

INDUSTRIAL RELATIONS COUNCIL

BETWEEN:

CINDY CHAN PIPER

(the "Complainant")

AND:

CITY OF VANCOUVER

(the "Employer")

AND:

VANCOUVER MUNICIPAL AND REGIONAL EMPLOYEES' UNION

(the "Union")

PANEL: RICHARD S. LONGPRE, Vice-Chairman

COUNSEL: Cindy Chan Piper representing herself
Gudrun Langolf representing the Union

DATE OF DECISION: December 23, 1992

CASE NO.: 12503

DECISION OF THE COUNCIL

I

This matter involves a complaint filed by Ms. Cindy Chan Piper pursuant to Section 7 of the Industrial Relations Act (the "Act"). Piper alleges the Union breached its duty of fair representation. At issue is the Union's decision to pursue a grievance on behalf of another employee, Ms. Monica Young, which Piper believes will adversely affect her own employment status. I have reviewed the submissions on file and have concluded a formal hearing into this complaint is not required at this time. Certain issues can be dismissed, while other issues should properly await the outcome of the arbitration hearing now underway.

II

BACKGROUND

The Employer posted three RS-1 Planner positions (hereinafter referred to as the "RS Planner" position). Mr. Bob Adair filled one position and Piper filled the second position. The third position was not filled. An employee, Mr. John Ho, grieved his "non-appointment" to the second RS Planner position, the position occupied by Piper. Ho was awarded the position and Piper was subsequently placed as a temporary, full time Planner 1 within the City Planning Department (hereinafter referred to as the "City Planner" position).

Young also applied, unsuccessfully, for one of the RS Planner positions. The Union filed a grievance on her behalf. The Union believed the Employer was obliged to fill all three of the RS Planner positions. The grievance was referred to arbitration and the hearing commenced on April 22, 1992.

Just prior to the arbitration hearing commencing, the Union became aware that the Employer was going to argue that the RS Planner position sought by Young was the City Planner position Piper had been transferred to fill. Apparently, the Employer had reorganized the Planning Department and the RS Planner position was now the same position as Piper's City Planner position.

At the opening of the arbitration hearing, the Union took the position that the two planner positions were distinct; however, if they were the same then a proper interpretation of the collective agreement required the Employer to compare the qualifications of Young and Piper before filling the position. Since Re: Hoogendorn and Greening Metal Products and Screening Equipment Co. (1976), 65 D.L.R. (2d) 641, anyone potentially affected by the outcome of an arbitration hearing be given notice of the proceedings. The hearing was adjourned so that Piper could be given notice.

The following day, Piper attended the hearing and requested an adjournment so as to properly prepare for the hearing. The adjournment was granted and the hearing was rescheduled for September 30, October 2 and 3, 1992. The hearing did not finish on those days and is scheduled to resume in January, 1993.

III

ARGUMENT

On September 14, 1992, Piper filed this Section 7 complaint. Piper argues that the Union acted in an arbitrary, discriminatory and bad faith manner. Piper relies upon the fact the Union failed to notify her that it was pursuing Young's grievance and that her employment might be affected. Further, the Union is seeking an interpretation of the collective agreement that would make awarding the Planner position a competition between Young and Piper. Notwithstanding, it made no attempt to ascertain Piper's qualifications prior to filing the grievance, nor did it inform Piper that her qualifications were being called into question.

Piper further believes that Young is a former employee with no bidding rights, while she has been a Union member, paying regular dues, for 22 months. In her view, the Union is pursuing a "marginal" grievance, which pits a former employee with no bidding rights against a current employee and dues paying member. In thirty years, this has never happened.

Piper argues that she should not be put to the expense of legal counsel to defend herself against the Union's conduct. She seeks an order that the Union withdraw the Young grievance and that she be compensated for legal expenses and time lost to date. If the hearing is to continue, Piper argues the Union should provide legal representation for her. Finally, Piper seeks return of her Union dues and damages for anxiety and emotional turmoil.

The Union disputes Piper's allegations. It says that Young was an employee of the Employer at the time of the initial RS Planner posting, and that she placed third out of thirty candidates. In its view, the Union was pursuing Young's right to fill the third posted position which the Employer chose not to fill. The Union says that as late as April 21, 1992, the day before the arbitration hearing commenced, the Employer continued to assert that Piper had not been assigned to the third RS Planner position.

Piper persuaded a number of Union members to sign a petition urging the Union to pay for Piper's legal costs for the arbitration hearing. The Union sought legal advice on the issue and submitted its counsel's advice with its reply to Piper's complaint. Union counsel notes that it remains the Union's position before the arbitrator that the Employer is obliged to fill all three RS Planner positions and that Piper, who is employed elsewhere, will not be affected by the arbitration hearing. If that is not the case, then the relative skills of the two Union members will have to be considered:

...It remains our view that there are three

legitimate vacancies and that neither Ms. Piper nor Mr. Adair will be affected. However, if the Employer has wrongfully manipulated the vacant positions and thereby denied Ms. Young a job opportunity, the Union must insist that Ms. Young be given one of the positions. If indeed the Employer has manipulated vacancies such that either incumbent received a position at Ms. Young's expense and in breach of the agreement, the Union must ensure that the terms of the collective agreement are honoured.

