CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 650, Applicant v CRISTINA SIPOS-BOZZAI, Respondent

LRB File No. 066-22; June 21, 2022
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Canadian Union of Public Employees, Local 650:	Crystal Norbeck, Q.C. Ridley Purcell
For Cristina Sipos-Bozzai:	Self-represented

When filing late application for summary dismissal, proper procedure would have been for Union to concurrently request extension of time pursuant to s. 30(2) of the Regulations and provide rationale for delay.

Non-compliance with s. 19(5) of the Regulations waived pursuant to s. 35 of Regulations – Original Application clearly lacking merit.

Application for summary dismissal granted – No arguable case that Union breached duty of fair representation or acted in a manner that was arbitrary or in bad faith.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On January 25, 2022, Cristina Sipos-Bozzai ["Applicant"] filed an application with the Board[1] ["Original Application"] alleging that the Canadian Union of Public Employees, Local 650 ["Union"] was contravening section 6-59 of *The Saskatchewan Employment Act* ["Act"]. She alleged that the Union breached the duty of fair representation it owed to her by acting in a manner that was arbitrary and in bad faith.

[2] The parties appeared for a pre-hearing with the Registrar of the Board on March 29, 2022. The issues between the parties were not resolved. As a result, they set dates for a hearing of the Original Application, to be held on July 12 and 13, 2022. On April 29, 2022, the Union filed an

[1] LRB File No. 009-22.

Application for Summary Dismissal of the Original Application[2]. With that application, the Union included written submissions, and asked that the application be considered without an oral hearing. The Applicant filed her Reply on May 12, 2022.

[3] Section 19 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* ["Regulations"] sets out the procedure for making an application for summary dismissal:

> *19(1) In this section:*
>
> > *"application to summarily dismiss" means an application pursuant to subsection (2);*
> >
> > *"original application" means, with respect to an application to summarily dismiss, the application filed with the board that is the subject of the application to summarily dismiss;*
> >
> > *"party" means an employer, union or other person directly affected by an original application.*
>
> *(2) A party may apply to the board for an order to summarily dismiss an original application.*
>
> *(3) An application to summarily dismiss must:*
>
> > *(a) be in Form 18 (Application for Summary Dismissal); and*
> >
> > *(b) be filed and served in accordance with subsection (5).*
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> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application with or without an oral hearing.*
>
> *(5) The application to summarily dismiss must be filed, and a copy of it must be served on the party that made the original application and on all other parties to the original application, before the date for the hearing of the original application is set.* [emphasis added]

[4] In this matter, the Application for Summary Dismissal was not filed before the date for the hearing of the Original Application was set, as required by subsection 19(5). Pursuant to subsection 30(2) of the Regulations, the Executive Officer has authority to extend the time for filing the application:

> *30(1) On the request of any employer, union, labour organization or other person, the registrar may extend the time fixed by these regulations for filing any Form or document or doing any other thing authorized or required by these regulations, if the period at or within which the matter ought to have been done has not expired.*
>
> *(2) On the request of any employer, union, labour organization or other person, the executive officer may by order set a further or other time than the time fixed by these*

[2] LRB File No. 066-22. Although Regina School Division No. 4 was named as a Respondent in the Original Application, it did not file a Reply or any submissions on either application.

> *regulations for filing any Form or document or doing any other thing authorized or required by these regulations.*
>
> *(3) The executive officer may issue an order pursuant to subsection (2) whether or not the period at or within which a matter mentioned in that order ought to have been done has expired.*
>
> *(4) The executive officer may impose any terms and conditions on an order issued pursuant to subsection (2) that the executive officer considers appropriate.*
>
> *(5) Anything done at or within the time specified by the registrar pursuant to subsection (1) or in an order pursuant to subsection (2) is as valid as if it had been done at or within the time fixed by these regulations.*

[5] In its Application for Summary Dismissal, the Union did not ask that the Executive Officer extend the time within which it could file that application or provide any grounds that would justify an extension of time. At Motions Day on June 7, 2022, the Board provided the Union and the Applicant with an opportunity to file further submissions to address that issue and directed the Union to address section 30 of the Regulations.

Late Filing of Application for Summary Dismissal:

[6] In its submissions of June 10, 2022, the Union did not address section 30 of the Regulations, and did not request that the Executive Officer extend the time for filing the Application for Summary Dismissal. Instead, it referred the Board to section 35 of the Regulations:

> *35 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.*

[7] The Union also relied on section 6-112 of the Act:

> *6-112(1) A technical irregularity does not invalidate a proceeding before or by the board.*
>
> *(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*
>
> *(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*
>
> *(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:*
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> > *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;*

> *(b) by striking out the name of a person improperly made a party to the proceedings;*
>
> *(c) by substituting the name of a person that in the opinion of the board ought to be a party to the proceedings for the name of a person improperly made a party to the proceedings; or*
>
> *(d) by correcting the name of a person that is incorrectly set out in the proceedings.*

[8] The Union suggested that, at the pre-hearing with the Registrar, "Had CUPE 650 been aware that section 19(5) of the Regulations was a barrier to filing the application, it certainly would not have scheduled the hearing dates. However, scheduling was a part of the Case Management portion of the March 29, 2022 meeting and CUPE 650 complied"[3].

[9] The Union argues that there is no prejudice to the Applicant in allowing the Application for Summary Dismissal to proceed, given that the grievance has been withdrawn.

[10] The Applicant noted that the Union advised the Board as early as March 1, 2022 that it was considering filing an application for summary dismissal, but did not actually file the application until April 29, 2022. In its submissions of June 10, 2022 the Union provided no reasons for not following through on its intention in a timely manner. For these reasons, the Applicant argues that the time limitation should not be extended and the Application for Summary Dismissal should be dismissed.

[11] The Board has determined that, because the Original Application is so lacking in merit, the Union's failure to comply with subsection 19(5) will be waived in this matter pursuant to section 35 of the Regulations. The Union's non-compliance with subsection 19(5) of the Regulations does not render its application void unless the Board directs otherwise, and the Board will not direct otherwise in this matter. There is nothing in the materials filed that could lead the Board to a conclusion that the Applicant has an arguable case that the Union did not fairly represent her.

[12] However, the Board would point out that the rationale for the timeline in subsection 19(5) is to prevent late-filed applications for summary dismissal causing a need for an adjournment of a hearing of an original application. When hearings are unnecessarily adjourned, the Board's ability to process applications in an orderly and timely manner suffers, to the detriment of all parties appearing before the Board. The Union's delay in this matter meant that either the Board would have to give their application the highest priority (given there was less than a month

[3] Submissions of the Respondent (Applicant), June 10, 2022 at para 8.

between receipt of final submissions in this matter and the date set for the hearing of the Original Application) or adjourn the hearing. The Board chose, in this instance, to do the former. Given the lack of merit in the Original Application, the Board will not dismiss the Application for Summary Dismissal on this basis but would caution the Union that it should not expect similar treatment in the future.

[13] Counsel who appear before the Board are expected to be familiar with the rules of procedure set out in the Regulations. The proper procedure in this matter would have been for the Union to request an extension of time pursuant to subsection 30(2) of the Regulations, and provide rationale for the delay, at the same time that it filed its Application for Summary Dismissal. This is the procedure that the Board will expect to be followed in future late applications for summary dismissal. Best practice, of course, would be for such applications to be filed on time.

Application for Summary Dismissal:

[14] The Board's authority to consider an application for summary dismissal arises from clauses 6-111(1)(p) and (q) of the Act:

> *6-111(1) With respect to any matter before it, the board has the power:*
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> *…*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing.*

Therefore, the question before the Board is whether there is a lack of evidence or no arguable case in the Original Application.

[15] The Union referred the Board to the following description of the test to be applied by the Board on an application for summary dismissal:

> *Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*[4]

[4] *Roy v Workers United Canada Council,* 2015 CanLII 885 (SK LRB) ["*Roy*"] at para 9.

The Applicant agrees that this is the test to be met.

[16] The Original Application alleges that the Union contravened section 6-59 of the Act:

> *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 considering whether to represent or in representing an employee or former employee.*

[17] In the hearing of the Original Application, the onus would be on the Applicant to satisfy the Board that the Union has not fairly represented her, and has acted in a manner that is arbitrary and/or in bad faith.

Evidence:

[18] The relevant facts in this matter are not in dispute. The Union is the certified bargaining agent for a group of employees employed by the Board of Education of the Regina School Division No. 4 ["Employer"], generally working in the maintenance department, the building and repair department, and the stores and distribution department.

[19] The Applicant is a member of the Union. She began working as a caretaker at Henry Braun School on August 27, 2021. During her first week at work she felt bullied by her supervisor, Franco Toniello, the Head Facility Technician at Henry Braun School. On September 9, 2021 she spoke to her shop steward about this issue.

[20] On September 11, 2021, she was elected as the Union recording secretary. On September 13, 2021 she advised Toniello that she would be late for work because she was performing Union business. Approximately an hour later she received a message from Henry Funke, Supervisor of Facility Operations for the Employer stating she must appear at work on time. She immediately called Funke and spoke briefly to him about the procedure to follow if she was going to be late for work. Funke and Toniello both denied that Toniello had passed along the Applicant's message to Funke. When she arrived at work she found a note left for her by Toniello chastising her for a non-approved mop handle she had purchased for work. She felt intimidated by the note. After finding the note she texted Cameron Hanover, vice-president of the Union, about Toniello's actions. On Hanover's advice she then contacted the Union president, Daniel Berube. According to the Original Application, they spoke for over an hour. Berube advised her

that the Union had ongoing grievances and complaints about the harassment of Union officers. The Applicant asked Berube not to take any action on her behalf.

[21] The next day, on September 14, 2021, the Applicant sent an email to Funke, with a blind carbon copy to Berube, advising him of her election as Union recording secretary, giving her interpretation of what happened on September 13, 2021, and asking for clarification respecting what she was to do if she was going to miss work because of Union business.

[22] Sometime later in September 2021 the Union filed a grievance respecting this issue, naming the Applicant as the grievor, and advanced the grievance to Step 1. The Applicant did not become aware of the grievance until sometime in October 2021 when she was working in the Union office and came across the paperwork for the grievance.

[23] On October 4, 2021, the Applicant was transferred to Sheldon Williams Collegiate, thereby ending any further interaction with Toniello. On November 12, 2021 the Applicant resigned as recording secretary of the Union.

[24] On January 12, 2022, the Applicant was advised by Union shop steward Glen Douglas that he would be representing her in the Step 2 grievance proceeding. He requested clarification of the events regarding her conversation with Funke on September 13, 2021. She advised him that she did not feel harassed by Funke.

[25] The next day, on January 13, 2022 the Applicant called Berube and asked that the grievance be withdrawn. After their conversation she sent an email to Berube reiterating her position that she would like the grievance withdrawn. She left the conversation with the impression that the grievance would be withdrawn, but the Union did not withdraw the grievance at this point. Instead the Union amended the grievance to remove her name and substitute “recording secretary” of the Union, making it a policy grievance. On January 17, 2022, the Applicant learned that the grievance had not been withdrawn and contacted Berube. Berube responded that the Union had decided to take the grievance forward as a policy grievance, the Union owns the grievance, and their legal assessment supported the grievance. He assured her that her name would not be mentioned.

[26] The Applicant filed the Original Application on January 25, 2022. A meeting for the Union and Employer to discuss the grievance at Step 2 took place on February 8, 2022. The Board of

the Employer denied the grievance at its meeting on February 15, 2022. The Union withdrew the grievance on February 16, 2022.

Argument on behalf of Union:

[27] The Union argues that there is no evidence that it acted in a manner that was arbitrary or in bad faith.

[28] With respect to whether it acted in an arbitrary manner in filing and then failing to withdraw the grievance, it relies on *Lucyshyn v. Amalgamated Transit Union, Local 615*[5] ["*Lucyshyn*"] where the Board held:

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

[29] The Union argues that its choice to proceed with a grievance is not subject to the same scrutiny as that brought to bear against a union's choice not to pursue a grievance. This, it argues, is because if a union chooses not to pursue a grievance, it is denying the member the opportunity to seek redress for an employer's perceived misconduct.

[30] The Union argues that, in pursuing a grievance, a union must make several difficult choices about how best to determine the merits of the grievance and, in choosing how to proceed, the Union must consider not only the interests of the Applicant but also the collective interests of the other members of the bargaining unit:

> *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.*[6]

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[5] 2010 CanLII 15756 (SK LRB) at para 36.
[6] *Prebushewski v Canadian Union of Public Employees, Local No. 4777*, 2010 CanLII 20515 (SK LRB) ["*Prebushewski*"] at para 59.

[31] The grievance does not belong to the grievor; the grievor does not have the ability to order that the grievance be discontinued. The Union responded to the Applicant's concerns by removing her name from the grievance. It did not breach its duty of fair representation just because it made a decision with which the Applicant does not agree.[7] The Applicant's allegation of arbitrary conduct is based on the Union's decision to proceed with the grievance to Step 2 even though she was of the view that it lacked merit. That factor does not establish arbitrary conduct.

[32] The Union further argues that the Applicant has not provided evidence that the Union acted in bad faith. To establish bad faith, the Applicant would have had to provide evidence that the Union was motivated by ill-will, malice, hostility or dishonesty.[8] A difference in perspective as to the merits of a grievance does not meet this threshold. A disagreement between the Union and the Applicant over the interpretation of the collective agreement does not meet the threshold of bad faith.

[33] The Original Application was filed while the Union was in the early stages of the grievance process. It discloses no actual prejudice or loss suffered by the Applicant because of the Union's choice to proceed with the grievance. As no compensable loss, or loss at all, is disclosed, the Original Application should be dismissed.[9]

[34] Finally, the Union argues that the Original Application should be dismissed because it is moot. The Union has discontinued the grievance, thus giving the Applicant her requested remedy.

Argument on behalf of Applicant:

[35] The Applicant argues that the Union acted arbitrarily due to the lack of any substantial investigation regarding the incident that led to the grievance. The Applicant relies on *Lucyshyn* to argue that the Union's decision, to proceed with the grievance over her objections, is subject to scrutiny by the Board:

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

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[7] *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB) ["*Zalopski*"]; *Chabot v Canadian Union of Public Employees, Local 4777*, 2007 CanLII 68749 (SK LRB) ["*Chabot*"].
[8] *Eros v Saskatchewan Polytechnic Faculty Association (SPFA) and Saskatchewan Polytechnic*, 2021 CanLII 114229 (SK LRB) ["*Eros*"] at paras 144 and 145.
[9] *Rattray v Unifor National*, 2020 CanLII 6405 (SK LRB) at para 109.

[35] The Union's approach in the present case differed markedly from what occurred in the Leblanc case, supra. The question that the Board must determine is whether or not, on an objective standard, the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof.

[36] This case, along with the other cases determined by the Board under s. 25.1, suggests a minimum standard of conduct by a Union in the handling of a grievance. There should be a clearly defined process followed by the Union which could include the following steps:

1. *Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;*
2. *The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;*
3. *A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;*
4. *The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;*
5. *At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of the Act;*
6. *At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of the Act; and*
7. *It must also be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (i.e.: not to proceed with a grievance) which is not arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.*

[36] The Applicant's criticism of the Union's actions in the handling of the grievance focuses on her assertion that there was never a formal conversation between a Union representative and herself regarding the incident on September 13, 2021. She does not believe that they carried out a proper investigation at the appropriate stage in the process. The Union acted arbitrarily due to the lack of any substantial investigation regarding the incident that led to the grievance. She also criticizes the Union's practice of not allowing a named grievor to attend a Step 2 meeting. Her opinion is that, by virtue of the wording of the collective agreement, the grievor is entitled to attend.

[37] In her Reply to the Application for Summary Dismissal, the Applicant withdrew the request for an Order that the Union be required to properly investigate the grievance. This leaves as the requested remedy a declaration that the Union contravened section 6-59 of the Act by acting in a

manner that was arbitrary and in bad faith. She does not agree that she has received her requested remedy, as the Original Application does not request as a remedy that the grievance be withdrawn.

Analysis and Decision:

[38] In *Roy*, the Board stated:

> *[8] The Board recently adopted the following as the test to be applied by the Board in respect of its authority to summarily dismiss an application (with or without an oral hearing) as being:*
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> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> > *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*
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> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

This continues to be the test applied by the Board to applications for summary dismissal. In this matter the Board must determine whether there is an arguable case that the Union breached its duty of fair representation and acted in a manner that was arbitrary and/or in bad faith.

[39] In *Lucyshyn*, the Board described arbitrary conduct as follows:

> *[37] As noted in Rousseau, supra, arbitrary conduct has been described as:*
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> > *A failure to direct one's mind to the merits of the matter, or to inquire into or 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.*

[40] In *Zalopski*, the Board described arbitrary conduct as follows:

> *[53] In Noël, LeBel J. elaborated on what constituted arbitrary conduct noting that this inquiry focused on "the quality of union representation". He stated:*
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> > *The concepts of arbitrary conduct and serous* [sic] *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.*

[41] None of the actions of the Union that are criticized by the Applicant can be described as arbitrary. While the evidence does not indicate that a thorough investigation was undertaken, it does disclose that: the Applicant and the Union president discussed the issue for over an hour; the Union president noted that harassment of Union executive members was an outstanding issue that the Union wanted to address; the Applicant was inexperienced in determining whether the Union should be challenging the Employer's conduct[10], having been a Union official only from September 11 to November 12, 2021; the Union indicated that its legal assessment supported the grievance; the Union responded to the concerns she raised by removing her name from the grievance and converting it into a policy grievance. The Applicant has not satisfied the Board that there is an arguable case that the Union's actions were superficial, careless or perfunctory.

[42] The next issue is whether the Union acted in bad faith. The test that the Board applies to determine if the Union acted in bad faith was described as follows in *Zalopski*:

> *[50] In Noël, 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".*

[43] In *Eros*, the Board stated:

> *[184] Bad faith requires an element of intention. There is no evidence that any of the missteps in representing Mr. Eros were motivated by ill-will. Whenever possible, the representatives made efforts to set aside Mr. Eros's criticisms to focus on the task at hand.*

[10] The definition of harassment in Part III of the Act, on which she relies, is not applicable in this matter.

> *Even where they did not succeed in doing this, there is no evidence that they intended to deny Mr. Eros the benefits under the CBA. While individual representatives expressed some frustration towards Mr. Eros at various times, other representatives intervened to continue to provide Mr. Eros with service. On the whole, the Board does not agree that the Union was motivated by ill-will or hostility in its representation of Mr. Eros.*

Applying that analysis to the facts of this case, the Board finds that the Applicant has not established an arguable case that the Union acted in bad faith. The Applicant has not satisfied the Board that she has an arguable case that, in making the decision to proceed with the grievance to Step 2, despite her objection, the Union acted with an intent to cause her harm. There is no evidence that the Union acted with ill-will against the Applicant.

[44] In *Prebushewski*, the Board noted:

> *[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.*

[45] The Board does not sit on appeal of the Union's decision to advance the grievance and, in particular, will not decide if the Union's conclusion as to the likelihood of success of the grievance was correct. The Board will not minutely assess every decision made by the Union in representing the Applicant. In determining whether to advance a grievance, and to what stage to advance a grievance, it is certainly acceptable for the Union to take into account the collective interests of other members of the bargaining unit:

> *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.*[11]

[46] In *Zalopski* the Board stated the following with respect to whether the Union was obligated to take direction from the Applicant with respect to their handling of the grievance:

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[11] *Prebushewski* at para 60.

> *[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.*
>
> *[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.*

[47] The fact that the Applicant disagrees with the Union's decision to advance the grievance to Step 2 does not establish an arguable case that the Union acted in a manner that was seriously negligent, arbitrary, capricious, discriminatory or wrongful.

[48] The Board does not accept the Union's argument that its decision to advance the grievance bears less scrutiny than a decision to withdraw a grievance. In all of its actions, the Union owes its members a duty of fair representation. That said, the Board is satisfied that the Union took steps to investigate the grievance, took a measured view of the grievance, and made a reasoned decision as to how to proceed. The Applicant does not believe the investigation undertaken by the Union was formal enough. On the other hand she admits that the Union president discussed her concerns with her on September 13, 2021 for over an hour. It was up to the Union to determine whether to proceed and how to proceed. They addressed her concerns by removing her name from the grievance and converting it into a policy grievance. This meant that by the time of the Step 2 meeting she was no longer named as a grievor, so there was no reason for her to attend the Step 2 meeting. The Union determined that they would proceed to Step 2 with the grievance on the basis of their more generalized concern about instances of harassment of Union officers. This was a choice they could reasonably make in this matter.

[49] The Board's role is not to assess the merits of the grievance but instead to assess the Union's decision-making process and conduct in handling the grievance. The Union has discretion to determine how best to handle grievances. The Union turned its mind to the merits and made a reasoned judgment. In a situation of conflicting employee interests, the Union may pursue one set of interests instead of another as long as it considers the relevant factors and is not driven by improper motives. The fact that the Applicant did not agree with the Union's conclusions is not evidence of a breach of their duty of fair representation.

[50] The Board does not agree with the Union's assertion that the Original Application should be dismissed because the Applicant suffered no compensable loss, or because it is moot now that the grievance has been withdrawn. The Union ignores the fact that the Applicant withdrew her request for an investigation of the grievance. If she had been able to prove her case, she would have been entitled to the outstanding remedy requested: a declaration that the Union breached the duty of fair representation that it owes to her.

[51] However, assuming the Applicant is able to prove everything that she has alleged, it is plain and obvious that she has no reasonable chance of successfully demonstrating that the Union has breached section 6-59 of the Act. Her criticisms of the Union do not rise to the level of establishing conduct that is arbitrary or in bad faith. These terms have specific meanings that define the threshold for the exercise of the Board's authority. The Board will not find a breach of the duty of fair representation on the basis that the Union could have provided better representation or on the basis that the Union did not do what the Applicant wanted them to do. None of the Applicant's allegations disclose facts that could give rise to a finding that the Union's conduct in representing her was arbitrary or in bad faith.

[52] As a result, with these Reasons, an Order will issue that the Application for Summary Dismissal in LRB File No. 066-22 is granted and the application in LRB File No. 009-22 is dismissed.

DATED at Regina, Saskatchewan, this **21st** day of **June, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson