

**The Labour Relations Board  
Saskatchewan**

**UNIVERSITY OF SASKATCHEWAN, Applicant and ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondent**

LRB File No. 057-05; April 30, 2007

Vice-Chairperson, Angela Zborosky; Members: Bruce McDonald and Marshall Hamilton

For the Applicant: Neil Gabrielson, Q.C.

For the Respondent: Gary Bainbridge

**Certification – Amendment – Exclusion – Employer asks Board to exclude positions presently included in scope of certification order – Given Board’s conclusions, not necessary to determine whether change in circumstances required – Board indicates that, in future applications of this kind, Board will expect parties to lead evidence and make argument on issues of whether change in circumstances required and, if so, whether change in circumstances established.**

**Bargaining unit – Appropriate bargaining unit – Community of interest – Community of interest factor utilized by Board to determine, on applications for certification or applications to add-on group of employees to existing certification order, whether position should be included in proposed or established unit –Community of interest may be used to determine in which unit disputed position belongs where workplace has more than one unit – Community of interest consideration irrelevant to application to exclude positions presently included in scope of certification order.**

**Employee – Managerial exclusion – Determination of whether position should be excluded factual one – Exclusions to be made on narrow basis where managerial duties major focus of position and will not be granted because managerial duties performed some of the time, incidentally or occasionally – Board reviews positions at issue and declines to exclude them on managerial basis.**

**Employee – Confidential personnel – Confidential information must relate to employer’s industrial relations and does not include mere access to information – Exclusions to be made on narrow basis and will not be granted where someone who would otherwise fall within definition of employee incidentally or occasionally performs tasks of confidential nature – Board reviews positions at issue and declines to exclude them on confidential basis.**

***The Trade Union Act, ss. 2(f), 5(m) and 5.2.***

## REASONS FOR DECISION

### Background:

[1] The University of Saskatchewan (the “University”) filed an application on March 24, 2005 seeking an order to amend the certification Order issued on November 1, 2001 designating the Administrative and Supervisory Personnel Association (“ASPA” or the “Association”) as the bargaining agent for a unit of employees employed by the University. In its application, the University sought to exclude eleven positions currently within the scope of the bargaining unit represented by ASPA, on the basis that the incumbents: (i) carry out duties of a confidential nature and have access to and use confidential information; and (ii) share a community of interest with positions excluded from the scope of the bargaining unit represented by ASPA. Shortly before the date for hearing, the University amended its application to include a third ground for exclusion of the positions in question, namely, that the employees in question are persons whose primary responsibilities are of a managerial character. The positions in question are:

*Director, Administration and Systems, University Advancement;*  
*Director, Purchasing Services;*  
*Director, Student Accounts and Treasury;*  
*Manager, Administrative Information Services*  
*Manager, Educational & Research Technology Services;*  
*Manager, Server & Database Services;*  
*Manager, Communications & Network Services;*  
*Director, Finance and Administration, Western College of Veterinary Medicine;*  
*Director, Community Services, College of Kinesiology;*  
*Director, Huskie Athletics;*  
*Director, Student Information Services.*

[2] ASPA filed a reply on April 8, 2005 taking the position that (i) community of interest is not an appropriate factor in making a determination whether to move an in-scope position out of scope; (ii) that the incumbents of the positions in question are all “employees” within the meaning of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the “Act”), having neither the primary responsibility to exercise and actually perform functions that are of a managerial character nor the requirement to regularly act in a confidential capacity with respect to the industrial relations of their employer; (iii) that the positions in question have been within the scope of ASPA for a considerable time and no industrial relations reasons can be demonstrated that would justify their removal

from the bargaining unit or the denial of their statutory rights to belong to ASPA and enjoy the benefits of collective bargaining; and (iv) the positions in question are directly analogous to other positions within the scope of the ASPA certification Order and share a community of interest with positions traditionally in that unit. ASPA therefore maintains that the positions in question must remain within the scope of the ASPA bargaining unit.

**[3]** The certification Order in issue describes the bargaining unit represented by ASPA, as follows:

*(a) that all administrative and professional persons and all technical officers employed by the University of Saskatchewan including but not so as to restrict the generality of the foregoing:*

...

[a list of included positions, by department, follows]

...

*and excepting:*

*those covered by the University of Saskatchewan Faculty Association Certification Order dated January 26, 1997,*

*those covered by the Canadian Union of Public Employees Local 1975, pursuant to Certification Orders dated:*

[a listing of dates follows]

*President; Vice-President, Academic; Vice-President, Administration; Vice-President, Planning; Assistant to Vice-President, Academic; University Secretary; Comptroller; Secretary to Vice-President Academic; Director, Academic Computing Services; Manager, Administrative Computing Services; Director News and Publications; Superintendent, Buildings and Grounds; Director Planning and Engineering, Buildings and Grounds; Director of Operations, Buildings and Grounds; Director of Administration, Building and Grounds; Director of Maintenance, Buildings and Grounds; Secretary to Controller;.....*

*and excluding:*

*Extension Specialists, Professional Librarians and persons with academic rank at the University of Saskatchewan,*

*are an appropriate unit of employees for the purposes of bargaining collectively;*

...

[4] A hearing was held in Saskatoon on October 25, 26 and 27, 2005. At the hearing, the parties agreed that consideration of the following positions would be adjourned *sine die*:

*Manager, Administrative Information Services  
Manager, Educational & Research Technology Services;  
Manager, Server & Database Services;  
Manager, Communications & Network Services.*

[5] At the outset of the hearing the Board also dealt with an objection by the Union to the University's filing of an amended application shortly before the date the hearing commenced. After hearing the submissions of the parties, the Board made an oral ruling determining that the amendment was permissible as the amendment was merely a ground to be relied upon by the University to support its submission that the positions in question should be excluded and therefore it did not amount to a "new" application not filed within the open period; that the ground had been discussed in negotiations between the parties in advance of the hearing; that the Union had anticipated the University's position as reflected by the fact that it defended this ground in its reply to the application; and because the amendment was important to ensure that the Board determined the real issues in dispute between the parties, pursuant to s. 19(2) of the *Act*.

[6] Given the nature of this application and the evidence led before the Board, we will first outline the relevant statutory provisions and the parties' arguments, followed by our analysis/decision, in which will also outline the relevant evidence before the Board.

**Relevant Statutory Provisions:**

[7] The 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:

- (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.

#### **Arguments:**

**[8]** Counsel for the University filed a written argument which we have reviewed. The University argued that the positions in dispute are properly excluded from the bargaining unit represented by ASPA on the basis of the definition of "employee" according to s. 2(f)(i) of the Act, specifically, that they are of a managerial nature, they access and utilize confidential information and/or they share a strong community of interest with other individuals whom are already excluded.

**[9]** The University relied on *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3<sup>rd</sup> Quarter Sask. Labour Rep. 153, LRB File No. 268-94; *Saskatchewan Joint Board*,

*Retail, Wholesale and Department Store Union v. Canadian Linen & Uniform Service Company*, [1999] Sask. L.R.B.R. 173, LRB File No. 048-99; and *Saskatchewan Government Employees Union v. Saskatchewan Liquor and Gaming Authority et al.*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96. The University submitted that the Board must determine whether the duties attached to the positions in question are of a kind and to an extent that they would create an insoluble conflict between the person's responsibility to perform managerial functions for the University and the interests of those employees in the bargaining unit. The University submitted that the job functions that are central to a finding of managerial status include the power to discipline and discharge, the ability to influence labour relations and the power to hire or promote and demote. The University argued that these functions are performed by the incumbents in the positions in question.

**[10]** With respect to the University's argument that the positions in question should be excluded on the basis of the confidential nature of the information they handle in performing the regular duties of their positions, the University relied on the principles in *Regina District Health Board v. Canadian Union of Public Employees*, [2001] Sask. L.R.B.R. 466, LRB File No. 054-00 and on the cases cited therein. The University argued that the Deans require administrative and not clerical personnel as resources as it is the directors who know what is occurring in each college/department.

**[11]** The University argued that the interests of the individuals in the disputed positions are at odds with those whom they direct. The University disputed the position of ASPA that there must be a demonstrated conflict. It argued that the test is not what has happened in the past or whether the exercise of certain duties has caused a problem in the past but rather whether the duties and responsibilities of these incumbents *could* put them in a position of conflicting interests. In the University's view, the fact that the individual may consult human resources concerning managerial decisions is of no consequence to a determination that the position should be excluded from the ASPA bargaining unit.

**[12]** The University also relied on *St. Thomas More College Faculty Union (1977) v. St. Thomas More College*, [2003] Sask. L.R.B.R. 426, LRB File No. 105-02 and *International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators of the United States and Canada v. Saskatchewan Centre of the Arts*, [1992]

3<sup>rd</sup> Quarter Sask. Labour Rep. 143, LRB File No. 126-92 to support the proposition that it is appropriate to exclude the positions in question from the ASPA bargaining unit because the incumbents share a stronger community of interest with other individuals excluded from the bargaining unit than with the interests of those in the ASPA bargaining unit.

**[13]** In its written argument, the University noted that in *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association*, [2000] Sask. L.R.B.R. 83, LRB File No. 218-98, the Board, in determining whether certain positions belonged in either the ASPA bargaining unit or the Canadian Union of Public Employees bargaining unit, stated that it concerned itself with "whether the duties and responsibilities of the new positions could be traced back to either of the bargaining units" as well as the consideration of "the similarities between the new positions and the ones currently assigned to each bargaining unit."

**[14]** The University also referred to *University of Saskatchewan v. Canadian Union of Public Employees, Local 1975 and Administrative and Supervisory Personnel Association*, [2000] Sask. L.R.B.R. 529, LRB File Nos. 083-00 & 108-00, wherein the Board excluded a position in dispute, rather than assigning it to either bargaining unit, and commented that there appeared to be certain positions in ASPA's bargaining unit which ought properly to be excluded on the basis that they exercised managerial functions, a matter which "may require addressing by the parties at a different time." It is the University's view that, regardless of whether the positions in dispute have been included in the ASPA bargaining unit (by way of the parties' agreement or by oversight) and whether or not the nature of the job functions and duties have changed since their inclusion in the ASPA bargaining unit, if the positions in dispute ought properly to be excluded, the Board has the power and duty to exclude them.

**[15]** Counsel for ASPA also filed a written argument which we have reviewed. The Association proposed that the Board deal with the issues raised by the University in the same manner as it would any other application under s. 5(m) of the *Act*, that is, the Board must determine whether each incumbent of each position in question is an "employee" within the meaning of the *Act*. In the Association's view, that requires consideration of two factors – whether the incumbent regularly accesses or uses information of a confidential nature *related to the employer's industrial relations* or

whether the incumbent actually performs duties of a managerial character on a regular basis. The Association submitted that the factor of community of interest plays no part in the determination of whether a position should be out of scope as it is a factor utilized by the Board only to determine whether a position belongs *in* a certain bargaining unit.

**[16]** The Association pointed out that the University's application has not been made as a result of the creation of any new positions. The positions in dispute are existing positions which have been within the scope of ASPA's bargaining unit for many years or are an evolution of positions that had been similarly established. ASPA has been certified to represent this bargaining unit for a period in excess of 25 years and, during that time period, the list of excluded positions in the certification Order has not been amended. The Association argued that the University must prove a clear need to remove these positions from the Association's bargaining unit given that: (i) they have enjoyed the benefits of collective bargaining for many years; and (ii) the result of excluding these positions is to remove the rights of these employees under s. 3 of the *Act* to join a trade union of their choosing and to bargain collectively.

**[17]** The Association reviewed each position in dispute and argued that none of the positions should be excluded from its bargaining unit, on the basis that none of the positions regularly access and use confidential information specific to the University's industrial relations nor do they actually perform duties of a managerial character on a regular basis. The details of these arguments as they apply to each position in dispute will be outlined in our analysis.

**[18]** In support of its arguments, the Association relied on the following cases: *Service Employees International Union, Local 333 v. North Central District Health Board and Nirvana Pioneer Villa*, [1995] 4th Quarter Sask. Labour Rep. 124, LRB File No. 224-95; *Canadian Union of Bank Employees v. Bank of Nova Scotia*, (1977), 77 CLLC 16,090; *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; *University of Regina (MacKenzie Art Gallery) v. Canadian Union of Public Employees, Local 1975*, [1995] 1st Quarter Sask. Labour Rep. 213, LRB File No. 266-94; *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; *Canadian Union of Public Employees, Local 3990 v.*



*Core Community Group Inc.*, [2000] Sask. L.R.B.R. 617, LRB File No. 015-00; *Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area)*, [1997] Sask. L.R.B.R. 591, LRB File No. 145-97; *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; *Communications, Energy and Paperworkers Union of Canada v. Arch Transco Ltd.*, [2000] Sask. L.R.B.R. 633, LRB File No. 060-00; *Canadian Union of Public Employees, Local 3287 v. University of Regina* [1995] 3rd Quarter Sask. Labour Rep. 195, LRB File No. 139-95; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remail Investments Corporation, o/a the Imperial 400 Motel (Swift Current)*, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and *Saskatchewan Government and General Employees' Union v. Saskatchewan Liquor and Gaming Authority et al.*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96.

#### **Analysis and Decision:**

[19] This is the first occasion upon which the Board has specifically been asked by the parties to make a determination as to whether certain positions should be excluded from any bargaining unit including employees of the University and, specifically, the ASPA bargaining unit. What makes this application additionally unique is that many of the disputed positions have been within the scope of the ASPA bargaining unit for quite some time.

[20] The Board has previously characterized the ASPA bargaining unit as “peculiar” and has said that is not a typical middle management unit. In *University of Saskatchewan*, LRB File No. 218-98, *supra*, the Board stated at 100:

*[56] . . . In our view, the original ASPA certification Order was not restricted solely to middle management positions, or, in other words, to those positions who would experience some labour relations conflict with membership in the larger CUPE bargaining unit. We come to this conclusion because of the generic wording of the ASPA order and from the positions listed in the Order, not all of which would have significant supervisory duties.*

[21] In *University of Saskatchewan v. Canadian Union of Public Employees, Local 1975 and Administrative and Supervisory Personnel Association*, [2001] Sask.

L.R.B.R. 388, LRB File No. 150-00, the Board was required to determine whether several new positions belonged to the ASPA or CUPE bargaining units. Although the test for such a determination is different than the one to be used in this case, the Board's discussion concerning the history of ASPA is helpful. The Board stated at 391 and 392:

*[14] The Board does not characterize the bargaining unit assigned to ASPA as a strict middle management bargaining unit. For historical reasons, it has evolved in a different manner than other middle management bargaining units. As a result, its membership is not restricted to positions which have a labour relations conflict as a result of the exercise of supervisory, but not managerial, functions over members of the larger bargaining unit. Some of the membership of ASPA do fall within a general "middle management" description but others are in the unit for historical reasons which relate primarily to the scope of CUPE's original certification Orders. Those Orders are summarized in the Board's recent decision in Saskatchewan Government and General Employees' Union v. Saskatchewan Liquor and Gaming Authority et al., [2001] Sask. L.R.B.R. ---, LRB File No. 037-95. There were originally 7 different certification Orders creating bargaining units on the basis of departments, such as the power house, or occupations, such as maintenance and servicing employees or "all painters." When the Orders were amalgamated into one "all employee" Order by the Board, the Supreme Court held that the amalgamated Order improperly swept unorganized employees into the bargaining unit without testing their support for CUPE. As a result, at the University, ASPA evolved as the bargaining unit for a variety of tag end groups that were not formerly organized by CUPE. Although it would be much simpler for all parties if the ASPA unit were a middle management unit, it has not evolved in this fashion and the Board is simply not entitled at this stage to redesign the bargaining unit into a middle management unit. The Board will continue to apply an historical approach to determine the assignment of positions to the appropriate bargaining unit.*

**[22]** Kathy Jeffrey, a manager in the human resources department, testified on behalf of the University. Ms. Jeffrey testified that the University has a multi-bargaining unit setting, including five bargaining units involving four different unions: CUPE, ASPA, the University of Saskatchewan Faculty Association and the Professional Association of Internes and Residents of Saskatchewan. In cross-examination, Ms. Jeffrey testified that the positions in ASPA generally include technical officers and professionals and, while the unit generally does not include clerical positions, there are some administrative assistants within the scope of the bargaining unit. She stated that many of those in-scope are required to have university degrees and many are required to exercise

independent thought and/or work independently without supervision. Some individuals supervise only CUPE members, some supervise both CUPE and ASPA members and others do not supervise any employees.

[23] With respect to the assignment of positions, Ms. Jeffrey testified that the University has established a committee to deal with this issue, although many applications involving numerous positions have come before the Board for determination. In cross-examination, Ms. Jeffrey acknowledged that not all of the out-of-scope positions (i.e. those not represented by any union) are managers and not all of them have been excluded by way of a Board order to that effect. With regard to the out-of-scope "comparable" positions that she testified about at the hearing, she acknowledged that the Board has not necessarily ruled that they are out-of-scope and, in fact, a number of them were excluded from the scope of the ASPA bargaining unit through the agreement of ASPA in circumstances where the University agreed to include other positions within the scope of the ASPA bargaining unit.

[24] It appears to us that the impetus for the University bringing this application before the Board was the comments made by the Board in its decision in *University of Saskatchewan*, LRB File Nos. 083-00 & 108-00, *supra*. In that decision, the Board was called upon to determine whether a number of new positions should be assigned to the CUPE bargaining unit or the ASPA bargaining unit. While the Board determined that one of the positions in question should be excluded altogether on the basis that the incumbent performed duties of a managerial character, specifically, that the individual hired and fired employees, including ASPA members, the Board made some comments, in *obiter*, about the status of positions not in dispute on that application. In this regard, the Board stated at 541 and 542:

*[41] CUPE commented on the relationship between this position and the Director of the Student Health Centre and the labour relations conflict that might arise given the Director's ability to hire, fire and discipline members of the Centre, including ASPA members. It became clear in this hearing that there may be certain positions in ASPA which properly ought to be excluded from any bargaining unit because they do exercise managerial functions.*

...

[42] *The focus of this hearing was not concerned with the status of the director of student health services. **However, it does concern the Board that there appears to be a willingness on the part of the University and ASPA to include persons who ought properly be excluded from any bargaining unit in the ASPA unit.** This matter may require addressing by the parties at a different time. In the meantime, however, the inclusion of the administrative assistant in the ASPA bargaining unit is not inappropriate, although the Board may find at a later date that the inclusion of the director of Student Health Services is not appropriate given his apparent managerial status.*

**[emphasis added]**

[25] It appears that, following this decision of the Board, the University undertook a review of ASPA positions to determine whether any ought to be excluded on the basis that they were not “employees” within the meaning of the *Act*. The University indicated that it then approached the Association with a view to negotiating the exclusion of these positions and, following the exhaustion of those negotiations, filed this application before the Board. Ms. Jeffrey acknowledged that none of the incumbents had notified her that they wished to be excluded from the ASPA bargaining unit. The Association stated that the University did not approach it with these negotiations until November 2003 and, after its own investigation, it agreed to exclude two positions on the basis of the confidential nature of their job duties. The two positions were the Director of Information Management Technology (Human Resources Division) and the Communications Officer and Government Liaison for the President’s Office. Ruth Thompson, Director of Programming for Native Law Studies and the past president of ASPA (she was the lead negotiator for the current collective agreement and was on the grievance committee), testifying on behalf of the Association, stated that ASPA agreed to the exclusion of these two positions on the basis of the confidential industrial relations information with which each incumbent dealt.

[26] As stated, the comment of the Board in *University of Saskatchewan*, LRB File Nos. 083-00 & 108-00, *supra*, was made in *obiter* and without prescribing the circumstances under which such an application might be brought by the University to exclude ASPA positions that had been in that bargaining unit for some period of time. Furthermore, the Board in that decision made no comment on the appropriate test to be utilized by the Board in making such a determination should the University bring an application before it. This is somewhat troublesome given the Board’s longstanding

requirement that a party must prove the existence of a change in circumstances in order to establish a right to an amendment of the certification order.<sup>1</sup> Such a change in circumstances is usually established on applications for amendment concerning the status of positions by reason of the fact that the positions in dispute are new positions or they are existing positions to which the employer has added new job duties which arguably place the position out of scope. It is clear that, in this case, none of the disputed positions are new – they appear to be established positions that have been included in the ASPA bargaining unit for some period of time. While there was some suggestion that the positions in question have “evolved” to a point where they should now be excluded, the evidence on that point was unsatisfactory<sup>2</sup> and that matter was not argued extensively<sup>3</sup> as the University's primary position was that it was not required to show a change in circumstances on this type of amendment application. However, given our conclusions in this case, it is not necessary that we make a determination whether a change in circumstances is required to be shown or has been shown. The parties should be aware, however, that, in the future, in applications of this kind, the Board will expect parties to lead evidence and make argument on the issues of whether a change in circumstances is required for such an amendment and, if so, whether it has been established. Such a requirement could be met by establishing that the positions in question are new or have changed such that managerial duties have actually been exercised by the incumbent or that the individual has regular access to and use of confidential information related to the employer's industrial relations. It would seem that without a “change in circumstances,” the matter would be *res judicata* (either because of

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<sup>1</sup> See the Board's discussion in *United Food and Commercial Workers Union, Local 1400 v. Sobey's Capital Inc., operating as Garden Market IGA*, [2006] Sask. L.R.B.R. 115, LRB File No. 016-05 wherein the Board examined its caselaw and determined that it is necessary to show a “material change in circumstances” in all amendment applications under s. 5(j) or (k) of the *Act* except in very limited circumstances -- the only one of which has been so far identified is an application for amendment in the nature of consolidation.

<sup>2</sup> For example, Ms. Jeffrey testified that she was not certain whether the disputed positions should always have been out of scope or whether their responsibilities had changed over time such that they should now be out of scope.

<sup>3</sup> The University pointed out that Ms. Kennedy testified that Ms. Toole's and Ms. Van Impe's duties had changed following the 1995 reorganization where the assistant controller positions had been eliminated. The University also argued that the University had grown over time and thus it needs more managers. It argued that it should not be penalized for delay in applying to the Board for determination because it was not until 2000 when it realized this might be an issue and it thereafter took the appropriate time to investigate several positions in order to bring them all together in one application to the Board.

the certification order having been issued by the Board or through an order resulting from an amendment application) or it could be seen as interference by the Board with an agreement reached between the parties concerning scope. The Board is reluctant to interfere with parties' agreements on scope issues and it is highly questionable that the Board has, as the University suggests, an overriding and continuing duty to ensure that individuals who are not and never were "employees" be removed from a bargaining unit upon request. It is not the Board's duty to ensure that the scope of a bargaining unit agreed to by the parties is consistent (and it is not often aware of such agreements by the parties), particularly in a complex multi-bargaining unit setting such as the University, where the demarcation lines are not easily or rationally drawn.

**[27]** It appears that the parties proceeded with this application on the basis that the appropriate way for the Board to determine this application is to examine each position to determine if the duties and responsibilities of each position are such that it ought properly to be excluded according to the Board's usual tests for exclusion of positions. In this regard, however, the parties differ somewhat in terms of the relevant factors the Board should consider. Both parties accept that it is appropriate for the Board to consider whether the person is an "employee" within the meaning of s. 2(f)(i) of the *Act*, that is, whether: (i) the individual performs functions of a managerial character; or (ii) that the individual has access to and uses confidential information (although each party attaches a different interpretation to the nature of that confidential information). In addition, the University argued that the Board should consider the factor of community of interest, that is, whether the individuals in the positions in dispute share a greater community of interest with those in excluded, out-of-scope positions than those within the ASPA bargaining unit.

**[28]** The University argued that community of interest is an appropriate consideration based on the Board's comments in the *University of Saskatchewan* decision on LRB File No. 218-98, *supra*. In that case, the Board stated that, when determining whether to assign a newly created position to the CUPE or ASPA bargaining unit, the Board must refer to the history of the position in question and whether the duties and responsibilities of the new position can be traced back to either bargaining unit, as well as whether there are similarities between the new position and positions previously assigned to either bargaining unit. The University submitted that the Board should utilize a similar approach in determining whether a position should remain in the

ASPA bargaining unit or be excluded from any bargaining unit, that is, the duties and responsibilities of the position should be examined to determine whether they are more similar to other excluded positions than positions within the ASPA bargaining unit.

**[29]** In response to the use of the factor of community of interest, the Association stated that such a factor is irrelevant as concerns whether a position should be excluded from all bargaining units, including its own. The Association submitted that “community of interest” is a test of inclusion, that is, its use is restricted to two situations: (i) determining whether, on a certification application, a position should be included in the bargaining unit proposed by a union; or (ii) determining, on an application for amendment, to which of two or more bargaining units a disputed position belongs.

**[30]** We agree with the interpretation advanced by the Union. The community of interest factor has been utilized by the Board to determine, on applications for certification or applications to “add-on” a group of employees to an existing certification order, whether the position in question should be included in the proposed or established bargaining unit (see for example, *Centre of the Arts, supra*, and *St. Thomas More College, supra*, cited by the University, both of which involved add-on applications). In *Arch Transco, supra*, the Board stated at 637:

*[18] The concept of community of interest among employees is a tool that can be used to assess the viability of a proposed bargaining unit. In Southern Ontario Newspaper Guild Local 87 v. Harlequin Enterprises Ltd., OLRB Rep. 226, the Ontario Labour Relations Board described this relationship, at 232:*

*The question is not “is there a community of interest amongst the employees for whom the union seeks certification?” but “is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?”. The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but with rather, goes to the issue of viability.*

**[31]** In addition, the factor of community of interest may be used by the Board to determine, on an application for amendment or a determination under s. 5(m), in which bargaining unit a disputed position belongs where the workplace has more than one bargaining unit. The test utilized by the Board in determining whether a disputed position properly belongs in the CUPE or ASPA bargaining units is a form of the community of interest consideration. That test involves an examination of the history of the position to determine whether the duties and responsibilities of that position can be traced back to either of the bargaining units and whether there are similarities between the new position and ones currently assigned to each of bargaining units (see for example, *University of Saskatchewan*, LRB File No. 218-98, *supra*). In *Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association*, [2005] Sask. L.R.B.R. 274, LRB File Nos. 103-04 & 222-04, the Board was required to determine in which bargaining unit certain disputed positions should be placed and described the relevant test as follows at 330 and 331:

*[134] In assessing community of interest, we are guided by a number of factors including educational qualifications, the general nature of the duties performed, lateral mobility, and the similarity of the positions to those in one of the competing bargaining units. Different cases have placed a different emphasis on each of these factors, as the circumstances require. For the purposes of this case, the most determinative factor is the similarity of the positions to positions in one of the competing bargaining units, however, we will examine each in turn.*

**[32]** In the present case, we are not dealing with an application for certification, an application to add-on a group of employees to an certification order or an application to determine in which of the bargaining units in a multi-bargaining unit setting a disputed position belongs. As such, the community of interest consideration is irrelevant to our inquiry.

**[33]** At the hearing, the University led evidence concerning the comparability of the disputed positions with other out-of-scope positions. It did this through the testimony of Ms. Jeffrey. Ms. Jeffrey testified about her view of the similarities of each disputed position with various out-of-scope positions by reference to many job descriptions entered as evidence at the hearing. In addition, the University led similar evidence through a number of the supervisors of the incumbents of the disputed positions. Given our conclusion that community of interest is not a relevant factor in the



circumstances of this case and because this evidence was led solely for the purpose of establishing a community of interest with out-of-scope positions, we have determined that this evidence is irrelevant. As such, it will not be detailed in our analysis of each of the disputed positions.

**[34]** The appropriate test for us to consider (aside from our comments in relation to the possible requirement to establish a change in circumstances, as noted above) is whether the positions in question ought properly to be excluded because they are not “employees” within the meaning of s. 2(f)(i)(A) or (B) of the *Act*.

### **Managerial Exclusion – s. 2(f)(i)(A)**

**[35]** The Board has, on many occasions, considered whether an individual should be excluded on the basis of s. 2(f)(i)(A), that is, whether the person’s “primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character.” The rationale for making a distinction between those individuals who should fall within the scope of a bargaining unit and those who must be excluded was discussed in *City of Regina*, LRB File No. 268-94, *supra*. At 158 and 159, the Board stated:

*The rationale for drawing a distinction between those who should be inside and those who fall outside a bargaining unit has often been discussed. In a passage which has often been quoted from the decision in Canadian Union of Public Employees v. Corporation of the District of Burnaby, [1974] 1 C.L.R.B.R. 1, the British Columbia Labour Relations Board outlined this rationale in the following terms:*

*The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, the employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand, an*

*employee equally dependent on the enterprise for his livelihood, but on the other hand, wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.*

*In one of our previous decisions, in City of Regina v. Regina Professional Fire Fighters' Association, LRB Files No.255-93 and 268-93, the Board alluded to the tension which exists between our interest in ensuring the existence of an arms' length relationship of the kind outlined in the District of Burnaby case, supra, and our interest in ensuring that access to collective bargaining is not unreasonably restricted:*

*This Board has on many occasions acknowledged that the decision whether someone should be excluded from a bargaining unit of employees is an important one, both from the point of view of the integrity of the bargaining relationship and from the point of view of the rights of individuals to engage in collective bargaining. On the one hand, both parties to collective bargaining need to be confident that the pursuit of their legitimate objectives will not be frustrated by divisive conflicts of interest or confusion over the nature of those interests. On the other hand, this Board has been alert to the possibility that exclusion from the bargaining unit of persons who do not genuinely meet the criteria set out in Section 2(f) of The Trade Union Act may unfairly deny them access to union representation and weaken the strength of the bargaining agent.*

*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. In International Brotherhood of Electrical Workers v. Caledon Hydro-Electric Commission, [1979] 3 C.L.R.B.R. 495, the Ontario Labour Relations Board made this point:*

*Because the Act does not contain a definition of the term "managerial functions", the task of developing criteria which can identify members of management*

has fallen to the Board and, in recognition of the fact that the exercise of managerial functions can assume different forms, in different work settings, the Board has evolved a number of "tests" to assist it in its enquiry. However, there are no magic formulae or rules of thumb which are universally applicable and dictate the result in every situation. **The Board has consistently held that it must have due regard to the nature of the industry, the nature of the particular business, and the employer's organizational scheme.** Essentially, the determination is a factual one, but the Board must always bear in mind that the purpose of its inquiry is to determine **whether the functions of the challenged individual are such that his inclusion in the bargaining unit would be incompatible with collective bargaining.** In the case of so-called "first line" managerial employees, the important question is **whether the individual can fundamentally affect the economic lives of his fellow employees so that he is inevitably put in a position that creates a conflict of interest with them.** The right to hire, fire, promote, demote or discipline employees are manifestations of managerial authority and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit...

Modern organizational structures and the devolution of complex responsibilities complicate the task of the Board still further. In the City of Regina case which was quoted earlier, the Board made the following comment:

Modern enterprises often employ persons who are charged with the responsibility of handling sophisticated or sensitive information, or of applying skilled professional judgement to inquiries initiated by an employer, or of formulating policy options which may be considered by management. To exclude all such persons from the definition of "employee" in The Trade Union Act would be to deny the benefits of collective bargaining to a wide range of persons who, while highly skilled and educated, have no direct control or influence on the terms and conditions under which their colleagues work of a kind which would either create a conflict of interest inimical to healthy collective bargaining, or render them less vulnerable to unilateral employer determination of their own terms and conditions of employment.

[emphasis added]

[36] The determination of whether a position falls to be excluded on this basis is primarily a factual one. In the *Remai Investments Corp.* decision, *supra*, the Board determined that there is no single test that applies in all circumstances and commented at 341:

*It should be clear from the passages which we have quoted that the Board has found it impossible to establish a foolproof "tests" for assessing whether a particular position falls outside the parameters of the definition of "employee" or not. **In each case, the Board has been sensitive to the factual context in which the issue arises, and has looked beyond titles, position descriptions or formal assignments of duties in an effort to ascertain the true role which the incumbent in a position place in the organization.***

[emphasis added]

[37] We agree with the proposition advanced by the Association that the Board has long held that exclusions on the basis of s. 2(f)(i)(A) and (B) must be made "on as narrow a basis as possible," will only be made where the managerial duties are "the major focus of the position," and will not be granted just because there are managerial duties being performed "some of the time" by the incumbent (see *Government of Saskatchewan, supra*. It is not sufficient that an individual who would otherwise be determined to be an employee performs tasks of a managerial (or confidential nature) "incidentally or occasionally."

[38] The Board's decision in *Saskatchewan Liquor and Gaming Authority, supra*, (hereinafter "SLGA") is helpful to our analysis of the positions in dispute. In that case, the Board was required to determine whether liquor store managers, who had previously been specifically excluded by Board order prior to the amendments to s. 2(f) in 1994, should continue to be excluded or whether they were "employees" within the meaning of s. 2(f)(i) of the *Act*. In determining that the managers were "employees," under the *Act*, the Board reviewed the applicable caselaw and concluded that the following considerations were relevant to its inquiry, at 854 and 855:

*This approach is similar to the one adopted by this Board in Service Employees' International Union, Local 333 v. Metis Addictions Council of Saskatchewan Inc., [1993] 3<sup>rd</sup> Quarter Sask. Labour Rep. 49, LRB File No. 002-93, where the Board concluded, at 59:*

*It is our view that in order to be excluded from the group defined as employees by Section 2(f)(i), **a person must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient**, in our opinion, to meet the requirements for exclusion under this section.*

*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.*

*In assessing managerial authority, **the Board considers the actual authority assigned to a position and the use of that authority** in the workplace. Section 2(f)(i) of the Act excludes only persons "whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character" from the right to be represented by a trade union. As noted in past Board decisions, **managerial functions** that are claimed to justify exclusion from a bargaining unit **must be genuine, not merely paper, powers**. In this sense, **the Board looks to the actual performance of work by the person whose status is in question to determine what managerial functions are actually performed**. In Service Employees International Union, Local 333 v. North Central District Health Board and Nirvana Pioneer Villa, [1995] 4th Quarter Sask. Labour Rep. 124, LRB File No. 224-95, the Board indicated its **preference to hearing direct evidence from an incumbent as to the actual performance of managerial duties, as opposed to documentary evidence of a job description**. In this instance, the Board had the benefit of hearing from managers at all levels of the system.*

*The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the*

**decision-making process.** *In this regard, the Board recognizes that in most modern corporations managerial powers are no longer centralized in the executive suite. Generally, such powers are spread over several layers of management. Decisions related to labour relations are often made by a manager after consultation with her superiors, human resources personnel and on some occasions, legal counsel. Despite the trend to disperse managerial functions among different levels of management, it is not uncommon for an employer to require that certain decisions, such as the termination of an employee, be approved by senior management before being implemented by the person whose status is in question. However, **this multi-layered approach to decision-making does not detract from the managerial status of the person in question if it can be demonstrated that the individual has an ability to make an effective determination.** In the Cowichan Home decision, *supra*, the British Columbia Board explained the term "effective determination" as follows, at 149:*

*In our view, **effective determination in the context of discipline means that at least in the majority of cases the sanction imposed by the person whose status is in question must be substantially the ultimate discipline imposed.** We recognize that the grievance procedure itself inevitably leads to changes in the actual amount of discipline imposed - typically from negotiation and compromise which are essential elements of the grievance process. That is different from changes made by more senior persons, or where the person whose status is in issue merely has input into the decision-making process. In such circumstances, it cannot be said discipline was "effectively determined" by the original author of the sanction.*

**[emphasis added]**

**[39]** In the *SLGA* case, *supra*, the Board determined that the managers in question did not exercise independent discretion to significantly affect the terms and conditions of fellow employees to the extent necessary to conclude that they should be excluded from the bargaining unit. At 855 the Board stated:

*Applying this criteria to managers, the Board noted that managers supervise in-scope employees, including in-scope supervisors, and have some ability to affect the working lives of those employees. Generally, however, managers manage by reference to policies set by SLGA, and they exercise little discretion with respect to the manner in which the work is performed. They prepare background*

*work that is used to establish budgets, staff complements and labour relations policy, but they lack authority to actually determine such matters and have little influence over corporate decisions related to them. With respect to the negotiation of a collective agreement, managers have little input or influence.*

**[40]** Also in the SLGA case, the Board determined that the fact that the managers took part in first level grievance meetings on behalf of the employer, issued minor admonitory discipline such as warnings and reported to management on problems with employees, were not sufficient to warrant their exclusion from the bargaining unit. The Board stated at 856:

*In matters of discipline and discharge, managers are the eyes and ears of SLGA in the workplace and have significant responsibility for and over work performance. In addition, while such managers generally lacked authority to institute discipline, except for minor admonitory discipline, they do report to management on employee problems and to recommend discipline or corrective measures, when needed. However, managers do not have authority to make effective determinations regarding discipline and discharge; rather, in our view of the evidence, they have authority to recommend discipline or discharge with the effective decision resting with the regional manager. The ability of managers to deal with an emergency situation by suspending employees pending an investigation of an incident is an accepted supervisory power within the store system, and is available to in-scope supervisors as well as managers. This emergency authority does not alter the overall assessment of the disciplinary authority bestowed on the manager.*

*With respect to the administration of the collective agreement, managers accept grievances, investigate work disputes to respond to grievances at Step 1. They are also responsible for ensuring implementation of employer policies related to anti-harassment, occupational health and safety, security, customer relations and the like. This work, however, is performed with and under the direction of the regional manager and human resources branch. Managers play an important role in funneling human resource issues to SLGA through the regional manager; however, the level of authority of a manager in relation to collective agreement administration is not sufficiently effective to exclude the position from the definition of employee.*

**[41]** Lastly, with respect to the function of hiring, the Board in the SLGA case concluded that, while the managers' role with respect to hiring casual workers was not insignificant, the decision with respect to the need to hire casual workers was made in

consultation with their superiors, the regional managers, and the selection was conducted with the assistance of either the regional manager or the human resources branch. The Board noted that while there was one anomaly to this practice where one regional manager had delegated this discretion to one manager in a location where casual employees were used very little, this anomaly would not affect its overall conclusions concerning the managerial authority to hire.

**Confidential Exclusion – s. 2(f)(i)(B)**

[42] The Board has also had the opportunity, on a number of occasions, to consider whether an individual should be excluded from a bargaining unit on the basis of s. 2(f)(i)(B), that is, whether the individual “regularly act[s] in a confidential capacity with respect to the industrial relations of his or her employer.” Such confidential information must relate to the industrial relations of the employer and does not include mere access to such information (see for example, *E.C.C. International Inc.*, *supra*, at 275). As with managerial exclusions, these exclusions are made “on as narrow a basis as possible” and “it is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a . . . confidential nature” (see *Government of Saskatchewan*, *supra* at 547).

[43] In *Hillcrest Farms*, *supra*, the rationale for confidential exclusions is explained at 599:

*The Board has commented in a number of decisions on the basis for the exclusion from a bargaining unit employees who act in a confidential capacity. In University of Regina (McKenzie Art Gallery) v. Canadian Union of Public Employees, [1995] 1st Quarter Sask. Labour Rep. 213, LRB File No. 266-94, the Board made the following comment, at 217:*

*The determination of whether a position should be excluded from the bargaining unit on the grounds argued for in support of this 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 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*



*that 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.*

*In Canadian Union of Public Employees v. City of Prince Albert, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96, the Board made this comment, at 683:*

*As the representatives of the Union pointed out, the Board has not thought it sufficient to justify the exclusion of a position that the employee be engaged in handling material the Employer considers confidential, as employees in many different kinds of positions are entrusted with sensitive information, and there is an expectation that they will conduct themselves in a discreet fashion. As the passage just quoted indicates, 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.*

**[44]** A summary of the approach used by the Ontario Labour Relations Board, which is followed in principle in Saskatchewan, is encapsulated by the following comments in G.W. Adams, *Canadian Labour Law*, 2<sup>nd</sup> ed., (Aurora: Canada Law Book, 2007) at 6-26:

*The Ontario Labour Relations Board applies the confidential employee exclusion with a view to balancing the rights of employees to collective bargaining with the rights of the employer to confidentiality. The board strives to provide the greatest degree of access to collective bargaining consonant with employees not being placed in a position of conflict of interest where their interests as members of the bargaining unit would interfere with the performance of their job functions on behalf of the employer. To this end, the board has developed a rule that an employee will be excluded from the bargaining unit as a “confidential employee” where that person’s access to confidential information is not merely “incidental” but rather is of such a nature that disclosure of facts within the employee’s knowledge would materially jeopardize the employer’s collective bargaining position.*

[45] The Board, in *Hillcrest Farms*, *supra*, was required to consider whether the position of corporate administrator should be excluded from the certified bargaining unit. The Board summarized its approach to making such a determination, at 600 and 601:

*Several points are clear from the approach the Board has taken to the proposed exclusion of an employee on the grounds that they act in a confidential capacity. The first of these is that the rationale for the exclusion of persons performing managerial functions differs from the exclusion of employees acting in a confidential capacity in important ways. In the case of persons excluded as members of management, the reason for excluding them from the bargaining unit is in order to preserve a clear identity for the parties to collective bargaining, and to prevent the muddying of this identity by including within the bargaining unit persons whose position as bargaining unit employees may conflict with their role in making decisions which have an impact on the terms and conditions of employment of other employees.*

*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 candour and confidence.*

*Another point which the Board made is that the exclusion 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.*

*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. We have recognized, however, that any employer who is faced with meeting the requirements imposed by the establishment of a collective bargaining relationship is likely to require some administrative or clerical support for this purpose.*

*In Canadian Union of Public Employees v. Town of Moosomin, [1994] 2nd Quarter Sask. Labour Rep. 92, LRB File No. 038-94, the Board addressed this issue, at 95:*

*Though it is perhaps exaggerating the position of the Board to suggest that every employer is "entitled" to*

*one excluded employee to maintain confidential records and documents, the Board is certainly sensitive to the implications of the introduction of a collective bargaining regime for the administrative system of an employer. It is often the case that the demands of a collective bargaining relationship will require the addition of a confidential capacity for management which may not have been necessary prior to the certification of the trade union.*

**[46]** In *E.C.C. International*, *supra*, the Board, following its adoption of the approach in *Hillcrest Farms*, *supra*, added the following factor for consideration, at 277:

*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.*

**[47]** In *Bank of Nova Scotia*, *supra*, a decision of the Canada Labour Relations Board, the Board set out a three-part test for a confidential exclusion at 537, which may be summarized as follows:

1. The confidential matters must be concerning industrial relations, not general industrial secrets and not information that the union or its members have knowledge of (salaries, performance appraisals, etc.) or information that may be obtained from other sources (personal history, family information, etc.);
2. The disclosure of that confidential information must adversely affect the employer; and
3. The person must be involved with the confidential information as a regular and not occasional part of their duties, and that simple access to such information through employer laxity does not suffice.

**[48]** Similarly, in *Community Health Services (Saskatoon)*, *supra*, the Board set out the test as follows at 330:

*[15] 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.*

**[49]** In *Regina District Health Board, supra*, a decision relied on by the University, the Board excluded the office assistant to an out-of-scope director of the occupational health and safety department on the basis of the confidential exclusion in s. 2(f)(i)(B). The Board's conclusion was based on an analysis of the duties of the out-of-scope director and the director's need for clerical support to perform those duties. At 474, the Board reasoned:

*[23] We are satisfied that the job duties of the director of the OH&S department to a significant degree are regularly related to the industrial relations of the Employer in regard to both collective agreement administration and the Employer's role in collective bargaining with the Union by SAHO. We have had the benefit of the evidence of the incumbent, Ms. Sliva, who has been working in the disputed position providing clerical support to the director for some time. We are satisfied that the volume of clerical duties associated with the performance of the director's job reasonably requires the professional clerical and administrative support presently rendered by Ms. Sliva, and requires that Ms. Sliva regularly act in a confidential capacity with respect to the industrial relations of the Employer. The evidence shows that a large portion of Ms. Sliva's duties regularly require her to access information and correspondence, and prepare documents and correspondence, directly related to the administration of the collective agreement that may affect the terms and conditions of employment of individual employees in the bargaining unit, and with respect to matters directly related to collective bargaining on behalf of the Employer.*

*[24] For the reasons set out above, it is determined that the position of confidential secretary, Occupational Health and Safety department, is excluded from the bargaining unit. If the parties require an amended order, they should advise the Board accordingly.*

**[50]** We wish to make a final note concerning the nature of the evidence led at the hearing. The Association argued that the University's failure to call the seven incumbents in the disputed positions as witnesses to testify concerning their actual duties (particularly because these are not new positions), is fatal to the University's case. The Association argued that it has been a practice of the Board for several years to require evidence of the incumbent on an application to exclude that position.<sup>4</sup> The Association pointed out that the evidence of the supervisors of the incumbents in the disputed positions and the job descriptions are evidence only of the University's "expectations" and not evidence of the actual job duties performed by the incumbents. Furthermore, the Association argued that the supervisors' testimony on what an incumbent has done is hearsay in nature and therefore unreliable. In these circumstances, the Association asks the Board to draw an adverse inference from the University's failure to call the incumbents as witnesses.

**[51]** The University responded that it did not call the incumbents as witnesses because it would require them to disclose their support for or against the Association. The University also stated that, in any event, the direct evidence of the supervisors of the incumbents concerning the incumbents' job duties, along with the documentary evidence of job profiles and organizational charts, are sufficient for the Board to make a determination and that the Board has done so, on occasion, in the past. Lastly, the University argued that, once it had established the duties of the disputed positions through the job profiles, it was incumbent on the Association to respond to that evidence by calling the incumbents in the disputed positions to testify on behalf of the Association.

**[52]** We agree with the Association that the University's reason for failing to call the incumbents to testify because it would disclose their support/nonsupport for the Association is not a rational one because evidence of support is not normally elicited from witnesses testifying about their job duties, primarily because their wishes are not relevant. The Board would declare such evidence inadmissible in any event. We note that it is odd that the University arranged for pre-hearing interviews of the incumbents and advised them of the dates on which their testimony would be required at this hearing, yet did not call them as witnesses at the hearing.

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<sup>4</sup> In *North Central District Health Board, supra*, the Board stated that the evidence of an incumbent working in the disputed position is preferable to evidence through a written job

[53] We have significant concern over the University's failure to produce the evidence of the incumbents at the hearing. In these circumstances, where the positions are not new and many of the incumbents have been working in these positions for quite some time, their evidence would have been the "best evidence" available of the actual duties they performed (specifically, whether managerial authority was actually exercised or whether the individual had regular involvement with confidential information related to the employer's industrial relations). When the supervisors testified with reference to job descriptions, it raised the question of how much knowledge those witnesses actually had about the performance of the duties of the incumbents. While we intend to render a decision on the basis of the evidence presented to us (as in the *North Central District Health Board* decision, *supra*), we may be hampered by the lack of reliable and detailed first-hand evidence of the incumbents concerning the actual duties they performed.

[54] Lastly, we do not agree with the University that the Association was required to call the incumbents to testify in response to the University's evidence. The Board has a long-established preference for hearing evidence of the incumbents of the disputed positions over other, less direct forms of evidence and, in this case, the University bears the onus of proof and must therefore present the best evidence available to prove its case.

### **Positions in Dispute**

[55] It is with the foregoing principles in mind that we will consider whether the evidence establishes that the following positions ought properly to be excluded from the ASPA bargaining unit.

#### **A. Director, Administration and Systems, University Advancement<sup>5</sup>**

[56] The incumbent in this position works in the Department of University Advancement, reporting to the Vice President Advancement, Heather Magotiaux. The

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description and that, without it, "the ability to determine the issue is hampered by a lack of detailed evidence on the functions performed." Also see the Board's decision in *SLGA, supra*.

Department of University Advancement focuses on alumni relations, communications and development. The primary purpose of this position is to provide strategic guidance and counsel on the effective development and execution of business processes, systems, policies and procedures for the department, as well as the management of information and data. This incumbent has been a member of ASPA for approximately 4 years and supervises seven ASPA members and two CUPE members. This person must possess a university degree in information management technologies or business administration and must have eight to 10 years of relevant experience.

**[57]** Ms. Magotiaux testified that she has three directors who report to her and form her management team, one of whom is the incumbent of the disputed position. She meets with these directors on a weekly basis to discuss workplace issues, including the setting of the budget for the department. According to the job profile entered into evidence, the individual in this position is responsible for hiring, discipline and performance evaluations of those he supervises. In cross-examination, Ms. Magotiaux acknowledged that the individual in this position has not actually been required to hire an employee but stated that the individual in this position would have the sole responsibility to hire any employee needed. Ms. Magotiaux also acknowledged that there have been no instances of formal discipline administered by the individual in this position, only a discussion with some employees about performance issues that amounted to verbal admonishment only. Ms. Magotiaux also acknowledged that "human resource" type duties were not the major focus of the position, but said that the incumbent would be expected to perform them, if they arose.

**[58]** Ms. Magotiaux testified that the incumbent was involved with a grievance filed by a CUPE member, however, this evidence was hearsay and there was no information as to what happened to the grievance or the extent of the incumbent's involvement.

**[59]** Ms. Jeffrey testified that, because the individual in this position leads a team, designs the structure of the unit, sets the strategic plan and sets the budget, the individual has the ability to affect the economic lives of other ASPA members. She also stated that the individual in this position is in a conflict of interest with other members

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<sup>5</sup> In the oral testimony and the documentary evidence, this position has also been referred to as "Director of Advancement Operations" and "Director, Advancement Information Services."

because the individual may need to take corrective action. Ms. Magotiaux stated that the individual in this position is in a conflict of interest with other ASPA members because planning and budgeting for the department could affect the economic lives of ASPA members, including the changing of positions, although she acknowledged that there have been no staff reductions in this area. Ms. Magotiaux speculated that this individual would be required to determine critical needs in the event of an ASPA labour dispute.

**[60]** The University argued that, because the individual in this position handles all labour relations matters of his reports, he is part of the management team and has the potential for a conflict of interest, the position should be excluded from the ASPA bargaining unit. The Association took the position that the individual in this position has not actually exercised managerial functions, has not created or utilized confidential information relating to the University's industrial relations and that neither of these duties are a major or a minor focus of the position.

**[61]** According to *Remai Investments Corp., supra*, it is necessary that we ascertain the true role of the position by looking beyond the position's title, position description and formal assignment of duties to the actual work performance of the incumbent in this position. As stated in the *SLGA* case, *supra*, the evidence of the incumbent is preferred for this reason. Based on the supervisor's evidence, the incumbent appears to exercise supervisory, rather than managerial, duties when exercising responsibility related to other employees' work performance. As stated in *SLGA*, an individual is not excluded because he or she might have significant responsibility over the work performance of others. While Ms. Magotiaux expects that the incumbent would be solely responsible for hiring, a secondary managerial function, we must consider the actual performance of the incumbent. In this case, the incumbent has not actually performed this duty during the four years in which he has held this position. While issuing discipline would be considered a primary factor evidencing managerial status, the incumbent has not actually disciplined anyone, except for a verbal admonishment over work performance issues, a duty which was characterized in *SLGA* as supervisory in nature. Even if we accept the hearsay evidence that the incumbent was involved with the grievance of a CUPE member, this is insufficient to warrant the exclusion of the incumbent from the ASPA bargaining unit -- we do not know the extent of involvement of the incumbent, the individual in question was not an ASPA member,



and an individual's involvement at the first stage of a grievance procedure is considered supervisory (rather than managerial) in nature (see *SLGA, supra*).

**[62]** Ms. Jeffrey testified that decision-making within the University and in each college/department is usually by committee. There was no evidence before us as to the independence of the decision-making of the incumbent. Also, there was no evidence as to how the specific types of decisions the incumbent makes affect the economic lives of the employees he supervises or the University's labour relations with ASPA. In these circumstances, we are not persuaded that the position should be excluded.

**[63]** In our view, the incumbent does not make effective determinations with regard to the budget and structure of the work area and is not involved in decision-making in these matters to the extent that an insoluble conflict exists with regard to his membership in the ASPA bargaining unit. The exercise of managerial duties is not the primary focus of the position. It appears that the primary focus of the position is to participate in and lead a team to develop and execute business processes, systems, policies and procedures and manage information and data in this department, using the individual's technical expertise in information management technologies.

**[64]** While it appears that the University did not argue that the position should be excluded under s. 2(f)(i)(B), there was no evidence presented that the incumbent acts in a confidential capacity with regard to the University's labour relations.

**[65]** In conclusion, it is our view that the incumbent should not be excluded from the ASPA bargaining unit.

## **B. Director, Purchasing Services**

**[66]** The incumbent in this position, Gwen Toole, works in the Financial Services Division, reporting to the Associate Vice President (Financial Services) and Controller, Laura Kennedy. The primary purpose of this position is to lead a team to facilitate the procurement of goods and services; to provide consulting services to senior administration and the University community on procurement strategies, contractual conditions, suppliers, estimates, etc.; and to develop bids and conduct the bidding process including evaluation, selection, negotiation and administration of those

contracts. Ms. Toole has held this position since 1999 and has been a member of ASPA during that time. She currently supervises six ASPA members and six CUPE members. The incumbent of this position must possess a university degree and purchasing designation as well as eight to 10 years of relevant experience.

**[67]** Ms. Kennedy testified that the Financial Services Division underwent two reorganizations; one in 1997-1998 and the other in 2001-2002. Prior to 1995, the Division operated with six out-of-scope assistant controllers reporting directly to her. Ms. Kennedy testified as to the structure of the Division in 2005 compared to how it existed prior to 1995. The evidence indicated that, in that time frame, the functions performed by the six assistant controller positions were essentially transferred to six director positions while one assistant controller position was eliminated and a seventh director position was added. Also during this time frame, Ms. Toole had, between 1994 and 1999, held the position of Manager of Purchasing, reporting to an out-of-scope assistant controller who was responsible for both purchasing and systems support (a separate director is now responsible for systems support). In her former position as Manager of Purchasing, it appears that Ms. Toole performed a number of the same functions as she performs in her current position.

**[68]** Ms. Kennedy testified that she now has seven directors who report to her and form her management team. She meets with these directors on a weekly basis to discuss various workplace issues including system implementation issues and staffing impacts. Ms. Kennedy testified that, on one occasion, the management team discussed contingency plans for a possible strike of CUPE members. She indicated that this presented a significant potential for a conflict of interest because she had asked the incumbent how many ASPA members would cross the picket line in the event of a CUPE strike. In cross-examination, Ms. Kennedy acknowledged that the University considers these discussions confidential and sanctions would ensue if that confidentiality was violated.

**[69]** According to the job profile entered into evidence, this incumbent is responsible for directing the development and management of the procurement function, including strategic planning and budget management. The individual in this position is also responsible for recruiting, hiring, training, and discipline, and performance evaluation. In cross-examination, Ms. Kennedy acknowledged that these human

resource duties are not a major focus of this position and that the primary human resource functions performed by the incumbent are leading, motivating, directing and assessing performance.

**[70]** Ms. Kennedy testified that the management team, including the incumbent, recently undertook a reorganization in the purchasing area due to a budget deficit and the desire to devote money elsewhere. Ms. Kennedy testified that Ms. Toole made the decision that a displaced employee (an ASPA member) would be placed in a term position that was not being renewed. Ms. Kennedy also testified that she, Ms. Jeffrey and Ms. Toole met at which time Ms. Toole provided an explanation for the change.

**[71]** Ms. Kennedy also testified concerning Ms. Toole's decision to create a new position in the purchasing area. Ms. Toole performed a study concerning customs/imports and thereafter developed a job description for a Customs Administrator within the scope of the ASPA bargaining unit.

**[72]** Ms. Kennedy stated that Ms. Toole was required to speak to an employee concerning compliance with the hours of work provisions of the collective agreement but acknowledged that this did not lead to any formal discipline, only a notation on the individual's performance evaluation. Ms. Kennedy also acknowledged that the only formal discipline issued by Ms. Toole was the termination of an employee in 1994. She also stated that Ms. Toole made this determination along with human resources concerning what action to take and how a letter should be drafted. We note that this occurred while Ms. Toole was working in the position of Manager of Purchasing.

**[73]** Ms. Jeffrey testified that, because the individual in this position leads a team and is expected to have involvement in the grievance procedure should a grievance arise, the incumbent should be excluded from the ASPA bargaining unit. She also stated that the incumbent should be excluded on the basis of confidential capacity with respect to the industrial relations of the University because the level of management she advises makes those types of decisions.

**[74]** The University argued that, because Ms. Toole is responsible for hiring, performance reviews and corrective action of ASPA members, there is a potential for a

conflict of interest and that it need not have direct evidence of the past performance of these functions by Ms. Toole. The Association took the position that Ms. Toole has not actually exercised managerial functions, except for a single incident of termination that was extremely dated, was done with the assistance of human resources and which, the Association argued, appeared to have been in violation of a requirement in the collective agreement that any termination have the consent of the Associate Vice President. The Association argued that the incumbent has not regularly acted in a confidential capacity with respect to the University's industrial relations and that the CUPE strike issue was an exceptional one that does not necessitate exclusion from the bargaining unit. The Association also pointed out that the University acknowledged that hiring and firing is not a major focus of the position but that leading, supervising and motivating are the key human resource functions performed by the incumbent.

**[75]** Our analysis in relation to the Director, Administration and Systems, University Advancement, stated above applies equally to this position. The primary focus of the position is not to actually exercise functions of a managerial nature but rather it is to use professional expertise in purchasing to participate in and lead the team to carry out the purchasing functions of the University. The incumbent has, for the most part, exercised only supervisory powers, which provides an insufficient basis to warrant exclusion from the ASPA bargaining unit.

**[76]** While there was some evidence that the position in question devolved, in part, from an out-of-scope assistant controller position, the evidence led was not sufficiently specific concerning which duties were previously performed by the assistant controller (and whether they were managerial ones) and which evolved from the incumbent's former ASPA position of Manager of Purchasing. The direct evidence of the incumbent who has worked in the manager and director positions for many years would have been of significant assistance in this inquiry. Given that the University bears the onus of proof in this case, its failure to call Ms. Toole as a witness leads us to draw an adverse inference or, at a minimum, has resulted in there being insufficient evidence that the incumbent actually exercises managerial duties.

**[77]** With regard to the elimination of an ASPA position and the transfer of the displaced ASPA member into a term position, we do not accept that this occurred through a decision solely made by Ms. Toole. Given the University's organizational

structure and committee decision-making style, it is more likely that Ms. Kennedy ultimately made the decision and that Ms. Toole's role was limited to making a recommendation. Also, given the lack of evidence concerning the decision and authority to create and fund the newly created customs position, it is our view that it was likely Ms. Kennedy's and the committee's decision to do so while Ms. Toole's role had been limited to preparing background information (i.e. the study) and preparing a job description. This involvement was more in the nature of making recommendations to Ms. Kennedy or to her and her team of directors. There was no direct evidence that these were Ms. Toole's independent decisions, which in our view is necessary when the testimony was that, generally, such decisions are made by committee. In any event, these two actions were not sufficient to demonstrate an insoluble conflict between Ms. Toole and the ASPA bargaining unit. Even if we are wrong in this conclusion and the decisions of Ms. Toole are considered effective determinations, those decisions did not fundamentally affect the economic lives of ASPA members and were only an incidental or occasional exercise of managerial duties insufficient when compared to her overall duties to warrant exclusion from the ASPA bargaining unit.

**[78]** The evidence that Ms. Toole terminated an employee several years ago is insufficient to remove her from the ASPA bargaining unit for several reasons. Firstly, it is of great significance that this termination occurred while Ms. Toole was the Manager of Purchasing, a position she held just prior to the disputed position. It is therefore not an appropriate consideration to the determination of whether the disputed position should be declared out-of-scope. Secondly, the limited evidence on this matter indicates that Ms. Toole had the assistance of human resources, however, we do not know the significance of that assistance and therefore it is difficult to conclude on the evidence presented that Ms. Toole made an "effective determination" on the matter. Lastly, it appears that, according to the collective agreement, termination requires the consent of the Associate Vice President, Human Resources. The University argued that it does not, as a matter of practice, obtain the consent of the Associate Vice President of Human Resources in the decision to terminate an employee, as required by the collective agreement. In our view, the University cannot rely on an incident of termination to support the exclusion of a position when that termination was made in violation of the collective agreement.

**[79]** With regard to the evidence concerning contingency plans for a CUPE strike, this does not of itself create a conflict of interest because the labour relations matter deals with the CUPE and not the ASPA bargaining unit. The confidential exclusion is aimed at protecting an employer from disclosure of information adverse to its interests with regard to labour relations and that must be further qualified to mean the labour relations involving the bargaining unit of which the incumbent in the disputed position is a member. Further, the University is protected in this instance by having the ability to issue sanctions against the incumbent should improper disclosure occur. In addition, that this occurred on only one occasion in several years illustrates that this is an incidental or occasional occurrence, not a regular one. The evidence that Ms. Kennedy asked the incumbent how many ASPA members would cross the picket line in a CUPE strike is troublesome. To have done so is arguably an improper communication by the University under the *Act*. In any event, the question would not have been asked if the individual had not been ASPA member and it therefore does not provide a logical basis for exclusion.

**[80]** Although not strenuously argued by the University, we see no basis for excluding the position under the confidential capacity exclusion in s. 2(f)(i)(B). No evidence was led that the individual had regular use of or involvement in confidential labour relations disclosure of which would jeopardize the University's position in collective bargaining or its labour relations with ASPA. We reject Ms. Jeffrey's argument that the position should be excluded because the incumbent provides information to others making those human resource-type decisions because we are concerned with the incumbent's knowledge and handling of information and not that of her superiors.

**C. Director, Student Accounts and Treasury**

**[81]** The incumbent in this position, Marion Van Impe, works in the Financial Services Division, reporting to the Associate Vice-President (Financial Services) and Controller, Ms. Kennedy. The primary purpose of this position is twofold: to lead a team in the management of the University's investments (the "treasury" function) and the management of student accounts receivable. Ms. Van Impe has held this position on an acting basis since 2001 and on a permanent basis since 2003 and she has been a member of ASPA during that time. She currently supervises two ASPA members and

seven CUPE members. The incumbent in this position must possess a university degree and an accounting designation as well as 10 years of relevant experience.

**[82]** The re-organizations described above concerning the Director, Purchasing Services, as testified to by Ms. Kennedy, also affected this position. The student accounts and treasury functions were performed by an assistant controller prior to 1995 and eventually, through the re-organizations, these functions were transferred to the Director, Student Accounts and Treasury. Previous to the incumbent obtaining the acting Director position, she held the position of Manager of Treasury and was at that time also a member of the ASPA bargaining unit.

**[83]** Ms. Van Impe is one of the seven directors who report to Ms. Kennedy and form part of the management team. Ms. Van Impe also acts as the secretary to an investment committee of the Board of Governors for which her duties include developing an agenda, compiling material and taking meeting minutes. Ms. Kennedy testified that certain financial information, including the status and results of the University's investments and their effects on operations, are discussed.

**[84]** According to the job profile entered into evidence, this incumbent is responsible for the development of cash and investment policies and procedures; consulting with other departments; analyzing and developing strategies regarding financial risk; interfacing with external fund managers; providing representation and advice to senior management and the Board of Governors; and researching and assessing financial initiatives and debt strategies. With respect to the student accounts receivable, the incumbent is responsible for managing collections of the accounts and assisting students seeking financial aid. Her responsibilities also include recruiting, hiring, supervising, evaluating and taking corrective action with respect to those employees she supervises. Also according to the job profile and according to Ms. Kennedy, Ms. Van Impe contributes to the development and implementation of the strategic plan and the budget. Ms. Kennedy also stated that the incumbent is required to determine staff numbers based on expectations. Ms. Kennedy acknowledged that there have been no ASPA positions eliminated during Ms. Van Impe's tenure but stated that Van Impe is considering deleting one CUPE position and a .5 ASPA position when the division completes its implementation of new information systems. Ms. Kennedy stated

that the elimination of these positions "will be her decision and she will make a recommendation."

**[85]** Ms. Kennedy indicated that Ms. Van Impe has in the past discussed performance expectations with employees in both ASPA's bargaining unit and CUPE's bargaining unit and noted the same on the individual's performance evaluation, however, this did not lead to any formal discipline. In addition, Ms. Kennedy stated that, on one occasion, Ms. Van Impe did not renew the term of an employee in the ASPA bargaining unit, however this did not give rise to a grievance.

**[86]** Ms. Jeffrey testified concerning her expectations of the incumbent should employee misconduct occur, suggesting that this position should be excluded from the ASPA bargaining unit.

**[87]** The University argued that, because Ms. Van Impe is responsible for hiring, performance reviews and corrective action relating to ASPA members, there is a potential for a conflict of interest and that it need not have direct evidence of the past performance of the functions by Ms. Van Impe. The University also took the position that there is a potential for conflict of interest in Ms. Van Impe's role as secretary to the Board of Governor's investment committee in that her knowledge of the University's investments could affect financial decisions. The Association took the position that the individual in this position has not actually exercised managerial functions and has not regularly acted in a confidential capacity with respect to the University's industrial relations. The Association argued that the information to which the incumbent is privy as secretary to the Board of Governors investment committee is confidential financial information which has nothing to do the collective bargaining or the University's industrial relations, noting that the incumbent is required to keep this information confidential as a term of her employment. The Association also pointed out that the University acknowledged that hiring and firing are not a major focus of the position but that leading, supervising and motivating are the key human resource functions performed by the incumbent.

**[88]** There is little to differentiate this position from the two previously discussed positions. In our view, the job duties actually exercised are merely supervisory in nature on the basis of our reasons outlined earlier and the primary focus



of the position is to provide technical expertise in accounting to the treasury and accounts receivable functions of the Division. Again, it is necessary to examine the actual duties exercised by the incumbent and not the "paper powers" or the expectations of the superior, particularly where the position is not new. There was insufficient evidence before us to conclude that managerial duties have devolved from the pre-1995 out-of-scope assistant controller position such that this position should be excluded as a management one. It is clear that any managerial decisions required to be made, such as staffing decisions and budgetary determinations, are made by the team and ultimately by Ms. Kennedy; Ms. Van Impe being limited to making recommendations.

**[89]** Ms. Van Impe's duties as secretary to the Board of Governors investment committee are not managerial in any way. We do not accept that these duties support a confidential exclusion. Ms. Van Impe is not involved with confidential information related to the University's industrial relations as she is only required to deal with confidential financial information concerning the University's investments. The evidence did not establish any link between that financial information and the University's industrial relations or collective bargaining decisions. Further, there was no other evidence to support a conclusion that Ms. Van Impe regularly processes or handles confidential information concerning industrial relations, the disclosure of which would jeopardize the University's bargaining position.

**D. Director, Finance and Administration, Western College of Veterinary Medicine**

**[90]** The incumbent in this position, Ralph Hildebrandt, works in the Western College of Veterinary Medicine, reporting to the Dean of that College Dr. Charles Rhodes. The primary purpose of this position is to provide strategic leadership for the financial, physical and human resources of the College. Mr. Hildebrandt has held this position and been a member of ASPA since 1992. The evidence indicated that this position has been within the ASPA bargaining unit since 1971. Mr. Hildebrandt supervises one ASPA member and two CUPE members. The person in this position must possess a Master's degree in Business Administration and an accounting designation as well as eight to 10 years of relevant experience.

**[91]** According to the job profile entered into evidence, Mr. Hildebrandt is primarily responsible for the financial and physical operations of the College and acts as the Dean's office manager. Dr. Rhodes testified that Mr. Hildebrandt and the two associate deans form the "Dean's Group," which meets on a weekly basis to address any issues arising in the college including matters involving the budget, faculty and students as well as labour relations issues. Mr. Hildebrandt provides human resource and financial advice to the members of the Dean's Group and the executive committee, and, specifically, provides advice concerning the handling of labour relations matters and the interpretation of the collective agreements. According to the job profile, as part of the Dean's Group, the incumbent's responsibilities include determining staff needs, recruitment, hiring, training, performance reviews and corrective action. Dr. Rhodes also testified that the College has an "executive committee" made up of the Dean's Group, five department heads and another director, which makes administrative decisions and act in an advisory capacity to the Dean. Mr. Hildebrandt works closely with these individuals to meet long-term and strategic financial planning and reporting requirements.

**[92]** Dr. Rhodes testified that budget and finance issues take much of Mr. Hildebrandt's time although he provides advice on labour relations matters and the interpretation of the collective bargaining agreements. He is often sought out by managers because he is a senior employee with significant knowledge from past experience relating to collective agreements, although Dr. Rhodes acknowledged that he does not "manage the agreements *per se*" and that, "at the end of the day," most decisions must be made by Dr. Rhodes himself. Dr. Rhodes reported that Mr. Hildebrandt is uncomfortable talking about ASPA members (and even CUPE members) however he acknowledged that this awkwardness has not caused a problem in carrying out the operations of the College. Mr. Hildebrandt also sits on a "human resources" committee, however disciplinary matters are not handled by this committee and the committee tends to take a proactive role in preventing the occurrence of human resource problems. Dr. Rhodes indicated that Mr. Hildebrandt has not disciplined or dismissed any employees and he would not expect this of him. The College utilizes the human resources office if disciplinary action needs to be taken and human resources carries out that disciplinary action.

**[93]** Dr. Rhodes testified that Mr. Hildebrandt provides him with advice and recommendations concerning the budget after consulting with management and gathering information. Dr. Rhodes stated that he heavily relies on that advice, however, he did acknowledge in cross-examination that the actual amount allocated to the College is not decided by those within the College and that the budget must ultimately be approved by the Dean.

**[94]** The University argued that, because this individual only manages .3 of an ASPA position, it is not relying on the ground of managerial duties to support exclusion of this position. Instead it relies on the confidential capacity exclusion, arguing that, because the incumbent prepares and administers the budget and because all management in the College go to him for advice on human resources and financial issues, he regularly acts in a confidential capacity with respect to the University's industrial relations. The Association took the position that the individual has not actually exercised managerial functions as he only provides advice and the Dean has the final say in all matters. While the incumbent might feel awkward as an in-scope supervisor, the Association argued this does not warrant excluding the position from the bargaining unit. The Association also argued that the incumbent does not regularly act with respect to confidential information concerning the University's industrial relations.

**[95]** In our view, this position should not be excluded from the ASPA bargaining unit. The University's indication that it is not relying on the managerial exclusion because the position manages only a .3 ASPA position merits comment. The fact that an individual supervises members of the same bargaining unit is not indicative in itself of managerial status. Over the years, a number of positions have been assigned to the ASPA bargaining unit where the position has the responsibility of supervising members of its own bargaining unit and the concept of an individual being an in-scope supervisor is well established in the case law. What are of significance are the actual managerial duties exercised by the incumbent. The only time the number of reports might become relevant to determining whether managerial duties are the primary focus of the position is where there are a large number of reports and that leads the Board to conclude that the individual must spend a great deal of time on managerial functions. In any event, Mr. Hildebrandt does not exercise actual managerial authority; his participation in management decisions being limited to making recommendations. It is clear that actual authority lies with Dr. Rhodes.

[96] With regard to the issue of confidential capacity, it appears that an unusual situation has arisen concerning the incumbent. While it was clear that Mr. Hildebrandt's primary duties relate to financial planning and reporting, managers in the College appear to have developed a practice of consulting Mr. Hildebrandt concerning human resource matters and matters of interpretation of the various collective agreements. It does not appear that Mr. Hildebrandt has any particular training in these matters, however, it was indicated that he was consulted because of his long experience as a senior employee in the College. Aside from his participation on a human resources committee, the consultation appears to be primarily informal. In our view, this informal practice that has developed where colleagues voluntarily share information about employees (the specific nature of which was not made entirely clear at the hearing) with the incumbent who is not required give advice, is insufficient to lead to the conclusion that the position should be excluded on the basis of confidential capacity. In addition, while we have the hearsay evidence that the incumbent feels awkward about this, it was acknowledged by Dr. Rhodes that Mr. Hildebrandt's giving of this advice has not caused any problems with the operation of the College and, as such, we cannot reach the conclusion that disclosure of this information would adversely affect the University.

[97] Similarly, while Mr. Hildebrandt's participation on the human resources committee is somewhat more formal, its focus is not on issuing discipline or making determinations but rather on the prevention of human resource problems. Without hearing from Mr. Hildebrandt on this matter, the evidence provides insufficient detail to lead us to conclude that there is confidential information discussed that relates to industrial relations or collective bargaining, the disclosure of which would adversely affect or compromise the University's position with ASPA.

**F. Director, Community Programs, College of Kinesiology**

[98] The incumbent in this position works in the College of Kinesiology, reporting to the Dean of the College of Kinesiology, Carol Rodgers. Ms. Rodgers joined the University in July 2005 and had therefore been in the position of Dean for approximately four months prior to the hearing of this application. The primary purpose of this position is to develop and manage community programs for students and the community. The individual in this position is responsible for the leadership and

administration of non-academic activities, including human resource management, coordination of financial activities, administrative resourcing, facilities and equipment and information technology. The incumbent has been a member of ASPA for approximately 10 years and supervises six ASPA members who are responsible for approximately 10 CUPE members and 300 casual programming assistants. The person in this position must possess a university degree in commerce or business administration, with an accounting designation or a university degree in Kinesiology, as well as five years experience related to community programming, finance and administration, managing projects and managing human resources.

**[99]** Ms. Rodgers testified that she has two directors (both ASPA members, the other of which is also in dispute in this application), an associate dean, and two other individuals (both ASPA members) who report to her and form her management committee. She meets with the committee on a weekly basis to discuss matters concerning the strategic plan as well as matters arising out of each of their areas of responsibility. According to the job profile entered into evidence, the individual in this position is responsible for determining the organizational structure of the area, quality of staff and program offerings, as well as marketing and building relationships with stakeholders. The job profile also indicates that the individual is required to lead, recruit and retain staff as well as be responsible for staff accountability and disciplinary action. In cross-examination, Ms. Rodgers stated that, while it would be the responsibility of this individual to hire the six coordinators who report to him, any individuals who were hired must be approved by her as Dean. Ms. Rodgers also indicated that, while the individual might make a decision as to whether to withhold pay increments, that is not a disciplinary matter. She also acknowledged that the individual has not disciplined or dismissed any employees but said that, if it was necessary to do so, the individual in this position would require the Dean's approval. Ms. Rodgers also acknowledged that no ASPA positions have been eliminated from the budget. Ms. Rodgers indicated her view that there is a potential conflict of interest if this individual remains a member of ASPA because of the requirement to deal with disciplinary matters and exercise discretion concerning pay increments.

**[100]** The University argued that this position should be excluded from the ASPA bargaining unit because the job duties are to hire, fire, conduct performance evaluations and take corrective action, all managerial functions required to be exercised

on a daily basis and made in relation to a number of individuals the individual in the position supervises. The Union argued that the position should remain within the scope of the ASPA bargaining unit because the individual in the position does not regularly act in a confidential capacity with respect to the industrial relations of the University, there are other ASPA personnel on the management committee and that has not hampered its operations and there has been no actual exercise of managerial duties such as discipline or dismissal, which would, in any event, have to be approved by the Dean.

**[101]** Again, our analysis as stated above in relation to the Director, Administration and Systems, University Advancement, applies equally to this position. The primary focus of this position is not to actually perform functions of a managerial nature but rather to develop and manage community programs for students and the community. Although the incumbent is responsible for certain supervisory functions such as leading, recruiting and retaining staff, the incumbent's responsibilities which could be characterized as managerial in nature, such as hiring for any vacant coordinator positions (belonging to ASPA) or discipline, have not actually been exercised by the incumbent and would, in any event, require the approval of the Dean. The incumbent therefore does not make effective determinations concerning these matters and the exercise of these duties in this matter does not create an insoluble conflict of interest such that inclusion in the ASPA bargaining unit is incompatible with collective bargaining. The responsibility to withhold pay increments is not considered by the University to be disciplinary, there was no evidence the incumbent actually exercised this authority, with or without the approval of the Dean, and therefore this is an insufficient basis upon which to conclude the position should be excluded.

**[102]** Although not strenuously argued by the University, we see no basis for the exclusion of the position under the confidential capacity exclusion in s. 2(f)(i)(B) of the *Act*. No evidence was led that the incumbent had regular use of or involvement with confidential labour relations information the disclosure of which would jeopardize the University's position in collective bargaining or labour relations involving ASPA.

**G. Director, Huskie Athletics**

**[103]** The incumbent in this position, Ross Wilson, works in the College of Kinesiology, reporting to the Dean of that College, Ms. Rodgers. As previously stated, Ms. Rodgers had been in the position of Dean for approximately 4 months prior to the hearing of this application. The primary purpose of this position is to develop and manage the Husky Athletics Program, an interuniversity sports opportunity for students. The individual in this position is responsible for the leadership and administration of the program, including human resource management, coordination of financial activities, marketing and promotions, administrative resourcing and facilities and equipment. Mr. Wilson has been in this position for approximately 15 years and has been a member of ASPA during that time period. He supervises 17 ASPA members (full-time and part-time coaches) and one CUPE member. This position requires a university degree with a preference for a Bachelor of Kinesiology or Sports Administration, as well as five years experience related to athletic programming, finance and administration, project management, and managing human resources.

**[104]** As previously stated, Ms. Rodgers testified that she has two directors (both ASPA members, the other of which is referred to above), the associate dean, and two other individuals (both ASPA members) who report to her and form her management committee. She meets with this committee on a weekly basis to discuss matters concerning the strategic plan as well as matters arising out of each of their areas of responsibility. According to the job profile entered into evidence, the individual in this position is responsible for determining the quality of staff and program offerings, as well as building relationships with various stakeholders. He is required to coordinate and oversee financial management of the area, including the budget. The job profile also indicates that the individual is required to lead, recruit and retain staff as well as be responsible for staff accountability and disciplinary action. Ms. Rodgers stated that the individual in this position is required to enforce the collective agreement including an hours of work plan that she developed. With respect to hiring, Ms. Rodgers stated that Mr. Wilson makes recommendations and she makes the decision.

**[105]** Ms. Rodgers testified that it was her understanding that certain grievances had been filed by ASPA relating to actions taken by Mr. Wilson, although she had no personal knowledge of the same. It was her understanding that these grievances related to hours of work, the withholding of a pay increment and the non-renewal of a contract. She noted that only one of the grievances had proceeded to a

stage where Mr. Wilson would have to side with the University and, in that case, the Dean of the College presented the matter for the University. That matter involved an "hours of the work" grievance filed by the coaches. On behalf of the Association, Ms. Thompson testified that this grievance involved a complaint by the coaches concerning the hours of work they were assigned. The grievance went to a grievance committee hearing under the terms of the collective agreement, however, at that hearing, Mr. Wilson was not present and the University conducted the hearing through the former Dean and human resources personnel.

**[106]** The grievance involving the withholding of pay increments was a matter that the Association settled with the Dean and human resources personnel. Ms. Thompson believed that Mr. Wilson was not present for these discussions or, if he was, he did not participate. In any event, it appeared that the decision came from the Dean directly and there was no indication that Mr. Wilson not participating at the meeting presented a problem. With respect to the grievance concerning the non-renewal of a contract, Ms. Thompson testified that Mr. Wilson had no involvement in this matter because it had to do with an employee employed on a seasonal, part-time basis whose hours were calculated and determined by the AECC, and not Mr. Wilson. She also indicated that Mr. Wilson had not disciplined or dismissed any employees but had only withheld a pay increment, however, that appeared to be related to a student evaluation and was not disciplinary in nature

**[107]** Ms. Jeffrey testified that the individual in this position should be excluded from the ASPA bargaining unit as a manager or because he is responsible for strategic decision-making, budget and staffing. She stated that a conflict of interest exists because Mr. Wilson was involved in a grievance resolution proceeding concerning a decision he made and because he had direct knowledge of the grievance in issue. Ms. Rodgers testified that there is a potential for conflict of interest because of the decision of whether to award pay increments and because Mr. Wilson would be unable to testify before the University in grievance proceedings.

**[108]** The University argued that the position should be excluded from the ASPA bargaining unit because the incumbent had a major role in the decision-making under attack in the three grievances and that, even if he did not attend the grievance meetings, the University wants him to play this role. The Association argued



that the position should remain within the scope of the ASPA bargaining unit because the incumbent does not regularly act in a confidential capacity with respect to the industrial relations of the University. There are other ASPA personnel on the management committee and that has not hampered its operations. The Association argued that there is insufficient information to conclude that the incumbent performs duties that put him in an "insoluble conflict" with other members of the bargaining unit. While he has had to make decisions which may lead to grievances, none of those decisions "fundamentally affected the working lives" of fellow ASPA members and it appears that the University was able to handle the grievances without the incumbent's presence.

**[109]** For the most part, the preceding analysis in relation to the Director, Community Programs, also in the College of Kinesiology reporting to Ms. Rodgers, applies to this position in relation to consideration of both the exclusion based on managerial authority and on confidential capacity. The duties and responsibilities stated in this position description are very similar except that the primary focus of this position is to develop and manage the interuniversity Husky Athletics Program.

**[110]** It appears that the primary basis upon which the University claims the position should be excluded from the bargaining unit is the incumbent's involvement in grievances of ASPA members reporting to the incumbent. The University claims that the incumbent must side with it and be involved in opposing these grievances. In our view, however, the true essence of the incumbent's involvement in the three mentioned grievances is that his supervisory actions/decisions caused the grievances to be filed. For example, with regard to the hours of work grievance, this arose out of an alleged improper assignment of work by the incumbent under the collective agreement or the hours of work plan prepared by Ms. Rodgers. Scheduling and assignment of work are supervisory powers, not managerial ones. Where a bargaining unit includes in-scope supervisors, lead hands or foreman, it is not uncommon or unexpected that grievances might arise concerning these decisions. This does not automatically result in or provide justification for exclusion from the bargaining unit. What is of significance with regard to the hours of work and pay increment grievances is the fact that these matters were dealt with between the Association and the University without the further involvement of Mr. Wilson. In this regard, we preferred the evidence of Ms. Thompson as she was directly involved in these matters whereas Ms. Rodgers was not, given that these actions

predated her appointment to her current position. According to the *SLGA* case, *supra*, involvement at the first stage of a grievance process, including the investigation of grievances, is not incompatible with an individual's membership in the union. While the University indicated its desire to have Mr. Wilson participate in these matters to a greater degree, it admitted that Mr. Wilson's lack of involvement at the committee hearing of one grievance and the settlement of the other created no problems in the University's handling of these matters. In addition, given the need for Ms. Rodgers' approval of other managerial decisions such as hiring and discipline, it is difficult to conclude that these matters would be "effectively determined" by Mr. Wilson rather than by the Dean herself along with human resources personnel. That the University might expect Mr. Wilson to testify as a witness on its behalf should there be an arbitration hearing of a future grievance, should not create an impediment to Mr. Wilson remaining in the ASPA bargaining unit. The requirement to testify involves the giving of truthful information, not the taking of a side in a dispute.

**[111]** Lastly, with regard to the grievance involving the non-renewal of the contract, we accept the evidence of Ms. Thompson in the absence of any direct evidence by the University, that this issue did not involve a decision made by Mr. Wilson. For these reasons, we conclude that this position should remain within the ASPA bargaining unit.

#### **H. Director, Student Information Systems**

**[112]** This position is located in the Information and Communications Technology Division, reporting to the Associate Vice President of Information and Communications Technology, Dr. Richard Bunt. While an ASPA member occupied the position from its inception four years ago, it is currently vacant. The primary purpose of the position is to provide leadership in the interpretation and implementation of strategic goals for collection, dissemination and use of information about students, courses and programs, while ensuring all information systems are integrated. The primary current responsibility of this position is to oversee the implementation and ongoing operations of the new student information system. This position has been within the scope of ASPA for a number of years and currently supervises 24 ASPA members and one CUPE member. This person must possess a university degree at the postgraduate level as well as seven years of relevant experience.

**[113]** According to the job posting for this position, the individual in this position has several related job duties including strategic planning and participation on the executive team with Dr. Bunt and two other directors. Dr. Bunt testified that he does little daily supervision of these directors and that they operate as a team to set policies and plans and develop a budget. He stated that he meets with each director on a weekly basis while group meetings are less frequent. Dr. Bunt indicated that each director is assigned a budget and oversees their area of operation within that budget. He stated that this presents an opportunity for hiring short-term staff and for purchases of hardware and software, although those decisions would be first approved by him.

**[114]** Dr. Bunt testified that the incumbent in this position would have full responsibility for personnel management and the job posting indicates that this would include recruitment, hiring, training and performance evaluation. The job posting also indicates that this director would be required to hold staff accountable and issue necessary disciplinary action. Dr. Bunt indicated that it was his expectation that the director would carry out disciplinary action, however, there have been no instances of dismissal or suspension since the creation of the position. Dr Bunt noted that, while the previous incumbent had to speak to some individuals about their conduct, there was no formal discipline issued, only verbal admonishment.

**[115]** Dr. Bunt stated that the previous incumbent was required to negotiate with the Association concerning an extension of an ASPA member's probationary period, however, he provided few details concerning this situation and had no firsthand knowledge of the matter. Ms. Thompson, who testified on behalf of the Association, stated that she met with Kathy Jeffrey on two occasions (as well as another individual from the human resources department on one of those occasions) to negotiate the extension of this individual's probationary period. She stated that the former incumbent in this position was not involved in those discussions and negotiations regarding the probationary employee.

**[116]** Dr. Bunt also testified that, on one occasion, the former incumbent recused herself from an executive team meeting while a collective bargaining update was discussed. Dr. Bunt said that this made the former incumbent feel demeaned because the other two directors stayed at the meeting, although he acknowledged in

cross-examination that her recusal was not a major impediment and business carried on. Dr. Bunt stated his concern was that, because the director sits on senior administrative bodies within the University, matters could come up about collective bargaining that would create a conflict of interest.

**[117]** The University argued that this position should be excluded because the incumbent would be responsible for recruiting, hiring and performance evaluation of those supervised. The University stated that there will be a conflict of interest if the incumbent remains in the ASPA bargaining unit because the incumbent will need to recuse himself or herself from executive team meetings and will be required to negotiate with ASPA on certain matters. The University urged the Board to accept the evidence of Dr. Bunt concerning the negotiation of the extension of an employee's probationary period but said that, in any event, it matters not whether the former incumbent negotiated directly with the Association or indirectly through Ms. Jeffrey.

**[118]** The Association argued that the evidence of Dr. Bunt was hearsay in nature and should not be accepted. The Association also took the position that the individual in the position has not actually exercised managerial functions, has not created or utilized confidential information relating to the University's industrial relations and that neither of these duties are a major or a minor focus of the position.

**[119]** The role and responsibilities of the incumbent in this position are similar to those of the incumbent in the position of Director, Administration and Systems, University Advancement and, as such, our analysis concerning that position applies here and leads us to the conclusion that the position should not be excluded from the ASPA bargaining unit on either of the grounds of managerial authority or confidential capacity. The primary focus of the position is to lead a team in the implementation and overseeing of student information systems, using professional expertise in information systems. While Dr. Bunt generally takes a "hands-off" approach with the directors who report to him, it is apparent that he would be involved in any decisions that fundamentally affect employees' working lives such as hiring and the actual setting of the budget. Given that there have been no instances of discipline and only the exercise of the supervisory function of verbal admonishment over work performance issues, we cannot conclude that the incumbent has managerial authority. In our view, it is likely that Dr. Bunt would have final say over any disciplinary decisions.

[120] With regard to the extension of the probationary period of an employee, we prefer the direct evidence of Ms. Thompson concerning the lack of involvement of the previous incumbent in those negotiations. It appears that the previous incumbent's role in the matter would have been supervisory only; to report on the work performance of the probationary employee and recommend that the University negotiate an extension. Given the lack of testimony of the previous incumbent, it is impossible to conclude that his or her role was greater than this.

[121] With regard to the previous incumbent's discomfort in having to recuse herself from parts of an executive committee meeting while a collective bargaining update was discussed, we find this insufficient to conclude that we should exclude this position from the ASPA bargaining unit. Not only is the evidence hearsay in nature and leads to concerns of reliability, the fact that the recusal had no impact on the operations of the College is determinative.

[122] This position will not be excluded from the ASPA bargaining unit.

**Conclusion:**

[123] For these reasons, we find that all seven positions in dispute before us shall remain within the scope of the bargaining unit represented by ASPA on the basis that the duties they exercise do not meet the criteria for exclusion in ss. 2(f)(i)(A) and (B) of the *Act*. Given this conclusion, it is unnecessary for us to examine whether the University is required to establish a change in circumstances and, if so, whether such change was established.

[124] While this decision of the Board disposes of the application regarding the seven positions herein dealt with, the application will, by the agreement of the parties, be adjourned *sine die* with respect to the four "Manager" positions which the parties did not address at the hearing. It is our hope that these Reasons for Decision will be instructive in the parties' further discussion concerning the status of these positions.

If the parties have been or are able to resolve the status of those remaining positions without the further involvement of the Board, the Board would appreciate if the parties would so advise.

**DATED** at Regina, this **30th** day of **April, 2007**.

**LABOUR RELATIONS BOARD**

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Angela Zborosky, Vice-Chairperson