Manitoba Labour Board
Suite 500, 5th Floor - 175 Hargrave Street
Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd

DISMISSAL NO. 1979
Case No. 279/10/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: **An Application by**

R.B.,

Applicant,

- and -

Canadian Union of Public Employees, Local 500,

Bargaining Agent/Respondent,

- and -

CITY OF WINNIPEG,

Employer.

BEFORE: **W.D. Hamilton, Chairperson**

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

WHEREAS:

1. On October 12, 2010, the Applicant filed an Application (the "Application") with the Manitoba Labour Board (the "Board") seeking certain remedies for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* (the"*Act*"). The Applicant alleges that the Respondent Union (the "Union") failed to represent the Applicant regarding the termination of his employment with the Employer on or about April 11, 2010. The Applicant alleges that he "….was terminated due to no representation". The Applicant was terminated for alleged insubordination arising out of events which occurred on or about April 1, 2010. In Paragraph 7 of the Application, the Applicant asserts that "….I have a witness who they say is not creditble (sic) as he did

…/2

not hear phone call and foreman isn't telling all". As to remedial relief, the Applicant requests "…to get my job back and have proper representation".

2. On October 20, 2010, the Employer through counsel, advised the Board that it would not be responding to the Application.

3. On November 2, 2010, following an extension of time, the Union, through counsel, filed its Reply asserting, the first instance, that the Application does not disclose a *prima facie* case and should be dismissed on that basis. The Union asserts that the Applicant has not recited any facts which, even if true, would constitute a breach of Section 20 of the *Act*. The Union says that it never dealt with the matter of the Applicant's termination of employment in a manner which was arbitrary, discriminatory or in bad faith and further asserts that reasonable care was taken to represent the Applicant's interests regarding to the said termination. The Union asserts that it properly considered the merits of the Applicant's case and reached a considered opinion that the grievance contesting the termination would not likely succeed at arbitration and that this decision was arrived at following the conclusion of the internal appeal procedures of the Union, in which procedures the Applicant participated.

4. Based on a review of the Application, the Union's Reply and the documentation attached to these pleadings, the Board recites the following material facts:

   (a) Based on certain incidents which occurred at work on April 1, 2010, the Department of Public Works of the Employer recommended that the Applicant's employment be terminated and the Applicant was suspended pending the outcome of a hearing before the Chief Administrative Officer of the City, which process is in accordance with the discipline procedure contained in article 13 of the Collective Agreement between the Union and the Employer.

   (b) By letter dated May 28, 2010, the Union advised the Applicant that the hearing before the Chief Administrative Officer would take place on June 14, 2010. (Ex2 to the Union Reply)

   (c) Prior to that hearing, representatives of the Union met with the Applicant to review the case, to discuss a financial offer of settlement which had been made by the Employer. This offer was rejected by the Applicant.

   (d) Immediately prior to meeting with the Chief Administrative Officer, representatives of the Union met with the Applicant to review the case, revisit the offer of settlement made by the Employer, and to review the written presentation which had been prepared by the Union for submission to the CAO. The hearing before the Chief Administrative Officer was held on June 14, 2010 at which time the Union's written submission was tabled (Ex4 to the Union Reply).

Representatives of the Employer also submitted a written presentation (Ex2 to Union Reply).

(e) On or about June 18, 2010, the Union and the Applicant were advised that the Employer's recommendation for termination of the Applicant's employment was upheld.

(f) On or about July 5, 2010, a representative of the Union spoke with two witnesses whom the Applicant believed would support his position on the merits of the case.

(g) The standard practice of the Union in discharge cases is to assess the likelihood of succeeding on a grievance at arbitration and, if so determined by the Union's Executive, then the Union would proceed to file a grievance and proceed directly to arbitration.

(h) A National Representative of the Union prepared a detailed written opinion dated July 9, 2010, the purpose of which was to address the likelihood of a grievance seeking to have the Applicant reinstated to his employment succeeding before an arbitrator (Ex5 to Union Reply). This opinion detailed the facts of the case, the Applicant's previous disciplinary record and the position advanced by both parties, a review of applicable jurisprudence and an observation that the two witnesses to whom the said Representative had been referred to by the Applicant did not corroborate the Applicant's version of events. The opinion concluded as follows:

> "Based on a review of these and other cases, general case law, the wording of the Collective Agreement, and the facts in evidence in this case, it is my opinion that Br. R.B.'s case would have little chance of succeeding before an arbitrator. Accordingly, it would be my advice that the Local not proceed to arbitration with this matter."

(i) By letter dated August 3, 2010, the Applicant was advised by the Union that the matter of whether or not to proceed to arbitration in respect of his discharge would be placed before the local Executive of Union on August 9, 2010. A copy of the written opinion was enclosed with this notification (Ex6 of Union Reply). This letter noted that the Applicant was entitled to attend before the local Executive to speak to the recommendation.

(j) On August 5, 2010, the Applicant forwarded a letter to the Union setting forth his position. This document is attached to the Application.

(k) Prior to meeting with the Union's Executive, the Applicant requested that the Union re-interview one of the witnesses. The Union Representative did so on

August 4, 2010. The results of that re-interview were made known to the Local Executive (Ex7 to Union Reply).

(l) A hearing before the Local Executive of the Union was held on August 9, 2010 at which time the Applicant appeared and made representations. The Local Executive concurred with the recommendation not to proceed to arbitration and, on August 10, 2010, the Applicant was advised of this decision by letter from the Union (Ex8 to Union Reply).

5. Based upon a review of the Application and the Reply of the Union, in the context of the material facts recited in Paragraph 4 above, and after considering the legal principles applied by the Board defining conduct which constitutes arbitrariness, discrimination, bad faith or a failure to take "reasonable care" under Section 20 of the *Act*, the Board has **DETERMINED**, to its satisfaction, the following:

(a) An oral hearing is not necessary as this matter can be determined by a review of the written material filed by the parties.

(b) The onus is on the Applicant to establish a violation of Section 20 of the *Act.* The Application must disclose a *prima facie* case.

(c) The fact that the Applicant disagrees with the decision of the Union not to pursue a grievance regarding the Applicant's dismissal to arbitration does not, standing alone, constitute breach of Section 20 of the *Act*. A union is entitled to decide not to file a grievance; not to pursue a grievance to arbitration or to settle a grievance without an employee's agreement as long as the union's decision is not arbitrary, discriminatory or made in bad faith or, in the case of the dismissal, represent a failure to take reasonable care to represent the employee's interest.

(d) Under Section 20, it is not the function of the Board to assume the role of a surrogate arbitrator and decide whether the Applicant would have succeeded on the grievance in arbitration. In assessing the conduct of the Union, an objective standard of review and not a subjective standard must be used, meaning that the proper question to be asked is whether the Union's decision was one that reasonably could have been made in the circumstances.

(e) The Union, like any bargaining agent, is entitled to rely upon legal opinions and/or advice when deciding whether or not to file a grievance in the first instance; whether to take a grievance to arbitration; or whether to settle a particular dispute [see *Re Maintenance Trades* [2006] MLBD No. 2 at pp 5 and 6]. Labour boards, including this Board, have consistently held that a union's decision to follow legal advice provided by counsel is a potent defence to a duty of fair representation complaint. See the comments in G.W. Adams, Q.C.,

Canadian Labour Law, 2d Ed. (Aurora, Ont., Canada Law Book) (loose leaf) at pages 13-25 and 13-26. See also the comments of the Board in *Darla Caliguiri nee Krupa and Winnipeg Fire Paramedic Service and Professional Paramedic Association of Winnipeg* [Case No. 414/06/LRA], particularly the analysis by Vice-Chairperson Robinson at pages 9 to 12. In the Applicant's case, the Union sought and obtained legal advice, which was shared with the Applicant. Prior to preparing this opinion, a Representative of the Union met with the Applicant to discuss the issues. Further, the Applicant was given notice of his right to appear before the Union's Executive, and that, on August 9, 2010, the Applicant did attend before the Executive and state his case for proceeding to arbitration. The fact that the Applicant disagrees with the decision of the Union's Executive not to proceed to arbitration does not, standing alone, establish that the Union acted in an arbitrary, or discriminatory manner, or in bad faith.

(f) A concise summary of the Board's decisions regarding the duty of fair representation appears in *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 at page 190 as follows:

> "Arbitrary" conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. "Bad faith" has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process the grievance for sinister purposes. A knowing misrepresentation may constitute bad faith, as may concealing matters from the employee. The term "discriminatory" encompasses cases where the union distinguishes among its members without cogent reasons…
>
> Bargaining agents have the discretion to determine whether or not a grievance shall be filed, referred to arbitration, or ultimately withdrawn or settled with or without the consent of the employee concerned. Provided that this discretion is exercised in a manner which is not inconsistent with the provisions of the Act, principally Section 20 thereof, the Board will not interfere with a Union's decision. The fact that an employee disagrees with the decision of the Union not to pursue a grievance to arbitration does not, in itself, constitute a breach of Section 20 of the *Act*.

(g) While the Application contains a general allegation that the Applicant was denied "… proper representation", the Application does not, on its face, plead or disclose "… a concise statement of the material facts, actions or omissions" upon which the Applicant relies and which facts, if proven, would result in a finding that the Union acted in an "arbitrary" or "discriminatory" manner under Section 20, as those terms have been interpreted by the Board. Neither does the Application recite any material facts, acts or omissions on the part of the Union, which, if proven, would establish that the Union made its decision not to proceed with the arbitration on the basis of irrelevant factors or that the Union, through its officers or its Executive, displayed an attitude which can be characterized as "…indifferent, or capricious" or that it acted in a non-caring or perfunctory manner. [See *Diane Moreau and Manitoba Association of Health Care Professionals and Burntwood Regional Health Authority* [2004] 102 C.L.R.B.R. (2d) 263 at p.268]. There are no facts pleaded in the Application which, if proven, would result in a finding that the Union acted on the basis of hostility, ill-will or dishonesty or that it attempted to deceive the Applicant or refused to process the grievance for sinister purposes. The Board notes that the Applicant attached a copy of the written opinion to his Application and that this opinion recites the background to the case, the steps which the Union undertook on the Applicant's behalf, and the results of the interviews with the two witnesses whom the Applicant referred to the Union.

Accordingly, the Application does not disclose a *prima facie* case. As the Board noted in *John Everitt, Andrew Pernal, James W. Mendenhall and Don Eastman and Brandon University –and- Brandon University Faculty Association* [Case No. 112/09/LRA] at para 12(a):

> "When assessing whether a *prima facie* case exists in respect of a particular statutory provision there must be more than a bare allegation or assertion. Rather, there must be a sufficient factual foundation evident in the Application in order to enable the Board to draw reasonable conclusions therefrom, which, at a minimum, would call for an answer from a respondent. Unsupported allegations, without any factual underpinnings, entitle the Board to conclude that a *prima facie* case has not been established…"

(h) The Union's Reply, including the detailed written opinion, confirms that its decision not to proceed to arbitration was made after the Applicant and potential witnesses were interviewed by the Union and after affording the Applicant the right to avail himself of the internal appeal procedures of the Union.

6. For the reasons set out above, the Board has determined that the Applicant has failed to establish a *prima facie* case and that the Application is without merit within the meaning

of Section 140(8) of the *Act.* Therefore, the Board declines to take any further action on the complaint pursuant to Section 30(3) of the *Act.* In the result, the Application is to be dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by R.B. on October 12, 2010.

DATED at **WINNIPEG**, Manitoba this 9th day of December, 2010, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W. D. Hamilton, CHAIRPERSON

WDH/lo/rb-s