



Government
of
Saskatchewan

Saskatchewan Labour Relations Board

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February 15, 2017

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Attention: Ms. Candice D. Grant

Attention: Ms. Juliana Saxberg

Dear Ms. Saxberg and Ms. Grant:

RE: LRB Files Nos. 013-17

Background:

[1] The Canadian Union of Public Employees (“CUPE”) filed an Unfair Labour Practice application with the Board on December 21, 2017¹. That application alleged that the City of Warman (“Warman”) had committed an Unfair Labour Practice in wrongfully terminating the employment of Grant Goerzen, an employee of Warman while he was engaged in the exercise of his right to join a trade union. CUPE alleged in its application that this was contrary to section 6-62(1), (4), and (5) of *The Saskatchewan Employment Act* (the “SEA”).

¹ LRB File No. 283-16

[2] In accordance with the Board's practice for scheduling hearings of application, the parties appeared before the Board on January 10, 2017 and agreed to have the matter heard by the Board on April 26-29, 2017.

[3] On January 30, 2017, CUPE brought this application for interim relief requesting the Board reinstate Mr. Goerzen pending the hearing of this matter and for ancillary relief related to their organizing campaign in the workplace.

[4] At the conclusion of the hearing of this matter, the Board considered the affidavits which had been filed and the arguments of the parties. The Board concluded that the application for interim relief should be dismissed, but that the hearing of the matter should be expedited to a date earlier than April 26-29. Additionally, counsel for Warman had provided the Board with an undertaking that Warman would advise employees of their right to seek representation by a union of the employees' own choosing. The Board also determined that this communication should occur. Its order issued on February 9, 2017 incorporated these elements.

Facts:

[5] The Union filed two affidavits with respect to its application. These were from Andrew Loewen, an organizer with CUPE and the other was from the affected employee, Grant Goerzen. Warman filed three affidavits, one from Jason Wiebe, the Public Works Supervisor for Warman, one from Randy Fehr, the Public Works Manager for Warman, and one from Bradley Toth, the Acting City Manager for Warman.

Affidavit of Andrew Loewen:

- [6] Mr. Loewen deposed² in his affidavit to the following:
1. That he was contacted by Mr. Goerzen in October of 2016 with respect to organizing the employees of Warman. He met with other employees and determined to begin an organizing campaign.
 2. That Mr. Goerzen assisted him as an unofficial inside organizer with respect to the organizing campaign.
 3. That on November 21, 2016, while distributing pamphlets, he inadvertently provided one to the Recreation and Community Services Manager for Warman, Paul McGonigal.
 4. That he was told by Mr. Goerzen in November (no actual date provided) that he had been questioned by his Manager, Randy Fehr about the organizing drive and the identity of those behind the drive.
 5. That after his conversation with Mr. Goerzen that he found it difficult to find employees willing to speak to other employees of Warman concerning unionization.
 6. That on December 14, 2016, he decided to hold an open meeting for employees and set out to contact individuals regarding the meeting. He found some employees were willing to attend and provided contact information to him. Some others were concerned about the consequences of attending.
 7. That at the meeting on December 14, 2016, Mr. Goerzen was the most outspoken concerning the need to have union representation.
 8. That on December 15, 2016, he received a text from Mr. Goerzen advising that he had just been fired by Warman.
 9. That he met with Goerzen on December 16, 2016 and reviewed the circumstances of the termination and determined to file the Unfair Labour Practice application with this Board.
 10. That since the termination of Mr. Goerzen his organizing drive has stalled.

Affidavit of Grant Goerzen:

- [7] As summation of the deposition by Grant Goerzen is as follows:

1. Mr. Goerzen was employed by Warman from 2013 until his termination on December 15, 2016.
2. That he had contacted CUPE regarding representation for the employees of Warman on October 7, 2016. That he met with people at CUPE, including Andrew Loewen several times. He spoke to other employees about having CUPE represent them. He deposed that he, jointly, with Mr. Loewen established the meeting to be held on December 14, 2016.
3. He deposed that his supervisor, Randy Fehr, had “point blank” asked, on December 14, 2016, at the morning public works meeting, if he or his co-workers were involved in a union organizing drive. He deposed that he said nothing, fearing reprisals.
4. He deposed that Mr. Fehr again brought up the subject of the union organizing drive on December 15, 2016 at the morning public works meeting. He deposed that Mr. Fehr told the meeting that “the City of Warman had looked at unionization but had found that it would not benefit the employees of the City”.
5. He says that on the morning of December 15, 2016, he was asked to remove snow from the City Hall. He says that there was insufficient snow to require it to be cleared. He then says he decided “to take the extra time and drive around the City to check all of our Lift Stations to see if they required any maintenance”.
6. He deposed that later that morning, Transportation Supervisor, Jason Robson, called him into his office and advised him that his supervisor, Jason Wiebe had complained about his work that morning. He says that he was advised to get out of his truck at each lift station “regardless of whether they needed my attention or not”. He says that he did not feel that he was being disciplined during that conversation.
7. He also deposed that in the afternoon of December 15, 2016, that one of his co-workers said that Randy Fehr had asked him very specifically whether or not he (Goerzen) had approached them about joining a union. He also deposed that Mr. Fehr had told his co-worker that he (Fehr) had received a number of emails concerning the organizing drive.
8. He says that the following morning (December 16, 2016), he was fired and accused of deliberately wasting time by driving around for 30 minutes in the City vehicle.

