WADE C. ZALOPSKI, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21 AND CITY OF REGINA, Respondents

LRB File Nos. 009-16; July 14, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C. (sitting alone pursuant to Section 9-95(3) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1)

For the Applicant:	Self-Represented
For the Respondent Union:	Juliana Saxberg
For the Respondent Employer	No one appearing

Duty of Fair Representation – Applicant filed Duty of Fair Representation application when Union, after consulting with one of its national representatives, decided not to refer his promotional grievance to arbitration – Union provided Applicant opportunity to meet with internal committee prior to deciding whether to accept its official's recommendation – Applicant chose not to attend meeting – Board reviewed previous decisions and concluded the Applicant failed to demonstrate the Union acted in an arbitrary or discriminatory manner or in bad faith – Application dismissed.

Duty of Fair Representation – Scope of Duty – Board does not second guess strategic decisions taken by the Union in the prosecution of a grievance – Union not obliged to accept Applicant's demands respecting how the grievance should be dealt with and what arguments to advance on his behalf.

REASONS FOR DECISION

OVERVIEW:

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Mr. Wade C. Zalopski [Applicant] has been employed by the City of Regina [City] for more than four (4) decades. For most of those years, the Applicant has worked in the RDWYS Branch – Asphalt Services. Throughout the duration of his employment, he has been a member of the Regina Outside City Workers,

Local 21, a charter local of the Canadian Union of Public Employees [Union]. At various times, the Applicant has held elected office with Local 21.

[2] The Union has been certified by this Board as the exclusive bargaining agent for employees represented by that Local. The Union and the City, which was not represented at this hearing, are parties to a collective agreement, the term of which ran from January 1, 2013 until December 31, 2015.

[3] On January 27, 2015, the Applicant commenced this application pursuant to section 6-59 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1[*SEA*] alleging that the Union failed to represent him fairly in relation to a supervisory promotional grievance.

[4] On February 5, 2016, the Union filed its Reply challenging many of the allegations set out in the Applicant's application, and asserted that it represented the Applicant fairly in the prosecution of the grievance.

[5] Subsequently, on June 22, 2016, the Union, invoking *Roy v Workers United Canada Council*[1] asked the Board to dismiss this application summarily.[2] The Union withdrew this application at the outset of the hearing on January 16, 2017.

[6] The Reasons for Decision that follow explain why the Applicant's claim must be dismissed.

FACTUAL BACKGROUND

[7] At the hearing of this application, the Applicant presented evidence on his own behalf. As well, he called one (1) witness, Mr. Tim Anderson, who is currently President of the Union. The Union did not call any witnesses. Instead, it chose to rely on documentary evidence which formed part of the Applicant's formal application.

[8] Both the Applicant and Mr. Anderson testified about the travails this Union has encountered, most notably when, on the recommendation of Mr. Guy Marsden, a National Representation of the Canadian Union of Public Employees [CUPE], Local 21 was placed under administration. At that time, the entire elected Executive, which included Mr. Anderson was

[1] 2015 CanLII 885 (SK LRB)
[2] LRB File No. 143-16

dismissed. In its place, Mr. Dave Stevenson, another CUPE National Representative, became the Union's Administrator. These events occurred around the same time as the circumstances giving rise to this application. While this evidence is not directly relevant to the application under consideration here, it does provide useful context to aid in understanding the on-going labour relations climate at the Landfill during the relevant time period.

[9] At the time of the hearing, the Applicant had been employed by the City for approximately 41 years. For most of those years, he has worked in the RDWYS Branch – Asphalt Services.

[10] On or about March 2, 2015, the Applicant filed a formal application for the position of Supervisor, Field Operations (Asphalt Services). He was one (1) of four (4) candidates considered for this position. The City used a matrix system to assess and rank potential candidates for a particular position.

[11] The Applicant introduced into evidence the matrix used by the City for the competition in which he participated.[3] It contained eleven (11) separate categories divided into two (2) general areas headed "Knowledge" and "Skills". This matrix read as follows:

> ***Knowledge***
> *Supervisor experience*
> *Knowledge of supervisory & Leadership Principles and Practices*
> *Advanced Knowledge of Roadway Planning, etc.*
> *Legal implications of inspection work*
>
> ***Skills***
> *Demonstrated Supervisory and project management abilities*
> *Demonstrated ability to assure specs, regs and policies*
> *Ability to resolve LR issues and interpret agreements*
> *Skilled with dealing with difficult people/situations*
> *Ability to manage conflict and build relationships*
> *Manage work according to OH&S policies*
> *Create and Maintain safe respectful work environment*

[12] This document also revealed that of all the candidates interviewed for this position, the Applicant consistently scored the lowest or next to the lowest. Despite his significant level of seniority, the position was nevertheless awarded to another individual who satisfied the "[m]inimum requirement of 8 years supervisory experience".

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[3] See: Exhibit A-2.

[13] Mr. Anderson testified that he was surprised by these results. He indicated that in his opinion, the Applicant had extensive experience in a number of the categories identified in the matrix, much more than candidates who were scored higher. As well, he believed the Applicant exhibited significant leadership and supervisor skills in the workplace, not the least of which was his 22 years as a member of the Union's Executive. In Mr. Anderson's opinion, the Union should have challenged the matrix system used by the City in this particular competition as unfair and unrealistic. The failure to do so he put down to the fact that Mr. Stevenson was not familiar with the Landfill.

[14] Mr. Anderson also testified that in his estimation, the City had not given sufficient weight to the Applicant's lengthy tenure at the Landfill. In particular, he pointed to Article 10.2.1 of Local 21's Collective Agreement with the City.[4] This provision which pertains to "Vacancies and New Positions" reads as follows:

> *10.2.1. In filling vacancies or new positions in the classification of supervisor within the scope of this agreement, the most qualified applicant who possesses the necessary qualifications shall be selected. However, where the qualifications of two or more applicants are relatively equal, seniority, in accordance with Article 9 shall be the governing factor.*

[15] After failing to obtain the position, the Applicant decided to file a grievance. However, prior to formally filing this grievance he met with Mr. Stevenson. The Union filed a grievance challenging the competition (Grievance No. L21-2015-022).

[16] The Step #1 meeting with the City took place on or about July 13, 2015. At that meeting, the City denied the grievance.

[17] The Union then moved the grievance on to Step #2 of the grievance process set out in the Collective Agreement. The Step #2 meeting took place on August 26, 2015, and on August 27, 2017, the City again rejected the grievance.

[18] Following the City's second rejection of the grievance, the Applicant had an e-mail exchange with Mr. Dave Stevenson. On September 16, 2015, Mr. Stevenson wrote to the Applicant as follows[5]:

> *Good morning, Wade*

[4] See: Exhibit A-1.
[5] See: Exhibit U-1, at 41-43.

Thank you for your response.

I have taken note of your concerns and have spoken to Gary Makuch [Grievance Committee Chair] about these concerns.

Both Gary and myself were present at a pre-grievance meeting with the manager and the step one meeting. Gary was present at the second step meeting.

I offered to meet with you to discuss your concerns regarding both your grievances to which I received your latest response. As you will know from your past experience it is the local that owns the grievance not the grievor.

In regards to your request to have Tim Anderson represent you I believe that I did communicate a response to you when I stated that I would consider your request. Tim is not a shop steward nor a member of the appointed working committee so therefore cannot represent members on behalf of Local 21.

I met with you prior to the informal grievance meeting that was held on May 8, 2015. I then met with you on May 20, 2015 to review the information that your manager shared with us at the pre grievance meeting. At that time you did not have anything new to add to the information that we already had from yourself and the employer.

When you and I met prior to the grievance being filed you communicated to me that you agreed and that I was probably right that this was not a good grievance to take forward, however, you stated "you would like to take one more kick at the can" which is why the local advanced the grievance to Step 1 and then Step 2 of the grievance process, we were unsuccessful at both steps. As you know, the next step of the grievance process is whether we advance this grievance to arbitration or not. We will assess the merits of advancing your grievance to arbitration with reference to the relative ability language in the collective agreement, previous L.21-City of Regina arbitration awards and the particular facts related to your case. It would be helpful to meet with you to get more information.

Please provide us with your availability. [Emphasis added.]

[19] On cross-examination, the Application testified that he did not recall the May 20th meeting with Mr. Stevenson but conceded it "could have happened".

[20] The Applicant also downplayed the import of the highlighted portion of the e-mail. He testified the comment indicated that in his experience moving a grievance onto arbitration is always risky, "50/50 chance of success".

[21] On November 27, 2015, Mr. Stevenson sent a registered letter to the Applicant advising him that Mr. Marsden had considered the merits of his grievance and, as result, the union had decided to withdraw it "on a *without prejudice* basis".[6]

[22] In the body of his letter, Mr. Stevenson listed various arbitral awards Mr. Marsden had consulted when making his assessment including "4 arbitration rulings from Local 21".

[23] The penultimate paragraph of this letter reads as follows:

> *You will have an opportunity to appeal this decision to the working committee on December 8, 2015, at 5:00 pm at the Local 21 office at 21-2148 Connaught Street. The office letter of withdrawal will not be sent pending this meeting should you decide you want to appeal this decision to withdraw this grievance. [Emphasis added.]*

[24] On December 3, 2015, the Applicant sent correspondence to Mr. Stevenson acknowledging receipt of the registered letter dated November 27, 2015, and requesting copies of the awards identified in the earlier correspondence as well as "all the minutes taken at the first and second strep [*sic*] grievance meeting with the employer".[7] The Applicant concluded[8]:

> *Once my requests have been acknowledged and I have had the opportunity to review said documents, then a meeting should take place, along with my witness, to have discussion with a view to coming to an agreement satisfactory to all concerned.*
> . . . . . .
> *In closing, it appears that the union's time line for submitting a matter to a board of arbitration is fast approaching and due to the union's reluctance to fulfill my past document requests and response to my questions and concerns, I would propose that Local 21 make known to the employer that the Local wishes to place the matter in abeyance.*

[25] This particular e-mail, like most of the Applicant's e-mails, was a pastiche of the bolded text of a previous e-mail from Mr. Stevenson with the Applicant's responses to the e-mail appearing intermittently in the text. The following paragraphs apparently appeared in an earlier e-mail Mr. Stevenson sent that was not introduced into evidence[9]:

> *We will continue with the meeting on December 8, 2015 at 5:00 pm so that you can provide the local with proof of your abilities, qualifications and any other relevant*

[6] *Ibid*., at 51. (emphasis in original)
[7] *Ibid.* at 53.
[8] *Ibid*., at 53 and 54.
[9] *Ibid*., at 54.

> *information for the said grievance in order for us to reconsider the position of withdrawing your grievance based on your qualifications, abilities and the merits of your grievance as outlined in the assessment of your grievance from Mr. Marsden's review of the file.*
> . . . . . .
> *I had requested in a previous email your availability in order to discuss your grievances including the harassment grievance that was referred to arbitration. To date you have not provided your availability.*

[26] On December 8, 2015, the Applicant again communicated with Mr. Stevenson by e-mail. In this e-mail, he reiterated his earlier request that the Union obtain the City's agreement to place his grievance in abeyance. He stated that he would not attend any meeting "until my requests have been satisfied and until I'm convinced the union represented my best interests."[10]

[27] The meeting to reconsider withdrawing the Applicant's grievance proceeded on December 8, 2015 in his absence. Not only did the Applicant fail to attend this meeting, he did not forward any further information to Mr. Stevenson or other Union representatives which might support his position that the grievance should not be withdrawn.

[28] On December 12, 2015, Mr. Stevenson communicated Local 21's decision respecting his grievance.[11] The full text of Mr. Stevenson's e-mail is reproduced below:

> *Good day Mr. Zalopski,*
>
> *Local 21 afforded you an opportunity to present your rationale for why you felt your grievance should move forward to arbitration. The date was given to you to appeal the decision to withdraw your grievance was December 8, 2015 at 5:00 p.m. In your reply email you did not indicate that you were not available nor did you propose another date or time. As a result the working committee reviewed your file along with Mr. Marsden's assessment of the merits of your grievance (Supervisor Operations – Asphalt Services) with the information that we had.*
>
> *This email is to inform you that the working committee passed a motion that your grievance be withdrawn on a without prejudice basis based on the merits of your mentioned grievance.*

[29] That same day the Applicant replied to Mr. Stevenson by e-mail as follows[12]:

> *Good evening, Dave. It appears you have no intention of addressing my repeated requests. I bring to your attention the last paragraph of my correspondence dated 8 December 2017 wherein I state that once my requests had been fulfilled I would*

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[10] *Ibid*., at 58.
[11] *Ibid.*, at 59.
[12] *Ibid.*

> *be happy to meet with you. Hence the facts stated in your [sic] in your correspondence dated 12 December 2015 are once again incorrect. Happy new year, Dave.*

[30] Subsequently, the Applicant met with Mr. Stevenson on January 14, 2016 to discuss two (2) promotional grievances filed on his behalf. In particular, the Applicant was concerned about Mr. Gary Makuch, whom the Applicant believed would not represent him adequately, or at all, because of personal animosity he demonstrated towards the Applicant. This meeting took place with a shop steward, Ms. Maria Kosetas in attendance.

[31] The results of this meeting did not satisfy the Applicant. Indeed, on January 24, 2016, he wrote to Mr. Stevenson as follows[13]:

> *My e-mail correspondence to you dated 11 January 2016 indicated that I was now properly prepared to discuss the matter surrounding the promotional grievance of supervisor, asphalt construction was well as other promotional grievance matters. We met 14 January 2016 and during our meeting you informed me that the promotional grievance of supervisor of asphalt construction has been withdrawn.*
>
> *I strongly disagree with the premature position the union has taken and I feel this matter should have been advanced to arbitration. I still have not been allowed to review the minutes, which I have every right to do, from the first and second step meeting with the employer. As well, I have not signed a union grievance withdrawal document.*
>
> *In my 3 December 2015 correspondence I informed you of the historic practice afforded to any member of the union if a decision was made not to advance a member's grievance to arbitration. That practice was to allow the member the opportunity to address his/her case directly to the members during a general membership meeting with membership direction to follow.*
>
> *You have denied me that historic right, but, during the General Membership meeting dated 12 January 2016, Gary Makuch, while verbally submitting his grievance reports, did state that* ***"a member was asked to attend tonight's meeting and doesn't appear to be here, so we will be withdrawing that grievance".***
>
> *It goes without saying that these actions do not restore my faith in the union. Actually, I feel betrayed.*
>
> *Please be advised that I intend to discuss this matter with the Saskatchewan Labour Relations Board and will be seeking their guidance and expertise in this matter. [Emphasis in original.]*

[13] *Ibid.*, at 60.

[32] True to his word, the Applicant filed this application with the Board on January 27, 2016. He itemized his allegations against the Union as follows, at paragraph 7:

> *For the record: I was not invited to participate in the meetings with the employer. The union did no re-interviewed [sic] after the first step meeting with the employer, this would have been very helpful in order to properly prepare for the second step hearing. The union denied my request to review the union minutes taken. The union did no advance my grievance to arbitration and in turn withdrew the promotional grievance. The union denied me the historic right to present my case at a general meeting of the membership, this would allow the members to have input and possibly over-rule the unions decision to not advance the matter to arbitration.*

[33] On February 5, 2016, the Union filed its Reply. The essence of the Union's defence is set out at subparagraphs 5(f) to (i) as follows:

> ***5.*** *f) CUPE Local 21 sent a registered letter to the Applicant November 27, 2015 advising him that the union was planning to withdraw his grievance following a legal opinion. The same letter advised Mr. Zalopski that he could appeal the decision to withdraw his grievance to a December 8, 2015 meeting of a committee of the union.*
>
> *g) The Applicant did not attend the December 8, 2015 meeting.*
>
> *h) CUPE Local 21 sent several e-mails to the Applicant from September to November offering to meet with him to discuss his grievance and to gather more information. The applicant refused to meet with the Union unless was granted access to privileged grievance documentation.*
>
> *i) CUPE Local 21 submits that the Union did not act in a way that was arbitrary, discriminatory or in bad faith in the handling and ultimate withdrawal of the Applicant's grievance and therefore did not violated ss. 6-59 and 6-60 of The Saskatchewan Employment Act.*

RELEVANT STATUTORY PROVISIONS

[34] The provisions of the *SEA* most relevant to this duty of fair representation application read as follows:

> ***6-58****(1) Every employee who is a member of a union has a right to the application of principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
>
> *(a) matters in the constitution of the union;*
> *(b) the employee's membership in the union; or*
> *(c) the employee's discipline by the union.*

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in consider whether to represent or in representing an employee or former employee.*

ANALYSIS AND DECISION

A. Brief Survey of Relevant Jurisprudence

[35] Section 6-59 of the *SEA* is the successor to section 25.1 of *The Trade Union Act*, RSS 1978, cT-17 [*TUA*], the provision interpreted and applied in much of the Board's large body of jurisprudence respecting a union's duty of fair representation. Section 25.1 obliged a trade union to represent its members "in grievance or rights arbitration proceedings…in a manner which is not arbitrary, discriminatory, or in bad faith". In *Gilbert Radke v Canadian Paperworkers Union*[14], for example, the Board explained the rationale for imposing such a duty on a union in respect of employees for whom they enjoy bargaining rights. The Board stated[15]:

> *The notion that a union owes a duty to those it represents to represent them fairly arose relatively early in the history of the interpretation of collective bargaining legislation in North America. As the legislation conferred the exclusive right to represent all employees in a group delineated as an appropriate bargaining unit, once a majority of those employees had selected a trade union, it was considered logical to impose on that trade union an obligation to be even-handed in its representation of all employees in the bargaining unit, including those who had opposed the selection of that union, had not become members of the union, or who were, for some reason in a minority within the bargaining unit. The union acquired exclusive status as a legal representative of all employees in a bargaining unit; in recognition of the degree of influence this gave the union over interests important to all employees, labour relations boards and courts imposed on it a duty to represent all employees fairly and without discrimination.*

[36] In Saskatchewan, the origin of the duty of fair representation is unique in that prior to the enactment in 1983 of section 25.1 of the *TUA*, this Board had already utilized its statutory power over unfair labour practices to address such claims. In *Doris Simpson v United*

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[14] [1993] 2nd Quarter, Sask. Labour Rep. 57, LRB File No. 262-92.
[15] *Ibid*., at 60.

Garment Workers of America[16], the Board *per* former Chairperson Sherstobitoff found that "through the application of section 11(2)(c) [failure to bargain collectively with the employer in respect of employees] and section 2(b) [definition of bargaining collectively] of [*TUA*] the Board can enforce a duty of fair representation on the part of a union, at least with respect to prosecution of grievances**"[17].**

[37] A few years later, Chouinard J., writing for the Supreme Court of Canada in *Canadian Merchant Service Guild v Gagnon et al.,*[18] reviewed relevant domestic and international case law and academic commentary. He concluded[19]:

> *The duty of representation arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit. In Sydicat catholique des employés de magasin de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206, Judson J. for a majority of this Court described at p. 212 the status conferred on a certified union of exclusive representative of all employees who are members of the bargaining unit:*
>
> > *The union is, by virtue of its incorporation under the Professional Syndicates' Act and its certification under the Labour Relations Act, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certain to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated.*
>
> *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 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.*

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[16] LRB File No. 069-80, [1980] July Sask. Labour Report 43.
[17] *Ibid*., at 45.
[18] [1984] 1 SCR 332.
[19] *Ibid*., at 526-7.

> *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 employee.*

[38] The Supreme Court has affirmed these principles in a number of subsequent cases including, most recently, *Noël v Société d'energie de la Baie and United Steelworkers of America, Local 6833*[20], at para. 42ff *per* LeBel J.

[39] Indeed, as this Board observed in *Gordon W. Johnson v Amalgamated Transit Union, Local No. 588 and City of Regina*,[21] at p. 12, the Supreme Court's pronouncement in *Gagnon*, *supra*, has had a "unifying influence" on Canadian labour law, at least in relation to duty of fair representation claims. To similar effect, see: *Lanigan v Prince Edward Island Teachers' Federation*[22], at paras. 23 and 24.

[40] The Applicant in this case complains that the Union failed to represent him fairly in the prosecution of his promotional grievance. Many, if not most, duty of fair representation claims allege that a member's union failed to prosecute his or her grievance appropriately. It is not surprising, then, that a large body of jurisprudence has evolved about what principles should guide a labour relations board when assessing the merits of such claims. A helpful summary of these principles is found in *Mwemera v United Brotherhood of Carpenters and Joiners of America, Local Union No. 2010*[23]. There the Alberta Board stated as follows at para. 20:

> *This Board's decision in Reid v United Steelworkers of America Local Union No. 7226, [2000] Alta. L.R.B.R. LD-064 (at para. 3) summarizes some of the key principles underlying the duty of fair representation:*
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> - *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asks the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
> - *The Board focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
> - *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*

[20] [2001] 2 SCR 207, 2001 SCC 39.
[21] LRB File No. 091-96.
[22] 2017 PECA 3.
[23] 2016 CanLII 8866 (AB LRB), aff'd 2017 ABQB 286.

- *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*
- *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*
- *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*

[41] It is important to recall, as well, that the function of this Board in such matters is not to "second guess" or "sit on appeal" of a union's handling of a member's grievance. As Chairperson Love reminded us in *Owl v Saskatchewan Government and General Employees' Union*[24]:

> *It is clear that a Union has carriage of grievances or, as has sometimes been stated, owns the grievance. It is also clear that the Board will not sit "on appeal" of a Union's decisions in how it conducts a grievance. At paragraph [24] of [Taylor v Saskatchewan Government and General Employees' Union 2011 CanLII 27606 (SK LRB)] the Board said:*
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> > *With respect to the Applicant's complaint that the Union should have called more or different witnesses, this Board has previously stated that we will not, with the benefit of hindsight, sit "on appeal" of a trade union's decision on how it conducts its arbitrations, including which witnesses should been called, and/or what evidence should have been tendered and/or what arguments should have been advanced or abandoned, as the case may be. [Citations omitted.]*

B. Onus

[42] It is now well-established that an applicant who seeks to have the union sanctioned for failing to represent him or her fairly bears the burden to prove those allegations on a balance of probabilities. As Rothstein J. explained in *F. H. v McDougall*,[25] at paragraph 49:

> *[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. [Emphasis added.]*

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[24] LRB File No. 345-13, 2014 CanLII 42401, at para. 57. See also: *Prebushewski v Canadian Union of Public Employees, Local 4777 and Prince Albert Parkland Health Region*, LRB File No. 108-09, 2010 CanLII 20515 (SK LRB), at para. 55, and *Koop v Saskatchewan Government and General Employee's Union and the Government of Saskatchewan (Ministry of Highways)*, LRB File No. 192-08; 2009 CanLII 53732 (SK LRB), at para. 52.
[25] 2008 SCC 53, [2008] 3 SCR 41.

[43] Furthermore, in *McDougall*, Rothstein J. emphasized that in order to satisfy the 'balance of probabilities' standard of proof, the evidence must be "sufficiently clear, convincing and cogent" [26].

[44] Accordingly, the Board must determine if the Applicant has demonstrated through clear, convincing and cogent evidence that it is more likely than not the Union failed to represent him in respect of his supervisory promotional grievance? If the Applicant satisfies this onus, the Union must be found to have violated section 6-59 of the *SEA*.

C. Did the Union's Actions Amount to Discriminatory Treatment of the Applicant?

[45] The consensus that emerges from the decisions of this Board as well as other Canadian labour relations boards is that for purposes of duty of fair representation claims the prohibition against discriminatory treatment by the union of one of its members means 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 favouritism"[27]. Over the years, these proscribed grounds of discrimination have been enlarged by subsequent revisions to provincial and federal human rights legislation as well as the proclamation of section 15(1) of the *Canadian Charter of Rights and Freedoms*. As a result, the ability of a complainant to base a duty of fair representation claim on other enumerated or analogous grounds of discrimination – sexual orientation, being an obvious example – has greatly increased.

[46] In *Noël*[28], LeBel J. described discriminatory conduct for purposes of duty of fair representation claims this way:

> *The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee's grievance, or conduct it differently, on the ground that the employee was not a member of the association, or for any other reasons unrelated to labour relations with the employer.*
> . . . . . .
> *Bad faith and discrimination both involved oppressive conduct on the part of the union. The analysis therefore focuses on the reasons for the union's action.*

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[26] *Ibid*., at para. 46.
[27] *Rayonier Canada (B.C.) Ltd and International Woodworkers of America and Ross Anderson*, [1975] 2 CLRBR 196, at 201. See also: *Coppins v United Steelworkers, Local 7689*, LRB File No. 085-16, 284 CLRBR (2d) 30, 2016 CanLII 79633 (SK LRB), at para. 25.
[28] *Supra* n. 20, at paras. 49, 52 (citations omitted).

[47] On balance, the Board concludes that the Applicant failed to satisfy the burden of proof on this particular aspect of the duty of fair representation inquiry.

[48] At the hearing, the Board heard evidence from the Applicant that he believed Mr. Makuch "did not have his best interests at heart". He stated, for example, that at the Step #1 meeting with representatives from the City, Mr. Makuch made only a feeble attempt to defend the grievance and, in his words, "did not do what he had to do". The Applicant also expressed a deep lack of confidence in Mr. Guy Marsden, CUPE's National Representative, whose assessment of the Applicant's grievance ultimately persuaded the Union's internal committee to withdraw it.

[49] Even accepting the Applicant's beliefs as sincerely held, the Board concludes that they do not provide a substantive basis for finding the Union handled his grievance in a discriminatory manner. There is no evidence, for example, to support an argument that the Union based its decision to withdraw the Applicant's grievance on a prohibited ground of discrimination such as age, race, sex or even political beliefs or affiliation. Nor can the Board conclude on these facts that the Union was attempting to disadvantage the Applicant in any way, let alone in a manner "not justified by the labour relations situation"[29] at the Landfill.

D. Did the Union Act in Bad Faith?

[50] In *Noël*[30], LeBel J. stated that for purposes of duty of fair representation claims, the concept of bad faith "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct"[31]. He acknowledged that "[i]n practice, this element alone would be difficult to prove"[32].

[51] As noted in the previous section, the Applicant asserted strongly his view that Mr. Makuch lacked experience in grievance matters, failed to defend his grievance vigorously and harboured ill-will towards him. He further argued that bad faith on the part the Union was further demonstrated by its refusal to allow Mr. Tim Anderson to represent him on this grievance. The

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[29] *Ibid*., at para. 49.
[30] *Ibid*.
[31] *Ibid*., at para. 48.
[32] *Ibid*. See also: *Hargrave, et al. v Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*, LRB File No. 223-02, [2003] SLRBR 511, 2003 CanLII 62883 (SK LRB), at para. 28, and *Toronto Transit Commission*, [1997] OLRD No. 3148, at para. 9.

Union had advised that this was not possible because Mr. Anderson was not an appropriate Union officer.

[52] The Board concludes this evidence is not sufficiently clear, convincing and cogent enough to persuade it that the Union in its representation of the Applicant exhibited bad faith or malice towards him. It does little to call into serious question the Union's motivations or actions in its prosecution of the Applicant's grievance.

E. Did the Union treat the Applicant Arbitrarily?

[53] In *Noël*[33], LeBel J. elaborated on what constituted arbitrary conduct noting that this inquiry focused on "the quality of union representation"[34]. He stated:

> *The concepts of arbitrary conduct and serous negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.*
> . . . . .
> *…In the case of [arbitrary conduct], what is involved is acts which, while not motivated by malicious intent, exceed the limits of discretion reasonably exercised. The implementation of each decision by the union in processing grievances and administering the collective agreement therefore calls for a flexible analysis which will take a number of factors into account.*

[54] This Board's decisions reflect a similar understanding of the concept of arbitrariness in duty of fair representation claims. See *e.g.*: *Hargrave et al. v Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[35]; *Coppins v. United Steelworkers, Local 7689, and Potash Corporation of Saskatchewan*[36], and most recently, *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*[37].

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[33] *Ibid.*
[34] *Ibid*., at para. 50
[35] [1998] Winter Sask. Labour Rep. 44, LRB File No. 031-98.
[36] LRB File No. 085-16, 2016 CanLII 79633, 284 CLRBR (2d) 30.

[55] In this matter, the Union filed a grievance on behalf of the Applicant, even though the evidence disclosed that it did not appear to be a strong one.[38] The Applicant asserts, however, that the Union's handling of his grievance was shoddy and inadequate. Allegations of arbitrariness based on such complaints, in and of themselves, are not sufficient to demonstrate arbitrary conduct on the part of the Union. The Board made this point well in *R.R. v Canadian Union of Public Employees, Local 4777 and Prince Albert Parkland Health Region*[39] as follows:

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

[56] To begin, the fact the Union chose to file a grievance in this matter, even though it had reservations about the strength of its merits, militates against a finding of arbitrariness. It suggests, at the very least, the Union took the Applicant's grievance seriously, and was prepared on his behalf to begin the grievance process in accordance with the terms of the Collective Agreement[40].

[57] The Union in its helpful Brief of Law outlines at paragraph 28 the steps it took with respect to prosecuting the Applicant's grievance as follows:

> a) *On September 9, 2015, the Applicant advised the Local Union that he was not interested in meeting with the CUPE National Servicing Representative to discuss the grievance, and further that he "did not request a meeting to discuss the matter".*
> b) *The Local Union Administrator advised the Applicant that himself and a representative of the Local Union had attended pre-grievance and Step 1 meeting with respect to the grievance, and that the same representative had attended the Step 2 grievance meetings with the employer; and that during this time the Administrator had offered to meet with the Applicant several times.*
> c) *The Local Union Administrator then met with the Applicant following the pre-grievance meeting, on May 20, 2015 [sic].*

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[37] LRB Files 226-14 &016-15, 2017 CanLII 20060, 290 CLRBR (2d) 1.
[38] See e-mail reproduced in the text at supra, fn. 5.
[39] LRB File No. 057-10, 2011 CanLII 100994 (SK LRB), at para. 43 (citations omitted).
[40] Collective Agreement Between Regina Outside City Workers', Local 21 and the City of Regina (January 1, 2013 to December 31, 2015), Article 8.

> *d) The Local Administrator then met with the Applicant following the pre-grievance meeting, on May 2016, to review the information provided by the employer with the Applicant.*
> *e) The Local Union Administrator maintained communication with the Applicant, and responded to the Applicant's numerous email communications, throughout the relevant time.*

[58] The evidence further disclosed that the Union pursued this grievance through the first two (2) steps of the grievance process. After failing at each of those stages, the Union decided to evaluate the grievance's merits before moving to the third step, namely to refer it to arbitration. This was not only a rational thing to do, it was the prudent course to follow before the Union fully committed its' resources to an arbitration proceeding.[41]

[59] The Union asked Mr. Guy Marsden, a CUPE National Representative, to supply a critical assessment of the merits of the Applicant's grievance. Mr. Marsden's conclusion and the basis for it was set out in correspondence to the Applicant from Mr. Dave Stevenson dated November 27, 2015. This letter also invited the Applicant to attend a meeting of the Union Local on December 8, 2015 to make representations about his grievance and Mr. Marsden's recommendation that it be withdrawn on a without prejudice basis.[42]

[60] The Board finds the following comments of the Canadian Industrial Relations Board in *Virginia McRae-Jackson et al. v CAW-Canada* particularly apposite here[43]:

> *Established unions usually have their own experienced staff to conduct investigations, assess the grievance and decide whether or not to pursue a grievance. Although the union may decide to obtain the advice of legal counsel, there is no requirement for the union to obtain a legal opinion before deciding not to refer a grievance to arbitration. The Board will not uphold a [duty of fair representation] complaint based on the mere fact that the union did not obtain legal advice before deciding not to refer a grievance to arbitration, or that the union did not follow counsel's advice.*

[61] As set out earlier in this Decision, the Applicant declined to attend that meeting.[44] He offered a number of reasons for his refusal. These included, at various times, the fact that

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[41] See especially: *Dwayne Luchyshun v Amalgamated Transit Union, Local 615, and the City of Saskatoon*, LRB File No. 035-09,178 CLRBR (2d) 96, 2010 CanLII 157 *per* Chairperson Love. at paragraph 36, factor (4): "The Union, Grievance Committee, or person charged with the conduct of grievances should determine if the grievance merits being advance. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence."
[42] Exhibit U-1, at 51.
[43] 2004 CIRB 290, at para.38.
[44] See text at fnn. 7 to 10, *supra*.

he wished to review the arbitral decisions that Mr. Madden purportedly consulted while undertaking his assessment; it was the Holiday Season, and he was simply unavailable at that time.

[62] The Board finds that despite whatever reason motivated the Applicant to forgo attending the committee meeting on December 8, the fact remains the Union did provide him an opportunity, and a forum in which, to present his case to the committee before it decided whether or not to accept Mr. Marsden's recommendation. The Applicant chose not to do so.

[63] It is now trite that a grievance belongs to the union as the collective bargaining agent for the employees. It is not a grievor's personal action over which the affected employee has ultimate control. As a result, the union manages the process and can decide whether or not it is the union's best interests to proceed with a grievance or arbitration.[45]

[64] It follows that the law does not oblige a union to obtain the views or preferences of a grievor prior to a determination by its grievance committee or another internal union committee as to whether or not to refer a grievance to arbitration. To be sure, it certainly is prudent for a union to do so. However, unless the constitution of the union in question or the bylaws of the union's local require such input from the affected employees (neither situation obtains here), there is no legal imperative to do so, and the failure to solicit such advice, in and of itself, does not amount to a breach of a union's duty of fair representation.

[65] The Board concludes that on the evidence presented in this case, the Applicant had ample opportunity to present his case to the Union before a decision was taken on the future of the grievance. Indeed, even after the decision was taken, the Applicant had another opportunity to discuss this grievance with Mr. Stevenson at the January 14th, even though nothing came of it.

[66] On balance, the Board cannot fault the Union for the process it followed with respect to the Applicant's grievance. It filed the grievance even though it harboured serious reservations about its merits; it pursued it through the first two (2) steps of the grievance process set out in the collective agreement; it sought the considered opinion of an experienced union official about the grievance's chances of success, and before acting on this official's

[45] See especially: *Noël*, *supra* n. 20, at paras. 44 and 55 *per* LeBel J.

recommendation to withdraw the grievance without prejudice, it afforded the Applicant the opportunity to be heard by the committee.

[67] This conclusion would be sufficient to dismiss the Applicant's arguments that the Union treated him arbitrarily. However, he advanced two (2) further allegations of union misconduct that he contended amounted to arbitrariness on the part of the Union. The Board will deal with them briefly now.

[68] The first allegation is that the Union failed during the grievance process to challenge the matrix used by the City for assessing potential candidates for the position of Supervisor, Field Operations (Asphalt Services). As indicated earlier in this Decision, the Board does not to sit in judgment of strategic decisions taken by a union in the prosecution of a particular grievance. The following comment of the Board in *R.R.*[46] accurately summarizes the Board's view on arguments of this kind:

> *[44] For example, this Board has confirmed that it does not "sit on appeal" of a trade union's decision not to advance a grievance to arbitration and, in particular, will not decide if a trade union's conclusion as to the likelihood of success of a grievance was correct nor will the Board minutely assess each and every decision made by a trade union in representing its members. (Emphasis added, citation omitted.)*

[69] The Applicant's second allegation is that the Union failed to comply with his request to be provided copies of the Minutes of the Steps 1 and 2 grievance meetings. The Union asserts that these documents are subject to either labour relations privilege or settlement privilege and, as a consequence, the Applicant was not entitled to copies.

[70] It is not necessary for the Board to resolve this dispute between the parties for purposes of this application. Even if it could be said the Union should have shared the Minutes of those meeting with the Applicant, a question about which the Board makes no finding, the fact that the Applicant did not see those Minutes does not alter the Board's conclusion that the Union did not treat the Applicant in an arbitrary manner.

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[46] *Supra* n. 39, at para. 44. See also: *Koop*, *supra* n. 24, at para. 52, and *Kathy Chabot v Canadian Union of Public Employees, Local 4777*, [2007] SLRBR 401, 2007 CanLII 68749, at para. 74.

F. Other Issues

[71] The Applicant also advanced an argument in his formal application that the Union ought to have allowed the general membership to vote on whether his grievance should be referred to arbitration. However, at the hearing he withdrew this argument, presumably in light of recent Board jurisprudence disapproving of this method of dealing with grievances.[47]

[72] In its Brief of Law, the Union advanced arguments respecting the application of section 6-58 of the *SEA*. However, in light of the conclusions set out above, and in view of the fact that the Applicant did not plead section 6-58 in his formal application, it is not necessary for the Board to consider those arguments.

G. Conclusion

[73] Accordingly, for these reasons, the Applicant's application brought pursuant to section 6-59 of the *SEA* must be dismissed.

CONCLUDING REMARKS

[74] The Board acknowledges the Applicant's real frustration that after more than four (4) decades of dedicated service, his opportunity for promotion failed. The Board further acknowledges that the labour relations environment at the Landfill during the time the events under consideration here unfolded, was troubled to say the least. These problems may or may not have exacerbated the difficult relationships already existing among the various players in this matter, which spilled over to the hearing of this application.

[75] That said the function of a labour relations board on a duty of fair representation claim is limited. It cannot rectify a perceived injustice by the complainant, it can only assess on an objective basis whether or not the complainant's union met the acceptable standard of representation identified in authorities referenced in this Decision and others.[48] This Board has done exactly that here, and finds the Union satisfied these minimal requirements in this case.

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[47] See especially: *Coppins*, *supra* n. 36, and *Hartmier*, *supra* n. 37.

DATED at Regina, Saskatchewan, this **14th** day of **July, 2017.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson

[48] See *e.g.*: *McCrae-Jackson v CAW-Canada*, *supra* n. 43, at para. 49.