Labour Relations Board
Saskatchewan

ANDREW VOLK, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2714, Respondent and TOWN OF MAPLE CREEK, Interested Party

LRB File No. 049-07; September 19, 2008
Vice-Chairperson, Angela Zborosky

The Applicant:	Andrew Volk
For the Respondent Union:	Malcom Matheson
For the Interested Party:	No one appearing

Duty of fair representation – Scope of Duty – Union's representatives fairly investigated facts and circumstances of applicant's grievance – Board finds no violation of duty of fair representation.

Duty of fair representation – Scope of duty – Whether Union representative acted in arbitrary or bad faith manner in giving advice on approach to grievance and to settlement proposal – Board finds applicant admitted to conduct for which terminated and agreed to propose settlement and terms thereof – Union representative conducted investigation and sought legal opinion before arriving at opinion on likelihood of success of grievance - Manner in which Union representative gave advice and advice itself not in violation of duty of fair representation.

Duty of fair representation – Scope of duty – Whether decision not to pursue grievance to arbitration made by secret ballot vote among bargaining unit employees was arbitrary - Applicant had notice of meeting and ability to participate and members had adequate information to make decision – Members provide reasons for decision not to proceed to arbitration with grievance - Board finds members considered relevant factors in making decision and that procedure for making decision not in violation of duty of fair representation.

***The Trade Union Act*, ss. 5(d) and 25.1.**

REASONS FOR DECISION

Background:

[1] On May 11, 2007, Andrew Volk (the "Applicant") filed an application claiming that the Canadian Union of Public Employees, Local 2714 (the "Union") failed to fairly represent him, in a manner that was arbitrary, discriminatory or in bad faith, contrary to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "Act"). The

Applicant's complaint against the Union arises out of the Applicant's dismissal from employment with the Town of Maple Creek (the "Employer") and the failure of the Union to pursue his grievance to arbitration. Specifically, he asserts that the Union was not strong in its representation of him throughout the grievance process and that its representatives did not adequately investigate the matter. Also, he asserted that when the Union made the decision not to go to arbitration, it did not fully examine the merits of his case, making their decision based on the high cost of going to arbitration. The Applicant had been employed by the Employer for approximately one year at the time of his dismissal and, at all material times, he was a member of the bargaining unit represented by the Union.

[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] In its reply to the application, the Union denied that it had failed to fairly represent the Applicant, having fully investigated the facts and circumstances surrounding the Applicant's grievance. The Union stated that following the Applicant's admission of the conduct that had resulted in the Applicant's dismissal, the Union, with the Applicant's consent, put forward a proposal for settlement to the Employer, which was ultimately rejected by the Employer. The Union stated that following the second step of the grievance procedure, it held a membership meeting at which it provided the Applicant the opportunity to address the membership before the members voted on whether to pursue his grievance to arbitration. The Union stated that the vote resulted in a decision of the membership to withdraw the grievance but that this decision was based on the merits of grievance as well as cost of grievance arbitration.

[4] The application was heard by the Board on July 9, 2007.

Evidence:

[5] At the hearing, the Applicant testified on his own behalf. In reply, the Union called the evidence of (i) Kelly Chabot, an employee of the Employer and the secretary-treasurer of the local of the Union; and (ii) Malcolm Matheson, a staff representative employed by the Union's national body, who had been assigned responsibility for assisting this local of the Union.

[6] Mr. Volk testified extensively about his employment with the Employer and the circumstances leading up to his termination from employment. However, as explained at the hearing, while that provides the Board with the background to the application, much of the evidence was not necessary to our determination of whether the Union violated s. 25.1 of the *Act*. Our focus is on the steps the Union took, or did not take, in its representation of the Applicant, in order to determine if the Union acted in a manner that was arbitrary, discriminatory or in bad faith.

[7] Mr. Volk testified that he began his employment with the Employer as a labourer in August 2005. He next held the position of "town works," followed by his appointment on September 7, 2006 to the full-time position of "environmental collection operator," responsible primarily for operating the garbage truck. He was on probation in this position until December 5, 2006. It was in this latter position that the difficulties leading up to his dismissal began.

[8] Mr. Volk testified that on December 8, 2006, at the workplace Christmas party, Mark Caswell, the administrator for the Employer, advised him that Dale Miller, the individual who previously held the environmental collection operator position, wished to return to that position. Mr. Volk stated that there was some discussion between them that due to an oversight, Mr. Miller had not "gotten his paperwork in on time" to revert to this position, but that Mr. Caswell asked him whether he and Mr. Miller could alternate between the environmental collection operator position and the town works position on a two week rotation. Mr. Volk testified that he told Mr. Caswell, "it may be a good idea," but stating that he did not want to "discuss shop" at a party.

[9] Mr. Volk testified that on January 3, 2007, Greg McDonald, the town foreman, advised him that effective that day, he would be working in the town works

position for two weeks while Mr. Miller would be operating the garbage truck, and that this direction came from Mr. Caswell. Mr. Volk stated that he did not know anything about this and that Mr. McDonald should speak with Mr. Caswell. Mr. Volk proceeded to perform the work of environmental collection operator that day.

[10] Mr. Volk stated that at approximately 10:15 a.m. on January 4, 2007, Mr. McDonald gave him a letter from Mr. Caswell dated January 3, 2007, that stated that as per their discussions just prior to Christmas, Mr. Miller and Mr. Volk were to take turns operating the garbage truck and therefore, commencing January 8th, Mr. Volk would start with two weeks in town works, followed by two weeks operating the garbage truck, and then continuing to alternate every two weeks. Following receipt of this letter, Mr. Volk went to see Mr. Caswell in his office where a verbal altercation ensued with Mr. Volk denying that he had agreed to this arrangement at the Christmas party. Mr. Volk stated that he told Mr. Caswell that the change of positions was not done properly with a Union representative, the Employer was acting out of favoritism, and Mr. Miller had not made his decision to revert to the position on time. Ultimately, Mr. Volk refused to accept this work arrangement. At that point, there was a break in their meeting, following which Mr. Caswell, Debbie McKay (the assistant administrator), and Mr. McDonald met with the Mr. Volk and Mr. Caswell advised Mr. Volk that he was dismissed from his employment immediately. Mr. Caswell asked Mr. Volk for his keys and advised him that he could pick up his final pay cheque and record of employment at the office the next day. At this time, the Applicant understood that the reason for his dismissal was his refusal to perform assigned work.

[11] Ms. Chabot, secretary-treasurer of the local of the Union, testified that Mr. Volk contacted her in the afternoon of January 4, 2007, and advised that Mr. Caswell had fired him for refusing to take on a new assignment of duties. Mr. Volk asked that Ms. Chabot be his Union representative, but because Ms. Chabot was relatively new to the position and only the secretary-treasurer, she told Mr. Volk that she would have to check whether she could act as his representative.

[12] Mr. Volk stated that on January 5, 2007, he attended at the Employer's office and obtained his pay cheque and record of employment but also a letter from Mr. Caswell, dated January 4, 2007, that stated that although his termination would be

"without just cause" and the record of employment would reflect that, he was dismissed "on the basis of two eyewitness reports that [he] consumed alcohol while operating a Town vehicle and during time for which [he was] paid." In his letter Mr. Caswell also made reference to the fact that numerous previous verbal reprimands given to Mr. Volk, but stated that it was the severity of the alcohol issue (alleged to have occurred on December 12, 2006) that forced the Employer to make a decision to dismiss him. The Employer provided two weeks pay in lieu of notice with this letter.

[13] Immediately following receipt of the dismissal letter, Mr. Volk contacted Mr. Matheson and advised him of the contents of the letter. Mr. Matheson advised that Mr. Caswell likely was angry and acted in haste. Mr. Matheson asked that the letter be faxed to him and indicated that he would come to Maple Creek to investigate the matter.

[14] In the weeks that followed his dismissal, Mr. Volk had a number of conversations with Ms. Chabot about his case. Ms. Chabot stated that after Mr. Volk requested she act as his representative, she checked with other Union representatives and determined that it was acceptable for her to act for Mr. Volk. Thereafter, she sought advice from the former local president and from Mr. Matheson, with whose assistance she filed a grievance on Mr. Volk's behalf. Ms. Chabot also testified that the Union held a meeting with its members around this time period to inform them of what had occurred. Ms. Chabot stated that when she first got the telephone call from Mr. Volk on January 4, 2007, she was not happy with the manner in which Mr. Volk had handled the situation but that when she found out on January 5, 2007 that it appeared that Mr. Volk had been dismissed for a different reason, she disapproved of the manner in which the Employer had acted.

[15] Also in the weeks that followed his dismissal, Mr. Volk had a number of conversations with Mr. Matheson about his case. Mr. Matheson, who is experienced in handling grievances and arbitrations, including dismissals, stated that he had been examining the case law to determine whether there were similar decisions with which he could compare Mr. Volk's situation. At this time, he felt that the Union had a good case because of the procedure followed by the Employer, that is, dismissing Mr. Volk for one reason on one day and another reason the next day. He felt that the Employer had acted in haste and out of anger and that the Union may be able to resolve the grievance with

the Employer. Although he also told Mr. Volk that even if he did not think that the Employer could reassign his duties (he must follow the "work now, grieve later" principle), Mr. Matheson did not feel that this one incident of insubordination alone warranted termination.

[16] At some point in their discussions, Mr. Volk had expressed to Mr. Matheson his concern that his personnel file had been filled with incident reports after he had been terminated. In cross-examination, Mr. Matheson acknowledged that Mr. Volk did not get to see his personnel file immediately, but did say that before the Union received copies of Mr. Volk's file,[1] Mr. Matheson had contacted Mr. Caswell to determine what was on Mr. Volk's file. Although Mr. Caswell had indicated that there were a number of complaints on Mr. Volk's personnel file, Mr. Volk had not been disciplined for these complaints. Mr. Matheson then explained to Mr. Caswell that it would be a problem for the Employer to rely on them.

[17] The Union arranged for a first step grievance meeting to be held with the Employer on January 31, 2007. On the same day but prior to that grievance meeting, Mr. Matheson met first with the co-workers (those who had been involved in or witness to the alleged alcohol incident, as well as other workplace incidents), then with Mr. Volk and his spouse and finally, with the Union membership in order to up-date them on Mr. Volk's grievance and to discuss the grievance process. It was following this membership meeting that Mr. Matheson, Ms. Chabot and Mr. Volk met with the Employer for a first step grievance meeting.

[18] Firstly, at the meeting Mr. Matheson held with Mr. Volk's co-workers, Mr. Matheson discovered that the co-workers' version of events of the evening of December 12, 2006 differed from that of Mr. Volk's. It appears that based on Mr. Matheson's discussion with the co-workers, as well as their written statements (copies of which Mr. Matheson viewed at the first step grievance meeting later that day), on the evening of December 12, 2006, Mr. Volk, Mr. McDonald, Mr. Miller, and Garrett Stokke were working on a water break, after usual working hours. Mr. Volk was required to operate the three

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[1] Mr. Caswell's notes concerning other complaints were in Mr. Volk's file and had been given to the Union at the January 31, 2007 grievance meeting. These notes represented a summary, which was apparently prepared by Mr. Caswell using other notes he had made at the time of the occurrences.

ton truck to haul excavated dirt away from the location of the water break to the compound and then return from the compound with loads of fill for the site of the water break. All three of Mr. Volk's co-workers stated that at approximately 8:00 p.m., when Mr. Volk came back with one of the loads of fill, he offered them a drink from a pop bottle, without any of them realizing there was alcohol in the drink until after each had taken a sip. Each were surprised Mr. Volk would bring alcohol to the worksite and one had stated that Mr. Volk had laughed when they were surprised by this. Each of the three co-workers stated that Mr. Volk either appeared to have had a couple drinks that night or he was drunk, and that he was taking a long time to bring back the fill to the worksite. Mr. McDonald stated that he noted the incident in his planner. Mr. Matheson also testified that at his meeting with the co-workers, they discussed other workplace incidents involving Mr. Volk.

[19] The Applicant disputes the truth of his co-workers' statements about what occurred on December 12, 2006. At the hearing of this application, Mr. Volk relayed his version of the events of the evening of December 12, 2006, although it is questionable whether he relayed this same version of events to the Union at the time of their investigation of the grievance.[2] The essential differences between Mr. Volk's version of events and that of his co-workers, was as follows:

(i) That when Mr. Volk first approached the worksite with the pop bottle containing alcohol, it was Mr. McDonald who asked him for a sip and that upon Mr. McDonald's realization that the bottle contained alcohol, Mr. McDonald offered it to Mr. Miller and Mr. Stokke, all of whom would have known it contained alcohol before they drank any of it;

(ii) That Mr. McDonald, Mr. Stokke and Mr. Miller drank almost the whole bottle and Mr. Volk did not have any at the worksite; and

(iii) That Mr. Volk did not drink and drive that night.

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[2] Mr. Volk did not indicate in his evidence that the details of his version of the events was relayed to the Union and if so, to whom and at one point in time. As will be explored later in these reasons, Mr. Matheson's evidence conflicts with Mr. Volk's in terms of what Mr. Volk told him at their meeting of January 31, 2007.

[20] At the hearing Mr. Volk explained that on the evening in question, he had been at home when he received a phone call from Mr. McDonald requesting that he work overtime. He stated that at approximately 7:40 p.m., he began to make his trips to the compound, taking excavated dirt from the worksite and returning with back fill. He stated that when he was bringing his fourth and final load of fill to the site, he noticed two Pepsi bottles in the truck and decided to stop at his house to get some rum that was in a bottle in the back of his personal vehicle and put it in one of the pop bottles. He did so and placed the bottle on the floor of the Employer's truck. He had not been feeling well that day and it was his intention to drink it on his way home, not while he was in the Employer's vehicle or at the job site. Upon returning to the job site with the last load of fill, he advised Mr. McDonald that he was going to walk home. It was at that point that Mr. McDonald "looked at the bottle" and Mr. Volk then offered it to him. Mr. Volk testified that after all three had taken a drink, Mr. McDonald had asked him, as a favour, to drive the three ton truck back to the compound and that he would then order pizza for all of them. Mr. Volk testified that when they returned to the compound, he asked Mr. McDonald about his timesheet, stating that he had worked until 8:30 p.m.. Apparently Mr. McDonald told him to use 9:30 p.m. as the end time because that was when he had brought the truck back to the compound. Mr. Volk stated that nothing was said the next day at the workplace about the incident.

[21] Although it was not clear to what extent Mr. Volk rationalized his behaviour to the Union representatives during its representation of him, at the hearing, Mr. Volk stated that he should not have been terminated because by 8:30 p.m. that evening, when he had alcohol in the Employer's vehicle, he was "off-duty." Through repeated questioning by the Board in an attempt to understand his position, Mr. Volk reasoned that because it was 8:30 p.m. when he stopped at his house to pour the alcohol into the pop bottle, and because, as far as he was concerned, he was "finished work," "off duty" and no longer charging the Employer for his time after 8:30 p.m., he was not responsible for consuming alcohol in a work vehicle *during work time*. While acknowledging that at 8:30 p.m. the truck he was driving still had a full load of fill to be brought back to the job site and unloaded, Mr. Volk claimed that at the time he stopped at his house, he had decided that he was "no longer working," insisting that his driving of the truck with the fill back to the job site was only being done as a "*favour*" to the Employer (a favour for which he did

not intend to be paid) and because he did not want the Employer's truck parked in front of his house overnight.

[22] As stated, on January 31, 2007, after Mr. Matheson met with Mr. Volk's co-workers, he met with Mr. Volk and his wife at Mr. Volk's house (before the first step grievance meeting) to discuss his grievance. Mr. Volk and Mr. Matheson are in substantial disagreement about what was said at this meeting. Mr. Volk testified that Mr. Matheson told him that he had spoken about the grievance with the Union's lawyer who had advised that little could be done if alcohol was involved. Mr. Volk stated that he then responded that alcohol was not relevant to what happened to him (a point with which Mr. Matheson disagreed) and that he was not drinking and driving. He also felt that the other employees who were with him that evening and had had a drink should have been reprimanded as well. Mr. Volk said that Mr. Matheson responded to him that that had no relevance to his case because he did take alcohol to the job site. Mr. Volk testified that Mr. Matheson stated, "if you want me to represent you, you do as I say," and that Mr. Matheson went on to tell him that at the first step grievance meeting with the Employer, he should admit to the incident, say that he was sorry and had made a terrible mistake, and assure the Employer that it would never happen again. Mr. Volk testified that Mr. Matheson said that if they proceeded in this fashion, there was a possible chance he would get his job back.

[23] Mr. Volk stated that he and Mr. Matheson also discussed a settlement proposal that could be made at the meeting with the Employer. Mr. Volk had been expressing his unhappiness to Mr. Matheson over the contents of the letter of dismissal as he thought it would be difficult for him to get employment insurance benefits. In addition, Mr. Volk had been expressing negative feelings about his co-workers, feeling that they had betrayed him. As such, Mr. Matheson asked Mr. Volk if he really wanted to return to the workplace under these circumstances. Mr. Volk did not and they therefore discussed an alternate resolution to the grievance. Mr. Volk stated that he was agreeable to Mr. Matheson's suggestion of an alternate resolution to his grievance that would include a change to the dismissal letter (to say that his dismissal was due to the Employer's concern about his ability to operate equipment because of his age), six weeks severance pay and the shredding of his personnel file.

[24] Mr. Matheson's testimony concerning his and Mr. Volk's discussions on January 31, 2007 differs in several material respects. Mr. Matheson stated that he had advised Mr. Volk that he had met with Mr. Volk's co-workers that morning and indicated what the co-workers had reported. Mr. Matheson further testified that when he told Mr. Volk about incidents his co-workers had relayed, including the December 12, 2006 incident, Mr. Volk admitted that he had alcohol in an Employer vehicle on more than one occasion. However, on cross-examination, Mr. Volk had denied that he made an admission at this meeting that he was drinking alcohol in an Employer vehicle on December 12, 2006. Mr. Volk also denied that he had admitted to another incident that involved him drinking alcohol from a coffee mug while operating the garbage truck on December 22, 2006. Mr. Volk did acknowledge in his cross-examination that he did carry alcohol in a Pepsi bottle in the Employer's vehicle on December 12, 2006, but that he did not drink it and that in any event, he considered himself "off-duty" at that time. Mr. Matheson stated at the hearing that they simply disagreed over the nature of Mr. Volk's admission, but that he gave Mr. Volk the best advice he could. Mr. Matheson testified that he would not have advised Mr. Volk to make an admission to the Employer that he had engaged in the conduct alleged by the Employer, unless Mr. Volk had first made that admission to him.

[25] Mr. Matheson testified that after meeting with Mr. Volk's co-workers and while meeting with Mr. Volk on January 31, 2007, he had begun to have serious concerns about the merit of the grievance. Based on his research and experience as well as the conversations he held with Mr. Volk and his co-workers, he stated that he would not be able to provide assurance to the members that the grievance had a reasonable chance of success. He had initially thought that the dismissal was over a momentary flare-up about Mr. Volk's assignment of duties, but had learned there was more behind it, in particular, the alcohol incident of December 12, 2006. While that latter incident appeared to him to act as the "trigger" for the termination, there was also the issue of Mr. Volk's refusal to perform assigned duties as well as several other issues raised by the Employer concerning problems Mr. Volk had with co-workers and administrators. Mr. Matheson felt that the weight of it all and the inability to separate the issues at arbitration would cause the Union difficulty in being successful with the grievance. He stated that he explained his reservations to Mr. Volk at their meeting of January 31st and this was one reason for their proposing an alternate method of resolution to the matter. Although Mr. Matheson

did not believe that he used the exact words “if you want me to represent you, you do as I say,” when speaking to Mr. Volk about making an admission and apology to the Employer, he would have said something quite similar, explaining that when he is brought in to assist locals with grievances, he must retain some control over the matter, and he generally asks that the grievor take direction from him.

[26] In cross-examination, Mr. Volk asked Mr. Matheson why he did not investigate whether the Employer had any policies concerning alcohol. Mr. Matheson responded that it is a pretty well established principle that having alcohol in a company vehicle and consuming alcohol on company premises or in a vehicle, are very serious matters.

[27] Ms. Chabot testified that on January 31, 2007 before the first step grievance meeting with the Employer, she and Mr. Matheson met with the Union membership. It was considered a regular membership meeting, but the main issue discussed was Mr. Volk’s dismissal. She stated that she, Mr. Hancock and Mr. Matheson all spoke at the meeting, informing the members of the facts and of the steps in the process to support Mr. Volk. Mr. Matheson testified that he had explained to the membership that because each local of the Union has considerable independent discretion to conduct its affairs, the local is responsible for the costs of an arbitration hearing, should the local decide to proceed with one. He did, however, explain that a local can apply to the national body of the Union for financial assistance. He stated that the cost of going to arbitration runs around $3000 – $5000, although he also explained methods that could be used to reduce the cost. At the membership meeting of January 31, 2007, Mr. Matheson had advised the members that they should proceed through the grievance process and that once the second step had been completed, a decision would have to be made by the local whether to proceed to arbitration. Mr. Matheson explained the members’ obligations to them and what the consequences might be if they chose not to proceed to arbitration. While he told the members that this was not the time to make that decision, they proceeded to have a good debate about the matter. He stated that there was a lot of discussion about the circumstances of the dismissal, whether any of Mr. Volk’s actions warranted dismissal as discipline, and the types of conduct for which an employee can properly be disciplined. Mr. Matheson stated that some members

expressed concern that if the local proceeded to arbitration, it would be condoning Mr. Volk's actions.

[28] At the first step grievance meeting with the Employer on January 31, 2007 present for the Employer were Mr. Caswell, Ms. McKay and Mr. McDonald, while Ms. Chabot and Mr. Matheson were present for the Union. Mr. Volk, who was also present at that meeting, testified that the statements and reports of incidents (apparently contained in his personnel file) were passed around at the meeting. Mr. Volk said he questioned Mr. Caswell about the many incidents. Mr. Volk believed that Mr. Caswell added these written statements (those concerning the incident of December 12, 2006) as well as the notes about numerous other incidents (which the Employer had either simply noted or where Mr. Volk was verbally reprimanded) to his personnel file *after* his dismissal, given that he could not get Mr. Caswell to give him a copy of his file prior to January 31, 2007. Mr. Volk stated that the reasons for his dismissal were not really discussed at the first step grievance meeting but that he recalled Mr. Matheson saying that this was his first offence, that he had been unfairly dismissed, and that he should be reinstated. Mr. Volk stated that although he did not want to do so and was doing so only at the request of Mr. Matheson, he stood up at the meeting, admitted to the incident, apologized, indicated that he knew it was wrong and was a terrible mistake on his part, and that it would never happen again. At the hearing, Mr. Volk stated that he had been reluctant to make this admission because it was untrue – he had alcohol in the vehicle at the job site but had not drank any of it.

[29] Mr. Volk testified that later at the grievance meeting, Mr. Matheson made a proposal for settlement along the lines they had previously discussed. Ms. Chabot testified that when she, Mr. Matheson and Mr. Volk discussed the proposal before hand, as an alternative to reinstatement, Mr. Volk was very much in favour of it. They took a break from the meeting with the Employer in order to prepare a letter outlining the proposal. Upon presenting the proposal to the Employer, Mr. Caswell stated that the General Government Committee of Town Council would review the proposal at a meeting that evening and then get back to the Union. It was Ms. Chabot's understanding that the General Government Committee met at 5:00 p.m. that evening.

[30] On February 1, 2007, Mr. Matheson contacted Mr. Volk to advise that the Employer was prepared to change the wording of the dismissal letter but not pay six weeks severance. He also advised that because the Employer was concerned about Mr. Volk taking further action against it, the Employer was reluctant to shred or seal his personnel file unless Mr. Volk signed a waiver. Mr. Matheson stated that he also explained to Mr. Volk that the Employer did not want to pay any further severance because its representatives felt that the two weeks the Employer had paid was more than was required by law. Mr. Volk stated that Ms. Chabot contacted him a couple of times recommending that he take the Employer's offer because he would then get employment insurance benefits. Initially he declined, but when he later agreed to settle the matter in this manner, Ms. Chabot advised him he would have to sign a waiver that he would not take legal action against the Employer. Mr. Volk testified that he would not agree to sign a waiver and indicated that because he had already sent the first dismissal letter to employment insurance, to now send a revised letter would be, in his view, a fraud.

[31] Mr. Volk testified that at some point,[3] he had a conversation with Ms. Chabot, at which time she told him that the membership were not strongly in favour of going to arbitration with his grievance and that the Union does not have a lot of money to go to arbitration. Mr. Volk said that he questioned this because they paid a lot in dues and the Union is a big one. He stated that Ms. Chabot responded that each local is "on their own" when it comes to paying for arbitration. Ms. Chabot testified that she believes that Mr. Volk misunderstood this conversation in that she had only mentioned to him that the issue was discussed at a membership meeting because one of the members had asked where the money comes from to pay for arbitration.

[32] At some point, although it is not entirely clear when, Mr. Matheson again consulted the Union's legal counsel. He stated that legal counsel advised that while the Employer may have acted improperly from a procedural point of view, it was unlikely to be fatal to the Employer's case. Legal counsel further advised that the Employer would likely be able to lead all of its evidence at an arbitration hearing and the arbitrator would simply attach appropriate weight to it. Mr. Matheson stated that he and the Union's legal counsel also discussed the problems that resulted from the fact that all of the eye-

witnesses were co-workers of Mr. Volk's and their versions of the facts did not support Mr. Volk's. They also felt they had a problem because there was no evidence to offer that Mr. Volk was a valuable employee having long service with good performance.

[33] The Union held a second step grievance meeting on February 16, 2007 with members of the General Government Committee of the Employer (with Mr. Caswell also present). Mr. Volk and Ms. Chabot attended in person while Mr. Matheson participated by way of conference call as a severe winter storm kept him from attending in person. Ms. Chabot testified that Mr. Matheson spoke to the grievance, explaining the situation, suggesting the punishment was too harsh and asking the Employer to reinstate Mr. Volk. Ms. Chabot stated that after a few questions by the councilors, Mr. Volk unexpectedly stood up to address the Committee, admitting that he had been "drinking on the job" and asking the Committee to forgive him and give him his job back. Mr. Volk acknowledged this conduct but stated that he again made such a statement against his own wishes.

[34] On February 16, 2007, the Employer's General Government Committee wrote a letter to the Union denying the grievance. It was now in the hands of the Union to make decision whether to proceed with the grievance to arbitration. Given her inexperience with such matters, Ms. Chabot contacted Mr. Matheson with advice on the process the Union should use to make that determination. Ms. Chabot stated that as far as she was aware, the Union had not dealt with such an issue before and therefore it did not have an established practice for making such a decision. Mr. Matheson also testified that the local has never had a grievance proceed to the stage of determining whether it should proceed to arbitration, even prior to his assignment to this local in 1993. He noted that because the local executive did not want to make a recommendation on their own (although he noted that in his discussions with them, there was nothing that suggested they were in favour of proceeding to arbitration with this grievance) and because it was such a small workplace with all the members being familiar with what had occurred, they felt that all the members should have a say in the matter of whether Mr. Volk's grievance should proceed to arbitration. Mr. Matheson therefore advised Ms. Chabot that since the locals are considered separate and must make independent decisions about such

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[3] Mr. Volk's evidence was not clear on when this conversation took place, however, based on the evidence that the membership discussed the issue of the cost of an arbitration hearing at their January 31, 2007

matters, the local should hold a membership meeting to make a decision by secret ballot vote and that it should invite Mr. Volk to come to the meeting to address the membership before they make a decision. Mr. Matheson stated that this process would also allow for an opportunity for members who supported Mr. Volk to speak out.

[35] On February 22, 2007, Ms. Chabot wrote a letter to Mr. Volk advising that a Union meeting would be held on February 26, 2007 at which time he would be provided with an opportunity to speak to the members regarding his grievance. Ms. Chabot also sent the following notice to all members:

> *We invite you to join us for a Union meeting being held in regards to Andy's Dismissal/Grievance.*
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> *Andy's grievance for being reinstated in his position was turned down by the General Government Committee and Management. So the next step in this process is to have the Union members vote, to <u>support</u> Andy and proceed to Arbitration or <u>not support</u> Andy with the grievance any further.*
>
> *We are also inviting Andy to the meeting, he will be requesting support from our union, when he finishes he will leave the meeting, we will then have a discussion and the vote will be held by secret ballot.*
>
> *Please come to this meeting as your vote is important. We would like everyone to make a well informed decision. So if you have any questions about the circumstances beforehand, please talk with myself or Joe and we will try to answer your questions as best we can. We also ask that you present some ideas of why we would support and why we should not.*
>
> *Please let Sally know if you are able to attend as we will need numbers to order food for supper.*

[36] Mr. Volk attended the February 26, 2007 Union membership meeting. Ms. Chabot stated that there were 11 members present (of the 14 in the local), while Mr. Volk recalled eight or nine being present. Mr. Volk stated that after they ate supper, he spoke to the members indicating that going to arbitration was "not just for him" but for everyone because if Mr. Caswell could do this to him, he could dismiss anyone, no matter how much seniority the employee has. Mr. Volk's evidence was confusing with respect to

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meeting, the Board concludes that this conversation with Ms. Chabot took place some time after that date.

what else he told the members at that meeting. He first indicated that he did not talk to the members about why he was dismissed as he believed that they already knew the reasons, although later in his evidence he stated that he may have mentioned that the reason for his dismissal was because he would not take the job that Mr. Caswell offered. Mr. Volk also testified that he did not bring up the alcohol incident at the meeting because he had already spoken to the members several times before the meeting and they therefore knew that he was dismissed because Mr. McDonald stated that he was consuming alcohol while working, although he also stated in his evidence that "alcohol was not brought up because it was not the issue." Finally, when asked if he denied at the membership meeting that he drank alcohol on the evening in question, Mr. Volk stated that he did not have enough time to speak and that he was basically "shoved out the door." Although, in cross-examination, he acknowledged that he was at no time cut-off during his presentation and he did have a chance to complete it. Ms. Chabot recalled that all that Mr. Volk told the members at this meeting was that the dismissal was unfair. He asked for their support but he did not discuss the reasons for his dismissal.

[37] Mr. Volk stated that after he spoke to the members, Ms. Chabot spoke to them, stating that "he got a raw deal," and he should not have been dismissed. Mr. Volk also stated that Ms. Chabot mentioned the importance of having a union representative attend any meetings. Ms. Chabot stated that she asked the members if they had any questions for Mr. Volk. She also stated that she told the members that the Union did not agree with the manner in which management had handled the dismissal, given that he was terminated one day for refusal to perform his assigned duties but the next day told it was because of the alcohol incident. Mr. Volk stated that none of the members had any questions for him and there was no other discussion of the matter while he was present. Ms. Chabot testified that she asked Mr. Volk if he was finished and when he responded that he was, she politely asked him to leave. Mr. Volk stated that he understood that after he left, the members would be voting whether to proceed to arbitration with his grievance.

[38] Ms. Chabot testified that when the Mr. Volk left the room, they had a "long, drawn out discussion about what to do," considering the facts and weighing the pros and cons of proceeding to arbitration. She stated that the members had a lot of knowledge about the matter given the January 31, 2007 membership meeting they had held as well as other conversations the members had had with her, Mr. Hancock and Mr. Matheson.

The ballots, which were blank pieces of paper, were then handed out, and Ms. Chabot asked the members to write either “yes” or “no” on the ballots, advising the members that they were voting to support Mr. Volk or not support him. She stated that the members would have clearly understood they were voting on the issue of whether to go to arbitration with his grievance, given the information provided to the members in the notice for the meeting. After the ballots were handed in, she counted them and discovered that of the ten members voting, all had voted “no,” meaning they did not want to support Mr. Volk by going to arbitration.

[39] The day following the membership meeting, Ms. Chabot contacted Mr. Volk by telephone to advise him of the results of the vote. She also contacted Mr. Matheson by email to advise of the vote results and to seek direction on how to notify management, specifically, whether she needed to provide the Employer with any reasons for the Union’s decision to withdraw the grievance, given that the members had come up with reasons at their meeting. The portion of the email that lists those reasons states as follows:

> *1) Andy did refuse the change in job description*
>
> *2) Andy was drinking while operating Town Equipment – we do not support illegal drinking and he put his co-workers and public at risk*
>
> *3) Andy has only been with us for a year and created some very serious safety issues*
>
> *4) This situation is a rare occurrence for the Town*
>
> *5) Some of the eye witness reports came from within the Union*

[40] Following the listing of reasons, Ms. Chabot stated in her email: “*Although, we are all in agreement that Management did not follow the Agreement for this dismissal and would like to bring this to their attention.*” Mr. Matheson advised Ms. Chabot to write to the Employer to advise that the Union is withdrawing the grievance, but that she should not provide any reasons to the Employer. She therefore wrote to the Employer on February 27, 2007, advising that the members had decided to withdraw Mr. Volk’s grievance. She sent a copy of this letter to Mr. Volk.

Arguments:

[41] The Applicant's argument was very brief. In his application, he had asserted that he felt the Union was not "backing him to the fullest" and did not represent him strongly. He suggested that the Union did not perform a full investigation or recognize that his dismissal was really over a wrongful assignment of work. Mr. Volk also submitted that the Union wrongly advised him to admit to the incident and apologize to the Employer. He also suggested that the settlement offer was improper and that he was being pushed by the Union to accept it. He submitted that the reason the Union decided not to go to arbitration was because the Union did not have a lot of money and it was too costly to go to arbitration.

[42] At the hearing, Mr. Volk added that the Union did not dig deep enough into the Employer's policies to determine what the standards and conditions were concerning alcohol. He asserted that the Union did not do a complete investigation – it did not more closely examine what he felt was the true reason for his dismissal, that is, his refusal to accept the change to his work duties. He felt that the alcohol incident only came to light on January 4, 2007 after he was dismissed and should not be considered. Mr. Volk also stated that the Union failed to find out the identity of the witnesses to the December 12, 2006 incident and took only the word of the Employer as to what happened that evening. Alternatively, the Union failed to test the accuracy of the witnesses' statements or to recognize that they were engaging in the same conduct as him yet they did not get disciplined.

[43] Mr. Volk asked that the Board find that the Union violated its duty of fair representation in s. 25.1 of the *Act*. He asked that the Board order the Union to proceed to arbitration with his grievance, unless the Union can first settle the matter with the Employer.

[44] Mr. Matheson, on behalf of the Union, argued that the Union had fulfilled its duty of fair representation to the Applicant. He asserted that the Union had made its decision not to proceed to arbitration with the Applicant's grievance in a manner that was not arbitrary, capricious, discriminatory or in bad faith. While arguing that the Board should not minutely assess each component of the Union's representation, he noted that the Union did a complete investigation, expending considerable effort to obtain the facts,

and, when faced with conflicting facts, attempting to establish what facts were credible. He submitted that the Union acted honestly and conscientiously and took a reasonable view of the matter in exercising its discretion not to proceed further with the grievance. The Union also argued that there was nothing improper about the attempts it made to settle the matter with the Employer.

[45] The Union argued that the taking of a secret ballot vote by the membership was a fair and appropriate means of making a decision on the grievance. This process permitted all the members of this small local to have a voice in the decision. The members had a lot of information and the evidence indicates that they took the issue seriously, aware that its decision had significant consequences for Mr. Volk. The Union argued that the membership made a reasonable decision on the facts before them and provided the reasons for their decision, which decision was unanimous in favour of not proceeding further with the grievance. The Union argued that unlike the situation in *Johnson v. Amalgamated Transit Union, Local No. 588 and City of Regina* [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, where the Board found the use of a referendum-style vote by the membership a breach of s. 25.1 of the *Act*, here, the local membership is small, only those who heard the information at the meeting voted on the issue, and the vote result was not contrary to a recommendation of the executive of the Union. Essentially, the decision the members made demonstrates that the merits of the case were discussed and considered by the members in good faith.

[46] Mr. Matheson also asked the Board to consider that the Union representatives are volunteers, not experienced employees of the Union. Throughout the grievance process, the local representatives sought his assistance where necessary, and he in turn, consulted legal counsel, before proceeding or advising Mr. Volk or the members.

[47] In support of the Union's arguments, Mr. Matheson referred to the following decisions of the Board: *Mercer v. Communications, Energy and Paperworkers Union, Local 922 and PCS Mining Ltd.*, [2003] Sask. L.R.B.R. 458, LRB File No. 007-02; *Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650 and Fantastic Cleaning Inc.*, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02; and *Stevenson*

v. United Food and Commercial Workers, Local 226, [2000] Sask. L.R.B.R. 517, LRB File No. 006-99.

Analysis and Decision:

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

> *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.*

[49] In *Gilbert Radke v. Canadian Paperworkers' Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board considered the nature of

the task before it when assessing the conduct of the union in light of a duty of fair representation complaint. At 64, the Board stated:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[50] In the present case, the Applicant has not alleged any bad faith on the part of the Union in the sense of their representatives having acted with personal hostility, political revenge or dishonesty, except perhaps in terms of how Mr. Matheson presented his advice to Mr. Volk at their January 31, 2007 meeting. The Applicant has not alleged that the Union has acted in a discriminatory fashion, whether on the basis of a prohibited ground or personal favouritism. For the most part, the Applicant's complaints center around the issue of arbitrariness and we will therefore focus on the issue of whether the Union's conduct in its representation of the Applicant was arbitrary within the meaning of s. 25.1 of the *Act*.

[51] The Applicant complains that the Union failed to perform an adequate investigation into his grievance and did not represent his interests strongly enough, such that it violated its duty of fair representation to him.

[52] In the Board's view, the evidence does not establish such a breach. The investigation by the Union, and Mr. Matheson in particular, was conducted in a thorough manner, focusing on all issues relevant to Mr. Volk's dismissal. The Union did not fail to consider that the Employer appears to have verbally dismissed Mr. Volk on one day for a refusal to perform assigned work while on the next day, gave him a termination letter which focused on the alcohol incident of December 12, 2006 as the primary reason for the dismissal. The Union simply determined, as it is entitled to do, that that was a

procedural problem that the Employer would likely be able to overcome should the matter proceed to arbitration. It was apparent that the primary focus of the Union's investigation was in relation to the alcohol incident as it was the more significant issue in terms of severity (regardless of whether the Employer had a policy concerning the same) and one where there was some dispute over the facts or circumstances. The Union representatives did not, as the Applicant suggested, blindly accept the Employer's version of what happened the evening of December 12, 2006, but rather, conducted interviews with the Applicant and eye-witnesses, as well as reviewed the documentation that was available. The Union representatives expended much time and effort in their representation of the Applicant and in attempting to discern the facts that would be available upon arbitration of the matter. In so doing, we find that the Union did not act in a capricious or cursory manner. The Union undertook its investigative duties seriously and conducted them with diligence, reasonable care, and honesty.

[53] The Applicant has also made complaints that the Union acted arbitrarily by wrongly advising him to admit to the conduct in issue (because, as he stated at the hearing, it was not true) and by making an improper settlement offer. Both of these complaints arise out of what occurred at the meeting between Mr. Volk and Mr. Matheson on January 31, 2007.

[54] The Applicant took issue with Mr. Matheson's comments to the effect that he must follow Mr. Matheson's advice (concerning the admission/apology and the proposal for settlement), or the Union would not represent him. The Applicant implied that this comment was in the nature of a threat and that he therefore had no choice but to follow Mr. Matheson's advice, which resulted in him admitting to the Employer that he had drank alcohol in an Employer vehicle, a statement which, at the hearing, he attempted to deny was the truth. Mr. Matheson did not deny that he made a comment to this effect to Mr. Volk at their January 31, 2007 meeting. However, Mr. Matheson stated that he made this type of comment only after Mr. Volk admitted to the conduct in question.

[55] In determining whether the Union was in violation of s. 25.1 of the *Act*, the Board does not consider the merits of the grievor's case to determine if the Union should have proceeded to arbitration or if it had, in some way, made an incorrect legal assessment of the grievance in issue. In *Mercer*, the Board stated at 468:

> *[41] However,* ***it is clear that the Board's role is not to minutely assess the reasonableness of every component of a union's conduct*** *in such cases. [See Note 1 below] This is because* ***the Board does not decide the merits of the purported grievance itself, but merely hears evidence of the nature of the grievance and the alleged acts or omissions of the union in its handling in order to have some context in which to assess the reasonableness of the union's conduct.*** *As the Board stated in Banga v. Saskatchewan Government Employees' Union, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, 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.*
>
> [**emphasis added**, footnote omitted]

[56] While it is not the task of the Board to consider or make pronouncements about the merits of the grievance, where necessary, we will review the merits to the extent that such an inquiry may shed light on whether the duty in s. 25.1 of the *Act* has been met. It is necessary for us to do so to some degree in this case, given the conflicting evidence before us concerning the nature of the discussions between Mr. Volk and Mr. Matheson at their January 31, 2007 meeting. In the present case, we prefer the evidence of Mr. Matheson where it conflicts with that of the Applicant's, as to the nature of the communications between them, as well as the details of the assistance given by the Union. Mr. Matheson's evidence is corroborated by the documentary evidence and the evidence of Ms. Chabot, and is consistent with the subsequent conduct of Mr. Volk. We find that at the meeting between Mr. Matheson, Mr. Volk and Mr. Volk's spouse, Mr. Volk had admitted that he had consumed alcohol while working. This admission by Mr. Volk was supported by the statements and information Mr. Matheson obtained from Mr. Volk's co-workers just prior to this meeting with Mr. Volk. This admission is also consistent with Ms. Chabot's evidence as to her conversations with Mr. Volk and Mr. Matheson, as well as the conduct of Mr. Volk in admitting to the Employer's allegations that he drank alcohol in the Employer's vehicle while working. However, even if we had

not found that Mr. Volk had admitted to Mr. Matheson that he was drinking while working, clearly Mr. Volk admitted, even at the hearing, that he had alcohol in the Employer's vehicle. We do not accept Mr. Volk's proposition that he was "not working" at the time of the incident such that it could not be concluded that he had alcohol in the Employer's vehicle *on work time*. His explanation that he declared himself to be "off-duty" at 8:30 p.m. when he stopped at his home to pour rum into a pop bottle but when he still had a load of fill to return to the worksite, is absurd. The need for him to return to the worksite can in no way be considered a "favour" to the Employer given that he was expected to finish the work assignment he started. Even if this point was communicated to Mr. Matheson at his meeting with Mr. Volk on January 31, 2007 (and we do not think that it was), it was reasonable for Mr. Matheson to have disregarded this argument altogether.

[57] Mr. Volk's complaint that Mr. Matheson approached him with a "take it or leave it attitude" concerning the Union's advice is not unlike the situation before the Board in *Gibson*, *supra*, where the union proposed that the grievor accept a settlement in relation to his dismissal even though the union felt that it had a good case for arbitration. The union had agreed to the settlement because its terms were very good but also because it had concerns over two post-termination incidents it had investigated. In relation to one of those incidents, the union had a concern that even if it were successful in getting the grievor reinstated through arbitration, the incident could result in the employee being banned from the premises where he carried out his work for the employer (by the owner of those premises), thereby making an order of reinstatement moot. In finding that the union did not act in an arbitrary manner by insisting that the grievor take the settlement offer or his grievance would be withdrawn, the Board stated at 582:

> *[26] The Board questioned counsel for the Union extensively about the "take it or leave it" aspect of the settlement into which the Union entered. The Board certainly has reservations about the appropriateness of this type of agreement. However, the Union entered into this agreement with the Employer in good faith, thinking that it had obtained a good settlement for the Applicant. The Applicant was immediately reinstated as a permanent, non-probationary employee, who would be receiving approximately half of his back pay. The "take it or leave it" settlement was negotiated with the Employer following the usual give and take that occurs in a "without prejudice" settlement meeting. It is not appropriate in these circumstances for the Board to second guess the Union's*

> *decision to enter into a settlement with the Employer on the terms which it did.*

[58] We too, might generally have some reservations about a "take it or leave it" approach such as that used by Mr. Matheson's in representation of the Applicant, however, Mr. Matheson, a very experienced and knowledgeable representative, made this statement in good faith, without personal animosity or dishonesty. He took this approach with the Applicant's best interests in mind, and in the context of the information he had before him at that time, which included the information from Mr. Volk's co-workers present at the time of the incident, as well as the admission from Mr. Volk. With regard to the settlement proposal, we find that Mr. Volk agreed with both the terms of the proposal and the fact that the proposal should be made to the Employer at the first step grievance meeting. Mr. Matheson testified that in the circumstances, he needed to maintain some control over the direction of the grievance and this is why he told Mr. Volk that he should follow his advice. As it turned out, neither the Union's request for reinstatement (following Mr. Volk's admission and apology) nor the settlement proposal was accepted by the Employer. This does not mean that Mr. Matheson's investigation was faulty or that his legal analysis or approach was incorrect, and in any event, it is not appropriate for the Board to second-guess the Union on those issues, given the care and diligence it exercised in arriving at those decisions. In all of the circumstances, it appears to the Board, that it was the failure of the Union's strategy to which Mr. Volk took exception, not Mr. Matheson's comment or approach *per se*. In our view, there is nothing in Mr. Matheson's approach to Mr. Volk or the investigation and the reaching of certain legal conclusions that would suggest arbitrariness, discrimination or bad faith. He spoke to the necessary witnesses and to Mr. Volk, he reviewed case law extensively and canvassed the matter with legal counsel, and he arrived at a thoughtful and reasonable decision, after considering all the information that he had available to him.

[59] The Applicant has also alleged that the Union acted in an arbitrary manner when the membership decided not to proceed with his grievance to arbitration. He asserts that they failed to properly examine the merits of his case and instead, based their decision on the high cost of proceeding to arbitration. The circumstances of this case also raise the issue of whether the manner in which the membership made a decision, namely, through a vote, was free from arbitrariness.

[60] In *Johnson*, *supra*, the Board scrutinized a union's decision-making process used to determine whether a grievance should proceed to arbitration. That process, dictated by the union's constitution, consisted of a referendum-style vote put to the membership as a whole. In that case, during the processing of the grievance, the union held membership meetings to allow for a discussion of the grievance and a determination by the members whether a vote should be held to make a decision whether to proceed to arbitration with the grievor's grievance. The grievor was invited to attend those meetings and make a presentation to the membership but instead, he chose to rely on the union representative to speak about the grievance. At those meetings, the union's representative spoke about the grievance and explained why the union's executive was recommending that the grievance proceed to arbitration and that the members should decide to hold a vote to determine that issue. A motion was passed at the meetings to hold a referendum-style vote among the members to determine whether the grievance should proceed to arbitration. A vote was scheduled for a few weeks later and in the end result, the membership voted against proceeding to arbitration. At issue was whether the process used by the Union to make this decision was arbitrary.

[61] While the Board in *Johnson*, *supra*, recognized that unions are democratic organizations, "with a tradition of strong reliance on the opinions and direction of their members," it stated that there must be some protection from the "excesses of majoritarianism" in the expression of the will of the majority. The duty of fair representation provides this protection and requires that any decision made be free from arbitrariness, discrimination and bad faith. Given that arbitrariness was at issue in the *Johnson*, case, the Board examined the process in order to ensure that the decision reflected the consideration of all relevant factors and none which were not relevant. The Board concluded as follows, at 43:

> *[86] The roots of the duty of fair representation lie in a recognition that, in addition to an expression of the will of the majority, democratic principles must provide for the protection of individuals and minorities from the excesses of majoritarianism. An individual, in the scheme of collective bargaining, cannot assert that his or her interest should prevail over others, or that it represents an entitlement of an absolute kind. The duty of fair representation requires, however, that he or she can require that any decision which is made concerning those interests does not reflect malice, ill will, or denigration on discriminatory grounds. More importantly for our purposes here, those decisions should, to*

use language which has become common in the discourse concerning the duty of fair representation, reflect a consideration of all of the factors which are relevant to the decision and of no factors which are not relevant.

[87] ***A decision-making process of the kind followed here falls afoul of the duty of fair representation, in our view, because it is impossible to know whether the decision was based on the appropriate considerations and only those considerations.*** *Mr. McCormick speculated that the vote went against the pursuit of the grievance because "Mr. Johnson's past caught up with him " - that is to say, that his colleagues felt his cumulative record might make dismissal reasonable. Mr. McCormick said that he did not think that the employees disliked Mr. Johnson, who was personally popular, but that they may have felt his work performance justified the criticisms levelled at him by the Employer. Mr. Johnson said that he had heard "talk" about the high cost of arbitration, and his sense was that this might have played a role in the outcome of the vote.*

[88] ***The problem with the use of a referendum ballot as a means of making this kind of decision is that there is no way of knowing whether either of these explanations played a role in the decision, or what range of other factors the voters may have taken into account. The decision is neither amenable to explanation nor accountable to Mr. Johnson or to the Union executive which had reached a contrary conclusion through a process of investigation and careful thought.*** *Mr. McCormick made considerable efforts, as apparently did other officers, to persuade the employees to support the executive recommendation; it cannot be said, however, whether their activity had any influence at all, or whether the employees considered another set of considerations entirely.*

[89] Mr. McCormick himself seems to have sensed that there was something not quite right about the outcome of this process; this is suggested by his inquiries with the international vice-president about whether a second vote could be taken. It is to the credit of Mr. McCormick that he continued to try to find ways of reversing both the result of the vote and the dismissal decision after the vote had been taken.

[90] Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration. ***The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what was on the notice, was, in our opinion,***

> ***inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.***
>
> [**emphasis added**]

[62] In the Board's view, *Johnson, supra,* does not stand for the proposition that in all cases where a vote is held by the membership as a means of determining whether to proceed with a grievance, it is arbitrary. In fact, the propriety of such a vote for this purpose was commented on by the Board in *Johnson*, at 42:

> *[81] In a smaller number of cases, decisions regarding the pursuit of a grievance to arbitration have been made by a group of union members at a membership meeting. An example of this was cited to the Board by counsel for the Union, in a decision of the British Columbia Labour Relations Board in Laurie White v. Amalgamated Transit Union and Pacific Transit Co-operative, [1993] B.C.L.R.B. No. B61/93 (unreported).*
>
> *[82] In this kind of case, the focus is commonly on such questions as whether the grievor was given an opportunity to attend the meeting or to address the membership, whether there sufficient opportunity for questions to be answered and debate to take place, and whether the membership was presented with sufficient information to allow them to make a fair decision.*

[63] In the decision in *White* referenced in the above quote (reported at [1993] B.C.L.R.B.D. No. 84, No B61/93 (QL)), the British Columbia Labour Relations Board determined that the union had not breached the duty of fair representation in circumstances where the membership voted, contrary to the recommendation of the executive, in favour of not proceeding to arbitration with the grievor's grievance, even though the union failed to advise the grievor of the meeting at which her grievance was voted upon. While the Board stated its reluctance to examine the merits of the grievance, in the circumstances of that case, the Board concluded that the grievance was so unmeritorious that even if the grievor had attended the membership meeting, the results of the vote would not have changed. In response to the grievor's allegation that the members improperly considered the high cost of arbitration as a reason not to proceed, the Board disagreed, accepting the evidence of the union that the lack of merit was the primary reason for the members' decision. The Board went on to hold that even if cost

was the primary factor, it was a legitimate one for the union to consider, given a union's limited resources and the desire to spend its funds on more meritorious grievances.

[64] In *Johnson*, *supra*, the Board distinguished the case before it from the circumstances before the British Columbia Labour Relations Board's decision in *White*, *supra*, primarily on the basis that the purpose of the meeting at which the grievance was discussed in each case was quite different. In *White*, the purpose of the meeting at which the grievance was discussed was to actually vote on whether the grievance should proceed to arbitration whereas the meetings in *Johnson, supra,* were not for this purpose. In *Johnson*, the Board distinguished the decision-making process at issue in *White*, stating at 42:

> *[83] It is not necessary for us to comment here on the status of this kind of decision-making process. In this case, membership meetings were held at which the grievance of Mr. Johnson was discussed; from the evidence, it would appear that he attended two of these. We accept that there was nothing to prevent him addressing his co-workers at these meetings, although he decided to leave the presentation of his case in the hands of Mr. McCormick.* ***The result of these meetings, however, was not a decision whether to take the grievance to arbitration, but a decision to submit the question to the entire membership of the local Union for determination by secret ballot****.*
>
> [**emphasis added**]

[65] The facts in the case before us align with those in *White* rather than *Johnson*, both *supra*. The Union held a meeting for the purpose of having the membership present determine whether the Union should proceed to arbitration with Mr. Volk's grievance. Mr. Volk received notice of this meeting and the opportunity to make a presentation to the members about his grievance. At this same meeting, the members who were present to hear information about the grievance voted on whether to proceed to arbitration. In all of these circumstances, we adopt the reasoning of the British Columbia Board in *White*, *supra*, and find that this decision-making process was not arbitrary and not in violation of s. 25.1 of the *Act*.

[66] We note that the lack of merit of the grievance under consideration in *White*, *supra*, was a factor in the British Columbia Board's decision, both in terms of

whether the failure to give the applicant notice of the meeting was fatal and with respect to the factors the membership took into account in deciding not to proceed to arbitration. We are perhaps more reluctant to make any specific pronouncements about the merits of an applicant's grievance when deciding whether the Union's decision was arbitrary and in violation of s. 25.1 of the *Act*. Although we have distinguished *Johnson* on the basis that the purpose of the membership meeting at which the grievance was discussed was to actually vote on whether to proceed with the grievance to arbitration, it is appropriate to make some further comment on the allegation of arbitrariness before us in light of the Board's analysis and findings in *Johnson, supra*, specifically, whether the members making the decision took into account relevant factors (of which the merit of the grievance may be one factor) in reaching their decision not to proceed with the grievance.

[67] However, before making such comments, the Board wishes to note that there are other aspects of the fact situation in *Johnson* which make it clearly distinguishable from that before us. While in both *Johnson* and the present case the grievor had notice of the membership meeting and the opportunity to make representations at that meeting, there was no recommendation made by the executive in the case before us. Also, in the present case, by contrast, the bargaining unit is very small and almost all of the members attended the meeting at which the vote was held. However, what is of particular significance in the present case is that only those members who attended the meeting and heard the discussion concerning the grievance, voted on whether to proceed to arbitration. On the contrary, in *Johnson*, the membership at large who voted on the issue of whether to proceed to arbitration were not all present for the discussion of the issue at the previous union meetings. In addition, in the present case, the membership had been advised of the grievance and the nature of the conduct for which Mr. Volk was disciplined, and generally kept informed of the status of the grievance, at earlier union meetings. Given the discussion that ensued at the membership meeting, including a weighing of the pros and cons of proceeding to arbitration, it is apparent that the members took the issue seriously and considered several factors. The final result was that all members voting voted in favour of not proceeding to arbitration with Mr. Volk's grievance. In our view, these factors illustrate that the process was more akin to a "group decision" than it was to a referendum style vote.

[68] Obviously, we cannot be certain what was in the minds of each of the members when they voted, but no less than we could if an executive committee of a union made such a decision. However, by examining the content of the members' discussions, the information they possessed at the time they voted, and their reasons for concluding that the grievance should not proceed to arbitration, we are in a position to determine whether, to use the words in *Johnson*, *supra*, they considered "all relevant factors" and "none that were not relevant," necessary to protect Mr. Volk from the "excesses of majoritarianism."

[69] In *Johnson*, *supra*, the Board undertook an extensive review of the case law concerning the duty of fair representation, and determined that while the seriousness of the interest to the employee is a factor the union must consider in its decision, mandatory discharge arbitration was not the answer and other factors may be considered. In that decision, the Board cited *Andre Cloutier v. Cartage and Miscellaneous Employees Union*, (1981) 81 C.L.L.C. 16,108, a decision of the Canada Industrial Relations Board, where it was stated:

> *[52] . . .*
>
> *The Board does not believe that the duty of fair representation obliges a bargaining agent to automatically defend to the limit a member's grievance just because the latter pays his union dues without taking into account the very merits of the complaint. It seems evident that such an obligation would seriously undermine the union's other duty, that of administering in a reasonable fashion the funds at its disposal, which are drawn from the dues paid by all members.*

[70] The Board in *Johnson* also makes reference to *Catherine Syme v. Graphic Arts International Union*, [1993] O.L.R.B. Rep. May 775, where the Ontario Labour Relations Board considered that a union may take into account that there is a long term collective bargaining relationship between the union and the employer. In that case, the Ontario Board stated at 779:

> *[56] . . .*
>
> *22. . . . I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court." Such position not only*

> *represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.*

[71] Following its extensive review of the case law, the Board in *Johnson* concluded that there are a number of factors to be taken into account "*which may mitigate the extent to which employees represented by a trade union can claim to have their own individual interests advanced or protected*." The Board articulated these factors at 36:

> *[59] . . . These factors include the process of setting priorities and making accommodations which is inherent in collective bargaining, the competing interests of individual employees and groups of employees, the democratic and voluntaristic nature of trade unions as organizational entities, the volunteer nature of much trade union leadership, the resources available, and the stake of trade unions in maintaining their credibility as parties to a continuing collective bargaining relationship.*

[72] In the present case, based on the reasons given by the membership for not proceeding to arbitration with Mr. Volk's grievance, we are satisfied that the members took into consideration only relevant factors and did not rely on irrelevant or improper considerations. In our view, the whole of the reasons given in Ms. Chabot's email to Mr. Matheson on February 27, 2007 (reproduced earlier in these Reasons) indicate that the members reached a decision on the merits of the case and concluded that the likelihood of success at arbitration was low. It is clear that they considered both allegations against Mr. Volk, including his refusal to perform assigned duties (conduct which Mr. Volk admitted) and that he was drinking while operating the Employer's vehicle (conduct he denied at the hearing). It is not up to the Board to determine whether the members made a correct decision on the assessment of the merits of the case but given the fact that there were three eye-witness reports from his co-workers attesting that he had alcohol with him and appeared to have been drinking, and the fact that Mr. Volk did not deny the conduct alleged by the Employer when he had an opportunity to speak to the members, it is reasonable that the members would reach this conclusion. It is also apparent that the members considered that there were no mitigating factors (i.e. that might go to a lesser penalty being appropriate) by indicating that one of their reasons for not proceeding to arbitration was that Mr. Volk only worked for the Employer for one year and there had

been other serious safety concerns. It is also apparent that the members chose to prefer other interests competing with that of Mr. Volk's, including the safety of other employees and the public. Lastly, the members appear to have considered that they have a long term collective bargaining relationship with the Employer and the need to maintain their credibility in that relationship. As such, it was reasonable for the members to take a position consistent with not supporting unsafe behaviour, noting that the termination is a rare occurrence for the Employer. In our view, all of these stated reasons were relevant factors for the members to consider when they made their decision not to proceed with the grievance to arbitration.

[73] Although the issue of the high cost of proceeding to arbitration is not listed in Ms. Chabot's email as a reason the members decided not to proceed with the grievance, it appears to have been a factor in the members' decision, albeit a secondary one. However, we find that a union's resources are an entirely proper factor to consider, particularly where, as is the case here, it appears that the members have found the grievance to be lacking in merit and having little chance of success at arbitration.

[74] In Ms. Cabot's February 27, 2007 email, following the list of reasons given for not proceeding, she comments that the members felt that management was not following the collective agreement and they wished to point that out to the Employer. In the context of the email, it is difficult to conclude precisely what that meant but, based on other evidence led at the hearing, it appears that she was referring to procedural aspects of the Employer's actions, including the failure to allow a union representative to be present with Mr. Volk and/or the fact that the Employer appeared to change its primary reason for the dismissal from one day to the next. It appears that these issues may have been the "pros" in favour of proceeding to arbitration and illustrate that the members considered these factors in reaching a decision about whether to proceed with the grievance to arbitration.

[75] In all of the circumstances of this case, we find that the discretion exercised by the members in making the decision not to proceed to arbitration was done in good faith, objectively and honestly after a thorough study of the grievance and taking into account the significance of the grievance to Mr. Volk. It is apparent from their discussions and their reasons that they carried out their duties seriously and

conscientiously, taking into account relevant factors and not irrelevant ones. While the reasons for not proceeding to arbitration may have been articulated in a more precise fashion, we must consider the voluntary nature of the Union leadership of this local and their inexperience in dealing with terminations and the grievance process. The Board concludes that the local representatives acted with reasonable care and competence, seeking advice from Mr. Matheson where necessary in order to assist the members in reaching a decision on this issue.

Conclusion:

[76] In all of the circumstances, we find that the Union approached the Applicant's grievance honestly and diligently, taking a reasonable view of the matters and making a thoughtful decision about what to do. For all of the reasons stated above, we are satisfied that the Union acted in a manner that was free from arbitrariness, bad faith or discrimination.

[77] For the foregoing reasons, the application is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **September, 2008.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson