Labour Relations Board
Saskatchewan

PATRICIA CHUEY, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4687 and GOOD SHEPHERD VILLAS INC., Respondents

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4687, Applicant v. GOOD SHEPHERD VILLAS INC., Respondent

LRB File No. 197-05 & 219-05, September 8, 2006
Chairperson, James Seibel; Members: Duane Siemens and Clare Gitzel

For Patricia Chuey: Stanley Loewen, Q.C.
For the Union: Sharleen Haarstad and Frank Mentes
For the Employer: Robert Gibbings, Q.C.

Decertification – Interference – Applicant approached certain employees during work hours to garner support for application – Union advised employer of applicant's actions – Employer immediately advised applicant to cease actions – Board concludes that facts do not support conclusion that employer indirectly participated in gathering of support evidence.

Decertification – Interference - Employer's inexperienced bargaining representative made impolitic comments to union representatives during first bargaining session some months in advance of filing of application for rescission – Board finds that comments had no bearing whatsoever on making of application or ability of employees to indicate support for application.

Decertification – Interference – Apprehension of betrayal – Applicant was in-scope supervisor but neither agent of employer nor in position of such authority as to improperly influence or intimidate employees solely by virtue of position – Board concludes that principle of apprehension of betrayal not applicable in circumstances of case.

Unfair labour practice – Union alleges that employer committed unfair labour practices through employer's actions in connection with rescission application – Union's allegations similar to allegations of employer interference made in reply to rescission application - Board determines, on all of the evidence, that employer did not commit any unfair labour practice.

***The Trade Union Act*, ss. 5(k), 9, 11(1)(a), 11(1)(b) and 11(1)(e).**

REASONS FOR DECISION

Background:

[1] By Order of the Board dated December 9, 2004 in LRB File No. 277-04, Canadian Union of Public Employees, Local 4687 (the "Union") was certified to represent an all employee bargaining unit at Good Shepherd Villas Inc. (the “Employer”), which carries on business in Prince Albert as the operator of a long-term care home and three other residence buildings. The Board heard the evidence in two related applications, one for rescission of the certification Order, and the other respecting an alleged unfair labour practice by the Employer through its actions or omissions during the period leading up to the filing of the rescission application.

LRB File No. 197-05

[2] At all material times, Patricia Chuey was an employee in the bargaining unit and a member of the Union. On November 9, 2005, Ms. Chuey filed an application for rescission of the certification Order (LRB File No. 197-05) pursuant to s. 5(k)(ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “*Act*”), together with a number of cards purporting to be evidence of support for the application from a majority of employees in the bargaining unit. Section 5(k)(ii) of the *Act* provides as follows:

> *The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> > *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

[3] There is no collective agreement between the parties. The application was filed within the appropriate “open period” pursuant to s. 5(k)(ii) of the *Act*.

[4] The Applicant estimated there were 56 employees in the bargaining unit at the date of filing the application; the statement of employment filed by the Employer listed 59 employees.

The parties agreed that the name of Karen Gaspar ought to be removed from the statement of employment. However, they joined issue as to whether the names of eight other individuals ought to also be removed.

[5] The Board also received a number of written revocations of support from certain employees prior to the filing of the application for rescission and one following the filing.

[6] The application for rescission stated that Ms. Chuey's reasons for making the application included the following:

> *Majority of members no longer wish to belong to the union; no member interest in meetings; no meeting minutes shared between union executive and members since April 2005 meeting; no collective agreement since certification and no pertinent information regarding negotiations available to members. Members feel they have not received any value for the dues they have paid fore the last eleven months.*

[7] In its reply to the application, the Union alleged, *inter alia*: that the Employer interfered in the making of the application for rescission; that the Employer had committed unfair labour practices in violation of ss. 11(1)(a), (b) and (e) of the *Act*; that Ms. Chuey, who works as a supervisor and relief manager, used her position to secure support for the application for rescission with the approval of the Employer; that, because Ms. Chuey is not a member of the Union, she is not entitled to attend union meetings and cannot assess members' interest in same; that the Union provided reports of bargaining at union meetings; that the Employer neglected or refused to remit dues deductions for two pay periods overlapping with the period of the garnering of support for this application. The Union asked the Board to dismiss the application for rescission pursuant to s. 9 of the *Act* in that the Employer had unduly interfered in or influenced the making of the application. Section 9 of the *Act* provides as follows:

> *The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

LRB File No. 219-05

[8] The Union filed an unfair labour practice application (LRB File No. 219-05) on

November 18, 2005, alleging that the Employer had committed unfair labour practices in violation of ss. 11(1)(a), (b) and (e) of the *Act*, which provide as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
>
> *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;*
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> *. . . .*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

[9] In its application the Union stated the grounds of the application as including: that the application for rescission was made with the assistance of the Employer; that Ms. Chuey used her position as a supervisor to influence and intimidate members into supporting the application

with the knowledge of the Employer; and that the Employer discussed wages and benefits with Ms. Chuey in terms of what might be achieved by the employees without the Union and Ms. Chuey informed the members of this during the garnering of support for the application for rescission.

[10] In its reply to the application, the Employer denied that the application for rescission was made with the assistance of the Employer, or that it discussed wages and benefits with Ms. Chuey as alleged. The Employer further alleged that, while it was aware that Ms. Chuey was planning to file her application, it specifically advised her that no activities related to the same should take place during working hours.

[11] Both applications were heard together. The Board heard a great deal of testimony from eleven witnesses over three days of hearing.

Evidence:

Patricia Chuey

[12] Ms. Chuey has been a licensed practical nurse ("LPN") for more than 35 years. She was recruited by the Employer to work for it when it opened its long-term care home in Prince Albert. She has been one of three or four LPN shift supervisors since that time; she is the most senior. There are also some part-time or casual LPNs on staff.

[13] At least one LPN supervises each of two daily shifts from 7:00 am to 3:30 pm and 3:00 pm to 11:30 pm; an LPN is also on call from 11:30 pm to 7:00 am. At the time of hearing, Ms. Chuey was the only full-time LPN shift supervisor; the second full-time LPN shift supervisor, Sherryl Downey, resigned and went onto the casual employee list -- her position remains unfilled; Gloria Gondek and Rob McKnight job share the third full-time LPN supervisor position.

[14] The LPNs direct the work of the care aides, kitchen and laundry staff. In addition to performing hands-on care duties as and when required -- e.g., assistance with dressing, personal care, eating, changing of dressings, blood pressure monitoring, etc. -- the LPNs are qualified to distribute medications and ensure compliance with physician's orders. Ms. Chuey and Ms. Downey, dealt with certain administrative matters in the absence of the Employer's out-of-scope administrator such as finding relief staff to fill in for sick and absent employees, ensuring adequate

staffing and doing staff scheduling as required. As Ms. Downey has resigned her full-time position and gone onto the casual list, Ms. Chuey alone now performs such relief duties.

[15] Ms. Chuey is a member of the bargaining unit and pays union dues, but she is not a member of the Union. She said that she was never asked to join the Union, but admitted that she was vocal in her opposition to unionization at the time of the original organising campaign. She testified that, as she is the most senior employee, other employees often discuss issues with her and seek her advice. Apparently, some employees who approached Ms. Chuey in the period of time before the making of the application for rescission indicated to her that they were interested in removing the Union as bargaining agent. Among the concerns raised with her by some employees was that minutes of union meetings had only been posted twice since the date of certification, the last occasion being April 13, 2005. On the other hand, Ms. Chuey said that a number of employees had indicated to her that they were not interested in attending union meetings.

[16] Ms. Chuey said she became concerned about the "turmoil" in the workplace between employees since certification and that she was worried about its effect on morale and its potential effect on the care of the residents, although she did not explain why there would be any such effect or what form it might take. Ms. Chuey testified that, although she is a member of the bargaining unit (although not a member of the Union), she had not received any information regarding the Union's bargaining with the Employer for a first collective agreement but, she admitted, she had not asked whether she might see any. She said she raised the concerns that employees expressed to her with members of the local executive of the Union.

[17] Once she decided to make the application for rescission, Ms. Chuey said that she obtained the appropriate forms from the Board's website and her husband helped her complete them. She received an explanation of the "open period" for filing the application from Board staff. She said she had four consecutive days off from October 14 to 17, 2005, during which time period she contacted a majority of the employees to attempt to garner their support for the application.

[18] In cross-examination, Ms. Chuey stated that, had the Union demonstrated progress in negotiations or "done anything for us" in the eleven months since certification, she "would not have a problem" with the Union.

[19] While Ms. Chuey testified that she obtained the bulk of the evidence of support from employees outside of work hours, she did obtain two signatures one day during a coffee break. Shirley Barkhouse, the Employer's out-of-scope administrator learned of the fact from the local president of the Union and contacted Ms. Chuey at home later that day to advise her that she was not to do so; Ms. Chuey apologised, destroyed the two cards and again obtained those employees' signatures outside of their work hours.

Roxanne Fox

[20] Ms. Fox was called to testify on behalf of the Applicant. Ms Fox works for the Employer as a nurse's aide. She is taking the SIAST special care aide course. She described Ms. Chuey as a supervisor and friend. Ms. Fox testified that when Ms. Chuey spoke to her about supporting the application for decertification she did not feel "pressured," and she volunteered the information that she signed a support card. On the other hand, she said that when a member of the local executive of the Union, Ms. Downey, spoke to her a few days afterwards she was upset about Ms. Downey's approach and comments regarding the loss of job security if the Union was removed as bargaining agent.

Shirley Viney

[21] Ms. Viney has worked for the Employer as a nurse's aide for almost two years. She was called to testify on behalf of Ms. Chuey. Ms. Viney testified that she never felt "coerced" by Ms. Chuey when approached for her support for the decertification application. She volunteered the information that she signed a support card. She stated that Ms. Downey, on behalf of the Union, later approached her and advised her to the effect that if the Union was removed they would all lose their jobs

Velvet Furber

[22] Ms. Furber has worked for the Employer as a nurse's aide for a little over a year. She was called to testify on behalf of Ms. Chuey. While she could not recall the specifics of what was said, she testified that when she was approached by Ms. Chuey to obtain her support for the application, she found nothing wrong with Ms. Chuey's manner. She volunteered the information that she signed a support card. However, she said she was shocked when Ms. Downey spoke to her later and advised her to the effect that she could lose her job without the Union as her representative. Ms. Furber stated that she then took the necessary steps to withdraw her

evidence of support for the application for rescission which had not yet been filed with the Board; she also signed a new card in support of the Union.