Affidavit of Jason Wiebe:

² I have taken the liberty of summarizing the evidence relevant to this application in the affidavit of Mr. Loewen as well as the affidavits of the others referenced below.

[8] Mr. Wiebe's affidavit may be summarized as follows:

1. Mr. Wiebe deposed that he was Mr. Goerzen's direct supervisor and had been his supervisor for the full term of his employment with Warman. He says that there were issues with Mr Goerzen's work ethic and performance during his employment with Warman. He noted that he had had an incident with Mr. Goerzen in July 2016 when he observed Mr. Goerzen driving around the City of Warman in his work truck during working hours. He says that when asked for an explanation, Mr. Goerzen said that he was looking for a lost lawn mower blade. He expressed the opinion that the manner in which Mr. Goerzen was driving "was not consistent with any kind of search, as he was travelling too fast and was not checking areas where he had been working with the mower".
2. He says that because of previous incidents, he determined to follow Mr. Goerzen on December 15, 2016 and observe him at his assigned work since he was leaving the public works shop at the same time as Mr Goerzen for the purpose of checking the City's lift stations.
3. He observed that when Mr. Goerzen arrived at City Hall that "he did not stop or get out of his vehicle". He noted that Mr. Goerzen continued to drive around the City, taking a meandering route which would not be consistent with his checking the lift stations. After making these observations, he attended to his work assignment of checking the lift stations. He deposed that he advised Randy Fehr of what he had seen and that made notes which were transcribed and attached to an affidavit sworn by Mr. Fehr.

Affidavit of Randy Fehr:

[9] Mr. Fehr's evidence may be summarized as follows:

1. Mr. Fehr deposes that he is the Public Works Manager for Warman and is familiar with Mr. Goerzen as he was the Public Works Manager during his employment with Warman.
2. He deposes that he became aware of a union organizing drive on December 14, 2016 as a result of a discussion with Rachelle Irvine who advised that "employees had received emails soliciting their support to join a union". He deposed that both he and Ms. Irvine speculated that it

was the parks department that was initiating the union discussion, but deposed “that we had no specific information to back up this speculation”. He noted in his affidavit that “Mr. Goerzen is not a member of the parks department”.

3. He deposes that he did ask his staff, on the morning of December 14, 2016 “whether they had heard rumours of union organization”. He says that he asked if anyone was unhappy with their working situation. He denied “asking my staff to identify themselves if they were involved in the potential effort to unionize”. He also acknowledged that he did “convey to my staff the general tone of my discussion with Ms. Irvine—which was that I did not believe unionization to be in the best interests of the City’s employees”.
4. In his affidavit, he denies that there was any discussion of union activity on December 15, 2016 as deposed to by Mr. Goerzen, recalling only discussing with Mr. Goerzen matters involving his having missed an opportunity to attend a “free Saskatoon Blades game sponsored by Warman on December 14, 2016 as well as an issue involving Mr. Goerzen’s home furnace.
5. He denies having had any discussions with any other staff members regarding whether or not Mr. Goerzen had asked them to join the union. He also denied receiving any emails regarding unionization as alleged by Mr. Goerzen in his affidavit.
6. He deposed that on December 15, 2016, “Mr. Goerzen failed to check City Hall at any acceptable level. He drove by City Hall (without stopping or exiting his vehicle) and continued going thereafter”. He deposed that after passing City Hall, Mr. Goerzen “continued to drive aimlessly around the City; his route was mainly on thoroughfares, which would have taken him past one or two lift stations. However, he did not stop to check any lift stations, nor had he been tasked to do so.”
7. He also provided a lengthy discipline and safety history for Mr. Goerzen during his employment with Warman. In summary, the incidents referred to were:
 - a) January 13, 2014: failing to lower a truck box while leaving the snow dump and ripping down a telephone wire as a result.
 - b) August 13, 2014: verbal warning for failure to wear appropriate safety clothing.
 - c) August 14, 2014: a second verbal warning for failing to wear appropriate safety clothing
 - d) August 20, 2014: verbal reprimand for driving with an unsecured hammer on the City flat deck.
 - e) August 12, 2015: Mr. Goerzen suffered an injury when using inappropriate equipment when trimming weeds.

- f) May 4, 2016: Mr. Goerzen was coached about ensuring focus on the job and not to chat with or distract other employees.
 - g) October 5, 2015: Mr. Goerzen left a City truck unlocked with the keys in the ignition and the window down overnight resulting in a verbal reprimand.
 - h) June 2, 2016: Mr. Goerzen failed to follow the City's dress code policy by cutting off the sleeves of his new City work shirt.
 - i) July 18, 2016: Mr. Goerzen was found to be driving around without any specific task (see paragraph 1 of Mr. Wiebe's affidavit summary above)
 - j) July 21, 2016: Mr. Goerzen received a written warning for leaving a City truck running, with the keys in the ignition while he took a lunch break.
8. Mr. Fehr deposed that upon being told of Mr. Goerzen's conduct on December 14, 2016, he recommended to Acting City Manager, Brad Toth, that he be dismissed from his employment. That recommendation was approved and Mr. Goerzen terminated on December 15, 2016.

[9] Mr. Fehr's evidence may be summarized as follows:

- 1. He deposes that he had been aware of an earlier unionization drive some 7 years prior, but did not become aware of the present union drive until mid-December, 2016. He acknowledged that at the time Mr. Goerzen was terminated that he "was generally aware of the union's efforts to unionize the workplace", he had "no knowledge of any involvement Mr. Goerzen may have had with the union and no knowledge of the efforts on his part to get his co-workers to join the union".
- 2. He deposes that he met with Mr. Goerzen on December 20, 2016 to discuss his dismissal. He deposes that "at that time I made a verbal offer to assist him with finding alternate employment. He never followed up on this offer".

Discussion and Analysis

[10] The Board's jurisprudence with respect to interim applications was most recently analyzed in *Amalgamated Transit Union, Local 615 v. The City*

of Saskatoon.³ In that decision, the Board confirmed⁴ that its jurisdiction under the former *Trade Union Act* was applicable to the revised statutory provisions under the *SEA*. The Board also confirmed its jurisprudence regarding interim applications as was set out in its decision in *Saskatchewan Government and General Employees' Union v. The Government of Saskatchewan*.⁵

[11] The Board utilizes a 2 part test with respect to the exercise of its authority to grant interim relief. The first element of this test is to determine if the application raises an arguable case. The second part of the test is more nuanced and requires the Board to consider whether the balance of convenience favours the granting of interim relief pending a hearing on the merits of the matter.

[12] There is also an overarching consideration which is that interim applications are to be utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard⁶.

Is there an arguable case?

[13] There is little doubt that an arguable case exists here. In her submissions to the Board, counsel for Warman acknowledged that an arguable case existed here. We do not, therefore need to probe deeper with respect to this aspect of the case.

³ [2014] CanLII 63994 (SKLRB)

⁴ See paragraph [39]

⁵ [2010] CanLII 81339 (SKLRB) at paras [30] to [34]

⁶ See para [30] of the *SGEU v. Saskatchewan* case at footnote 5.

Does the Balance of Convenience Favour the Board Granting the Requested Relief?

[14] The nature of the relief sought by CUPE is twofold. Firstly, it asks for re-instatement of Mr. Goerzen to his former position. Secondly, CUPE asks for assistance with its organizing drive in requesting the Board order Warman to cease and desist from communicating with employees in a manner that may interfere or intimidate them with respect to their choice of union. CUPE also seeks orders that Warman produce contact information for employees of Warman as well as orders that CUPE be permitted unimpeded access to the workplace to distribute materials and that it be permitted to hold meetings, during working hours, with employees in groups of 12 employees or less. It also requests that the employer notify employees of the Board's orders in that respect.

[15] At the hearing of this matter, Warman objected to the Board ordering that it cease and desist from communicating with employees. This, it argued, presumed that Warman had previously been engaged in improper communication with its employees, something, in argued, had not been proven in the affidavits sworn and before us. It also objected to the provision of contact information for its employees, saying that to do so would offend *The Local Authorities Freedom of Information and Protection of Privacy Act*.⁷ Warman also argued that CUPE should not be permitted to solicit support on the City's property, citing *United Food and Commercial Workers Union, Local 1400 v. Wal-mart Canada Corp. et al.*⁸ At the hearing of this matter, Warman did provide the Board with an undertaking to communicate with all employees

⁷ S.S. 1990-91 c. L-27.1

⁸ [2012] CanLII 61524 (SKLRB)

of Warman to advise them of their rights pursuant to the *SEA* to seek representation for collective bargaining.

[16] The Board has considered both the position of Mr. Goerzen and CUPE in respect of the relief sought. We cannot conclude that the balance of convenience favours the relief sought.

[17] At the outset of the hearing, the Board was concerned that this underlying application was filed with the Board on December 22, 2016. The parties appeared before the Board on January 10, 2017 and agreed to have the matter heard on dates in late April, 2017. There appeared to be no urgency to have Mr. Goerzen re-instated at that time. Then, some 3 weeks later, CUPE brings this application for interim relief.

[18] The purpose of the underlying application is to determine if Mr. Goerzen was fired while exercising his rights under the *SEA* and whether or not Warman can rebut the statutory presumption in section 6-62(4) which provides a reverse onus in respect of such terminations. While we had no concrete evidence to support Warman's assertion that his return to the workplace would prove disruptive, nor was there any evidence that he was in any way prejudiced by not being re-instated. We did have evidence that notwithstanding his termination, he nevertheless was qualified for and was receiving Employment Insurance in the interim. Furthermore, as noted above, there did not seem to be any urgency to return him to work in early January when CUPE agreed to a hearing date in April.

[19] We are of the view that it is far preferable to have the merits of this matter determined at an early date so that everyone knows where they stand. It disadvantages everyone to wait until a hearing date in late April to have the

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matter considered by the Board. Accordingly, in our order made February 9, 2017 following the hearing on February 8, 2017, we required the parties to cooperate with the Board Registrar to have the application set down for hearing prior to March 8, 2017. The Board will then be able to hear the merits of the case rather than relying on contradictory affidavit evidence from the parties.

[20] If Mr. Goerzen has been improperly terminated contrary to the *SEA*, he can be re-instated and made whole following a hearing on the merits. There is no disadvantage to him financially and he can be made whole financially should a violation be found.

[21] With respect to the other aspects of the relief sought the Board is also not satisfied that it is appropriate to order such relief either in this case. Primarily this is due to the fact that no such relief was sought in the initial application to the Board. The only aspect of the relief sought in the underlying application was that the Board make an order “requiring that the employer notify all employees via email and workplace notices of their legal right to participate in the formation of a labour union free of intimidation by the employer”. All of the additional relief sought in the interim application is not supported by the underlying application filed on December 22, 2016.

[22] However, as noted above, Warman did undertake to the Board to provide a communication similar to what was being originally sought by CUPE in its underlying application. Accordingly, the Board has, in its February 9, 2017 Order, directed Warman to comply with that undertaking.

[23] Since we are unable to conclude that the Balance of Convenience in this case favours the issuance of the interim Order, we dismiss the application for such relief subject to the terms of the Order issued on February 9, 2017.

Decision and Order:

[24] As noted above, the Board issued the following Order on February 9, 2017:

INTERIM ORDER

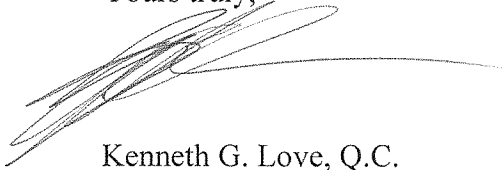
HAVING READ the application filed by Canadian Union of Public Employees, Locals 600-3 and 600-5 for interim relief pending the making of a final determination in application bearing LRB File No. 283-16, together with the affidavits and other material filed on behalf of both the Applicant and the Respondent, **THE LABOUR RELATIONS BOARD**, pursuant to s. 6-103(2)(d) of *The Saskatchewan Employment Act*, **HEREBY ORDERS:**

1. That the interim application be **DISMISSED**.
2. That, in cooperation with the Board Registrar, LRB File No. 283-16, be set down for an expedited hearing, which hearing shall occur no later than March 8, 2017.
3. That the Respondent, the Town of Warman shall, on or before February 17, 2017, comply with its undertaking given at the hearing of this matter on February 8, 2017 to post at conspicuous locations in the workplace, or by email, an open letter to employees advising them of their right to organize and to be represented by a union of their choice.

That with respect to items 2 and 3 above, this panel of the Board shall remain seized of the matters dealt with therein, but shall not be seized with respect to LRB File No. 283-16

[25] This is a unanimous decision of the Board.

Yours truly,

A handwritten signature in black ink, appearing to read "Kenneth G. Love", with a long horizontal flourish extending to the right.

Kenneth G. Love, Q.C.
Chairperson