Saskatchewan
Labour Relations Board

KEVIN PASIECHNIK, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 47, Respondent and CITY OF SASKATOON, Respondent

LRB File Nos. 068-23; March 21, 2024
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Applicant, Kevin Pasiechnik:	Self-represented
Counsel for the Respondent, Canadian Union of Public Employees, Local 47:	Candice D. Grant
Counsel for the Respondent, City of Saskatoon:	Tyson Bull

Employee-Union Dispute – Offer of Temporary Management Position – Same Work Unit – Request for Leave of Absence from Union – Leave Denied – Employee Application Dismissed.

Section 6-4 of *The Saskatchewan Employment Act* – Employee Choice to Accept Position – Appropriateness of Bargaining Unit – No Breach.

Section 6-6 – Action Not Due to Application Filed – No Breach.

Section 6-58 – Natural Justice – Not Union-Imposed Discipline – Requirements Less Strict – Compliance with Greater Protections – No Breach.

Section 6-59 – Duty of Fair Representation – No Evidence of Arbitrary, Discriminatory, or Bad Faith Conduct – No Breach.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an employee-union dispute brought by Kevin Pasiechnik. The respondents are Canadian Union of Public Employees, Local 47 [Local] and the City of Saskatoon. The Local is the exclusive bargaining agent for a unit of employees of the City of Saskatoon.

[2] Pasiechnik currently works in a temporary position as a maintenance manager at the Saskatoon Wastewater Treatment Plant. The maintenance manager position is within the Saskatoon Civil Middle Management Association ("SCMMA"). Pasiechnik began working in the position on March 16, 2023. Prior to this, he held a permanent full-time position as a mechanic

within the Local's bargaining unit. Pasiechnik was active within the Local over the years, serving as a shop steward, a member of the executive, and most recently, the Treasurer.

[3] On February 14, 2023, Pasiechnik requested a leave of absence (LOA) from the Local's bargaining unit to pursue the job opportunity as maintenance manager. The Local denied the request.

[4] In this application, Pasiechnik alleges that the Local has breached sections 6-4, 6-6, 6-58, and 6-59 of *The Saskatchewan Employment Act* [Act]. He seeks to have his LOA request granted, thereby restoring his permanent status and the associated benefits.

[5] In reply, the Local admits that it refused the request both in the first instance and on appeal but denies that it breached the Act. According to the Local, a conflict of interest would result from granting an LOA from the unit to supervise members of that unit.

[6] In its reply, the City states that while it regularly approves leaves of absence for permanent employees taking temporary positions elsewhere within the City those requests are assessed on a case-by-case basis. These arrangements have always been pursuant to a "without prejudice" agreement applicable to the specific employee and position. In this case, the City was willing to approve the leave request.

Evidence:

[7] The following is a summary of the evidence.

[8] In the hearing of this application, the Board heard testimony from seven witnesses:

a. On behalf of Pasiechnik:
    1. Rhonda Heisler (CUPE National Representative);
    2. Michael Sadowski (Plant Manager);
    3. Kim Heuchert (Operations Coordinator at the City); and
    4. Pasiechnik.

b. On behalf of the City:
    5. Jane Calder (Manager of Human Resources Business Partners).

c. On behalf of the Local:
    6. Susan Dobrowney (Local President); and

7. Richard Sielski (Utility Operator with Saskatoon Water, Past Vice-President of Local).

[9] At all material times, there was a collective agreement in force with a term commencing January 1, 2017.

[10] On February 14, 2023, Pasiechnik emailed the executive to advise that he had been offered the position and to request an LOA.

[11] On the same day, Dobrowney sent an email to Heisler, asking if the position could be considered a conflict of interest. Heisler replied that she didn't view it as a conflict of interest.

[12] On February 15, Dobrowney provided Pasiechnik with a letter denying his request and advising him of his right to appeal (not indicating any deadline). The letter included no rationale for the decision. Pasiechnik asked for the rationale. Dobrowney responded that the "concern was a conflict of interest". After receiving that rationale, Pasiechnik advised of his request to appeal.

[13] On February 17, Pasiechnik asked for a timeframe for an appeal.

[14] On February 19, Dobrowney advised that the executive's decision would be reconsidered on February 22.

[15] In the meantime, the Local and the City had been attempting to come to an agreement to allow the leave request through the operation of a memorandum of agreement (MOA).

[16] The draft of the MOA allowed Pasiechnik to return to his position without loss of seniority and to resume receiving the benefits under the applicable CBA. The draft also included the following clause:

> *Whereas Mr. Pasiechnik has accepted a temporary SCMMA position as a Maintenance Manager with the term of March 16, 2023 to March 15, 2024, with the possibility of an extension…*

[17] By the time the executive met on February 22 the draft MOA had been prepared. The executive had wanted language in the MOA that would address the issue of a conflict of interest. That language was not included in the draft.

[18] On February 22, Dobrowney wrote to Pasiechnik to advise that the executive met again that day and the decision remained the same. She advised him of his right to appeal indicating

that he was to advise of his intention by March 1. He responded by asking for reasons for the denial. Later that day, the reasons were provided:

> *1. The current CBA does not have a clear, specific provision that contemplates members moving back and forth between bargaining unit jobs and out-of-scope (OOS) positions.*
>
> *2. Where it may be contemplated, under Article 7.3 – the first bullet suggests that seniority is lost upon leaving the bargaining unit.*
>
> *3. A conflict of interest may be created by members leaving to OOS positions in having to manage their peers by potentially disciplining their former peers, or are required to act in a superior capacity to their peers while in an OOS position. The members of the bargaining unit being supervised and the supervisor/manager are potentially put at odds during the time acting in the position and more so, once the OOS term position is over and the member returns to normal duties.*
>
> *4. Concerns with confidentiality exist – having access to other members personal information or requests from management to share industrial union knowledge put the membership and/or the temporary manager in a compromising position.*
>
> *5. Consideration was given to career development through temporary opportunities but would prefer the CBA to have a clear provision contemplated and ratified by the membership to either allow or disallow movement.*

[19] On February 28, Sadowksi wrote to the Local indicating that,

> *…Every effort will be undertaken to address real or perceived conflict that may arise with respect to the sharing or disclosing of confidential union business and/or discipline involving CUPE 47 members. Furthermore, Kevin will be supported as a new manager, with this support coming from both myself and our HR team.*
>
> *As a reminder, all employee[s] are held to the standards established in the Employee Code of Conduct, including Kevin. We expect professionalism and confidentiality from all of our employees, and we are confident Kevin will also exhibit these behaviors.*
>
> …

[20] Apparently, Sadowksi and the executive had different views on the conflict of interest issue. The executive wanted the issue addressed in the MOA. Sadowski felt that his email should be sufficient.

[21] On February 29, National Representative Will Bauer emailed the executive to outline the rationale undergirding a decision to revisit the request for a “one (1) year leave of absence”. Among the reasons were: the need to provide reasons for the denial if the request was denied; the view that the denial was a departure from past decisions; acquiescence with respect to previous interpretations or applications of the CBA.

[22] Then again, on March 1, the Local advised Pasiechnik that it had reconsidered the request but that the decision remained the same. He was also notified of a deadline to appeal of March 8.

[23] On March 2, Pasiechnik advised that he would be appealing the decision and that he was resigning his position as Treasurer.

[24] Also on March 2, he accepted the new position. He started the job on March 16. In the new position, his wage is significantly higher, his pension has continued, and the benefits are similar.

[25] On March 12, he inquired when the appeal would be heard.

[26] On March 13, Heisler provided some guidance to the executive about forming the appeal committee. One suggestion was to call “members who would likely be unbiased”.

[27] Later that day, the recording secretary sent an email to the Local members seeking three volunteers for the appeal committee, with a deadline of March 16. Pasiechnik’s name was not mentioned in the invitation. Ten individuals came forward. From those, the executive voted for three members by secret ballot.

[28] Once chosen, the chair of the panel, Sielski, attempted to contact the panel members. One was on vacation, and another had some medical issues. At some point, it became clear that this latter member was going to be on sick leave for a few weeks. A decision was made to go with an alternate member.

[29] On March 24, Pasiechnik was advised that the appeal committee had been formed.

[30] On April 12, Pasiechnik was asked to train the new Treasurer of the Local.

[31] On May 9, Pasiechnik filed this application with this Board.

[32] On May 16, he was advised that the appeal hearing was to be held on May 25.

[33] Around May 17, the panel of Sielski, Damian Spock and Cornelia Micu met to discuss procedure with Heisler.

[34] The appeal was heard on May 25. Notes of the appeal were entered into evidence. The notes were prepared by Heuchert, a friend of Pasiechnik who supports his position.

[35] The next day, Heisler sent an email to those in attendance:

> *Hi All,*
>
> *I wanted to congratulate you all on completing your first appeal hearing. It was difficult, time-consuming, and stressful.*
>
> *Regardless of the outcome, I'm extremely proud of the whole group for the following reasons:*
>
> 1) *Both sides were very prepared with documentation and argument strategy.*
> 2) *Everyone had an opportunity to tell their story, ask questions and clarify points. Cross-examination questions were well considered.*
> 3) *The Appeal Committee asked important and relevant questions throughout the whole process.*
> 4) *You kept on point and chose not to bring up irrelevant information.*
> 5) *Everyone was highly committed to the process and acted with remarkable professionalism.*
>
> *The group was sent into the wilderness with only a compass as a guide. You figured out a way to map out this process. This made me realize that, despite the difficult and uncomfortable circumstances, something is working well.*
> *…*

[36] The appeal decision is dated June 6, 2023. Of particular interest are the following passages:

> *The Appeals Committee believes that had the employer agreed to having specific language in the Memorandum of Agreement (MOA) addressing both concerns of conflict and confidentiality, the leave would have been granted.*
>
> *Mr. Pasiechnik's original ask was for a two-year LOA. He gave evidence of past practice with seven examples of LOAs, six to eleven months in length, that were granted to four different individuals. The Appeals Committee examined those and are of the opinion that none were exactly the same or comparable to Mr. Pasiechnik's request. As a matter of fact, none involved directly managing their own work group.*
>
> *Mr. Pasiechnik was concerned about losing his pension, benefits and position. Upon further evidence later in the hearing, the committee learned that the employer found a way for him to keep his pension, have his benefits transferred over all the while assuring him a permanent position should he revert.*
>
> *The Appeals Committee had to take into account whether the Local's decision was done arbitrarily, discriminatory or in bad faith. This was somewhat difficult for us as we are laypeople.*

[37] In its conclusion, the committee upheld the decision to deny the request and made the following recommendations:

> *Recommendations from the committee would include bargaining changes in the CBA for clear, concise language regarding LOAs and career advancement. Also, it is noted that some of the onus falls upon the employer to allow more precise language in MOAs and LOUs. The employer could also assist by keeping temporary positions to one year or less without any extensions as this tends to disrupt and displace members of the Union, especially if those positions are not under filled.*

[38] In evidence is a list of previously granted requests for leaves of absence. None of these requests involved employees who were moving into temporary middle management roles to manage employees working within the scope of the Local's bargaining unit.

[39] The CUPE Constitution includes the following provisions:

> ***B.8.3 Continuation of Membership***
>
> *Once accepted, a member continues as a member in good standing while employed within the jurisdiction of the Local Union unless the member loses good standing under the provisions of the Constitution.*

[40] The CBA includes the following provisions:

> ***ARTICLE 7. SENIORITY***
>
> *a) Seniority shall commence as of the employee's last date of entry into the bargaining unit. Seniority shall operate on a bargaining unit wide basis.*
> *. . .*
>
> *d) Seniority shall be lost when an employee:*
>
> - *resigns or retires from the service of the City or leaves the bargaining unit;*
> - *his employment ends;*
> - *is on layoff for a period greater than 12 months;*
> - *is on an approved leave of absence for a period greater than 12 months unless mutually agreed between the City and the Union; or*
> - *is absent without approved leave and without reasonable cause.*
>
> *…*
>
> ***ARTICLE 23. LEAVE OF ABSENCE***
>
> *a) The City may grant leave of absence without pay for a period not exceeding one (1) year.*
>
> *b) Any permanent employee, who has completed one (1) year of service and who is selected for a full-time position with the Union, shall be granted leave of absence without pay for a period up to, but not exceeding one (1) year. During the period of leave without pay, no claim shall be considered for any promotion effected during this leave, the employee's service shall remain unchanged but no accumulation of sick or vacation credits will take place during such leave of absence.*

c) Any employee, who has completed one (1) year of service, and who is elected to Public Office (other than municipal), shall be granted leave of absence without pay for the period of holding office. During the absence of any employee on leave of this nature, such employee shall retain seniority rights, but without claim to any promotion effected during the absence.

d) Employees in the bargaining unit shall have the right to apply for leave of absence for educational purposes. Such requests shall be submitted to the General Manager. The General Manager shall forward the request to the Human Resources Department for evaluation.

…

ARTICLE 33. CUSTOM and USAGE

Existing working conditions not specifically mentioned herein, and established by custom and usage, shall continue in full force and effect and shall not be altered during the lifetime of this Agreement except by mutual consent.

Arguments:

Pasiechnik:

[41] The Local breached its duties in the following ways.

[42] First, the Local interpreted the leave request as covering a period of 24 months. The Local made no attempt to reach out to Pasiechnik to clarify the duration of the requested leave, to check in on him, or to discuss his needs.

[43] Second, the Local denied his request from the outset instead of attempting to find a path forward.

[44] Third, the Local relied for purposes of denying the request on an asserted conflict of interest when the Local itself was in a conflict of interest.

[45] Fourth, there was no conflict of interest or issue with confidentiality. By denying the leave request, the Local made an arbitrary decision unsupported by the facts.

[46] Fifth, the Local's decision was inconsistent with past practice. There is no evidence of a denial of a leave request except on one occasion, where an individual's consecutive leaves had totaled four years and four months.

[47] Sixth, the Local's reasons, relying on the CBA, were inconsistent with the language contained in the CBA. The CBA makes clear that the Local needed to play no role in approving the leave request.

[48] Seventh, the Local relied on the fact that there was no CBA provision that specifically allowed for such movement. It is unreasonable to suggest that an individual must wait until a CBA is renegotiated to have a leave request allowed.

[49] Eighth, the appeal was not heard by an educated and unbiased appeals committee. Relatedly, the decision of the committee suggests that he was not given a fair hearing. The decision misrepresents or ignores evidence presented at the hearing.

[50] Finally, Pasiechnik was discriminated against on the basis of his employment situation.

[51] As for remedies, Pasiechnik seeks an order that his leave request be granted, a public apology, damages, restoration of Local dues, and the removal of the Local executive.

Local:

[52] This employee-union dispute is without merit and should be dismissed.

[53] Sections 6-4, 6-6, and 6-58 are not applicable to the matters before the Board.

[54] With respect to section 6-4, Pasiechnik does not allege that he has been limited in his right to unionize. Rather, he has been required to choose whether to leave his original union to take an employment opportunity within a bargaining unit represented by a different union. An employee has a right to representation by a union of one's choosing, but this right is subject to the appropriateness of the bargaining unit.

[55] Next, section 6-6 prohibits retaliation against an employee in specific circumstances. The Local's concern about a conflict of interest is not a breach of section 6-6. The only action that could be engaged is Pasiechnik's filing of this application. However, by the time he had filed the application, the Local had already voted against the LOA and had established the appeal committee. There is no evidence that the members of the appeal committee were aware that the application had been filed.

[56] Of the three categories covered by subsection 6-58(1), only the employee's membership in the Local could be engaged. However, there is no suggestion that Pasiechnik was not enrolled as a member of the unit during his employment or that he was expelled from membership. He chose to take a position outside of the bargaining unit.

[57] With respect to subsection 6-58(2), the Local has not suspended Pasiechnik, subjected him to a penalty, nor refused membership to him. Again, he chose to leave the bargaining unit and was refused a discretionary LOA.

[58] The essence of Pasiechnik's complaint is that the Local has failed to comply with its duty of fair representation pursuant to section 6-59. As such, the focus of the Board's inquiry should not be on the outcome of the leave request but on whether the Local treated Pasiechnik fairly in adjudicating his request.

[59] The Local did not engage in arbitrary, discriminatory, or bad faith conduct.

[60] First, the evidence does not establish arbitrary conduct. The Local considered Pasiechnik's request on three separate occasions and then allowed an appeal. The Local engaged directly with the City to attempt to negotiate an MOA that would be acceptable to both parties. Timeliness was not an issue. The Local's concern about a conflict of interest is the very reason that certain positions have been placed outside of the bargaining unit in the Board's certification order. The Local's appeal process was procedurally sound.

[61] Second, there was no evidence to support discrimination.

[62] Third, the Local's conduct was not taken in bad faith. There was no evidence that any members of the executive were motivated by personal animosity or hostility. Although there was some suggestion that one of the appeal committee members was biased, the evidence suggests otherwise.

[63] Alternatively, if the Board finds a breach, the Board should remit the matter to the Local for reconsideration. The remedies sought in the application are inappropriate.

City:

[64] In its reply to the application, the City outlined its position:

> *At paragraph 4 of the Application Mr. Pasiechnik states that the Employer and Union both customarily approve leaves of absence. The City of Saskatoon does regularly approve leaves for permanent employees taking temporary positions elsewhere within the City, but such requests are assessed on a case-by-case basis and are not granted as of right. As the collective bargaining agreement between the City and the Union does not provide for members retaining a home position and seniority while taking a temporary position outside the bargaining unit, such arrangements have always been pursuant to a without prejudice agreement for the specific employee and position.*

[65] The City states that it was willing to approve the request for a LOA.

[66] The City participated in the hearing but did not make any closing arguments.

Applicable Statutory Provisions:

[67] The following provisions of the Act are applicable:

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> ***6-6****(1) No person shall do any of the things mentioned in subsection (2) against another person:*
>
> > *(a) because of a belief that the other person may testify in a proceeding pursuant to this Part;*
> >
> > *(b) because the person has made or is about to make a disclosure that may be required of the person in a proceeding pursuant to this Part;*
> >
> > *(c) because the person has made an application, filed a complaint or otherwise exercised a right conferred pursuant to this Part; or*
> >
> > *(d) because the person has participated or is about to participate in a proceeding pursuant to this Part.*
>
> *(2) In the circumstances mentioned in subsection (1), no person shall do any of the following:*
>
> > *(a) refuse to employ or refuse to continue to employ a person;*
> >
> > *(b) threaten termination of employment or otherwise threaten a person;*
> >
> > *(c) discriminate against or threaten to discriminate against a person with respect to employment or a term or condition of employment or membership in a union;*
> >
> > *(d) intimidate or coerce or impose a pecuniary or other penalty on a person.*
>
> ***6-58****(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
>
> > *(a) matters in the constitution of the union;*
> >
> > *(b) the employee's membership in the union; or*
> >
> > *(c) the employee's discipline by the union.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> > *(a) in doing so the union acts in a discriminatory manner; or*

> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*
>
> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

Analysis:

[68] The applicant has the onus to prove, on a balance of probabilities, that the Local has breached its obligations under the Act.

[69] The Board will proceed to consider whether Pasiechnik has established a breach of sections 6-4, 6-6, 6-58, or 6-59 of the Act, in turn.

Section 6-4:

[70] As explained by the Board in *Blunt*, section 6-4 recognizes the principle of "dual unionism":[1]

> *[161] The principle that "an employee has the right to acquire membership in more than one union if they should choose to do so" is recognized by subsection 6-4(1) of the Act, which states that "employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing."…*

[71] Relatedly, a union is prohibited from engaging in a retaliatory act designed to prevent an employee who holds membership in one union from substituting a different union as their bargaining agent. Unions do, however, enjoy an implicit but not unqualified right to suspend or expel members for exercising dual unionism rights. The question in such a case is whether the union's actions were legitimately defensive.

[72] The typical dual unionism case involves an employee whose position(s) comes within the scope of two bargaining units. This circumstance arises most often in the unique environment of the construction industry. In the construction industry, an employee is required to be a member of a union to obtain work on a closed shop work site. In such cases, there is a presumption consistent with the precarious nature of the construction industry that members take work, and therefore join

[1] *Blunt v International Association of Heat and Frost Insulators and Allied Workers*, 2023 CanLII 33964 (SK LRB).

a union, to support themselves. The employees remain in a position or positions within the scope of both of the bargaining units, concurrently, unless they are removed.

[73] The current case is entirely different. In the current case, Pasiechnik was offered a position outside the scope of the existing bargaining unit, as a maintenance manager. He chose to accept the job offer after becoming aware that he could jeopardize his status with the Local by doing so. The certification orders for each of the units were designed taking into account the Board's finding that the placement of such middle managerial positions (who remained employees) in the Local's unit would give rise to a conflict of interest and would therefore be inappropriate.[2] After accepting the new job, Pasiechnik transferred to a new bargaining unit and sought approval to maintain a relationship with the former bargaining unit.

[74] The right to representation by a union of one's choosing is subject to the Board's determination as to the appropriateness of the bargaining unit. Pasiechnik chose to take the offer despite knowing his status was in peril. He did not remain in a position or positions within the scope of both bargaining units. Nor was he removed. He was denied a leave of absence. There has been no breach of section 6-4.

Section 6-6:

[75] Next, clause 6-6(1)(c) is the only provision (within section 6-6) that could possibly apply to the facts of this case.

[76] Clause 6-6(1)(c) prohibits certain actions because a person has made an application. The application in issue is that which Pasiechnik filed with the Board (the present application).

[77] There is no evidence that the Local took any of the applicable actions against Pasiechnik due to his having made the present application. By the time that the application was filed, the executive had already made a decision to deny the leave request, and had reconsidered that decision on two occasions, affirming the original decision both times. The fact that the Local then ran an appeal, affirming the earlier decisions, is not evidence that the Local has taken any action against Pasiechnik due to Pasiechnik's having filed the application.

[78] As such, there has been no breach of section 6-6 of the Act.

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[2] *Canadian Union of Public Employees, Local 47 v Saskatoon (City)*, 2002 CanLII 52893 (SK LRB) [*Local 47 v Saskatoon*], at para 39.

Section 6-58:

[79] The next question is whether the Local breached subsection 6-58(1). The applicable clause is 6-58(1)(b), which establishes the right of an employee to natural justice with respect to all disputes with a union relating to the employee's membership in the union.

[80] The Union denies that section 6-58 is applicable to this case:

> *…There has been no suggestion that CUPE Local 47 did not enrol Mr. Pasiechnik as a member of the bargaining unit during his employment at the wastewater treatment plant. There has been no suggestion that Mr. Pasiechnik was expelled from membership. It is clear that he elected to take a position outside of the bargaining unit and accordingly left his membership in the Union; however, any argument in terms of whether a leave of absence ought to have been granted are better addressed under s. 6-59 of the SEA.*

[81] In the Board's view, Pasiechnik is no longer a member of the Local for two reasons: 1) he opted to take a temporary position outside of the bargaining unit; 2) his request for an LOA was denied.

[82] Pasiechnik has requested an LOA so that his membership may be maintained. That request was denied. Pasiechnik is in a dispute with the Local about its denial of his request for leave.

[83] Although he was no longer a member as of March 16, there has been no suggestion that the existing protection pursuant to section 6-58 terminated as of that date.

[84] The Board is satisfied that this is a matter that falls under clause 6-58(1)(b).

[85] Much of the natural justice case law has developed through the Board's review of union-imposed discipline against a member. In one such case, decided recently, the Board summarized the meaning of natural justice:

> *[89] The meaning of natural justice was explained in Knight v Indian Head School Division No. 19, 1990 CanLII 138 (SCC), [1990] 1 SCR 653 at 682 [Knight]:*
>
> > *Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. In [Nicholson], Laskin C.J. adopts the following passage from the decision of the Privy Council in [Furnell]…:*
> >
> > *Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in Russell v. Duke of Norfolk [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend*

> *on the circumstances of each particular case and the subject matter under consideration.*
> *[full citations removed]*

[90] Since Knight, there has been an evolution away from what was once a distinct category for each of the duty of fairness and the principles of natural justice towards a spectrum on which fairness is assessed. The authors, Donald J.M. Brown, K.C. and the Honourable John M. Evans, explain this evolution:[2]

> *…However, the Supreme Court subsequently stated that decision-making powers should be conceived as occupying a spectrum that ranged from those that were functionally indistinguishable from the powers exercised by judges, to those of a policy or non-final nature. In the result, and while the older dichotomy may still be referred to, no meaningful distinction now exists between the rules of natural justice and the duty of fairness. Rather, the precise procedural content of the duty of fairness will depend upon the particular administrative and legal context in which it is being applied.*

[91] It is well established that the principles of natural justice are variable, and their content is to be decided based on the specific context of each case. Internal union hearings tend not to be conducted by persons with legal training; the strict rules of evidence are not binding. Taking into account these characteristics, the B.C. Board in Coleman established a list of requirements specific to such hearings. This list was adopted by this Board in Lalonde, at paragraph 102, and Pidmen v Canadian Union of Public Employees, Local 1975-01, 2005 CanLII 63108 (SK LRB) [Pidmen]:

> *(1) Individual members have the right to know the accusations or charges against them and to have particulars of those charges.*
>
> *(2) Individual members must be given reasonable notice of the charges prior to any hearing.*
>
> *(3) The charges must be specified in the constitution and there must be constitutional authority for the ability to discipline.*
>
> *(4) The entire trial procedure must be conducted in accordance with the requirements of the constitution; this does not involve a strict reading of the constitution but there must be substantial compliance with intent and purpose of the constitutional provisions.*
>
> *(5) There is a right to a hearing, the ability to call evidence and introduce documents, the right to cross-examine and to make submissions.*
>
> *(6) The trial procedures must be conducted in good faith and without actual bias; no person can be both witness and judge.*
>
> *(7) The union is not bound by the strict rules of evidence; however, any verdict reached must be based on the actual evidence adduced and not influenced by any matters outside the scope of the evidence.*
>
> *(8) In regard to serious matters, such as a suspension, expulsion or removal from office, there is a right to counsel.*

[92] The Coleman requirements are not intended to be comprehensive or exhaustive; nor will all of these requirements apply to every internal union hearing.[3] The nature and extent of the requirements may depend on the nature or severity of the consequences for the individual.

[86] In *Coleman*[3], the B.C. Board appears to have limited the application of these requirements to disciplinary matters, including expulsion from membership, as follows:[4]

> *123 Fourth, although s. 10(l)(a) is directed to "all disputes relating to matters in the constitution of the trade union", the rules of natural justice set out above are in relation to s. 10(l)(b) and (c) — disciplinary matters including, of course, expulsion from membership.*

[87] The statutory provision in *Coleman* was substantially similar to the provision in issue in this case.

[88] Even if the Board were to adapt the *Coleman* "requirements" to a non-disciplinary matter, they would have to be re-stated, as follows:[5]

a. The employee has a right to know the case s/he has to meet;
b. The employee must be given reasonable notice of the case s/he has to meet before the hearing is held;
c. The action taken by the union must be allowed under the Constitution;
d. The union's determination of the matter should be conducted in accordance with the Constitution;
e. The employee has a right to a hearing;
f. The hearing should be conducted in good faith and without "actual bias"; and
g. The union is not bound by the strict rules of evidence, but should not be influenced by matters outside the scope of the evidence.

[89] However, the principles of natural justice are variable, and their content is to be decided based on the specific context of each case. The standard of conduct expected in a procedure meant to determine a member's rights is dependent on the affected rights of the employee.

[90] Here, the affected rights included the employee's membership in the Local, his accumulated seniority rights, his permanent status in a position with the City, and the associated benefits. The LOA refusal is a barrier to Pasiechnik returning to his former position and to reverting to his former seniority and benefits.

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[3] *Coleman v OTEU, Local 378*, 1995 CarswellBC 4089, [1995] BCLRBD No 282.
[4] The reference to s. 10(l)(b) and (c) alone would suggest otherwise but the statement "disciplinary matters including, of course, expulsion from membership" is a qualifier that suggests this limitation.
[5] In the present case, the "right to counsel" is not relevant and does not need to be considered.

[91] On the other hand, the LOA refusal does not impact Pasiechnik's ability to work to the same extent as it would in a closed shop construction environment. Nor has it arisen in the context of disciplinary proceedings. It has arisen not because Pasiechnik was expelled from the Local but because he chose to take a middle managerial job. Due to that choice, Pasiechnik is no longer working in the bargaining unit.

[92] Considering the circumstances, the *Coleman* requirements (as adapted) provide greater protection than is guaranteed to Pasiechnik in this case. And, even if found to apply, they represent the high end of spectrum, and the Local has substantively complied with them.[6] The Board has found no breach of the principles of natural justice, in the circumstances of this case.

[93] To begin, Pasiechnik knew the case he had to meet, and he had reasonable notice of the case he had to meet before the appeal hearing. The executive considered his request on three separate occasions. While the executive's first decision was made relatively quickly, it proceeded to reconsider the decision twice. It did so once after the parties attempted to negotiate an MOA and a second time following advice received by a national representative. Although Dobrowney did not initially provide the reasons for the denial, she provided them upon request. Pasiechnik was later provided with more comprehensive reasons.

[94] When the appeal was heard, Pasiechnik was aware of the reasons given for the denial.

[95] There is no indication that the Local was acting outside of its constitutional authority by denying the leave request.

[96] To the extent that the Bylaws can be found to apply, the Local's determination of the matter was consistent with them.

[97] The Bylaws do not contain guidelines for determining an LOA request, nor a related appeal. Instead, Pasiechnik relies on the Grievance Appeal Process Guidelines.[7] The Local complied with all of those guidelines[8], except for one - the appeals committee was comprised of non-executive members, instead of two executive members who had not participated in the initial decision, as set out in the guidelines. The intent of this guideline is to ensure that the appeals

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[6] To be clear, the Board is not adopting the *Coleman* requirements (as adapted) in non-disciplinary matters. It did not receive sufficient argument to consider the potential for unintended consequences to a union's internal decision-making processes.

[7] Exhibit U-2, Local Bylaws, at 26.

[8] Note that, according to Exhibit E-8, email dated March 24, 2023, Pasiechnik was provided with the names of the original three committee members, including the member who was in his work group.

committee decision was not tainted by the involvement of the original decision-makers. By populating the appeals committee with non-executive members, the executive substantively complied with that intent.

[98] Pasiechnik also complains that the "executive decided to choose the appeals committee rather than having a free vote of members as is the practice with all other committees". However, in her communications with the executive, Heisler alluded to the possible involvement of the executive in the committee appointments.[9] Relatedly, Article XV of the Bylaws states that,

> *…Elections will be held at the following October general membership meeting, in the event of no quorum at either meeting terms will be extended until nominations and elections can be held. In the event of a mid-term vacancy the executive may appoint Committee members until by-elections can be held.*

[99] In other words, the executive has a role in appointing committee members in the case of mid-term vacancies. Given that the committee in question was an ad hoc committee, the executive's role in voting for the committee members is not inconsistent with the bylaws.

[100] Furthermore, if Pasiechnik had raised a concern[10] about a prospective committee member, there would have had to have been a mechanism for appointing a replacement.

[101] With respect to the appeal hearing, Pasiechnik was given ample opportunity to prepare, and an opportunity to make submissions. The appeal committee took time to consider the submissions and issued written reasons for its decision.

[102] There is no indication that the hearing was conducted in bad faith or with "actual bias" (as opposed to reasonable apprehension of bias).[11]

[103] On this latter point, Pasiechnik has raised concerns with respect to the composition of the executive and the appeal committee. He states that one of the executive members and one of the committee members (two different individuals) were in Pasiechnik's direct work group. He argues that their involvement was both inappropriate and contradictory given the Local's purported concern about a conflict of interest.

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[9] Exhibit U-3, email dated March 13, 2023.
[10] For example, a conflict of interest.
[11] The relevant *Coleman* requirement states that "[t]he hearing should be conducted in good faith and without 'actual bias'" (as opposed to reasonable apprehension of bias).

[104] The current question before the Board is whether their participation was indicative of a breach of the principles of natural justice.

[105] Pasiechnik has presented no evidence of *actual* bias on the part of the executive member.

[106] With respect to the appeal committee member, there is insufficient evidence of actual bias. Heisler had concerns before the hearing but did not raise those concerns and, instead, after the hearing sent an email congratulating the participants on their professionalism. She testified that she was impressed by the way the appeal committee (and Pasiechnik) conducted themselves. Heuchert, who was a friend of Pasiechnik and had inserted his own personal commentary in the notes he took of the appeal, did not flag a related concern in the notes. Despite his vested interest, Pasiechnik did not point to any relevant, specific interaction that demonstrated actual bias.

[107] Sadowski described the panel member's "relationship with" Pasiechnik as "confrontational" but did not provide evidence that he was "actually" influenced by partiality or prejudice in coming to a decision.

[108] The Board is not persuaded that the hearing was tainted by actual bias.

[109] While not directly on point, nor did Pasiechnik raise a *reasonable apprehension* of bias at his earliest possible opportunity.[12]

[110] There is no evidence that Pasiechnik objected to the involvement of any executive members. In fact, Pasiechnik made his initial request by email, addressed to multiple people including the impugned executive member. The "executive" made three decisions with no indication that any member had declared a conflict and still Pasiechnik did not object.

[111] Pasiechnik was aware in advance of the appeal that a unit member would be participating. Although he raised an objection to the manner in which the appeal committee was selected, he had indicated that he was okay with the composition of the committee, per Dobrowney's testimony. Pasiechnik confirmed that he did not raise an objection to its composition.

[112] Finally, there is no evidence that the appeal committee was influenced by matters outside the scope of the evidence.

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[12] See, for example, *R v Wolfe*, 2021 SKCA 39 (CanLII), which suggests that a failure to object is a factor to consider. On the other hand, some courts have found a failure to object to amount to waiver of breach: *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 (CanLII), at para 26.

[113] Next, Pasiechnik raises a number of issues that fall outside the direct scope of the *Coleman* requirements.

[114] First, he criticizes the committee for not having relevant education and experience.[13] However, in cases such as this, a union's resources are limited. Certainly, the Local could have managed its resources better by removing a few members from involvement in the initial decisions. It did not do this. But it is not uncommon for a union to be reliant on volunteers for the adjudication of disputes. The committee members met with Heisler to discuss procedure and expectations for the appeal. The Board does not micromanage the training provided to volunteers.

[115] Next, Pasiechnik argues that the decision contains errors which demonstrate that he was not given a fair hearing: the committee did not acknowledge Heisler's presence; mistakenly referred to an "original ask" for "a two-year LOA"; and inaccurately described the duration of the past LOAs as being from six to eleven months in length.

[116] In the Board's view, these errors and omissions are not determinative.

[117] In its decision, the committee identified the issues in dispute:

> *The two reason's [sic] that Mr. Pasiechnik did not agree on were:*
>
> *1. A conflict of interest would be created managing his own work group*
> *2. Concerns with confidentiality, should he return to his work group as an out of scope employee along with industrial knowledge of the Union being used in inappropriate ways.*

[118] The committee addressed these issues. First, the committee noted that the MOA could have resolved the Local's concern. In other words, the City had inhibited a resolution by failing to adequately address the central issue. Second, the committee considered the evidence of past LOAs, but observed that "none were exactly the same or comparable to Mr. Pasiechnik's request" and that "none involved directly managing their own work group". The other LOAs were not appropriate comparators. Third, the committee took into account the CUPE "Oath of Obligation and Oath of Office", indicating that "they had to reasonably balance the integrity of the individual as well as the membership as a whole".

[119] The failure to mention Heisler is a minor error. The description of the leave durations is also a minor error, considering that the duration of the leave was not the decisive issue.

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[13] He notes that two of the three panel members did not have experience on the executive.

[120] Pasiechnik argues that the committee went astray when it considered whether the Local's decision was arbitrary, discriminatory or in bad faith. The decision states that the committee "had to take [these questions] into account", and then, "[t]his is somewhat difficult for us as we are laypeople". Clearly, the committee was not in a position to determine a breach of section 6-59. However, if the committee had found that, in its view, the Local's decision was arbitrary, discriminatory, or in bad faith, it could have overturned the decision. Understood in this way, the committee did not taint its decision by considering these issues.

[121] Furthermore, Sielski testified that the mandate of the committee was to decide whether to uphold the executive's decision.

[122] Overall, the context of the decision should be taken into account. It is well established that union hearings do not tend to be conducted by persons with legal training. The committee was comprised of volunteer members from the Local. Hearing panels in union proceedings are not held to the same standards as panels in other tribunal settings. The committee gave Pasiechnik an opportunity to make submissions, he took that opportunity, and the committee considered the central issues in coming to a determination.

[123] Next, Pasiechnik argues that the Local's decision was inconsistent with past practice. Pursuant to section 6-58, this argument is relevant only in determining whether the Local failed to apply the principles of natural justice. The Local provided Pasiechnik with a fair hearing in relation to this issue. Pasiechnik was given an opportunity to provide evidence of past LOAs, he did provide that evidence for the committee's review, the committee considered that evidence, and the committee decided that said evidence was distinguishable.

[124] Pasiechnik also points out that the Local did not follow the advice of the national representatives.[14] This is true. However, the Local did not ignore the advice; it considered the advice and made a different decision. The Local's willingness to reconsider its decision following the receipt of advice suggests that it was open to healthy debate.[15] It was entitled to come to a different conclusion. The Local is the exclusive bargaining agent with respect to the employees' rights under the CBA. As the exclusive bargaining agent, the Local is charged with the task of representing its members' interests. It took those interests into account in coming to a decision.

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[14] Whose advice was explicitly influenced by a damages award that had been ordered in a different case.
[15] The submissions made by Pasiechnik suggest that the national representatives' strong opinions may have raised his expectations.

[125] Next, Pasiechnik suggests that the Local erroneously assumed that the duration of the requested LOA was 24 months.

[126] It is likely that the Local initially interpreted the LOA in that manner.[16] However, Pasiechnik bears responsibility for the wording of his request. In his request, he described the City's offer of a two-year temporary position but then provided no other timeframe to qualify his request.

[127] Pasiechnik argues that, before considering the request the first time, the Local should have clarified the details.

[128] Even if the Local was concerned about the prospect of a two-year LOA, it was not fixated on this issue, nor was it ultimately influenced by it.

[129] First, if the duration of the LOA was an issue there were alternative options available.

[130] The parties entered into negotiations for an MOA, the draft of which included the following language:

> *Whereas Mr. Pasiechnik has accepted a temporary SCMMA position as a Maintenance Manager with the term of March 16, 2023 to March 15, 2024, with the possibility of an extension…*

[131] The draft MOA suggests that the City was willing to convert the term to a one-year duration. Relatedly, Sadowski testified that he was willing to re-post the position.

[132] Ultimately, the duration was not an obstacle to reaching a resolution. The obstacle to reaching a resolution was the City's refusal to include language addressing the Local's concern about a conflict of interest. When the Local initially provided reasons for its decision to refuse the request[17], it made no reference to the length of the term. Later, when Bauer outlined the rationale for revisiting the request, he described the request as for a "one (1) year leave of absence".

[133] Although the appeal committee characterized the original request as "for a two year LOA", its decision did not turn on this issue. It described the issues in dispute as the conflict of interest and the concerns with confidentiality. In considering the past examples of LOAs, it indicated that "none involved directly managing their own work group." It also indicated that if the City had addressed the two concerns in the MOA, it believed that the leave would have been granted.

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[16] Dobrowney, for one, testified that it was a red flag that the position was for more than a year.
[17] On February 15 and 22.

[134] Finally, the committee's recommendation to the City is not determinative. The committee did not identify the term as being a decisive issue. It made a recommendation to minimize potential future complications.

[135] Pasiechnik also argues that the Local's reasons were inconsistent with the language in the CBA.[18] Pasiechnik suggests that, given the CBA language, the Local never should have been involved in determining the leave request.

[136] The implication of this argument is that, by deferring to the Local's determination, both the Local and the City misinterpreted their rights and obligations under the CBA. In other words, the entire process through which the Local had adjudicated the leave request was an unnecessary obstruction.

[137] This argument raises an issue of interpreting the CBA.

[138] Matters that come to be decided pursuant to section 6-58 of the Act raise questions of internal union affairs. Consistent with this, the question before the Board is whether the Local complied with the principles of natural justice in the adjudication of the dispute.

[139] In deciding this question, the Board may consider whether the Local complied with its own rules, such as those contained in its Constitution. By asking the Board to interpret the CBA, Pasiechnik urges the Board to take the analysis one step further, that is, to consider not only the Local's own rules, but also whether the Local has a right to apply its own rules to this dispute, or whether it has a right to be involved at all. In other words, Pasiechnik asks the Board to determine the rights and obligations of the parties as set out in the agreement.

[140] However, there is no (or insufficient) evidence that Pasiechnik objected to the Local's involvement. Pasiechnik did not raise this concern in the email exchanges with the Local; nor did he mention it in the materials filed with the appeal committee. Instead, Pasiechnik made a leave request directly to the Local. When the leave request was denied, Pasiechnik focused on the Local's denial of his request. In the meantime, the Local has taken actions in reliance on the existing characterization of the dispute.

[141] Under the circumstances, it would be inappropriate to consider whether the Local should have been involved in adjudicating Pasiechnik's own request.

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[18] In support of this argument, he points to Articles 7 and 23 of the CBA.

[142] Furthermore, to consider this question, the Board would be required to consider the relevant evidence and make findings of fact about the interpretation of the relevant provisions. That evidence could include extrinsic evidence of past practice and negotiating history.[19] The only relevant extrinsic evidence before the Board suggests that the Local has been involved in considering leave requests in the past.

[143] Pasiechnik also argues that, by taking into account whether the CBA contained language addressing such leaves, the Local considered an irrelevant factor in making its decision. The Board disagrees. The Local was entitled to weigh Pasiechnik's interests against those of the membership as a whole. In raising the conflict issue, the Local was raising an issue of likely interest to the membership. CBA language would ensure that the membership could consider and vote on the issue.

[144] Finally, timeliness is not an issue of concern. While there were some delays, there were extenuating circumstances, and those delays were reasonable under the circumstances. The Local was considering and reconsidering Pasiechnik's requests, seeking and obtaining advice, forming an appeal committee, and operating with volunteers.

[145] In summary, the Board has found no breach of section 6-58 of the Act. The Board has weighed the relevant interests and concluded that the *Coleman* requirements (as adapted) provide greater protection than is guaranteed to Pasiechnik in this case. And, even if found to apply, the Board has concluded that the Local has substantively complied with those requirements. Pasiechnik has presented no other evidence to demonstrate that the Local breached the principles of natural justice, pursuant to section 6-58.

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[19] Interpreting the CBA would require the presentation of relevant evidence, which could include extrinsic evidence, as explained by Donald J. M. Brown and David M. Beatty, in *Canadian Labour Arbitration*, looseleaf (2/2024 – Rel 1) 5th ed. (Toronto: Thomson Reuters, 2017), at 4-102 to 4-104.:

> In some earlier awards, arbitrators were restricted to construing a collective agreement to the agreement itself, and could not resort to extrinsic evidence to assist in this task unless the agreement was ambiguous. However, this general proposition was qualified in two respects. First, where the context of the agreement or subject-matter referred was sought to be established, extrinsic evidence could be received for that purpose. In addition, where the word or phrase in issue was alleged to have been used in a trade sense or to have a special technical meaning, evidence of the trade, custom or special meaning could be adduced. More recent awards have concluded that arbitrators can resort to extrinsic evidence to aid in the interpretation of the collective agreement even where there is no ambiguity in the language.
>
> In grievance arbitration, the clearest and most commonly utilized examples of extrinsic evidence are past practice and negotiating history.
>
> [emphasis added]

Section 6-59

[146] The next issue is whether the Local breached its duty of fair representation pursuant to section 6-59 of the Act. Section 6-59 states:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

[147] As this provision suggests, a union's duty of fair representation is engaged in relation to an employee's rights pursuant to the CBA. If the Local acted in a manner that was arbitrary, discriminatory or in bad faith in considering whether to represent or in representing Pasiechnik (with respect to his rights pursuant to the CBA), then it will be found to have breached its duty.

[148] Here, the applicable rights are those pertaining to Pasiechnik's seniority and benefits, and the applicable question is whether the Local breached its duty of fair representation in relation to those rights.

[149] The usual meaning of "represent" in this context is to "act in the place of or for" in relation to the employee's interests. In most cases, the representation question arises from a union's decision whether to proceed with a grievance or from its actions in the course of a grievance proceeding taken against an employer. Here, Pasiechnik's interest is in having the Local approve his leave request so that he may maintain his status with the Local. Without that status, he has no rights under the CBA.

[150] It is not obvious that this application raises a matter that engages the Local's representational duties, except, perhaps, in relation to its negotiation of the MOA. The City was willing to agree to the request for an LOA. In assessing Pasiechnik's request, the Local did not have to act in place of Pasiechnik, nor did it have a role in advocating on his behalf (except in relation to the MOA). The Local received the request, and considered whether he would be "in or out", taking into account the interests of the membership.

[151] Given the Local's arguments, however, the Board will consider whether the evidence discloses that the Local breached its duty of fair representation through conduct that was arbitrary, discriminatory, or in bad faith.

[152] The Board's decision in *Berry v SGEU*[20] provides guidance as to the meaning of the terms "arbitrary", "discriminatory" and "bad faith":

> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
>
> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
>
> *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[153] The Board also relies on the following descriptions from *Toronto Transit Commission*:[21]

> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "Discriminatory" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice[,] hostility or dishonesty.*

[154] The first issue is whether the Local's actions were arbitrary.

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[20] *Berry v SGEU*, 1993 CarswellSask 518.
[21] *Toronto Transit Commission*, [1997] OLRD No 3148, at para 9.

[155] Pasiechnik's main argument is that the Local raised invalid and unfounded issues and that, by denying the leave request, the Local made an arbitrary decision unsupported by the facts. Pasiechnik's secondary argument is that the Local's decision was inconsistent with its past practice of approving leave requests.

[156] Pasiechnik's arguments rest on his description of his own personal circumstances and qualities, as alleged by the following:

a. He has handled confidential information in his role on the executive and as a member of the sick bank committee;
b. He has never been responsible for a breach of confidentiality;
c. His movement into the role has been perceived as a positive;
d. No concerns have arisen in relation to his management of employees;
e. No issues have been raised with respect to his integrity;
f. He has a strong character, and conducts himself with dignity and professionalism;

[157] Pasiechnik also observes that other individuals have transferred to and from supervisory positions without creating conflict, asserts that in-scope supervisors have the same access to personal employee information that Pasiechnik has as a "manager"; and, indicates that the work group information is visible to the "manager" only if permitted.

[158] He argues that it is pure speculation to suggest that a conflict may arise upon the "manager" returning to the bargaining unit, the Local ignored the significance of the Code of Conduct, and Heisler didn't agree that there was a conflict of interest.

[159] In summary, Pasiechnik believes that the Local's rationale is a personal affront based on no evidence or in contradiction with the evidence before it.

[160] A conflict of interest arises when an individual faces conflicting responsibilities or vested interests. A conflict is managed, generally, by removing the individual from the conflict or by putting in place formal mechanisms to prevent the sharing of information or the execution of responsibilities that result in the conflict. It is not a reflection of a person's character or qualities.

[161] Furthermore, the scope of the Board's certification order for the SCMMA unit was meant to be confined to "positions that would be in a conflict of interest in a labour relations sense with

members of the more general bargaining unit, and to positions excluded from the general bargaining unit for some historical reason". As explained in *Local 47 v Saskatoon*:[22]

> *[35] In City of Saskatoon, supra, LRB File No. 232-97, the Board considered for the first time a proposed amendment to the SCMMA certification Order to include 10 newly created positions. The Board stated that its approach to determining the scope of middle management bargaining units was restrictive, confining membership to positions that would be in a conflict of interest in a labour relations sense with members of the more general bargaining unit, and to positions excluded from the general bargaining unit for some historical reason. The Board stated, at 321:*
>
> > *. . .the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.*
>
> *…*
>
> *[37] The decision was soon followed by a City of Saskatoon, supra (LRB File No. 244-97), another application to amend the SCMMA certification Order to include a new position of accountant in the transit department. The Board reiterated its restrictive approach, usefully summarizing the principles enunciated in City of Saskatoon, supra (LRB File No.232-97), at 339, as follows:*
>
> > *This is the second occasion on which the Board has been asked to comment on the scope of the middle management unit at the City. In City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board set out its approach in determining the boundaries of the middle management unit along the following general principles:*
> >
> > > *1. in a multi-bargaining unit setting, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in industrial instability;*
> > >
> > > *2. the Board historically favours larger, industrial units over smaller specialized bargaining units as being the best vehicles for promoting industrial stability;*
> > >
> > > *3. when faced with multiple bargaining units, the Board will take a restrictive approach to defining the scope of the smaller, more specialized unit;*
> > >
> > > *4. middle management units will be confined, in general, to those employees who, if they were included in the large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and low level managerial functions and their membership in the larger unit;*

[22] *Local 47 v Saskatoon*, *supra* note 2.

> *5. the Board may allow for exceptions to the conflict of interest test where there are peculiar historical reasons for excluding persons from the larger unit, but these exceptions will not be permitted to form a spring board for organizing positions that otherwise would be assigned to the larger unit.*

…

[40] Not long afterwards, in City of Saskatoon, supra (LRB File Nos. 354-97 & 010-98), the Board confirmed that, in the middle management context, the industrial relations authority of a position is of overarching significance in determining its assignment, stating, at 349-50:

> *The determination of the composition of middle management units requires a focused approach to allow more accurate and efficient decisions as in the case of managerial exclusions. The Board has determined that, in fostering industrial peace and stability, the essence for assignment to the middle management unit must be confined to those positions which would be in conflict or potential conflict in the exercise of their supervisory and junior management duties in relation to their membership in the general unit. It should be recognized that there may be exceptions to the strict application of this criterion for historical or other good and sufficient reasons but it is the industrial relations characteristics of the position in relation to community of interest which are of overarching significance.*
>
> *In other words, the approach of the Local was not arbitrary but was supported by the case law of this Board. The application of the Code of Conduct does not resolve the issue.*

[162] As such, the Board's own certification orders provide support for the Local's rationale.

[163] Moreover, none of the LOA examples involved supervising or managing employees in the employee's own bargaining unit.[23] Although similar leaves have been approved within some of the City's other CUPE bargaining units, those locals have language addressing such leaves in the applicable collective agreements. That language is a mechanism through which the Local can obtain the support of the membership. The Local was entitled to consider the interests of the membership as a whole in deciding whether to grant the LOA request.

[164] Pasiechnik also implies that the Local's involvement in the LOA determination, given the CBA language, was arbitrary. As explained, however, Pasiechnik submitted to the process. The Local's participation is consistent with past practice. Its involvement does not support a claim of arbitrariness.

[165] In summary, the Local did not make an arbitrary decision unsupported by the facts or inconsistent with its past practice.

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[23] And, the City's example of a manager moving to a director position, described as being outside of the "unionized workforce", is not relevant or comparable.

[166] Next, Pasiechnik seeks to challenge the Local's decision by suggesting that the Local engaged in contradictory conduct. In the Board's view, the conduct in question is not contradictory.

[167] The Local refused Pasiechnik's request in order to protect the interests of its members.[24] In other locals, members are involved in assessing the local's practice in relation to LOAs by ratifying the language in the CBA. Clearly, members have some interest in determining whether to allow another member to maintain their status with the Local while employed in a middle management position. By extension, the Local's decision to allow colleagues to be involved in determining whether to grant the LOA does not contradict its decision to refuse the LOA.

[168] Pasiechnik's training of the new Treasurer was a limited scope activity for the purpose of facilitating a transition.

[169] Furthermore, the Local provided Pasiechnik with a fair opportunity to make a request, took care to reconsider its decision twice and to run an appeal, and for legitimate reasons rejected the request that was made. Any delays were reasonable under the circumstances.

[170] Before disposing of the matter, the Local attempted to negotiate an MOA that would alleviate its concerns. The Local's request for language was directly related to its concerns. Despite the Local's efforts at communicating its concerns and seeking alternative language be included in an MOA, the City refused to include the language that the Local requested. No evidence was presented to suggest that the Local's request was unreasonable. The City's evidence was that the inclusion of the requested language would be "redundant". The Local does not bear responsibility for the City's refusal to agree to a reasonable request.

[171] The Local took a reasonable view of the problem before it and made a thoughtful decision about how to resolve it, through the negotiation of an MOA.

[172] Overall, there is no evidence of flagrant, capricious, totally unreasonable, or grossly negligent conduct on the part of the Local. Arbitrariness has not been established.

[173] The next issue is whether the Local engaged in discriminatory conduct.

[174] Discriminatory conduct may be established if based on "invidious distinctions without reasonable justification or labour relations rationale". As explained by authors MacNeil, Lynk, and

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[24] From, for example, a managerial decision by a person holding a personal stake in matters of seniority.

Engelmann, such “invidious distinctions” are generally based on “factors that are included in human rights legislation, such as race and sex, as well as simple personal favouritism”.[25]

[175] Pasiechnik argues that he was treated differently not because of any human rights factors but because of his “employment position”.

[176] Pasiechnik’s employment was not an invidious distinction but, rather, a labour relations rationale for treating his request differently than previous requests. The duties of the new job created the conflict of interest, upon which the Local’s decision was based.

[177] As such, discriminatory action has not been established.

[178] The next issue is whether the Union acted in bad faith.

[179] There is no evidence that any members of the executive were motivated by ill-will, malice, or hostility towards Pasiechnik.

[180] Pasiechnik did raise concerns about one of the appeal committee members. As indicated earlier in these Reasons, there was insufficient evidence of actual bias.

[181] The Board is not persuaded that any of the decisions, all of which relied on the Local’s legitimate concern about a conflict of interest, were motivated by hostility towards Pasiechnik.

[182] For all of the foregoing reasons, the allegations made pursuant to sections 6-4, 6-6, 6-58, and 6-59 are dismissed.

[183] An appropriate order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **21**st day of **March, 2024.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

[25] Michael MacNeil, Michael Lynk, Peter Engelmann, *Trade Union Law in Canada*, loose-leaf (12/2023 – Rel 5) (Toronto: Thomson Reuters, 2023), at 7-14, 7-15.