The Labour Relations Board
Saskatchewan

GENEVIEVE ROLLHEISER, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Respondent

LRB File No. 232-03; March 16, 2005
Vice-Chairperson, Wally Matkowski; Members: Ken Ahl and Duane Siemens

For the Applicant: Gregory J. Curtis
For the Respondent: Peter J. Barnacle

Duty of fair representation – Contract administration – Union considered relevant factors such as cost of arbitration, chance of success and what could be achieved at arbitration in deciding not to pursue grievance to arbitration – Although union politically divided, insufficient evidence that division had anything to do with union's decision on grievance – Board dismisses application.

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

REASONS FOR DECISION

Background:

[1] Genevieve Rollheiser (the "Applicant") filed an application alleging that Canadian Union of Public Employees, Local 59 (the "Union") violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by failing to carry forward a grievance relating to a written reprimand which the Applicant received from the City of Saskatoon (the "Employer") in July, 2003 and a number of verbal reprimands which the Applicant allegedly received from the Employer prior to the written reprimand.

[2] Initially, the Union filed a grievance dated August 13, 2003 (the "Rollheiser grievance") that stated in part:

> *…the Employer has unjustly disciplined G. Rollheiser in the written reprimand of July 9th, 2003 and in the verbal warnings referred to by the Employer, on November 2nd, 29th, December 3, 1999, August 23rd, 24th, 2000 and February 9th, 2001. This is in violation of Articles 12.1 and 12.8 and any other Articles that may apply in the Collective Agreement.*
>
> *Therefore we request that all references to the above reprimand and warnings be immediately removed from all records and not be referred to in any manner or used against the employee.*

[3] The Union and the Employer held a grievance hearing relating to the Rollheiser grievance on September 15, 2003. Following the hearing, the Employer provided the Union with a letter from Chief Russell Sabo, dated September 16, 2003, which read in part:

> *As for the actions of Ms. Rollheiser, I believe her interpretation of the note and, therefore, her resulting response was overstated. By responding in the manner she did, she failed to show respect to her co-worker and lacked professionalism. Having said this, however, there are inadequacies in Service practices that were highlighted as a result of this case.*
>
> *In particular, there are some issues related to how we communicate with our personnel. While I am confident the previous verbal warnings did take place, the lack of supervisory notes detailing the discussions indicates a potential training issue for our supervisory personnel. Additionally, the lack of an annual assessment of our employees, where issues of performance can be dealt with proactively, is also of concern. These two issues are things that our Human Resources Division must address.*
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> *Recognizing our values and in particular fairness, it is my finding that the letter of discipline should remain on Ms. Rollheiser's personnel file for a period of only six months, effective on Ms. Rollheiser's return to work date. If there are no further incidents of inappropriate behaviour during that time, the written warning will be removed from Ms. Rollheiser's personnel file and considered a verbal warning.*
>
> *. . . .*
>
> *I trust this is a suitable resolution to [the] Grievance.*

[4] The letter of discipline was removed from the Applicant's personnel file prior to the start of this hearing.

[5] The hearing commenced in Saskatoon on October 6 and 7, 2004 and concluded on February 7, 2005.

Relevant statutory provisions:

[10] The relevant section of the *Act* provides as follows:

> *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.*

Facts:

[11] Ann St. Denis, a staff representative of the Union, testified on behalf of the Union. Prior to obtaining this position, she had been the local president and was on the executive committee of the Union when the executive committee made its decision not to proceed with the Rollheiser grievance.

[12] Ms. St. Denis testified that the executive committee looks at a number of factors prior to deciding whether or not to proceed to arbitration on a grievance. The executive committee considers the merits of the grievance, the cost of the arbitration, the likelihood of success and the best interests of the Union as a whole.

[13] A member can appeal the executive committee's decision not to proceed to arbitration to the Union's membership and the Union's membership has the ability to overturn the executive committee's decision.

[14] With respect to the Rollheiser grievance, the executive committee considered that if an arbitration was unsuccessful, the written reprimand would remain on the Applicant's personnel file for three years, pursuant to the terms of the collective agreement. In addition, the executive committee considered the fact that an arbitration would pit one member of the Union against another member of the Union. The executive committee was also aware that there had been previous personality conflicts at the Applicant's work location, that a supervisor of the Applicant had been found guilty of harassment and that the Applicant had filed additional harassment claims.

[15] The executive committee considered that the collective agreement provided that the first stage of discipline was a written reprimand and that there was no provision dealing with a verbal reprimand.

[16] The executive committee considered what an arbitration could actually obtain. Given the concession set out by the Employer in Chief Sabo's letter of September 16, 2003, the executive committee was aware that the written reprimand could be removed from the Applicant's file within six months once the Applicant returned to work.

[17] The executive committee considered the cost of an arbitration. Ms. St. Denis testified that the executive committee believed that an arbitration could take longer than one day and could cost in excess of $3,000.00 and that the Union would have to obtain outside legal counsel, given that the Union's solicitor was unavailable because he was involved in a major dispute at another work location. The executive committee was also aware that there were a number of arbitrations proceeding in priority to any grievances that could be approved to go to arbitration.

[18] Ms. St. Denis testified she was aware that the Applicant's position was that the verbal warnings had been manufactured but that, because verbal warnings do not form part of the grievor's personnel file, the Union did not believe that this matter should be pursued. In addition, the Union prefers that its members receive non-disciplinary warnings rather than formal discipline.

[19] Ms. St. Denis testified that she was aware that a small percentage of the Union's members were unhappy and that Dave Taylor, a former local president, would be included in that group of unhappy members. Ms. St. Denis testified that the Applicant's association with Mr. Taylor had nothing to do with the executive committee's decision not to proceed to arbitration on the Rollheiser grievance.

[20] The Union sent the Applicant a letter dated October 21, 2003 which stated in part:

> *As I had previously indicated to you, the Grievance Committee's decision if to hold your grievance in abeyance until the harassment complaints have been dealt with. We do not see any benefit in going forward to arbitration for a letter of reprimand which will be removed from your file after six months (based on the decision of Chief Sabo). If you receive a favourable outcome to the harassment complaints, and the decision regarding those complaints has an impact on the situation with your grievance, then the decision to go forward with your grievances will be re-evaluated.*

[21] By letter dated December 4, 2003 the Applicant was informed by the Employer that her complaints of "disrespectful behavior" made against six individuals were unfounded.

[22] The Applicant informed the Union of the December 4, 2003 results in February, 2004. By letter dated February 17, 2004 the Union advised the Applicant that the Rollheiser grievance would not be going to arbitration.

[23] The Union assisted the Applicant following the filing of the Rollheiser grievance in a number of other areas. The Union assisted the Applicant in attempting to obtain a "buy-out" from the Employer and assisted the Applicant in relation to a sick bank request and in relation to seeking alternate employment with the Employer.

[24] Mr. Taylor testified on behalf of the Applicant. He testified that in 2000 he was defeated as local president by Lois Lamon. Following this occurrence, a number of lawsuits emerged and are apparently winding their way through the court system. Mr. Taylor testified that he and the Applicant are friends and that this fact was known by people. Mr. Taylor testified that he had no knowledge of what the executive committee considered when it decided not to proceed with the Rollheiser grievance.

[25] The Applicant testified on her own behalf. Prior to the written reprimand in question, the Applicant had a spotless record dating back to her start of employment in 1981. The Applicant testified that, while with the Employer, she trained new personnel from 1998 to 2003.

[26] In 2002, a supervisor of the Applicant was found to have harassed the Applicant at the workplace. The Union and the Employer entered into an agreement whereby the Applicant was returned to the workplace, made whole and reported to another supervisor.

[27] The Applicant received a written memo from the Employer dated July 12, 2002 confirming that she had no formal warnings or discipline on her personnel file.

[28] On July 9, 2003 the Applicant received a written reprimand from the Employer. There is no reference to any verbal warnings in the written reprimand.

[29] With the assistance of the Union, the Applicant was made aware that the Employer had a list of verbal warnings given to her relating to her interpersonal relationships. The list referenced eight incidents, some dating back to 1999. The Applicant denied ever being

verbally warned by the Employer and stated that the dates do not coincide with the dates of alleged verbal warnings given to her in a previous document prepared by her supervisor.

[30] The Applicant complained about the quality of representation she received from the Union and testified that she and Mr. Taylor are friends. The Applicant testified that the Union was "split" in 2000-01 and she referred to an incident when she did not run for a position in the Union because Mr. Taylor was running for the position and that this may have affected any decisions made by the Union in relation to the Rollheiser grievance.

[31] The Applicant complained that the Rollheiser grievance did not proceed to arbitration and even offered to pay for her own solicitor to bring the matter to arbitration. She complained that the Employer had changed its policy relating to harassment investigations. The Applicant testified that, in 2002, her harassment complaint was handled by an independent entity and that harassment was found. In 2003, the Employer's policy apparently called for the investigation to be handled internally. The Applicant complained that this change affected the results of the 2003 investigation. No harassment investigation policy was placed before the Board.

[32] A number of other witnesses presented evidence before the Board on behalf of the Applicant, but their testimony was for the most part irrelevant. For example, two individuals employed by the Employer were subpoenaed by the Applicant. Their testimony confirmed that verbal warnings did not form part of an employee's personnel file, but could be used in a manner that would amount to counseling or coaching, although one of the witnesses did also refer to verbal warnings as being "discipline." The only relevant evidence came from Thomas Graham, who testified that there were differences of opinion within the Union following the defeat of Mr. Taylor as president.

Applicant's arguments:

[33] Counsel for the Applicant argued that the Board could conclude that the Union had failed to represent the Applicant as required by s. 25.1 of the *Act*. He argued that the Union had discriminated against the Applicant because of her friendship with Mr. Taylor. Counsel argued that the Applicant had been poorly represented and treated in a manner that amounted to bad faith. He argued that the Board should look at the backdrop of the circumstances surrounding the Applicant's case. Counsel argued that the Union should not have accepted the

non-harassment findings of the Employer in December, 2003 and should have pushed for an independent investigation, rather than accepting the Employer's existing policy relating to harassment investigations. Finally, counsel complained that the verbal warning issue should have been pursued by the Union.

Union's arguments:

[34] Counsel for the Union argued there was no evidence that the Union, in making its decision not to proceed to arbitration of the Rollheiser grievance, acted in a manner which could be described as arbitrary, discriminatory or in bad faith. Counsel argued that the Union considered what penalty could be substituted if the grievance was successful, what impact the grievance could have on both the Applicant and all employees and the fact that the collective agreement did not provide for any lesser penalty than a written reprimand. Counsel took the position that the application must be dismissed.

Analysis:

[35] The Board found Ms. St. Denis to be an extremely credible witness. Ms. St. Denis testified as to what the executive committee considered in arriving at its decision on the Rollheiser grievance. Ms. St. Denis testified that the Applicant's friendship with Mr. Taylor did not form any part of the executive committee's decision relating to the Rollheiser grievance and her testimony is totally accepted by the Board.

[36] The Board finds that there was no arbitrary, discriminatory or bad faith conduct on the part of the Union, as dictated by s. 25.1 of the *Act*, in not proceeding with the Rollheiser grievance. The Union considered such relevant factors as the cost of an arbitration, the chance of success and what could be achieved by running an arbitration. The Union considered the fact that the collective agreement (which was filed as an exhibit before the Board) does not provide for verbal warnings. The Union took the reasonable position that, if the Applicant's harassment complaints were found to have merit and were linked to the issuance of the letter of reprimand, it would re-evaluate whether or not to proceed with the Rollheiser grievance.

[37] In their evidence, Mr. Taylor and the Applicant attempted to establish that the decisions made by the Union in relation to the Rollheiser grievance were motivated in large part by a division that had occurred in the Union. While it is true that there was, and arguably is, a division within the Union, there was insufficient evidence to establish that the Union's decisions

relating to the Rollheiser grievance had anything to do with the Applicant's friendship with Mr. Taylor.

[38] For all of the foregoing reasons, the application is dismissed.

DATED at Regina, Saskatchewan, this **16th** day of **March, 2005.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson