STEPHEN PETRINA
(the "Complainant")

-and-

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA
(the "Union")

-and-

THE UNIVERSITY OF BRITISH COLUMBIA
(the "Employer")

PANEL: Jennifer Glougie, Associate Chair, Adjudication

APPEARANCES: The Complainant, for himself

CASE NO.: 71713

DATE OF DECISION: July 3, 2018
DECISION OF THE BOARD

I. NATURE OF APPLICATION

The Complainant applies under Section 12 of the Labour Relations Code (the "Code") alleging the Union has failed to represent him in a manner consistent with its duty of fair representation.

Under Section 13(1)(a) of the Code, I must determine whether the application discloses an apparent breach of Section 12.

II. BACKGROUND

The Complainant is a tenured professor in the Employer's Faculty of Education (the "Faculty"). On or about September 7, 2016, the Complainant was advised by the Union's Executive Director, Deena Rubuliak, that a number of complaints had been made against him alleging various violations of the Employer's Statement on Respectful Environment (the "RES") (the "RES Complaints") and that the Dean of the Faculty scheduled a meeting with him to discuss the RES Complaints.

The Complainant told Rubuliak that, in his view, he was being discriminated against for his political views and their expression. The Complainant also told Rubuliak that he was the target of academic mobbing, which he describes as a concerted process to get rid of an employee by using negative communication to frame the employee as someone who is impossible to work with and who threatens the organization. By a memo dated September 8, 2016, he asked the Union to launch an investigation into the working conditions and climate for members within the Faculty and asked the Union to appoint legal counsel to represent him at the meeting with the Dean.

The Complainant says he came to understand that the RES Complaints were filed at the Dean's request. The Complainant says he raised serious concerns about the Dean to the Provost and actively participated in a review of the Faculty and the Dean's reappointment and says the Dean encouraged the RES Complaints to be filed as retaliation.

Rubuliak sent the Complainant a letter on September 26, 2016. In that letter, she responded to various communications between the Complainant and the Union including the September 8, 2016 memo. The letter also served as a follow up to a September 15, 2016 meeting with the Complainant and the Union's counsel. Rubuliak acknowledged the Complainant's view that the RES "undermines core statements of academic freedom enshrined in the collective agreement" and that it is a "heavy-handed tool and utter mismatch with the new workplace legislation". She confirmed, however, that the Union disagreed with the Complainant's view of the RES and would not pursue his request to obtain a legal opinion with respect to it. Rubuliak also confirmed counsel's advice that the Employer was required to investigate all complaints made.
under the RES, including those made against the Complainant. Finally, Rubuliak confirmed that the Union would represent the Complainant through the investigation process, but would not necessarily be retaining counsel for that purpose.

The investigation into the RES Complaints was conducted by an independent third-party, Irene Holden (the "Investigator"). A copy of the Investigator's terms of reference was provided to the Complainant on September 21, 2016. The documents attached to the Complainant's application demonstrate that the Union continued to meet with him during the investigation, often with counsel present, to review the allegations in the RES Complaints and to assist in developing a response strategy.

In an October 27, 2016 letter, Rubuliak explained the RES Complaints in the context of the Complainant's disciplinary history. From 2010 to 2011, the Complainant was the subject of a previous investigation over similar complaints which resulted in a year-long removal from his department within the Faculty and a one-month unpaid suspension. The previous investigator rejected the Complainant's counterclaim of academic mobbing and Rubuliak expressed concern with the Complainant's commitment to adopting the same approach before the Investigator. She noted as follows:

At our meeting on Tuesday, you were reminded that your similar response in the previous investigation was not successful; that Ms. Janzen concluded that the conduct that you considered to be academic mobbing on the part of those complainants was in fact, "a sincere attempt to open a private and informal discussion with [you] about conduct that they considered to be inappropriate and harmful to them and the interests of the Department," and further held that "the Complainants have raised legitimate and valid concerns and that [your] claim of academic mobbing is without foundation."

If you go forward with this approach, the Investigator may well make findings of fact to the effect that you have engaged in conduct which contravenes the respectful workplace policy, and that you have no insight or remorse with respect to how that conduct has impacted your colleagues. As you were advised at our meeting, your previous discipline record relates to conduct that is, in our view, very similar to that alleged now, and it is likely to be relied upon if the Investigator finds misconduct. In that event, quite serious discipline could be imposed, up to and including termination of your employment. If discipline was to be grieved by the Association, and if the grievance was pursued to arbitration, discipline may be upheld.

We strongly recommend that you reconsider this approach to the Investigator. If you decide to adopt this approach despite our advice to the contrary, we recommend that, at the very least, you advise the Investigator of any witnesses to the conduct complained of who may be able to provide favourable evidence with respect to
the context in which your comments were made/conduct was exhibited.

The allegations against you, coupled with your discipline record, put you in a very difficult position, and it is not certain that we can successfully oppose any discipline meted out, even if you do acknowledge wrongdoing, and make a commitment to training and improvement in this area. We can say, however, that continuing to dispute every allegation as malicious, and criticizing everyone who makes a complaint, is very unlikely to be a successful approach. Therefore, as stated at the meeting, we recommend that you again review the complaints, and reconsider how some of your comments and conduct might be considered offensive. Although your positions may have been correct on the issues in dispute in those communications, we ask you to consider how your methods of communicating may be deemed to be disrespectful. If you truly cannot see how that might be the case, we recommend that you consider seeking some training on this issue to try to improve your interactions with your colleagues...

During the course of the investigation, the Investigator conducted 22 interviews, reviewed hundreds of pages of documents, and received and considered written submissions. Contrary to the Union's advice, the Complainant pursued his counterclaim of academic mobbing by the Faculty's administration before the Investigator. He attached to the application copies of two confidential drafts of his written submission to the Investigator. Those drafts demonstrate the Complainant's continued efforts to establish that he is the target of academic mobbing.

The Investigator issued her findings and recommendations in a report dated May 10, 2017. She determined that four of the five specific complaints constituted disrespectful behaviour in breach of the RES (the "Report"). The Investigator rejected the Complainant's allegations of academic mobbing, finding that they were unsubstantiated. As a result of the Report, the Complainant was suspended without pay for four months. The discipline was announced in a letter from the Employer's President dated September 1, 2017 (the "Disciplinary Letter") and the Complainant served the suspension between January 1 and April 30, 2018.

III. POSITIONS OF THE PARTIES

The Complainant says the Union acted arbitrarily when it refused to file a grievance because, in its view, it was unlikely to be successful at arbitration. He says the Union's decision on what will or will not be successful "seems irrelevant" to the filing of a grievance. The Complainant says he was not provided with any correspondence from the Union's Member Services and Grievance Committee ("MSGC") indicating it reviewed or responded to the files and serious concerns he conveyed to the Union throughout the investigation and to the date of his application under Section 12. He says the Union acted arbitrarily by deciding the RES is beyond review and by refusing
to file the policy grievance he requested. The Complainant says the Union's response to the RES is "arbitrarily dependent" on the identity of the transgressor and that the RES Complaints were "petty". He further says the Union ostracized and chose to make an example of him, which amounts to representation in bad faith.

The Complainant says he felt coerced and intimidated by the Union from May through August 2016, the four months leading up to the Disciplinary Letter and, as a result, has refrained from asking questions about his file. He says he was discouraged from responding to the Investigator's findings and coerced into accepting the four month suspension.

The Complainant says his discipline began on January 1, 2018 and, to date, he has yet to receive any correspondence from the Union or the MSGC on the matter. He says he understands that it is not up to the individual member to file grievances because that is the prerogative of the MSGC.

The Complainant says there is no avenue to appeal the Union's refusal to file a grievance, only to appeal a refusal to pursue a grievance to arbitration. Finally, he says any delay in filing his application under Section 12 was because he was waiting for the MSGC to respond to the Disciplinary Letter.

IV. ANALYSIS AND DECISION

A union's duty of fair representation is set out in Section 12 of the Code, which provides in part as follows:

12 (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith

(a) in representing any of the employees in an appropriate bargaining unit...

Section 13 of the Code permits the Board to proceed with a complaint filed under Section 12 only if there is sufficient evidence that Section 12 had been breached: *James W.D. Judd*, BCLRB No. B63/2003 ("Judd"), at para. 12.

Section 12 prohibits unions from representing their members in a way that is arbitrary, discriminatory or in bad faith. The Board's approach to the interpretation of the duty of fair representation is set out in the leading decision *Rayonier Canada (B.C.) Ltd.*, BCLRB No. B40/75, [1975] 2 Canadian LRBR 196, and endorsed at paragraph 7 of Judd:

...a union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of the employees. The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are
illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.

Section 12 contains a narrow right and protection: *Judd*, at para. 26. It is neither a forum for complaints against an employer nor an avenue to appeal a union's decision: *Judd*, at paras. 46 and 44.

The Complainant says the Union acted arbitrarily when it decided the RES was not reviewable. The Union's refusal to obtain a legal opinion or to file a policy grievance challenging the RES and its reasons for that refusal are set out in its September 26, 2016 letter. Put simply, the Union disagreed with the Complainant's concerns about the RES. A union is entitled to make decisions, even where individual members of the bargaining unit disagree, as long as its decision-making is informed by relevant workplace considerations: *Judd*, at paras. 39 and 42. The Complainant says the Union's response to the RES depends on who is alleged to have transgressed it. I find this is a bald assertion with no particulars to support it. The Complainant does not assert any facts on which I might conclude the Union's decision not to challenge the RES was motivated by inappropriate factors. The Complainant may disagree with the Union's decision not to challenge the RES, but that disagreement does not amount to an apparent breach of Section 12.

The Complainant suggests the Union did not properly represent him throughout the investigation into the RES Complaints. The Complainant says, in his mind, the substance of the RES Complaints were petty. While I note the Investigator found otherwise, I find this aspect of the Complainant’s application goes to the Employer's decision to conduct an investigation, not the Union’s representation of him. The Complainant says he felt coerced and intimidated by the Union in the months leading up to the investigation. I find this is a bald assertion that is not supported by any particulars and dismiss the allegations accordingly. I am satisfied on the basis of the documents attached to the application that the Union met with the Complainant, with and without counsel, to develop a response strategy to the RES Complaints and to assist him with the investigation process. Even if the Union's attempt to discourage him from adopting his preferred approach as a defence to the investigation could constitute an apparent breach of Section 12 (and I make no such finding), a review of the Union's October 27, 2016 letter demonstrates the Union considered relevant workplace factors when it told the Complainant that his decision to pursue the academic mobbing allegations was ill-advised. Specifically, the Union considered the nature of the RES Complaints, the Complainant's prior discipline for similar misconduct, and the previous Investigator's rejection of his academic mobbing allegation. I find the Complainant has not disclosed an apparent breach of the Code with respect to the Union's representation of him throughout the investigation process.
With respect to the Union’s response to the suspension, the Complainant says the MSGC is responsible for initiating grievances, not individual members. He suggests the Union breached Section 12 when the MSGC failed or refused to initiate a grievance on his behalf. While a union has carriage of a grievance and gets to decide how (if at all) to proceed, an employee is nonetheless responsible for making the union aware of the grievance and asking it to act on their behalf: *Judd*, at para. 34. In the present case, the Union was undoubtedly aware of the discipline imposed on the Complainant as a result of the investigation, but the duty of fair representation did not require it to initiate a grievance in the absence of a request to do so. The Complainant has not asserted any facts on which I might find he asked the Union to grieve his four month suspension or that the Union refused. Accordingly, I find this aspect of the application does not establish an apparent breach of Section 12, or, alternatively, is premature.

I find the Complainant’s application does not disclose an apparent breach of Section 12 with respect to any aspect of the Union’s representation. The application is dismissed pursuant to Section 13(1)(a) of the Code.

V. CONCLUSION

For the reasons given above, the Complainant’s application is dismissed under Section 13(1)(a) because it fails to disclose an apparent breach of Section 12.

LABOUR RELATIONS BOARD

“JENNIFER GLOUGIE”

JENNIFER GLOUGIE
ASSOCIATE CHAIR, ADJUDICATION