Saskatchewan
Labour Relations Board

J.C., Applicant v REGINA POLICE ASSOCIATION INC. and REGINA POLICE SERVICE, Respondents

LRB File No. 075-23; October 31, 2023
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Applicant, J.C.:	Self-represented
Counsel for the Respondent, Regina Police Association Inc.:	Susan B. Barber, K.C. and Alyssa Phen
For the Respondent, Regina Police Service:	No one appearing

Employee-union dispute – s. 6-59 of *The Saskatchewan Employment Act* – Police officer dismissed pursuant to s. 60 of *The Police Act, 1990* – Union refusing to pay for counsel with respect to officer's appeal pursuant to s. 61 of *The Police Act, 1990.*

Jurisdiction – *Shotton* (SCC) reviewed – *Robin* (SK LRB) reviewed – Dispute does not involve Union's conduct in a representational capacity with respect to collective agreement or Part VI of *The Saskatchewan Employment Act* – Board has no jurisdiction with respect to dispute pursuant to s. 6-59.

Employee-union dispute – If Board in error with respect to jurisdiction, Union's conduct not arbitrary, discriminatory or in bad faith.

Employee-union dispute – s. 6-58 not pled – Union would have called its case differently – Inappropriate to consider s. 6-58 in these circumstances.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons following a hearing with respect to an employee-union dispute between J.C. and the Regina Police Association Inc. [Union].

[2] The dispute arises due to the Union's refusal to pay for counsel to assist J.C. with an appeal pursuant to s. 61 of *The Police Act, 1990*[1] [*Police Act*].

[1] *The Police Act, 1990*, SS 1990, c P-15.01 [*Police Act*].

[3] J.C. was dismissed by the Chief of Police [Chief] of the Regina Police Service [RPS] on July 27, 2022, and is appealing his dismissal pursuant to s. 61 of the *Police Act*. J.C.'s appeal will proceed before a hearing officer appointed pursuant to the *Police Act*. That hearing is presently scheduled to begin on January 28, 2024, and J.C. has retained a lawyer at his own expense to act for him therein.

[4] J.C.'s application relies on s. 6-59 of *The Saskatchewan Employment Act* [Act].[2] More particularly, it alleges that the Union breached its duty of fair representation to him by breaching an alleged promise to, at a minimum, pay for counsel to review disclosure relevant to his dismissal and his *Police Act* appeal. In terms of requested relief, J.C.'s application lists "full representation by [the Union's] legal counsel for the duration of my appeal against dismissal", including review of disclosure from the RPS and medical records related to J.C.'s diagnosis of post-traumatic stress disorder [PTSD].

[5] J.C. clearly takes issue with the reasons the Chief gave for his dismissal, including whether many of the incidents relied upon by the Chief actually occurred, or occurred as characterized. Further, in J.C.'s view the incidents the Chief relied upon to dismiss him were not considered against the backdrop of J.C.'s diagnosed PTSD, which arose from his service with the RPS.

[6] For its part, the Union raises as a preliminary issue whether the Board has jurisdiction to order the relief requested by J.C. It notes that it has no representational role with respect to appeals under the *Police Act*; employees carry their appeals, the Union doesn't. The Union's duty of fair representation under s. 6-59 of the Act is with respect to employees' rights pursuant to their collective agreement or Part VI of the Act.

[7] The Union also denies that any promises were made to J.C. to pay for any form of legal review or representation for his *Police Act* appeal. Its position is that the Union's board reasonably considered J.C.'s request for assistance through its established process, and declined it for rational and defensible reasons. J.C. also had the opportunity to convene a special meeting of the Union's entire membership to consider his request, but he was unable to garner the requisite number of signatures to compel such a meeting.

[8] In sum, the Union's position is that the Board lacks jurisdiction with respect to the dispute J.C. has placed before it, and regardless, that the Union's conduct with respect to the dispute cannot be characterized as arbitrary, discriminatory, or in bad faith.

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[2] *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act], s 6-59.

Evidence:

[9] J.C. gave evidence on his own behalf, and Colin Glas [Mr. Glas], President of the Union, gave evidence on behalf of the Union.

[10] J.C. testified that on January 21, 2022 he participated in an interview regarding allegations of him behaving in a manner which could constitute discreditable conduct or render him unsuitable for police work. Mr. Glas, who was Vice-President of the Union at the time, attended the interview with him. The interview was lengthy, spanning approximately 12 hours, according to J.C.

[11] J.C. acknowledged that the allegations against him were numerous, potentially amounting to as many as 47 alleged incidents. He explained that the allegations generally arose from the breakdown of his relationship with his spouse, and involved his spouse and members of her family as well as others, including some of his RPS colleagues. J.C. said he cooperated during the interview and was truthful. He admitted to a few of the allegations during the interview, which he characterized as minor. He is adamant that other than those allegations that he admitted to, the remainder were (and are) unfounded.

[12] J.C. was served with an order of relief from duty on January 21, 2022.[3] This was signed by Deputy Chief of Police Rae. It stated, in part, "[t]his relief from duty is not related to a single incident or complaint, it is based on multiple allegations of threatening, intimidating, harassment, and watching and besetting that has had a negative impact on the mental well-being of many individuals."[4]

[13] During the evening of January 21st, after J.C.'s interview had concluded, Mr. Glas contacted a law firm so that a lawyer could provide J.C. with legal advice. Mr. Glas did so by email, and attached a copy of the allegations against J.C. as well as a copy of the order of relief from duty.[5] Mr. Glas indicated in the email that it was his understanding that the RPS would be paying for the consultation. J.C. indicated that he had no reason to dispute this, and that he did in fact meet with a lawyer from the law firm.

[14] J.C. acknowledged that he was in regular contact with Mr. Glas following January 21st. One of J.C.'s primary concerns was whether the Union would pay for a lawyer to review disclosure

[3] Exhibit U-1.
[4] Exhibit U-1, p 3.
[5] Exhibit U-2.

with respect to the allegations against him and advise on the appropriateness of any discipline that might be meted out, if any.

[15] J.C. testified that he was summoned to a meeting with the Chief and dismissed from the RPS on July 27, 2022. He was provided with a written notice of dismissal pursuant to s. 60 of the *Police Act*.[6] J.C. testified that on July 27th Mr. Glas told him that the Union would be unlikely to pay for counsel to represent him for allegations related to off-duty conduct. J.C. said that this was contrary to earlier discussions he'd had with Mr. Glas, where Mr. Glas had indicated that the Union would pay for counsel to review the allegations against him, and the appropriateness of any discipline meted out.

[16] During cross-examination, J.C. was asked about his awareness of the Union's board[7] voting on whether to fund legal counsel for him, following his dismissal. He indicated that he didn't recall becoming aware that the board had held such a vote until several months following his dismissal (i.e., several months after July 27, 2022).

[17] J.C. was also asked about whether Mr. Glas had told him prior to his dismissal that whether legal counsel would be funded was a decision for the Union's board to make. J.C. testified that he didn't recall Mr. Glas telling him this before he was dismissed. Rather, he testified that Mr. Glas had told him that the Union would pay for legal counsel to review the appropriateness of any discipline. According to J.C., it was only after he was dismissed that Mr. Glas brought up the Union's board needing to make a decision about whether to fund legal counsel for him.

[18] J.C. acknowledged that he and Mr. Glas discussed two specific examples where the Union had agreed to fund counsel for RPS officers who had been disciplined under the *Police Act*. However, J.C. stated that these examples (involving officers Power and Magee) were only discussed after he had been dismissed.

[19] During cross-examination, J.C. acknowledged that the Union had indicated to him that it was refusing to pay for a lawyer because the allegations against him did not arise while he was in the execution of his duties as a police officer. J.C. responded by saying that when he logs on and logs off doesn't matter, he is a police officer "24-7", and that some of the allegations related

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[6] Exhibit A-1.
[7] In these reasons, "board" and "Union's board" means the Union's board. "Board" means the Labour Relations Board.

to his conduct while he was on shift. J.C. highlighted the following from his notice of dismissal (emphasis added):

> *8. Although the majority of the conduct occurred while you were off-duty, several incidents occurred while you were on duty. Instead of being focused on your sworn duties, you were engaging in behaviour that was perceived as threatening and harassing.*[8]

[20] Before leaving the notice of dismissal, the Board notes the document suggests that J.C. admitted to at least some of the allegations against him, which generally conforms with the evidence he gave to the Board, though he did not touch on these specific allegations in his evidence to the Board:

> *7. The investigation substantiated the targeting of a fellow member of the Regina Police Service, and his family, by sending anonymous text messages disclosing information about an alleged extra-marital affair, and creating false online advertisements intended to discredit his efforts to sell property on three separate occasions. You have admitted this conduct. …*[9]

[21] J.C. testified that following his dismissal he was diagnosed with PTSD stemming from a call he had responded to while on duty. He filed correspondence from the Workers' Compensation Board [WCB], dated February 23, 2023, in which the WCB confirmed that it considered J.C.'s PTSD to be a work injury caused by a traumatic event on or before May 22, 2020, for coverage purposes.[10]

[22] J.C. testified that he advised Mr. Glas of his PTSD diagnosis. During cross-examination, J.C. agreed that Mr. Glas told him that he was going to advise the Union's board about the diagnosis. J.C. also stated, however, that Mr. Glas told him that his mental health assessment would be provided to Ms. Barber, K.C., counsel for the Union, for her review.

[23] J.C. acknowledged that Mr. Glas told him that, in spite of the Union's board deciding against funding a lawyer for him, he had the opportunity to request a special meeting of the Union's membership. J.C. testified that he attempted to obtain the requisite number of signatures to compel a special meeting, but was unable to do so. He admitted that he had no evidence that the Union in any way attempted to limit his ability to obtain signatures. He acknowledged that if he had been able to obtain the requisite number of signatures, he would have had the opportunity to state his case to the entire Union membership.

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[8] Exhibit A-1, para 8.
[9] Exhibit A-1, para 7.
[10] Exhibit A-2.

[24] As aforementioned, Mr. Glas gave evidence on behalf of the Union.

[25] Mr. Glas has been employed by the RPS for 22 years and has held elected positions in the Union for the past 12 years. He initially served as a director, then as Vice-President, and mostly recently he has been serving as President. He described the Union's board as comprising a total of 17 elected officers and directors. The board meets once per month.

[26] Mr. Glas discussed the Union's bylaws and constitution. He identified a document intended to be adopted on October 10, 2023, described as "Regina Police Association Inc. Bylaws and Constitution".[11] Mr. Glas indicated that this document was not in effect during the material times with respect to J.C.'s application. However, he testified that nothing material had changed between the bylaws and constitution which were in effect at those times and the document that was filed with the Board.

[27] Mr. Glas noted that the Union's bylaws and constitution make no reference to the Union paying legal fees, other than the following, under Article 13 – Revenue and Expenditures (emphasis in original):

> *5. Legal expenses experienced by a Member may only be considered for payment if preapproval has been granted by an Executive Board Member. The Request must be in writing when it is reasonable to do so.*[12]

[28] As Vice-President and President, Mr. Glas has at all material times been an executive board member.[13] Mr. Glas explained that over the course of his 12 years on the Union's board, he has understood this provision to be intended as a deterrent to members retaining counsel on their own and asking for reimbursement afterward. Mr. Glas stated that this provision allows an executive board member to authorize payment for an initial consultation with a lawyer. However, the decision to pay for anything more than an initial consultation rests with the Union's board. In this case, following J.C.'s relief from duty on January 21, 2022, the RPS paid for his consultation for a lawyer, so there was no need for Mr. Glas to consider approving payment for it.

[29] Mr. Glas was directed to the Union's collective agreement, and noted the following statement under Article 8 – Grievances and Disputes:

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[11] Exhibit U-3.
[12] Exhibit U-3, p 20.
[13] Exhibit U-3, p 3.

> *The provisions of this Article are not intended to be utilized in any circumstances where the provisions of The Saskatchewan Police Act and Regulations thereunder apply.*[14]

[30] Articles 8(b)(i) to (v) of Schedule A of the collective agreement contemplate an employee being reimbursed their legal fees by their employer (not by the Union) in certain circumstances involving discipline under the *Police Act*, including when the Chief and member resolve the *Police Act* proceeding through a joint submission for a reduced penalty.

[31] Mr. Glas explained that the Union plays a limited role when a member is under investigation for potential discipline under the *Police Act*, and that this role is outside of its obligations to its members under the collective agreement. The Board notes that the Union's constitution and bylaws make no obvious reference to this role, either. They reference decisions on whether to pursue a grievance under the collective agreement being made by the Union's executive Board (i.e., its officers but not its directors), but nothing with respect to *Police Act* proceedings.[15]

[32] Mr. Glas stated that the Union is not required to be made aware that a member is being investigated for potential discipline under the *Police Act*, and that it is not always made aware. Members may ask for the Union to support them when they are being investigated. In this case, Mr. Glas provided support to J.C. on January 21, 2022, the day he was interviewed and relieved from duty, and afterward. This included Mr. Glas attending the interview with J.C., assisting with lining up legal counsel following the interview that day, and discussing J.C.'s circumstances as time went on, including the potential for the Union to pay for legal counsel in relation to any discipline that might be imposed.

[33] Mr. Glas explained that the Union has no control over a member's *Police Act* proceedings. As he put it, the member "owns" their discipline under the *Police Act*. This is in contrast with grievances under the collective agreement, which are "owned" by the Union.

[34] Mr. Glas testified as to his experience with the Union approving funding for members subject to *Police Act* discipline. He explained that there is nothing in writing that sets out the process, to his knowledge. His testimony was based on his 12 years on the Union's board and the cases he has had involvement with as a board member.

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[14] Exhibit U-4.
[15] Exhibit U-3, Article 15(3), p 22.

[35] Mr. Glas emphasized that, except for an initial consultation, discussed at paragraph 28, above, whether to provide funding for a member is a decision which must be made by the Union's board. Requests are rare. In his experience, a primary consideration for the board is whether the conduct in question occurred while the member was in the execution of their duties. Other considerations include the potential cost of supporting the member, the potential precedential value of the matter, and whether other Union members are involved in the impugned conduct, as complainants, for example.

[36] Mr. Glas confirmed that he attended a lengthy interview with J.C. on January 21, 2022, at which J.C. was interviewed about numerous allegations of misconduct. After the interview, J.C. was served with the order of relief from duty.[16] Mr. Glas then facilitated J.C. being able to meet with a lawyer, payment for which was made neither by the Union nor J.C., and to Mr. Glas' understanding was made by the RPS.

[37] Mr. Glas stated that he was in regular contact with J.C. after January 21st, by text or telephone call. He indicated that they likely communicated daily for the next two weeks, and weekly after that. Mr. Glas described himself as acting as a "support network" for J.C.

[38] Mr. Glas testified that a recurring topic of conversation between himself and J.C. over the weeks and months after January 21st was whether the Union would pay for legal counsel in relation to any *Police Act* discipline J.C. might be facing. Mr. Glas emphasized during their conversations that the decision was not his to make, and that it would need to be voted upon by the Union's board. They discussed cases Mr. Glas was aware of in which the Union's board had voted in favour of paying for legal counsel. These were the Power and Magee cases. Mr. Glas emphasized that he didn't suggest that their circumstances were analogous to J.C.'s, and that Power and Magee faced *Police Act* discipline for conduct which occurred during the execution of their duties.

[39] Mr. Glas testified that he and J.C. discussed the process for the Union's board to approve payment of legal fees "at least half a dozen times" prior to July 27, 2022, when J.C. was dismissed by the Chief.

[40] Mr. Glas was present when J.C. was served with the order of dismissal by the Chief. Afterward, Mr. Glas and J.C. discussed next steps. Mr. Glas told J.C. that the matter would be

[16] Exhibit U-1.

discussed at the next board meeting in August, and a motion would be made to either support or not support funding legal assistance for him.

[41] Mr. Glas denied ever promising J.C. that the Union would fund any form of legal assistance for him.

[42] Whether to pay legal fees for J.C. was on the agenda for the Union's August 2, 2022 board meeting.

[43] Mr. Glas testified that in his experience the board has not invited the member whose circumstances are being discussed to make submissions to it, and that it did not do so in this case. Further, Mr. Glas could not recall J.C. asking to present to the board. Rather, Mr. Glas presented the information he had available to him respecting J.C.'s dismissal, based on his observations during the January 21st interview, his discussions with J.C., and documentation he had received, including the order of relief from duty and the notice of dismissal. Mr. Glas testified that the discussion at the board took close to an hour. There was what he described as "good, healthy conversation" amongst the board. At the end of the discussion a motion was tabled to not pay for legal counsel for J.C., and it passed by a vote of 10 to 1. The board meeting minutes were entered into evidence.[17]

[44] Mr. Glas explained that the board placed significant emphasis on the fact that the allegations did not concern J.C.'s conduct in the execution of his duties as a police officer; they were personal in nature. Other factors influencing the board's decision were the potential cost involved and the fact that other Union members were complainants or victims with respect to some of the alleged conduct.

[45] Mr. Glas testified that he communicated the result of the vote to J.C. after the August 2nd board meeting, as well as J.C.'s ability to attempt to compel a special meeting of the Union to revisit the board's decision, provided he could obtain a sufficient number of signatures.

[46] A letter dated August 3, 2022, signed by then-President Casey Ward and addressed to J.C., was entered into evidence.[18] The letter explains that the decision to not pay for J.C.'s legal expenses is "due to the incidents happening off duty and/or not in the execution of your duties". It also explains J.C.'s ability to attempt to compel a special meeting of the Union.

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[17] Exhibit U-6.
[18] Exhibit U-7.

[47] On August 3rd Mr. Ward emailed all members of the Union, advising them of the board's decision, and that a special meeting could be convened to revisit that decision if a sufficient number of signatures were compiled.[19] According to Mr. Glas, this was consistent with the board's past practice, to his knowledge. Ultimately, no special meeting was convened because J.C. couldn't obtain enough signatures.

[48] Mr. Glas testified that he was contacted by J.C. at the end of March of 2023 regarding some additional information that J.C. thought the board should consider. More particularly, J.C. advised Mr. Glas that he had been diagnosed with PTSD, and that his PTSD had been attributed to his on-duty work as a police officer.

[49] J.C. provided a copy of his mental health assessment to Mr. Glas, which Mr. Glas read. Mr. Glas spoke to J.C. about what he wanted disclosed to the board. J.C. indicated that he didn't want the whole assessment given to the board. Mr. Glas suggested he'd provide the summary diagnosis to the board (PTSD and major depressive disorder), and advise the board that J.C. was suffering from these conditions during the time period his *Police Act* appeal would be examining. J.C. agreed with this.

[50] Mr. Glas denied promising J.C. that he would provide the mental health assessment to Ms. Barber, K.C. He acknowledged that J.C. had authorized him to provide it to her. Ultimately, neither Mr. Glas nor the board considered this to be necessary.

[51] J.C.'s request for the board to reconsider his circumstances was added to the agenda for the Union's April 4, 2023 board meeting. The minutes of this meeting were filed with the Board.[20] During the meeting a recap of the board's discussion and resolution from its August 2, 2022 meeting was provided by reviewing the minutes from that meeting. It was also noted that J.C. was unable to obtain enough signatures to compel a special meeting after the August 2nd meeting.

[52] The discussion at the board's April 4, 2023 meeting focused on whether the mental health information affected the board's previous reasoning for why it would not fund counsel for J.C. The board discussed that reasoning, particularly it being based on: (1) J.C.'s impugned behaviour either having occurred while off duty or not in the execution of his duties; (2) the financial cost of paying for legal counsel; (3) the fact that other members were involved as complainants or victims. The board had a slightly different composition on April 4, 2023 than on August 2, 2022, including

[19] Exhibit U-8.
[20] Exhibit U-9.

that Mr. Glas had become President. The discussion with respect to J.C. was approximately 45 to 50 minutes long.

[53] Ultimately, the board concluded that the new mental health information did not change the appropriateness of the decision to refuse to fund counsel for J.C. The board determined that the reasoning from its August 2, 2022 meeting still applied. A motion was made to not fund counsel for J.C., and it passed unanimously (16-0). Mr. Glas informed J.C. of the vote's outcome.

[54] During cross-examination it was put to Mr. Glas that some board members considered it difficult to make a decision without having full disclosure regarding all of the allegations against J.C. Mr. Glas indicated that he was able to present his understanding of the allegations based on his having sat in on J.C.'s January 21, 2022 interview, which was conducted by members from the Saskatoon Police Service and Prince Albert Police Service, and which lasted about 8 or 9 hours.

[55] Mr. Glas was also questioned about one of the board members who voted at the August 2nd and April 4th board meetings having investigated some of the allegations with respect to J.C. Mr. Glas indicated that he had no concerns about this member being biased or improperly influencing the board through their participation.

[56] Mr. Glas did not believe the board needed all of the disclosure regarding the allegations against J.C. (nor did it have authority to obtain it from the RPS) to base its decision to refuse funding on the grounds that it did. Board members ultimately felt they had sufficient information to vote on both August 2, 2022 and April 4, 2023.

[57] During cross-examination Mr. Glas maintained that he never promised J.C. that the Union's counsel would review disclosure to determine the appropriateness of any discipline that might be imposed on J.C. Mr. Glas stated that he discussed the Power and Magee cases with J.C. on multiple occasions. He maintained that he explained the specific circumstances of the Power and Magee cases to J.C. and emphasized that their *Police Act* discipline arose from their conduct in the course of their duties. Their impugned conduct involved either effecting an arrest or overstepping their bounds with respect to use of force. Mr. Glas stated that the Union did not consider J.C.'s circumstances to be analogous.

[58] During cross-examination, it was put to Mr. Glas that on July 27, 2022, shortly after J.C. and Mr. Glas met with the Chief, Mr. Glas told J.C. that then-President Casey Ward had said that the Union would not pay for legal counsel for J.C. Mr. Glas stated that he had no recollection of

this, and that the board needed to meet to determine whether to provide J.C. funding. That is what occurred on August 2, 2022.

Argument on behalf of J.C.:

[59] J.C. filed a closing argument and made oral submissions.

[60] J.C. maintains that prior to his dismissal Mr. Glas promised that the Union would fund counsel to review the appropriateness of any discipline meted out to him. After his dismissal, on July 27, 2022, Mr. Glas told him that the Union would not be funding counsel.

[61] J.C. maintains that he was not told his request for funding by the Union would be taken to a vote by its board until months after he was dismissed (i.e., months after July 27, 2022). J.C. submitted that he did not receive the August 3, 2022 letter advising him of the Union's board voting against funding counsel for him until shortly before the hearing before *this* Board. The Board notes that J.C. did not discuss this in his evidence, or suggest that he did not receive the letter to Mr. Glas in cross-examination.

[62] J.C. submits that the Union should have reviewed all of the disclosure with respect to the allegations against him before making a decision on whether to fund legal counsel for him, especially because he faced the ultimate form of discipline.

[63] J.C. submits that the Union's board made its decisions in bad faith based on incomplete information, hearsay and false allegations. Only 5 or 6 of the incidents alleged (which dated back to 2009) actually occurred, and he admitted to those.

[64] J.C. emphasizes that his diagnosed mental illnesses stemmed from his on-duty work as a police officer, as noted by the WCB. His mental condition affected his behaviour and should have been given more weight in the Union's decision-making at its April 4, 2023 board meeting.

[65] J.C. asks the Board to order the Union to pay for all of his past and future legal costs in relation to his dismissal and *Police Act* appeal.

Argument on behalf of the Union:

[66] The Union makes the following arguments:

a. The Board lacks jurisdiction under s. 6-59 of the Act with respect to the dispute that J.C. has brought before it.

b. If the dispute does fall within the Union's duty of fair representation under s. 6-59, which is denied, the Union did not breach its duty.

c. Section 6-58 has not been pled by J.C. and should not be considered by the Board. Alternatively, s. 6-58 is not engaged on the facts and/or the Union did not breach s. 6-58.

[67] With respect to jurisdiction, the Union notes that its duty of fair representation under s. 6-59 only arises with respect to an employee's or former employee's rights pursuant to their collective agreement or Part VI of the Act. J.C. does not assert a right under the collective agreement or pursuant to Part VI of the Act for which the Union provides representation to its members.

[68] *Police Act* disciplinary proceedings are carried by members themselves. They are specifically excluded from the grievance process in the collective agreement and are not governed by Part VI of the Act. The Supreme Court of Canada has previously held in *Shotton* that disciplinary matters under the *Police Act* are not arbitrable by the Union.[21] A grievance arbitrator cannot resolve them; they must be resolved pursuant to the process in the *Police Act.* There has been no material change in the *Police Act* or the Union's collective agreement since *Shotton*. As such, J.C. has failed to establish that the Union had any representational responsibilities with respect to him so as to engage its duty of fair representation under s. 6-59. The Union cannot have such responsibilities without also having the exclusive right to represent him in his dispute with the Chief, which it lacks. The Union relies on the Supreme Court's statements in *Gagnon* that the duty of fair representation with respect to grievances arises from the exclusive power to act on behalf of an employee.[22]

[69] The Union notes that the Board has previously determined that a union's duty of fair representation does not arise with respect to pursuing insurance claims against third parties on behalf of members (which it has no statutory right to bring), quoting the Board's decision in *McEwan* (emphasis added):

> ***[48]*** *… As a general rule, it is not arbitrary for a union to decline to assist with and pursue employees' claims against third parties using legal procedures or processes other than the grievance procedure contained in the collective agreement… Under the Act, a union has no right to represent employees outside the union/employer relationship and the specific terms in the collective agreement. It would be unusual if a union had no statutory right to*

[21] *Regina Police Assn. Inc. v Regina (City) Board of Police Commissioners,* 2000 SCC 14, [2000] 1 SCR 360 [*Shotton*].
[22] *Canadian Merchant Service Guild v Gagnon et al*., 1984 CanLII 18 (SCC), [1984] 1 SCR 509 [*Gagnon*], at p 527.

> *represent its members against third parties such as an insurer yet was statutorily required to provide such representation if a member so requested*.[23]

[70] The Union acknowledges that the Board has previously considered whether the antecedents to ss. 6-58 and 6-59 of the Act were engaged in a dispute bearing some resemblance to the one before the Board, in *Robin*.[24] A copy of *Robin* was provided to the parties by the Board at the commencement of the hearing so that they could address its relevance from their perspectives, if so inclined. The Union did so in its brief and in its closing argument.

[71] The Union notes that in *Robin* the Board held that it had jurisdiction to "supervise the duty of fair representation" owed by the Prince Albert Police Association [PAPA] with respect to a member's allegation that his request for payment of legal fees for *Police Act* disciplinary proceedings was wrongfully denied by the PAPA.

[72] The Union notes that in *Robin*, the PAPA's constitution and bylaws contained detailed provisions clearly establishing a member's right to request coverage for legal fees, and a process for the PAPA to consider same, and that there are no equivalent provisions in the Union's bylaws and constitution. The Union suggests that the Board may have determined that it had jurisdiction over the dispute in *Robin* by virtue of s. 36.1 of the *Trade Union Act* [*TUA*],[25] the antecedent provision to s. 6-58 of the Act, because the dispute related to a matter in the PAPA's constitution. In *Robin*, the member alleged breaches of both s. 36.1 of the *TUA* and s. 25.1 of the *TUA*, the latter being the antecedent provision to s. 6-59 of the Act.

[73] The Union submits that the Board erred in *Robin* if it found its jurisdiction in s. 25.1 of the *TUA* and the duty of fair representation. If *Robin* was decided on this basis, it should not be followed by the Board because it is wrong in law.

[74] The Union submits that the essential character of J.C.'s dispute is breach of an alleged promise outside any of the Union's obligations under the collective agreement or Part VI of the Act. As such, the Board has no jurisdiction to hear it under s. 6-59 of the Act.

[75] Turning to its next argument, the Union argues that its conduct was at no time arbitrary, discriminatory or in bad faith. Accordingly, even if s. 6-59 were somehow engaged on the facts, the Union met its duty of fair representation.

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[23] *McEwan v Canadian Union of Public Employees, Local 1975*, 2007 CanLII 68751 (SK LRB) [*McEwan*], at para 48.
[24] *Robin v Prince Albert Police Association*, 2010 CanLII 81336 (SK LRB) [*Robin*].
[25] *The Trade Union Act*, RSS 1978, c T-17 [*TUA*].

[76] The Union submits that Mr. Glas was engaged with J.C. from the outset, and employed significant and honest efforts to support him during the January 21st interview, the period in which J.C. was relieved from duty, and following his dismissal. The Union's board followed its established process in considering J.C.'s request for funding. The considerations it took into account at its August 2, 2022 meeting were reasonable. It convened a second meeting on April 4, 2023 to consider the new medical information, and reasonably concluded to leave its initial decision unchanged. The determinative consideration was that the allegations did not involve conduct in the execution of J.C.'s duties, not the merits of the allegations. J.C. was advised of the board's decisions. He was also advised of the potential for him to attempt to convene a special meeting; he simply couldn't muster the signatures required. The Union submits that J.C. is in error in suggesting that Mr. Glas made any promises to him with respect to funding for legal counsel. He may have misunderstood what Mr. Glas conveyed.

[77] Turning to the Union's arguments with respect to s. 6-58, the Union notes that J.C. did not plead s. 6-58 or request to amend his pleadings to plead s. 6-58. The Union states that it had no notice that s. 6-58 would be argued, and that it would have presented its case differently had it known that s. 6-58 would be argued, including by calling additional witnesses. It submits that it would be inappropriate for the Board to decide J.C.'s application on the basis of s. 6-58 in these circumstances.

[78] Alternatively, the Union submits that its bylaws and constitution do not grant members prescribed rights regarding legal funding for *Police Act* discipline, unlike those examined in *Robin*, and as such, J.C.'s dispute does not fall within s. 6-58. If a right does not arise from the Union's constitution, s. 6-58 is not engaged. In the further alternative, even if it could be argued that s. 6-58 were somehow engaged, the Union afforded J.C. natural justice in considering his request for funding. J.C.'s position was relayed by Mr. Glas to the board, and in spite of the board deciding against J.C.'s request, he still had the opportunity to attempt to convene a special meeting of the Union, if he could obtain the requisite support. He simply was unable to do so.

Statutory Provisions:

[79] The following provisions of the *TUA* are referenced in these reasons:

> ***25.1*** *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*
> …

> ***36.1****(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

[80] Sections 6-59 and 6-58 of the Act are the successor provisions to ss. 25.1 and 36.1 of the *TUA*, respectively:

> ***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.*
> …
>
> ***6-58****(1) Every employee who is a member of a union has a right to the application of the 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.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> *(a) in doing so the union acts in a discriminatory manner; or*
>
> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*

[81] As indicated earlier, J.C.'s application pleads reliance on s. 6-59. It does not plead reliance on s. 6-58.

Analysis:

[82] The Board has conducted its analysis by posing the following questions:

1. Does J.C.'s dispute with the Union fall within the Board's jurisdiction under s. 6-59 of the Act?

2. Assuming the dispute falls within the Board's jurisdiction under s. 6-59 of the Act, has J.C. established that the Union breached s. 6-59?

3. Is it appropriate for the Board to consider s. 6-58 of the Act in these circumstances, and if so, does the dispute fall within s. 6-58 and has J.C. established a breach of s. 6-58?

[83] The Board will address these questions in turn.

1. Does J.C.'s dispute with the Union fall within the Board's jurisdiction under s. 6-59 of the Act?

[84] The Board will begin its analysis by repeating the text of s. 6-59, which states (emphasis added):

> ***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.*

[85] As the underlined language makes clear, s. 6-59 is concerned with the Union's conduct in representing or considering whether to represent an employee or former employee with respect to their rights pursuant to a collective agreement or Part VI of the Act.

[86] Section 6-59 codifies the Union's duty of fair representation in this regard. In *Gagnon*, the Supreme Court explained that "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."[26] While the Court was speaking specifically with respect to a union's duty of fair representation in respect of grievances, a union's exclusive power as bargaining agent also underlies its duty of fair representation with respect to employees' rights under Part VI of the Act. To use an extreme example, a union cannot collude with an employer in bad faith to withdraw an unfair labour practice complaint it has filed on behalf of its members.

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[26] *Gagnon*, at p 527.

[87] The Union correctly points out that its collective agreement does not contemplate the Union representing members with respect to discipline under the *Police Act*. Further, as the Supreme Court held in *Shotton*, the process under the *Police Act* is the exclusive means by which discipline thereunder may be imposed and adjudicated.[27]

[88] Accordingly, the Union submits that J.C.'s request for funding for counsel could not engage the Union in a representational capacity with respect to the RPS, whether under the collective agreement or Part VI of the Act. Discipline under the *Police Act* is carried by the member, i.e., J.C., and must be dealt with under the *Police Act*.

[89] The potential stumbling block for the Union is the Board's decision in *Robin*. Accordingly, *Robin* must be examined in some detail.

[90] *Robin* is a 2010 decision of the Board.[28] Mr. Robin was employed as a constable with the Prince Albert Police Service [PAPS]. He was dismissed from his employment pursuant to the provisions of the *Police Act*, and thereafter appealed his dismissal pursuant to same.

[91] Mr. Robin sought assistance from his union in accordance with the union's constitution and bylaws. These contained detailed provisions for members being able to retain counsel at the union's expense, including when subject to discipline under the *Police Act*.[29] Ultimately, approval was subject to a vote by the union's membership. The union considered Mr. Robin's request and voted against it. According to Mr. Robin, the union's president argued against the union retaining counsel for him and told him that the vote was effectively "a popularity contest".

[92] Mr. Robin argued that the essential character of his dispute with the union related to its obligation to provide him with assistance in his dispute with the PAPS. Mr. Robin acknowledged that his dispute with the PAPS was under the *Police Act*, and not the collective agreement, but he took the position that the union had a duty of fair representation to him under s. 25.1 of the *TUA*, regardless.[30] He also took the position that s. 36.1 of the *TUA* provided the Board with jurisdiction to hear his dispute, arguing that at the heart of the matter was a denial of natural justice with respect to a "matter of membership" under s. 36.1 of the *TUA*.[31]

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[27] *Shotton*, at paras 30-32.
[28] *Robin* involved a decision "from the bench", so to speak. The Board held that it had jurisdiction on September 13, 2010, the day the issue was argued. It provided written reasons for its decision on October 6, 2010.
[29] *Robin*, at para 6.
[30] *Robin*, at paras 16-17.
[31] *Robin*, at paras 18-19.

[93] Mr. Robin's union took the position that the Board did not have jurisdiction under either s. 25.1 or s. 36.1 of the *TUA*.

[94] The crux of the Board's decision in *Robin* was as follows (emphasis added):

> *[36] Nevertheless, as instructed by the Court of Appeal in McNairn, supra, for the Board to find jurisdiction in this case, the Board must determine "the essential character of the dispute, having regard for its substance rather than its form."*
>
> *[37] The Respondent Union relied upon the Supreme Court of Canada decision in Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners[17] as authority for the proposition that The Police Act provides for exclusive jurisdiction over the discipline and discharge of Police Officers. We concur with the Association in that view. As is the case in grievance arbitrations which are often the subject of applications to the Board under s. 25.1, the Board has no interest in, nor jurisdiction over the process for the appeal against discipline and discharge imposed upon a police officer. The merits of the case against the Applicant will be dealt with by the process established by The Police Act.*
>
> *[38] However, the Board agrees with the Applicant that the essential nature of his complaint has nothing to do with the discipline that was invoked by the Chief of Police, or that he was discharged. He has taken an appeal against that decision in accordance with the procedures established by The Police Act and has not asked the Board to become involved in that process. Had he done so, we would have declined to do so.*
>
> *[39] What the application requests is that the Board engage its supervisory jurisdiction and review the process and procedures utilized by the Association in refusing assistance to the Applicant. It is the nature and extent of the Associations duty to its members in that regard that invokes the jurisdiction of the Board.*
>
> *[40] In Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555[18] the Board made the following comment: respecting the Board's jurisdiction under s. 25.1 of the Act:*
>
> > *In an application under s. 25.1 of the Act, it is not the function of the Board to determine the merits of a grievance or to substitute our opinion for a union's opinion on the basis that we might think the union was wrong. Our function is to determine whether a union has fairly and reasonably arrived at its decision without acting in bad faith or in an arbitrary or discriminatory manner. This is often difficult for individual members to understand given that the concepts are somewhat legalistically complex and that their individual interests may be in conflict with those of the collective membership. An example is where a union has certain goals it wishes to achieve in bargaining which, in its opinion, are in the interests of its membership as a whole that do not coincide with the interests of an individual member.*
>
> *[41] Therefore, in accepting jurisdiction regarding this matter, the Board finds that it does have jurisdiction to supervise the duty of fair representation owed by a trade union to its members, as alleged by the Applicant in this case.*

[95] On a plain reading, the Board appears to have determined that it had jurisdiction to deal with Mr. Robin's complaint under s. 25.1 of the *TUA*. For reference, s. 25.1 of the *TUA* stated (emphasis added):

> ***25.1*** *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

[96] In spite of referring to s. 25.1 of the *TUA*, the Board did not identify how Mr. Robin's dispute related to his union's obligation to represent him in grievance or rights arbitration proceedings under a collective agreement. Further, Mr. Robin's dispute with the PAPS was under the *Police Act*, not the collective agreement. Accordingly, it is unclear from the reasons in *Robin* how the Board connected the union's duty under s. 25.1 of the *TUA* with its refusal to fund Mr. Robin's *Police Act* appeal.

[97] At paragraph 9 of its reasons the Board stated the following, but this provides no obvious connection between Mr. Robin's union's duty to represent him in proceedings under its collective agreement and its refusal to fund a lawyer for his *Police Act* appeal:

> *[9] The Collective Agreement between the Board of Police Commissioners for the City of Prince Albert and the Association provides for an indemnity for "costs associated with defending a charge or resolving a proceeding" under inter alia The Police Act, 1990.*[32]

[98] This paragraph suggests Mr. Robin's union may have had a right to pursue the PAPS on his behalf under an indemnity provision in the collective agreement. But the dispute Mr. Robin had with his union was over whether the union would pay for his legal counsel, not whether it would pursue the PAPS to do so.

[99] Accordingly, *Robin* is not helpful in assessing whether J.C.'s dispute with the Union falls within the Board's jurisdiction under s. 6-59 of the Act, the successor provision to s. 25.1 of the *TUA*.

[100] In *Robin*, the Board appears to have been satisfied that Mr. Robin's dispute engaged s. 36.1 of the *TUA*, possibly due to the detailed provisions in the union's constitution and bylaws pertaining to the union paying for members' legal counsel. Notably, in *Brady*, the Board referenced *Robin* in its discussion of s. 6-58 as follows (emphasis added):

> *[95] As directed by former Chief Justice Bayda in Floyd, we are not to concern ourselves with labels or with the manner in which the legal issues have been framed, that is, the packaging of the dispute. We are to proceed on the basis of the facts surrounding the dispute.*
> *…*

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[32] *Robin*, at para 9.

> *[98] In Robin v. Prince Albert Police Association[35], the Board reviewed the genesis for what is now section 6-58 of the SEA. At paragraph [25], the Board says:*
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> > *[25] Similarly, the genesis of s. 36.1 of the Act arose out of the Board's supervision of the relationship between a union and its members. The earliest Board decision in this regard was in Alexander Spalding v. United Steelworkers of America, CIO, AFL, CLC and Federal Pioneer Limited.[11] In that decision at p. 53, the Board says:*
> >
> > > *It would, in the opinion of the Board, be wrong for the Board to permit a union to punish a member for exercising a right given to him under The Trade Union Act. The Board will not permit the enforcement of any provision in the union constitution which might defeat, abrogate or vary any rights given by statute. Any attempt to enforce such rights by a union amount, in the opinion of the Board, to a violation of Section 11(2)(a) of The Trade Union Act and the Board finds the union guilty of an unfair labour practice accordingly.*
>
> *…*
>
> *[100] As was the case in Robin, this case involves the Board engaging its supervisory jurisdiction to review the process and procedures utilized by the Union in imposing the "fitness" condition on Brady.*
>
> *…*
>
> *[105] As was the case in Spalding, the Board is granted the jurisdiction to supervise member/union disputes, and, as discussed in Robin, this extends to insuring that the processes and procedures utilized by a union in dealing with its members are in accord with the rules of natural justice.*[33]

[101] However, to the extent the Board's jurisdiction in *Robin* was grounded in s. 36.1 of the *TUA* (as suggested in *Brady*), *Robin* does not assist with the analysis of the applicability of s. 6-59, here.

[102] Here, the Board is not satisfied that it has jurisdiction pursuant to s. 6-59 with respect to the dispute that J.C. has placed before it.

[103] The Union's collective agreement does not contemplate it representing members with respect to discipline under the *Police Act*. Article 8 of the collective agreement, which was referenced in *Shotton*, expressly acknowledges this (emphasis added):

> *30 I turn now to the collective agreement to determine whether the dispute falls within the ambit of its provisions. In determining whether the dispute falls within the ambit of the collective agreement, we must bear in mind that the legislature intended that the members of the Regina Police Force be governed by two separate schemes, the collective agreement and The Police Act and Regulations. In determining whether the dispute is arbitrable, we cannot interpret the collective agreement in a manner that would offend the legislative scheme set out in The Police Act and Regulations. The provisions of the*

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[33] *Brady v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 and Jacobs Industrial Services Ltd.*, 2018 CanLII 68442 (SK LRB) [*Brady*], at paras 95, 98, 100, 105.

> *collective agreement, therefore, must be interpreted in light of the scheme set out in The Police Act and Regulations. This is recognized in Article 8 of the collective agreement itself, which emphasizes that the collective agreement is not intended to be utilized in any circumstances where the provisions of The Police Act and Regulations apply. Article 9 of the collective agreement deals with termination, but provides only for the notice requirements for dismissal or retirement of permanent employees, dismissal of civilian employees, and notice requirements in the event that the entire force be replaced. The collective agreement does not govern dismissal for cause. In addition, there are no provisions in the collective agreement which provide for the investigation or adjudication of disciplinary matters involving members of the police force.*[34]

[104] Further, as explained in *Shotton*, the process under the *Police Act* is the exclusive means by which discipline thereunder may be imposed and adjudicated (emphasis added):

> *31 As Vancise J.A. outlined extensively in his dissent, both The Police Act and the Regulations specifically address the procedural issues at the investigative, adjudicative and appeal stages of a disciplinary process. The detailed provisions in the legislative scheme governing disciplinary matters are a clear indication that the legislature intended to provide a complete code within The Police Act and Regulations for the resolution of disciplinary matters involving members of the police force. This is reflective of a well-founded public policy that police boards shall have the exclusive responsibility for maintaining an efficient police force in the community. …*[35]

[105] J.C.'s dispute with respect to his dismissal does not involve the Union in its representational role pursuant to the collective agreement. Nor does it involve the Union in a representational role pursuant to Part VI of the Act, since the dispute must be dealt with under the *Police Act*. As the Board stated in *McEwan*, "it would be unusual if a union had no statutory right to represent its members… yet was statutorily required to provide such representation if a member so requested."[36] This reasoning also applies to funding counsel for a proceeding in which a union has no representational role, for the purposes of s. 6-59.

[106] It is a common misconception that the Board is a governmental agency established to hear all complaints involving unions.[37] Employees may have disputes with their union that fall outside the Board's jurisdiction, and which may be actionable in other forums.[38]

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[34] *Shotton*, at para 30.
[35] *Shotton*, at para 31.
[36] *McEwan*, at para 48.
[37] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), at para 15.
[38] *McNairn v United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*, 2004 SKCA 57 [*McNairn*]. In *McNairn*, the Court of Appeal determined an employee was able to bring a civil action for breach of contract against his union because the dispute did not engage either ss. 25.1 of 36.1 of the *TUA*.

[107] The Board's jurisdiction under s. 6-59 is only engaged with respect to an employee-union dispute involving a union's conduct in its representational role pursuant to a collective agreement or Part VI of the Act.

[108] The dispute before the Board does not involve the Union's conduct in such a role. Accordingly, the Board concludes that it has no jurisdiction under s. 6-59 with respect to it.

[109] In the event that the Board is in error, however, it will consider whether the Union's impugned conduct was arbitrary, discriminatory or in bad faith.

2. Assuming the dispute falls within the Board's jurisdiction under s. 6-59 of the Act, has J.C. established that the Union breached s. 6-59?

[110] For the purposes of s. 6-59, J.C.'s allegations may be summarized as follows. First, he alleges that the Union reneged on promises to pay for legal counsel to review information and/or assist him. These promises were allegedly made by Mr. Glas and reneged in bad faith. Second, J.C. alleges that the Union's decision-making with respect to whether to fund legal counsel for him was flawed. The Union should have reviewed all of the disclosure respecting the allegations against him, and not relied on incomplete information, hearsay and false allegations.

[111] In order for J.C.'s allegations to succeed, he must establish that the Union's conduct was arbitrary, discriminatory or in bad faith. While J.C.'s application only uses the words "bad faith" in describing the Union's conduct, the Union did not object to the Board considering whether its conduct could be characterized as arbitrary or discriminatory.

[112] In *Ward*, the Board described the meaning to attribute to the terms "arbitrary", "discriminatory" and "in bad faith", in the context of s. 25.1 of the *TUA*:

> *Section 25.1 of The Trade Union Act obligates the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do. So long as it does so, it will not violate section 25.1 by making an honest mistake or an error in judgment.*[39]

[39] *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 [*Ward*], at p 47.

[113] These descriptions from *Ward* have been routinely applied in proceedings alleging a breach of s. 6-59.[40]

[114] The Board also routinely relies on the following descriptions established by the Ontario Labour Relations Board:

> *. . . a complainant must demonstrate that the union's actions are:*
>
> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in BAD FAITH" – that is, motivated by ill-will, malice, hostility or dishonesty.*[41]

[115] The Board will first address the allegation that the Union reneged on promises to J.C. Due to the conflicting evidence regarding whether Mr. Glas promised J.C. that the Union would pay for legal assistance for him, the Board must resolve the conflicts in the evidence.

[116] In considering the evidence, the Board is mindful of the British Columbia Court of Appeal's oft-cited reasons in *Faryna v Chorny* (emphasis added):

> *If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. Raymond v. Bosanquet (1919), 1919 CanLII 11 (SCC), 50 D.L.R. 560, at p. 566; 59 S.C.R. 452, at p. 460; 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression*

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[40] See, for example, *Tammy Kurtenbach v Canadian Union of Public Employees,* 2019 CanLII 10586 (SK LRB) [*Kurtenbach*], at para 15, and *Saskatchewan Government and General Employees' Union v Rodney Wilchuck*, 2023 CanLII 50900 (SK LRB) [*Wilchuck*], at para 39.

[41] *Kurtenbach*, at para 16.

> *of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say 'I believe him because I judge him to be telling the truth', is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.*[42]

[117] As noted above, the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Further, a witness may sincerely believe he is telling the truth, but be mistaken. This has been explained by the Ontario Court of Appeal in *H.C.* as follows:

> *[41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately*
>
> *i. observe;*
>
> *ii. recall; and*
>
> *iii. recount*
>
> *events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: R. v. Morrissey (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514, at 526 (C.A.).*[43]

[118] Mr. Glas' evidence was that he did not promise J.C. that the Union would pay for counsel to review disclosure respecting the allegations against him, the appropriateness of any discipline imposed upon him, or his medical information. Mr. Glas testified that he had no authority to make such promises on behalf of the Union; rather, the Union's board had to decide whether to pay for counsel for J.C. Mr. Glas' understanding was based on his 12 years of experience on the board and the process the board used in previous cases. The one circumstance in which Mr. Glas understood that he would have had authority to authorize a limited expenditure was inapplicable, since the RPS had paid for J.C.'s initial consultation with counsel in January of 2022 (see paragraph 28 of these reasons). After J.C. was dismissed, Mr. Glas promptly placed the question of paying for counsel on the board's agenda for its next meeting. Mr. Glas testified that he discussed the Power and Magee cases multiple times with J.C., both before and after J.C. was dismissed. Mr. Glas described using these cases as examples where the Union had agreed to pay for counsel for a member in a *Police* Act proceeding, but not suggesting to J.C. that his

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[42] *Faryna v Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 [*Faryna v Chorny*], at 356-357
[43] *R. v H.C.*, 2009 ONCA 56 [*H.C.*], at para 41.

circumstances were analogous or that counsel would be funded for him. Mr. Glas' evidence was unwavering in cross-examination.

[119] J.C.'s evidence was that once he was interviewed on January 21, 2022 he was concerned about whether the Union would pay for counsel for him. He acknowledged meeting with a lawyer shortly after the interview and had no reason to dispute that the consultation was paid for by the RPS rather than the Union. J.C. testified that he was promised by Mr. Glas that the Union would pay for a lawyer to review disclosure with respect to the allegations against him and the appropriateness of any discipline that might be meted out. J.C. did not specify when this promise was made, other than that it was made before he was dismissed, because according to J.C. on the day he was dismissed Mr. Glas told him that the decision would be up to the Union's board. J.C.'s also testified that Mr. Glas only brought up the Power and Magee cases after he was dismissed.

[120] In considering the conflicting evidence of Mr. Glas and J.C., the Board notes that Mr. Glas had familiarity with the Union's processes, based on his experience on the board, and would have been able to rely on his knowledge thereof in his communications with J.C. This supports Mr. Glas' testimony that he did not promise J.C. that the Union would pay for legal counsel to review anything. Based on Mr. Glas' understanding, he had no authority to promise this on behalf of the Union.

[121] With respect to discussions about the Power and Magee cases, Mr. Glas discussing these cases with J.C. before J.C.'s dismissal accords with Mr. Glas drawing on his experience on the board to explain potential outcomes, but not necessarily promising any particular outcome. Again, Mr. Glas understood that the decision was not his to make, it would be up to the board. Given the frequent and regular communication between Mr. Glas and J.C. before J.C.'s dismissal, the Board accepts that Mr. Glas discussed the Power and Magee cases with J.C. during those communications. This would have been a natural thing to do.

[122] With respect to J.C.'s evidence, the Board accepts that he may have misconstrued his communications with Mr. Glas, and what Mr. Glas related to him. J.C. was undoubtedly under a great deal of stress as a result of the order of relief from duty. He may have "heard what he wanted to hear" as a coping mechanism.

[123] The Board has some difficulty putting stock in the reliability of J.C.'s evidence regarding what he was promised based on the implausibility of some of his other evidence. More particularly,

J.C. testified that he didn't know the issue of paying for a lawyer for him had gone to a vote until several months following his dismissal. He repeated this in his closing argument to the Board. Respectfully, while this may be J.C.'s recollection, it seems manifestly less likely than J.C. knowing shortly after the board's August 2, 2022 board meeting that the board had voted against his request. Notably, Mr. Glas testified that he told J.C. about the result of the vote, a letter dated August 3rd was drafted to J.C.'s attention advising him of the board's decision,[44] and an August 3rd email went out to Union members advising them of the board's decision.[45] Both the letter and email referred to a motion having been passed to not cover J.C.'s legal costs. Both referred to J.C.'s opportunity to convene a special meeting of the Union, provided he could obtain enough signatures. And, as aforementioned, J.C. did try to do so, but couldn't obtain enough signatures.

[124] Taking into account all of the foregoing, on balance the Board prefers the evidence of Mr. Glas to that of J.C. with respect to whether Mr. Glas made any promises to J.C. On January 21, 2022, Mr. Glas may have referred to the Union paying for an initial consultation of the type that occurred shortly thereafter. However, the Board accepts that that consultation was paid for by the RPS, and that Mr. Glas was under the understanding that he had no authority to promise anything further. The Board accepts that Mr. Glas did not promise any form of payment by the Union that he understood required a board decision.

[125] In short, the Board accepts that Mr. Glas did not make the promises alleged by J.C. Accordingly, a breach of s. 6-59 cannot be sustained on the basis of the Union reneging on such promises.

[126] As aforementioned, the second overarching allegation made by J.C. is that the Union's decision-making with respect to whether to fund legal counsel for him was flawed. In his view, the Union's board inappropriately relied on incomplete information, hearsay and false allegations. The Union should have thoroughly reviewed all of the disclosure with respect to the allegations against him before making its decisions.

[127] Mr. Glas' evidence was that the Union's board decision-making accorded with the process that had been used before, based on his experience on the board. Mr. Glas emphasized that the Union has no authority to request complete disclosure respecting all of the allegations against a member subject to *Police Act* discipline, and that the member has carriage of any *Police Act*

[44] Exhibit U-7.
[45] Exhibit U-8.

appeal, not the Union. He also emphasized that the board's decision-making focuses on the nature of the allegations, and not on whether they may ultimately be proven.

[128] Based on Mr. Glas' evidence, which the Board accepts, the primary factor influencing the Union's refusal to pay for legal counsel was its view that the allegations against J.C. did not involve conduct J.C. was engaged in while in the execution of his duties. This was the reason the Union gave in its August 3, 2022 letter addressed to J.C.

[129] According to Mr. Glas the other factors which influenced the Union's decision to refuse funding were the potential cost of doing so in this case and the fact that other members were involved as complainants or victims. The Board considers these to have been secondary factors in the Union's decision-making, including because these factors were not given as reasons in the Union's August 3, 2022 letter.

[130] In the Board's view, it was open to the Union on August 2, 2022 to decide against funding counsel for J.C. based on the primary and secondary factors discussed above.

[131] The Union had the benefit of Mr. Glas' description of the allegations against J.C., which was based on Mr. Glas having sat in on J.C.'s January 21st interview, his discussions with J.C., and the documentation Mr. Glas had received, including the order of relief from duty and notice of dismissal. Based on this information, the Union's board would have had an appreciation of the number, scope and type of allegations against J.C., including who was alleged to have been involved as a victim or complainant.

[132] As Mr. Glas stated, the Union distinguishes between off-duty conduct/conduct not in the execution of a police officer's duties and conduct in the execution of a police officer's duties. Mr. Glas gave the example of the Union being unwilling to pay to defend a member's off-duty impaired driving. This is a relatively obvious example to give, but in the Board's view it demonstrates the distinction the Union draws between conduct a member engages in in their capacity as a peace officer and conduct a member engages in that is unrelated to their policing duties (e.g., making a harassing telephone call to a family member about a personal dispute while on shift). The Union may pay to defend the former under the *Police Act*, but has chosen not to fund the defence of the latter.

[133] Undoubtedly the Union has limited resources and many demands on its resources. Further, the Union does not have carriage of *Police Act* appeals. Accordingly, its refusal to fund an appeal does not prevent the appeal from proceeding. J.C.'s circumstances attest to this. The

fact that the Union's decision does not determine whether a member's appeal of their dismissal will proceed, as it would in a grievance arbitration, suggests that the Union is not required to conduct the detailed review of disclosure that J.C. alleges.[46]

[134] In drawing a line between conduct in a member's capacity as a peace officer and other conduct, the Union is determining how its limited resources may be allocated. RPS officers generally have a common interest in whether particular conduct in the execution of an officer's duties should result in discipline under the *Police Act*, and if so, what type of discipline.[47] RPS officers may, but are less likely to share a common interest with respect to conduct outside the execution of their duties. Determining whether allegations against a member concern conduct in the execution of their sworn duties does not require an inquiry into the allegations' veracity. This can be objectively and rationally determined based on the allegations themselves. The Board concludes that consideration of this factor in the Union's decision-making is reasonable.

[135] With respect to the secondary factors considered by the Union, the Board understands that these were not determinative. In the Board's view, however, they were proper factors to consider. Potential cost will always be considered when determining how to spend limited resources in a particular case. Further, funding counsel for J.C. could be seen as "choosing a side" with respect to his discipline when complainants or alleged victims were fellow members. The conflict thereby generated could be heightened due to the Union not having carriage of J.C.'s *Police Act* proceedings. The Board does not consider the Union's reliance on these factors to evidence arbitrary, discriminatory or bad faith conduct.

[136] The Union's communication with J.C., including advising him of the potential for him to convene a special meeting, was reasonable.

[137] When J.C. alerted Mr. Glas that he had been diagnosed with PTSD, in March of 2023, Mr. Glas reacted promptly. Mr. Glas discussed what information he could share with the Union's board and obtained J.C.'s consent to do so. He added an item to the board's April 4, 2023 agenda so that it could consider the new information. Following the meeting, Mr. Glas informed J.C. that the Union's position had not changed.

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[46] In determining whether to pursue a grievance where critical job interests are involved (e.g., discharge from employment), the Board has stated that a union may be held to a higher standard in determining whether it has acted arbitrarily than in cases of lesser importance to the individual: *Hargrave v Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883 (SK LRB), at para 40.

[47] With respect to the Power and Magee cases the conduct involved the use of force during an arrest or detention.

[138] The manner in which the Union considered the new information at its April 4th board meeting cannot be characterized as arbitrary, discriminatory or in bad faith. The board's composition at the time had changed slightly from the last meeting where the matter was considered, and the discussion was relatively lengthy. Ultimately, the board concluded that the reasoning from its August 2, 2022 meeting remained relevant and persuasive in refusing to fund counsel for J.C., in spite of the new information.

[139] The issue is not whether the Union's board came to the correct decision on April 4, 2023. That is a matter which could be reasonably debated by reasonable people. For example, it is arguable that the Union should have placed primary emphasis on the potential for J.C.'s impugned conduct under the *Police Act* having been a result of PTSD arising from him acting in the execution of his duties on other occasions. However, doing so would have departed from the Union's practice of primarily considering whether the impugned conduct under the *Police Act* occurred in the execution of a member's duties. As described above, there is a rational basis for that practice. Further, the secondary factors of the potential cost in the particular case and the involvement of other members as victims or complainants remained.

[140] The ultimate issue is whether the Union acted in an arbitrary, discriminatory or bad faith manner in refusing to pay for counsel to assist J.C. On balance, the Boad concludes that J.C. has not discharged his onus to establish that it did.

3. Is it appropriate for the Board to consider s. 6-58 of the Act in these circumstances, and if so, does the dispute fall within s. 6-58 and has J.C. established a breach of s. 6-58?

[141] J.C. has not raised s. 6-58 in his pleadings, nor has he applied to amend his pleadings. Further, the Union states that it would have called its case differently if it had had notice that s. 6-58 would be in issue in the proceedings before the Board. More particularly, the Union would have called additional witnesses. That said, the Union did make some attempt to address s. 6-58 in argument.

[142] In these circumstances, the Board is not prepared, on its own motion, to amend J.C.'s pleadings to put s. 6-58 in issue.

[143] The Board notes that potential amendments to the pleadings could have been discussed prior to the hearing, including at a pre-hearing or case management conference. Such a conference was initially scheduled for August 29, 2023. The Union requested it be postponed so

that Mr. Glas could attend a funeral. J.C. did not respond to the Board's request for his position on the Union's request, and the request was granted. Attempts were made to set another date in advance of the hearing of this matter, but J.C. did not respond to the Board's communications. As a result, no pre-hearing or case management conference occurred.

[144] The Board notes its comments in *Eros* (emphasis added):

> *[130] At the end of the hearing, Mr. Eros applied to amend the application in LRB File No. 287-19 so as to rely on s. 6-58(1)(a) in respect of the Union's alleged effort to remove him from his position as school representative through the meeting to vote for removal.*
>
> *[131] In response, the Union objected to what it characterized as a scatter-shot approach to the applications, stating that such applications for amendments should be made prior to the evidence being presented. It did, however, acknowledge that it had anticipated some tangential link with this provision and had addressed it in argument.*
>
> *[132] S. 6-112(2) instructs this Board that "all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings". If the timing and nature of the request does not permit a fair opportunity to present evidence and argument, then the purpose of determining the real questions cannot be fulfilled.*
>
> *[133] The Board has decided not to allow the amendment for the following reasons. LRB File No. 287-19 alleges the removal of Mr. Eros from the representative position, contrary to the Union Constitution. The related application, LRB File No. 289-19, makes mention of the "contravention of the Union constitution and democratic process to remove" Mr. Eros from the position of school representative. It also states that Mr. Eros informed Mr. White that he believed that his actions in "unilaterally declaring" him "to not be the union rep" were "contrary to natural justice".*
>
> *[134] None of these references invokes the application of the principles of natural justice to the vote for removal. There was no attempt to amend the application until after all of the evidence was presented to the Board. As a result, the opportunity to present adequate evidence and argument on the application of s. 6-58 to these facts was severely limited. Not only would granting an amendment be unfair to the Union; neither party would be well served.*
>
> *[135] Had the Board decided to allow the amendment, there would still be the issue of whether the guarantee pursuant to s. 6-58 extends to the circumstances in issue. S. 6-58 provides the Board with authority to consider whether the Union has complied with the principles of natural justice in relation to a narrowly defined scope of matters. It does not give the Board jurisdiction to adjudicate a dispute whose essential character is whether there has been a breach of the Constitution. Nor does it give the Board jurisdiction to consider the application of the principles of natural justice to a matter that is not a dispute between the employee and the union.*[48]

[145] Here, for similar reasons to those given in *Eros* - in addition to there being no request by J.C. to amend his pleadings to plead s. 6-58 - it would be inappropriate to consider s. 6-58.

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[48] *Chad Eros v Saskatchewan Polytechnic Faculty Association (SPFA) and Saskatchewan Polytechnic*, 2021 CanLII 114229 (SK LRB) [*Eros*], at paras 130-135.

[146] The Board accepts that the Union understood that it was responding to an application grounded in s. 6-59, and more particularly, an allegation that it acted in bad faith by breaking one or more promises allegedly made by Mr. Glas to J.C. J.C.'s application makes no mention of the Union's bylaws and constitution, or a failure to apply the principles of natural justice in relation thereto. Neither party would be well served by the Board, on its own motion, placing in issue the potential applicability of s. 6-58.

[147] Similar to *Eros*, if the Board were to engage in an analysis of s. 6-58, it would need to consider whether the payment of legal fees in relation to *Police Act* discipline is a matter that is contemplated within the Union's constitution, for the purposes of s. 6-58. As an observation only, the Board notes that the Union's bylaws and constitution do not contain prescriptive provisions of the type considered in *Robin*.[49]

[148] For the foregoing reasons, the Board declines to consider the potential applicability of s. 6-58.

Conclusion:

[149] J.C.'s application is dismissed.

[150] An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **31st** day of **October, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

[49] *Robin*, para 6.