Labour Relations Board
Saskatchewan

JEFF BOOS, Applicant v. HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Respondent and REGINA QU'APPELLE HEALTH REGION, Interested Party

LRB File No. 181-05; September 16, 2008
Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and Donna Ottenson

For the Applicant:	Ronni Nordal
For the Respondent:	Neil McLeod, Q.C.
For the Interested Party:	No one appearing

Duty of fair representation – Arbitrary conduct – Union based decisions on grievance on information not made available to applicant – Union did not adequately explain failure to disclose information – Failure to disclose information not mere oversight but amounted to cursory and perfunctory approach to appeals process – Cursory and perfunctory approach to appeals process arbitrary within meaning of s. 25.1 of *The Trade Union Act*.

Duty of fair representation – Remedy – Applicant seeks order that union proceed to arbitration with grievance and pay for independent representation for applicant – Board concludes relief sought not appropriate where no bad faith or discrimination by union – Board orders parties to return to stage of appeal process where arbitrary conduct occurred.

Duty of fair representation – Practice and procedure – Board defers jurisdiction over elements of duty of fair representation complaint to Saskatchewan Human Rights Commission.

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

REASONS FOR DECISION

Background:

[1] The Applicant, Jeff Boos, a member of the Health Sciences Association of Saskatchewan (the "Union"), filed an application with the Board on October 14, 2005 alleging that the Union had violated ss. 25.1 and 36.1of *The Trade Union Act*, R.S.S. 1978, c.T-17, (the "*Act*") by failing to fairly represent him in a manner that was not arbitrary, discriminatory or in bad faith with respect to a grievance relating to the

termination of his employment by the Regina Qu'Appelle Health Region (the "Employer") on September 23, 2004.

[2] The Applicant was employed by the Employer as an emergency medical technician. He was dismissed from his employment because of an identified conflict of interest due to his association with the motorcycle gang, Hells Angels (“HA”). In his application before the Board, Mr. Boos alleged a violation of ss. 25.1 and 36.1 of the *Act* by reason of the Union's failure to take his grievance to arbitration on the basis of this association, citing provisions of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the “*Code*”) which guarantee him the right to engage in and carry on an occupation of his choosing and the right to peaceful assembly and to perform with others in associations.

[3] By letter dated October 25, 2005, counsel for the Union asked certain questions of counsel for the Applicant and requested particulars of the allegations contained in the application. The Applicant's counsel responded on November 28, 2005, clarifying the allegations in the application by stating that the Applicant also took the position that the Union failed to properly apply the principles of natural justice when considering his grievance as well as his appeal of the decision not to proceed with his grievance to arbitration. The Applicant’s counsel also referenced certain other correspondence between the Union and the Applicant as well as between the Employer and the Union which provides particulars of the claim.

[4] On March 2, 2006, the Union filed a reply to the application taking the position that the Union's decision not to proceed to arbitration with the Applicant's grievance was not arbitrary, discriminatory or made in bad faith and that the decision was made after a full investigation, a proper assessment of issues and interests and a consideration of the prospects of the grievance at arbitration. The Union also stated that there was no factual basis for a violation of s. 36.1 of the *Act* and that, in any event, that it did not fail to apply the principles of natural justice in its dealings with the Applicant. The Union also asked the Board to defer this matter to the Saskatchewan Human Rights Commission (the “SHRC”) given that a substantially similar complaint was filed by Mr. Boos with the SHRC.

[5] At the outset of the hearing, the parties discussed the scope of the Applicant's complaint. The parties advised that the Union's counsel had disclosed to the Applicant's counsel, just days before the hearing, a number of documents – in particular, documents relating to the internal appeal process that the Applicant proceeded through to challenge the Union's decision not to take his grievance to arbitration. The Applicant indicated that the scope of the application also included allegations that the Union breached s. 25.1 by reason of certain conduct during the appeals process. The Union agreed that the Applicant could proceed with these allegations at the hearing without filing an amended application.

[6] In the initial discussions at the hearing, the Union also took the position that s. 36.1 of the *Act* did not apply to the internal appeal process because the Applicant's membership in the Union or discipline under the Union's constitution was not in issue, relying on the Saskatchewan Court of Appeal's decision in *McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179* (2004), 240 D.L.R. (4th) 358 (Sask. C.A.) and the Board's decision in *Lance Connell v. Saskatchewan Government and General Employees' Union*, [2005] Sask. L.R.B.R. 52, LRB File No. 027-03. The Applicant appeared to agree that s. 36.1 would not apply although he maintained the position that the Board could consider his procedural fairness/natural justice allegations in the context of whether there had been a breach of s. 25.1 of the *Act*.

[7] Also at the outset of the hearing the parties addressed the issue of the overlap between the application and the Applicant's complaint to the SHRC. The Applicant filed a complaint with the SHRC on October 12, 2005, shortly before he filed the application with the Board. In the complaint, the Applicant stated that the *Code* guaranteed freedom of association and he alleged discrimination by the Union, the Employer and the Regina Police Service (the "RPS") on the basis of his association with HA. The SHRC responded to the Applicant by letter dated June 2, 2006 advising the Applicant it believed it did not have "reasonable grounds" to accept/formalize the complaint and proceed with an investigation, essentially concluding that there were reasonable limits on the right to freedom of association and that, in the circumstances, the limits imposed by the Employer on the Applicant's freedom to associate with HA,

while discriminatory, were reasonable and were tied to the Employer's right to insist employees and those they serve are not put in a position of risk or perceived risk.

[8] At the hearing, the Union asserted that the Applicant's allegations were the same in both the application and the complaint and that the Board should therefore defer the discrimination issue to the SHRC in accordance with the Board's decision in *Metz v. Saskatchewan Government and General Employees Union and Government of Saskatchewan*, [2003] Sask. L.R.B.R. 28, LRB File No. 164-00. Essentially, the Applicant agreed with this proposition but stated that it was still open to the Board to consider that the Union improperly took into account the fact of the Applicant's association with HA such that its decision not to proceed to arbitration was arbitrary or taken in bad faith. The Applicant also took the position that the Union's failure to consider freedom of association could be considered from the perspective of whether the failure was arbitrary or taken in bad faith, in violation of s. 25.1 of the *Act*. The Board's decision on this issue will be dealt with in the course of these Reasons for Decision.

[9] The application was heard on October 16 and 17 and November 1, 2006. At the hearing, the Applicant testified in support of the application. In response, the Union called the evidence of (i) Mario Kijkowski, a labour relations officer employed by the Union and responsible for the carriage of the Applicant's grievance; and (ii) Tim Slattery, executive director of the Union.

Evidence:

[10] The Applicant was employed with the Employer from January 2003 until he was terminated by letter dated September 23, 2004, during a meeting with the Employer on the same date. The letter refers to a previous meeting held with the Applicant and the Union on May 28, 2004 to discuss the Applicant's involvement with HA. At the previous meeting, the Employer had taken the position that the Applicant's involvement violated the public trust and the Employer's conflict of interest policy. The stated reason for the termination on September 23, 2004 was the Applicant's continued involvement with HA and his desire to pursue full membership status therein, as well as his unwillingness to comply with the Employer's conflict of interest policy.

[11] A meeting was held on May 28, 2004, between the Employer's representatives Terry Kyak and Collin Hartness; the Applicant; and the Union's representatives, Kateri Singer and Mr. Kijkowski. While there was some dispute in the evidence over the nature of the May 28, 2004 meeting, we find that it was held for the purpose of the Employer determining the extent of the Applicant's association with HA and the Employer advising the Applicant that the Employer felt that the Applicant's involvement and continued pursuit of membership with HA jeopardized the public trust in the Employer, damaged the Employer's reputation and was in violation of the Employer's published conflict of interest policy. The Employer also expressed concern over clothing and promotional items that had been worn by the Applicant. No discipline was issued as a result of the meeting and the information the Employer obtained from the Applicant. In its written response to the grievance that was eventually filed, the Employer took the position that at the May 28, 2004 meeting it told the Union and the Applicant that the Applicant's continued involvement with and pursuit of membership in HA would be viewed as defiance of the conflict of interest policy and the Employer might take action "up to and including discontinuation of our relationship" and that the Applicant's failure to make the right decision would force the Employer to discontinue the relationship. The Employer also stated in the letter that the Applicant's work ethic and attitude had changed since his association with HA and other employees had concerns that his late-night activities with HA affected his work performance in that he appeared tired and slept during day shifts. The Employer also stated that the Applicant need not have a criminal record for a conflict of interest to exist, that the association was in opposition to the Employer's values and that there was concern about how the association would affect the Employer's relationship with the RPS. Mr. Boos testified that he did not receive a copy of the Employer's conflict of interest policy at the May 28, 2004 meeting.

[12] While the Employer may not have specifically told the Applicant at the May 28, 2004 meeting that his continued association would result in his termination, that conclusion appears to us to have been implied and, in any event, the Applicant should have reasonably understood that message from the meeting.

[13] The Applicant did not disassociate from HA and this resulted in his termination at a meeting on September 23, 2004. Present at the September 23, 2004 meeting were labour relations consultant, Laura Debassige, Mr. Hartness, one other

representative for the Employer, Mr. Kijkowski, Ms. Singer and the Applicant. Once it was determined that the Applicant still associated with HA, that his status had elevated from that of "friend" to "hang around" and that, as stated in the Employer's letter, the Applicant had no intention of quitting the association, the Employer's representatives took a one-hour break, then returned with the termination letter. Mr. Kijkowski testified that, at this time, the Union's representatives and the Applicant left the room and discussed whether the Applicant would disassociate to get his job back. He agreed and therefore, upon their return to the meeting, the Union asked if the Employer would reconsider its decision if the Applicant disassociated. The Employer responded that it would have to consult others before it could answer the question and Mr. Hartess said he would get back to the Union and the Applicant the next week. Mr. Kijkowski testified that, before the Employer could get back to the Union, on September 27, 2004, he received a call from Ms. Singer who said she had been informed by the Applicant that he no longer wished to meet with the Employer to discuss his disassociation. This information was apparently passed on to the Employer.

[10] The Union filed a grievance on September 29, 2004, a copy of which was sent to the Applicant. Mr. Kijkowski stated that, when an employee is terminated, the Union files a grievance almost automatically. In the grievance, the Union complained that, despite requests at the May and September meetings, the Employer did not provide specific evidence of damage to the public trust or its reputation or specific evidence demonstrating a violation of the conflict of interest policy. The Employer referred only to a letter received from RPS concerning the Applicant's association with HA and the impact of that association on the image of the Employer. The Union grieved that the Employer was in violation of article 8.01 of the collective agreement that no employee be discharged except for cause. In the grievance, the Union sought reinstatement and wage loss retroactive to the date of termination as well as costs of arbitration due to the Employer's failure to disclose any evidence upon which it based its decision to terminate.

[11] A grievance meeting was held on October 22, 2004 to discuss the grievance. At the meeting, the Employer gave the Union a copy of the letter received from the RPS, a Supreme Court of Canada decision stating that HA was a criminal organization within the meaning of the *Criminal Code* and a copy of a September 2004 Vancouver newspaper article with a photo of the Applicant outside a HA clubhouse in

British Columbia. At the meeting, the Union took the position there was no just cause for termination; the Applicant had done nothing wrong and he had no criminal record. On November 5, 2004, the Employer replied to the grievance, setting out its position, describing the discussions the parties had held at all of the meetings referred to above and ultimately denying the grievance.

[12] The Applicant testified that he knew that the Union was meeting as part of the grievance procedure to determine whether anything had changed to assist in deciding whether to pursue the grievance although he says it was always his understanding that the Union would be moving the grievance forward and going to arbitration.

[13] The letter from the RPS, a copy of which the Employer gave to the Union at the October 22, 2004 grievance meeting, was signed by the deputy chief of the RPS, was dated September 16, 2004 and referred to a meeting held the same date between representatives of RPS and the Employer where the Applicant's association with HA was referred to and where the RPS described HA as "an Outlaw Motorcycle Gang involved in organized crime." The stated concern of the RPS was that the Applicant would have access to private health information and conversational information with police at crime scenes. The RPS had a concern about "a person associated with an organized crime organization having the ability to readily provide medical assistance to an injured police officer." The RPS indicated that the police, having this knowledge, had been tentative with all emergency medical technicians since they did not know who the specific individual was and this led to guarded conversations with all emergency medical technicians.

[14] In his evidence, the Applicant acknowledged his association with HA which began in December 2003 and ended in March 2005. Although the precise nature of his association is not relevant to the issues before us, the Applicant acknowledged that, at the time of the May 28, 2004 meeting, he had the status of "friend" within HA and that ,at the time of his termination, he had conveyed to the Employer that his status had elevated to "hang around" (which is the second step in a four-step process to becoming a full member). The Applicant testified that he did not have a criminal record and had never been charged with a criminal offense. He believed his involvement with HA was

not unlawful in itself. Although there was some evidence led at the hearing on the issue of whether HA is a "criminal organization" within the meaning of the *Criminal Code*, neither that issue nor the issue of whether or not HA engages in criminal activity, are relevant to the decision we must make on the application before us. What is relevant, is the fact that the RPS and the deputy chief of the RPS in particular, take that position.

[15] It could not have come as a surprise to the Applicant that the Employer had problems with his association with HA, as did the RPS. The Applicant testified that the police attended at his workplace to have a discussion with him about his involvement in HA. Also, prior to his termination, the Employer had commented on the Applicant wearing clothes and insignia related to HA to the workplace.

[16] On November 18, 2004, the Union responded to the Employer's November 5, 2004 letter, a copy of which went to the Applicant, taking the position that "potential problems" and "potential risk" were insufficient to constitute just cause for termination and that the Employer failed to subject the Applicant to progressive discipline. The Union indicated it was referring the grievance to arbitration and asked for the Employer's cooperation in setting a time and place for the arbitration hearing. In cross-examination, the Applicant acknowledged that he reviewed the Employer's November 5, 2004 letter with Mr. Kijkowski and raised any concerns he had over its contents in order that Mr. Kijkowski could raise them with the Employer. The Applicant stated that Mr. Kijkowski raised all the necessary issues in the Union's correspondence to the Employer dated November 18, 2004.

[17] As part of determining whether to proceed to arbitration, the Union sought and received a legal opinion dated November 30, 2004 concerning the prospects for success of the grievance. In this legal opinion, which was extensive and thoroughly canvassed the relevant issues, legal counsel concluded that the prospects for success were difficult to assess - while the RPS assertions might be successfully challenged, success in doing so likely depended on the "demeanor and credibility" of the Applicant, as well as the arbitrator's attitude toward HA. The suggested prospects for success were 50-50. Mr. Kijkowski testified that he provided the Applicant with a copy of this legal opinion.

[18] On December 2, 2004, the Union's staff, consisting of the labour relations officers of the Union, including Mr. Kijkowski and the Union's executive director Mr. Slattery, met to discuss whether to proceed to arbitration with the Applicant's grievance. They had before them the information Mr. Kijkowski gained through the grievance procedure as well as the November 30, 2004 legal opinion. Decisions on whether to proceed to arbitration with any grievance are decided upon by this group and, in the past, their decisions had primarily been unanimous. This was not so in this case - Mr. Kijkowski and the other labour relations officers wished to proceed to arbitration while Mr. Slattery was adamantly opposed to doing so. Mr. Kijkowski stated that he and the other labour relations officers were focused on the freedom of association issue and the fact that the Applicant's association was not in itself criminal while Mr. Slattery was focused on the implications of the Union's decision to proceed to arbitration on others including patients and co-workers and the Union's members' relationship with RPS. The Union's staff was therefore deadlocked. This presented a problem as one of the Union's policies mentioned that labour relations officers and the executive director, together, had the authority to decide whether a grievance would proceed to arbitration.

[19] Mr. Slattery testified that the Union's staff decided that the matter of the deadlock was to be taken to a meeting of the Union's executive council on February 10, 2005 for a decision. However, before the issue proceeded to executive council, the Union had undertaken some further investigation of the grievance. At the time of the December 2, 2004 meeting of the labour relations officers and the executive director (at which time the committee was deadlocked on the decision of whether to proceed with the grievance) the Union's representatives discussed their potential liability in not proceeding and felt they had to do their own research rather than rely on what the Employer had told them. The staff also found that they had insufficient information about the working relationship issues and felt that the members should have an opportunity to give feedback. Mr. Slattery therefore directed Mr. Kijkowski to obtain more information by interviewing the RPS and polling the membership (more will be said about this later). The Union did not advise the Applicant it was taking these steps and did not disclose the information obtained from these sources to the Applicant. In fact, the Applicant did not know the Union was relying on this information in making its initial decisions and through the various stages of appeal. In cross-examination, Mr. Kijkowski stated that the reason he did not share the information the Union obtained through the survey and RPS

meeting was because the Applicant had nothing to do with how the members or the RPS felt.

[20] Shortly before February 8, 2005, around the time the dilemma concerning the Applicant's grievance was being considered by executive council of the Union, a survey was done of the membership by e-mail to the members' homes and by hard copy. While the completed survey forms were not entered into evidence, a copy of the blank survey was. The survey form advised members that the Union required information from them to help in its assessment of a grievance involving the termination of an emergency medical technician because of his association with HA, where the grievor had "indicated that his intention is to pursue 'full membership' status within the HA," and where the grievor had "refused to disassociate to keep his job."

[21] The evidence indicated that the Union had asked the Employer to distribute the survey by work e-mail and, while that request had been denied, the Union may have given a copy of the survey to the Employer. Mr. Kijkowski testified that the survey was sent to some 60 members and that 28 responded. It was pointed out that it was sent to all emergency medical technicians regardless of whether they worked with the Applicant or not. Although the Applicant suggested the Employer could have talked to employees about the matter before the survey was taken, there was no evidence that this occurred. Mr. Kijkowski testified that, of the 28 responses, only one was in defense of the Applicant. He stated that the survey results were given to the executive director, executive council, legal counsel and the labour relations officers. Mr. Slattery said he believed that the survey results were never given to the Applicant.

[22] Although the survey did not disclose the name of the individual terminated and Mr. Kijkowski testified it was drafted in a way to protect anonymity, he admitted that the co-workers completing the survey would know that it related to the Applicant. Mr. Kijkowski also testified that the members were assured of anonymity in completing the survey. The questions asked in the survey read as follows [with the general results of the survey, as testified to by Mr. Kijkowski, indicated in square brackets following each question]:

> *1. Generally speaking, do you think that the continuing employment of the Grievor as an EMT in the Health Region is detrimental to the reputation of Emergency Medical Services (EMS)? Indicate clearly Yes or No* [27 yes, 1 no]
>
> *Comments:*
>
> *2. Does the Grievor's association with the HA cause you any concern in terms of working alongside him? Indicate clearly Yes or No* [25 yes, 3 no]
>
> *Comments:*
>
> *3. Do you think that the Grievor's association has the potential to create problems with clients of EMS, in terms of their comfort or sense of confidence, should the association be known to the client? Indicate clearly Yes or No* [26 yes, 2 no]
>
> *Comments:*
>
> *4. Do you think that this Grievor, working as an EMT, would be able to work cooperatively with the Regina Police Service, should his association with the HA be known to the Police? Indicate clearly Yes or No* [27 no, 1 yes]
>
> *Comments:*

[23] In addition to the above "yes/no" responses, the Union also learned the following from comments made on the surveys: there is a flow of confidential information between emergency medical services personnel and the RPS; emergency medical services employees are on standby during police raids; emergency medical services employees' lives may be on the line; emergency medical services personnel may at any time ask for the assistance of the RPS; emergency medical services personnel receive advance notice on many calls where the RPS is aware of weapons at the location or where there tends to be known violence or criminals/criminal activity; and emergency medical technicians work to preserve crime scenes against contamination.

[24] The Applicant takes issue with the statement in the survey that he had refused to disassociate to keep his job, stating that this option was never offered to him by the Employer and therefore the facts upon which members completed the survey were inaccurate. He referred to the evidence of himself and Mr. Kijkowski and from the letter from the Employer to the Union dated November 5, 2004 that, at the termination

meeting of September 23, 2004, the Employer stated that it would get back to the Union on the issue of whether the Applicant's disassociation could result in reinstatement but that the Employer never got back to Mr. Kijkowski on that issue. The Applicant claimed he never had discussions with the Union that he should disassociate and that, because the Union's representatives had advised him during the break at the termination meeting that the Employer could not terminate him for associations outside of the workplace, he relied on that statement and did not disassociate. The Applicant argued against the Board accepting the hearsay evidence of Mr. Kijkowski where he relayed that, at the time of termination, Ms. Singer "begged" the Applicant to quit his association. Mr. Kijkowski also stated in his evidence that a few days after the termination meeting, Ms. Singer advised him that the Applicant did not wish to meet to discuss disassociation. While the Applicant initially denied that he was advised at the termination meeting by Ms. Singer to disassociate and that he never told Ms. Singer he refused to discuss disassociation with the Employer, it must be noted that, in cross-examination, the Applicant acknowledged advising Ms. Singer, at some point, that he did not want to disassociate in order to keep his job.

[25] Also at the direction of Mr. Slattery, on February 3, 2005, Mr. Kijkowski and Jason Williams (an emergency medical technician employed by the Employer and a member of the Union) met with the deputy chief of the RPS and the RPS' legal counsel to obtain more information to assist the Union in assessing the merits of the Applicant's grievance. At the meeting, the Union was given a copy of an unsigned six-page document titled "Memorandum of Understanding Re Mutual Aid Between RHD-EMS & Regina Police Service." There was no evidence that this document was agreed to or had been signed by the parties, however, Mr. Kijkowski testified that the Union's members had confirmed that the responsibilities and procedures outlined in the document had been put into practice by the members. Mr. Kijkowski testified that he provided a copy of the information from the RPS meeting to Mr. Slattery and members of the Union's executive council.

[26] The Applicant testified at the hearing that he was not aware of any instance where RPS had shared with emergency medical technicians information about dangerous premises. Mr. Kijkowski's typed notes for the meeting with the RPS' representatives indicate that the focus of the discussion was the "sensitive nature of

interaction" between members of the RPS and members of emergency medical services represented by the Union and “how this interaction could be affected by an emergency medical services’ member being associated with the Hell’s Angels." Mr. Kijkowski noted the following points made by the deputy chief of the RPS at the meeting:

1. *Jeff Boos’ association with the Hell’s Angels is detrimental to the working relationship between the RPS and EMS.*

2. *Hell’s Angels is an outlaw motorcycle gang and involved in organized crime.*

3. *The generalized pattern of promotion among Hell’s Angels is as follows:*
    - *"friend"*
    - *"hang around" (Jeff's current status)*
    - *member of Hell’s Angels*

4. *Jeff is proud to be an associate of Hell’s Angels and obviously he is being promoted within the ranks of this organization.*

5. *RPS members do not know the identity of the EMS worker who is involved with the Hell’s Angels and are therefore more guarded with all EMS staff.*

6. *RPS raids the Regina clubhouse of the Hell’s Angels at least once a year and RPS always request stand-by assistance from EMS during these raids; this would lead to an obvious conflict of interest.*

7. *For their own safety, EMS members are often given confidential information by the RPS as to the addresses of homes where known criminal elements reside and/or where potential violence could take place or where drugs are involved. The RPS are concerned about the leaking of this confidential information to the Hell’s Angels.*

8. *Crime scenes often require the RPS and EMS to work together. This could create situations where an associate of the Hell’s Angels could potentially contaminate the crime scene.*

9. *The Deputy Chief of Police stressed during the meeting, that he gave us information for educational purposes only and the RPS is not trying to tell the Union or the RQHR what to do.*

[27] In addition to conducting the interview with the deputy chief, Mr. Kijkowski went on a “ride along” to a bar scene to observe their interaction first hand.

[28] On February 10, 2005, the issue of the deadlock between the executive director and the labour relations officers went before the Union’s executive council. There was some conflict in the evidence as to whether the matter brought before the executive council was to determine whether, *in any situation*, the executive director had the power to overrule labour relations officers on decisions such as these or whether executive council was to determine specifically whether the Applicant’s grievance should proceed to arbitration. Mr. Slattery testified that the matter for executive council to determine was whether he, as executive director, could overrule the labour relations officers on any decision of whether to proceed to arbitration, stating that this was the only time in 19-1/2 years that the matter of whether a grievance should proceed to arbitration was brought before executive council. He stated that the reason for bringing it before executive council was to decide on a "go forward basis" whether the executive director could overrule the labour relations officers on such an issue. However, minutes for the executive council meeting indicate that the merits of the Applicant’s grievance were spoken to at the meeting. Mr. Slattery acknowledged that the minutes were not clear that the issue of whether he had a “veto” power had been considered by executive council. The minutes reflect that the issue was discussed in the presence of members of the executive council, legal counsel for the Union, Ms. Singer, Al Shalansky and Kevin Glass. The minutes reflect that Mr. Kijkowski, Ms. Singer, Mr. Slattery and the Union's legal counsel all reported on the matter and the result was that "executive council supports the executive director's decision not to proceed to arbitration with the grievance," with the motion being presented by Bonnie Yake, seconded by Mary Wilson and carried by those present at the meeting. Mr. Kijkowski acknowledged that Mr. Slattery had used the Applicant’s grievance as a "real life situation" for determining this question in order to try to explain why he needed this authority. Mr. Kijkowski testified that, at this meeting, he shared the results of the Union’s investigation into the Applicant's grievance, including the information obtained from the membership survey as well as the meeting the Union’s representatives had held with the RPS, the legal opinion of November 30, 2004 and all of the correspondence between the Union and the Employer. Mr. Slattery stated that he felt that executive council needed all of this information in order to understand the background of the case and his rationale for not

wishing to proceed to arbitration (even though he had not yet obtained all of this information when he had decided at the staff meeting of December 2, 2004 that they should not be proceeding with the grievance) but also to ensure that executive council was aware that the Union could face a duty of fair representation application if it decided not to go to arbitration.

[29] The Applicant had asked to attend the February 10, 2005 executive council meeting, but his request was denied. Mr. Kijkowski testified that he thought that there was no reason for the Applicant to be present at the meeting as the main issue was whether the executive director had the unilateral authority to stop a grievance from going forward and secondly because the Applicant would have a later opportunity to meet with executive council to present his case, if necessary. Mr. Slattery testified that the Applicant was not asked to attend because the purpose of the meeting was not so the Applicant could make his case but was to determine whether Mr. Slattery, as executive director, had the authority to go against the labour relations officers. Mr. Slattery acknowledged that the Applicant never had the results of the member survey and the RPS interview and therefore had had no opportunity to respond to that information.

[30] On February 14, 2005, following the meeting of the Union's executive council on February 10, 2005, the Union sent a letter to the Applicant advising that the Union had decided not to proceed to arbitration because the grievance had a minimal chance of success and because the Union believed the Employer would be able to demonstrate a conflict of interest between the Applicant's continued "open support of Hell's Angels and the interest of its major working partner, the Regina Police Department, and the detrimental effect this conflict of interest has on the working environment of its EMS staff." The letter of February 14, 2005 advised that the Union's decision might be appealed to the grievance committee. On February 25, 2005, the Applicant filed a letter of appeal to the grievance committee, with the assistance of Mr. Kijkowski, concerning the Union's decision not to proceed to arbitration with the grievance.

[31] Mr. Kijkowski testified that he had explained to the Applicant that the executive council had many concerns with his decision, how he arrived at it and whether

his assessment was well done. Mr. Kijkowski also testified that he felt he did not have sufficient information when he first made an assessment of the case but, as further information was gathered by the Union, it tended to weaken the Applicant's case. Mr. Kijkowski acknowledged that, with the survey results, he had more information about the detrimental effect of the Applicant's association on the working relationship between emergency medical technicians and the RPS. He accepted that it would be difficult to find a witness to testify otherwise at an arbitration hearing.

[32] The Applicant later claimed he was not really sure why the Union was not pursuing his grievance, only that Mr. Kijkowski had previously referred to the reasons as "back door politics." Mr. Kijkowski acknowledged that he may have used the phrase "back door politics" in referring to the deadlock between the executive director and the labour relations officers and believed he signaled to the Applicant that issues had been raised by Mr. Slattery with respect to the strength of the case. He was not using the phrase as meaning there was a popularity vote but rather that the Union's decision-making process was complex and others might not agree with his assessment of the case.

[33] The Applicant complained that up until this time (February 2005), the Union never told him it had changed its opinion that the Employer could not terminate him based on his association with HA or that the Employer could terminate him if he did not disassociate. The Applicant claims that, until late January or early February 2005 when he spoke with Mr. Kijkowski who advised him that the executive director had not wanted to proceed to arbitration and executive council would be meeting about the issue, he understood the Union was proceeding to arbitration and it was only a matter of a date being selected. In cross-examination, the Applicant stated that he did not see the Union's seeking of a legal opinion (received November 30, 2004) as part of the Union's decision-making about whether to proceed to arbitration but rather simply as background information.

[34] Mr. Kijkowski denied telling the Applicant that the Union would for certain proceed to arbitration stating that, early on, he had advised that the Union would pursue the matter through the grievance process. He said he may have told the Applicant that

what an arbitrator might do was uncertain and he was certain he told the Applicant the simple solution was to disassociate. He also stated that the Union did not take every grievance to arbitration and that he felt strongly about the case at first, being unable to see how the Applicant's association would impact the Employer's operations. Mr. Slattery testified that it was standard protocol for a labour relations officer to indicate that a matter was proceeding to arbitration even if the matter had not been discussed at a staff meeting and that reference to the fact that the Union referred the grievance to arbitration in its letter of November 18, 2004 to the Employer, a copy of which was received by the Applicant, was only to lead the reader (*i.e*. the Employer) to believe the Union was in fact proceeding to arbitration. Apparently, the Applicant was led to believe this as well. It is noted in the grievance committee policy that, because deliberations of the committee could go beyond prescribed time limits in the collective agreement, the grievance should be submitted to arbitration but the arbitration hearing delayed until the committee completes its review. In cross-examination, the Applicant acknowledged that, at least up until February 14, 2005 when he was advised by the Union that it would not be proceeding to arbitration, he was going to remain associated with HA regardless of the effect of that association upon his job.

[35] Following the filing of the Applicant's appeal to the grievance committee on February 25, 2005, on April 11, 2005 the Union advised the Applicant by letter that the date for the hearing of the appeal to the grievance committee would be April 26, 2005 and with the letter sent a package of material representing part of the submissions to be made by the executive director of the Union as to why the Union decided not to proceed to arbitration. The remainder of the letter sets out the process to be followed for the appeal hearing.

[36] The grievance committee of the Union consists of three executive council members (with one alternate); two members at large (with one alternate) and one labour relations staff person. The Applicant appeared before the committee and, while all documents related to the grievance were given to the grievance committee (including the survey of members and the RPS interview notes, along with the memorandum of understanding), they were not all given to the Applicant. Again, the grievance committee had the benefit of information from the membership survey and RPS interview, unknown to the Applicant. At the appeal hearing, Ms. Singer excused herself because of a conflict

of interest, having been involved with the grievance in the early stages. At the appeal hearing, the Applicant advised the grievance committee that he had disassociated with HA in March 2005, testifying that he recognized that the association was damaging his reputation. Mr. Slattery testified that he and the grievance committee were surprised at the Applicant's decision given that he had been so adamant about maintaining his association.

[37] The grievance committee responded to the Applicant by letter dated May 10, 2005 denying his appeal and setting out the reasons for the denial. The letter makes note of the facts that: (i) the Applicant failed to disassociate when he had the opportunity, stating his intention was never to quit HA; and (ii) after termination, the Applicant was given the opportunity to meet with the Employer to discuss his disassociation and the Applicant declined. The Applicant was advised of the opportunity to appeal this decision to the Union's executive council, while a labour relations officer would continue to advocate for his reinstatement based on his recent disassociation. Mr. Kijkowski testified that, after the April 26, 2005 appeal hearing, he confirmed with the RCMP that the Applicant had, in fact, disassociated and he then attempted, to no avail, to lobby the Employer for reconsideration of the Applicant's status.

[38] The grievance committee's response of May 10, 2005 also made reference to a further legal opinion obtained by the Union which suggested that, if the arbitrator were to find just cause for the termination, the Union would be unlikely to alter that finding "based on this kind of new evidence," specifically, the Applicant's recent disassociation. The legal opinion, dated May 5, 2005, was entered into evidence at the hearing. It is obvious that the legal opinion was not in the hands of the Applicant or the grievance committee at the April 26, 2005 grievance committee appeal hearing. Mr. Slattery testified that, because he was aware that there may be a legal issue over the use of "post-discharge evidence" at an arbitration hearing but he did not know all of the law on the issue, he felt the Union needed to get a further legal opinion. He could not specifically recall who sought the opinion but believed it may have been the grievance committee. We note that the letter was addressed to the executive director of the Union, although it was obviously considered by the grievance committee when it evaluated the Applicant's April 26, 2005 appeal. The opinion was primarily directed to the significance of the Applicant's recent indications that he wished to disassociate from HA and the

Union's decision not to proceed to arbitration. The legal opinion reviewed the law of post-termination evidence and concluded that, if an arbitrator was prepared to accept that the Employer had "just cause" for termination, the new evidence of the Applicant that he had now disassociated with HA would not alter that conclusion. In the legal opinion, counsel noted that although the Applicant's appeal was currently before the grievance committee, the letter was provided as follow-up to counsel's earlier legal opinion for the purposes of Mr. Slattery's recommendation as executive director of the Union.

[39] On June 14, 2005 at an executive council meeting, the Applicant presented his appeal to executive council. Members of executive council who were members of the grievance committee that had made a decision on the Applicant's appeal at the prior stage excused themselves, except for Ms. Singer. She continued to hear the appeal. In his evidence, Mr. Slattery acknowledged that the same body which made the decision at the February 10, 2005 meeting (before the grievance committee appeal stage where the executive director was seeking direction about the matter of a deadlock between him and the labour relations officers) also heard this appeal to executive council. The Applicant stated that he presented his position while Mr. Slattery presented the Union's position as to why the grievance should not proceed to arbitration. The minutes of the June 14, 2005 meeting reflect that executive council recommended that the decision of the grievance committee be upheld upon a motion made by Ms. Wilson, and seconded by Angie McConnell. Again, the executive committee had the membership survey results (as well as one sample of a completed survey) and the information from the RPS interview, unknown to the Applicant. The Applicant did not recall receiving any such documents from the executive council or executive director and Mr. Kijkowski acknowledged at the hearing that the Applicant definitely did not receive the RPS memorandum of understanding or interview notes or the completed survey or results, agreeing the Applicant had no opportunity to challenge this information. Mr. Slattery stated that it was not necessary to share the information with the Applicant because the Union was only determining if the Employer had a good case and what the chances of success of the grievance would be, although he later acknowledged that the purpose of the appeals was to allow the Applicant to "rebut and poke holes" in the Employer's case for just cause.

[40] By letter dated June 28, 2005, the Union advised the Applicant that executive council had denied his appeal and noted that, in addition to the Applicant's representations, it had considered "the documents regarding [his] case" and that "[t]he file record indicates all the relevant information was taken into account and fairly assessed" by the executive director and the grievance committee.

Arguments:

The Applicant

[41] Counsel for the Applicant submitted a written brief which we have reviewed. The Applicant submitted that the Union had failed to fairly represent him in accordance with s. 25.1 of the *Act* when it determined not to proceed to arbitration with his termination grievance. The Applicant argued that the Board had jurisdiction to deal with issues raised by the Applicant concerning the internal processes used by the Union in dealing with his grievance and in this regard, relied on *Connell*, *supra*. The Applicant also relied on the Board's decisions in *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92 and *Ward v. Saskatchewan Government Employees' Union*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88 where the Board sets out the law of the duty of fair representation.

[42] The Applicant acknowledged that the SHRC did not accept the Applicant's complaint that his right to freedom of association had been breached but noted that this was done before the SHRC performed any investigation. While accepting that the Board ought not to reconsider a matter that was within the expertise of the SHRC, the Applicant argued that the Board should still consider whether the Union's reliance on his association with HA in determining not to proceed to arbitration was arbitrary or in bad faith, noting that his association was the only factor considered by the Union and Employer in this case.

[43] The Applicant argued that the Union's reliance on his association with HA as a reason for not proceeding with his grievance was arbitrary and in bad faith because the Union did not disclose to the Applicant the information it independently obtained through an interview with representatives of the RPS and made no other attempts to ensure the information it obtained from the RPS was accurate. The Applicant stated that the memorandum of understanding obtained from the RPS had not been signed and he

denied that some of the processes and responsibilities described in that document had been put into practice.

[44] The Applicant argued that both the Union's decision to survey its members, as well as the way in which the survey was carried out, were arbitrary ways in which to decide whether to proceed to arbitration with the grievance. The Applicant argued that the survey was not distributed in a way to ensure it was only members of emergency medical services who completed the survey. In addition, the Employer had a copy of the survey and could have discussed the same with its employees before they completed the survey. The Applicant objected to the form of the survey stating that it was misleading because it suggested this was an "urgent" matter and that the Applicant had refused to disassociate with HA. He viewed the latter statement as an untrue one stating that, following the termination meeting, Mr. Hartness never got back to them on the issue of whether the Applicant could keep his job if he disassociated. Further, the Applicant stated that at no time did Mr. Kijkowski tell him he should disassociate. The Applicant relied on *Johnson v. Amalgamated Transit Union, Local No. 588 and the City of Regina*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, where the Board found that a vote by the members on the issue of whether to proceed to arbitration was arbitrary in violation of s. 25.1 of the *Act*, noting that it was necessary to ensure that the members had sufficient information before making such a decision and that their decision took into account only appropriate considerations.

[45] The Applicant also submitted that, throughout the grievance process, the Union represented to him that the Employer had no basis to terminate him and that the Union would proceed to arbitration with his grievance. The Applicant relied on this representation and did not disassociate with HA when he had an opportunity to do so. The Applicant did not know of the Union's change in position until February, 2005 when it advised him it would not be proceeding to arbitration with his grievance.

[46] The Applicant also argued that it was improper for the executive council to effectively hear and determine, in the first instance, the question of whether his grievance should be taken to arbitration and then later, at the final stage of internal appeals, to determine essentially the same question. While the Union stated that the direction it was seeking from executive council was generally whether the executive director had power to overrule the labour relations officers, the Applicant argued that the Union actually obtained

a decision on the Applicant's specific situation not only using the information the Union had obtained at the time the staff met on December 2, 2004 and reached a deadlock but also the information the Union had gathered subsequent to that. The minutes for the meeting support that the decision made was specifically about the Applicant's grievance and not the general question. The Applicant argued that this was arbitrary conduct carried out in bad faith, because the same body heard and determined the same question (whether the Union should proceed to arbitration with the Applicant's grievance) on two occasions and therefore executive council could not be truly objective. The Applicant was not entitled to be present at the February 10, 2005 meeting and he did not have the same information the executive council had and was thereby unable to respond to all of the Union's concerns. Regarding the February 10, 2005 executive council meeting, the Union was not seeking a general direction – *i.e.* whether the executive director had a veto power – but rather a consideration of the merits of the grievance was made. Otherwise the Union would not have given executive council all of the information it had, including information gathered after the December 2, 2004 meeting where the Union's staff discussed whether to proceed with the grievance. Therefore the issue of whether to proceed was made by executive council on February 10, 2005, in the absence of the Applicant and without the Applicant's response to new information gathered. The Applicant argued that, on June 14, 2005, the executive council was effectively sitting in appeal of its February 10, 2005 decision**.**

[47] The Applicant also submitted that the Union acted in an arbitrary and bad faith manner by providing executive council (at both the February 10, 2005 meeting and June 14, 2005 appeal hearing) and the grievance committee (at the appeal hearing on April 26, 2005) information it had gathered during its investigation, namely, the results of the member survey and the interview with the RPS, but failed to share this information with the Applicant. Relying on *Johnson*, *supra*, the Applicant submits that it was improper for the appeal bodies to have some or all of the information relating to the member survey, particularly when he had no opportunity to respond to it because it would be impossible to know whether the appeal bodies were relying only on appropriate considerations in reaching their decision to deny his appeal. The Applicant argued that this failure to disclose was a conscious decision on the part of the Union and that, from the time the Union staff met on December 2, 2004 and the executive director disagreed with the labour relations officers, the Union had focused on gathering information to support its position

rather than to determine the truth, as evidenced by its failure to review the results of the survey and interview with the Applicant and get both sides of the story. It is the Applicant's view that after December 2, 2004 the Union was moving to strengthen the executive director's conclusions and was not investigating for the truth of the matter otherwise it would have obtained his response to the RPS meeting and the survey.

[48] The Applicant seeks a declaration that the Union has violated s. 25.1 of the *Act* and the following remedial relief:

(i) an order directing the Union and Employer to proceed with the grievance to arbitration without challenging the jurisdiction of the arbitration board to hear and determine the matter;

(ii) an order providing and paying for independent counsel of the Applicant's choosing, at a rate equal to that charged by the Union's current legal counsel.

[49] The Applicant also suggested it would be helpful to order that the parties first proceed to mediation for a period of 30 days before proceeding to arbitration in an attempt to resolve the matter. The Union and Employer would share the cost of the mediator with the Union providing and paying for independent legal counsel for the Applicant.

The Union

[50] The Union denied that it had violated s. 25.1 in relation to both its consideration of the fact of the Applicant's association with HA and the manner in which it conducted the internal appeal process the Applicant accessed in challenging the Union's decision not to proceed to arbitration with his grievance. The Union argued that there is not evidence of bad faith having been demonstrated by the Union officials who handled the Applicant's matter. Having dealt with the issue of discrimination at the outset of the hearing, the Union submitted that the only issue for the Board's consideration is whether the Union acted in an arbitrary manner. The Union argued that the Board should focus on those who actually made the decision in the first instance rather than the appeal process as the Union should not be in a less defensible position by reason of it providing the Applicant access to an appeal process. In any event, the Board should not be holding the Union to an ideal standard but rather considering only whether the Union acted in an

arbitrary, discriminatory or bad faith manner. The Union asks that the Board pay deference not only to the substantive complaints of the Applicant but also to the process complaints concerning how the Union handled the matter internally.

[51] The Union submitted that right from the time of the May 28, 2004 meeting between the Applicant, Union and Employer, the Applicant knew that his association with HA could result in his termination, yet he did not disassociate and in fact, at the time he was terminated, he had elevated his status within HA. The Applicant remained adamant that these were his friends and he was not quitting. The Union argued that the Board should accept its evidence that the Applicant had every opportunity to consider disassociation both before and shortly after his termination meeting, yet he decided not to meet further with the Employer to discuss whether his disassociation would result in his reinstatement The Union pointed out that given that the Applicant did not object to the Employer stating this fact in its November 5, 2004 correspondence, the Board should find as a fact that the Applicant knew he could disassociate in an effort to keep his job but he chose not to. In fact, at no time between the date of the termination meeting and when the grievance committee met in May 2005 did the Applicant indicate an intention to disassociate. Therefore, the Union consideration of the fact that he refused to disassociate or to further discuss disassociation with the Employer is not arbitrary, discriminatory or in bad faith.

[52] The Union submitted that it put a significant amount of effort into the handling of the Applicant's grievance and appeals. The Union submitted that it took a reasonable view of the problem and made a thoughtful decision about the matter. It took into account the chances of success and obtained a legal opinion concluding that it was not likely to be successful. After balancing the interests of other employees/members, the Union reasonably decided not to go to arbitration with the grievance. While the Applicant may have developed certain expectations about the Union pursuing the grievance to arbitration, the evidence shows that at no time was the Applicant assured by the Union that it would proceed to arbitration and, in fact, the Applicant was advised that there was a process in place to deal with this question of whether a grievance proceeds to arbitration. The Applicant received a copy of the November 30, 2004 legal opinion and it should have been apparent to him that the Union was still considering whether to proceed to arbitration.

[53] The Union acknowledged that the labour relations officers and executive director disagreed whether the matter should proceed to arbitration, each having a different view of the possible success of the case – Mr. Kijkowski focused on the termination and the freedom of association argument while Mr. Slattery focused on broader issues of service delivery and the relationship of EMTs to patients and the RPS. However, the Union submitted that the decision of the Union's staff to have their deadlock considered by the executive council was reasonable, given that executive council is the highest governing body within the Union. This problem had never arisen before and the Union had to find some way to break the deadlock. The Union defends the executive director's actions in presenting the details of the Applicant's grievance when it says it was only seeking a general direction on whether the executive director had authority to overrule the labour relations officers, on the basis that it was necessary for executive council to understand why the executive director was opposing the labour relations officers.

[54] The Union argued that its decision to further investigate the matter after the December 2, 2004 staff meeting at which there was a deadlock on the decision to go to arbitration was not only not in violation of s. 25.1 of the *Act*, but was a reasonable action to take and assisted in answering certain questions raised in the legal opinion they had obtained. It was through these further investigations that Mr. Kijkowski came to change his views on the possible success of the grievance.

[55] With respect to the membership survey, the Union distinguished the *Johnson* case, *supra*, on the basis that there the union had completely abdicated its decision-making responsibility in favour of the members, even though the executive were in favour of proceeding to arbitration, and in circumstances where it was not possible to discern whether members took into account proper considerations and only those considerations. In this case, the survey was merely used as fact finding tool.

[56] The Union argued that the Board has not in the past closely scrutinized the Union's internal appeal procedures, noting that the real focus should be on the original decision of the Union and whether that decision was arbitrary, discriminatory or in bad faith. In *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th

Quarter Sask. Labour Rep. 65, LRB File No. 134-93, the Board held that it was not premature for an applicant to bring a duty of fair representation application when the internal appeal process had not been exhausted. The Union submitted that had the appeal bodies in this case reached a conclusion based on reasons that did not form the basis of the original decision, arbitrariness may exist, but that is not true of the current situation. The Union submitted that it is apparent in the decision of *Connell*, *supra*, that the Board took a very deferential approach to its examination of whether the appeal procedures followed by the union were arbitrary, discriminatory to in bad faith. The Union submitted that in any event, throughout the appeal process, there was transparency at every stage.

[57] The Union argued that poor communication with a grievor is not a basis for a finding of a violation of the duty of fair representation (see: *Radke*, *supra*, *Rayonnier Canada (B.C.) Ltd.* (1975), 2 CLRBR 196; *Garry Gregoire v. United Steelworkers of America, Local 5890 and IPSCO, Inc.*, [1997] Sask. L.R.B.R. 766, LRB File No. 317-95; Nistor v. United Steelworkers of America, [2003] Sask. L.R.B.R. --, LRB File No. 112-02; *Yearley v. Service Employees' International Union, Local 299*, [1993], 4th Quarter Sask. Labour Rep. 57, LRB File Nos. 055-92, 080-92 and 081-92; Mercer v. Communications, Energy and Paperworkers Union, Local 922 and PCS Mining Ltd., [2003] Sask. L.R.B.R. --, LRB File No. --) and that in any event, anything the Applicant could responded with to the survey and the RPS interview results would not have been pivotal to his appeals. The Union also argued that the interests of other EMTs were a relevant consideration, relying on *Rayonnier, supra*; *E.A. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and Hotel Saskatchewan*, [2006] Sask. L.R.B.R. --, LRB File No. 076-04; and *I.R. v. Canadian Union of Public Employees, Local 1975-01 and University of Regina*, [2006] Sask. L.R.B.R. --, LRB File No. 139-03.

[58] In addition to the cases cited above, the Union also relied on *Datchko v. Deer Park Employees' Association and Board of Education of the Deer Park School Division No. 26*, [2006] Sask. L.R.B.R. --, LRB File No. 262-03 and 263-03.

Applicant's Reply

[59] The Applicant argued in reply that it is questionable whether it was the executive director or executive council that made the original decision not to proceed with the grievance, submitting that the question of who made the decision and when is significant. The Applicant stated that the Union apparently takes the position that the Union's decision was made on December 2, 2004, and that information gathered after that date (and whether such information was disclosed to the Applicant) is irrelevant. However, in the Applicant's view, the decision under attack was made no earlier than February 10, 2005 when executive council met about the deadlock between the executive director and the labour relations officers and therefore, the Applicant argues, the Union's investigation and information it gathered during that time is relevant and should have been disclosed as it formed the basis of the Union's decision. The Applicant distinguished *Gregoire* on the basis that the Board had characterized the union's failure to communicate in that case as an "oversight" whereas in the present case, there was a conscious decision by the Union not to disclose this information to the Applicant.

Analysis and Decision:

[60] The Applicant submits that the Union violated s. 25.1 of the *Act* on several bases. It was argued that the following conduct by the Union amounts to arbitrariness or bad faith, in violation of s. 25.1 of the *Act* :

(i) The Union obtained and relied on information from the RPS without sharing it with the Applicant and/or otherwise testing its accuracy;

(ii) Both the decision to survey the members and the manner in which it was carried out as well as the Union's failure to inform the Applicant of the fact that a survey was done or its results;

(iii) The RPS interview and survey results were not disclosed to the Applicant and were relied on by all bodies of internal appeal, without the knowledge of the Applicant;

(iv) Executive council, which is to be the final level of appeal, actually determined the very question of whether the grievance should go to arbitration earlier in the process, in the absence of the Applicant; and

(v) During the grievance procedure, the Applicant was led to believe that the Union thought the grievance had good prospects of success and that the Union would be proceeding to arbitration. The Applicant relied on that representation in deciding not to disassociate with HA and his failure to disassociate was relied on by the executive director, the members and the bodies of internal appeal in recommending/making the decision not to proceed to arbitration.

[61] The allegation made in the application concerning an alleged violation of s. 36.1 of the *Act* concerning the requirement to apply the principles of natural justice to matters involving membership or discipline, appears to have been abandoned by the Applicant, with good reason in our view. It is clear that s. 36.1 of the *Act* applies only to matters that involve an internal union process that deals with a member's membership in the union or discipline under the union's constitution and not to the union's consideration of a member's grievance or the internal process of appeal of the union's decision on such a matter.

[62] In the Board's decision in *Connell*, *supra*, the applicant took issue with the union's internal process with regard to appeals he had made from decisions not to progress his grievances to arbitration. He alleged both a violation of s. 25.1 of the *Act*, suggesting that the union acted arbitrarily, discriminatorily or in bad faith in making its decisions, and also that the union failed to follow the principles of natural justice as required by s. 36.1 of the *Act*. The Board considered these assertions in light of its jurisdiction under these provisions of the *Act* and stated as follows, at 63 and 64:

> *[48] The issue to be decided in this case is whether the Union, in compliance with s. 25.1 of the Act, fairly represented Mr. Connell with respect to grievance and rights arbitration proceedings in relation to his staffing competition grievances in a manner that was not arbitrary, discriminatory or in bad faith.* ***At the hearing before the Board, Mr. Connell raised as an issue whether the Union's internal processes with respect to***

appeals from decisions not to progress a grievance were unfair and not in accordance with the principles of natural justice. To the extent that this latter allegation can be considered in the context of the Union's duty of fair representation, we have jurisdiction to deal with it. But, as far as whether those internal processes, as established and defined by the Union's constitution, internal bylaws, policies and/or rules, accord with the application of the principles of natural justice per se, and are consequently unlawful, we do not have jurisdiction to consider same, as those processes are not included in the matters placed within our mandate to determine pursuant to s. 36.1 of the Act which provides as follows:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> (3) *No employee shall unreasonably be denied membership in a trade union.*

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

[**emphasis added**]

[63] It is for the same reasons that we find that s. 36.1 has no application to the present case. The matters complained of are not matters of union membership or internal discipline although, as in *Connell*, *supra*, we may examine the appeal processes used by the Union to the extent that they might be in violation of s. 25.1 of the *Act*. Section 25.1 of the *Act* provides as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

[64] We are therefore left to determine this application on the basis of the evidence relevant to the elements of s. 25.1 of the *Act*. While we have set out the evidence in some detail, we have considered all of the evidence led *viva voce* at the hearing of this matter as well as the exhibits, in making our findings of fact. We have considered this evidence along with the parties' submissions and case authorities, in reaching the within conclusions of law.

[65] The oft cited decision in *Berry, supra*, describes the general approach of the Board to allegations of a violation of the duty of fair representation in s. 25.1 of the *Act*. The Board stated as follows at 71 to 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.***
>
> [**emphasis added**]

[66] In *E.A. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) and Hotel Saskatchewan*, [2006] Sask. L.R.B.R. 369, LRB File No. 076-04, the Board described the general duty, in conclusion, at 374:

> *[19] Accordingly, it is not for the Board to determine whether the Union did everything possible, or indeed properly, to assist the Applicant or whether it reached a correct conclusion in law about the effect of the "last chance" agreement, but rather to determine whether the Union put its mind fairly and reasonably to an investigation and assessment of the facts of the situation, the interests at stake and the effect upon the Applicant and its membership as a whole, without arbitrariness, discrimination or bad faith. We find that the Union did so and did not breach its duty of fair representation under s. 25.1 of the Act.*

[67] The Board also described the general nature of the duty of fair representation in *Rachelle Zora Kowal v. Communications, Energy and Paperworkers Union of Canada*, [1995] 2nd Quarter Sask. Labour Rep. 115, LRB File No. 001-95 at 126:

> *In determining whether a trade union has met the obligation to provide an employee with fair representation, the task of this*

> *Board is not to act as a substitute for a board of arbitration. The issue before us is not whether a particular grievance would have succeeded at arbitration on its merits, and the basis of our conclusions is not the evidence which would be used in adjudicating the grievance. Our role is rather to examine whether the trade union handled the grievance in a manner which was not arbitrary, discriminatory or in bad faith. This determination must be made in light of a number of considerations, including the information which was available to the trade union at the time, legitimate concerns about allocation of union resources, the significance of a particular issue in the context of other issues and interests competing for the attention of the union, and the relationship between the employee and the trade union. In this context, the strength or weakness of the merits of the grievance may suggest that the case has or has not been treated fairly, but the particulars of the grievance are not the only factors which are considered by the Board.*

[68] In the context of this case, we find no evidence of any bad faith by any of the Union's representatives. On the whole, the representatives acted honestly and demonstrated no personal animosity or hostility toward the Applicant.

[69] With respect to the issue of discrimination, we find that there was no evidence that the Union discriminated against the Applicant in the sense of personal favoritism toward others in similar circumstances. To the extent that the application alleges discrimination by the Union against the Applicant based on factors such as those protected under the *Code* (the case law refers to "race" or "sex" as examples), we must defer the issue to the SHRC. Whether the Union discriminated against the Applicant by failing to take his grievance to arbitration on the basis of his association with HA (or the Union was complicit in discrimination by the Employer) is the matter directly before the SHRC through the Applicant's complaint filed with that body. The Applicant essentially conceded this point, however, the Applicant asserted that it was arbitrary or in bad faith for the Union to consider the fact of the Applicant's association with HA as a reason not to proceed with the grievance. We cannot accept this argument.

[70] The reason the association was a factor considered by the Union and the Employer in this case is because that is the very conduct in violation of the conflict of interest policy for which the Applicant was terminated. As such, the "association" is a very relevant factor in the Union's determination of whether the grievance should

proceed to arbitration and it was not arbitrary or in bad faith for the Union to consider it. The only way in which consideration of the Applicant's association with HA or any failure to fully explore the freedom of association issue could be viewed as improper is if those considerations by the Union violated the *Code* or were "discriminatory" under s. 25.1 of the *Act*. As stated, the Applicant agreed that the Board should defer any question of whether the conduct by the Union is discriminatory to the SHRC. The issue of overlapping jurisdiction between the Board and the SHRC was at issue in *Metz*, *supra,* where the Board deferred all overlapping issues to the SHRC even though the Board had jurisdiction to review the same under s. 25.1 of the *Act*. The Board stated at 41 through 44:

> *[54] Applying the principles of Cadillac Fairview, supra, to the present case, we find that the Human Rights Commission has primary jurisdiction over the Applicant's complaints that the Employer failed in its duty to accommodate her due to her disability. Although the Applicant raised similar issues in her duty of fair representation complaint against the Union and her unfair labour practice application against the Employer, the underlying issues in the complaint relate to discrimination on the basis of disability, a right established by The Human Rights Code. Although the Labour Relations Board has the obligation to consider and apply human rights law when it interprets the provisions of the Act, [See Note 1 below] our primary focus is on the enforcement of rights under the Act and, unlike the Human Rights Commission, we have no specialized knowledge or practice in the area of human rights law or adjudication.*
>
> *[55] The human rights complaint subsumes three aspects of the complaint that is currently before the Board: (1) all aspects relating to the failure to accommodate the Applicant into employment with the Employer; (2) all aspects relating to the financial settlement entered into between the Union and the Employer; and (3) all aspects relating to the settlement of the Applicant's grievances. With respect to (1), the Human Rights Commission, as we indicated above, has ruled on the accommodation and indicated that it is not an outstanding issue. With respect to (2), the Commission has ruled that the financial settlement entered into between the Union and the Employer for the Applicant was a satisfactory settlement. The grievance settlements include the accommodation settlement and the financial settlement, along with the provision of appropriate releases from the Union and the Applicant to the Employer. This settlement is implicitly approved by the Commission's findings.*

[56] Given this overlapping jurisdiction, the Board will defer its jurisdiction under s. 25.1 and will not determine if the agreements entered into by the Union and the Employer meet the tests under s. 25.1. If the Board did not defer its jurisdiction over these aspects of the Applicant's duty of fair representation complaint, we would be required to examine the agreements reached on the accommodation and the financial settlement. Although the Board may use slightly different standards to judge the two agreements, nevertheless, the results of its examination might conflict with the ruling of the Human Rights Commission. If the Board were to find a breach of the duty of fair representation and order the parties to refer the Applicant's grievance to arbitration, an arbitration board would surely be bound by the findings of the Human Rights Commission that accommodation had been achieved and the financial settlement was satisfactory. By deferring to the Human Rights Commission, we avoid unnecessary litigation and potentially contradictory results.

. . .

[58] In the present case, the Applicant's complaint against the Union, to the extent that it raises issues of discrimination on the basis of disability, refusal to accommodate and denial of compensation for the period of non-accommodation, are matters that are squarely before the Human Rights Commission. The Commission has primary authority for enforcing compliance with The Saskatchewan Human Rights Code and it has equal or superior remedial powers to rectify the complaint. On these grounds, the Board should also exercise its discretion to defer to the Human Rights Commission and its processes.

. . .

[62] The Board therefore defers its jurisdiction over the Applicant's duty of fair representation complaint to the Human Rights Commission with respect to (1) the agreement to accommodate the Applicant's disability; (2) the financial agreement to compensate the Applicant for the failure to accommodate her in a timely manner; and (3) any claim for damages arising from an alleged breach of the collective agreement.

[63] The Board will retain jurisdiction over the Applicant's duty of fair representation complaint to determine whether any of the processes that the Union used to arrive at the accommodation, financial or grievance settlements were taken in bad faith, with discrimination or in an arbitrary fashion. If the Board were to determine that the Union had not processed the Applicant's grievances in accordance with the standards set down in s. 25.1 of the Act, liability would affect only the Union, not the Employer. On this limited aspect of the application, there is no

> *possibility that the Board would order the Union to refer any of the Applicant's grievances to arbitration. Vis-Ó-vis the Union, the Employer and the Applicant, the settlement of these matters are in the hands of the Human Rights Commission*

[71] This leaves us with the question of whether the Union acted in an arbitrary manner in violation of s. 25.1 of the *Act*. Much of what the Union has done is beyond reproach, certainly with respect to the initial action it undertook to represent the Applicant and the formulation of its initial position on the merits of the grievance. It is our view that, for the most part, the Union fairly and adequately investigated the circumstances of the Applicant's complaints. The Union's staff members appear to have arrived at an informed and rational view with respect to the grievance that it was not supportable and had a minimal chance of success at arbitration. It was the labour relations officers and the executive director, senior staff of the Union with much experience, who reviewed the merits and supportability of the grievance and, even though there was an initial conflict between the position of the labour relations officers and the position taken by the executive director, the Union came up with a method to resolve that deadlock – by taking the matter to executive council. More will be said about this issue later.

[72] The Applicant alleges that the Union acted arbitrarily because it led the Applicant to believe his prospects at arbitration were good and that the Union would be proceeding to arbitration with his grievance right up until February 2005 when it decided not to so proceed, thereby causing the Applicant the lost opportunity to disassociate to keep his job. In our view, the evidence does not support the Applicant's position. As previously stated, it should have been abundantly clear to the Applicant at the May 2004 investigative meeting that the Employer was going to terminate his employment yet the Applicant did not disassociate from HA. Again, at the termination meeting, the idea of disassociation was discussed between the Applicant, Ms. Singer and Mr. Kijkowski during a break in the meeting immediately after the Applicant had been given his termination letter. Returning to the meeting, this suggestion was then made to the Employer's representatives, who responded that they would have to consult with others, presumably to determine if disassociation was now "too little, too late." While we find that the Union's representatives did advise the Applicant that they felt there was no "just cause" to support his termination, at no time did they tell him they would, for certain,

proceed to arbitration. In fact, during the termination meeting, Mr. Kijkowski advised the Applicant that the simplest solution would be for him to disassociate. While the Union's letter to the Employer of November 18, 2004 asked that the grievance be referred to arbitration, the Applicant must have known that this was a not a foregone conclusion as soon after he received a copy of the legal opinion of the Union's counsel which identified the problems with the success of the grievance and suggested the prospects were only 50-50. Certainly, that legal assessment must have caused the Applicant to realize that, even if his grievance proceeded to arbitration, he might not be successful with it.

[73] The Applicant urged the Board to accept his evidence over the hearsay evidence of Mr. Kijkowski on the issue of whether he had refused to discuss possible disassociation with the Employer days after the termination meeting. Mr. Kijkowski testified that Ms. Singer advised him, shortly after the termination meeting, that the Applicant had told Ms. Singer that he did not wish to meet with the Employer to discuss disassociation. The Applicant maintains that he did not so advise Ms. Singer and that it was the Employer which failed to get back to the Union on the issue. While we often question the reliability of hearsay evidence, other evidence supports the hearsay evidence of Mr. Kijkowski. It is important to note that, when the Applicant saw the Employer's letter of November 5, 2004 where mention is made of his refusal to discuss disassociation with the Employer in the days after his termination, he should have made his objection to this comment known to the Union. He did not do so yet in cross-examination he acknowledged having gone through that letter with Mr. Kijkowski at which time he pointed out all the concerns he had about the content of the Employer's letter.

[74] Based on all of the evidence, we find that the reason the Applicant did not disassociate earlier was not because the Union represented to him that it would proceed to arbitration (the Applicant's view), but simply because he did not want to. He expressed to the Union, more than once, that he had no intention of quitting – that these were his friends. Up until March 2005 when he did disassociate (and there was no evidence he did so to obtain his reinstatement), he had been adamant about maintaining the association. He acknowledged in cross-examination that, up until the time the Union rejected his grievance in February 2005, he had no intention of disassociating. The Applicant had to have known that the best chance of keeping his job was by

disassociation, which he could have done at any point both before and shortly after his termination.

[75] In any event, this allegation is a matter that should have been raised by the Applicant during the appeals process. He could have argued then that the appeal bodies should take this factor (that the Employer did not get back to the Union on whether disassociation would allow the Applicant to return to his job) into account in deciding whether he had proper opportunity to disassociate. He did not do so.

[76] The Applicant also argued that the Union violated s. 25.1 of the *Act* by reason of the fact that executive council, the body which should hear the final stage of appeal, actually heard and determined the question of whether the Applicant's grievance should proceed to arbitration on two occasions. The Applicant argues that this in itself is arbitrary, but is particularly so when the first time executive council considered this question it did so in the absence of the Applicant, despite his request to participate. While we do not accept the Union's explanation that the first consideration by executive council on February 10, 2005 was merely a decision by executive council whether the executive director could overrule the decisions of labour relations officers on the question of whether a grievance should proceed to arbitration, we also do not accept the position of the Applicant that such conduct by the Union constitutes arbitrariness.

[77] In our view it is quite apparent that on February 10, 2005 executive council considered the merits of the Applicant's grievance and not merely an administrative issue – otherwise it would have been quite unnecessary for those at the meeting to review the circumstances of the Applicant's grievance and the reasons for and against going to arbitration. The minutes of the meeting support this view. However, the fact that executive council made such a decision on February 10, 2005 and then heard the appeal on June 14, 2005 does not in itself constitute arbitrariness. There was nothing in the evidence to suggest that executive council pre-judged the matter when it heard the actual appeal. Furthermore, and perhaps more importantly, the Union was faced with a very unusual problem where the executive director and labour relations officers disagreed on whether to proceed to arbitration and some method of breaking that deadlock needed to be found. In the circumstances, it seems to us reasonable for the executive director to have taken the matter to executive council, the

ultimate governing body of the Union, for a decision. While we think it unwise to have used the specific circumstances of the Applicant's grievance in reaching a decision on that issue, we accept that it would have been more difficult to present the general question to executive council without an example. In the circumstances, use of the Applicant's situation as an example was convenient.

[78] The fact that the Applicant was not present at the February 10, 2005 executive council meeting, as well as the fact that executive council had more information than either the Applicant or even the Union's staff had at the time they met on December 2, 2004, does not make the Union's actions arbitrary. In our view, executive council was only assisting the Union's staff to make a decision in the first instance (i.e. whether to proceed to arbitration), a decision that is not unreasonably made in the member's absence and with all information available to the Union at the time. While it is arguable that the Union should have obtained the Applicant's views on the new evidence it had gathered before executive council examined the matter on February 10, 2005, we see that failure as relevant to the appeal stages where certain procedural rights of the Applicant must be protected. We therefore find that in the whole of the circumstances before us, executive council's review of the matter and the decision of February 10, 2005 was not arbitrary or made in bad faith.

[79] The Applicant's remaining complaints ((i) through (iii)), center around what occurred, or did not occur, after the Union's staff (the executive director and labour relations officers) made their decision not to go to arbitration which was, for the most part, events that transpired during the appeal processes the Applicant went through.

[80] In *Connell*, the Board examined the appeal processes used by the Union to determine if it violated s. 25.1 of the *Act*. The Board concluded that the Union had not violated the *Act*, and stated at 67:

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

[81] In *Gregoire, supra,* the Board commented on the issue of poor communication between a grievor and the union as well as the question of arbitrariness in relation to an appeal process followed by the union. The Board stated at 785 and 786 (note – first part also relates to ground (v)):

> *The Union may be fairly criticized for failing to advise Mr. Gregoire that a recommendation was going to be made with respect to his grievance at the membership meeting in December of 1990. In addition, the Union can be criticized for failing to keep Mr. Gregoire properly informed as to the outcome of his grievance.* ***It is imperative in order for the grievance and arbitration procedure to work properly and efficiently that information pertaining to a grievance be relayed to the individual grievor.***
>
> *We are satisfied, however, that* ***the failure to communicate information to Mr. Gregoire was an oversight on the part of the Union officials, who assumed Mr. Gregoire and his counsel were aware of the outcome. There is no suggestion in the evidence that Mr. Gregoire had meaningful new information to present to the Union before it made its final decision that may have influenced the Union's assessment of the likelihood of successfully arbitrating the grievance.*** *Mr. Gregoire's physical limitations were unchanged since 1984; his assessment of his ability to perform other work had been thoroughly explored; settlement options had been considered and rejected.* ***The Union had a full understanding of the nature of the problem in December of 1990. The Union executive fairly assessed the likelihood of winning the arbitration taking into account these factors and the Union's understanding of the terms of the collective agreement and the alternate duty policy for disabled and injured workers. In these circumstances, the failure to communicate, in and of itself, does not constitute a violation of s. 25.1 of the Act.*** *See Brideau, supra, at 16,012 and Young, supra, at 16,035.*
>
> [**emphasis added**]

[82] The Union argued that the Board should be examining the whole of the circumstances and not examining each step in the process to determine if each step the Union took met the duty prescribed by s. 25.1 of the *Act*. As the Board stated in *Connell*, *supra* "It is not for the Board to minutely dissect and scrutinize each action and decision taken by the Union with respect to the grievance and arbitration process." While we generally agree with this statement that the Board should be most concerned with "the big picture" particularly where the decision under consideration involves the question of

"why" a union is not proceeding to arbitration, where the matter in dispute is a procedural one, the answer to whether the procedure was followed (and should have been followed) is often more clear. Often, processes or policies are developed to appropriately guard against arbitrary, bad faith or discriminatory practice by the union, and the parties are aware of those processes either through the fact that they are specifically communicated or have been a longstanding practice. In such cases, the Board may apply a greater degree of scrutiny and ensure that the union has followed the process fairly closely. When considering an allegation that the union has acted improperly in a procedural sense, there are certain standards a union must meet in order to lack arbitrariness. While we may not find arbitrariness if the union's conduct can be characterized as mere laxity, negligence or a simple error in judgment, that conduct may be determined to be arbitrary if it was done in a perfunctory or cursory way, without reasonable care. While the matter under consideration in the case before us involves a procedure to deal with internal appeals by a member over the decision whether to proceed to arbitration, we believe this test applies whether or not there is an established procedure in place that deals with the subject of the member's complaint. Therefore, even where an established procedure is silent on what standards a union is required to meet, the Board must consider whether the conduct complained of is arbitrary, discriminatory or in bad faith.

[83] This approach is similar to that taken by the Board in *Ron Beatty v. Saskatchewan Government and General Employees' Union and Northlands College*, [2006] Sask. L.R.B.R. 440, LRB File No. 086-04, where the Board examined the processes the union had engaged in to determine if it had acted in a manner that was arbitrary, discriminatory or in bad faith when providing assistance to a member who had been terminated. In that case, the union had represented to its member that a grievance had been filed or would be filed on the member's behalf over his termination from employment, however, at a later point in time it was discovered that the union had not filed the grievance, without any explanation. It was not clear whether the union had decided not to file the grievance for good reason or whether it was through inattention, inadvertence, miscommunication or otherwise. The Board found that the union had acted in a cursory manner, without reasonable care, by abandoning its planned course of action without making a thoughtful decision about what to do. The Board found that, given the experience of the union representatives involved (one was a full-time staff member) and the fact that the union was addressing a "critical job interest" of its

member, the union's inaction could not be characterized simply as "mere laxity or negligence" or as an "error in judgment." As in *Beatty*, once a policy or procedure is put into place (i.e. the appeals process), the Board must consider whether the Union's action or inaction in carrying out that policy/procedure amounts to arbitrariness or, in other words, is conduct characterized as being done in a cursory manner and without reasonable care.

[84] The Applicant's allegations in (i) through (iii) referred to above, center around the Union's gathering of certain information, which in itself was alleged to be improper, and the use of that information by the appeal bodies without the knowledge of the Applicant. We will turn first to the issues around the conduct and use of the membership survey.

[85] In its Board's decision in *Johnson*, *supra*, the Board considered the propriety of a secret ballot vote by the union's membership as a means of determining whether the union should proceed to arbitration with the grievor's grievance. The vote resulted in a decision not to proceed to arbitration, contrary to the recommendation of the union's executive. The Board reviewed the history of the duty of fair representation and concluded that, while the seriousness of the interest of the employee is a relevant factor, it must be evaluated along with other factors which led to the union's decision. The Board went on to conclude that the use of a secret ballot vote by the membership on the question of whether a grievance should proceed to arbitration, was arbitrary in the circumstances. In reaching this conclusion, the Board noted that, in some cases where the decision whether to proceed with a grievance to arbitration is made by a group of members at a membership meeting, the focus is commonly on such issues as whether the grievor had the opportunity to attend the meeting and address the membership, whether there was opportunity for questions to be answered by the grievor and debate to take place between the members and whether sufficient information was presented to the membership to allow it make a fair decision. In reaching its conclusion that the method of decision-making that utilized a secret ballot vote of the membership was arbitrary in the circumstances of the *Johnson* case, the Board reasoned as follows, at 42 through 44:

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.

Trade unions are democratic organizations, with a tradition of strong reliance on the opinions and directions of their members. This is one of their chief strengths, and one of the foundations for confiding to them the important interests which they are charged with representing.

The genesis of the duty of fair representation, however, lies in a recognition that any organization which is governed exclusively by majoritarian principles has the potential to be oppressive to individual employees or minority groups of employees. Because these individuals and groups have no option but to rely on the certified trade union to represent their interests, the courts, legislatures and labour relations boards which have considered the issue concluded that their bargaining agents must be held to a minimal standard of fairness in dealing with them, a standard, described earlier in these reasons, defined in terms of a proscription of trade union decision-making which is arbitrary, discriminatory or in bad faith.

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.***

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.*
>
> ***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.*
>
> *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.*
>
> *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]**

[86] In our view, the Union's decision to conduct the survey was not, in and of itself, arbitrary. Perhaps the Union should have let the Applicant participate in what

information was given and/or how the questions were framed but, in our view, those decisions were within the discretion of the Union to make and were not arbitrary. The questions asked of the members appear to have been designed to elicit relevant information for the Union and bodies of appeal to take into consideration in making a decision whether to proceed to arbitration. Unlike the situation in *Johnson*, *supra*, the members were not simply asked for a "yes/no" answer on the actual decision the Union had to make – whether or not to proceed to arbitration.

[87] What is problematic for the Board, however, is the fact that the Applicant did not know of the existence of the survey and had no opportunity to respond to the information it contained. While it does not appear that the survey results were the whole basis of the appeal committees' decisions, they must have played a fairly important role in the decision to uphold the executive director's position. Given the apparent relevance of the survey results, once the results of the survey were being used by the bodies of appeal, the Union should have disclosed them to the Applicant. What is significant is that the Applicant had no opportunity to rebut either the results or the form of the survey, including the accuracy of the information given to those completing the survey. Similarly, the Applicant had no opportunity to challenge the manner in which the survey was conducted, at either level of appeal.

[88] The Union's policy governing the grievance committee is silent on the issue of disclosure to the member although it provides for disclosure of "a summary of the case" and "all pertinent documentation, including the Labour Relations Staff recommendation/rationale," as well as the member's submission, to the grievance committee one week in advance of the hearing. The policy provides for presentations to be made by the member and the executive director, each presenting their position on the issues. In these circumstances and given that the mandate of the committee is "to ensure that all HSAS members are represented in a fair, consistent and reasonable manner," we find that the full disclosure of information relied on by the executive director and the grievance committee to the Applicant is implicit, as to find otherwise would not be "fair" or "reasonable." Even though s. 36.1 does not apply, the failure to conduct an appeal hearing in accordance with a very basic principle of natural justice of full disclosure, necessary to give full effect to the Union's policy and grievance committee

mandate, amounts to a violation of s. 25.1 on the basis of the reasoning in *Connell*, *supra*.

[89] We have reached a similar conclusion with respect to the information the Union obtained at its meeting with the RPS, including the memorandum of understanding. It was not arbitrary for the Union to have conducted this meeting or obtain this information, even though it may have been preferable to have brought the Applicant along or checked facts with him. However, that is not the standard to which we will hold the Union. We see no difficulty with the Union's staff having this information (or executive council having it on February 10, 2005) when it made its initial decision not to proceed to arbitration. The problem is that this information was relied on by the bodies of internal appeal without the Applicant's knowledge and without the opportunity to respond. The failure to disclose this information was a failure to allow the Applicant the opportunity of full rights of appeal, implicitly a violation of the policy and the grievance committee's mandate and was therefore arbitrary.

[90] In our view, there was no adequate reason put forward for the failure to disclose the survey and the RPS interview results. The opinion offered up at the hearing by the Union that the opinions of the other members and the RPS were of no concern to the Applicant, cannot hold. Counsel for the Applicant challenged the contents of the survey and the RPS memorandum of understanding in an attempt to suggest that the Union needed the Applicant's response to this information in order to properly assess the merits of the claim. For example, the Applicant may have been able to establish that the facts upon which the members based their opinions were faulty and this may have caused the appeal bodies to question the validity of the beliefs held by the members. While this may be somewhat speculative on our part, it illustrates the need for the Applicant to have this information and be in a position to respond to it. Unlike the situation in *Gregoire*, *supra*, we do not find that the failure to provide this information was a mere oversight by the Union nor was it simply laxity but rather it was done without adequate care and taking only a perfunctory approach to the appeals process thus amounting to arbitrariness.

[91] We also see a problem with respect to the failure to disclose the second legal opinion the Union obtained on May 5, 2005. Although this point was not argued by

Applicant's counsel, we find that the failure to disclose the legal opinion in the circumstances of this case was arbitrary as the Union's inaction was taken without reasonable care. Again, it is not at all problematic that the Union sought and obtained a second legal opinion. In fact, it was prudent to do so in light of the Applicant's recent disassociation. However, it is problematic that this opinion, written for the executive director, was then shared by the executive director with the grievance committee after that committee had heard the Applicant's appeal and without giving the Applicant a copy in order that he have an opportunity to respond to it. While the opinion contains somewhat complex matters of law, it was open to the Applicant to challenge the facts relied upon in reaching that opinion. In these circumstances, the failure to provide the second legal opinion to the Applicant was done without reasonable care and amounts to arbitrariness.

[92] Our conclusions above focus on (i) the Union's obligation to disclose the basis for its reasons; and (ii) the Applicant's right to fully respond at the appeal hearings. In our view, the line of distinction between the executive director's decision and that of both appeal bodies became blurred by the fact that they all had important information that the Applicant did not such that we do not believe that the appeal process was conducted in a fair and open manner. In other words, the Applicant's right to appeal the decision of the executive director turned out to more apparent than real. In these circumstances, we find the Union's approach to the appeal process to be cursory and perfunctory and therefore arbitrary within the meaning of s. 25.1 of the *Act*.

[93] The Board therefore finds that the Union has violated s. 25.1 of the *Act* for the following reasons:

(i) It acted arbitrarily by failing to share the results of the survey of the membership with the Applicant prior to the hearing of his appeal by both the grievance committee and executive council;

(ii) It acted arbitrarily by failing to share the results of the interview with the RPS, including a copy of the memorandum of understanding, with the Applicant prior to the hearing of his appeal by both the grievance committee and executive council; and

(iii) It acted arbitrarily by failing to share the second legal opinion dated May 5, 2005, with the Applicant prior to the hearing of his appeal by both the grievance committee and executive council.

[94] The Board wishes to note that, while we have found the Union in violation of s. 25.1 of the *Act* with respect to the process it followed in dealing with the Applicant's appeal of the decision not to proceed to arbitration, there is no evidence that the Union acted arbitrarily, discriminatorily or with bad faith in its examination of the merits of the case, *with the information it had available to it*. It is only our view that, through the deficiencies in the appeal process used by the Union, the Union did not have all relevant information before it necessary to make its decision or, perhaps more importantly, the Applicant did not have sufficient opportunity to present his point of view at every stage of internal appeal. It may well be that the Applicant has nothing "new" to offer in response to the RPS interview results and the member survey results which the appeal bodies had and he did not, however, it is that lost opportunity which must be remedied. As such, it is our view that the only appropriate order in these circumstances is to: (i) direct the parties to return to the stage of the internal appeal process where this new information was received and considered by that appeal body in making its decision, that is, the level of the Applicant's appeal to the grievance committee; and (ii) direct the Union to disclose the notes concerning its representatives' meeting with the RPS, the memorandum of understanding between emergency medical services and the RPS, the membership survey and its results, as well as the second legal opinion obtained from counsel for the Union.

[95] The Applicant had requested remedial relief in the form of an order that the Union proceed to arbitration with his grievance and permit the Applicant to have the representation of his choice, for which the Union would be required to pay. That is not appropriate relief in the circumstances of this case. There were no findings of bad faith or discrimination on the part of the Union that would lead us to conclude that the Union representatives could no longer effectively act on behalf of the Applicant, if necessary. Furthermore, we are dealing here with a matter of a breach of duty of fair representation in a procedural sense, not a substantive one. Our findings of arbitrariness relate only to the manner in which the Union conducted the appeal proceedings and in our view can

be remedied by repeating those appeal procedures and correcting the mistakes we have identified. There is nothing in the evidence that would suggest that the bodies of appeal could not or would not approach the matter with an open mind, after considering the submissions of both parties, and all the information before it. In *Beatty*, *supra*, a similar request had been made, and the Board stated at 489 and 490:

> *[110] Turning to the issue of an appropriate remedy, the Applicant urged the Board to order the Union to proceed to arbitration with his grievance, to pay for him to have independent legal representation of his choosing and that, if he is reinstated, to pay at least some of his monetary loss.* ***While the Board has the power to order these remedies, we find that they are not appropriate in the circumstances of this case. In fashioning an appropriate remedy, one of the principles which guides us is that commonly utilized in contract law - that is, to place the wronged party in the position he or she would have been in had a breach not occurred.*** *In this case, the Union breached s. 25.1 of the Act by failing to properly direct its mind to the merits of the issue, failing to conduct a meaningful investigation into the Applicant's concerns regarding his failure of probation and erroneously relying on an illegal clause in the collective agreement as the reason for not filing a grievance on the Applicant's behalf. To place the Applicant in the position he would have been in had the Union not breached s. 25.1 in the manner that it did, would compel us to make certain orders requiring the Union to comply with its duty to fairly represent the Applicant. In finding the Union in breach of s. 25.1, we specifically make no finding as to whether the Applicant's concerns legitimately form the basis of a grievance - that is for the Union to assess. Our determination is limited to determining whether the Union acted in a manner that was arbitrary, discriminatory or in bad faith, in its representation of the Applicant. Here we found that the Union acted arbitrarily, primarily in the sense that it failed to take appropriate factors into account while taking into account inappropriate considerations.* ***In our view, because there was no evidence of any bad faith, discrimination or ill will shown to the Applicant by the Union, we find it entirely appropriate to allow the Union the opportunity to represent the Applicant fairly and our order will reflect that.***
>
> [**emphasis added**]

[96] The Board therefore orders:

(i) That the parties shall immediately return to that stage of the internal appeal process where the Union must give notice of the time and date of the hearing of the appeal to the grievance committee, which date for hearing must be at least 30 days following the date of the Order accompanying these Reasons for Decision;

(ii) That at least 15 days prior to the date of the hearing of the appeal by the grievance committee, the Union shall deliver to the Applicant copies of all documents it intends to rely on at the appeal hearing, including, but not limited to, the following:

(a) the form of the survey of the membership; the results of the survey (including the answers/comments to all the questions); a copy of the sample of the completed survey previously shared with the grievance committee and/or executive council (although, if the Union wishes, it may mask the identity of which specific individual completed the survey form); and copies of any other completed surveys the Union shares with the internal bodies of appeal (similarly masked);

(b) the interview notes resulting from the Union's representatives' meeting with representatives of the RPS on February 3, 2005; and

(c) the legal opinion of Union's legal counsel dated May 5, 2005.

(iii) If the appeal is denied by the grievance committee, the Applicant may proceed to file an appeal to executive council and a hearing shall be held in accordance with the Union's usual practice;

(iv) Any applicable time limits in the appeal process shall be extended/waived to the extent necessary to give effect to the terms of the Order accompanying these Reasons for Decision;

(v) There shall be a continuing obligation on the Union to disclose to the Applicant any and all information submitted to or used by any of the bodies of appeal; and

(vi) The Board retains jurisdiction to hear and determine any matters arising from the implementation of the Order accompanying these Reasons for Decision.

DATED at Regina, Saskatchewan this **16th** day of **September, 2008**.

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson