Date: 20051222

File: 525-18-8

Citation: 2005 PSLRB 179

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

GLORIA DANYLUK ET AL.

Applicants

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 832

Respondent

Indexed as
Danyluk et al. v. United Food and Commercial Workers Union, Local No. 832

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Yvon Tarte, Chairperson

For the Applicants: Gloria Danyluk, Jadwiga Pyka, Mary Wilson, Ruby McCarville, Muriel Runge

For the Respondent: Anne Gregory, counsel

(Decision rendered without an oral hearing.)

Request before the Board and summary of the evidence

[1] On January 20, 2004, Gloria Danyluk submitted an application for revocation of certification against the United Food and Commercial Workers Union, Local No. 832 (UFCW). The UFCW was certified as the bargaining agent for all Canex employees employed at the Canadian Forces Base (17th Wing Westwin) in Winnipeg, Manitoba. This application was dismissed for timeliness by the Public Service Staff Relations Board (the "former Board") on June 29, 2004 (decision 2004 PSSRB 76).

[2] On August 24, 2004, the applicant and four other individuals wrote to the former Board asking it to review its decision. The only mailing address provided in the request was that of Ms. Danyluk but the request was signed by Jadwiga Pyka, Mary Nelson, Ruby McCarville and Muriel Runge as well as Ms. Danyluk. It contained arguments in support of the request for review and was forwarded for response to the UFCW by the former Board.

[3] The bargaining agent responded to the request for review on November 19, 2004, which response was copied to Ms. Danyluk by both the UFCW and the former Board. The applicant was asked to provide her comments on the bargaining agent's submissions by December 15, 2004, but no response was received by the deadline. During a telephone call to Ms. Danyluk by the former Board in January 2005, the applicant stated that she had not yet had the time to confer with her co-workers but would do so and provide a reply.

[4] On April 1, 2005, the *Public Service Labour Relations Act* (the "new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 12 of the new *Act*, the Public Service Labour Relations Board was established, replacing the Public Service Staff Relations Board. Pursuant to section 39 of the *Public Service Modernization Act*, the Public Service Labour Relations Board (the Board) continues to be seized with the application, which must be disposed of in accordance with the new *Act*.

[5] Despite the applicant's promise during the January 2005 telephone call, she did not file a reply and on June 17, 2005, the Board wrote to the applicant and requested that she advise the Board regarding the status of the file by July 18, 2005. Once again, nothing was forthcoming from her and a second telephone call was placed to the applicant at her residence. The person who answered the telephone advised the Board

that Ms. Danyluk was away and that Canex had closed the workplace in question. This individual agreed to convey to Ms. Danyluk the message that the Board had called.

[6] The Board's next attempt to reach Ms. Danyluk was made on October 11, 2005, and once again the Board was unable to reach her. The person who answered the telephone was the same individual to whom the Board had spoken during the earlier telephone call and this person advised the Board that Ms. Danyluk was away for a month. The Board did confirm with this individual, however, that she had given the Board's earlier message to Ms. Danyluk.

[7] A final written notice was sent to Ms. Danyluk on October 18, 2005, via registered mail. The letter advised Ms. Danyluk that her failure to provide the Board with an update on the status of the matter could result in the Board's closing the file without further notice. The Board confirmed with Canada Post Corporation that the letter had been delivered and signed for.

Summary of the arguments

[8] The request for review, dated August 24, 2004, explains why the signatories do not agree with the Board's initial decision:

> *We have received the results of our application for revocation of certification. It has taken us awhile to wave through all of the legal jargon. We are interpreting that the reason that this application was not accepted was because there was no collective agreement in force and therefore the time line was not met.*
>
> *It is unfair to hold us to a collective agreement that was not even in affect at the time of our hiring. You quoted that Section 52 of the PSSRA operates to continue any term or condition of the collective agreement. You also stated that the board found that Section 52 of the PSSRA does not have the effect of maintaining the collective agreement in force, but only the terms and conditions of employment. This is unfair as we feel that board cannot choose what part of the collective agreement is still affect.*
>
> *Our collective agreement expired 14 August 2002. At the time of our hiring the Union did not inform us about the status of the negotiations. We were lead to believe that we had the same collective agreement as Shilo as we were being negotiated with Shilo. It was not until our meeting 12 January 2004 that Mr. Ron Fotti informed us that Shilo and Winnipeg were two different agreements. We also*

> *discovered at that time that our agreement expired 3 months before Shilo. We were not given the opportunity to renegotiate ours. Apparently it was decided that because there was only five of us that we would follow whatever Shilo received and this was an on going practice set prior to any of our employment. However we should have been informed of this at the time of our hiring but we were not. This verbal agreement may have been acceptable with prior employees but it should not have been assumed that it was acceptable with us. If we had been given the opportunity to negotiate then there would be a collective agreement in force and we would have met the time lines but this was taken away from us without our knowledge. When asked for this agreement in writing it could not be produced by the Union.*
>
> *We are requesting that our application be re-considered. We feel that the Union does not have our best interests at heart and said so when we met with them on 12 January 2004. There are only five of us and because of this we do not have a say in our future or in our rights as union members. As per reference D, the Union is not contesting this application. The assumption that what was acceptable practice with prior employees would be accepted by current employees has hindered all concerned.*
>
> [*Sic* throughout]

[9] A copy of the above application was sent by the Board to the UFCW on September 23, 2004, and the bargaining agent replied on November 19, 2004, arguing that there was no basis to review the Board's decision. The UFCW's response is as follows:

> *The Union has reviewed the "Request for Appeal" filed by the Applicant on or about August 30, 2004. As there is no "appeal" per se, the Union understands that the Applicant is requesting a review and reconsideration under the* Public Service Staff Relations Act *of the Board Order issued dismissing the Application for revocation of certification of the United Food and Commercial Workers Union, Local No. 832 and Staff of the Non-Public Funds, Canadian Forces All Employees of Canex employed at the Canadian Forces Base (17th Wing WestWin) Winnipeg, Manitoba, (Board File No. 150-18-53).*
>
> *Such Applications are contemplated under Section 27 (formerly section 25) of the* Public Service Staff Relations Act*. . . .*
>
> *. . .*

The purpose of this section of the Act was set out by the Board in Public Service Alliance of Canada *v.* Treasury Board *(Board File 125-2-41):*

> *In the Board's view, [then] section 25 was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of [then] section 25 was rather to enable the Board to reconsider a decision either in light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists. It would not only be inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try and shore up or reformulate arguments that had already been considered and disposed of.*

*The power to reconsider a decision must be used "judiciously, infrequently and carefully". (*C.A.T.T. *and* Treasury Board *and* Federal Government Dockyard Trades and Labour Council East*) (Board File No. 125-2-51)*

In addition to new evidence or arguments that could not reasonably have been presented at the original hearing, any new evidence that a party seeking review and reconsideration wishes to place before the Board must also have a "material and determining effect".

What constitutes new evidence with a "material and determining effect" is discussed in Czmola *v.* Treasury Board *(Board File 165-2-201). In* Czmola, *the Board cites with approval a passage from* Public Service Alliance of Canada *v.* Treasury Board *(Board File no. 125-2-41) where that Board adopted the reasoning of the Ontario Labour Board decision in* Lorain Products (Canada) Ltd. *[1978] OLRB Rep. March 262. The Ontario Board wrote:*

> *The [Ontario] Board having regard to the labour relations chaos which would result if there were not some finality to its decision has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party seeking reconsideration can show that is* [sic] *has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board.*

In Czmola, *after the initial hearing and decision, new facts came to light that were not available to the Applicant and could not have been obtained with reasonable diligence and*

adduced at the time of the original consideration and disposition of his Application.

However, in considering the application for review and reconsideration, the Board found that while the Applicant had new facts, the facts were not such that they would have had a material and determining effect on the decision of the Board.

Having regard to the current request before the Board, it is the respectful submission of the Union that there is no basis for review or reconsideration of the decision of the Board in this case (Board File No. 125-18-53). Specifically:

1. *The Applicant has failed to cite any change in circumstances or new evidence or arguments at all in the request for review and reconsideration, or if the Applicant has (which is not conceded by the Union), such change in circumstances and/or new evidence or arguments are not material and do not have a determining effect on the original decision of the Board.*

2. *With respect, the request for review and reconsideration does not address the reasons for the Board decision at all (i.e. the original Application is untimely), and is an attempt to reargue the merits of its case, relying on the same facts which were already considered prior to the decision. (Board File No. 150-18-53)*

I am advised that the only change in circumstances since the original revocation Application was filed that is arguably "material and determining" with regards to that Application is that progress has been made in collective bargaining. I am further advised that since the Revocation Application was filed, collective bargaining has resulted in an Agreement for the "lead" unit at Shilo, which will shortly lead to the conclusion of bargaining of the revised Collective Agreement for the Applicant's unit. I am also advised that the revised Collective Agreement will contain improvements to the existing terms and conditions in effect for the members of the Applicant's bargaining unit.

Therefore, the Union opposes the Application for review and reconsideration as there is no basis for review. Alternately [*sic*], *if the Board determines that there is a basis for review, which is not conceded by the Union, the Union submits that the Order of the Board was correct in law and ought not to be disturbed.*

Finally, should the Board rule that review and reconsideration of the original decision is warranted, and pursuant to such a review the original decision regarding the timeliness of the Application is overturned (i.e. the original

> *Application is found to be timely), and should the Board ultimately consider the merits of the revocation Application, the Union requests that an oral hearing be held for full consideration of all the relevant facts. As indicated above, as the "lead" Collective Agreement for the Shilo unit has now been settled, there has been a material change in the determining facts relevant to the Application for Revocation since the original ruling by the Board (Board File No. 150-18-53).*

[10] As indicated above in paragraphs 5 to 7, the Board received no reply to the UFCW's response, despite several attempts to elicit a response from Ms. Danyluk.

Reasons

[11] Under the circumstances, I am satisfied that Ms. Danyluk and the four other signatories to the request for review do not wish to pursue this application. Since filing the request for review in August of 2004, neither Ms. Danyluk nor the four other signatories to the request for review have contacted the Board in any manner. Further, the Board made several unsuccessful attempts to communicate with Ms. Danyluk, who was the only applicant to provide her contact information to the Board in the request for review. Finally, despite the registered letter of October 18, 2005, warning Ms. Danyluk that failure to provide the Board with an update regarding the status of the file could result in the Board's closing the file without further notice, no response was forthcoming. For these reasons, I have concluded that the applicants do not wish to pursue this request for review and have therefore abandoned it.

[12] However, if I am incorrect in my conclusion, I find that none of the reasons given in support of the request for review meets the standards previously established by the Board for a successful reconsideration application. The request for review was submitted under s. 27 of the *Public Service Staff Relations Act (PSSRA),* which subsection reads as follows:

> *Subject to subsection (2), the Board may review, rescind, amend, alter or vary any decision or order made by it, or may re-hear any application before making an order in respect thereof.*

[13] The new *Act*, at section 43, gives the Board the same power. Subsection 43(1) reads as follows:

> *Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any*

> *application before making an order in respect of the application.*

[14] Despite the change in wording, I find no substantial difference between the two subsections. The former Board had long been of the view, based on the wording of s. 27 of the *PSSRA*, that the purpose of s. 27 was not to allow an unsuccessful party to re-argue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where there was some other compelling reason for review. Furthermore, the Board's jurisprudence has held that any new evidence or arguments raised by a party in a request for review must have a material and determining effect. I am in agreement with the position adopted by the former Board regarding the interpretation to be given to s. 27 of the *PSSRA* and I see no reason why the same interpretation should not be applied to the present *Act*. The bargaining agent has correctly pointed out that the request for review fails to disclose any change in circumstances or new evidence or arguments. The arguments cited in the request for review are in fact attempts to reargue the merits of the initial application for revocation and as such do not meet the criteria for review.

[15] For all of the above reasons, the Board makes the following order:

(*The Order appears on the next page)*

Order

[16] The Board directs that these proceedings are terminated and that the file be closed.

December 22, 2005.

Yvon Tarte,
Chairperson