Labour Relations Board
Saskatchewan

GARNET GALENZOSKI Applicant v. SASKATOON CITY POLICE ASSOCIATION and CITY OF SASKATOON BOARD OF POLICE COMMISSIONERS o/a SASKATOON POLICE SERVICE, Respondents

LRB File No. 068-01; April 22, 2005
Chairperson, James Seibel; Members: Joan White and Gerry Caudle

For the Applicant: Michael Owens
For the Saskatoon City Police Association: Rod Gillies
For the Saskatoon Police Service: Patricia Warwick

Duty of fair representation – Scope of duty – Applicant takes issue with processes followed by committees relating to changes to sick bank plan and with effect in law of back to work agreement – Board may only scrutinize such matters insofar as they might be said to constitute evidence of arbitrariness, discrimination or bad faith in union's representation of applicant within meaning of s. 25.1 of *The Trade Union Act*.

Duty of fair representation – Scope of duty – Union vigorously attempted to influence committee on claw back issue but, subsequently, on basis of interviews and research conducted by union's nominees to committee, union executive ultimately voted to approve amendments including claw back – Union arrived at decision without gross negligence after reasonable investigation and fair consideration of applicant's interests and interests of union membership as whole – Union fulfilled duty of fair representation.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Background:

[1] Saskatoon City Police Association (the "Association") is a trade union certified as the bargaining agent for a unit of employees of the Saskatoon Police Service. By operation of law, the City of Saskatoon Board of Police Commissioners is deemed to be the employer of the personnel of the Saskatoon Police Service (the "Employer")[1]. The City of Saskatoon (the "City") administers payroll for the Employer. At

[1] See, *The Police Act, 1990*, S.S. 1990, c. P-15.01, s. 31.

all material times, the Applicant, Constable Garnet Galenzoski, was a member of the bargaining unit represented by the Association. He filed an application with the Board alleging that the Association had violated 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.*

[2] The Applicant has been employed as a police officer by the Saskatoon Police Service since August 1987. He carried out his full duties until October 1992, when he was diagnosed with multiple sclerosis. In his application the Applicant alleges that: the Association entered into a memorandum of agreement with the Employer in September 1996 respecting the terms and conditions of the Applicant's return to work at that time; the Employer is not honouring the agreement; the Applicant is not receiving the benefits to which he is entitled under the agreement; and, the Association is not fulfilling its duty to ensure that the agreement is honoured. Since December 1998, the Applicant has not been able to work whatsoever because of his medical condition.

Evidence:

[3] Certain matters of evidence were not in dispute. There were two collective agreements between the Association and the Employer during the period of time material to the present application: one for the term April 1, 1996 to September 30, 1998 and another from October 1, 1998 to September 30, 2001 (differentially referred to, where material, as the "1996 (or 1998) collective agreement"). The 1998 collective agreement was not signed by the parties until September 14, 2000.

[4] Article 21(f) of the collective agreement maintains a sick leave "bank" (the "sick leave bank"), established by the parties to the agreement many years earlier, to which each employee of the Saskatoon Police Service annually contributes an 8-hour "sick day credit" matched by the City. The object of the sick leave bank is "to provide benefits for long-term sickness, where an employee has run out of sick leave" ("sick bank benefits"). The level of sick bank benefits, as a percentage of the eligible

employee's regular salary, varies depending on the length for which sick bank benefits are paid, as follows: 50 percent of regular salary for the first 40 working days (based on an 8-hour day); 100 percent for working days 41 through 260; 75 percent thereafter. With his complete cessation of active duty in December 1998, the Applicant drew sick bank benefits at the rate of 75 percent of regular pay. In addition, the Applicant collected Canada Pension Plan Disability Benefits ("CPD benefits").

[5] The terms of reference and criteria for the administration of the sick leave bank is determined by a joint committee (the "joint sick bank committee") composed of four persons, two of whom are appointed by the Association, one who is appointed by the Saskatoon Police Service and one who is appointed by the City's human resources department. Appendix "B" to each collective agreement comprises the "Guidelines for Administration" of the sick leave bank plan (the "sick bank guidelines"). The sick bank guidelines to the 1996 collective agreement are dated December 17, 1974. Pursuant to the sick bank guidelines[2], any proposal for amendment to the sick bank guidelines "shall first be discussed by the entire [sick bank] Committee, and if found agreeable to a majority of the Committee, shall be enacted." During the spring and summer of 1999, the sick bank committee purported to negotiate significant amendments to the sick bank guidelines. The sick bank guidelines to the 1998 collective agreement (which collective agreement was not signed by the parties until September 14, 2000) are dated August 1999 (the "1999 sick bank guidelines").

[6] The present application arises out of the amendments to the sick bank guidelines provisions governing the "basis of payment" from the sick bank[3], which became effective September 1, 1999. Pursuant to the sick bank guidelines to the 1996 collective agreement, sick bank benefits paid were subject to certain deductions, as follows:

> *8. …*
>
> *Members drawing benefits from the Bank shall be paid at the rate of pay which they would otherwise have been drawing had they*

[2] The sick bank guidelines to the 1996 collective agreement, paragraph 9; the sick bank guidelines to the 1998 collective agreement, paragraph 10.
[3] The sick bank guidelines to the 1996 agreement, paragraph 8; the guidelines to the 1998 agreement, paragraph 7.

> *not been drawing benefits from the bank, less (a) any required normal payroll deductions, including deductions for Superannuation, Group Insurance, U.I.C. Contributions, Income Tax, C.P.P., Union Dues, etc., and (b) the amount of any benefit contributed to wholly or in part by the Employer.*

[7] With the amended 1999 sick bank guidelines, the basis of payment provisions specifically provided for a "claw back" of sick benefits depending on the level of benefits and whether the employee is also in receipt of CPD benefits, as follows:

> *7. …*
>
> *(c) Members drawing benefits from the Bank shall be paid at the rate of pay as set out in paragraph 7 (a) of the Sick Bank Guidelines less any required payroll deductions and reductions as authorized by the Sick Bank Committee.*
>
> *(d) A member drawing benefits at a rate of 100% from the Sick Bank and also receiving Canada Pension Plan Disability Benefits shall have those benefits deducted from the amount received from the Bank.*
>
> *(e) A member drawing benefits at a rate of 50% or 75% from the Sick Bank and also receiving Canada Pension Plan Disability Benefits shall have one half of the Canada Pension Plan Disability Benefits deducted from the amount received from the Bank.*
>
> *(f) A member receiving Canada Pension Plan disability Benefits will be required to disclose said amount to the Sick Bank Committee.*
>
> *NOTE: Amendments to this Article shall take effect September 1, 1999 and shall include all members who are presently in the Sick Bank as of this date.*

[8] Therefore, under the 1999 sick bank guidelines, an employee cannot receive combined sick bank benefits and CPD benefits in an amount that exceeds 100 percent of regular pay; employees who are otherwise eligible to receive sick bank benefits at a rate of 50 percent or 75 percent of regular pay have those benefits decreased by an amount equal to one-half of any CPD benefits they also receive.

