The Labour Relations Board
Saskatchewan

TOM McKNIGHT, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 481, Respondent and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Employer

LRB File No. 135-11; November 28, 2011
Chairperson, Kenneth G. Love, Q.C.;

For the Applicant:	Self Represented
For the Respondent Union:	Mr. Greg Eyre
For the Employer:	No one appearing

Duty of Fair Representation – s. 25.1 of *Trade Union Act* – Employee alleges that Union failed to properly represent him with respect to three (3) grievances.

The first grievance, filed in 1998, was not pursued by the Union as its file on the grievance was lost.

A second grievance, filed in 1999, dealt with Applicant's claim that he was not awarded a position of Agreement Administration Advisor when he was the senior applicant. Union took position that applicant withdrew his application and did not proceed with grievance.

A third grievance, filed in 2008, dealt with discipline given to Applicant following a strike. Union claims it reviewed grievance, took legal advice, acted on that legal advice and withdrew grievance.

Section 25.1 – Board considers duty of fair representation and steps necessary for Board to be satisfied that Union properly discharged its responsibility to its members under s. 25 in a manner which was not discriminatory, arbitrary or in bad faith.

REASONS FOR DECISION

Background:

[1] Communications, Energy and Paperworkers Union of Canada, Local 481, (the "Union" or "CEP") is certified as the bargaining agent for a unit of employees of Saskatchewan Government Employees and General Employees' Union (the "Employer"). The Applicant filed an application on August 16, 2011 alleging that the Union failed in its duty of fair representation.

Facts:

[2] The Applicant, at the time of his application, was retired as an employee of the Employer, having retired from his employment on September 1, 2008. He began his employment in 1998 sometime prior to the filing of the first grievance in this matter.

[3] The facts related to this matter are not complex, nor is there any dispute between the parties as to the facts related to the three grievances at issue here.

The First Grievance

[4] The first grievance with respect to this matter was filed sometime in 1998. No one, including the Applicant, could advise the Board as to the nature of the grievance or what relief was sought. Ms. Adriane Paavo, the Chair of the Union's Grievance Committee testified that when she took over as Chair of the Grievance Committee she requested all of the files from the former Chair. She testified that the Union's records, when she took over, showed there were 95 outstanding grievances, including one by the Applicant. However, no record or file related to the grievance could be found. Her explanation was that it was presumed to have been lost.

The Second Grievance

[5] The second grievance arose out of a competition for a position as an Agreement Administration Advisor (hereinafter "AAA") for the Employer, that position was located in Prince Albert, Saskatchewan, which was the Applicant's home, and where he wished to return for personal reasons. The Applicant applied for the position, and he testified that he was the senior qualified applicant for the position, but was not awarded the position. Ms. Paavo testified that the Union reviewed the grievance, and determined that the Applicant had withdrawn his application prior to the close of the competition.

[6] In support of its position, the Union tendered a letter written February 22, 1999 by the Applicant to the then Executive Director of the Employer. In that letter, he says "...I agreed to withdraw from the AAA competition on the understanding that the Organizer position would be moved to Prince Albert".

[7] The Organizer position referenced in the letter was the position which the Applicant then occupied in Regina for the Employer. He testified that he understood that that

position would be relocated to Prince Albert and, accordingly, he was content to remain in that position. However, the position was not, in the final result, moved to Prince Albert as anticipated which lead to the Applicant renewing his grievance for not having been awarded the AAA position.

[8] Ultimately, after about a year, the Applicant was successful in obtaining an AAA position in Prince Albert.

[9] The second grievance was not processed either. There was no record of it having gone to any of the steps of the grievance procedure. Nor was there evidence that the grievance had been investigated in any significant degree. Nothing was done with the grievance until Ms. Paavo took over the position as Chairperson of the Grievance Committee in 2010.

The Third Grievance

[10] The third grievance arose out of discipline given to the Applicant following a lengthy strike action by the Union in 2008. That grievance was Union Grievance File #2008-01 and was filed by the Applicant on March 25, 2008.

[11] The Applicant testified that no one from the Union contacted him to discuss the facts related to the incident which lead to the discipline. Ms. Paavo did not deny that the Applicant had not been contacted. She testified that the grievance had been considered by the Grievance Committee, along with another 94 outstanding grievances (which included the Applicant's first and second grievance).

[12] Ms. Paavo testified that when she commenced as the Chair of the Grievance Committee, there were 95 outstanding grievances, many of which extended back some years. She testified that the Grievance Committee determined that it needed to analyze these outstanding grievances. The Grievance Committee then started what she testified was a "major review of the outstanding grievances to get them under control".

The Grievance Review Process

[13] Ms. Paavo testified that in 2008, the Union had gone through a lengthy strike that resulted in the Union's finances being extremely limited. In fact, she testified, that the Local was

in trusteeship during the period that the grievances were being considered by the Grievance Committee. She testified, however, that the trustee, Mr. Cec Matkowski did not participate in the review of the outstanding grievances, leaving the Grievance Committee to deal with them.

[14] Ms. Paavo testified that due to the depletion of their resources during the strike, the Local did not have the resources to finance arbitrations on all of the outstanding grievances. She noted as well that they had serious matters to deal with, but were without significant resources to deal with those serious matters.

[15] Ms. Paavo testified that the Grievance Committee reviewed each outstanding grievance based upon six factors. These were:

1. Had the collective agreement been violated?
2. What was the last date of any clear action? Had there been any follow up on estoppel letters from Employer?
3. Established whether or not there were signed grievance forms on file?
4. Reviewed the evidence on the file – was there good documentation on file, especially in long outstanding grievances.
5. Reviewed what harm had been done.
6. Considered the remedy sought by the grievance. Was it practical and able to be implemented, especially after a long delay.

[16] As a result of this analysis, Ms. Paavo testified that the Grievance Committee was able to close a large number of files. Some were settled, some withdrawn, and some had resolved themselves by effluxion of time. The net result was that from a total of 95 grievances, the committee now has about eight (8) to ten (10) active files.

[17] In furtherance of this review process, the Grievance Committee wrote to the Applicant on August 17, 2010 in respect of the three (3) grievances filed by the Applicant and advised as follows:

> *The First Grievance*
>
> *1998-481-05*
>
> *The grievance file is lost and no longer among the local's records. This lack of documentation prevents preparing and presenting a credible case.*

The Second Grievance

1999-481-05 (Non-appointment)

The fact that you withdrew your application for the job in question presents a significant obstacle to success at arbitration. The documentation shows that you withdrew because you believed that your position at the time would be relocated to Prince Albert. While that belief was no doubt sincere on your part, the relocation was not promised in writing and the employer strongly contends that you were advised at the time that the decision required final approval from Provincial Council….

The Third Grievance

2008-481-01

Because of the issues involved in this grievance, we sought legal advice to assist in our decision making. That advice is that we would not be successful at arbitration in overturning the discipline, nor would we be able to use the medical evidence from your physician as mitigation.

[18] The Grievance Committee determined not to proceed with any of the Applicant's grievances for the reasons noted above. The Applicant was advised that he had the right, pursuant to the Bylaws of the Local, to appeal this decision to the general membership at a membership meeting. By letter dated August 24, 2010, the Applicant advised that he wished to appeal the decision.

[19] On the date of the general membership meeting, Mr. McKnight was unable to attend the meeting. He testified that he contacted Ms. Paavo about an adjournment of the meeting. That was not possible as this meeting was a long scheduled general membership meeting to be held on November 20, 2010. Only two (2) such meetings were normally held each year. There was also some conflicting evidence regarding whether or not Mr. McKnight could have an advocate appear for him. Ms. Paavo says she assured him that he could have an advocate appear for him. The Applicant testified that the advice he received was that he could not have an advocate appear for him.

[20] At the general membership meeting, the general membership concurred with the decision of the Grievance Committee not to proceed with the grievances.

[21] For what the Union claimed was an oversight, the Applicant was not advised of the decision taken at the general membership meeting. He had not been advised of the decision

as of the date he filed his application, which, in part, requested an update on the proceedings respecting his grievances.

Relevant statutory provision:

[22] Relevant statutory provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") provide 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 and Decision:

[23] This case is somewhat unique. Generally, in cases under s. 25.1, the Applicant is concerned that the Union has failed to take his (what the Applicant believes to be) good case forward to arbitration. Applicants frequently fail to consider that the grievance is not the property of the Applicant, but is that of the Union.

[24] The Board will usually defer to a sound and reasoned decision by a Union to determine that a grievance should not proceed to arbitration. The rationale for such decisions can be numerous, including lack of a credible case, lack of financial resources, or even a settlement of the grievance without the grievor's consent.

[25] However, in all such cases, the Board has stressed the need for a comprehensive and reasoned examination of the merits of the case and other mitigating factors. The Board focused not on the outcome of the decision to proceed or not to proceed, but rather on the process which lead to that decision. The process adopted provided that there was no evidence of discrimination on the part of the Union against the grievor, nor evidence of arbitrariness in the process adopted, or bad faith demonstrated against the Applicant. The Union was granted liberal license to deal with its grievances as it saw fit.

[26] 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*[1]:

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[1] [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.*

[27] The issue of the process to be followed has been dealt with by the Board in *Lucyshyn v. Amalgamated Transit Union, Local 615*[2]. That case discussed the factors and processes which the Board considered to be a minimum standard for a grievance process. In that case, the Board determined that:

> *[32] However, the Board's reluctance to interfere in decisions made by a trade union in the processing of grievances is based upon an objective standard. That is, the Board must be shown that the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof.*

[28] The Board then went on at paragraph [36] to specify seven (7) steps which it considered to be the minimum standard of conduct by a Union in dealing with a grievance. These steps were:

1. *Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;*

2. *The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;*

3. *A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;*

4. *The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;*

5. *At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of the Act;*

6. *At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of the Act; and*

7. *It must also be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (i.e.: not to proceed with a grievance) which is not arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.*

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[2] [2010] CANLII 15756, LRB File No. 035-09

[29] The evidence in this case clearly shows that the Union did not meet this minimum standard. Firstly, they conducted no independent investigation of the grievances, relying instead upon a review of the files (one of which they did not have) in the Grievance Committees' determination that the grievances should be abandoned. While the Board is sympathetic to the plight of Ms. Paavo and her Grievance Committee having inherited 95 outstanding grievances, they must, nevertheless, be responsible for the conduct of their predecessors who failed to conduct any meaningful investigation. In fact, the Applicant denied that anyone sought to investigate or contact him with respect to the grievances at any time.

[30] Point No. 2 above sets, as a minimum, that there would be an interview with the grievor to determine what his or her view of the facts were before investigating the allegations further. It appears from the evidence that no such investigation was conducted at any time.

[31] The Union argued that, at least with respect to the third grievance, that it took the step of obtaining a legal opinion with respect to its potential success at arbitration. While normally a sound procedure in most cases, the presentation of this evidence of taking legal advice was overshadowed by the lack of evidence that any of the grievance processes under the collective agreement were followed with respect to any of the three grievances.

[32] The process for winnowing the 95 outstanding grievances as described by Ms. Paavo, while interesting, does not address the minimum standard set out above. Surprisingly, the process and the factors considered that she described to the Board, was not mentioned in her letter of August 17, 2010 to the Applicant.

[33] That process, had it been utilized by the Grievance Committee at an earlier date, could have provided a sufficient rationale for a decision to discontinue the grievances. However, it remains tainted by the lack of an initial investigation and a by a failure to deal with particularly grievance one and grievance two in a timely and efficient manner.

[34] No reason was given by the Union for its failure to deal with these grievances (and possibly some of the other 95 grievances) in a timely and efficient manner. In the case of the first grievance, the file was lost, but no steps were taken by the Union to attempt to discern from the Employer either the nature of the grievance or what steps, if any, had been taken by the

Union in the processing of that grievance. It was simply dismissed as, "Sorry, we can't do anything to help you because we lost the file".

[35] As noted in paragraph 28 above, the terms utilized by the Legislature to frame the Union's duty of fair representation have been defined by the Supreme Court of Canada as follows:

> *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:*
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> > *... 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.*

[36] Our Board, while adopting the principles set out above, also simplified the definitions slightly in In *Glynna Ward v. Saskatchewan Union of Nurses*[3]:

> *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.*

[37] In this case, the Union has acted in an arbitrary manner, contrary to the provisions of Section 25.1 of the *Act*. As noted in *Glynna Ward,* being arbitrary, in the context of fair

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[3] LRB File No. 031-88

representation under the *Act*, means that the Union "must not act in a capricious or cursory manner". While the evidence does not support a finding that the union acted capriciously, it has certainly been cursory in its investigation, processing, and pursuit of the three grievances. As stated in *Rayonier, supra,* the Union is required not to act in a perfunctory manner, that is, "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".

[38] The application is hereby allowed.

Remedy

[39] There are two (2) practical problems in framing an appropriate remedy in this matter. Firstly, is the time delay between the date of the filing of the first two grievances and the time that they have been finally addressed by the Union, a period of over ten (10) years. Similarly, but not so egregiously, the 2008 grievance is now at least three (3) years old. Second, is the fact that the grievor is no longer an employee, having retired in 2008 shortly after the last grievance was filed.

[40] The grievor sought an Order reinstating the grievances and an Order directing that they proceed to arbitration. The Union suggested that in the event the application was successful, they be ordered to follow the minimum process as defined in *Luchychyn, supra.*

[41] I decline to accept either of these positions. To return a ten (10) year or older grievance to arbitration will present a difficult problem for all of the participants. There was evidence that in respect of the second grievance, the main representative of the Employer engaged on that file, Ms. Patricia Gallagher, has died. The Board knows this to be the case since Ms. Gallagher was formerly one of its board members. In respect of the first grievance, no one, including the Applicant seemed to know what the grievance was about or what the facts were. This lack of evidence or memory of the facts would present a major difficulty in the presentation to a board of arbitration.

[42] In respect to the third grievance, it involved a four (4) day suspension by way of discipline which the grievor suggests could be mitigated by medical testimony concerning his state of mind when the incident occurred. However, he has since retired and there is little to be gained if the arbitration were successful and the penalty mitigated. Unless there is a valuable

principle or policy issue concerning the collective agreement, a full blown arbitration does not seem to be justified with respect to this issue on a cost-benefit analysis.

[43] We therefore Order as follows:

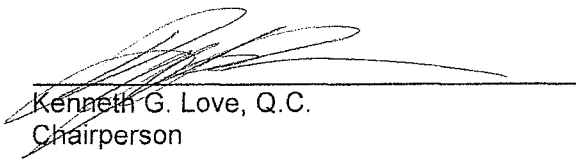
1. **THAT** the Applicant and Ms. Paavo meet before January 31, 2012 to discuss each of the Applicant's three (3) grievances in an attempt to negotiate a settlement of those grievances and further discuss the Respondent Union's failure to properly represent the Applicant with respect to those grievances; and

2. **THAT** failing a resolution between the parties, the parties consider mediation of their dispute; and

3. **THAT** if the parties are unable to agree to voluntarily mediate their dispute, that upon the application of either party to the Board, the Board will appoint a conciliator to hear and determine their dispute. The cost of such conciliator will be borne by the Respondent Union.

DATED at Regina, Saskatchewan, this **28th** day of **November, 2011.**

LABOUR RELATIONS BOARD



Kenneth G. Love, Q.C.
Chairperson