BRITISH COLUMBIA LABOUR RELATIONS BOARD

EMERGENCY AND HEALTH SERVICES COMMISSION
(BRITISH COLUMBIA AMBULANCE SERVICE)

(the "Employer")

-and-

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA -
CUPE LOCAL 873

("CUPE")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

("BCGEU")

PANEL:	Michael J. Adam, Vice-Chair
APPEARANCES:	Karen L.M. Carteri and N. David McInnes, for the Employer Patrick Dickie, for CUPE Kenneth R. Curry, for BCGEU
CASE NO.:	59035
DATE OF DECISION:	October 30, 2009

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 CUPE requests that I recuse myself from hearing all outstanding applications involving the parties. In the alternative, CUPE requests that I recuse myself from hearing the Employer's application dated July 21, 2009 (the "Scheduling Application"). CUPE alleges a reasonable apprehension of bias as the basis for its recusal application.

2 CUPE submits that a reasonable apprehension of bias arises from two aspects of a decision I issued on September 25, 2009, BCLRB No. B194/2009 (the "Reasons Decision"), in which I gave reasons for an April 17, 2009 essential services order (the "2009 ESO").

3 First, CUPE submits that the Reasons Decision exhibits prejudgment of the Scheduling Application, which is presently outstanding before me. Second, it submits that a reasonable apprehension of bias arises from the explanation given in the Reasons Decision for the delay in issuing reasons for the 2009 ESO.

4 CUPE notes that, on April 17, 2009, in BCLRB No. B85/2009, I issued the 2009 ESO as a "bottom line" decision, with reasons to follow if requested by a party. CUPE requested reasons, and they were given on September 25, 2009, in the Reasons Decision. The Reasons Decision was based on the facts and submissions made during the seven days of hearing held in March and April 2009. In the interim, the labour dispute has been ongoing, and the parties have brought a number of applications to amend or vary the 2009 ESO. I have decided some of those applications while others have been settled by the parties or have been held in abeyance. There are a number of applications which remain outstanding before me, including the Scheduling Application.

5 On July 21, 2009, the Employer filed the Scheduling Application. As CUPE notes, the parties have exchanged written submissions on the Scheduling Application, and that application, together with certain other related applications, was set down for hearing beginning September 10, 2009. Those proceedings were adjourned pending the production of certain documents, and the parties subsequently engaged in mediation of the issues. The Reasons Decision was issued while the mediation process was ongoing. The parties continued to engage in mediation until recently, when mediation broke off. The hearing of the Scheduling Application and related applications has not yet resumed.

6 The details of CUPE's arguments with respect to how a reasonable apprehension of bias is alleged to arise from two aspects of the Reasons Decision, and the Employer's response to those arguments, will be discussed below. The Employer opposes the recusal application. BCGEU takes no position on it.

7 CUPE submits that its recusal application can be decided on the basis of written submissions and requests that the application be decided as soon as possible. I agree

that the application can be decided on the basis of the written submissions, and I have endeavoured to provide this decision as quickly as possible.

II. ANALYSIS AND DECISION

8 In deciding this application, I am guided by the legal principles and case authorities cited by the parties in their submissions to me, as well as by the jurisprudence to similar effect discussed in paragraphs 10-12 of BCLRB No. B129/2009, a decision I issued some months ago concerning an earlier recusal application brought by CUPE.

9 In BCLRB No. B129/2009, I quoted Goepel J. in *Makowsky v. John Doe*, 2007 BCSC 1231 (affirmed 2008 BCCA 112), who noted (at paragraph 17) that, faced with an application of this kind, "the natural tendency is to step aside" and allow another adjudicator to handle the case. However, Goepel J. continued, such a course of action "conflicts with the judge's duty to hear cases to which he is assigned" (*ibid.*).

10 Goepel J. went on to quote Groberman J. (as he then was) in *De Cotiis v. De Cotiis*, 2004 BCSC 117, where he stated at paragraph 11:

> ...it is my duty to determine whether or not I ought to recuse myself, not by simply agreeing to refrain from hearing the matter because an objection is raised, but by reference to established legal principles.

11 As CUPE notes, the issue is not whether I am actually biased against CUPE, which is not alleged. Rather, it is whether the circumstances relied on by CUPE give rise to a reasonable apprehension of bias: *Refrigeration Workers Union, Local 516 v. Labour Relations Board of British Columbia* (B.C.C.A.) (1986), 27 D.L.R. (4th) 676. The legal principles that courts have developed for determining whether a reasonable apprehension of bias exists in the judicial context are also applicable in the context of administrative tribunals such as the Board: *Construction and Specialized Workers' Union, Local 1611 v. British Columbia (Labour Relations Board)*, 2009 BCSC 701.

12 The leading authority on the concept of reasonable apprehension of bias is *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, and the principles were summarized as follows by our Court of Appeal in *Taylor Ventures Ltd. (Trustee of) v. Taylor* (2005), 49 B.C.L.R. (4th) 134, at paragraph 7:

> (i) a judge's impartiality is presumed;
>
> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> (iii) the criterion for disqualification is the reasonable apprehension of bias;
>
> (iv) the question is what would an informed, reasonable and right minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

> (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is *more likely than not that the judge*, whether consciously or unconsciously, *would not decide fairly*;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific. (emphasis in the original)

13 Accordingly, these are the legal principles I must apply in deciding whether I am disqualified on the basis of a reasonable apprehension of bias from hearing either all outstanding applications involving these parties or alternatively, the Scheduling Application.

14 As noted earlier, CUPE relies on two aspects of the Reasons Decision in alleging a reasonable apprehension of bias. I will address each aspect in turn, beginning with the second aspect, which I believe can be dealt with more briefly.

15 CUPE submits that paragraphs 19-23 of the Reasons Decision, which explains the delay in issuing written reasons for the 2009 ESO, "clearly demonstrates that the panel made a decision to withhold the issuance of the ESO Decision". CUPE further submits that the "one identified reason for doing so was a concern that the issuance of the decision might distract the parties" and that this is not "an appropriate justification for withholding the issuance of a decision".

16 CUPE submits that "reasons for judgment are not something a panel can withhold" for any reason, and that my having done so in this case "unfortunately leads to a reasonable apprehension that the panel was unjustifiably preventing the Union from exercising its right of appeal", and that "this constitutes a reasonable apprehension of bias".

17 In my view, an informed, reasonable and right-minded person, reviewing the matter realistically and practically, would not conclude on the basis of paragraphs 19-23 that I "withheld" my reasons for the 2009 ESO so as to prevent or delay CUPE from exercising its right of appeal.

18 With regard to whether withholding reasons would *prevent* CUPE from exercising its right of appeal, CUPE's ability to apply under Section 141 for leave and reconsideration of the 2009 ESO is unaffected by the delay in issuing reasons for the "bottom line" decision. The time limit for an application runs from the date the reasons were issued, not the date of the "bottom line" decision.

19 To the extent that CUPE's complaint is that the delay in issuing reasons has delayed its ability to seek reconsideration and thus forced it to continue to prosecute its strike under an order that is inconsistent with the law and policy of the Code, I find that this complaint does not provide a basis for a reasonable apprehension of bias. There is always some period of time that elapses between the publication of a "bottom line" decision and the publication of reasons. In the present case, while the period of time may appear longer than usual, it must be considered in context. Essential service

orders are interim rather than final in nature: under Section 72(9) they can be amended, varied or revoked without the need to invoke the Board's reconsideration powers. Since reconsideration is rarely sought (given the parties' ability to seek to have the order amended, varied or revoked under Section 72(9)), reasons are rarely provided.

20 Here, I endeavoured to provide reasons as quickly as possible but, due to various circumstances, a period of several months elapsed before those reasons were provided. The delay must be seen in the context of the nature of essential service orders generally, as well as the evolving circumstances of this dispute in particular, in which I was adjudicating and mediating other applications brought by these parties, and was uncertain whether those applications would render the need for reasons for the 2009 ESO moot. As well, at the relevant time I was also performing adjudicative functions on a number of other files. Given these circumstances, I find a reasonable apprehension of bias does not arise from the delay in providing reasons for the 2009 ESO.

21 To the extent CUPE argues that paragraphs 19-23 demonstrate that I "withheld" reasons, and that explanation given for the "withholding" does not constitute an "appropriate justification", I do not accept this characterization of those paragraphs. In my view, the paragraphs do not indicate that I "withheld" my reasons. Rather, they explain the lengthier than usual delay in issuing reasons for a "bottom line" decision, which explanation included my concern that the issuance of the reasons not distract the parties from their efforts to mediate a resolution to their labour dispute.

22 However, even if I were to accept CUPE's characterization of those paragraphs as demonstrating that I "withheld" my reasons out of a concern for distracting the parties, and that this was not an appropriate justification for "withholding" reasons, I find these circumstances do not give rise to a reasonable apprehension of bias. If I committed an error of law or policy as CUPE alleges, I find the alleged error would not lead an informed, reasonable and right-minded person to think that I would not decide matters between these parties *fairly*.

23 Adjudicators are fallible and may make errors of fact, law or policy in the course of deciding matters before them. However, the mere allegation of error does not, in itself, establish a reasonable apprehension of bias. Given my rejection of CUPE's claim that my alleged error in delaying or "withholding" reasons prejudices its ability to seek reconsideration or amendment of the 2009 ESO, I find no basis for concluding that paragraphs 19-23 of the Reasons Decision objectively give rise to a reasonable apprehension that I would decide matters between these parties in an unfair or biased manner.

24 Turning to CUPE's other basis for alleging a reasonable apprehension of bias, CUPE relies on certain passages in the Reasons Decision, paragraphs 17-18 and 69-70, as establishing that I have prejudged the issue in the Scheduling Application.

25 In paragraphs 17-18, I stated:

> Finally, the parties have agreed that scheduling of employees will be in accordance with standard practice, meaning that the majority of paramedics will be scheduled by the Employer. Normally, the Board's standard global order requires the union to

> schedule qualified members to perform designated essential services.
>
> There are a number of reasons for this approach. First, it recognizes the fact that the union normally controls access to its members' labour during a strike or lockout, and allows the union to allocate and share available essential work amongst its members. Second, it places direct responsibility on the trade union to ensure that its members recognize that essential services must be maintained as a condition of their right to strike. Third, the union may be better able to persuade its members to come to work during a strike or lockout, thus facilitating compliance with the ESO and enhancing the ESO's efficacy. While these are some of the general principles on which the scheduling provisions of the Board's standard global orders are typically based, their application in any particular essential services dispute will vary. Their application in the present dispute has not yet been adjudicated.

26 CUPE submits that this passage "clearly demonstrates that the panel has reached fundamental conclusions in the [Reasons] Decision about the very matters that are squarely before the panel in the Scheduling Application". CUPE notes the final two sentences of paragraph 18, which state that these are "some of the general principles on which the scheduling provisions of the Board's standard global orders are typically based" but that their application in any particular essential services dispute "will vary" and further that their application in the present dispute "has not yet been adjudicated". But it submits that, this statement "provides no comfort that the panel has not reached conclusions regarding the scheduling issue, given the unequivocal nature of the panel's preceding statements".

27 In response, the Employer submits that paragraphs 17-18 "reflect an outline of the general principles governing the approach to scheduling in essential service orders" and that it is specifically stated that those general principles would apply differently in each case and that such issues have not been adjudicated in determining the terms of the essential services order in this dispute because of the agreement of the parties on scheduling. The Employer submits that a reasonably informed bystander reviewing these comments in context would not reasonably view them as revealing bias.

28 In its final reply, CUPE submits that the Union and the Employer "had joined issue in the Scheduling Application over what the applicable principles were (Scheduling Application, paragraph 17; Scheduling Reply, paragraphs 19-20)". It further submits that the Reasons Decision "accepted the Employer's position in this regard, notwithstanding the fact that scheduling was not an issue in the proceedings" that led to the 2009 ESO.

29 In its recusal application, CUPE quoted both paragraph 17 of the Employer's Application and paragraphs 19-20 of its Scheduling Reply. CUPE highlights a part of paragraph 17 of the Employer's Application which submits: "Typically, the standard global order in an essential service work stoppage contains a provision requiring the union to schedule to ensure that employees are scheduled in compliance with the

essential services order...". It highlights paragraph 19 of its Scheduling Reply, which submits:

> The [Employer's Scheduling] application is based on a mistaken view that the essential service global order developed in the health sector 'requires' unions to schedule employees, as a means of ensuring compliance with the essential service designations. Again, with the greatest respect, this is not at all the case.

30 In paragraph 20 of its Scheduling Reply, CUPE continues:

> The global order was developed in the health sector. Trade unions in that sector sought the scheduling role so that they could distribute the available work fairly amongst their striking members. This makes a lot of sense in the health sector, where 50% of employees might be withdrawing their services. It makes little sense in the emergency health services sector, where the designation levels are 100%. That is why it has not been a feature of the essential service order in the emergency health services sector (or many other disputes outside of health care).

31 Thus, in its Scheduling Application the Employer took the position that "typically", the Board's standard global essential services order requires the union to do the scheduling, and CUPE in its reply took the position that, while the global order was developed in the health sector where it makes sense for the union to do the scheduling, it "makes little sense" in the emergency health services sector, and has not been a feature of the essential services order in that sector.

32 I am not persuaded that the statements of general principle in paragraphs 17-18 of the Reasons Decision accept the Employer's position to the extent the Employer and CUPE join issue in these paragraphs as to the applicable general principles governing scheduling. In my view, the Employer and CUPE do not so much join issue concerning general principles; rather, they describe a norm and an exception: the Employer cites the norm, which is that the union does the scheduling, while CUPE asserts and argues for an exception to the norm in the emergency health services sector.

33 Paragraphs 17-18 of the Reasons Decision describe the norm cited by the Employer, and the reasons why the union is usually required to do the scheduling. However, they further state that these are "general principles" on which Board essential services orders are "typically based", and their application in any particular essential services dispute "will vary". It is further expressly stated that their application in the present dispute "has not yet been adjudicated".

34 I find that, in light of these latter statements, CUPE's claim is not made out that paragraphs 17-18 of the Reasons Decision demonstrate that CUPE's assertion and argument regarding the Scheduling Application, that the norm of union scheduling does not and should apply in this case, has been prejudged or decided. These paragraphs merely set out the norm; they leave open and undecided the question of whether the norm applies in this case, or whether, for the reasons CUPE advances, this sector is or should be an exception to the norm of union scheduling.

35 Moreover, I am satisfied that "an informed, reasonable and right-minded person, reviewing the matter realistically and practically, and having thought the matter through", would conclude that I have not prejudged the issues that are before me in the Scheduling Application on the basis of paragraphs 17 – 18 of the Reasons Decision. I am satisfied that such a person, reading the Reasons Decision as a whole, would not discount the statements made at the end of paragraph 18 in the manner advocated by CUPE in its application.

36 CUPE also relies on paragraphs 69-70 of the Reasons Decision. In those paragraphs, I explained why I accepted the Employer's position that the 2009 ESO must contain a requirement that employees be available to work in accordance with their historical levels of availability, rather than CUPE's position that employee availability should be based on the minimum availability required under the collective agreement (with the Employer being able to require additional availability but only at the double time rates of pay prescribed by the collective agreement).

37 Paragraph 68 of the Reasons Decision (which immediately precedes paragraphs 69-70) concludes with the following two sentences:

> While CUPE asserts that its proposal is intended to ensure the maintenance of essential services, I find instead that its principal purpose is to maximize the cost and inconvenience to the Employer in scheduling paramedics during the dispute. Moreover, I find it provides no assurance of sufficient availability.

38 Paragraphs 69-70 then state:

> First, the issues of availability and compensation only arise because of the agreements reached between the parties that: (1) 100% of existing pre-hospital care is essential; and (2) that scheduling shall be in accordance with current practice, i.e., that most paramedics will continue to be scheduled by the Employer, not CUPE. If essential services designations had been made by day, time, and shift and if CUPE was responsible for scheduling its members to work, employee availability would not be an issue in this dispute; hence, this is a dispute the parties have in large measure manufactured by virtue of the agreement they have made.
>
> While the benefit of the Employer doing the scheduling accrues to both CUPE and the Employer, the burden of securing employee availability rests entirely with the Employer. I find that such an approach is not consistent with Section 72(8) of the Code.

39 CUPE submits that, in these paragraphs, I have "concluded that the Union's position in the Scheduling Application – that the Employer should continue to schedule employees – is inconsistent with the Code". It submits that these paragraphs therefore give rise to a reasonable apprehension that I have prejudged the matter before me in the Scheduling Application and will not approach the issue with an open mind.

40 In response, the Employer submits that my comments in paragraphs 69-70 were made in the context of an assessment of the parties' positions during the ESO hearing as to how employee availability should be stipulated in the 2009 ESO. The comments

in paragraphs 69-70 were intended to explain why I accepted the Employer's position as opposed to CUPE's. The Employer submits that the comments had "nothing to do with scheduling *per se*" or with the Scheduling Application.

41 The Employer further submits that the Board's obligations under Part 6 "create a special context for assessing the Board's decisions and its approach during an essential service dispute". It submits that the Board has "an independent responsibility under Part 6 of the Code to designate essential services that it considers necessary to protect the public", and that therefore "the Board's approach to evaluating issues between the parties in an essential service dispute is therefore primarily driven by the public interest". The Employer further submits:

> In light of that special context, one must be careful that the Board's independent obligation and duty to protect the public is not mistaken for bias in favour of one party or another. By mandate under the Code, the Board is predisposed to protection of the health, safety and welfare of the public and in that context and for that purpose the Board may take positions that are not proposed or advocated by either party.

42 In final reply, CUPE submits that it cannot be said that paragraphs 69-70 have nothing to do with scheduling *per se*: "The panel clearly concluded that the Union's position in the Scheduling Application – that the Employer should continue to schedule employees – is inconsistent with the Code. This has everything to do with scheduling, and was not at issue in the proceedings that led to the ESO Decision".

43 With respect to the Employer's argument that the Board's obligations under Part 6 of the Code create a "special context" for assessing the Board's decision, and that in that context the Board may take positions that are not proposed or advocated by either party, CUPE submits, in the Reasons Decision, "the Board took a position that *was* advocated by a party – the Employer – even though that position concerned something that *was* not at issue in the proceedings that led to the [Reasons] Decision" (emphasis in CUPE's submission).

44 In its Scheduling Application, the Employer seeks an amendment to the 2009 ESO to require that CUPE be responsible for scheduling paramedics. In seeking the amendment, the Employer asserted that it was having difficulties scheduling paramedics for shifts which presented an immediate and ongoing danger to the health, safety and welfare of patients requiring emergency services. To address this scheduling problem, the Employer proposed that CUPE should be made responsible for scheduling. It also took the position that having CUPE doing the scheduling was the norm.

45 In its Scheduling Reply, CUPE opposed the amendment, arguing that it would not solve the staffing shortfall problem and that the application was "an improper attempt to enforce a Board order, an improper attempt to visit the consequences of alleged non-compliance by individual members on the Union without any finding that the Union is engaged in unlawful action, and an improper attempt to interfere with the Union's lawful collective bargaining and strike activities". As noted earlier, CUPE also argued that union scheduling was not the norm in this sector.

46 In this context, do the comments in paragraphs 69-70 of the Reasons Decision – in particular the comment that the approach of having the Employer doing the scheduling is "not consistent with Section 72(8) of the Code" (paragraph 70) – give rise to a reasonable apprehension of bias that I have prejudged the Scheduling Application? Although these comments were obviously not intended to have that effect, I find that objectively they do.

47 The Employer is correct that, in the context of essential service designations under Part 6 of the Code, the Board is primarily driven in its decision-making by a concern for protecting the public interest. This, of course, is not bias. However, in the present case, the parties initially agreed, and the Board ordered, that the Employer do the scheduling of most paramedics. Subsequently, the Employer formed the opinion that this approach created difficulties which threatened the public interest, and that the problem should be addressed by having CUPE do the scheduling. CUPE opposed the application, submitting in effect that the Employer should continue to do the scheduling.

48 The issue in the Scheduling Application, therefore, is whether the Employer should continue to do the scheduling, or whether the 2009 ESO should be amended to require CUPE to schedule. While the comments in paragraphs 69-70 were not intended to be in any way decisive of the issue, I can see how objectively it might lead to the conclusion that I am predisposed to favour the Employer's position over CUPE's in respect to that application.

49 In these circumstances, I find that CUPE has met the test for disqualification with respect to the Scheduling Application, and accordingly I recuse myself from hearing that matter.

50 The Scheduling Application was to be heard along with a number of related applications. My office will contact the parties to arrange a case management conference call to discuss whether, as a practical matter, I should recuse myself from hearing those matters as well, or only the Scheduling Application. If that issue cannot be resolved by way of case management discussions, I may require written submissions from the parties.

III. CONCLUSION

51 The legal test for disqualification is not met with respect to my hearing all outstanding applications involving the parties. It is met with respect to my hearing the Scheduling Application. Accordingly, I recuse myself from hearing that matter.

52 A case management conference will be scheduled to discuss whether or not, as a practical matter, I should recuse myself from hearing the related applications currently set to be heard with the Scheduling Application.

LABOUR RELATIONS BOARD

"MICHAEL J. ADAM"

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VICE-CHAIR