[9] Pursuant to paragraph 8(a) of both versions of the sick bank guidelines, at the discretion of the sick bank committee, members may draw benefits only until 25 years of service or the earliest date upon which they become eligible to draw

superannuation benefits. Pursuant to paragraph 8(b), notwithstanding anything else in the sick bank guidelines, the sick bank committee, "in its discretion may terminate or adjust a members benefits from the Bank at any time."

[10] The 1999 sick bank guidelines were signed by one of the Association's then nominees to the sick bank committee, Constable Judy McHarg and by Staff Sergeant John MacDonald (now retired), the then president of the Association, as well as by representatives of the Employer.

[11] In addition to the Applicant himself, two witnesses were called to testify on his behalf: S/Sgt. MacDonald (who also testified in rebuttal) and Deputy Chief Roy O'Hare (now retired). Constable David Haye and Cst. McHarg testified on behalf of the Association.

The Applicant

[12] The Applicant did not work from October 1992 to June 1996. He collected sick bank benefits during this period pursuant to the rates allowed under the guidelines to the 1996 collective agreement and, in early 1995, he also commenced collecting CPD benefits. In June 1996, new medications allowed the Applicant to attempt to return to the regular duties of a police officer. Pursuant to a perceived requirement to accommodate the Applicant's disability, the Association and the Employer entered into a memorandum of agreement dated September 6, 1996 (the "1996 back to work agreement") regarding the Applicant's return to work on a flexible basis that would allow him to "top up" his remuneration with sick bank benefits for any week in which he could not work regular full-time hours. The salient portions of the 1996 back to work agreement include the following:

> 2. *(a) That the member remains entitled to all benefits including Sick Bank Benefits, in accordance with the collective Agreement.*
>
> *(b) Time away from work as a result of the member's currently diagnosed illness shall be treated as sick time for which he will receive Sick Bank Benefits.*

(c) Time away from work for reasons other than the member's currently diagnosed illness shall be treated in accordance with the Collective Agreement.

3. *(a) That the member will not receive Sick Bank Benefits when he works the required number of hours per week as described in Article 4 of the Collective Agreement.*

(b) That the member will receive Sick Bank Benefits to the extent required to achieve his regular salary for those weeks when, as a result of his currently diagnosed illness, he is unable to work the normal weekly hours in accordance with Article 4 of the Collective Agreement.

4. *That the member's hours of work schedule will apply as follows:*
Day Shift consists of 12 hours, 0800 – 2000 hours
Night Shift consists of 8 hours, 1900 – 0300 hours
Any other hours of work arrangement agreed to by the parties.

5. *That any shift scheduling or assignment of hours of work is subject to the member's ability to carry out his duties.*

6. *That the terms of this Memorandum of Agreement could be amended or terminated at any time by the parties depending on the ability of the member to perform his duties. The member will not lose any benefits under the Sick Leave Bank Plan as a result of any amendment or termination of this Memorandum of Agreement.*

7. *That the member will be granted reasonable time off during a work shift to take his prescribed medication.*

8. *That all other terms and conditions of the Collective Agreement will prevail.*

This agreement is without prejudice and will not be used, produced, or referred to by either party in any future grievance, arbitration, or any other matters undertaken by the parties subsequent to this date.

[13] Then Association president, S/Sgt. MacDonald and the Applicant were signatories to the agreement on behalf of the Association. The Applicant advised the Canada Pension Plan of his return to work and ceased to collect CPD benefits.

[14] The Applicant testified that his understanding of paragraph 6 of the 1996 back to work agreement was that, if his medical condition worsened such that he could

no longer work, he would revert to receipt of full benefits under the sick bank plan (i.e., at 75 percent of salary) plus full CPD benefits. For the next two years the Applicant collected benefits under the sick bank plan only at those times when he was unable to work the full complement of regular hours.

[15] The Applicant's condition deteriorated to the point where he could not perform all the regular duties of a police officer. On October 12, 1998, the Association and Employer entered into a revised memorandum of agreement (the "1998 back to work agreement") to make changes to paragraph 2(c) and the description of the Applicant's work duties and schedule in paragraph 4. It is otherwise identical to the 1996 back to work agreement except for the addition of a paragraph 9, which is of no consequence to this application. The amended paragraphs 2(c) and 4 provide as follows:

> *2. (c) Time away from work as a result of the member's currently diagnosed illness shall be treated in accordance with the Collective Agreement.*
>
> *4. That the member's hours of work will follow "C" Platoon's rotation. The hours of duty for "C" Platoon night shift will be scheduled by the member's Staff Sergeant. That the member will be responsible for phoning on outstanding warrants and other duties the member is physically capable of performing.*

[16] A draft copy of the 1998 back to work agreement was provided to the Applicant under cover of a memorandum from Keith Rans, superintendent of human resources, dated October 8, 1998. It was signed on behalf of the Association by S/Sgt. MacDonald.

[17] The Applicant's health worsened. He ceased work completely in December 1998, and then commenced, and continued, to receive sick bank benefits at the rate equivalent to 75 percent of his regular salary. He also recommenced receipt of CPD benefits.

[18] The Applicant testified that no one took any issue with his receipt of both sick bank benefits and CPD benefits during the period before he returned to work in

September 1996, although he believed that at least one person in the payroll department at the City was aware of the fact. However, he received a letter from Deputy Chief Wiks, then the Saskatoon Police Service nominee to the sick bank committee, dated January 4, 1999. The letter referred to paragraph 8 of the sick bank guidelines to the 1996 collective agreement regarding deductions from benefits and asked for certain information including confirmation as to whether the Applicant was in receipt of CPD benefits and, if so, for how long and in what amount. The Applicant did not reply to the letter, but said he spoke to Cst. McHarg, one of the Association's two nominees to, and then chair of, the joint sick bank committee[4], and communicated his position that he was entitled to receive both benefits in their entirety because they did not total more than 100 percent of his regular salary, and because he had collected them previously without complaint.

[19] The Applicant received a letter from Cst. McHarg, dated January 18, 1999. The letter advised that the sick bank committee had met and discussed the Applicant's file. Cst. McHarg requested certain information from the Applicant regarding the CPD benefits stating, "I want your file to have the appearance as if a lawyer completed the argument and that I could present this as evidence if it should get as far as a formal hearing." The Applicant did not provide the information to Cst. McHarg. In cross-examination, he testified that, between January and August 1999, he had occasion to discuss the situation several times with Cst. McHarg and her counterpart on the sick bank committee, Cst. Haye, but the Applicant said he was never sure "what hat they were wearing," i.e., sick bank committee member or representative of the Association. The Applicant believed that Cst. Haye was also a member of the Association's executive at the time.

[20] Cst. McHarg and Association president S/Sgt. MacDonald, sent a letter to Deputy Chief Wiks dated April 8, 1999, copied to the Applicant, that provided as follows:

> *Since our meeting in regards to Garnet Galenzoski's CPP benefit, Garnet Galenzoski has asked Dave Haye and Judy McHarg to investigate further the Joint Sick Bank Committee's ability to claw back his CPP disability payment.*

[4] The Association's other nominee to the committee is Cst. Dave Haye.

> *As a result of our inquiries, we believe that the Joint Sick Bank Committee does have the right to claw back the CPP payment, but only so total compensation to Cst. Galenzoski does not exceed 100% of normal pay, as if he had not been receiving Sick Bank benefits.*
>
> *Subsequently, we suggest that Cst. Galenzoski be informed that the CPP cheque will be turned over to the Sick Bank. The cheque will be credited directly to the sick bank and converted to hours. We can then guarantee Cst. Galenzoski 100% pay as per Schedule "A" in our Collective Agreement.*
>
> *This will ensure that the original intent of the Sick Bank Guidelines remains intact; Cst. Galenzoski receives 100% pay and the Sick Bank benefits from any excess thereof.*

[21] According to the Applicant, on several occasions during the next few months he communicated to Cst. Haye that he would not agree to any claw back beyond that outlined in the April 8, 1999 letter. In mid-August 1999, S/Sgt. MacDonald spoke to the Applicant and advised him that the Association's executive had voted in favour of certain amendments proposed by the sick bank committee to the sick bank guidelines (i.e., those eventually made effective September 1, 1999 as outlined above). The Applicant received a letter from then Acting Chief Wiks dated August 13, 1999, on behalf of the sick bank committee, advising that the committee agreed to amend the guidelines, enclosing a copy of the amended guidelines and further providing as follows:

> *As the amendments take effect September 1, 1999 and will entail a payroll adjustment, it will be necessary for you to forward a copy of your most recent statement of benefit from the Canada Pension Plan to me as soon as possible.*
>
> *Should you have any questions concerning these amendments, please feel free to contact me or any of the Sick Bank Committee members.*

[22] The amended guidelines were signed by all four members of the sick bank committee and contain the following note to paragraph 7, which provides for the claw back of CPD benefits:

> *Amendments to this Article shall take effect September 1, 1999 and shall include all members who are presently in the Sick Bank as of this date.*

[23] The Applicant made no reply to the letter from Acting Chief Wiks. He received a follow-up letter from Supt. Rans in human resources dated August 30, 1999 advising that, because of his failure to respond, the Employer would assume that he was receiving the maximum allowable CPD benefits and would make payroll adjustments accordingly effective September 1, 1999.

[24] The Applicant testified that he made his position known to Cst. McHarg and Cst. Haye on several occasions to the effect that the amendments to the sick bank guidelines did not apply to his situation because of the 1996 and 1998 back to work agreements. He sought clarification from them but, finding their answers unsatisfactory, he consulted a lawyer who wrote to the Association in early September 1999 inquiring about an appeal on behalf of the Applicant. A copy of that letter is not in evidence. S/Sgt. MacDonald, Association president, responded to the Applicant's lawyer, Mr. Owens, by letter dated September 8, 1999 advising of the provisions for appeal and further providing, in apparent response to some comment in Mr. Owens' letter, that,

> *Our executive Board of the [Association] does not feel that the [sick bank] Committee has an apprehension of bias and feel this matter should be and can be resolved at Committee level.*

[25] The sick bank guidelines (both versions) provide for the following procedure for appeals from decisions of the sick bank committee:

> *9. (a) In the event of an adverse Committee decision on a member's claim for benefits from the "Bank", the member may appeal to the Committee to review their decision. The appeal shall be made in writing within thirty (30) days of the Committee's decision.*
>
> *(b) In the event of an impasse among the Committee regarding any matter concerning the operation of the "Bank", then the matter shall be referred to a single arbiter – agreeable to the members of the Committee – whose decision shall be final and not subject to appeal.*

[26] The Applicant received a letter from Cst. McHarg dated September 16, 1999 advising that the Applicant's appeal to the joint sick bank committee was scheduled for October 22, 1999, and further providing, in part, as follows:

> *The changes to the [sick bank] guidelines did not come about easily or quickly. A lot of discussion and research went into this, and an overwhelming majority of your Executive voted to implement these changes. Both Union and Management questioned their respective legal councils (sic) before changes were made. We have acted within the laws that govern us. There are processes in place if you wish to make changes to the Sickbank Guidelines or the Collective Agreement. Please research these areas with your own council (sic) using the appropriate legislation.*

[27] The Applicant testified that no one from the Association provided him with any explanation for what he described as a "flip-flop" in its position regarding his situation between April and August, 1999.

[28] By letter dated September 24, 1999, Supt. Rans, as then chair of the joint sick bank committee, wrote to Mr. Owens advising of the procedure for the appeal as follows:

> *The Committee has determined that written arguments should be prepared and submitted to the Committee by October 15, 1999. This will give us an opportunity to consider them prior to the hearing date.*
>
> *At the hearing, the Committee is prepared to hear your arguments and will then adjourn to consider these arguments.*
>
> *It is not our intention to engage in debate over the legalities of the guidelines for the administration of the Sick Bank and whether they conform with the tennants (sic) of administrative law. Our focus will be to review the decision of the Committee as it affects Cst. Galenzoski's claim for benefits from this Sick Bank.*

The Applicant attended the hearing of the appeal with his counsel. A representative of the Association also attended.

[29] The Applicant wrote a letter dated February 7, 2001 to then Association president, Al Stickney (who had replaced S/Sgt. MacDonald), and expressed the opinion that he was not properly represented by the Association with respect to the effect of the 1996 back to work agreement and asking that the Association represent him in obtaining what he believed was his due under the agreement. The letter provided in part as follows:

> *I am writing to you in regards to my working agreement that was signed in the Spring of 1996 when I came back to work. I feel that I was not represented properly by the Association and that this working agreement should have been followed in that I would not lose any benefits if I got sick again. When I got sick again, I was to return to the Sick Bank and not lose any benefits that I had been receiving before. The idea behind the working agreement that I signed in 1996 was to protect me if I ever did have to quit working again. I would like to dispute the fact that my working agreement was not followed.*
>
> *. . . .*
>
> *I am requesting that the [Association] represent me in getting the conditions of my working agreement fulfilled, getting my wage returned to 75%, and getting the full CPP disability amount that I am entitled to. I am also requesting back pay for the amount that has been taken off since the fall of 1999. …This can be done according to the sick bank guidelines or by going to an arbitrator. There are also some legal bills that I feel the [Association] should cover too.*
>
> *If the [Association] fails to represent me, I will be going to the Labour Board, under the Trade Union Act …under section 25.1… .*

[30] By letter dated March 14, 2000, Supt. Rans, on behalf of the sick bank committee, advised the Applicant that the committee had dismissed his appeal. The letter provides, in part, as follows:

> *The Sick Bank Committee met on November 15, 1999 to consider the arguments put forward during this appeal.*
>
> *The Committee members were unanimous in their belief that the Guidelines for administration of the Saskatoon police Service sick Leave Bank were being applied fairly in the case at hand. Amendments made to those Guidelines in August of 1999, specifically Articles 7(c)(d) and (e), clearly allow a reduction in Benefits from the Sick Bank, if Canada Pension Plan benefits are being received. These amendments were made to provide clarification regarding what deductions from Sick Bank benefits were permissible.*
>
> *The Committee also considered the possibility of the Guidelines being discriminatory, as suggested by your Counsel during this appeal. It was determined that this was not a question to be determined by the Committee, and until this question had been answered, the Committee would reserve its final decision.*
>
> *The Police Administration and the Saskatoon City Police Association then jointly sought an independent opinion to*

> *determine if the "Guidelines" contravene the Saskatchewan Human Rights Code.*
>
> *[Then follows an excerpt from the opinion letter].*
>
> *With this information at hand, the Committee comprised of Cst. Dave Haye, Cst. Judy McHarg, Ron Avant and myself met again on March 6th to consider your appeal. It was the unanimous opinion of the Committee that your appeal be denied and that the reduction in Sick Bank Benefits as allowed by 7(e) of the Guidelines, continue to be applied. In our opinion the Guidelines have been properly applied in your case, and you are not being treated unfairly.*

[31] Mr. Stickney responded to the Applicant's letter of February 7, 2000 by letter dated March 16, 2000, enclosing a copy of the opinion letter referred to in the decision of the sick bank committee, and further advising, in part, as follows:

> *In regards to your concerns regarding the memorandums of understanding, you have received all of the benefits you were allowed under the Sick Bank Guidelines.*
>
> *We also want you to be aware that there are no further avenues of appeal available to you. The [Association] will not be covering any of your legal bills after March 1, 2000.*

The Association neither filed a grievance on behalf of the Applicant nor took any other action. The Applicant filed this application with the Board in March, 2001.

S/Sgt. (ret'd) John MacDonald

[32] S/Sgt. MacDonald retired from the Saskatoon Police Service in 2000. He was president of the Association for two terms from 1995 through October 1999. He was involved with representatives of the Employer (i.e., the Police Service and the City) in developing both the 1996 and 1998 back to work agreements, both of which he signed on behalf of the Association. The purpose of the agreements, which was desired by both the Employer and the Applicant, was to set the parameters for the Applicant's return to work and to ensure that the Applicant would revert to sick bank benefits if he subsequently again became incapable of working. The Applicant was the only member who had the benefit of such an agreement at the time. S/Sgt MacDonald testified that he was not aware at the time that the Applicant was in receipt of CPD benefits and no one raised it as a concern.

[33] A few weeks after the 1998 back to work agreement was signed, S/Sgt. MacDonald, on behalf of the Association, signed a memorandum of agreement with the Employer dated November 20, 1998 essentially terminating the back to work agreement (the "1998 back to work rescission agreement"), as follows:

> *1. As a result of [Cst. Galenzoski] being unable to work the "Return to Work Agreement" dated October 2, 1998 will expire immediately.*

S/Sgt. MacDonald said that he had no recollection of signing the 1998 back to work rescission agreement and was unable to recall why it had been signed or if the Association's executive committee had discussed the matter.

[34] S/Sgt. Macdonald testified that the Association's nominees to the sick bank committee are appointed by the Association's president after a vote among the members of the Association's executive committee. He said that one of the Association's expectations of its nominees to the committee is that they will negotiate changes to the sick bank plan on behalf of the Association and make reports back to the Association on the committee's activities. If the nominees require legal advice, they may seek same from the Association's counsel.

[35] S/Sgt. MacDonald said he became aware of a proposed change to the sick bank guidelines to claw back CPD benefits in 1999 from the Association's then nominees to the sick bank committee, Cst. McHarg and Cst. Haye. They expressed to him that the sick bank committee had a concern that the Applicant could receive the equivalent of more than one hundred percent of regular pay through a combination of sick bank benefits at 75 percent of his regular salary and CPD benefits. S/Sgt. MacDonald said that at that time the Association's position was to "stand behind" the Applicant with respect to the issue. After their discussion, S/Sgt MacDonald and Cst. McHarg sent the letter of April 8, 1999 (see, *supra*) to Deputy Chief Wiks, which S/Sgt MacDonald said reflected his position on behalf of the Association. When Cst. McHarg subsequently advised S/Sgt MacDonald that the Employer's representatives on the sick bank committee favoured a claw back of CPD benefits, S/Sgt. MacDonald said he told her that he and others on the Association's executive were opposed to that position and

that she should attempt to negotiate terms of amendment that were more favourable to the Applicant's position, but acknowledged that the matter was left to the sick bank committee to deal with.

[36] S/Sgt. MacDonald said that he did not agree with the decision of the sick bank committee when he learned from Cst. McHarg that the Association's nominees on the sick bank committee had voted with the Employer's nominees to amend the sick bank guidelines and that he felt that the Association's nominees had therefore not properly represented the Applicant's interests at the committee. S/Sgt. MacDonald said that, while the Association's executive committee can merely offer advice to its nominees on the sick bank committee and cannot force them to vote in any particular way, the nominees should have advised the executive committee that they were considering voting in support of the changes to the guidelines regarding the claw back of CPD benefits. However, S/Sgt. MacDonald acknowledged that he nonetheless signed the amended 1999 sick bank guidelines on August 12, 1999, the day after a meeting of the Association's executive committee on August 11, 1999 at which, after a presentation by Cst. McHarg and Cst. Haye (both of whom were also members of the executive committee), a motion was carried that the Association endorse the 1999 sick bank guidelines.

[37] When the Association subsequently received a letter from a lawyer retained by the Applicant inquiring about an appeal of the decision of the sick bank committee, S/Sgt. MacDonald responded by letter dated September 8, 1999, advising that the appeal should be made to the sick bank committee as per the amended guidelines.

[38] In cross-examination by Mr. Gillies, S/Sgt. MacDonald acknowledged that another member of the Association, a Constable Shillington, had been subjected to a total claw back of CPD benefits as a result of a 1995 arbitration award. In that context, a 50 percent claw back in the Applicant's case was better.

Deputy Chief (ret'd) Roy O'Hare

[39] Deputy Chief O'Hare was a member of the Saskatoon Police Service from 1965 until his retirement in July 1996 while in the position of deputy chief of administration. Prior to his retirement, he had a discussion with the Applicant and one of the superintendents regarding the provisions of the collective agreement dealing with disability specifically article 40(B)(ii), during which he expressed the opinion that it was contemplated that the disabled member would receive the equivalent of 100 percent of his salary. The claw back of CPD benefits was never an issue because it was never raised. However, Deputy Chief O'Hare acknowledged that, in calculating the amount to be paid pursuant to article 40(B)(ii), subsection 40(B)(i)(b) provides for the deduction, inter alia, of "benefits paid by…the Canada Pension Plan." Deputy Chief O'Hare had no input into the provisions of the 1996 back to work agreement as he was by that time retired. He could not recall whether any other members had been in the same position as the Applicant.

Cst. David Haye

[40] Cst. Haye has been a member of the Saskatoon Police Service and the Association for some 18 years. At the time of hearing he had been the Association's vice-president for a little over two years, and had been on its executive committee, which comprises 14 members, for over 6 years. As the vice-president, he was a member of every committee of the Association and was also the chair of its grievance committee.

[41] Cst. Haye has been one of the two Association nominees to the sick bank committee since 1996. His duties in administering the sick bank jointly with the nominees appointed by the Police Service and the City include the review of applications for sick bank benefits and representing the interests of members of the Association in the committee. All members of the sick bank committee have a duty to ensure the viability of the sick bank, monitor its usage and ensure that its eligibility rules are followed.

[42] In January 1999, when Deputy Chief. Wiks made the sick bank committee aware that the Applicant was receiving CPD benefits in addition to sick bank benefits,

the sick bank committee did not have a position regarding claw back of CPD benefits. Deputy Chief Wiks advised the other committee members that the Employer desired to do so. Cst. Haye and Cst. McHarg decided that Cst. Haye would contact the Applicant to discuss the matter with him. Subsequently, Cst. McHarg sent a letter to the Applicant on the Association's letterhead dated January 18, 1999, seeking to obtain a "report" from the Applicant detailing his arguments for his position with any supporting documents, in order to have as much information as possible to deal with the matter in the sick bank committee. Cst. McHarg said that the Applicant did not respond.

[43] However, Cst. McHarg and Cst. Haye met with the Applicant in February 1999, at which time the Applicant said that if the CPD was to be clawed back he would rather not receive it. As a result, in March 1999, Cst. McHarg and the Applicant met with Ron Avant (also a member of the sick bank committee) who worked in the City's pension office, to discuss the pros and cons of continuing to receive the benefit and whether it would have any effect on the Applicant's pension entitlement.

[44] According to Cst. Haye, the Association had no position with respect to the proposed claw back other than to reject the idea outright. At the March meeting of the sick bank committee, he and Cst. McHarg floated a trial balloon of a 50 percent claw back for persons receiving sick bank benefits at a rate less than 100 percent of full pay. The Employer's nominees did not seem receptive, but did not reject the idea out of hand.

[45] With the assistance of Cst. McHarg, Cst. Haye sent a detailed letter to S/Sgt. MacDonald (as president of the Association) dated March 26, 1999 describing the consideration of the claw back issue in the sick bank committee and the information they had gleaned to date and summarizing. The letter provides in part as follows:

> *…Galenzoski draws 75% of his regular wage from the Sick Bank. If he was to receive the CPP Disability Benefit it would put him over 100% of his regular wage.*
>
> *….*
>
> *The Joint Sick bank Committee has an agreement where members who are in the Bank and who are doing secondary employment cannot earn a combined wage (secondary employment and sick bank benefit) which totals more than their normal wage if they had not been sick. If this occurs the Sick bank Benefit would be "clawed back" so that the total amount earned was 100% the members normal wage.*

The letter continues on to outline two incompatible interpretations of article 8, paragraph 3, of the 1996 sick bank guidelines, and then mentions the case histories of two other sick bank benefit recipients regarding CPD benefits as follows:

> *There has been discussion in the Joint Committee regarding two previous members where the issue arose:*
>
> *Barry Shillington – an arbitrated decision which allowed the [Saskatoon Police Service] to claw back the CPP Disability Benefits as part of the Arbitration Award; and*
>
> *Brian Keating – a decision of the Joint Sick Bank Committee not to claw back the CPP Disability Benefit as his illness was terminal. Made without prejudice however none of the documentation about his particular issue can be found in the association's file on this matter.*

[46] Cst. Haye testified that through his research he determined that it was standard in private industry to claw back CPD benefits in such circumstances, and that the Canada Pension Plan had no rules on the subject. He also reviewed two arbitration decisions regarding Cst. Shillington, dated November 1, 1985 and May 26, 1987, a member of the Association in circumstances similar to the Applicant (the "Shillington decisions"). Cst. Shillington had been terminated after he was rendered quadriplegic in an off-duty accident. The Association grieved his dismissal and he was reinstated after arbitration. But the parties could not agree on compensation. The board of arbitration determined that Cst. Shillington was entitled to all benefits properly claimable under the collective agreement including compensation from the sick bank, but it left it to the discretion of the joint sick bank committee to determine the basis of payment. The sick bank committee apparently determined that 100 percent of CPD benefits were subject to claw back. On the basis of this decision, Cst. Haye stated that he formed the conclusion that it was "past practice" to claw back the benefits.

[47] At the April meeting of the sick bank committee, Deputy Chief Wiks proposed a 50 percent claw back in a different form than earlier floated out by Cst. McHarg and Cst. Haye. Cst. Haye discussed the proposal with the Applicant, who rejected the idea. The Association's executive committee also rejected the proposal at its May 1999 meeting. Subsequently, the sick bank committee met twice in May and

June, 1999. The idea of choosing an arbitrator pursuant to the sick bank guidelines to determine the issue was discussed, but no decision was made. Cst. Haye testified that in July 1999 the Association's executive committee decided that the matter should be referred to arbitration, however, a few days before the sick bank committee met on July 28, 1999, S/Sgt. MacDonald advised Cst. McHarg and Cst. Haye that, after speaking to Deputy Chief Wiks, he thought they should try to negotiate the matter further in the sick bank committee. The sick bank committee came up with the present amendments to the 1999 sick bank guidelines. Cst. Haye said that he and Cst. McHarg viewed the amendments as a reasonable compromise because no one could receive more than 100 percent of regular salary, and those receiving less than 100 percent in sick bank benefits had CPD benefits clawed back at a lesser rate. The Association's executive committee voted to adopt the changes at its meeting on August 11, 1999. S/Sgt. MacDonald advised Cst. Haye not to speak about the matter with the Applicant as he would do so himself.

[48] In cross-examination by Mr. Owens, Cst. Haye acknowledged that the persons on the sick bank committee that were of the opinion that the Applicant was subject to the changes made in the 1999 sick bank guidelines regarding claw back of CPD benefits - notwithstanding the back to work agreements - were the same persons that heard the Applicant's appeal, but Cst. Haye said that was what the guidelines provided for. Cst. Haye maintained that, rather than voting against the Applicant's interests in the first instance, as a sick bank committee member he had voted in favour of the changes to the sick bank guidelines both as a representative of the Union's membership and pursuant to his trustee-like duty to the sick bank. He confirmed that the vote by the Association's executive committee in favour of adopting the changes was unanimous.

[49] Cst. Haye acknowledged that while the Association's formal position prior to July 1999 was against any claw back, it changed in the interests of negotiating acceptable changes to the guidelines in the sick bank committee. He also confirmed that to his knowledge the Applicant was not informed of this change in position until after the Association's executive committee agreed to the guideline changes.

[50] The Association's executive committee appointed Mr. Peters to represent the Applicant at the appeal to the sick bank committee, although the Applicant had his own counsel.

Cst. Judy McHarg

[51] Cst. McHarg has been with the Saskatoon Police Service since 1984. She was on the Association's executive committee from 1994 to October 2000, and was one of the Association's nominees to the joint sick bank committee during approximately the same time period.

[52] Cst. McHarg testified that her responsibility as a representative on the joint sick bank committee was to make decisions in accordance with the sick bank guidelines. And, while the Association may make recommendations to its nominees on the sick bank committee, it does not dictate to them.

[53] When the sick bank committee was first made aware that the Applicant was receiving CPD benefits as well as sick bank benefits and that the position of the Employer's representatives on the committee was that the CPD benefits should be clawed back, Cst. McHarg's immediate response was to reject the notion. However, so that she and Cst. Haye would have as much information as possible, she sent the letter of January 18, 1999 to the Applicant (see, *supra*). She and Cst. Haye kept the Association informed monthly as to the progress of the discussions in the sick bank committee regarding the issue. Cst. McHarg said that, throughout the discussions, she and Cst. Haye represented to the sick bank committee that there should be no claw back of CPD benefits but, eventually, when they formed the opinion that there was a great risk that if the matter were forced to arbitration as per the sick bank guidelines it could result in a total claw back of such benefits, they raised the compromise proposal with S/Sgt. MacDonald and then the Association's executive committee of a formula for claw back such as was eventually adopted.

[54] At a meeting of the Association's executive committee on November 1, 1999, two months after the 1999 sick bank guidelines were implemented (on September 1, 1999), after receiving a report from Cst. McHarg regarding the status of the Applicant's appeal to the joint sick bank committee, the minutes note that the executive

committee "affirm[ed] …that [the Applicant's] entitlement should be at 100%." Cst. McHarg said that the executive committee asked her to try to have the sick bank committee agree that the Applicant would not be subject to the claw back mandated by the guidelines. She said she attempted to do this but was not successful.

[55] Cst. McHarg confirmed that there are several other members of the Association with back to work agreements and she did not consider the Applicant to be in any different position than they; that is, the sick bank guidelines and such changes as may be made to the guidelines from time to time apply to them.

S/Sgt. MacDonald in Rebuttal

[56] At the request of counsel for the Applicant, and without objection by counsel for the Association, S/Sgt. MacDonald was recalled to testify. He stated that, while the Association's executive committee approved the changes to the sick bank guidelines, no motion was made that the Applicant should be subject to claw back of the CPD benefit under the guidelines.

[57] S/Sgt. MacDonald confirmed that, as president of the Association he was entitled to attend sick bank committee meetings. However, he did not attend and he did not know what representations were made by the Association's nominees to the committee regarding the Applicant's situation. S/Sgt. MacDonald denied that he told Cst. Haye that he should not speak to the Applicant regarding the executive committee decision to approve the 1999 sick bank guidelines.

Arguments:

The Applicant

[58] Mr. Owens, counsel for the Applicant, argued that the effect of the 1996 back to work agreement was to place the Applicant in a position whereby, if he was not able to work at all, he was entitled to receive sick bank benefits equivalent to 100 percent of his regular salary notwithstanding his receipt of benefits from any other source, including CPD benefits. Counsel asserted this was the same as was afforded to Cst. Keating. And, he further asserted that the "affirmation" by the Association's executive committee at its November 1, 1999 meeting that its position was that the

Applicant's "entitlement should be at 100%" confirms the belief of same by the Association. That is, while the Association approved the 1999 sick bank guidelines, it never intended that the claw back provisions would apply to the Applicant. According to counsel, the guidelines must be interpreted in the context of the history of the Applicant's entitlement pursuant to the back to work agreement.

[59] Counsel argued that, in her letter to the Applicant dated January 18, 1999, Cst. McHarg undertook to represent at the sick bank committee the Applicant's position that he should not be subject to any claw back of CPD benefits. Counsel suggested that Cst. McHarg did not properly do this. Counsel asserted that the Applicant was without an advocate to represent him during the time that the sick bank committee was considering changes to the sick bank guidelines. Cst. McHarg purported to represent the Applicant's interests and then voted against them. This, counsel said, constituted a denial of natural justice and offended the principles of procedural fairness. In support of this position counsel referred to the decision of the Saskatchewan Court of Queen's Bench in *Graham v. River Bend Presbytery* (2002), 218 Sask. R. 177.

[60] In *Graham*, *supra*, the applicant, a United Church minister, had requested a change of pastoral assignment. Instead, the Presbytery, a minor court of accountability and discipline within the church institution, initiated a review of the pastoral relationship at the applicant's church. In the course of that review, the applicant requested disclosure of the names of persons interviewed by the review team. The review team maintained that the names were confidential. The review team presented its report and conclusions to the Presbytery. The applicant provided a written response to the report and again requested disclosure of the individuals who provided information forming the basis for the report. The Presbytery's executive met to make its decision. The applicant did not attend, but was represented by a colleague. The decision was that the applicant be suspended from duty and be required to undergo medical and psychiatric examination. The applicant applied for judicial review and an order of *certiorari* to quash the decision. Relying on the well-known decision of the Supreme Court of Canada in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, and other decisions confirming a duty of fairness to ministry personnel, Allbright, J. determined that the Presbytery owed a duty of fairness to the applicant and it denied natural justice to her as a result of its failure to make full disclosure to the applicant of all

the allegations underpinning the report in a timely fashion, which in turn resulted in the applicant's inability to respond to the complaints made against her in a full and meaningful way.

[61] Counsel asserted that Cst. McHarg and Cst. Haye could not purport to represent the Applicant's interests and then act as adjudicators in the process. Furthermore, counsel said, it was a denial of natural justice for the same persons to hear the appeal as made the original decision that the Applicant was subject to the claw back implemented with the 1999 sick bank guidelines – the committee could not sit in appeal of its own decision.

[62] Counsel argued that the Applicant was led to believe that the Association agreed that the effect of his back to work agreement was that his income would be protected regardless of future changes to the sick bank plan that might pertain to other employees, and that the Association's nominees to the sick bank committee were committed to the position that the Applicant should not be subject to a claw back of CPD benefits. The Applicant had a reasonable expectation that the Association's sick bank committee nominees would not deviate from that position, unless the Applicant was advised that they intended to do so.

[63] As a result, on the facts, counsel said, the Association failed to represent the Applicant in a manner that was not arbitrary, discriminatory or in bad faith and did not treat him fairly. In support of this position, counsel referred to the decision of the Board in *Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93.

The Association

[64] Mr. Gillies, counsel on behalf of the Association, asserted that the position of the Applicant is premised on the assumption that Cst. Haye and Cst. McHarg voted against the Applicant's interests. That is, just because the Applicant did not like the claw back formula effected by the 1999 sick bank guidelines, does not mean that it was not in the Applicant's interests for the Association's nominees to negotiate the changes as they did. The arbitration of the issue had they pressed it to impasse could have resulted in a decision that CPD benefits were subject to a deeper claw back than

that mandated by the guidelines. Indeed, the Shillington arbitration decision had resulted in a complete claw back of such benefits.

[65] Counsel further argued that it is not uncommon in negotiations that the interests of an individual union member are opposed to those of the membership as a whole. The individual member is not entitled to bargain with the employer on his or her own. While the union cannot refuse to recognize the interests of the individual, the union is entitled to negotiate terms that are in the best interests of the membership as a whole. Counsel asserted that that is what happened in this case. In support of this position, counsel referred to the decision of the Board in *Hidlebaugh v. Saskatchewan Government and General Employee's Union*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02.

[66] Counsel argued that the back to work agreements simply provided terms for a flexible return to work for the Applicant: if he was unable to work full time, any shortfall in salary would be made up from the sick bank plan. But, the back to work agreements did not guarantee that the monies that the Applicant received from the sick bank plan would not be subject to deductions allowed under the collective agreement and the sick bank guidelines appended to the collective agreement under which the plan operated or to any subsequent changes to the sick bank guidelines.

[67] Counsel further argued that the sick bank committee members are trustees of the sick bank plan. In that capacity, while they can attempt to advance the interests of the Association as its executive committee communicates those interests to them, they are not bound to follow the dictates of the Association. In any event, the position of the Association regarding the issue of CPD claw back changed sometime after March 1999. Initially, the Association's view was that the issue of any form of claw back would be pressed to impasse and arbitration under the sick bank guidelines process. However, Cst. Haye and Cst. McHarg communicated the results of their research to the Association's president, S/Sgt. MacDonald and its executive committee. This included the Shillington arbitration and the fact that the claw back of CPD benefits is standard in industry. Throughout this time, those three persons were in communication with the Applicant, who was repeatedly asked to provide information and arguments to support his position. The Applicant's position was premised on the assumption that an

arbitration would have been in the Applicant's favour. In the end, the Association's executive committee voted to approve the changes to the guidelines as being in the best interests of its membership as a whole.

[68] Counsel argued that the Association did not deny natural justice to the Applicant. He was not entitled to a hearing with the Association's executive committee before it moved to approve the sick bank guidelines. The Association agreed to a compromise that it viewed as reasonable. Its actions were not arbitrary, discriminatory or in bad faith.

The Employer

[69] Ms. Warwick, counsel on behalf of the Employer, submitted that the Board does not have jurisdiction to force the joint sick bank committee to put the matter of claw back to arbitration. She said the joint sick bank committee is an entity unto itself and there is no capacity to grieve its decisions changing or applying the sick bank guidelines. Counsel argued that the joint sick bank committee can make changes to the sick bank guidelines, as and when it sees fit, that may reduce, increase or otherwise limit entitlement. Individuals who are unhappy with the application of the guidelines by the joint sick bank committee are limited to the appeal process provided for therein. In support of this position, counsel referred to the Saskatchewan Court of Queen's Bench decision in *Saskatoon (City) Police Commissioners v. Canadian Union of Public Employees, Local 59* (1993) 115 Sask. R. 56.

[70] The changes made to the sick bank guidelines in August 1999 were within the legitimate exercise of the mandate of the joint sick bank committee. Absent an impasse on that committee regarding the application of the guidelines to the case of the Applicant (which there was not), there is no jurisdiction to refer the matter to arbitration.

Analysis and Decision:

[71] There is no issue in this case that changes to the sick bank could not be negotiated. The issue is whether the Association, in compliance with s. 25.1 of the *Act*, fairly represented the Applicant with respect to his complaint that the back to work

agreements exempted him from changes to the sick bank in a manner that was not arbitrary, discriminatory or in bad faith. At the hearing before the Board, it was further alleged that the participation of the Association's sick bank committee nominees in the negotiation of changes to the guidelines that did not conform to the Applicant's position that he was not subject to a claw back of CPD benefits, their agreement in the decision by the joint sick bank committee that he was subject to the claw back required by the amended guidelines rather than pressing the matter to impasse and arbitration, and their participation in the appeal to the sick bank committee, are evidence of a denial of natural justice and procedural fairness.

[72] To the extent that this latter allegation can be considered in the context of the duty of fair representation, we have jurisdiction to deal with it. But, as far as whether the Applicant is entitled to the application of natural justice by the sick bank committee, and whether the process established by the sick bank guidelines violates the principles of procedural fairness *per se*, and is 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 the *Act*. Likewise, it is not within our mandate to determine whether the procedure followed by the Association's executive committee, in resolving to approve the changes to the sick bank guidelines in August 1999, accords with the principles of natural justice.

[73] We may only scrutinize such actions insofar as they might be said to constitute evidence of arbitrariness, discrimination or bad faith in the representation of the Applicant 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.

[74] Furthermore, it is not for the Board to determine the effect in law of the back to work agreements, but to assess whether the Association's representation of the Applicant with respect to his complaint regarding the effect of same was not arbitrary, discriminatory or in bad faith.

[75] In making our findings of fact and conclusions of law, we have considered all evidence adduced *viva voce*, the exhibits, the submissions advanced on behalf of the parties, the case authorities referred to and the demeanour of the witnesses.

[76] 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, as follows, at 71 and 72:

> *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.*

The Board has followed and applied these principles in numerous cases over the past many years.

[77] It is recognized that a union has the duty in collective bargaining to represent the individual employees in the bargaining unit in a manner that also is not arbitrary, discriminatory or in bad faith. In that context, the union may not uncommonly

find itself in a position of some conflict as described by the Board in *Hidlebaugh*, *supra*, at 285-86:

> *The Union's duty of fair representation is a dual responsibility. It owes a duty of diligent and competent representation to the bargaining unit as a whole, as in collective agreement negotiation, and a duty to fairly represent individual members in grievance and arbitration proceedings. The cases are legion that recognize that the two arms of the duty are often in conflict and that it is necessary for a union to engage in a balancing of collective and individual interests. However, it is clear that a bargaining agent need not grieve or arbitrate every individual complaint even if it is legitimate. It may decline to do so where the interests of the collective membership are reasonably deemed to be more important than those of the individual. A common example is the decision by a union to represent one of its members in a selection grievance based on its interpretation of the collective agreement and the interests of the wider membership where the successful outcome of the grievance will mean that another member will not be successful in obtaining the position.*

[78] In the present case, the Association's representation of its members' interests includes its ability to attempt to influence the administration of the sick bank plan through its nominees to the joint sick bank committee. However, the Association's executive committee recognizes that prudent stewardship of the plan and its continued viability is in the interests of its membership as a whole. In that regard, the Association's executive committee recognizes that, while it can communicate its position and make recommendations to its nominees regarding both changes to the sick plan guidelines and the application of the guidelines, it cannot control or dictate to its nominees in the joint committee's administration of the plan. From the perspective of the Association's nominees to the joint sick bank committee, while they may advance the interests of the Association and individual members in their joint administration of the sick bank plan, they recognize an overarching duty of prudent stewardship, if not trusteeship. We cannot take issue with the views of either the Association or its nominees to the joint committee in this regard.

[79] In all of the circumstances we do not find that the Association violated its duty of fair representation under s. 25.1 of the *Act*. While a union may represent to a member that it will press the member's complaint, by itself that does not constitute a guarantee that the matter will be grieved let alone taken to arbitration. In this case, the Association could not guarantee that the Applicant's case would go to arbitration. Of

course, the reason for this is that whether any policy issue regarding interpretation of the sick bank guidelines, or any member's entitlement to or level of benefits from the sick bank plan proceeds to arbitration depends upon an impasse in the joint sick bank committee.

[80] In our opinion, the Association vigorously attempted to influence the actions of its nominees to the joint sick bank committee. Likewise, the Association's nominees, Cst. Haye and Cst. McHarg, vigorously pressed for no claw back of CPD benefits for all members in discussions among the joint committee members over several months. The Association's nominees conducted interviews and research regarding the issue. They presented their findings to the Association's executive committee in the course of their regular updates to that body. On the basis of the information provided by the nominees, the Association's executive committee voted unanimously to approve the amendments to the sick bank guidelines as being in the best interests of its membership as a whole. Indeed, even S/Sgt. MacDonald, who appeared throughout his testimony to be conflicted by the decision, voted in favour of the amendments. While S/Sgt. MacDonald may personally have believed that the effect of the back to work agreement would insulate the Applicant from the application of the claw back, he certainly knew that the Association could not dictate to its nominees on the joint sick bank committee with respect to the application of the guidelines. By all accounts, the executive committee of the Association investigated the matter, considered the position of the Applicant as to the effect of the back to work agreement, received the opinions and advice of its sick bank committee members and carefully considered and discussed the matter in committee. While the Association did not get everything that it would have liked to obtain in the negotiations and discussions by the joint sick bank committee members to amend the sick bank guidelines, that does not mean that it did not fairly represent the interests of the Applicant.

[81] While the Association did not advise the Applicant that it was considering agreeing to amendments to the sick bank guidelines that would include an express claw back of a portion of his CPD benefits, that does not mean that it violated s. 25.1 of the *Act*. The Association was aware of the facts of the Applicant's case and of the Applicant's position on the issue and the Applicant did not testify that he was thereby

deprived of the opportunity to provide new information that might have changed the minds of the members of the executive committee.

[82] It is not for us to minutely assess all of the actions and decisions of the Association's executive committee with respect to its conclusion that the matter of claw back of the Applicant's CPD benefits could not be grieved and arbitrated, but to determine whether it arrived at that decision without gross negligence after a reasonable investigation and a fair consideration of the Applicant's interests and those of the membership as a whole. In our opinion, the Association fulfilled its duty of fair representation in that respect. The statement in the November 1, 1999 minutes of the meeting of the Association's executive committee to the effect that it affirmed that the Applicant's "entitlement should be at 100%" was merely wishful thinking. The executive committee must be taken to have known that any change in that respect would have to be sought through negotiation at the joint sick bank committee and it asked Cst. McHarg to do so, but she was not successful.

[83] The note to paragraph 7 of the 1999 sick bank guidelines states that it is applicable to all persons then in receipt of benefits as and from September 1, 1999. The Association's nominees to the joint sick bank committee agreed with the other members of that committee that the Applicant was subject to the claw back. While it is true that the Applicant did not receive a personal hearing before the committee and it simply determined to apply the amended guidelines to his receipt of benefits as it viewed appropriate and while the same committee members that made that decision heard his appeal, it does not appear that there was a violation of the guidelines, and it is not for us to say whether this procedure is a denial of natural justice. According to *Saskatoon (City) Police Commissioners*, *supra*, the joint sick bank committee is entitled to apply the guidelines as it sees fit.

[84] In *Saskatoon (City) Police Commissioners*, *supra*, Halvorson, J. considered the application of sick bank guidelines by the joint sick bank committee under the sick bank plan for civilian employees of the Saskatoon Police Service. Those guidelines are similar, but not identical to, those at issue in this case, the main procedural difference being that a difference of opinion among joint committee members was referred to the City Commissioner for decision and that decision could then be

appealed to the joint committee in the same manner as provided for by the guidelines in the present case. The joint sick bank committee had determined to limit the duration of an employee's benefits. The City Commissioner agreed. The employee appealed the decision to the joint sick bank committee under the guidelines and, unhappy with the decision on appeal, purported to file a grievance of the decision. In quashing the decision of the grievance arbitrator that he had jurisdiction to hear the grievance, Halvorson, J. found that the sick bank guidelines were not part of the collective agreement and stated, at paragraphs 8, 16 and 17, as follows:

> *8. These guidelines are extensive and constitute a code for operation of the sick bank by the committee. Among other things, the committee empowered itself to set the duration of sick benefits and in its discretion, to terminate or reduce benefits. An appeal procedure was included. …*
>
> *16. …Criteria for administering the sick bank are to be determined by the joint committee just as the article states. The extent of the benefits are prescribed in the guidelines. …*
>
> *17. The intention of the parties as expressed in the article is obvious. The sick bank was to be administered exclusively by the joint committee using its own criteria. There is no role for an arbitration board. The board may not usurp the functions of the…*

[85] Indeed, Halvorson, J. cited with approval the Shillington arbitration award, *supra*. That award arose from a grievance under the collective agreement of the termination of Cst. Shillington. While the arbitration board reinstated his employment, it took the position that it was solely for the joint sick bank committee to then determine his entitlement under the sick bank plan; that is, the arbitration board held that it did not have the jurisdiction to usurp the function of the sick bank committee.

[86] Further, in our opinion, the *Graham* case, *supra*, is not applicable to the present situation. It must be confined to its facts. That is, it merely affirms the principle enunciated in *Knight*, *supra*, that termination of employment in certain circumstances might be required to conform with the rules of natural justice.

[87] Therefore, in our opinion, the decisions of the joint sick bank committee are not assailable by the Board in these proceedings. It is not for us to determine whether the joint sick bank committee must apply the principles of natural justice or

whether its procedures do not accord with procedural fairness. However, we can consider what was done and determine whether it is evidence of arbitrary, discriminatory or bad faith representation of the Applicant by the Association. But having done so, we conclude that in all the circumstances of the case it is not.

[88] For these reasons, the application is dismissed.

DATED at Regina, Saskatchewan this **22nd** day of **April, 2005.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson