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

**I. R., Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975-01 and UNIVERSITY OF REGINA., Respondents**

LRB File No. 139-03; September 19, 2006
Chairperson, James Seibel; Members: Hugh Wagner and Mike Wainwright

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| The Applicant: | I. R. and Keith Peterson |
| For the Union: | Peter Barnacle |
| For the Employer: | Bonnie Dobni |

**Duty of fair representation – Contract administration – Union fairly investigated grievances and concluded that allegations against grievor well founded – Union sought legal opinion and union executive then fairly decided not to advance grievances, unless grievor admitted wrongdoing and agreed to seek assistance – Grievor declined to do so, knowing that grievances would be withdrawn – Union did not violate s. 25.1 of *The Trade Union Act*.**

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

## REASONS FOR DECISION

**Background:**

**[1]** Canadian Union of Public Employees, Local 1975-01 (the "Union"), is designated as the bargaining agent for a group of employees of the University of Regina (the "Employer"). The Applicant, I. R., was at all material times employed by the Employer as a caretaker and was a member of the bargaining unit until his employment was terminated on May 13, 2003. The Applicant filed an application with the Board alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) in failing to fairly represent him in respect of grievance or rights arbitration proceedings with respect to disciplinary actions prior to and resulting in the termination of his employment.

**[2]** Section 25.1 of the *Act* provides as follows:

> *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.*

**[3]** The Union filed several grievances in respect of the discipline and discharge of the Applicant but declined to advance them and eventually withdrew them. In its reply to the application, the Union denied the allegations made in the application. It stated that it conducted an investigation into allegations of harassment made by the Applicant against certain of his co-workers and into the discipline imposed by the Employer on the Applicant and concluded that it required the Applicant's co-operation in order to properly advance the grievances. When the Union did not receive such co-operation, the grievances were withdrawn. The Union further stated that the Applicant failed to avail himself of his right under the Union's constitution to appeal the Union's decision to withdraw the grievances.

**[4]** The Applicant was provided with the full opportunity to present evidence and call witnesses, to cross-examine witnesses called to testify on behalf of the Union and to present argument.

**Evidence:**

**[5]** The Applicant testified on his own behalf. The Union called two witnesses: Don Puff, the Union's local president; and Don Moran, one of the Union's national servicing representatives. Following is a summary of the evidence that was either uncontroverted or as we have accepted it.

**[6]** The Applicant had been employed in the Employer's custodial department for over six years. The material events began in May 2002, when the Applicant filed a harassment complaint against a co-worker. The arbitration board that heard the complaint concluded that the only harassment was more probably that by the Applicant of his co-worker. The award, dated May 16, 2002, provided in part, as follows:

> *In an attempt to have Ms. S removed from the workplace, [the Applicant] chose to document culpable conduct of Ms. S including a manufactured case of harassment. It is our view that the actions of [the Applicant] more closely resemble harassment than any act committed by Ms. S.*

**[7]** As a result of complaints made against the Applicant by his co-workers, including allegations of intimidation, watching and surveillance, the Employer suspended the Applicant for five days on November 19, 2002 after he failed to attend a scheduled disciplinary hearing relating to the matter. The Union discussed the matter with the Employer's representative before the discipline was imposed. The letter to the Applicant from the director in his department, Dave Button, provided in part as follows:

> *We received the following complaints regarding your behaviour and conduct:*
>
> *1. The constant watching and surveillance of other members of the custodial staff and keeping records of their actions.*
>
> *2. Clients in the building have also noticed that you seem to be watching your co-workers on a regular basis and are concerned that they too are being watched. They have expressed their unease about the entire situation.*
>
> *3. You have intimidated your co-workers by being aggressive, speaking in a loud voice including swearing, and by threatening to take action against them.*
>
> *. . . .*
>
> *Your supervisor has spoken to you about these matters on numerous occasions and there have been several meetings with yourself and other members of the team in the Ad-Hum building to specifically discuss their unease and try to resolve the situation. Your supervisor has also solicited assistance from Union representatives in hopes of resolving this issue to no avail. You have chosen to deny your actions rather than resolve the situation. Your actions may constitute harassment of your co-workers, and you are causing dissension and poisoning the work environment. This has resulted in a dysfunctional work unit, which has affected the performance and morale of the entire team.*
>
> *. . . .*
>
> *This type of behaviour and conduct is not condoned and will not be tolerated. Upon your return from suspension it is expected that your inappropriate conduct will cease and you will take action to resolve the conflict with your co-workers. Failure to comply will result in further disciplinary action up to and including dismissal.*
>
> *In addition to the five-day suspension, you will also be scheduled and required to attend training in the following general areas within the next three months:*

*a. Respectful Workplace; and,*
*b. Anger Management.*

**[8]** On December 11, 2002 the Union filed a grievance of the discipline imposed by the Employer and Mr. Puff and Mr. Moran engaged in an investigation of the matter. The Union obtained the Employer's agreement that the grievance be held in abeyance pending the completion of the Union's investigation.

**[9]** At around the same time, the Applicant filed further harassment complaints against two of his co-workers pursuant to the Employer's harassment policy. Mary Ross, Coordinator, Harassment and Discrimination Prevention Office, conducted an investigation into the Applicant's complaints and prepared a report dated December 16, 2002, in which she dismissed all of the Applicant's complaints and found that it appeared that he, in fact, had harassed his co-workers. It was also observed that this was an "ongoing problem." The report provided, in part, as follows:

> *The evidence, based on the statements of witnesses … is that [the Applicant] was doing the watching and was behaving in a way that was threatening and intimidating to his coworkers, rather than the other way around.*

**[10]** By letter to the Applicant dated January 3, 2003 from Mr. Button, the Employer suspended the Applicant for another five days for insubordination. The letter advised the Applicant that any further disciplinary action could include dismissal. The Union also grieved that suspension and that grievance was also held in abeyance, with the agreement of the Employer, pending completion of an investigation by the Union.

**[11]** By memorandum to the Applicant dated February 26, 2003, Mr. Button advised the Applicant that, as a result of the conclusions made by Ms. Ross in her December 2002 report, Mr. Button would be conducting an investigation into the Applicant's conduct described in the report. A meeting was held on May 6, 2003 to discuss Mr. Button's findings. Persons in attendance included Mr. Button, the Applicant's supervisor, a member of the Employer's human resources department, Mr. Puff and the Applicant.

**[12]** By letter dated May 13, 2003, the Employer dismissed the Applicant from his employment effective May 13, 2003 based on the Applicant's apparent pattern of intimidation and harassment of coworkers and supervisors. The letter pointed out that the Applicant had been moved four times during his six years of employment as a result of conflicts and concerns in the workplace. It further provided, in part, as follows:

> *At the outset of the meeting on May 6th it was stated that the gravity of this situation warranted severe disciplinary action. Your continued harassment and intimidation of co-workers has been malicious, making a very disruptive and poisoned work environment … Throughout the course of your employment, and particularly in the situations above, numerous meetings have been held with you and your co-workers to try to work through the conflicts and resolve the situations. These meetings have generally been to no avail and there are work relationships that have deteriorated beyond repair.*
>
> *As I have advised you in the past, harassment of co-workers will not be tolerated. One of the most disconcerting elements of this situation is your continued denial and your feelings that your actions are appropriate. You continue to feel that it is always someone else, the many supervisors, arbitration panel members and formal investigators involved in your cases that have been wrong and that are not being fair. You bear no guilt and accept no responsibility for the situations that have occurred.*
>
> *. . . .*
>
> *… What was apparent is that you are unwilling to acknowledge your behaviour and conduct, or to take any corrective steps, notwithstanding the repeated warnings you have received.*

**[13]** The Union filed a grievance of the Applicant's discharge, which was also held in abeyance with the agreement of the Employer pending the completion of the Union's investigation into the matter.

**[14]** Mr. Moran and Mr. Puff completed the investigation on behalf of the Union with respect to the three grievances and provided their interview notes and findings, dated May 12, 2003 and May 23, 2003, to the Union's national president and Ottawa legal counsel for their consideration.

**[15]** Mr. Moran and Mr. Puff met with the Applicant on June 18, 2003 and advised him as to the results of their investigation, including the fact that it verified the Employer's allegations against the Applicant and that success at arbitration of the grievances was improbable. They presented the Applicant with two options for him to consider: (1) to continue to deny that the events occurred, in which case the Union would not pursue the grievances any further; or, (2) to admit to his unacceptable conduct and that he may need some assistance regarding his behaviour, in which case the Union would look to seeking his reinstatement under a "last chance" type of agreement, failing which, it would proceed to arbitration on the issue that the discipline was too severe.

**[16]** The Applicant purported to accept the second option immediately. However, a week later, he said he had sought legal advice and was not prepared to accept the Union's conditions that he admit responsibility and avail himself of assistance programs.

**[17]** By letter dated July 4, 2003, the Union advised the Applicant that it intended to withdraw all three of the grievances filed on his behalf, but that he had the right to appeal the decision to the next general meeting of the Union's membership later that month on July 15, 2003. The Applicant neglected or refused to appeal the decision at that meeting and the Union withdrew the grievances.

**Arguments:**

**[18]** In argument, Mr. Peterson read out a long, rambling and somewhat inflammatory written submission on behalf of the Applicant. Furthermore, much of its contents were irrelevant to the issues in the present case. Essentially, however, he submitted that the Union and in particular Mr. Puff and Mr. Moran had failed to adequately represent the Applicant in a fair, honest and equal manner and had violated certain articles of the Union's constitution. Mr. Peterson further submitted that the Union had acted in bad faith and in an arbitrary and discriminatory manner with respect to the Applicant in handling his grievances. In particular, it was asserted that the Union's ultimatum that the Applicant acknowledge the allegations against him constituted a breach of s. 25.1 of the *Act*.

**[19]** Mr. Barnacle, counsel on behalf of the Union, argued that the Union had acted reasonably in presenting its advice to the Applicant that he admit responsibility for his actions and seek reinstatement as described in the evidence. He submitted that the Union is not obliged to proceed with a grievance that it believes will not be successful. He stated that the Union had taken its responsibility very seriously, had conducted a detailed investigation and consulted with legal counsel before determining on the course that it did.

**[20]** Counsel argued that the Union had not violated its duty under s. 25.1 of the *Act*. In support of his argument, counsel referred to the following decisions of the Board: *Johnson v. Amalgamated Transit Union, Local No. 588 and City of Regina*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96; *Griffiths v. Construction and General Workers' Union, Local 890*, [2002] Sask. L.R.B.R. 98, LRB File No. 044-01; *Hawkins v. United Transportation Union, Local 1110 and Carlton Trail Railway Company*, [2003] Sask. L.R.B.R. 127, LRB File No. 193-01.

**Analysis and Decision:**

**[21]** The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72. It has been followed in numerous decisions of the Board since. In *Berry*, the Board stated 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 favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

> *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 favouritism. 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.*

**[22]** On the facts of the present case viewed in the light of the principles set out above, we are of the opinion that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith in determining to withdraw and not to advance the grievances filed on behalf of the Applicant.

**[23]** It is not our mandate to determine whether the Union was correct in deciding that the grievances would not be successful in proposing the course of action that it recommended to attempt to have the Applicant reinstated but, rather, to determine whether the Union arrived at that decision in a fair and reasonable manner, without gross negligence, taking into account all reasonably available information and relevant considerations.

**[24]** Mr. Puff, the local president of the Union and long serving member of the Union's local executive in many capacities and Mr. Moran, a national servicing representative of the Union, fairly investigated the matter in much detail, conducting numerous interviews. They concluded that the allegations against the Applicant that resulted in his discipline and discharge were well founded. They submitted their findings to the Union's national president and staff legal counsel for opinion and advice. Following receipt of that opinion, the Union's local executive fairly arrived at the decision not to advance the grievances or only to do so on the basis of the quantum of disciplinary penalty; they concluded that the grievances would not be successful on the

merits and that, if the Applicant would admit his actions and agree to seek counseling and training to assist him, it would be the best, if not the only, chance to obtain his reinstatement. The Applicant declined to accept their advice, knowing that his grievances would be withdrawn.

**[25]** As has been stated in numerous decisions of the Board, for example, in *Hidlebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, it is not for the Board to minutely assess and second guess the actions of the Union in its conduct of the grievance procedure so long as it does not do so in violation of s. 25.1 of the *Act*.

**[26]** The Union is not obliged to take every grievance to arbitration and this is particularly so when it has determined in good faith that a grievance will not be successful. The Union also has certain responsibilities to its entire membership quite apart from the individual interests of an individual grievor. In *Hidlebaugh*, *supra*, the Board described this dual responsibility as follows at 285 and 286:

> *The Union's duty of 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 the 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.*

**[27]** In *Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, the Board stated at 98:

> *It is clear from the jurisprudence which has accumulated concerning the duty of fair representation that it is not the task of a labour relations board to second guess a trade union in the performance of its responsibilities, or to view the dealing of that union with a single employee without considering a context in*

> *which numerous other employees and the union itself may have distinct or competing interests at stake.*

**[28]** The allegations against the Applicant by the Employer that resulted in his discipline and discharge were serious and even disturbing. The Union was satisfied that the allegations were substantiated. The situation involved a pattern of harassing behaviour by the Applicant of his co-workers, to the point where he fabricated harassment complaints against them, which backfired and resulted in findings that he was the harasser. It is not for us to decide whether those allegations and findings have any substance, but we are convinced that the Union acted with sufficient diligence in arriving at its conclusions in that regard. Being that the allegations involve a pattern of bad behaviour by the Applicant against his co-workers, the Union owes a duty to protect their interests as well. By all accounts, the Applicant's behaviour resulted in a conflicted and unhappy workplace, to say the least. The Union sought to have the Applicant admit his wrongdoing and obtain assistance – he refused. The Union presented the Applicant with its assessment of the best chance to obtain his reinstatement – he ignored the advice.

**[29]** In our opinion, the Union did not act arbitrarily, discriminatorily or in bad faith in any of its dealings with the Applicant or the handling of his complaints. The Union did not violate s. 25.1 of the *Act*.

**[30]** The application is dismissed. An order will issue accordingly.

**DATED** at Regina, Saskatchewan, this **19th** day of **September, 2006**.

**LABOUR RELATIONS BOARD**

James Seibel,
Chairperson