

REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Applicant v ADAM BARAGAR, Respondent, and CITY OF REGINA, Respondent

LRB File No. 167-23; August 23, 2024

Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant, Regina Civic Middle Management Association:	Matthew Taras
For the Respondent, Adam Baragar:	Self-Represented
For the Respondent, City of Regina:	Christine Clifford

Application for Delay – Order of Proceedings

REASONS FOR DECISION

Background:

[1] Kyle McCreary, Chairperson: The Regina Civic Middle Management Association (“RCMMA”) has applied for a preliminary determination on the question of delay of Mr. Baragar’s s. 6-59 application. Prior to the hearing of that application, the RCMMA has sought the Board’s direction on the order of proceedings, in particular, the RCMMA has sought an order for Mr. Baragar to present his case first. For the following reasons, the Board directs that Mr. Baragar shall present his case first, with the RCMMA calling evidence second, and the City of Regina (“the City”) calling its case last if it chooses to call evidence.

[2] LRB File No. 167-23 is an application by Mr. Baragar under s. 6-59 of the Act.¹ The RCMMA brought a summary dismissal application that was partially successful in relation to Mr. Baragar’s claim reported as *Regina Civic Middle Management Association v Baragar*, 2024 CanLII 34272 (SK LRB)(“*Baragar #1*”). The Board’s summary of the outcome of the decision is at paras 70-71:

[70] In summary, the Board has decided to grant the application for summary dismissal, in part, in relation to the following allegations:

¹ *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (“the Act”).

- a) *The Union breached its duty of fair representation when it refused to represent the Employee in relation to the human rights complaint [the SHRC Allegation];*
- b) *The Union breached its duty of fair representation when it refused to file a second grievance on the Employee's behalf [the Second Grievance Allegation];*
- c) *The Union failed to comply with the principles of natural justice, contrary to section 6-58, when it refused to represent him and when it refused to file a grievance [the Section 6-58 Allegation].*

[71] *The allegation that the Union breached its duty of fair representation in relation to the 2020 discipline grievance may proceed. The Union has leave to request a preliminary hearing on delay or to argue the issue of delay at the hearing on the merits.*

[3] In relation to the issue of delay, the Board found that the delay was excessive, but that the matter needed to proceed to hearing to assess any further prejudice to the RCMMA, and to assess Mr. Baragar's reasons for delay: *Baragar # 1* at paras 14-28.

[4] Pursuant to para 71 of *Baragar #1*, the Board granted leave to the RCMMA to request a preliminary hearing on the question of delay. On May 2, 2024, the RCMMA requested a preliminary hearing on delay. The Board has scheduled the hearing on the issue of delay for August 27, 2024.

[5] On August 12, 2024, the RCMMA wrote to the Board seeking the Board's direction that the applicant proceeds with his evidence first at the hearing on August 27, 2024. The RCMMA argues that as the prejudice caused by delay is presumed and Mr. Baragar bears the burden of justifying the delay, that Mr. Baragar should present his evidence first. The RCMMA relies on various authorities that find the party seeking relief from delay bears the legal burden in justifying delay including: *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB) ("*Hartmier*"); and *Kinaschuk v Saskatchewan Insurance Office and Professional Employees' Union, Local 397 and Saskatchewan Government Insurance*, [1998] Sask LRBR 528.

[6] The City took no position on this request. Mr. Baragar took the position that the RCMMA is the applicant in the application for dismissal, and as an applicant should present its case first.

Analysis and Decision:

[7] The Board's authority to dismiss a s. 6-59 application for delay is pursuant to s. 6-103 of the Act and not pursuant to s. 6-111(3): *Coppins v. United Steelworkers, Local 7689*, 2016 CanLII 79633 (SK LRB) at paras 19-22; *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB) at paras 62-66; and *United Steelworkers, Local 5917 v Lyle Brady*, 2023 CanLII 68839 (SK LRB) at paras 22-29. As such,

the test on this application for delay is without reference to the 90 day period in s. 6-111(3) of the Act.

[8] The Board also has the authority to determine the order of presentation of evidence pursuant to its ability to control its own proceedings and to conduct hearings including preliminary hearings it considers appropriate under ss. 6-103(2)(a) and 6-111(1)(h) of the Act.

[9] The RCMMA is the moving party in this delay application. The RCMMA is seeking relief in an order for dismissal without a full hearing. As the party seeking relief, the RCMMA bears the burden of establishing that it is entitled to the relief sought. However, the Board has already found the delay to be excessive: *Baragar #1* at para 14. The initial evidentiary burden that would normally fall on the RCMMA has already been met. Mr. Baragar bears the ultimate burden in justifying the delay that has been established, *Hartmier* at para 120.

[10] The Board notes the comments of Justice Locke of the British Columbia Court of Appeal in *Hogarth v. Archibald Moving & Storage Ltd.*, 1991 CanLII 1187 (BC CA):

In my view, this order was not necessary and insofar as "just", I think it proceeds upon a misunderstanding in the circumstances as to the law of burden of proof, in that there has been a confusion between the "ultimate" burden of proof so called, and the burden which lies upon a party presenting evidence at that particular time. The two are not necessarily the same. It is not the law that he who has the ultimate must invariably present evidence first.

[11] It will be for each preliminary hearing on delay to determine the appropriate order when considering the facts of the case. In many cases, evidence will need to be called to establish the period of delay in issue, whether it is excessive, and whether there is prejudice sufficient to attract the Board's scrutiny. However, in this case, the Board has already found the delay is excessive and deserving of scrutiny and the question for the preliminary hearing is primarily the justification of the excessive delay. The RCMMA may also call evidence on further prejudice in reply, but the Board's primary concern based on the findings in *Baragar #1* is the question of the justification for the delay.

[12] As a result, the Board has determined that Mr. Baragar will present his evidence first. If the City intends to call evidence, it will present second. The RCMMA will call its case last.

DATED at Regina, Saskatchewan, this **23** day of **August, 2024**.

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson