The Labour Relations Board
Saskatchewan

LORRAINE PREBUSHEWSKI, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL NO. 4777 and PRINCE ALBERT PARKLAND HEALTH REGION, Respondents

LRB File No. 108-09; April 15, 2010
Vice-Chairperson, Steven Schiefner, sitting alone.

For the Applicant:	Mr. Trevor W. Klassen
For the Respondent Union:	Mr. Tony Miotti
For the Respondent Employer:	No one appearing

Duty of Fair Representation – Arbitrariness - Dismissal grievance placed in abeyance pending outcome of *Criminal* charge – Union incorrectly informed Applicant had been convicted – Union decides to abandon dismissal grievance but does not notify Applicant – Union does not provide Applicant with information on procedure for appeal – Board determines Union failed to fairly represent Applicant.

Duty of Fair Representation – Delay – Applicant delays filing application with Board for two (2) years – Board concludes that employer and trade union had prior notice that applicant disputed both dismissal and Union's decision to abandon grievance. Board concludes delay did not impair capacity of Board to grant remedy.

Duty of Fair Representation – Remedy – Upon finding violation of duty of fair representation, Board grants Applicant leave to appeal decision to abandon dismissal grievance to Union's Executive Committee and waives restrictions in collective agreement regarding grievance procedure with respect to continuing grievance.

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

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: The Canadian Union of Public Employees, Local 4777 (the "Union") represents a unit of employees working for the Prince Albert Parkland Health Region (the "Employer"). The Applicant was, at all material time, an employee of the Employer and a member of the unit of employees represented by the Union. The Employer operates a hospital and various other health care related facilities in northern Saskatchewan. The Applicant was a special care aide at the Herb Bassett Nursing Home located in Prince Albert, Saskatchewan, until she was dismissed by the Employer in 2007.

[2] On September 22, 2009, the Applicant filed an application with the Saskatchewan Labour Relations Board (the "Board") alleging that the Union failed to fairly represent her in relation to her dismissal by the Employer contrary to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*").

[3] The Applicant's application was heard on March 16, 2010 in Saskatoon, Saskatchewan. The Employer did not file a reply and did not participate in the proceedings.

[4] The Applicant testified on her own behalf. The Union called Ms. Sharleen Rayner (nee: Haarstad), the National service Representative for the Canadian Union of Public Employees (CUPE) responsible for the unit of employees of which the Applicant was a member, as well as Ms. Lori Martin, the Union's 1st Vice-President and Chair of the Union's Grievance Committee, and Ms. Carol Anne McKnight, the President of the Union.

Facts:

[5] The findings of fact set forth in these Reasons for Decision are based upon the evidence (both oral and documentary) tendered during these proceedings. Where a witness has testified at variance with the Board's findings of fact as set forth herein, I have discredited such testimony because I found it to be conflict with other credible evidence (either documentary or testimonial). Of particular significant, the Applicant's testimony was, at times, confusing. Her references to when certain events took place (such as conversations), the persons involved (whom she spoke to) and her recounting of events (where these conversations took place, whether these conversations were in person or on the phone, and who said what to whom) was often unclear. In light of the evidentiary burden on the Applicant (to prove her case on the balance of probabilities), the lack of specificity in the Applicant's testimony was problematic for the Board.

[6] The Applicant began working for the Employer at the Herb Bassett Nursing Home in 1991. This facility provides long-term nursing care for elderly and disabled residents.

[7] On or about July 8, 2006, the Applicant was involved in an incident at work for which she was disciplined. The Applicant described the incident as her foot touching a coworker's behind. Apparently, the coworker (Ms. Sandy Lai) was bending down to pick up a tray at the time and the Applicant's foot "*made contact*" with her behind. The Applicant tended to

minimize both her culpability and the nature and degree of the contact, describing it as "*accidental touching*", with her foot "*brushing up against"* the coworker's behind. Apparently, neither the coworker nor the Employer felt that the Applicant's conduct was either trivial or accidental. To the contrary, this incident with her coworker gave rise to two (2) different proceedings involving the Applicant; firstly, the Employer commenced discipline procedures; and secondly, the local police commenced an investigation related to possible charges under the *Criminal Code of Canada*, R.S.C 1985, c. C-46.

[8] With respect to the discipline proceedings, both the Employer and the Union investigated the incident that occurred on July 8, 2006. Of particular significance, management and Union officials interviewed Ms. Elaine Pelltier, an LPN (Licensed Practical Nurse), who was present when the incident occurred. The following is the description of the interview of Ms. Pelltier (as recorded by officials of the Union):

> *Elaine Pelltier L.P.N., L. Martin, Cheryl P. E. Ekle*
>
> *C-incident of Jul 8/06 @ 4:15 pm what happened*
>
> *E-Sandy was bending over to get a tray – Laurie came up behind her saying come on – come on – then I seen Laurie bring her foot up and she kicked her. Then Sandy asked her why did you kick me.*
>
> *L.M. – so you seen this happen*
> *E – Yes*
> *D – Was it intentional*
> *E – Yes, but I don't think that she thought she kicked her that hard.*
> *C – Was there anyone else around*
> *E – I don't remember, I was doing my job. I didn't hear anything else about it until Sunday afternoon. Sandy came in on Sunday – filled out the incident form and asked me to sign it. I just thought Laurie was being goofy. Sandy gets teased a lot – not always in front of her, but they tease her about her size.*

[9] The Applicant's supervisor (Ms. Cheryl Prediger) met with the Applicant on July 12, 2006 to discuss the incident. Representatives of the Union were present for this meeting. At this meeting, the Employer was proceeding on the assumption that the Applicant had kicked her coworker, with the Applicant denying that she had done so.

[10] As a result of its investigation, including the Employer's meeting with the Applicant, the Employer indicated to the Union that it was prepared to dismiss the Applicant because of the July 8, 2006 incident. However, through the Union's intervention, the Employer

agreed to enter into a Last Change agreement with the Applicant. The Union negotiated terms on behalf of the Applicant and met with her on July 18, 2006 to explain the agreement, which was contained in a Letter of Understanding between the Union, the Employer and the Applicant (the "Last Change Agreement"). The Applicant testified that she felt pressured by the Union to admit she had kicked her coworker and to sign the Last Change Agreement because she was told by her the Union that, if she didn't, she would be fired.

[11] The Last Change Agreement was signed on July 19, 2006. The substance of this Agreement was as follows:

> *This Letter of Understanding serves as a "last chance agreement" with respect to the continued employment of Laurie Prebushewski, who is currently employed as a Special Care Aide at the Herb Bassett Home – Lakeland Trail. Evidence gathered through an investigation of an incident which occurred on Saturday, July 8, 2006 suggests that Ms. Prebushewski physically assaulted a co-worker by kicking her in the lower back.*
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> *Ms. Prebushewski is aware that any type of assault (whether physical, verbal or otherwise) will not be tolerated in the workplace. She is also aware of the expectation that all staff will provide appropriate, quality care for the residents entrusted to them, and will do so while working in a co-operative, respectful environment with their co-workers.*
>
> *The terms under which Ms. Prebushewski will be permitted to continue her employment as a Special Care Aide at the Herb Bassett Home are as follows:*
>
> - *Ms. Prebushewski is suspended, without pay for five 12-hour shifts: July 12, 13, 17, 18 and 26, 2006. She will return to work for her day shift on Golden Hill on July 28, 2006.*
> - *Prior to her return to work, Ms. Prebushewski will write a letter of apology to Ms. Sandy Lai and will provide a copy of that letter to Sharon Chesley, Nursing Unit Manager on July 28, 2006. A HBH manager will arrange a meeting between Ms. Prebushewski and Ms. Lai so that a verbal apology and the letter of apology can be delivered in person, in the presence of the manager and Ms. Carol McKnight, CUPE Local 4777 President.*
> - *Ms. Prebushewski will avoid any retaliation (in any form) against Ms. Lai.*
> - *Ms. Prebushewski will seek counseling for her anger/aggression issues. It is strongly recommended that she access the Employee & Family Assistance Program (EFAP) in this regard. Prior to her return to work on July 28, 2006, she must provide evidence that she has commenced counseling; a letter from the counselor addressed to the Employer is required.*
> - *Ms. Prebushewski will enroll in and complete an anger management program equivalent to the anger management program offered by Family Services (information will be provided in September). Proof of attendance and completion of such a program shall be provided to Ms. Prediger prior to December 15, 2006.*
> - *Ms. Prebushewski will be transferred to the next available permanent or temporary full time Special Care Aide rotation on the Golden Hill unit of Herb Bassett Home. She [sic] eligible for overtime on Golden Hill only.*

> *She will not have access to the internal application/bidding process for rotations on Lakeland Trail or Paradise Path for a period of one year.*
>
> *It is understood that should Ms. Prebushewski be involved in any further incidents of anger, aggression or inappropriate behavior against anyone in the care or employ of the Prince Albert Parkland Health Region her employment with the Region will [sic] terminated immediately.*

[12] Pursuant to the Last Change Agreement, the Applicant was suspended, without pay, for a specific period of time. Two (2) of additional terms of the Applicant's Last Chance Agreement were that she attend counseling for anger/aggression and that she apologize to the coworker she kicked (Ms. Lia), both verbally and in writing, prior to her return to work. Apparently, the Applicant was unable or unwilling to comply with these later conditions. To avoid the Applicant being dismissed for breach of the Last Chance Agreement, the Union intervened again and negotiated an Addendum to the Last Chance Agreement. The substance of the Addendum to the Last Chance Agreement was as follows:

> *The terms of this addendum are in addition to all the terms contained in the Letter of Understanding, signed by the parties on July 19, 2006.*
>
> *Given that Ms. Prebushewski did not fully meet two of the terms contained in the original Letter of Understanding, specifically the requirements to provide a) evidence, in the form of a letter, to the employer that she has sought counseling for her anger/aggression issues and b) a letter of apology addressed to Ms. Sandy Lai, the following additional terms become part of the original Letter of Understanding:*
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> - *Ms. Prebushewski is suspended, without pay, for her scheduled shifts of July 28, 29 and 30, 2006; that suspension to commence at 1:00 p.m. July 28, 2006. She will return to work for her scheduled 12-hour Day shift (orientation) on Golden Hill on Wednesday, August 2, 2006.*
> - *By 3:00 p.m., Monday, July 31, 2006, and prior to her return to work, Ms. Prebushewski will provide to Ms. Sharon Chesley, Nursing Unit Manager, a letter from a counselor indicating that she has contacted the EFAP provider and has requested counseling regarding her anger/aggression issues. The letter is to confirm the date that the first counseling session is scheduled. Evidence of attendance at that counseling session, duly signed by the counselor, must be provided to Ms. Chesley no later than the day following the counseling session. The Employer reserves the right to request evidence of attendance if further counseling sessions are scheduled.*
> - *By 3:00 p.m., Monday, July 31, 2006, Ms. Prebushewski will write a letter of apology addressed to Mrs. Sandy Lai and will provide a copy of that letter to Ms. Chesley. The letter must be acceptable to both the Employer and the Union. Ms. Chesley will then arrange a meeting between Ms. Prebushewski and Ms. Lai so that a verbal apology and the letter of apology can be delivered in person, in the presence of Ms. Chesley and Ms. Carol McKnight, President of CUPE Local 4777.*

- *Ms. Prebushewski must maintain confidentiality regarding the terms of the Letter of Understanding, including this Addendum, as well as the meetings wherein these terms were discussed.*

Ms. Prebushewski is aware that failure to meet any of the above-noted terms or the remaining terms of the original Letter of Understanding will result in immediate termination of her employment with Prince Albert Parkland.

[13] The Applicant testified that she attempted to apologize to her coworker but that the coworker would not accept her apology. With respect to the required counseling, the Applicant testified that she went to a counselor (but did not indicate the counselor's name) and was told by her counselor that she didn't need counseling. It was unclear from the evidence whether these events occurred before or after the Addendum to the Last Chance Agreement was executive by the parties (on July 31, 2006). In any event, the Applicant apparently satisfied the requisite conditions for her return to work following her suspension, as the Applicant did, in fact, return to work for the Employer.

[14] The second process flowing from the July 8, 2006 incident was a police investigation. In November of 2006, this investigation came to fruition and the Applicant was charged with assault causing bodily harm under the *Criminal Code*, supra.

[15] The Applicant testified that she originally agreed to provide a statement to the police regarding the incident but then later changed her mind (and decided not to provide the police with a statement). It is unclear from the evidence whether the Applicant failed to advise the police of her change of mind or the police were merely persistent in their desire to discuss the July 8, 2006 incident with the Applicant. In any event, on December 19, 2006, a police officer called the Herb Basset Nursing Home and asked to speak with the Applicant. The phone call from the police was either received by or directed to Ms. Cheryl Prediger and the Applicant was asked to attend to Ms. Prediger's office. The Applicant testified that she was upset by the phone call from the police and, at some point while she was in Ms. Prediger's office, she raised her voice with her supervisor. The exact conversation was not recounted by the Applicant in her testimony. However, the tenor of the conversation appeared to have been that the Applicant was frustrated by the police investigation and upset with her coworkers and the Employer. It was unclear from the evidence how her conversation concluded with her supervisor. However, the Applicant was scheduled to return to work the next day but was told by her supervisor not to do so.

[16] On January 2, 2007, the Applicant and representatives of the Union were called to a meeting with Ms. Prediger, whereat the Applicant was terminated for breach of the Last Chance Agreement. The Employer's reasons for terminating the Applicant were contained in a letter dated that date, which reads as follows:

> *Dear Lorraine:*
>
> *This letter is to inform that due to your anger and inappropriate actions directed to me [] on December 19, 2006, your employment with the Prince Albert Parkland Health Region is hereby terminated effective immediately.*
>
> *As you are aware you signed a Last Chance Agreement, along with the Employer and your Union, on July 19, 2006, regarding your anger and aggression while at work. The agreement specifically outlines that any further incidents of anger, aggression or inappropriate behavior directed to anyone in the care or employ of the PAPHR will be grounds for immediate termination.*
>
> *Please return immediately your name tag, parking pass and any other Prince Albert Parkland Region property that you have in your possession.*

[17] After the meeting with Ms. Prediger, the Applicant met with representatives of the Union and completed a grievance fact sheet. The Union filed a grievance with the Employer on January 6, 2007 challenging the Applicant's termination and seeking her reinstatement and/or compensation. A meeting between the Employer and the Union was held on January 23, 2007 to discuss this grievance. During the meeting, the Union took the position that the Applicant's conduct on December 19, 2007 was a "*momentary flare-up*". The Union advised the Employer that the Applicant "*wasn't herself*" at the time of incident and asked the Employer to excuse the Applicant's conduct because of "*problems*" she was having at the time. Unfortunately, for the Applicant, the Employer did not accept the Union's explanation and the Applicant's termination stood (although it does not appear that the Employer formally denied the Union's grievance).

[18] Earlier in the process, in August of 2006, the Union had contacted Ms. Rayner (nee: Haarstad), who was the CUPE's National Service Representative with service responsibilities for the Union. The Union was seeking advice as to the proper handling of the Applicant's situation, which at that time, was just after the Union had negotiated the Last Chance Agreement and Addendum thereto with the Employer. Following the Applicant's dismissal on January 2, 2007, the Union again sought the assistance of Ms. Rayner for advice on the Applicant's grievance. Ms. Rayner testified that she was briefed on the Applicant's situation by the Union and that she called and spoke with the Applicant on or about January 31, 2007.

Based on her understanding of the situation, including her direct communication with the Applicant, Ms. Rayner advised the Union to place the Applicant's grievance in abeyance pending the outcome of the *Criminal Code* charge against her. Relying on this advice, the Union contacted the Employer and asked that the Applicant's grievance be placed in abeyance, to which the Employer agreed.

[19] During Ms. Rayner's conversation with the Applicant, she indicated that she had not yet retained a lawyer to represent her in the court proceedings. Ms. Rayner asked the Applicant to advise the Union of the name of her lawyer so that the Union could be informed of the outcome of her court case. Finally, Ms. Rayner testified that she had no further dealings with proceedings involving the Applicant after January of 2007.

[20] As a consequence of the foregoing, by the end of January, 2007, it would appear that the Employer, the Union and the Applicant were all in agreement that the Applicant's grievance (regarding her termination following the December 19, 2006 incident with her supervisor) should be placed in abeyance pending the outcome of the *Criminal* charge against her (related to the July 8, 2006 incident with her coworker). In the interim, the Applicant agreed to keep the Union informed on the status of her court case.

[21] A trial on the *Criminal Code* charge was held in August of 2007, with the presiding judge reserving decision. Unfortunately, it would appear that communication between the Union and the Applicant had broken down. The Union's policy at the time was to place responsibility on the grievor for maintaining communication with the Union; for keeping in contact with the Union and for keeping Union officials informed and updated on their situation. The Union did not attempt to contact the Applicant and the Applicant failed to provide the Union with the name of her lawyer and both her and her lawyer failed to inform the Union as to the status of the Applicant's *Criminal* charge. Ms. Martin testified that, by this point in time, the Union had not heard from the Applicant in months (ie. since January of 2007).

[22] Ms. Martin testified that the Union's Executive Committee met on a monthly basis and, during each meeting, it was her responsibility, as Chair of the Union's Grievance Committee, to report on all outstanding grievances. Ms. Martin testified that each month she provided the Union's Executive Committee with an update on the status of all outstanding grievances. In her updates, Ms. Martin's practice was to not use the name of the grievor but

rather to refer to each grievance by its respective grievance number. For example, the Applicant's grievance was referenced as grievance no. 07 of 2007 (or "07 – 07"). Ms. Martin testified that, following the decision in January of 2007 to place the Applicant's grievance in abeyance, her monthly reports were that the grievance no. 07 - 07 continued to be in abeyance awaiting the outcome of a *Criminal* charge.

[23] However, following her trial, rumors were emerging in the community that the Applicant had been found guilty (ie. that she had been *"convicted"*)[1]. Ms. Martin heard this rumor and, during the regular meeting of the Union's Executive Committee in September of 2007, Ms. Martin reported this information; that the grievor in Grievance No. 07 – 07 had been found "guilty" (of some offence) in relation to a workplace incident. Ms. Martin indicated that she heard the rumor from someone she understood to be a family member of the Applicant and thus assumed the information to be accurate. As a consequence, the Executive Committee proceeded to deliberate on the disposition of the Applicant's grievance. The Union's practice at the time was not to provide advance notice to a grievor that the Union's Executive Committee was deliberating on the disposition of his/her grievance. However, Ms. Martin did testify that the monthly meetings of the Union's Executive Committee were open to members of the Union.

[24] Ms. Martin testified that her report to the Union's Executive Committee described the circumstances of the Applicant's Last Chance Agreement, the Addendum to the Last Chance Agreement, and the incidence on December 19, 2006 giving rise to the Employer's decision to terminate the Applicant, together with the Union's knowledge of past infractions in the workplace by the Applicant and other performance-related coaching sessions involving the Applicant.

[25] Ms. Martin described two (2) past incidents involving the Applicant; in 2002, the Applicant was disciplined for being involved in an "*altercation*" with a coworker; and in 2006, the Applicant received "coaching" from the Employer with respect to an incident wherein she "*yelled*" at a patient of the nursing home. The Union represented the Applicant in proceedings related to these incidents and thus had records of their occurrence. Ms. Martin testified that she reported this information to the Union's Executive Committee, as part of the Applicant's workplace history, when they were considering the disposition of her grievance.

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[1] It was not clear from the evidence as to what offence it was rumored that the Applicant had been convicted.

[26] As indicated, Ms. Martin also reported on her understanding that the Applicant had been convicted of a *Criminal* charge (based on the rumors she heard in the community). This information was later determined by the Union to be incorrect. In fact, the presiding judge in the Applicant's case did not render a judgment until November of 2007; at which time the Applicant was found to be "not guilty". In cross-examination, Ms. Martin testified that she did not attempt to contact the Applicant when she heard the rumor of her conviction or otherwise attempt to verify the information. Ms. Martin's explanation was that she had not heard from the Applicant in months and she believed the information she received was reliable.

[27] Ms. Martin testified that she did not make a recommendation to the Union's Executive Committee as to the appropriate disposition of the Applicant's grievance. Rather, her role, as Chair of the Union's Grievance Committee, was to report on the facts and circumstances associated with the outstanding grievances. Following Ms. Martin's report, the Union's Executive Committee decided to abandon the Applicant's termination grievance concluding that there was little change of obtaining a favourable outcome for the Applicant.

[28] Ms. Martin admitted that the information as to the Applicant's conviction was incorrect. However, she also indicated that the Executive Committee did not base their decision solely on that information; saying they also had information on the original disciplinary incident (ie. on July 8, 2006), the breach of the Last Chance Agreement that gave rise to the Addendum, the incidence on December 19, 2006, and the Union's knowledge of past infractions in the workplace by the Applicant.

[29] The Union's decision to abandon the Applicant's dismissal grievance was communicated to the Employer by letter dated September 20, 2007. It does not appear that a copy of this letter was provided to the Applicant.

[30] In November of 2007, following the "not guilty" verdict, the Applicant immediately contacted the Union wanting to pursue her dismissal grievance. It was at this point that the Applicant became aware that the Union had abandoned her grievance. The Applicant was also informed that the Union understood (erroneously) that she had been convicted of her *Criminal* charges.

[31] The Applicant testified that, after she learned that her grievance had been abandoned, she contacted a lawyer and commenced proceedings (ie. filed a Statement of Claim) in the Court of Queen's Bench to sue the Employer for wrongful dismissal. The Applicant did not indicate (nor was she cross-examined as to) when she commenced her court proceedings. The Applicant testified that, during these proceedings, she was advised that she could not sue the Employer; but that she could bring an application against the Union pursuant to the *Trade Union Act*. The Applicant did not indicate (nor was she cross-examined as to) when she was advised as to the potential that she could bring an application to this Board. As indicted, the Applicant filed her application with this Board on September 22, 2009.

[32] Ms. Martin testified that the Union held the view that, if the Applicant had been convicted, it would have been very difficult to obtain a favourable outcome for the Applicant in prosecuting her dismissal grievance. In cross-examination, Ms. Martin admitted that, if the Union's Executive Committee had known that the Applicant had been acquitted, it might have changed things (might have changed someone's mind on the Executive Committee); but tempered this speculation with her observation that the Executive Committee had a lot of other information (including both the July 8, 2006 and the December 19, 2006 incidents, as well as prior incidents in the workplace) that Ms. Martin believed would have tended to indicate that it would have been difficult to obtain a favourable outcome for the Applicant irrespective of the outcome of her *Criminal* charge.

[33] Ms. Martin testified that the Union's practice at the time was that, if a grievor did not maintain sufficient or appropriate communication with the Union, the Union could abandon that member's grievance. In cross-examination as to the Union's policy, Ms. Martin provided an example of another grievor, whose grievance was abandoned by the Union because the grievor had not maintained communication with the Union. Ms. Martin did not provide particulars of (and was not cross-examined as to) the circumstances of that incident.

[34] Finally, Ms. Martin testified that, in 2007, the Union processed approximately 300 grievances.

[35] Ms. McKnight (President of the Union) testified that she was in attendance during the meeting of the Union's Executive Committee when the decision was made to abandon the Applicant's grievance. Ms. McKnight confirmed Ms. Martin's testimony regarding the nature of

the information available to the Executive Committee when deliberating on the disposition of the Applicant's grievance. In addition, Ms. McKnight testified that another factor that would have been in the minds of other members of the Union's Executive Committee (as it was something she was well aware of) was the Employer's "Harassment Policy" and its "Violence and Abuse Prevention Policy". Ms. McKnight testified that the Employer's goal with these policies was to establish a "zero tolerance" for harassment in the workplace and that the Union was aware that, if harassment occurs in the workplace, the Employer would take action. For example, Ms. McKnight testified that the Union believed that, if it hadn't negotiated the Last Chance Agreement and if the Applicant hadn't signed that document, the Employer would have dismissed the Applicant on the basis of the July 8, 2006 incident.

[36] Ms. McKnight also testified that the Union's practice, in 2007, was not to give prior notice to a grievor that the Union's Executive Committee was considering the disposition of his/her grievance and that the Union had, in the past, withdrawn grievances without giving advance notice to the affected members. Ms. McKnight testified that, following advice from the Union's national office, the Union has since modified its practice in this regard; such that now a grievor is informed in advance that the Executive Committee will be considering the potential of abandoning a grievance so that they can attend the relevant meeting of the Executive Committee. Ms. McKnight also testified that, if a member disagreed with a decision of the Union's Executive Committee (regarding the disposition of a grievance), they had the right to "appeal" that decision. With respect to the process, Ms. McKnight testified that such appeals were referred back to the Executive Committee, with the affected member being granted an opportunity to appear and ask the Committee to reconsider their previous decision.

[37] Ms. McKnight testified that the Union did not receive a request from the Applicant to appeal the decision of the Executive Committee to abandon her grievance. Ms. McKnight testified that, if the Applicant had made such a request, it would have been referred to the Union's Executive Committee (presumably together with the corrected information as to the outcome of the Applicant's court case).

[38] No evidence was presented that the decision of the Union's Executive Committee to abandon the Applicant's dismissal grievance was formally transmitted to the Applicant or that information was provided to the Applicant with respect to the procedure for appealing the decision of the Executive Committee.

Relevant statutory provisions:

[39] Section 25.1 of *The Trade Union Act* provides as follows:

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

Argument of the Parties:

[40] The Applicant argued that the Union failed to fairly represent her in a number of respects. Firstly, the Applicant argued that the Union failed to properly investigate the December 19, 2006 incident and, in particular, the Union failed to properly investigate the difficult circumstances that the Applicant was experiencing at the time this incident occurred.

[41] Secondly, the Applicant argued that the Union acted on the basis of incorrect information that it obtained, not from the Applicant, but from rumors in the community. To which end, the Applicant argued that she did what she was asked to do (or at least half of what she was asked to do) when she immediately informed the Union after she learned the disposition of her *Criminal* charge. The Applicant argued that the Union failed to contact her; failed to inform her that the Executive Committee was considering the disposition of her grievance; and thus failed to give her an opportunity to present her case to the Executive Committee. The Applicant argued that there is no duty on a grievor to maintain communication with his/her union and took the position that the Union, as the exclusive bargaining agent for the Applicant, was responsible for maintaining communication with her.

[42] Thirdly, the Applicant argued that, not only did the Union proceed on the basis of incorrect information (information which it did not attempt to confirm with either the Applicant or the Courts), the Union also did not get updated advice from Ms. Rayner, the Union's National Service Representative, regarding the potential for obtaining a satisfactory outcome for the Applicant in light of her acquittal.

[43] Fourthly, the Applicant argued that the December 19, 2006 incident was a momentary flare up at a time when the Applicant was experiencing difficult personal circumstances and was under a great deal of pressure. To which end, the Applicant took the position that, while there was no guarantee that she would ultimately win her dismissal

grievance, the Union (if the Union had properly turned their mind to the issue) should have realized that she, at least, had an arguable case. For example, the Applicant observed that, pursuant to the terms of the collective agreement, the Employer would not be able to rely on past disciplinary incidents that occurred more than three (3) years prior to her dismissal.

[44] Finally, the Applicant observed that this was a dismissal grievance and, as such, the stakes were very significant for the Applicant; the abandonment of her grievance meant that she lost the chance to challenge the Employer's decision to dismiss her. Because of the importance of the "critical job interest" at stake (her continued employment), the Applicant argued the Union owed a higher duty to the Applicant to ensure that her grievance was properly handled and that her interests received due consideration.

[45] The Applicant argued that the Union's errors (failing to adequately investigate, proceeding on the basis of incorrect information, failing to give prior notice to the Applicant, and failing to get updated advice from the Union's National Service Representative), when considered in light of the critical job interests involved, were sufficiently negligent to be "arbitrary" within the meaning of s. 25.1 of the *Act*. In the alternative, the Applicant argued that the Union conduct was indicative of bad faith on the part of the Union in representing the interests of the Applicant.

[46] With respect to the appropriate remedy, the Applicant asked this Board to direct the Union to file (or re-file) and process a grievance on behalf of the Applicant and to waive any timeline or other restrictions in the Union's collective agreement with the Employer. In addition, because the Applicant took the position that the relationship between her and the Union had been irreparably harmed by the Union's conduct, the Applicant also sought an Order from the Board that the Applicant be granted separate standing during the grievance proceedings and that the Union be directed to pay the cost of independent legal counsel for the Applicant during her grievance proceedings. Finally, the Applicant also sought an Order from this Board directing the Union to reimburse her for the cost of attending before this Board during these proceedings, together with the expense of her counsel doing so as well.

[47] The Applicant relied on this Board's decision in *William Petite v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*, [2009] S.L.R.B.D. No. 21, 2009 CanLII 27858, LRB File No. 158-08.

[48] In response, the Union took the position that they satisfied their obligations to the Applicant pursuant to section 25.1 of the *Act*. The Union pointed to the evidence that they investigated the December 19, 2006 incident; that they argued in her defense during the January 23, 2007 meeting with the Employer (asking that Employer to reconsider its decision); that they filed a grievance on her behalf; and that they sought advice from their National Service Representative. The Union argued that they took a reasonable view of the information that they had available at the time; and that they made a reasonable decision based on that information. To which end, the Union took the position that their conduct was reasonable and appropriate under the circumstances. The Union argued that, if errors were made in representing the Applicant, such errors were not of the nature or degree that could or should represent a violation of the *Act* and asked the Board to be mindful of the Applicant's role in any errors that might have been made by the Union.

[49] The Union noted that the Applicant was asked, but failed, to keep the Union informed as to the status of her *Criminal* charge. The Union argued that, at any given time, they may be handling over 100 grievances. As a consequence, the Union's practice at the time was to require grievors to maintain communication with the Union, which the Applicant failed to do. The Union argued that they proceeded on the basis of incorrect information precisely because the Applicant failed to keep them informed; to maintain communication as she was requested. The Union argued that they reasonably relied on information that they believed was reliable at the time. The Union noted that, when they heard a rumor from someone that they believed to be a family member of the Applicant (in September of 2007), they had not heard from the Applicant in months (since January of 2007). The Union argued that, under these circumstances, it was reasonable for the Union to rely on the limited information that they had about the Applicant's situation given that the Applicant had not made any effort to keep the Union informed. To which end, the Union argued that their reliance on erroneous information about the disposition of the Applicant's *Criminal* charge was not indicative of arbitrariness or bad faith on the part of the Union.

[50] Furthermore, the Union argued that, even if they had correct information regarding the Applicant's *Criminal* charge in September of 2007, they would have come to the same conclusion as to the disposition of the Applicant's dismissal grievance. The Union reminded the Board that the December 19, 2006 incident was the second time the Applicant had

breached her Last Chance Agreement and that the Applicant's conduct toward her supervisor was contrary to her obligations under that Agreement. The Union argued that, just because they had argued that the Applicant's conduct was merely a "momentary flare up" during their meeting with the Employer on January 23, 2007, doesn't mean the Union wasn't fully aware of the seriousness of the Applicant's conduct, particularly so in light of the Employer's zero tolerance for harassment in the workplace.

[51] In addition, the Union argued that members of the Executive Committee were briefed on the Applicant's prior history in the workplace, including the original July 8, 2006 incident (when she kicked a coworker), an incident in April of 2006 (when she yelled at a patient), and the incident in 2002 (when she got into an "altercation" with another coworker). The Union argued that the collective agreement would not have prevented the Employer from considering the 2002 incident because of subsequent similar incidents. The Union took the position that there was no basis to assume that the Executive Committee's decision would have been any different had the Applicant kept the Union informed and they had the correct information as to the disposition of her *Criminal* charge. Simply put, the Union argued that there was no reasonable basis to assume that the Union could have obtained a satisfactory result for the Applicant had they advanced the Applicant's grievance irrespective of the outcome of her *Criminal* charge.

[52] The Union argued that, even if the Board accepts that the Union made an error, there was no evidence that the Union acted arbitrarily or in bad faith. The Union noted that there was no evidence of personal hostility or animosity toward the Applicant; nor was there any evidence that the Union conduct was perfunctory, seriously negligent or anything other than genuine.

[53] The Union relied upon the decision of the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, 9 D.L.R. (4th) 641, 84 CLLC 12181, for the proposition that a griever has no absolute right to assume that his/her grievance will be taken to arbitration. The Union also relied upon the decision of the British Columbia Labour Relations Board in *James Judd v. Canadian Energy and Paperworkers' Union of Canada, Local 2000*, [2003] B.C.L.R.B.D. No. 63, 91 C.L.R.B.R. (2d) 33, and the decisions of this Board in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, and *Kathy Chabot v. Canadian Union of Public Employees, Local 4777*,

[2007] Sask. L.R.B.R. 401, LRB File No. 158-06, for the proposition that narrow and very specific circumstances are required to sustain a violation of s. 25.1 of the *Act*; circumstances which the Union argued were not present in this case.

Analysis and Decision:

[54] This Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was well summarized in *Laurence Berry v. Saskatchewan Government Employees' Union*, *supra*, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
> >
> > *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
> >
> > *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*
>
> *The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*

> *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

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

> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[55] The obvious corollary of the above captioned description of the duty of fair representation was articulated by this Board in *Kathy Chabot v. Canadian Union of Public Employees, Local 4777, supra*; that being, that very narrow and specific behaviour/conduct on the part of a trade union is required to sustain a violation of the statute. A common misconception is that this Board is a governmental agency established to generally hear complaints about trade unions. However, from a plain reading of s.25.1 of the *Act*, it is apparent that this Board does not sit in general appeal of each and every decision made by a trade union in the representation of its membership. To sustain a violation of s. 25.1, the Board must be satisfied that a trade union has acted in a manner that is “arbitrary” or that is “discriminatory or that it acted in “bad faith”. These terms are not mere chalices into which applicants may pour their criticisms of their trade union for presentation to the Board. These terms have specific meanings that define the threshold in the exercise of this Board’s supervisory authority. For example, the Board has no jurisdiction to sustain a violation on the basis that a trade union could have provided better representation for a member or on the basis that a trade union did not do what the member wanted. Similarly, the Board does not have jurisdiction to sustain a complaint from a member that he/she received poor service and/or was treated rudely or that there were delays in receiving phone calls or correspondence. While such allegations may be relevant to the Board’s understanding of the circumstances of an alleged violation of s.25.1, the Board supervisory responsibility is focused on determining whether or not the impugned conduct of a

trade union has achieved any of the thresholds of arbitrariness or discrimination or bad faith. The theory being that conduct not achieving one of these thresholds is more appropriately a matter for that trade union's internal complaint processes and/or for consideration by the membership during the election of their leadership.

[56] For example, this Board has held that there is no breach of the duty of fair representation where a trade union declines to file or withdraws a grievance, if it took a reasonable view of the circumstances and if it made a "thoughtful decision" not to advance the grievance. See: *I.R. v. Canadian Union of Public Employees, Local 1975-01, et al.,* [2006] Sask. L.R.B.R. 344, LRB File No. 139-03; and *Dave Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555, et al.,* [2007] Sask. L.R.B.R. 648, LRB File No. 028-07.

[57] Similarly, this Board has recognized that a trade union does not breach its duty of fair representation by settling a grievance without the grievor's consent, even if it does so over the objection of the grievor, unless it acts in a manner that is seriously negligent, arbitrary, capricious, discriminatory or wrongful. See: *Randy Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650*, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02. Similarly (and as already indicated), this Board has confirmed that it does not "sit on appeal" of a trade union's decision not to advance a grievance and, in particular, will not decide if a trade union's conclusion as to the likelihood of success of a grievance was correct or minutely assess each and every decision made by a trade union in representing its members. See: *Kathy Chabot v. Canadian Union of Public Employees, Local 4777, supra.*

[58] This Board has acknowledged that many factors are taken into consideration by a trade union in deciding whether or not to advance a grievance, one of which is the likelihood of obtaining a favourable outcome for the grievor. But there are other factors that may also legitimately influence a trade union's decision, the most obvious being the cost of proceeding to arbitration. By way of further example, this Board has held that it is not inappropriate for a trade union to consider the injury to its credibility and relationship with an employer by advancing a questionable grievance. See: *Edward Datchko v. Deer Park Employees' Association*, [2006] Sask. L.R.B.R. 354, LRB File Nos. 262-03 & 263-03.

[59] The exclusive right to represent a unit of employees brings with it many responsibilities for a trade union. In representing a member in grievance proceedings, a trade union may be required to make a number of difficult decisions, including how best to investigate the circumstances of a dispute between a member and his/her employer, assessing the relative strength or merits of a potential grievance; determining whether or not to advance a desired grievance and, if so, deciding how best to present and prosecute the case on behalf of the grievor. In doing so, the trade union must take into account both the interests and needs of the individual member(s) directly affected by the grievance and the collective interests of the remaining members of the bargaining unit, including how best to allocate the trade union's scarce resources.

[60] The cases are legion that demonstrate the point that this Board's supervisory responsibility pursuant to s. 25.1 is not to ensure that any particular member achieves his/her desired result; but rather the purpose of this provision is to ensure that, in exercising their representative duty, a trade union does not act in an arbitrary or discriminatory fashion or in bad faith.

[61] Turning to the case at hand, there was no allegation (and the Board saw no evidence) of discriminatory conduct on the part of the Union. In addition, the Board saw no evidence to sustain an allegation that the Union was motivated by "bad faith" within the meaning ascribed for purposes of section 25.1 of the *Act*. Simply put, the Board saw no evidence of any improper purpose, personal hostility toward the Applicant, or dishonesty on the part of the Union in their representation of the Applicant.

[62] Understandably, much of the argument of the parties was focused on whether or not the Union's conduct was "arbitrary". The Applicant alleging that the Union's conduct was perfunctory in that they did not properly investigate the circumstances of her dismissal, that the Union proceeded on the basis of incorrect information; that they did not take a thoughtful view of the potential for obtaining a successful outcome; and that they did not notify her in advance of their decision to abandon her grievance. On the other hand, the Union argued that, if errors were made in representing the Applicant, such errors were not of a nature or degree sufficient to sustain a violation of s. 25.1 of the *Act*.

[63] In *Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on the definition of "arbitrariness" and the jurisprudence of labour boards in distinguishing "mere negligence" from the kind of conduct necessary to sustain a violation of s.25.1. The Board stated the following at pp. 34 to 38:

> *[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake.*
>
> *[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:*
>
> > *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*
>
> *And further, at 194-95, as follows:*
>
> > *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
> >
> > > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to*

> *note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
>
> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment*

> *will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
>
> . . .
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[64] Having carefully considered the evidence in these proceedings, the Board was satisfied that the Union made errors in representing the Applicant in his dismissal grievance. In the Board's opinion, these errors were that the Union proceeded on the basis of incorrect information as to the disposition of her *Criminal* charge and that the Union failed to provide reasons for its decision to the Applicant, together with information as to her right to ask the Union's Executive Committee to reconsider its decisions. While neither of these errors may have been individually sufficient to sustain a violation of s.25.1, their combined result was a failure to fairly represent the Applicant.

[65] There was no dispute that the Union preceded on the basis of incorrect information as to the disposition of the Applicant's *Criminal* charge. Rather, the Union defended its action in three (3) respects. Firstly, the Union argued that their error was a direct result of the Applicant's failure to keep the Union informed as she was requested and required to do. The Union argued that, had the Applicant done so, the Executive Committee would not have proceeded on the basis of incorrect information. Secondly, the Union argued that it reasonably relied on information that it received from someone whom they assumed was a reliable source. Thirdly, the Union argued that the members of the Executive Committee had more than enough information to conclude that there was no reasonable chance of obtaining a favourable outcome for the Applicant irrespective of the outcome of her *Criminal* charge. The Applicant argued that it wasn't her responsibility to keep the Union informed; it was the Union's responsibility to ensure that it was proceeding on the basis of correct information.

[66] In the Board's opinion, the disposition of the *Criminal* charge was not the central issue in determining whether or not the Applicant was appropriately dismissed by the Employer. The Applicant was dismissed for her conduct on December 19, 2006 for "anger and inappropriate action" toward her supervisor. The *Criminal* charge related to the July 8, 2006 incident wherein the Applicant kicked a coworker. The disciplinary consequences of the July 8, 2006 incident were already fully meted out with the execution of the Applicant's Last Chance Agreement. If the Applicant was of the view that the finding of "not guilty" on the *Criminal* charge exonerated or otherwise excused her misconduct in the workplace and thus voided the Last Chance Agreement, she was mistaken. The *Criminal* proceedings determined the *Criminal* consequences of the Applicant's conduct on July 8, 2006; not the disciplinary consequences of her actions. On the other hand (and as already indicated), the disciplinary consequences associated with the Applicant's conduct on July 8, 2006 had already been meted out by the

Employer. While the decision to wait for the result of the *Criminal* charge was understandable under the circumstance, the disposition of the charge, with all due respect, was not particularly probative with respect to the December 19, 2006 incident for which she was dismissed (other than the July 8, 2006 incident was the explanation for the existence of the Last Chance Agreement). The substantive issue being; whether or not the Applicant's conduct on December 19, 2006 violated the terms of her Last Chance Agreement.

[67] However, having collectively decided to wait for the disposition of the *Criminal* charge, the Union erred in proceeding on the basis of a rumor in the community (ie. in failing to verify that information from either the Court or the Applicant directly). Simply put, the Union proceeded on the basis of erroneous information; the very information for which the grievance had been placed in abeyance. The Board accepts the evidence of Ms. Martin that the Union received the erroneous information from someone whom the Union believed was a family member of the Applicant and, thus, was a reliable source. Ms. Martin was forthright and thoughtful in her testimony and was cross-examined by Counsel for the Applicant on both the information she received and how she received this information. The Board saw no indication that Ms. Martin's conduct was motivated by anything other than a genuine desire to monitor the numerous grievances for which she was responsible and to provide the Union's Executive Committee with the relevant and necessary information to enable them to make an informed decision.

[68] This Board has held that honest mistakes and/or errors in judgment, if reasonably made, do not amount to a violation of the Union's duty of fair representation. See: *Glynna Ward v. Saskatchewan Union of Nurses, et al.,* [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88 and *Gilbert Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92. While the reasonable reliance on erroneous information could easily be characterized as the kind of honest mistake falling outside of this Board's supervisory responsibilities, the Union compounded the error by failing to communicate its decision (to abandon the Applicant's grievance) to the Applicant in a timely fashion and by failing to provide the Applicant with information as to her right to ask the Union's Executive Committee to reconsider its decision. The result was to leave the Applicant without the very knowledge she required to properly respond to her concern that the Union had decided to abandon her grievance based on incorrect information.

[69] The evidence was that the Applicant learned of the abandonment of her grievance by phoning the Union in November of 2007. There was no evidence that the Union wrote to the Applicant to explain the decision of the Executive Committee or her right of appeal. Absent correct information, the Applicant embarked upon the wrong process in attempting to express her concerns.

[70] In coming to the conclusion that the Union failed to fairly represent the Applicant, the Board is mindful that the Applicant's own conduct, in failing to keep the Union informed as to the status of her *Criminal* charge, helped create the very circumstances of which she now complains. While the Applicant promptly notified the Union after she won her *Criminal* charge, she otherwise failed to ensure the Union was informed of the status of these proceedings as she had been requested to do. The Union's practice at the time was to require grievors to maintain communication with Union officials. In light of the number of grievances being administered by the Union, this practice was not unreasonable. However, this was a dismissal grievance and, thus, the critical job interests for the Applicant were high. The abandonment of the Applicant's dismissal grievance was determinative of her continued employment with the Employer (or rather the loss thereof). The seriousness of the consequences for the Applicant is part of the circumstances within which the actions of the Union must be measured.

[71] On the other hand, the Board was satisfied that the Union appropriately investigated both the July 8, 2006 and December 19, 2006 incidents; that the Union sought advice from their National Service Representative; and that reasonable procedures were in place for monitoring outstanding grievance. Similarly, the Union's practice of not giving advance notice to affected grievors of the deliberations of the Executive Committee is not necessarily unreasonable either, provide affected members have some opportunity to appeal that decision (by a reconsideration or some other appeal process). The defect in the Union's procedures occurred when it failed to advise the Applicant of the decision of the Executive Committee in a timely fashion and inform her of her right of appeal.

[72] Upon finding a violation of s.25.1 of the *Act*, the remedial goal of this Board is to place the Applicant in the position she would have been but for the error of the Union. In this Board's opinion, the proper remedy is to remit the Applicant's grievance back to the Union's Executive Committee, together with any additional information which the Applicant may wish to present, and have that Committee reconsider its prior decisions in light of the correct information

as to the disposition of the Applicant's *Criminal* charge. The merits of the Applicant's grievance, and the efficacy of pursing it, are matters to be determined by the Union's Executive Committee.

[73] However, remitting the Applicant's grievance back to the Union raises another issue for this Board; that being whether or not it is appropriate for this Board to waive the time and other restrictions in the collective agreement so as to permit the Union to re-file or reactivate the Applicant's dismissal grievance (if the Executive Committee elects to reverse its prior decision).

[74] In November of 2007, when the Applicant contacted the Union, she was informed that the Union erroneously understood she had been convicted and that the Union had already decided to abandon her grievance. Rather than asking the Union to reconsider it decision at that time, the Applicant filed a Statement of Claim in the Court of Queen's Bench alleging wrongful dismissal. Then, upon coming to the understanding that this Board was the appropriate forum for her concerns, the Applicant then brought her application to this Board. As indicated, no evidence was lead as to when the Applicant commenced her proceedings in the Court of Queen's Bench; nor when she was advised that she was in the wrong forum. Nonetheless, by the time the Applicant filed her application with this Board, two (2) years had passed from when the Union decided to abandon her grievance.

[75] This Board has previously stated that the timely resolution of outstanding grievances is an important component of maintaining amicable labour relations in the workplace and that the parties (that are the subject matter of outstanding grievance and claims) have the right to expect that claims, that are not advanced and prosecuted on a timely basis, have been abandoned. See: *Dishaw v. Canadian Office & Professional Employees Union, Local 397,* 2009 CanLII 507 (Sk. L.R.B.), LRB File No. 164-08. It is generally accepted that the scale of delay that the Board will find acceptable is measured in months; not years. Simply put, this Board must approach with caution the granting of a remedy affecting labour relations in a workplace (such as, waiving the time restrictions in a collective agreement) following a delay of the magnitude present in this case.

[76] In this regard, the Board accepts that both the Union and the Employer would have been/should have been aware that Applicant disputed her dismissal and the Union's decision to abandon her grievance upon the filing of her Statement of Claim in the Court of

Queen's Bench. In addition, the Employer elected not to participate in these proceedings and, thus, the Board must be cautions not to infer injurious consequences (ie. to labour relations in the workplace) if the parties elect not to advance that issue.

[77] As a consequence, I am satisfied that the delay of two (2) years in bringing her application to this Board (while excessive) does not impair the authority of this Board to grant the remedy set forth herein. In coming to this conclusion, the Board is satisfied that both the Employer and the Union had prior knowledge of the Applicant's allegations.

[78] Finally, the Applicant sought additional remedies from this Board which I am not prepared to grant; specifically independent standing in any subsequent grievance proceedings and reimbursement for legal and other expenses. In the Board's opinion, these are extraordinary remedies granted to redress conduct that was simply not present in the Union's representation of the Applicant.

Conclusion:

[79] For the foregoing reasons, the Board finds that the Union failed in its duty to fairly represent the Applicant as prescribed by s. 25.1 of the *Act*. An Order of this Board shall issue as follows:

1. The Applicant shall have leave to ask the Union's Executive Committee to reconsider its decision to abandon her dismissal grievance; being grievance no. 07-07. The Applicant shall do so within thirty (30) days and shall do so in writing, stating her reasons. Any deadline or other restrictions in the Union's bylaws or constitution related to appeals of decisions of the Executive Committee shall be waived.
2. If the Applicant asks the Union's Executive Committee to reconsider its decisions, the matter shall be presented to that Committee for consideration within thirty (30) days of receipt of the Applicant's request.
3. If the Union's Executive Committee determines not to proceed with the Applicant's dismissal grievance, the Committee shall give reasons for its decision in writing to the Applicant within thirty (30) days.
4. If the Union's Executive Committee determines to proceed with the Applicant's dismissal grievance, any time limits or other restrictions in the collective agreement related to the grievance procedure shall be waived.

5. If the Union's Executive Committee determines to proceed with the Applicant's dismissal grievance but decides to abandon the grievance at any subsequent stages in the grievance procedure, the Committee shall give reasons for its decision in writing to the Applicant within thirty (30) days.

[80] This Board shall remain seized of this matter and any matters that may arise with respect to the implementation of this decision and resulting Order.

DATED at Regina, Saskatchewan, this 15th day of **April, 2010.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson