

**The Labour Relations Board
Saskatchewan**

**MARVIN TAYLOR, Applicant and REGINA POLICE ASSOCIATION, INC.,
Respondent**

LRB File No. 016-03; June 25, 2003

Chairperson, Gwen Gray, Q.C.; Members: Gloria Cymbalisty and Don Bell

For the Applicant: David Barth

For the Respondent: Merrilee Rasmussen, Q.C.

Duty of fair representation – Scope of duty – Timely request for union’s assistance is key and necessary element of successful duty of fair representation application – Board concludes that, due to applicant’s extreme delay in requesting union’s assistance, inconceivable that union could successfully prosecute applicant’s grievance, even if union found grievance to be meritorious – Board dismisses duty of fair representation application.

Duty of fair representation – Contract administration – On duty of fair representation application, Board does not assess merits of applicant’s grievance but whether union acted in arbitrary, discriminatory or bad faith manner – Board does not pre-judge issue of arbitrability which must be decided by arbitration board after hearing evidence from union and employer pursuant to s. 25 of *The Trade Union Act*.

***The Trade Union Act*, ss. 25 and 25.1.**

REASONS FOR DECISION

Background:

[1] Marvin Taylor (the “Applicant”) filed a duty of fair representation application against the Regina Police Association, Inc. (the “Union”) alleging that the Union failed to fairly represent the Applicant in his employment difficulties with the Regina Police Service. The Applicant also filed an application for reinstatement (LRB File No. 089-03) pertaining to the facts of this application.

[2] At the hearing of this matter, the Board summarily dismissed the application for reinstatement as the Board lacks jurisdiction to determine the substance of any grievance that may result in the Applicant’s reinstatement. Section 25(1) of *The*

Trade Union Act, R.S.S. 1978, c. T-17 (the “Act”) assigns jurisdiction over collective bargaining disputes of this nature exclusively to arbitration boards.

[3] The Union raised two preliminary objections to the application of Mr. Taylor (aside from the issue of this Board’s jurisdiction to order reinstatement). First, the Union argued that the essence of the Applicant’s claim is either constructive dismissal, which is exclusively assigned to the procedures set out in *The Police Act*, 1990, S.S. 1990-91, c. P-15.01, or is harassment, which is assigned to procedures set out in *The Occupational Health and Safety Act*, 1993, S.S. 1993, c. O-1.1. Second, the Union argued that the application ought to be dismissed as a result of the Applicant’s excessive delay in asserting his claim against the Union.

[4] The parties filed an agreed statement of facts and two volumes of exhibits. They both presented oral and written arguments, which the Board has reviewed. These Reasons address the preliminary issues raised by the Union.

Facts:

[5] The agreed statement of facts reads as follows:

1. *Marvin Taylor (Taylor) joined the Regina Police Service on January 8, 1973 at 21 years of age, as a sworn officer. He was also a member of the Regina Police Association Inc. (the Association), which is the certified trade union representing employees of the Regina Police Service, during the entire period of his employment.*
2. *Terms and conditions of employment of members of the Regina Police Service are governed by a collective agreement with the Association, and have been since 1946. In particular, members of the Regina Police Service have access to benefits provided under the collective agreement in the form of pension, sick leave, disability and in respect of work-related injuries. As a sworn officer, Taylor was entitled to the benefits provided under Schedule A to the collective agreement. It is the practice of the Association to provide copies of the collective agreement to every member each time a new collective agreement is negotiated. Copies of the collective agreements in force in December 1998 and in January 1999, when the events relevant to this application occurred, are attached as Exhibits 1 and 2.*
3. *In June 1976, Taylor was a member of the Canine Unit. Vernon Forbes (Forbes) was also a member of the Canine Unit. Forbes*

allowed a police dog to attack Taylor and Taylor had to attend to hospital and receive tetanus shots.

4. *In 1998, Taylor held the rank of Staff Sergeant and was the head of the Commercial Crimes Unit (CID). In about May 1998, Forbes, who then held the rank of Superintendent, became the officer in charge of CID. In December 1998, Gary Hoedel, who held the rank of Inspector, was also assigned to CID. Both Hoedel and Forbes outranked Taylor.*
5. *On November 19, 1998, Forbes asked Taylor to sign a "Letter of Commitment re RPS/OSS Restructuring", a copy of which is attached as Exhibit 3. Taylor refused. On November 23, 1998, Taylor forwarded an email outlining his concerns about the proposed restructuring to Deputy Chief Weighill, a copy of which is attached as Exhibit 4. Taylor's notes of the conversations he had with Forbes on November 18 and 19, 1998 in relation to the restructuring proposal are attached as Exhibit 5.*
6. *On December 16 and 17, 1998, Taylor brought a number of his concerns relating to Forbes to the attention of Deputy Chief Weighill by memorandum, copies of which were provided to Troy Hagen, then President of the Association. Copies of these memoranda are attached as Exhibits 6 to 9.*
7. *The memorandum attached as Exhibit 9 deals with Taylor's concerns about "casual Fridays". Other documents related to this issue include:*
 - *Regina Police Service Dress and Department Policy re Casual Fridays, dated May 1998, attached as Exhibit 10;*
 - *email from Taylor dated June 9, 1998, attached as Exhibit 11; and*
 - *email from Forbes dated June 19, 1998, attached as Exhibit 12.*
8. *On December 17, 1998, in a meeting between Forbes, Hodel and Taylor, Forbes placed Taylor on "Progressive Discipline". On December 18, 1998, Taylor's lawyer wrote to the Chief of Police about remarks made by Forbes. A copy of this letter was sent to Troy Hagen, then President of the Association. Copies of his letter and of the reply from the Chief dated December 29, 1998 are attached as Exhibit 13.*
9. *On December 21, 1998, Taylor met with the Chief of Police who revoked the Progressive Discipline and advised Taylor to take a couple of weeks to think over his decision to resign. Taylor submitted his resignation from the Regina Police Service on December 21, 1998, indicating that January 9, 1999 would be his last day of work. He outlined the reasons for his resignation in a*

lengthy attachment. A copy of the resignation and attachment is attached as Exhibit 14.

10. *On December 22, 1998 Forbes informed members of CID that Taylor would not be returning.*
11. *The Association acknowledges that Forbes was a person lacking in interpersonal skills and difficult to work with.*
12. *Taylor discussed his situation with Troy Hagen and Hagen accompanied Taylor in a meeting with the Chief on January 4, 1999. The Chief and Hagen advised Taylor to stay as the problems he was concerned with were resolvable. The Chief offered Taylor the option of returning to the Patrol Section as watch commander or returning to work with Forbes. Taylor chose to resign. Because he had more than 25 years' service he was able to retire with an unreduced pension based on his years of service.*
13. *Taylor did not file or attempt to file a grievance in relation to any of these incidents, nor did he file a complaint under the employer's harassment policy.*
14. *On March 15, 2002, Taylor met with Association President Christine Tell who advised him that the Association was not able to do anything because of the passage of time.*
15. *On March 21, 2002, Taylor filed a claim with the Workers' Compensation Board. Copies of the claim and related statements are attached as Exhibits 15 to 18. The WCB rejected his claim in a decision by the Appeals Committee dated May 12, 2003, a copy of which is attached as Exhibit 19.*
16. *On October 29, 2002, Taylor requested the Association to provide him written confirmation that it would not represent him. Copies of that letter and the reply from the Association dated November 28, 2002 are attached as Exhibit 20.*
17. *On December 18, 2002, Taylor commenced action in the Court of Queen's Bench against the Regina Board of Police Commissioners and the Association. The Association applied to be removed as a party on the basis that the court had no jurisdiction to deal with allegations of a failure by the Association to meet its duty of fair representation, and its application was granted on January 21, 2003. On January 23, 2003, Taylor commenced this application.*
18. *Other related documents include:*
 - *Harassment Policy, Regina Police Service, dated April 1998, attached as Exhibit 21;*

- *Progressive Discipline Policy, Regina Police Service, dated April 1998, attached as Exhibit 22;*
- *Marvin Taylor's income tax returns for 1999 to 2002 tax years, attached as Exhibits 23 to 26;*
- *extracts from collective agreements from 1999 to 2003 in relation to pay rates, attached as Exhibits 27 and 28.*

Relevant Statutory and Collective Agreement Provisions:

The Trade Union Act

25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.

(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.

(1.2) The finding of an arbitrator or an arbitration board is:

(a) final and conclusive;

(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and

(c) enforceable in the same manner as an order of the board made pursuant this Act.

25(2) An arbitrator or the chairperson of an arbitration board, as the case may be, may:

...

(f) relieve, on terms that, in the arbitrator's opinion, are just and reasonable, against breaches of time limits set out in the collective bargaining agreement with respect to a grievance procedure or an arbitration procedure;

...

25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his

bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.

...

Collective Agreement Provisions

Article 8 – Grievances and Disputes

The provisions of this Article are not intended to be utilized in any circumstances where the provisions of the Saskatchewan Police Act and Regulations thereunder apply.

- (a) *When an employee has a grievance, he/she shall, within seven (7) consecutive working days following the act or omission giving rise to such grievance, state his/her grievance in writing, addressed to the Association and shall thereafter be heard by a Committee of the Association. The Association shall thereupon and thereafter have the right to interview and obtain information pertaining to the grievance from any employee or any other persons believed to have knowledge of the grievance.*
- (b) *The Association, shall within seven (7) consecutive working days after receipt of the grievance, have the right to make submissions to the Chief of Police. In making application for a hearing, the Association shall outline, in writing, the matter complained of. The hearing shall be held within seven (7) consecutive working days of the application being made, and the Association may have the employee(s) concerned present at the hearing. The Chief of Police shall, within seven (7) consecutive working days following the hearing, give his/her decision and reason, in writing, to the Association.*
- (c) *The Association shall have the right to appeal the decision of the Chief of Police to the Board of Police Commissioners. In so doing, the Association shall file with the Board a written statement of the claims along with reasons of the Chief of Police shall be submitted with the Statement of the Claim. The appeal shall be filed with the Board within seven (7) consecutive working days following receipt of the decision of the Chief of Police.*
- (d) *The Board shall hear the appeal within twenty (20) consecutive working days after it has been filed with them and shall give their decision within seven (7) consecutive working days after the conclusion of the hearing.*
- (e) *Any grievance, which is not settled by the procedures set forth, may be referred to a Board of Arbitration by either party to this Agreement. Application for the establishment of a Board of Arbitration must be made by either party within thirty (30) calendar*

days of the date the decision of the Board of Police Commissioners is rendered.

- (f) *When either party requests that a grievance be submitted to a Board of Arbitration, the request shall be made by registered mail or hand delivered to the other party of the Agreement. Subject to clause (g), the Arbitration Board shall be comprised of a single arbitrator to be chosen in normal rotation from the following list of arbitrators.*

*Mr. Jack Chapman
Mr. Peter McKinnon
Ms. Francine Chad Smith
Ms. Gene Anne Smith*

- (g) *When either party requests that a grievance be submitted to a three person Board of Arbitration, the request shall:*

- (i) *be made to the other party within seven (7) consecutive days of the submission to arbitration;*
- (ii) *be made by registered mail or hand delivered to the other party of the Agreement; and*
- (iii) *indicate the name of that party's nominee on the Arbitration Board.*

Within seven (7) consecutive working days thereafter, the other party shall answer by registered mail or hand-delivered, indicating the name and address of its appointee to the Arbitration Board. The Chairperson of the Arbitration Board shall be selected in the ordinary rotation from the list set forth in clause (f) hereof.

- (h) *The Board may determine its own procedure, but shall give full opportunity to all parties to present evidence and make representations to the Board. It shall hear and determine the difference of allegation and render a decision within seven (7) consecutive working days from the time the Chairperson is appointed.*
- (i) *The decision of the majority shall be the decision of the Board. Where there is no majority decision, the decision of the Chairperson shall be the decision of the Board. The decision of the Board of Arbitration shall be final and binding and enforceable on all parties, but in no event shall the Board of Arbitration have the power to change this agreement or to alter, modify or amend its provisions.*
- (j) *Should the parties disagree as to the meaning of the decision, either party may apply to the Chairperson of the Board of*

Arbitration to reconvene the Board to clarify the decision, which it shall do within seven (7) consecutive working days.

- (k) *When either party applies for the establishment of a Board of Arbitration, each party shall pay the fees and expenses of their own nominee and shall each pay one-half of the cost of the fees and expenses of the Chairperson.*
- (l) *The Board making the final decision shall determine the financial or other arrangements to be made in the case of any suspension, dismissal or demotion.*
- (m) *This section shall, at all times, be subject to the provisions of the Laws of the Province of Saskatchewan and regulations thereunder and not in any sense, be in derogation of the rights of the respective parties hereto under the said Law.*
- (n) *All number of days mentioned in this section shall not include Saturdays, Sundays and Holidays.*

Arguments:

[6] The Union argued that the essence of the Applicant's claim is that he was constructively dismissed by the Regina Police Service. In *Regina Police Association and Shotten v. Regina Board of Police Commissioners*, [2000] 1 S.C.R. 360, the Supreme Court of Canada held that constructive dismissal is a form of discipline or discharge that falls exclusively within the legislative purview of *The Police Act, 1990* and is not subject to the grievance and arbitration provisions contained in the collective bargaining agreement. As a result, the Applicant could not file a grievance concerning the termination of his employment. Section 25.1 of the *Act* applies the duty of fair representation to "grievance or rights arbitration proceedings under a collective bargaining agreement" only and, as such, the Union had no duty or obligation to act on the Applicant's behalf in relation to the termination of his employment.

[7] The Union also argued that, if the essence of the Applicant's complaint was found to be an allegation of harassment, he must bring such a complaint under *The Occupational Health and Safety Act, 1993*. In essence, the Union argued that there were no direct or implied provisions contained in the collective bargaining agreement dealing with harassment of a member by a supervisor.

[8] In addition, the Union argued that the Applicant's claim should be denied as a result of the Applicant's delay in bringing the matter forward.

[9] The Applicant took the position that the Union was estopped from arguing that the Board lacked jurisdiction to hear the matter as the Union argued on a motion to strike the Applicant's wrongful dismissal and duty of fair representation pleadings filed in Court of Queen's Bench that only the Board had jurisdiction to hear and determine the duty of fair representation application.

[10] Second, the Applicant argued that dismissal was dealt with in article 9(a)(i) of the collective agreement and that a grievance could be filed by the Union challenging the validity of the Applicant's resignation. The Applicant took the position that the *Shotten* case, *supra*, did not apply to the present factual situation as the Applicant was not disciplined or discharged by the Regina Police Service but rather was subject to harassing conduct which caused him to resign his position. In his written brief, counsel for the Applicant characterized the resignation as follows:

Marvin Taylor was forced to resign. He had been threatened by his supervisor, Superintendent Forbes. Forbes started disciplinary action against Taylor and threatened to make his life difficult. Marvin Taylor was later informed by members of Commercial Crimes that Forbes had said he was not returning.

Taylor was left with three choices; keep working with Forbes, become watch duty commander for the Patrol section, or quit. He was too old to return to patrol and could not keep working with Forbes. Therefore he had to quit.

[11] Counsel argued that the cause of the resignation was not discipline, but rather was harassment and dismissal.

[12] In his supplementary argument, counsel for the Applicant argued that the Union also had a duty to represent the Applicant before the Board of Police Commissioners, if the matter falls under *The Police Act, 1990*.

[13] The Applicant argued that *The Occupational Health and Safety Act, 1993* provisions dealing with harassment did not apply to the circumstances of this case as

the harassment was not based on a prohibited ground (race, creed, religion, colour, sex, etc.).

[14] In relation to the argument on delay, the Applicant argued that he was unaware of the Board's jurisdiction over duty of fair representation complaints and was not advised to bring an application to the Board by any legal counsel whom he contacted.

Analysis:

Delay in Asking for Union Assistance

[15] The Applicant's duty of fair representation case is premised on the fact that the Union did not file a grievance on his behalf in relation to the harassment he experienced under the supervision of Superintendent Forbes. The Union replied by indicating that the Applicant resigned his employment effective January 9, 1999 and did not seek grievance assistance from the Union until March 15, 2002.

[16] Under article 8 of the collective agreement, an employee has seven (7) consecutive working days to state a grievance in writing to the Union, at which time the Union is authorized to investigate the matter and act on the complaint. The Union President was present and assisted the Applicant during his meeting with the Chief of Police in January, 1999. He also advised the Applicant not to resign his position but the Applicant did not take his advice.

[17] In these circumstances, the Applicant has not established a *prima facie* case under the duty of fair representation provision. He did not ask the Union to file a grievance in a timely manner pertaining to the matters that are the subject of his complaint. Under the duty of fair representation provision contained in s. 25.1 of the *Act*, the Applicant must demonstrate that he asked the Union to act on his behalf and that he made this request within the time limits set out in the collective agreement for filing a grievance (i.e. seven days from January 9, 1999) or, if the time limits are not met, when the delay could at least be excused by an arbitration board under s. 25(2)(f) of the *Act*. In this case, the Applicant delayed seeking assistance from the Union from January 9, 1999 to March 15, 2002, a period in excess of three (3) years.

