The Labour Relations Board
Saskatchewan

R.R., Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4777 and PRINCE ALBERT PARKLAND HEALTH REGION, Respondents

LRB File No. 057-10; July 26, 2011
Vice-Chairperson, Steven D. Schiefner, sitting alone.

For the Applicant:	Mr. Trent Forsyth.
For the Respondent Union:	Ms. Crystal Norbeck & Mr. Will Bauer.
For the Respondent Employer:	No one appearing.

Duty of Fair Representation – Applicant alleges trade union failed to fairly represent her in grievance proceedings involving her former employer - Board not satisfied that trade union's conduct was arbitrary or otherwise in violation of *The Trade Union Act.*

The Trade Union Act, s. 25.1

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: The Canadian Union of Public Employees, Local 4777 (the "Union") is the exclusive bargaining agent for a unit of employees of the Prince Albert Parkland Health Region (the "Employer") working at the Pineview Terrace Lodge in Prince Albert. The Applicant, R.R., was, at all times relevant to these proceedings, a member of the Union's bargaining unit and an employee of the Employer until her employment was terminated by the Employer on February 11, 2008.

[2] On June 4, 2010, 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 termination by the Employer. The Union filed a Reply denying the allegations. The Employer elected not to participate in these proceedings.

[3] The Board heard evidence in the Applicant's application commencing on December 21, 2010 in Saskatoon, Saskatchewan, and continuing on April 28 and 29, 2011. The Applicant testified on her own behalf and called two (2) former coworkers from the workplace. The first witness, M.J.B., had also been employed as a Special Care Aide at the Pineview Terrace Lodge, while the second witness, R.A.F., worked in the kitchen. The Union called

Rhonda Heisler, the Union's National Service Representative and Ms. Lori Martin, the Vice-President of the Union. The Union also called Robin Knudsen, who was the Employer's Manager of Labour Relations at times relevant to these proceedings.

[4] In lieu of oral arguments, the parties elected to file written arguments with the Board; the last of which documents, being an argument in reply filed by the Applicant, was received by the Board on June 28, 2011; which date shall represent the last day of hearing pursuant to s. 21.1 of *The Trade Union Act,* R.S.S. 1978, c.T-17 (the "*Act*").

Facts:

[5] The evidence in these proceedings was personal and, at times, explicit. As a consequence and for privacy reasons, the Board has elected to anonymise the names of the Applicant, her witnesses, and other employees of the workplace through the use of initials rather than full names. For privacy reasons, the Board has also elected to exclude much of the specific allegations of improper conduct and the details of sexually-explicit conversations where such evidence was not directly relevant to the determinations this Board was required to make.

[6] The Applicant was a young woman; twenty-nine (29) years of age at the time of the hearing. Until her dismissal, the Applicant worked as a Special Care Aide at Pineview Terrace Lodge (the "Lodge") in Prince Albert, Saskatchewan. The Lodge was a special care home primarily designed for seniors but also providing institutional, long-term care for individuals requiring such services from Prince Albert and the surrounding area. Because of the Lodge's northern location, many of the residents of that facility were of Aboriginal ancestry.

[7] As a Special Care Aide, the Applicant was responsible for assisting with the daily living needs of residents of the Lodge, most of whom required some level of daily personal care. Simply put, as a Special Care Aide, the Applicant was responsible for assisting in a wide range of daily needs, including helping residents get up in the morning, and assisting with hygiene needs as necessary depending on the physical and cognitive capacities and/or impairments of individual residents. The capacity of residents varied, with some residents of the Lodge being quite independent while others were frail, vulnerable and/or of limited capacity.

[8] The Applicant began working at the Lodge while she was completing her certificate in Home Care/Special Care Aide. After completing her training, the Applicant worked

at the Lodge on a casual basis; and slowly, over time, acquired more hours of work, until by 2006, she was working full time.

[9] While working at the Lodge, the Applicant became friends with M.J.B., another Special Care Aide. The two (2) coworkers had a lot in common, were of similar age, and often worked similar shifts. M.J.B. described the Applicant has he best friend. Both the Applicant and M.J.B. appeared to the Board as compassionate and caring individuals. They clearly both enjoyed working with and caring for the residents of the Lodge. In this regard, the Applicant's compassion for the individuals within her care was apparent. On the other hand, the Applicant also had an open personality and a playful sense of humour which, coupled with inexperience, led to inappropriate conduct in the workplace.

[10] In early 2008, a number of the Applicant's coworkers approached C.S., a Registered Nurse working at the Lodge, and complained that the conduct of the Applicant and M.J.B. had become inappropriate. The coworkers complained of escalating, explicit sexual talk between the Applicant and M.J.B., with other staff, and with residents in the Lodge. The coworkers cited a number of examples of inappropriate conduct in the workplace on the part of the Applicant. The Registered Nurse recorded these concerns in a document dated February 3, 2008 and provided this document to management of the Lodge. In response to the allegations, the Employer placed the Applicant and M.J.B. on suspension pending the outcome of an investigation. The Employer conducted an investigation in the workplace that included interviewing both residents and staff as to the conduct of both the Applicant and M.J.B.

[11] Following their suspension, both the Applicant and M.J.B. contacted their shop steward and sought assistance from the Union. Union officials approached management and sought clarification as to why the two (2) members had been suspended. Union officials were allowed to read the February 3, 2008 document containing the complaints but were not allowed to share it with either the Applicant or M.J.B. Union officials met with the Applicant and M.J.B. on February 7, 2008 and outlined the general nature of the allegations against them. By this point in time, the Employer had concluded its investigation and had asked the Applicant to attend an investigation meeting with management at the Lodge the next day. In preparing for this meeting, the Union officials advised the Applicant to "*be honest*" during her meeting with management.

[12] The Applicant attended a meeting with management on February 8, 2008. Representatives of the Union were asked to and did attend this meeting as well. During the meeting, the Applicant was either asked or given an opportunity to comment on the various allegations against her. During this meeting, the Applicant admitted to coaching a male resident to ask M.J.B. to "*show me your boobies*" when he saw her at work; she admitted to joking with a male resident and asking him if he wanted to "*have his balls shaved*" while she was bathing him; she admitted to combing the hair of a male resident of First Nations ancestry into a "*Mohawk*" after washing it; she admitted to coaching a resident to say "*gone smoke'n*" when asked where M.J.B. was; and she admitted to discussing matters of an explicit sexual nature with residents of the Lodge or with coworkers when residents were present. A number of examples were identified.

[13] During the February 8, 2008 meeting, the Applicant was asked if she had any comments; at which point, the Applicant identified a number of incidents where other staff had engaged in what she felt was conduct similar to that which she had been accused of (*i.e.:* practical jokes with residents and sexually-explicit conversations in the workplace). The Applicant also advised management that her actions were meant in good humour and intended to make people laugh. The Applicant stated that, if she had known her behaviour was offensive or disrespectful, she would have stopped. The Applicant went on to say "*how sorry [she] was that [her] actions were perceived this way*" and that she "*would never want to hurt anyone*".

[14] On February 9, 2008, the Applicant left the country on a previously-approved vacation.

[15] On February 11, 2008, the Employer drafted a written notice to the Applicant terminating her employment. The rationale of the Employer for doing so was contained in the body of its letter, which reads as follows:

> *Dear R.:*
> *This letter is to inform you that your employment with the Prince Albert Parkland Health Region is terminated – effective immediately.*
>
> *Through documentation submitted by co-workers, investigatory meetings and with verification from residents, we have determined that your conduct has been inappropriate, offensive to others and disrespectful to all who have been subjected to it. This is harassment of fellow employees and it is abuse of the residents who have experienced it. Your conduct is unacceptable and will not be tolerated.*

> *As a result of the serious and culminating nature your actions, the trust of clients and the employer has been irreparably damaged. The Employer considers the above mentioned incidents gross misconduct and in accordance with CUPE/SAHO Collective Agreement Article 10: Discipline/Discharge, we have determined that termination is the appropriate course of action.*
>
> *Please return your name tag and any other property of the Health region within the next 24 hours. Any retaliation against the Health Region, Staff or other involved persons will not be tolerated.*
>
> *Sincerely,*
>
> *Marj Bodnarchuk RN*
> *Director of Care*

[16] The Employer also terminated the employment of M.J.B., ostensibly for the same reasons that the Applicant was dismissed.

[17] At the time of her termination, the Applicant was out of the country. Nonetheless, the Union filed a grievance with respect to her dismissal on February 14, 2008. The Union also filed a grievance on behalf of M.J.B. related to her termination.

[18] The Union asked their Regional Office for assistance with the two (2) termination grievances. The Union's Regional Office originally assigned Ms. Sharleen Rayner (*nee*: Haarstad), a National Staff Representative, to assist the local with these matters. However, for medical reasons, Ms. Rayner was unable to continue. At which point, Ms. Heisler was appointed. The transition between National Staff Representatives resulted in a delay and certain confusion for the Applicant.

[19] Early in the discussions regarding the dismissals, the issue of a permissive workplace culture arose as the Applicant had alleged that other workers in the workplace had also engaged in playful banter both between coworkers and with residents, including conversations involving sexually-explicit topics. Ms. Rayner had identified this as a potential mitigating factor to be considered by the Union. When Ms. Heisler took over responsibility for the Applicant's file, she noted that this issue had been identified but needed to be researched further.

[20] While the Union had originally suggested to the Applicant that she should be present during the presentation of her termination grievance to the Employer, this did not take

place. By the time the Applicant's grievance was discussed with the Employer, the Employer and the Union were attempting to resolve multiple grievances involving a number of employees. On the occasion that the Applicant's grievance was discussed, the Employer had called the meeting with the Union on short notice. The Applicant's grievance was discussed with the Employer during a grievance meeting that was held on March 20, 2008. The Applicant was not informed that her grievance was being presented at this meeting and was not in attendance for the meeting. Ms. Heisler was, however, in attendance for the grievance meeting.

[21] During the grievance meeting, when the Applicant's grievance was discussed, Union officials questioned the process used by the Employer to investigate the claims against the Applicant. The Union also argued that a culture existed in the workplace involving playful banter about sexually-explicit topics and asked the Employer to conduct further investigations. Following the March 20, 2008 grievance meeting, the Applicant was informed of what happened at the meeting and asked to record details of occasions when other workers had engaged in explicit conversations; which she did.

[22] On April 17, 2008, the Applicant met with Union Officials to discuss her grievance. Both Ms. Heisler and Ms. Martin attended this meeting. During this meeting, Union officials discussed the various incidents that had formed the basis of the Employer's decision to terminate the Applicant's employment. In most cases, the Applicant admitted to the impugned conduct. The minutes from this meeting indicate that the Union also asked the Applicant whether or not management of the Lodge or anyone else had discussed with her appropriate and non-appropriate conduct in the workplace, to which she answered "*some .. something in bathroom about respect.*" The Union also reviewed with the Applicant her work history at the workplace, including previous incidents of conduct involving either coaching by the Employer or formal discipline. The Union also discussed the Applicant's allegations that other employees had engaged in similar conduct. Finally, the Union discussed the issue of remorse and whether or not the Applicant understood that her conduct was inappropriate.

[23] Ultimately, the Union was unsuccessful in persuading the Employer to modify the discipline imposed upon the Applicant and/or to obtain her return to the workplace. The Employer formally denied the Applicant's grievance on or about August 29, 2008. By this time, the Union was already considering its options for proceeding to arbitration with the Applicant's

termination grievance. To which end, Ms. Heisler was asked to give the Union an opinion on the Union's chances of success at arbitration.

[24] Ms. Heisler testified that her conclusion was that the Applicant had a weak case and that her recommendation to the Union was that they not proceed to arbitration. Ms. Heisler researched cases with similar circumstances and was surprised to learn of the high standard of conduct expected of employees working with vulnerable persons. Ms. Heisler testified that the high number of incidents, together with the fact that the Applicant had admitted to most of them, presented a serious problem for the Union in obtaining a favourable outcome for the Applicant through arbitration. Ms. Heisler testified that she reviewed a number of arbitration cases involving elder abuse and that very few would have supported the imposition of a lesser penalty for the Applicant. Ms. Heisler also came to the conclusion that attempting to argue that a permissive work culture existed in the workplace would also not work as it would tend to undermine the Applicant's need to demonstrate remorse; something that was, in Ms. Heisler's opinion, also a weakness in the Applicant's case. Ms. Heisler testified that the Applicant did not appear to be genuinely remorseful for her conduct; only remorseful that others had perceived her conduct as being inappropriate. While this might have been a subtle distinction, Ms. Heisler testified that her research indicated that a clear demonstration of remorse appeared to be a key factor in any of the cases where a trade union had been successful at arbitration.

[25] In cross-examination, Ms. Heisler admitted that she relied upon the Applicant's admissions and did not independently interview either staff or residents of the Lodge. Ms. Heisler also admitted that her recommendation to the Union was that M.J.B.'s case was stronger because M.J.B. had not admitted to anything and because, in Ms. Heisler's opinion, she had demonstrated greater remorse.

[26] Ms. Heisler's analysis and recommendations were presented to the Union in the fall of 2008. On or about December 4, 2008, the Union's Executive Committee accepted the recommendation of Ms. Heisler and decided not to proceed to arbitration with the Applicant's grievance.

[27] The Applicant testified that, on more than one occasion, she had to repeatedly contact the Union to find out what was happening with her grievance proceedings. Also complicating the situation was the fact that the Applicant was out of the country for significant

periods of time. Such was the case in December of 2008, when the Applicant contacted the Union to enquire as to the status of her grievance proceedings. At that time, the Union indicated that a letter dated December 4, 2008 had been prepared for her regarding her grievance. The Union's letter, which was not received by the Applicant until January 19, 2009, provided as follows:

> *December 4, 2008*
>
> *R.R.,*
>
> *After careful consideration and deliberation, and on the advice of our Union Representative, we feel that we cannot proceed any further with your grievance. If you would like to appeal our decision to the Executive Committee, you may do so at our next meeting on January 6th, 2009, at the address provided above.*
>
> *Sincerely,*
> *Lori Martin*
> *Prince Albert Vice President, CUPE 4777*

[28] The Applicant sought an explanation from the Union for the decision to abandon her grievance. The Union's explanation was contained in various emails from the Union's staff representative to the Applicant; of particular significance to these proceedings were two (2) emails from Ms. Heisler to the Applicant dated January 28, 2009 and February 13, 2009, which provided, in part, as follows:

> *January 28, 2009*
>
> *Hi R.,*
>
> *I forgot that you are out of country so email will have to do.*
>
> *There are many things the union considers when deciding whether or not to pursue a grievance to arbitration after the grievance procedure has been exhausted and denied by the employer. A few of the issues for consideration include, but are not limited to:*
>
> *1. the chances of success at arbitration- this involves many considerations such as the nature/seriousness of the violation or allegation, case law and precedence set by other similar grievances that have gone to arbitration, the possibility of setting a precedent for the local and for all SK health care locals, etc.*
>
> *2. the high cost/resources involved by going to arbitration*
>
> 3. *the impact on the local as a whole.*
>
> *It is my job to provide advice to the local regarding grievances and arbitrations.*

With regard to the other grievor mentioned, it would not be appropriate for me to comment.

The "personal violations" or objectionable behavior by the employer as you have described was considered in the whole picture.

The arbitration process is very similar to a court case but it is more of a "layman's court" and is often more relaxed an environment. There is generally an arbitration board comprised of a Chairperson (the Arbitrator) a union nominee and an employer nominee. Both sides of the case are presented, along with witnesses, evidence and argument by both sides. The union either has a rep or our lawyer present the case and the employer usually has their lawyer present their side. In the end, the Board makes a decision by majority vote of the Board and the Arbitrator renders the written decision, usually citing reasons and case law.

Instead of the penal or criminal code, the Saskatchewan Trade Union Act and the Collective Agreement between SAHO and CUPE apply, as well as any other legislation relevant to labour law (provincial OH&S, Labour Standards, Human Rights, etc)

Usually when a local decides against going to arb, the grievor can appear at an executive meeting and make their case about why the decision should be revisited, especially if there is new information or if the grievor thinks something has not been given due consideration. Then the executive will make a decision whether or not to uphold the original decision.

If you were told you can still appeal to the local to revisit or overturn the decision I'm pretty sure they will still be fine with that and your absence out of country will not affect anything. There may be a time limit after you return to hear your appeal and we can advise you about that time limit by email following the next exec. Meeting on Tuesday. When are you returning?

- *hope that answers most of your questions.*

Take care,

Rhonda Heisler
CUPE National Servicing Representative

February 13, 2009

Hi R.,
My apologies as I had to leave the exec. Meeting early and I did not get a chance to bring it up. We are meeting again in the first week of March and I'll be sure to request that this issue be put on the agenda.

The employer's lawyer will undoubtedly argue against your reinstatement on the basis of breach of trust. They won't want to reinstate you because they will assert you have destroyed the working relationship and their trust.

> *Without getting into the whole argument the union would have to use at arbitration, I'll say that you have admitted doing some things you are accused of doing, but appear to take very little responsibility for your actions and are not genuinely remorseful. Rather than taking responsibility, you blame others and speak of your rights being violated. When there is no remorse shown for wrongdoing, it is impossible to convince a Board that the behavior will stop and that trust can be restored. I believe our chances of success are nil.*
>
> *My comments are not a personal reflection of you. This grievance is just too difficult of an argument to win and in considering all factors described in my last email, its one of the reasons the decision to not forward the grievance to arbitration was made.*
>
> *I'll let you know what the executive decides on the issue of appeal.*
>
> *Rhonda Heisler*
> *CUPE National Servicing Representative*

[29] The Applicant was advised of her right to appeal the decision to abandon her grievance to the Union's Executive Committee, which she did. After giving the Applicant an opportunity to be heard, the Union's Executive Committee upheld the decision to abandon her termination grievance. The Applicant was advised of the decision of the Union's Executive Committee by email from the then Acting President of the Union dated February 1, 2010.

[30] Although the M.J.B.'s grievance did not ultimately proceed to arbitration, her grievance was not abandoned when the Union elected not to proceed to arbitration with the Applicant's grievance. Approximately two (2) years after M.J.B.'s termination and before her grievance could proceed to arbitration, the Employer agreed that M.J.B. could return to the workplace. Although it had already abandoned the Applicant's grievance, the Union attempted to negotiate a similar arrangement with the Employer for the Applicant; but was unsuccessful.

[31] M.J.B. testified that she returned to work at the Lodge in January of 2010 and her time away from the workplace had been treated as a suspension. In her testimony, M.J.B indicated that it was not uncommon for employees of the Lodge to have conversations of a sexual nature in the workplace. In cross-examination, M.J.B. admitted that it was not alleged, and she did not admit to, initiating any inappropriate conversations or conduct in the workplace. She also confirmed that she told the Employer that she felt horrible for her participation in the conduct that was occurring in the workplace.

[32] The Applicant testified that she strongly disagreed with the Union's decision to not take her grievance to arbitration. The record demonstrates numerous conversations through emails with various individuals in both the Union and the Canadian Union of Public Employees' Regional Office wherein the Applicant repeatedly sought clarification from the Union regarding their decision and the Union's support for taking her grievance to arbitration. The Applicant testified that, regardless of what the Union thought, she was genuinely remorseful for her conduct and that she told both the Employer and the Union, if she had known her conduct was inappropriate, it would not have occurred.

Argument of the Parties:

[33] Counsel for the Applicant argued a number of reasons that the Union's conduct in representing the Applicant was either arbitrary (*i.e.:* seriously negligent) or undertaken in bad faith (*i.e.:* based on improper motives). First, the Applicant argued that the Union failed to take sufficient steps to ensure that the Applicant was aware of the specific allegations against her. For example, the Applicant argued that the Union had failed to obtain from the Employer a copy of the complaint letter of February 3, 2008 that had been provided to management. The Applicant argued that the Union could have, and should have, utilized Article 10.01 of the Collective Agreement to obtain a copy of this document. The Applicant argued that failing to obtain the complaint letter, as well as allowing the Applicant to participate in the investigative meeting on February 8, 2008 without knowing the specifics of the allegations against her (*i.e.:* by ensuring she had a copy of the complaint letter), was indicative of serious negligence on the part of the Union.

[34] Second, the Applicant argued that the Union should have prevented the Applicant from participating in the February 8, 2008 investigation meeting because the complaints against her were based on hearsay information and, in the Applicant's opinion, not properly presented. Third, the Applicant argued that the Union did not conduct an adequate investigation into the circumstances of the allegations against her, including interviewing the involved residents to obtain contextual information which the Applicant argued would have assisted the Union in representing her. Fourth, the Applicant argued that the Union erred in allowing the Applicant's grievance to be discussed with the Employer on March 20, 2008 without her being present for those proceedings or without even advising her in advance that the meeting was taking place. The Applicant argued that doing so showed disregard for the best interests of the Applicant and demonstrated arbitrariness on the part of the Union.

[35] Fifth, the Applicant argued that the Union acted arbitrarily when it withdrew the Applicant's grievance without first consulting her. Sixth, the Applicant argued that the Union erred in failing to continue to advance the permissive workplace argument in the face of evidence that such culture existed in the workplace. Seventh, the Applicant asked this Board to infer that the Union's decision to abandon her grievance must have been based on personal animosity toward her because the reasons given by the Union for abandoning her grievance were inadequate. In this respect, the Applicant argued that the Union's Executive closed its mind to the prosecution of the Applicant's case because she was simply too demanding of the Union.

[36] The Applicant argued that the Union's conduct, when considered as a whole, failed to satisfy the statutory obligations on the Union to fairly represent her. By way of remedy, Counsel for the Applicant sought an Order determining that the Union failed to fairly represent the Applicant in the prosecution of her dismissal grievance and directing the Union to continue prosecuting that grievance (*i.e.:* through to arbitration), together with an Order directing the Union to compensate the Applicant for her lost wages.

[37] The Union argued that it fully represented the Applicant in all her dealings with the Employer. The Union argued that it filed a grievance on behalf of the Applicant and prosecuted that grievance to the fullest extent that it deemed reasonable. The Union argued that it took into consideration the circumstances of the Applicant's termination and, after a thoughtful and careful review, the Union concluded that it was unlikely to be successful in obtaining a favourable outcome for the Applicant through arbitration. The Union argued that it came to this conclusion only after consulting with the Union's National Staff Representative, who researched the matters in issue in the Applicant's grievance and made a reasonable recommendation to the Union.

[38] The Union argued that the Applicant was advised of her right to appeal the decision to abandon her termination grievance to the Union's Executive Committee, who heard but ultimately upheld the decision to abandon her grievance. Finally, the Union argued that, even after a decision was made to abandon her grievance, the Union continued to represent the Applicant. For example, the Union asked the Employer to consider returning the Applicant to the workplace after learning that the Employer had agreed to allow M.J.B. to return to the workplace.

[39] The Union asked that the Applicant's application be dismissed.

Relevant Statutory Provisions:

[40] The relevant provisions of *The Trade Union Act* are 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.*

Analysis:

[41] 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*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

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

> *be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*
>
> > *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
>
> *This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
>
> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[42] The Applicant did not allege, and this Board saw no evidence of, discrimination on the part of the Union in the form recognized by this Board. Rather, the Applicant alleged that the Union's conduct was 'arbitrary', in that the Union's investigation was defective or inadequate and that the Union's conduct in representing her was seriously negligent. The Applicant also alleged that the Union exercised 'bad faith', in that its decision to not prosecute her grievance through to arbitration was motivated by improper considerations. Having carefully considered the evidence in these proceedings, I am not satisfied that the evidence supports either allegation.

[43] When confronted with an allegation of arbitrariness on the part of a trade union in the representation of its members, the Board is not looking to determine whether or not we believe that the trade union erred in its strategies or that its decisions may have been wrong. To successfully sustain an allegation of arbitrariness, an applicant must establish more than mere negligence (*i.e.:* mistakes on the part of the union), an applicant must satisfy the Board that the trade union's impugned conduct was grossly or seriously negligent (*i.e.:* reckless, capricious, or perfunctory). 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. See also: *Deb 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.

[44] For example, this Board has confirmed that it does not "*sit on appeal*" of a trade union's decision not to advance a grievance to arbitration and, in particular, will not decide if a trade union's conclusion as to the likelihood of success of a grievance was correct nor will the Board 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,* [2007] Sask. LR.B.R. 401, 2007 CanLII 68749, LRB File No. 158-06.

[45] Similarly, this Board has held that there is no breach of the duty of fair representation where a trade union withdraws a grievance, if it took a reasonable view of the circumstances and if it made a "*thoughtful decision*" not to advance that particular grievance to arbitration. See: *I.R. v. Canadian Union of Public Employees, Local 1975-01 and University of Regina,* [2006] Sask. L.R.B.R. 344, 2006 CanLII 63023, 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. 649, 2006 CanLII 68758, LRB File No. 028-07.

[46] In my opinion, the evidence in these proceedings did not disclose conduct on the part of the Union sufficient to sustain a violation of the *Act*.

[47] The complaint letter prepared by C.S dated February 3, 2008 was the basis of the Applicant's suspension and was the genesis for the Employer's decision to conduct an investigation into the Applicant's conduct in the workplace; but, in my opinion, it was not the basis for her termination. Contrary to the Applicant's assertion, it was not apparent that she was entitled to this document as a matter of right and that the Union was seriously negligent in failing to obtain and/or provide a copy of it to the Applicant prior to her meeting with management on February 8, 2008 or thereafter. Furthermore, I place no significance on the fact that the complaint letter contained hearsay statements. In fact, it is hard to imagine how a document of that nature could not contain hearsay statements. It was a record of complaints made by the Applicant's coworkers regarding her conduct in the workplace that was compiled by C.S. In this regard, it is important to note that the Applicant was not dismissed because the Employer received the complaint letter; the Applicant was dismissed because, in the Employer's opinion,

her conduct in the workplace was inappropriate; conduct which was verified by the Employer's own investigation and conduct to which the Applicant mostly admitted. With all due respect to the obvious desire of the Applicant to have access to this document, in my opinion, the complaint letter prepared by C.S. was not particularly relevant to the matters in dispute between the Union and the Applicant, other than it provided the historical context of how the Employer came to investigate the Applicant's conduct.

[48] With respect to the investigative meeting of February 8, 2008, the evidence demonstrates that both the Applicant and the Union were aware that the Applicant had been placed on suspension pending an investigation into serious allegations of inappropriate conduct in the workplace. In this regard, the Applicant's assertion that she misunderstood the nature and purpose of the February 8, 2008 meeting is inconsistent with the pattern of events occurring at that time. The Union informed the Applicant of the general nature of the allegations against her the day before the meeting. Furthermore, it is not apparent to the Board that the Union's advice to the Applicant to be "*honest*" with the Employer was in error. The Union took the position that the "*truth would come out*" and, in light of the small size of the workplace, it is difficult to imagine a different outcome. Counsel for the Applicant argued that the Union ought to have refused to allow the Applicant to participate in the Employer's investigative meeting. In my opinion, it is speculative to assume that a refusal on the part of the Union to allow the Applicant to participate in the Employer's investigation would have achieved a better result for her. But more importantly, the Applicant now makes this argument with the benefit of hindsight; something the Union did not have at the time it was representing her. Having considered the evidence, I am not persuaded that the Union's conduct in representing the Applicant either before or during the February 8, 2008 investigative meeting was negligent; let alone seriously flawed.

[49] I am also not persuaded that the Union's investigation into the circumstances of the Applicant's dismissal was inadequate. In my opinion, the Union's investigation satisfied the minimum requires set forth by this Board in *Dwayne Lucyshyn v. Amalgamated Transit Union, Local 615*, 2010 CanLII 15756, LRB File No. 035-09; particularly so in the present circumstances where the Applicant admitted to most of the allegations against her. Having done so, the primary issue for the Union was not whether or not the impugned conduct occurred but rather the appropriateness of the discipline imposed by the Employer and the potential for persuading the Employer (and/or an arbitrator) to allow the Applicant to return to the workplace; all of which were issue to which the Union gave thoughtful consideration.

[50] I am also not persuaded that the Union's failure to inform the Applicant in advance that her grievance was being discussed with the Employer on March 20, 2008 or the Union's failure to not ensure the Applicant was present when her grievance was discussed with management were indicative of either arbitrary conduct or bad faith on the part of the Union. In my opinion, these actions were not indicative of error on the part of the Union but, if they were, I am satisfied that they were the kind of honest mistakes, reasonably made in the representation of a member falling outside of the scope of this Board's supervisory jurisdiction. 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.

[51] The Applicant argued that Ms. Heisler's conclusions regarding the potential for obtaining a favourable outcome through arbitration were seriously flawed. For example, the Applicant argued that the Union erred in failing to advance the permissive workplace argument in the face of evidence that such a culture existed in the workplace. The Applicant also argued that the Union's opinion that she was not sufficiently remorseful was inconsistent with the evidence. With all due respect, it is not apparent that Ms. Heisler's conclusions were seriously flawed; nor that the Union acted arbitrary in relying upon Ms. Heisler's recommendations.

[52] As this Board has acknowledged on a number of occasions, trade unions are required to make a matrix of difficult decisions in representing a member, including which arguments are likely to be persuasive and which witnesses are likely to be seen a credible. The Applicant clearly believed that her grievance was stronger than the Union did and, in effect, has asked this Board to assess the relative strength or merit of her grievance and to infer therefrom the kind of non-caring attitude and/or recklessness on the part of the Union necessary to sustain a violation of s. 25.1 of the *Act*. As this Board has previously cautioned, it is not our role to assess the correctness of a trade union's decision to abandon a grievance; rather, our supervisory jurisdiction is limited to a significantly higher threshold than that; namely to determine whether or not, in the representation of a member, a trade union's conduct was arbitrary or discriminatory or indicative of bad faith on the part of that union.

[53] After reviewing and weighing the evidence presented in these proceedings, including the not insignificant volume of documentary evidence, I was not drawn to the

conclusion that the Applicant's grievance was so clear or so compelling that the Union's decision to abandon it could be seen as indicative of a violation of the *Act*. While this Board heard evidence of conduct similar in nature to that which the Applicant was accused occurring in the workplace, there was little evidence from which the Board could infer that the Employer knew this conduct was occurring, let alone sanctioned or permitted it. To the contrary, the evidence indicated that the Employer was very concerned when it learned that the conduct was occurring in the workplace and that, upon confirmed that the Applicant had engaged in the impugned conduct, it believed that the discipline imposed upon her was warranted. It is difficult for this Board to assess whether or not the Union's impressions of whether the Applicant was genuinely remorseful and/or whether she would make a credible and/or sympathetic witness if the matter proceeded to arbitration were correct. It was, however, apparent to the Board that the Union turned its mind to these issues, sought advice from its National Service Representative, and made a judgment call. In reviewing the evidence, I was not inescapably drawn to the conclusion that the Union's decision was wrong; let alone sufficiently wrong to be indicative of arbitrary conduct or bad faith on the part of the Union.

[54] In coming to this conclusion, I am mindful that, as this was a dismissal grievance, critical job interests were involved. In this respect, the Board had considerable sympathy for the Applicant, who clearly enjoyed working with and caring for the residents of the Lodge. While the Applicant strongly disagreed with the Union's decision to abandon her grievance, I saw no evidence of recklessness, arbitrariness, personal hostility, or bad faith on the part of the Union in its representation of her. The evidence demonstrated that the Union sought advice from its National Staff Representative as to the likelihood of success of the Applicant's grievance. Ms. Heisler researched the matters in issue and provided advice and a recommendation to the Union. The Union reasonably relied upon that recommendation and communicated its decision to the Applicant, who was granted the opportunity to appeal that decision to the Union's Executive Committee. The Applicant availed herself of that opportunity but was unsuccessful in changing the Union's mind.

[55] Simply put, after carefully reviewing the evidence, I am unable to conclude that the Union's conduct was in violation of s.25.1 of the *Act*.

Conclusion:

[56] For the foregoing reasons, the Applicant's application shall be dismissed.

DATED at Regina, Saskatchewan, this **26th** day of **July, 2011.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson