Work-Refusing Employee Did Not Have Right to Delay Investigation for 2 Hours Until Her Preferred Union Representative Could Attend

A correctional officer did not have the right to delay her employer's investigation of her work refusal for two hours while her preferred union representative attended to "personal" matters.

The correctional officer's union was nearing a strike deadline. The employee and five other correctional officers attended at work and engaged in a work refusal when they learned that 50 of their colleagues had called in sick and that the institution was being run by management on that day.

The employer advised that it wished to engage in a "Stage 1" work refusal investigation. The employee asked for a certain union representative to assist her, and asked to wait two hours while that union representative, who was not at the workplace at that time, attended to personal matters. The employer advised the six correctional officers that if they did not participate in the investigation, they would be deemed to have abandoned their work refusal, which the employee took as a "threat".

The other five officers agreed to have another union representative assist them, but the employee did not. She then filed a reprisal complaint with the Ontario Labour Relations Board alleging that the employer's "threat" was a reprisal that violated the Occupational Health and Safety Act.

The OLRB disagreed. The OLRB noted that the OHSA required the employer to investigate the work refusal "forthwith" after the work-refusing employee has "promptly" reported it. The OHSA also provided that any representative of a work-refusing employee "shall attend without delay". As such, the employee had no right to representation, in the work refusal investigation, by a union representative who was not in the workplace and not available for two hours. As a result, the employer's "threat" did not violate the OHSA as the employer was not threatening the officer for engaging in a work refusal per se, but rather for holding up an investigation which the OHSA requires to be conducted "forthwith". The employer was entitled to tell her that her refusal to participate in the work refusal process in a timely manner could be taken as an abandonment of the work refusal which could lead to disciplinary consequences if the employee continued to refuse to work.
[Lynda Kathleen Gough v Elgin-Middlesex Detention Centre, 2016 CanLII 74661 (ON LRB)]