

**The Labour Relations Board
Saskatchewan**

**AUDREY KAUFMANN, Applicant v. SASKATCHEWAN GOVERNMENT AND
GENERAL EMPLOYEES' UNION, Respondent**

LRB File No. 287-00; August 1, 2003

Chairperson: Gwen Gray, Q.C.; Member: Leo Lancaster

The Applicant: Audrey Kaufmann

For the Respondent: Rick Engel

Duty of fair representation – Contract administration – Union did not approach applicant's complaints in perfunctory manner or in manner that demonstrated inattention, disinterest, incompetence or other indicia of gross negligence – Union conducted proper investigations, sought information, made reasoned decisions based on information and legal advice and achieved settlement probably unachievable through arbitration process – Board finds no breach of duty of fair representation.

The Trade Union Act, s. 25.1

REASONS FOR DECISION

Background:

[1] During the course of this application Audrey Miller changed her name to Audrey Kaufmann and we will refer to her as Ms. Kaufmann.

[2] Ms. Kaufmann filed a duty of fair representation application against the Saskatchewan Government and General Employees' Union (the "Union") on November 17, 2000. She claimed that, in the fall of 1993, the Union and its officials, Pat Gallagher and Margo Wallace, refused to file a grievance on her behalf. Ms. Kaufmann lost her job and position with Saskatchewan Environment and Resource Management ("SERM" or the "Employer"), a department within the Government of Saskatchewan. Ms. Kaufmann claimed that, although she filed a harassment claim under Appendix "H" of the collective bargaining agreement, it did not help her situation.

[3] The Union replied to the application on December 20, 2000. In its reply the Union set forth facts upon which it relied to dispute Ms. Kaufmann's claim that it had not fairly represented her in relation to her dispute with SERM.

[4] Ms. Kaufmann provided further particulars of her claims against the Union on June 21, 2001. The hearing was delayed for some time to permit the parties an opportunity to resolve the matter without a hearing.

[5] In December 2001, Ms. Kaufmann requested that the matter proceed to hearing.

[6] Hearings were held in Weyburn and Regina between February 1, 2002 and May 1, 2002 with final written arguments forwarded to the Board on June 19, 2002.

[7] Subsequent to the hearing of this application and the time of deliberation of the matter by the Board, Hugh Wagner, a member of the Board panel, accepted an offer of employment with the Union. Mr. Wagner notified the Board of his conflict of interest in relation to this matter when the offer of employment was made. As a result, the Board deliberations have taken place without Mr. Wagner's involvement. To be abundantly clear, while Mr. Wagner participated in the hearing of this application, he did not receive any copy of the draft decisions, nor did he participate in any deliberations with respect to these Reasons for Decision.

Facts:

[8] The parties presented a large volume of documentary and oral evidence before the Board. We will not attempt to summarize all of the events that occurred over the course of the period from September 1993 to the date of the hearings but we will outline the key events.

[9] Ms. Kaufmann was employed as a fire protection worker I, a labour service position with SERM at Prince Albert. She successfully bid on a fire protection worker III position at the Cypress Hills Park and commenced employment there on June 8, 1992. As a fire protection worker III, Ms. Kaufmann was responsible for supervising a fire crew.

[10] Ms. Kaufmann was required to complete a one-year probationary period in her new position. The one-year period was spread over two fire seasons because of the seasonal nature of the employment. Rick Goett, Ms. Kaufmann's supervisor, rated her performance as "meeting expectations" in her interim probationary review conducted in December 1992. He commented on some difficulties she was experiencing with the crew but noted "this is not totally Audrey's fault and must also be attributed to those she supervises." Ms. Kaufmann noted in her statement attached to the interim probationary review that "the fire crew . . . did their very best to put me on the first flight back to the north."

[11] Ms. Kaufmann was laid off on December 4, 1992 in accordance with the normal seasonal lay-offs for fire suppression crew employees and she was recalled to the fire protection worker III position again in 1993.

[12] In July 1993, Ms. Kaufmann was awarded an increment increase in her salary. No performance concerns were raised with her at this time.

[13] On September 2, 1993, Mr. Goett completed the final probationary review of Ms. Kaufmann and found her performance to be "below standards." He failed Ms. Kaufmann on her probationary period and recommended that she be removed from the position. The Park Superintendent accepted Mr. Goett's recommendation. However, the Chairperson of the Public Service Commission never signed the probationary evaluation as is required before the evaluation takes effect. As a result, Ms. Kaufmann was not presented with formal notice that she had not passed her probationary period.

[14] Mr. Goett presented the final probationary evaluation to Ms. Kaufmann on September 8, 1993. On September 9, 1993, she received notice of lay-off. The position number cited on the lay-off form related to Ms. Kaufman's home position in Prince Albert and not the fire protection worker III position at the Cypress Hills Park.

[15] Ms. Kaufmann was stunned by the final probationary review. She had just enrolled her children into school at Maple Creek only to find that she was out of work

and in an uncertain status. She contacted the Union to seek advice and assistance in dealing with the matter.

[16] The Union assigned Margot Wallace, agreement administration advisor, to assist Ms. Kaufmann. Ms. Wallace met with Ms. Kaufmann and the latter's shop steward, Dan McGill, on September 19, 1993 in Swift Current. Ms. Kaufmann wanted the Union to file a grievance with respect to her loss of position and the failed probationary period and she understood that Ms. Wallace would prepare and file the grievance.

[17] Ms. Wallace, instead, set up meetings with the Employer to attempt an informal resolution of the problems. She arranged meetings with Mr. Goett and the Park Superintendent, Brad Mason, on October 8 and October 20, 1993. Ms. Wallace obtained Mr. Mason's agreement to count the time period for filing a grievance from the date of the final informal meeting.

[18] By November 1993, Ms. Wallace had obtained a concession from Mr. Mason that the Employer would agree to remove the probationary report. The Employer still would not agree to pass Ms. Kaufmann in her probationary period for the fire protection worker III position. Ms. Wallace explained that the Employer had not properly brought its concerns regarding Ms. Kaufmann's performance to her attention and that they appeared to deal with the conflict between Ms. Kaufmann and the fire crew by removing her from the crew without dealing with the inappropriate conduct of some of the fire crew members.

[19] Ms. Wallace also explained that Mr. Mason informed her that he would not be re-hiring anyone in to the fire protection worker III classification in future fire seasons. Ms. Wallace and Mr. Mason discussed various options for Ms. Kaufmann, which included a leave of absence from the position, a transfer as a probationary employee to another fire protection worker III position, or a bid on another position within Cypress Hills Park.

[20] Ms. Wallace was not satisfied with Mr. Mason's settlement proposal and she asked Wayne Lightfoot, Personnel Advisor – Human Resources Branch of SERM, to become involved in the informal discussions.

[21] On December 17, 1993, Ms. Kaufmann, Ms. Wallace, Mr. McGill and Pat Gallagher, then Director of Membership Services for the Union, met to discuss whether Ms. Kaufman's situation fell within the parameters of the harassment policy recently negotiated between the Union and the Employer. The harassment policy is attached to the collective bargaining agreement as Appendix "H." Ms. Kaufman explained to the Board that she was frustrated with Ms. Wallace's refusal to file a grievance so she searched through the agreement to see if any other actions could be taken. She felt that her case fell well within the harassment provisions.

[22] Ms. Gallagher concluded that the probationary assessment of Ms. Kaufmann by Mr. Goett was coloured by the fire crew's sexist attitude toward Ms. Kaufmann. She felt that there was no objectivity to the probationary review. In terms of selecting action, Ms. Gallagher thought that the harassment process would bring out facts that the Union otherwise would be unable to obtain as the harassment investigators would be empowered to interview crew members and others.

[23] Ms. Gallagher indicated in her notes of this meeting that it was agreed that Ms. Wallace would arrange a meeting with Mr. Lightfoot to continue to examine Ms. Kaufmann's options. At the end of that meeting, the Union would advise the Employer that a harassment complaint would be forthcoming. Ms. Gallagher also agreed to set out the matters needed in the complaint form for Ms. Kaufmann. Ms. Gallagher indicated in her testimony that Ms. Kaufmann's case was one of the first harassment cases dealt with by the Union under the policy set out in Appendix "H." The Union did not have a well-developed approach to resolving such complaints. In addition, under the harassment policy, the individual employee must file the harassment complaint, not the Union.

[24] During this time, as well, Ms. Wallace understood from her discussions with Ms. Kaufmann, that she no longer wished to work at Cypress Hills Park because of the events that had transpired while she worked there. In addition, it was Ms. Wallace's

understanding that Ms. Kaufmann did not wish to return to her home position in Prince Albert for personal reasons. Ms. Wallace understood that Ms. Kaufmann did not want to move from Maple Creek until the end of the school year.

[25] On January 14, 1994, Ms. Wallace and Ms. Kaufmann met with Mr. Lightfoot to discuss Ms. Kaufmann's complaints. Ms. Wallace suggested to Mr. Lightfoot that the matter be resolved by removing the probationary review, passing Ms. Kaufman on her probationary period and finding her another fire protection worker III position at a location other than Cypress Hills Park or Prince Albert. The meeting was positive but no agreement was reached at that time.

[26] Ms. Kaufmann was increasingly dissatisfied with Ms. Wallace's representation. She wanted a grievance filed and one was not forthcoming. On May 2, 1994, in a telephone call to Ms. Gallagher, Ms. Kaufmann indicated that she had not been recalled and her recall situation needed to be worked out; she was disappointed that the new park superintendent had not straightened out the situation at the park, and that she had not received Ms. Gallagher's suggested form for filing the harassment complaint. Prior to this period, Ms. Kaufmann had informed Ms. Wallace that she was unwilling to move from Maple Creek until the end of the school year. Ms. Gallagher noted that there was a lot of confusion about Ms. Kaufmann's status, as the probationary review had not been finalized.

[27] A further meeting was scheduled between the Union and Mr. Lightfoot on May 16, 1994. Ms. Wallace met with Ms. Kaufmann and Mr. McGill prior to the meeting with the Employer. At that time, Ms. Wallace presented Ms. Kaufmann with a written harassment complaint that she wanted Ms. Kaufmann to sign and submit to Mr. Lightfoot at the meeting. According to Ms. Wallace, Ms. Kaufmann had various concerns about the harassment grievance and indicated that she did not want to file the complaint until she had left Maple Creek. She told Ms. Wallace that her car had been vandalized and she did not want to take the chance of being subject to further violent incidents.

[28] Ms. Kaufmann recalled the meeting in different terms. She recalled that she was upset with Ms. Wallace for not filing a grievance dealing with her removal from the fire protection worker III position and the lack of action on Ms. Wallace's part in

getting the situation sorted out for the upcoming fire season. She left the meeting with Ms. Wallace and did not attend the meeting scheduled with the Employer. As a result, Ms. Wallace could not achieve any results with the Employer at the scheduled meeting.

[29] Unknown to Ms. Wallace, Ms. Kaufmann did meet with Mr. Lightfoot on the day in question. During the meeting between Ms. Kaufmann and Mr. Lightfoot, Ms. Kaufmann expressed her desire to be placed on indefinite leave of absence from her position.

[30] In a letter to Ms. Kaufmann dated May 31, 1994, Mr. Lightfoot points out the consequences of applying and receiving an indefinite leave. In particular, at the expiry of the leave, the employee is placed on an agency wide re-employment list for a maximum of two years. If no employment is found, or if a job opportunity is declined, the employee loses seniority benefits within the public service. In the memo, Mr. Lightfoot offered Ms. Kaufmann \$500 toward the cost of her move to Frenchman's Butte, where Ms. Kaufmann and her family decided to relocate to at the end of June, 1994.

[31] On June 16, 1994, Ms. Kaufmann filed a harassment complaint under the Appendix "H" policy. Around the same time, she moved with her family to Frenchman's Butte where her spouse had found employment.

[32] On July 12, 1994, Ms. Gallagher telephoned Mr. Lightfoot to explore options for settling Ms. Kaufmann's complaints. Ms. Gallagher pointed out the confusion that existed concerning Ms. Kaufmann's current status as a laid-off fire protection worker. It was not clear if she was laid-off as a fire protection worker III (on probation) or as a fire protection worker I. If the latter was the case, then she ought to have been recalled to work in Prince Albert. Mr. Lightfoot noted that, officially, Ms. Kaufmann was a fire protection worker I but he noted that she had not been formally advised by SERM that she had failed her probationary period and that matter was still open for discussion with the Union.

[33] On July 13, 1994, Ms. Kaufmann testified that she had received a call from her former manager in Prince Albert, Dennis Engel, who asked her if she was now reverting to her former fire protection worker I position in Prince Albert. She called Ms.

Gallagher to discuss the matter with her. According to Ms. Kaufmann, Ms. Gallagher told her not to revert to the fire protection worker I position until the complaints were dealt with by the Union. Ms. Kaufmann took this advice to mean that, if recalled to the fire protection worker I position, she should decline it.

[34] Ms. Gallagher, on the other hand, recalled the conversation in very different terms. According to her, Ms. Kaufmann indicated to her that she had never received notification that she was to revert to her former position as a fire protection worker I and that there was confusion over her current status. Ms. Gallagher indicated that had Ms. Kaufmann asked her if she should accept a recall, if offered, her answer would clearly have been "Yes." A recall to the former position would not affect Ms. Kaufmann's grievances or complaints and there would be no reason to discourage Ms. Kaufmann from accepting the recall. Ms. Gallagher understood that the Employer had not recalled Ms. Kaufmann to the fire protection worker I position.

[35] As a result, on July 13, 1994, Ms. Gallagher wrote to Mr. Lightfoot, in part, as follows:

It is my understanding that Ms. Miller [Kaufmann] has never received any formal notification from the Department respecting failure or confirmation of her fire protection worker III status. In addition, she was never recalled to Cypress Hills Park, nor reverted to her fire protection worker I position in Prince Albert.

At the current time, her status is ambiguous to say the least in that she is not on an approved leave, either definite or indefinite.

I am requesting that the Department either confirm in writing what Ms. Miller's [Kaufmann's] status is, or at the very least put forward to her (through the Union) an offer to resolve this impasse.

[36] By telephone prior to August 9, 1994, Mr. Lightfoot advised Ms. Wallace that SERM was prepared to recommend that Ms. Kaufmann be placed on an indefinite leave of absence for one year commencing September 1, 1994 and that her status would be a fire protection worker III on probation. Mr. Lightfoot indicated that Ms. Kaufmann could apply to the Public Service Commission for an extension of her indefinite leave. He also proposed that the final probationary review at Cypress Park would be put on hold. He stated that if Ms. Kaufmann obtained another fire protection worker III position, she would be required to serve a full probationary period. This

conversation was recorded in a letter from Mr. Lightfoot to Ms. Wallace date stamped August 9, 1994.

[37] On August 8, 1994, Ms. Gallagher followed up on the matter with Ms. Kaufmann indicating to her that the Employer would be forwarding a letter to her indicating that she was on indefinite leave as a fire protection worker III on probation. Ms. Gallagher noted in her letter that the Union would not be filing a grievance on the status issue now but would wait to see if SERM agreed to remove the probationary evaluation. Ms. Gallagher also undertook to follow up on the issue of the time spent by Ms. Kaufmann on probation in the fire protection worker III position. Ms. Gallagher noted that the process of naming investigators to review Ms. Kaufmann's harassment complaint was underway.

[38] Ms. Wallace set about to obtain information from Mr. Lightfoot on the time spent by Ms. Kaufmann during her probationary period in the fire protection worker III position. Mr. Lightfoot forwarded the information directly to Ms. Kaufmann. Ms. Kaufmann believed that she had completely served her one-year probationary period and did not agree that she should have to re-serve the probationary period on re-employment to a fire protection worker III position.

[39] In Mr. Lightfoot's letter to Ms. Kaufmann dated October 25, 1994, he asked her to respond to his May 31, 1994 letter to her in which he advised her of her right to request indefinite leave and the need to complete the required forms. This letter was copied to Ms. Wallace. Prior to receiving the October 25, 1994 correspondence, Ms. Wallace was unaware that Ms. Kaufmann had not applied for indefinite leave and she encouraged her to do so in order to protect her status as an employee.

[40] By September 1994, Ms. Kaufmann and her family had returned to live in Prince Albert.

[41] On November 9, 1994, the harassment investigators filed their report with the Deputy Minister of SERM. The report was not made available to Ms. Kaufmann or to her Union advisors. Rather, one staff member of the Union kept the report under lock

and key in accordance, apparently, with the procedures agreed to by the Union and the Public Service Commission when Appendix "H" was added to the collective agreement.

[42] Initially, Mr. Shaw, Deputy Minister of SERM, made Ms. Kaufmann and her advisors aware that the harassment investigators had upheld her complaint of harassment. However, he would not share copies of the investigators' report with Ms. Kaufmann.

[43] In a telephone conversation between Ms. Kaufmann and Ms. Gallagher on November 23, 1994, Ms. Kaufmann told Ms. Gallagher that she had not been recalled to any position and her request for an indefinite leave of absence was verbal only. She asked if the fire protection worker I position in Prince Albert had been filled on a permanent basis.

[44] On December 13, 1994, Mr. Shaw wrote to Ms. Kaufmann and outlined the steps taken by SERM to resolve her harassment complaint, including the following:

The department attempted to remedy your situation at Cypress Hills Provincial Park by:

- *Attempting to identify alternate employment at a comparable level at another location;*
- *Offering an indefinite leave to maintain your access to seniority and benefits for the maximum allowable time;*
- *Providing access to the Employee Assistance Program for counseling to deal with the stress of your situation; and*
- *Providing \$500 towards your relocation expenses to Frenchman's Butte.*

It is my understanding that you have not pursued alternative employment as you felt you needed time away from the department, but you have not, as yet, applied for an indefinite leave.

I want to advise you that the department again renews its offer to provide you alternate employment as a fire protection worker III or equivalent for the 1995 season, at a location other than Cypress Hills Park. Your initial probationary review as a fire protection worker III will be set aside and you will serve a new probationary period in this position.

[45] Ms. Kaufmann responded to Mr. Shaw by indicating that his proposed resolution of the harassment complaint was not satisfactory to her and by requesting a meeting with him. Ms. Kaufmann also requested a copy of the harassment report.

[46] Ms. Gallagher, with assistance from Tim Davies, research officer at the Union, began working with Ms. Kaufmann to develop a settlement offer in relation to the harassment complaint. Ms. Gallagher arranged a meeting between the Union, Ms. Kaufmann and the Employer for March 16, 1995. Ms. Kaufmann, however, informed Mr. Shaw that she would be unable to attend the meeting in person and would participate via telephone. Ms. Kaufmann also set out a list of settlement proposals. They included the following:

1. *Loss of wages and benefits including but not limited to:*
 - *overtime and loss of UI benefits for 1994/95*
 - *seniority*
 - *CPP, group life, and Sask. Public Employees Benefits.*
2. *All benefits according to the moving policy from Prince Albert to Maple Creek and from Maple Creek to Prince Albert to be paid.*
3. *Position clarified as to whether I am a FPW I or FPW III, not on probation.*
4. *My probation report to be revoked.*
5. *Retraining.*
6. *Reimbursement of cost of living expenses and for hardship suffered due to maintaining two homes.*
7. *Written apology to me from the region, individuals involved and the department be given to me and also be placed on record in my file.*
8. *Compensation for pain and suffering to myself and family.*
9. *Proof that further incidents of this nature will not be tolerated by the department and will be dealt with accordingly and in a much better and timely manner.*
10. *Finalizing my leave.*
11. *Compensation for obtaining my I.R.M. Diploma.*

[47] Ms. Kaufmann also noted in her letter that Mr. Rolles, Executive Director of Regional Operations, had not contacted her with respect to finding a new fire

protection worker III position, as promised in Mr. Shaw's letter to her of December 13, 1994.

[48] Ms. Gallagher met with Mr. Shaw and his officials on March 16, 1995. Mr. Shaw did not agree to meeting with Ms. Kaufmann via telephone. During the meeting, Mr. Shaw indicated to Ms. Gallagher that he found Ms. Kaufmann's claims excessive. He indicated that the department wanted to offer Ms. Kaufmann a position in SERM and they did not take the view that she had abandoned her job. However, he did indicate that Ms. Kaufmann had an obligation to mitigate her losses.

[49] A further meeting was scheduled between department officials, union officials and Ms. Kaufmann on April 13, 1995. Prior to the meeting, Ms. Gallagher sent Ms. Kaufmann an outline of the settlement options. The first option contemplated a return to work. In the proposal, Ms. Gallagher indicated that Ms. Kaufmann "would need to state in writing what geographic areas you [Ms. Kaufmann] would be prepared to work in and any restrictions you may want to put on your re-employment." The second option proposed by Ms. Gallagher was based on a severance package on the assumption that Ms. Kaufmann would not be returning to work.

[50] Mr. Shaw also indicated in a further letter to Ms. Kaufmann dated March 27, 1995 that SERM was prepared to offer her a position but needed to know Ms. Kaufmann's preferred work locations.

[51] Ms. Gallagher wrote to Mr. Shaw on April 6, 1995 asking him to respond to the issues raised in Ms. Kaufmann's March 8, 1995 letter quoted above. Ms. Gallagher indicated to Mr. Shaw that Ms. Kaufmann's letter would form the basis of the discussion on April 13, 1995. In addition to the forward looking solutions posed by Mr. Shaw in his letter to Ms. Kaufmann on December 13, 1994, Ms. Gallagher also wanted the Employer to address how it would correct the past problems for Ms. Kaufmann.

[52] During the April 13, 1995 meeting, Mr. Shaw indicated that SERM would accept responsibility for Ms. Kaufmann's lost wages for the 1993 and 1994 seasons. They estimated that Ms. Kaufmann had been laid off ten weeks early in the 1993 season. SERM was also willing to compensate Ms. Kaufmann for lost E.I. benefits

arising from the loss of seasonal work in 1993 and 1994. The Employer also agreed to pay for Ms. Kaufmann's move from Maple Creek to Prince Albert, less the \$500 already paid with respect to moving expenses. The Employer was not willing to waive the probationary period for a fire protection worker III but it was prepared to discuss the length of any new probationary period. SERM agreed to destroy the final probationary review. SERM agreed to pay the sum of \$1,500 as pain and suffering resulting from the harassment. In addition, the Employer asked Ms. Kaufmann to assist it in finding future employment within SERM. The Employer also indicated that it was flexible on adjusting Ms. Kaufmann's leave if it was required.

[53] At that time, Ms. Kaufmann was pregnant and required a leave of absence from her position due to pregnancy. The Employer at the April 13, 1995 meeting did not know this fact. In the normal course, Ms. Kaufmann would qualify for maternity leave commencing in July, 1995 and lasting to the spring of 1996.

[54] After the April 13, 1995 meeting, Ms. Gallagher asked Mr. Davies to structure a fair settlement of the financial issues for Ms. Kaufmann and to work with her in negotiating a package with the Employer. Mr. Davies had numerous discussions and meetings with Ms. Kaufmann to work out the terms of an offer.

[55] Ms. Kaufmann and her family moved from Prince Albert to Lake Alma in July, 1995. This move removed Ms. Kaufmann physically from the forest zone and made her re-entry into the work place difficult simply because of the distances she would be required to travel to work as a fire protection worker.

[56] On May 10, 1995, the Employer set out its proposed settlement in writing totaling \$23,235 in lost wages and E.I. benefits plus relocation costs. The Employer also offered to reinstate Ms. Kaufmann in a fire protection worker III position at a mutually acceptable location effective immediately. In the alternative, the Employer offered a one-year period of definite leave with the right to return to a fire protection worker III position.

[57] During May and June, 1995, Mr. Davies proposed various options to Ms. Kaufmann and he obtained legal advice in relation to various aspects of her claim against the Employer.

[58] On October 12, 1995, the Union responded to the Employer's May 10, 1995 proposal in writing. The Union advised the Employer in its letter that Ms. Kaufmann had delivered her child on July 14, 1995 and therefore needed a maternity leave period commencing July 1, 1995 with a recall to a fire protection worker III position in the spring of 1996. Mr. Davies also informed Mr. Shaw that Ms. Kaufmann had moved to Lake Alma and would limit her availability to a reasonable driving distance from Lake Alma. Mr. Davies sought information from the Employer on the location and type of work that would be available to Ms. Kaufmann within her parameters.

[59] On October 26, 1995, Mr. Shaw responded by reiterating the offer made on May 10, 1995 with minor changes. In addition, Mr. Shaw noted as follows:

In addition, I have made repeated offers of alternative employment to Ms. Miller [Kaufmann] (December 13, 1994; April 13, 1995; May 10, 1995) and have received no response. In a further letter to Ms. Miller dated June 19, 1995, I confirmed that she could apply for a leave of absence, an offer that had been extended several times previously. To date I have received no such request. As a consequence of this, we are no longer accountable for any lost wages and benefits for 1995 or future seasons.

As Ms. Miller [Kaufmann] is effectively absent without leave, it is important that there be a regularization of her employment status with us through an application for a leave of absence. We are prepared to offer:

- *A definite leave from an FPWIII position in Prince Albert for 1995; or*
- *An indefinite leave of absence, which will afford her access to a re-employment list and the ability to bid on jobs which may be of interest to her when she is ready to return to work.*

Any leave granted as per the above will be subject to seasonal layoff requirements. You are already aware that the department does not have FPW positions of any kind within reasonable driving distance of Lake Alma.

If we do not receive an application for a leave of absence by December 15, 1995, I will have no alternative but to assume that Ms. Miller [Kaufman] has chosen to resign and I will therefore take appropriate steps to effect her resignation.

[60] Mr. Davies indicated that when he received the October 26, 1995 letter, he contacted the human resources branch of SERM to ask where was Ms. Kaufmann's job offer. Normally, the Union is not involved in issues pertaining to the status of an employee. Mr. Davies felt that it was up to the Employer to issue a recall notice to Ms. Kaufmann, which it had not done. He viewed the October 26, 1995 letter as a hardening of the Employer's position.

[61] Mr. Davies responded to the October 26, 1995 letter on December 14, 1995 by enclosing an application for maternity leave for Ms. Kaufmann and indicating that the Union would make a detailed proposal for settlement of her claim within a few days.

[62] Mr. Shaw for the Employer responded to Mr. Davies' letter on January 3, 1996 indicating that the Employer wanted to regularize Ms. Kaufmann's employment in one of three ways:

- (1) *Find her a fire protection worker III position in SERM at a mutually agreeable location. Once appointed to the fire protection worker III position, grant a definite leave of absence during the maternity period; and, at the end of the definite leave, recommend approval for indefinite leave with access to the re-employment list for two years;*
- (2) *Permit Ms. Kaufmann to go on a one-year indefinite leave of absence effective July 1, 1995 and access the re-employment list for two years in accordance with the collective agreement; or*
- (3) *Accept the offer of \$23,000 plus reasonable and actual relocation expenses from Cypress Hills to Prince Albert (less the \$500 already paid), plus interest.*

[63] Mr. Shaw was clearly frustrated that the Union did not view his earlier offers of employment as "employment offers." Mr. Davies explained that the Employer did not issue an offer of a specific position to Ms. Kaufmann as it normally would have done with an employee who was being offered a position in government.

[64] On February 6, 1996, Mr. Davies forwarded a detailed monetary proposal to the Employer. In relation to her future employment at SERM, Mr. Davies indicated that Ms. Kaufmann would commence work April 1, 1996, at the end of her maternity leave, at the fire protection worker III pay level or equivalent. Ms. Kaufmann resided in Lake Alma and still required work within traveling distance of Lake Alma.

[65] The negotiations between the Union and the Employer came to a stalemate. At that point, Mr. Davies filed two grievances. The first grievance alleged a failure on the part of the Employer to accommodate Ms. Kaufmann by failing to offer her a position in April, 1996 following the finding of workplace harassment. This grievance was signed on March 7, 1996 and was submitted to the Employer on March 22, 1996. The second grievance claimed damages for the Employer's failure to compensate Ms. Kaufmann for her losses related to the workplace harassment. This grievance, as well, was filed with the Employer on March 22, 1996.

[66] The Employer rejected the grievances as being out of time under the provisions of the collective agreement. The Union disputed this allegation and claimed that the clock did not start to run until the parties reached an impasse on settling the harassment complaint. Eventually, the grievances were accepted and the parties proceeded to negotiate with respect to them. The parties agreed to mediate the dispute using the services of Ted Priel as mediator.

[67] In January 1997, an arbitrator was selected; however, the person in question was appointed to the Court of Queen's Bench and could not sit as chairperson of the arbitration board.

[68] In April, 1997, Ms. Kaufmann wrote to complain about the delays in her case to the Union President, Barry Nowoselsky. She asked why Margot Wallace had not filed grievances in 1993 when she was first laid off and provided an improper probationary evaluation. Mr. Nowoselsky responded that Ms. Wallace had received assurances from Mr. Lightfoot that the matter would be handled properly in accordance with the collective agreement, that is, that Ms. Kaufmann would be reverted to her former position in Prince Albert or she would be given another fire protection worker III

position, perhaps in Prince Albert. The Union agreed that the process had not served her well, but it asserted that the Union had been steadfast in its efforts to get an acceptable settlement for Ms. Kaufmann.

[69] Through May, 1997, Mr. Davies continued to attempt to convince Ms. Kaufmann to settle the matter with the Employer with the assistance of Mr. Priel as mediator. Ms. Kaufmann was becoming increasingly distraught over the situation and the losses that were occasioned on her family as a result of her on-going unemployment. During this period of time, Ms. Kaufmann did receive independent legal advice regarding her settlement options.

[70] Ms. Kaufmann's circumstances posed a difficult issue for the Union. She resided in an area where no forests existed. As a result, if she were reinstated to a fire protection worker III position, she would be required to work away from home in the north or back to Cypress Hills. Mr. Davies commented on this problem in a letter to Ms. Kaufmann as he thought the chance of obtaining reinstatement through the arbitration process was high but it would not be an effective remedy for Ms. Kaufmann as there were no fire protection worker III jobs within driving distance of her home. He continued to encourage Ms. Kaufmann to consider negotiating a settlement of her grievances.

[71] After the chosen arbitrator was no longer available to sit on the arbitration, the parties agreed to Fred Cuddington as mediator assisting Mr. Priel. This process continued from late 1997 to March 1998 when the Union and the Employer entered into a settlement agreement. The settlement agreement provided for the settlement of the harassment complaint, the probationary failure, the grievances, Ms. Kaufmann's human rights complaint that had been filed sometime earlier and termination of her employment. In the agreement, the Employer agreed to pay Ms. Kaufmann \$65,000 by way of general damages for personal injury. Ms. Kaufmann's consent to the terms was a condition of the agreement. She did not consent and was advised by her lawyer not to sign the agreement.

[72] Mr. Davies was of the view that this was the best agreement he could reasonably achieve for Ms. Kaufmann and he recommended the agreement to her.

[73] However, because Ms. Kaufmann did not consent to the settlement, the parties continued to meet and negotiate with the assistance of the mediators. During some of these sessions, her legal counsel accompanied Ms. Kaufmann.

[74] An agreement was finally achieved between the parties on April 22, 1999. It contained the basic parameters of the earlier agreement but it differed in that it did not effect the termination of Ms. Kaufmann. Instead, she was allowed to remain on the re-employment list effective May 1, 1999 as a fire protection worker III. The Employer paid the sum of \$65,000 to Ms. Kaufmann as damages for personal injury.

[75] Ms. Kaufmann was permitted under the terms of the collective agreement to place restrictions on her availability for work. As a result, she restricted her availability to only those positions she may be deemed to be qualified that are within 100 kilometers of Lake Alma.

[76] Since the signing of the agreement there have been various disputes arise between the parties. The agreement contemplated that any disputes concerning it should be referred first, to Mr. Cuddington, for mediation and if not successful, to Mr. Priel for arbitration.

[77] A number of issues were referred by the Union to Mr. Cuddington and he has issued one further report dated February 26, 2002. In that report, the parties were attempting to sort out whether Ms. Kaufmann could alter her restrictions. In addition, problems had arisen in relation to the tax-free status of the settlement. The department issued a T-4 slip to Ms. Kaufmann indicating that the sum received was income. The amount was added to Ms. Kaufmann's income for the tax year in question and, as a result, she was assessed taxes on the sum and lost other benefits that she and her family had previously received, such as child tax credits. This problem has caused incredible personal stress for Ms. Kaufmann and her family. Ms. Kaufmann was of the view that the Employer had breached the agreement and, as a result, it is null and void.

Relevant Statutory Provision:

[78] This application is governed by 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, which states:

25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.

Arguments:

[79] Ms. Kaufmann argued that the Union breached its duty of fair representation by failing to file a grievance relating to her failed probationary evaluation in September 1993. Ms. Kaufmann pointed out that, as a result, her position in government was jeopardized and she effectively lost her government employment. Ms. Kaufmann noted that she had never received a lay-off notice from her fire protection worker III position. Ms. Kaufmann believed that Ms. Wallace lied to her about filing a grievance and was reckless in the manner in which she dealt with Ms. Kaufmann's complaints. Ms. Kaufmann indicated that Ms. Gallagher did not tell her that she could revert to her fire protection worker I position in Prince Albert when it was offered, without jeopardizing her probationary evaluation grievance. Ms. Kaufmann also complained about the tone and manner of service from Mr. Davies, whom she found to be hostile.

[80] Ms. Kaufmann criticized the Union for failing to take up the Employer on its offer to find her re-employment in SERM. In the first agreement, signed by the Employer and the Union, Ms. Kaufmann noted that the agreement was one that would result in the termination of her employment. She indicated that she was not aware of the terms of this agreement until sometime after it was signed by the Union and Employer.

[81] In her written argument, Ms. Kaufmann advised the Board that, since filing her duty of fair representation complaint, she has been provided with copies of job postings and has obtained work with the Employer.

[82] Ms. Kaufmann also complained that the final agreement between the Employer and the Union has not been complied with and the Union has not taken the steps necessary to ensure that it is complied with.

[83] Ms. Kaufmann provided the Board with a list of remedies that would make her whole.

[84] Rick Engel, counsel for the Union, argued that the Union acted responsibly in proceeding to deal with Ms. Kaufmann's complaints under the harassment policy as opposed to the filing of grievances. If a grievance had been filed in September 1993, the Union would have had to obtain evidence of harassment from Ms. Kaufmann's co-workers. The Union could not obtain this information through any mechanism other than talking to her co-workers or subpoenaing them as witnesses in the arbitration. The harassment investigation provided a more thorough method of obtaining information that eventually assisted Ms. Kaufmann in obtaining a settlement from the Employer.

[85] The Union noted that the return to work issue was complicated by a number of factors, including Ms. Kaufmann's initial request to Mr. Lightfoot that she be placed on indefinite leave. Ms. Gallagher did not understand from Ms. Kaufmann that Mr. Dennis Engel, her former manager, was asking Ms. Kaufmann to revert to her former fire protection worker I position in Prince Albert, nor was any recall notice issued to that effect. In relation to the offers of re-employment from the Employer, the Union noted that the Employer did not offer any positions in a formal sense, nor was Ms. Kaufmann easily available for work, given initially, her pregnancy, and her subsequent move to Lake Alma.

[86] The Union argued that although the process of settlement took too long, it was the result of prolonged negotiations both with the Employer and with Ms. Kaufmann. The Union believed that it obtained a better settlement of Ms. Kaufmann's complaints through this process than it may have obtained through arbitration.

Analysis and Decision:

[87] The Board is required to determine if the Union acted in a manner that was arbitrary, discriminatory or in bad faith in its representation of Ms. Kaufmann's complaints and grievances against her employer. After having reviewed the evidence, we find that there is no basis for alleging that the Union acted in a manner that was discriminatory or in bad faith toward Ms. Kaufmann.

[88] The central allegations and analysis focus on whether the Union's representation of Ms. Kaufman was arbitrary. In the recent decision of *Vandervort v. University of Saskatchewan Faculty Association et al.*, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board summarized its approach to arbitrary treatment as follows at 193 to 195:

[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, where the Supreme Court set out five aspects of the duty of fair representation as follows at 527:

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence and without hostility towards the employee.*

[emphasis added]

[216] This Board has also adopted standards set by the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Inc. v. International Woodworkers of America, Local 1-217 et al., [1975] 2 Can L.R.B.R. 196, at 201-202 as follows:

The Union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race or sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.

[emphasis added]

[217] This standard was expanded on by the Board in Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep.57, LRB File No. 262-92, at 64:

What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudice or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or view of an individual employee.

[218] As noted by counsel for the Faculty Association in his brief to the Board, this Board in the Banga v. Saskatchewan Government Employees' Union, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, adopted comments as well from the Ontario Labour Relations Board in Prinesdomu v. Canadian Union of Public Employees, [1975] 2 Can L.R.B.R. 310:

It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making

that cannot be branded as implausible or capricious.

[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:

Through various decisions, labour boards, including this one, have defined the term “arbitrary.” Arbitrary conduct has been described as a failure to direct one’s mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.

Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.

When does negligence become “serious” or “gross”? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada

commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.

[89] In the present case, we summarize Ms. Kaufmann's main complaints against the Union as follows: (1) the Union failed to file a timely grievance with respect to the Employer's decision to fail her on her probationary period in the fire protection worker III position; (2) the Union excessively delayed obtaining a settlement of her harassment complaint and grievances; (3) the Union failed to find work for her after the probationary evaluation; and (4) the Union failed to enforce the terms of the agreement ultimately arrived at between the Employer, the Union and Ms. Kaufmann. We will examine each complaint in light of the principles outlined above.

- (1) Failure to file a timely grievance with respect to the Employer's decision to fail Ms. Kaufmann on her probationary period as fire protection worker III.

[90] Ms. Kaufmann argued that Ms. Wallace ought to have filed a grievance concerning the probationary evaluation within 30 days of Ms. Kaufmann learning that the Employer intended to fail her on her probationary period. Ms. Wallace explained that she had covered off the grievance period with the Employer by agreeing to waive the time period until the informal discussions were at a stalemate. She wrote the Employer to confirm her understanding of the agreement. In addition, she was of the view that she was making progress in the negotiations with the Employer, and in particular, with Mr. Lightfoot. At some point, it was difficult for Ms. Wallace to identify a grievable issue as the Employer was indicating that it would remove the probationary evaluation.

[91] The harassment complaint provided a different avenue for resolving Ms. Kaufmann's complaints. Ms. Wallace and Ms. Gallagher viewed this avenue as being potentially more productive for Ms. Kaufmann than the grievance process. They concluded that the evidentiary problems of establishing harassment would be easier to address through the harassment complaint process as the alleged harassers would be required to speak to the harassment investigators. A broader range of information could be obtained through the investigation than would occur through the arbitration process.

[92] The Union commenced negotiations with the Employer shortly after the findings of the harassment investigation were made known. The harassment investigation supported Ms. Kaufmann's position that she had not received a fair probationary evaluation as a result of the workplace environment.

[93] In this context, we do not find that the failure of Ms. Wallace to file a grievance in relation to the probationary evaluation was a major oversight or error. Ms. Wallace attempted an informal settlement of the problem; significant progress was made with Mr. Lightfoot until Ms. Kaufmann elected not to attend the meeting with Ms. Wallace and Mr. Lightfoot on May 16, 1994.

[94] Once the harassment complaint was filed, Ms. Kaufmann's legal rights were well defined and protected. As indicated by Mr. Davies, once the negotiations of the harassment complaint came to a stalemate, which they did, he was able to file grievances pertaining to the harm caused to Ms. Kaufmann as a result of the proven harassment. Mr. Davies did ultimately file two grievances, which were resolved through the negotiation process.

[95] Overall, we conclude that the failure of Ms. Wallace to file a grievance relating to the probationary evaluation did not constitute gross negligence or even negligence. The Union did not approach Ms. Kaufmann's complaints in a perfunctory manner. Rather, it encouraged her to pursue a course of negotiations with the Employer to achieve a resolution of the matter. In addition, it provided her with assistance in filing and negotiating a settlement of her harassment complaint. Both avenues provided mechanisms for resolving the complaints.

(2) Delay in achieving a settlement of the harassment complaint and the grievances.

[96] There was a significant delay in achieving a settlement of Ms. Kaufmann's work problems. The probationary evaluation took place in September, 1993. The harassment investigators reported in November, 1994. Grievances were filed in March, 1996 and a settlement was reached in April, 1999.

[97] There is no doubt that the delay was prejudicial to Ms. Kaufmann. She was without work for a considerable period of time and had to resort to welfare for support. This period was extremely difficult for her, her spouse, Kelly, and her family.

[98] In the period from September 1993 to November 1994, there was little the Union could have done to speed up the process of settlement. Ms. Kaufmann did not want to file a harassment complaint until she had arranged to leave Maple Creek in June, 1994. In addition, Ms. Kaufmann refused to meet with the Union and Mr. Lightfoot in May, 1994 to deal with the outstanding issues. At the same time, when she did meet with Mr. Lightfoot on her own, she led him to believe that she wanted to be placed on indefinite leave.

[99] From November, 1994 to July, 1995 the parties were involved in formulating their respective bargaining positions and in negotiations for a settlement. When matters came to a stalemate in negotiations in March, 1996, Mr. Davies filed two grievances pertaining to the harassment negotiations.

[100] From March, 1996 to April, 1999 the Union and the Employer continued to negotiate with respect to the grievances using both the traditional grievance mechanisms of step meetings and the naming of an arbitrator and also, using mediators to assist in the discussions. The matters dragged on for some time. Mr. Davies explained that he continued with the negotiations and mediation because he was of the firm belief that it would result in a better settlement for Ms. Kaufmann than she could achieve through arbitration. In particular, he was concerned that an arbitrator would simply re-appoint Ms. Kaufmann to her fire protection worker III position in Cypress Hills Park, a position that Ms. Kaufmann could not access from her home in Lake Alma.

[101] The Board does not believe that Ms. Kaufmann's harassment complaint should have dragged out for so long. However, we must ask if the delay occurred as a result of the Union's inattention, indifference or incompetence. In our view, the Union did not act in such a manner.

[102] Ms. Kaufmann's complaints were complicated by her personal circumstances involving her desire not to work again in Cypress Hills. Ms. Wallace

understood that Ms. Kaufmann was also unwilling to work in Prince Albert. In addition, Ms. Kaufmann advised the Employer that she wanted to be placed on indefinite leave. This information complicated the negotiation of a return to work as both the Union and the Employer were operating on a set of assumptions that may have changed for Ms. Kaufmann.

[103] In addition, the Employer did not issue a normal recall or deal with Ms. Kaufmann in a formal manner after her probationary evaluation. This is understandable given Mr. Lightfoot's conversation with Ms. Kaufmann in May, 1994, but it did make it difficult for the Union and Ms. Kaufmann to sort through her status issues and to arrange a return to work in a timely fashion. The Union, of course, does not issue recall notices – that is the responsibility of the Employer.

[104] In our view, Mr. Davies achieved a settlement for Ms. Kaufmann that was probably unachievable through the arbitration process. He demonstrated a great deal of skill and knowledge in putting together Ms. Kaufmann's claims and he continued to press her claims with the Employer through very difficult negotiations. The results were overall positive for Ms. Kaufmann with the exception of the Employer's error in sending out a T-4 relating to the amount paid for personal injury. The Union did not contribute to this problem and has taken reasonable steps to rectify the matter under the terms of the settlement agreement.

[105] For these reasons, although we find the delay excessive and generally unacceptable, in the context of assessing whether the Union breached the duty of fair representation, we do not find that the Union acted in a manner that demonstrated inattention, disinterest or incompetence toward Ms. Kaufmann or her complaints. The delay was regretful but it was not caused by gross negligence on the part of the Union.

(3) The Union's failure to find work for Ms. Kaufmann after the probationary failure

[106] The main difficulty that occurred for Ms. Kaufmann was the loss of her employment with the Employer. This occurred when she was not recalled for the 1994 fire season and onward. We did not have the opportunity to hear from the Employer why it did not formalize Ms. Kaufmann's status as a fire protection worker I or III, or why it did

not recall her to work in the 1994 or 1995 fire seasons. From the evidence, we understand that Ms. Kaufmann told Mr. Lightfoot that she wished to be placed on indefinite leave. Although he attempted to formalize the leave, Ms. Kaufmann never actually applied for indefinite leave, nor did the Employer take steps to deal with her as an employee eligible for recall. The matter was somewhat surprisingly left up in the air.

[107] Ms. Gallagher attempted to clarify the matter with the Employer in July, 1994. In response, Mr. Lightfoot asked Ms. Kaufmann to complete the necessary forms to obtain an indefinite leave. Again, there does not appear to have been any serious follow-up with Ms. Kaufmann on this issue by the Employer until Mr. Shaw's threatening letter dated October 26, 1995.

[108] We do not find on the evidence that Ms. Gallagher or Ms. Wallace told Ms. Kaufmann not to accept a recall to her former position in Prince Albert as a fire protection worker I. As Ms. Gallagher explained, if she had understood that Ms. Kaufmann had been offered the reversion, she would have encouraged her to take the job as it would not jeopardize her other claims. Ms. Gallagher was of the view that the Employer had not made any offer of re-employment as was within its power to do.

[109] During the hearing, it was somewhat baffling to the Board why the Union did not respond in a more positive manner to the offers of re-employment made by the Employer during the negotiation of the settlement of the harassment complaint. Mr. Shaw made the first offer of re-employment to Ms. Kaufmann on December 13, 1994. The Employer offered a fire protection worker III position (away from Cypress Hills Park) with the requirement that Ms. Kaufmann serve a full probationary period. Ms. Kaufmann found this offer wanting and she advised Mr. Shaw accordingly. Mr. Shaw proposed in his letter that Mr. Rolles would be in touch with Ms. Kaufmann to finalize a location but the Employer took no action along these lines.

[110] Ms. Gallagher outlined settlement options for Ms. Kaufmann in a letter dated April 13, 1995, during which time Ms. Gallagher was attempting to settle the harassment complaint for Ms. Kaufmann with the Employer. Ms. Gallagher set out that, under the return-to-work option, Ms. Kaufmann would need to indicate in writing what geographic areas she would be prepared to work in and any restrictions she would place

on her re-employment. Ms. Kaufmann does not appear to have responded to this request. Mr. Shaw repeated the request for similar information from Ms. Kaufmann but no response from her was forthcoming.

[111] In July, 1995, Ms. Kaufmann and her family moved to Lake Alma, which is far from the forest regions of the province and made it unlikely that Ms. Kaufmann could find work comparable to the fire protection worker III position offered by the Employer. She placed additional restrictions on her return-to-work, once the settlement agreement was signed, that virtually ensured she would not obtain work from the re-employment list.

[112] Mr. Davies played a significant role in assisting Ms. Kaufmann to understand the importance of changing the restrictions and in getting the Employer to agree to the changes.

[113] During the remaining period of time, Mr. Davies worked to conclude the settlement agreement, which resulted in extended re-employment rights for Ms. Kaufmann.

[114] There were several occasions where Ms. Kaufmann was asked to identify her preferred location for working and several opportunities for the Union to push Ms. Kaufmann into returning to work. In our view, these opportunities were largely glossed over by both Ms. Kaufmann and the Union because of the personal stress suffered by Ms. Kaufmann as a result of the incidents in Cypress Hills Park. Ms. Wallace indicated that she thought the Department took advantage of Ms. Kaufmann's vulnerability by not recalling her in the 1994 and 1995 season. She also indicated that she did not "push" Ms. Kaufmann as hard as she should have on these issues because of Ms. Kaufmann's vulnerable state following the Cypress Hills experience. Ms. Wallace also was adamant that Ms. Kaufmann made it clear to her that she did not wish to work either at Cypress Hills or Prince Albert.

[115] Although with hindsight, it would have been better for everyone if Ms. Kaufmann had returned to work in the 1994 season and on-ward, there were complicating factors to take into account. These included: (1) Ms. Kaufmann's

expressed desire not to work at Cypress Hills Park or Prince Albert; (2) the Employer's belief that Ms. Kaufmann wanted to be on indefinite leave; (3) Ms. Kaufmann's unwillingness to request definite or indefinite leave and her unwillingness to state a location preference for work; (4) Ms. Kaufmann's residences in Frenchman's Butte and Lake Alma; and (5) the Union's gentle handling of Ms. Kaufmann.

[116] We do not find that the Union's failure to obtain work for Ms. Kaufmann, however, resulted from inattention, indifference, incompetence or other indicia of gross negligence. The Union was attempting to resolve a very difficult complaint, which was complicated by information it had received from Ms. Kaufmann as to where she did not want to work and by the perception that Ms. Kaufmann was under considerable stress and could not be pressured to make decisions about a return to work.

(4) The Union's failure to enforce the terms of the agreement ultimately arrived at between the Employer, the Union and Ms. Kaufmann.

[117] Ms. Kaufmann complains that the Union has not taken sufficient steps to ensure that the Employer has complied with the settlement agreement. She takes the position that the settlement agreement is null and void because the Employer has breached it. Mr. Davies explained the steps the Union has taken to review the Employer's compliance with the settlement agreement. There are a number of areas where the Union has been satisfied, after investigating Ms. Kaufmann's allegations that the Employer has not been in breach of the agreement. In other areas, the Union has agreed with Ms. Kaufmann and has referred the disputes to the dispute resolution mechanisms set out in the agreement. This is the proper course of conduct for the Union.

[118] On a review of the steps taken by the Union in ensuring compliance with the settlement agreement, we do not find that the Union approached its responsibilities in a cursory or less than diligent fashion. It conducted proper investigations, sought the information it needed and made reasoned decisions based on the information and the legal advice it received. In these circumstances, we do not find that the Union has breached its duty of fair representation.

Conclusion:

[119] The Board, composed of Gwen Gray, Q.C. as Chairperson and Leo Lancaster, as Member, finds that the Union did not breach its duty of fair representation. As a result, the application is dismissed.

DATED at Regina, Saskatchewan, this **1st day of August, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.,
Chairperson