[18] This case is somewhat unique in the Board's experience, as generally the argument pertaining to delay relates to the filing of a duty of fair representation application with the Board. Such delay is a procedural issue for the Board and does not go to the merits of the duty of fair representation complaint. In the present case, however, the delay pertains to the Applicant's request for assistance from the Union. In these circumstances, it is inconceivable that the Union could successfully prosecute the Applicant's grievance, even if it found the grievance to be meritorious, based on the Applicant's extreme delay in requesting assistance from the Union.

[19] As a result, the Board dismisses the duty of fair representation as a key and necessary element of the complaint (that is, a timely request for assistance) has not been made out.

Should the Board determine whether the subject matter of the complaint could give rise to a grievance under the collective agreement?

[20] The Union asked the Board to dismiss the duty of fair representation application on the basis that the subject matter of any alleged grievance would fall either under the provisions of *The Police Act, 1990* or *The Occupational Health and Safety Act, 1993*. In other words, the Board was asked to determine if the subject matter of the alleged grievance was arbitrable under the terms of the collective agreement.

[21] At first blush, the Union's request seemed to be a practical one. The Board could assess whether the essential character of the complaint was one that fit within the ambit of the collective agreement and then determine if the complaint was or was not assigned exclusively to another legislative scheme of dispute resolution, as was done by the courts in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) and subsequent cases.

[22] At the same time, however, the Board notes that arbitration boards are responsible under s. 25(1) of the *Act* for determining whether or not a complaint is arbitrable. Under the mandatory arbitration provisions contained in the *Act*, the task is clearly assigned to the arbitrators chosen by the parties.

[23] In *Saskatoon City Police Association v. Saskatoon Board of Commissioners*, [2000] Sask. L.R.B.R. 372, LRB File No. 086-99, upheld on judicial review at (2000), 200 Sask. R. 292 (Sask. Q.B.) and (2001), 213 Sask. R. 224 (Sask. C.A.), the Board held that an aspect of the duty of bargaining in good faith required the employer to refer a grievance to arbitration, even where the employer took the position that the matter was not arbitrable under the terms of the collective agreement. Mr. Justice Vancise, speaking for the Court of Appeal, held at paragraph 10:

The issue of arbitrability is for an arbitrator to decide, not for the employer or the union to decide. That is the procedure that was followed in the Regina Police Assn. v. Regina (City) Board of Police Commissioners. There the Board of Police Commissioners questioned the applicability of the collective agreement and the jurisdiction of the arbitrator to resolve the dispute involving the discipline of a member. The question of jurisdiction was submitted to an arbitrator who found that she did not have jurisdiction under the collective agreement and that the matter should be dealt with under The Police Act. That is the procedure that should have been followed here. Arbitrators routinely determine the arbitrability of issues. A failure to refer the dispute to arbitration is an unfair labour practice.

[24] It is ironic that cases such as *Weber, supra*, which deal with the exclusive jurisdiction of arbitration boards, have usurped a good part of the role of arbitrators by determining the implicit and explicit ambit of the terms of a collective agreement. In our view, this issue is best left to arbitration boards who are chosen by the parties to resolve their collective bargaining disputes, including the issue of whether a grievance is arbitrable: see *Brown v. Westfair Foods Ltd.*, [2002] 8 W.W.R. 654 (Sask. Q.B.) for an excellent analysis of the role of arbitrators.

[25] On the application before us, it may well have been a good defense to the complaint on its merits that the Union was of the view that the Applicant's complaint did not fall within the realm of the collective agreement. Typically, on a duty of fair representation complaint, the Board does not assess the merits of a grievance. Rather, the Board assesses whether the Union acted toward the member in a manner that was arbitrary, discriminatory or in bad faith. By taking this approach, the Board does not pre-judge the issue of arbitrability, which ultimately must be decided by an arbitration board after hearing evidence and argument from both the Union and the Employer.

[26] For these reasons, the Board will not enter into a debate on whether or not the subject matter of the Applicant's complaint is one that would fall within the ambit of the collective agreement.

Conclusion:

[27] The Board dismisses Mr. Taylor's application on the grounds that he did not establish a *prima facie* case based on the lack of a timely request for assistance from the Union.

DATED at Regina, Saskatchewan, this **25th** day of **June, 2003**.

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson