**Labour Relations Board**
**Saskatchewan**

**LANCE CONNELL, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent, and SASKATCHEWAN PUBLIC SERVICE COMMISSION, Interested Party**

LRB File No. 027-03; April 6, 2005
Chairperson, James Seibel; Members: Gloria Cymbalisty and Leo Lancaster

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| The Applicant, | Lance Connell |
| For the Respondent: | Rick Engel, Q.C. |
| For the Interested Party: | Giselle Fontaine |

**Union – Constitution – Applicant takes issue with union's internal processes with respect to appeals from decisions not to progress grievance – As matters complained of do not constitute matters of union membership or internal discipline, Board does not have jurisdiction to determine whether processes should be impugned because union did not apply principles of natural justice.**

**Duty of fair representation – Contract administration – Union fairly and adequately investigated circumstances of complaints in order to obtain as much information as possible from employer and arrived at informed and rational view with respect to each grievance that not supportable and had little chance of success at arbitration – Board finds no violation of duty of fair representation.**

**Duty of fair representation – Contract administration – Failure of union representatives to invoke investigation process not violation of s. 25.1 of *The Trade Union Act* per se – Decision whether or not to invoke process judgment call made by union representatives – Board will not minutely dissect and scrutinize each action and decision taken by union in grievance and arbitration process.**

***The Trade Union Act*, ss. 25.1 and 36.1.**

## REASONS FOR DECISION

**Background:**

**[1]** The Applicant, Lance Connell, a member of the PS/GE bargaining unit represented by Saskatchewan Government and General Employees' Union (the "Union"), filed an application with the Board on March 4, 2003 alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. T-17, (the "*Act*") by failing to fairly

represent him in a manner that was not arbitrary, discriminatory or in bad faith with respect to several grievances relating to staffing competitions. Section 25.1 of the *Act* 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.*

**[2]** Mr. Connell has been employed by the Government of Saskatchewan since October, 1995. He has Bachelor's degrees in Human Justice (1988) and Business Administration (1991) and a Master's degree in Business Administration (2000), all from the University of Regina. He has been employed as an investigator in the Consumer Protection Branch of Saskatchewan Justice since April 1999. According to the Saskatchewan Public Service Commission (the "PSC"), during his tenure of employment, Mr. Connell has applied for some 85 positions, within 62 competitions, approximately half of which were in-scope of the Union. Mr. Connell was the successful candidate in one of the competitions. Over the years, grievances with respect to the conduct and outcome of several of the in-scope competitions were filed by him, or on his behalf by the Union, with the PSC.

**[3]** The present application contains allegations that the Union violated s. 25.1 of the *Act* with respect to: (1) its handling of three specific grievances; and, (2) the fairness of its internal appeal process generally. The three grievances are briefly described as follows:

> 1. Grievance #2000-568-003R, dated March 3, 2000, related to Mr. Connell's application for either of two positions as Business Development Officer, Industry Development Branch, Saskatchewan Agriculture and Food and Food Business Development Officer, Industry Development Branch, Saskatchewan Agriculture and Food (the "agriculture grievance");

2. Grievance #2000-569-002R, dated July 19, 2000, related to Mr. Connell's application for the position of Manager of Programs and Operations, Mediation Services, Saskatchewan Justice (the "mediation grievance"); and

3. Grievance #2002-033-003R, dated August 22, 2002, related to Mr. Connell's application for the position of Community Education Consultant, Saskatchewan Learning (the "learning grievance").

However, the Applicant maintained that these are the most recent such matters that are indicative of a pattern of treatment by the Union and the PSC regarding his applications for some 100 positions since 1995.

**[4]** The allegation with respect to the Union's internal procedure is, briefly, that the presence of the Union's staff agreement administration advisor ("AAA"), who assists a grievor in the grievance process, during the deliberation of the union grievance committee that decides whether to progress the grievance to arbitration, is a violation of natural justice.

**Preliminary Issue:**

**[5]** At the commencement of the hearing, Mr. Engel, counsel on behalf of the Union, raised an issue regarding the inclusion of the matters relating to the agriculture grievance in the present application. On November 26, 2001, Mr. Connell filed an application against the Union (LRB File No. 255-01), alleging violation of s. 25.1 of the *Act*, with respect to the Union's handling of the agriculture grievance. Following a pre-hearing meeting of the parties with Vice-Chairperson Matkowski on January 24, 2002, Mr. Connell unconditionally withdrew the application. The Union took the position that it was an abuse of process for Mr. Connell to include the matter in the present application filed over a year after he had withdrawn his application in LRB File No. 255-01.

**[6]** Following a *voir dire* during which the Board heard evidence from Mr. Connell and AAA, Larry Langgard and after hearing and considering argument by both parties, the Board concluded that there was insufficient evidence of prejudice to the Union occasioned by the delay and determined to allow Mr. Connell to adduce evidence with respect to the agriculture grievance on the present application.

**Evidence:**

**[7]** A great deal of evidence was adduced on the present application over the course of four days. Mr. Connell had attached several hundred pages of correspondence, documents and chronologies to his application, incorporated by reference into paragraph 4 thereof as details of his allegations. In response, many pages of exhibits were filed on behalf of the Union. A not insignificant portion of the evidence was substantially irrelevant in that it concerned the details of the "core competencies" (knowledge, skills, abilities and personal attributes – customarily referred to as "KSA's") developed by the PSC in consultation with the Union that form the basis for the evaluation of the qualifications of applicants for positions, the relative core competencies allegedly possessed (or not possessed) by Mr. Connell, the details of the staffing process pursuant to the SGEU PS/GE collective agreement (the "collective agreement"), the details of the staffing process with respect to the three specific positions and the history of Mr. Connell's treatment by the Union and the PSC generally. We have necessarily reviewed all of the evidence adduced but, accordingly, it will not all be described in detail in these Reasons for Decision.

**[8]** In addition to his own testimony, Mr. Connell called five witnesses: Jason Rattray, Lisa Hampel-Ballan, Gisele Fontaine, Earl Hill and Wendy Sherar. Mr. Langgard was called to testify by the Union.

**[9]** Mr. Rattray is employed by the Government of Saskatchewan and is a member of the Union. He has held positions on several committees of the Union and is a trained representative of the Union to staffing panels ("panel rep") under the staffing procedure in the collective agreement

**[10]** Mr. Rattray described the staffing procedure generally. Briefly, an applicant's qualifications for a position are assessed by the staffing panel (comprising a representative from each of the PSC, the hiring department and the Union) based on the core competencies required to perform the duties of the position. Pursuant to article 6.1.17.3 of the collective agreement, the Union's panel rep may request further investigation of an applicant's qualifications in the form of contacting the applicant to obtain further information or inviting the applicant before the panel for a personal

assessment of the applicant's qualifications; the article states that, "such requests shall not be unreasonably forthcoming, nor shall they be unreasonably denied." According to Mr. Rattray, the only time the Union takes recourse to making such requests is when a senior applicant is being screened out of the process.

**[11]** With respect to the agriculture grievance, on March 2, 2001 Mr. Rattray was asked by AAA, Joe Pylatuk, to accompany Mr. Pylatuk on behalf of Mr. Connell to the second level grievance meeting with the PSC. Mr. Rattray offered the opinion that had he been the panel rep to the selection panel in respect to the agriculture position, he would have requested further investigation pursuant to article 6.1.17.3

**[12]** Ms. Hampel-Ballin is employed in the internal audit branch of Saskatchewan Justice. Tracey Ward also worked in the department. Ms. Hampel-Ballin, Ms. Ward and Mr. Connell all applied for the manager position that is the subject of the mediation grievance. Ms. Hampel-Ballin said that Ms. Ward was awarded the position even though Ms. Hampel-Ballin had greater seniority. She said she raised the issue with John Jakes, a manager in the mediation branch, who advised her that because it was a term position it did not have to be filled with the senior qualified candidate. Ms. Hampel-Ballin testified that she knew she could have filed a grievance but declined to do so.

**[13]** Ms. Fontaine is employed at the PSC as manager of staffing services. She testified about a list of 85 full-time permanent positions (i.e., not including secondments) within 62 competitions that Mr. Connell applied for since 1995. Six of these were cancelled and the outcome of 2 was still to be determined. Of the 77 remaining positions, some 43 postings were for positions out-of-scope of the Union (i.e., the collective agreement did not apply to the staffing process). Of the 34 in-scope positions, 18 were filled by applicants with greater seniority than Mr. Connell; 6 were filled by targeted employment equity candidates; four were grieved by Mr. Connell (two of which grievances were subsequently withdrawn); Mr. Connell was awarded one of the positions.

**[14]** Ms. Fontaine testified with respect to a letter dated May 7, 2001, to Mr. Pylatuk regarding the step 2 grievance meeting of the agriculture grievance (also

referred to by Mr. Rattray in his testimony, see *supra*) in which Ms. Fontaine addressed the currency of Mr. Connell's knowledge of marketing, considered to be a KSA for the position.

**[15]** Mr. Hill is a member of the Union and has held several executive positions with the Union including chair of the Union's provincial grievance committee, member of the PS/GE provincial appeal committee, member of the PS/GE negotiating committee and representative on the bargaining council for the Saskatoon local of the Union. He has also taken the training for a Union staffing panel rep.

**[16]** Mr. Hill said that one reason for the Union's negotiation of article 6.1.17.3 of the collective agreement was a concern that casual and part-time persons were being hired into positions ahead of senior, qualified full-time applicants.

**[17]** Referring to the Union's internal appeal process under its provincial grievance policy, he noted that appeal hearings to the Union's provincial grievance committee must be conducted "in a manner consistent with the concept of the duty of fair representation and the principles of natural justice." Mr. Hill stated that he had raised an issue with respect to staff members of the Union sitting on more than one committee. For example, Mr. Hill was a member of the Union's PS/GE grievance committee and the provincial grievance committee.

**[18]** While Mr. Hill said he also questioned the fact that AAA's would sit in on grievance committee appeal hearings, he noted that their role was to provide information to the committee about the file and legal issues arising therefrom – the AAA's do the research, assess the merits of grievances and provide an opinion as to whether a grievance should go forward – but they do not vote on the issue even though they remain in the room while the vote is conducted.

**[19]** Mr. Hill was the chair of the Union's appeal committee hearing regarding the agriculture grievance, but could not recall who else was on the committee at the hearing. The committee directed Mr. Langgard, the AAA assigned to the agriculture grievance, to investigate as to why Mr. Connell had been screened out of the competition. Mr. Hill recalled that Mr. Langgard reported back to the committee. Mr. Hill

recalled that there was discussion and debate, during which Mr. Langgard was present. Mr. Hill thought that the committee's decision was to decline to advance the grievance.

**[20]** Ms. Sherar is a member of the Union. She is in a staffing liaison position jointly sponsored by the Union and the PSC and is familiar with the staffing process for positions in the PS/GE bargaining unit. Ms. Sherar has acted as a panel rep and has trained panel reps.

**[21]** Ms. Sherar testified that the role of the Union's panel rep is to monitor the competition and ensure that it adheres to the collective agreement. However, Ms. Sherar also said that the role of the Union's panel rep includes ensuring that the senior applicant obtains an interview if there is a reasonable match between that applicant's resume and the KSA's set for the position. She opined that the purpose of collective agreement article 6.1.17.3 is to clarify the particular applicant's fit with the KSA set. She also expressed the opinion that sometimes managers inflated the KSA set beyond 8 to 10 items to increase the likelihood of being able to award the position to a particular applicant.

**[22]** Ms. Sherar was not able to testify that any of her concerns regarding the staffing procedure and application of article 6.1.17.3 pertained to the competitions that were the subject of Mr. Connell's grievances.

**[23]** Mr. Langgard has been an AAA for many years. He is a member of the Union's staff grievance and screening committees; he has trained as, and provided training to, panel reps. He described the general duties and responsibilities of an AAA as the administration of and provision of advice with respect to grievances under the PS/GE collective agreement.

**[24]** Mr. Connell cross-examined Mr. Langgard in detail with respect to each of Mr. Connell's grievances that are the subject of this application. Much of the cross-examination revolved around the KSA's for each position and Mr. Connell's education and experience with respect to same. Mr. Connell expressed frustration that position qualifications are not more definitive and exact. We have reviewed and considered Mr.

Connell's questions and the testimony of Mr. Langgard regarding same, but do not propose to set either out in detail here.

**[25]** Mr. Langgard described success with respect to staffing grievances as being particularly difficult. Describing the grievance procedure with respect to such situations generally, he said that a panel rep might invoke article 6.1.17.3 as he or she sees fit; the shop steward files the grievances at step 1 of the grievance procedure, and the AAA becomes involved at the step 2 stage. Mr. Langgard described the goal of the AAA at that stage to determine the facts and the employer's arguments relied upon to assert that a grievor is not qualified for the position and to then attempt to persuade the employer otherwise.

**[26]** Mr. Langgard said he fulfilled his commitment to Mr. Connell to represent him at steps 1 and 2 of the learning grievance and that Mr. Connell in fact did most of the talking at step 1.

**[27]** At step 2, however, is where the AAA is able to more fully assess the merits of the grievance, having more of the facts in hand and the opportunity to consult with others. If the AAA supports further action, the process continues; if, however, the AAA does not support further action, the grievor is so advised and is also advised of the right to appeal to the Union's provincial grievance committee. If the grievor avails him or herself of the appeal process, the AAA provides the appeal committee with all of the information provided by the grievor and gleaned from the AAA's investigation.

**[28]** With respect to the learning grievance, Mr. Langgard attended with Mr. Connell at the step 1 grievance meeting on September 9, 2002 and the step 2 meeting on November 26, 2002. Mr. Langgard also met separately with Ms. Fontaine on December 9, 2002, because Mr. Connell felt he was being "blacklisted" in general with respect to his applications for positions; Mr. Langgard said he was convinced there was no such bias on the part of the PSC. The PSC denied the learning grievance on January 16, 2002. Mr. Langgard referred the learning grievance to arbitration because of a seven-day time limit in which to do so. However, whether to actually proceed further was considered by the bargaining unit grievance committee, which, despite Mr. Langgard's support for pursuing the learning grievance, determined not to do so on

January 30, 2003. A review of that decision by senior union staff on February 24, 2003, concluded likewise. Mr. Connell was advised of the decision not to proceed on March 7, 2003. He appealed the matter to the provincial grievance appeal committee on March 14, 2003. That 8-person committee heard the matter, including representations by Mr. Connell and Mr. Langgard (with respect to which he raised no objection). Mr. Langgard, who is the Union's staff member assigned as secretary to the committee, remained in the room during the committee's deliberations, but took no part in the vote. The provincial grievance appeal committee determined not to progress the learning grievance further, on the basis that the grievance lacked sufficient merit.

**[29]** Mr. Connell filed the agriculture grievance himself. Mr. Pylatuk and Mr. Rattray attended with Mr. Connell at the step 2 grievance meeting. After consultation between Mr. Pylatuk, Mr. Langgard and Mr. Bayer, of the Union's executive, who all agreed that Mr. Connell was not qualified for the position and that the grievance would likely not succeed at arbitration, the Union withdrew the grievance subject to Mr. Connell availing himself of the right to appeal the decision to withdraw within thirty days. Mr. Connell appealed to the bargaining unit grievance committee, which dismissed his appeal. Mr. Connell was advised of his right to appeal to the provincial grievance committee, but he declined to do so.

**[30]** With respect to the mediation grievance, the AAA was Christine Horsman. Ms. Horsman filed the grievance on behalf of Mr. Connell. The PSC replied that Mr. Connell had failed to meet the core competencies for the position. According to Mr. Langgard, the position was for a term of less than one year and, pursuant to the collective agreement, seniority does not govern the awarding of such term positions. In any event, he said, the grievance was withdrawn at Mr. Connell's request in April, 2001. However, the Union did not confirm with Mr. Connell that this had been done.

**[31]** Mr. Connell outlined his employment history and his lengthy history of job applications during his tenure with the government, which we do not propose to set out here. In addition, he is a trained panel rep and a former chief shop steward.

**[32]** Mr. Connell testified that he attended all meetings and answered all correspondence as necessary to progress his grievances. With respect to the

agriculture grievance, he did not appeal to the provincial grievance committee regarding the decision not to proceed with the grievance, because he said he filed an application alleging breach of duty of fair representation instead.

**[33]** Mr. Connell opined that the Union's internal appeal process was unfair and contrary to natural justice because Mr. Langgard remained with the appeal committee during its deliberation. Mr. Connell has written letters to the Union criticizing the appeal process. He was highly critical of the approach taken by Mr. Langgard in dealing with the PSC regarding his grievances. Mr. Connell admitted that Mr. Langgard told him that, while he supported the learning grievance, he was not very hopeful that it would succeed. Mr. Connell said that, while the learning grievance was moved along at a good pace, the agriculture grievance was seriously delayed; he indicated he was unable to say whether there was merit to the Union's contention that the grievance had no reasonable chance of success.

**[34]** Mr. Connell admitted that, while he was not happy about it, he did agree to the withdrawal of the mediation grievance – he felt the Union should have investigated the matter further.

**[35]** Mr. Connell also testified about a serious employment situation that he was involved in in 1998 (the details will not be set out here) in respect of which he was vindicated, but said that it had resulted in his being stigmatized. He believed it possible that the PSC was reluctant to allow his applications for other positions because of that situation and he expressed the opinion that the Union did not press this position forcefully enough in subsequent application situations.

**[36]** Mr. Connell testified that he was really interested in pressing the learning and agriculture grievances, maintaining that, in his estimation, the PSC's contentions that he did not meet the core competencies for the positions simply did not accord with what was indicated in his resume and applications for the positions. He asserted that no impartial person has ever evaluated his qualifications and that Mr. Langgard let himself be "steam-rolled" into withdrawing the learning grievance by a biased employer that wanted to award the position to an incumbent. In the end, Mr. Connell asserted on his testimony that the Union was negligent in not investigating further, but accepting the

PSC's assessment of his qualifications. He also felt that the grievance appeal committee was not very well informed about the facts at his hearing.

**Arguments:**

**[37]** In his argument, Mr. Connell asserted that the Union's panel reps should have invoked article 6.1.17.3 of the collective agreement during the staffing process in order to obtain an investigation into his qualifications for the positions. For his part, he said he has pursued all the internal avenues available to him to have his issues dealt with. He said he relied upon the Union to represent him, but its processes are tainted and contravene natural justice. He maintained that the Union representatives – Mr. Langgard in particular – did not properly understand his qualifications or those required for the positions in question and, therefore, could not do a proper job of representing him.

**[38]** While Mr. Connell conceded that an employee does not have an absolute right to have a grievance arbitrated, he argued that a union must exercise its discretion to do so in good faith after a thorough study of the case. He expressed his belief that the AAA's that handled his grievances did not educate themselves thoroughly enough with respect to whether his educational courses and work experience satisfied the KSA's for the positions: for example, with respect to the learning grievance, whether the courses he took for his degree in human justice satisfied the position requirements regarding community development. Mr. Connell felt that if the panel reps had invoked article 6.1.17.3 of the collective agreement, with respect to both the learning and agriculture grievances, his qualifications could have been impartially reviewed. He also felt that the agriculture grievance was unreasonably delayed.

**[39]** With respect to the Union's internal processes, Mr. Connell expressed the opinion that they were flawed or unfair. For example, he said that the Union's panel reps are supposed to be from the department, but were not so in his case. He asserted that the Union acted arbitrarily and perfunctorily and did not take a reasonable view of his grievance situations after thoughtful reflection; the Union's officials did not understand his qualifications, nor did they consider his history of conflict with several of its officials.

**[40]** Mr. Connell asserted that the Union engaged in bad faith decision-making in that the AAA's that dealt with his situations were in a conflict of interest: he believed they presented the grievance to the local committee, may then have decided to turn it down, and then presented the appeal to the appeal committee.

**[41]** Authorities referred to by Mr. Connell in support of his arguments, which we have reviewed, included the following: *Canadian Merchant Services Guild v. Gagnon,* [1984] 84 CLLC 12,181 (S.C.C.); *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America and Ross Anderson*, [1975] 2 C.L.R.B.R. 196 (BCLRB); *Ward v. Saskatchewan Government Employees' Union*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88; *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Kozak v. United Food and Commercial Workers, Local 1400*, [1994] 4th Quarter Sask. Labour Rep. 213, LRB File No. 170-94; *Chrispen v. International Association of Fire Fighters, Local 510*, [1992] 4th Quarter Sask. Labour Rep. 1233, LRB File No. 003-92.

**[42]** Mr. Connell sought the following relief for the alleged violations: an order for an impartial evaluation of his qualifications for both the agriculture and learning positions; an order directing that the grievances be taken to arbitration notwithstanding the expiration of time limits; unbiased interviews for the positions; compensation for monetary loss if successful on obtaining a position; compensation for the four days of annual leave he used to attend this hearing; an order directing officials of the Union to avoid conflict of interest in the internal grievance evaluation process; any other order required to make him whole.

**[43]** Mr. Engel, counsel for the Union, argued that the real issue for the Board was not to assess and pronounce upon the merits of the grievances, but to assess the quality of the Union's representation with respect to arbitrariness, discriminatory treatment and bad faith conduct.

**[44]** Counsel submitted that, with respect to staffing competitions, every applicant is in a vulnerable position in that someone makes a decision about whether or not the applicant is qualified for the job; one applicant is awarded the position and another, or others, are not. Unsuccessful applicants are often in disagreement with the

decision. The Union is in a difficult position because its support for one applicant or another – that is, if a grievance is filed – places it at odds with the applicant who stands to lose the position award. In such cases, the Union attempts to make an assessment of the reasonableness of the staffing decision – does it accord with the requirements of the collective agreement?; was it discriminatory?; was there any other improper consideration?; and the chance of success at arbitration. Under the collective agreement in the present case, staffing competitions are not without a significant subjective element, in that the definition of "core competencies" includes "personal attributes."

**[45]** Counsel asserted that it is not for the Board to scrutinize and assess the merits of those decisions, but to determine whether the Union acted with reasonable diligence in its assessment of the merits of the grievances and its decision whether to prosecute same. With respect to the reference of grievances to arbitration, the approach of every union is not the same: some are more antagonistic, while others are more collaborative, in their relationship with the employer. Unions must also choose which disputes most merit the use of their resources, because resources are not unlimited. In the present case, the evidence disclosed that the Union's decisions not to progress the grievances to arbitration were based on the assessment of the reasonableness of the staffing decisions.

**[46]** With respect to Mr. Connell's assertion that the panel reps' failure to invoke article 6.1.17.3 of the collective agreement was a violation of the Union's duty of fair representation, counsel submitted that the process allowed by the article is not part of the grievance and arbitration process to which s. 25.1 of the *Act* applies. Rather, he said, the evidence disclosed that Mr. Langgard made a commitment to Mr. Connell to investigate the circumstances of the staffing decisions with respect those grievances in his portfolio; involved Mr. Connell at all stages of the grievance process and appeal hearings; was careful, thoughtful and methodical; and was polite, responsive and respectful throughout. Moreover, many other officers and staff of the Union considered Mr. Connell's grievances, without any undue regard for the successful applicant. Mr. Langgard was not in a conflict of interest in remaining in the room during the appeal committee vote – he did not take part in the vote.

**[47]** In support of his arguments, counsel cited the following decisions of the Board: *Hidlebaugh v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02; *Wionzek v. International Brotherhood of Electrical Workers, Local 2067*, [1998] Sask. L.R.B.R. 765, LRB File No. 101-98; *Lymer v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (O.P.E.I.U.)*, [2000] Sask. L.R.B.R. 174, LRB File No. 176-99; *Mravcak v. Communications, Energy and Paperworkers Union, Local 594*, [1995] 1st Quarter Sask. Labour Rep. 103, LRB File No. 221-94.

**Analysis and Decision:**

**[48]** The issue to be decided in this case is whether the Union, in compliance with s. 25.1 of the *Act*, fairly represented Mr. Connell with respect to grievance and rights arbitration proceedings in relation to his staffing competition grievances in a manner that was not arbitrary, discriminatory or in bad faith. At the hearing before the Board, Mr. Connell raised as an issue whether the Union's internal processes with respect to appeals from decisions not to progress a grievance were unfair and not in accordance with the principles of natural justice. To the extent that this latter allegation can be considered in the context of the Union's duty of fair representation, we have jurisdiction to deal with it. But, as far as whether those internal processes, as established and defined by the Union's constitution, internal bylaws, policies and/or rules, accord with the application of the principles of natural justice *per se*, and are consequently unlawful, we do not have jurisdiction to consider same, as those processes are not included in the matters placed within our mandate to determine pursuant to s. 36.1 of the *Act* which provides as follows:

> *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.*

**[49]** Accordingly, as the matters complained of do not constitute matters of union membership or internal discipline, we are precluded from determining whether the appeal procedures that were followed are to be impugned because the Union did not apply the principles of natural justice in following those procedures. However, those procedures may be scrutinized insofar as any deficiencies in them might be said to constitute arbitrariness, discrimination or bad faith in the representation of Mr. Connell in grievance or rights arbitration proceedings within the meaning of s. 25.1 of the *Act*. See, *McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179* (2004), 240 D.L.R. (4th) 358 (Sask. C.A.); *McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, [2001] Sask. L.R.B.R. 874, LRB File No. 278-99.

**[50]** Therefore, our decision in this case is based on all of the evidence relevant to the elements of s. 25.1 of the *Act*, but not s. 36.1. In making our findings of fact and conclusions of law, we have considered all such evidence adduced *viva voce* and exhibits, the submissions advanced on behalf of the parties, the case authorities referred to and the demeanour of the witnesses.

**[51]** The Board's approach to applications alleging a violation of the duty of fair representation pursuant to s. 25.1 of the *Act* was summarized in *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, 71-72, as follows:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *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.*

*The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*

> *... 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 and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. 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.*

*This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*

> *Section 25.1 of The Trade Union Act obligated 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.*

**[52]** The Board has followed and applied these principles in numerous cases over the past many years. In the present case, it is our opinion that the Union fulfilled its duty pursuant to s. 25.1 of the *Act* with respect to each of the grievances in issue. The Union fairly and adequately investigated the circumstances of Mr. Connell's complaints. It arrived at an informed and rational view with respect to each grievance that it was not supportable and had little chance of success at arbitration. Two of the grievances were advanced to the second stage of the grievance procedure in order to obtain as much information as possible from the PSC. Another of the grievances was withdrawn at Mr. Connell's request. The merits and supportability of each grievance were reviewed by senior staff of the Union. It is not a conflict of interest for such staff to arrive at a reasoned and thoughtful conclusion that a grievance is not likely sustainable nor to communicate that opinion and the basis upon which it is made to appropriate committees of the Union (in this case the local bargaining unit and provincial grievance appeal committees).

**[53]** We agree with counsel for the Union that the process allowed by article 6.1.17.3 of the collective agreement is outside of the grievance or rights arbitration process referred to in s.25.1 of the *Act*. However, even if this conclusion is not correct, we would not find on the evidence that failure to invoke the clause is a violation of s. 25.1 *per se*. The decision whether or not to do so is a judgment call made by the staffing panel rep at the time and the collective agreement specifies that requests to

invoke the investigation process set out in the clause "shall not be unreasonably forthcoming." It is not for the Board to minutely dissect and scrutinize each action and decision taken by the Union with respect to the grievance and arbitration process.

**[54]** In this case, the evidence disclosed that the AAA's acted reasonably, courteously and with sensitivity to Mr. Connell's general perception of blacklisting by the PSC. Indeed, Mr. Langgard met with Ms. Fontaine for the specific purpose of trying to find out if there was any evidence of such activity. And he in particular spent a lot of time dealing with and investigating Mr. Connell's many complaints. There is no evidence that the AAA's gave Mr. Connell's concerns short shrift or acted dismissively toward him. Rather each matter was given careful consideration. The fact that Mr. Connell did not agree with their conclusions is not evidence of deficiency in representation.

**[55]** Mr. Connell was present when the AAA's made their submissions to various committees on his behalf and did not object or seek to add to the information provided at that time. We do not find that the procedures followed in those committees could be said to constitute or contribute to any conclusion that the Union acted in a manner that was arbitrary, discriminatory or in bad faith.

**[56]** For these reasons, the application is dismissed.

**DATED** at Regina, Saskatchewan this 6th day of April, 2005.

**LABOUR RELATIONS BOARD**

James Seibel,
Chairperson