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File: 161-2-1143

Citation: 2001 PSSRB 79

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

STEPHEN SAVOURY

Complainant

and

CANADIAN MERCHANT SERVICE GUILD

Respondent

RE: Complaint under section 23 of the Public Service Staff Relations Act

Before: Anne E. Bertrand, Board Member

For the Complainant: Wayne Roger

For the Respondent: Raymond F. Larkin

Heard at Halifax, Nova Scotia,
November 27 and 28, 2000
Written submissions filed up to December 15, 2000

[1] This matter involves a complaint of unfair representation by an employee of the Department of Fisheries and Oceans against Canadian Merchant Service Guild for having acted in a manner that was arbitrary, discriminatory and in bad faith in the representation of the complainant's grievance relating to disciplinary action by the employer, in violation of subsection 10(2) of the *Public Service Staff Relations Act*.

I – FACTS

[2] It was agreed between the parties that the witnesses to testify would be excluded from the hearing room with the exception of Mr. Savoury and Mr. Lawrence Dempsey who remained present.

[3] The following witnesses testified: Harry Jung, President and CEO of Meta Vista Technology Inc., Stephen Savoury, the Complainant, a Logistic Officer with the Department of Fisheries and Oceans (DFO), Russell Faulkner, Regional Manager of Materials and Services for DFO, Mark Boucher, Union Representative for the Canadian Merchant Service Guild, and Lawrence Dempsey, the National Treasurer for the Guild's Headquarters in Ottawa.

[4] Jung was formerly a government employee for about 20 years in technologies. He was also Regional Manager, Finance Administration for Transport Canada. He now works in the private sector and he specializes in developing large computer software applications for groups such as the Coast Guard and other Fisheries and Oceans divisions. Because the government is a large client of Jung, he puts on conferences for uses of his systems which would assist him in obtaining feedback from his software and also to identify future needs of the clients in order to aid in future development of the software. Conferences had been held over the past three to four years in such places as Ottawa, Toronto and Vancouver. The computer software program which is at the centre of this conference to be hosted by Jung is called IMS (Inventory Management System) and it is a computer-based system to manage the entire inventory for the Coast Guard services across Canada. Jung is an expert in the field of development of this type of system.

[5] These conferences were national in scope but, due to costs of travel, Jung realized that when a conference was held on the west cost, it was very difficult to attract the participants from the east cost. Consequently, Jung decided to hold the next conference on the east cost, but in order to attract more clients from all over the

country, he would only charge the conference fee and absorb the entire travel cost. These arrangements were being made by Jung through his travel agent who had advised that if the participants stayed over a weekend (i.e. a Saturday night), the cost for travel would be greatly reduced. This was arranged; however, Jung realized that participants did not wish to travel to the east coast to stay for the entire duration of the conference plus a weekend because this was too many days away from their home destination.

[6] Jung's travel agent therefore suggested that a cruise be held instead since the weekend stay would not be a factor and it would be less expensive than paying for the airfare and accommodation in private hotels. In fact, the travel agent indicated to Jung that holding the conference on a cruise ship would still be 30% to 40% cheaper for him and would still attract the participants he wanted to attract from all regions of Canada. He related this information to Mr. Savoury who said that the idea of holding a conference on a cruise ship might not be very well received, and that it would therefore be best to consult someone in his department.

[7] To that end, a meeting was held in August of 1998 between the following people: Stephen Savoury; one of his supervisors, Mark Chin-Yee, the contracting authority for Fisheries; Harry Jung; and Russell Faulkner, who was also interested in participating at the conference. Jung proceeded to explain the details of the conference, what the objectives were and why. It was felt that holding it on the cruise ship would be an attraction to get as many participants across Canada as possible.

[8] Prior to this meeting in August of 1998, Stephen Savoury, who had participated in the last conference held by Meta Vista Technology in Vancouver, had already requested approval for attendance at the conference. This request to attend the conference and payment for the tickets to the conference were made in the months of April, June and July of 1998. At that time, Savoury had been informed that the conference would be held on the east coast: in Halifax or Dartmouth. No decision had been made by Jung at that time to change the location of the conference to the cruise ship, a further reason for Savoury to ensure that his superiors approved the change in location.

[9] Jung felt that speaking with Chin-Yee would be sufficient authority for him to get an approval from DFO that the cruise ship idea would fly. At the time of this meeting, there were four or five conference fees already paid. The cost for the

conference fee was $2,800 per person. There were no additional cost for attending on the cruise ship again because Jung had made a decision to absorb the cruise and travel costs in order to attract participants. Faulkner was also registered for the conference before he was advised that it would be on a cruise ship. It was important to get a sense of what the Department felt about this idea in August of 1998 because the cancellation date to obtain full reimbursement for the conference was September 1998 and if the Department chose not to go ahead with this type of conference, the monies could be returned to the coast guard.

[10] At this meeting Chin-Yee approved the location of the conference given the explanation of Jung. Later on in January of 1999, Savoury informed Jung that the employer had concerns about the cruise and a letter had been received from Savoury's supervisor David Parkes that none of Savoury's personnel would be authorized to attend the conference. Jung by that time had already delivered the tickets to those participants who had purchased the conference fee to attend. As for Stephen Savoury, he informed Jung that he could not go to the conference, that he had been advised not to by his employer and in that case it would be inappropriate to keep the tickets for himself; however, he would retain the ticket he had purchased for his wife to be on the cruise. Stephen Savoury had already paid between $600 or $700 for that ticket. Meanwhile, the complainant Savoury had applied and obtained approval for vacation leave to spend an extra week in Florida near the location of the cruise ship, so he could visit his relatives with his wife. While he could not attend the conference, he was still able to go on his paid vacation leave.

[11] In January 1999, the employer was concerned about the perception of this conference, which apparently had been precipitated by members of the bargaining agent Public Service Alliance of Canada ("PSAC") that the employer ought not to be paying for this kind of conference when they themselves were requesting benefits for which they were not getting paid. There was at that time a union strike by PSAC members.

[12] Savoury's supervisor David Marsh met with Jung and told him that this type of conference to be held on a cruise ship was fraudulent and that the bargaining agent was upset about this and that the employer was totally against it. Jung made the employer an offer that he would be prepared to refund the four conference fees which Marsh's Department had already purchased. This offer was made to Marsh because

Jung accepted the fact that Marsh had not been aware that the location had changed and it would therefore be appropriate to return the four conference tickets. However, Jung was not prepared to reimburse all other employees who had registered, employees from other departments in the region, because their supervisors had been aware of the location of the conference when they had applied to attend. Marsh was upset at this offer because he wanted Jung to return and refund all of the conference fees paid by the different departments within DFO and made a counter-offer that Jung return all or none at all. Jung declined this counter-offer and reiterated that his conference was a legitimate conference with a legitimate offer to pay for travel costs which can be done and that it was not fraudulent or a means to attract the participants.

[13] Refunding all of the tickets for the conference could very well be perceived in relation to Jung as a recognition of his having done something wrong and he was not prepared to do that. Jung again, in the hopes of accommodating one of his big clients, offered to present a sub-conference to the main conference, one only for the employees of the Coast Guard in Halifax, but Marsh declined that offer.

[14] Jung was interviewed by a person called Cameron in February of 1999 who was investigating this whole matter of the cruise, the conference, etc. Jung had a chance to explain what had taken place as he testified today. Jung disagrees with the statement presented to him in which Chin-Yee tells the investigator Cameron that he did not know of the location of the conference, for the reason that Chin-Yee met with Jung on that very point in August of 1998.

[15] Jung added that the conference had been published; posters had been printed and distributed for the information disclosed was disclosed to all then, certainly there was no intent to defraud anybody. In addition, the tickets for the cruise could not be refunded after such a late date. Marsh had ordered that no employee under his direction be authorized to go on leave for the conference. Savoury, however, who had already obtained paid vacation leave to go on a week's vacation with his wife to meet with their relatives in Florida, asked Jung if he could obtain through his travel agent another ticket to match that of his wife given that he had already paid for his wife's. Jung said he would oblige him but when Jung attended at the airport to deliver the ticket to Savoury, he gave him the same ticket as the one for the conference cruise because it would come out to the same, as far as Jung was concerned. There would be

no difference. Savoury tendered him a personal cheque to cover the cost of the ticket which personal cheque Jung did not cash because he had not received payment from any of the other three employees who had still chosen to go on the conference.

[16] Savoury did not go to the conference. He went on the trip, on the cruise, but did not attend the conference. For all intents and purposes, Savoury had not asked for the same ticket to go on the cruise; he had asked that another ticket be made out for him for which Savoury was prepared to pay and in fact did pay by giving the cheque to Jung. Jung did not cash it.

[17] This personal cheque was obtained during the hearing of this complaint and put forth as an exhibit. Jung was never contacted by the bargaining agent representative Mark Boucher nor by Lawrence Dempsey of the Guild's National Headquarters.

[18] The brochures as to the location of the conference were issued in August of 1998 after the meeting held between Jung, Chin-Yee and the others.

[19] Originally 16 people registered for the conference and after the problems arose with DFO, many people cancelled but eight employees did attend the conference, some of which were from the private sector. Three came from DFO.

[20] Faulkner testified as to his willingness to go to the conference. He had attended the Vancouver conference in February 1998 and had been made aware at that time that the next conference would be held on the east coast. He had discussed this with his immediate supervisor Chin-Yee and Chin-Yee had asked Faulkner to obtain information as to the extent of the conference, details, etc.

[21] Faulkner testified that he was aware that Chin-Yee knew of the location; he could not remember the exact time at which Chin-Yee became aware of the location. As for the meeting with Chin-Yee, Jung, Savoury and himself, it indeed took place on August 12, 1998 because Faulkner wrote it down in his itinerary book. In that regard, the investigation report by Cameron is incorrect because it refers to the meeting having been held in June or July. Faulkner also testified that Chin-Yee did authorize Faulkner's attendance at the conference in the fall of 1998. Faulkner arranged for the purchase of the conference fee through Savoury's Department by a procedure known as Journal Voucher Service (i.e. Savoury would pay for it and invoice Faulkner's Division who would in turn pay them).

[22] At the same time, Faulkner bought a ticket for his wife for about $800 to cover her portion of the air travel and vouchers for the cruise. Later Faulkner was asked by his superiors to return the tickets that he had obtained for his attendance at the conference, which he did. He held on to his wife's ticket, however, for which he had paid himself. Later, the Department offered to reimburse him for his wife's ticket. He returned the ticket to the Department but he was not paid for it.

[23] Faulkner was never interviewed by the bargaining agent representative Mark Boucher, nor by Lawrence Dempsey.

[24] Faulkner added that the rumours of the conference being held on a cruise ship were circulating around during the Spring of 1998 and it is likely, therefore, that he spoke to Savoury about this location at that time. Faulkner also added that he gave a signed statement of all of this information to the investigator Cameron, but it is nowhere to be found in the investigative report.

[25] Faulkner only made a decision at the very last minute not to go on the cruise. While his employer had asked him to return the ticket and told him he would not be able to attend the conference, he could have himself bought the ticket to accompany his wife for whom he had already purchased a ticket. He came very close to doing so but there was at that time a union strike and the location of the conference was being scrutinized by the members on the picket line. Therefore, he decided not to go and suffered a loss on his wife's ticket.

[26] Faulkner also testified that he did not submit a formal request to travel to the location of the conference but rather did all of the arrangements by e-mail with Stephen Savoury. He added that it was not unusual to obtain approval to travel in this fashion, as that had been done in the past. Also, Faulkner's immediate supervisor Chin-Yee had authorized him in late summer or fall to travel to the conference.

[27] Savoury testified that he has been a member of the Guild for 20 years and he has been with the Coast Guard for 31 years, as a Logistics Officer since 1995, and became Supervisor of Logistics in January of 1999. He received an assignment as Acting Supervisor of Logistics which he held for approximately six years. The assignment was to cease at the end of July of 1999. While the matter of the conference and the investigation about the conference location were taking place, the employer decided to terminate his acting employment two weeks early.

[28] While he was on the assigned acting position, Savoury was not a member of the Guild but rather a member of another bargaining agent, PSAC. In order to remain a member in good standing of the Guild, however, he made an application each year to indicate to the Guild that he was a member of PSAC and to ask for withdrawal of his fees from the Guild so that the union fees could be applied to PSAC. This he did for the period of six years.

[29] When his assignment was abruptly terminated, Savoury sought advice from PSAC and was told to submit his inquiries to the Guild.

[30] As a result of the entire matter concerning the conference and the employer's investigation, and the fact that Savoury did attend the cruise, Savoury was disciplined by his employer by receiving a five-day suspension, as well as an order to reimburse the Department of Fisheries and Oceans the cost of the conference and cruise, namely 2,800.00 dollars. Savoury brought this matter to the Guild for its support to challenge the employer's decision in regard to his discipline and termination of appointment.

[31] Mark Boucher was the Guild's representative who had been assigned to handle this matter. Boucher is a Labour Relations Officer with the Guild and has been in that capacity since May of 1999. Before that time, he was a Commanding Officer on a ship for the Department of National Defence, a permanent job which he had held for two years. Prior to that time, he had been in the acting position for ten years. His experience in handling grievance matters includes approximately 20 cases at first level and approximately 6 cases at second level, plus other matters which had not gone to grievance. Boucher had never represented someone at higher levels, nor at adjudication. He had handled these grievances as Ships' Officers' representative for the Guild while on active duty.

[32] The matter concerning Stephen Savoury came to him in August of 1999. Savoury made an appointment with Boucher to meet and go over his concerns. Savoury had received a letter from his supervisor Parkes that his acting appointment had been terminated and the parties discussed the matter of that letter plus rumours that there might be more trouble for Savoury upon his return from vacation that summer. Boucher obtained background information and realized that Savoury had been an employee of 30 years and a member in good standing of the Guild. While Savoury was able to give him the details of the incident, Savoury had not himself received a copy of the investigation report which had been conducted by the employer.

Savoury had informed Boucher, however, that he had made a request to obtain a copy through the Privacy Act. Boucher asked Savoury to give him a copy when he received it.

[33] Then, the parties discussed the matter of a letter which Savoury had received from Lynn Thibault, the Regional Director for Finance and Administration who reports to the RDG Maritimes Region Neil Bellefontaine. Lynn Thibault had indicated to Savoury in her letter of February 2nd, 1999 that he was not entitled to attend the conference and that he was to remit to DFO any tickets, vouchers, etc. for the trip which he had in his possession.

[34] Savoury told Boucher he did not agree with the letter, and he explained the background of the case and the fact that he had given all of this information to the person who had conducted the investigation.

[35] Boucher asked Savoury why had he gone on the cruise after having been told not to go and, according to Boucher, Savoury indicated he might as well go on the cruise since he was in enough trouble already. Savoury, however, had not gone to the conference but had only attended the cruise trip portion of the conference. As a possible defence to why Savoury had attended the cruise, there had been other incidents in the past of similar nature which had gone unchallenged by the employer and Savoury felt that he was being singled out in this one.

[36] Boucher's assessment of the situation was as follows. The acting appointment was finishing anyway in two weeks. As for attending the cruise, this might amount to insubordination given that Savoury had received a directive not to do something and yet had done it anyway. Boucher also felt that from the materials supplied by Savoury, it appeared that Savoury had played a significant role in setting up the cruise. Boucher went about to verify adjudication cases on insubordination and read leading authorities on the subject. He could not find anything useful to assist in this case. Boucher also testified at the hearing that he was worried that Savoury might be facing a dismissal as he had breached a fiduciary duty. The cases which Boucher's research revealed showed that a two-week suspension might have been a possible discipline in such cases. Savoury had never been disciplined in the past, was a long-term employee of 30 years, and an employee who had received a number of awards for his work. Boucher did not feel that he would be dismissed on account of this action. Boucher failed to discuss any of this with Savoury.

[37] Finally, on September 8, 1999, Savoury did receive his letter of discipline which showed the five-day suspension plus reimbursement of 2,800 dollars. Savoury came to see Boucher about this letter and also brought a copy of the investigation report he had received. He noted, however, that it was only a portion of the investigative report released through the *Privacy Act*. Savoury had also prepared a grievance form and supplied materials for factual background of the grievance. Boucher did not sign the grievance form, advising Savoury that he would verify with Headquarters in Ottawa.

[38] Boucher admitted at the hearing that he did not read the report that had been placed before him by Savoury. He read the summary that Savoury had prepared, but that this was a brief meeting. Savoury had expressed concerns that he had not had access to the investigator's notes, but Boucher did not feel that there was any usefulness in that concern. As for the investigator's version of Savoury's statement, Boucher questioned Savoury on that and Savoury agreed with the contents but indicated to Boucher that other portions of his statements had been left out. Boucher testified, however, that he did not think that those portions were important. Boucher also admitted to not going over the contents of the investigative report paragraph by paragraph, but essentially asked Savoury to comment on it during that meeting.

[39] As for this first meeting about the grievance and what the parties intended to do, Boucher really could not recollect any specific discussions with Savoury but generally indicated that the strategy he recommended would be for Savoury to admit wrongdoing and to try to get resolution that way. After this first meeting, Boucher glanced over the documents he had received from Savoury, which he referred to as extensive, and read the first page and last page only of the investigative report. This he felt was very damaging and he asked Savoury if he were prepared to admit his wrongdoing given the letter by his employer imposing the disciplinary suspension and fine. Savoury was not interested in doing that and could not understand any wrongdoing given that the conference fees had been purchased prior to the location having been changed to the cruise ship and also by the fact that Savoury did not have any ticket for the cruise ship in his possession when he received the letter from his employer. Furthermore, it was Savoury's contention that he had not attended the conference but he had only attended the cruise trip, and he was on paid authorized vacation leave at the time. Savoury also brought to Boucher's attention that there were other examples of unusual events happening within the employer's knowledge, for example a luncheon for retiring employees which had been given aboard a Coast Guard

vessel, on a cruise out into the waters, but Boucher did not find this particularly useful for Savoury's case, nor other examples of similar incidents.

[40] Savoury had also made a request for legal representation given that a lawyer would be able to examine the investigative report and illustrate the discrepancies in the investigative report and bring this to his superiors' attention. This avenue might avoid the grievance avenue and could result in a quicker outcome according to Savoury. Boucher simply replied he would verify with Headquarters, but did indicate to Savoury that normally lawyers were not hired for discipline cases except for cases in which loss of life or fire incidents were involved.

[41] Boucher went on to fax the first and last pages of the investigative report to Lawrence Dempsey at Headquarters and discussed generally what the report entailed. Dempsey gave Boucher instructions to sign the grievance at the first level and he did so on September 21st, 1999. Next he read the materials submitted by Savoury and discussed same with his superiors. He kept continued contact with his superiors on this file. According to Boucher the investigation conducted by Cameron had been very thorough and it was Boucher's impression that going to first level hearing would enable the Guild to uncover more information which would be useful. There was no other discussion with Savoury except perhaps when Savoury came by to pick up the signed grievance forms at which point Boucher informed him of the first level meeting date which was October 13, 1999.

[42] On October 13, Savoury met Boucher at a coffee shop for just a few minutes before the meeting. There had been no other prior meeting except for the one with Savoury in August. Boucher does not remember the discussion but generally Boucher advised Savoury as to who would be at the meeting which included his supervisors, Parkes and Marsh. Savoury advised Boucher that he did not put much faith in success at this level given that there was a conflict with his supervisors, especially in the fact that Savoury had competed for Marsh's job, which Marsh received and that Savoury had appealed that appointment back then. In any event, it was decided that Savoury would do most of the talking and Boucher would simply add anything he felt was missing at the end of the meeting. This is in fact what took place. Boucher simply scribbled some notes on the key points that were discussed at the meeting. During this meeting it was revealed that other employees who had gone on the cruise, the same as Savoury, had not been disciplined and to which the employer simply replied

that other letters of discipline would be issued. When the other discipline letters were issued to these employees, they received only two days of suspension plus reimbursement of the $2,800 fee. Boucher represented those employees as well in their grievances. Savoury was upset with this but Boucher felt that Savoury's more severe discipline was due to the fact that Savoury had been involved in the setting up of the conference and he ought to have known better.

[43] Boucher did not advocate Savoury's case at the first level meeting and he did not intervene when Savoury spoke, simply for the reason that Savoury was completely familiar with the events and Boucher felt it was the best way to present the case. Boucher would be there to pick up at the end if anything had been missed.

[44] Then the parties received the first level response from the employer; Savoury felt that the explanation was missing from that, but Boucher disagreed with it. The parties decided to go ahead to second level following Headquarters' approval. Boucher did not meet Savoury prior to the second level meeting except for a quick luncheon with Savoury after they had received the first level response. During this luncheon Boucher proposed to Savoury the advice he had received from his bosses at Headquarters, i.e. that they should try to negotiate a lesser penalty at the second level, but Savoury would not admit any wrongdoing and wanted in fact an apology from the Department for the way it had acted towards him. Boucher told Savoury during this luncheon that they would meet just a few minutes before the second level meeting and there he proposed to Savoury that Savoury speak at the second meeting as he had done for the first level meeting and to prepare notes for that purposes.

[45] Once again the parties only met for coffee on November 5, 1999, date of the second level meeting. Savoury had given Boucher a list of other allegations of incidents to which the employer had not acted in a similar manner and Boucher was not familiar with these. In any event, Boucher recalls that during the second level meeting RDG Bellefontaine was quite annoyed with Savoury and stated that he expected more from his officers. Boucher did not intervene at the second level meeting and allowed Savoury to present his case. According to Boucher, it became evident that the facts upon which the discipline was based were not in dispute; therefore, it was difficult for Boucher to challenge the discipline imposed upon Savoury. It did not seem to matter to the employer that the supervisor Chin-Yee had been advised of the location of the conference and had still approved for Savoury and

other employees to go. Boucher really felt at this point that their case was weak given that the employer's view of the five-day discipline was a lenient discipline and also because Savoury was not offering explanations which were going to be acceptable to the employer.

[46] The parties were not surprised with the second level response and at this point Boucher sent a full package to Lawrence Dempsey at Headquarters to get a decision on whether to proceed to third level grievance. Once again, Mr. Savoury had prepared briefing notes for use at the third level response as he had done at the other two levels. Boucher testified that Savoury would call him numerous times with questions which Boucher would answer over the phone. Boucher had asked Savoury if he had anything to show that he had paid for the trip, any receipts to which Savoury had replied that he did not.

[47] Boucher did not undertake any independent investigation of this matter; he did not speak to the other people involved, nor to Harry Jung, the businessman who had put on the conference. Then for the third level meeting which was to be held at Headquarters in Ottawa, Savoury called Boucher many times because he was concerned with the delays. The delays were caused essentially due to the fact that the Guild had to wait for the appropriate employer's delegate to be available for that meeting and finally that person was not. Larry Dempsey conducted the third level meeting alone with Chabot and not the Deputy Minister. Larry Dempsey did not speak to Savoury and in fact only met him at the hearing for this complaint. Essentially Boucher's approach to the file was that there was not much to go on and he made no recommendation about the case to Headquarters. He did however share with them; he did not feel that they would have any more success than at the first and second levels because there were no angles to use; the facts were not disputed. Boucher had discussions with his boss Simpson in Ottawa as well as with Dempsey and with the National President and, according to Simpson, the Savoury case had no likelihood of success because he felt the discipline had been lenient. He agreed with Boucher's assessment in this regard. Simpson, the National President and Boucher were all former ship captains and they all agreed on the principle that when you are ordered to do something, you do as you are told. That came from Boucher and his colleague's experience of working on a ship. The first thing you learn working on a ship is that you must follow orders, because lives might be at stake. Boucher, however, had to admit that Savoury did not work on a ship.

[48] Essentially, Headquarters therefore decided there would be no likelihood of success at adjudication and related this information to Boucher who in turn informed Savoury that the Guild would not take it to adjudication for the reason that there was no likelihood of success. No further explanation was given to Savoury and it was not explained to Savoury that the Guild's view of this case was that he had simply not followed an order that he had received.

[49] Boucher had never bothered to speak with Harry Jung about the contention that Savoury had paid for the trip; he never bothered, therefore, to ask him if he had a cheque in his possession that had been delivered to him by Savoury. Boucher never verified any of the information related to him by Savoury and continued on the premise that Savoury had attended the conference even though the facts were that Savoury had never attended same but had gone on the cruise ship trip only. The letter from his employer had indicated he was not to go to the conference.

[50] Boucher revealed at the hearing of this complaint that everything he did on this case he verified with his superiors. This was not a written policy but rather a practice that he had been told to follow. Boucher did not explain to Savoury that he could proceed on his own without the Guild's signature on the grievance and he did not share with Savoury that while the Guild did not agree to bring the matter forward to adjudication, he was entitled to take it to adjudication on his own by hiring his own representative or lawyer. Boucher did not meet with the employer independently of Savoury to discuss the case, nor did he verify any statements which had been given during the investigation, nor did he ask any witnesses to appear at the first and second levels in support of Savoury's case. Boucher admitted that there is a policy within the Guild that a member can challenge a decision by the Guild not to represent the member at adjudication, but this was not explained to Savoury. Boucher furthermore did not feel it was his responsibility to advise Savoury of a time limit within which he had to bring the matter to adjudication. Boucher felt that Savoury was knowledgeable of the collective agreement and he could find out for himself. When challenged as to whether Boucher was trying to ameliorate the case of Savoury as opposed to making the case for the employer, Boucher said that Savoury's case was weak and he could not make a better argument for the reason that Boucher believed that a penalty of five days was reasonable in the circumstances. That was his opinion. He felt therefore that the penalty was appropriate; however, he did not choose to share this information with

Savoury and did not ask to excuse himself from the case and allow Savoury to be represented by someone else.

[51] As for the real reasons why the Guild decided not to go to adjudication, Boucher revealed that Headquarters were ships' officers and ships' officers follow orders. They felt that Savoury was wrong in how he had conducted himself and that the penalty was just and would not be ameliorated. When asked how the employer could tell whether the Guild was supporting Savoury in his grievance, Boucher replied that it was by virtue of the fact that he had signed a grievance form.

[52] Lawrence Dempsey also testified at this hearing. He indicated that, as National Secretary Treasurer for the Guild for the last 13 years, his primary duty is as Financial Officer of the Guild. His other duties are attending meetings with the Council and with DFO, Public Works and DND, as well as handling grievances at the final stage for Ships' Officers and maintaining contact with Branch Presidents, etc. Dempsey revealed that he had been made aware by Boucher in 1999 of a case that might possibly go to third level. Boucher had advised him that there had been extensive materials, which materials he had sent to Dempsey. Dempsey had reviewed the material and the crux of the matter seemed to stem from the fact that a cruise was involved and that employees had been told not to go but had gone nevertheless. Dempsey was also aware that Savoury had requested legal representation but that the Guild refused because it would not be financially feasible to have a lawyer involved in all grievances and especially not in a case like this one. Apparently there were a lot of discussions between Dempsey and Boucher on this file, enough discussions that Dempsey knew the case and knew the problems Boucher was having with the case. Throughout this, Savoury felt that he was being treated very unfairly and Boucher was under constraints to cut a deal because Savoury would not accept anything short of a complete exoneration from his Department. As to why it was decided that Savoury would make the representations instead of Boucher at the first and second level, Dempsey replied that Boucher seemed to know what was going on and felt that this approach worked best, and particularly at the second level, Boucher knew Bellefontaine personally and therefore Dempsey relied on Boucher's impression of how that would work at that level. Dempsey had not undertaken any independent investigation either, nor had he given a telephone call to Harry Jung, the businessman involved in the conference. At the third level, Dempsey did not meet with the Deputy Minister but rather met with a delegate named Chabot who reported to John Adams, the Commissioner for the Coast Guard. Dempsey went

into that meeting arguing that Savoury had gone to the conference and tried to have a more lenient position than the employer. Dempsey was unaware that Savoury had not gone to the conference but was rather on paid vacation leave. In the third level response, the employer found that Savoury had acted in an insubordinate manner, which word had not been used in any other employer's responses.

[53] Dempsey felt that he could not reply to the employer's consistent question: why did Savoury go when he was told not to go? So Dempsey was not surprised to receive the third level response. Therefore, when it came time to make a determination as to whether to go to adjudication, Dempsey recalls that there would be no chance in winning this case at adjudication. Dempsey has a responsibility on how he spends his members' union dues and cannot take a case on to adjudication when there is no reasonable chance of success. On the one hand, Dempsey said that the Guild does not have thousands of grievances such as other bargaining agents because employees of the Coast Guard are well trained and knowledgeable individuals who do not grieve "willy nilly". Nevertheless, Dempsey said that Savoury's case was not a good one for adjudication and he knew that they would have very little success at adjudication. The decision not to go ahead was not taken lightly according to Dempsey.

[54] When Savoury asked for an explanation as to why adjudication was not approved, Dempsey replied that it was based on the unlikelihood of success, but Savoury asked again what the reasons were for that, and Dempsey replied in a second letter that they had already given explanations and that he had a right to lodge a complaint with the Public Service Staff Relations Board. Dempsey had never been made aware from Boucher that Savoury had not attended the conference. When asked why Dempsey did not call Savoury directly, Dempsey replied that Savoury was a fairly intelligent man, obviously very well knowledgeable in the materials he had generated for this file and therefore ought to have known the National Executives' phone numbers from the Guild's newsletters and he should have called Dempsey, that Savoury too had a responsibility to call Dempsey.

[55] On cross-examination, Dempsey admitted that he had the third level meeting with the Deputy Minister's designate, and this was done by agreement with the Guild, for the collective agreement does not provide for anyone else but the Deputy Minister to hear the final level grievances. Dempsey admitted that it is simply a practice that

has been done for a long time and the Guild does not insist on final level grievance meetings with the Deputy Minister. Dempsey also admits that it is possible that the delegate may have been involved at the lower level and he or she is likely to have information from the file and therefore may be biased in his or her position for the final level. In fact, Dempsey was shown e-mails which demonstrated that Chabot, the designate, had intimate involvement in the case at the lower levels.

[56] While Dempsey agrees that it is the bargaining agent's job "to go to bat for the member" and to put forward the best possible case and argue well to ameliorate the member's case before the employer, even if those arguments may not be accepted, it is the objective of the bargaining agent to put their best efforts for their member. Notwithstanding this principle, Dempsey maintained that he would never have argued anything other than what he did because he felt the complainant's case plainly came down to being told not to use the ticket to go on a cruise conference but he had taken the ticket and gone anyway. In his opinion, Savoury ought to have refused to take the ticket from Jung at the airport the day he was scheduled to leave for the cruise. Dempsey said he did not use the example of another case in which employees were taken on a vessel cruise, at the taxpayers' expense, and for which no discipline was handed out, and which case had been reported in the newspapers, to draw parallels with Savoury's case. Dempsey did admit also that he had the obligation to put forth the interest of the Guild's member Savoury, and the extent to which they represented Savoury was fair representation in his estimation.

[57] As for legal representation, it was Dempsey's view that he cannot spend the monies of the members unwisely and, in a case like this, it would not have been wise to do so; however, if the case had gone to adjudication, a lawyer would have been hired to represent Savoury because he would not have allowed Boucher to represent him at a more formal, higher level such as a "courtroom setting". Support to the member, according to Dempsey, is basically to sign the grievance form as presented and to be present at the hearing.

[58] Parallel to this was the fact that the Guild hired an experienced lawyer to represent them in this present complaint, and this lawyer fully investigated the background of the complaint in order to defend the Guild's obligations towards Savoury in this matter.

[59] Dempsey defines success at adjudication as follows: that the member has had his day in court, that the member has had a chance to speak, and thirdly, that someone has understood the member no matter the outcome. Even with this benchmark, Dempsey did not approve that the Savoury matter go to adjudication for the reason that there was no likelihood of success and there were financial restraints in permitting such a case to go forward.

II – POSITION OF THE COMPLAINANT

[60] The complainant takes the position that the Guild failed in its duty to him as per the requirement of subsection 10(2) and section 23 of the *Public Service Staff Relations Act* in two ways. Firstly, in failing to provide competent representation during the complainant's grievance process; and secondly, in failing to advise of his right to advance the matter to adjudication without the consent of the Guild.

[61] On behalf of the complainant, Mr. Wayne Rogers cites the following facts upon which he relies to maintain that the Guild did not provide competent representation. Pursuant to an investigation report commissioned by the employer, the complainant lost his acting assignment on July 12, 1999, a job which he had held for six years. The loss of his acting assignment went unchallenged by the Guild. There were later a suspension of five days and a fine of $2,800 on September 1999, based again on the same investigation report. This action was described as disciplinary whereas the loss of the acting assignment was not. The Guild did not research the matter, nor did it support the complainant's position to contest the employer's actions and failed to tell the complainant of this lack of support. During the present hearing, Boucher testified he did not tell Savoury that he did not support his case.

[62] These facts pointed to a "passive" approach to Savoury's grievance at all levels, and all the while, Savoury was relying on the Guild to advance his case in a manner which professionals ought to utilize in a grievance process.

[63] When the reply to the last level of grievance proved unsuccessful, the national office of the Guild, according to Mr. Rogers, made an arbitrary decision not to represent Savoury at adjudication before an adjudicator appointed under the Public Service Staff Relations Act. Mr. Rogers says the Guild's decision was "arbitrary" based on the evidence that Dempsey did not contact Savoury to clarify the matter nor any discrepancies between the version advanced by this member and the employer's

version; that he did not conduct a thorough study of the matter before making a decision not to advance to adjudication; and that he did not give reasons for the Guild's decision not to represent the complainant at adjudication. In fact, when Dempsey testified, it became clear that he misunderstood the grievance and therefore put forth an inappropriate argument to the employer.

[64] On the second argument advanced by the complainant, i.e., that the Guild failed to advise Savoury of his right to advance the matter to adjudication without the consent of the Guild, the evidence is more compelling according to Mr. Rogers. The Guild made a decision not to represent the complainant at adjudication the same day as the Guild received the third level response from the employer. With no discussion with its member Savoury and a quick decision on the same day as opposed to using the allowable 30-day time period, Mr. Rogers argues that the Guild did not undertake nor conduct a thorough review and therefore made an arbitrary decision.

[65] The Guild has no policy to enable a member to challenge a decision of the Guild not to represent him at adjudication. In such an instance, there is a higher duty upon the Guild to ensure that Savoury understood the process, and that he be advised of his right to advance the matter on his own. More importantly, the Guild had a "basic obligation" to inform the complainant of the time limit in which to file a reference to adjudication to ensure that Savoury's right in this matter be preserved. None of these obligations were fulfilled by the Guild.

[66] The complainant is therefore of the view that the Guild did not believe him nor in his case and that is why no one gave him an opportunity to address any of the concerns of the Guild in order to challenge the employer's decision. Mr. Rogers states that the Guild simply kept quiet.

[67] In his written submissions, Mr. Rogers illustrates the relationship between a bargaining agent and their members. He states that members pay their dues and they expect aggressive representation of their interests. They do not expect mediocrity or indifference. They also expect the professionals who make up their bargaining agent and who are paid to represent them to be aware of the various procedures and time limits and anything relating to the preservation and advancement of their rights.

[68] In a case where a bargaining agent decides not to support the grievance at adjudication, Mr. Rogers professes that this should only be done after an independent

investigation of the facts by the bargaining agent and a thorough discussion with the member involved. The bargaining agent has a responsibility in such cases to advise the member in a timely fashion that his or her case will not be supported, and to provide a rational decision supported by jurisprudence to give the member an opportunity to challenge the bargaining agent's decision. If the member is unable to convince his or her union to advance the matter further, the bargaining agent should assist the member in understanding how the matter can be advanced. For instance, the bargaining agent should indicate to which tribunal the matter must be referred, the time limit involved, and the forms to be used. This should be done in writing to ensure the member understands the process. Mr. Rogers cites in support of this contention the decisions of *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509, *Jacques and Public Service Alliance of Canada* [1995] C.P.S.S.R.B. No. 38 (Board file 161-2-731), *John Nicholas Lipscomb v. Public Service Alliance of Canada* (Board File 161-34-1127), and *Centre hospitalier Régina Ltée v. Judge Bernard Prud'homme and the Labour Court and Cécile Montigny* [1990] 1 S.C.R. 1330.

[69] None of these obligations were fulfilled by the Guild, states the complainant. The passive approach by the Guild and the non attempt to ameliorate the penalty imposed conveyed a message to the employer that the Guild did not support Savoury's case. This is clear from the evidence of the final level response by the employer in which stronger language is used to describe the actions of the complainant which were not contained in the original letter of discipline, i.e., that Savoury was now accused of insubordination (Exhibit B-3, Tab 20). Furthermore, while the Guild knew that the second level grievance had been heard and denied by Bellefontaine, the Regional Director General, who had been advised by staff relations officer Chabot, Dempsey nevertheless chose to advance the final level grievance to Chabot instead of Bill Elliott, the Deputy Minister and the designated grievance officer at the final level. Chabot in turn presented the case to Adams, but Adams did not have the authority to overturn a decision of the Regional Director General, only Elliott could and the bargaining agent knew this. Mr. Rogers describes this action on the part of the Guild to knowingly present Savoury's case not to the highest designated person in the Department as evidence of bad faith.

[70] According to subsection 100(4) of the *Public Service Staff Relations Act*, the employer must designate a person who will hear final level grievances, and Mr. Rogers

states the Guild failed to insist on its right to be heard by Elliott, and in doing so, the Guild failed to properly represent Savoury.

[71] The evidence is clear. Savoury was on annual leave, and he would enjoy a cruise with his wife, not a cruise on DFO's time nor business. Savoury did not attend the conference which was part of the cruise. The Department cancelled the conference-cruise and ought to have sought to recover the costs of the conference. The Guild, however, did not make arguments in this regard. The letter of Line Thibault dated February 2, 1999 was referred to time and time again, and yet, it is clear there was a misunderstanding but no one saw fit to enquire. When Dempsey received the file from Boucher, he simply relied on it even though it contained only a few notes by Boucher and nothing else. Boucher was an inexperienced officer and Dempsey ought not to have placed such importance on a file which lacked content.

[72] Mr. Rogers concludes in asking for the following relief for his client Savoury.

> *We are seeking the following sanctions against the Guild:*
>
> *1. The Guild reimburses Mr. Savoury for all costs associated with his representation before this Board;*
>
> *2. Reimburse Mr. Savoury $2800.00 which the Department recovered;*
>
> *3. Reimburse Mr. Savoury five days pay that was taken from Mr. Savoury as a result of his suspension;*
>
> *4. The Guild provide Mr. Savoury with a letter of apology for their failure to properly represent his interests.*
>
> *We are also seeking leave to have Mr. Savoury's disciplinary action reviewed by the PSSRB. I believe the facts are clear, Mr. Savoury intended to pursue the matter to Adjudication. It was only because he misplaced his trust in the Guild and the Guild showed serious negligence in the administration of his grievance that he lost his opportunity. His actions from the outset of his grievance clearly demonstrate his intent to press forward with the issue. He should not be denied an opportunity to have his reputation restored within the Department. The only way to have his disciplinary record erased is to have the PSSRB review the disciplinary action. I ask that this Board grant Mr. Savoury the opportunity to be heard on the facts.*
>
> *In the case of Centre hospitalier Regina Ltee v. Judge Bernard Prud'homme and the Labour Court and Cecile*

> *Montigny, syndicate national des employes de l'Hopital Regina (C.S.N.) and Raynald Frechette, in his capacity as Minister of Labour the decision cites numerous examples related to the duty of fair representation as well as concluding that an employee retains the right to have their case properly adjudicated when it is clearly demonstrated that the union failed in its duty of fair representation. On page 16 of the decision it states;* **"This having been said, the question here is whether, applying these principles, the union has infringed its duty of fair representation, as defined in s. 47.2 L.C. with respect to Cecile Monrigney [sic]. It seems clear that the union disposed of her grievance without her consent, indeed without telling her. It is equally clear that the grievance was one regarding dismissal, and thus covered by s. 47.3 L.C. The rest is a question of fact, which the Labour Court judge had jurisdiction to assess in his sovereign power as the trier of fact who saw and heard witnesses. As the Labour Court was acting within the boundaries of its jurisdiction and made no error in doing so, the Superior Court and Court of Appeal were right not to intervene, especially as the union admitted its lack of care. I also share the view taken by the Labour Court, which found serious negligence on the part of the union and concluded that the latter had based its discretion – a discretion which it undoubtedly had – not on serious grounds, taking into consideration advantages beneficial to the employees as a whole, but rather on grounds completely unrelated to the grievance. As this was a case where the nature of the grievance did not permit this approach, the unions duty of fair representation was thereby infringed."**
>
> *We believe the above decision allows you the precedent to grant Mr. Savoury leave to have the PSSRB schedule a hearing in order to provide Mr. Savoury an opportunity to have his grievance adjudicated on its merits.*
>
> (At pages 19 to 22 of the complainant's written submissions.)

III – POSITION OF THE BARGAINING AGENT

[73] Mr. Raymond Larkin represents the Guild. He begins by stating that the position held by the complainant Savoury, that of acting Supervisor of Logistics in the Maritime Region of DFO, was not a position included in the ships' officers bargaining unit represented by the Guild, but rather one which formed part of another bargaining unit represented by the PSAC. The Guild therefore maintains that such a position or loss thereof was not a mandate of theirs, but rather that of Savoury and PSAC. Neither Savoury nor PSAC undertook a grievance of this termination of the acting assignment.

[74] Mr. Larkin states that such a matter fell outside the scope of the present complaint.

[75] As for the scope of the present complaint, the Guild is of the view that this Board's jurisdiction is determined by the way in which the complaint is framed at the outset, i.e., the issues raised in the complaint filed by the complainant will set out the four corners of the Board's jurisdiction, and the Board is not entitled to look beyond those four corners notwithstanding if the complainant raises other issues during the hearing of the complaint.

[76] Larkin starts out by citing *Gagnon* as the standard for fair representation, and adds that the regime at play in the *Gagnon* case was not the same as is currently found in subsection 10(2) of the *Public Service Staff Relations Act*, in that in the *Gagnon* case, the right to take a grievance to arbitration was reserved to the union. Under the *PSSR Act*, an employee aggrieved by disciplinary action may process the matter in a grievance to adjudication and the bargaining agent's consent is only required where the matter involves an interpretation or application of a provision of the collective agreement (sections 91 and 92).

[77] In support of this position, Mr. Larkin refers to the case *Wolfe v. Snell,* [1995] C.P.S.S.R.B. No. 40 (Board file 161-2-752) where a complaint was dismissed because the complainant did not require authorization or support of his bargaining agent, though admittedly a strict approach to the standard for the duty of fair representation.

[78] Other decisions offer a wider approach, Mr. Larkin adds, such as in prior decisions of this Board in *Charron and Lafrance,* [1990] C.P.S.S.R.B. No 27 (Board file 448-H-4):

> *The Association, nevertheless was obliged to provide fair representation to the grievor in the processing of his grievance. It could not arbitrarily or capriciously decide not to. It could, however, decide not to support the grievance if it had a valid reason for doing so.*
>
> . . .
>
> *The decision not to support the grievance was taken objectively and honestly, with full knowledge of the grievance, while taking into account the significance of the grievance, and the legitimate interests of the Association and its other members in the same acting corporal positions.*

. . .

> ***Based on the reasons why the Association considered that it would not support the complainant's grievance, it cannot be faulted for not advising him that he could, nevertheless, proceed on his own.***
>
> (At pages 9-10 of the Guild's written submissions)

[79] Further, in *Lipscomb v. PSAC*, [2000] C.P.S.S.R.B. No. 40 (Board file 161-34-1127):

> ***The Board must allow fairly wide latitude to a bargaining agent in the representation of its membership pursuant to the PSSRA.*** *The Board does not accept the complainant's position that the right to representation contained in subsection 10(2) of the PSSRA is practically absolute and cannot be denied except in the most trivial of cases. Such a view is contrary to the ruling of the Supreme Court of Canada in* Gagnon*, supra.*

[80] Mr. Larkin also adds this passage from *Richard v. PSAC,* [2000] C.P.S.S.R.B. No. 37 (Board file 161-2-1119):

> *There is, however, an obligation on the bargaining agent not to act in an arbitrary or discriminatory manner or to act in bad faith in deciding whether to represent them or not.* ***However, absent evidence of those elements, the bargaining agent has a wide degree of latitude as to how best to represent its membership at large.***

[81] Again in *Sophocleous and Pascucci*, [1998] C.P.S.S.R.B. No. 94 (Board file 161-2-861):

> *However, prior case law has recognized* ***that employee organizations have a wide degree of latitude concerning the manner in which they choose to assist employees.*** *As long as an employee organization acts fairly, impartially, and in good faith, this Board will respect its decision.*
>
> . . .
>
> ***While Mr. Sophocleous might feel that the CEIU should have done more, it is not for this Board to decide what amount of assistance must be offered by CEIU.***
>
> . . .

> ***The Board underlined that the employee organization can decide which way to best represent its members, as long as it undertakes its actions in good faith, and it ponders all relevant considerations.***

[82] Mr. Larkin adds that this Board has also stressed in some cases that the bargaining agent's decisions must not be "**improperly motivated**", it "**must not seek to harm or hamper any employee in the** bargaining agent", "**as long as the power to withhold it [authorization] is not exercised in bad faith or without any reasons whatsoever, then it must be accepted that the bargaining agent has a right to exercise its discretion even if in so doing it makes an honest mistake**", citing *Ford and PSAC,* [1995] C.P.S.S.R.B. No. 116 (Board file 161-2-775), *Begley and PSAC,* [1995] C.P.S.S.R.B. No. 65 (Board file 161-2-759), *Morin and Ford,* [1989] C.P.S.S.R.B. No. 263 (Board file 148-2-163).

[83] The Guild is of the view that the PSSR Board decisions show an approach which reflects the specific statutory regime for the processing of grievances and the responsibilities of a bargaining agent under the Act. The Board consistently held that a bargaining agent has wide latitude and a breach of subsection 10(2) only happens where the actions of the bargaining agent are improperly motivated or seek to harm or hamper an employee in the bargaining unit. As in *Jacques Poitras* (1985), 63 di 1983 (C.L.R.B. No. 546), "**Parliament did not intend the Board to become a 'Better Union Bureau'... responsible for monitoring all union practices according to rules comparable to consumer protection**".

[84] Mr. Larkin takes exception to the position advanced by the complainant as he says it incorporates a "negligence standard" into subsection 10(2) which is not present nor intended to be.

[85] **The Guild invites this Board to follow the earlier decisions and to reject the "Better Union Bureau" approach argued by the complainant. It adds that I should** recognize the wide latitude given to bargaining agents under the Act, and "*to be particularly alert to the motivation of the Guild representatives in representing Mr. Savoury.*"

[86] The Guild argues that it did not act in an arbitrary nor discriminatory manner in its **dealings** with the complainant. Firstly, the Guild, through its officer Boucher, obtained information about the facts surrounding the discipline of Savoury of

September 8, 1999, mainly through speaking with Savoury. Then Boucher reviewed prior decisions of the PSSR Board, and reviewed three text books relating to discipline. Boucher formulated an opinion that Savoury's conduct could involve serious discipline, but that he would not lose his job given his employment history. According to Mr. Larkin, Boucher also reviewed the investigation report, though in part, which led to the matter of the discipline. Savoury admitted to all of the essential facts upon which the employer had relied to impose the discipline. Boucher agreed to support Savoury at the first level of the grievance process, and suggested to Savoury that he admit his wrongdoing but negotiate a lesser penalty. The Guild was of the view that any factual disputes raised by Savoury had "very limited relevance to the validity of the disciplinary action". Savoury refused to negotiate a "deal".

[87] Again at the second level, Boucher supported the complainant's grievance "hoping that new or additional information would emerge through discussions with the employer". Mr. Larkin argues that the Guild did not act in any manner contrary to the *Act* in investigating the grievance given that all of the essential facts were known and undisputed, were reflected in the documents provided by the complainant, and thus no further investigation was needed nor required, citing the *Gagnon* case in support.

[88] Additionally, the Guild states that there is no evidence Boucher was "improperly motivated" in conducting his investigation or that he sought to "harm or hamper" the complainant. There is no evidence of personal hostility.

[89] The Guild relied upon the facts as relayed by the complainant, and according to the case *Morin and Ford,* supra, that is how the bargaining agent can best proceed with the presentation of the grievance.

[90] The fact that Boucher allowed Savoury to speak on his own behalf at both first and second levels is not an indication of bad faith but rather good strategy, maintains the Guild. Firstly, Savoury would not accept Boucher's suggestion to cut a deal and therefore Boucher could not act; and secondly, speaking for himself would give Savoury the "opportunity to make some answer to the employer's position, to confront his accusers, and to see some natural justice." Boucher's actions were pro-active, not passive, states Mr. Larkin, and as per the relevant authorities, as long as the bargaining agent did not harm the employee, it is not for the Board to decide what approach the bargaining agent should have taken or what amount of support it should have offered.

[91] As for the allegation that Boucher did not offer his support during the grievance process, Mr. Larkin states at page 35 of his written submissions:

> *It is incorrect to say that Mr. Boucher did not support Mr. Savoury's grievance. Mr. Boucher supported his grievance by referring it to the three levels of the grievance process. However, he remained objective about the merits of grievance. Mr. Savoury had admitted to receiving a letter from the Employer requiring him to return tickets and vouchers paid for by the Department of Fisheries and Oceans Canada, and that knowing he was acting contrary to these instructions he used the tickets and vouchers to take a free Caribbean cruise. He admitted that he had not followed the proper procedures in making the arrangements for the conference.*
>
> *Mr. Boucher did not act in a manner that was arbitrary, discriminatory or in bad faith in reaching his opinion that the Employer's position was valid. As the matter proceeded through the first and second levels, it had become clear that many of the peripheral issues raised by Mr. Savoury had no relevance or validity. The Guild submits that Mr. Boucher was entitled to reach his conclusion in good faith. At no time was he influenced by any ill will or hostility towards Mr. Savoury that would translate into bad faith in these circumstances.*

[92] In a letter dated May 1, 2000, Savoury personally thanked Boucher for his time (Exh. B-3, Tab. 21), but there is some indication that Savoury was rather upset about the final level representation and the refusal to advance to adjudication.

[93] As for the representation by Dempsey at the third level, the Guild admits Dempsey made an honest mistake in that he misunderstood one fact, i.e., he incorrectly believed Savoury used the tickets paid for by the employer to attend the conference when he had been told not to do so when in fact, Savoury went on his vacation. An honest mistake does not equate a breach in the duty of fair representation, citing *Morin v. Ford*, supra, and *Larry C. Fisher v. IBEW Local 804* (1999), 55 C.L.R.B.R. (2d) 299. Mr. Larkin adds that the grievance was denied, not by this misunderstanding, but rather because the employer could not accept Savoury's conduct.

[94] As for the allegation that Dempsey did not communicate with Savoury, the Guild counters with the fact that Boucher maintained regular contact with Savoury and that he passed on whatever information was available to him regarding the third level

grievance. In any event, the Guild argues that labour relations boards have consistently rejected a claim of unfair representation by a bargaining agent because of poor communications with a grievor: *Re Dayton* [1995] B.C.L.R.B.D. No. 299, *Re Korpan* [1999] S.L.R.B.D. No. 5, *Richard Brassard and Brotherhood of Maintenance of Way Employees and Canadian National* (1993), 92 di 67 (CLRB), and *Re Filipe and International Brotherhood of Electrical Workers* (1982), 2 CLRBR (NS) 84.

[95] And as for the fact that Dempsey chose to deal with someone other than the designated final level grievance officer, that is a matter for the bargaining agent in its discretion, and the complainant cannot attempt to impose a "Better Union Bureau" standard which goes beyond the scope of the duty of fair representation.

[96] Mr. Larkin finally argues that the Guild did not breach the duty of fair representation by virtue of not proceeding to the adjudication of Savoury's case. He suggests that subsection 10(2) should be interpreted to promote sound labour relations practices between the employer and the bargaining agent as per the Act. Sound labour relations practices require bargaining agents to assess grievances on their merits and not to proceed to adjudication with doubtful claims, as per the case *Re Catherine Syme* [1983] OLRBR 775.

[97] Boucher had a "thorough knowledge of the facts"; he was "familiar with all of the relevant facts"; he "researched" the law, and he provided this information to Dempsey. Dempsey in turn consulted the National President and with all of this, says Mr. Larkin, the Guild was of the view that there was no probable chance of success on the merits of the grievance. Thus the decision not to proceed was based on facts and research and not on ill will or improper motives.

[98] Further, the Guild does not dispute the need for a ships' officer to follow lawful instructions from persons in authority. It was not arbitrary for the Guild to recognize the importance of this rule for its members.

[99] The Guild does admit, however, that it did not consult with the complainant before reaching its decision not to proceed to adjudication and that the Guild did not provide him with an opportunity to address the Guild's concerns after the third level response. The Guild is not of the view, however, that this demonstrates a breach of duty under subsection 10(2), as per the findings in *Re Dayton*, *Re Korpan*, and *Richard Brassard*.

[100] The real issue under subsection10(2) is not the communication of the decision not to proceed but rather the decision whether or not to proceed, which after a review of the case, proved that there was no chance of success.

[101] Finally, as for the issue of not informing the complainant of his right to proceed to adjudication without the consent of the Guild, Mr. Larkin refers to the *Charron*, supra, case where no breach occurs in such instances if there is no evidence of ill will or bad faith. In this case, he argues, there was no evidence of such at all toward the complainant.

[102] As for the relief requested by the complainant, the Guild suggests that such is beyond the jurisdiction of this Board, and ought not to be considered. The Guild does agree that Savoury can apply for an extension of time to refer his case to adjudication, but that should be dealt with by the Board outside the limits of this complaint.

IV – ISSUE

[103] Did the Guild fail in its duty of fair representation to its member Savoury?

V – DECISION

[104] The Guild advances the proposition that my jurisdiction is limited by the description of the act complained of in the formal complaint filed by the member. The Guild provided no authority in support of such a proposition. In any event, my decision does not go beyond the act complained of in the formal complaint.

Current state of the law

[105] While the duty of fair representation has been codified in many labour codes at the provincial and federal levels, its roots in the common law since the 1940's were well recognized by our Canadian courts before such time. In fact, our Supreme Court of Canada reminds us of this fact in the 1984 cases of *Canadian Merchant Service Guild v. Gagnon* and in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada*, [1990] 1 S.C.R. 1298.

[106] In *Gagnon*, the SCC found that the union did not breach its duty of fair representation on the principal reason that the union could not be said to have acted in an arbitrary fashion in not conducting a thorough investigation when the union had

already obtained all of the facts of the case which it had relayed to its legal counsel for an opinion (at page 15). Upon further analysis, we find that the Court of Appeal's decision in that case, rendered by J.A. L'Heureux-Dubé as she then was, was based on the notion that the union's knowledge of the full facts coupled with the grievor's insistence to push his case to arbitration ought to have "logically led" the union to conduct a thorough investigation. According to Justice L'Heureux-Dubé, knowledge of the full facts was not sufficient; those facts should have sent a signal to the union that more had to be done, and in that case, a thorough investigation would have disclosed the unfair treatment of the grievor. It was the failure to undertake to conduct such an investigation , or in other words, the failure to act in the face of the facts and the grievor's insistence that there was more to the case, which constituted a failure in the union's duty to adequately represent the legitimate interests of its member.

[107] While Justice L'Heureux-Dubé's proposition was not entirely endorsed by Justice Chouinard who wrote the decision for the SCC in *Gagnon*, the requirement that the union conduct a thorough study of the facts of the case was nevertheless part of the standards imposed for the duty of fair representation. Justice Chouinard states:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *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.*
>
> [Emphasis added, quote found at page 12 of the *Gagnon* case in the Guild's Book of Authorities.]

[108] Justice Chouinard had obtained these requirements after reviewing the jurisprudence on the duty of fair representation including its early inception in the important precedent case of *Rayonnier Canada (B.C.) and International Woodworkers of America, Local I-127,* [1975] 2 Can.LRBR 196:

> *Finally, it [the Board] identifies various factors which should be taken into account in assessing the position taken by the union: the importance of the grievance for the employee in question, the apparent validity of the grievance based on the collective agreement and the available evidence, the care taken by the union in investigating, the union's practice in such cases, the interest of other employees and of the bargaining unit as a whole.*
>
> [Emphasis added, quote at page 8 of the *Gagnon* case in the Guild's Book of Authorities]

[109] The many precedents on this subject like *Gagnon* are reflective of a similar approach to the determination of a union's duty of fair representation: to represent the member in a fair manner, with attention to the case and its importance to the member.

[110] Both the *Gagnon* and *Gendron* cases are often referred to in the wealth of decisions which have since followed, and various labour boards and tribunals have applied the principle of the duty of fair representation with the guiding requirements found in these precedents. The interpretation of these precedents by various tribunals has offered interesting perspectives on the application of the duty of fair representation. To cite all of these decisions would prove onerous, and I thank the parties in this matter for having obliged by providing a good number of cases which illustrate the application of the duty of fair representation for discussion.

[111] I will refer to the application of the duty of fair representation in Canada over the past few years in an attempt to illustrate the thrust of the widely held views on this important topic, and to also show the trend which is developing in this country on the application of the duty of fair representation upon an employee organization.

[112] Among these we find the *Jacques Poitras* case (1986), 63 di 183 in which the Canada Labour Relations Board applied the last three criteria set out in Gagnon. Its focus was primarily on the union's handling of the case which the Board described as inept but nonetheless not in a dishonest way. The Board noted that the union was fully acquainted with the facts of the case, communicated with the grievor regarding its decision, attempts to help the grievor were not merely apparent, and its decision not to go to arbitration while dubious was not wrongful (see pages 191-192).

[113] In the *Morin and Ford* case [1989] C.P.S.S.R.B. No. 263 (Board file 148-2-163), the Public Service Staff Relations Board found that the bargaining agent had not breached its duty of fair representation for the reason that the bargaining agent had gone to some lengths to assess the complainant's case and to assist him in the pursuit of his claim. As there was no evidence of bad faith, nor arbitrary or capricious actions on the part of the bargaining agent, the Board maintained the bargaining agent's right to exercise its discretion as part of its "large stake" in matters of any grievance and as those impact upon the interests of the entire membership, not just that of one individual (at pages 9-10 of Morin and Ford, supra). The interests of the group outweighed the interest of one member.

[114] Later, that same Board in *Charron and Lafrance* [1990] C.P.S.S.R.B. No. 27 (Board file 448-H-4) held that the bargaining agent could decide not to support the grievance if it has a valid reason for doing so, and that decision not to support the grievance must be taken objectively and honestly, with full knowledge of the grievance, while taking into account the significance of the grievance, and the legitimate interests of the bargaining agent and its members in similar positions. Here the Board recognizes the individual member's interest vis-à-vis those of the entire bargaining unit, and focuses upon the bargaining agent's actions in balancing the two.

[115] Interestingly, in that same year, the Supreme Court of Canada had a chance to speak once more on the duty of fair representation in *Centre Hospitalier Régina Ltée v. Judge Bernard Prud'homme and the Labour Court and Cécile Montigny*, supra. Justice L'Heureux-Dubé remarked that the duty of fair representation "raises thorny problems" due to its obligation to defend the interest of members in the unit as a whole and those of an individual member. "These interests can be and often are indeed divergent". In that case, the union had settled the dismissal grievance of the

complainant with other grievances during negotiations on the agreement with the employer, and had not advised the grievor of such.

[116] Justice L'Heureux-Dubé points out that the union's duty is alive at all stages of the collective representation, from negotiating the agreement to its implementation to its implications upon the employees (at page 12 of *Centre Hospitalier Régina*, supra in the Guild's Book of Authorities). The Court adds that in the handling of a grievance, the union must first carefully consider the merits of the grievance to decide whether it has merit, and when the union decides to represent after making a decision the case has merit, it must do so without serious negligence, discrimination or bad faith. Equally important, it must do so by recognizing the importance of the employee's individual interest (see pages 12 -15 of *Centre Hospitalier Régina*, supra in the Guild's Book of Authorities). The more serious the disciplinary action and impact upon an employee's job, the less there is discretion on the union's decision to represent (at pages 15-16 of *Centre Hospitalier Régina*, supra in the Guild's Book of Authorities).

[117] We see that the duty of fair representation develops at this stage to recognize the importance of a disciplinary action upon a single employee, the overall impact upon one's job and life. The imposition of this criterion will assist the union in deciding which case is of importance and/or has merit, and in order to seek this answer, the bargaining agent must, in my view, carefully analyse the case. That is the common thread in the many cases I have reviewed. How otherwise can the union make an informed decision to represent or to not represent.

[118] This idea is carried again in *Sophocleous and Pascucci*, supra, where the Board would not interfere as long as an employee organization acted fairly, impartially, and in good faith, and after pondering all relevant considerations.

[119] In *Re Korpan*, the Board stated that the bargaining agent's decision that a grievance would not be successful was not based on a superficial, uninformed or ill-founded assessment of the facts of the case, and the relevant key aspects of the case has been considered.

[120] In *Jacques and Public Service Alliance of Canada* [1995] C.P.S.S.R.B. No 38 (Board file 161-2-731), the Board maintained that the decision by an employee organization whether to represent a member in a grievance matter must not be tainted by arbitrary or discriminatory actions, must be made in compliance with established

rules (internal policies), and after study and analysis of the case and the caselaw. Decisions cannot be motivated by inappropriate considerations, must not harm or assail a member, failing which will be evidence of bad faith.

[121] In *Richard v. PSAC*, supra, and in *Lipscomb v. PSAC*, supra, absent the elements of acting in bad faith, in an arbitrary or discriminatory manner, the bargaining agent is allowed fairly wide latitude in the representation of its membership, keeping in mind that the right to representation contained in subsection 10(2) of the PSSRA is not an absolute right. In arriving at its various decisions in these cases that the bargaining agent had not breached its duty and had not shown any bad faith or arbitrariness toward the complainants, the Board particularly noted that the bargaining agent had reviewed the merits of the case (in Richard) and had meticulously assessed the facts (in Lipscomb).

[122] In the recent case of *International Longshore and Warehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd.* [2000] F.C.J. No. 1929, the Federal Court of Appeal stated that in order to prove a breach of the duty of fair representation, the complainant must prove that the union acted in an arbitrary manner, or "the member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory". The word 'perfunctory' was also used before to describe 'arbitrary actions' in the *Rayonnier* case.

[123] Again we see a Court placing an emphasis on the union's analysis of the case, and that such analysis must be more than superficial or casual.

[124] In the *Empire Int. Stevedores's* case, the Canada Industrial Relations Board found that the bargaining agent had breached its duty of fair representation but that decision was reversed on judicial review. The *Empire Int. Stevedores* case is currently before the Supreme Court of Canada awaiting leave to appeal.

[125] I believe the current state of the law in Canada according to the existing jurisprudence can be summarized as follows. The power conferred upon a union, as such is found in subsection 10(2) of the PSSRA and other similar legislation, to act as spokesperson for the employees of a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit. For matters involving a complaint of unfair representation, as in section 23 of the PSSRA, the examination of the union's actions includes the union's decision to represent or

not represent the member at all levels, including during the grievance process, as well as the union's decision to represent or not represent the member at arbitration.

[126] When representation is undertaken by the union, such representation must be fair, genuine and not merely apparent. It must be undertaken with integrity and competence, without major negligence, and without hostility towards the employee. When a consideration is made in regard to arbitration, it is recognized that the employee does not have an absolute right to arbitration for the union enjoys considerable discretion in the making of this decision, but that discretion has limits based on the severity and impact of the disciplinary action upon the employee. The union's discretion must be exercised:

a) in good faith, objectively and honestly;

b) after a thorough study of the grievance and the case, and not merely cursory or perfunctory;

c) having pondered all relevant considerations of the case;

d) taking into account the significance of the grievance for the member and its consequences for the member;

e) taking into account the legitimate interests of the union;

f) with regard to proper motives only.

[127] In the final analysis, the union's decision vis-à-vis the representation of its members will not be disturbed absent the elements of bad faith, or actions which are arbitrary, capricious, discriminatory or wrongful, providing that the union has met the criteria above.

Application to this case

[128] Savoury has been a member of the Guild for 20 years and he has been with the Coast Guard for 31 years. He held an assignment as Acting Supervisor of Logistics for approximately six years. That assignment was to cease at the end of July of 1999, but due to the matter of the conference on a cruise, and the employer's investigation on the matter, the employer decided to terminate his acting assignment abruptly two weeks early. While on this assignment, Savoury was not a member of the Guild but rather a member of PSAC. He remained a member in good standing of the Guild, however, during the years he was on such assignment. When his assignment was

abruptly terminated, Savoury sought advice from PSAC and was told to submit his inquiries to the Guild, which he did.

[129] The evidence shows that Harry Jung, the host of the conference, believed that holding the conference on a cruise was a good and cheaper way to attract participants from across Canada. Savoury thought it prudent to consult someone in his Department. That is why a meeting was held on August 12, 1998 at which Harry Jung explained the whole idea of the conference on a cruise to Mark Chin-Yee, the contracting authority for DFO and Savoury's supervisor. Savoury was also in attendance, as well as Russell Faulkner, another employee interested in participating at the conference. All agreed that holding the conference on a cruise ship would attract many participants across Canada, and Chin-Yee approved the location of the conference at this meeting.

[130] Faulkner testified that Chin-Yee knew of the location of the conference and that Chin-Yee authorized Faulkner's attendance at such a conference in late summer or early fall of 1998. Given that Savoury had been authorized to attend the conference on the cruise ship, he purchased a ticket for his wife for which he paid $700.00, and he also applied and was given approval for vacation leave in order for him and his wife to spend an extra week in Florida near the location of the cruise ship to visit their relatives.

[131] It was only several months later, in January of 1999, that Savoury was informed that his employer had concerns about the cruise. Savoury's supervisor Parkes sent him a letter stating that none of Savoury's personnel would be authorized to attend the conference. Savoury so informed Jung, who, by that time, had already delivered tickets to those participants who had paid for the conference.

[132] Faulkner gave a signed statement of all of this information to the investigator Cameron, but it was not included in the investigative report. Neither Jung nor Faulkner was interviewed by the Guild's representatives Boucher and Dempsey.

[133] Savoury informed Jung that he could not go to the conference having been told by his employer not to. Savoury decided, however, to retain the ticket he had purchased for his wife because even if he could not attend the conference, Savoury believed he was still able to go on his paid vacation leave by purchasing his own ticket. Savoury asked Jung to arrange for the purchase of another ticket to match that of his

wife in order that Savoury could accompany her. When Jung met Savoury and his wife at the airport just as they were about to leave on their vacation, Jung gave Savoury the same ticket as the one Jung's company had already purchased for the conference cruise. Savoury tendered him a personal cheque to cover the fees for the ticket. In all fairness to Savoury, he had not asked for the same ticket to go on the cruise, he had asked that another ticket be made out for him for which Savoury was prepared to pay and in fact did pay by giving the cheque to Jung. Jung made a decision on his own and without the knowledge of Savoury not to cash this cheque. I am puzzled, however, as to why Savoury stated to Boucher he had nothing to prove he had paid for the trip such as a receipt when he had at least attempted to pay for the cruise.

[134] As a result of the entire matter concerning the conference and the employer's investigation, and the fact that Savoury did attend the cruise, Savoury received a five-day suspension as well as an order to reimburse DFO the cost of the conference and cruise.

[135] Savoury brought this matter to the Guild for its support to challenge the employer's decision in regard to his discipline and termination of his acting assignment in August of 1999. Boucher has been a Labour Relations Officer since May of 1999, and he had handled a few cases before that of the complainant. He had no experience at adjudication. Boucher found out that Savoury was a long time employee and a member in good standing with the Guild. Savoury gave him the details of the incident and a promise to provide a copy of the investigation report when he received same through the *Privacy Act*. The parties discussed the employer's letter of February 2, 1999, in which Savoury was told not to attend the "conference" and that he was to remit back to DFO "any tickets, vouchers, etc. for the trip which he had in his possession". Savoury told Boucher he did not agree with the letter, and he explained the background of the case which had also been given to the employer's investigator.

[136] When asked why he had gone on the cruise after having been told not to go, according to Boucher, Savoury indicated he might as well go on the cruise since he was in enough trouble already. Savoury, however, had not gone to the conference but had only attended the cruise trip portion of the conference. Savoury, notwithstanding, felt singled out in this case because the employer had not challenged similar cases in the past. Savoury told Boucher of other examples of similar events happening within the employer's knowledge, such as a luncheon for retiring employees aboard a Coast

Guard vessel and a cruise into open waters. Boucher did not find this particularly useful.

[137] Boucher received documentation from Savoury which he described as "extensive"; he received the letter of suspension, and a copy of the investigation report Savoury obtained, but with a portion omitted from the Privacy Commissioner's office. Boucher reviewed adjudication cases on insubordination and read leading authorities on the subject. The precedents revealed a two-week suspension might be possible, but given Savoury's good record and being a long-term employee, dismissal was not in question. Boucher failed to discuss any of this with Savoury.

[138] Boucher admitted to not reading the investigation report, even though Savoury had expressed concerns in relation to same, and Boucher dismissed the complainant's concerns as unimportant. He read only the first and last pages of the investigative report and this, in his opinion, pointed to a damaging case against Savoury. He discussed these two pages with Dempsey. Boucher believed the investigation conducted by Cameron had been very thorough. Boucher's review of "insubordination" cases revealed that the penalty imposed upon Savoury was appropriate, and therefore, Boucher made no attempts to ameliorate the complainant's case, nor did he tell Savoury that he held this opinion either.

[139] Boucher's assessment of both matters was therefore summed up as follows: that Savoury's acting appointment was ending soon in any event, and attending the cruise when told not to amounted to insubordination for which the penalty imposed was appropriate.

[140] He suggested to Savoury to admit to the wrongdoing to try to cut a deal on the penalty. Savoury was not interested in any "deal" given that he could not understand any wrongdoing on his part insisting that the conference fees had been paid for prior to the location having been changed to the cruise ship, and which location his supervisor had approved, and also by the fact that Savoury did not have any ticket for the conference trip in his possession when he received the letter from his employer. Lastly, Savoury had not attended the conference but he had attended the cruise trip portion while on his authorized vacation leave. It did not seem to matter to Boucher that Savoury's supervisor Chin-Yee had been advised of the location of the conference and had still approved for Savoury and other employees to attend.

[141] During the first level grievance meeting, Savoury found out that other employees who had gone on the cruise like himself had not been disciplined. When challenged, the employer later issued letters of discipline for only two days of suspension plus reimbursement of the conference fee. Savoury was upset by the employer's inconsistent imposition of penalties for the same so-called "act", but Boucher was of the view that Savoury was involved in the setting up of the conference and he ought to have known better. Savoury again gave Boucher a list of other allegations of incidents in which the employer had not acted in a similar manner. It did not seem to matter to Boucher.

[142] It is not surprising that the second level grievance amounted to the same reply by the employer. Boucher simply did not believe in advancing the arguments of Savoury. Essentially Boucher's approach to the file was that there was not much to go on and simply gave his opinion about the case to Headquarters.

[143] Boucher never verified any of the information related to him by Savoury and continued with the assumption that Savoury had attended the conference even though the facts were that Savoury had never attended the conference. Boucher did not meet with the employer independently of Savoury to discuss the case, nor did he verify any statements which had been given during the investigation, nor did he speak to Jung nor Faulkner.

[144] At the end of the grievance process, Boucher did not explain to Savoury that Savoury could proceed on his own without the Guild's support, he did not share with Savoury that while the Guild did not agree to bring the matter forward to adjudication, the complainant was entitled to take it to adjudication on his own. Boucher was not responsible in telling Savoury of time limits within which to bring the matter to adjudication, believing that Savoury was knowledgeable of the collective agreement and could find out for himself. While Boucher knew of a policy that a member can challenge a decision by the Guild not to represent at adjudication, he did not communicate this to Savoury.

[145] At Headquarters, Dempsey was assigned the case for review for presentation at the final level of the grievance process, and his examination of the case consisted in the main of the information and opinion advanced by Boucher. He did not speak to Savoury. Dempsey was therefore ill equipped and in fact uninformed of many facts about the case to come to his own conclusion about its merits. Dempsey and other

officials at Headquarters were, like Boucher, all former ship captains and they too held the notion that "when you are ordered to do something, you do as you are told". With this approach, how could anyone "go to bat" for the grievor.

[146] More troubling was the fact that the Guild never explained to Savoury that it held this view of his case. They did not believe an employee who does not follow an order from his superior had any case, and thus no likelihood of success at adjudication. The Guild made a decision not to take it to adjudication for that reason. No explanation to that effect was ever given to Savoury. Savoury, an employee of many years, but not necessarily someone who would have in-depth knowledge of grievance procedures nor legal training in the analysis of the merits of grievance cases, relied upon the professionals who were presented to him to advance his case. He had a right to believe that these professionals would study his case, tell him what they thought, and counsel him on the best approach to take. Without a "study of the case", none of the rest could occur, but Savoury was unaware of this.

[147] To make matters worse, no one advised Savoury of his right to proceed without the support of the Guild, nor of time limits within which to do so. It is unacceptable to state that an employee can review the legislation and find out for himself. Members of a bargaining unit pay a price for their representation, and that representation demands a basic service of being informed of one's rights.

[148] I fail to see how a bargaining agent in our modern age of rights would omit to advise a member of his or her right to proceed to adjudication personally and without the assistance and support of the bargaining agent. This to me seems so basic a duty owed to a member. A member has the right to disagree with his bargaining agent and to take the case further on his own time and money.

[149] Whether Savoury's decision to accept the same ticket that Jung had acquired for DFO, and to go on the cruise notwithstanding the controversy such cruise had generated may not have been made with sound judgment, that is not for this Board to determine. Nor is it for this Board to judge the merits of the complainant's grievance. My task is to weigh the facts concerning the representation offered by the Guild in the complainant's case to determine whether the Guild fulfilled its duty of fair representation in accordance with the law.

[150] When representation was undertaken by the Guild, the Guild had a duty to be fair, genuine and not merely apparent. I do not find that is what the Guild did in this case. The Guild enjoyed considerable discretion in this case given the not so severe case of disciplinary action (compared to more severe cases such as a lengthy suspension or dismissal). The Guild's discretion, in my view, however, was not exercised objectively, nor after a thorough study of the grievance and consideration of all relevant aspects of the case. In the final analysis, the bargaining agent's representation of the complainant was arbitrary. I wish to add that the evidence before this Board did not disclose any hostility towards the complainant nor bad faith on the part of either Boucher nor Dempsey. The Guild ought to have undertaken the support of Savoury's case with integrity and competence. The Guild's casual approach to the case was not at the level a member would expect of such professionals, a standard which is imposed in our Canadian law.

[151] For these reasons, I allow the complaint in this case.

[152] As for the relief sought by the complainant, I order that the Guild represent the complainant on an application to the Board for an extension of time to submit his grievance to adjudication pursuant to section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure*. In the event the Guild is successful in acquiring an extension of time to submit the complainant's grievance to adjudication, I then order that the Guild represent the complainant at the adjudication hearing.

[153] I remain seized of this matter should the parties encounter any difficulty in implementing this decision.

Anne E. Bertrand,
Member

FREDERICTON, July 25, 2001.