The Labour Relations Board
Saskatchewan

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

LRB File No. 155-07; May 6, 2009
Panel: Chairperson, Kenneth G. Love, Q.C., Members, Clare Gitzel and Maurice Werezak

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

Reconsideration of Board Decision. Board reviews criteria for reconsideration. Applicant fails to satisfy any of the criterion. Application Dismissed.

***The Trade Union Act*, Sections 5(l) & 42.**

REASONS FOR DECISION

Background:

[1] This is an application by Trevor Malyon (the "Applicant"), filed with the Board on December 11, 2008, for reconsideration of a decision of the Board dated August 18, 2008, LRB File No. 155-07. The Applicant brings this application under s. 5(i) and 42 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and alleges as follows:

1. *Certain critical evidence was not adduced for good and sufficient reason; and*
2. *The Board's decision was based on improper interpretation of law or policy; and*
3. *The Board's decision was tainted by breach of natural justice.*

[2] The application was dismissed in the Reasons for Decision referred to above.

[3] The Applicant, under s. 25.1 of the *Act* alleges that the Union did not properly represent him in his grievance of his dismissal 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 previously held other positions with the Employer prior to his appointment to this position. The Applicant's employment was terminated on May 19, 2006, and a grievance was initiated by the Union that same day.

[4] In the August 18, 2008 decision, the Board found that the Union had discharged its duty of fair representation for the reasons given in that decision. The Applicant was not satisfied with that decision and sought to have same reconsidered by the Board.

[5] The Board heard from the Applicant at the reconsideration hearing, but did not find it necessary, for the reasons that follow, to hear from either counsel for the Union or the Employer and dismissed the application.

Relevant statutory provision:

[6] Relevant provisions of the *Act* are as follows:

> *5 The board may make orders:*
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> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
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> *. . .*
>
> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Decision:

[1] When dealing with applications for reconsideration, the Board recognizes that there is a balance to be achieved between a request for reconsideration and the value of finality and stability in decision making. As a result, the Board has adopted a two step approach which requires that the Applicant first establish grounds for reconsideration before a decision is made as to whether a reconsideration or some other disposition of the matter is appropriate. This hearing was for the purpose of determining the first step in the process, that is, whether the Applicant can establish sufficient grounds for the Board to determine that it should embark upon a reconsideration of its earlier decision.

[2] The Board has adopted the reasoning in *Overwaitea Foods v. United Food and Commercial Workers No. C86/90,* a decision of the British Columbia Industrial Relations Council. In that case, the British Columbia Industrial Relations Council adopted six criteria in which it would give favourable consideration to an application for reconsideration. Those criteria were set out as follows:

> *In Western Cash Register v. International Brotherhood of Electrical Workers, [1972] 2 CLRBR 532, the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRD No. 61/79, [1979] 3 Can LRBR 153, added a fifth and a sixth ground:*
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> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
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> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
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> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> 4. *if the original decision turned on a conclusion of law of [sic] general policy under the code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[7] In the present case, although the Applicant alleges that there were factors in the original decision that would allow the Board to reconsider its earlier decision, as the argument was made by the Applicant, it became apparent that the Applicant had no new evidence to present, but rather, that he wished to argue that the Board did not properly consider the evidence placed before it at the earlier hearing. As such, it did not meet the criterion set out in point 2 above so as to permit reconsideration of its earlier decision.

[8] Further, the Applicant was unable to provide any basis for his allegation, that the Board had based its decision on improper interpretation of law or policy. While the Applicant did not agree with the decision of the Board, that in and of itself is not sufficient justification to have a decision reconsidered.

[9] Nor could the Applicant provide any argument or factual basis for his assertion that the Board had breached the rules of natural justice in the making of its decision.

[10] An application for reconsideration is not a right of appeal of a Board's decision and should not be considered as such. Reconsideration will be granted only in very limited cases based on the criteria set out above and may not be used by Applicants to appeal a decision which they may believe to be improperly decided against them.

[11] For the Applicant to have been successful on the initial application under s. 25.1, it was necessary for the Applicant to show that the Union's representation of him, and the withdrawal of his grievance was "arbitrary, discriminatory, or in bad faith." In that original application the Applicant was unsuccessful. No new or novel evidence or arguments were advanced during this hearing that met any of the six criterion which the Board has consistently relied upon in determining if a reconsideration of a decision was warranted.

[12] The Applicant failed in his initial hearing 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.

[13] There was no evidence presented at the original hearing that the decision to withdraw the grievance was in any way marred by the Union's discrimination against the Applicant.

[14] At the original hearing, the Applicant also did not provide evidence of bad faith by the Union. The Union and the Employer had come to the same conclusion as to the likelihood of success of the grievance based on its review of past 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 that can be characterized as having been done in bad faith.

Conclusion:

[15] Although the Union has requested that the Board consider summarily dismissing the Applicant's application, it is unnecessary for the Board to rule on that request, given the reasons outlined above.

[16] Accordingly, we confirm the Board's August 18, 2008 decision and dismiss this application for reconsideration.

DATED at Regina, Saskatchewan, this **6th** day of **May, 2009.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson