



**ORDER NO. 1467**

**CASE NO. 241/09/LRA**

**IN THE MATTER OF: *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF: An Application by**

**Manitoba Association of Health Care Professionals,**

**Applicant,**

**- and -**

**BURNTWOOD REGIONAL HEALTH AUTHORITY,**

**Employer/Respondent.**

**BEFORE: W.D. Hamilton, Chairperson.**

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On August 14, 2009, the Applicant filed an Application (the "Application") seeking various remedies for an alleged unfair labour practice, contrary to Section 6 of *The Labour Relations Act* (the "Act"). In particular, the Applicant alleges that on or about March 12, 2007, the Respondent hired two Midwife Instructors, entered into direct negotiations with them, and executed agreements detailing the terms and conditions of their employment without the participation of the Applicant. The Applicant further says that the Respondent proceeded to second the two instructors to a different employer in Norway House pursuant to special agreements reached between the University College of the North, the Government of Canada and the Respondent. These secondment agreements were negotiated and executed without consultation or negotiation with the Applicant. The Applicant says that the actions of the Respondent interfered with the Applicant's right to represent employees, contrary to Section 6(1) of the *Act*.
2. In the Application, the Union alleges that it only discovered some details of the arrangements recited in paragraph 1 on or about November 26, 2008, following which the Applicant proceeded to investigate the matter more thoroughly. The Applicant alleges that after waiting seven months, without receipt of the requested information from the Respondent, further information regarding the arrangements involving the two employees was received on or about May 13, 2009. . . . /2

3. On September 4, 2009, following an extension of time, the Respondent, through Counsel, filed its Reply disputing the Application on various grounds and claiming that it ought to be dismissed without a hearing. The Respondent submits that the Applicant became aware of the facts and matters relevant to the Application prior to November of 2008, and therefore failed to file the Application for a period of over nine months. The Respondent submits that this constitutes undue delay. Second, the Respondent submits that the matters raised in the Application ought to be dealt with pursuant to the grievance and arbitration procedure of the 2006-2010 Collective Agreement between the Applicant and the Respondent (the "Agreement"). Finally, the Respondent submits that the Applicant failed to establish a *prima facie* case.
4. Based on the material filed by the parties, the Board is satisfied of the following material facts:
  - (a) In July of 2006 the Respondent and the University College of the North (the "UCN") posted two vacancies for Instructor Midwives located at Norway House, Manitoba. These vacancies were to be filled by the Respondent.
  - (b) In September and November of 2006 respectively, the Respondent awarded the two Midwife Instructors positions to Ms. Darlene Birch ("Birch") and Ms. Meagan Moon ("Moon"). On September 19, 2006, the Respondent, Birch and UCN entered into a Secondment Agreement attached as Appendix 2 to the Respondent's Reply (the "Birch Agreement"). On November 23, 2006, the Respondent, Moon and UCN entered into a Secondment Agreement (attached as Appendix 3 to the Respondent's Reply the "Moon Agreement").
  - (c) The Birch and Moon Agreements second Birch and Moon to UCN for varying terms, both of which terms will expire on June 30, 2010. The Birch and Moon Agreements provided that the Respondent would continue to pay the participating employees their normal salaries and benefits as Instructors, as if they continued to work for the Respondent. Further, both the Birch and Moon Agreements contained the following the provision:

"During the term of this Secondment Agreement, earned and accumulated service, vacation, sick leave, family related leave, statutory holidays and other entitlements normally associated with the Participant's employment will be extended in a manner consistent with the Collective Agreement between the Manitoba Association of Health Care Professionals"

- (d) In paragraph 5(c) of its Reply, the Respondent asserts (and the Board accepts) that at all material times, the Respondent deducted union dues from Birch and Moon and remitted these dues to the Applicant and that the Respondent also listed Birch and Moon on all seniority lists applicable to the Applicant.
- (e) The classification of Midwife falls within the ambit of the Agreement.
- (f) On or about November 26, 2008, the Applicant advised the Respondent of its concerns regarding the Birch and Moon Agreements and the parties, at varying times, had some discussions on these matters thereafter.
- (g) On or about August 13, 2009, the Applicant filed a grievance (the “Grievance”) pursuant to the Agreement (Appendix 5 to the Reply of the Respondent). The Grievance alleges that the Respondent created the classification of Midwife Instructor and filled positions in that classification without proper consultation with the Applicant. The Applicant grieves that it has not had the opportunity to review a job description and/or to negotiate a proper rate of pay for this classification, all of which violated, *inter alia*, Articles 1, 3, 4.02 and 5 of the Agreement, as well as Memorandum of Understanding No. 20. As to remedies, the Applicant claims that the Respondent provide the Applicant with a proper job description for Midwife Instructor; that the Respondent negotiate a rate of pay with the Applicant for Midwife Instructor and provide retroactive compensation, if required, to the incumbents in this classification and, finally, that Respondent consult with the Applicant on the scope and requirements of this classification and any outside agreement pertaining to the work to be done by the incumbents thereof.
- (h) The Agreement contains the following provisions:
- Article 104 prescribes that no employee can enter into any separate agreement which conflicts with the provisions of the Agreement.
  - Article 3.02(a) states that if the Respondent creates a new classification then it is to notify the Applicant of the job description and the wage rate established for the new classification, as well as the effect on employees. Within the time limits prescribed by Article 3.02, the Applicant has the right to object to the wage rate for a new classification established by the Respondent and, where such an objection is filed, “... negotiations or the Arbitration Procedure set out in Article 20 must be utilized to resolve the difference within sixty (60) calendar days following the Employer notifying the Association in (a) above”.

