Saskatchewan
Labour Relations Board

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 342, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5430 and CANADIAN UNION OF PUBLIC EMPLOYEES (SASKATCHEWAN DIVISION), Respondents

LRB File No. 127-21; June 6, 2022
Chairperson, Susan C. Amrud, Q.C.; Board Members: Hugh Wagner and Allan Parenteau

For Canadian Office and Professional Employees Union, Local 342:	Stephen Legault
For Canadian Union of Public Employees, Local 5430:	Crystal Norbeck, Q.C.
For Canadian Union of Public Employees (Saskatchewan Division):	Perry Erhardt, Q.C.

Application to defer to arbitration denied - None of the criteria that would lead to deferral were met - Not the same dispute - Arbitrator could not resolve dispute or provide a suitable remedy.

Unfair labour practice pursuant to s. 6-62(1)(a), (g) and (h) - CUPE Saskatchewan committed unfair labour practices when it threatened its employee with termination if he participated as a member of COPE 342's bargaining committee.

Unfair labour practice pursuant to clause 6-62(1)(b) - CUPE Saskatchewan committed unfair labour practice when it interfered with COPE 342's right to compose its bargaining committee.

Unfair labour practice pursuant to section 6-7 and clause 6-62(1)(d) - CUPE 5430 did not contravene these provisions - They threatened to, but did not actually, refuse to bargain.

REASONS FOR DECISION

[1] Susan C. Amrud, Q.C., Chairperson: On October 12, 2021, the Canadian Office and Professional Employees Union, Local 342 ["COPE"] filed an Unfair Labour Practice Application with the Board. It named as respondents Canadian Union of Public Employees, Local 5430 ["CUPE 5430"], Canadian Union of Public Employees (Saskatchewan Division) ["CUPE SK"], Sandra Seitz (President of CUPE 5430) and Judy Henley (President of CUPE SK).[1] The

[1] LRB File No. 127-21.

Application alleges that the respondents were contravening section 6-7 and clauses 6-62(1)(a), (b), (d), (g) and (h) of *The Saskatchewan Employment Act* ["Act"]. By letter to the Board dated February 7, 2022, COPE removed Seitz and Henley as respondents.

[2] In its evidence and argument, COPE made several allegations with respect to CUPE Local 1975. Since CUPE Local 1975 is not a party to this matter, those allegations have been disregarded.

[3] The Board heard evidence from the parties on March 10 and 11, 2022, at an in-person hearing. Based on an agreement reached by the parties, they then filed written arguments, with the final one received by the Board on April 5, 2022. Having many unanswered questions, the Board reconvened the parties by Webex on May 24, 2022 to receive further submissions.

Background:

[4] COPE is a small local. In Saskatchewan it has 30 members spread over several employers. Nathan Markwart is a member of COPE and an employee of CUPE SK. He is also the elected vice-president of COPE. In that role he bargains collective agreements on behalf of COPE Locals whose members are employed by CUPE Locals.

[5] CUPE 5430 was formed by an amalgamation of CUPE Locals 3967 and 5999 effective January 1, 2018. Markwart had previously bargained collective agreements on behalf of COPE members employed by each of those Locals. After the amalgamation COPE and CUPE 5430 entered into a Successorship Agreement dated March 19, 2018. They negotiated a collective agreement for the one employee of former CUPE Local 5999 that included a Letter of Understanding re: Intent to Bargain Master Collective Agreement, dated September 6, 2019 ["Letter of Understanding"]. They then commenced bargaining for a new collective agreement to replace the collective agreements in place with each predecessor local/employer. During this bargaining, they discovered that they disagreed about the interpretation of the Letter of Understanding. This bargaining occurred in December 2020 and January, June and August of 2021. The disagreement was eventually resolved through Minutes of Settlement signed February 11, 2022.

[6] During the course of this bargaining, CUPE 5430 decided that they were uncomfortable with Markwart bargaining on behalf of COPE. They arranged for their lawyer to send a letter to the President of COPE, Erin McGhee, dated June 30, 2021 ["Exhibit U6"]. It included the following statements:

> *We see Mr. Markwart's role as a union representative working against our Local as a conflict.*
>
> *We understand that Mr. Markwart has worked in this capacity with COPE 342 for some time now and it is unfortunate that no one raised the conflict sooner. CUPE Local 5430 is not prepared to continue to bargain with a person who's* [sic] *salary is paid, in part, by the dues submitted by our members. Mr. Markwart's interests while bargaining and representing COPE 342 are not the best interests of CUPE Local 5430.*

[7] COPE did not change its bargaining committee as a result of this letter. Markwart was present at the bargaining table when they next met on August 11, 2021. CUPE 5430's next step was to complain to Henley. In response, on September 2, 2021, Henley provided a letter to Markwart ["Exhibit U4"] that referred to Exhibit U6 and then stated as follows:

> *I am disappointed that you continued to bargain against CUPE Local 5430 given the nature of your position with CUPE Saskatchewan. Of further concern is the fact that your salary is paid largely by the dues of CUPE's members. Acting for COPE 342 in this manner is unacceptable and entirely incompatible with the faithful discharge of your duties to CUPE Saskatchewan.*
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> *You are hereby advised that engaging in any further bargaining against CUPE Locals is prohibited, and that disregarding this direction can and will result in disciplinary action against you up to and including dismissal. We trust that you will attend to remedying this conflict of interest immediately by recusing yourself and no longer bargain against CUPE locals that have COPE 342 employees.*

Preliminary Issue: Deferral to Arbitration

[8] CUPE SK asked the Board to either dismiss the Application or adjourn it *sine die*, on the basis of its opinion that the proper procedure in this dispute would have been for COPE to file a grievance pursuant to their collective agreement in accordance with subsection 6-45(1) of the Act:

> *6-45(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*

[9] The parties agree that the law with respect to this issue is set out by the Board in *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v AlumaSafway* [2] ["*AlumaSafway*"]. When an unfair labour practice application raises an issue related to the meaning, application or alleged contravention of a collective agreement, the Board shares concurrent jurisdiction with an arbitrator. Deferral to an arbitrator is not automatic or unconditional. It needs to be appropriate under the circumstances. The Board will determine when

[2] 2019 CanLII 120651 (SK LRB).

to exercise the discretion to defer a question to an arbitrator. In deciding whether to defer, the Board takes into account its proper role, as well as the important policy objective of promoting the capacity and willingness of the parties to engage in collective bargaining on their own accord. The Board must be careful not to encourage parties to come to the Board as a forum of first resort for resolving disputes as to the meaning, application or alleged contravention of a collective agreement.

[10] In *AlumaSafway*, in determining whether to defer an unfair labour practice application to the grievance arbitration process, the Board relied on the test established by the Court of Appeal for Saskatchewan in *UFCW, Local 1400 v. Saskatchewan (Labour Relations Board)*[3]:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board. [4]*

[11] The first question, then, is whether the dispute described in this matter, and the dispute arising from the facts of this matter that could be referred to an arbitrator, are the same. The first step in assessing this issue is to determine the essential character of the dispute.

[12] CUPE SK argued that the essential character of the dispute in this matter involves an alleged contravention of Article 2.1 of the collective agreement:

> *2.1 CUPE Saskatchewan recognizes and will not interfere with the rights of the employees to become members of the Union. There shall be no discrimination, interference, restraint or coercion by CUPE Saskatchewan or any of its agents, against employees because of membership in the Union.[5]*

As such, section 6-45 of the Act requires that it be settled by the grievance arbitration procedure established by the collective agreement. If COPE thought that CUPE SK was discriminating against Markwart on the basis of his membership in the union and restraining his rights to engage in union activity, they ought to have filed a grievance prior to filing an application with the Board.

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[3] 1992 CanLII 8286 (SK CA) at para 16.
[4] *AlumaSafway*, at para 65, quoting from para 22 of *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*, 2013 CanLII 1940 (SK LRB).
[5] Collective Agreement between CUPE SK and COPE, October 1, 2019 to September 30, 2022, Exhibit U3.

[13] CUPE SK noted that when Markwart signed an acknowledgement of receiving Exhibit U4 he also wrote the following note on it:

> *I believe this directive violates Article 2 of the CBA by discriminating against me on the basis of my membership in the union and restraining my rights to engage in union activity.*

This, they argued, indicates that COPE shares their view that the dispute should be referred to arbitration.

[14] COPE argued that CUPE SK's actions in this matter raise serious concerns with respect to interference in its collective bargaining rights with another employer, CUPE 5430. COPE argued that the essential character of the dispute is CUPE SK's attempt to interfere with and control COPE's ability to select its own bargaining committee. While the act of drafting and sending the letter to Markwart could technically be considered a breach of the collective agreement in the form of unjust discipline, it is also an attack on Markwart's rights under the Act and an attack on COPE itself.

[15] The second question is whether the dispute can be resolved by means of the grievance arbitration process in the collective agreement. CUPE SK argued that the possibility that an arbitrator could resolve one of the disputes at issue is sufficient to satisfy this criterion.[6] COPE argued that the only remedy that an arbitrator could grant in this matter, an order that Exhibit U4 be removed from Markwart's personnel file, would not address the real issues in this matter. While an arbitrator could find that the letter constitutes unjust discipline and have it removed from Markwart's file, an arbitrator cannot deal with the larger issues this matter raises.

[16] The third question is whether the remedies that could be granted by an arbitrator are a suitable alternative to the remedies that the Board could order. CUPE SK argued that the available remedies in both fora need not be the same, but the available remedies in the grievance process must be a suitable alternative. If the remedy granted at arbitration does not address all issues, COPE would be free to return to the Board to obtain resolution of any outstanding issues.[7] COPE argued that only the Board has the authority and jurisdiction to provide all of the remedies sought by COPE. An arbitrator can provide no relief with respect to the allegations against CUPE 5430.

[17] CUPE 5430 took no position on the preliminary issue.

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[6] *International Brotherhood of Electrical Workers, Local 2038 v PCL Intracon Power Inc.*, 2017 CanLII 68787 (SK LRB).
[7] *Ibid*, para 44.

[18] The Board determined that none of the criteria mentioned in *AlumaSafway* have been met in this matter. The essential character of the dispute does not engage the meaning, application or alleged contravention of the collective agreement. The essential character of the dispute is the alleged attempt by the respondents to control the membership of COPE's bargaining committee. This is not an issue that can be addressed by an arbitrator.

[19] Resolving the narrow issue of the discipline letter being placed on Markwart's file will not address the issues before the Board. Therefore, deferral to an arbitrator would not be appropriate in these circumstances. The grievance process could not resolve the issues in dispute in this matter. No matter what an arbitrator might decide, there is no possibility that they could resolve the dispute entirely.

[20] The grievance process could not provide a suitable remedy. An arbitrator could not provide a remedy to address the real issue in dispute between COPE and CUPE SK, and an arbitrator could provide no remedy against CUPE 5430.

[21] For all of these reasons, the Board declined to exercise its discretion to defer to an arbitrator. The preliminary issue was dismissed, and the hearing of the unfair labour practice application proceeded.

Argument on behalf of COPE:

[22] COPE argues that CUPE 5430 contravened section 6-7 and clause 6-62(1)(d) of the Act by failing or refusing to bargain in good faith, relying on Exhibit U6, which contains a clear refusal to bargain.

[23] COPE argues that CUPE 5430 and CUPE SK breached clause 6-62(1)(b) of the Act by interfering with the administration of COPE. CUPE 5430 suggested that COPE should use a staff representative, rather than union executive members, to bargain contracts. Given the small size of the COPE membership, that option is financially unavailable to it. Further, it relies on *National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1967 v. McDonnell Douglas Canada Limited* [8] ["*McDonnell Douglas*"], where the Ontario Labour Relations Board stated:

> *In the normal course of events, an employer has no more right to dictate the qualifications or identity of union representatives than the union has with respect to employer representatives.*

[8] 1988 CanLII 3701 (ON LRB), at para 7.

[24] In *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v Mosaic Potash Colonsay ULC* [9] ["*Mosaic Potash*"], the Board found there was no contravention of clause 6-62(1)(b) because:

> *. . . It* [Employer] *did not interfere with the Union's selection of its representatives. The Employer asked for information about the selection process for representatives of the Union. There was no failure or refusal to bargain with the representatives of the Union representing the employees in the bargaining unit. There was no attempt to influence the composition of the existing bargaining committee.*

That is the opposite of what occurred here. CUPE 5430 and CUPE SK threatened COPE's ability to represent its members at the bargaining table.

[25] In *Mosaic Potash*, the Board reviewed its decision in *Re Western Canadian Beef Packers Inc.*[10] ["*Western Canadian Beef*"]:

> *[99] In Western Canadian Beef, the employer had refused to negotiate with the union's representative, an international staff representative, for the settlement of grievances. In the hearing, the staff representative testified that, as a part of his duties, he acted as a representative of the union assisting with the processing of grievances. The employer argued that it had refused to meet with a specific individual, not the union as a whole. According to the employer representative, the main issue was that there had been deterioration in the relationship, that both individuals were "hot tempered", and the employer representative felt that nothing would be gained in their meeting.*
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> *[100] In finding that the employer had committed an unfair labour practice, the Board made the following comments:*
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> > *36 While we do not ascribe any finding of bad faith on the part of the Employer in Mr. Third's refusal to meet with Mr. Meinema, the ramifications of that failure may be subtle but serious: in preventing Mr. Meinema from carrying out the duties of his position the result may be an undermining of the authority of the Union and of the status of Mr. Meinema in the eyes of employees.*
> >
> > *37 We are of the opinion that Mr. Third, acting on behalf of the Employer, was in violation of s. 11(1)(d) of the Act in refusing to meet with the Union's grievance committee including Mr. Meinema, a duly appointed representative of the Union. It is no answer for the Employer to say that the formal steps of the grievance procedure in the collective agreement had been duly fulfilled and that it was seeking to engage in a more informal discussion process rather than to re-open the final step of the grievance procedure. Having made the overture to the Union in indicating that the Employer wanted to discuss the grievances further, and having obtained the response of the Union that it was agreeable to doing so, the Employer could not then seek to dictate who the Union's representatives in that discussion would be.*

[9] 2020 CanLII 31222 (SK LRB), at para 107.
[10] [1998] SLRBD No 62.

[26] COPE argues that the situation here is almost identical to that in *Western Canadian Beef*. Refusing to bargain with COPE's chosen representative is a significant interference in the administration of COPE.[11]

[27] COPE argues that CUPE 5430 contravened clauses 6-62(1)(a) and (g) when it refused to bargain with COPE while Markwart is at the table. In Exhibit U6, CUPE 5430 advised COPE that it would no longer bargain as long as Markwart is at the table.

[28] COPE argues that CUPE SK contravened clauses 6-62(1)(a), (g) and (h) by using intimidation, coercion, threats of termination and requiring as a condition of employment that Markwart cease union activity. CUPE SK threatened him with dismissal if he were to bargain any further contracts with CUPE Locals.

Argument on behalf of CUPE 5430:

[29] CUPE 5430 argues that where there is a genuine dispute as to the respective obligations of the parties, this Board has held that a determination to end bargaining based on that dispute is not an unfair labour practice[12]. It states that the reason for the pause in bargaining here was the disagreement between the parties respecting the proper interpretation of the Letter of Understanding, and therefore CUPE 5430 has not committed an unfair labour practice or breach of the Act.

[30] CUPE 5430 argues that the evidence shows that there was never any actual refusal to bargain on their part. Despite their concern that a conflict may exist between Markwart's role at the bargaining table and his position at CUPE SK, the parties continued to meet and attempted to resolve the dispute over the Letter of Understanding. Now that the parties have resolved the issue of the proper interpretation of the Letter of Understanding, CUPE 5430 has recently proposed new dates to move forward with bargaining. In response to questions by the Board, CUPE 5430 would not state that they have withdrawn their objection to Markwart being at the bargaining table. However, in their written argument they stated:

> *And ultimately, rather than holding to its view of its rights, CUPE 5430 allowed for Mr. Markwart to resume his role in bargaining without being required to do so by the Board.*[13]

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[11] See also *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 6500 v Vale Inco Limited*, 2011 CanLII 82288 (ON LRB); *McDonnell Douglas*, *supra* note 8.

[12] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*, 2017 CanLII 44004 (SK LRB); *AlumaSafway*, *supra* note 2.

[13] Brief of Law and Argument on Behalf of Canadian Union of Public Employees, Local 5430, para 54.

The Board interprets this comment to be referring to the August 2021 meeting.

Argument on behalf of CUPE SK:

[31] CUPE SK argues that it is an implied term of an employment contract that the employee will serve honestly and faithfully. Employees have an implied duty of fidelity and a duty to avoid conflicts of interest. The cases cited by CUPE SK in support of this argument included[14]:

- *Re University of Saskatchewan and CUPE, Local 1975 (Jumalon)*[15], in which the employee was being disciplined for theft from his employer;
- *Taylor v AVMAX Aircraft Leasing Inc.*[16], a wrongful dismissal case where the complainant disclosed confidential information belonging to his employer, for the purpose of competing in business against his employer;
- *Canadian Imperial Bank of Commerce v Boisvert*[17], another wrongful dismissal case, where the complainant, an assistant administration supervisor in a bank, who was familiar with the bank's security measures, was cohabiting with a person who robbed two branches of her bank.

[32] These decisions, CUPE SK argues, establish that as an employee, Markwart owes a duty of loyalty to his employer. In the event of a withdrawal of services by COPE, where would his allegiances lie? This presented a concern for both CUPE 5430 and CUPE SK. Henley acted to avoid a potential problem and directed Markwart not to bargain against CUPE Locals. She did not direct the curtailment of any other union activities. The activities that Markwart engages in while bargaining against CUPE Locals are incompatible with the faithful discharge of his duties to CUPE SK. Markwart has access to important and confidential information. He exhibited behaviour that falls short of appropriate and respectful conduct of an employee who has a duty to faithfully promote and respect his employer. As his employer, CUPE SK had a responsibility to act in an appropriate and measured way to address the concerns raised with it about his conduct.

[33] CUPE SK argues that Markwart's job was not threatened by Exhibit U4. It "simply provided a directive that continuing to act in a conflict of interest could result in discipline up to and including dismissal"[18]. They further argued that the evidence did not meet the objective test of establishing that the probable effect of Exhibit U4, on employees of reasonable intelligence and fortitude,

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[14] CUPE SK also referred to *Pearce v Foster* (1885), 17 QB 536 and *Martin v Brown* (1910) 19 Man R 680 (Man KB), without providing the Board with copies of them and without any indication of their relevance to this matter.
[15] 2020 CarswellSask 632, 147 C.L.A.S. 5, 323 L.A.C. (4th) 16; upheld on judicial review, *University of Saskatchewan v Canadian Union of Public Employees, Local 1975*, 2022 SKQB 49 (CanLII).
[16] 2019 CanLII 51806 (CA LA).
[17] 1986 CarswellNat206 (FCA).
[18] Final Argument and Brief of Law, para 36.

would have been to interfere with, restrain, intimidate, threaten and/or coerce them in the exercise of their rights under Part VI of the Act.[19]

[34] CUPE SK argues that Exhibit U4 is saved by subsection 6-62(2) of the Act, which allows an employer to communicate facts and its opinions to its employees. CUPE SK suggests that Markwart's actions in going to his union with Exhibit U4, and COPE's action in filing this Application show that he was not intimidated by Exhibit U4. Markwart was not vulnerable to the views of CUPE SK. It takes the position that Exhibit U4 was neither threatening nor intimidating, as its intention was to communicate its opinion that Markwart was acting in a conflict of interest, and attempt to resolve the conflict of interest.

[35] CUPE SK argues that there were other ways to "resolve the unrest created by [Markwart's] attitude and comments to an affiliate of his employer during his off-duty endeavours"[20]. It suggests that, rather than filing this Application, COPE should have replied to Exhibit U6.

[36] CUPE SK argues that it has not contravened clause 6-62(1)(h), because it has not required Markwart to abstain from assisting or being active in his union. The direction provided in Exhibit U4 was not to cease being active in COPE. The only directive was that he refrain from bargaining with CUPE Locals. The direction was provided in response to a unique situation that he created.

Relevant Statutory Provisions:

[37] The following provisions of the Act were raised in this matter:

> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *6-7 Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*
>
> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
> >
> > *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*

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[19] *Saskatchewan Government and General Employees' Union v Saskatoon Downtown Youth Centre Inc.*, 2021 CanLII 19681 (SK LRB).
[20] *Supra* note 18, para 45.

> *. . .*
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> *(c) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*
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> *. . .*
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> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*
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> *(h) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any union or from exercising any right provided by this Part, except as permitted by this Part.*
>
> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*
>
> *6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
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> *. . .*
> *(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate.*

Analysis and Decision:

[38] The issues in this matter arose out of the allegation, first by CUPE 5430, and then by CUPE SK, that Markwart was in a conflict of interest when he was bargaining on behalf of COPE members who are employed by CUPE Locals.

[39] The respondents stated in Exhibit U4 and Exhibit U6 that Markwart is in a conflict of interest while bargaining with CUPE 5430 because his salary is paid, in part, through per capita contributions of CUPE 5430 members. At the hearing of this matter, the respondents suggested additional rationale on which they now argue that Markwart was in a conflict of interest when he participated in COPE's collective bargaining: he has access to confidential information about CUPE SK and its Locals; he attends CUPE SK Executive Committee and Table Officer meetings; he is responsible for promoting CUPE SK's public image; he drafts CUPE SK's newsletter; he prepares publications and visuals for CUPE SK's annual convention; he manages CUPE SK's public professional image online through its official media accounts.

[40] CUPE SK argues that Markwart was allowing his personal interests as a member of COPE to influence the exercise of his professional responsibilities as an employee of CUPE SK. However, CUPE SK admitted that there is no evidence before the Board that supports this argument. Further, the cases relied on by CUPE SK in making this argument[21] do not support this argument. The Board rejects CUPE SK's argument that Markwart has breached his duty of loyalty to his employer. There is no evidence that Markwart has access to information that would compromise CUPE 5430 in its bargaining with COPE. There is no evidence that his job of public relations and promotions on behalf of CUPE SK is being or would be compromised by his actions on behalf of COPE. There is no evidence that he is using confidential information obtained in the course of his employment to further his personal interests. CUPE SK acknowledged that there is no evidence to support any of these allegations.

[41] Markwart was not in a conflict of interest when he was bargaining on behalf of COPE members who are employed by CUPE 5430. A union-management relationship is an adversarial relationship. CUPE 5430 and CUPE SK must understand that when Markwart puts on his union hat, he is not a "CUPE guy"; he is not expected to act in their best interests; he is acting in the best interests of CUPE 5430's employees. He is not being disloyal or acting inappropriately. He is exercising the rights granted to him by Part VI of the Act and by the *Canadian Charter of Rights and Freedoms*. Markwart's action in representing his union while on union leave is not incompatible with the due and faithful discharge of his duty of loyalty to his employer. CUPE SK's position would have the Board find that employees who bargain a collective agreement on behalf of their union are in a conflict of interest, because they are not acting in the best interests of their employer. That is obviously something the Board would never find. Markwart absolutely did not breach his duty of loyalty to his employer by bargaining on behalf of COPE members.

[42] Further, while Markwart is bargaining, he is not being paid by CUPE SK, but is on union leave, and his salary is being paid by COPE. The fact that Markwart's salary is paid from CUPE members' union dues while he is at work and not on union leave does not place him in a conflict of interest when he is on leave bargaining on behalf of COPE members. The salary of every employee of CUPE 5430 and CUPE SK is paid for by CUPE members' dues. To find this establishes a conflict of interest would disentitle all of them from bargaining with their employer, something the Board would clearly never find.

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[21] *Segin v Hewitt*, 1993 CarswellOnt 864 (ONCJ Gen Div); *Cox v College of Optometrists of Ontario* 1988 CanLII 4750 (ON SC).

[43] The witnesses disagreed about whether COPE threatened withdrawal of their members' services if the parties were unable to arrive at a collective agreement. The Board is satisfied that the issue arose at the bargaining table, but whether there was an actual threat of job action was not clear. It is not necessary for the Board to decide this issue, as it has no bearing on the outcome of this matter. CUPE SK argues that Markwart's threat to withdraw services on behalf of COPE was another example of his conflict of interest and is what prompted CUPE 5430 to question what would happen if Markwart facilitated a strike against them while continuing to be required to promote CUPE SK in accordance with his job description. Even if Markwart did suggest at the bargaining table that COPE employees would consider withdrawing their services, the right to strike is a *Charter*-protected right:

> *[3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple recognized:*
>
> > *The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter. (Laws Against Strikes (1972), at p. 8)*
>
> *The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.*
>
> *. . .*
>
> *[24] I agree with the trial judge. Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d). As the trial judge observed, without the right to strike, "a constitutionalized right to bargain collectively is meaningless".*[22]

[44] The employees of CUPE 5430, through their chosen bargaining representative, Markwart, can use whatever legal method[23] they choose to bargain their contract, including their right to strike. A threat of strike at the bargaining table is not inappropriate or unusual. Being unions themselves, the Board would expect the respondents to understand this.

Clause 6-62(1)(a):

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[22] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245.
[23] There is no suggestion of illegality here.

[45] Turning to COPE's specific complaints, the first issue is whether CUPE SK contravened clause 6-62(1)(a), by interfering with, restraining, intimidating, threatening or coercing Markwart in the exercise of any right conferred by Part VI of the Act. This provision does not apply to CUPE 5430 because it was neither Markwart's employer nor acting on behalf of his employer, when it sent Exhibit U6. The Board finds that CUPE SK contravened clause 6-62(1)(a). It is no excuse for them to say that they only demanded that he abstain from exercising some of his rights, not all of his rights. Clause (a) prohibits them from interfering with Markwart's exercise of any of his rights.

[46] The Board is satisfied that COPE has provided clear, convincing and cogent evidence that the probable effect of Exhibit U4, on an employee of reasonable intelligence and fortitude, would have been to interfere with, restrain, intimidate, threaten and/or coerce them in the exercise of their rights under Part VI of the Act. Exhibit U4 clearly contravenes clause 6-62(1)(a) when it stated: "You are hereby advised that engaging in any further bargaining against CUPE Locals is prohibited". The evidence was clear that CUPE SK interfered with, threatened and coerced Markwart to prevent him from exercising his rights under Part VI. It was also clear that they were successful – he was intimidated by Exhibit U4 into refraining from exercising his rights. Steps taken by COPE to protect and defend him support this finding.

[47] CUPE SK argues that they could curtail Markwart's right to exercise some of his union rights, as long as they did not curtail all of them. They cannot. Clause 6-62(1)(a) clearly states they cannot interfere with the exercise of any right.

[48] CUPE SK argues in the alternative that their action was saved by subsection (2), and that it was merely "communicating facts and its opinions". If Exhibit U4 had only stated CUPE SK's opinion that Markwart was in a conflict when bargaining with CUPE Locals, it might not have contravened clause 6-62(1)(a). It crossed the line when it threatened him with termination if he continued to engage in collective bargaining on behalf of his union.

[49] CUPE SK argues that Markwart's demeanor at the hearing of this matter indicates that he was not intimidated by Exhibit U4. That argument is not supported by his evidence. He testified that he would not return to the CUPE 5430 bargaining table as long as the threat of termination of his employment remained. In any event, by using "or" rather than "and", clause 6-62(1)(a) does not require COPE to prove that CUPE SK intimidated Markwart, since they have proven that CUPE SK interfered with, coerced and threatened him with termination if he was to continue to exercise his right to represent his union at the bargaining table.

Clause 6-62(1)(b):

[50] The second issue is whether CUPE 5430 or CUPE SK contravened clause 6-62(1)(b) by interfering with the administration of COPE when it attempted to interfere with who could represent COPE at the bargaining table, when it raised an allegation of conflict of interest.

[51] In *Mosaic Potash*, the Board stated:

> *[56] To begin, it is well established that a union has a right to determine the composition of its bargaining committee. This right aligns and is supported by the principles of employee choice and independence, promoted by the existing statutory labour relations framework and by leading case law interpreting and applying section 2(d) of the Charter: Mounted Police Association of Ontario v Canada (Attorney General), 2015 SCC 1, [2015] 1 SCR 3.*

[52] CUPE 5430 does not like negotiating with Markwart. Their witness testified that they found his attitude to be condescending, aggressive and arrogant. The relationship between him and their bargaining lead had deteriorated. They thought the parties could make better progress with different representatives. They replaced their representative. When COPE did not remove Markwart as a representative, they sent Exhibit U6 alleging a conflict of interest. When COPE did not respond or change its bargaining committee, CUPE 5430 went a step further. They went to the president of CUPE SK and threatened to disassociate their Local (and its sizable annual financial contribution) from CUPE SK unless she "persuaded" Markwart to stop bargaining on behalf of his union. She was willing to oblige.

[53] The Board finds that, with respect to CUPE 5430, this situation is similar to what occurred in *Western Canadian Beef*, where the Board found that the employer had contravened clause 11(1)(d) of *The Trade Union Act* [24]. The difference is that while CUPE 5430 threatened to refuse to bargain with COPE's chosen representative, they did not carry through with that threat.

[54] In *Mosaic Potash*, the Board found that the employer's actions did not contravene clause 6-62(1)(b):

> *[106] The question here is whether the Employer interfered with the administration of the Union. Clause 6-62(1)(b) governs conduct that threatens the integrity of the Union as an organization, or creates obstacles that make it difficult or impossible to carry on as an organization devoted to representing employees. It is not intended to deal with all types of*

[24] Clause 11(1)(d) of *The Trade Union Act* made it an unfair labour practice for an employer "to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or of employees in the appropriate unit, as the case may be, or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances".

> *conflict between parties. Albeit, the Employer repeatedly asked for information about the selection of the Union's bargaining committee. The details of the selection process were not the Employer's concern.*
>
> *[107] However, the Employer's actions in requesting information, in this specific case, did not constitute interference with the administration of a union. It did not threaten the integrity of the union as an organization. It did not interfere with the members' ability to rely on their own union constitution. It did not interfere with the Union's selection of its representatives. The Employer asked for information about the selection process for representatives of the Union. There was no failure or refusal to bargain with the representatives of the Union representing the employees in the bargaining unit. There was no attempt to influence the composition of the existing bargaining committee.*

[55] The Board finds that by issuing Exhibit U4, CUPE SK contravened clause 6-62(1)(b). CUPE SK did not just ask for information. There was a clear interference with the ability of COPE to compose its bargaining committee, when it prohibited Markwart from participating, under threat of termination of his employment based on an unfounded allegation of a conflict of interest. This situation is similar to *McDonnell Douglas*, where the Ontario Labour Relations Board stated:

> *There can be little doubt that the respondent's conduct amounts to a significant interference in the administration of the complainant. Aside from the fact that the latter's duly elected President has been prevented from or impeded in the carrying out of his duties, we also accept that such conduct may have more subtle ramifications, including undermining both the complainant and this particular President in the eyes of employees and having an impact on subsequent elections. Indeed, it is unnecessary to belabour this point as the respondent did not suggest otherwise.*[25]

Section 6-7 and clause 6-62(1)(d):

[56] The next issue is whether CUPE 5430 contravened section 6-7 and clause 6-62(1)(d) by failing or refusing to bargain in good faith with COPE's duly appointed representatives.

[57] In *Mosaic Potash*, the Board stated:

> *[58] As for whether the employees of another employer may be a part of the bargaining committee, clause 6-62(1)(d) is clear. It is an unfair labour practice to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer.*

[58] COPE is entitled to choose its own bargaining committee and CUPE 5430 has no right to interfere in that choice. In Exhibit U6 CUPE 5430 stated that it was not prepared to continue to

[25] At para 18.

bargain with Markwart at the table. If they had followed through with that threat they would have been in contravention of section 6-7 and clause 6-62(1)(d). However, while CUPE 5430 threatened to refuse to bargain, it did not actually refuse to bargain. When COPE ignored Exhibit U6, and showed up at the meeting in August 2021 with Markwart present at the bargaining table, the meeting proceeded.

Clauses 6-62(1)(g) and (h):

[59] The final issue is whether CUPE SK contravened clauses 6-62(1)(g) and (h) by using a threat of termination of its employee, Markwart, with a view to discouraging activity in or for his union, and by requiring as a condition of his continued employment that he abstain from assisting or being active in COPE, with respect to its collective bargaining with CUPE Locals. It is inexplicable that CUPE SK would argue that his job was not threatened by Exhibit U4 when it so clearly is:

> *You are hereby advised that engaging in any further bargaining against CUPE Locals is prohibited, and that disregarding this direction can and will result in disciplinary action against you up to and including dismissal.*

[60] The Board finds that the only possible way to interpret this sentence is that CUPE SK used this threat of termination of Markwart's employment with a view to discouraging his activity in his union, and requiring as a condition of his continued employment that he abstain from collective bargaining on behalf of COPE members employed by CUPE Locals. Under questioning by the Board, CUPE SK admitted that was a reasonable interpretation of that sentence.

Remedy:

[61] COPE asks for numerous Orders:

(a) An Order requiring CUPE 5430 to engage in collective bargaining;

(b) A declaration that CUPE 5430 and CUPE SK have committed and continue to commit unfair labour practices, and that the declaration be posted in the workplace;

(c) An Order that Exhibit U4, the letter issued to Markwart, be removed from his personnel file;

(d) An Order that CUPE 5430 and CUPE SK cease and desist from interfering with Markwart's rights under subsection 6-4(1) of the Act;

(e) An Order that CUPE SK cease and desist interfering in the administration of COPE;

(f) An Order of restitution in the amount of $25,967.05, based on a Bill of Costs attached to COPE's written argument, representing its lawyer's fees and disbursements.

[62] The Board did not find CUPE 5430 to have committed an unfair labour practice because, despite its threat to refuse to bargain with Markwart at the table, they did not carry through with that threat. CUPE 5430 has no right to interfere with the composition of COPE's bargaining team. As long as they continue to bargain with COPE's chosen representatives, they are complying with the Act. It is the Board's expectation that CUPE 5430 will return to the bargaining table and make no further comment or complaint about who COPE chooses to represent them.

[63] With these Reasons, the Board will issue an Order that grants all of the requested remedies against CUPE SK, other than the one requested in paragraph (f). COPE cites no authority in support of this request. In *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*[26], the Board stated:

> *An award of costs is discretionary. This Board exercises restraint in awarding costs, and generally requires each party to bear its own costs in the proceedings. In exceptional and compelling circumstances in which the unreasonable conduct of one party compounds the complexity of the proceedings, there may be a basis for ordering costs. Such an order is not intended to provide full compensation for expenses, but instead to compensate for the breach of the statutory duty. It is an equitable, rather than punitive, remedy.*

[64] CUPE 5430 argues that ordering costs in this matter would be contrary to the Board's well-established jurisprudence that costs are not ordered as a matter of course.[27] There are no extraordinary circumstances in this matter that would justify an Order for costs. CUPE SK points out that COPE did not lead evidence to support the restitution requested in its Brief. Both CUPE 5430 and CUPE SK note that COPE failed to mitigate its costs when it declined CUPE 5430's request that the parties ask the Board to conduct the hearing via Webex rather than in person.

[65] The Board finds that COPE has not led evidence to prove circumstances that are so exceptional in this matter that they justify an award for costs, especially on a solicitor-client basis. COPE has not persuaded the Board that this is an appropriate matter in which to award costs.

[66] The Board thanks the parties for the comprehensive oral and written submissions they provided, which the Board has reviewed and found helpful. Although not all of them may have been referred to in these Reasons, all were considered in making this decision.

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[26] 2019 CanLII 98484 (SK LRB) at para 131.

[27] *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, *ibid*; *SEIU-West v Variety Place Association Inc*., 2017 CanLII 43922 (SK LRB); *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB).

[67] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **6th** day of **June, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson