IN THE MATTER OF THE *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH POLICE SERVICES BOARD

- The Employer

and

THE HAMILTON-WENTWORTH POLICE ASSOCIATION

- The Union

AND IN THE MATTER OF a grievance regarding signing for annual leave

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer

Gary J. Kuzyk	- Counsel
John Petz	- Inspector

On behalf of the Union

Brad Boyce	- Executive Officer
Joanne Engelhardt	- Member, Union Board of Directors

Hearing held December 6 and 14, 2001, in Hamilton, Ontario.

AWARD

I. INTRODUCTION

This collective agreement includes provisions by which civilian employees of the police service select the time of their annual leave. The agreement then permits employees to trade leave days with another member or to move to an open spot, providing that notice is given to the Employer.

Two issues arose relating to the operation of these provisions:

1. Do the provisions allowing employees to change leave days incorporate a discretion for the Employer to refuse the change? and,
2. How much notice is required for such a change?

II. THE EVIDENCE

This collective agreement regulates the employment of the civilian employees of the police service. The employees work 12, 10 and 8 hour shifts. Annual leave is scheduled by the members of each group pursuant to the agreement. The Employer posts a bid sheet in the fall of the year indicating how many employees in each group may take annual leave each day during the following year. Employees then sign for their leave according to the rules in the agreement.

After the leaves have been scheduled through the signing process, the agreement (see Articles 5.10(d), 5.11(g) and 5.12(g)) provides that an employee is allowed to switch annual leave days by way of a trade with another member. An employee is also allowed to move a scheduled leave day to another annual leave spot provided that the spot is still open - that is, provided no employee has signed for leave that day or, if multiple employees can be on leave, provided the maximum number of employees has not been reached. Notice must be given

of all changes.

In addition, the Employer must post the actual work schedules (duty lists) three weeks prior to their operative date.

Some 64 full time employees work in the records section. During 2000 the records section supervisors had difficulty maintaining minimum staffing levels while accommodating many requests for schedule changes. Some of the requests for schedule changes involved employees changing their annual leave days. August 18, 2000 the supervisors in the records section distributed to their staff the following message:

> The growing increase in changes to the duty schedule have had a great impact on this section thus increasing the amount of time that is being spent working on scheduling. Due to this fact, effective immediately once the schedule has been posted in the binder 3 weeks in advance (as per the Collective Agreement Article 3 sec. 3.8), there will be no more changes.

This grievance arose as a result of that message. The Union contested the Employer's right to impose a three week notice period for changing annual leave days.

I heard evidence about the practice in the records section and elsewhere within the bargaining unit.

Kelly Chalmers worked in the records area for 15 years and now works in the radio section. She said that the practice has been for an employee to tell the supervisor when he or she wished to move a vacation day to an open spot; the supervisor would verify that the spot was still open and, if it was, the member would move into that spot. She said that this had occurred within three weeks of the date of the proposed leave. With respect to trading leave days with other employees, she said that she had been involved in trades within the three week period. She said she had not previously heard the word permission used in the context of changing leave days, although she said one supervisor had attempted to restrict a change but backed down when contacted by the Union. She agreed that late changes in leave days

create staffing problems.

Joanne Engelhardt has been employed under the civilian agreement for more than twenty years. During most of her employment she has been a communications operator in the communications room and for several years she was a supervisor. She worked briefly in records about 1980. She testified that she had changed leave days with other employees within a very short time before the proposed leave day and that she had also moved to open spots on very little notice. She indicated that, in her experience, all that took place was that the employee notified the supervisor. She said she had never thought that she or other employees needed permission for such changes. The first time she had heard that an employee might need to have Employer permission was the August 2000 memo which prompted this grievance. She testified that, to her knowledge, no employee had ever been prevented from moving to an open spot or from switching leave days.

For some 16 years Ms Engelhardt has been a member of the board of directors of the Union and she has regularly served on the negotiating committee for the Union. She said that the collective agreements for both the civilian staff and the sworn officers have been negotiated together and in many areas the agreements have been similar. She identified the previous agreement for the civilian employees and both the previous and current agreements for the sworn police officers. Appendix H of the current agreement for sworn officers (1996-1999) provides special provisions for annual leave for Patrol Branch Officers. Although many parts are similar to that of the civilian agreement before me, that appendix also provided for the first time that "Members cannot move into an open spot within three (3) weeks of the affected calendar week without prior consent of the Command Officer".

Darlene Shepherd is a records supervisor. The records department has some 64 full time employees and four supervisors. The supervisors are scheduled so that at times there are two or more supervisors at work while at other times, such as all day Sunday, there are no

supervisors. She indicated that there are minimum staffing levels known as "minimum strength". On many shifts the duty lists only provide for enough staff to meet the minimum strength. When an employee takes a leave on short notice by moving to an open spot, that employee often has to be replaced either by calling in one of the approximately nine (9) part time employees or by having a full time employee work overtime. She said that the department often falls below minimum strength and the problem had become worse in recent years.

Ms Shepherd identified a number of e-mails in which employees indicated that they wished to change their scheduled shifts. Some e-mails indicated the employee wished to change to an open annual leave day (an open spot) or to switch leave days with another employee, but many e-mails did not specify the nature of the change and others clearly did not relate to annual leaves. Some of the e-mails were framed as requests and all appear to have been allowed. Ms Shepherd indicated that she had denied requests but that she had never denied a request to switch leave days.

The problem with changes in annual leave was primarily related to employees moving to open spots. Ms Shepherd said that the large number of requests to change work schedules had caused the supervisors to issue the August 18 memo reproduced above. She said the supervisors wished to know well in advance who would be working so that after the duty list was posted it would need little, if any, change. She said that the August memo was not intended to cover swapping of leave days and, further, that any requests would be considered even if made after the deadline expressed in that memo. She agreed that her memo also covered changes in overtime leave which is regulated elsewhere in the agreement under different rules. In addition, she agreed that one of the problems in the records department related to the scheduling of the supervisors and the fact that there were no supervisors on some shifts.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the key provisions of the parties 1996-1999 Agreement. The primary provisions in dispute are Articles 5.10(d), 5.11(g) and 5.12(g).

ARTICLE 2
MANAGEMENT RIGHTS

2.1 . . .

(g) The Board agrees that it will not exercise any of the functions set out in this Article in a manner inconsistent with the provisions of this Agreement or the Police Services Act of Ontario and the Regulations thereto.

ARTICLE 3
STANDARD HOURS OF WORK

. . .

3.8 A duty list is to be posted at each police station in the Regional Municipality of Hamilton-Wentworth not less than three weeks in advance of the operative date thereof. Once posted this list is not to be altered without the knowledge of the member, subject to the exigencies of the service.

ARTICLE 5
ANNUAL VACATION

[Note: Employees under this agreement work 12 hour shifts, 10 hour shifts and 8 hour shifts. Because of the nature of the shifts, employees working a 12 hour shift work an average of 42 hours per week and the extra two hours each week are taken off with annual leave as "accrued" time. Employees on both 12 and 10 hour shifts do not take statutory holidays as they occur but, instead, take the equivalent time in conjunction with annual leave.]

. . .

5.7 It is agreed and understood that the Board has the right to determine staffing requirements for vacation scheduling. Member vacation signing shall be determined on the basis of full-time seniority . . . Vacation schedules are to be arranged and posted at least two (2) months before the vacation period commences. Vacations commence at the beginning of a calendar week unless the demand of the operation of the Police Service makes this impossible.

. . .

5.9 Subject to the exigencies of the service, a member may, at the member's discretion, take one

(1) week of vacation entitlement and use it one (1) day at a time.

5.10 The following provisions shall apply to those members working a twelve (12) hour shift.

(a) For the purpose of this Article, entitlement shall include vacation time, accrued time, and statutory holiday credits.

(b) Signing sheets will be posted that indicate the days on which a squad is required to work, and indicate the minimum number of members . . . entitled to take time off on each day. It will also include a list of members on the squad in numerical order by seniority.

. . .

(c) The members will sign by seniority, within their squad, for the subsequent year, on or before November 1 for the following year's entitlement as follows:

(i) First signing for two (2) weeks . . .
(ii) All remaining annual vacation entitlement;
(iii) Third signing for all statutory holidays and at least 60% of accrued time entitlement.

(d) A member will be allowed to change days signed for by arranging a trade with another member within the squad, or by moving the date to an open spot, but notice must be given to Command Officer.

. . .

5.11 The following provisions shall apply to those members working a ten (10) hour shift schedule:

(a) For the purposes of this Article, entitlement shall include annual leave and four (4) statutory holiday credits.

. . .

[Note: The agreement then includes provisions similar to those in Article 5.10, above, describing the process by which members sign for leave.]

(g) Personnel shall be allowed to change days signed for by arranging a trade with another member within the signing group unit or by moving the date to an open spot, but notice must be given to the Command Officer. Where a conflict arises, seniority shall prevail.

. . .

5.12 The following provisions shall apply to those members working a regular eight (8) or ten (10) hour straight day office hour schedule:

(a) For the purpose of this Article, entitlement shall only include annual leave entitlement as Statutory Holidays shall be utilized in accordance with the applicable provisions of the Agreement.

. . .

[Note: The agreement then includes provisions similar to those in Article 5.10, above, describing the process by which members sign for leave.]

(g) Personnel shall be allowed to change days signed for by arranging a trade with another member within the signing group unit or by moving the date to an open spot, but notice must be given to the Command Officer. Where a conflict arises, seniority shall prevail.

. . .

IV. UNION POSITION

The Union submitted that employees had a right to switch annual leave days with another employee or to move to an open spot. They exercised that right by notifying the supervisor. No request was needed and no permission was required. The Union said that it was possible to notify the supervisor of a change right up to the last minute. That was the proper meaning of the disputed provisions.

The Union also said that this interpretation was supported by a comparison with the new provision added to the agreement covering the sworn police officers which requires consent for some employees to move into an open spot within the final three weeks. The new language supported the Union view that, prior to that change, no such permission had been intended by the parties.

Finally, the Union said its interpretation was supported by the evidence as to the past practice which indicated that employees had both switched shifts and moved to open spots within the three weeks before the date of the change.

In response to the Employer submission on the meaning of "be allowed", the Union said that those words convey an entitlement. In addition, the Union said the requirement for notice was not to permit a period of consideration by the Employer but simply to ensure that the employee was not absent without leave.

The Union referred to the following: *Canadian Labour Arbitration*, 3rd edition (Brown, Donald J. M. and David M. Beatty) Sections 4:2320 (Management's duty to act fairly), 2:1200 (The Collective Agreement), and 4:2000 (Interpretation of Collective Agreements); *The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) in re Canadian Industries Limited (Windsor Works)* (1951), 3 L.A.C. 853 (Hanrahan); *Black's Law Dictionary,* "Implied"; *Re Provincial Schools Authority and Federation of Provincial School Authority Teachers* (1980), 25 L.A.C. (2d) 248 (MacDowell); *Re City of St. John's and Canadian Union of Public Employees, Local 569* (1998), 69 L.A.C. (4th) 308 (Alcock); *Re Grande Prairie General and Auxiliary Nursing Home District No. 14 and United Nurses of Alberta, Loc. 37* (1996), 57 L.A.C. (4th) 173 (Christian); *Re Corporation of the City of Windsor and Ontario Nurses' Association* (1985), 19 L.A.C. (3d) 1 (McLaren); and *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.* (1981), 124 D.L.R. (3d) 684 (Ont. C.A.).

V. EMPLOYER POSITION

The Employer submitted that the language was unambiguous. The agreement requires notice of changes. The period of notice must be reasonable. The requirement for reasonable notice was implicit in the agreement. What is reasonable notice depends on the type of change.

The Employer said that if two employees were simply swapping leave days, the change had little impact on the Employer's operations and thus very little notice was required. The

Employer suggested that two days would be sufficient in this situation.

However, moving to an open spot has a greater impact on the Employer's operation and reasonable notice would be much longer. The Employer suggested that it receive three weeks notice of any such change; that would mean notice prior to the time the Employer must post the duty list.

The Employer submitted that it was unreasonable to require the Employer to post a duty list three weeks in advance and still interpret the leave provision as giving employees a right to move to open leave spots after the duty list had been posted.

The Employer submitted that its position was supported by a consideration of "will be allowed" and "shall be allowed" in Articles 5.10(d), 5.11(g) and 5.12(g). The Employer submitted that this language did not convey an employee entitlement but rather implied that the Employer had to consider the request and indicate whether the request would be granted. In order to properly consider the request the Employer needed the amount of notice above.

Finally the Employer submitted that, on balance, the evidence did not support the Union position any more than it did the Employer position.

The Employer referred to the following: *Canadian Labour Arbitration*, 3rd edition (Brown, Donald J. M. and David M. Beatty) Sections 5:3100 (Work Hours and Shifts), 5:2300 (The Requirement of Bona Fides), and 4:2000 (Interpretation of Collective Agreements); *Collective Agreement Arbitration in Canada* (Palmer, E.E.) Section 4.14 (The Collective Agreement to be Read as a Whole); *Bighty v. Norton* [1862] 32 Q.B. 38; *Mister Broadloom Corp. (1968) Ltd. v. Bank of Montreal et al.* (1983), 44 O.R. (2d) 368 (Ont. C. A.); *Canadian Union of Postal Workers v. Canada Post Corp. (Mah)* [1999] C.L.A.D. No. 547 (Freedman); and *The Regional Municipality of Hamilton-Wentworth Police Services Board and Hamilton-*

Wentworth Police Association (October 5, 2001), unreported (Snow).

VI. CONCLUSIONS

There are differences in language among the primary provisions in dispute - Articles 5.10(d), 5.11(g) and 5.12(g). However, the parties were of the view that the intention was the same in each of Articles 5.10(d), 5.11(g) and 5.12(g) regardless of the differences in language. For the purposes of this grievance, I agree that these provisions mean the same thing.

There were two issues of interpretation raised by the grievance.

The first issue is whether an employee has a right to change leave days. Do "will be allowed" and "shall be allowed" convey an employee right, or do they mean the Employer must consider the request and make a decision as to whether or not to allow the request? In my view the use of "be allowed" after both "shall" and "will" in these provisions means that the employee can make the change. I do not view this as meaning that the Employer has a discretion as to whether or not to grant a request. There are a number of provisions in the agreement in which the Employer is able to exercise a discretion, but I do not find this to be one of those situations. In this situation the agreement itself, in Articles 5.10(d), 5.11(g) and 5.12(g), conveys the permission. If the employee gives the required notice of either a swap or of a move to an open spot, that employee has the right to change the leave day.

The second and main issue is what is meant by "notice must be given to the Command Officer". The Union submitted that any notice, regardless of how brief, would suffice to meet the requirement of the agreement. The Union submitted that the notice was only intended to ensure that an absent employee was not viewed as being absent without leave. I am unable to accept this as the sole purpose of providing notice. The Employer has to provide staffing for the effective operation of the police service all hours of every day. There

are specific minimum strength requirements. I believe the parties intended the notice to be sufficient notice for the Employer to maintain an effective police service, meet the minimum strength requirements, and otherwise meet its obligations under the agreement and the *Police Services Act.* It follows that I agree with the Employer that implicit in the agreement is a requirement that the notice be reasonable notice.

What, then, is reasonable notice?

The collective agreement does did not specify how much notice is needed, beyond the implied provision in the agreement that it must be reasonable. I agree with the Employer that reasonable notice requires an assessment on a case by case basis. The period of notice will be reasonable so long as it provides the minimum time needed for the Employer to find a replacement employee when one is needed, and otherwise meet its obligations under the agreement and the *Police Services Act.*

In the August 18 memo which precipitated this grievance the Employer defined the period of notice by saying that three weeks notice was needed. Can that memo be allowed to remain in effect?

First, I note that for many years the Employer has been able to respond to these changes in well under three weeks. Secondly, it was obvious that three weeks notice is not needed for the Employer to adjust to two employees simply switching leave days. The Employer did not argue for three weeks notice of such changes and Ms Shepherd said the August memo was not intended to cover those situations. Thirdly, in my view the Employer does not need three weeks notice when an employee wishes to move to an open spot. Nothing I heard in evidence or in argument suggested to me that it would take the Employer three weeks to find a replacement and/or make any other necessary adjustments for an employee who wished to exercise the collective agreement right to move to an open spot. While I accept that notice

must be reasonable in the sense that it allows the Employer time to react and maintain staffing and effective policing, I declare that the August 18 memo does not convey the proper interpretation of the collective agreement in so far as it deals with changes in annual leave days.

This grievance did not involve a specific employee request for a change in leave days, so there is no specific case in which I can make a decision as to whether the notice provided was reasonable. However, it was clear that the parties sought guidance on this issue and, in the hope that it will be of assistance, I offer my general views on reasonable notice based on the evidence I heard.

When two employees simply wish to swap leave days, I think a very brief period of notice would be sufficient. I would think that one hour notice of the swap would be reasonable notice and meet the requirement in the agreement. There was a suggestion that the Employer needed more notice so that if an employee failed to show up for a shift the Employer would know who was missing. But this particular concern does not arise until the start of the shift and one hour notice would be sufficient to meet this concern. I heard nothing to persuade me that the Employer needed two days notice (as it argued at the hearing) in order to deal with an employee who does not show up for a shift. While two days may be administratively convenient for the Employer, mere administrative convenience cannot prevent the exercise by employees of their rights under the agreement.

Different considerations apply to the issue of moving to an open spot. Moving a leave day to an open spot may require a staffing adjustment and may require the Employer to schedule another employee. When another employee must be scheduled, in order to be reasonable, the notice must allow an opportunity for the supervisor to arrange for a part time employee to attend or for a full time employee to be brought in on overtime. How much time that requires will vary. One of the variables will be whether a supervisor is at work. In the records

section, for example, if notice is provided late on a Saturday I understand no supervisor is present until early Monday. The time from the notice on Saturday until the supervisor arrives on Monday is lost time for this purpose.

While the evidence regarding the amount of time necessary between a supervisor's knowledge of a request and the locating and scheduling of a replacement was not clear, and while it will vary from situation to situation, I formed the opinion that such changes can usually be done quickly. Given that the employee has a right to take the day off under the agreement, reasonable notice must only be as long as is necessary for the Employer to make any required staffing adjustments and otherwise fulfil its obligations. If it has sufficient time to do that, then the employee has provided reasonable notice. On a normal week day I conclude that one day's notice of moving to an open spot would be adequate in most situations to allow sufficient time for the Employer to react and would be reasonable notice.

I remain seised to deal with any issues which may arise in the implementation of this award.

Dated in London, Ontario, this 14th day of January, 2002.

Howard Snow, Arbitrator