

Subject:
– Appointment to Position
– Whether Lateral Transfer or New Position
– Management Rights

ARBITRATION AWARD

BETWEEN: THE ROYAL NEWFOUNDLAND CONSTABULARY
ASSOCIATION
(hereinafter called the “Association”)

AND: HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR
as represented by TREASURY BOARD
(hereinafter called the “Employer”)

GRIEVOR: SERGEANT JAMES C. MacDONALD

COUNSEL: For the Association: Jamie Martin, LL.B.
For the Employer: Bernadette Cole-Gendron, LL.B.

SOLE ARBITRATOR: David G.L. Buffett, QC

INTRODUCTION

The hearing was held in St. John’s on the 22nd, 23rd, and 29th days of September, 2010.

At the commencement of the hearing the parties agreed as follows:

1. That the Arbitrator was a properly constituted tribunal and had authority to hear the case.

2. That the Arbitrator would take notes and in the event of a conflict as to the evidence or as to what transpired at the hearing, the Arbitrator's notes would prevail.
3. That all parties likely to be affected by the outcome of the hearing had received adequate notice thereof and been informed of their right to appear and be represented.
4. That all matters pertaining to the grievance procedure, and all times limits, (including time limits governing the publication of the award) whether statutory or arising from the Collective Agreement, had been either properly observed or waived.
5. That there are no preliminary points to be raised as to arbitrability and no other preliminary objections.
6. That issues of quantum, if any, would be dealt with separately, and that if the parties do not reach an agreement within 60 days of publication of the award, they will be referred to the arbitrator.
7. That the arbitrator would remain seized of the matter for a period of 60 days after publication of the award to deal with any issues of interpretation should they arise.
8. That all witnesses would be excluded until their testimony has been heard.
9. That any time limits for the publication of the award are waived.

The one person affected by the outcome of the hearing, Sergeant James Penton, was present and was permitted to call and examine witnesses, cross-examine witnesses and present argument.

Exhibit Consent 1 was received. It was a bundle of documents consisting of 12 tabbed sections as follows:

- Tab 1 Grievance form 2008-016/08-04-22
- Tab 2 Request for sole arbitrator July 29, 2009
- Tab 3 Appointment of sole arbitrator September 8, 2009
- Tab 4 Personnel Order - Operational support, patrol services-March 26, 2008 - 2008-106
- Tab 5 Personnel Orders – Constable position Mounted Unit, Operational Support Services (Penton and Horan), then (Coombs) and then (Day)
- Tab 6 Personnel Order – Sergeant Operational Support 2005 – 192 – September 14, 2005
- Tab 7 Letter dated March 18, 2010 from David Hickey to Jamie Martin enclosing the Competition File materials
- Tab 8 Email from David Hickey to Jamie Martin on James Penton overtime
- Tab 9 Personnel Order 2007-164 May 28, 2007
- Tab 10 Organization Charts (2)
- Tab 11 Personnel Order – Selection Sergeant, Operational Support (11 pages)
 - 2005-2006
 - 2006-227
 - 2007-061
 - 2007-044
 - 2007-061
 - 2007-044
 - 2006-208
 - 2006-227
- Tab 12 Collective Agreement between the parties

The following additional documents were received as Consent Exhibits:

1. Consent 2 Royal Newfoundland Constabulary Position Descriptions and Competencies

2. Consent 3 A brief history of the Mounted Unit of the Royal Newfoundland Constabulary
3. Consent 4 Detailed employment history Deputy Chief Janes
4. Consent 5 Personnel Order #2008-386 dated December 10, 2008 regarding a Constable position with the Mounted Unit
5. Consent 6 Personnel Order #2007-166 dated May 29, 2007 regarding a Constable position with the RNC Mounted Unit
6. Consent 7 A letter dated September 13, 2007 to William J. Brown, Deputy Chief of Police OIC Patrol Services signed by William J. Janes, Acting Inspector Operational Support Services
7. Consent 8 Duplicates of some Personnel Orders found in Consent 1 but in a different order and a duplicate of SR#1.

The reason for Consent 8 was that Counsel for the Association wished to place the Personnel Orders side by side in a particular order and to cross-examine an Employer witness on them.

One additional exhibit was received during the evidence of Inspector Sean Ryan. It was marked SR #1. It is a Personnel Order calling for applications for a Staff Sergeant position for the Forensic Identification Section Investigative Support Services, CID and is dated 3/1/10. It was authored by Inspector S.P. Ryan and bears the Personnel Order #2010-066.

Nature of the Grievance

The Grievor filed a grievance dated April 22, 2008. Initially it was not on a printed grievance form but took the form of an email to Staff Sgt. Devereaux.

It stated that the Grievor would like this communication to serve as notice of his grievance to the awarding of a position to Sgt. J. Penton. The grounds for the grievance were stated as being that the Grievor was senior in rank, had a longer duration as a

supervisor than Sgt. Penton, exceeded Sgt. Penton in all areas required for the position with the exception of horse care, *i.e.* – nine years of crime prevention, represented the RNC on numerous boards and committees, and organized major events such as the 2004 FIS Conference. It also set forth that the Grievor had completed courses in media relations and effective presentation and made the point that the mounted position had been, since its inception, a constable's position and that if a third or fourth horse was to be added to the unit, training should be provided to another constable.

The suggested recourse or redress requested in the email was to be awarded the position.

The grievance was transferred onto a grievance form and the email was incorporated into the grievance form. On the form the Association requested as an adjustment “to be awarded the position applied for”.

The grievance was not resolved at either the first or second reply stages and at the third stage, the third reply was signed by William Janes. It read:

“Sgt. Penton was selected for the position based on his experience/skills and nature of the work. The majority of Sgt. Penton's work will be with the Mounted Unit.”

The matter then proceeded to arbitration.

The position in question was a Sergeant's position in the Operational Support, Patrol Services Sector of the Royal Newfoundland Constabulary.

A Personnel Order dated March 26, 2008 bearing the number 2008-106, Exhibit Consent 1 Tab 4, was the Personnel Order which prompted the competition for the position. It was entitled “Expression of Interest – Sergeant position Operational Support, Patrol Services.” It invited applications from Sergeants on the Northeast Avalon for a supervisory position for the Mounted Unit, Community Services and Drug Awareness.

There were two applicants for the position, the Grievor and Sgt. James Penton. Both had entered the Royal Newfoundland Constabulary (RNC) in the same year and were in the same class but the Grievor was senior because of the timing of their respective enrolments or swearing in as officers. The Grievor has Regimental number 400 and Sgt. Penton Regimental number 408. Their seniority numbers are 36 for the Grievor and 43 for Sgt. Penton. In any event, seniority is not an issue and it is conceded that the Grievor has seniority.

The Evidence

The Association called four witnesses, Inspector Sean Ryan, Constable Krista Day, Constable George Horan and the Grievor.

The Employer called two witnesses, Deputy Chief William Janes and Sgt. James Penton. Sergeant Penton called no witnesses.

The Association Evidence

The first witness called was Inspector Sean Ryan.

Inspector Ryan joined the police in April 1984 and served in various capacities over the years though the bulk of his career was in the Criminal Investigation Division (CID) section of the RNC. He was called mainly because of his involvement with the Mounted Unit.

In earlier times horses had played a key role within the RNC. However, they ceased to play a role some time in the early 1950's.

In 1996 when the RNC was engaged in anniversary celebrations a senior officer, Ches Oliver, approached Inspector Ryan about re-establishing a Mounted Unit.

As a result of this Inspector Ryan lobbied the Executive within the RNC and eventually with the help of a businessman a Mounted Unit was established.

Inspector Ryan had had an involvement with horses, not as a police officer, but in a recreational capacity and was active in western riding or trail riding.

Inspector Ryan went on to say that two officers were selected in 2003 for attachment to the unit and to go to Toronto for training in the care and use of police horses. This training was provided by the Metro Toronto Police Force.

The first two persons selected to become members of the unit were Sgt. Penton, then Cst. Penton, and Cst. George Horan.

Cst. Krista Day and another officer were selected as alternates.

Cst. Penton and Cst. Horan were sent to Toronto for training.

Inspector Ryan explained that when applications were called for for these two positions persons with a horse background were preferred and there were also fitness and weight requirements.

Inspector Ryan did not recall there ever being a Sergeant responsible for the Mounted Unit.

He stated that in the early years he was the Unit supervisor and he was an Inspector.

He recalls Bill Janes, Ab Singleton, Barry Constantine and Phonse Lahey having a supervisory responsibility over the years. Most of these persons were senior officers in Operational Support and Phonse Lahey was a Staff Sergeant.

Inspector Ryan was unable to say what experience any of these persons had with horses.

Inspector Ryan was shown Consent Exhibit 1, Tab 4, namely the Personnel Order which sparked the competition between the Grievor and Sgt. Penton. He was asked about the use of the words “expression of interest” and “applications are invited”. He said that the document seemed to be a blend of a call for expressions of interest and a call for applications. He had no involvement in drafting it or in the decision to go forward with it.

Inspector Ryan was asked about lateral transfers and about expressions of interest and applications. His response was that lateral transfers usually apply to transfers within a division of the RNC and involve expressions of interest being called for whereas applications are invited RNC wide.

Inspector Ryan said that if there are vacancies in a division, the practice is to call for expressions of interest within the division to see if any persons are interested and meet the criteria. He said if so it would likely be dealt with by lateral transfer.

If this wasn't the case then an invitation for applications would go out Force wide.

Inspector Ryan was also asked about the bundling of duties and what that connotes to him. He responded that he has bundled duties himself. He said it is necessary because many times an officer “wears many hats”.

He was asked about putting drug awareness in the same group with horses. His response was that it seemed to him that dogs and horses would be a good fit. In Toronto the canine and mounted units are bundled together. He reiterated that this was just his opinion.

He said that he was never a Sergeant in charge of the Mounted Unit but was an Inspector when he was in charge of the unit.

Inspector Ryan said that to his knowledge there was never a “working” Sergeant who supervised the Mounted Unit up to the time of Sergeant Penton. He said there may have been a Sergeant doing scheduling but that Sergeant Penton was “the first Sergeant in a saddle”.

He testified that in selecting persons for a position he puts emphasis on demonstrated interest and ability.

He described the Toronto training program attended by members of the Mounted Unit as an arduous one.

He said that training and knowledge of horses is not necessary in terms of scheduling and keeping track of overtime “but it is a bonus”.

He also acknowledged that a person could acquire knowledge about horses through training.

In terms of the costs of sending the two officers for training he said there was no costs for the course but there were costs of housing and salaries.

He also said there was nobody that they had sent on the course that had not been able to do it.

During cross-examination Inspector Ryan indicated that it was 2002 when the unit was started. When it became operational in nature he was in charge of the CID as an Acting Superintendent. He said that his duties with the unit were to set it up, select the officers, get them trained, look after the housing of the horses, after feed, and after veterinary issues.

He indicated that he had no formal training with horses but years of experience as a trail rider.

He said in 2002 there was not a Sergeant in charge and Personnel Order 2005-192 at Consent 1, Tab 6 was the first to call for a Sergeant in charge of the Mounted Unit.

He described what the day to day duties of the constables were when the unit was his responsibility. These were cleaning of stalls, grooming, maintaining kit (which means maintaining uniforms and boots for riding as well as saddles and other riding gear) and proper feeding and watering.

He said that the horses were first housed at Clovelly Stables, private stables, before the current stables, near Government House, were created.

He described lateral transfers as being transfers within a division. For instance, in the CID one could get transferred from or to major crimes, sexual assault, fraud, property, the general investigations section, or drugs.

He examined the Personnel Order in question and commented on the wording "Northeast Avalon" saying that not every Sergeant in the Northeast Avalon works in that division, meaning Operational Support.

He opined that one could be laterally transferred within the patrol division, the same as one could in the CID.

He said the fact that the Personnel Order refers to existing Sergeants means they are looking for someone already promoted to Sergeant as opposed to someone eligible for promotion.

He said if it was just to Sergeants within Operational Support, it would have been more like an expression of interest.

He could not say what the drafter of the Personnel Order had intended.

He said with Expressions of Interest it is normally by email that persons respond.

In the case of SR #1, it was a call for applications. There was a vacancy in that case. This Personnel Order stipulated experience was “a must” however that was not his idea but someone else determined that it should go into the document.

He had no involvement in re-bundling the units which resulted in the Personnel Order in 2008 and he had no authority in Operational Support.

He has rebundled duties within his sphere of authority.

He said a working Sergeant was one who was engaged and involved in the actions of his unit and in the case of the Mounted Unit it would be a person in the saddle. He stated that he has had working Sergeants under him. The demand determines if you have a working Sergeant and he would do a Needs Analysis to determine if he needed one.

Sergeant Penton cross-examined Inspector Ryan. During the course of his cross-examination Ryan testified that Penton and Horan excelled in the training they received in Toronto. Penton was noted to have been one of the top students ever.

Cst. Coombs who was later appointed to the unit shone above the rest.

He said that Cst. Day met the criteria but would need mentoring.

In redirect, he stated by Needs Analysis he meant “does the position deal with any specific expertise or any specific legislation, is it a specialty service as opposed to a generic service, will there be a need for expert testimony”.

He also said that in the case of SR #1, the Personnel Order which he issued, he personally did not view experience as a must or think that a forensic background was required. He viewed the wording which was in #1 as having the effect of ruling out people.

He also stated in his experience one does not need applications for lateral transfer unless it is to a new position and if it's a new position applications are called for RNC wide.

Cst. Krista Day testified that she became a member of the RNC in November 1990. Prior to holding her current position as a member of the Mounted Unit, she spent 14 years in street patrol, three years in CID special projects, and one year in street crimes. It will be two years in this coming December that she had been a member of the Mounted Unit.

In April 2009 when she came back from the Toronto training for the Mounted Unit, Sgt. Penton was her immediate supervisor. Constables Horan and Coombs were also in the unit at that time. She is one of three Constables reporting to Sgt. Penton.

She described a regular day as involving showing up at 8 am, the horse is already fed, you start mucking out the stall, clean the gear and polish it, take the horse out and tie it on, clean and groom the horse, change into your riding uniform, and start out on the streets of St. John's. She said you might be called to assist if someone was being chased. You would go back at the end of the day, put the horse back in the stall, and do any upkeep and repairs to the barn. Sometimes they go in after their regular hours and feed the horses. Sometimes they work 10 hours because of the way the shift system works. A stable hand works some days.

She said she was interested in horses as a teenage girl and had ridden horses but was never formally trained until she received the training in Toronto.

When asked what level of supervision is provided by Sgt. Penton she said "he orders things as needed" and that "he was a supervisor but also a co-worker". She described him as one who orders supplies and schedules events.

During cross-examination Cst. Day said that when the unit was first set up she was named as an alternate to go to the training in case something happened to either Sgt. Penton or Cst. Horan.

She had to reapply for the position when they decided to expand the unit in 2008. Before then, when she was an alternate, she would volunteer her time in the unit and Constables Horan and Penton gave her some experience with the horses over the period of probably a year. This would be during their work hours and her work hours or her time off.

She said therefore when she reapplied in 2008, she had some training.

A 15 week program in Toronto was described by her as being invaluable. She said it taught her how to care for and groom a horse and basic riding. She said you then advance through and street patrol works with you. She said that you learn about vet care and equine care. She described the training as not giving her everything she needed to do the job and said experience and time teaches additional things. She said one gets the basics but one has to become better and rely on one's senior officers to teach things.

She indicated there is a learning curve both for the horse and rider when they come out of training.

She indicated that there is a time before one can go out alone and its got to be when one feels in total control.

Sgt. Penton had no questions of Cst. Day.

On redirect she responded yes to the question "If you had no knowledge of horses, taking the Toronto program would be valuable".

Cst. George Horan was the next to testify. He joined the Mounted Unit when it was started. He has been an RNC officer since April 4, 1983 and was appointed to the Mounted Unit in 2003. He and Sgt. Penton, then Cst. Penton, were the first two officers in that Unit.

He indicated that their supervisor then was Inspector Sean Ryan. He recalled that Ab Singleton then an Inspector, followed Sean Ryan. Bill Janes and Staff Sergeant Lahey were also supervisors. He also recalled Inspector Constantine being a supervisor as well as Staff Sergeant Geoff Janes. The only one he was aware of who had any experience with horses was Sean Ryan. He indicated that his current supervisor is Sgt. James Penton.

He thought that before Sgt. Penton was a supervisor there had been no sergeant responsible for the Unit, just Staff Sergeants and Inspectors.

He described the daily duties as Cst. Day had but added that they sometimes go to special events. He also said they go to trouble areas not accessible by car.

He has been around horses since he was a boy but really learned about them in Toronto.

He described the training he and Penton received as being superior to other training given by the Toronto Force including that which was given to Coombs and Day because he and Penton were trained alone whereas the others were trained as part of a larger group.

He noted that he and Penton got to do actual crowd control in Toronto and took horses to downtown Toronto to police things such as the Rolling Stones concert.

He acknowledged that his previous supervisors did not undertake the training in horses in Toronto, but also added that they would have benefited from doing so.

He described Sgt. Penton as still being at the barn. He said Penton sees to the filing and record keeping that has to be done, does attendance, arranges for farrier care and other work, schedules events, and allots what work has to be done. He was aware that Penton was also responsible for Drug Awareness and Community Services.

He testified that he could recall seeing Staff Sgt. Lahey and Inspector Janes down around the stable from time to time when they were supervisors but not Inspector Singleton very much.

During cross-examination by Ms. Cole he was shown Consent #1, Tab 6, a Personnel Order in September of 2005 calling for a Sergeant to supervise that Unit as well as the Accident Investigation Unit and other Units. He was also shown Consent #1, Tab 11, which contained a Notice of Appointment of Sergeant C. Penney (Cec Penney) to that position. He then recollected that this was the case but said that he always in his mind associated Cec Penney with Accident Investigation. This was why he had earlier forgotten Cec Penney.

He said in cross-examination he and Penton received more training than Coombs and Day because of the numbers of officers they trained with.

Under questioning by Sgt. Penton, he said he believed Coombs just left the ring to go to the CNE grounds but did not actually get out into the streets of Toronto. He understood the same was true of Cst. Day.

In redirect, he cannot recall ever reporting to Cec Penney but he can remember seeing him around. He also said Penney had, to his knowledge, no experience with horses.

The Grievor, Sgt. James MacDonald, was the last Association witness.

He has been an RNC officer for 28 years. He identified the unsigned letter and application bearing his name at Tab 7 of Consent #1 as his letter and application for the position which was the subject of Personnel Order #2008-106 at Tab 4 of Consent #1.

He stressed that this grievance is not a personal thing and that he and Sgt. Penton and Cst. Horan were all in the same graduating class as police officers.

He testified that he was promoted to Sergeant in 2005.

He outlined his duties over the years. As is the practice, he started in the street patrol sector of the RNC. As a member of street patrol he'd lay Criminal Code, Highway Traffic, and Drug charges. He spent a short time as a dispatcher at the Communications Centre.

One of his longest periods in any job was as a member responsible for Crime Prevention which is now called Community Services.

He attended the Ontario Police College and was trained to become a Forensic Identification Officer.

He said in Crime Prevention he acquired a high public profile and it was a unit dedicated to public relations. During his tenure he developed presentations for schools. He has done hundreds of presentations in schools, roughly one third being connected with drug awareness and education.

He was 12 years in the RNC when he was dealing with drug awareness.

He also served in the break and entry section of the CID and was in the Communications Centre for a year.

In 1998 he became a Forensic Identification Officer.

In 2005 he was transferred back to Street Patrol and was assigned as a Sergeant to Street Patrol in Mount Pearl supervising five to six Constables. He estimated it was about two months after this time that a Personnel Order came out looking for Sergeants in the Communications Centre. He did not apply but was transferred there. He felt he was not qualified because since he had last been there, the centre changed and had become completely computerized and there was an entirely different system in place. He said other than having interpersonal skills and basic police radio understanding, he was in a foreign world. This was in October 2005. He was still in that position at the time of the hearing.

He said training had to be provided for him when he went into the Sergeant's position at the Communications Centre in the form of a 10 week course.

He also outlined applying for a Forensic Identification position, a Staff Sergeant's position, as he is on the roster of persons eligible for promotion to Staff Sergeant and he applied for a Media Relations Officer's position.

He described what was going through his mind when he saw Personnel Order 2008-106. He said that if it was simply looking for a Sergeant in charge of the Mounted Unit he would not have applied.

He stressed that he felt he was qualified for the position because of his strong interpersonal skills, his community service experience and his drug awareness involvement over the years. He did not believe that on the sections other than the Mounted Unit Sgt. Penton outweighed him. He liked horses and stated that he could have mastered the training. He perceived horse experience was desired but not mandatory.

He described in some detail his accomplishments as a police officer stating that he has received commendation after commendation in the sections he's worked in. He described his experience with community services, recreational committees and his

diabetes volunteer work. He stated that he brought the RNC into the Crime Prevention Association and revamped the Youth Diversion program. He described being involved in many community services initiatives and as having made 700-1000 presentations in the area of drug awareness.

His position was that he was ideally suited for the drug awareness, community service and public relations aspects of the job.

He felt that he could be trained in the use and care of horses.

As for the branding and image projection role, he had been doing that for years.

He also referenced his involvement with the Senior Resources Centre.

Sgt. MacDonald stressed that he had two more years supervisory experience than Sgt. Penton.

The Personnel Order was dated March 26, 2008. Some time after that Sgt. MacDonald recalled that he was at a social event, which I took to be one with other police officers, and he said people expressed surprise that he had applied and said "what did you apply for, I think its Jim's job".

He was referred to his application and asked to comment on the written comment on it by now Deputy Chief Janes "does not meet criteria". He said he understood that to mean he was not getting the job.

He said he heard informally through the grapevine that he was not getting the job but the first he heard of it officially was in the form of an official Personnel Order sent out by Ruby Tobin, the Chief's assistant, which I took to be a notice to everyone else in the RNC as well. He did not get a call or notice in advance.

He stressed the point again in his testimony that he felt he was ahead of Sgt. Penton in all aspects of the job except for the Mounted Unit, felt that he had the supervisory skills, and made the point that because other persons in the Unit had received specialized training the supervisor did not necessarily need the same amount of training. He felt he could learn about horses from the members. He noted at this time that when Sgt. Penton went into the supervisory position there was only one other person in the Mounted Unit, an experienced Constable, Cst. Horan. He also made the point that he could have taken the training that was afforded to either Cst. Coombs or Cst. Day.

He felt that the management within the Force were surprised when anyone other than Sgt. Penton applied.

As he read the Personnel Order it was not excluding persons without experience with horses.

He believed that the general consensus was that Sgt. Penton was not going to be taken out of the Unit and that management took the one criteria they knew he could not meet and used it to disqualify him.

Sgt. MacDonald also commented on the fact that it was stated to be a call for expressions of interest. He said other than a Personnel Order in 2005 and one in 2006 he had not seen this term used in Personnel Orders. He was puzzled at first and said when people see "Expression of Interest", they just delete it because they think it's restricted to a particular section of the RNC, but in this case if you read on you note it calls for applications. He has never seen the call for expressions for interest and a call for applications blended like this before. He thought it was either a mistake or was deliberate so that persons would not be prompted to apply.

At the close of his examination in chief, Sgt. MacDonald asked that I consider all aspects of the Personnel Order as it is written and not just the Mounted Unit aspect of it. He asked that I also consider that the Employer had the opportunity to provide training. He

said that he learned forensics through a training course when he went there. He also said that he learned the communications job through formal training when he went there.

On cross-examination by counsel for the Employer he stated that it was his letter and Sgt. Devereaux's that he submitted with his application and nothing else.

He said his drug awareness experience falls under his crime prevention experience so he did not perceive that he had to set it out. He was never told that there would be a file review or that he would not have to set out all his qualifications.

On cross-examination by Sgt. Penton he said that he had never served in a joint RNC/RCMP Drug Enforcement Task Force. He also stated that he had never been involved with a dedicated drug unit.

In his redirect examination, it was brought out that the Personnel Order said Enforcement "or" Awareness in relation to drugs, not Enforcement "and" Awareness. He also said that there are Personnel Orders that say your file may be reviewed. This one did not.

He said that there was not a matrix used in this competition that he was aware of. He also said there was no interview in this case.

He said in some cases they have asked for interviews and in other cases they have not.

The first Employer witness was Deputy Chief William Janes.

Deputy Chief Janes went through his detailed employment history, Consent Exhibit #4.

In June of this year he was appointed to the position of Deputy Chief of Police. His experience included him being in the Operational Support sector of the RNC and while there, he was for a time overseeing the Mounted Unit.

Prior to promotion to Deputy Chief, from June 2007 he was an Inspector in Operational Support responsible for managing the work of Sergeants and Staff Sergeants in areas such as Accident Investigation, Telephone Reporting, Communications, Community Services, the Mounted Unit, Drug Awareness, the Police Dog Service, Tactics and Rescue, Public Order, Ground Search and Rescue, Explosives Disposal, Emergency Preparedness and Crisis Negotiation.

He was an Inspector in Patrol Services from August 2006 to June 2007. Prior to that from January 2006 he was a Sergeant in Patrol Support Services, a Sergeant in Platoon D-West District, a Sergeant involved with Operation Remedy, a Sergeant in charge of Team 6 and 7 and Community Services, was involved with the RCMP/RNC Drug Section Joint Forces Operation, was assigned to Operation Rumor, a major crime investigation of homicides, was a Sergeant in Patrol Team 4-District B, was acting Sergeant from May 2000 to October 2000 and was assigned to an Armed Robbery Task Force. At the outset of his career, as is invariably the case, he was a Constable in Patrol Services.

Deputy Chief Janes explained that there are three key parts to the RNC:

1. Patrol Services with a Deputy Chief in charge;
2. The CID or Criminal Investigation Division with a Deputy Chief in charge;
3. Support Services overseen by an Executive Director.

Operational Support is part of Patrol Services. He said that Operational Support is usually set up with three Sergeants reporting to a Staff Sergeant. He referred to the organizational chart 3.3 at Consent #1, Tab 10.

When Deputy Chief Janes moved to Deputy Chief, his position of Inspector in Patrol Services was assumed by Inspector Constantine.

The Staff Sergeant in charge of Operational Support is now Staff Sergeant Geoff Janes. He replaced Staff Sergeant P. Lahey, who is shown in the chart.

Deputy Chief Janes also referred to Organizational Chart 3.3.1 at the same Tab 10 and noted that Lahey is now replaced by Staff Sergeant Janes and one of the areas that a Sergeant under him has charge of is Public Relations.

Sgt. Penton is in charge of Public Relations. Sgt. Penton has three constables in Community Services reporting to him, three constables in the Mounted Unit reporting to him and one constable in Drug Awareness reporting to him.

Deputy Chief Janes testified that Drug Awareness was created after his time as Sergeant and came about when he was an Inspector in charge of Operational Support.

He referred to Tab 6 of Consent #1 which was a Personnel Order issued in 2005, 2005-192, calling for a Sergeant in charge of Accident Investigation, Community Services, the Front Desk and the Mounted Unit and said that Sgt. Cec Penney was put in that position. Penney left in December 2005 or January 2006 so that a temporary vacancy was created. He, Janes, was approached and asked to go there by way of a transfer within Patrol Services. He did so. He said part of his oversight as a Sergeant in that position was administrative, dealing with labour relations and financial issues. It was approximately 28 persons he was supervising whereas the normal span of control was 5-10.

As far as the Mounted Unit was concerned his duties were of an administrative nature only, payroll, scheduling, and providing the facilities they needed.

He testified that the only technical skills required in that position were in respect to Accident Investigation.

He explained that there are four levels of accident investigation and that all members of Patrol have levels one and two. He said he had those but not the higher levels, not accident reconstruction. He said Cst. Kennedy was there and was trained in accident investigation at a higher level than he was.

He said in hindsight, he now knows he was put there because of succession planning by the Chief, and that the Chief wanted to expose him to as many areas as possible in anticipation of promoting him to Inspector.

When he left the position in August 2006 he said Sgt. Darren Feehan replaced him.

He testified that when he went to the position there were two constables in the Mounted Unit, Cst. Penton and Horan. For a period of time the horses were housed at Bill Bradley's residence and for a period of time at Clovelly stables.

He said he went back again to having the Mounted Unit within his span of control. This was when he was an Inspector and the Mounted Unit was bundled under Sgt. Feehan. He then said that at one point Accident Investigation and Community Services were removed from Feehan and given to Sgt. Murphy. Sgt. Murphy was put in charge of those areas and he believed it may have been the case that Sgt. Murphy was actually in charge of those areas when he as an Inspector assumed responsibility for the span of control that included the Mounted Unit.

He referred to Personnel Orders 2007-044 and 2007-061 as being the Personnel Orders that resulted in Sgt. Murphy assuming responsibility for Community Services and Accident Investigation.

The Mounted Unit remained with Feehan in June 2007. When he came on as Inspector he said he did not have to familiarize himself with any of his duties with respect to that unit. He had had a responsibility for it as Sergeant.

He referenced the 2007-219 Personnel Order in Consent #1-Tab 5 whereby Cst. Coombs was appointed to the Mounted Unit and said that by this time in July 2007 they had three Constables in the Unit. In November 2007 they opened the Force's own stables.

He was shown Consent #7, a September 13, 2007 letter to Deputy Chief Brown. He said at this point he had been in the Inspector's job three or four months and was looking at his span of control and trying to determine if he was getting the outcomes that he should be.

He said he felt that a group could be bundled together dealing with a branding of the organization. He noted the Province was rebranding at the same time. He thought that the importance of public relations called for Community Services and Drug Awareness to be together. He thought that an NCO should oversee six constables. There was an NCO over Traffic and Accident Investigation Services and the Deputy Chief was of the view that this area should stand alone. His view was that this was where most loss of life and damage occurred.

He said a Sergeant was overseeing Telephone reporting and Canine and he thought this was ok. There were three members of the Mounted Unit and he thought the span of control had changed. He felt that the Employer was gravitating towards further expansion of the Mounted Unit with one more member and one more horse, which would make for four members and four horses.

He said that Deputy Chief Brown agreed with him that it was appropriate to bundle Community Services, Drug Awareness and the Mounted Unit under a Sergeant. Deputy Chief Janes said that he saw it as making sense from a public relations point of view but believes that the primary motivation for Deputy Chief Brown may have been to reduce the responsibilities of the person in charge of Accident Investigation by taking away his additional duties and allowing that person to concentrate solely on Accident Investigation.

In September 2007 they knew that the RNC was having its own stable built.

There were discussions also about hiring a stable hand.

Janes believed there should be an NCO with six constables reporting to him or her, two in the Mounted Unit, one in Drug Awareness and three in Community Services. He anticipated that it might be seven if an additional constable was appointed to the Mounted Unit.

In 2008 a stable hand came on board. His view was that the Mounted Unit provided a huge opportunity to do public relations and could be used to great effect in terms of branding the organization.

He felt that this was the primary value of the Mounted Unit though it did have secondary values in areas such as ground searches and crowd control.

Deputy Chief Janes commented on Cst. Day's evidence that it was her decision when she could go out on her own.

He said this was not the case, it would be the Sergeant's call but a good Sergeant would let her think that and he could understand why she perceived it as being her decision.

He drafted Personnel Order 2008-106. He says that he put it out as an Expression of Interest after discussions with the Deputy Chief. Article 28.01 of the Collective Agreement gives the Chief the right to make lateral transfers.

The practice in the CID was to transfer people from one part of the CID to another.

Deputy Chief Brown's opinion was that the Chief had the same right to transfer Sergeants and Staff Sergeants to different areas within Patrol Services.

His intention in drafting the document was to send it out as an Expression of Interest for Sergeants in Patrol Services. He put in the words "Northeast Avalon" because they did not want Sergeants from Corner Brook or elsewhere applying.

He said people in the same division can move around their division.

He spoke about vacancies and said vacancies can be created by retirements, promotions, layoffs or dismissals, none of which was the case here. He said this was simply a rebundling of duties under Patrol Services. Article 28.01, he said, has been used many times.

When he created the Personnel Order he did not consider it a vacancy.

He did not consider it a new position as a new position can only be created by Cabinet and by Cabinet giving the Force a Personnel Control Number. He said the Chief can move staff around but he can't create a new position. Only Cabinet can do that.

He cited two examples of new positions recently being created. They were two Sergeants for surveillance teams and one for the Drug Section. He said they resulted from a proposal put forward by the RNC to government, which was approved by government. This resulted in the RNC receiving new Personnel Control Numbers from government.

Deputy Chief Janes referred to Exhibit SR#1 and said that was the result of a vacancy. He said it came about as a result of the retirement of Staff Sergeant Poole.

He testified as to how it would be different if it was a new Sergeant's position. In that case they would call for applications from Sergeants and from Constables in the Sergeant's promotional pool.

Deputy Chief Janes indicated he was familiar with the concept of lateral transfer. He said it is a right the Chief has under Article 28.01 and Article 5, the Management's Rights clause, to transfer within a division. In the Communications Centre they would not have filled four positions had the Chief not had the right to be able to transfer people into those positions.

He said it was a right of the Chief but said that it should always be done to meet operational needs in a sense of public safety or business needs and not be arbitrary.

One only needs to post if there is a vacancy or a new position or if one is moving a constable from street patrol to major crimes one would be required to post.

The division here was Patrol Services and both Penton and MacDonald were in Patrol Services at the time of this Personnel Order and the placement of either of them in the position could be done by way of lateral transfer.

He said of Consent #1 Tab 6, Personnel Order 2005-192 and Consent #1 Tab 11 2007-044 and 2006-2008, that he reads those as transfers.

He testified as to his thoughts and intentions in preparing Consent #1 Tab 4, the Personnel Order concerning the position in question. He said Expression of Interest was used because he contemplated a lateral transfer. The words Northeast Avalon were used because they did not want someone from Corner Brook applying for the position.

He said additional wording was used because it was envisaged that the person would report to a Staff Sergeant in Operational Support.

In addition to the Mounted Unit, the words Community Service and Drug Awareness were used because he saw these as going together. He wanted someone familiar with drug issues as the person in the Constable's position dealing with that at the time was struggling with it because he didn't have a background in the area. Janes said that such a Drug Awareness position involves meeting stakeholders and addicts and interacting with organizations such as Eastern Health.

He testified that the Sergeant would oversee the Constable who was in that position at the time and he wanted someone who that Constable could go to with questions.

In terms of the desired qualifications the Mounted Unit was put in last. He said he “wanted someone in this position building on branding, image, and public relations.” He felt it was not appropriate to leave out experience in the care and use of horses especially given the anticipated expansion of the number of horses and officers, the establishment of the stable and the hiring of a stable hand.

He did not speak with Sgt. Penton or with anyone else about this Personnel Order. He drew it from the report he had given to Deputy Chief Bill Brown.

He said that it was his intention that the person be a caretaker of one of the horses, ride a horse and be a working Sergeant. He “saw part of the role being operational in nature.”

When he was asked to contrast the Personnel Order at Tab 4 with that at Tab 6 where the latter said nothing about the care of horses or experience with horses, he could only surmise why there was a difference. He surmised that the span of the control in the case of the Personnel Order at Tab 6 was much larger than the span of control that would exist in the case of the Personnel Order at Tab 4.

Tab 6 had included within it the massive Accident Investigation and Reconstruction responsibility.

The one that Janes put out had a smaller span of control and in addition there was not expansion of the Mounted Unit contemplated when the Tab 6 Personnel Order was put out.

Janes explained that he thought it was essential that there not be “a fiasco at the stable”. If there was there would be a public relations nightmare.

He described Sgt. Penton’s duties as including the operational piece, *i.e.* care and use of horses, evaluation of the officers under his command and the making of decisions about

whether to permit them to ride alone, whether they could be involved in crowd control, and how far they had progressed.

He said that he envisioned all these duties when he drafted the Personnel Order.

He said the words "applications are invited" was used. He admitted that he could have used "expressions of interest are invited", but said that there is no policy which governs the words one must use. He also asked for a CV so that an assessment of the individual candidate qualifications could be done.

He said two applications were received, the Grievor's and Sgt. Penton's.

He identified Tab 7 as the competition file. He was asked why would he sign saying he concurred on the recommendation letter that had been sent in support of Sgt. Penton by Staff Sergeant Lahey. He said that he endorsed it and in doing so he was only endorsing what Staff Sergeant Lahey said.

He said that it would be logical for Penton to ask Lahey for a letter of recommendation. He doesn't recall how it came to be that he concurred on it. He does not know who asked him. He said that he has done this in the past.

When Sgt. MacDonald's application was put to him with Sgt. Devereaux's recommendation, he was asked why he did not state on Devereaux's recommendation that he concurred. His response was that he was not asked.

He was asked that if Devereaux had asked him to do so, would he have concurred. There was a momentary pause but his answer was "yes, I would have endorsed what Devereaux was saying." He said that he has worked with Sgt. MacDonald in the past. Their relationship was good and he found him to be an officer willing to take on additional duties, which not all officers are willing to do.

He said that he had no issues with the Grievor's supervisory abilities.

He was asked why he noted on the Grievor's application he "does not meet criteria". His answer was that I reviewed his letter and based on what he submitted he did not feel the Grievor met the criteria.

He said this was not written at the assessment stage and when it was written he did not even know he'd be the assessor. So he gave his comment and sent it through for the competition file.

He said the posting date by which persons were to have applications in was April 11 and on April 18 the decision was made so that his appointment as the person who would be doing the assessment must have been made between those days.

He talked about how he assessed the two candidates.

He said that he had no problem with the interpersonal skills of either. He said he was satisfied with both with respect to Community Services. As for Drug Enforcement, he said he rated Penton more highly because he had been involved in joint RCMP/RNC operations whereas MacDonald as a patrol police officer would be limited to seizing drugs and placing them in storage. He discounted Sgt. MacDonald's Drug Enforcement experience. Penton had training in the care and use of horses and MacDonald did not. Janes said consequently from an overall knowledge, skills, training, and ability as regards the core competencies, he felt Penton was the more appropriate person to select.

He said he looked at the knowledge and training and ability of both and said that he did assess MacDonald for the position despite his earlier statement in the Grievor's application form that he did not meet the criteria. He said the Grievor did not satisfy the horse component and in his mind did not meet the Drug Awareness and Enforcement component.

He said that he simply relied on the competition file which is contained in Consent #1, Tab 7. He did not do any additional investigation and did not review either of their personnel files. He said that he did not see any value in doing so.

He said that there was nothing in the Personnel Order indicating that he wouldn't review their personnel files and he never indicated to either that he would do so.

He said he found that Sgt. Penton met all the qualifications set out in the Personnel Order.

He identified Consent #5 and 6 as Personnel Orders that he prepared.

This had to do with calling for persons interested in a constable's position in the Mounted Unit.

Cst. Krista Day was selected.

The Personnel Order did not stipulate that knowledge of horse care was essential because it was the RNC's intention that the person selected would be sent for training in Toronto.

He believes there were three applicants, but there may have been more.

He said Cst. Day had volunteered hundreds of hours to the Mounted Unit and been a rider in her youth.

By this time Janes said he was familiar with the training program as Cst. Coombs had gone through it and brought back videos. Additionally they had had discussions about it.

He was asked if he ever contemplated selecting a Sergeant and sending that person for training. His answer was no. He said he can't think of a situation where they would place a Sergeant in a position and then send that Sergeant for training for two months.

He said he saw no value in holding interviews for the Penton/MacDonald competition. He says he would do interviews only if he could not select based on the resumes received.

He referred to Consent #2 as being the only general description of what a Sergeant does.

He described Sgt. Penton as being a working Sergeant.

He said most Sergeants when promoted go to street patrol as this is where most vacancies are. Inspector Ryan was an exception. Sgt. Penton was also never put back to street patrol when he was promoted.

In cross-examination Deputy Chief Janes was asked "could you not provide training in horse care and use for Sergeants". His response was if there was no applicant with those skills we'd have to make a decision as to what we would do. He said the training was for Constables. He said in this case it would make no sense to appoint the Grievor and send him for training. He did admit that there would be nothing preventing the RNC from doing so however.

He admitted signing the Personnel Order on March 26 and that it had a deadline of April 11. He admitted endorsing the Lahey letter of recommendation for Penton on March 28. He also admitted that he could have declined when asked to do the assessment because of his endorsement of Penton or because he had signed the Personnel Order. However, he expressed the view that his doing so did not taint his ability to do the assessment.

He said there was no requirement for him to sign the Lahey letter however he had done such things in the past. He speculated that maybe Sgt. Lahey assumed he had to do it.

He admitted writing on the Grievor's application on April 4, six days after endorsing the Lahey letter on behalf of Penton and that he wrote on the Grievor's application "does not meet criteria as laid out in PO".

He said Lahey's letter did not have a CV attached to it. The Grievor's application did and he knew what was in the CV.

He said saying "does not meet criteria, does not mean I rule him out". He said if asked he would have signed Devereaux's letter in support of the Grievor in the same way he had signed Lahey's in support of Penton.

He said the application had a place for me to sign and it had a CV attached.

He indicated that it was up to him to sign and complete it.

He felt that his comment was accurate.

He acknowledged that the competition closed seven days later.

He said that Deputy Chief Bill Brown gave him the file to do the assessment. He admitted that he did not tell Brown that he had already weighed in on the matter by endorsing Lahey's letter and by stating on the Grievor's application that he does not meet the criteria as laid out in the PO.

He said that he did not feel that he was too deeply involved to do the assessment. He said he didn't feel he was in any kind of conflict.

He did state that Brown awarded Penton the job based solely on Janes' assessment and recommendations.

He reiterated he viewed Penton as stronger in the areas of Drug Enforcement, Drug Awareness and horse use and care.

The supervisory experience of each was not a consideration. Supervisory experience was not noted in the Personnel Order as a requirement.

The witness was asked if he was dealing with an Article 28.10 situation how would he deal with seniority. His response was that supervisory experience would be part of that although a person with more seniority may not necessarily have more supervisory experience.

He said that he did not look at supervisory experience or seniority in this case.

He said that if it was an Article 28.10 situation seniority would come into play only if the candidates were relatively equal on each of skills, ability, qualifications, training and merit.

He reiterated in cross-examination that he saw no need to consult the personnel file of the two candidates or to do interviews.

Mr. Martin, on behalf of the Association, suggested that this was because Janes had already made up his mind when he wrote on the Grievor's application "does not meet criteria set out in Personnel Order".

Deputy Chief Janes denied this and said that his mind was not made up until he had finally analyzed the competition file.

Finally a series of Personnel Order duplicates in Consent Exhibit 8 were put to the witness.

2005-192 was one in which there was reference to the Mounted Unit, to applicants being screened and a review of personnel files as well as a possible interview was mentioned.

Personnel Order 2006-208 makes no mention of the Mounted Unit, states candidates may not be interviewed but refers to a selection process including a review of personnel files.

2010-66-SR1, says interviews may be conducted if warranted and that personnel files will be reviewed and considered. A selection process is described.

2008-106, the Personnel Order in question, makes no reference to a selection process and calls for expressions of interest unlike the others.

2007-044 makes no reference to and does not describe the selection process.

When it was put to him, Deputy Chief Janes agreed that there was some inconsistency in the way the documents were drafted.

The question was put to the witness does Article 28 give the Chief the discretion to one day grant interviews and the next day not, and to review a personnel file one day and one day to not review a personnel file.

The witness responded that SR1, Inspector Ryan's Personnel Order, was under a different section of the Collective Agreement because it involved a vacancy.

The witness also said just because interviews are not mentioned does not mean that they cannot be done.

The witness agreed that there is an obligation to be fair to the candidates.

He compared SR#1, by saying that Inspector Ryan started from a distinctly different position than he, because Ryan was dealing with a vacancy caused by a retirement.

The reason he, Janes, used Expression of Interest was that he decided that phrase could be used because a transfer would be implemented within Patrol Services, the same way it is done in the CID.

He said it was oversight on his part in not indicating whether the personnel file would be looked at or not and in not indicating the possibility of interviews.

He did not see these oversights as fatal flaws. He made the comment that one of the chief reasons for looking at a personnel file was disciplinary history.

He admitted that had he viewed the Grievor's file, it may have changed his views somewhat on Drug Awareness. However, he made the point that the Personnel Order said that you bring forth your full qualifications.

In this instance the competition was not close so there were no interviews.

Sgt. Penton had no questions of Deputy Chief Janes.

In redirect the Deputy Chief said a Sergeant has more authority and it is not just a question of mentoring. He indicated that a Sergeant oversees his officers from other perspectives including discipline. He said there is a difference between a responsibility and authority. A senior Constable does not have more authority but sometimes has more responsibility.

When he wrote in the box on Sgt. MacDonald's application that he did not meet the criteria, he was not comparing the Grievor to anyone else.

On the point of supervisory experience, he said more does not necessarily mean better but it depends on what one supervised and how many persons one had under one's span of control.

As for disciplinary history, he had supervised both the Grievor and Sgt. Penton and knew that there were no disciplinary issues or concerns with either of them.

He was able to hold interviews and look at personnel files if he thought it was necessary. In this case he did not think it was necessary.

The final Employer witness was Sgt. James Penton.

Sgt. Penton is now the Sergeant in charge of three areas, the Mounted Unit, Community Services, and Drug Awareness. He was the successful candidate for the job competition that is the subject of this grievance.

He joined the RNC in April of 1983, spent five years on street patrol, three years in the Communications Centre as a dispatcher, was in the court system dealing with the holding cells and transporting prisoners as well as being a police liaison officer with the courts who then had the responsibility of swearing informations.

He had two years prosecuting traffic offences in traffic court and two years serving process, mostly warrants and warrants of committal.

He testified that he had stints in the CID as well, as part of surveillance teams and as part of a task force operation. He spent approximately three years in the RNC/RCMP Joint Task Force on Drugs and was on a Joint Task Force dealing with Intelligence Gathering. He said that he has done surveillance in Montreal and has testified in Nova Scotia courts. From 2003 to the present day he along with Cst. Horan has been in the Mounted Unit.

He said for the first three to four years they had the horses they boarded them at Clovelly and not at the state of the art stables that they now have.

He described the unit. He said each member is assigned to a horse including himself. Our duties are to give feed, implement the feeding regime, muck the stalls, clean kits, and

the general daily operations which include patrols, ceremonial events, strike situations and the PR side of things such as attending when cruise ships come into port.

He described being around horses as a child and says his father had a horse and a relative had horses on Nagles Hill where he actually rode in the saddle as a child.

He described the training that he and Horan went on and echoed what Horan had to say about it being different than the training that was subsequently received by Constables Coombs and Day. He described that while in Toronto he and Horan spent numerous hours with the horses actually out on Yonge Street, at the Carabana, at the Gay Pride Parade, at the Rolling Stones concert and were out on the horses when the lights went out in downtown Toronto. He said that they were more independent than Coombs and Day and it was up to a year after the latter two returned before they were "cut loose".

At the start he said that he and Horan reported to Inspector Ryan. He said that he can't recall Cec Penney's involvement with the Unit and said that Ryan did come to visit and indicated that they would have to go here and there but eventually they just started doing it on their own. He said there was no hands on or visits from Sgt. Feehan when he was there as a Sergeant. They would just complete the attendance and drop it off to him. Janes came to visit from time to time. He said neither Janes nor Feehan were knowledgeable about horses.

In 2008 he was appointed as a Sergeant in charge. He described then how his duties changed. He said he became more of a supervisor of Horan and Coombs. Coombs would be inclined to ask him things. He selected the events or agenda for each of the Constables and decided who was going when and where. It became his responsibility to order materials, get quotations, do pricing and costing, do preparation of quarterly reports, and generally be looking after the daily needs of the members.

On top of this he had his Drug Awareness and Community Services duties.

When he was first promoted to Sergeant in 2007 but before getting the position in question there was a time when he spent three days a weeks in the Mounted Unit and two days working in professional standards. During this time he did carry the attendance and paperwork to headquarters.

He said prior to seeing the Personnel Order in question, he spoke to no one about the position. He had no idea about the position until the Personnel Order came out. He had no idea that the three areas in question would be bundled together.

He described his current duties. He said he was initially involved with the purchase of horses. He was involved with tack ordering, getting curved bits, was responsible for all farrier tools and arranging for farrier work and veterinary care. He said that he is responsible for responding to emergencies with the horses and described the situation of colic and also a situation where one of the horses was down and he and Horan had to get the horse up. He orders bedding and feeds and supplements, protection for the eyes and legs of the horses and handles all media inquiries. He testified that he has spent time with the CBC program *Land and Sea* crew and has responded to other police forces on how to start a Mounted Unit, dealt with police week activities and coordinated the activities of all others involved, dealt with Best Boy Productions on a film and contributed an article concerning horses to a RCMP publication.

When the stable hand is off, he along with the Constables rotate the night feedings.

He was involved in the formulation of the plans and design for the Stables.

He said that a person could say that they like horses but many people who say that when they are around the horse get scared.

He deals with the ordering of clothing and the RNC's quarter master. He does all scheduling. He pointed out they are on a six week rotation and sometimes work eight

hour shifts but there are other times when the shifts are 10.5 hours in duration such that it works out over six weeks to 40 hours per week.

He testified that he keeps the attendance, submits leave requests and posts annual leave.

He testified that he drafted guidelines for the stable hand.

He testified that he prepared a demonstration ride for the Chief and Lieutenant Governor.

He does inspection of fleet vehicles for the Mounted Unit and Community Services, oversaw the acquisition of a new truck to haul the horse trailer, and anticipates involvement in getting a larger trailer.

He said he is the one who takes all the requests for the unit's involvement in ceremonial events and signs off on it and coordinates such events.

He says that he arranged for specialized equine training in Ottawa for himself and Cst. Horan and he is trying to now arrange for Cst. Coombs to have the same training.

He says that he had to supervise Day and Coombs when they first started and they could not be left on their own. He described several instances of having to help out with Cst. Day and Cst. Coombs with their horses when they were having problems. He described one instance where Cst. Day could not get her horse to back up and he had to intervene and he described one instance where Cst. Coombs lost control of his horse and he had to intervene.

He described the Mounted Unit as being by far his largest area of responsibility.

The other areas, Community Services and Drug Awareness, involve him in scheduling, dealing with attendance, posting annual leave, dealing with the training needs of the Constables, and dealing with equipment needs. He is in regular contact through his

blackberry with them. He looks upon Cst. Foley in Community Services as his contact within that group. In Drug Awareness there is one officer, Cst. Crocker. He said that this officer comes by from time to time and he deals with his training needs and is in email communication with him as to whether overtime is needed.

He says that someone without experience with horses could not do his job until they had the training in Toronto and then got some experience under their belt here.

During cross-examination, he expressed the view that if someone was sent to Toronto for the horse training they could learn his job, depending on the individual, and eventually be able to supervise.

Of all previous supervisors none had any experience with horses except for Inspector Ryan.

He describes his duties as 10% Drug Awareness, 10% Community Services, and 80% Mounted Unit. He submitted that his Mounted Unit time was perhaps 30% administrative as opposed to horse riding and horse attending duties. He said that his riding time could be 60-70% of his Mounted Unit time depending on the week. Most Sergeants could do the administrative part of the job. 60-70% of his time with the Mounted Unit involves what he was doing as a Constable.

He was asked if it was a new position. His answer was it was a different spin, it's a blending of responsibilities, it changed my position in that I have more administrative duties and supervisory duties. He said if that's a new position, so be it. He said he approached only Lahey about a letter of recommendation and did not approach now Deputy Chief Janes at all about his application.

He said he had no input into the contents of the Personnel Order in question.

He said he'd estimate that one could add \$3,000 to \$4,000 to the figure Mr. Hickey mentioned at Tab 8 of Consent #1, as being his overtime. He said that the additional figure would bring the amount up to date and his overtime was roughly \$33,000.00.

On redirect he was asked if a newly appointed Sergeant was sent for training who would mentor him or her after he or she came back here. His response was the Constables. He was asked if Cst. Horan could train the Sergeant and he said "yes to some extent but I think the Sergeant should be directing the Constable and not the reverse".

The Association Argument

The Association argued that the position filled by Sgt. Penton in 2008 was a new position and not one that could be filled by lateral transfer under Article 28.01. It argues that it is a budgetary technicality only that to be a new position the government must provide the RNC with a Personnel Control Number (PCN) for the position and that it is examination of the actual facts of the matter that must determine whether, for Collective Agreement purposes, it is a new position.

Cst. Horan testified that it was Ryan, Janes, Singleton, Constantine, Cec Penney, and Lahey who supervised him and that it was either Inspectors or Staff Sergeants who did so as opposed to Sergeants.

In only the 2005-192 Personnel Order, Consent #1, Tab 6 which resulted in Penney getting the position, and 2008-106 is there mention of the Mounted Unit. All other Personnel Orders previous to the one in question, 2008-106, did not mention the Mounted Unit.

The evidence of Cst. Day was that in-saddle positions were always Constables positions and this is what Penton is now except for his supervisory duties.

The Association submitted that Inspector Ryan said that in his view it made more sense to combine the Canine and Mounted Units and this indicated that the position called for by Deputy Chief Janes was a new position.

It said that even Sgt. Penton's evidence indicates it's a new position. It said that looking at his new duties, how the position is bundled, the addition of a stable hand and two additional horses and Constables, along with the acquisition of the Force's own stables, all indicate it's a new position.

The Association argued that because it's a new position there has to be a proper posting and evaluation of candidates and the position cannot be filled by a lateral transfer by the Chief of Police.

The Association submitted that the analysis and investigation leading up to the creation of the 2008-106 Personnel Order did not mention a Sergeant needing to be able to ride a horse and it was never considered at the time.

Having a requirement that the Sergeant be able to ride a horse adds to the argument that it's a new position.

The Collective Agreement does not help with whether it's a new position or not, it is the evidence which determines that. If it is a new position, the proper process was clearly not followed.

Having said that whether it's a new position or a lateral transfer, the selection has to be done fairly, without discrimination or arbitrariness and in good faith.

On the second point raised, a large part of the process was arbitrary in nature. The September 13, 2007 analysis, Consent #7 made no mention of the Sergeant needing to be able to ride a horse.

Where the arbitrariness is most apparent and where the flaws are most manifest is in the selection of the candidate.

The Association submitted that one has to look at the processes that were engaged in and the timing of each.

While the Association is not suggesting any ulterior motive, it is suggesting the way things were done leads inexorably to the conclusion that there was arbitrariness.

In 2007 in the month of November Janes does an analysis that makes no reference to a Sergeant needing horse riding experience.

One zooms ahead to March 26, 2008 and we have the Personnel Order going out saying that the competition closes April 11 with the only requirement being that a candidate get a recommendation from his or her immediate supervisor.

On March 28 Janes concurs with Lahey on Penton's suitability for the position. Though Janes tried to minimize the significance of this by saying that he would have concurred with Sgt. Devereaux on what he said about the Grievor had he been asked, the Association noted that there was some hesitancy on his part when he said that.

The Association says here we have a person, Janes, who does an analysis for the creation of the position who is now weighing in on the suitability of one of the candidates on March 28, when the competition is not yet closed. Following this six days later the same person writes that the second candidate, the Grievor, does not meet the criteria for the position. He is now weighing in on the merits of the second candidate.

Even if that was standard practice, it does not make it right.

The Association suggests that then someone between April 11 and April 18 asked the same person, to do the final assessment of the candidates.

The Association espouses the position that Deputy Chief Janes got dragged into the process far too deeply to do the assessment.

He weighed in earlier on Penton's suitability when there was no need to do so. The Personnel Order did not require it.

The Association does not take issue with the fact that Article 5, the Management's Rights clause, gives the Chief a largely unfettered discretion in managing the Force. However, one has to weigh that with the practicalities of managing a police force. Janes did not consider an interview and did not consider looking at the personnel files of the two individuals, though in his evidence he acknowledged that the personnel file of the Grievor may have contained many of the things that the Grievor spoke of that were not apparent from his application. The Association submitted this is why at a minimum one needs to look at the personnel file of the individual candidates.

The Association submitted that Article 28.10 places limits on the discretion of the Chief where the Grievor has more supervisory experience and has seniority.

Originally the Association was asking me to put the Grievor in the position in question. The grievance had asked for this redress.

During argument the Association changed its position and appeared to accept that I could not do that. What it did ask was that I order that the competition process be repeated.

The Association submitted that the inclusion of a riding ability in the qualifications in light of the analysis that had previously been done which made no mention of it, is indicative of bad faith.

In the absence of an interview, the Grievor was deemed by Janes not to meet the criteria.

The Union submitted that this was a sufficient ability position and the Grievor had sufficient ability. The Association urged that even if I did not uphold the grievance and order that a new competition be held that I should at least make recommendations for reforming how competitions are run and how Personnel Orders are drafted.

It is submitted that Personnel Orders are important. It indicated the rank and file officer looks at the Personnel Order and decides if he or she wants to apply. Therefore there needs to be consistency as to how they are drafted.

It is suggested that the selection process is where the biggest problems exist. Sometimes there are interviews and sometimes not. Sometimes there are reviews of personnel files and sometimes not.

It suggested that there is something wrong where one individual, in this case Deputy Chief Janes, can have such a dominant role in selecting a person for the position.

It is submitted that he got far too deeply involved in the process earlier on to do the assessment of the candidates. His thought processes were compromised.

It submitted that there should be a separation on who signs off on a Personnel Order and who selects the candidate. The practice followed here was not a good practice and Janes should have stepped back.

The Association submitted that the grievance should succeed and alternatively asks that I make recommendations for reform if in fact I found that I could not uphold the grievance. It cited the Public Complaints Commission example of where a Commissioner notwithstanding his findings made recommendations for reform.

In support of its position the Association submitted the following authorities:

1. Brown and Beatty, Canadian Labour Arbitration (4th ed.) Aurora-Canada Law Book;
2. Saskatoon (City) v. C.U.P.E., Local 59, 2008 Carswell Sask 22(SaskCA);
3. Foothills Provincial General Hospital v. U.N.A. Local 115, 1995 Carswell Alta, 1169 (Alberta Arbitration Board);
4. C.U.P.E. Local 21 v. Regina (City) 2009 Carswell Sask 899(Sask. Arbitration Board)
5. Scarborough (Borough) v. C.U.P.E., Local 545 1977 Carswell Ont 671(Ont. Arbitration Board)
6. Ontario Hydro v. Power Workers Union 1996 Carswell Ont 5802 (Ont. Arbitration Board)
7. Zehrs Markets v. U.F.C.W. Local 1977, 1996 Carswell Ont 5796, 61L.A.C.(4th) 25

Employer Argument

Ms. Cole-Gendron for the Employer stressed that this was an individual grievance filed by Sgt. MacDonald and was not a policy grievance challenging the process, yet it was a challenge to the process that was much of the focus of the Association throughout the arbitration.

Ms. Cole-Gendron said that in reviewing the grievance all it does is set out why Sgt. MacDonald believes he is the better candidate. He claimed that he was superior in all areas except for horse care.

The Association has now gone beyond the grievance and is challenging that qualification itself.

The Employer maintained that the grievance did not challenge that this was not a transfer but was instead a new position however this is the argument that the Association is now raising.

Ms. Cole-Gendron submitted the first thing to be decided is whether it is a new position or a situation of lateral transfer.

She submitted that there are different standards of arbitral review depending on how it is characterized.

She further submitted that regardless of how it is characterized that I as an arbitrator cannot stray outside the appropriate scope of review whatever that scope be.

The Employer's position was that this was a situation of lateral transfer under Article 28.01 and that the Chief of Police has an unfettered discretion with respect to lateral transfers.

An opportunity within the Patrol Services division arose from a rebundling of duties. There was always a Sergeant in charge of the Mounted Unit and this was a case of supervisory responsibility for that unit being taken from one Sergeant and given to another.

The Employer submitted that no posting is required for lateral transfers.

The Employer made the point that Article 28.01(a)(ii) indicates where there is a need to post with respect to lateral transfers and outside of that situation, which does not apply in the instant case, there is not a requirement to post.

The Employer submitted there is a practice in instances such as the one Janes was dealing with to call for expressions of interest and only if no expressions of interest are received does one post and go through the actual application process.

Simply because the Call For Expressions of Interest was posted does not make the Personnel Order subject to either 28.10 or 27.07.

The Employer submitted that there does not have to be a posting under Article 28.01 because the assessment provisions of Article 27.07 and 28.10 do not apply in the case of an action taken under 28.01.

28.01(a)(ii) places restriction on the ability to make certain transfers into the CID. 28.01(e) sets out an assessment process for lateral transfers but only with respect to lateral transfers to certain regions of the province. The Employer submitted that this makes clear that apart from 28.01(a)(ii) or 28.01(e) nothing encroaches on the Chief's discretion or limits him in any way.

The only provisions applicable to the case before me are Article 28.01, Article 5 Management's Rights, and Article 31.02(x) which says that an Arbitrator cannot add to, modify, or subtract from a Collective Agreement.

As to the scope of review, the Employer submitted there is not a general standard of reasonableness or fairness with respect to Article 28.01 decisions because the Collective Agreement does not say that there is and an Arbitrator can't modify the Collective Agreement to import those requirements.

It is submitted that Article 28.01 gives the Chief the right to do what he did in this instance and one does not even need to default to the Management's Rights clause.

The Employer cited a decision of Arbitrator John Scott in a case, The Government of Newfoundland represented by Treasury Board and The Royal Newfoundland Constabulary Association (Grievor Angus Head) dated July 19, 2005 in support of its position. In that case Sgt. Head did not want to go to where he was transferred. Arbitrator Scott dealt with the scope of review of the Chief's action under 28.01 and concluded that no fairness standard can be implied but that the key was whether there was a breach of the Collective Agreement.

Ms. Cole-Gendron submitted that arbitral awards recognize the different standards of genuineness and reasonableness and genuineness is a lower standard than either fairness or reasonableness. She noted the Association talks about 27.07 and 28.10 fettering the

Chief's discretion but Arbitrator Scott dispels the idea that there is any nexus between those provisions and Article 28.01.

The only fetters on Article 28.01 actions of the Chief are found in Article 28.01 itself, namely in Article 28.01(a)(ii) dealing with certain transfers into the CID and 28.01(e) and (f) which deal with transfers between certain regions of the province.

Arbitrator Scott concluded that apart from these there are no fetters on the Chief's right to transfer under Article 28.01.

The second step, in Ms. Cole-Gendron's submission, is to ask whether the actions of the Employer were genuine ones in the sense that they were not done to manipulate the legal rights of the employees under the Collective Agreement or whether they were done for legitimate business reasons.

The Employer submitted that the duties listed in the Personnel Order were there for legitimate business reasons and Janes assessed the candidates for legitimate business reasons.

The Employer submitted that in the alternative if there is a broader scope of review the question becomes whether the decision was arbitrary or discriminatory.

If there was a broader scope of review, the Employer submitted that on lateral transfers clearly one can't be held to a higher standard than would apply if it was a situation where job postings were required.

The onus is on the Association to show arbitrariness or discrimination and it is not enough for it simply to assert it.

The Employer submitted that the evidence shows that the Employer acted for legitimate business reasons, drafted the Personnel Order and selected a Sergeant for legitimate business reasons and even on the alternate standard, the Association has failed.

The Employer submitted that the qualifications were reasonably related to the duties.

The Employer submitted that the only relevant evidence on this point is that of Chief Janes. It submitted that he testified as to how the process started and that he looked at his span of control and asked the question “were they getting the outcomes they should be getting?” It was a business review of the area under his control?

It submitted that Janes saw the potential for public relations and rebranding that would come from bundling the duties of the Mounted Unit, Community Services and Drug Awareness together.

What occurred after that occurred for genuine business reasons.

Inspector Ryan’s opinion on the suitability of the bundle is only his opinion. Ryan said an Inspector could rebundle duties and there was nothing unusual about doing that.

Deputy Chief Brown wanted Accident Investigation to stand alone under one Sergeant. The enormity of the Accident Investigation section when it was bundled together with the Mounted Unit was the main reason why previous Sergeants were purely administrative Sergeants as opposed to working Sergeants.

There was 28-30 officers under the Sergeant at that time so that it is easy to see how the Sergeant could not have been a working Sergeant.

Cst. Coombs was added in July 2007 to the Mounted Unit, a new facility was under construction and discussions were being held about acquiring a stable hand. This was

how bundling of the public relations areas came to be and the next step was to create a Personnel Order.

Just because knowledge of horses was not in the analysis but in the Personnel Order does not signify anything. The analysis was very general and the details would be flushed out in the Personnel Order.

Deputy Chief Brown and then Inspector Janes discussed the filling of the position, the differences between vacancies and transfers were discussed and that is why it was decided to proceed with calling for expressions of interest because this was seen to be a situation of transfer.

The Employer submitted that the appointment of Sgt. Penton to this position clearly comes within the definition of lateral transfer as stated in Article 1.01(j). It was the transfer of one Sergeant from one position in Patrol Services to another position in Patrol Services. It was not a call up from a promotional pool.

Instead of using the word “applications” in the body of the Personnel Order after having used the words “Expressions of Interest” in the heading, maybe then Inspector Janes should have used the words “Expressions of Interest” but the use of the word “applications” does not make it other than what it actually is, *i.e.* a lateral transfer.

The Employer argued that both Janes and Ryan were familiar with the process and each said that they would only go to the applications stage if one could not fill the position by transfer. Deputy Chief Janes spoke about new positions and vacancies and he was the only one to speak to these terms in the Collective Agreement sense. Any other witness including Ryan only spoke of new positions in the colloquial sense. According to Deputy Chief Janes new positions are created by government and the Force is given a PCN number. Vacancies are created by death, retirement, etc.

The Employer submitted that if there was a vacancy or a new position, there should have been a call for applications from Sergeants and persons in the promotional pool. The Employer submitted that if the Association really believed that this was a new Sergeant's position they would have filed a grievance complaining that there was not a call for applications from the promotional pool.

The only evidence called as to what a new position is came from Deputy Chief Janes and he was not rebutted or refuted.

In pointing out the differences in Personnel Orders Deputy Chief Janes noted that SR#1 was a call to fill a vacancy created by a retirement and it was therefore different.

Deputy Chief Janes gave reasons as to why he drafted the Personnel Order the way that he did. He wanted a Sergeant that a Constable in Drug Awareness could go to with questions. The care and use of horse requirements was put in because of the evolution and expansion of the Mounted Unit.

There was a third horse and third rider and the Chief was talking about a fourth horse and a fourth rider. There was also talk of hiring a stable hand. In his mind, the Sergeant would ride and be responsible for one of the horses.

Ms. Cole-Gendron submitted that management has every right to create a working Sergeant.

She submitted that the Association has not shown that the establishment of the position or the appointment to it was not genuine, not reasonable or arbitrary.

While it is no doubt that this is the first time a Sergeant in charge of the Mounted Unit was required to do these operational duties, nothing turns on this. In the past Accident Investigation was such a big part of the Sergeant's role that he wouldn't have had time to be a working Sergeant in the Mounted Unit. It submitted that just because there was a

change of duties does not mean that it was arbitrary as long as there is a nexus between the qualifications which were stipulated and the actual duties.

No one disputes that historically a Sergeant did not have those duties but management has a right to change duties. Given the day to day duties carried out by Sgt. Penton, it was more than reasonable that there be a care of and use of horse requirement. The Sergeant is responsible for assessing riding abilities, determining when Constables can ride alone, when they are ready for crowd control, and for giving ongoing training after the Constable returns from Toronto.

The duties that Penton carries out today are the ones that Deputy Chief Janes envisioned. Nothing was done to exclude or for the purpose of excluding anybody.

The grievance form suggests if they were adding a fourth individual to the Mounted Unit they should have added a Constable. The Employer submitted that this is an operational issue and is not within my jurisdiction.

Even if we were under Article 28.10 and if the candidates were relatively equal, the whole appointment is still subject to the Chief's discretion because it is stated to be subject to be operational and organizational considerations.

In answer to the Grievor's contention that he could be trained, the Employer submitted that the evidence indicated that the Toronto training is not all that is necessary. After the trainee came back the trainee would have to be mentored and coached and someone would have to determine when the trainee could ride alone and do other things. It would not be appropriate for a Constable to be mentoring a Sergeant.

Janes did not turn his mind to training because there was no need to do so. He had one candidate fully qualified.

He said he did not know of a Sergeant being put in a position who then had to be sent to training for it. There is no requirement in the Collective Agreement to select someone and then send them for training.

With respect to challenging the assessment process the onus is on the Association. It says Janes was not fair, not malicious but biased. In answer the Employer says Janes concurrence in Lahey's letter was not to the effect that I think Penton is the best person for the job but only an endorsement of what Lahey said. The evidence suggests that he concurred because he was asked by Lahey to do so, not by Penton. The evidence was also to the effect that there was nothing unusual about this. Janes indicated that he would have concurred with Devereaux's letter in support of MacDonald if asked.

On the matter of the "does not meet criteria" comment on the Grievor's application, as Divisional Commander he is required to make a comment. As Divisional Commander, he has to make truthful comment. It was required. He was not saying that MacDonald should not get the job and he was not comparing him to anyone else. It was a statement of fact to whoever was doing the assessment.

Then Janes became the Assessor. The Employer acknowledged that this would not occur in a perfect world but Brown gave him the job, likely because he was the Divisional Commander, and the most knowledgeable.

Janes testified that he went meticulously over both applications and said he felt that MacDonald fell short of Penton, not only in horse care and use, but also on Drug Enforcement and Awareness. Drug Awareness detail was not included in the Grievor's letter. Had the personnel file been looked at it would have told Janes more about the Grievor's involvement in that area. Unfortunately the Grievor did not put all his qualifications in. The Employer submitted that there was nothing of significance about Personnel Orders not stating if the personnel file would or would not be looked at. It was clear that the person was to submit all their qualifications. The Employer submitted that this was an individual grievance by Sgt. MacDonald and he did not testify as to his

awareness of what other Personnel Orders said or about the assumptions he made on reading this Personnel Order or that he relied on anything to his detriment.

The evidence fails to show that the assessment was not genuine, fails to show that the qualifications were not genuine, and supports the position that everything was done for legitimate business reasons.

In order to find differently, the Employer submitted that I would have to find that Deputy Chief Janes' evidence was not credible. He said he looked at both applications in detail and there is no evidence otherwise.

The case of *Surrey School District #35 v. Canadian Union of Public Employees, Local 728*, 109 L.A.C.(4th) 365(Jackson), was cited for the proposition that when dealing with ordinary management rights situations and challenges to job postings the only question is whether the qualifications are reasonably related to the duties.

Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union 22 L.A.C.(3d) 42(Outhouse), was cited for the same proposition and for the proposition that the Employer can change the qualifications from time to time as long as they are reasonably related to the job duties. In that case the job posting was upgraded.

The Employer also cited *General Dynamics v. Independent Union of Defence Contractors* 150 L.A.C.(4th) 41(R. Brown), and *A & P Canada Company v. CAW Local 414*, 183 L.A.C.(4th) 413.

Some cases were also cited dealing with situations where assessments were required namely *Newfoundland Association of Public and Private Employees (NAPE) v. Her Majesty the Queen in Right of Newfoundland (Hobbs Grievance)* dated April 5th, 2001 and *NAPE v. Her Majesty the Queen in Right of Newfoundland (Ash Grievance)* dated November 26th, 2001.

NAPE v. Her Majesty the Queen in Right of Newfoundland (George Grievance) dated February 8th, 2001 was cited as to the remedy not being the appointment of the Grievor.

Newfoundland and Labrador Health Care Association v. NAPE (2000) Newfoundland L.A.A.#7(Browne) was cited in support of a lack of a responsibility to train.

Black's Law Dictionary was cited as to the definition of arbitrary.

In addition, Brown & Beatty supra was cited with respect to the topics of trial, training, and familiarization periods, pages 6-60 to 6-66, and with respect to the issues of skill and ability at page 3-43.

The Employer submitted that taking all the principles into account the grievance must be disallowed.

Considerations and Reasons for Decision

The issues in this case are:

1. Whether this is a case of lateral transfer;
2. If it is a case of lateral transfer what if any restrictions or fetters are there on the Chief's ability to laterally transfer to the position;
3. If it was an appointment to a new position or to a vacancy, what, if any, restrictions or fetters are there on the Chief's ability to appoint to the position in that case;
4. Was the placement of Sergeant Penton in the position done contrary to the Collective Agreement;
5. If the answer is yes, what is the appropriate remedy;

The relevant provisions of the Collective Agreement are as follows:

**ARTICLE I
INTERPRETATION**

- (j) "Lateral Transfer" means the transfer of a police officer from one job assignment to another job assignment which does not result in a promotion, demotion or classification change.

- (p) "Preferred positions" in the absence of the incumbent, the day-to-day filling of preferred positions shall mean to apply within the shift assigned, but does not mean to apply to relief for court time, meal breaks, and the like. Preferred positions shall be limited to the following:
 - (1) Shift by shift assignments as drivers of police vehicles;
 - (2) Desk Officers;
 - (3) Security/House of Assembly;
 - (4) Police officers working courts, and
 - (5) Assignment to Property Room.

**ARTICLE 5
MANAGEMENT RIGHTS**

- 5.01 All the functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.

ARTICLE 27
PROMOTIONS

27.07 Supervisory Vacancies

- (a) Supervisory vacancies in any bargaining unit position shall be advertised within thirty (30) days from the time the vacancy occurs. The Chief of Police shall call for applications from interested police officers currently in the rank and police officers in the respective promotional pool. Each applicant shall complete an application form and include a résumé, outlining training and work experience.

- (b) The Chief of Police, or his delegate, will choose the successful candidate based upon supervisory ability, qualifications, training, merit and experience. In the case of all these being determined equal as among the applicants, the senior applicant will be chosen.

ARTICLE 28
TRANSFERS, TRAINING AND SELECTION

Transfers

- 28.01 (a) (i) General – The Chief shall have the right to make lateral transfers.

- (ii) Notwithstanding Clause 28.01(a)(i), the Chief is required to post opportunities for the lateral transfers of police officers of patrol operations to general duty assignments within the Criminal Investigation Division where the period of lateral transfer is anticipated to exceed thirteen (13) weeks.

- (e) If the lateral transfer involves a police officer re-locating from the St. John's region to the Corner Brook Region or the Labrador West region the

Chief of Police shall select from the applicants a police officer whom based on an assessment of skills, ability, qualifications, training and merit is best suited for the position. Provided, however, that on a candidate to candidate assessment (as between candidates), where the best candidate is considered relatively equal on each of the considerations to another candidate who has more seniority, the candidate with more seniority shall be awarded the position, subject to any reasonable operational and organizational considerations of the Police Force. If none of the applicants are suitable or no one applies the Chief of Police will transfer the most junior qualified police officer.

- (f) Police Officers transferred to the Corner Brook Region or the Labrador West Region may apply for transfer to another region after one year, however, there is no obligation on the Chief of Police to consider their applications. Within four (4) years after applying for transfer in writing the Chief must transfer the police officer to another region if the police officer still wants a transfer. If a police officer who has been in these locations for three (3) or more consecutive years requests transfer the Chief must transfer the police officer within two (2) years of the written requests.

Selection

- 28.10 (a) When a vacancy occurs, other than those referred to in Clause 1.01(p) and in Article 27, which the Chief of Police determines will be filled, or a new position is created, the Chief of Police shall post notice of the position in all regions so that all members of the Bargaining Unit will have the opportunity to know of the vacancy or new position. Positions shall be posted for a period of two (2) weeks. This notice shall contain the following:

- nature of the position
- qualifications for the position
- required work knowledge
- necessary skills
- required rank

Such qualifications may not be established in an arbitrary or discriminatory manner. All job postings shall state "This position is open to male and female applicants."

- (c) The Chief of Police shall review the applicants and shall select the police officer best suited for the position based upon an assessment of skills, ability, qualifications, training and merit. Provided, however, that on a candidate to candidate assessment (as between candidates), where the best candidate is considered relatively equal on each of the considerations to another candidate who has more seniority, the candidate with more seniority shall be awarded the position, subject to any reasonable operational and organizational considerations of the Police Force. If none of the applicants are suitable, the Chief of Police may select any member of the Force and provide the name and reasons for the selection.

ARTICLE 31

GRIEVANCE PROCEDURE

- 31.02 (c) x) The decision of a majority of an arbitration board shall be the decision of the board and if there is no majority the decision of the chairperson shall be the decision of the board. The arbitration board shall not have the power to add to, subtract from or modify any terms or provisions of this agreement. In cases dealing with examinations and/or evaluations in connection with promotions or possible promotions the board shall have the power to hear

evidence and to examine all documents pertaining to the marking, assessment and evaluation of the police officer concerned. The arbitration board shall have the power to modify or set aside any penalty imposed by the Employer, relating to the disciplinary measures before them, save such as may be defined and set forth in this agreement. The decision of the arbitration board shall be final and binding upon the parties to this agreement and all persons covered by the terms of this agreement.

I conclude that the grievance must be disallowed. In doing so, I conclude that this case is one of a lateral transfer. I also conclude that in transferring Sgt. Penton into the position, the Employer was not in violation of the Collective Agreement. Let me explain my reasons for arriving at this decision.

Sgt. Penton, prior to the appointment to the position, was a Sergeant in the Operational Support Section of Patrol Services. His duties included being a member of the Mounted Unit as well as being assigned part time to Professional Standards.

After his appointment he remained a Sergeant in the Operational Support Section of Patrol Services but his duties changed to him being a Sergeant in charge of the rebundled area of Public Relations which included the Mounted Unit, Community Services, and Drug Awareness. He continued to have duties as a riding member of the Mounted Unit but ceased to have any duties in Professional Standards. He supervised the Mounted Unit, Community Services and Drug Awareness.

In Article 1(j) of the Collective Agreement lateral transfer is said to mean the transfer of a police officer from one job assignment to another job assignment which does not result in a promotion, demotion or classification change.

As I see it, the movement of Sgt. Penton and the changing of his duties fits squarely within Article 1(j). He was not being demoted or promoted and his classification was not

being changed. His job duties changed somewhat. Article 28.01(a)(i) gives the Chief of Police the right to make lateral transfers. In other words he can transfer a police officer from one job to another as long as it does not result in a promotion, demotion or classification change. He can give the officer new duties or relieve him or her of old ones.

The Association argues that this is not a situation of lateral transfer but one of appointing an officer to a newly created position. The argument is that Article 28.10 is brought into play because the position into which Penton is appointed is a new one.

Article 28.10 deals with two things. It deals with appointment to a vacancy other than a vacancy in a preferred position or a supervisory vacancy as is dealt with in Article 27.07. It also deals with what happens when a new position is created. In either instance there are specific requirements with respect to posting in all regions, with respect to what the posted notice shall contain, and how the selection of the person, to fill the position, is to be done. The Grievor did not state in his grievance that this was an appointment to a vacancy and the Association did not argue this at the hearing. The Employer argued that had the Association considered this a situation of a vacancy it would have grieved to that effect and maintained that there should have been a call for applications RNC wide from existing Sergeants and those in the promotional pool who are eligible to be promoted to Sergeant. Instead, all it did was grieve that the Grievor instead of Sgt. Penton should have been given the position.

I agree with the Employer and based on the evidence I have heard I am not able to conclude that a vacancy either existed or occurred. I am not prepared to find that every time that there is a rebundling of duties and/or an assignment of different duties to an officer that a vacancy is brought about and filled.

Though the grievance did not maintain that the position in to which Sgt. Penton was placed was a new one, the Association certainly argued at the hearing that this was the case.

It maintained that "newly created position" is not defined and that the Collective Agreement will not assist me in determining if the position is a newly created one. It said that instead, I had to examine the facts and the evidence to make that determination.

It argued the position espoused by the Employer that it is only a new position if it is an additional position created by government for which the RNC is given a new Personnel Control Number, does not determine the matter. The Association maintained that this is only a budgetary technicality.

Deputy Chief Janes expressed the position that by new position what is meant is a position newly created by government for which the RNC is given a new Personnel Control Number. He maintained that it is not the Chief who creates new positions but government. He said that the Chief can manage and reshape the Police Force but that it is only government that can create new positions.

I find that I do not have to decide if the Deputy Chief is right.

Sgt. Penton will not be carrying out duties that had never been carried out before. The Drug Awareness and Community Service duties were being carried out before by someone else or others. The administrative aspect of the Mounted position was being carried out by another Sergeant before it was rebundled. He continues to carry out some of the duties he had before, namely riding and attending to his horse and was relieved of any responsibilities in Professional Standards.

Suffice it to say, I am not prepared to conclude that every time duties are rebundled and assigned to someone other than the person who has previously been performing them that a newly created position has come about.

In my view, given the right that the Chief has to laterally transfer under Article 28.01 and the retention of management rights in Article 5, language much more clear than that which exists in Article 28.10 would be required to allow me to conclude that this is a case

of a newly created position. If what occurred in this case was the creation of a newly created position, the right to laterally transfer under Article 28.01 might just as well not exist and it would mean that at most all the Chief could do was switch officers between fixed and established batches of duties but never change the nature of the batch. Before being able to conclude that his ability to manage the Force was impacted to that degree in my view language much more clear and explicit, than that which exists in Article 28.10, would be necessary.

Therefore it is my conclusion that Article 28.10 is not at play.

There are certain situations where the Chief's ability to laterally transfer is affected. These are the situations contemplated by Article 28.01(a)(ii) - transfers to certain assignments in the CID, Article 28.01(e) - transfers to regions in the province other than St. John's, and Article 28.01(f) - transfers from the Corner Brook region or Labrador West region to another region. Neither of these situations are involved in this case.

The fact that the Personnel Order in question was posted, the fact that the words "Expression of Interest" were used in the heading and the word "applications" was used in the body of the Personnel Order are not significant. There is no evidence that anyone was misled or that detrimental reliance resulted therefrom.

The Chief was free to handle an Article 28.01(a)(i) lateral transfer in the manner he thought best.

He was free to call for expressions of interest or applications or to do neither. If he did call for expressions of interest or applications he was free to deal with them in the manner he thought appropriate to the situation.

As the Employer argued, the fact that there was a posting of a call for expressions of interest or the fact that applications was the word used in the body, do not have the effect of converting this situation into one where a posting is required or a call for applications

is required or where the selection processes contemplated by Articles 27.07 or 28.10 or something akin thereto must take place.

The Chief was free to utilize whatever selection procedures and wording he deemed appropriate.

This leaves for consideration what if any other restraints apply to the Chief's ability to laterally transfer.

Having determined that this is a case of lateral transfer and that the posting and selection requirements specified in Article 28.10 are not at play, the question arising is whether or not there are requirements of fairness or reasonableness or lack of arbitrariness placed on the Chief.

Arbitrator Scott in *The Government of Newfoundland and Labrador as represented by Treasury Board and Royal Newfoundland Constabulary Association (Head Grievance) supra*, concluded that such requirements were not placed on the Chief. He quotes at page 88 of his decision from *Re Calgary and Rural General Hospital, District No. 93 and United Nurses of Alberta, Local 121, 15L.A.C.(3d)293*:

“It is not open (to an Arbitrator whose powers are so limited by a Collective Agreement) to imply a term of reasonableness into the Management's Rights clause.”

Arbitrator Scott goes on further to write at page 88 in discussing whether there is a fairness standard to which the Employer must adhere:

“but the award holds that an arbitrator does not have such jurisdiction where the Employer's ‘exercise of those rights is unqualified’. This award stands for the proposition that in such a situation an arbitrator has ‘no jurisdiction to consider the reasonableness of a management decision which is unqualified by the other provisions of the agreement’”.

Arbitrator Scott at page 89 quotes further from Re Calgary:

“I must determine in the absence of any express or implied term to the contrary, whether I have jurisdiction to consider whether management acted reasonably and non-arbitrarily in the exercise of its management rights and if so, whether it acted reasonably in this case. I might state at the outset that where the exercise of management’s rights is in some way qualified by another provision of the agreement I naturally have jurisdiction to examine the exercise of these rights in view of that other provision. In my view, however, the matter is different where the exercise of those rights is unqualified. I am of the opinion that I have no jurisdiction to consider the reasonableness of a management decision which is unqualified by the other provisions of the agreement.”

He also references Re Metropolitan Commissioners of Police and Metropolitan Toronto Police Association (1981) 124 D.L.R. (3d) 684, a decision of the Ontario Court of Appeal which writes at page 687:

“In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the Collective Agreement. The power to challenge the decision of management must be found in some provision of the Collective Agreement.”

Arbitrator Scott notes as well the case Re Bank of British Columbia and Union of Bank Employees, Local 2100 (1982), 133 D.L.R. (3d) 227 at pp. 238-9, 1982 where MacFarlane J. writes:

“The question is not whether there was an appearance of arbitrariness as to what management did but whether what management did was in breach of the terms of the Collective Agreement. Management must, of course, have acted genuinely. They must not have manipulated the terms of the agreement to defeat the legitimate rights of employees. In making that assessment, however, the arbitrators must not infringe upon the right of management to assess a given situation and to make a business judgement. The Arbitrators must not weigh the evidence and substitute their own opinion for that of management. If management has ignored the provisions of the agreement, then although it might be appropriate to characterize such conduct as arbitrary or discriminatory, the decision

would be reversed only because there had been a breach of the agreement.”

Arbitrator Scott goes on to write at page 90 of his decision:

“I find the reasoning provided in *Re Bank of British Columbia* and in *Re Calgary and Rural General Hospital* has application in the matter before me. My authority is limited by the language of the instant agreement to determining, on the one hand, whether there are specific limitations on the Chief’s authority within the Collective Agreement to make a lateral transfer; and, on the other hand, whether the Employer’s action was ‘genuine’ in the sense which Justice MacFarlane uses the term to denote acts that are free of manipulation to ‘defeat the legitimate rights of employees’ as those rights are set out in the agreement.”

I agree with Arbitrator Scott that the Chief is not required to adhere to a fairness standard, or a reasonableness standard in terms of the decisions he makes and the actions he takes, under Article 28.01(a)(i). It is a only specific abridgement, delegation or modification of rights in the Collective Agreement itself which can take away from his authority under Article 28.01(a)(i). None exists in this Collective Agreement which apply to the situation at hand.

Arbitrator Scott concluded that in making his decision and in taking action the Employer must be “genuine” in the sense used by Justice MacFarlane namely, the actions must be free of manipulation “to defeat the legitimate rights of employees” as those rights are set out in the agreement.

Deputy Chief Janes gave his reasons as to why the duties were rebundled as they were. His overriding consideration was Public Relations and the branding of the organization. He saw the Mounted Unit’s greatest value as being in the area of Public Relations and thought it made sense to bundle Community Services, Drug Awareness and the Mounted Unit together because of the common denominator of Public Relations. He said his Superior was motivated by freeing up a Sergeant who was in charge of Traffic and Accident Investigation so that person had that area as his/her only area of responsibility.

When asked about rebundling, Inspector Ryan thought rebundling the Canine Unit and the Mounted Unit together made sense. It is only his opinion. As an arbitrator I cannot substitute my view of what it makes sense to bundle together for that of management nor can I be swayed by whatever Inspector Ryan's thoughts might be.

The point is that the rebundling occurred in the way it did because of what management thought made sense from a business point of view.

It was in this sense "genuine".

Selection of Sergeant Penton rather than the Grievor was explained by Deputy Chief Janes. He perceived the two were equal in terms of interpersonal skills and community relations activities but he perceived Sgt. Penton as being superior to the Grievor in terms of his experience with Drug Awareness or Drug Enforcement and in terms of his experience and training in the care and use of police horses.

Clearly in terms of experience and training in the care and use of police horses, it was not even close. Penton had a high level of training and years of experience. The Grievor had none. The Grievor conceded that Penton outranked him in terms of that qualification.

It was in the area of Drug Awareness experience where the Grievor perceived he was most harshly assessed and based upon his years of experience in Community Services and Crime Prevention and his lecturing on the topic of drugs countless time to school children, he believe he ranked ahead of Penton.

The Grievor also asserted that he was superior to Penton in terms of interpersonal skills and in Community Services activities.

It is not for me to wade in on who was superior in certain areas. Suffice it to say that Deputy Chief Janes' evidence satisfied me that he selected the person who he judged was

the best candidate and in this sense the selection process met the requirement of being genuine.

As far as the qualifications which were prescribed are concerned, I am satisfied that they are reasonably related to the duties which were to be carried out.

I recall Deputy Chief Janes saying that it was vital that the person have experience in the care and use of horses. In his view, "if a fiasco occurred in the stable it would be a Public Relations nightmare".

The requirement that the Employer's actions be "genuine" in the sense that they are free of manipulation to defeat the legitimate rights of employees, is most certainly met.

That being the case, the grievance must be dismissed.

The Association has asked that I embark on a series of recommendations as to how the Employer might better handle such matters as the drafting of Personnel Orders and whether or not personnel files should be reviewed or interviews held. It cited an instance where the Public Complaints Commissioner appointed under the *Royal Newfoundland Constabulary Act* made recommendations. It submitted that I am entitled to do the same and that I should do so in this case.

The Public Complaints Commissioner is specifically given the ability to make recommendations by Section 19(3) of the Act. No such authority is conferred on an Arbitrator such as myself. There are many who would say that I would be very presumptuous to stray into this area even if I had the ability to do so. They would probably be right. In any event I view such matters as being beyond my jurisdiction and in my view it would be very inappropriate for me to make such recommendations. I therefore decline to do so.

Decision

The grievance is denied.

Order

It is ordered that the grievance is denied.

DATED at St. John's, in the Province of Newfoundland and Labrador, this ^{7th} 26 day of November, A.D., 2010.



DAVID G.L. BUFFETT, QC
Sole Arbitrator