BRITISH COLUMBIA LABOUR RELATIONS BOARD

SCOTT GORDON

("Gordon")

-and-

HOTEL, RESTAURANT & CULINARY EMPLOYEES & BARTENDERS UNION, LOCAL 40

(the "Union")

-and-

COAST HOTELS LIMITED

(the "Employer")

PANEL:	Jan O'Brien, Vice-Chair
APPEARANCES:	Blair Franko, for Gordon Terry Honcharuk, for the Union Kevin P. O'Neill, for the Employer
CASE NO.:	49269
DATE OF DECISION:	April 20, 2004

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 Gordon applies under Section 12 of the *Labour Relations Code* (the "Code") alleging that the Union breached the duty of fair representation when it withdrew his grievance seeking an exemption from the Employer's mandatory Hepatitis A vaccination program. This matter was initially before a different Vice-Chair, but was reassigned to me due to unavailability.

2 After reviewing the parties' submissions and attached documents, I am able to decide this matter without an oral hearing. Where there are material facts in dispute, I have accepted Gordon's version for purposes of this decision. In accordance with the Board's usual practice, I have not considered any of the unsolicited submissions from Gordon and the Employer that were received after Gordon's reply to the Union's and Employer's responses to his complaint.

II. BACKGROUND

3 Gordon was a full-time waiter with six years' seniority in the Employer's restaurant at the Coast Capri Hotel in Kelowna (the "Capri") when a mandatory Hepatitis A vaccination program was introduced in 2002.

4 The Union sent business agents a memo on June 24, 2002 about the Employer's plans to start the mandatory Hepatitis A vaccination program for all food handlers in the Employer's hotels in British Columbia.

5 The memo stated that the Union's legal advice was that the Employer could order employees to get the vaccination with two exceptions: legitimate religious objections or medical reasons. The memo says "employees would be required to show a *bona fide* reason for not receiving the vaccination, i.e. a doctor's note".

6 The Union states that its memo was the result of legal research that turned up a line of arbitration and Court decisions dealing with mandatory influenza immunization programs "which holds that employers were within the ambit of their usual management rights to initiate mandatory vaccination programs provided that other safeguards to employees' rights were in place": *Kotsopoulos*, [2002] O.J. No. 715 and *Carewest,* 104 L.A.C. (4th) 240. The Union notes that in *Carewest,* the arbitration board concluded that while it was doubtful that the *Charter of Rights and Freedoms* applied to the employer's mandatory influenza immunization program, even if it applied, the program did not infringe on employees' *Charter* rights. The arbitration board took into consideration that the employer had recognized legitimate medical and religious exemptions.

7 As a result of its legal research, the Union states it concluded that the Employer was entitled to implement a mandatory Hepatitis A inoculation program and adopted an

approach of ensuring that its members' rights were properly taken into account and/or protected.

8 The Capri issued a memo to employees on July 12, 2002 setting out the details of the vaccination program:

> 1. The program is mandatory... .
>
> 2. All employees must be vaccinated by September 1, 2002.
>
> 3. Those not having proof of their vaccination by September 1st will not be rescheduled for work.
>
> 4. The company will pay for any such vaccinations if you do not qualify for a free vaccine.
>
> * * *
>
> Hepatitis A is a definite concern in the workplace and is taken very seriously. This Coast Hotel's initiative has been discussed with Local 40, who are in general agreement with the program and its benefits to employees and guests alike.
>
> Any of you who have an issue with this program are encouraged to contact your Shop Steward or Business Representative to discuss.

9 The Employer attached some general information regarding Hepatitis A from the Ministry of Health and advised employees to consult their physicians if they were in doubt about how the inoculation might affect their health.

10 Information from the provincial Ministry of Health indicates that Hepatitis A is a virus that affects the liver causing fever, vomiting, a tired feeling and yellowing of the skin and eyeballs. According to the Ministry of Health:

> The symptoms may last from 1 to 2 weeks to several months. Most people recover completely and then are immune to re-infection. Death can occur, but is rare. Illness can be more severe in people who have hepatitis C.
>
> * * *
>
> Reactions to the vaccine tend to be very mild and short-lasting. Reactions may include soreness, redness and swelling at the injection site. A person may have a headache, fever, nausea and lack of appetite. ...

The Ministry of Health states that as with any vaccine, there is a possibility of a shock-like allergic (anaphylaxis) reaction. It advises individuals to stay in the clinic for at least 15 minutes after receiving any inoculation.

11 The Employer states it was reacting to a Hepatitis A infection in early 2002 at a Vancouver food store which resulted in several customers becoming ill and 6,400

members of the public receiving shots of immune serum globulin to prevent illness. In May 2002, the Vancouver Coastal Health Authority in cooperation with restaurant and food services associations announced a Hepatitis A vaccination program for food service workers in the region.

12 Gordon did not get vaccinated and on September 1, 2002 the Employer stopped scheduling him for shifts at the restaurant. On September 10, 2002, Gordon gave the Employer a note from his family doctor stating Gordon has "concerns re Hep A immunization, and should not be forced to get it".

13 The Union grieved in September stating: "According to the Hep A memo employees who have a doctor's note or religious reason will be excused from taking the Hep A shot. Therefore Scott has a doctor's note and should be paid for all lost wages, and hours put toward his seniority from Sept. 1st, 2002 to date according to his seniority".

14 Gordon sent the Union a letter on October 22, 2002 setting out his reasons for refusing to be inoculated against Hepatitis A. It states in part:

> ...An inoculation for hepatitis A is a toxic compound that does not eliminate the risk of contracting the virus. Exposure to the inoculation may also predispose an individual to long-term health complications. For these reasons the Coast hotel is negligent for forcing their employees to comply with this initiative and denying those individuals the freedom to choose whether or not to expose themselves to a potential health risk.
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> The Hepatitis A virus is not a life threatening disease. The symptoms of hep A are similar to the flu and good personal hygienic practices will greatly reduce the risk of contracting this virus. If an individual does contract the virus their immune system will produce antibodies to combat the infection. It is unreasonable that anyone should be forced to have an injection for an illness that can be overcome by natural immune response.
>
> Like other vaccinations, the hep A shot will not eliminate the risk of contracting the virus and could make a person ill. Aside from the possibility of a severe reaction to the shot, a person may experience long-term health problems from exposure to this inoculation. Science has documented a direct correlation with childhood inoculation practices and the rise in the rate of some types of diabetes. An individual must have the right to make decisions concerning their health. The Coast Hotel does not have the right to make a decision for an employee that could have a negative impact on a person's health.
>
> I do not agree with the Hep A initiative because it does not address the possibility of health risk and or the rights of employees. I am being persecuted for not complying with this outrageous demand without any consideration of my opinion or personal

> health. The Coast Hotel mandatory inoculation initiative infringes on my human rights, which, includes my right to be afforded the means to support myself.

15 The Employer denied the grievance because Gordon's note did not state any *bona fide* medical reason for not receiving the vaccination. The Union pursued the grievance through to Step 2 then referred it to Union legal counsel Terry Honcharuk.

16 In a letter dated December 16, 2002, Honcharuk told Gordon that the Union consulted extensively with the Employer and was generally in agreement with the plan to implement a Hepatitis A vaccination program. He said the Union believed that the Employer "had a genuine interest in protecting both its employees and the public from potential health hazards" and that the program would be implemented on "a fair and reasonable basis" with the inclusion of the religious and medical exemptions.

17 Honcharuk said he had discussed with the Employer ways to accommodate Gordon. Honcharuk then outlined three options. Gordon could receive the inoculation and return to his previous job without compensation for lost wages; he could refuse the inoculation and possibly return to a job that did not involve handling food with an adjustment in his seniority and wages; or he could end his employment at the Capri as the Employer considered his continued refusal to be inoculated as a wish to sever his employment. Honcharuk told Gordon that the Union would not pursue his grievance:

> You, of course, objected to receiving the inoculation on the basis of a medical excuse. However, the only medical note that you submitted in support of your objection ... did not put forward any medical reason, valid or otherwise, for your refusing to receive the inoculation.
>
> The end result is that you have been held out of service by the hotel as you have not advanced a legitimate reason to refuse participation in the program. Based on the evidence to date, it is the Union's opinion that your grievance lacks sufficient merit to proceed.

18 Gordon sent a letter to the Employer on January 3, 2003 which for the most part repeated the objections to the inoculation program that he had outlined in his October letter to the Union. He continued to refuse to have the inoculation. He added that the Canadian Centre for Occupational Health and Safety had found "little evidence of risk for hepatitis A infections in the workplace". Gordon offered to be tested for Hepatitis A on a monthly basis to ensure that he was not a carrier.

19 The Union withdrew Gordon's grievance on January 8, 2003. The Board received Gordon's Section 12 complaint on April 24, 2003.

III. POSITIONS OF THE PARTIES

20 Gordon argues that the Union acted in an arbitrary manner by agreeing to the mandatory immunization program without consulting employees. He asserts that the Union conspired with the Employer by agreeing not to grieve when an employee refused to be inoculated. Gordon argues that the mandatory inoculation program is contrary to Article 17.05 of the collective agreement which prohibits individual employees from entering into contracts with the Employer concerning conditions of employment.

21 He further argues that the Union acted in an arbitrary way by agreeing to exempt employees from the mandatory inoculation program on only two grounds – religious and medical. He asserts that he believed the doctor's note he provided was sufficient and that it was not made clear that he had to have a *bona fide* medical reason to refuse the inoculation. He contends that his *Charter* right to life, liberty and security of person has been breached.

22 He submits that the "work now, grieve later" principle was violated when the Employer stopped scheduling work shifts for him after he refused to get inoculated. He contends that the Union handled his grievance in an off-handed or perfunctory manner.

23 Gordon argues that his grievance was not arbitrable and that the Union acted in bad faith because it intentionally deceived him by leading him to believe that his grievance was arbitrable when there were no collective agreement provisions dealing with mandatory immunization.

24 In his submission, Gordon provides documents extracted from the Internet to support his opposition to the mandatory Hepatitis A inoculation. He also now argues that he has a religious objection to the use of aborted fetal tissue in the production of vaccine as he is pro-life. I have not considered the Internet documents or the religious objection in reaching my conclusion because Gordon did not raise these issues with the Union before it reached its decision in January 2003 to withdraw his grievance.

25 The Union submits that its agreement to the inoculation program was reasonable, and Gordon failed to provide a medical reason upon which the Union could advance his position to opt out of the program. Gordon has not established that the Union breached Section 12 of the Code.

26 The Employer submits that its mandatory vaccination program was both reasonable and necessary after it considered the consequences of a Hepatitis A outbreak at another food service establishment earlier in 2002. Thousands of members of the public required inoculations to prevent the illness, several employees became ill, and the establishment suffered negative publicity and economic consequences. The Employer contends that Gordon was not treated any differently than other employees and was given ample notice of the vaccination program and the job repercussions of not getting an inoculation.

IV. ANALYSIS AND DECISION

27 Section 12 prohibits a union from acting in a manner that is arbitrary, discriminatory or in bad faith. In the context of Section 12, a union's conduct is arbitrary when it acts in a perfunctory, superficial or indifferent way in the course of handling an employee's problem. To support a charge of arbitrary conduct, a complainant must provide evidence that the union's conduct was reckless or indifferent to the interests of the individual. Discriminatory conduct occurs where the union does not treat members the same due to irrelevant factors such as the member's race, sex, religion or disability which are contrary to the *Human Rights Code*. Bad faith means the union has made a decision based on ill will, hostility or revenge toward an individual: *Rayonier Canada (B.C.) Ltd*., BCLRB No. 40/75, [1975] 2 Can LRBR 196.

28 In *James W.D. Judd*, BCLRB No. B63/2003, 91 CLRBR (2d) 33, the Board reviewed a union's duty under Section 12:

> A union's exclusive bargaining agency gives it the right to make all decisions concerning a collective agreement on behalf of the employees. Matters such as whether to proceed with a grievance, whether to settle or drop the grievance, and whether to take the grievance to arbitration are all decisions for the union to make. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees.
>
> Section 12 prohibits a union from representing an employee in the bargaining unit in a manner that is arbitrary, discriminatory, or in bad faith. To meet its duty, the union must ensure it is aware of the relevant information when making a decision concerning an employee's representation. Its decision must be based on reasoned judgment and not on improper factors. Lastly, it must carry out an employee's representation in a manner that does not show blatant or reckless disregard for the employee's interests. If a union does these things, it has not violated Section 12. The fact that a complainant may disagree with a union's reasons for dropping or settling a grievance does not demonstrate a failure to consider the relevant circumstances, nor blatant or reckless disregard. (paras. 113-114)

29 Gordon raises a wide range of arguments to support his allegation that the Union breached Section 12 of the Code. After considering Gordon's complaint, the submissions of the Union and the Employer, and Gordon's final reply, I have concluded that Gordon's arguments do not come close to establishing a violation of Section 12. I will address the most salient aspects of Gordon's arguments below.

30 I turn first to Gordon's allegation that the Union acted in bad faith. Nothing in the facts alleged by Gordon would reasonably support an inference that the Union deliberately deceived him or otherwise acted in bad faith. I add that a grievance is not inarbitrable merely because the employer rule or requirement to which it refers is not contained in the collective agreement. I reject Gordon's argument that the Union acted in bad faith in the handling of his grievance.

31 There are several aspects to Gordon's allegation that the Union acted in an arbitrary manner. To begin with, I find that Gordon has misunderstood Article 17.05. I agree with the Union and the Employer that the purpose of the clause is to prevent individual employees from reaching agreements with the Employer. It does not prohibit the Union from reaching agreement with the Employer about a workplace rule.

32 Next, Gordon complains that he should have been allowed to work while his grievance was being processed. He received six weeks' notice of the new requirement for a Hepatitis A inoculation yet he has provided no evidence that he raised his concerns about immunization with the Union or Employer during that time. In fact, he did not provide the Employer with his doctor's note until 10 days after the deadline for getting the inoculation. Gordon's argument concerning the "work now, grieve later" principle misconstrues the nature of that principle. It is not a principle that precludes an employer from taking action until a grievance is heard; in fact, it is precisely the opposite.

33 Gordon alleges that the Union and the Employer engaged in a conspiracy to deny any grievances from employees seeking exemptions from the mandatory immunization program. I find that this is a bald allegation that is not supported by any evidence.

34 Gordon also suggests that the Union discussions with the Employer about the mandatory inoculation program were improper because employees were not consulted. As the exclusive bargaining agent, part of the Union's job in representing employees is to engage in discussions with the Employer regarding workplace issues: see, for instance, Section 53 of the Code. While consultation with employees over changes in working conditions such as occurred at the Capri is encouraged, it is not necessarily a requirement under the Code. As long as the Union does not act in a way that is arbitrary, discriminatory or in bad faith the duty of fair representation is not breached. In this case, the Union satisfied itself that the Employer's actions were reasonable and legally permissible, and it ensured that employees were permitted the exceptions available to them by law. In the circumstances, I do not find that the Union's agreement to the program or its failure to consult employees beforehand supports a breach of Section 12.

35 I will now consider whether the Union handled Gordon's grievance in a perfunctory manner. At the Union's request Gordon provided a letter outlining his reasons for refusing to be inoculated. This letter argues that the Employer's justification for the mandatory Hepatitis A immunization program is faulty and raises concerns about an adverse reaction to the inoculation. Gordon does not link his concerns to a specific

medical reason for exempting him from the immunization program. He states that he does not agree with the Hepatitis A immunization program because it "does not address the possibility of health risk and or the rights of employees". I am not persuaded that the Union acted in an off-handed or perfunctory manner in rejecting Gordon's grievance. The Union reviewed Gordon's reasons for opting out of the program before concluding that he failed to advance "a legitimate reason to refuse participation in the program".

36 Gordon complains that he did not know that he had to provide a *bona fide* medical reason and that he believed the doctor's note he provided was sufficient. I accept that Gordon may have initially believed his doctor's note was enough to provide an exemption from the immunization program. However, once the Employer rejected the note and the Union made it clear that he needed to provide a *bona fide* medical reason for refusing to be inoculated, I cannot accept that he would be under any illusion that the note was adequate. While Gordon now says his "concerns" were a matter of doctor-patient confidentiality, I find the Union was reasonable in its belief that the Employer was entitled to insist on a specific medical reason before exempting employees from the inoculation program. The Union was also reasonable in its belief that this required a medical reason particular to the employee in question, not just a concern on the employee's part about effects of the inoculation that were common to all employees.

37 I am not persuaded that the Union's conduct was reckless or indifferent to Gordon's interests. When faced with Gordon's strongly held refusal to be immunized, the Union then tried to find a way of accommodating Gordon. He was given the option of potentially returning to work in a job that did not involve food handling. However, he made no attempt to explore the possibility of alternative work and, in effect, summarily rejected the option.

38 In summary, I am satisfied that the Union acted reasonably in its agreement to the inoculation program and its treatment of Gordon's grievance. When I consider the Union's conduct as a whole, I find that there is no basis to conclude that the Union acted in an arbitrary, discriminatory or bad faith manner in the context of Section 12 in its handling of Gordon's grievance.

V. CONCLUSION

39 Gordon's complaint under Section 12 of the Code is dismissed.

LABOUR RELATIONS BOARD

"JAN O'BRIEN"

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VICE-CHAIR