BRITISH COLUMBIA LABOUR RELATIONS BOARD

STEPHEN PETRINA

(the "Complainant")

-and-

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

(the "Union")

-and-

THE UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

PANEL: Andres Barker, Vice-Chair

APPEARANCES: The Complainant, for himself

CASE NO.: 2020-000434

DATE OF DECISION: September 18, 2020
DECISION OF THE BOARD

I. NATURE OF APPLICATION

The Complainant applies under Section 12 of the Labour Relations Code (the "Code"), alleging the Union breached its statutory duty of fair representation in relation to its response to an Employer policy addressing respectful behavior in the workplace. Pursuant to Section 13 of the Code, I must first determine whether the complaint demonstrates a case of an apparent contravention of Section 12.

II. BACKGROUND

The Complainant is a tenured professor in the Employer's Faculty of Education, and he is employed within a bargaining unit represented by the Union.

The Complainant says that on July 4, 2008, the Employer introduced a "Statement on Respectful Environment" (the "RES"). The opening summary of the RES states as follows:

The University of British Columbia envisions a climate in which students, faculty and staff are provided with the best possible conditions for learning, researching and working, including an environment that is dedicated to excellence, equity and mutual respect. The University of British Columbia strives to realize this vision by establishing employment and educational practices that respect the dignity of individuals and make it possible for everyone to live, work, and study in a positive and supportive environment, free from harmful behaviours such as bullying and harassment.

The RES outlines expectations for staff regarding what it defines as a respectful environment and explains the process for complaints and investigations made under the policy.

Within his complaint submissions the Complainant expresses various concerns with the RES. He states that since its introduction the Union has remained silent about it despite volumes of RES investigations and discipline meted out under the policy. The Complainant says the Union has not pursued any grievances under the RES and has not provided any information to members regarding the volume or nature of RES investigations.

The Complainant contrasts the Union's silence on the RES to actions by the Canadian Association of University Teachers (the "CAUT"), which he says has aggressively opposed the RES and other related policies across Canada, and has maintained and circulated multiple advisories to unions about issues with respectful workplace policies.
The Complainant has previously been subject to discipline brought pursuant to the RES. In September 2016 the Employer hired a third-party investigator to investigate complaints made against the Complainant under the RES. Following the investigation the Employer found the Complainant had breached the RES and issued a four-month suspension, which the Complainant served from January 1 to April 30, 2018. The Union did not agree to the Complainant's request to file a policy grievance relating to the RES, and the Complainant then filed a complaint under Section 12 of the Code against the Union due to its refusal. The Complainant also asserted in that complaint that the Union should have grieved his suspension despite a lack of a request by him for it to do so. The Board dismissed the complaint on July 3, 2018 (Stephen Petrina, BCLRB No. B93/2018 ("Petrina")).

On July 3, 2018, the Complainant emailed a Union representative asking that the Union immediately grieve his suspension. The Complainant's email included the following:

Given today's communication from the Labour Review Board regarding the filing of grievances, I am uninformed. As a longstanding, knowledgeable member of the [Union], I never once was told nor read that members must request that grievances be filed. I served on the Executive Committee for four years and never once was informed that members must make this request to the [Union]. Hence the timeline between 1 September 2017 and now. Perhaps this necessity for explicit request is a technicality and has no practical application to the [Union's] handling of grievances. Perhaps it does.

Nonetheless, I am requesting that the [Union] file a grievance on my behalf regarding the discipline to which I was submitted under the 1 September letter.

On September 18, 2018, the Union sent the Complainant a letter authored by the chair of the Member Services and Grievance Committee. Within the letter the Union stated as follows:

The Member Services and Grievance Committee of the [Union] met on September 10, 2018 and considered your request to file a grievance regarding the discipline imposed on you by President Ono, discipline which you served starting in January of this year.

After a careful and considered discussion regarding the facts of the case, the history of previous discipline for similar conduct and communications in the past, and the advice of legal counsel, the MSGC concluded that it will not file a grievance disputing the 4-month disciplinary suspension. It was the view of the Committee that the discipline was not excessive in light of the circumstances.

You have the right to appeal the decision of the MSGC to the Executive Committee. Please advise our Executive Director, Deena
Rubuliak, and she can provide you on how to make such an appeal.

The Complainant did appeal the decision to the Executive Committee. On November 28, 2018, the Union president on behalf of the Executive Committee wrote to the Complainant advising it concurred with the decision of the Member Services and Grievance Committee not to pursue a grievance.

The Complainant asserts he delayed “following up to the [Board]” with a Section 12 complaint: out of fear and intimidation by the Union and Employer; because he wanted to confirm whether the Union would introduce RES protections in the next round of collective agreement bargaining or through a RES letter of understanding; and because he felt he could no longer delay as the Union indicated it was “tracking and monitoring its members' critical speech patterns under the RES through April 2020”.

The Complainant also separately wrote to the Union president, vice-president, and executive director on September 22, 2018. Within the letter, the Complainant expressed displeasure with the Union's representation of him. The Complainant also raised concerns with matters relating to internal Union affairs that are unrelated to his discipline and suspension, including a request that the Union process a complaint under its Constitution and By-laws against the Union's former president.

Part of this letter includes assertions by the Complainant that the Union was giving confusing and arbitrary advice with respect to the RES, including advising him that “[i]t's not about what you say, it's about how you say it“. The Complainant asked the Union to obtain a legal opinion regarding the Union’s advice regarding the RES.

The Complainant says that on September 28, 2018, the Union responded as follows:

I am again informing you that we have not changed our response to your request, we will not be seeking an opinion on the RES. In fact, very few members overall have had to deal with any issues related to the RES since its implementation, though the Union remains committed to ensuring that when a member is investigated for a potential breach under that policy, it is not due to an exercise of their academic freedom. We will continue to monitor the application of the policy on a case by case basis.

The Complainant disputes the Union’s claim in its September 28, 2018 letter about the number of RES investigations. He states that in November 2018 the Employer responded to a Freedom of Information request to disclose the number of complaints made under the RES since 2016. The Complainant says that the Employer responded with minimal information, and merely indicated that between January 2016 and June 2018 two faculties reported conducting nine RES investigations. The Complainant asserts that extrapolating from that data to other faculties there were likely 100 RES investigations between 2016 and June 2018. The Complainant refers in his submission
to an unnamed employee who requested the Union file a grievance in February 2019 relating to an RES investigation, and the Complainant says this request was denied.

The Complainant makes the following factual assertions about the Union:

[Union] officers utilize the RES to threaten members critical of decisions and launch RES investigations of members articulating critical academic speech patterns. The [Union] established a suspicion that members that dislike critical speech patterns utilize a "snitch line" to the [Union] officers as well as [Employer] managers. I and critical colleagues have a tremendous fear of communicating with the [Union], as the union documents critical speech patterns. For instance, on 5 July 2019, to my questions about the use of non-union faculty labour on campus I was given a threatening response from the [Union] President, who documented my uses of "gullible," "mess," and "sold us out." (reproduced as written)

The Complainant says that on April 27, 2020 he used a "specific incident" and inquired with the Union about its alleged lack of action on the excessive use of non-union faculty labour on campus. He says he received a response from the president which stated that the Union expected all communications to be respectful. The Complainant states he interpreted this response as being quite threatening.

Within his submissions the Complainant states the RES has had a chilling effect on academic freedom, as he and his colleagues fear retaliation for commentary or feedback on workplace decisions and plans.

III. POSITION OF THE COMPLAINANT

The Complainant says the Union's representation is arbitrary in regard to the RES. He also says the Union is negligent in informing its members on RES policy matters and, as a result, the handling of RES cases is superficial. He says, in effect, the Union leaves members vulnerable and guessing at how to interpret the RES. I also infer through the Complainant's submissions that he believes the Union should have grieved his suspension when he asked it to do so following the Board's ruling in *Petrina*.

The Complainant states the superficiality of the Union's response and its representation means some members are arbitrarily investigated and disciplined while others escape investigation for the same transgression or expression.

The Complainant also states the Union "keeps its members ignorant by suppressing information regarding abuses and uses of the RES policy. Vulnerable members are uninformed about what transgressions of expression managers investigate and why investigations are pursued as opposed to other means of resolution, such as mediation".

He further says the Union carelessly and recklessly ignores the RES policy advisories and warnings from the CAUT and refuses to advise and inform its members.
The Complainant asserts it is serious negligence by the Union to make no attempt to inform members about the RES through a policy grievance, which could generate information through arbitration, or to inform members through RES advisories, which would mean more than arbitrary indifference to the concerns of CAUT and the Union's members.

IV. ANALYSIS AND DECISION

Section 12 of the Code dictates that a trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory, or in bad faith in representing any of the employees in an appropriate bargaining unit. The Complainant submits the Union acted in an arbitrary manner with respect to its representation.

Section 13 of the Code requires the Board to follow a procedure when an applicant has filed a complaint under Section 12 of the Code. The Board must first determine whether it considers the complaint to disclose a case that an alleged contravention has apparently occurred. If an apparent contravention is identified, then the Board will invite submissions from the union; otherwise it will dismiss the complaint.

The Board's approach to complaints under Sections 12 and 13 of the Code is comprehensively set out in James W.D. Judd, BCLRB No. B63/2003 ("Judd"). As noted in that decision, Section 12 confers a focused right and protection upon employees (Judd, para. 26). The Board in Judd held that "it is not the Board's role to decide if a union was right or wrong as long as the union has not acted in an arbitrary, discriminatory, or bad faith manner" (Judd, para. 30). Where a union decides not to proceed with a grievance due to relevant considerations, such as its own assessment that a grievance lacks sufficient merit, it is undertaking its job of representing its members as a whole and it is free to decide on the best course of action without that decision amounting to a violation of Section 12 (Judd, para. 42).

What the Complainant must show to succeed in his complaint is that the Union represented him in an arbitrary manner. Arbitrary conduct essentially encompasses three requirements. The union must: (i) ensure it is aware of the relevant information; (ii) make a reasoned decision; and (iii) not carry out representation with blatant or reckless disregard for an employee's interests (Judd, para. 61).

I first address the Union's decision not to grieve the Complainant's suspension. As noted in the background to this decision, the Complainant responded to the Board's decision in Petrina by specifically asking the Union to grieve his suspension. On September 18, 2018, the Union replied to this request by stating that after considering the facts of the case, the history of previous discipline for similar conduct and past communications, and the advice of legal counsel, it would not file a grievance. The Union upheld this decision on appeal on November 28, 2018.

The Complainant filed his complaint approximately 18 months after the Union rendered its final decision not to grieve his suspension. Complainants are expected to file a complaint in a timely manner. The is no time limit for filing a complaint under
Section 12 of the Code, but the Board expects a complaint to be filed within months, and for complainants to provide a compelling explanation for delay. Absent a compelling explanation, the complaint will be dismissed (Judd, paras. 96 to 97).

29 I find none of the reasons identified by the Complainant for his delay constitute a compelling explanation. The Complainant says he felt fearful and intimidated by the Union, though I find he has not demonstrated the Employer or Union acted in a way that would justify waiting 18 months to file a complaint. I also find the Complainant has not provided justification for waiting to see if the Union negotiated RES protections in the new collective agreement, and this assertion stands in contrast to all the other allegations made about the Union’s complacency with the RES. I further find the Complainant’s assertion that he was motivated to file the complaint because the Union was tracking and monitoring members’ critical speech patterns is a bare allegation, and in any event is not sufficiently related to a grievance of his suspension such that I can find it provides a compelling reason for waiting to file a complaint with the Board.

30 For the above reasons I find the Complainant has not provided a compelling explanation for the amount of time he waited to pursue a complaint of the Union’s decision not to grieve his suspension, and I therefore find this portion of the complaint is untimely and it is dismissed.

31 Even if I were to consider this portion of the complaint on its merits I would dismiss it. The Complainant has not provided sufficient reasons upon which I could find the Union acted in an arbitrary manner with respect to its representation in terms of how it assessed the specific facts of his case and determined it would not grieve his suspension. Rather, I find the Complainant only identifies a general disagreement with the Union’s decision. I therefore am unable to find an apparent case of a breach of Section 12 of the Code.

32 The Complainant also alleges the Union’s representation was arbitrary because it did not agree to his request that it file a policy grievance relating to the RES. The same allegation was dismissed by the Board in Petrina, and I am not satisfied there are new circumstances since Petrina was issued that would warrant differentiating the present iteration of this allegation from the one already litigated. Therefore, on the facts of this case, I find it constitutes an abuse of process for the Complainant to ask the Board relitigate the same allegation against the Union. For that reason this portion of the complaint is dismissed.

33 I would in any event also dismiss this allegation on its merits. The Board’s role on a Section 12 complaint is not to act as a final right of appeal over the general decision-making functions of a union. In other words, it is not my role to make my own judgment about ambiguities or inconsistencies in how the RES is enforced by the Employer and then dictate to the Union that it challenge the policy through the grievance procedure. Rather, I am limited to considering whether the Union has acted in a manner that is arbitrary with respect to its representation as it concerns its decision not to file a grievance over the RES. In the present case I find the Complainant has not demonstrated the Union’s decision not to file a policy grievance relating to the RES was
done in the absence of relevant information, was unreasoned, or was done with a blatant or reckless disregard.

In terms of the Complainant's other allegations, he says the Union has been negligent in informing its members on RES policy matters and has handled RES investigations superficially, and some members have been arbitrarily investigated and disciplined while others have escaped investigation for similar transgressions. I note that apart from limited details relating to one other employee I have no direct evidence from the Complainant on the Union's handling of any members' RES cases apart from his own. I also do not have evidence of how anyone other than the Complainant feels about the Union's communications regarding the RES. On this basis I am unable to find an apparent case of a breach of Section 12 in relation to how the Union has handled RES investigations relating to other members.

The Complainant also alleges the superficiality of the Union's communications and representation leaves him vulnerable and guessing as to how to interpret the RES. In the opinion of the Complainant the Union should be providing guidelines, workshops, or legal opinions that address the RES, in particular with respect to the statement attributed to the Union Executive that "[i]t's not about what you say, it's about how you say it".

However, the RES is the Employer's policy, not the Union's. In the present case I am unable to find it is the Union's statutory obligation to provide guidelines, workshops, or legal opinions to members about how the RES, a policy unilaterally created by the Employer, will be interpreted and applied by the Employer. I also find the Complainant's assertion that the Union is engaged in a deliberate campaign to keep its members ignorant by suppressing information regarding abuses and uses of the RES policy is a bare allegation, unsupported by the complaint particulars.

Finally, the Complainant says the Union has been negligent in ignoring RES policy advisories and warnings from CAUT. Although the Union is a member of CAUT it is nevertheless an independent organization, and I am unable to find any basis in Board policy for the assertion that the Union should be guiding itself according to CAUT advisories.
V. CONCLUSION

For the above reasons I find the complaint does not disclose a case that a contravention of Section 12 of the Code has apparently occurred. The complaint is therefore dismissed pursuant to Section 13 of the Code.

LABOUR RELATIONS BOARD

"ANDRES BARKER"

ANDRES BARKER
VICE-CHAIR