

**Labour Relations Board  
Saskatchewan**

**ELMWOOD RESIDENCES INC., Applicant v. SERVICE EMPLOYEES  
INTERNATIONAL UNION, LOCAL 333, Respondent**

LRB File No. 140-04; November 28, 2005

Vice-Chairperson, Angela Zborosky; Members: Bruce McDonald and Joan White

For the Applicant: Larry Seiferling, Q.C.

For the Respondent: Shawna Colpitts

**Employee – Confidential personnel – Coordinator of human resources and scheduling regularly accesses and uses confidential information for employer’s labour relations purposes – In particular circumstances of case, given findings on managerial functions of position, Board finds conflict of interest sufficient to exclude position from scope of bargaining unit – Board provisionally excludes coordinator of human resources and scheduling.**

**Employee – Managerial exclusion – Coordinator of human resources and scheduling completely and solely responsible for all aspects of recruitment and hiring process and responsible for scheduling and approving leaves – Performance of these two functions combined would result in labour relations conflict if coordinator of human resources and scheduling part of bargaining unit – Under circumstances of case, Board provisionally excludes coordinator of human resources and scheduling.**

***The Trade Union Act, ss. 2(f) and 5(m).***

**REASONS FOR DECISION**

**Background:**

[1] Elmwood Residences Inc. (“Elmwood” or the “Employer”) filed an application to amend the certification Order of the Board dated December 30, 1986 which designates Service Employees International Union, Local 333 (the “Union”) as the certified bargaining representative of all employees employed by Elmwood Residences Ltd., working at group homes operated by Elmwood Residences Ltd. in Saskatoon, except the executive director, the supervisor of group homes, the assistant supervisor of group homes, the house manager of the special needs home and all registered and graduate nurses and psychiatric nurses. The Employer seeks an amendment to the Order excluding the newly created position of “coordinator of human resources and

scheduling” pursuant to s. 5(m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “*Act*”) on the basis that this position has managerial and industrial relations duties and should therefore be determined to be out of the scope of the bargaining unit. In its reply, the Union states that the incumbent of the newly created position does not perform managerial duties but rather performs functions properly performed by a member of the bargaining unit. The application was filed on May 31, 2004, which is outside the 30-60 day open period set by s. 5(k) of the *Act*.

[2] The matter came before a panel of the Board for hearing on October 15, 2004. The parties joined issue with respect to the status of the coordinator of human resources and scheduling. The parties agreed that the jurisdiction of the Board on this application to amend was limited to determining whether the incumbent of this newly created position was an “employee” within the meaning of the *Act* and that a provisional order would be appropriate pursuant to s. 5(2).

[3] In its reply, the Union also states that the Employer has not employed a person in the out-of-scope position of “house manager of the special needs home” for a considerable period of time and requests that the Board amend the certification Order by deleting this exclusion. At the outset of the hearing of this application, the parties agreed that the excluded position of the house manager of the special needs home could be deleted from the certification Order pursuant to s. 5(j) of the *Act*.

#### **Evidence:**

[4] At the hearing, the Employer led evidence through Shelly Bartram, executive director and Laurie Appel, the incumbent in the disputed position. The Union responded with the evidence of Kelly Harrington, a staff representative of the Union involved in representing its members, grievance handling and collective bargaining, and Vivian Braun, the unit chairperson in the workplace who is responsible for attending disciplinary meetings, union-management meetings and collective bargaining.

[5] Elmwood operates a residential service for intellectually disabled adults. It serves approximately 150 clients through a variety of services and programs including a 150 bed lodge (the “Kinsmen Elmwood Lodge” or the “Lodge”), twelve group homes,

including a respite home, and a supported living program serving 18 people in the community. Ms. Bartram, as executive director, reports to the Employer's board of directors and is primarily responsible for overseeing the operation, for securing funding for the Employer's business and for supervising both in-scope and out-of-scope staff. Ms. Bartram testified that there are 165 employees employed at Elmwood, 154 of whom are within the scope of the Union's certification Order. The organizational structure of the Employer's operation is different for the Lodge and the group homes, although primarily so in relation to the type of bargaining unit positions contained within each workplace. There are also some slight differences in relation to the out-of-scope positions in the organizational structures of the Lodge and group homes. Reporting directly to Ms. Bartram as executive director in relation to both the Lodge and the group homes are the out-of-scope positions of director of support services, clerical support services, program director and director of finance. Within the group homes structure, a supervisor of group homes, also an out-of-scope position, reports directly to Ms. Bartram, while the assistant supervisor of group homes reports to that supervisor. Within the Lodge structure, lodge staff supervisors are also out-of-scope. The disputed position of coordinator of human resources and scheduling, which the Employer proposes is out-of-scope, reports to the program director in relation to the Lodge and to the supervisor of group homes in relation to the group homes. No one reports to the coordinator of human resources and scheduling.

**[6]** The Lodge and the group homes each operate with staff according to their needs. Some group homes have a 24 hour home operator while some group homes have coordinators working mornings, afternoons and on weekends. Both the Lodge and group homes have care workers and their shifts vary and include mornings, evenings, nights and weekend shifts. There are several different shift schedules for the various classifications depending on the particular clients and needs of the home or the Lodge.

**[7]** Ms. Bartram testified that the disputed position originated in late 2001 as a result of the assistant supervisor quitting her employment and the supervisor having excess workload. It was decided that a person would be hired to perform the scheduling function for the supervisor for three hours per day, 5 days per week, until an assistant supervisor could be hired. In February 2002 the Union indicated that it did not oppose

the filling of this position as it was temporary and part-time and because it was the Union's understanding that the duties were evolving, although limited at that time to scheduling and some orientation. The Union indicated that it would want to revisit the issue if the position became permanent and the full duties were established. At that time, the position was titled "coordinator of staff development/scheduling." Approximately one year later, in October 2002, the scope issue arose again between the Employer and the Union. The Employer, having found that the position was successful, informed the Union that it wanted to continue with the position and that the position should be out-of-scope. While the Union advised the Employer that it disputed the status of the scope of the position, the Employer proceeded to fill it on a temporary basis and a person was hired to the position in November 2002. It was classified as a temporary position given that there was no government funding for the position. The Employer thought that if it could demonstrate the position was necessary, it could secure further funding. The Union continued to dispute the scope of the position and, in January and February 2003, the Employer advised the Union that it wished to address the issue of scope through an application to the Board for a provisional order. Following this, the incumbent in the position left her employment and another employee was hired in July 2003. The parties further discussed the scope issue at a union-management meeting on March 5, 2004 at which time the Employer presented the Union with a revised job description for the "coordinator of staff development/scheduling" which was different from the last version of the job description provided by the Employer, primarily in that recruitment was added as a primary job function. On April 13, 2004 the Union wrote a letter to the Employer indicating that the Union disagreed with the Employer's contention that the position belonged out-of-scope and suggesting that the Employer must proceed with an application before the Board for a determination on scope.

**[8]** Ms. Bartarm testified that, after the Employer filled the position in November 2002, the hours for the position increased to a guarantee of four hours per day. The reason for increasing the hours was to have the incumbent in the position perform other functions, particularly recruitment. The Employer had hoped that funding would become available in order to further increase the hours of work for the position. Ms. Bartram explained that, before the Employer hired Ms. Appel, the position had evolved and the Employer wanted the position to have the full scope of a human resources position. Specific goals for the position included analyzing the schedules to

identify problems causing high overtime costs and turnover and to developing solutions to those problems. The Employer set the salary for the position at \$30,000.00 per year based on the guidelines of the government branch providing funding for full-time positions at the level of supervisor/coordinator. While Ms. Appel was hired in April 2004 on a full-time basis, she became permanent at the time that the funding for the position was approved in June or July 2004.

**[9]** Ms. Bartram testified that the disputed position was needed as a result of restructuring in the workplace. A number of the duties performed by the incumbent in the disputed position were previously performed by the supervisor of group homes (since 1976) and then by the assistant supervisor of group homes (since 1981 or 1982). Elmwood had recently expanded and the Union had raised quality of care issues. The Employer responded by changing the duties of the out-of-scope positions to provide more supervision, coaching and training. While Ms. Bartram testified that there were approximately 154 in-scope staff, Ms. Harrington gave evidence that there had been little change in the staff complement between January 2001 and January 2004 from 92 in-scope staff to 101 and it was her belief that the staff could not have increased so dramatically from January to October 2004. The Employer was not questioned concerning this issue. It was the Employer's evidence that the restructuring was not yet complete at the time of this hearing and that the disputed position would continue to evolve as the Employer obtained control over scheduling and recruitment/retention.

**[10]** Ms. Appel obtained employment with the Employer on April 20, 2004. Prior to working for the Employer, Ms. Appel had worked in the health care industry as a special care aide, activity director and administrative assistant. When Ms. Appel was hired by the Employer, she was told that the position was out-of-scope but that scope was an issue with the Union. She was not certain that she was hired for a term but in any event she believes she is now a permanent employee. She works 11:00 a.m. to 7:00 p.m., Monday to Friday and earns \$30,000.00 per year. Ms. Appel stated that she took this position with a view to becoming more involved in the human resources field on the "employer side." Ms. Appel testified that her job duties have evolved over the time she has spent in the position and that she has assumed greater responsibility as her capabilities have increased. The job description provided to her at the commencement of her employment stated as follows:

**POSITION TITLE:** *Coordinator Human Resources/Scheduling  
(Term Position)*

**RESPONSIBLE TO:** *Supervisor of Group Homes & Program  
Director*

**SCOPE:** *Scope under negotiation*

**HOURS OF WORK:** *Must be flexible according to operational  
needs.  
Full time*

**DUTIES AND RESPONSIBILITIES:**

*The Coordinator of Human Resources is responsible for recruitment, orientation and scheduling of Group Home staff; for providing/organizing training for all staff at Elmwood Residences, and participating in employee discipline and performance evaluations.*

**RESPONSIBILITIES:**

*The Coordinator of Human Resources/Scheduling is responsible for:*

- *Prepare Group Home Staffing Schedule in compliance with the requirements of the collective agreement and Elmwood's policies.*
  - *Scheduling relief up to 6 weeks in advance.*
  - *Make the least number of calls possible to ensure relief staffing is complete and carried out efficiently.*
  - *Plan relief in the most cost effective manner possible.*
  - *Recognizing and analyzing staffing problems, ensuring solutions are identified, communicated to supervisor and implemented in a timely manner.*
  - *Approves time off for Group Homes: Home Operator, Home Coordinator and Care Staff as per Collective Agreement and Overtime as required.*
  - *To recommend house closure to Assistant Supervisor or Supervisor of Group Homes with the appropriate back up information for them to make the decision.*
  - *To maintain accurate staff scheduling records that include call made, date, time, nature of leave, etc.*
  - *To maintain statistics regarding scheduling, and all time off categories. To analyze the stats 4 times per year and report the results to Supervisor/Assistant Supervisor of Group Homes, Program Director and Executive Director. Follow-up if a problem identified continues by bringing it to the attention of the above noted group.*

- *Interpret and apply the collective agreement for the purpose of scheduling group home staff for relief work such as vacation, stat holidays, sick days, Worker's Compensation, leave of absence, disability, etc. This includes contacting labour standard [sic], drafting language for collective agreement that applies to scheduling and coordinating with other managers regarding future needs.*
- *Recruitment for Group Homes. Plan and implement a recruitment strategy that addresses organization needs on an ongoing basis. This includes:*
  - *Recognizing when Home Operators, Home Coordinators, Care Workers need to be hired and to carry out all parts of the process in a timely fashion.*
  - *Attract appropriate resumes*
  - *Evaluating resumes of Home Operator, Home Coordinator and Care Workers – for interview selection*
  - *Hiring – makes decisions regarding hiring jointly with Assistant Supervisor of Group Homes*
- *Orientation:*
  - *To develop and organize orientation of new Group Home staff*
  - *To carry out policy orientation*
  - *To schedule and ensure in-home orientations are carried out*
  - *Maintain records of all of the above.*
- *Staff Development:*
  - *Identifying when training is necessary and making appropriate arrangements for all Elmwood staff.*
  - *Responsible for organizing and implementing educationals such as: WHMIS, Back Care for Group Homes, Food Safe.*
  - *To know the standards of training required by law by the organization.*
  - *Keep records of who is trained, who needs training, and number of turnover and training losses.*
  - *Be aware of cost involved in training and to keep costs to a minimum by scheduling staff appropriately, larger group sizes, etc.*
- *Participate in employee discipline and performance evaluation by:*

- *Providing information regarding compliance with policies to the Assistant Supervisor or Supervisor of Group Homes related to employee discipline or performance evaluation.*
- *Maintain records*
- *To ensure Elmwood's Occupational Health & Safety standards are in compliance with law by:*
  - *Participating in the O.H. & S. Committee*
  - *Ensuring staff are observing safe work practice, keep record of same, reporting infractions to the Supervisor of Group Homes and Program Director for follow-up.*
  - *Ensuring each home has an up-to-date fire procedures and floor plan posted and fire drills are carried out according to standards.*
  - *Participating in the supervision of Group Home Staff by:*
    - *Reporting infractions noted in O.H. & S. standards*
- *Provide management with information for bargaining and labor [sic] relations and recommend language related to time off, relief and Human Resources.*
- *Promote good working relationships with management, staff and outside agencies.*
- *Participate in management level decisions as required.*
- *Collect, review and submit payroll sheets to accountant monthly.*
- *Other duties as assigned.*

**REQUIRED QUALIFICATIONS:**

1. *Grade 12 plus 4-5 years related education/experience.*
2. *Excellent judgment*
3. *Experience in developing and delivering educationals to small groups.*
4. *Experience recruiting and supervising staff*
5. *Ability to work in a fast paced, changing environment.*
6. *Excellent verbal and written skills*



7. *Computer skills in windows, spreadsheets, collecting statistics.*

8. *Strong organizational skills.*

### **DESIRED QUALIFICATIONS**

- *Experience interpreting a collective agreement*
- *Experience/knowledge developing and implementing recruitment strategy.*
- *Experience/knowledge of assessing, planning and implementing an education strategy for an organization.*
- *Knowledge of Occupational Health & Safety Act & Regulations and experience in applying it.*

### **PROBATIONARY PERIOD: 6 months**

[11] Ms. Appel testified concerning her current job duties. She indicated that she spends the majority of her time on recruitment and hiring, having identified that there was a six-month turnover rate for care workers. She stated that she is independently involved in the entire process including advertising the positions, reviewing resumes, determining who to interview, interviewing first by telephone and then conducting an in-person interview, checking references, hiring and arranging for new employees' orientation. Ms. Appel testified that between June 20, 2004 and the time of this hearing, she hired approximately 30 individuals, 60 -70 % of whom have been care workers. In a document prepared by Ms. Appel and submitted to the Union prior to the hearing, Ms. Appel indicated that, between April 20 and September 20, 2004, she hired 38 people, which process consisted of reviewing 278 resumes, conducting 159 telephone interviews and 49 personal interviews and performing 49 reference checks and 38 orientations of new employees. In the document Ms. Appel also outlined the time spent on each part of the process of recruitment, hiring and orientation and, on the basis of the numbers she provided, it is apparent that she spent approximately 40% of her time on these functions. Ms. Appel acknowledged in cross-examination that she would not be involved in the selection process for filling out-of-scope positions and, although there have been no new hires in these positions since she became employed, she believes that she may be

included in the interview process. Ms. Appel has also organized and worked at a job fair.

**[12]** Ms. Appel is also involved in arranging for training and orientation. While she delivers the training in relation to the orientation in policies and procedures as well as WHMIS, she arranges for other training and in-home orientation by other staff or a third party. She has also developed a system to monitor training of staff.

**[13]** Ms. Appel testified that the area in which she spends the second greatest proportion of her time is scheduling, particularly around holiday time, although this duty might be performed as little as once per week. There is a master schedule for each group home because there are different classifications of employees working different hours depending on the client needs in each home and other seasonal changes. Ms. Appel copies these master schedules and sends out copies to the respective group homes. Requests for leave are then made from this master schedule. In examination-in-chief Ms. Appel indicated that she is responsible for preparing the vacation schedule and for approving sick leave when an employee calls in ill and that, to do so, she must interpret and apply the collective agreement. She stated that if she is not at work to approve the leaves, this duty falls to one of three out-of-scope nurses. In cross-examination Ms. Appel clarified that no one really approves sick leave but rather it is granted automatically upon request. Also in cross-examination, Ms. Appel was confronted with a memo dated May 7, 2004 from the supervisor and assistant supervisor of group homes to all group home staff which indicated that notification of illness must be given directly to either of them or to Maureen on evenings or weekends (either at work, by cell or at home) and that Ms. Appel "will not accept illness or absence calls." In response, Ms. Appel explained that, because she does not commence her work day until 11:00 a.m., it is necessary for employees to notify one of the three above named people in order that they can be immediately replaced on the shift for which they are calling in ill. Ms. Appel further clarified that the only leaves of absence she approves are those that are requested ahead of time using the proper leave of absence request form.

**[14]** Another memo dated May 4, 2004 from the supervisor and assistant supervisor of group homes to the staff indicated that "All requests for time off, exchanges, time sheets and availability forms should be given to Laurie or placed in her

mailbox.” Ms. Braun, for the Union, testified that there has been no change in this process of requesting planned leaves of absence since the inception of the disputed position. Ms. Braun stated that the Employer had a policy in place to determine whether requested leaves of absence would be granted. The policy prescribes that no greater than two employees of the same classification may have a leave on the same day. If a third employee requests a leave on the same day, the request is automatically denied and the employee is informed of the denial. In the past, when Ms. Braun had been denied a leave of absence she was told the reason for the denial was that there were already two employees off work that day. In cross-examination Ms. Braun acknowledged that the collective agreement does provide for employer discretion in determining whether to grant a leave of absence to an employee and it is open to the employee to file a grievance if the Union believes the Employer could have found a replacement for the employee so that the employee could take the leave. The collective agreement contains several provisions which govern the availability of leaves of absence. Annual vacation leave is governed by agreement between the employee and the Employer, subject to seniority, however, it is up to the executive director specifically to exercise her discretion whether to grant vacation leave requests between December 15 and January 2 of each year. There is some discretion which can be exercised by the Employer in relation to general leaves of absence, union leave and education leave, whereas other types of leave “shall” be granted by the Employer, including mourner’s leave, leave for a union position, jury or witness leave, maternity, adoption and parental leave, family illness leave, sickness leave and bereavement leave (although there remains some discretion regarding an extension of bereavement leave). In any event, the employee would have to establish eligibility for the leave requested, based on the requirement of the applicable provision of the collective agreement.

**[15]** Ms. Appel testified that she is also required to interpret and apply the collective agreement in relation to replacing employees who are ill or granted leaves of absence. She indicated that, in making those replacements, there is some discretion for management and that she exercises that discretion on her own. The collective agreement provides very specific procedures for the assignment of additional hours of work and overtime work to bargaining unit employees, based on seniority and their location of work, with very little exercise of discretion. In cross-examination she indicated specifically that she is required to follow the collective agreement in relation to

“call-ins” and the posting and awarding of positions. The collective agreement provides for the filling of vacancies based on seniority provided the applicant has the necessary qualifications and the ability to perform the work. Ms. Appel acknowledged that she does not have authority to decide not to replace an employee, but rather the exercise of her discretion is in relation to arranging for relief or moving a staff member to another group home (which she has done on approximately ten occasions). She also acknowledged that she does not replace every staff member on leave because some homes can operate with less than a full staff complement if staff are in short supply.

**[16]** Ms. Appel also indicated that she has made changes to the home operator schedules. She addressed this by developing five optional schedules for the home operators which she presented to management representatives. The management representatives accepted three of her options and presented them to the Union. The Union, which had developed two of its own (which happened to be the same as the other two that Ms. Appel prepared) took all five back to the membership and a vote resulted in the Union choosing one of its options (which happened to be the same as one of the options Ms. Appel had developed that was rejected by the management representatives). Ms. Appel was not directly involved in the negotiations between the Employer and the Union or in the selection of which schedule would be implemented. Ms. Appel has not yet been involved in any proposed changes to the care workers' schedules.

**[17]** Ms. Appel testified that she is also involved in disciplinary meetings however her involvement is limited to fact finding or providing employee information to management about absenteeism or sick leave usage prior to management's meeting with the employee. (In Ms. Appel's written document provided to the Union she indicated that she aids the supervisors in pre-disciplinary meetings by making recommendations and providing information although, in her testimony, she appeared to limit her involvement to providing information). Typically Ms. Appel would meet with the supervisor and assistant supervisor of group homes before those two would meet with the employee and the Union. Ms. Appel is aware that an employee will be disciplined before the Union and the employee are aware. In cross-examination Ms. Appel clarified her involvement in disciplinary matters. She stated that she rarely needs to perform any kind of investigation and that a disciplinary matter usually arises when one of the

employees contacts her with a complaint in which case she asks the employee to document the complaint. Ms. Appel then arranges a meeting with the supervisor and assistant supervisor to advise them of the complaint. There have been some occasions where an employee or a family member comes to the supervisor or assistant supervisor with a complaint and in those situations Ms. Appel has had to contact employees to find out the facts surrounding the incident. Ms. Appel stated that it is the supervisor of group homes who makes final decisions concerning discipline.

**[18]** With respect to grievances, Ms. Appel testified that she assumes that grievances that are filed by an employee or the Union go to the supervisor of group homes and, if they involve scheduling, the supervisor would seek information and input from her. In relation to a specific grievance that was filed concerning a scheduling error, Ms. Appel stated that the supervisor came to her for an explanation and asked her to write a letter to the accountant, after which she believes the employee was properly paid.

**[19]** Ms. Harrington, for the Union, testified that in approximately May 2004, she attended a disciplinary meeting with an employee and only the supervisor and assistant supervisor of group homes were present. She also stated that it was her understanding that the incumbent in the disputed position would not be involved in grievance or disciplinary meetings.

**[20]** Ms. Appel testified that she has been required to interpret the collective agreement in relation to various labour relations matters arising in the group homes and gave as an example her writing to the provincial government's Labour Standards branch for clarification on an issue affecting a blended classification where the Employer was combining two classifications – one classification that is subject to *The Labour Standards Act* and the other the home operator classification for which the Employer has an exemption for the 24-hour shift. She acknowledged in cross-examination that she has not yet performed labour relations on behalf of the Employer in relation to the Union.

**[21]** Ms. Appel does not ordinarily attend union-management meetings. In fact, Ms. Bartram stated that even the assistant supervisor might only attend these meetings as a recorder or support person. Ms. Bartram described one meeting at which

Ms. Appel attended. In relation to the proposed changes to the home operator schedules, Ms. Appel attended only for the purpose of presenting the options after which time she left the meeting. Ms. Harrington testified that the scheduling item was changed to become the first issue on the agenda for the meeting in order that Ms. Appel could present the options and then leave the meeting, while union and management representatives dealt with other labour relations issues. The labour standards issue, which Ms. Appel stated she was involved in, was also discussed later at this union-management meeting and not with Ms. Appel in attendance to address the issue. Ms. Harrington stated that the only person she has dealt with concerning the labour standards issue has been Ms. Bartram. Ms. Harrington stated that Ms. Appel was not present for any other union-management meetings. Ms. Braun, who has attended approximately 20 union-management meetings or disciplinary meetings on behalf of the Union, confirmed that the above mentioned union-management meeting where scheduling was discussed was the only such meeting Ms. Appel has attended.

**[22]** Ms. Appel also indicated that she is responsible for providing bargaining proposals to the Employer for issues that arise in her work; however, she has not yet done so because the parties have not entered into collective bargaining since she commenced employment. Ms. Bartram testified that as part of the collective bargaining process she would typically seek advice from the out-of-scope supervisors and it would be she and the two out-of-scope supervisors (one for the group homes and one for the Lodge) who would sit as the Employer's representatives at the bargaining table. Ms. Bartram stated that they are currently preparing for the next round of bargaining and that Ms. Appel has been part of a group which has been putting language together for the Employer's bargaining proposals.

**[23]** Ms. Appel is involved in payroll by reviewing employees' timesheets submitted to her which she verifies for accuracy against the schedule before she sends them to accounting for payment. Ms. Appel maintained that, if she does not sign off on the timesheets, the employees would not be paid.

**[24]** Ms. Appel testified that she is also responsible for collecting and tracking human resources data on matters such as absenteeism with the goal of improving schedules. She provided the example of the change to home operators' schedules

referred to earlier in which she was involved. To perform this duty she has access to the employee personnel files and shares an office with the assistant supervisor of group homes. Ms. Appel stated in cross-examination that she had tracked absenteeism as part of the scheduling function she performed in an in-scope position with a previous employer.

**[25]** Ms. Appel also sits as the Employer's representative on the occupational health and safety committee.

**[26]** Ms. Appel testified that in all of the positions she held prior to her employment with the Employer, she was a member of a union and was active in the union by holding the positions of trustee, treasurer, president and as a member of the provincial collective bargaining committee for the union. Ms. Appel testified that she believes she could not properly perform the duties of her current position if she were a member of the Union, particularly because of the duties she performs and what she hears while sharing an office with the assistant supervisor of group homes. She stated that, if she were in-scope, it would be a conflict of interest and create a huge moral dilemma for her because she believes that "unions are good." She indicated that she would feel great discomfort if she had to attend a union meeting to discuss an employee's termination which she had recommended. Also, given her involvement in providing bargaining proposals for the Employer, she feels she could not also develop and present bargaining proposals on behalf of the Union.

**[27]** Ms. Bartram was previously employed with the Saskatchewan Human Rights Commission for ten years in an out-of-scope position titled "human resources coordinator." She testified that her duties in that position were the same as those performed by the incumbent in the disputed position with the Employer, except that she did not perform a scheduling function. It was Ms. Bartram's belief that, if the disputed position were placed within the scope of the Union's certification Order, there would be a conflict of interest created as a result of the incumbent being a part of recommending the termination of in-scope employees and being involved in recommending bargaining proposals for the Employer. In addition, if the disputed position were in-scope, the Employer would have to relocate Ms. Appel's workspace because she should not have access to the personnel files. Although Ms. Bartram indicated that the incumbent could

perform some of the scheduling functions if she were in-scope, she would not be able to approve leaves of absence and the position would be limited to part-time. In addition, to separate the scheduling and recruitment functions would be inefficient because they are inter-related -- if there are problems with scheduling, the Employer may need to hire additional employees. In Ms. Bartram's opinion, it only made sense that the position would evolve to include recruitment and retention because an analysis of scheduling problems could only be done in the context of the recruitment and retention system.

**[28]** Ms. Bartram testified that there are three out-of-scope supervisors who earn less than the salary of \$30,000.00 per year paid to Ms. Appel. The collective agreement provides for the rates of pay of in-scope employees as follows: Group Home Operators - \$32,340 to \$36,260 per annum; Group Home Coordinators - \$22,150 to \$23,900 per annum; Care Workers - \$17,300 to \$19,250 per annum; and Recreation Workers - \$26,375 to \$29,650 per annum.

#### **Arguments:**

**[29]** Mr. Seiferling, on behalf of the Employer, filed several case authorities, all of which the Board has reviewed. He argued that Ms. Appel is out-of-scope of the proposed bargaining unit.

**[30]** The Employer advances the position that the disputed position is in essence a true human resources position and should be excluded because it is managerial and because the incumbent has access to confidential labour relations information about employees. The Employer states that the incumbent exercises managerial authority through decisions she makes on behalf of management on a day to day basis and because she interprets and administers the collective agreement. She is responsible for filling positions, granting or denying planned leaves of absence and calling in replacement employees, all of which, the Employer argues, requires the exercise of some discretion. A significant portion of her work involves recruitment and hiring and analyzing the retention problems of the Employer and developing programs, policies and procedures to address these issues. Another significant area of work for Ms. Appel is performing scheduling and, while she has been involved in the change to the home operators' schedules, it is expected that she will be involved in developing



changes to the schedules of other classifications. For the most part, these are duties that only Ms. Appel performs and she performs these duties on behalf of management.

**[31]** The Employer also argues that Ms. Appel has regular access to confidential information in employees' personnel files, has input into what may happen to employees as well as advance knowledge of any disciplinary action to be taken against employees. She also sits as the Employer's representative on the occupational health and safety committee and is responsible for generating bargaining proposals for the Employer.

**[32]** The Employer argues that Ms. Appel would be placed in a conflict of interest should her position be included within the scope of the Union. It is not possible for her to formulate bargaining proposals for each of the Employer and the Union and it would be impossible for her to support a union member in a grievance or complaint concerning a decision that she made or had input into, whether it concerned the granting of a leave or disciplinary action. Mr. Seiferling urged the Board to accept Ms. Appel's uncontradicted evidence on the managerial nature of her work and her perceived conflict of interest should her position be placed in the bargaining unit because she has worked in workplaces where she was a member of a union and has been actively involved in a union.

**[33]** It was also argued that Ms. Appel's position is continuing to evolve and she is expected to perform more human resources functions. The origins of the duties she now performs are from other management positions and it could not be viewed that she has taken a job away from a union member.

**[34]** Referring to the decision of the Board in *Westfair Foods Limited v. United Food and Commercial Workers International Union*, [1981] Feb Sask. Labour Rep. 66, LRB File No. 085-80, where the status of first line managers was analyzed, Mr. Seiferling argued that a relevant consideration is whether the job duties put Ms. Appel in a conflict of interest with the bargaining unit employees. It was argued that Ms. Appel's position meets the indicia of a managerial position because of the hiring she performs, her administration of the collective agreement and her role in the grievance process which is to justify her exercise of discretion and her representation of the Employer's

interests. In addition, the Employer argues that it matters not what percentage of the day one performs certain managerial functions but rather what the incumbent is *responsible for* 100% of the workday.

**[35]** In *Service Employees International Union, Local 333 v. Lutheran Sunset Home Corp. at Lutheran Riverside Terrace*, [2002] Sask. L.R.B.R. 685, LRB File No. 184-02, it was emphasized that the cases fall to be determined on their facts with the primary question being one of whether an insoluble conflict exists. The case also stands for the proposition that one should examine the history of the duties of the position and the rate of pay for the work performed to determine whether the position is more closely aligned with management or the bargaining unit. Also, in reference to the Board's decision in *Saskatchewan Indian Federated College Inc. v. University of Regina Faculty Association*, [2001] Sask. L.R.B.R. 657, LRB File No. 049-01, Mr. Seiferling argued that a relevant indicator of whether the employee is performing functions of a managerial character is whether the incumbent has the ability to affect the economic lives of bargaining unit employees. The Employer also relied on the following cases: *International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 v. Rural Municipality of Estevan No.5*, [2002] Sask. L.R.B.R. 94, LRB File No. 006-02; and *Canadian Union of Public Employees, Local 4449 v. Glencairn Child Care Co-operative*, [2001] Sask. L.R.B.R. 510, LRB File No. 092-01.

**[36]** The Union filed a written brief and referred to several case authorities, all of which the Board has reviewed. Ms. Colpitts argued that Ms. Appel is an "employee" within the meaning of s. 2(f)(i) of the *Act* and does not fall within either of the exceptions commonly referred to as the managerial and confidential exclusions. Specifically, Ms. Appel does not actually perform functions of a managerial character or actually exercise authority because her primary responsibilities are to act in the capacity of a scheduler and administrative assistant. She acts as a resource for the maintenance of the schedule and manages the replacement of employees taking leaves of absence by following the rules laid out in the collective agreement and workplace protocol, all of which is more in the nature of administrative functions. The Union also pointed out that unplanned leaves such as sick leave or emergency leave are not managed by Ms. Appel at all. The Union pointed out that, although the Employer points to a crisis in turnover rates of care workers, only the home operators' schedules have changed and not the

care workers' schedules. The Union also characterizes Ms. Appel's recruitment functions as administrative tasks. The Union referred to the *Lutheran Sunset Home* decision, *supra*, and *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority* and *Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96 (the "SLGA case"), which state that the primary responsibilities indicative of managerial status are the authority to discipline, discharge and influence labour relations while the secondary managerial functions include the authority to hire, promote and demote. The Union argues that Ms. Appel should not be excluded merely on the basis that she performs a secondary responsibility of hiring employees.

**[37]** The Union also relied on *Rural Municipality of Estevan No. 5, supra* to support the proposition that an employee is not managerial even if he or she performs supervisory functions such as "directing the workforce, training staff, assigning work, approving leaves and the scheduling of work."

**[38]** The Union also argued that Ms. Appel does not act in a confidential capacity with respect to the Employer's labour relations. In support of her argument, Ms. Colipitts referred to the decisions of the Board in *Canadian Union of Public Employees, Local 1660 v. The Board of Education of the Battlefords School Division No. 118*, [2002] Sask. L.R.B.R. 556, LRB File No. 022-02; and *Canadian Union of Public Employees, Local 4552 v. Deer Park Villa Inc.*, [2002] Sask. L.R.B.R. 488, LRB File No. 159-02. A requirement to keep information confidential does not warrant grounds for exclusion as many employees are subject to this duty. The Union also pointed out that in order to be excluded on this basis the access to confidential information must be "regular" and that this has not been demonstrated with respect to the disputed position.

**[39]** The Union also referred to *Regina District Health Board v. Canadian Union of Public Employees*, [2001] Sask. L.R.B.R. 466, LRB File No. 054-00, as authority for the proposition that the high volume of work activity related to confidential labour relations was a relevant factor for the exclusion of a confidential secretary. In that case it was also observed that it may be appropriate in some cases to transfer the managerial functions and confidential capacity functions to other out-of-scope positions where the duties are not significant, although the Board did not do so in that case. The

Union argued that in this case, non-administrative functions could be transferred to an out-of-scope employee.

[40] The Union argued that Ms. Appel's wage is also not reflective of out-of-scope status, falling between the annual salaries of the home operator and recreation worker, two in-scope positions. The wage for the disputed position is not reflective of a higher level of duties.

[41] Concerning a potential for conflict with members of the bargaining unit, the Union answered that it did not challenge Ms. Appel's evidence on this point because it did not perceive such a conflict of interest. The Union suggests that there is no conflict because the decisions Ms. Appel makes are not independent ones with respect to discipline, promotion/demotion, performance evaluations, granting leaves and calling in replacement employees. The Union acknowledges that there may appear to be some discretion in granting leaves, but the Employer has always followed the policy of not allowing more than two employees in the same classification to be absent at the same time and the Union has never grieved the denial of a leave in these circumstances.

[42] Ms. Colpitts argued that to include Ms. Appel in the proposed unit would be in accordance with the Board's general policy to provide employees in the workplace with as wide an access as possible to the benefits of collective bargaining: see, *Glencairn Childcare Co-operative, supra*.

### **Statutory Provisions:**

[43] Relevant provisions of the *Act* include the following:

2 *In this Act:*

(f) "employee" means:

(i) a person in the employ of an employer except:

*(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*

*(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*

5        *The board may make orders:*

*(j) amending an order of the board if:*

*(i) the employer and the trade union agree to the amendment; or*

*(ii) in the opinion of the board, the amendment is necessary;*

*(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*

*5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*

*(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

### **Analysis and Decision:**

**[44]**        We must determine whether Ms. Appel, in the position of coordinator of human resources and scheduling, is excluded from the bargaining unit. The Employer asserts that Ms. Appel is excluded under s. 2(f)(i)(A) because her “primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character” and under s. 2(f)(i)(B) because she is “regularly acting in a confidential capacity with respect to the industrial relations” of the Employer. The Union counters that managerial functions are not Ms. Appel’s primary responsibility, if they are her

responsibility at all, and that she does not act in a confidential capacity with respect to the industrial relations of the Employer. The onus is on the Employer to establish on the balance of probabilities that Ms. Appel is not an “employee” within the meaning of the *Act*.

**[45]** Although many of the Board decisions on exclusion state that there is no single test determinative of whether an employee should be excluded on the basis of managerial responsibilities, the observation of the Board in *City of Regina v. Canadian Union of Public Employees, Local 21, and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, is often referenced. At 158, the Board stated:

*At the heart of the decision the Board must make is the question whether in any particular case the duties which are attached to a position are of a kind and extent which would create an insoluble conflict between the responsibility which someone performing managerial functions owes to an employer, and the interests of that person and his or her colleagues as members of a bargaining unit. Because such a conflict is in many cases a matter of degree, it is impossible to state any one test which can be used to determine whether a particular person falls on one side of the line or the other.*

**[46]** In *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97, the Board observed, at 547-48:

*This Board has interpreted this definition as a direction to make exclusions on as narrow a basis as possible. It is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a managerial or confidential nature. The provision requires that, in order for a person to be excluded, the functions which are the basis of the exclusion must be the major focus of the position.*

*This does not mean that the Board has not been confronted with the questions of degree which were addressed by the Canada Board in some of the cases referred to above. The rationale which has often been articulated as the impetus for the exclusion of persons performing managerial or confidential functions is, as we have seen, the possibility of an insoluble conflict of interest between the responsibilities of these persons in carrying out their duties, and*

*their inclusion for purposes of representation with a group of employees whose terms and conditions of employment may be materially affected by their performance of those duties. Sensitivity to such potential conflict has led the Board, on occasion, to exclude positions on the basis that certain key responsibilities inevitably pose the risk of conflict, even if they may not in themselves occupy the preponderant amount of working time of the incumbents.*

*(emphasis added)*

[47] Several decisions were brought forward by the parties in support of their respective positions on the issue of exclusion on the basis of the exercise of managerial authority. In *Lutheran Sunset Home, supra*, the Board commented that the proportion of work time spent performing managerial functions is not necessarily determinative of the issue and, with respect to the relevance of job descriptions, stated at 692:

*Position descriptions often bear limited similarity to the way the job is actually performed. Indeed, such descriptions often contain duties and responsibilities that, on the face of the description, the incumbent may independently exercise, but which in practice may only be exercised with the approval of, or made as a recommendation to, a superior. In the end, it is the real performance of the job that is important.*

[48] While the work the incumbent performs is more important than a job description for the purposes of assessing whether an employee is performing functions of a managerial character, job descriptions can provide some insight into what duties and responsibilities the employee in the position is expected to perform, particularly if the employee has not occupied the position for a sufficient length of time or if occasion to perform certain duties has not yet arisen (see: *Saskatchewan Indian Federated College, supra*).

[49] In the SLGA case, while examining whether a person's job functions and responsibilities had the potential to place the person in a conflict of interest with members of the bargaining unit, the Board outlined a focused approach to the determination, at 854:

*The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as*

*directing the workforce, training staff, assigning work, approving leaves, scheduling of work and the like are more indicative of supervisory functions which do not, in themselves, give rise to conflicts that would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.*

**[50]** In *Saskatchewan Indian Federated College, supra*, the Board considered whether the incumbent in the disputed position would play a central role in collective bargaining or in the formation of the Employer's bargaining strategies. There was no indication of the same in the job description and, with no evidence led in that regard, the Board concluded that there was no current conflict of interest in placing the employee in the bargaining unit.

**[51]** One of the issues raised through the evidence is that of Ms. Appel's wage rate. In *Lutheran Sunset Home, supra*, the Board stated at 693:

*While it is not an immutable rule, wage rates in a work place generally reflect the relative responsibilities of the jobs in the workplace. Skilled, technical, professional and managerial staff are usually paid somewhat to a lot more than unskilled or experienced labour. Lead hands without managerial responsibility are generally paid a modest amount more than those they supervise. Ms. Wells's present wage is \$9.00 per hour, while that of Ms. McKeown is \$16.90 per hour – in excess of some 80 per cent more. In contrast, Ms. Wells's wage rate is less than that for an in-scope starting cook, barely more than that of a server with about 4 years service and about the same as a dishwasher with similar service.*

**[52]** Prior to concluding whether the position is appropriately excluded, it is also necessary to examine the possible basis for exclusion under s. 2(f)(i)(B). In *Saskatchewan Government and General Employees' Union v. Rural Municipality of Meadow Lake, No. 588*, [2001] Sask. L.R.B.R. 782, LRB File No. 140-01, the Board had occasion to consider whether two positions were excluded on the basis of this provision of the Act in the context of a certification application. At 792 to 794, the Board reviewed several authorities and outlined the Board's position in relation to the interpretation of this provision:



[35] In considering whether to found an exclusion under s. 2(f)(i)(B) of the Act, the Board must be satisfied that the person regularly acts in a confidential capacity with respect to the industrial relations of the Employer. It is irrelevant to the Board's determination whether the person has mere access to such information or acts in a confidential capacity with respect to other kinds of information, for example, matters related to competitive positioning in the marketplace.

[36] The Board explained the policy underlying such exclusions in the Canadian Union of Public Employees, Local 882 v. City of Prince Albert, [1996] Sask. L.R.B.R. 680, LRB File No. 266-94, at 683, as follows:

*The exclusion which is contemplated in s. 2(f)(i) of the Act is aimed at preventing any conflict of interest which might arise for an employee who regularly processes or handles information of a sensitive nature which is connected with the industrial relations of the employer.*

[37] However, because of the deprivation of union representation for the employee involved, the Board has consistently held that it is only for good and compelling reasons that exclusions on this basis should be allowed. The importance of this concern was described by the Board in University of Regina (MacKenzie Art Gallery) v. Canadian Union of Public Employees, Local 1975, [1995] 1<sup>st</sup> Quarter Sask. Labour Rep. 213, LRB File No. 266-94, at 217, as follows:

*The determination of whether a position should be excluded from the bargaining unit on the grounds argued in support of the application must be approached with caution. The rationale for the exclusion of employees who act in a confidential capacity is that an employer is entitled to a limited amount of technical and clerical support for the industrial relations activities, without having to be concerned that the employees who provide that support will be torn between their responsibility to their employer and their role as members of a bargaining unit. Unlike persons who are excluded on the grounds they perform managerial functions, those who act in a confidential capacity generally have little independent authority. It is necessary to be sure, before deciding to exclude such an employee, that the confidential role she performs is of some significance, as the cost to her is the loss of representation by a trade union.*

[38] The Board has recognized that an employer requires a modicum of administrative resources and clerical support during the bargaining process and in carrying out its responsibilities under a collective agreement. In Hillcrest Farms Ltd., supra, the Board stated, at 600:

*In the case of employees excluded because they act in a confidential capacity, on the other hand, the purpose of the exclusion is to reinforce the collective bargaining process by providing an employer with administrative and clerical resources which will permit decisions to be made about bargaining or about the terms and conditions of employment of employees in an atmosphere of candor and confidence.*

[39] However, exclusions on this basis are not made lightly. As the Board stated in E.C.C. International, supra, at 277:

*... the exclusions will not be considered on the basis of some vague notion of what constitutes confidentiality in this context. The board is alert to efforts by an employer to deny any employee access to trade union representation because of some generalized concern about employee discretion.*

[53] Also, in *Communications, Energy and Paperworkers Union of Canada v. E.C.C. International Inc.*, [1998] Sask. L.R.B.R. 268, LRB File No. 362-97, the Board commented on the difference in the assessment of an exclusion under s. 2(f)(i)(B) compared to 2(f)(i)(A), at 277:

*Unlike the instance of managerial exclusions, the Board has not required that the duties performed in a confidential capacity be the primary focus of the position, although they must be performed "regularly" rather than incidentally.*

. . .

*A further principle which bears upon the situation is that it is not necessary that all or a substantial portion of the position's work time will be spent on such confidential matters, but rather that such duties will be regularly performed, genuine and significant, though not necessarily greatly time-consuming.*

[54] The approach of the Board to determine whether an exclusion will be made on the basis of a claim that the employee acts in a confidential capacity was clearly enunciated in *Service Employees' International Union, Local 333 v. Metis Addictions Council of Saskatchewan Inc.*, [1993] 3<sup>rd</sup> Quarter Sask. Lab. Rep. 49, LRB File No. 002-93. The Board does not routinely allow the exclusion of one employee on this basis at the request of the employer and each case must be examined on its merits before a determination is made to exclude an employee from access to collective bargaining.

[55] In *Community Health Services (Saskatoon) Association Ltd. v. Canadian Union of Public Employees, Local 974*, [2000] Sask. L.R.B.R. 326, LRB File No. 246-98, in the context of an application for certification, the Board considered whether to exclude a confidential secretary whose primary job duties were to attend executive committee meetings (which included discussions related to the employer's labour relations), to take minutes and to prepare and circulate minutes and background information prior and subsequent to weekly meetings. The employee in the position was also responsible for typing, distributing and filing material related to collective bargaining and grievances, and for personnel files. The evidence established that an administrative assistant, who was accepted to be out-of-scope, had insufficient time to devote to these work duties. In-scope staff had performed these duties from time to time, although they felt uncomfortable given the confidential nature of some of the discussions. The Board, in determining that the position should be excluded, stated at 330 – 331:

*In the E.C.C. International Inc., case, supra, the Board noted that the purpose of the confidential exclusion under s. 2(f)(i)(B) was to prevent a conflict of interest between an employee, whose job requires him or her to have access to confidential information related to his or her employer's labour relations, and his or her membership in the Union. The provision also permits an employer to freely discuss labour relations issues with a group of managerial and confidential employees without fear that the discussions will be inappropriately disclosed. The exclusion is granted with caution because of the serious consequences for the person holding such position – they are not permitted to belong to any trade union. In this regard, the Board must*

*ensure that the job functions entail regular exposure to confidential labour relations information.*

*In any workplace, the amount of confidential labour relations work will vary from time to time depending on the issues at play in the workforce, the state of collective bargaining, the relationship between the union and the employer, and other factors.*

...

*In our view, the Clinic has established that the proposed position will have access to confidential labour relations information and will be regularly exposed to confidential labour relations discussions among the management team. The person who occupies the position will be required to act in a confidential capacity with respect to the labour relations of the Clinic by keeping minutes of IPPE meetings, circulating and compiling confidential information and being present during confidential discussions among management relating to labour relations.*

**[56]** In the *RM of Estevan* case, *supra*, relied on by the Union and the Employer in this case, involving the status of a foreman, the Board did not exclude the foreman on the basis of either s. 2(f)(i)(A) or 2(f)(i)(B) of the *Act*. The Board found that the foreman did not exercise the functions of hiring, firing or disciplining and that supervisory functions such as directing the workforce, training staff, assigning work, approving leaves of absence and scheduling of work, did not place the employee in the category of management. Considering the issue of whether the employee acted in a confidential capacity with respect to the employer's labour relations, the Board found that the employee was not involved in the negotiation of wages, benefits or other working conditions. The employee only relayed complaints by employees to the council and made joint submissions with the employees concerning wages, however it was council that made the ultimate decisions on those issues.

**[57]** The Employer asserted that, by reason of Ms. Appel sharing an office with the out-of-scope assistant supervisor of group homes and the presence of the employee personnel files in that office, Ms. Appel's position should be excluded on the basis of confidential capacity. The Board addressed

the issue of having access to employee files in the *R.M. of Meadow Lake, No. 588* decision, *supra*, and stated at 796:

*The last item is not particularly important. In most enterprises of any size with a unionized clerical staff, persons in the bargaining unit have access to employee files and personal employee information, including absenteeism, payroll and disciplinary records. The duty to keep such information confidential is simply part of employees' jobs, the breach of which duty may attract disciplinary sanction. The crux of the exclusion under s. 2(f)(i)(B) of the Act is that the position in question regularly acts in a confidential capacity with respect to the Employer's industrial relations. While on a broad interpretation, the clerical administration of employee personal information and records is part of the wider gambit of "industrial relations" to the extent that the concept includes human resources, it is not on the simple access to such records as part of one's job that the exclusion rests. Rather, it is the reasonably necessary involvement in, or access to, confidential information or discussions relating to negotiations, bargaining strategy, the internal considerations and adjustment of grievances, internal discussions regarding collective agreement interpretations, and the strategic administration of the collective agreement, on which the exclusion is most often based. We use the phrase "reasonably necessary" because it is the policy of the Board in keeping with the object and purpose of the Act is to ensure that access to collective bargaining is open to as many employees in a proposed bargaining unit as possible. That is, an employer cannot obtain an exclusion on this ground by arbitrarily adding such duties and authority to a position when it is not reasonably necessary to the prudent management of the workplace.*

**[58]** In this application we are presented with the somewhat unusual circumstance of a position which might not be excluded on the basis of either s. 2(f)(i)(A) or 2(f)(i)(B) considered alone, making it necessary for us to determine whether exclusion is appropriate on the basis of whether the position's primary functions are to exercise managerial authority and perform functions of a managerial character *and* whether the incumbent in the position acts in a confidential capacity with regard to the Employer's labour relations. In our view, it is appropriate to exclude the position of coordinator of human resources and scheduling from the bargaining unit on the basis of a combination of these factors.

**[59]** In the present case, it is clear that Ms. Appel does not actually exercise the authority to discipline or discharge employees. That decision is made solely by the supervisor of group homes. Ms. Appel has some involvement in the disciplinary process through receiving complaints, fact finding or investigation, answering inquiries about employees from management and providing input into possible discipline, however, her functions are more supervisory in nature and in exercising them she is not directly responsible for the decision to discipline employees. Other tasks which Ms. Appel performs which are merely supervisory in nature and would not form the basis for exclusion of the position include her activities in relation to payroll, orientation and staff development, all of which are incidental functions of her position.

**[60]** Ms. Appel has, however, undeniably exercised an authority to hire staff – approximately 38 employees in a five-month time frame. Although this is considered a secondary function indicative of managerial status, according to the SLGA case, it is apparent that the process of selection comprises a majority of her work time and is a primary focus of her duties. The job description indicates that it is Ms. Appel's responsibility to identify whether there is a need to hire a care worker, home operator or home coordinator and the Board accepts this in absence of evidence to the contrary. The job description also indicates that the decision to hire is made jointly with the assistant supervisor of group homes but Ms. Appel testified that she makes the hiring decisions on her own without conferring or consulting with anyone. Her authority to hire went unchallenged and we accept that she has the independent authority to make the hiring decisions. The evidence was very clear that Ms. Appel is completely and solely responsible for all aspects of the recruitment and hiring process.

**[61]** The other primary focus of Ms. Appel's duties is in relation to scheduling. Ms. Appel is not only responsible for preparing the work schedules for a very large number of employees, she is also involved in approving leaves of absence and replacing employees who are on planned leaves of absence. While there is a master schedule that is used to guide the scheduling function, it is apparent that Ms. Appel is primarily responsible for maintaining the schedule by replacing employees on planned leaves. To do so she is required to follow the terms of the collective agreement and exercise her discretion appropriately in relation to both granting leaves of absence and, to some

extent, replacing employees on leave. While the Union made much of the fact that Ms. Appel does not take calls in relation to leaves of absence due to illness nor does she replace those employees on sick leave, the fact is that the reasons for having other out-of-scope staff perform this function are practical. Ms. Appel's hours of work do not permit her to receive these calls and make the replacements before the shifts begin that day.

**[62]** The Union argues that Ms. Appel does not exercise discretion when granting various types of leave under the collective agreement because there is an unwritten practice in place at Elmwood that no more than two employees of the same classification may be off work at the same time. We disagree that such a practice eliminates her exercise of discretion in this regard. In addition to an employee being required to establish eligibility for the leave he or she is seeking, there are a number of leave of absence provisions in the collective agreement where it is clear that the Employer must exercise discretion in determining whether it is able to grant a leave. Ms. Appel's failure to grant a leave for either of these reasons could attract a grievance by the Union and place Ms. Appel in a conflict of interest with members of the bargaining unit. Merely because there have never been any grievances over the failure of the Employer to exercise this discretion appropriately does not prevent this possibility in the future should the Union believe that the Employer could have granted a leave or that the employee met the basic requirements for the leave.

**[63]** While scheduling alone would be insufficient to warrant placing Ms. Appel outside the scope of the bargaining unit, as it is often considered a supervisory function, Ms. Appel has the ability to influence the terms and conditions of employment of the employees through the combination of performing her functions of recruitment/hiring and scheduling/approving leaves. These functions are exercised to the extent that there would be a labour relations conflict if she were part of the bargaining unit.

**[64]** An important factor in reaching our conclusion is that the scheduling and recruitment functions were previously performed by other excluded positions, including the assistant supervisor of group homes and the supervisor of group homes. The position which Ms. Appel currently occupies was initially created out of the need of the Employer to have someone performing the scheduling function after the assistant

supervisor left her employment with Elmwood. When another assistant supervisor was hired, this duty continued to be performed by the incumbent of the newly created position and, due to restructuring in the workplace, by the time Ms. Appel obtained the position, the scope of the position had expanded, primarily by adding recruitment functions. Due to growth of Elmwood, the Employer began to focus on quality of care issues and the assistant supervisor and supervisor were expected to spend more time on supervision and coaching. In addition, the Employer wanted a greater focus on recruitment in order to attempt to hire and retain more qualified employees. Ms. Appel therefore performs no duties that were previously performed by bargaining unit members. Another distinguishing factor from many of the cases where the employee in the disputed position performs scheduling is that Ms. Appel does not perform work alongside those she schedules.

**[65]** The decision of the Board in *United Food and Commercial Workers, Local 1400 v. 610539 Saskatchewan Limited, o/a Heritage Inn, Saskatoon* [2002] Sask. L.R.B.R. 460, LRB File No. 161-02 is distinguishable. In that case, the Board determined that the position of hotel housekeeping supervisor was within the scope of the proposed bargaining unit. The incumbent's main job duty was to inspect the rooms cleaned by the three day supervisor housekeepers and eleven housekeepers and, while she also prepared the schedule (thereby affecting the number of hours an employee worked), directed the housekeeping staff and provided verbal warnings regarding quality of work, she could not issue more serious discipline without the approval of a manager. Also, she did not make decisions on hiring independently, having only the responsibility to conduct interviews, perform reference checks and make recommendations to management concerning who to hire. In the present case, it is significant that Ms. Appel performs the hiring function entirely independent of the out-of-scope management in the workplace. An additional distinguishing factor is that Ms. Appel does not perform work alongside those whom she hires and schedules, the primary focus of her position being to hire and schedule employees of other classifications.

**[66]** While the Board accepts the proposition of the Union that exclusions should be made on as narrow a basis as possible, we do not find Ms. Appel's performance of managerial tasks to be incidental or occasional although, in relation to some of the occasional functions Ms. Appel performs, the nature and degree of those



tasks makes exclusion appropriate. An occasional task which Ms. Appel performs which is of a nature and degree that it is indicative of managerial responsibility, even though it does not occupy a substantial portion of her time, includes the filling of vacancies under the collective agreement where Ms. Appel would be required to exercise her discretion concerning the requirement of whether the employee was properly qualified for the vacancy. Such a decision would have an economic impact on employees.

**[67]** One additional factor which bears mentioning is that Ms. Appel's wage rate reflects that of an out-of-scope position. The evidence indicated that Ms. Appel's wage rate was set based on advice received from the Employer's government funding branch concerning the appropriate rate for a "supervisor/coordinator." Ms. Appel is compensated within the range of salaries paid to other excluded positions and is paid more than three other out-of-scope positions. While she is paid slightly less than the in-scope position of a group home operator, the group home operator appears to be a highly skilled position and has a unique set of working conditions, having shifts of 24 hour duration and more limited benefits and labour standards protections. With respect to other in-scope positions, Ms. Appel earns slightly more than the top rate of a recreation worker and substantially more than a care worker and a group home coordinator.

**[68]** A review of the evidence also indicates that Ms. Appel regularly accesses and uses confidential information for the purposes of the Employer's labour relations. While her access to employees' personnel files by reason of her sharing an office with the assistant supervisor would be insufficient to meet this test, her utilization of that information for certain purposes provides a basis to exclude the disputed position from the scope of the bargaining unit, when considered in light of the managerial functions she performs. Examples of the use of this labour relations information includes accessing it to provide information and opinions for performance evaluations and possibly discipline and for collecting and analyzing data and making recommendations to the Employer regarding changes to master schedules (such as the home operator schedule), new recruitment strategies and strategic application of the provisions of the collective agreement. Ms. Appel is also involved in the Employer's collective bargaining process by developing bargaining proposals related to scheduling issues and by sitting on the committee developing collective agreement language for bargaining. Ms. Appel's

job description also indicates that she is responsible for the maintenance of employee discipline and performance evaluation records. In addition, through discussions with the supervisor and assistant supervisor, Ms. Appel is often aware of disciplinary action to be taken before the subject employee and the Union become aware and it appears she has some limited involvement in the adjustment of grievances that relate to her decisions. The exclusion of Ms. Appel's position allows the Employer to discuss these labour relations issues without fear they will be inappropriately disclosed.

**[69]** It is our view that Ms. Appel's access to and use of this confidential labour relations information in the manner described, while not time consuming, is reasonably necessary to the efficient operation of Elmwood, given the number of bargaining unit employees and the problems the Employer is attempting to address in the workplace including excess overtime and a high turnover of staff in the facility. It is also performed on a reasonably regular basis. Although Ms. Appel does not attend grievance meetings or union-management meetings on behalf of the Employer, nor is she involved in face to face negotiations with the Union, she does have access to and use of the confidential labour relations information referred to and, in the particular circumstances of this case, considering our findings concerning the managerial functions she exercises, it creates a conflict of interest sufficient to exclude the disputed position from the scope of the unit.

**[70]** For the reasons outlined above, we are of the opinion that the Employer has met the onus to establish on a balance of probabilities that the position of coordinator of human resources and scheduling should be excluded from the bargaining unit based on ss. 2(f)(i)(A) and 2(f)(i)(B). Given the extent of time devoted to hiring and the occasions during which Ms. Appel must exercise discretion in applying the collective agreement, this is not an appropriate situation in which to transfer the non-administrative or non-supervisory tasks to an out-of-scope position. Also, it makes sense that the person who performs the duties of scheduling/granting leaves of absence is also responsible for recruitment, to address the problems identified with scheduling and leaves of absence and for the purpose of tracking and analyzing such data to provide solutions to the problems identified, whether through changes to scheduling, hiring procedures, policies or bargaining proposals.

[71] While we have determined that the position of coordinator of human resources and scheduling should be excluded from the scope of the bargaining unit, in our view, this is an appropriate situation in which to make a provisional order pursuant to s. 5.2. At the time of the hearing it was apparent that the position in dispute had evolved from the date of its introduction some two years previous to the date of the hearing and there were indications from the Employer and the incumbent that the position was continuing to evolve and to expand. There was some evidence concerning the role the incumbent is expected to fulfill in collective bargaining and her involvement in labour relations with the Union, however, at the time of the hearing, collective bargaining had not yet commenced. While there was otherwise little evidence to establish the manner in which the position was expected to evolve, it is our expectation that the time frame from the date of the hearing until one year from the date of this decision will be sufficient to allow the duties of the position to crystallize.

[72] The position of coordinator of human resources and scheduling is declared to be provisionally out of scope for a period of one year from the date of the Order to issue on these Reasons. At the end of that period, if the Union or Employer does not object by bringing the matter back before the Board, the position shall become finally out-of-scope. The Employer may then apply under s. 5(k) during the open period to amend the certification Order, or the parties may jointly request the amendment under s. 5(j). In addition, on the basis of the parties agreement at the hearing of this matter to amend the certification Order to delete the excluded position of house manager of the special needs home, an Order will issue to that effect pursuant to s. 5(j).

**DATED** at Regina, Saskatchewan, this **28th** day of **November, 2005**.

**LABOUR RELATIONS BOARD**

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Angela Zborosky  
Vice-Chairperson