

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

394188 INC. operating under the firm name  
of H & H TOTAL CARE SERVICES

(the "Employer")

-and-

WESTMINSTER HOUSE EMPLOYEES ASSOCIATION

(the "Association")

PANEL: Maria Giardini, Vice-Chair

COUNSEL: Sharon Kearney, for the Employer  
Thomas D. Schiller, for the Association

CASE NO(S): 18621

DATE(S) OF HEARING: April 28, 1994

DATE OF DECISION: May 5, 1994



## **DECISION OF THE BOARD**

### **I. NATURE OF THE APPLICATION**

On April 18, 1994 the Association applied to be certified for employees at and from Westminster House, 153 - 140th Street, Surrey, B.C. The application was not opposed by the Employer. However, the Industrial Relations Officer's report noted two issues which are the subject of this decision. First, the report noted that the wording on the membership cards did not accord with the wording set out in Regulation 3(b). Second, the report set out a sequence of events which indicated there may have been Employer involvement or influence in the formation of the Association. Consequently, the matter was set down for a hearing to address these two issues. The Employer's counsel attended the hearing but did not participate in the proceedings.

### **II. BACKGROUND**

The Employer operates Westminster House, an intermediate care facility for seniors. The Employer took over management of the facility (under a management service contract) in the fall of 1993. During an initial meeting with the employees an Employer representative raised the subject of an employee association as an alternative to an established union. The Hospital Employee's Union (the "HEU") had been certified for a unit of employees working for the previous Employer and, at that time, an application was before the Board regarding the status of the HEU certification (i.e., whether there was a successorship, whether H & H was a common employer).

After learning from the Employer that they could form an association, certain employees got together to discuss that possibility. The Industrial Relations Officer's report, which was provided to the parties and not challenged, states that arrangements were made through Ivan Mills, the administrator of H & H, for three employees to meet with the administrator and employees of Pine Grove Place ("Pine Grove"). Mills drove the three employees to Pine Grove. Pine Grove is an intermediate care facility, unrelated to H & H, which had voluntarily recognized an employees' association.

Elizabeth Uddenberg, who gave evidence for the Association, said she did not attend the meeting at Pine Grove and did not know how it came about. However, the three employees who attended asked the executive of the Pine Grove Employees' Association to attend a meeting of the employees at Westminster House. None of the executive of the Pine Grove Employees' Association attended because they were in negotiations; however, Alfred Hildebrandt, Pine Grove's administrator, met with the employees at Westminster House. Uddenberg said she didn't know how it came about that Hildebrandt attended. Hildebrandt explained how the staff association at Pine Grove had been formed and answered questions about the collective agreement in place at Pine Grove. This meeting was held in the evening at the coffee shop within the facility.

Twelve employees at Westminster House felt an employee association was a good idea and they decided to hold a vote to see how many other employees were interested. They made up a poster and put it up on the employees' bulletin board. Uddenberg used a telephone list of employees which she had access to because she works in the office. Because some employees were going to be away, the employees organizing the Association asked the Employer's permission (which was granted) to hold an advance vote. A vote was subsequently held for the remaining employees. A majority of employees indicated they wished to form an entity they called a "council."

The organizing group made up a poster regarding the first meeting of the proposed association and posted it on the bulletin board. At the first meeting, held at the facility, the employees reviewed the constitution, by-laws and collective agreement from Pine Grove. A second meeting also took place. At the same time that certain employees were taking the above noted steps to form an association of the B. C. Government and Service Employees Union (the "BCGEU") conducted an organizing campaign among the employees at Westminster House and applied for certification.

Uddenberg said she was upset when she learned about the BCGEU application and made enquiries at the Board to obtain information on how to proceed. An Industrial Relations Officer suggested to her that she consider seeking legal advice. Uddenberg returned to Westminster House and told other employees about her discussion with the Industrial Relations Officer. The

conversation took place in the office at Westminster House where Uddenberg works.

Mills, the administrator, overheard the conversation and told Uddenberg he would obtain names of a couple of law firms. He returned later with the names of several law firms. Uddenberg contacted a lawyer in the firm which was first on the list. Subsequently, when the Association found out that the BCGEU certification bid had not been successful it instructed its lawyer to file an application for certification.

Uddenberg said the Association was not influenced by the Employer. The employees decided to form an association because they were not getting anywhere with the other unions. They were not on company time when they attended meetings and the company did not pay the legal fees for the Association. She said the employees were not coerced or intimidated by the Employer.

Uddenberg said that the employees have signed membership forms several times. After filing the application for certification the Association was told that the wording on the membership application was not correct because the word "union" had not been used. Members were approached and asked to amend the membership card by striking out the word "association" and writing in "union." This amendment was dated and initialled. I have viewed the amended cards and they are dated between April 20 to 27, 1994 (i.e., after the application for certification was filed).

### III. ARGUMENT

The Association says that it has sufficient support for an automatic certification and should, therefore, be granted certification. It argues that the wording stipulated by Regulation 3(b) was contained in its membership card. It asserts that the fact that the word "association" was used instead of the word "union" is not fatal to the validity of the membership cards. The association points out that the definition of "trade union" in the *Code* includes an employee association. Moreover, it relies on the *Interpretation Act*, R.S.B.C. c.206, Section 28, which provides that where a form is prescribed a deviation from it, not affecting substance, does not affect its validity.

The Association submits that, unlike other cases which this Board has adjudicated (*Elkview Coal Corporation*, BCLRB No. B288/93 (Leave for Reconsideration denied, BCLRB No. B335/93) and *M3 Steel (Kamloops) Ltd.*, BCLRB No. B394/93), there is no essential element missing from its membership cards. The Association asserts that a deviation or change in one word is not a substantive irregularity, particularly in this case where the word omitted (union) is defined to include the word actually on the card (association).

In the alternative, the Association says that it has met the requirements set out in the jurisprudence because the employees who are members went the extra step of amending the membership cards to reflect the wording in Regulation 3(b).

On the issue of Employer influence, the Association argues that a case has not been made out. The Association argues that, even if every allegation of Employer involvement set out in the Industrial Relations Officer's report is found to be true, this does not make one iota of difference to the Association's trade union status. The Association says it is not illegal for an Employer to point out that there are different kinds of trade unions. What the Employer must not do is affect the free will of the employees. Here, the Association says there is no evidence that occurred.

#### IV. ANALYSIS AND DECISION

##### Membership Evidence

Section 18(1) of the Code provides that an application for certification may be made by "a trade union claiming to have as members in good standing not less than 45% of the employees in that unit." However, an application under Section 18 is subject to the regulations and Section 22(3) specifically provides that membership in good standing "must be determined on the basis of membership requirements prescribed in the regulations." Furthermore, Section 24 provides that in circumstances where the Board is satisfied "that on the date it receives an application" the union has 55% or more members in good standing the Board shall certify the Union without a vote.

In this case, the question in issue is whether the membership cards submitted by the Association meet the requirements of Regulation 3(b) which states, in part:

3. For the purpose of establishing membership in good standing in a trade union where that trade union is making an application for certification, the following minimum criteria apply:

(b) a membership card signed on or after January 18, 1993 must contain the following statement:

In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining;

The membership card signed by the employees did not strictly comply with the prescribed statement. Instead of the word "union" the statement contained the word "association." That change to the prescribed wording is fatal to the validity of the membership cards.

The Association argued that the alteration was not substantive because the definition of trade union includes an employee association. I do not find that argument persuasive. The legislation now specifies wording which must be on a membership card. The requirement is mandatory, not permissive. The purpose of the prescribed statement is to ensure that employees know: that the trade union intends to apply for certification, that it will be the exclusive bargaining agent and that it will represent the employees in collective bargaining. However, in my view, it also serves the further purpose of alerting employees that, no matter what name the organization goes by, it is a union as defined by the Code and not some other kind of organization.

Furthermore, recent Board jurisprudence has made it clear that strict compliance with Regulation 3 is required. In *Elkview Coal Corporation*, BCLRB No. B288/93, *supra*, the panel stated:

The content of a membership card is a substantive matter. Similar wording cannot overcome this fundamental problem. (p.6)

See also: *M3 Steel (Kamloops) Ltd.*, *supra* and *Dencan Restaurants Inc.*, BCLRB No. B255/93 (Leave for Reconsideration of Decision dated March 31, 1993). In this

case, the Association did not comply with the requirements of Regulation 3(b). Consequently, I find that the membership cards used to support this application for certification are defective.

The Association, however, argues that if there was a defect it was cured because, after filing for certification, it had its members cross out "association" and insert the word "union." The change on each card was dated and initialled by the appropriate member. This argument misapprehends the nature of certification proceedings before the Board. Membership in good standing must be determined on the basis of the membership requirements prescribed in the regulations as of the date on which the Board receives an application. If, on the date the Board receives an application, the membership evidence is defective the defect cannot be cured after the fact in respect of that particular application. In other words, the Association may be able to file a new application, but it cannot rely on "amended" membership evidence for this application because the membership cards were amended after the date this application was filed. Therefore, I find that the Association's application for certification must be dismissed because the membership cards were defective.

#### Status of the Association

Section 31 of the Code provides that:

31. An organization or association of employees
- (a) the formation, administration, management or policy of which is, in the board's opinion, dominated or influenced by an Employer or a person acting on his or her behalf, or
  - (b) that discriminates against a person contrary to the Human Rights Act,
- shall not be certified for the employees, and an agreement entered into between that organization or association of employees and the employer shall be deemed not to be a collective agreement.

This section gives the Board authority to scrutinize the status of an organization when it applies to be certified. The test to be applied is set out in *McCoy Bros. Ltd.*, BCLRB No. 9/77, [1977] 1 Can LRBR 450, which dealt with the predecessor to Section 31:

The scheme of the Code, in part, is the evolution of an equality of bargaining strength. The thought expressed in s. 50(a) of the Code

is simply a part of that scheme. Really, then, the Board should be asking itself this question: can we be satisfied that a sufficient arm's length relationship exists so that meaningful collective bargaining - the kind of collective bargaining contemplated by the Code - can be undertaken and sustained? That, admittedly, is a subjective judgment. The whole of the evidence must be examined and inferences carefully drawn. (p.455)

This test has been applied in other cases; in particular, see: *Speed-Erect Foundations and Framing Systems Ltd.*, BCLRB No. B1/93 (Reconsideration of IRC No. C132/92). Moreover, in *McCoy Bros. Ltd.*, *supra*, the panel also concluded that if an organization was "influenced" in any one of the four aspects referred to in the section, the Board was not permitted to certify the organization.

In this case, I find that the formation of the Association was influenced by an Employer. I reach that conclusion after considering the following facts which were not disputed:

- an Employer representative, at its first meeting with employees, raised the issue of an employees association as an alternative to an established union;
- Mills, the Employer's administrator, made arrangements for three employees to go to Pine Grove to learn about an employees' association at that facility;
- Mills drove the three employees to Pine Grove;
- another employer was also involved in the person of Hildebrandt, the administrator of Pine Grove. He met with the employees and explained how the employees association worked and, as well, went over details of the Pine Grove collective agreement;
- the employees held their meetings and the vote as to whether to form an association at the Employer's facility. Additionally, they asked and received the Employer's permission to hold an advance vote;
- the Employer provided names of several law firms so the Association could obtain legal advice. I am not suggesting any impropriety on the part of the Association's counsel. The fact that the Employer provided names of law firms by itself would not have been enough to establish employer influence. But, in this case, unlike the situation in *Perimeter Transportation Limited*, IRC No. C190/90, the formation of the Association did not proceed independently from the Employer.

Individually, the facts outlined above would not necessarily establish Employer influence. However, taken in their totality they persuade me that the formation of the Association was influenced by the Employer.

In reaching this conclusion I considered the evidence given by Uddenberg to the effect that the Association was not employer influenced. In assessing that evidence I applied the test set out in *Faryna v. Charney*, [1952] 2 D.L.R. 354 (BCCA), and concluded that Uddenberg's evidence is not in harmony "with a preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...." (p. 357).

V. CONCLUSION

The Association's application is dismissed because the membership cards were defective and because the formation of the Association was influenced by the Employer.

LABOUR RELATIONS BOARD

MARIA GIARDINI  
VICE-CHAIR