

**Labour Relations Board
Saskatchewan**

**KEITH PETERSON, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 1975-01, Respondent**

LRB File Nos. 056-03, 061-03, 062-03, 096-03, 097-03, 098-03 & 104-03; December 8,
2004

Chairperson, James Seibel; Members: Leo Lancaster and Pat Gallagher

The Applicant Keith Peterson
For the Union: Peter Barnacle

Duty of fair representation – Contract administration – Applicant’s complaints primarily of perceived arbitrariness in relation to union’s decisions not to file or process grievances and discrimination in relation to union’s failure to grieve certain actions of employer that applicant perceived as harassment – Board reviews each of applicant’s complaints and concludes that no violation of s. 25.1 of *The Trade Union Act* occurred under circumstances of case.

The Trade Union Act, s. 25.1.

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 1975-01 (the “Union”) represents a unit of employees employed by the University of Regina (the “University”). The Applicant, Keith Peterson was, at all material times, an employee of the University and a member of the bargaining unit. Mr. Peterson filed seven applications each alleging that the Union committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “Act”), which provides as follows:

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.

All of the applications were heard together over the course of two days.

Evidence:

[2] Mr. Peterson testified at length on his own behalf. He was first employed by the University part-time in 1978. He became a full-time employee as a storekeeper 1 in the physical education department in 1987. His employment was terminated in October, 2003.

[3] Don Puff, president of the Union and chair of the Union's grievance committee, and Don Moran, a national service representative for the Canadian Union of Public Employees, were called to testify on behalf of the Union.

[4] Mr. Puff testified generally that, as president of the Union and chair of the Union's grievance committee, before a grievance is filed it is his preference to meet with the appropriate department head and utilize the "problem-solving procedure" outlined in article 14.4 of the collective agreement. While grievances may be signed and filed by the chair of the grievance committee, union steward or in some cases by the employee themselves in order to meet time limits, it is the decision of the committee whether to prosecute or continue to prosecute a grievance. According to Mr. Puff, there is no procedure for the appeal of such a decision in the Union's constitution or bylaws, but it is an informal practice that a member can bring the issue to a meeting of the general membership and that the Union will generally abide by the wishes of the membership.

[5] Following is a summary of the evidence adduced with respect to each application.

LRB File No. 056-03

[6] In his application filed with the Board Mr. Peterson stated that the University gave him a written warning on May 16, 2002. A grievance of this action was filed by the Union on May 22, 2002 requesting as relief that the warning be removed from Mr. Peterson's personnel file. Mr. Peterson alleged that the Union has not prosecuted the grievance with due diligence and that the reprimand was the basis for his subsequent suspension of employment by the University in March, 2003.

[7] In its reply the Union stated that the grievance was moved to stage 2 of the grievance process in June, 2002. On June 21, 2002 the University advised the

Union that Mr. Peterson's performance had improved and no further action would be taken. The Union advised the University that the University need not file a stage 2 response while the Union reviewed its position. The Union's grievance committee subsequently determined that the grievance should be withdrawn.

[8] Mr. Peterson testified that the Union did not advise him that the grievance was withdrawn by the Union until May, 2003 and he was not advised that there was any procedure to appeal the Union's decision to withdraw the grievance.

[9] Mr. Puff testified that the Union filed a grievance on May 22, 2002 with respect to the May 16, 2002 written reprimand given to Mr. Peterson by the University. The written reprimand in question enumerated twelve concerns – some less serious, some more serious – the details of which we do not propose to set out. Following a meeting with the University, the Union declined to advance the grievance to stage 2 of the grievance procedure, pending a review by the Union. Subsequently, the Union grievance committee (of which Mr. Puff was not then a member) determined to withdraw the grievance, but Mr. Puff admitted that he was not aware of the reason for doing so and the Union's file did not indicate the reason. At a meeting in May, 2003, Mr. Puff and Mr. Moran advised Mr. Peterson that the grievance had been withdrawn.

[10] Mr. Moran testified that he provides advice to local unions on an as requested basis. In late 2002 he commenced a review all of the Union's files relating to Mr. Peterson. The first thing that struck Mr. Moran was the fact that there were three very thick files containing hundreds of letters from Mr. Peterson and the fact that Mr. Peterson appeared to copy the University with all of his correspondence to the Union. Mr. Moran and Mr. Puff met with Mr. Peterson several times in the first half of 2003, including a meeting on April 24, 2003, to discuss all of Mr. Peterson's outstanding concerns and to obtain information from Mr. Peterson in respect to all of them. Mr. Moran said that his impression at the time was that Mr. Peterson already knew that the Union had withdrawn the grievance of the March 2002 reprimand. Upon being advised by Mr. Peterson in May, 2003 that he had not been informed of the withdrawal, Mr. Moran and Mr. Puff both apologized. Mr. Moran said that his understanding was that the Union made its decision to withdraw the grievance after meeting with the University back in June, 2002.

LRB File No. 061-03

[11] In his application filed with the Board Mr. Peterson alleged that the University had withheld from him a number of “earned days off” (“EDO’s”) from the year 2000. He asked the Union to file a grievance. The Union filed a grievance, but Mr. Peterson alleges that the Union has not prosecuted the grievance with due diligence.

[12] In its reply the Union stated that Mr. Peterson did not request that a grievance be filed until March, 2002. The Union filed a grievance in May, 2002. The University proved a stage 1 response in June, 2002. By letter dated June 24, 2002 the Union informed Mr. Peterson that it was filing a policy grievance with respect to the University’s treatment of EDO’s, which was done on June 24, 2002, and that Mr. Peterson’s individual grievance would be held in abeyance pending disposition of the policy grievance. The Union and the University are presently negotiating with respect to a proposed memorandum of agreement on the EDO issue.

[13] Mr. Peterson testified that, in fact, the EDO’s in question were returned to him by the University and that he was paid out for those remaining at the time of his dismissal from employment. However, he expressed his dissatisfaction with the length of time it took for the adjustment to be made and with the fact that a suspension was imposed on him for taking unauthorized sick days, when he could otherwise have used the EDO’s.

[14] Mr. Puff testified that the individual grievance regarding Mr. Peterson in relation to the use of EDO’s was not pursued pending the eventual resolution of a policy grievance of the issue, which was achieved in May, 2003. The appropriate adjustments were made with respect to Mr. Peterson and other affected employees.

LRB File No. 062-03

[15] In his application filed with the Board Mr. Peterson alleged that he requested that the Union file a grievance on November 3, 2002 pursuant to Mr. Peterson’s allegation that the University had assigned him a task that was a “managerial” responsibility, i.e., ensuring that the equipment cash till had sufficient

change for public paid admissions to the facility during hours when the general office was closed. The Union failed to file a grievance.

[16] In its reply the Union stated that it undertook to deal with the issue through discussion with the University pursuant to the problem-solving procedure in article 14.4 of the collective agreement. The Union felt the matter was resolved by a procedure outlined in a memorandum from the University to the Union dated February 7, 2003 establishing a dedicated change fund for the equipment room. The University communicated the new procedure to affected staff, including Mr. Peterson, by a memorandum dated February 7, 2003. The Union acknowledged that it had not individually advised Mr. Peterson of the negotiated resolution of the matter.

[17] Mr. Peterson testified that the University had asked him to perform a task of a managerial nature and that he ought to have received a higher rate of pay for performing the task. The agreement by the University to solve the problem by the establishment of a separate equipment room cash fund was not communicated to Mr. Peterson at the time because he was off work with an injury from January to March, 2003. Mr. Peterson claimed to be entitled to the higher rate of pay for the time when he performed this task and argued that the Union did not fairly represent him by filing a grievance and pursuing the matter.

[18] Mr. Puff testified that the problem-solving procedure is used before the Union decides whether to file a grievance. The real issue, the performance of the particular task in question by employees including Mr. Peterson, was resolved by use of the procedure. The Union then determined that it would not pursue any additional individual adjustment(s).

LRB File Nos. 096-03 & 097-03

[19] In these two applications filed with the Board, Mr. Peterson stated that, on April 5 and April 8, 2003 respectively, he requested that the Union file a grievance against the University alleging that the University was guilty of harassment of Mr. Peterson with respect to a reprimand imposed for alleged failure to comply with the

workplace dress code. The Union has not advised Mr. Peterson whether it did file a grievance.

[20] In each of its replies the Union stated that Mr. Peterson's complaint is related to his one-month suspension imposed by the University on March 26, 2003, with respect to which a grievance had been filed.

[21] Mr. Peterson testified that his original complaint was that the University enforced a dress code for employees in the equipment room which prohibited the wearing of, among other things, "sweat pants" and "t-shirts" against himself, but did not do so with respect to another employee in the same workplace. Mr. Peterson acknowledged that the same issue was the first item of complaint by the University in its letter of reprimand dated May 16, 2002 and that he continued to defy the rule after his return from a leave of absence in the spring of 2003. Because he viewed the rule as being applied inconsistently by management, he asked the Union to file a harassment grievance.

[22] Mr. Moran discussed the situation with representatives of the University and advised Mr. Peterson verbally and in writing, on or about May 25, 2003, that the issue was resolved without filing a grievance on the basis of a commitment by the University to apply the dress code in a consistent manner. However, Mr. Peterson took the position that he was exempted from the dress rules by virtue of being "grandfathered" under the collective agreement. By letters dated August 16, 2003 and October 4, 2003, Mr. Peterson continued to insist that the Union file a harassment grievance over the issue. To the extent that the matter was related to the University's basis for suspending Mr. Peterson in May, 2003, it is a subject of the pending grievance the Union has filed with respect to that suspension.

[23] In his testimony, Mr. Puff acknowledged much of what Mr. Peterson stated as to the chronology of the issue, but insisted that it was not a matter of "harassment." The issue itself was, in the opinion of the Union, adequately resolved without the filing of a grievance alleging harassment. The Union grievance committee did not view the dress policy itself as being unreasonable.

LRB File No. 098-03

[24] Mr. Peterson alleged the Union failed to grieve a suspension imposed on him by the University on October 27, 2001.

[25] In its reply the Union stated that it met with the University regarding Mr. Peterson's complaint on November 5, 2001. The Union's grievance committee determined not to file a grievance and Mr. Peterson was so advised by letter dated June 24, 2002.

[26] Mr. Puff testified that, while the matter ostensibly involved the use of EDO's in lieu of sick days, it was really about unauthorized absence from work. Mr. Peterson had been advised that he could attend at work or take a leave of absence without pay, but he was not told that he could use EDO's. By the time he complained, the time limit for filing a grievance had long expired.

[27] According to Mr. Moran, although Mr. Peterson's complaint was long out of time, it was considered by the Union's grievance committee which determined that a grievance would not be filed.

LRB File No. 104-03

[28] Mr. Peterson alleged that the Union failed to file a grievance against the University alleging that the University was guilty of harassment of Mr. Peterson by reason of alleged differential treatment from other employees.

[29] In its reply the Union stated that Mr. Peterson's complaint was subsumed in the grievance that had been filed with respect to Mr. Peterson's suspension imposed on March 26, 2003.

[30] In his testimony Mr. Peterson acknowledged that the matter related to the till cash-out procedure in the equipment room and that it was one of the items included in the letter of suspension from the University dated March 16, 2003. Because Mr. Peterson says he was treated differently from other employees regarding the application

of the procedure, he felt that the Union should file a harassment grievance against the University.

[31] Mr. Puff testified that, to the extent the issue is part of the March, 2003 suspension, it is included in the grievance of that suspension that has been filed by the Union. However, Mr. Peterson simply does not understand the nature of “harassment” and the situation does not fall to be determined in that manner.

[32] Both Mr. Puff and Mr. Moran testified that Mr. Peterson now simply refuses to meet and discuss matters with them so that the Union can properly deal with the outstanding grievances.

Arguments:

[33] Mr. Peterson’s argument was somewhat general. Although he specifically complained that the grievance of his reprimand in May, 2002 (see LRB File No. 056-03, *supra*) was withdrawn without his knowledge and that he had the right to use the EDO’s as he did (see LRB File No. 061-03, *supra*), his main assertion was that he was the victim of administrative deficiencies on the part of the Union, although he said that he did not know what the Board could do for him about it. He submitted that he has suffered great humiliation as a result of the March, 2003 suspension.

[34] Mr. Barnacle, counsel for the Union, argued that the applications as a group demonstrate that Mr. Peterson does not understand his rights as a member of the Union and the responsibilities of the Union. He said that the evidence demonstrated that the Union endeavoured to address all the issues raised by Mr. Peterson, but that he has refused to cooperate with the Union, while at the same time sometimes sending the Union four or five letters a day.

[35] Counsel submitted that with respect to the reprimand of May, 2002 (see LRB File No. 056-03, *supra*), after meeting with representatives of the University to discuss the matter and the grievance that was filed, the Union’s grievance committee determined that it was not appropriate to continue to prosecute the grievance. The failure by the Union to communicate that decision to Mr. Peterson until May, 2003 was unfortunate, but it does not change the merits of the situation or prejudice Mr. Peterson

so as to make it an instance of arbitrary, discriminatory or bad faith action on the part of the Union.

[36] With respect to the complaints by Mr. Peterson over the failure of the Union to file grievances alleging harassment by the Employer (see LRB File Nos. 096-03, 097-03 and 104-03, *supra*), counsel submitted that the view of the Union that the matters in issue were not properly the subject of such allegations was reasonable. With respect to the particular issues themselves, they were solved through negotiation with the University or are subsumed in the grievance of the March, 2003 suspension.

[37] Counsel argued that the issue of the EDO's (LRB File Nos. 061-03 and 098-03, *supra*) was really an issue of unauthorized absence from work and that, even if there was merit to Mr. Peterson's complaint, the time limit to file a grievance had long expired before he requested the Union do so. To the extent that Mr. Peterson had suffered any loss of use of the EDO's themselves, the appropriate adjustment had been made, as it had for other employees similarly affected, by the resolution of the policy grievance filed with respect to the issue.

[38] Counsel asserted that none of the applications disclosed that the Union had violated s. 25.1 of the *Act* in any event. Further, the Union is not obliged to grieve all employee complaints no matter how trivial, even if they have merit. The Union has demonstrated care and concern for Mr. Peterson's position and, if anything, Mr. Peterson has received preferential service of his complaints.

[39] In support of these arguments, counsel referred to the decisions of the Board in *Griffiths v. Construction and General Workers' Union, Local 890*, [2002] Sask. L.R.B.R. 98, LRB File No. 044-01 and *Johnson v. Amalgamated Transit Union, Local No. 588*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96.

Analysis and Decision:

[40] In this case the Board must determine whether the Union breached the duty of fair representation pursuant to s. 25.1 of the *Act*. In numerous decisions, the Board has approved of the following summary by the Supreme Court of Canada in

Canadian Merchant Services Guild v. Gagnon, [1984] 84 C.L.L.C. 14,043, at 12,181, of the general principles applicable to duty of fair representation cases:

The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as a 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 employees.*

[41] In the *Gagnon* case, *supra*, the Supreme Court of Canada cited with approval the decision of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd.* [1975], 2 Canadian LRBR 196, at 201-02, as follows at 12, 185:

. . . 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 factors such 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.

[42] The Board commented on the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith as used in s. 25.1 of the *Act* in *Glynnna Ward v. Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88 at 47, as follows:

Section 25.1 of The Trade Union Act obligates the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.

[43] In the present case, Mr. Peterson's complaints are primarily that of perceived arbitrariness in relation to the Union's decisions not to file or process alleged grievances and discrimination in relation to the failure to grieve certain actions of the University related to alleged differential application of workplace rules that Mr. Peterson perceived as "harassment."

[44] With respect to the latter complaint, involving the applications in LRB File Nos. 096-03, 097-03 and 104-03 (dress code rules and till cash-out violations) the Union took the position that Mr. Peterson's complaints did not properly come under the rubric of "harassment" as that issue is dealt with in the provisions of the collective agreement. It is not for the Board to second-guess the interpretation of those provisions by the Union, but to assess whether the Union arrived at its decisions not to grieve for that reason in a manner that was not arbitrary, discriminatory or in bad faith. We find that there is no evidence that the Union did not make those decisions without fair and thoughtful consideration and absent any of those disqualifying factors. The Union achieved an understanding with the University regarding the specific matters in issue that it felt was of benefit to all employees in the area. Accordingly, the applications in LRB File Nos. 096-03, 097-03 and 104-03 are dismissed.

[45] We also find that the applications regarding the complaints about the use of EDO's, LRB File Nos. 061-03 and 098-03, must be dismissed. As discussed by the Board in *Hidlebaugh v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, at 285-86, a certified union is not obliged to grieve, or progress through to arbitration, every legitimate individual complaint if the interests of the collective membership are reasonably deemed to be more important than those of the individual, as in a job selection situation. Moreover, where a number of employees have substantially the same complaint, it is open to the bargaining agent to make a settlement of the issue with the employer that reasonably satisfies the complaints of all of the employees affected, even if an individual employee does not receive what he or she considers a complete adjustment or the particular adjustment that he or she wants. A bargaining agent may consider any number of factors in arriving at such a decision, such as the costs of grievance and arbitration of multiple individual grievances of the issue and whether it is able to achieve a reasonable global settlement by wielding the force of the entire number of individual complaints as a package. In the present case, the evidence is that there were a number of individuals with substantially the same complaint. While the Union had filed an individual grievance on behalf of Mr. Peterson regarding the EDO issue (see the summary of evidence relating to LRB File No. 098-03, *supra*), it later filed a policy grievance on behalf of all employees affected by the University's actions. The eventual settlement of that policy grievance resulted in an adjustment for Mr. Peterson within the parameters of the adjustment afforded all affected employees. It may not have been the adjustment that he wanted, but there is no evidence to suggest that it was not negotiated in good faith or was not reasonable given the interests of the collective membership of the Union. Accordingly, the application in LRB File No. 061-03 is dismissed.

[46] With respect to Mr. Peterson's contention that the Union did not grieve the EDO issue from the point of view that the University treated it as an infraction, i.e., being absent from work without leave (LRB File No. 098-03), we accept the Union's position that Mr. Peterson did not request that a grievance be filed until well after the time limit for doing so had expired. In any event, the Union accepted the University's interpretation that the specific circumstances constituted a violation of the leave requirements. Unless there is evidence that the Union arrived at this decision in a manner that is arbitrary, discriminatory or in bad faith, it is not for the Board to second-

guess the decision. We find that there is no evidence to that effect. Accordingly, the application in LRB File No. 098-03 is dismissed.

[47] Similarly, with respect to the application in LRB File No. 062-03, regarding the alleged assignment of a managerial task to Mr. Peterson (i.e., the keeping of a change fund for the equipment room), the Union achieved what it considered a reasonable resolution of the situation applicable to all employees working in the area through the problem-solving procedure in the collective agreement and then decided that an individual grievance on behalf of Mr. Peterson was not in the best interest of the Union's relations with the University. We accept that the purpose of the problem-solving procedure agreed to by the parties to the collective agreement is to expedite the mediation and resolution of disputes without the undue expenditure of money and resources. Again, there is no evidence that the Union did not reasonably consider and weigh the benefits to the collective membership by use of the procedure, nor that it acted arbitrarily, discriminatorily or in bad faith in arriving at the decision not to grieve. Accordingly, the application in LRB File No. 062-03 is dismissed.

[48] With respect to the application in LRB File No. 056-03, Mr. Peterson's complaint is two-fold: that the Union withdrew the grievance of his reprimand and that it failed to advise him of same until May, 2003. Firstly, the evidence disclosed that the Union does not entirely disagree with the University's view of the culpability of some of Mr. Peterson's behaviour outlined in the letter of reprimand and the Union's grievance committee determined to withdraw the grievance. While the specific basis for the grievance committee's decision is not known, there is no evidence that it was not arrived at after due consideration and in good faith, whether or not it is the "correct" decision. The evidence discloses that the issues addressed in the letter of reprimand were the subject of discussion between the Union and the University in June, 2002 and that, while further progress along the grievance procedure was held in abeyance, the Union subsequently undertook to review the situation and consulted with Mr. Moran, a servicing representative with Canadian Union of Public Employees. In any event, rightly or wrongly, the Union takes the position that any matters in issue in the letter of reprimand, to the extent that they form part of the basis for the subsequent suspension, are subsumed in, and may be dealt with in the course of proceedings in, the grievance that has been filed of the suspension. With respect to the delay in advising Mr. Peterson

of the decision, while it is unfortunate and not exemplary service, it is not so egregious as to constitute arbitrary, discriminatory or bad faith representation in grievance proceedings. Accordingly, the application in LRB File No. 056-03 is dismissed.

DATED at Regina, Saskatchewan, this **8th** day of December, 2004.

LABOUR RELATIONS BOARD

James Seibel
Chairperson