We repeat that the issue is not whether either incumbent is qualified to perform as a Planner I. The question is whether the grievor was qualified to perform as a Planner I and by virtue of her prior employment with the City ought to have been awarded one of the three vacant positions. Those issues may well require the parties to refer to the qualifications of the incumbents. We cannot litigate this issue in a vacuum. Nor can we anticipate all defences or arguments the City may raise and therefore cannot give any assurance beyond saying we do not intend, and have never intended, to attack the integrity or ability of either incumbent.

(at 2)

The Union's legal counsel also advises the Union that it was not appropriate for it to provide legal counsel to Piper in these circumstances:

...However, the Union is not obligated to retain independent legal counsel for the incumbent, or pay for the retaining of counsel. To do so would be to breach the Union's lawful obligation to the grievor under our labour laws. The Union cannot both prosecute a grievance and assist the Employer in defending it. The Employer will defend the grievance and thereby defend the interests of the incumbents as the applicants it has chosen for the jobs in question.

(at 2)

IV

ANALYSIS

The Board and the Council have long recognized that a union has the right to advance the interests of one employee, or one group of employees, over the interests of another employee or group. Before advancing a grievance on behalf of one employee, however, the Union must take reasonable steps to inform itself of the respective merits of each member's interests. The Supreme Court of Canada recently commented on this in Gendron v. Local 50057, Supply and Services Union of Public Service Alliance of Canada and Public Service Alliance of Canada, [1990] 4 W.W.R. 385, wherein Madame Justice L'Heureux-Dubé commented:

The principles set out in Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, clearly contemplate a balancing process. As is illustrated by the situation here, a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.

(at 409)

If the Union's grievance on Young's behalf affects Piper's employment status, Section 7 of the Act requires the Union to properly consider Piper's interests. On the other hand, if the arbitration award does not affect Piper's employment status, her complaint to the Council is without merit. Piper's complaint is premised on her assumption that the arbitration hearing will affect her employment status. The Union argues Piper's employment status should not be affected. In its enquiry, the arbitration board will have to decide whether the Employer is obliged to fill

all three RS Planner positions. The board will also have to decide whether the City Planner position, occupied by Piper, is in fact the third RS Planner position sought by Young's grievance. Furthermore, if the Employer advances Piper's argument that Young was in fact not qualified to post for the RS Planner position, the arbitrator will also have to decide that issue. If the arbitrator's conclusions on these, and perhaps other issues, result in the award not affecting Piper's employment status, the entire basis of her complaint falls. Accordingly, the disposition of a Section 7 complaint depends in large measure on the disposition of Young's grievance.

Piper also alleges the Union failed to consider her interests and her qualifications prior to filing its grievance on behalf of Young. Again, this allegation is predicated on the assumption Young's grievance will affect Piper's employment status. As well, the Union's defense to her complaint will no doubt include its assertion that the Employer has "wrongfully manipulated the vacant positions". Whether this has occurred will have to await the outcome of the arbitration.

Given the close connection, it is appropriate to await the outcome of the arbitration process before adjudicating Piper's complaint. The arbitration board has held several days of hearing and is scheduled to finish in January, 1993. No purpose would be served by this Panel conducting a formal hearing into the nature of the grievance and the conduct of the Union in processing the Young grievance until after the award is issued.

Piper argues that if the hearing is to proceed the Union should be required to pay for her to have independent legal counsel. Since the hearing is to proceed, I will address that issue.

The Council's jurisdiction to grant Piper's request is set out in Sections 8(4) and 28(1) of the Act. While our remedial authority is broad, it is predicated on the Council first finding that there has been a breach of the Act by the Union. Absent a decision that the Union has breached Section 7 of the Act, the Council cannot issue a remedial order against the Union.

Section 29(1) permits the Council to impose certain conditions where the Council "makes or may make a decision". There are a number of reasons, however, why it is not appropriate in this case to exercise my discretion and to award legal costs prior to finding that the Union has breached the Act.

First, as noted earlier, the Union has a right to advance the interests of one employee over the interests of another employee. As a general rule, a union should not be required to pay legal

costs for deciding to pursue the interests of one employee over another where the underlying motive has not been found to be objectionable; that is, a breach of the Act.

Second, Section 29(1) is normally used where it is necessary to maintain the respective rights of the parties until a final adjudication can be made by the Council. In this case, if Piper decides to pursue her Section 7 complaint at the conclusion of the arbitration hearing and if it is found the Union has breached Section 7 of the Act, the Council has the authority to provide her with an appropriate remedy at that time.

Finally, the Board and now the Council have exercised their discretion under Section 29(1) and imposed conditions on parties prior to a finding that the Act has been breached in only the most "exceptional circumstances" (see Nickolai Manufacturing Inc., BCLRB No. 93/87). This case does not give rise to exceptional circumstances. The Union is grieving the Employer's interpretation and application of the promotion provisions of the collective agreement. The Employer is defending its interpretation of the collective agreement. Piper is entitled to be present at the hearing pursuant to the Hoogendorn decision that an employee who may be directly affected by the outcome of a proceeding is entitled to attend the proceeding. However, her interests are identical to the Employer's and will be advanced as part of its case before the arbitration board.

IV

CONCLUSION

In summary, it is not appropriate to pursue Piper's application at this time. I would ask Piper to write to the Council after the arbitration award is issued and to indicate whether she wishes to pursue her complaint. If she does wish to pursue her complaint, I would ask that she file a further submission and a copy of the award. The other parties will then be given an opportunity to respond.

INDUSTRIAL RELATIONS COUNCIL

RICHARD S. LONGPRE
VICE-CHAIRMAN