The Labour Relations Board
Saskatchewan

TREVOR MALYON, Applicant v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Respondent Union and THE SASKATOON HEALTH REGION, Respondent Employer

LRB File No. 155-07; August 18, 2008
Single Panel: Chairperson, Kenneth G. Love, Q.C.

The Applicant:	Trevor Malyon
For the Respondent Union:	Drew Plaxton
For the Respondent Employer:	Evert Van Olst

Duty of fair representation – Scope of duty - Union fairly and adequately investigated circumstances and consulted with legal counsel before determining likelihood of success at arbitration – arrived at informed and reasonable view with respect to success of grievance at arbitration – union fulfilled duty of fair representation – Board dismisses application.

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

REASONS FOR DECISION

Background:

[1] Trevor Malyon (the "Applicant") brings this application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") based upon his assertion that the Service Employees International Union, Local 333 (the "Union") had abandoned and withdrawn his grievance filed in respect of his termination from his employment with the Saskatoon Health Region (the "Employer").

Facts:

[2] The Applicant's application to the Board relates to a grievance filed on his behalf by the Union following his termination from his employment on May 19, 2006.

[3] The Applicant was employed by the Employer as a security officer at the Royal University Hospital in Saskatoon, Saskatchewan (the "RUH"). The Applicant commenced his employment as a security officer on March 20, 2001, but had held other positions with the Employer prior to his appointment to this position.

[4] On March 25, 2006, the Applicant was involved in a situation with an unruly patient who had been admitted involuntarily to the RUH. The patient was confined in a room in the hospital and had become violent. The Applicant, along with other security officers, were required to enter the room and restrain the patient. In the course of performing their duties, the Applicant was observed by fellow security officers to be engaging in what they believed was physical and verbal abuse of the patient.

[5] Following the incident, some of the other security officers involved discussed their concerns with one of their senior officers. He indicated that they were required to write the incident up and provide the information to the District Manager of Security Services for the Employer. Security officer notes of the incident, along with the reports written by the security officers, were entered as Exhibits in the proceedings.

[6] As a result of the reports filed by the other security officers, the Employer conducted an investigation of the incident. The Applicant was suspended without pay on May 4, 2006, pending the results of the investigation. The Applicant participated in the investigation and was represented by his Union representative, Ms. Flo Broten.

[7] At the conclusion of the investigation, it was determined that the reports of physical and verbal abuse were substantiated and the Applicant was terminated from his employment by letter dated May 19, 2006. In his letter, Mr. Tony Elliot, District Manager, Security Services, states in the last paragraph:

> *Your unacceptable actions that night along with your statement that you did nothing wrong leaves me with no other alternative but to terminate your employment with the Saskatoon Health Region effective May 4, 2006.*

[8] A grievance against the Applicant's termination was filed by the Union on May 19, 2006. Ms. Broten was the person in the Union responsible to assist the Applicant with his grievance procedure.

[9] As a part of the preparation for the grievance procedure and possible arbitration, Ms. Broten, on behalf of the Union, conducted an independent investigation into the incident and also reviewed matters with legal counsel. Her investigation was very thorough. She spoke to all the security officers involved in the incident, reviewed the written evidence provided to the

Employer, and discussed with legal counsel the likelihood of success at arbitration, should the matter proceed that far.

[10] A first stage of the grievance procedure was August of 2006. Prior to going into the meeting, Ms. Broten provides in her testimony that she advised the Applicant that it was going to be difficult to win this case based on her investigation and the research she had done with legal counsel. Ms. Broten further testified that, at the meeting, the Employer provided copies of arbitration cases similar to those found by the Union's legal counsel and which the Employer intended to rely on if the grievance proceeded to arbitration. The meeting concluded with the Employer denying the grievance.

[11] Ms. Broten's evidence was that any decision to take a matter forward to arbitration (which would have been the next step in the grievance procedure), must be endorsed by the Union's Grievance Committee. The Grievance Committee met, considered the investigation which Ms. Broten had conducted and the cases and advice of their legal counsel, and determined not to proceed further with the grievance, as they were of the view that it had little chance of success. The Applicant was informed of the decision by letter from Ms. Broten dated August 31, 2008. It is as a result of the Grievance Committee's decision that the Applicant brings this application.

[12] The Applicant's testimony at the hearing was directed principally towards his assertions that he had done nothing wrong and had not used excessive force in the incident. However, it was clear, that as noted above in Mr. Elliot's letter, he appeared to be unwilling to accept that his conduct could have been different.

[13] The Applicant made reference to another incident which allegedly occurred where a security officer had used excessive force, but was not terminated as a result of that incident. In her testimony, Ms. Broten indicated she had not been aware of that other incident prior to it being brought to her attention by the Applicant as a part of his grievance procedure. She investigated that incident and found that there had been no discipline, but that the employee involved had accepted responsibility for his actions and had taken steps to ensure better behaviour in the future. It was this difference between the employee who had taken responsibility for his actions and accepted that remedial steps were necessary, and this Applicant who continued to deny that he had done anything wrong or to take any steps to

remedy his behaviour. It is the Union's opinion that the Applicant's failure to take responsibility for his actions lead to his termination.

[14] The Union's Constitution provides that a member can appeal any decision of the Grievance Committee by appealing to the Union's Executive Board. The Applicant availed himself of that appeal process and was represented by counsel during that appeal. His appeal was not successful and the Executive Committee upheld the Grievance Committee's decision not to proceed further with the grievance.

[15] The Union's Constitution also provided for a further appeal against the decision of the Executive Committee by a member being able to appeal to the Union's International Executive Board. The Applicant declined to take any further appeal and filed this application instead. He was offered every opportunity, both at the commencement of the hearing and during the hearing of this matter, to avail himself of the appeal to the International Union, but determined to continue with this application.

Relevant statutory provision:

[16] Relevant provisions of the *Act* are 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.*

Analysis and Decision:

[17] The Applicant bears the onus of proof in the present application.

[18] The case law that the Board consistently follows with respect to the duty of fair representation owed by the Union to the Applicant as set out in s. 25.1 of the *Act* was extensively reviewed in *Beatty v. Saskatchewan Government and General Employees Union*, [2006] Sask. L.R.B.R. 440, LRB File No. 086-04 at 464 through 473. It is unnecessary to repeat that review here.

[19] In the present case, the Applicant argues that the Union failed to properly represent him, insofar as the Union withdrew the grievance it had filed regarding his termination.

[20] However, the evidence from the Union showed that the Union carefully considered the facts of the grievance, took pains to investigate the complaint independently, received legal advice on the situation and concluded that it had no reasonable chance of success in the event that the grievance proceeded to arbitration. That initial view was communicated to the Applicant by Ms. Broten prior to the first grievance hearing. As it turned out at the grievance meeting, the Employer raised the same cases in their defense. For both parties the case law indicated that the grievance would not, in all likelihood, succeed at arbitration.

[21] As pointed out in *Chabot v. C.U.P.E. Local 477* [2007] Sask. L.R.B.R. 401, LRB File No. 158-06 at para. 71:

> *The Board does not sit in appeal of decisions made by unions, does not decide if a union's opinion of the likelihood of success of a grievance was correct and does not minutely assess and second guess every union action.*

[22] The Applicant is requesting that this Board review the actions of the Union and determine, based on the evidence he provided concerning the proper application of force in situations such as the one which lead to his dismissal, that he had not used excessive force and that the Union would, or could be successful if the issue went to arbitration.

[23] However, the Applicant's argument overlooks a prime element with respect to the Union's decision not to proceed with the grievance; that being that the Applicant's failure to take responsibility for his actions or show a desire to avoid a repeat of that behaviour. That, coupled with his failure to recognize that his actions may have been excessive or viewed by others as excessive were the main reasons that the Union felt that they would be unable to persuade an arbitrator that there was an opportunity for rehabilitation and hence the likelihood of reinstatement by an arbitrator. This failure to take responsibility for his behavior or to recognize that a different outcome could have ensued was the significant difference in the example cited by the Applicant as referenced in paragraph [13] above.

[24] For the Applicant to be successful, it is necessary for him to show that the Union's representation of him, and the withdrawal of his grievance was "arbitrary, discriminatory, or in bad faith."

[25] The Applicant failed to provide any evidence to the Board that the actions of the Union were arbitrary. In fact, the evidence from the Union showed that their decision was anything but arbitrary. They conducted an independent investigation, received legal advice from counsel and provided the Applicant the opportunity to appeal the decision of the Grievance Committee to the Union's Executive Committee. Further, several times prior to and during the hearing the Union also offered the Applicant access to a further appeal in the Union's appeal process.

[26] There was no evidence presented that the decision to withdraw the grievance was in any way marred by the Union's discrimination against the Applicant. The case involving the other security officer raised by the Applicant was neither known to the Union (because it never reached the discipline stage) and was distinguishable insofar as the security officer in that case showed remorse and agreed to take steps to avoid such conduct in the future.

[27] The Applicant also did not provide evidence of bad faith by the Union. The Union and the Employer came to the same conclusion based on its review of arbitration decisions. Also, the Union conducted its own independent investigation of the facts and determined the likelihood of success of arbitrating the Applicant's grievance. The Board concludes that there is nothing in the Union's conduct which can be characterized as being done in bad faith.

Conclusion:

[28] Although the Union has requested that the Board consider dismissing the Applicant's application on the ground that the Applicant did not avail himself of the opportunity to further the appeal process to the International Board, it is unnecessary for the Board to rule on that request, given the reasons outlined above.

[29] The application is therefore dismissed.

DATED at Regina, Saskatchewan, this **18th** day of **August, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson