine, Mill & Smelter Workers, Local 598, and Falconbridge Nickel Mines Ltd.* (1959), 10 L.A.C. 189, where at p. 193 the majority holds: " ... they emphasize management's rights to manage and conduct its own business as it sees fit provided it does so within the law and within the terms of any existing collective agreement. This applies even though it may result in the loss of jobs by employees or their transfer from a

job which they prefer to one they prefer less.") In the absence of job descriptions freezing the duties of a job classification, an employee has no proprietary rights in any particular job or in any particular bundle of job duties. It may well be that an employee, after a lengthy period over which he has been assigned duties, may look upon that particular bundle of duties as comprising "his job" and he may resent having those job duties taken away from him and being assigned other job duties in his classification which he prefers less. By the same token, an employee may look upon a machine to which he has been assigned for some considerable time as "his machine." Nevertheless, neither the duties nor the machine are; in fact, "his" but are, in fact, the property of and under the control of the company, and unless the collective agreement otherwise directs, the company is free to remove the particular job duties or the machine from the orbit of the employee and assign other duties and make him responsible for other machines.

The Service submitted that arbitral authority to review transfer decisions and similar management action should be narrowly construed and exercised: *Re Wellington County Board of Education and Ontario Secondary School Teachers' Federation, Wellington County District 39* (1979), 24 L.A.C. (2d) 431 (Abbott) at p. 439; *Re Prince Edward County Memorial Hospital and Service Employees International Union, Local 183* (1991), 20 L.A.C. (4th) 38 (Willes); *Re Municipality of Metropolitan Toronto and C.U.P.E., Local 43* (1980), 26 L.A.C. (2d) 44 (Kennedy). In the latter case, the desirable privileges and status enjoyed by the grievor in his former shift schedule were characterized as "a gratuitous benefit" to which there was no entitlement. There was no unfairness in revising the schedule and ending the benefit. Similarly in the present case, argued the Service, overtime in Homicide could have been terminated by adding staff or reorganizing the Unit, so that the Sergeant position became comparable to all other Sergeant assignments in terms of compensation. This would have been within the prerogative of the Service and would not have been unfair or unreasonable. Neither was it unfair to transfer the grievor to another Sergeant assignment with equivalent compensation impacts.

On the particular facts of the present case, Guyader assumed his new position late in the

transfer cycle and could not have provided much notice to the grievor in any event. Admittedly Guyader was not fully forthcoming and candid, but the staffing situation was fluid. Larson may have declined and the grievor might never have moved. Larson was definitely reluctant. Thus, the decision not to advise the grievor about plans under consideration was an acceptable management choice. Whether or not it might have been good labour relations, Guyader and Stephens were not obligated to share their thoughts about the future of the Unit with the grievor and receive his response. An arbitrator should be hesitant to intervene in the management of an enterprise simply because the grievor feels unfairly treated by a discretionary decision. The Service therefore urged that this branch of the grievance be dismissed.

Again I cannot accede to the position advanced by the Service. On the facts, I have no hesitation in finding that the Service breached its obligation to act fairly and reasonably in administering the collective agreement in respect of the grievor's transfer.

The grievor had virtually no notice of his transfer, even though the subject of Homicide Unit leadership was under active review and consideration by Guyader and Stephens for an extended period. As of February 17, 2011, there was specific planning to replace the grievor with "a fresh set of eyes". His position was in jeopardy but he was blithely unaware as he continued performing his regular duties and pressing to extend the constables in his Unit. Assuming that "fresh ideas" was the true motivation for the changes being contemplated, fairness dictated that the grievor have an opportunity to respond and make the case for retaining his role as Homicide Sergeant.

I do not accept the explanation by Guyader and Stephens that they kept the grievor in the dark benevolently, to spare him unnecessary stress. More to the point, as they also acknowledged, the grievor might have been upset and left the Unit had he known their plans. This could have

created a serious problem if Larson did not come on board. In my view, this reasoning by Guyader and Stephens only underlines the unfairness of refusing to be candid with the grievor at that juncture. Moreover, I infer from the evidence as a whole that the Larson plan was kept secret to prevent the grievor from fighting back, as he surely would have done had he gotten wind of a potential transfer. Even the notification of transfer on March 15, 2011 was deliberately terse without any offer of a meaningful explanation. Both Guyader and Stephens admitted their lack of candour was probably unfair to the grievor. I appreciate that a manager cannot always be totally open with an employee about personnel planning matters, but in these particular circumstances, the unfairness was patent.

The other significant factor in this case relating to fairness was the past practice. While the written Policy allowed a transfer at any time, virtually unrestrained, this was not the reality. Members reasonably expected a long period of notice and sufficient time to engage in the networking which accompanies the formal transfer process in the WPS. This can be changed in future but the Service must be clear about the new ground rules if it opts to depart from widely accepted past practice.

There are caveats in this case which should be understood. I accept the argument and authorities of the Service that no employee has an entitlement to maintain a particular position within his or her classification. I agree as well that the Transfer Policy on its face allowed for substantial management flexibility in determining who to transfer and when to do so. Finally, I concur with Deputy Chief Hart that past practices can change. Effective management often demands change. Nothing in this award detracts from the legitimacy of the management perspective articulated by Hart and Herman. But the collective agreement and *The Labour Relations Act* required that before the grievor could be transferred, significantly affecting his employment interests, at least the rudiments of fairness should have been observed - notice, information about the supposed new direction, an opportunity to be

heard, adequate time to pursue alternative positions. Respect for basic fairness is not normally incompatible with efficient management. All the WPS witnesses readily endorsed the suggestion that decisions under the Policy must be made fairly, reasonably and without arbitrary or discriminatory effect.

As for the submissions based on relevant and irrelevant considerations, I do not accept the Association's line of argument. I reject the allegation that Guyader and Stephens were deficient in their appreciation of Homicide Unit operational needs or were lacking in the experience necessary to make sound judgments in that regard. In my view, to accept this line of attack by the Association would undermine the authority of management and involve arbitrators inappropriately in police governance controversies. Admittedly the members who are closest and most committed to the Homicide Unit have a deep understanding of the work they perform. But they may lack the broad perspective so vital for Service-wide planning and management. All points of view are deserving of respect. In the end, the chain of command is entitled to make necessary decisions, subject to the duty of fairness, good faith and compliance with the collective agreement.

Award and Order

The grievance is upheld. It is declared that the transfer of the grievor violated the collective agreement. Jurisdiction is retained to settle remedy.

ISSUED August 23, 2011.

“A. Peltz”

ARNE PELTZ, Arbitrator

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