

BRITISH COLUMBIA LABOUR RELATIONS BOARD

NANAIMO SENIORS VILLAGE PARTNERSHIP (NANAIMO
SENIORS VILLAGE MULTI-LEVEL CARE FACILITY)

(the "Partnership")

-and-

WELL-BEING SENIORS SERVICES LTD.

("Well-Being")

(Collectively the "Respondents")

-and-

HOSPITAL EMPLOYEES' UNION

(the "Union")

PANEL: Allison Matacheskie, Vice-Chair

APPEARANCES: Delayne M. Sartison, for the Partnership
David McDonald and Kathryn Ford, for Well-
Being
G. James Baugh and V.R. (Sam) Black, for the
Union

CASE NOS.: 51999 and 52002

DATES OF HEARING: September 2, 2004, January 4-6, 10, 11, 13,
14, 26 and 27, 2005

DATE OF DECISION: August 24, 2005

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union alleges that the Partnership breached Sections 5(1), 6(1), 6(3)(a), (b),
(d), 9 and 32 of the *Labour Relations Code* (the "Code") when it terminated all of its care
service employees while an application for certification was pending. The Employer's
primary argument is that it contracted out its care service employees in keeping with its
rights as a health sector employer under the *Health and Social Services Delivery
Improvement Act*, RSBC 2002, c. 2 ("Bill 29") and therefore, its actions are not in
violation of the Code.

2 The Partnership also argues that it is not the employer of the employees that are
the subject of this application as it contracted out its care services to Well-Being long
before the certification applications were filed. The Union argues that the Partnership is
the true employer, but also filed another unfair labour practice complaint in the
alternative naming Well-Being as the employer. The applications were heard together
and are both dealt with in this decision.

II. FACTS

3 The Partnership presently owns and operates the Nanaimo Seniors Village Multi-
Level Care Facility which is a licensed residential care facility in Nanaimo (the "Facility").
The Facility has 100 permanent publicly funded beds, 10 temporary publicly funded
beds and 40 privately funded beds.

4 The Facility opened in 2001. From 2001 to January 2004, the Facility was under
the operation of the Nanaimo Seniors Village Ventures Ltd. ("Ventures"), a company
that existed under the umbrella of Retirement Concepts Senior Services Ltd.
("Retirement Concepts").

5 The Partnership came into existence in January 2004 through a corporate
reorganization of companies under the umbrella of Retirement Concepts. The
Partnership exists under a partnership agreement between Retirement Concepts and
RC Holdings Ltd. ("RC Holdings"). Retirement Concepts owns 99.99% of the
Partnership and RC Holdings owns 0.01% of the Partnership. Retirement Concepts
also owns 100% of RC Holdings.

6 In January 2004, the Partnership replaced Ventures as the owner and operator of
the Facility. In this decision, I will use the term Partnership even if the facts predated
the transfer of operation from Ventures to the Partnership.

7 Mary McDougall is the current President and Chief Operating Officer of Retirement Concepts. Dr. Azeem Jamal is the current Chief Executive Officer of Retirement Concepts. McDougall is also the President and Chief Operating Officer of the Partnership.

8 When the Facility first opened in 2001, the Partnership entered into a voluntary recognition agreement with BCGEU to be the bargaining agent for the Resident Care Aides ("RCAs") and Activity Aides ("AAs").

9 The Partnership is expressly designated as a public sector health employer under the *Public Sector Employers Act*, RSBC 1996, c. 384 ("PSEA") and the *Health Care Employers Regulation*, BC Reg. 427/94 ("Regulation") to the PSEA. By virtue of Section 6 of the PSEA, any employer designated in the Regulation must become and remain a member of the Health Employers' Association of British Columbia ("HEABC"). The Partnership is a member of the HEABC as was its predecessor, Ventures. Therefore, when the care service staff were certified to BCGEU, the Facilities Subsector Collective Agreement ("Master Agreement") applied.

10 The Registered Nurses ("RNs") and Licensed Practical Nurses ("LPNs") employed at the Facility were not unionized. The terms and conditions of their employment were covered by an agreement between the Partnership and the individual nurses called the "Professional Nurses Partnership Agreement" (the "Nurses Agreement"). It had a term from April 1, 2001 to March 31, 2004.

On January 28, 2002, the government of British Columbia enacted Bill 29 which voided provisions of existing collective agreements and, among other things, enabled a health sector employer to contract with outside service providers to perform services previously performed by certain unionized employees.

12 In June 2003, the Partnership began to consider contracting out the care services at the Facility because they understood that the total wage cost when a contracted service provider was used was approximately \$22 per hour as compared to the approximately \$33 per hour under the Master Agreement currently in place at the Facility.

13 Retirement Concepts initiated an expression of interest process in July 2003 for contracting out the non-clinical services at three of the Retirement Concepts' facilities: Renfrew Care Centre, Beacon Hill Villa and the Facility.

14 In July 2003, McDougall held a meeting with the employees at the Facility and told them the Partnership was seeking proposals to contract out the care services. McDougall told them they had heard the cost of contracting out was \$22 per hour and they wanted to see if it was true and whether they could provide a level of service at that cost that could be accepted in the Facility. McDougall told them she would be in a better position to let them know what was happening at the end of August 2003.

15 By August 2003, three companies were short listed as potential contractors for
the Facility. They were Caresource, Bayshore and Tendertouch.

16 McDougall then had another meeting with the employees. She advised them
that the Partnership was still not in a position to make a decision relating to contracting
out. At this meeting, employees asked what they could do, and McDougall told them
they could talk with BCGEU and have the Union meet with them.

17 Diane O'Brien was the BCGEU shop steward at the Facility and she contacted
BCGEU. There were numerous meetings between BCGEU and the Partnership from
August to October 2003. McDougall was insistent that the cost savings had to be in the
range of \$10 per hour for any proposal to be considered as an alternative to contracting
out. BCGEU never put forth a proposal that was competitive with the outside
contractors. The BCGEU representative advised O'Brien that the Union would not put
forth a proposal for a \$10 wage cut for all the employees.

18 The RCAs and AAs applied for decertification and effective November 14, 2003,
they were decertified from the BCGEU.

19 After the decertification, McDougall met with some employees and told them the
Partnership would allow them time to put in a proposal. McDougall testified that the
decertification was not something that the Partnership had not anticipated and that this
event threw a "curveball" into the exploratory contracting out process that was
occurring.

20 McDougall suggested the RCAs and AAs elect four representatives to put
together a proposal on behalf of the larger group. A group of four was chosen and it
included O'Brien and another RCA named Howard Van Impe. McDougall and Carol
Crow, Director of Human Resources for the Partnership, then began discussing options
with the employees' representatives. To ensure the employees knew the parameters of
what would be acceptable to the Partnership, McDougall told them "I am putting \$22 in
an envelope and you need to decide how to allocate it over wages and benefits". Crow
then put together five different options to show the different ways that their wages and
benefits could be cut from \$33 per hour to \$22 per hour. McDougall made it clear to the
employees that she would not proceed with the outside companies pending the
employees putting forward an acceptable proposal.

21 For over a month, the employees' representatives worked on their proposal. In
December 2003, Van Impe made a presentation to McDougall and Crow of the package
prepared by the committee. The cost to the Partnership was slightly higher than the
\$22 and so he made a formal written proposal which he went through with them line by
line. He felt that he had to sell the proposal to the Partnership because it was a little
higher than the parameters initially set out by McDougall. The last written point in his
proposal was "the greatest concession made by the RCAs was the decertification from
the union". He felt that was important because it showed the employees' integrity and
trust in what they were doing. Van Impe testified that the comment back from

McDougall was that she was "proud of them and it set a precedent as there had not been a lot of decertifications".

22 The Partnership accepted the employees' proposal. A meeting was then scheduled for all the RCAs and AAs on December 22, 2003 to communicate the new terms and conditions of their employment.

23 The Partnership then looked at the situation and focused on the fact that the reason they had wanted to contract out was to get away from the Master Agreement using the legislation available. In her evidence, McDougall explained:

...keeping that objective in mind, we couldn't keep the employee group with Partnership because we are a health sector employer. So we wrapped Well-Being around the employees.

24 One of the other corporate entities under the Retirement Concepts umbrella is Well-Being. An arrangement was put into place with Well-Being. Well-Being is a company that is 100% owned by Retirement Concepts and McDougall is the sole operating authority. Well-Being does not have an office or any overhead expenses. There was no negotiation process between the Partnership and Well-Being.

25 The RCAs and AAs were given letters of employment to sign that were on Well-Being's letterhead signed by McDougall. The letters set out the same terms and conditions that the Partnership and the RCAs and AAs had just agreed to. Some employees noticed the name of Well-Being on the letter. McDougall told Sue Ball, the Administrator of the Facility, to tell them it was just a payroll change. Ball complied with these instructions. The employees did not receive letters of termination or records of employment from the Partnership.

26 The next step in the process was the creation of a new employee handbook. The four employee representatives put one together by taking information and documents from existing policies and procedures. They then took it to Crow for her approval.

27 A document called a Contract Service Providers Agreement was signed by the Partnership and Well-Being. It stated the contract was for a five-year term.

28 The Nurses Agreement between the Partnership and the RNs and LPNs expired on March 31, 2004. Before it expired, the Partnership met with the nurses to advise them that the Nurses Agreement would not be renewed and they would structure the employment relationship the way they had with the RCAs and AAs. The nurses were told they would receive employment letters and an employee handbook which would govern the terms and conditions of their employment. At the end of May 2004, employment letters were issued to the nursing employees on Well-Being's letterhead. Most of the nurses refused to sign the letters. The nurses did not receive termination notices or records of employment from the Partnership and they remained working at the Facility.

29 The reduced labour costs from the wage reductions agreed to by the RCAs and
AA's would save the Partnership approximately \$400,000 per year.

30 On June 22, 2004, the Union filed an application for certification of the LPNs
naming the Partnership as the employer. At the certification hearing on June 30, 2004,
Well-Being attended and asserted that it was the employer of the LPNs. The Union
maintained that the Partnership was the true employer but also filed an alternative
application naming Well-Being as the employer. The Respondents also asserted that
the only appropriate bargaining unit was one which included all of the care service
employees.

31 According to McDougall, the certification application triggered a risk assessment
by the Partnership. The Partnership wanted to ensure that the cost objectives of
avoiding the Master Agreement could be continued. In particular, the Partnership was
concerned that if there ever was a decision from the Board that the Partnership was the
true employer of the employees, they would automatically qualify for the Master
Agreement. So, the Partnership decided they had to clarify the situation by transferring
its "contract" with Well-Being to another organization with which the Partnership had an
arms-length relationship.

32 On June 29, 2004, a memorandum was issued to the LPNs on Well-Being's
letterhead. The memo stated that "a union is not necessary" and "it is not appropriate for
just the LPNs to unionize". The memo continued, "If the LPNs vote to join the Union ...,
you will become a small group in a very large union ... [that] makes political decisions.
We believe those political decisions may not necessarily reflect the best interests of
employees ...". It ended with "Your colleagues ... recently decided against union
representation due to uncertainty around the Facilities Subsector Collective
Agreement".

33 Van Impe was approached by other RCAs or AAs about unionizing and he
contacted the Union on July 12, 2004.

34 On July 14, 2004, Ball and Crow met with the RCAs and AAs and announced
that the Partnership intended to change the service contractor from Well-Being to
another contractor. O'Brien, Van Impe and the other employees were shocked. O'Brien
and Van Impe felt they had been lied to as they had understood if they agreed to the cut
in wages and benefits their jobs would not be contracted out. Also, they had been
specifically told that Well-Being was just a payroll change. They were devastated at the
news of their positions being contracted out.

35 One employee, Eric Evans, testified that he knew he had been contracted out
since January and Van Impe testified that he would have known he was contracted out
if he had taken the time to seriously consider his employment letter on Well-Being's
letterhead. However, I accept the evidence of O'Brien and Van Impe that most
employees at the meeting were shocked by the Partnership saying their jobs had been
contracted out.

36 There was a separate meeting with the LPNs immediately following the meeting with the RCAs and AAs. The LPNs were advised that it was unclear what would happen to the LPNs given the outstanding application for certification, but the Partnership believed that all care staff, including the LPNs, should be covered by the new contract.

37 On July 16, 2004, the Partnership filed a Section 32(1) application with the Board. In the application, it maintained that it is not the employer of the care staff at the Facility and therefore the Section 32 application was really unnecessary. However, out of an abundance of caution, it brought the application to seek permission to terminate its existing care services contract with Well-Being as it pertained to the LPNs and re-tender that contract to another service provider. It did not seek permission to change the contractor with respect to the RCAs and AAs as the certification application did not include them. In its application, the Partnership set out the reason the change of contractors was necessary:

The proposed change is necessary to ensure effective and continued implementation of the Partnership's long-held business plan to contract out care services to achieve cost savings and efficiencies. Further, it is necessary to make the change within the freeze period because the Partnership was not aware of the risk associated with its current contract arrangement until it received the HEU's initial certification application. Until the Partnership received the HEU's application, it thought that the identity of the employer of care staff and the nature of its contractual relationship with Well-Being were understood and would be respected.

38 The Partnership then met with the contract service care providers who had been short-listed back in the summer of 2003. The Partnership entered into extensive discussions with Bayshore with the intention that it would enter into a contract for care services effective September 9, 2004. The date of September 9, 2004 was chosen because it fell on a payroll date and was within the statutory 10-month time-bar following the BCGEU decertification.

39 On July 27, 2004, McDougall sent an email to Bayshore on behalf of the Partnership advising that they had been selected as the new care service provider for the Facility.

40 On July 28, 2004, McDougall accepted a letter addressed to Well-Being from the Partnership, signed by Jamal, which confirmed that the contract was terminated effective September 9, 2004 and that both the Partnership and Well-Being had agreed to waive the contractual requirement for 60 days written notice for the termination of the contract.

41 On that day, there was another meeting with the RCAs and AAs to tell them their employment was being terminated and Bayshore would be the new contractor. Prior to this meeting, McDougall, Crow and Ball met with O'Brien, Van Impe and the other members from the group of employees' representatives. At this meeting, McDougall