5. In the context of the facts recited in paragraph 4, Board has determined the following:

- (a) An oral hearing is not necessary as this matter can be determined by a review of the written material filed by the parties.
- (b) The Board is satisfied that this matter can be disposed of under Section 140(7) of the *Act*, which provides, in part, as follows:  
“The Board may refuse to hear or continue to hear any matter which it considers can be adequately determined under the provisions of a collective agreement for final settlement of disputes between the parties ...”
- (c) Articles 19 and 20 of the Agreement contain a grievance and arbitration procedure which provides for final and binding resolution of disputes between the Applicant and the Respondent concerning the interpretation, application, or alleged violation of the Agreement.
- (d) The matters raised in the Application regarding the Respondent’s decision to post, fill and then enter into the Secondment Agreements for Midwife Instructors can be raised through the grievance and arbitration procedure under the Agreement and, in fact, the Applicant did file the Grievance pertaining to Midwife Instructors (see paragraph 4(g), *supra*) prior to the filing of the Application with the Board.
- (e) It is not the role of the Board to function as a surrogate arbitrator in respect of a matter that can be adequately determined under the provisions of a collective agreement for the final settlement of disputes between the parties.
- (f) Based on the foregoing, the Board is satisfied that it ought to refuse to hear the Application because the matters raised therein can be adequately determined under the provisions of the Agreement. Having made this determination, it is not necessary for the Board to address the other grounds upon which the Respondent disputes the Application.

Accordingly, the matter ought to be referred to the arbitration process as defined in the Agreement, pursuant to Section 140(7) of the *Act*.

**T H E R E F O R E**

Pursuant to Section 140(7) of *The Labour Relations Act*, the Manitoba Labour Board **DECLINES** to hear the Application filed on August 14, 2009 by the Applicant and **DEFERS** the matters raised to the grievance and arbitration provisions of the collective agreement between the parties.

**DATED** at **WINNIPEG**, Manitoba, this **16<sup>th</sup>** day of **September, 2009** and signed on behalf of the Manitoba Labour Board by

“original signed by”

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**W.D. Hamilton, Chairperson**

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**NOTES**

**REQUEST FOR REVIEW BY MANITOBA LABOUR BOARD OF A DECISION, ORDER, ETC., OF THE BOARD**

- a. Subsection 143(3) of *The Labour Relations Act* of Manitoba, C.C.S.M. Chapter L10, provides:

**Board review.**

**143(3)** The board or any panel of the board may review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, and may rehear any matter if it considers it advisable to do so.

- b. Request for review by the board of its decision, order etc. must be made by application to the board within ten days of the making of the board decision, order, etc.

Section 17 of the *Manitoba Labour Board Rules of Procedure* (being *Manitoba Regulation 184/87R*, published in the *Manitoba Gazette Part II*) provides:

**Application for review of board decision**

**17(1)** Where an application is made to the board under subsection 143(3) of the Act, to review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, the applicant, in addition to the material required to be filed under section 2, shall

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- (a) file a concise statement of any new evidence with such evidence being verified by statutory declaration;
- (b) file a statement explaining when and how the new evidence became available and the applicant's reasons for believing that the new evidence so changes the situation as to call for a different decision, order, direction, declaration or ruling; and
- (c) in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision, order direction, declaration or ruling.

**Time limit for review**

**17(2)** Except by leave of the board, no application under subsection 143(3) of the Act for a review of any decision, order, direction, declaration or ruling made by the board shall be reviewed by the board after more than 10 days have elapsed following the date of the making of the decision, order, direction, declaration or ruling.

**JUDICIAL REVIEW OF FINAL DECISION OF THE MANITOBA LABOUR BOARD**

Subsection 143(6) of *The Labour Relations Act* of Manitoba provides:

**Judicial review of final decision**

**143(6)** Notwithstanding any other Act, a final decision, order, direction, declaration or ruling, but not a procedural, interim or any other decision, order, direction, declaration or ruling, of the board or a panel of the board may be reviewed by a court of competent jurisdiction solely by reason that the board or the panel failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, if

- (a) the applicant for review has first requested the board or the panel, as the case may be, to review its decision under subsection (3), and the board or the panel has decided not to undertake a review, or has undertaken a review and rendered a decision thereon, or has failed to dispose finally of the request to review within 90 days after the date on which it was made;

- (b) the board has been served with notice of the application and has been made a party to the proceeding; and
- (c) no more than 30 days have elapsed from, as the case may be, the decision by the board or panel not to undertake a review, or the date of the decision rendered by the board or panel on the review, or the expiration of the 90 day period referred to in clause (a).

### **REASONS FOR DECISION**

It is the policy of the Manitoba Labour Board that, where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed, that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.