The Labour Relations Board
Saskatchewan

B. P., Applicant v. ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondent and UNIVERSITY OF SASKATCHEWAN, Interested Party

LRB File No. 065-11; February 24, 2012
Vice-Chairperson, Steven D. Schiefner, sitting alone.

For the Applicant:	Mr. Gordon D. Hamilton.
For the Respondent Union:	Mr. Gary L. Bainbridge.
For the Interested Party:	Mr. David M.A. Stack.

Duty of Fair Representation – Applicant claimed coworkers discriminated and harassed her in workplace – Employer retained independent investigator – Investigator concluded that, while errors in management occurred, no harassment or discrimination occurred – Employer dismisses applicant's harassment/discrimination claim - Applicant asked her union to grieve employer's decision – Union considers applicant's request and obtains legal advice - Union declines to grieve employer's decision - Applicant alleges union's failure to file and prosecute grievance on her behalf was arbitrary and indicative of bad faith and discrimination on part of union – Board finds union understood applicant's allegations and made a thoughtful decision – Board not satisfied that Union failed to fairly represent the applicant in any of her dealings with the employer – Applicant's application was dismissed.

The Trade Union Act, s. 25.1

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: The Administrative and Supervisory Personnel Association (the "Union") is the certified bargaining agent for a unit of employees of the University of Saskatchewan (the "Employer" or the "University") in the City of Saskatoon, Saskatchewan. The Applicant, B. P. was, at all time relevant to these proceedings, a member of the Union's bargaining unit and an employee of the Employer until her contract of employment expired on February 28, 2011.

[2] On April 28, 2011, 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 grievance proceedings with the Employer and, in doing so, violated s. 25.1 of *The*

Trade Union Act, R.S.S. 1978, c.T-17 (the "*Act*"). The Union filed a Reply denying the allegations.

[3] The Board heard evidence in the Applicant's application commencing on December 22, 2011 in Saskatoon, Saskatchewan and concluding on January 18, 2012. The Applicant testified on her own behalf and called one (1) witness; namely, Brenda Lynn McCarty, a professional family assistance counsellor. The Union called Mr. Kim Baryluck and David Allan Bocking, both past-presidents of the Union. The Employer elected to call no evidence.

[4] The Applicant requested that her name be replaced with initials in these Reasons for Decision. Certain of the evidence relevant to these proceedings involved personal information. Having considered this evidence, in my opinion the Applicant's request is reasonable and represents an appropriate compromise between the open court principle and relevant privacy considerations. In these proceedings, the Employer also requested that the investigative report of Mr. Andrew R. Robertson dated October 27, 2010 be sealed by the Board following the conclusion of these proceeding to protect the privacy of those individuals who were interviewed by Mr. Robertson in his investigation. In my opinion, the Employer's request, subject to certain exceptions, is also reasonable and appropriate. An Order sealing this document shall be issued jointly with these Reasons for Decision.

Facts:

[5] The Applicant was raised in Taiwan. She holds a Bachelor of Arts from Tmkang University in Taipei, obtained in 1982, and a Masters of Education (Psychology) from Yokohama National University in Japan, obtained in 1987. She speaks five languages, being Cantonese, Mandarin, Taiwanese, Japanese and English.

[6] When the Applicant moved to Canada, she came to live in Saskatoon. To have her foreign credentials recognized in Saskatchewan, the Applicant took steps to become registered with the Saskatchewan College of Psychologists. She was told that she needed to work under supervision in a mental health setting for a total of 1,500 hours before she would be allowed to complete the written and oral examinations necessary to become registered in this Province.

[7] The Applicant's interactions within the counselling community in Saskatoon led her to come into contact with Mr. Curtis Mills, who was then the Practice Leader of Student Counselling Services at the University of Saskatchewan. Mr. Mills advised the Applicant that the Employer was interested in her background because he believed she could work with the University's international students and with other students for whom English was a second language (i.e.: the University's "ESL" students). Mr. Mills was aware that the Applicant needed to work under supervision to complete her requirements for the College of Psychologists and felt that a mutually beneficial arrangement was possible because the University's Student Counselling Services could use someone with her background. The Student Counselling area offered the Applicant as position as a "practicum student" and explained that they had never had a "practicum student" before and that there was no payment for persons involved in practicum training. In other words, if the Applicant accepted the Employer's offer, she would be working for free while she was a practicum student. On the other hand, the Employer's offer gave the Applicant an opportunity to complete her requirements for the Saskatchewan College of Psychologists. The Applicant accepted and it was agreed that she would only work part time, either half days or only a few days per week. The Applicant started working for the Student Counselling area on September 1, 2006.

[8] Soon thereafter, the Student Counselling area found some money from which they could pay the Applicant. From the perspective of management in the Student Counselling area, the monies to be paid to the Applicant were simply an honorarium during a period when the Applicant was working as an unpaid "practicum student". While the management of the Student Counselling Area did not view the Applicant as an employee during this period, she was provided a pay stub and was paid as an employee working approximately twenty-five percent (25%) of the time or, as the Employer recorded it, as a .25 FTE (Full Time Equivalent). This percentage was calculated not based on the actual amount of time the Applicant worked but rather it was based on the available funding; the quantum of the honorarium the Employer had agreed to pay her. The Applicant actually worked approximately fourty percent (40%) of the time (or as a .40 FTE) during this period.

[9] The Applicant continued working for the Student Counselling Services area with her practicum placement being extended on a number of occasions until approximately September of 2009. During this period (i.e.: from September 1, 2006 until approximately September 1, 2009), the management of the Student Counselling Services area did not consider

the Applicant to be an employee; rather they considered her to be a “practicum student” being paid an honorarium. However, during this period, the nature of the Applicant’s relationship with the Employer slowly evolved from that of a practicum student receiving a modest honorarium while completing her requirements for the Saskatchewan College of Psychologists into a more traditional employment relationship with the Applicant working along side other counsellors in the Student Counselling area, providing similar services albeit under supervision. While the nature of the Applicant’s employment relationship with the Employer evolved and changed over this period, her remuneration and classification did not change until September of 2009.

[10] In 2009, the Employer obtained some additional funding and utilized these funds to staff two (2) positions within the Student Counselling area. Following posting of these positions and interviews, the Applicant was offered a term position commencing September 1, 2009. This position was a .70 FTE and, as a term position, has a specified end date; in this case, being February 28, 2011 (roughly corresponding to the available funding). At this point in time, the Applicant’s standing with the Saskatchewan College of Psychologists was that of a Registered Psychologist (provisional). Her new position with the Employer was that of a “counsellor”. Concomitant with her tenure in her new position, the extent to which the Applicant worked under the direct supervision of a supervisor was progressively reduced. In addition, by this point in time, the Applicant had also obtained a certificate as a Canadian Certified Counsellor. However, because of her provisional standing with the College of Psychologists, it continued to be a requirement that she worked under a psychologist’s supervision.

[11] While there may have been some confusion as to whether or not the Applicant was a member of the Union while she was a practicum student, there was no dispute that with the acceptance of this new position on September 1, 2009, the Applicant became a member of the Union.

[12] The Applicant testified that soon after she was hired as a counsellor, the dynamic in the Student Counselling area became stressful. Firstly, a new team leader (i.e.: Clinical Practice Leader) was assigned. Secondly, some counsellors within the Student Counselling area felt that the Applicant was not sufficiently qualified for her new position or that the interview process leading to her appointment was flawed with the result being that some of counsellors displayed irritation at the Applicant’s appointment to her new position. Thirdly, a long-time counsellor (and close friend of many in the Student Counselling area) was diagnosed with

terminal cancer. Fourthly, another counsellor left on medical leave. Collectively, this resulted in staff shortages within the Student Counselling area at a time when all were experiencing the emotional trauma of stressful events.

[13] In response to these stresses, it would appear that a core group of counsellors in the Student Counselling area tended to band together for mutual support. The Applicant was not a member of this group and felt excluded. On at least one (1) occasion, unkind words were exchanged between the Applicant and other staff. However, for the most part the Applicant's primary frustration was that she was not included in and felt marginalized by the group of long-time counsellors in the Student Counselling area.

[14] During this period, some concerns arose regarding the Applicant's performance as a counsellor and her conduct in and out of the workplace. For the most part, these complaints would be considered relatively minor resulting in little more than coaching from her supervisor (assuming that they had any validity at all). However, it would appear that the various stresses occurring in the Student Counselling area had an unfortunate impact on all staff and none appear to have handled the situation particularly well. For example, there appears to be an unjustified amplification of the complaints regarding the Applicant's performance by other counsellors. Similarly, there also appears to have been an unjustified amplification of the Applicant's perception of the hostility by other staff toward her. The result being that otherwise seemingly minor misunderstandings and grievances became points of acute criticism of the Applicant by other staff and the Applicant began seeing all of her interactions with other staff through a "*prism of discrimination*"[1]. Compounding these tensions, through inexperience or otherwise, management in the Student Counselling area appears to have over-reacted to the concerns expressed by staff regarding the Applicant's performance and/or they failed to adequately investigate the events occurring in the workplace. In hindsight, it would appear that management erroneously compounded and escalated, rather than helped diffuse, the tensions in the workplace.

[15] The Applicant was asked by her supervisor to attend a meeting on March 18, 2010 to discuss certain concerns from staff that had been communicated to management. The meeting took place as scheduled. The concerns discussed with the Applicant were minor and, in

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[1] A phrase used by Mr. Roberston to describe the Applicant's observed tendency to find evidence of harassment and discrimination in seemingly innocent interactions with her coworkers.

one case, involved incidents unrelated to work. Nonetheless, during this meeting the Applicant was advised that she need to demonstrate improvement in her performance and, if she didn't, that her job was in jeopardy as she was a probationary employee. If this meeting was intended to be disciplinary, it was misguided and ill-advised. If the meeting was intended to be a coaching opportunity, it was very poorly executed by the Applicant's supervisor[2]. For example, the Applicant was not a probationary employee at this time and yet she was informed that she was and that her job was potentially in jeopardy. Further compounding these errors, representatives of the Union were not present for this meeting, which clearly had a disciplinary tone (if not intent).

[16] The Applicant was understandably upset following her meeting with management. On the advice of a friend, the Applicant called the Union and an off-site meeting was arranged. The Applicant testified that she had a general mistrust of trade unions and was very reluctant to disclose any information to the Union or to involve its representatives in the concerns she had with the Employer and/or her co-workers. On March 26, 2010, the Applicant met with Mr. Baryluck and Mr. Docking, who were at that time the president and past-president of the Union. Both Mr. Baryluck and Mr. Docking described the Applicant as extremely agitated during this meeting. At this point in time, the Applicant was not only concerned about her meeting with management but she was also concerned that she had been underpaid during the period of time when she was working as a practicum student. During this meeting, the Union asked the Applicant to consider if the conduct she had been experiencing in the workplace could be described as "harassment". The Union advised the Applicant that the Employer had a Harassment and Discrimination Prevention policy and the procedures for filing a claim, including how to contact the University's Discrimination and Harassment Prevention Officer. The Union also agreed to investigate her concerns that she had been underpaid. However, the Applicant clearly and specifically asked the Union to take no action with respect to <u>any</u> of her workplace issues. In response to her request, the Union agreed to take no action.

[17] On March 29, 2010, the Applicant sought medical attention from her doctor and he recommended a leave of absence. The Applicant testified that during this period, she was extremely distraught and largely unable to function. The Applicant indicated that she was surprised at how strongly she reacted to the events that had occurred in the workplace, as she considered herself to be a strong person. The Applicant testified that her emotional reaction was

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[2] The management errors and deficiencies that occurred during this meeting were well document by Mr. Robertson in his investigation report dated October 27, 2010.

so debilitating that her cognitive functions became impaired and she had trouble concentrating, reading and remembering what she had been told. At the time of hearing, the Applicant appeared thoughtful and composed.

[18] The Applicant met again with representatives of the Union soon after going to her doctor. Representatives of the Union again noted that the Applicant was very agitated. The Applicant was advised by the Union's representatives that she needed to get better; that her health was more important than her job; and that she should take full advantage of the Employer's sick leave plan so that she could get healthy before she went back to work. Union officials indicated that all of the Applicant's concerns with her Employer could be addressed and that the Union was willing to assist her with these issues. The Union recommended that it would be better to deal with her workplace issues after she returned to work. Two (2) items of significance were discussed at this meeting. The first item was the Union's research regarding the Applicant's status as an employee. The Union was aware that she was in a term position. If her work with the Employer had exceeded a particular threshold, she would be considered a permanent employee on a term assignment. In either event, the Applicant's employment would end at the end of her term. However, if she had achieved the status of permanent, she would be entitled to notice or severance at the end of her term. The Union's research indicated that the Applicant was not a permanent employee. The second item of significance discussed at this meeting was the Applicant's concern that she had been underpaid during the period when she was working as a practicum student. Again, the Union agreed to raise this issue with the Employer. After the meeting, but before the Union could pursue this matter, the Applicant again contacted the Union and expressly asked that no action be taken by the Union on her behalf. At the request of the Applicant, the Union took no action on her behalf.

[19] The Applicant advised the Employer that she was going on medical leave and then essentially went through a period where she was *incommunicado* with both her work and her Union. While on medical leave, the Student Counselling area began a review of the Applicant's client files and discovered a few anomalies in the Applicant's clinical notes. Although none of these anomalies appeared to be significant, they were the kind of anomaly in record keeping that warranted some follow-up with the councellor making them; in this case, the Applicant. The Employer wanted to raise this issue with the Applicant when she returned to work and asked the Union for assistance in providing her with a letter outlining these additional concerns of the Employer. The Union agreed and a letter from the Employer was sent by the

Union to the Applicant in June of 2010 outlining these addition concerns. Upon receiving the Employer's letter, the Applicant was very upset at the Union for allowing the Employer to communicate with her regarding workplace issues while she was on sick leave. The Applicant phoned the Union and expressed her concerns and disappointment in the Union's conduct. The Union responded by explaining to the Applicant that the Union believed it would be more beneficial for her to know of the Employer's additional concerns before she returned to work. The Union again advised the Applicant that it would assist her with all of her concerns with the Employer when she was fit to return to work.

[20] The Applicant was originally away from work on sick leave and, when her sick leave entitlement expired (i.e.: after 90 days), the Applicant applied for and was accepted (at least initially) on the Employer's Long Term Disability plan. In cross-examination, the Applicant admitted that the Union was helpful and assisted her in her dealings with the Employer regarding her eligibility for and maintenance on the Employer's Long Term Disability Plan. At the time of hearing, the Applicant continued to be on the Employer's Long Term Disability plan, with her eligibility for benefits unaffected by the expiration of her term positions. At the time of hearing, the Applicant described herself as totally disabled and unable to work.

[21] While on medical leave, on or about July 13, 2010, the Applicant filed a formal complaint with the Employer pursuant to the University's Discrimination and Harassment Prevention Policy. The Applicant's complaint alleged personal harassment and harassment based on race or perceived race, creed, religion, and colour by the Applicant's supervisor and a co-worker. The Applicant did not consult with the Union prior to making this complaint nor did she seek the Union's guidance in preparing the complaint document.

[22] The Employer assigned Mr. David Hannah, an Associate Vice-President, to adjudicate the Applicant's harassment/discrimination complaint. Mr. Hannah retained Mr. Andrew Robertson, a lawyer from Calgary, Alberta to investigate the Applicant's allegations, to conduct interviews with the affected parties, and to make recommendations as to the substance of the Applicant's allegations. Mr. Robertson began investigating the Applicant's allegations in August of 2010. Mr. Robertson came to Saskatoon and personally interviewed the Applicant, the persons named in the Applicant's complaints, and various other individuals working in the Student Counselling area, including a number of individuals that the Applicant specifically asked that Mr. Robertson interview. The Applicant testified that she did some research into Mr.

Robertson's background and understood that he was a lawyer, with a good reputation for dealing with complaints like hers. The Applicant testified that she was pleased with all her interactions with Mr. Robertson, believing that he understood her concerns regarding what had occurred in the workplace.

[23] The Employer and Mr. Robertson agreed that all members of the Union involved in the investigation were entitled to have a representative of the Union present during their respective interviews. The Union wanted to have representatives present during these interviews to both allow the Union to have direct knowledge of the evidence gathered by the Investigator and to ensure that Mr. Robertson's interviews did not exceed the scope of the investigation or otherwise become inappropriate. Representatives of the Union were in attendance during all interviews with members of the Union, with the exception of the Applicant. On multiple occasions, the Union encouraged the Applicant to allow representatives to be present during her interviews with the Investigator but each time she refused.

[24] The Union also recognized that, as the two (2) named respondents in the Applicant's harassment/discrimination claim were also members of the Union, a conflict of interests could arise. In response, the Union organized separate representation for its members that were respondents (those accused of harassment/discrimination) and the Applicant (the accuser). It was agreed that the Applicant would continue to be represented by the two (2) representatives with whom she had been dealing with (namely; Mr. Baryluck and Mr. Bocking) and that these two (2) individuals would not be involved in representing any of the other members of the Union involved in these issues. Mr. Baryluck and Mr. Bocking testified that it was the Union's usual practice to provide separate representation for members in conflict and for the separate representatives to not shared information between them. Both Mr. Baryluck and Mr. Bocking testified that this practice was following with respect to the Applicant harassment/discrimination claims and that they did not share their information with the other representatives; nor did they received information from the other representatives.

[25] During the course of Mr. Robertson's investigation, the Applicant wrote emails to both of the respondents named in her harassment/discrimination claim. Mr. Robertson described these emails as "*unhelpful*". On October 7, 2010, the Union met with the Applicant and cautioned her about communicating with the respondents named in her claim because doing so was inappropriate and could be injurious to her claim. During this meeting, the Applicant

wanted to know whether or not the Union would assist her in the event the Investigator ruled against her. In response, the Union said that it would review the Investigator's report when it arrived and would assist her at that time. The Union did, however, caution the Applicant that she may have to "*live with*" the result of the investigative report; whatever they may be. At this point, the Applicant continued to have serious reservations about her willingness to cooperate with the Union as she did not believe that Union officials were sufficiently committed to prosecuting her claims and defending her interests. The Applicant asked the Union to pay for her to get her own lawyer. However, the Union declined the Applicant's request.

[26] Mr. Robertson completed his investigation on or about October 27, 2010 and delivered his report to the Employer (the "Investigation Report"). The Investigation Report was some fifty (50) pages in length. It was detailed and included specific references to individuals and the statements they provided to Mr. Robertson. The Investigation Report contained a comprehensive analysis of each of the means by which the Applicant claimed that she was had been the victim of discrimination and/or harassment, as well as the general circumstances in the workplace (i.e.: within the Student Counselling area). In his report, Mr. Robertson also considered the issue of whether or not the Applicant had been underpaid for all or some portion of the period of time when she had worked as a practicum student. Finally, the Investigation Report contained Mr. Robertson's finding as to whether or not the impugned conduct of the Applicant's coworkers violated the University's Discrimination and Harassment Prevention Policy.

[27] In accordance with what appears to be the Employer's usual practice, a summary of the Investigation Report was prepared (the "Summary Document"). This document was some nineteen (19) pages in length and densely packed. The Summary Document summarized the process used by Mr. Robertson, including the names of the individuals he interviewed, and the facts upon which Mr. Robertson based his conclusions, as well as Mr. Robertson's conclusions regarding whether or not harassment or discrimination had occurred in the workplace.

[28] On November 3, 2010, the Employer wrote to the Applicant and advised her that Mr. Robertson's investigation of her harassment/discrimination claims had been concluded. The Employer provided a copy of the Summary Document to the Applicant and indicated that she could provide the Employer with a response before it made a determination on her claims. On

November 17, 2010, the Applicant submitted a detailed response prepared by a lawyer she had retained.

[29] The Applicant's response was not prepared with the assistance or knowledge of the Union. The Union had offered to assist the Applicant with a response but she declined the Union's offer. The Applicant did not inform the Union that she had retained a lawyer to help her prepare a response to the Summary Document and she did not provide the Union with a copy of the document she provided to the Employer (or tell the Union she had even provided a response to the Employer) until February 1, 2011. At this point in time, the Union did not know the nature of the concerns that the Applicant had with the Summary Document; other than she strongly disagreed with Mr. Robertson's conclusions regarding her discrimination/harassment claim.

[30] The essence of Mr. Robertson's conclusions following his investigation was that, while he understood why the Applicant felt she had been harassed and discriminated against, the impugned conduct of the respondents involved "error in management" but neither harassment nor discrimination within the meaning of the University's applicable policies. Mr. Robertson concluded, *inter alia*, that the March 28, 2010 disciplinary/coaching meeting had been poorly conducted and was ill-advised; that the Applicant had unfortunately become the lightning rod for much of the stresses of the workplace; and that management had generally handled the entire situation very poorly. While Mr. Robertson concluded that the Applicant had been treated "harshly", he was not satisfied that any of the impugned conduct was discriminatory or harassing within the accepted definitions of those terms. Simply put, Mr. Robertson concluded that the impugned conduct was the result of "errors in management" but did not give rise to a violation of the University's policies. However, Mr. Robertson did conclude that the Applicant had been underpaid during the period of time that she was working as a practicum student.

[31] The essence of the Applicant's response to the summary of the Investigation Report was that Mr. Robertson erred in his conclusion. The Applicant argued that there was substantial and sufficient evidence apparent in even the Summary Document upon which both Mr. Robertson and the Employer could have concluded that the impugned employees had violated the University's Discrimination and Harassment Prevention policy. The Applicant argued that the Investigator erred because he tended to minimize the actions of the Applicant's co-workers and the impact of their conduct on her. For example, the Applicant took particular exception to the Investigator's characterization of her co-workers as "*nice, well-meaning people*

trying to do their job" with "*good intentions*". From the Applicant's perspective, her coworkers were aggressors who attacked her because she was different. Furthermore, the Applicant argued that the Summary Document did not contain an adequate explanation as to why Mr. Robertson felt the impugned conduct of the Applicant's coworkers did not to represent a violation of the University's policy.

[32] Mr. Hannah received the Applicant's response to the summary of Mr. Robertson's report, together with responses from the respondents in her harassment/discrimination claim. On December 3, 2010, Mr. Hannah wrote to the Applicant on behalf of the Employer and advised her of his decision. Mr. Hannah informed that Applicant that he was not satisfied that the University's Discrimination and Harassment Prevention policy had been violated. In coming to this conclusion, Mr. Hannah stated that he was in agreement with the conclusions of the Investigator, based partly on the findings as contained in his Investigation Report and based partly on Mr. Hannah's own investigations. Mr. Hannah agreed that several errors in management had occurred in the workplace but concluded that none of these errors were harassing or discriminatory. The Employer, however, did accept that errors had occurred with respect to the Applicant's employment status and that she had been underpaid during the period November, 2007 and August, 2009. The Employer agreed to take steps to quantify and rectify the errors in the Applicant's pay.

[33] Upon being informed that her harassment/discrimination claim had been denied, the Applicant asked the Union to file a grievance on her behalf so that she could challenge and/or appeal the Employer's decision. In cross-examination, the Applicant admitted that she made this request without reading Mr. Hannah's letter of December 3, 2010. The Applicant explained that she did not read the Employer's letter because she was afraid of reactivating her symptoms. The Applicant described herself as suffering from post-traumatic event syndrome at this point in time.

[34] In an unusual turn of events, the Applicant sent an email to the Employer's Harassment and Discrimination Prevention Officer on or about December 14, 2010 (i.e.: the person with whom she had originally filed her harassment/discrimination claim) and indicated that Mr. Robertson had found that she had been discriminated against and/or harassed by her coworkers. In this document, the Applicant commented that "*Their sophisticated discrimination and harassment plan is beyond my imagination. It is vivid, stunning and has put Canadian*

mental health profession to shame." The Applicant went on to describe her time with the Student Counselling Services area as "*the most horrible and unfortunate experience*" in her career. This document was neither sanctioned by, nor prepared with the assistance of, the Union.

[35] On January 7, 2011, the Employer wrote to the Applicant indicating that it had re-calculated the Applicant's compensation and provided her with a cheque in the amount of $11,656.58 representing the shortfall in the Applicant's compensation. The Employer's cheque was accepted and cashed by the Applicant.

[36] During this period, the Applicant had instructed her lawyer to represent her in all her dealings with both the Employer and the Union. However, the Employer advised the Applicant that the Union was her exclusive bargaining agent and that it intended to continue dealing with the Union with respect to her claims and not with her lawyer. While the Union agreed to meet with the Applicant and her counsel, the Union's position was that it would prefer that "*lawyers not be involved*". Although both parties indicated a willingness to meet, no meeting took place at this time, with each side apparently waiting for the other to initiate a meeting. While a meeting did not take place, it should be noted that a good deal of correspondence passed between them, as the Union was continuing to aid the Applicant in dealing with problems in her eligibility under the Employer's Long Term Disability Plan. In this correspondence, the Union repeatedly advised the Applicant of its willingness to aid her in all her dealings with the Employer.

[37] In response to her request that a grievance be filed, the Union advised the Applicant on or about January 31, 2011, that it did not intend to file a grievance unless the Applicant could identify some basis for her belief that Mr. Robertson and/or the University had erred in their conclusions. At this point in time, the Applicant had not identified to the Union any specific concerns that she had with respect to Mr. Robertson's investigation or his conclusions (other than he was "wrong"), nor had she provided the Union with a copy of the document her had provided to Mr. Hannah in November of 2010 outlining her concerns with Mr. Robertson's investigation based on her review of the Summary Document.

[38] On February 1, 2011, the Applicant, through her counsel, provided the Union with a copy of her response to Mr. Hannah. After receiving this information, the Union did two (2) things. Firstly, it agreed to reconsider its decision on filing a grievance on her behalf. Secondly,

the Union requested permission from the Employer to review Mr. Robertson's full Investigation Report. While the Employer agreed to provide the Union with a copy of this document, it did so upon a number of conditions regarding the document's use. The Union agreed to these conditions. The Union also requested and received permission for the Applicant to review Mr. Robertson's report as well. It is noted that the Applicant declined the opportunity to review Mr. Robertson's full report and, even at the time of the hearing, the Applicant testified that she had not read Mr. Robertson's Investigation Report. No explanation was provided as to why she had declined to do so.

[39] On February 23, 2011, the Employer wrote to the Applicant and indicated that her term position with the University (within the Student Counselling area) was about to conclude. The Employer reminded the Applicant that she had been hired in a term position commencing on September 1, 2009; that this position was for a fixed term, being eighteen (18) months; and that her employment with the Employer was scheduled to come to a conclusion on February 28, 2011.

[40] The Applicant's term position expired on February 28, 2011. At this point in time, the Applicant continued to be on long-term disability and had not returned to the workplace. As a consequence, the Employer began asking the Applicant for the return of the University's properties, including her office keys. The Employer also wanted the Applicant to retrieve her personal belongings from the Student Counselling area. When the Applicant failed or refused to respond, the Employer enlisted the Union to assist in these matters. A string of emails were exchanged between the Union and the Applicant in March of 2011 wherein the Applicant stated her belief that she need not clean out her office until her complaints with the University had been finalized and the Applicant again asked the Union to file a grievance on her behalf; this time with respect to her "termination". In response, the Union indicated that it did not believe that a grievance with respect to her termination would be successful because she had not been "terminated". Rather, as the Union described it, the Applicant's term position had expired in the normal course of events. The Union did, however, agree to have its counsel review her file after the Union had obtained a full copy of Mr. Robertson's Investigation Report. In doing so, the Union telegraphed to the Applicant that the only basis upon which the Union believed a grievance could be filed with respect to the Applicant's discrimination/harassment claim and/or with respect to the expiration of her employment contract was if an egregious error was discovered in Mr. Robertson's report.

[41] The Union received a copy of Mr. Robertson's full investigation report on March 28, 2011. As it indicated it would, the Union provided a copy of this document to its counsel, together with the Applicant's submissions to Mr. Hannah. On April 1, 2011, the Union advised the Applicant that, based on its review of the Investigator's full report, the Union would not be filing a grievance on her behalf. Mr. Bocking testified that the Union's decision was made by the Union's Executive although no formal meeting of the Executive was called. Mr. Docking testified that the Union based its decision on the fact that Mr. Robertson's investigation appeared to be thorough; that Mr. Robertson was well-respected; that his findings of fact appeared to be fair; and that his conclusions appeared to be reasonable and consistent with the facts.

[42] Following the conclusion of her term position, the Employer attempted to coordinate a time with the Applicant wherein she could retrieve her personal belongings from the University and clean out her office. The Applicant largely resisted or ignored the Employer's wishes that she clean out her office. During April of 2011, the Union repeatedly contacted the Applicant, cautioning her that she needed to cooperate with the Employer. Union officials attempted to coordinate a suitable time and circumstances for the Applicant to clean out her office and retrieve her personal belongings from the University. Ultimately, the Union's efforts were unsuccessful, with the Applicant escalating events into what can only be described as a public protest outside the Student Service area on the day she was scheduled to clean out her office. Both Union officials and campus security attempted to mediate a resolution acceptable to the Applicant and the Employer but were unable to do so. In an unceremonious end to her career at the University of Saskatchewan, the Applicant's belongings were placed in a box and mailed to her.

Argument of the Parties:

[43] The Applicant took the position that the Union's actions in failing to file a grievance to dispute the Employer's conclusions regarding her harassment/discrimination claim were arbitrary, discriminatory and/or undertaken in bad faith.

[44] With respect to her allegation that the Union's conduct was arbitrary, the Applicant argued that Union failed to conduct a proper or any investigation into the circumstances related to her desire that a grievance be filed challenging the University's decision regarding her harassment/discrimination complaint. The Applicant noted that, after she requested a grievance

be filed, the Union did not interview her or the other employees in the work place to determine the merits of her claims and the facts relevant to the Applicant's request that a grievance be filed. The Union also did not ascertain why the Applicant wanted a grievance filed or the impact of failing to file a grievance on her personal situation. The Applicant argued that the Union ought to have conducted an independent and thorough investigation into the Applicant's allegations that she was harassed and/or discriminated against by her coworkers when they became aware that she wished to challenge the Employer's decision to deny her harassment/discrimination complaint.

[45] The Applicant took the position that, in failing to conduct its own, independent investigation and instead relying upon Mr. Robertson's investigation report, the Union failed to satisfy the "minimum standard of conduct" established by this Board for trade unions in *Dwayne Lucyshyn v. Amalgamated Transit Union, Local 615*, [2010] 178 C.L.R.B.R. (2nd) 96, 2010 CanLII 15756 (SK LRB), LRB File No. 035-09. The Applicant argued that, in failing to inform itself of the facts and in failing to properly determine the merits of the Applicant's grievance, the Union's investigation (and thus its conduct) was perfunctory if not, grossly negligent. Although not directly part of her claim against the Union, the Applicant also argued that the Union's disinterest in prosecuting a grievance related to her termination was indicative of the Union's dismissive attitude toward the Applicant and her concerns.

[46] Furthermore, the Applicant argued that the Union's desire not to communicate through her legal counsel exasperated their negligence by failing to acknowledge and accommodate the medical issues that she was suffered from at the time. The Applicant relied upon a decision of the Canada Industrial Relations Board in *Grace Bingley v. Teamsters Local Union 91 and Purolator Courier Ltd.*, 2004 CanLII 65657 (CIRB), as standing for the proposition that failing to account for the special situation of a member with a mental disability can provide the basis for a violation of the duty of fair representation.

[47] With respect to her allegation that the Union's conduct was either discriminatory or in bad faith, the Applicant argued that the Union itself displayed racial insensitivities and prejudice toward her similar to the impugned conduct of her coworkers. The Applicant pointed to the Reply filed by the Union with this Board in the within proceedings, wherein a representative of the Union made the following statement:

> *5(f): ASPA designated two Executive members to assist the Applicant in pursuing that harassment complaint, who set up a "Chinese wall" between them and two other ASPA officers appointed to represent the ASPA members that were the subject of the harassment complaint;*

[48] The Applicant argued the fact that the Union would use the term "*Chinese Wall*" in dealing with a person of Chinese ancestry was indicative of an underlying insensitivity on the part of the Union on issues of race. In the Applicant's opinion, the treatment she received from the Union in response to her request that grievances be filed was entirely consistent with the negative and dismissive treatment she received from her coworkers because she was different; a difference based on race. The Applicant argued that the onus was on the Union to accommodate her unique cultural and racial background in dealing with her request that a grievance be filed on her behalf. In failing or refusing to consider her cultural and racial background in representing her, the Union's conduct was discriminatory or indicative of bad faith on the part of the Union.

[49] The Applicant argued that representatives of the Union closed their minds to whether or not there was a valid basis for prosecuting a grievance on her behalf and, each time the Applicant asked that the Union to file a grievance, the Union was merely "*going through the motions*" with no intention of fairly representing her. The Applicant took the position that the evidence demonstrated that she had a very "winnable" grievance in light of the many "*errors in management*" identified by Mr. Robertson; errors acknowledged and accepted by the Employer. The Applicant felt that it was impossible to reconcile the conduct that was acknowledged to have occurred in the workplace in Mr. Robertson's investigation and the conclusion that this conduct did not satisfy the accepted definitions of harassment or discrimination.

[50] By way of remedy, the Applicant sought an Order from this Board compelling the Union to file and actively prosecute a grievance challenging the Employer's decision dismissing her harassment/discrimination complaint. Counsel on behalf of the Applicant filed a detailed written brief of law and argument, which I have read and for which I am thankful.

[51] The Union agreed that the Applicant had been poorly treated by the Employer or, at least, management within the Student Counselling area. However, the Union argued that it had carefully and conscientiously represented her; that it had responded completely, promptly and professionally to all of the Applicant's requests; and that the Union appropriately and fairly represented her in all her dealings with the Employer. The Union argued that not all errors in

management are indicative of discrimination or harassment. The Union noted that this Board came to a similar conclusion in *J.K. v. Canadian Auto Workers, Local 4209 & Delta Bessborough Hotel*, [2010] 181 C.L.R.B.R. (2d) 138, 2010 CanLII 44856 (SK LRB), LRB File No. 113-09; a case that also involved allegations of harassment between coworkers in the workplace.

[52] The Union noted that all of the Applicant's concerns regarding harassment and discrimination in the workplace were thoroughly investigated by Mr. Robertson, who was an independent investigator specifically retained to investigate her complaints. The Union also noted that Mr. Robertson specifically concluded that, while errors in management had occurred in the workplace, no discrimination toward or harassment of the Applicant had occurred. The Union also noted that the Applicant's concerns regarding Mr. Robertson's investigation were presented to the Employer and considered in its decision. The Union argued that, while the Applicant may have wanted a different result or would have preferred a different outcome from her harassment/discrimination claim, she was unable to demonstrate any basis to believe that a different adjudicator (i.e.: an arbitrator) would have come to a different conclusion. The Union argued the evidence demonstrated that its officials assembled all of the available information relevant to the Applicant's claims, including obtaining a full copy of Mr. Robertson's report; that it sought guidance from its legal counsel; and that it properly turned its mind to the merits of the Applicant's claims; but that it ultimately concluded that there was no prospect of success in prosecuting a grievance on behalf of the Applicant.

[53] The Union argued that in cases such as this, where an independent investigator has been retained and has determined that no harassment or discrimination has occurred, the onus is on the Applicant to do more than just say "*I want a grievance filed*". Simply put, the Union argued that the Applicant's desire for vindication did not place an overriding onus on the Union to prosecute her claims without regard to the potential for success of that grievance. The Union argued that under these circumstances, there is some onus on the Applicant to provide the Union some basis or rationale for challenging the investigator's conclusions because, absent some egregious error on the part of investigator, the Employer's decision would be very difficult to challenge.

[54] The Union argued that its conduct toward the Applicant was conscientious and appropriate notwithstanding numerous rebuffs of Union officials by the Applicant; notwithstanding the fact that the Applicant repeatedly failed to heed the advice of Union officials; and

notwithstanding the fact that the Applicant repeated excluded the Union from her dealings with the Employer, and, in so do, preventing it from gathering the very information it needed to properly represent her.

[55] With respect to the allegation that the Union's conduct was discriminatory, the Union argued that there was absolutely no evidence that its conduct was motivated by anything other than a genuine and honest desire to represent one of its members. With respect to the use of the term "Chinese wall" in its Reply, the Union conceded that the term had been inserted by its legal counsel; that it was a term routinely used by legal practitioners; and that it had not intended any offence through use of the term.

[56] The Union asked that the Applicant's application be dismissed. The Union filed a detailed written brief of law and argument, which I have read and for which I am thankful.

[57] The Employer agreed that the Applicant's application ought to be dismissed. The Employer noted that claims of harassment or discrimination between coworkers can be very divisive and disruptive in workplace. The Employer argued that, recognizing this reality, it has adopted a fair and impartial process to adjudicate these claims. The Employer took the position that the Applicant's concerns were thoroughly and appropriately investigated and that compelling the Union to prosecute a grievance under these circumstances would be inappropriate and injurious to the workplace. The Employer argued that one of the purposes of its Harassment and Discrimination Prevention policy was to ensure that claims, like that of the Applicant's, are investigated and resolved on a timely basis. The Employer argued that, now that the Applicant's claims have been properly and thoroughly investigated, everyone, including the Applicant, needs to accept the results and move on.

Relevant Statutory Provisions:

[58] The relevant provision of *The Trade Union Act* is 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:

[59] 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.*

[60] In addition, in *Lorraine Prebushewski v. Canadian Union of Public Employees, Local* 4777, [2010] 179 C.L.R.B.R. (2nd) 104, 2010 CanLII 20515 (SK LRB), LRB File No. 108-09, the Board, after setting forth the general approach as described in *Laurence Berry, supra*, made the following observations at paras. 55 to 60 that seem relevant to the present application:

> *[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] There can be no doubt that the Applicant mistrusted the Union and its officials. However, I note from the Applicant's own evidence that her mistrust of the Union existed before she had even met any of its officials and that it persisted notwithstanding repeated efforts on the

part of the Union to aid her, to represent her, and to reassure her that it was willing to represent her interests.

[62] Contrary to the Applicant's assertions, I saw no credible evidence of discrimination or bad faith on the part of the Union in any form recognized by this Board. The use of the term "Chinese wall" was probably an unfortunately choice of words when describing the Union's actions in representing a member who has expressed concerns about racial insensitivity. On the other hand, the singular use of this expression provides a wholly insufficient basis from which this Board can reasonably infer discrimination or bad faith on the part of the Union. The preponderance of evidence in this case demonstrated that Union officials were polite, courteous, conscientious and appropriate in all their dealings with the Applicant, save this one example. Even in that one respect, the term "Chinese wall" is a recognized legal expression routinely utilized in proceedings involving conflict of interests to describe the procedures used by parties to function in the face of such conflicts. I am satisfied that the use of this term in the Union's Reply was as suggested by the Union; merely its efforts to inform this Board as to the nature of its dealing with the Applicant. Simply put, I am not persuaded that the use of this term is indicative of any underlying racial insensitivity on the part of the Union.

[63] Mr. Robertson indicated in his report that he understood why the Applicant felt that she was harassed and discriminated against by her coworkers because of the harsh treatment she received from her supervisor but went on to conclude that the factors that the Applicant saw as discrimination and/or harassment were indicative of bad management but not harassment or discrimination. It is more difficult to understand why the Applicant viewed the Union's conduct as discriminatory or indicative of bad faith other than she tended to view most (if not all) of her interactions with the Union through the same prism of discrimination and harassment that Mr. Robertson observed. In my opinion, an objective review of the evidence in these proceedings did not support the Applicant's allegations of discrimination or bad faith on the part of the Union.

[64] The substance of the Applicant's allegation was that the Union failed to fairly represent her (and the area where the parties focused most of their argument) was that the Union's conduct was 'arbitrary'. The Applicant argued that the Union's investigation into her claims of harassment/discrimination was defective and/or inadequate and that the Union's decision to not file and prosecute a grievance on her behalf was perfunctory at best and

seriously negligent at worst. Having carefully considered the evidence in these proceedings, I am not satisfied that the evidence supports either of these allegations.

[65] There can be no doubt that the Applicant would have been a very difficult member to represent. She was dismissive and mistrusting of the very people who were trying to help her. However, as this Board stated in *J.K. v. CAW, Local 4209, supra*, the cooperation of the grievor is a factor that may be taken into consideration by a trade union in assessing the likelihood of obtaining a successful outcome through grievance proceedings. In doing so, the trade union must not be motivated by a desire to punish an uncooperative member (no matter how frustrating or self-destructive the conduct of that member may be) but rather the trade union must base its decision on a reasonable and thoughtful assessment of the potential of achieving a successful outcome, together with other relevant factors, such as the reasonable use of the trade union's scarce resources.

[66] I have no doubt that the Applicant's failure to cooperate with the Union and to follow the advice of the Union's representatives would have been frustrating for the Union. However, I saw no evidence that the Union faltered in its representation of the Applicant in any of her dealings with the Employer and, to the extent that there were any errors or lapses in the Union's representation of the Applicant, I am satisfied that such were the kind of mistake that this Board has characterized as falling outside of the Board's supervisory responsibilities. 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.

[67] I am not persuaded by the Applicant's argument that, in failing to conduct its own independent investigation and instead relying upon Mr. Robertson's investigation report, the Union failed to satisfy the "minimum standard of conduct" established by this Board for trade unions in *Lucyshyn v. Amalgamated Transit Union, supra*. The comments of Chairperson Love in *Lucychyn* were not intended to be prescriptive in a literal sense, as the Applicant has argued. Rather, these comments were intended to provide guidance and to be instructive on the general expectations of this Board as to the duties expected of a trade union in processing a request for a grievance from a member. In my opinion, the conduct of the Union in the present case differed markedly from the circumstances before this Board in the *Lucyshyn* case. In that case, the union (which was found to have violated s.25.1) had failed to conduct any meaningful investigation of

the alleged complaints and could not even locate their records of the applicant's complaints. Simply put, in that case, the impugned trade union had no means, and had made no effort, to determine the relevant facts and, thus, could not reasonably have turned their mind to the merits of the alleged complaints.

[68] In the present case, the Union had the benefit of the results of Mr. Robertson's investigation, including both the Summary Report and later a copy of the full Investigation Report. As this Board found in *Patrick Miller v. Amalgamated Transit Union, Local 615*, [2010] 181 C.L.R.B.R. (2nd) 275, 2010 CanLII 41137 (SK LRB), LRB File No. 139-09, the requirement that a trade union conduct an investigation to determine the merits and facts (of an allegation giving rise to a potential grievance), does not always require that an independent investigation be conducted by that trade union provided it has sufficient knowledge of the matters in dispute from which it may form its own opinion. Specifically, in *Miller v. Amalgamated Transit Union, supra*, the Board made the following comments on this issue:

> ***[41]*** *While the Union relied on management's review of the impugned buses in making its decision as to whether or not to file and advance a grievance on behalf of the Applicant, the Union's own members, including journeyman mechanics, played an integral role in management's review.* ***It is not apparent to the Board (as suggested by the Applicant) that an independent review of the buses by someone else was necessarily or would have provided more, different or better information.*** *Interestingly, for much of management's review, the City would have been relying on the advice and expertise of the Union's members.* ***The participation of the Union's members in this review gave the Union direct knowledge as to the subject matter in dispute sufficient for the Union to form its own opinion as the operational safety of the 95 and 97 series of buses.*** *The mere fact that the Union came to the same conclusion as management is not indicative of a lack of independence or a perfunctory decision making process on the part of the Union. The Union's Executive reviewed management's findings and conclusion and concluded that management's decision to cease providing accommodations with respect to the 95 and 97 series of buses was reasonable.*

[69] In the present case, the Union relied upon the investigative report of Mr. Robertson, as did the Employer. In my opinion, the Union had the right to do so. I am not persuaded by the Applicant's argument that the Union was required to conduct its own independent investigation into the Applicant's harassment/discrimination claims to satisfy the "minimum standard of conduct" established by this Board for trade unions in *Lucyshyn v. Amalgamated Transit Union, supra*, for a number of reasons.

[70] Firstly, the Union had at least two (2) face to face meetings with the Applicant with respect to her concerns that she was being mistreated in the workplace. In fact, it was the Union that suggested that the conduct that was occurring in the workplace might have been harassment and/or discrimination and it was the Union that advised the Applicant on the procedures for filing a claim under the University's Discrimination and Harassment Prevention Policy. In my opinion, it was not necessary for the Union to re-interview the Applicant following her request that a grievance be filed as this request was not a new issue for the Union. It was a continuation of the same issue on which the Union had been attempting to represent the Applicant. I am satisfied that the Union had a sufficient understanding of the nature of the allegations giving rise to the Applicant's desire that a grievance be filed.

[71] Secondly, the Employer in the present case has adopted a policy of retaining an independent investigator to investigate and resolve allegations of discrimination and harassment on a timely basis. In my opinion, this is a commendable practice. I take notice of the fact that allegations of harassment and discrimination between coworkers are very disruptive to a workplace. Until resolved, such allegations tend to cause divisions in the workplace and amplify dissent, tension and frustrations between coworkers. Furthermore, as this Board noted in *J.K. v. CAW, Local 4209, supra*, not all conflict between co-workers involves victimization and discipline by management (even when poorly done) is not the same thing as harassment. In the *J.K.* case, this Board observed that disputes between coworkers are difficult for both employers and trade unions:

> ***[57]*** *It was management's responsibility to sort out the dysfunction in the workplace being caused by the participants and it is generally recognized that interpersonal conflicts can be the most difficult problems for management to resolve. Generally speaking, by the time management becomes involved in these disputes, by definition, they have already escalated beyond the boundaries of appropriate conduct. The motivations, explanations and justifications of the participants are typically (from management's perspective) confusing, illogical, and represent unjustified amplifications of what would otherwise appear to be minor trespasses.* ***Simply put, interpersonal disputes in the workplace represent exasperating and unproductive distractions for management and they seldom involve unilateral wrong-doing from which the victim and the perpetrator can be identified.***
>
> ***[58] For the same reasons, co-workers involved in interpersonal disputes can also be very difficult members for a trade union to represent.*** *In this case, the Applicant was willfully blind to his participation in the conflict occurring in the workplace, seeing himself wholly as a victim of the aggression of his co-workers and the bias and incompetence of management.* **Emphasis added.**

[72] The procedures adopted by the Employer were intended to solicit the facts relevant to the Applicant's allegations and to provide a factual basis for determining the merits of her claims on a timely basis. In my opinion, there is nothing perfunctory or cursory in the Union's decision to rely upon the results of Mr. Robertson's investigation, together with its own understanding of the Applicant's allegations, to form the basis for its decision as to whether or not a grievance could be successful and/or justified the expenditure of the Union's scarce resources.

[73] Thirdly, Applicant's allegations, which involved a dispute between members within the same union, placed the Union into a conflict of interest situation. As such, the Union was under a practical handicap with respect to its capacity to thoroughly investigate the relevant circumstances because of its requirement to maintain separation between the various representatives involved in representing opposing and affected members of the Union. For the Union to have done what the Applicant now suggests (i.e.: to conduct its own independent investigation) would have required the Union to replicate Mr. Robertson's investigation not just once, but multiple times (once for the Applicant and once again for each of the named respondents). In my opinion, under these circumstances, it was entirely appropriate for the Union to rely upon Mr. Robertson's investigation, provided that it was satisfied with his appointment (i.e.: his independence and impartiality), his credential (i.e.: his experience or reputation for conducting a fair and thorough investigation); and that no egregious error or fundamental breach of natural justice occurred in his investigation. The evidence indicates that both the Union and the Applicant investigated Mr. Robertson and were satisfied with his appointment and credential. While the Applicant disputed Mr. Robertson's conclusions, no egregious error or fundamental breach of natural justice was identified in his investigation. Rather, the substance of the Applicant challenge to Mr. Robertson's investigation was that he came to the wrong conclusion.

[74] Fourthly, the Union's advice to the Applicant that she may have to "*live with*" the results of Mr. Robertson's investigation (unless an egregious error was discovered in Mr. Robertson's report) was both reasonable and appropriate. In my opinion, the Union's caution was not indicative of a perfunctory or cursory attitude on the part of the Union. Simply put, this advice was entirely consistent with the procedure agreed to by the parties and envisioned by the University's Harassment and Discrimination Prevention Policy. The Union asked the Applicant to explain why or how she believed Mr. Robertson had erred. The Union considered her

submissions and sought advice from its counsel. In the end, the Union was not persuaded by the Applicant's arguments. In this respect, I agree with the Union's position that the Applicant's singular desire for vindication did not place an overriding onus on the Union to prosecute her claims without regard to the potential for success of that grievance; or the use of the Union's scarce resources; or any of the other facts this Board has identified as valid considerations for a trade union in deciding whether or not to prosecute a grievance on behalf of a member.

[75] This Board has repeatedly acknowledged that it is not a breach of the duty of fair representation for a trade union to decline to file or to withdraw a grievance, if it takes a reasonable view of the circumstances and if it makes a "*thoughtful decision*" not to prosecute that 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. In my opinion, the evidence demonstrates the Union "*put its mind*" to the issue of whether or not a grievance ought to be filed on the Applicant's behalf and did so upon an appropriate and sound factual basis. It is not reasonable to infer that the Union was just "*going through the motions*" as the Applicant suggests. The evidence reveals that the Union provided separate representation for her by two (2) of its most senior officials (i.e.: two presidents of the Union). Union officials repeatedly offered to assist the Applicant and the Union attended to all of the concerns that she would allow it to represent her on. Union officials responded appropriately, politely and diligently to all her requests and they reasonably kept her apprised of relevant circumstances. The fact that the Union decided not to prosecute a grievance on her behalf, even if contrary to express wishes, is not indicative of arbitrariness.

[76] While it is not the role of this Board to assess the relative strength or merit of the Applicant's grievance, the evidence in the proceedings did not, contrary to the Applicant's suggestion, inescapably lead to the conclusion that the Applicant's grievance was winnable. In this respect, the facts of this case are relatively simple. The Applicant made a harassment/discrimination complaint regarding conduct that was occurring in the workplace. The Applicant's complaints were investigated by an independent investigator. This person found that the Applicant's allegations of both harassment and discrimination were unfounded. The investigation appears on its face to have been thorough, comprehensive and in compliance with the requirements of natural justice. The investigator appears to have considered and weighed the evidence and his conclusions appear well-reasoned. While it is possible that a different

adjudicator (i.e.: an arbitrator hearing her grievance) could have weighed the evidence differently or could come to a different conclusion, it is far from obvious that such would be the probable outcome of prosecuting a grievance on her behalf.

[77] While the Applicant clearly desired vindication in her belief that she was the victim of harassment and/or discrimination in the workplace, the Union had the right to evaluate not only the potential for success of the Applicant's grievance, but also the expenditure of the Union's resources and potential injury to its reputation by prosecuting an arguably weak grievance. With all due respect to the Applicant's belief that she was wronged by her coworkers, there is a recognized need for finality in all dispute resolution proceedings; something also that the Union has the right to consider. In my opinion, the Union had the right to come to the conclusion that it did in light of the process that it followed and the factors that it took into consideration.

[78] Having carefully considered the evidence in these proceedings, I can find no evidence of the kind of recklessness or non-caring attitude necessary to sustain a violation of s. 25.1 of the *Act* nor was there any credible evidence from which this Board could infer that the Union's actions were motivated by discrimination or bad faith.

Conclusion:

[79] For the foregoing reasons, the Applicant's application is dismissed.

[80] The Investigative Report prepared by Mr. Robertson dated October 27, 2010 and identified as Exhibit R-35 in these proceedings shall be sealed by the Registrar and access to this document shall be limited to the Applicant, the Administrative and Supervisory Personnel Association, the University of Saskatchewan and their respective legal counsels and representatives and the production requirements of any court of competent jurisdiction. Provided, however, that such access may be modified by further Order of this Board.

DATED at Regina, Saskatchewan, this **24th** day of **February, 2012.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson