

**The Labour Relations Board
Saskatchewan**

**A. M., Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL
EMPLOYEES' UNION, Respondent**

LRB File No. 287-00; March 31, 2010

Chairperson: Kenneth G. Love, Q.C.; Members: Bruce McDonald and Ken Ahl

The Applicant: A. M.
For the Respondent: Juliana Saxberg

Reconsideration of Board Decision – Board reviews evidence presented at the original hearing and at the reconsideration hearing to determine if evidence suggests the original hearing was in any way tainted by involvement of former and current members of the Board who provided evidence at original hearing and who sat on original panel.

Reconsideration – Board reviews evidence related to grounds on which reconsideration was granted to determine if there is any basis for a change of the original decision. Board finds that no evidence that hearing tainted by involvement of former and current member of Board.

Reconsideration – Board reviews evidence at original and reconsideration hearing to determine if original decision should be modified or changed based upon a review of original evidence or on evidence presented at reconsideration hearing.

REASONS FOR DECISION

Background:

[1] This decision arises out of a reconsideration of the Board's original decision in respect of A. M.'s (the "Applicant's") application to the Board pursuant to Sections 25.1 and 36.1 of *The Trade Union Act*, R.S.S. 1978. c.T-17 (the "Act"). In its original decision dated August 1, 2003, (the "original decision")¹ a reduced panel of the Board, composed of then Chairperson, Gwen Gray, Q.C. and Leo Lancaster, dismissed the application.

[2] The panel was reduced because Mr. Wagner, the Union nominee on the panel, was offered and accepted a position with the Saskatchewan Government and

¹ *A.K. v. SGEU*, [2003] Sask. L.R.B.R. 344, LRB File No. 287-00

General Employees' Union, (the "Respondent" or the "Union") during the course of the hearing. As a result of his acceptance of that position, he was unable to continue to sit as a member of the panel on this matter.

[3] The Applicant applied to the Board to reconsider the original decision on a number of grounds. In its decision dated February 22, 2006², the Board determined that the Applicant had not received a fair hearing for the reasons outlined in that decision and directed that the matter be re-heard.

[4] A fresh panel of the Board began re-hearing this matter on January 19, 2009. The delay in re-hearing the matter was at the request of the Applicant. The hearing commenced on January 19, 2009, but was adjourned at the commencement of cross-examination of the Applicant by counsel for the Respondent. In response to a question posed by the counsel for the Respondent, the Applicant advised that she did not feel she was competent to represent herself at the hearing.

[5] The Applicant had been seeing a Psychiatrist who was assisting her to deal with some of the issues arising out the events which give rise to this application. The Board requested that she meet with her Psychiatrist prior to resumption of the hearing to ensure that it was desirable that she proceed with the hearing at this time. The Applicant's Psychiatrist wrote to the Board to advise that it would be advantageous for the hearing to continue and for the application to be resolved.

[6] Prior to the resumption of the hearing, the parties agreed to attempt to resolve the issues raised by the application by way of mediation. Vice-Chairperson Schiefner conducted the mediation, but the differences between the parties could not be resolved. The matter was then returned to the panel for continuation of the hearing.

[7] The hearing resumed on January 19, 2010 and was concluded on that day. The Applicant sought leave to file a written argument which request was granted. She was allowed until February 22, 2010 to file a written argument. The Respondent filed a written argument with the Board on January 19, 2010, but were given leave to file any rebuttal to the Applicant's written argument by March 8, 2010. The Applicant filed a

² *A.K. v. SGEU and Govt of Sask*, [2006] Sask. L.R.B.R. 97, LRB File No. 287-00

written argument, the Union relied upon the argument filed on January 19, 2010 and did not file any rebuttal.

[8] At the hearing of this matter, both the Applicant and the Respondent relied upon the transcript of the original hearing before the Board. The Applicant provided additional oral evidence and documents from herself and from Mr. Michael F. Shaw, the former Deputy Minister of the then named Department of Saskatchewan Environment and Resource Management (“SERM”).

[9] The oral evidence and documents presented at the hearing of this matter were not new and were not dissimilar to the evidence and documents provided to the Board at the original hearing. For that reason, we have relied primarily upon the statement of facts as found by the original panel in the original decision.

Facts:

[10] The Applicant filed an application under ss. 25.1 and 36.1 of the *Act*, 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. The Applicant ultimately lost her position with SERM (or the “Employer”), a Department within the Government of Saskatchewan. The Applicant claimed that, although she filed a harassment claim under Appendix “H” of the collective bargaining agreement, it did not help her situation.

[11] The Respondent replied to the application on December 20, 2000. In its Reply the Respondent set forth facts on which it relied to dispute the Applicant’s claim that it had not fairly represented her in relation to her dispute with SERM.

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

[13] In December 2001, the Applicant requested that the matter proceed to hearings.

[14] 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.

[15] The parties presented a large amount of documentary and oral evidence before the Board both at the original hearing and at the hearing of this matter. 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 original hearings, but we will outline the key events.

[16] The Applicant 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 Provincial Park and commenced employment there on June 8, 1992. As a Fire Protection Worker III, the Applicant was responsible for supervising a fire crew.

[17] The Applicant 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. Mr. Rick Goett, the Applicant'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." The Applicant 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."

[18] The Applicant 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.

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

[20] On September 2, 1993, Mr. Goett completed the final probationary review of the Applicant and found her performance to be "below standards." He failed the

Applicant 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 report as is required before the evaluation takes effect. As a result, the Applicant was not presented with formal notice that she had not passed her probationary period.

[21] Mr. Goett presented the final probationary evaluation to the Applicant 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 the Applicant's home position in Prince Albert and not the Fire Protection Worker III position at the Cypress Hills Provincial Park.

[22] The Applicant 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.

[23] The Union assigned Ms. Margot Wallace, agreement administration advisor, to assist the Applicant. Ms. Wallace met with the Applicant and her shop steward, Mr. Dan McGill, on Sunday, September 19, 1993 in Swift Current. The Applicant 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.

[24] 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.

[25] 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 the Applicant in her probationary period for the Fire Protection Worker III position. Ms. Wallace explained that the Employer had not properly brought its concerns regarding the Applicant's performance to her attention and

that they appeared to deal with the conflict between the Applicant and the fire crew by removing her from the crew without dealing with the inappropriate conduct of some of the fire crew members.

[26] 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 the Applicant, 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 Provincial Park.

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

[28] On December 17, 1993, the Applicant, Ms. Wallace, Mr. McGee and Pat Gallagher, then Director of Membership Services for the Union, met to discuss whether the Applicant'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". The Applicant 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.

[29] Ms. Gallagher concluded that the probationary assessment of the Applicant by Mr. Goett was colored by the fire crew's sexist attitude toward the Applicant. 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 attain as the harassment investigators would be empowered to interview crew members and others.

[30] 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 the Applicant'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 the Applicant. Ms. Gallagher indicated in her testimony that the Applicant'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.

[31] During this time as well, Ms. Wallace understood from her discussions with the Applicant that she no longer wished to work at Cypress Hills Provincial Park because of the events that had transpired while she worked there. In addition, it was Ms. Wallace's understanding that the Applicant did not wish to return to her home position in Prince Albert for personal reasons. Ms. Wallace understood that the Applicant did not want to move from Maple Creek until the end of the school year.

[32] On January 14, 1994, Ms. Wallace and the Applicant met with Mr. Lightfoot to discuss the Applicant's complaints. Ms. Wallace suggested to Mr. Lightfoot that the matter be resolved by removing the probationary review, pass the Applicant on her probationary period, and find her another Fire Protection Worker III position at a location other than Cypress Hills Provincial Park or Prince Albert. The meeting was positive but no agreement was reached at that time.

[33] The Applicant 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, the Applicant 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, the Applicant 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 the Applicant's status, as the probationary review had not been finalized.

[34] A further meeting was scheduled between the Union and Mr. Lightfoot on May 16, 1994. Ms. Wallace met with the Applicant and Mr. McGee prior to the meeting with the Employer. At that time, Ms. Wallace presented the Applicant with a written harassment complaint that she wanted the Applicant to sign and submit to Mr. Lightfoot at the meeting. According to Ms. Wallace, the Applicant 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.

[35] The Applicant 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.

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

[37] In a letter to the Applicant 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 the Applicant \$500 toward the cost of her move to Frenchman's Butte, where she and her family decided to relocate to at the end of June, 1994.

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

[39] On July 12, 1994, Ms. Gallagher telephoned Mr. Lightfoot to explore options for settling the Applicant's complaints. Ms. Gallagher pointed out the confusion that existed concerning the Applicant'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 later was the case, then she ought to have been recalled to work in Prince Albert. Mr. Lightfoot noted that officially, the Applicant 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.

[40] On July 13, 1994, the Applicant testified that she had received a call from her former manager in Prince Albert 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 the Applicant, Ms. Gallagher told her not to revert to the Fire Protection Worker I position until the complaints were dealt with by the Union. The Applicant took this advice to mean that, if recalled to the Fire Protection Worker I position, she should decline it.

[41] Ms. Gallagher, on the other hand, recalled the conversation in very different terms. According to her, the Applicant 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 the Applicant 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 the Applicant's grievances or complaints and there would be no reason to discourage the Applicant from accepting the recall. Ms. Gallagher understood that the Employer had not recalled the Applicant to the former Fire Protection Worker I position.

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

It is my understanding that Ms. M 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. M's status is, or at the very least put forward to her (through the Union) an offer to resolve this impasse.

[43] By telephone prior to August 9, 1994, Mr. Lightfoot advised Ms. Wallace that the Department was prepared to recommend that the Applicant 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 the Applicant could apply to the Public Service Commission for an extension of her indefinite leave. He also proposed that the final probationary review at Cypress Hills Provincial Park would be put on hold. He stated that if the Applicant 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.

[44] On August 8, 1994, Ms. Gallagher followed up on the matter with the Applicant 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 the Applicant on probation in the Fire Protection Worker III position. Ms. Gallagher noted that the process of naming investigators to review the Applicant's harassment complaint was underway.

[45] Ms. Wallace set about to obtain information from Mr. Lightfoot on the time spent by the Applicant during her probationary period in the Fire Protection Worker III position. Mr. Lightfoot forwarded the information directly to the Applicant. The Applicant 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.

[46] In Mr. Lightfoot's letter to the Applicant 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 the Applicant had not applied for indefinite leave and she encouraged her to do so in order to protect her status as an employee.

[47] By September 1994, the Applicant and her family had returned to live in Prince Albert, Saskatchewan.

[48] On November 9, 1994, the harassment investigators filed their report with the Deputy Minister of SERM. The report was not made available to the Applicant 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.

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

[50] In a telephone conversation between the Applicant and Ms. Gallagher on November 23, 1994, the Applicant 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.

[51] On December 13, 1994, Mr. Shaw wrote to the Applicant and he outlined the steps taken by the Department 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.

[52] The Applicant 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. She also requested a copy of the harassment report.

[53] Ms. Gallagher, with assistance from Mr. Tim Davies, Research Officer of the Union, began working with the Applicant to develop a settlement offer in relation to the harassment complaint. Ms. Gallagher arranged a meeting between the Union, the Applicant and the Employer for March 16, 1995. The Applicant, however, informed Mr. Shaw that she would be unable to attend the meeting in person and would participate via telephone. The Applicant 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.*

[54] The Applicant 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.

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

[56] A further meeting was scheduled between department officials, union officials and the Applicant on April 13, 1995. Prior to the meeting, Ms. Gallagher sent the Applicant an outline of the settlement options. The first option contemplated a return-to-work. In the proposal, Ms. Gallagher indicated that the Applicant "would need to state in writing what geographic areas you [Ms. M] 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 the Applicant would not be returning to work.

[57] Mr. Shaw also indicated in a further letter to the Applicant dated March 27, 1995 that the Department was prepared to offer her a position but needed to know her preferred work locations.

[58] Ms. Gallagher wrote to Mr. Shaw on April 6, 1995 asking him to respond to the issues raised in the Applicant's March 8, 1995 letter quoted above. Ms. Gallagher indicated to Mr. Shaw that the Applicant'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 the Applicant on December 13, 1994, Ms. Gallagher also wanted the Employer to address how it would correct the past problems for the Applicant.

[59] During the April 13, 1995 meeting, Mr. Shaw indicated that the Employer would accept responsibility for the Applicant's lost wages for the 1993 and 1994 seasons. They estimated that the Applicant had been laid off ten weeks early in the 1993 season. The Employer was also willing to compensate the Applicant for lost employment insurance benefits arising from the loss of seasonal work in 1993 and 1994. The Employer also agreed to pay for the Applicant'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. The Employer agreed to destroy the final probationary review. The Employer also agreed to pay the sum of \$1,500 as pain and suffering resulting from the harassment. In addition, the Employer asked the Applicant to assist them in finding future employment within the Department. The Employer also indicated that it was flexible on adjusting the Applicant's leave if it was required.

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

[61] After the April 13, 1995 meeting, Ms. Gallagher asked Mr. Davies to structure a fair settlement of the financial issues for the Applicant and to work with her in

negotiating a package with the Employer. Mr. Davies had numerous discussions and meetings with the Applicant to work out the terms of an offer.

[62] The Applicant and her family moved from Prince Albert to Lake Alma in July, 1995. This move removed the Applicant 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.

[63] On May 10, 1995, the Employer set out its proposed settlement in writing totaling \$23,235 in lost wages and Employment Insurance benefits plus relocation costs. The Employer also offered to reinstate the Applicant 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.

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

[65] 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 the Applicant 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 the Applicant 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 the Applicant within her parameters.

[66] 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. M (December 13, 1994; April 13, 1995; May 10, 1995) and have received no response. In a further letter to Ms. M 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. M 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. M has chosen to resign and I will therefore take appropriate steps to effect her resignation.

[67] Mr. Davies indicated that when he received the October 26, 1995 letter, he contacted the Human Resources Branch of SERM to ask where the Applicant's job offer was. 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 the Applicant, which it had not done. He viewed the October 26, 1995 letter as a hardening of the Employer's position.

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

[69] Mr. Shaw responded to the Mr. Davies' letter on January 3, 1996 indicating that the Employer wanted to regularize the Applicant'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. M 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.*

[70] 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 the Applicant, as it normally would have done with an employee who was being offered a position in government.

[71] 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 the Applicant would commence work April 1, 1996, at the end of her maternity leave, at the Fire Protection Worker III pay level or equivalent. The Applicant then resided in Lake Alma and still required work within traveling distance of Lake Alma.

[72] 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 the Applicant 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 the Applicant for her losses related to the workplace harassment. This grievance, as well, was filed with the Employer on March 22, 1996.

[73] 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 Mr. Ted Priel as mediator.

[74] 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.

[75] In April, 1997, the Applicant wrote to complain about the delays in her case to the Union President, Mr. 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 the Applicant 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 her.

[76] Through May, 1997, Mr. Davies continued to attempt to convince the Applicant to settle the matter with the Employer with the assistance of Mr. Priel as mediator. The Applicant 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, she did receive independent legal advice regarding her settlement options.

[77] The Applicant'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 Provincial Park. Mr. Davies commented on this problem in a letter to the Applicant as he thought the chance of obtaining reinstatement through the arbitration process was high but it would not be an effective remedy for the Applicant as there were no Fire Protection Worker III jobs within driving distance of her home. He continued to encourage her to consider negotiating a settlement of her grievances.

[78] After the chosen arbitrator was no longer available to sit on the arbitration, the parties agreed to Mr. 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, withdrawal of a Human Rights complaint the Applicant had filed sometime earlier and termination of her employment. In the agreement, the Employer agreed to pay the Applicant \$65,000 by way of general damages for personal injury. The Applicant'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.

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

[80] However, because she 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 her.

[81] 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 the Applicant. 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 the Applicant as damages for personal injury.

[82] The Applicant 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.

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

[84] 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 the Applicant could alter her restrictions. In addition, problems had arisen in relation to the tax-free status of the settlement. The Employer issued a T-4 slip to the Applicant indicating that the sum received was income. The amount was added to the Applicant'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 caused incredible personal stress for the Applicant and her family. The Applicant was of the view that the Employer had breached the agreement and, as a result, it is null and void.

Relevant Statutory Provisions:

[85] This application was made under Sections 25.1 and 36.1 of the *Act*, which state:

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.

...

36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.

(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.

(3) No employee shall unreasonably be denied membership in a trade union.

Arguments:

[86] The Applicant argued that the Union breached its duty of fair representation pursuant to s. 25.1 by failing to file a grievance relating to her failed probationary evaluation in September, 1993. She argued that, as a result, her position in government was jeopardized and she effectively lost her government employment.

She noted that she had never received a lay-off notice from her Fire Protection Worker III position. The Applicant argued that Ms. Wallace lied to her about filing a grievance and was reckless in the manner in which she dealt with her complaints. She also argued 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. She further complained about the tone and manner of service from Mr. Davies, whom she found to be hostile.

[87] The Applicant criticizes 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 SGEU, she 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.

[88] The Applicant also 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.

[89] The Applicant 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.

[90] At the original hearing, the Applicant provided the Board with a list of remedies that would make her whole.

[91] Ms. Juliana Saxberg, counsel for the Union, argued that the Union acted responsibly in proceeding to deal with the Applicant'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 any evidence of harassment from the Applicant'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 the Applicant in obtaining a settlement from the Employer.

[92] The Union noted that the return-to-work issue was complicated by a number of factors, including the Applicant's initial request to Mr. Lightfoot that she be placed on indefinite leave. Ms. Gallagher did not understand from the Applicant that Mr. Dennis Engel, her former Manager, was asking her 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 the Applicant easily available for work, given initially, her pregnancy, and her subsequent move to Lake Alma.

[93] 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 the Applicant. The Union believed that it obtained a better settlement of her complaints through this process than it may have obtained through arbitration.

Analysis and Decision:

[94] For the reasons given in the original decision, the Board dismissed the Applicant's application under s. 25.1 of the *Act*. The Board did not deal with the application under s. 36.1 of the *Act* in the original decision. The reason that the Board did not deal with the issue are not disclosed in the decision. However, the failure of the Board to deal with s. 36.1 was not raised in the application for reconsideration nor was it dealt with by the Board in its reconsideration of the original decision. We can speculate that this was because s. 36.1 does not apply in the situation dealt with here. Accordingly, we have not deal with that section as a part of our reconsideration.

[95] The grounds on which the reconsideration was granted was that Ms. Gallagher, one of the Union's witnesses was also a member of the Board and participated on subsequent panels of the Board with members of the panel which heard the Applicants application. At paragraph [23] of the reconsideration decision, the Board found as follows:

It is clear that, in this case, the Board breached the policy when Ms. Gallagher participated in subsequent proceedings with the chairperson of the panel that heard her as a witness in this case. It

matters not whether Ms. M personally apprehended bias in these circumstances; Ms. Gallagher's participation on subsequent panels with the chairperson amounted to a conflict of interest as identified by the Board's policy. This conflict of interest gives rise to a reasonable apprehension of bias and therefore amounts to a breach of natural justice entitling Ms. M to a re-hearing of her application.

[96] When re-hearing a matter on reconsideration, the Board looks at the reasons for which the reconsideration was granted and reviews the evidence presented both at the original hearing and the subsequent hearing to determine if there is any or sufficient justification to change the Board's original decision. In *The North West Company v. Tora Regina (Tower) Limited*³ the Board examined the factual situation and determined that due to the changes which had occurred (*i.e.*: the Employer had opened a new store location), that the evidence of support filed was insufficient to support the certification which had been granted. In that instance, the Board ordered a new vote of the affected employees to determine if they wished to be represented by the Union for the purposes of collective bargaining.

[97] In this case, in re-hearing the matter the Board must attempt to determine if there was any evidence to suggest that there was any bias resultant from the impugned actions of Ms. Gallagher as a member of the Board which would justify the Board in coming to a conclusion different than the original board. Secondly, the Board was required to take a fresh look at the evidence provided to the Board both at the original hearing and the subsequent hearings before this panel of the Board to determine if, based upon this panels view of that evidence if a different result was warranted.

[98] There was no evidence provided to this panel which would allow it to conclude that there was any bias associated with Ms. Gallagher having sat on other matters with members of the original panel. Nor was there any basis to conclude or evidence to act upon that suggested that Mr. Wagner's participation in hearing the matter, but not deciding the matter, in any way tainted the original panels deliberation or determination of the matter. It is clear from the original decision that the former Chairperson and Mr. Lancaster took great pains to insure that their decision was in no way tainted by Mr. Wagner accepting an opportunity with the Union.

³ 2008 CanLII 47050 (SK L.R.B.)

[99] The jurisprudence relied upon the original panel in its decision has not been overturned by the Board since that decision, and has, in fact been relied upon subsequently by the Board in its more recent decisions. The rationale and logic adopted by the original panel in dismissing the application was, and remains, in accordance with the Board's jurisprudence in this area.

[100] This panel of the Board adopts and supports the Reasons for Decision given by the original panel, composed of Chairperson Gray and member Lancaster.

Conclusion:

[101] The Board finds that the Union did not breach its duty of fair representation. As a result, the application is dismissed.

DATED at Regina, Saskatchewan, this **31st** day of **March, 2010**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.,
Chairperson