TANYA BEAUCHAMP, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent Union and THE GOVERNMENT OF SASKATCHEWAN, Respondent Employer

LRB File No. 001 - 14; August 7, 2014
Chairperson, Kenneth G. Love Q.C sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act*

For the Applicant:	Jessie Buydens
For the Respondent Union:	Crystal Norbeck
For the Respondent Employer:	Curtis Talbot

Duty of Fair Representation – Section 25.1 of *The Trade Union Act* – Applicant fails to meet onus of proof of violation of the duty of fair representation.

Duty of Fair Representation – Board reviews evidence – Finds no evidence that Union breached its duty of fair representation.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** The Saskatchewan Government and Employees' Union, (the "Union") is certified as the bargaining agent for a unit of employees of The Government of Saskatchewan (the "Employer"). The Applicant was employed by the Ministry of Corrections and Policing.

[2] For the reasons which follow, the Application is denied.

Facts:

[3] The Applicant was hired in March 2009 to work at the Pinegrove Correctional Centre in Prince Albert, Saskatchewan. She resigned that position the following month and in

May, 2009 commenced working at the Saskatoon Correctional Centre. She was suspended from her position on October 20, 2010 due to her having been criminally charged in relation to the death of a known gang member in Saskatoon. Those charges were later withdrawn. She was ultimately discharged from her employment in November, 2010 on the basis that she had violated the employers Relationship Policy with respect to relationships with offenders or ex-offenders and on the basis that she was also in violation of the Code of Professional Conduct for Corrections Workers .

[4] The Applicant and the Union filed a grievance with respect to her termination on December 20, 2010. Her grievance alleged that she had been terminated without good and sufficient cause and sought re-instatement and repayment of all lost wages and benefits.

[5] The grievance was processed through the usual grievance steps, but was denied. The Union moved the grievance to step 3 of the grievance procedure on June 13, 2012, but asked that the grievance be held in abeyance pending a decision in another grievance[1] which the Union thought would have precedential value with respect to the Applicant's grievance. The Employer agreed to that request.

[6] On February 13, 2013, the Longman arbitration decision was issued by the Arbitrator. The Longman decision, which the Union anticipated would determine if the Relationships Policy of the Employer was discriminatory with respect to aboriginal women, was determined on a different issue and hence was of no precedential value in this case.

[7] On March 13, 2013, the Union determined to recommend that the grievance not proceed, and advised the Applicant in writing of its decision. Ms. Willerton of the Union relied upon the following to reach her conclusion that the grievance should not be pursued:

1. The Applicant made admissions of fact during an interview conducted by the Employer (in the presence of a Union representative) while the Applicant was on remand in Pinegrove Correctional Centre while charged with the criminal offence related to the death of the gang member.

[1] The Longman grievance

2. The Applicant also made similar admissions of fact during the Step 2 grievance meeting with the Employer.
3. The Employer's relationship policy which governed relations between correctional workers and offenders or ex-offenders.
4. The Code of Conduct for Corrections Workers.
5. Confirmation from the Employer that information regarding relationships with offenders and ex-offenders had been presented/discussed during the training the Applicant received when first hired at the Pinegrove Correctional Centre.
6. The provisions of the collective agreement[2] with established the "just cause" standard.
7. Relevant case law as well as pertinent and written materials by notable authors of Labour Law respecting off-duty conduct of employees.

[8] The Applicant was advised that she could appeal, Ms. Willerton's recommendation not to proceed with the grievance, to the screening committee of the Union. The Applicant appeared before the screening committee to plead her case for continuation of the grievance, but was unsuccessful. The committee, with written reasons, concurred in the recommendation to discontinue the Applicant's grievance.

[9] The screening committee decision could be further appealed to the Union's Sector Appeal Committee. The Applicant took the opportunity to appeal to the Sector Appeal Committee. At that hearing she appeared with counsel to oppose the recommendation that her grievance not proceed. The Sector Appeals Committee again determined to support the recommendation made by Ms. Willerton that the grievance be abandoned.

[10] Following the decision of the Sector Appeal Committee, the Union formally advised the Employer that it was withdrawing the grievance. The Applicant then filed this application under section 25.1 of *The Trade Union Act* on January 3, 2014.

Relevant statutory provision:

[2] Article 20.2

> *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.*

Applicant's arguments:

[11] The Applicant argued that the Union had failed in its duty of fair representation owed to the Applicant. It argued based upon the Supreme Court of Canada decision in *Canadian Merchant Service Guild v. Gagnon*[3] and this Board's decision in *Lucyshyn v. Amalgamated Transit Union, Local 615*[4] that the Union failed to properly investigate the grievance.

[12] The Applicant's submission that the Union failed to properly investigate the grievance was premised on the Union's failure to conduct any inquiry into the Employer's interview of the Applicant while incarcerated in Pinegrove Correctional Institute. The Applicant argued that the Union failed to review the transcript of the evidence provided at that interview until after the dismissal of the grievance at step 2.

[13] The Applicant argued that such investigation would have shown that the Applicant's basic and constitutional right to counsel were violated during that interview.

[14] The Applicant also argued that no investigation was conducted to determine if the Applicant was aware of the relationship policy. The Applicant denied knowledge of the policy and the Employer alleged she had had that training during her initial indoctrination at Pinegrove. The Applicant argued that a proper investigation as to who, when and where that knowledge had been provided to the Applicant should have been sought out.

[15] The Applicant also argued that there was animosity between the Applicant and Ms. Willerton. The Applicant testified that she had had a good relationship with the previous Union representative assigned to her file, but did not have the same relationship with Ms

[3] [1984] 1 S.C.R. 509
[4] [2011] CanLII 32698 (SKLRB)

Willerton who took over the file. The Applicant alleged that Ms. Willerton was unreasonable and failed to make proper inquiry as to the underlying facts.

[16] The Applicant also alleged that Ms. Willerton caused or was partially responsible for her losing her privileges to enter federal penal institutions in the performance of a new job with the Elizabeth Fry Society.

Respondent Union's arguments:

[17] The Union argued that they had fulfilled their duty of fair representation in that it had not acted in a manner which was arbitrary, discriminatory, or in bad faith. In support it cited the *Gagnon* decision (*supra*) as well as *Lucyshyn* (*supra*) as well as the various definitions utilized by the Board respecting arbitrary, discriminatory or bad faith behavior.

[18] The Union argued that it had properly investigated the grievance and had afforded the Applicant every opportunity to appeal against the recommendation to withdraw the grievance. It argued even if Ms. Willerton had acted contrary to section 25.1 (which it denied), the Applicant had tested that recommendation before both the screening committee and the sector appeals committee, both of whom had upheld the recommendation. It argued that the Applicant had provided no evidence to show that either of the screening committee or the sector appeals committee had, in any way, acted in a manner that was arbitrary, discriminatory or in bad faith in its determination to abandon the grievance.

[19] The Union argued that the interview conducted by the Employer was outside its control and that it had a representative in attendance to insure the Applicant's rights under the collective agreement were protected.

[20] The Applicant also argued that the Applicant bore the onus of proof of a breach of section 25.1 and had failed to satisfy that onus.

Respondent Employer's arguments:

[21] The Employer also argued that the Applicant had failed to prove a violation of section 25.1. It argued that the Applicant had not shown conduct by the Union which was arbitrary, discriminatory or bad faith.

[22] The Employer also argued that while the Applicant had a right to have a union representative available during the Pinegrove interview, the Applicant was not entitled to have legal counsel present during that interview.

Analysis:

Applicable Law

[23] Only the Union[5] argued that the applicable law with respect to this application is *The Trade Union Act*[6], which was repealed by the proclamation of *The Saskatchewan Employment Act*[7] on April 29, 2014. We agree with the Union in this regard. The matter arose under *The Trade Union Act* and any rights respecting representation of the Applicant arose prior to the coming into force of *The Saskatchewan Employment Act*. Accordingly, we have dealt with this application pursuant to section 25.1 of *The Trade Union Act* (the "*Act*").

Rationale & Decision

[24] The Board's jurisprudence with respect to the duty of fair representation is well established. The Board recently undertook a review of its jurisprudence regarding a Union's duty of fair representation in *Banks v. Canadian Union of Public Employees, Local 4828.*[8] At paragraph [65], the Board quoted from its previous jurisprudence as follows:

> *[65] The Board's jurisprudence with respect to the duty of fair representation under Section 25.1 of the Act is well established. In Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[9]*, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. In that case, the Board said:*
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> . . .
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> *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of*

[5] The other parties took it as settled that *The Trade Union Act* was applicable
[6] R.S.S. 1978 C. T-17
[7] S.S. 2013 C. S-15.1
[8] [2013] CanLII 55451 (SKLRB)
[9] **[**2003] Sask. L.R.B.R. 511, LRB File No. 223-02

Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:

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.

[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:

. . . a complainant must demonstrate that the union's actions were:

(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;

(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or

(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.

The behavior under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".

The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:

It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.

This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.

. . . .

[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:

What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake.

[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:

[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .

And further, at 194-95, as follows:

. . .

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board*

described the duty not to act in an arbitrary manner as follows:

Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.

Negligence is distinguishable from arbitrary, discriminatory or bad faith behavior. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.

When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.

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

A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:

Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.

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

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

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

... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.

Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.

. . .

Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigorous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.

[39] As noted above, the Canada Labour Relations Board took a similar view in Rousseau v. International Brotherhood of Locomotive Engineers et al., supra. In Johnson v. Amalgamated Transit Union, Local 588 and City of Regina, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the

obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.

The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:

This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.

They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:

As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.

They went on to summarize the nature of the duty imposed on the trade union, also at 614:

It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers

will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.

[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

…The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.

[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:

The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.

In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by

> *voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

[25] It is also well established that the Applicant bears the onus of proof of the allegations that he/she was not properly represented.

[26] In this case, the Applicant has failed to meet this onus of proof that the Union has failed to properly represent her. The Applicant's allegations that the Union failed to properly represent her by not investigating the transcript of the interview of the Applicant at Pinegrove Correctional Centre is not convincing. The Applicant testified that she was not advised by the Union to file a grievance with respect to the conduct of that interview. However, she failed to provide any evidence to support whether or not that would be something which could be grieved under the collective agreement. Similarly she argued that the Union had failed to advise her to grieve her suspension prior to her dismissal. However, there was again, no evidence to support that such a grievance was possible or even desirable when a termination grievance was already being processed and had been abandoned.

[27] This Board does not sit in appeal of a Union's activities in the conduct of a grievance. Our jurisdiction is to ensure, as set out in *Gagnon*, that the exclusive power granted to a union to act as spokesman for the employees in a bargaining unit is balanced with the obligation to fairly represent all employees comprised in the unit. Furthermore, as set out in *Gagnon*, 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, provided that discretion is "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".

[28] In this case, the Union formed the opinion not to proceed with the grievance. It communicated this decision to the Applicant, provided reasons, and gave her the right to appeal. She availed herself of the right of appeal to the Screening Committee and then to the Sector Appeals Committee. In both cases, these committees concurred with the recommendation. No evidence was provided to show that these committees' decisions were in any way motivated by arbitrary or discriminatory conduct or bad faith.

[29] As noted by this Board in its decision in *Lorraine Prebushewski v. Canadian Union of Public Employees, Local 4777*[10]

> *[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 behavior/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.*

[30] The Applicant tried to rely upon several points which are not relevant to this application, such as the alleged egregious conduct of the Union in allowing the Applicant to be interviewed without counsel being present while she was in Pinegrove, as well as failing to counsel her to grieve that interview. Additionally, the fact that no grievance was filed respecting the suspension does nothing to show that the Union did not discharge its duty of fair representation as set out in section 25.1 and as outlined by the Supreme Court in *Gagnon*.

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[10] [2010] CanLII 20515 (SKLRB) at paragraph [55]

[31] As noted above, the Board does not sit in appeal of each and every decision made by the Union. We have no evidence that suggests that the conduct of the Employer in the conduct of the interview at Pinegrove was contrary to the provisions of the Collective Bargaining Agreement and hence could be the subject of a grievance. Similarly, the filing of a grievance with respect to the suspension, in light of the termination of the Applicant would serve no purpose.

[32] Similarly, whether or not the Applicant got along with Ms. Willerton is irrelevant to the conduct of the union in the discharge of its duty of fair representation. More is required such as evidence that the Union otherwise failed in its duty as a result. There was no evidence that Ms. Willerton was arbitrary, discriminatory or acted in bad faith towards the Applicant in the processing of her grievance.

[33] Furthermore, we agree with the Union that, even if there had been evidence that Ms. Willerton had somehow failed to fairly represent the Applicant, that conduct, on her part, should have been one of the subjects of the appeals to the Screening Committee and the Sector Appeals Committee. It was those committees responsibility to ensure that the recommendation made by Ms. Willerton was not tainted by any such concerns. None were found by the committee, who supported the recommendation. As noted before, there was no evidence that these committees were in any way acting arbitrarily, discriminatorily or in bad faith in the conduct of their review of the recommendation.

[34] The Applicant has failed to satisfy the onus of proof that she was not fairly represented contrary to section 25.1. The application is hereby dismissed. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this 7th day of August, 2014.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson