

BALL & ALEXANDER

**Barristers & Solicitors
82 Scollard Street
Toronto, Ontario
M5R 1G2**

**Telephone: (416) 921-7997 ext 222
Facsimile: (416) 921-3662
email: kenalexander@82scollard.com**

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Canada Industrial Relations Board



Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Ruby Sapra,

complainant,

and

Association of Postal Officials of Canada,

respondent,

Canada Post Corporation

employer.

Board File: 27358-C

Neutral Citation: 2010 CIRB 533

July 23, 2010

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Judith F. MacPherson, Q.C., Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members, considered the above-noted matter. A case management conference was held on August 18, 2009, and a hearing was held on February 25, 2010 in Toronto, Ontario.

Representatives and Counsel of Record

Messrs. Ken Alexander and Brian Wozneah, for the complainant;
Mr. George Rontiris, for the Association of Postal Officials of Canada;
Ms. Nancy Fraser and Mr. Cater, for Canada Post Corporation.

Canada

These reasons for decision were written by Ms. Judith F. MacPherson, Q.C., Vice-Chairperson.

I - Nature of the Complaint

[1] Ms. Ruby Sapra (the complainant) filed a complaint with the Board on March 3, 2009, pursuant to section 97(1) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*), alleging that her bargaining agent, the Association of Postal Officials of Canada (APOC or the association), violated section 37 of the *Code* by acting arbitrarily when it withdrew her grievance with respect to her resignation from her position at Canada Post Corporation (CPC or the employer) and, particularly, when it failed to consider her grievance and provide her with the reason for its withdrawal.

[2] By way of remedy, the complainant requests that her resignation be rescinded and that she be reinstated.

II - Facts

[3] At the August 18, 2009 case management conference, the Board indicated that it had not decided whether to hold an oral hearing. Subsequently, the Board determined that it would require an oral hearing and held one on February 25, 2010 in Toronto, Ontario. At the hearing, the parties asked the Board to accept the expedited process to which they had agreed. That process provided that the will-say statements of the witnesses would be accepted as their evidence, with the last paragraph of the complainant's statement, Exhibit C-11, to be omitted. The witnesses were: the complainant; Ms. Delfina Santos, APOC's York Division representative; Ms. Angella Dunn, APOC's York Branch president; and Mr. Darrin Kohut, APOC's national vice-president. Additionally, the complainant would be entitled to testify and Mr. Kohut would be subject to cross-examination. The Board accepted the parties' request regarding the hearing process. It, therefore, admitted into evidence on consent all documents submitted by the parties (Exhibits C-1 to C-11), subject to the parties' agreement that the CPC documents dated February 3, 2009 and February 25, 2009 (Exhibit C-1), were not admitted for the truth of their contents.

[4] The following is a summary of the Board's findings of fact, derived from the evidence presented at the hearing.

[5] As of February 3, 2009, the complainant had been working in a supervisory position for CPC for approximately seven years and had a clean disciplinary record. She alleges that she did not voluntarily resign her position and that the association arbitrarily refused to pursue her resignation grievance to arbitration.

[6] On February 3, 2009 at 4:00 a.m., the complainant commenced her 4:00 a.m. to 12:00 p.m. shift. At approximately 11:00 a.m., as the complainant was leaving to get some food, two of the employer's security agents approached her and asked her to accompany them to an office, to which the complainant agreed. Once there, they began questioning her concerning some missing cash. They referred to the missing cash as having been dusted with purple dye, placed in a coworker's purse that morning and being stolen from it. During this interview and with her consent, the complainant's workspace, pockets, shoes, socks, as well as the cash in her possession, were searched; but no missing cash was found. The agents repeatedly accused the complainant of stealing the cash, demanding to know its whereabouts, and suggesting that a witness had seen her take it. The agents told her that, if she did not reveal the location of the missing cash, they would call the police, who would arrest her. They asked her to explain some marks on her shirt, cell phone, and desk calendar, to which the complainant offered various explanations such as that others, including her young children, could have caused them. Throughout the questioning, the complainant was adamant that she was innocent and denied stealing or having in her possession any missing cash. The agents called the police and the association.

[7] According to the complainant, the female police officer who interrogated her raised her voice in a "threatening manner" and accused her of stealing the cash, which the complainant denied. The officer conducted a manual search of the complainant's body and effects and found none of the missing cash. She pointed her finger at the complainant, demanding to know the whereabouts of the cash. The complainant agreed to the police officer's request that she be subjected to a strip search. The officer then withdrew the request advising the agents that, as the complainant seemed too confident, she must not have had the missing cash.

[8] When Ms. Santos arrived on the scene, she was advised that the complainant was being examined with respect to some missing cash that had previously been powdered and that there was purple dye found on some of the complainant's effects.

[9] Although the complainant states that she first spoke to her representative between the questioning by the agents and the officer, Ms. Santos' statement indicates that she first spoke to the complainant only after the agents and the police had finished questioning the complainant, as CPC had initially denied her request to speak to the complainant. Ms. Santos states that she was also advised that other police officers were coming to the workplace to lay criminal charges against the complainant.

[10] Ms. Santos privately relayed what she had been told to the complainant, and called Ms. Dunn on speakerphone, with the complainant present. The complainant denied stealing any cash and said she did not want to go to jail. Ms. Dunn and Ms. Santos advised the complainant not to resign and assured her that APOC would support her. Ms. Dunn also told the complainant that, if she was not guilty, she would get out of jail and that the association would support her.

[11] The complainant made a couple of calls to her family to inform them that she would be late, including one at approximately 2:15 p.m. to notify her mother-in-law that she would be unable to pick up her son from school at 2:50 p.m. and asked that other arrangements be made. She said that it took her approximately one-half hour to drive to her son's school.

[12] The complainant testified that she felt harassed by the police and security agents, wanted to get out of there, avoid dealing with the police, jail and bail, and anxious about her family's best interest. The complainant testified that she wrote her letter of resignation, at the bottom of which Ms. Santos wrote that she advised the complainant against this, but that the choice was hers. Ms. Santos gave the resignation letter to the complainant's manager, Mr. Cater, who accepted the resignation in writing within minutes. At approximately 3:15 p.m., the complainant left the office where she had been.

[13] Throughout the examinations, the complainant maintained her innocence. No missing cash was found in her personal effects or workspace, nor was any witness to the alleged theft produced.

[14] On February 4, 2009, at approximately 10:00 a.m., the complainant telephoned Ms. Dunn to rescind her resignation. A meeting was scheduled for the following day and the complainant was asked to provide a statement. On February 5, 2009, the complainant met with Ms. Dunn and Ms. Santos and provided her statement. The events of February 3, 2009 were reviewed. The complainant explained that she had felt threatened, harassed, concerned for her reputation and forced to resign to avoid being arrested. Ms. Dunn advised the complainant that if CPC agreed to rescind the resignation, it would most likely discharge her and lay criminal charges against her. Ms. Dunn explained that the onus was on CPC to prove the theft and said that she and the divisional vice-president would work towards having CPC rescind the resignation. The complainant said that she would be going to British Columbia for 18 days and provided a telephone number where she could be reached. The association filed a grievance seeking rescission of the resignation, reinstatement of the complainant and any other redress that the arbitrator deemed appropriate. The grievance set out that the complainant was "forced, harassed, pressured and most of all intimidated" into resigning, and referred to CPC's agents interrogating and intimidating her, threatening strip searches and criminal charges, without substantiated proof of theft and without having immediately notified the association. At the first level grievance meeting held on February 12, 2009, the employer denied the grievance.

[15] On or about February 24, 2009, Ms. Dunn met with the complainant to update her on the status of the grievance. On or about February 24, 2009, the complainant telephoned Mr. Kohut who outlined the potential consequences of the grievance including the possibility that, if the resignation were rescinded, CPC would likely terminate her for cause and lay criminal charges against her. The complainant acknowledged that she understood the possible consequences, but still wanted to pursue the grievance. Mr. Kohut asked the complainant to provide a statement, which she sent to him by email on February 24, 2009 (Exhibit C-6). Mr. Kohut informed the complainant that APOC would consult with its lawyer and then he would let her know whether the matter was going to arbitration.

[16] Subsequently, Mr. Kohut requested that CPC provide copies of their documents regarding this matter and received Exhibit C-1, referred to previously.

[17] Mr. Kohut and the national president, Mr. François Goulet, met with outside legal counsel to obtain a legal opinion. No documents were generated from this meeting and Mr. Kohut testified that he did not recall any details with respect to the meeting.

[18] On March 5, 2009, Mr. Kohut called the complainant and advised her that APOC would not be pursuing the grievance, as it did not think it would win at arbitration, based on the legal opinion. Mr. Kohut did not provide any further explanation to the complainant. The complainant advised him of the importance of the grievance to her and asked what her options were, including whether she could retain her own lawyer and pursue the matter. Mr. Kohut advised the complainant that she could, but that APOC would not assist her in this. She was also advised about her rights pursuant to section 37 of the *Code*.

[19] APOC claimed solicitor-client privilege over the legal opinion and the claim of privilege has been maintained throughout.

[20] Following this, Mr. Kohut contacted Ms. Dunn and told her not to refer the grievance to arbitration.

III - Positions of the Parties

A - The Complainant

[21] The complainant testified that her "interrogation" lasted over three hours. At the outset, the security agents read her something off a card which was incomprehensible to her, before they began questioning her. The complainant's evidence was that the questioning about the theft quickly turned into accusations that she had committed the theft. Also, according to the complainant, she was threatened with jail and needing to use bail procedures. Once Ms. Santos arrived, the complainant alleges that she was only allowed a brief verbal exchange with her prior to the police resuming their interrogation. The complainant claims that she was shaking and nervous because the police officer was pointing a finger, yelling and swearing at her, and searching the outside of her body. The complainant says she was also thinking about her son, whom she needed to pick up at 2:50 p.m. and

that she had to call others to make alternate arrangements. After the teleconference with Ms. Dunn, the complainant testified that she was fed up with the harassment and intimidation by the police and security agents; was in a weakened mental state; felt threatened with the prospect of going to jail and using bail procedures; and felt concerned for her personal safety and for her children's well-being. She also testified that she feared having to go to the police station and dealing with multiple police officers and believed that, regardless of her innocence, she would spend a night in jail. She was bothered by what her family would go through if this happened. She submits that she felt she had no alternative but to resign as she could endure no more and just wanted to get out of there. According to the complainant, she wrote her letter of resignation, and following CPC's prompt acceptance of it, she was free to leave the office at approximately 3:15 p.m.

[22] The complainant testified that, in the February 24, 2009 telephone call with Mr. Kohut, he told her the procedure that, after the grievance is denied at the first level, the association has to consult with lawyers and then Mr. Kohut would advise her if the grievance was going to arbitration. He also asked her to provide a statement setting out that she understood that proceeding with the grievance may result in her termination and in criminal charges being laid against her, and when she requested that her resignation be rescinded. The complainant said she emailed this statement to him, Exhibit C-6, that same day.

[23] The complainant argues that she was forced into resigning, that her reasoning was impaired and that her resignation was not voluntary. She submits that most resignation grievances consider the voluntariness of the resignation, whether normal reasoning was impaired, and whether there was a continuing and true intention to resign. The complainant argues that she asked to rescind her resignation the next morning and that, in such circumstances, the case law supports rescission of the resignation. She argues that Mr. Kohut's testimony to the effect that APOC considered her resignation to be voluntary and that her grievance would not have been concerned with the voluntariness of her resignation, indicates that APOC did not properly consider her case. Also, she submits that Mr. Kohut's refusal to provide the factors that APOC considered in withdrawing her grievance further indicates its arbitrary conduct and failure to properly consider her case.

[24] The complainant maintains that she is innocent and submits that there is no evidence against her. She submits that APOC must provide her with its reason for not proceeding with her grievance, and that not doing so, demonstrates arbitrariness, citing *Sharon Parker*, [2003] OLRB Rep. July/August 653. She argues that Mr. Kohut's testimony demonstrates APOC's arbitrary conduct, when he was asked to provide a reason why APOC thought the grievance would not succeed, he replied that the reason was based solely on the legal opinion. The complainant argues that APOC is required to turn its mind to the matter and consider the seriousness and complexity of it and that obtaining a legal opinion does not obviate APOC's responsibility in this regard, citing *Clare Lenahan*, [2004] OLRB Rep. May/June 591, among other cases. The complainant submits that APOC acted arbitrarily by refusing to consider anything other than the legal opinion before withdrawing her grievance. The complainant submits that APOC acted in an arbitrary manner when it failed to take into account the various factors involved in her grievance and to make its own decision; as APOC cannot simply leave the decision to its counsel.

[25] In addition, the complainant argues that APOC's counsel's submission at the hearing, to the effect that the legal opinion was not in favour of the grievance proceeding to arbitration, is insufficient to satisfy APOC's obligation to provide her with an explanation for withdrawing her grievance.

[26] The complainant submits that the evidence proves that APOC did not consider the seriousness and complexity of the grievance before withdrawing it. Also, she submits that APOC's failure to explain to her what it considered in withdrawing the grievance is further evidence of arbitrary conduct, and that its failure to communicate this to her breaches its obligations pursuant to section 37. She argues that the decision, without reasons, is arbitrary as APOC has not provided its justification for withdrawing her grievance.

[27] The complainant asks that the Board not focus on whether APOC acted in bad faith or in a discriminatory manner pursuant to section 37 of the *Code* in this matter.

[28] The complainant's counsel requested recession of the resignation and reinstatement of the complainant. The grievance form sought rescission of the resignation, reinstatement of the

complainant and any other redress the arbitrator deemed appropriate, including damages.

B - The Association

[29] The association submits that it was contacted by the employer on February 3, 2009 to represent the complainant. It argues that the complainant says she resigned due to threats from the employer and the police, and she admits that APOC told her not to resign and that it would support her.

[30] It alleges that Ms. Dunn asked the complainant during the February 5, 2009 interview why she did not follow APOC's advice not to resign, to which the complainant replied that she felt she had no choice and that she was sorry she had not followed APOC's advice. At the first level grievance meeting on February 12, 2009, the employer was adamant that it would not rescind the resignation, having accepted it without discussing the issue with the complainant prior to her offering to resign. APOC submits that it conscientiously obtained and considered all relevant information prior to its consultation with legal counsel and before deciding against proceeding. It submits that it requested an opinion from its counsel with respect to the resignation grievance, as well as the merits of the potential termination grievance, should the first grievance be successful. It argues that it does not have to be perfect and that, based on the circumstances of the complainant's case and the legal advice provided, there was little merit in referring the grievance to arbitration. It argues that it was entitled to rely on the opinion of its legal counsel, whether or not the opinion was correct, citing *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509 and that it fulfilled the five principles emanating from that case in its representation of the complainant. It points out that the Board's role is not to judge the merits of a grievance, nor second-guess a union's decision, which distinguishes this matter from that in *Sharon Parker, supra*; *Clare Lenahan, supra*; and the other cases cited by the complainant.

[31] Also, APOC submits that its evidence supports its decision not to proceed and is reliable as it was subjected to cross-examination. It argues that the Board's mandate is to review the totality of the process which culminated in its decision not to proceed to arbitration. Further, it submits that the Board does not intervene when a union has considered all of the circumstances, as it has done in this case, citing *David Coull* (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957) and

Terry Griffiths, 2002 CIRB 208.

[32] It submits that, according to Mr. Kohut's testimony, he has handled 70 to 100 grievances as APOC's vice-president, and every grievance has been handled in the same "consultative process," and legal opinions are not shared with the members. It argues that Mr. Kohut's testimony was that APOC based its decision to withdraw the grievance solely on the legal opinion, over which it claimed solicitor-client privilege. It argues that its process was explained by Mr. Kohut, who testified that APOC conveys to its members that grievances belong to it and that decisions are made following the consultative process. APOC submits that it decides whether to proceed at every level of the grievance/arbitration process after having carefully considered the circumstances at each step where a decision is required. It argues that, as its normal procedures were followed, it has not breached section 37.

[33] APOC maintains that it acted in good faith and not in an arbitrary or discriminatory manner, and that there is no evidence that it did not properly consider the matter. It argues that it has been following the same consultative process in its handling of grievances for approximately 25 years. It obtains the information, then the national president, vice-president and legal counsel discuss it, and a decision is made. It denies that its conduct is arbitrary because of the consultative nature of its process. APOC submits that it does not have to waste its resources and denies that it handled this grievance in a superficial manner.

[34] APOC argues that the facts of February 3, 2009 indicate that the complainant resigned voluntarily, as a result of her becoming fixed on resigning. With respect to Mr. Kohut's admission that he did not provide the factual foundation for the legal opinion to the complainant, it submits that this was only part of the process and that the Board reviews the entire process. APOC submits that it obtained the available documents concerning the matter from the complainant and the employer. Further, APOC submits that the complainant failed to provide evidence that it acted in an arbitrary manner. It submits that the Board has previously held that a union's processes do not have to be perfect, only free of arbitrary, discriminatory or bad faith conduct, and that a union can be wrong in its decision whether to pursue a grievance to arbitration, without breaching its duty of fair representation, providing it does not act in an arbitrary or discriminatory manner or in bad faith. It

points out that the Board's role is not to determine whether a grievance should have proceeded to arbitration.

[35] APOC submits it represented the complainant in a proper manner, without violating section 37 of the *Code* and asks that the complaint be dismissed.

C - The Employer

[36] The employer took no position on the merits of the complaint. It submitted in writing that it should be entitled to the benefit of the time limits negotiated with the union for filing and referring grievances to arbitration, should the Board find that a breach of the *Code* has occurred. The employer declined the opportunity to provide submissions at the hearing.

IV - The Law

[37] Section 37 of the *Code* provides as follows:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[38] To determine whether the association violated its duty of fair representation, its conduct is analyzed on the basis of the five principles set out by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon et al., supra*, which are summarized as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with

integrity and competence, without serious or major negligence, and without hostility towards the employee.

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[39] Commenting on these principles, Justice L'Heureux-Dubé, of the Supreme Court of Canada, in *Gendron v. Supply and Services Union of the Public Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, stated the following:

The principles set out in *Gagnon* clearly contemplate a balancing process. As is illustrated by the situation here a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.

(pages 1328 - 1329)

[40] A complainant bears the burden of proof in a section 37 complaint and must establish sufficient facts to prove his or her case to the Board. Unless the collective agreement provides otherwise, which has not been argued here, the carriage of a grievance is reserved to the union, and the decision to proceed to arbitration with a grievance is one for the union to make. The Board will not second-guess or sit in appeal of the union's decision, nor substitute its opinion for the union's assessment of a particular situation, provided that it was not made in a manner that could be characterized as arbitrary, discriminatory or in bad faith. The Board's role is not to rule on the merits of a grievance, that being the function of a grievance arbitrator.

[41] The Board will normally find that a union has fulfilled its duty of fair representation if it investigated the grievance; obtained full details of the case, including the employee's side of the story; turned its mind to the merits of the claim; made a reasoned judgment about the outcome of the grievance, and advised the employee of the reasons for its decision not to proceed to arbitration (see *Virginia McRae Jackson*, 2004 CIRB 290, paragraph 37).

[42] The Board examines the process followed by a union and its conduct in the handling of the grievance in order to determine whether it acted in an arbitrary or discriminatory manner or in bad faith. A union can decide not to pursue a grievance without an employee's agreement so long as it does not act in an arbitrary or discriminatory manner or in bad faith in arriving at its decision.

[43] In this case, the complainant argues that APOC acted in an arbitrary manner. With respect to the definition of "arbitrary," the Board has set out the following, in *Virginia McRae Jackson, supra*:

[29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see *John Presseault, supra*, but see *Orna Monica Sheobaran, [1999] CIRB no. 10*, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and *Clive Winston Henderson, supra*, where the union's decision jeopardized an employee's seniority).

[30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis (1995), 98 di 72 (CLRB no. 1126)*, appeal to F.C.A. dismissed in *Seafarers' International Union of Canada v. Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al., supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell, [1999] CIRB no. 8*).

...

[33] A union can fulfill its duty to fairly represent an employee by taking a reasonable view of the grievance, considering all of the facts surrounding the grievance, investigating it, weighing the conflicting interest of the union and the employee and then making a thoughtful judgment about whether or not to pursue the grievance. That is called balancing the circumstances of the case against the decision to be made. For example, it is legitimate for the union to consider collective agreement language, industry or workplace practices, or how similar issues have been decided. It is also legitimate for the union to consider the credibility of a grievor, the existence of potential witnesses in support of the grievor's version of the events, whether the discipline is reasonable, as well as the decisions of arbitrators in similar circumstances.

[44] A union is not required to obtain a legal opinion regarding a grievance's chance of success at arbitration and doing so, does not relieve it of its responsibility to turn its mind to the merits of the matter. In arriving at its decision, a union may consider a legal opinion, along with the other relevant facts. Although the Board is generally deferential to a union's reliance on a legal opinion, a union must nonetheless exercise its discretion including conducting its own analysis of a situation and make a reasoned decision with respect to the matter (see *Mr. G, 2007 CIRB 399*). As stated, a union

is entitled to obtain a legal opinion and can claim solicitor-client privilege over it.

V - Analysis and Decision

[45] In the instant matter, the complainant submits that APOC breached section 37 of the *Code* by acting in an arbitrary manner because it failed to give proper consideration to her grievance. She argues that it is arbitrary for APOC to base its decision not to proceed solely on the legal opinion, as it must also exercise its discretion, turn its mind to the matter and consider the seriousness and complexity of it, before reaching its decision. Further, she submits that APOC has to provide her with an explanation as to why it withdrew her grievance and that its failure to do so also constitutes arbitrary conduct pursuant to section 37 of the *Code*.

[46] APOC submits that it followed its normal process for determining whether to refer a grievance to arbitration. It submits that it "engaged in a detailed review of the relevant facts and turned its mind to the relevant issues at hand," that it "acted reasonably and in good faith," and that there is no evidence that it acted in an arbitrary manner. It states that it determined, "based on the circumstances of the Complainant's case and based on the legal advice provided that there was little merit in referring the grievance to arbitration." It further submits that "there was no evidence ... that the association's representation ... was other than genuine, undertaken with integrity and competence, and without serious negligence or hostility towards the Complainant."

[47] After carefully reviewing the evidence, the Board finds that the association acted in an arbitrary manner in violation of section 37 of the *Code* with respect to the complainant's grievance for the reasons that follow.

[48] The Board notes that Ms. Dunn and Ms. Santos' evidence states that, on February 3, 2009, Ms. Dunn advised the complainant that, if the complainant was not guilty, she would get out of jail and the association would support her. This is notable because one of the factors that led the complainant to resign was to avoid being arrested, going to jail and going through bail procedures. Also, it is significant that, on the resignation letter handed to the employer (Exhibit C-2), Ms. Santos wrote that she advised the complainant "against this, however the choice is hers." As Ms. Santos

was not assisting the complainant by writing this; in the Board's view, this indicates that Ms. Santos felt uneasy about the resignation, and wrote this for other reasons such as to assist herself and APOC. This uneasiness is readily apparent, despite Mr. Kohut's testimony, on cross-examination, that APOC considered the complainant's resignation to be voluntary and denied that the grievance would have been about the voluntariness of the resignation.

[49] According to Mr. Kohut's evidence, he advised the complainant during their first telephone conversation, which occurred on February 24, 2009, that APOC had not decided whether to refer the grievance to arbitration and that a decision would be made following a consultation with its counsel. At this stage, Mr. Kohut had not received the documents from the complainant and the employer, Exhibits C-6 and C-1 (not admitted for the truth of its contents), respectively, that were present in the meeting with counsel. Further, the Board notes Mr. Kohut's testimony that APOC did not have to consult with counsel regarding every grievance as, after Mr. Kohut receives a grievance, a determination can be made with the "national office" and, if it is decided to proceed to arbitration, hearing dates are scheduled. Therefore, despite APOC's contention that the complainant's grievance followed APOC's normal process for determining whether to refer a grievance to arbitration, Mr. Kohut's testimony is inconsistent with this.

[50] Also, the Board notes Mr. Kohut's testimony that Exhibits C-1 to C-6 were the documents that were present during the meeting with counsel. It is significant to note that there was no statement from the complainant setting out her version of events. In Mr. Kohut's direct evidence, Exhibit C-10, he refers to his direct involvement in the matter commencing with his February 24, 2009 telephone conversation with the complainant and states:

Mr. Kohut inquired as to the circumstances of the Complainant's resignation and her request to rescind said resignation. He requested that she provide a brief synopsis of her request to rescind her resignation. The complainant subsequently provided a copy of a document outlining when she had requested to have her resignation rescinded.

[51] The document to which Mr. Kohut refers, however, is a short note that the complainant emailed him on February 24, 2009 (Exhibit C-6) that states:

Dear Darrin,

As per our conversation over the phone I am e-mailing you that I understand the consequences of the

fact that if the corporation decides to give my resignation back to the APOC; firstly corporation could possibly terminate me and secondly they have a right to press criminal charges on me.

I resigned from the corporation after the shift of February 3, 2009, dated February 4, 2009. I contacted Angela Dunn on February 4, 2009 if I could take back my resignation. She asked me to meet her the very next day with my statement, and which I did on February 5, 2009.

[52] Clearly, Exhibit C-6 does not set out the complainant's version of events. The complainant's evidence was that she sent Exhibit C-6 to Mr. Kohut in accordance with his instructions. There is no evidence indicating Mr. Kohut asked the complainant to provide any additional information after his receipt of Exhibit C-6. The complainant's evidence is accepted that the statement she emailed to Mr. Kohut on February 24, 2009 (Exhibit C-6), was what he requested she provide. It is also noteworthy that the complainant had provided her statement to Ms. Dunn, as Ms. Dunn had requested; but this statement was not produced at the said meeting with counsel, nor was it tendered in evidence. The Board finds, based on the evidence, that the complainant had provided APOC with all the information it had requested from her and that APOC did not have the complainant's version of events at the meeting with counsel. In the Board's view, the evidence indicates that APOC was therefore not in a position to give a proper consideration to the grievance.

[53] As noted previously, Messrs. Kohut and Goulet met with counsel to obtain the legal opinion. Mr. Kohut testified that he could not recall any specifics from this meeting and that no documents were generated as a result of the meeting. The Board notes Mr. Kohut's admission that the complainant's grievance was exceptional because of police involvement, yet finds his lack of recall to be inconsistent with this. After Messrs. Kohut and Goulet obtained the legal opinion, Mr. Kohut telephoned the complainant on March 5, 2009 and advised her that APOC would not be pursuing the grievance as it did not think it would win at arbitration, based on the legal opinion. According to Mr. Kohut's evidence, the reason for withdrawing the grievance was based solely on the legal opinion, over which solicitor-client privilege was claimed. He admitted that he had no other reason to provide to the complainant for not proceeding, that he would not advise the complainant what the legal opinion was nor the factual foundation for the opinion.

[54] Despite APOC's contention that it reached its decision in this matter in a "consultative" manner, the Board finds that the evidence does not support this. Mr. Kohut's testimony on cross-examination revealed that he and Mr. Goulet met with counsel to obtain the legal opinion and that afterwards,

there was no further consultation between he and Mr. Goulet regarding the grievance. This testimony differed from Mr. Kohut's direct evidence which was in writing and admitted in evidence as Exhibit C-10, which set out that he and Mr. Goulet had consulted following receipt of the legal opinion. Moreover, at the hearing, Mr. Kohut was unable to advise the factors APOC considered in withdrawing the grievance, other than confirming that it was based solely on the legal opinion. The Board notes that, when it was made clear to Mr. Kohut that he was not being asked to breach solicitor-client privilege, but to advise the factors APOC considered before withdrawing the grievance, he reiterated that the decision was based solely on the legal opinion, over which solicitor-client privilege was maintained. As noted previously, on March 5, 2009, Mr. Kohut called the complainant to inform her that the grievance would not be pursued, as APOC felt it could not win based on the legal opinion, but offered no further explanation.

[55] As stated previously, a union is entitled, but not required, to obtain a legal opinion regarding a matter and can claim solicitor-client privilege over the opinion. Although the Board generally defers to a union's reliance on a legal opinion, this does not absolve the union of its obligation pursuant to section 37 to turn its mind to the merits of a matter and make a reasoned judgment with respect to it.

[56] In the instant complaint, the Board is unable to conclude that APOC did anything other than superficially consider the matter, as the complainant asserts, given its failure to obtain her version of events. Despite APOC's submissions, the Board has no evidence that APOC analyzed the complainant's situation and turned its mind to the merits of the case before withdrawing the grievance. Moreover, the evidence indicates that the matter was not considered after the meeting with APOC's counsel. Furthermore, APOC admits that it withdrew the grievance based solely on the legal opinion over which solicitor-client privilege is claimed. In the Board's view, APOC cannot use the legal opinion as a blanket justification for not pursuing the grievance without considering the relevant facts involved. Also, the Board concludes that APOC's reliance on counsel's opinion, and not making its own reasoned decision, was arbitrary in the circumstances, as it turned its discretion over to legal counsel without further considering the complainant's matter.

[57] The Board finds that APOC failed to turn its mind to the merits of the complainant's case and exercise its discretion in order to make a reasoned decision; thereby acting in an arbitrary manner. Notwithstanding that APOC did not advise of the facts it considered in reaching its decision, Mr. Kohut's testimony touched on certain aspects of the matter, for instance, that APOC considered the resignation to be voluntary and that the grievance would not have been about the voluntariness of the resignation. In the face of not advising if in fact, it had considered the above in withdrawing the grievance, APOC is, in effect, asking the Board to either speculate as to the basis for the withdrawal of the grievance or to conclude that the grievance had little merit and should therefore be withdrawn, which the Board will not do.

[58] With respect to the complainant's arguments that APOC also failed to communicate a reason to her to explain why it withdrew her grievance, the Board notes that a lack of communication is not generally a violation of the duty of fair representation. In the circumstances, however, the Board finds the lack of communication to be further evidence that APOC failed to consider the matter and acted in an arbitrary manner. Also, APOC's arguments that it acted reasonably are unsupported by the evidence, inasmuch as the evidence indicates that it did not turn its mind to the matter but allowed counsel to make its decision without further consideration. It is therefore found that the association inappropriately delegated its discretion to its legal counsel, and failed to conduct a "thorough study of the grievance and the case," contrary to the third principle enunciated by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon et al.*, *supra*.

[59] The Board adopts the following statements of the Ontario Labour Relations Board in *Sharon Parker*, *supra*, on the union's onus to provide a reasonable explanation for its decision not to pursue a grievance:

24. In my view, the basic assertions that the union "thought it would lose" at arbitration and it did not want to damage its relations with the employer do not, in these circumstances, satisfy the onus on the union to provide a "persuasive account" of its decision not to proceed to arbitration. While section 74 of the Act does not require that a union be right in its assessment of the likelihood of remedy at arbitration, it is required to put sufficient consideration into its decision that the seriousness and complexity of the matter justify.

...

26. Absent a demonstration of the scope of contemplation of the applicant's grievance which was demanded under the circumstances, given the seriousness of the penalty imposed, the unusual facts

of the case, the applicant's apology, and her disciplinary record, the Board finds that the union acted arbitrarily and violated section 74 of the Act.

[60] In the complainant's case, the Board finds that the factual circumstances, the seriousness and complexity of her matter, and the resultant consequences on her career, required more careful consideration by APOC (see *Virginia McRae-Jackson, supra*; *William Campbell, supra*; and *Brian L. Eamor* (1996), 101 di 76 (CLRB no. 1162), upheld by the Federal Court of Appeal in *Canadian Air Lines Pilots Association v. Eamor*, judgment rendered from the bench, no. A-467-96, June 18, 1997 (F.C.A.)).

[61] In *Canadian Merchant Service Guild v. Gagnon et al., supra*, the Supreme Court of Canada found that the union did not breach its duty of fair representation because it relied on a reasoned opinion obtained from its counsel, even though it was later revealed that the opinion was wrong. In that case, however, the legal opinion had been forwarded to the complainant and the union had provided the complainant with its reasons for not proceeding. The Supreme Court of Canada defined "arbitrary" as a perfunctory disregard for the employee's interest and set out that a union must take a reasonable view of a complainant's circumstances and arrive at a thoughtful judgment, considering the various relevant as well as conflicting information. In the instant case, APOC did not consider the circumstances of the complainant's matter, nor arrive at a thoughtful judgment about it.

[62] APOC referred to a number of Board decisions, including *David Coull, supra*, and *Terry Griffiths, supra*, in support of its position that the complaint should be dismissed because APOC had considered all the circumstances of the complainant's case. In *David Coull, supra*, the Board held that when a grievance is dropped, the union's considerations and reasons for not proceeding with the grievance are important elements to consider when determining whether the union breached its duty of fair representation. In that particular case, which involved a dismissal grievance, the union sought legal advice on the chances of success and explained to the complainant why the grievance was unlikely to succeed. Having determined that the union would lose if it went to arbitration, the union then used every avenue available to have Mr. Coull reinstated. The union struck a deal with the employer. The Board was satisfied that the union had fulfilled its duty of fair representation.

[63] In *Terry Griffiths, supra*, involving a request for accommodation, the Board found that the union conscientiously considered the medical information provided by the complainant and that received from its members and the employer, and concluded that there was no basis to file a grievance. From the union's assessment of the information received from its members, the employer and the complainant, it had determined that the union and the employer had met their obligations with respect to the duty to accommodate. The union explained why it decided not to pursue the accommodation matter, based on a number of considerations, which the Board summarized as follows:

[74] Following his review, Mr. Gill determined that (a) the union and the employer had met their obligations with respect to the duty to accommodate; (b) the disqualification was related to matters of performance and, therefore, not covered by the collective agreement; and (c) as the subject matter of the grievance was not within the jurisdiction of the CAW, the matter could not be carried forward by the union. Accordingly, Mr. Gill advised the complainant of the union's position and suggested he contact the USWA.

[64] In the Board's view, the cases in *David Coull, supra*, and *Terry Griffiths, supra*, can be distinguished from the case at hand on the basis that APOC admits that its sole consideration in withdrawing the grievance was the legal opinion. Despite being afforded numerous opportunities to explain why it withdrew the grievance, by way of written submissions, at the case management conference, and at the hearing, APOC maintained it withdrew the grievance based solely on the legal opinion over which it claimed solicitor-client privilege. As indicated above, the fact that APOC obtained a legal opinion does not absolve it of its obligation pursuant to section 37 to turn its mind to the merits of the matter and make a reasoned decision based on the circumstances of the complainant's case. The evidence indicates that APOC did not do so.

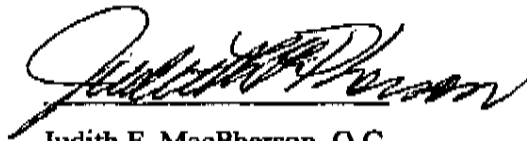
[65] Based on the totality of the evidence, the Board finds that APOC failed to direct its mind to the merits of the complainant's matter and thereby acted in an arbitrary manner in violation of section 37 of the *Code*. In accordance with the complainant's request, the Board will not address whether APOC acted in bad faith or in a discriminatory manner pursuant to section 37, which, in any event, would not affect the remedy.

VI - Conclusion and Remedy

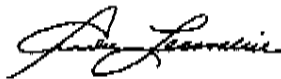
[66] By way of remedy for the association's breach of section 37 of the *Code*, as previously noted, the complainant's counsel requested that the resignation be rescinded and that the complainant be reinstated. However, the Board's mandate is not to determine the merits of a grievance.

[67] As a result of the Board's finding that the association violated section 37 of the *Code*, the Board hereby orders that APOC refer the complainant's resignation grievance to arbitration and that it assume the reasonable costs of legal counsel of the complainant's choice for the grievance hearing. The Board waives any time limits which might otherwise prevent the grievance from proceeding to arbitration.


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



Judith F. MacPherson, Q.C.
Vice-Chairperson



André Lecavalier
Member



Norman Rivard
Member