Gloria Gondek

[23] Ms. Gondek has been employed by the Employer as a full-time LPN for a little over a year. She was called to testify on behalf of Ms. Chuey. She testified that Ms. Chuey approached her on her lunch break to seek her support for the decertification application. She volunteered the information that she did sign a card in support of the application. Sometime afterwards, she said she was contacted several times by fellow employee and member of the Union's local executive, Arlene Raab, who sought to get Ms. Gondek to revoke her support for the decertification application; Ms. Gondek informed Ms. Raab that she needed some time to think about it. On the last occasion (Ms. Gondek could not recall the date), Ms. Raab told Ms. Gondek that she would fax to Ms. Gondek the papers necessary for her to withdraw her support for the application, and that someone would come over to pick them up. Later that evening, Sharleen Haarstad, a national servicing representative for the Union, came to Ms. Gondek's home. Ms. Gondek indicated that Ms. Haarstad was respectful and that she did not feel "pressured" to sign a withdrawal of her support for the decertification application, however, she also indicated that she did want to "get it over with and be left alone."

[24] Ms. Gondek testified that as an LPN shift supervisor it is her responsibility to ensure that the work gets done. She indicated that, while she would provide guidance and minor admonishment to employees on her shift, if the untoward behaviour continues, she would refer the matter to the administrator, Ms. Barkhouse, to deal with it.

Koeke Soles

[25] Ms. Soles was called to testify on behalf of the Applicant. Ms. Soles has been employed by the Employer as a cook for about 18 months. She testified that, sometime in October, 2005, she was asked to attend a meeting on work time with certain local officers of the Union and Ms. Haarstad, at which she was advised that there was no need to decertify the Union.

Sharleen Haarstad

[26] Since January 2005, Ms. Haarstad has been the Union's national servicing representative with responsibility for the bargaining unit. She testified on behalf of the Union. Her

initial role was to hold an information meeting for the new members of the union local, set up the first local executive, set up committees for bargaining and health and safety and assist the new executive.

[27] By two letters both dated January 26, 2005, the Union firstly requested certain information from the Employer in preparation for negotiations and secondly advised of the identities of the persons on its local executive and bargaining committee and stated its preference that negotiations commence in February 2005. Ms. Haarstad received a letter dated February 3, 2005 from the Employer's administrator, Ms. Barkhouse, that provided some of the information requested by the Union but which advised that the Employer could not commence bargaining until some things could be put "in place quickly on a go forward basis operationally." The letter also advised that Ms. Barkhouse wanted to move Ms. Chuey's position out of the scope of the bargaining unit. The letter provided, in part, as follows:

> *The second item I would like to address immediately is:*
>
> *I would like to make a formal application to have employee Pat Chuey (LPN) removed from the bargaining unit. She would be doing a combination of administrative/direct care role.*

[28] Ms. Haarstad had her first conversations with Ms. Barkhouse on February 5 and 7, 2005 to discuss seniority and its calculation and scheduling. She said that at that time Ms. Barkhouse advised her in person that the Employer wanted to take Ms. Chuey's position out of the scope of the bargaining unit. The proposed position was to be titled "Professional Team Leader." After receiving and perusing a copy of the draft job description for the proposed position, the Union declined to agree that it should appropriately be out-of-scope.

[29] The Union continued to entreat the Employer to commence bargaining. By letter dated May 19, 2005 to Ms. Barkhouse, Ms. Haarstad referred to the fact that the Union had twice suggested dates for bargaining but had received no response from the Employer. She requested that the Employer provide available dates by May 29, 2005.

[30] The Employer and the Union met to bargain for the first time on July 12 and 13, 2005. Near the beginning of the meeting, the Employer's spokesperson, Doug Banzet, a member of the Employer's board of directors, stated that the Employer was evolving and that union

certification was premature. He asked the Union's bargaining committee, led by Ms. Haarstad, what the process would be if the employees no longer wished to be part of the Union. Somewhat taken aback, Ms. Haarstad responded that there was a process pursuant to the *Act*. At the meeting, the Union presented its proposal and some progress was made, including agreement with respect to the term of the first agreement and the management rights and union recognition clauses. The parties also discussed the Employer's proposition to designate Ms. Chuey's existing position, and Ms. Chuey along with it, as out-of-scope, but the Union declined to agree.

[31] The parties met to bargain once more on August 3, 2005. At that meeting, Mr. Banzet advised the Union's bargaining committee that he would out of the province for several periods of time during the fall and suggested that the parties attempt to bargain further by mail and e-mail. Ms. Haarstad stated that both parties "had some homework to do."

[32] Ms. Haarstad testified that, after these bargaining sessions, the Union's local executive provided reports on the progress in bargaining to members that attended union meetings. Ms. Chuey was not entitled to attend union meetings because she was not a member of the Union but, as a member of the bargaining unit, she and other non-members of the Union were represented in bargaining.

[33] In mid-October 2005, the Union became aware of the campaign to garner support for a decertification application. By November 2005, the Employer had fallen two months behind in its remittance of union dues; the Union was concerned by this because it could verify the complete list of employees at the time the present application for decertification was filed on November 9, 2005. Ms. Haarstad testified that when she contacted the Employer about the situation she was advised that the Employer had run out of cheques and had to wait until its financial officer returned from time off. Ms. Haarstad termed this an "odd coincidence." When Ms. Haarstad compared the employee lists from the Employer's general ledger for the pay periods ending August 12 and 26, 2005, she said that she noted that there were names on those lists that did not appear on the statement of employment filed by the Employer in the application for rescission.

[34] Also on October 17, 2005, Ms. Haarstad spoke with Ms. Barkhouse about her belief that Ms. Chuey had been speaking to employees about the decertification application at the pre-shift meeting and indicated that it was the Employer's responsibility to advise Ms. Chuey that it

was not appropriate to do so.

[35] The parties agreed that the name of Ms. Gaspar ought properly to be removed from the statement of employment for the purposes of determining the level of support for the application for rescission.

[36] The Employer sent letters dated November 10, 2005 (copied to the Union), to eight persons, each of whom had last worked at some considerable time in the past, regarding their employment status, asking that they each advise as to their intent with respect to continued employment or their resignations would be processed accordingly:

- Louise Storey (last day worked was July 7, 2005);
- Judy Riben (last day worked was prior to September 6, 2004);
- Connie Walters (last day worked was prior to November 2004);
- Johane Stephens(formerly Levesque) (last day worked was July 7, 2005);
- Mykaela Matthews (last advised employer she was “investigating other options” on unknown date prior to the application);
- Paula Wieder (last day worked was in March 2005; last advised Employer she was “exploring other options”);
- Brenda Kwiatkowski;
- Barbara Prince (last day worked was June 27, 2005).

[37] Ms. Kwiatkowski is not listed on the statement of employment filed by the Employer. On the statement of employment, the Employer also indicated that one Trent Ferguson had resigned, but did not indicate the date — presumably it was noted because it was prior to the filing of the application on November 9, 2005.

[38] Ms. Haarstad testified that the slow progress of negotiations and the campaign to decertify caused such turmoil in the workplace and between co-workers that members who were otherwise supporters of the Union were reluctant to become involved in the Union’s affairs; indeed, the president and vice-president were reluctant to continue to act as officers and resigned and other members were reluctant to fill the vacancies. Because of this situation, in January 2006, Ms. Haarstad made a request of the Union’s national office that Local 4687 be placed under administration and that she be appointed administrator. In her letter to the Union’s national

president dated January 13, 2006, Ms. Haarstad described her assessment of the situation, in part, as follows:

> *To briefly describe the circumstances, this newly certified local with approximately 50 members has been involved in a fightback campaign since National Convention and a rescission application was filed in November 2005. The Union responded with Unfair Labour Practices challenging the rescission application and other violations of The Trade Union Act. Since that time the executive has been under continued stress in the workplace and the president and vice-president have resigned.*

[39] A further letter to the national office from the Union's director for the Saskatchewan region regarding the situation, dated January 13, 2006, stated, in part, as follows:

> *This is a new local that has experienced tremendous difficulties in their attempts to reach a first collective agreement. This has caused much turbulence in the local resulting in resignations and subsequently, constant changes to the executive. There appears to be no member(s) willing to step up and take over the local. There is also an application to decertify at the Labour Relations Board.*
>
> *We feel that a collective agreement can be achieved and once completed, the attitude of the members will change for the better. …*

[40] Ms. Haarstad was appointed administrator of the local shortly afterwards.

[41] Nothing more occurred with respect to bargaining until February 2006, when the Union sent certain proposals to the Employer. The Employer responded approximately three weeks later to advise that it had not yet perused the information.

Doug Banzet

[42] Mr. Banzet is the chief financial officer of Golden Opportunities Mutual Fund, a labour-sponsored venture capital fund which is one of the investors in the construction and operation of the Employer. He is a director, but not an officer, of the Employer. There are four directors on the Employer's board. He testified on behalf of the Employer.

[43] Although Mr. Banzet was the Employer's chief spokesperson in bargaining with the Union for a first collective agreement, he had no prior experience with bargaining. His evidence

in-chief, with respect to the events in bargaining at the meeting of July 12, 2005, was in substantial accord with the evidence of Ms. Haarstad on that point.

[44] Mr. Banzet testified that, on October 3, 2005, he attended a meeting with the other members of the Employer's board of directors and Ms. Chuey. The directors asked Ms. Chuey, who was filling in for Ms. Barkhouse who was absent that day, to provide them with a report on complaints about Ms. Barkhouse's management and with Ms. Chuey's opinion as to the veracity of those complaints. He said the directors had also asked Ms. Downey about certain of the complaints. When asked whether there was any discussion about the Union at that meeting, Mr. Banzet stated that he thought Ms. Chuey had advised the directors that some employees were frustrated by the lack of information about contract negotiations, but that one of the directors present said that they could not discuss the matter.

[45] Mr. Banzet denied that he had ever suggested to Ms. Chuey that she apply for decertification and said that he had never given her any information as to how to do it. He also denied that he had ever discussed wages and benefits with Ms. Chuey. He did state that he saw Ms. Chuey as a manager and that she had management skills – he described her as "the number 2" in the absence of Ms. Barkhouse.

Lisa Christianson

[46] Ms. Christianson has been employed by the Employer in housekeeping and laundry since May 2004. She was called to testify by the Union under subpoena. She is a member of the Union. She is the former local vice-president of the Union and was on the Union's bargaining committee.

[47] Ms. Christianson testified that, because of Mr. Banzet's remarks at the first bargaining meeting of July 12, 2005, she did not think that negotiations would get very far. She also testified that after the start of the decertification campaign there was stress in the workplace and a decline in morale.

[48] Ms. Christianson testified that she had had a discussion with Mr. Banzet, outside of the context of contract negotiations, during which he informed her to the effect that, whether there was a union or no union, the employees would receive an increase in wages and benefits. Ms. Christianson said that Mr. Banzet told her to advise Ms. Chuey that he would call Ms. Chuey in the

next couple of days. Ms. Christianson said that, a few days later, Ms. Chuey told her that the staff would get an increase in benefits and a $1.50 per hour wage increase. She also said that during the same conversation Ms. Chuey told her about Ms. Chuey's campaign to apply to decertify the Union.

[49] In cross-examination by counsel for Ms. Chuey, Ms. Christianson stated that she considered Ms. Chuey to be "a supervisor," but that she did not feel that Ms. Chuey supervised her.

[50] Ms. Christianson stated that no further bargaining dates were set at the August 2005 bargaining meeting because the Employer could not advise of its availability. To her knowledge the Union had not requested a face-to-face bargaining meeting with the Employer since then.

Arlene Raab

[51] Ms. Raab has been employed by the Employer in housekeeping and laundry since July 2004. She was called to testify by the Union under subpoena.

[52] Ms. Raab had been the treasurer of the local union, but said she resigned because of the stress between workers caused by the application for decertification. She testified that she became aware of the application when Ms. Chuey came into the laundry to speak to Ms. Christianson and herself about it. She said that Ms. Chuey later approached her at the nursing station to obtain her signature in support of the application. She stated that she did not feel intimidated by Ms. Chuey.

[53] Ms. Raab testified that Ms. Chuey had told her that, according to information Ms. Chuey got from someone on the board of directors, if the Union was "out" the staff would probably get a wage raise of $1.50 per hour; however, she was unsure as to whether this conversation took place before or after the application for decertification was filed.

Shirley Barkhouse

[54] Ms. Barkhouse has been a registered psychiatric nurse for over 33 years. She has been the Employer's resident healthcare administrator since October 2004, responsible for overall

operation of the facility, and she reports to the board of directors. She was called to testify on behalf of the Employer.

[55] The Good Shepherd facility is a Level 1 to 4 care home with approximately 55 residents. The facility consists of four "houses" of twelve rooms each – two houses on either side of a main hallway. Each house has its own dining area. In addition to her administrative duties, Ms. Barkhouse said she also does hands-on client assessments and transport at whichever house requires help at the time and so the staff can take their breaks.

[56] Ms. Barkhouse described her view of Ms. Chuey's position as "a supervising LPN, the same as all LPNs" – Ms. Chuey has no authority to hire, fire or discipline staff. However, Ms. Barkhouse acknowledged that, in her absence, Ms. Chuey was in charge of the facility and that Ms. Chuey's "compensation" for doing so was to take time in lieu or straight time pay if it was for less than 120 hours.

[57] Ms. Barkhouse testified that she first became aware of Ms. Chuey's campaign for support for the decertification application on October 17, 2005 from Ms. Haarstad when she complained to Ms. Barkhouse about Ms. Chuey's activity on work time. Ms. Barkhouse spoke to Ms. Chuey that day and advised Ms. Chuey to cease and desist her campaign activities during work time. Ms. Barkhouse posted a memo in the staff room the next day advising employees that there was to be no discussion in the workplace during working hours regarding the decertification attempt, but only during breaks. Ms. Barkhouse also received a complaint from one employee who was upset and confused by the entreaties made by both sides to the debate. Ms. Barkhouse further stated that the management bargaining team had not yet discussed wage rates by that date.

[58] Ms. Barkhouse indicated that part of the reason for offering Ms. Chuey the new position was in order to enhance management coverage at the facility in the event of a strike.

[59] With respect to the individuals she contacted when assembling the statement of employment, Ms. Barkhouse testified as follows: She never met Ms. Kwiatkowski during her time as director; Ms. Walters was unavailable to work because she was caring for an ill family member, and formally resigned in November 2005; Ms. Storey had not worked since July 7, 2005, had taken another job and was not available to work; Ms. Prince had taken a job at another care home;

Ms. Wieder, who had not worked at Good Shepherd for a long time, worked at another care home and the hospital; Ms. Bishop resigned on October 10, 2005; Ms. Riben, who lived in Blaine Lake, had not worked since June 2005; Ms. Stephens worked full-time at another facility and indicated she had limited availability; M. Romenchuk had resigned.

[60] Ms. Barkhouse's evidence in general indicated that the LPNs directed staff and had authority to correct behaviour and provide minor admonishment.

Patricia Chuey in Rebuttal

[61] Ms. Chuey was called to testify in rebuttal. She testified that, while she did not know where the comment of a $1.50 per hour raise came from, she did tell Ms. Christianson and Ms. Raab that effectively there would be a 1.5 per cent wage increase if there was no union, because that was the rate of union dues the employees were paying.

Arguments:

[62] Mr. Loewen, representing Ms. Chuey stated that the real issue on the decertification application was whether there was majority support for the application. He submitted that the maximum number of employees on the statement of employment, if Ms. Gaspar is removed as agreed, is 58. In any event, he submitted that the application had majority support no matter how many names might possibly be removed from the statement of employment.

[63] With respect to the reasons for making the application for rescission, Mr. Loewen submitted that there was little employee interest in attending meetings of the Union, that very few copies of minutes of any meetings were posted with respect to updates regarding contract negotiations and that the Union had failed to achieve a first collective agreement: the employees had received no value for dues paid

[64] With respect to the unfair labour practice application, Mr. Loewen argued that there was no evidence that the application was made with the assistance of the Employer nor that the applicant had used her supervisory position to coerce or intimidate anyone into providing evidence of support for the application, but that there was evidence that the Union had coerced employees to withdraw support for the application and the Board should draw an adverse influence from the failure of the Union to call Ms. Downey to testify. Counsel also submitted that there was no

evidence that anyone representing the Employer had discussed wages and benefits with Ms. Chuey.

[65] Ms. Haarstad, representing the Union, argued that both Ms. Chuey and the Employer violated ss. 11(1)(a), (b) and (e) of the *Act*, the application was made with the passive assistance of the Employer and the application should be dismissed on the basis of Employer influence pursuant to s. 9. Ms. Haarstad asserted that Mr. Baznet's comments at the first meeting between the Union and the Employer demonstrated that the Employer was contemplating supporting decertification from the start of the relationship. In the fall of 2005, the Union did not obtain the dues checked off by the Employer with a list of employees from the Employer for several weeks until after the decertification application was filed. Ms. Haarstad suggested that Ms. Chuey had a vested interest in the decertification of the workplace, because the Employer could place her in the new position without hindrance by the Union, and that Ms. Chuey was an agent of the Employer.

[66] Ms. Haarstad referred to the decisions of the Board in *Leavitt v. United Food and Commercial Workers, Local 1400 and Confederation Flag Inn (1989) Ltd.*, [1990] Summer Sask. Labour Rep.61, LRB File No. 225-89, and *Mandziak v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Co. Ltd*., [1987] Dec. Sask. Labour Rep. 35, LRB File No. 162-87, as indicative of the test employed by the Board to determine whether an application for decertification ought to be dismissed pursuant to s.9 of the *Act*: that is, where the employer's conduct compromises the ability of the employees to decide whether or not they wish to be represented by the Union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined. Ms. Haarstad also referred to the Board's decisions in *Poberznek v. International Union of Bricklayers and Allied Craftsmen, Local No. 3 and United Masonry Construction Ltd*., [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84, and *Nadon v. United Steelworkers of America and X-Potential Products Inc*., [2003] Sask. L.R.B.R. 383, LRB File No. 076-03, (application for judicial review dismissed [2004] Sask. L.R.B.R. c-1 (Sask. Q.B.)) in support of the proposition that, while any one circumstance or event by itself may not be of a nature or significance to lead the Board to draw such a conclusion, the Board may look at whether all such evidence viewed and considered together may lead it to do so.

[67] Ms. Haarstad also suggested that Ms. Chuey was an agent of the Employer, being in a position of some authority vis a vis the other employees, and in a position to improperly

influence them with respect to whether to support the application, referring to the decisions of the Board in *Nadon*, *supra* and *Shuba v. International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 and Gunnar Industries Ltd*. [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.

[68] Referring to the decisions of the Board in *Arnold v. United Steelworkers of America, Local 5917 and Westeel Ltd*., [2005] Sask. L.R.B.R. 5, LRB File No. 275-04, and *Dyck v. International Woodworkers of America and Shelter Industries Ltd*., (unreported – January 30, 1979), LRB File No. 307-78, Ms. Haarstad asserted that the Board ought to consider that the signing of some of the support cards in the workplace on work time by Ms. Chuey, an in-scope supervisor, demonstrates the tacit approval of the application by the Employer and should be enough to cause the Board to dismiss the application. Referring to the decision of the Board in *Gabriel v. United Food and Commercial Workers, Local 1400 and Saskatchewan Science Centre*, [1997] Sask. L.R.B.R. 232, LRB File No. 345-96, Ms. Haarstad suggested that it was open to the Board to find that Ms. Chuey is an agent of the Employer within the meaning of s. 2(h) of the *Act*.

[69] Ms. Haarstad also asserted that the evidence of support of any of the employees ought to be disregarded pursuant to the principle of "apprehension of betrayal" as described by the Board in *Monahan v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd*., [1993] 4th Quarter Sask. Labour Rep. 109, LRB File No. 169-93 and *Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04.

[70] Mr. Gibbings, representing the Employer, advised that the Employer took no position with respect to the application for rescission and asserted that there was no evidence that the Employer had committed an unfair labour practice as alleged by the Union in the application in LRB File No. 219-05, nor was there any evidence of employer influence or interference in the rescission application.

[71] After suggesting that several of the authorities relied on by Ms. Haarstad in her argument on behalf of the Union were easily distinguishable as being blatant or very clear cases of employer interference, Mr. Gibbings asserted that the decision of the Board in *Matychuk v. Hotel Employees and Restaurant Employees Union, Local 206 and El-Rancho Food and Hospitality Partnership*, [2004] Sask. L.R.B.R. 5, LRB File No. 242-03, supported the contention that not

every somewhat suspicious circumstance will compromise the ability of employees to exercise their right to decide whether to be represented by a union, and there is insufficient evidence in the present case to support a finding that the Employer had so compromised the ability of the employees to make their decision.

[72] Mr. Gibbings described the comments attributed to Mr. Baznet made at the start of the first bargaining session between the parties as "impolitic," and noted that, in any event, they were made to a representative of the Union and not to the employees generally. He pointed out that, despite the comments, much progress was made by the parties in bargaining.

[73] With respect to the suggestion that the Employer wanted to take Ms. Chuey out of the bargaining unit, Mr. Gibbings asserted that indeed she was the Employer's first choice from among the supervisors to fill a new out-of-scope position that it hoped to create.

[74] With respect to the allegation that Mr. Baznet communicated to Ms. Chuey and Ms. Christianson that if the Union was decertified the employees would receive a wage increase of $1.50 per hour, Mr. Gibbings argued that that evidence came only from witnesses on behalf of the Union and was denied by both Mr. Baznet and Ms. Chuey. He suggested that it made no sense for Mr. Baznet to make such a remark at the time alleged, as the Employer had not yet determined what offer to make in bargaining with respect to wages. He also pointed out that it was likely a misconception of the fact that Ms. Chuey was aware that union dues were 1.5 percent of earnings and may have made some reference to that fact in her discussions with fellow employees to obtain support for her application.

[75] With respect to the Employer's failure to remit dues to the Union for a period of some weeks in the fall of 2005, Mr. Gibbings suggested that there was no evidence of improper motivation on the part of the Employer, as the dues had been deducted.

[76] In reply, with respect to Ms. Haarstad's suggestion that the evidence of support for the decertification application was unreliable, Mr. Loewen pointed out that Ms. Chuey was not a member of management but was an in-scope supervisor.

Analysis and Decision:

[77] In considering all of the evidence adduced, we are of the opinion that there is

insufficient evidence of undue influence or interference on the part of the Employer to justify dismissing the application for rescission pursuant to s. 9 of the *Act*. Similarly, we find that there is insufficient evidence to ground a finding that the Employer committed an unfair labour practice pursuant to any of ss. 11(1)(a), (b) or (e) of the *Act*.

[78] In *Leavitt*, *supra*, at 66, the Board described the test applicable in cases such as the present situation as follows:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not the wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

[79] In *Nadon*, *supra*, the Board stated at 386 and 387:

> *The issue to be determined is whether the Board ought to order a vote of the employees on the rescission application. In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing (or whether to be represented by a union at all) against the need to ensure that the employer has not used its authoritative position to improperly influence the decision: Shuba v. Gunnar Industries Ltd., et al., [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.*

[80] In *Mandziak*, *supra*, the Board made a similar point at 36:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

[81] The evidence does not support a finding that the impugned actions or omissions of the Employer, considered either individually or together, are sufficient to warrant dismissing the

application on the basis of the exercise of our discretion pursuant to s. 9 of the *Act,* or drawing the inference that the ability of the employees to decide whether to be represented by the Union has been compromised to the extent that their wishes can no longer be reliably determined through a secret ballot vote.

[82] In *Mandziak*, *supra*, the Board dismissed the application for rescission because it found that it had "resulted directly" from the employer's influence and indirect participation in the gathering of necessary evidence of employee support. The facts of the present case do not support such a conclusion. Immediately upon being advised by Ms. Haarstad that Ms. Chuey had approached two employees in the workplace on work time in order to garner their support for her application, Ms. Barkhouse advised Ms. Chuey in no uncertain terms that she was not to do so.

[83] And, in *Poberznek*, *supra,* the Board found that, when several discrete conditions were considered together, it could not conclude that the applicant had acted spontaneously and without influence by the employer in making the application for rescission. That is not the case here. We find that the comments of Mr. Baznet at the first meeting of the parties' negotiating committees were indeed "impolitic," but also very naïve and, having been made only to the Union's bargaining representatives some months in advance of the filing of Ms. Chuey's application, had no bearing whatsoever on the making of the application or the ability of employees to indicate their support therefor. Ms. Chuey testified that she had never been in support of the Union and we have little doubt, in all of the circumstances, that she came to make the application of her own volition and initiative and without influence by the Employer. Nor did she receive advice and information from representatives of the Employer as in *Nadon*, *supra*.

[84] Furthermore, we agree with the suggestion by counsel for the Employer that the principle of apprehension of betrayal is not applicable in all of the circumstances. Ms. Chuey is neither an agent of the Employer nor in a position of such authority as to improperly influence or intimidate employees solely by virtue of her position. There are several in-scope supervisors with the same authority as Ms. Chuey; she is simply the most experienced, and apparently, respected, among them. There is no evidence that leads us to infer that there is any likelihood or reasonable

possibility that the Employer has been or would be made aware of who supports the application by Ms. Chuey. Indeed, the evidence we heard tends to show that many of the employees are not shy about disclosing their position on the issue to their fellow employees.

[85] While, as was stated by the Board in *Nadon, supra,* at 386-87, it is necessary for the Board to be vigilant regarding the exercise of influence by an employer in such cases because such influence is rarely overt, there is no evidence to indicate that the Employer in the present case has been engaged in a course of conduct designed to influence Ms. Chuey in making the application or the employees in deciding whether to support it. Certainly, the circumstances in *Nadon* were much more extreme than those in the present case even if the latter are viewed in the worst light.

[86] For the foregoing reasons, we have determined that the application for rescission in LRB File No. 197-05 shall not be dismissed by reason of employer influence as contemplated by s. 9 of the *Act*.

[87] Furthermore, we also have determined on all of the evidence that the Employer did not commit an unfair labour practice or practices as alleged in LRB File No. 219-05 and that application is dismissed.

[88] It still remains to determine whether a majority of employees in the bargaining unit support the application for rescission. The statement of employment filed by the Employer lists 59 employees. The parties agreed that the name of Ms. Gaspar should be removed. We also note that the Employer provided no sample signature for Mr. Ferguson and, in any event, Ms. Barkhouse admitted that he had resigned his employment.

[89] The parties also joined issue with whether the following names should be removed from the statement of employment: Ms. Storey, Ms. Riben, Ms. Walters, Ms. Stephens (formerly Levesque), Ms. Matthews, Ms. Wieder, Ms. Kwiatkowski and Ms. Prince. However, Ms. Kwiatkowski is not listed on the statement of employment. The Employer had also crossed off the name of Leslie Grandberg.

[90] Accordingly, at least two names should be removed in any event – Ms. Gaspar and Mr. Ferguson – which would leave 57 names remaining. If the Union's position is accepted with respect to the seven that remain in dispute as stated by the parties – Ms. Storey, Ms. Riben, Ms. Walters, Ms. Stephens, Ms. Matthews, Ms. Wieder and Ms. Prince – then 50 names would remain. And if Mr. Grandberg is removed, there are 49. The policy of the Board is that an applicant must file evidence that at least fifty per cent plus one of the employees support the application for rescission before a vote may be ordered. In this case, the threshold number is, therefore, 29 at most (if 57 names remain) and 25 at the fewest (if 49 names remain).

[91] We have examined all of the support evidence in detail. A number of revocations of support for the application were received by the Board from employees. In keeping with long-standing Board policy, we have only accepted for consideration those revocations filed prior to the date the application was filed. We have carefully compared the statement of employment to the support evidence filed on the application. We have determined that, if no names are removed from the statement of employment other than Ms. Gaspar and Mr. Ferguson (i.e., leaving 57 employees) and discounting any evidence of support they may have signed and ignoring the evidence of support of any of the persons who filed revocations of support prior to the filing of the application, Ms. Chuey has provided evidence of support from a majority of employees for the application. Similarly, if we perform the same exercise assuming that either 50 or 49 employees remain on the statement of employment as described above, Ms. Chuey has still filed evidence that a majority of employees support the application and, accordingly, a vote will be ordered.

[92] However, for the purposes of compiling the list of eligible voters, we have determined that that list shall be comprised of 49 names, being the statement of employment as filed on this application, with the following names being removed for the reasons indicated:

- Ms. Gaspar, by the agreement of the parties;

- Mr. Ferguson, by the admission of the Employer that he had resigned (and no sample signature was provided for him);

- Mr. Grandberg, as the Employer had crossed his name off the statement of

employment;

- Ms. Storey, Ms. Riben, Ms. Walters, Ms. Stephens-Levesque, Ms. Matthews, Ms. Wieder and Ms. Prince, for the reason that they either had formally resigned prior to the filing of the application for rescission or had indicated they were not interested in working or had last worked so far in the past that they no longer have a sufficiently substantial and tangible interest in the outcome of the application.

[93] The application in LRB File No. 219-05 is dismissed.

[94] An order directing a vote with respect to the rescission application in LRB File No. 197-05 shall issue in the usual form.

DATED at Regina, Saskatchewan, this **8th** day of **September, 2006.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson