Labour Relations Board
Saskatchewan

UNIVERSITY OF SASKATCHEWAN, Applicant v. ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondent

LRB File No. 057-05; October 28, 2008
Vice-Chairperson, Angela Zborosky; Members: Marshall Hamilton and Bruce McDonald

For the Applicant: David Stack
For the Respondent: Gary Bainbridge

Reconsideration – Criteria – Board discusses and applies criteria for reconsideration – Decision not precedential and not significant policy adjudication – Board follows precedent in not excluding employees from bargaining unit in multiple bargaining unit setting – Application for reconsideration dismissed.

Reconsideration – Criteria – Board discusses and applies criteria for reconsideration – Decision does not turn on a conclusion of law not properly interpreted by original panel – Board did not merely carry out a quantitative measure of time spent on managerial duties – Original panel's decision that community of interest not a relevant consideration not improper interpretation of law – Application for reconsideration dismissed.

Reconsideration – Criteria – Board discusses and applies criteria for reconsideration – Decision not tainted by a breach of natural justice – The drawing of adverse inference and ignoring of evidence not natural justice issues – Alternatively, to limited extent adverse inference drawn, not improper and not failure to ignore relevant evidence – Board not required to accept uncontradicted evidence – Application for reconsideration dismissed.

***The Trade Union Act*, ss. 2(f)(i), 5(j), and 13.**

REASONS FOR DECISION

Background and Facts:

[1] The University of Saskatchewan ("the University" or "the Employer") applied on May 16, 2007, pursuant to ss. 5(j) and 13 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), for reconsideration of a decision of the Board respecting the parties dated April 30, 2007, reported at [2007] Sask. L.R.B.R. 154.

[2] The Administrative and Supervisory Personnel Association ("ASPA" or "the Association"), is the certified bargaining agent for a unit generally comprising administrative and supervisory personnel, including professionals, technical officers and administrative assistants. In addition to ASPA, there are four other bargaining units in place at the University represented by three different unions: the Canadian Union of Public Employees ("CUPE") representing two bargaining units, and the University of Saskatchewan Faculty Association and Professional Association of Interns and Residents of Saskatchewan each representing one unit. The Board has often commented on the nature of the bargaining unit represented by ASPA. While the Board has stated in the past that the unit does include some "middle management" employees, it is not restricted to such employees and includes "tag end" groups of employees not placed in the larger CUPE bargaining unit as well as other employees placed there for historical reasons (see paragraphs 20 – 22 of original decision).

[3] On March 24, 2005, the University filed an application seeking an order to amend the certification Order by excluding 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. At a later date, the University added that the incumbents be excluded on the basis of a third ground, namely, that the employees in question were persons whose primary responsibilities are of a managerial character.

[4] While the University sought the exclusion of eleven positions, it asked that only seven of those positions be dealt with at the original hearing, while adjourning *sine die* the determination of the status of the remaining four positions. The incumbents in the seven positions dealt with by the Board in its decision were as follows:

> *Director, Administration and Systems, University Advancement;*
> *Director, Purchasing Services;*
> *Director, Student Accounts and Treasury;*
> *Director, Finance and Administration, Western College of Veterinary Medicine;*
> *Director, Community Programs, College of Kinesiology;*
> *Director, Huskie Athletics;*
> *Director, Student Information Systems.*

[5] The Board dismissed the University's application to exclude these positions from the ASPA bargaining unit, finding that the University had not met the criteria for exclusion in s. 2(f)(i) of the *Act* (which contains the definition of "employee"), specifically, that they were not persons "whose primary responsibility is to actually exercise authority and actually perform functions of a managerial character" nor were they persons who were "regularly acting in a confidential capacity with respect to the industrial relations" of their employer. The Board held that the continued inclusion of each position in the ASPA unit would not create an insoluble conflict based on the nature and extent of any managerial duties to be performed for the employer and the individual's interests as a bargaining unit member. Based on the evidence offered by the University which consisted of job descriptions and the testimony of the incumbents' superiors, the Board held that while some of the incumbents performed supervisory duties (which do not provide a basis for exclusion), the managerial authority they were assigned by their job descriptions was not genuine or effective in the sense that they rarely, if ever, exercised those assigned duties (it was not their primary responsibility) and that they did not have the power of effective determination. The Board also held that the employees in question did not have regular access and use, or in some cases, any access at all, to *confidential information related to the employer's industrial relations*, such that their inclusion in the bargaining unit would create a conflict of interest or potential for such conflict.

[6] In reaching its decision, the Board specifically rejected the contention of the University that "community of interest" was a relevant consideration, on an application to amend by exclusion. It is rather a consideration of *inclusion* in the sense that it is only considered upon either an application for certification (when determining whether a group of employees would form a viable bargaining unit), or on an amendment application (when determining whether a group of employees should be *added to an existing bargaining unit* or when determining *in which unit* a new position belongs in a multi-bargaining unit setting.)

[7] The present application filed by the University on May 16, 2007 is for reconsideration of the Board's decision to dismiss its application and its ruling that the disputed positions should remain in the ASPA bargaining unit. In its letter to the Board forming its request for reconsideration, the University provided a list, three pages in

length, detailing purported grounds for reconsideration, including several particulars under each of the following basic premises: (i) that the decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change; (ii) that the decision turns on a conclusion of law or policy not properly interpreted by the original panel; and (iii) that the decision is tainted by natural justice.

[8] Also, in its written request for reconsideration, the University asked that the reconsideration application be heard by an expanded panel of the Board in light of the precedential nature of many of the issues it was raising. In response, counsel for ASPA submitted that the Board should follow its usual practice of having reconsideration applications heard by the original panel, basing its position on the Board's Reconsideration decision in *United Food and Commercial Workers' Union, Local 1400 v. Sobey's Capital Inc. (o/a Varsity Common Garden Market)*, [2005] Sask. L.R.B.R. 358, LRB File No. 181-04 & 227-04) where the Board stated at 360 that "While the assignment of a panel to hear a case is an administrative decision, the Board's normal policy is that a reconsideration hearing is dealt with by the original panel when possible." In the case before us, on the basis of the *Sobey's* decision, *supra*, and the Board's decision in *United Brotherhood of Carpenters and Joiners of America, Local 1985, et al. v. Graham Construction and Engineering Ltd. et al.,* [2004] Sask. L.R.B.R. 142, LRB File No. 014-98 & 227-00 (June 4, 2004)[1] the Chair of the Board assigned the application to the original panel of three members that heard and determined the initial application. The University raised no objection to the Chair's decision at the reconsideration hearing.

[9] The reconsideration hearing was held on July 10, 2007, at which time the parties made oral argument and filed briefs of law and argument. The University restricted its request for reconsideration to the following grounds:

I. That the decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change, because:

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[1] In *Graham*, the Chair of the Board assigned an expanded panel of five members, three of whom sat on the panel that heard the original application, to hear a reconsideration application. The Board, in rejecting both the unions' request for a reconsideration by the entire Board and the employers' request for a hearing by the original three panel members, stated that "*it was an administrative decision to expand the original panel to five members*" but cautioned that the use of five members rather than three does not transform the reconsideration application into an appeal.

(a) The decision departs from existing Board authority respecting exclusion of managerial/supervisory employees in a multi-bargaining unit setting; and

(b) The decision repudiates earlier statements by the Board that identified managerial responsibility within the ASPA unit as a source of concern;

II. That the decision turns on a conclusion of law or policy not properly interpreted by the original panel because:

(a) the Board carried out a quantitative measure of how much time the employees spent carrying out managerial activities; and

(b) the Board erred by not considering community of interest;

III. That the decision is tainted by a breach of natural justice because:

(a) the Board improperly drew an adverse inference from the failure of the University to call the incumbents in the disputed positions to testify; and

(b) the Board ignored relevant evidence.

Arguments:

[10] Counsel for the Employer, Mr. Stack, argued that reconsideration of the application is necessary and appropriate for a number of reasons. In general, the Employer argued that the Board's original decision was "coloured by a mistaken approach that the Board does not have responsibility to ensure that the certification lines in a multi-unit workplace comply with the legislation and do not give rise to adverse labour relations consequences." The Employer argued that by following this mistaken approach, the Board made a decision that tolerates significant conflict between the disputed positions, both with other ASPA members and as between ASPA and CUPE members (a matter about which CUPE has made complaints in the past and which was the subject of previous Board comment) leading to concerns of unfairness and neutrality.

[11] The Employer also argued that by following this mistaken approach, the Board has failed to: (i) address evidence of managerial duties and conflict on a qualitative basis (as opposed to a quantitative basis); and (ii) take into account community of interest considerations, including the Employer's structure and the practice and history of collective bargaining in the workplace. Lastly, the Employer asserted that

"the decision is insolubly affected by a breach of natural justice, specifically, inappropriate adverse inferences and disregarded evidence."

[12] Counsel for the Association, Mr. Bainbridge, stated that the Association is opposed to the Employer's request for reconsideration, arguing that the Employer has not met the criteria for the first step in the two-step approach the Board has adopted for such requests, that is, establishing grounds to justify the re-opening of a hearing. The Association argued that the essential nature of the Employer's request for reconsideration is that it wants a "re-match" based upon the same arguments it made at the original hearing, a request which is manifestly unfair and does not provide a proper basis for reconsideration. The Association relied on *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, for the proposition that a litigant is "only entitled to one bite at the cherry."

[13] The Association argued that there have been very few successful applications for reconsideration before the Board and characterized those cases as ones involving obvious and glaring oversights, unlike the situation presently before the Board which is merely a dispute over the *result* of the decision. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, the original decision was reconsidered on the basis that both the Board and the parties overlooked a specific provision of the *Act* directly applicable to the matter at hand. In *City of North Battleford, supra*, the Board, in amending a certification order, made an incorrect assumption about the facts (that a certain group of employees had always been included in the bargaining unit); and the party opposite agreed the Board had made such an error and that reconsideration was appropriate. In *Kaufmann v. Saskatchewan Government and General Employees Union and Government of Saskatchewan*, [2006] Sask. L.R.B.R. 97, LRB File No. 287-00, the Board reconsidered its decision and ordered a re-hearing in circumstances where a breach of natural justice occurred as a result of a union's witness having subsequently sat as a member of a panel of the Board with the same chairperson hearing a different application while the decision in which the witness was involved was still pending. The final case where reconsideration was granted by the Board was in *Canadian Union of Public Employees, Local 4683 v. Ross and Hertz Northern Bus (1993) Ltd.*, [2006] Sask. L.R.B.R. 109, LRB File No. 193-05, where, on the initial

application, a rescission vote had been ordered on the basis of what the parties' agreed was an inaccurate statement of employment.

[14] The Association argued that the Board's decision in this matter is not precedential and that to the contrary, accepting the Employer's request to remove incumbents from the bargaining unit without evidence of changed circumstances would have been a substantial departure from the law. The Association also argued that reconsideration is not an appeal and that to the extent that the Employer has asserted that the Board made errors in law as a result of overlooking key legislation or the application of certain case law, the appropriate avenue for the Employer is a judicial review application and not a reconsideration before the Board.

[15] Finally, in relation the Employer's factual assertions as to why the incumbents were not called to testify as well as its offer to now call the evidence of the incumbents at a reconsideration hearing, the Association argued that the Employer has failed to established grounds for the admission of new evidence.

[16] We will address the further particulars of the Employer's and Association's arguments in the course of our analysis and decision.

Relevant Statutory Provisions:

[17] The following provisions of the *Act* are relevant to this application:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or*
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;*
>
> *…*
>
> *5 The board may make orders:*
>
> *(j) amending an order of the board if:*

> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*
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> *. . .*
>
> *13 A certified copy of any order or decision of the board shall be filed in the office of a local registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court, but the board may nevertheless rescind or vary any such order.*

Analysis and Decision:

[18] The Board first described the criteria applicable to an application for reconsideration in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al*., [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, as follows, at 107-108:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster.*
> *. . .*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
>
> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
> *. . .*

In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:

> *In Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
>
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> 4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

The fourth and sixth of these criteria reflect the concern of the Council with an issue which is of less significance in smaller

> *jurisdictions such as ours, the issue of consistency and coherent development with respect to the articulation of public policy. Where there are numerous panels struck to determine similar cases, the concern for maintaining a uniform approach on matters of principle understandably becomes acute. In any case, this issue is not a factor here.*
>
> *The first and fifth criteria have been the basis of decisions of this Board, both formal and informal, though the decision in Westfair Foods, supra, represents the most extensive discussion of these issues. We have been unable to discover any instances where the Board has been confronted with the circumstances alluded to in the third criterion.*
>
> *The second criterion in the list set out above in the quotation from the Overwaitea Foods decision seems to us to be an accurate statement of the standard which must be met if the applicant is to succeed on this application. The application rests on an assertion that there is evidence which was not put before the Board at the original hearing which would alter their conclusions with regard to the allegations made by Ms. Ruff.*

[19] In the Board's decision in *City of North Battleford v. Canadian Union of Public Employees, Local 287*, [2003] Sask. L.R.B.R. 288, LRB File No. 054-01, the Board commented on the reason for such a stringent test for reconsideration, at 291:

> *[9] As explained by the Ontario Labour Relations Board in Volta Electrical Contractors Ltd., [2000] OLRB Rep. Sept./Oct. 1041, the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made". At para. 39, the Ontario Board described the purpose of the reconsideration discretion as follows:*
>
> > ***A request for reconsideration is not a hearing de novo and is not an appeal. It is not an opportunity for a party to reargue a case, raise new arguments or present new evidence. The power to reconsider is typically invoked by the Board solely to allow important policy issues to be addressed, evidence or law that would make a substantial difference to the case that was not previously available to be presented, or errors to be corrected.***
>
> [**emphasis added**]

[20] The principle that the Board does not sit in appeal of its own decisions was applied in *Graham*, *supra*, where the Board stated at 457:

> *[17] As stated, counsel for the Unions attempted to transform the reconsideration application into an appeal. For example, in the Particulars Re Application For Reconsideration filed by the Unions, the Unions contend that the original panel "failed to consider or properly consider evidence," and that the Board "erred in accepting arguments."* ***As set out earlier herein, the Board has rejected the approach that a reconsideration application should be turned into an appeal. As such, a number of the Unions' arguments were inappropriate and need not be considered on a reconsideration application.***
>
> *[18]* ***The Unions raised no new arguments before the expanded panel of the Board.*** *Counsel for the Unions challenged the Board's jurisdiction to accept the defence of abandonment. Counsel had previously made this argument before the Board in Mudjatik, supra. The only new discussion arose as a result of a question from Board Member Wagner relating to the Board's decision in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. CAA Saskatchewan Emergency Road Service, [2000] Sask. L.R.B.R. 476, LRB File No. 153-00.*
>
> *[19] In our view, this is not an appropriate case in which to grant a reconsideration application. The Board's decision has not operated in an unanticipated way and counsel for the Unions did not strenuously argue this point. Counsel for the Unions did argue that the Board's original decision turned on a conclusion of law or general policy under the legislation which was not properly interpreted by the original panel. With respect, the Board does not believe that the original decision turned on conclusions of law and general policy which were not properly interpreted. As stated earlier, the original panel accepted that the principle of abandonment has existed as a Board concept, supported by precedent, since the early 1980's. The original panel accepted that the principle of abandonment should be applied sparingly, depending on the facts of the case. The original panel did not deviate from Board precedent or start a new line of thinking with respect to the abandonment concept. Based on the facts presented before it, the original panel determined that the principle of abandonment applied.*
>
> *[20] Counsel for the Unions argued that the original decision was precedential and amounted to a significant policy adjudication which the Board may wish to change. This argument is rejected in that the original decision is based on Board precedent which*

> *originated in Wappel, supra. In the Board's decisions on abandonment set out earlier herein, the concept of abandonment is deemed applicable in the construction industry, depending on the facts of the case. In the original decision, the Board applied the principle of abandonment and accepted that it was a ridiculous proposition that a union could be excused from taking action for a period of upwards of fifteen years, banking on a change of law that might improve the union's legal position. As such, the original decision is not precedential or based on a new policy which should be changed, as requested by the Unions.*
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> [**emphasis added**]

[21] The application by the Employer for reconsideration of the Board's decision is based upon the fourth, fifth and sixth grounds enunciated in *Western Cash Register*, *supra*. We shall deal with each in the order argued by the Employer.

I. That the decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change.

[22] Under this ground, referred to as the "sixth ground" in *Western Cash Register, supra*, the University took the position that the decision of the Board: (a) departs from existing Board authority respecting exclusion of managerial/supervisory employees in a multi-bargaining unit setting; and (b) repudiates earlier statements by the Board that identified managerial responsibility existing within the ASPA unit as a source of concern.

[23] The University argued that the Board should reconsider its decision because it had become apparent, through the experience in this particular workplace, that the certification lines that were drawn are wrong and/or have had a negative impact on the collective bargaining relationship (in particular, the relationships involving CUPE) and/or have led to labour unrest. In making its arguments that the Board is *obliged* to make changes to the lines of a certification order, that certification lines are not *res judicata* and that such changes need not be predicated on the establishment of a change in circumstances, the Employer relies on: (i) the British Columbia Labour Relations Board's decision in *Re: Pacific Press*, [1996] B.C.L.R.B.D. No. 146 (QL) as authority for the proposition that the Board can and should revisit previously ordered or

agreed upon bargaining unit descriptions, precisely because the demarcation lines in this workplace are not easily or rationally drawn; and (ii) the Board's decision in *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 in which the Board noted its concern that persons who exercise managerial authority appeared to be included in the ASPA bargaining unit, indicating that the "matter might require addressing by the parties at a different time" and that "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."

[24] With respect to the Board's comments in the *University of Saskatchewan* (LRB File Nos. 083-00 & 108-00) decision, *supra*, as noted above, the Employer argued that the Board had, in effect, "repudiated" that decision by calling the Board's comment in that case "*obiter*." The Employer's review of potential conflict concerning the placement of existing positions in ASPA, which was taken subsequent to this decision, was done in order to "attempt to promote positive labour relations in this multi-unit workplace by removing a continuing source of irritation, distrust and conflict as between ASPA and CUPE."

[25] The Employer also referred to the Board's decision in *Saskatchewan Union of Nurses v. Saskatchewan Association of Health Organizations and Prince Albert District Health Board,* [1999] Sask. L.R.B.R. 549, LRB File No. 078-97, where the Board excluded nursing supervisors even though they did not meet the test for exclusion on the basis of managerial or confidential capacity duties (the definition of "employee" in s. 2(f)(i) of the *Act*) but because of the labour relations role they played in a multi-bargaining unit setting, specifically, that these nurses were expected to play the role of "neutral arbiter" between employees who are members of several bargaining units, including the Saskatchewan Union of Nurses to which the incumbent belonged. The Employer argued that in the circumstances of the present case, where an incumbent in the ASPA bargaining unit supervises employees in several bargaining units (including ASPA), the Board must gauge the degree of conflict not only between the incumbent and other ASPA members but also whether labour relations conflict is created among the multiple bargaining units by leaving the employee in the ASPA unit. In this regard, the Employer stated that there were concerns of fairness and neutrality and referred to a

number of applications that CUPE has brought to the Board to have ASPA declared a company-dominated union[2] on the basis of the allegation that managerial activities were being carried out by ASPA members for the benefit of other ASPA members and to the detriment of CUPE members. The Employer argued that the Board failed to take into account the conflict created by having ASPA members supervise both CUPE members and other ASPA members.

[26] The Association argued that this ground has no application because the decision is not at odds with the Board's general policy and law, adding that this sixth ground, as set out in *Western Cash Register, supra*, was not meant to be relied on for minor changes in the law. The Association also noted the comments of the Board in the *Imperial 400*, decision, *supra*, that this ground is of less significance in a smaller jurisdiction such as Saskatchewan. The Association argued, however, that more importantly, the decision is not precedential and conflicting, the Board having followed "numerous decisions going back decades," and that the vast majority of case authority favoured a decision of dismissal of the University's application.

[27] The Association submitted that it was the Employer, who, at the original hearing, was seeking to fundamentally change the existing law by attempting to have long time ASPA members excluded from their bargaining unit without establishing a change in circumstances or changes to their positions.

[28] The Association argued that the Employer failed to establish at the original hearing any "neutrality concerns" CUPE would have. The Association pointed out that CUPE received notice of this application and chose not to participate in the hearing; their absence demonstrates that they do not share the concern of the Employer.

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[2] In none of these applications, all of which were decided in 2000 and 2001, was CUPE successful with that argument, the Board determining that CUPE had no standing to bring such an application - *Administrative and Supervisory Personnel Association v. University of Saskatchewan and Canadian Union of Public Employees, Local 1975*, [2001] Sask. L.R.B.R. 841, LRB File No. 108-01; *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; *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association,* [2001] Sask. L.R.B.R. 288, LRB File No. 154-00; and *University of Saskatchewan v. Canadian Union of Public Employees, Local 1975 and Administrative and Supervisory Personnel Association,* [2000] Sask. L.R.B.R. 527, LRB File Nos. 083-00 and 108-00.

[29] The Association further submitted that the Employer's argument that the Board should have considered the principle in *SAHO, supra,* is without merit as the case is highly distinguishable on its facts. It also represents an improper attempt by the Employer to re-argue its case on a reconsideration. The Association submitted that the weight of the Board's authority, which the Board applied in the present case, goes against the result in the *SAHO* decision.

[30] In examining this ground for reconsideration, we are mindful of the Board's comments in the *Imperial 400* and *City of North Battleford* decisions, both *supra*, (as well as the cases cited therein), that there is value in the "finality and stability of decision-making," and that a reconsideration is not a "hearing *de novo*" or an "appeal." We find that the decision is not precedential and not based on new policy that the Board may wish to change.

[31] The thrust of the University's argument is that the Board must, upon request, examine a position to determine in which bargaining unit, if any, it belongs, regardless of the fact that the Board may have previously made such an order placing that position in a certain bargaining unit or that the parties have previously entered into an agreement regarding same. The Employer says we can do this without it having to first establish a change of circumstances. In our view, this argument does not form a valid ground for reconsideration of the Board's decision. This argument is the very same one put before the Board at the original hearing and the University's position was flatly rejected by the Board [see paragraphs 24 – 26]. Based on established case law, the Board stated that it is improper to revisit an order it has made on scope without the party seeking such an order first establishing a change in circumstances. This makes sense on a legal and practical level – if the Board has previously made an order about a subject matter, the doctrine of *res judicata* applies. In addition, practically speaking, it makes no sense for the Board to permit parties to continuously challenge the same Board order merely because it does not like the result. Such an attempt effectively amounts to an "appeal" of the Board's earlier decision. The Board has long held that it does not sit in appeal of its own decisions on scope and that is why a change in circumstances is required to be shown before the Board will revisit the issue of scope.

[32] The University also argued that the Board has an overriding duty to ensure that the parties' agreements on scope reflect the law because the parties cannot contract out of the provisions of the *Act*. The Board essentially dealt with this issue as well in its original decision, at paragraphs 24 to 26, stating that it does not have an overriding and continuing duty to remove employees from bargaining units upon request and that it will not interfere with parties' agreements on scope, particularly because it is often not aware of those agreements. The Board does not wish to adopt a practice of requiring parties to make an "employee determination" application to the Board on every occasion where a new position is created, or on the whim of one party or another who does not like the agreement it made. Such a practice would discourage the settlement of disputes by the parties themselves, contrary to the intent and purpose of the *Act*. That this would be incredibly impractical is evident when examining the University's workplace – not only are there multiple bargaining units but the evidence at the original hearing indicated that those employees who are currently out of scope have not all been declared so by way of Board order (some occurred through an agreement by the parties where positions were "exchanged" between them) and that in some cases, those who have been treated as out of the scope of any bargaining unit do not exercise managerial duties (see paragraph 23 of the original decision which outlines the evidence of Ms. Jeffrey on these points). In the Board's view, there would have to be compelling circumstances for it to overturn an agreement on scope and none exist here. Although the University has framed its argument on this point in a slightly different fashion than it did at the original hearing, a reconsideration shall not be granted merely to hear new arguments on the same issue.

[33] Although the Board made its original decision on the basis of well established Board authority, we also note the Board's decision in *City of Regina v. Regina Civic Middle Management Association and Canadian Union of Public Employees, Local 21*, [1990] 2nd Quarter Sask. Labour Rep. 80, LRB File No. 276-88, a decision which addressed the requirement of establishing a change in circumstances upon an employer's application to remove several positions from the scope of a bargaining unit, where the positions had previously been placed in scope as a result of Board orders or the parties' agreements. The Board stated at 80:

When an employer invokes the amendment process for the purpose of having a position removed from the bargaining unit, the onus rests upon the applicant. ***Furthermore, where the position's relationship to the bargaining unit has already been decided by the Board or by the collective bargaining agreement, the Board has refused to grant amendment applications which seek to reverse the position's status unless the applicant can show that there has been a material change in the duties and responsibilities of the position since the date of the order or agreement.***

The Board's policy was set forth in Saskatchewan Liquor Board, Sask. Labour Report, May 1981, Vol 32, No. 5, p. 37. … The Board dismissed the union's unfair labour practice and stated:

> *There is before the Board a situation where a certification order of the Board has, in effect, been amended by putting certain persons out of scope through the collective bargaining process and the collective agreements reached thereby. The policy of this Board has been to accept such arrangements since the purpose of the legislation is to facilitate collective bargaining. (p. 39)*

The Board continued:

> *There are two possible circumstances where the Board might refuse to recognize the definition of a bargaining unit reached by the parties in a collective bargaining agreement which differs from the bargaining unit defined in a Board order. The first is where the Board finds that the unit agreed to by the parties is not an appropriate unit....The second area where the Board might not recognize a unit voluntarily agreed to by the parties and differing from the unit defined by a Board order is where the agreed unit violates the right of employees to be represented by a union within the unit defined by the Board. … The Board has no power to amend the collective bargaining agreement which is what the union is in effect asking it to do in this case. … (p. 40-41)*

The Board has subsequently reaffirmed Saskatchewan Liquor Board, supra, on numerous occasions. See:

> *Liquor Board of Saskatchewan, Sask. Labour Report, Nov. 1984, Vol. 35, No. 11, p. 38;*
>
> *Saskatchewan Government Insurance, Sask. Labour Report, March 1987, p. 48;*

> *Town of Shaunavon, Sask. Labour Report, Dec. 1987, p. 37;*
>
> *Beeland Co-operative Association Limited, Sask. Labour Report, Nov. 1982, Vol 33, No. 11, p. 38*
>
> *Regina General Hospital, Sask. Labour Report, 1988 Fall, p. 35.*

…

> *In Saskatchewan Liquor Board, Sask. Labour Report, May 1981, Vol 32, No. 5, p. 37,* ***the Board decided that if a union negotiates a position out of scope, then it must use the collective bargaining process to bring that position back into scope. Conversely, if an employer concludes a collective bargaining agreement which includes certain positions, then it must either exclude them through the process of collective bargaining or have them excluded by the Labour Relations Board in accordance with The Trade Union Act. To countenance any other approach to collective bargaining would inevitably lead to industrial instability because it would encourage both sides to ignore their contractual and statutory rights and obligations.*** *(p. 36-37)*

… If either party applies to the Board, it must establish that there has been a material change to the position's duties and responsibilities since the date of the last Board order or since the date of the collective bargaining agreement, as the case may be.

… Moreover, it is apparent from the history of proceedings before the Board, commencing with the original certification application which was unopposed by the employer, that the employer has been unconcerned about any conflict of interest resulting from its senior employees belonging to a union. This lack of concern is also reflected by a series of collective bargaining agreements which placed many of the senior employees in the bargaining unit. The employer, as this application indicates, is now alive to these potential conflicts of interest, however, the Board cannot determine this application as though the past did not exist. …

…

A number of positions have been in-scope for many years and are in-scope according to the terms of the current collective

> *bargaining agreement. The employer cannot ignore its contractual obligations, nor expect the Board to, in effect, amend the collective agreement. There was no evidence of any material change in their duties and responsibilities and the application is therefore dismissed with respect to the following positions: …*
>
> [**emphasis added**]

[34] In support of its argument that the Board has an overriding duty over the issue of scope, the University referred to the British Columbia Labour Relations Board's decision in *Pacific Press*, *supra*, to support the proposition that the historical allocation of positions (by agreement or by Board order) is less important than "the collective bargaining experience of the parties since the determination of that bargaining unit." Again, a reconsideration will not be granted only because a party finds a new case from which to argue points raised at the original hearing. However, it is critical to note that the *Pacific Press* case involves a decision whether to amend the bargaining unit by merger, amalgamation or consolidation, an issue requiring quite a different set of considerations than the type of application before us. In a case of consolidation, the Board is examining *whether the bargaining unit in question is no longer appropriate* and *whether another configuration might be more appropriate*. In those types of cases, this Board uses a test similar to that used by the British Columbia Board in *Pacific Press* and has also identified that that is a special type of amendment application where no change in circumstances need be shown.[3] Regardless of these distinguishing features, there was no evidence led at the original hearing that the experience in this workplace necessitates a review of the certification lines among bargaining units.

[35] The University also argued that the Board repudiated the statement of the Board in *University of Saskatchewan* (that there appeared to be managerial positions in the ASPA unit that required addressing) by calling it *obiter*. This argument was made to the original panel (at paragraph 14) and the Board disposed of it at paragraphs 24 to 26. The University is not permitted to reargue the same points on a reconsideration hearing. Furthermore, the need for consistency in the Board's decision-making overrides the observation made by the Board in the *University of Saskatchewan* decision, which statement the Board had characterized as *obiter* because it was extraneous to the issue

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[3] See *Retail, Wholesale and Department Store Union, Local 568 and Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen and Uniform Service Co.* , [2004] Sask. L.R.B.R. 69, LRB File Nos. 062-02 & 090-02.

the Board was required to decide in that case. In our view, if we were to accept the Employer's characterization of the Board's comment in that case, the effect would be to replace years of Board authority for determining scope on amendment applications, including the Board's 1990 decision in *City of Regina* (LRB File No. 276-88) and cases cited therein. It continues to be our view that the Board's comment in that case refers to its observations about one position, with a vague reference to other possible conflicts, suggesting the parties should address the issue in the future. While the Board suggested that such a matter might be decided by it in the future, it did not suggest that the Board would "figure it out" for the parties without regard for long established case law and legal principles.

[36] Furthermore, and perhaps more importantly, even though the original panel referred to the Board's comments in *University of Saskatchewan* decision as "*obiter*," the original panel still found that the duties the incumbents in the disputed positions were performing did not exclude them from the definition of "employee" within the meaning of s. 2(f)(i) of the *Act*. It therefore makes no difference that the original panel referred to such comments of the Board as *obiter*. It is essential to note that although the Board stated that it appeared from the case authority that a change in circumstances was required to be shown in order to consider such an application for amendment, the Board proceeded to analyze the substantive issues raised by the University without it first establishing a change in circumstances (see paragraph 26). Therefore, even while the Board stated its reluctance to review each position because they had already been dealt with by order/agreement, and no change in circumstances had been established by the Employer,[4] the Board reviewed the positions anyway and found that the incumbents in each of the disputed positions were "employees" within the meaning of the *Act*, through its examination of the actual responsibilities and functions of

[4] We believe this is a critical point. While the Board stated in its original decision that it would not make a finding about the issue of whether a change in circumstances was required to have been shown by the Employer given the result of the application (i.e. that it was dismissed), should this panel of the Board have determined to reconsider its original decision on the basis of any of the other arguments presented here by the Employer, it would first be necessary for the Board to make a decision on whether the Employer needed to prove a change in circumstances and if so, whether there was a change in circumstances. In our view, the case law strongly supports that the Employer would have had to establish a change in circumstances and, on a reading the original decision, it appears the Board thought the Employer led little or no evidence on this point. Therefore, even if this panel of the Board granted a reconsideration hearing, the Employer would also have what appears to be a difficult task in addressing the "change in circumstances" issue on the basis of the evidence currently before the Board.

the employees in question. The Board ultimately determined that no labour relations conflict existed with the positions remaining in the ASPA bargaining unit.

[37] The University also argued that the Board should reconsider its decision on the basis of a principle it recently discovered in the Board's decision in *SAHO*, *supra*, in particular, that the Board consider the actual or potential for conflict not only in terms of whether the incumbents have a conflict in loyalties to the employer and the bargaining unit to which he or she belongs by reason that the employee is required to exercise managerial duties, but also because the employee supervises both members of CUPE and ASPA and those interests may be in conflict. In our view, this is not an appropriate ground for reconsideration. Again, the University is attempting to raise a slightly new argument that it could have raised at the original hearing. However, even if we were to conclude otherwise, it is clear on a review of the Board's case law that the weight of the Board's authority is in line with the Board's original decision. In other words, the Board followed its precedent. The *SAHO* decision, *supra*, is an aberration – it is the only decision we have discovered where the Board determined that a position would be placed out of the scope of any bargaining unit even though it did not meet the tests for exclusion based on the definition of "employee" in s. 2(f)(i) of the *Act*. It is also interesting to note that in *SAHO*, the Board required that the employer establish a material change in circumstances before proceeding to consider the amendment application, a change which was established by proving that there had been a significant reorganization in health care that justified the Board's review of the scope of the positions in question.

[38] In addition, the *SAHO* case is clearly distinguishable on its facts. In that case, the incumbents in the nursing supervisor positions were the highest level of authority in the workplace on the off-shift (at night) and they frequently exercised responsibilities that could cause conflict between members of more than one bargaining unit, including the nurses' unit to which the incumbents belonged. They were required to be "arbiters" of disputes among the members of multiple bargaining units, including their own. The Board excluded the positions from the scope of the nurses' bargaining unit as much for practical reasons as anything else, but primarily on the basis that they were required to resolve conflicts (between members of various units) that arose in the workplace. In our view, the fact that the workplace has multiple bargaining units was not

the decisive factor in that case but rather, the need for a “neutral arbiter” was key and the employer in that case had led direct evidence on that point. In the case before us, there was no evidence before the Board at the original hearing that any supervisory decisions made by the incumbents have caused conflict between the bargaining units in such a manner or to a degree that the incumbent must be seen to be in a neutral position and therefore be excluded from any bargaining unit.

[39] Lastly, the University suggests that it is acting on the basis of continuous complaints by CUPE. It says that ongoing issues about scope and the ASPA unit have been an irritation to CUPE, as evidenced by their position in repeated applications to the Board to have ASPA declared a company dominated union. In our view, this is not proof of the conflict the Employer alleges. In those applications, CUPE took the position that ASPA members have too many managerial duties which they use to benefit their members, that management has shown a preference for ASPA, and that there is an attempt to place new positions in the ASPA unit rather than in the CUPE unit. In all cases, the Board stated that CUPE did not have standing to make such an argument and there was no concern expressed by the Board in any of those decisions that ASPA was a company-dominated union. In *University of Saskatchewan* (LRB File No. 108-01), *supra*, the Board granted ASPA’s application to amend its certification orders to reflect past Board decisions and in so doing, the Board rejected CUPE’s assertion that ASPA was a company dominated union on the basis CUPE lacked standing to make such a challenge. In that decision, the Board noted that CUPE had not challenged the Board’s previous decision in *University of Saskatchewan* (LRB File No. 154-00), *supra*, by way of reconsideration or judicial review, in which case the Board dismissed CUPE’s unfair labour practice application against the Employer (alleging it improperly bargained with ASPA, a company dominated union), and where the Board stated at 484:

> *[24] Does CUPE have any direct or material interest in the issue at this stage? CUPE argues that its membership is unduly affected by the fact that ASPA is company dominated. CUPE asserts that ASPA has an advantage because its members can create new positions and design them to fit the criteria of belonging to ASPA. In essence, CUPE complains that ASPA members are provided too many managerial or supervisory responsibilities and they use them for the benefit of ASPA and to the detriment of CUPE.*

> *[25] In our view, this issue is insufficient to give CUPE a real or direct interest in attacking the status of ASPA. In previous cases before the Board, CUPE has raised many questions regarding the appropriateness of the ASPA bargaining unit and its relationship to the CUPE bargaining unit.* ***The Board has noted that the line drawn between the two units is somewhat haphazard and difficult to administer. Nevertheless, a test has evolved for determining placement of new positions in one or the other bargaining unit and CUPE has access to the Board for assistance in relation to the assignment of new positions. The power to create new positions almost always rests with the Employer*** *who can design new positions to fall in either bargaining unit, or out-of-scope and structure its workforce in the manner it thinks most suitable.* ***The fact that CUPE views the Employer as favouring ASPA in the creation of new positions is not one that gives rise to a real or direct interest on the part of CUPE in challenging the status of ASPA as a trade union. It would seem to the Board that CUPE's real interest, in this case, is limited to the assignment of positions between bargaining units****.*
>
> [**emphasis added**]

[40] Lastly, it is our view that if CUPE had any issues or concerns with the placement of the positions at issue in this case (either that they remain in the ASPA unit or be declared out of scope), it would have participated in the original hearing before the Board. It did not. Therefore, even if we were to reconsider the decision by allowing the University to argue that the positions should not remain in ASPA because of actual or potential conflict with CUPE members, there is an insufficient evidentiary basis to do so.

[41] It is therefore our conclusion that the original decision of the Board is not precedential. The Board considered the usual tests for exclusion developed over many years (see paragraphs 27, 34, 35 – 41 (managerial duties) and 42 – 49 (confidential capacity) of the original decision) and applied those tests to determine that the positions in question should remain within the scope of the ASPA bargaining unit. In so doing, the Board did not create a new policy or a new line of thinking that the Board may wish to expand upon, refine or otherwise change.

II. That the decision turns on a conclusion of law or policy not properly interpreted by the original panel.

[42] Under this ground, commonly referred to as the "fourth" ground, the University took the position that the Board improperly carried out a quantitative measure of how much time the employees spent carrying out managerial activities and that the Board erred by not considering the factor of community of interest.

(a) The Board improperly carried out a quantitative measure of how much time the employees spent carrying out managerial activities.

[43] This argument differs only slightly from that argument made by the Employer in relation to the "sixth ground" above. The Employer argued that the Board erred in keeping the positions within the ASPA unit because there are: (i) insoluble conflicts within the ASPA unit; (ii) neutrality and fairness concerns with respect to CUPE, Local 2975 employees; and (iii) problems about confidentiality and labour planning. The Employer argued that in the University's "unique and complex multi-bargaining unit workplace," discipline does not occur on a daily basis, and therefore the Board must consider the qualitative nature of the managerial and labour relations duties these incumbents exercise, not the quantitative measure the Board actually used – that the incumbents should be excluded if their "key responsibilities inevitably pose the risk of conflict, even if they may not in themselves occupy a preponderant amount of working time of the incumbents" (*Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97). The Employer says that the quantitative measure used by the Board failed to take into account the nature of the workplace (because the amount of discipline required to be managerial is dependent on the nature of the workplace) and the quality of the conflict as between ASPA members and as between ASPA and CUPE members. In making these arguments, the Employer relied on the substantive law in *Elmwood Residences Inc. v. Service Employees International Union, Local 333,* [2005] Sask. L.R.B.R. 562, LRB File No. 140-04 and *SAHO*, *supra*, as well as cases referred to therein.

[44] The Employer proceeded, in its written brief, to review each of the seven positions examined by the Board in its decision, in an attempt to establish that the Board erred in either its assessment of the facts (restating parts of the evidence which were

recited by the Board in its decision which it thought most relevant) or the application of the law to the facts, in particular, the conflict test describe in *SAHO*, *supra*. Given our reasoning below, it is unnecessary to set out those assertions in any detail.

[45] The Association argued that the Employer's submissions are in the nature of an appeal of the original decision and are therefore inadequate as grounds for reconsideration. The Association argued that any submission that commences with the words, "the Board erred in law …" is not properly before this Board on a reconsideration application. Although the Association believes that the Board made no errors of law, it suggested that if the Employer so believes, the appropriate forum to make that challenge is the Court of Queen's Bench on an application for judicial review.

[46] Furthermore, the Association submitted that the Employer is not raising any new arguments before the Board on reconsideration that were not already presented at the original hearing. The matters in issue were extensively argued by ASPA through highly competent counsel at the original hearing. The Association submits that the Employer's argument is unlike that in the *Pepsi-Cola* decision, *supra*, where the Board *overlooked* a principle of law that would lead it to a different conclusion, but instead, the Employer in this case just does not like the way its arguments were decided. The Association submitted that the Employer has failed to prove that the Board has overlooked any principle of law or even any argument that was put before it at the original hearing.

[47] We find that the Employer's arguments in relation to this ground are in the nature of an appeal of the Board's original decision and as such; do not provide appropriate grounds for reconsideration. That the Board will not sit in appeal of its own decisions is a well-established principle, the case authority for which is summarized in *Graham*, *supra*, reproduced earlier in these Reasons.

[48] In addition, the Board disagrees with the proposition of the University that it applied strictly a quantitative analysis in measuring the degree of conflict. Although, the Board did include a quantitative measure in its analysis by reason of the fact that the incumbent of the disputed position must have managerial duties as the "primary focus" of the position, that the authority must *actually be exercised*, and the duties *actually be*

performed (in many cases the duties in question were not performed at all or only on one occasion). In addition, for a confidential capacity exclusion, the individual must *regularly act* in a confidential capacity with respect to the employer's industrial relations and therefore *quantity* is by definition a component of the Board's consideration.[5] The Board found, on the evidence before it, that the University did not prove actual insoluble conflict with regard to these positions, nor did it prove that the incumbents had the power of effective determination. In many cases, the Board found that the duties were not truly managerial but only supervisory in nature.

[49] We note that the Employer's argument under this ground attempts to combine the conclusions of the Board in its decisions in the *SAHO* case and *Elmwood Residences* case, both *supra*, and that the Board must therefore reconsider the entire case in light of a combination of those principles. The Employer says that the Board improperly restricted its examination to the question whether the employees should be excluded from ASPA because they: (i) exercise managerial duties; and/or (ii) act in a confidential capacity (i.e. the grounds for exclusion prescribed by s. 2(f)(i) of the *Act*) and that it did so on a quantitative basis. The Employer argued that the Board failed to examine a third factor, that of labour relations conflict as between several bargaining units, as identified in the *SAHO* case, *supra*. The Employer then added to that argument by saying that the Board should have treated the situation in the same manner as the Board did in *Elmwood Residences, supra*, where even though one factor may not be sufficient to exclude an employee from the bargaining unit, the employee could be excluded on the basis of a combination of the factors considered together, although in this case, the Employer argues that *SAHO* provides a third factor to the mix, that of labour relations conflict as a result of the incumbent supervising employees of more than one bargaining unit, including its own.

[50] In our view, this submission does not provide proper grounds for reconsideration. The Employer is merely attempting to buttress the legal argument it made at the original hearing based on its discovery of additional case authority. Furthermore, it is attempting to combine those principles in a manner that does not

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[5] Also see paragraph 37 of the original decision where the Board stated that the caselaw had made it clear that exclusions under s. 2(f)(i) will be made "on as narrow a basis as possible," where managerial duties are "the major focus of the position," and that the managerial duties must be performed more than "some of the time;" incidental or occasional performance of tasks will be insufficient for exclusion.

accord with the plethora of legal authority the Board considered. There was no explanation why this argument was not put to the Board at the original hearing. In any event, for the reasons stated above, the circumstances before us are nothing like those before the Board in *SAHO*. Similarly, the circumstances in *Elmwood Residences, supra*, were unique, and dealt only with the two categories of exclusion under the definition of "employee," (*i.e.* the performance of managerial duties and the acting in a confidential capacity). Reconsideration is not a hearing *de novo* and is not an appeal. Reconsideration cannot be used as an opportunity to restate previous arguments or present new arguments that the Employer could have presented at the original hearing.

[51] In conclusion, the original decision did not turn on a conclusion of law not properly determined by the panel. The original panel did not deviate from precedent nor did it create a new line of reasoning. Applications to determine scope are often complex and involve the weighing of evidence and the careful application of the law, in particular, the tests developed by the Board over the years, including the specific tests the Board has developed and applied to this workplace in the past. Although the term "employee" appears to be clearly defined in s. 2(f)(i) of the *Act*, it can be problematic in its application. When we add to this the peculiarities of the ASPA bargaining unit and the Board's modification of the usual tests to assist it in placing a position in one of the bargaining units, we are left with an application than can be very difficult to assess. It is apparent from the Board's lengthy Reasons for Decision that the original panel considered all of the evidence, made certain findings of fact, and applied the many principles governing this area of the law (as found in numerous Board decisions), to make a decision in the context of this particular workplace and its unique history. Also, the Board had consideration for historical determinations and the fact that ASPA is known to include some middle management positions.

(b) The Board erred by not considering community of interest.

[52] The Employer argued that the Board failed to consider the factor of community of interest when determining whether the incumbent should be excluded from the ASPA bargaining unit. The Employer took the position that community of interest is not only relevant at the time of certification, but is also a "fundamental consideration when reviewing whether positions should remain in a bargaining unit." The Employer relies on *Pacific Press*, *supra*, a decision in which the British Columbia Labour Relations

Board stated that community of interest, along with industrial stability, are the primary factors to consider when determining if a bargaining unit should be varied, consolidated or merged. The Employer argued that community of interest facilitates consistency with regard to where the line is drawn between a bargaining unit and management and the Employer should not be prevented from bringing an application to the Board to deal with the anomalous positions that have been improperly placed in the ASPA bargaining unit. The Employer stated that the Board refused to consider the evidence led by it on the issue of community of interest and therefore reconsideration is necessary so that this evidence and the factors involved in a community of interest test can be properly assessed.

[53] This very point was argued by the Employer at the original hearing (see paragraphs 12 - 13). The Board ruled on this very point in its original decision (see paragraphs 28 - 33). Community of interest as a factor in determining whether a position belongs out of scope was rejected by the Board on the basis that such a consideration is only a proper one at the time of certification, upon an application to add on a group of employees to an existing bargaining unit, or upon making a determination as to which unit, in a multi-bargaining unit setting, a new position belongs. The Employer's assertion is in the nature of an appeal and we will therefore not consider it as proper ground for reconsideration.

[54] As previously noted, community of interest may be a factor for the Board's consideration upon an application to consolidate or merge several bargaining units in a workplace, as was the subject of the application in *Pacific Press*, cited by the Employer. As previously stated, this Board has approached such applications in a manner similar to that outlined by the British Columbia Labour Relations Board in that decision and has also clarified that for such applications to succed, the party does not first have to establish a change in circumstances. The Employer has provided no case authority, from either this or any other labour relations board, for the proposition that community of interest is relevant on an amendment application where the dispute centers around the issue of whether a position should be excluded from any bargaining unit.

III. The decision is tainted by a breach of natural justice.

[55] Under this ground, the "fifth" ground according to *Western Cash Register*, *supra*, the University took the position that the Board improperly drew an adverse inference from the failure of the University to call the incumbents in the disputed positions to testify, and that the Board ignored relevant evidence.

[56] The Employer suggested that the Board is held to a standard of correctness on these issues by arguing that "[t]here is no deference warranted in respect to issues of natural justice," (as stated in *University of Saskatchewan v. Dumbovic*, (2007) 297 Sask. R. 1 and *Brand v. British Columbia (Worker's Compensation Board),* [1993] B.C.J. No. 2330 (QL)). We note that the decisions cited by the Employer are judicial review cases where decisions of the Saskatchewan Human Rights Tribunal and British Columbia's Worker's Compensation Board, respectively, were reviewed by the provinces' superior courts. Generally speaking, the principle that no deference applies to issues of natural justice is an argument properly made before the Court of Queen's Bench on a judicial review application, not on a reconsideration by the Board of its original decision.

(a) The Board improperly drew an adverse inference from the failure of the University to call the incumbents in the disputed positions to testify.

[57] The Employer argued that the Board improperly drew an adverse interest as a result of the University not calling the incumbents to testify about their duties and responsibilities and instead called only the evidence of the incumbents' superiors. The Employer argued that the Board used the wrong test in drawing this adverse inference, stating that the general rule (as stated in *R. v. Joliet*, [2000] 1 S.C.R. 751) is that all evidence must "be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted," and that the party failing to call a witness "may explain it away by showing circumstances which otherwise account for not calling a particular witness."

[58] In its argument, the Employer attempted to provide the Board with reasons for not calling the incumbents as witnesses: (i) it had met with the incumbents and determined they had no evidence that would depart from or add to the evidence of their superiors; (ii) it had a concern the incumbents may be asked questions that would

illicit support or lack thereof for ASPA; (iii) it was concerned that if the incumbents were called to testify, they would appear to be witnesses for the Employer against the bargaining unit (they wished to avoid placing a further burden of conflict of interest on these employees); and (iv) the incumbents were not within the special power of the University to produce (but rather, they were in ASPA's power to produce because they were ASPA members; therefore an adverse inference should be drawn against ASPA for its failure to call the incumbents as witnesses). While the University believes the uncontradicted evidence of the superiors was more than adequate to inform the Board of the incumbents' expected duties, "if the Board considers the incumbents' testimony necessary before deciding the matter," the University would call these incumbents to testify at a reconsideration hearing.

[59] The Employer referred to the Board's decision in *MacKenzie Society Ventures Inc.*, [1998] Sask. L.R.B.R. 387, LRB File No. 169-97, where the Board, accepting the general manager's evidence as credible and objective, refused to draw an adverse inference for the failure of the employer to call the incumbent to testify and determined that a position of program coordinator be excluded from the bargaining unit. The Employer argued that it is therefore not an absolute requirement to call the incumbent in every case, commenting that "[i]t would be difficult to fathom a finding that some of the most senior academicians and officers of the University of Saskatchewan were not credible or objective in their testimony," as they "are stewards in non-profit post-secondary institutions; they are not managers in business to make a profit," and are not interested or motivated to tender "evidence about these positions that could be refuted or rebutted by the incumbents' testimony." The Employer also pointed out that the Board made no findings of a lack of credibility or objectivity on the part of any of the University's witnesses.

[60] The Association argued that the Employer is improperly attempting to split its case because it failed to call the incumbents to give evidence at the original hearing. To that end, it is improperly attempting to give new evidence in the form of (i) counsel now telling the Board the "true reasons" the incumbents were not called to testify; and (ii) calling the incumbents to testify at a reconsideration hearing.

[61] The Association submitted that it is not appropriate for counsel to testify about the true reasons for failing to call the incumbents as witnesses because: (i) the time for explaining this is at the original hearing through a witness; and (ii) even if the Board were to consider this issue now, counsel for the Employer advised at the original hearing that it did not call the incumbents because they would be required to indicate their support for or against the Association (which reason was rejected by the Board, as explained in paragraph 51 of that decision) and it is therefore not open to the University to proffer other "true reasons" at this time. In addition, the Association submitted, it is not appropriate to call the incumbents to testify at a reconsideration hearing because: (i) the requirement to call incumbents to testify about their job duties is not a new one – the jurisprudence going back ten years states a strong preference for incumbents' testimony in these types of cases; and (ii) the issue of the Employer's failure to call the incumbents as witnesses was argued at the hearing and Employer counsel did not seek to re-open its case to call the evidence at that time.

[62] In any event, the Association argued, the evidence should not be permitted to be entered because the Employer has failed to meet the high threshold for the introduction of new evidence on a reconsideration, the principles of which were discussed initially in the *Imperial 400* case, *supra*. The Employer has failed to establish that the evidence sought to be adduced could not have been obtained by reasonable diligence. This evidence was fully available at the time of the original hearing and the Employer has now failed to proffer good and sufficient reason for its failure to adduce that evidence at the original hearing. The Employer made a strategic decision not to call those witnesses at the original hearing. Furthermore, as counsel for the Employer states that the evidence of the incumbents would be the same as what their supervisors have said, the resulting decision would not be different if the incumbents now testified. As such, the evidence would not be "crucial" to the Board's determination of the application.

[63] Firstly, in our view, it is highly questionable that the drawing of an adverse inference is an issue concerning a breach of the principles of natural justice. Procedurally, there is nothing unfair about the Board making such an evidentiary ruling in the course of reaching its findings. However, having said this, the Employer has not demonstrated that there are solid grounds that support reconsideration on the basis that the Board improperly drew an adverse inference in the circumstances of this case.

Again, a number of the arguments made by the University were already ruled upon by the Board at the original hearing and are not properly the subject of reconsideration. In addition, however, is the fact that *the Board did not generally draw an adverse inference against the University* for its failure to call the evidence of the incumbents (see paragraph 53). The Board drew an adverse inference against the Employer for its failure to call the incumbent in relation to only one of the disputed positions (see paragraph 76), although, in the analysis of that one position, the Board stated, as an alternative, that there was simply "insufficient evidence that the incumbent actually exercises managerial duties" (see again, paragraph 76). The Board noted in its analysis of that position that there was a "lack of evidence," "no direct evidence," "limited evidence," and that the "evidence was not sufficiently specific" to prove many of the points made by the Employer that might be indicative of managerial status. In other words, the Board found it unnecessary to rely on or resort to an adverse inference in order to find, on all of the evidence presented, that the Employer had failed to prove that the individual was not an "employee" within the meaning of the *Act* and should be removed from the ASPA bargaining unit.

[64] Also, it is important for the University to understand that the Board did not, in its decision, say that the University's witnesses were not credible or objective in their testimony (and it need not have done so to make the findings it did). The Board merely decided, as it is entitled to do in assessing and weighing evidence (even uncontradicted evidence), that in terms of a number of the points made or matters spoken to, the witness testifying to same did not have sufficient or direct knowledge on the point in question, such that his or her evidence was not reliable or should not be given the weight the University has attached to it. In our view, the statement by counsel for the University that we have to accept the evidence of these witnesses because of their high level positions and the fact that the University operates on a not-for-profit basis, misses the point. These witnesses are not labour relations experts and they were giving evidence of factual matters, not opinions. There was a certain evidentiary standard that the University, as the applicant seeking to exclude positions long included in the ASPA bargaining unit, needed to meet, and the Board found that it did not do so. The University's argument implies that we found that its witnesses were untruthful and improperly motivated in giving their testimony. On a review of the original decision and the reasons stated therein, that is simply not true. The University's argument also

suggests the Board should make a distinction between the witnesses for the University (a non-profit institution) and witnesses testifying on behalf of private businesses (profit-seeking institutions), because those institutions which are seeking a profit are more motivated to be less objective/truthful. We do not agree with this distinction and find it to be not at all reflective of the Board's experience.

[65] Even if we accept the University's assertion that it may explain the circumstances leading to its decision not to call certain evidence in order to avoid the drawing of an adverse inference; in this case, it is too late to do so. However, having said this, the following represents the four reasons the Employer has now put forward for not calling the incumbents to testify at the original hearing, and our findings as to why each of those reasons is not accepted:

(i) *That the witnesses were not in the power of the University to produce*: The Board dealt with this argument in its original decision and rejected it on the basis that the witnesses were as much in the power of the University to produce as they were in ASPA's power. They were not within the special power of ASPA to produce merely because they were ASPA members. Furthermore, the Board said that no adverse inference should be made against ASPA for their failure to call the incumbents as witnesses because there was no evidentiary burden upon ASPA (see paragraphs 51, 53 and 54 of the original decision);

(ii) *That the incumbents' support/non-support for ASPA would be elicited:* At the original hearing, the University stated, through its legal counsel, that it did not want the incumbents to be in a position where their support for or against the Association could be elicited (paragraph 51). The Board dealt with this argument in its original decision (paragraph 52) and determined it was not a legitimate reason to fail to call a witness given that any questions about an employee's support for a union are not allowed by the Board and that in any event, whether an incumbent supports or does not support the Association is completely irrelevant to the issues before the Board on this application;

(iii) *That the factual matters were covered by other witnesses:* There are two ways of looking at this assertion. One, which is implicit, is that the University did not call these witnesses at the original hearing because it felt it had led a sufficient amount of proof of the matters in its application, in which case, that is simply the chance the Employer has taken with respect to meeting its burden of proof. On the other hand, the Employer's statement may, in the manner in which it has been put forward here, be characterized as the proffering of "new evidence." This is problematic in that the comments of counsel are hearsay in nature and are inappropriate for the Board to rely on when they are offered as proof of the matter stated, i.e. that the testimony of the incumbents concerning their duties and responsibilities is the same as what the superiors have said and therefore we should accept the superiors' evidence without hearing from the incumbents. In our view, it is inappropriate to accept this statement as evidence because the Association should have had the opportunity to cross-examine those incumbents on their descriptions of duties and responsibilities;

(iv) *That it wishes to avoid ASPA members being placed in further conflict by being "University" witnesses:* This is an unusual concern given that the Employer's position is that these employees are already "conflicted" to the extent that they should be excluded from the bargaining unit. We do not find this is an acceptable reason for not calling the incumbents as witnesses.

[66] In addition, the evidence the University seeks to adduce on the reasons it did not call the incumbents as witnesses was available at the time of the original hearing and the University offered no good reason for failing to adduce it at that time. Furthermore, the evidence is not crucial to the outcome of the decision, given the limited extent to which the Board drew an adverse inference. In this respect, we rely on the Board's comments in the *Imperial 400*, decision, *supra*, and the cases cited therein, where the Board discussed the ability to lead new evidence on reconsideration, stating at 109:

> ***The argument that a tribunal should enter into a reconsideration of a decision on the basis of different evidence is one which must clearly be approached with some***

caution. *In United Brotherhood of Carpenters and Joiners of America v. Detroit River Construction, 63 CLLC 16,260, the Ontario Labour Relations Board described the standards by which the claim for a reconsideration on the basis of new evidence ought to be judged. The Ontario Board considered the principles articulated by the courts for dealing with this question, and in this connection quoted the following statement from the case of Rothburn v. Michael (1910), 20 O.L.R. 503 (C.A.), at 507:*

> *There is no doubt that the rule which governs the admission of new or further evidence is rightly fenced round with strict limitations. The parties should come to the trial prepared with the evidence upon the issues to be tried; and to open the door wide to enable them to make good a case defectively presented would lead to abuses such as the prolonging of litigation and opportunities for fraud - There must have been, as is said - no remissness in adducing all possible evidence at the trial, and "as to the class of evidence it must be such that if adduced it would be practically conclusive - that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different".*

The Board also reflected on the considerations pertinent to its own decision-making, in the following terms:

> *... While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decisions. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause.* ***The Board ought not to encourage a practice whereby one party can remain silent throughout a hearing, and after he has discovered the weak points in his adversary's armour be permitted to explain them by calling evidence at another and later hearing which he could and should have presented at the original hearing. If it were otherwise, the door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the next ad infinitum and no one could ever safely rely on any decision as finally settling the rights of the parties.***

In the Detroit River Construction case, the Board ultimately adopted the following as the requirements which the applicant for a reconsideration must satisfy:

> *... **the Board should, at least and as a general rule require, as minimum conditions, that a party seeking to set aside a decision on this ground show, (1) that the alleged new evidence proposed to be adduced could not have been obtained by reasonable diligence before and presented at the hearing held for that purpose, (2) that there is a strong probability that the new evidence will have a material and determining effect on the decision sought to be set aside. Plainly, the applicant union in this case has not even attempted to establish the first of these minimum conditions.***

The British Columbia Labour Relations Board expressed the requirements in similar terms in Saanich Police Association v. G.V.L.R.A., B.C.L.R.B. No. 191/86, at 4:

> ***In order for an application for permission to call new evidence to succeed, the applicant needs to demonstrate not only that the evidence is "crucial" but that it was not introduced at the original hearing for a "good and sufficient" reason.*** *In our view, these two factors are reflective of the test applied by the appellate levels of the ordinary courts that will permit new evidence to be called if it existed at the time of the original hearing, if it was not discovered despite due diligence being exercised and if the evidence, if accepted, would be practically conclusive of the appeal (see Dormuth et al v. Untereiner et al (1964) 43 D.L.R. (2nd) 135 (S.C.C.) and Brown v. Gentlemen (1971) 18 D.L.R. (3rd) 161 (S.C.C.)). While the process of the Board with its virtual absence of pleadings and its high degree of lay involvement and representation, even at the hearing stage, requires, in our view, a less stringent application of these tests, the underlying principles remain the same. The Canada Labour Relations Board has adoptd[sic] much the same approach in the exercise of its powers of reconsideration (see The Employees of the Regional Comptroller and the Canadian National Railways [1975] 2 Can LRBR 284).*

This continuing relevance of the test put this way was confirmed by the British Columbia Industrial Relations Council in a decision

> *in Cairns Electric Ltd. v. International Brotherhood of Electrical Workers (1990), 10 CLRBR 80, at 98.*
>
> *The requirements expressed in these cases seem to us to represent sensible standards by which to decide whether a decision will be reconsidered on the basis of new evidence**. The evidence must not only be crucial, but there must be some convincing and reasonable explanation for not putting the evidence forth at the original hearing.*** *In this sense, the standard framed as one of showing "good and sufficient reason" in the British Columbia cases seems to us to be preferred to the "due diligence" criterion set out in the Detroit River Construction case. Though "due diligence" may be one requirement, it seems to us conceivable that there might be other reasonable explanations for a failure to put evidence before the Board.*
>
> ***The possibility of reconsideration is not offered to make it possible for the parties to mend their mistakes or experiment with a different strategy at a second hearing - an opportunity which advocates everywhere would no doubt welcome. The jurisdiction to reconsider a decision is intended instead to redress an injustice which would be perpetrated by failing to take into account evidence which, for reasons beyond the control of the party making the application, was not presented at the first hearing.***
>
> [**emphasis added**]

[67] It is therefore our view that the opportunity for the Employer to explain the circumstances for failing to call the incumbents was given and the Employer had availed itself of that opportunity. It is not now open to the Employer on an application for reconsideration to provide new reasons or “new evidence” on that point, particularly in a hearsay manner. However, even if it was open for the Employer lead such evidence and do so in the manner it has, the reasons given do not justify a reconsideration of the application on the limited extent to which the Board drew an adverse inference. Furthermore, given the fact that the Employer had met with the incumbents prior to the hearing and purportedly determined that they had no evidence that would depart from or add to the evidence of their superiors; it would have seemed prudent for the Employer to call them as witnesses at the original hearing, given the Board’s long-standing preference of hearing direct evidence from the incumbents in these types of cases.

[68] We hold similarly with respect to the University proposal to now call the incumbents to testify at a reconsideration hearing. The University had that opportunity at the original hearing and did not avail itself of it. The preference of the Board to hear the direct evidence of the incumbents was not a surprise to the Employer. Furthermore, it is apparent that the Board did not consider such evidence "necessary before it could decide the matter;" – it made its decision, as it is required to do, on the basis of all the evidence before it.

(b) The Board ignored relevant evidence.

[69] The Employer argued that there were several instances where the Board ignored evidence the Employer thought relevant or did not accept its uncontradicted evidence. The Employer relied on the *Brand* decision, *supra*, to suggest that ignoring relevant evidence amounts to a breach of natural justice.

[70] The Employer argued that the Board's dismissing of evidence concerning the performance of managerial duties in relation to a number of the disputed positions because the exercise of those managerial duties was subject to the ultimate approval of a superior is contrary to the well-established principle of "effective recommendation" as commented on by the Ontario Labour Relations Board in *Canadian Union of Operating Engineers and General Workers v. Chep Canada Inc.*, [1990] O.L.R.D. No. 489 (QL).

[71] The Employer further argued that the Board was not justified in disregarding its uncontradicted evidence on the basis that it would have preferred to hear evidence from the incumbents on certain points, it being the Board's responsibility to decide the case on the evidence before it. The evidence of the authority to perform managerial duties came in the form of job profiles, supplemented by the evidence of the incumbents' superiors and the Board should not have dismissed such evidence on the basis that some of the duties had not yet been exercised or only exercised rarely. Such evidence should only have been disregarded by the Board if there was rebuttal evidence by ASPA that the responsibilities were only "paper duties."

[72] The Employer proceeded to give several examples where the Board ignored or simply disregarded such uncontradicted evidence. The Employer also suggested that the Board reached conclusions incompatible with and in opposition to

uncontradicted evidence and therefore a reconsideration of all of the evidence is necessary. Essentially, the Employer argued that because the Board ignored uncontradicted evidence, it must take a "fresh look" at the entire case. Given our reasoning below, it is unnecessary to go through the list of examples provided by the Employer.

[73] In response to the Board's questions, in particular, whether the University was challenging the Board's reasons as inadequate, counsel for the University indicated it was in the sense that the Board recounted all of the testimony but then made findings against the uncontradicted evidence.

[74] The Association submitted that the Employer is simply wrong that the Board must accept its uncontradicted evidence, noting that the Saskatchewan Court of Appeal has said on many occasions that a finder of fact may accept some, all or none of the testimony of a witness – that "the mere testimony of a witness does not a finding of fact make." To the extent that the Employer alleges that there are conflicting findings of fact by the Board, a reconsideration hearing by the Board will not resolve that issue – the appropriate forum for that allegation to be addressed is a judicial review application.

[75] The Employer cited *Brand*, *supra*, in support of its argument that the Board has breached natural justice by ignoring relevant evidence. In our view, this is not an accurate statement of the law. In *Brand*, the Court stated that an adjudicator acts *ultra vires* if the adjudicator "breaches the principles of natural justice or the duty to be procedurally fair, considers irrelevant evidence, ignores relevant evidence, or acts for an improper purpose." In our view, ignoring relevant evidence is just one ground upon which a Court might find that the Board acted in an *ultra vires* manner, or in other words, acted without jurisdiction, as opposed to it being a breach of the principles of natural justice. It is our view that if the University wishes to assert that the Board acted in an *ultra vires* manner or breached the principles of natural justice by ignoring relevant evidence, the appropriate forum to make such an argument is before the Court of Queen's Bench on a judicial review application. However, we will proceed to examine the points made by the Employer under this allegation to the extent that we have not previously dealt with them in these Reasons.

[76] In our view, it appears that the University has failed to understand the significance of uncontradicted evidence. The Board must carefully weigh and assess all of the evidence before it, whether that evidence is contradicted or not, to reach certain findings of fact upon which to base its decision. It is open to the Board to reject uncontradicted evidence on a number of bases, including, as was often the situation in this case, that the evidence was not relevant or reliable – it was either not sufficiently specific, was lacking particularity, or the witness had little personal or direct knowledge concerning the matter testified to. It seems very apparent from the decision that the Board did not fail to consider any of the evidence (the Board set out that evidence in painstaking detail) but rather the Board disagreed with the University on the extent of its relevance, reliability and/or weight. If the University takes the position that the Board improperly rejected uncontradicted evidence, gave certain evidence an unsatisfactory degree of weight, or did not adequately explain its reasons, the University's recourse is a judicial review application, although we note that the Courts have historically shown significant deference to the Board in terms of its findings of facts and evidentiary rulings.[6]

[77] It is also apparent from the Board's reasons that it did not reject the evidence of the written job profiles solely on the basis that the listed managerial duties were not yet exercised or exercised only rarely. While the case law makes it clear that the amount of time spent performing managerial duties is a relevant factor to consider (because actual performance of these managerial duties must be the person's "primary responsibility"), the breadth of the Board's analysis makes it clear that other factors were considered. In any event, what is of particular significance to the Board in these types of cases is the *actual exercise of authority or actual performance* of the duties in question, not merely the expectations listed in the job description. As stated, the University bears the evidentiary burden in this case and it must establish that the incumbents' managerial duties are not merely a "paper powers." Also, as explained by the Board in its original

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6 See, for example, the decision of the Saskatchewan Court of Appeal in *Wal-Mart Canada Corp. v. Saskatchewan (Labour Relations Board)*, [2005] 11 W.W.R. 252 where the Court held that determining the relevance of evidence is a matter within the exclusive jurisdiction of the Board pursuant to s. 18 of the *Act* and that the standard of review of the Board's determination on the relevance of evidence is one of patent unreasonableness, given the specialized nature of the Board, its members' expertise, as well as the strong privative clause in the *Act* and the nature of the Board's powers in s. 18. Although the standard of review may have changed since that decision was rendered, the degree of deference in relation to these decisions likely remains high.

decision, it is not up to the Association to rebut the evidence contained in the job profiles.

[78] While we find it unnecessary to address the examples given by the University concerning the Board's purported failure to consider relevant evidence given our reasoning for rejecting this ground as a basis for reconsideration, we will set out below our findings in relation to those examples. Generally speaking, we note that in the examples given by the University, our review of the original decision indicates that the Board was clearly aware of the evidence the University now relies on, but obviously placed less weight or significance on it or determined the evidence to be unreliable or lacking in specificity. In addition, we note that in the examples provided, the University focuses on discrete or isolated pieces of evidence which it believes supports its view that these are management positions. This is contrary to the approach of the Board to this issue. In determining whether a position should be excluded, the Board examines the whole of the incumbent's duties and responsibilities to determine if the individual's primary responsibility is to actually exercise authority or actually perform managerial functions. In the Board's view, there was no misapprehension of the facts by the Board of a nature or a type that was at issue in the Board's decision in *City of North Battleford, supra*, such that the decision operated in an unintended manner (see paragraphs 12 and 13 of these Reasons).

[79] We will now address each of the examples given by the University where it claims that the Board ignored relevant evidence, along with our response:

> ***Director, Community Programs, College of Kinesiology*** – *Employer's argument:* The Employer asserted that the Board wrongly concluded that the incumbent does not make effective recommendations in the face of the Dean's uncontradicted evidence that while he has the ultimate approval power, "it would be the responsibility of this individual to hire the six coordinators (ASPA positions) who report to him." *Our response:* The Board utilized the test of "effective determination" in the *Saskatchewan Liquor and Gaming Authority* case (referred to as the *SLGA* case), and found that because the decisions of the incumbent about who to hire and whether to discipline (neither of which authority had been exercised by the incumbent in the previous 10 years) must first be

approved by the Dean, the incumbent does not make effective determinations (see paragraphs 101 and 102 of the original decision).

Director, Purchasing Services - *Employer's argument:* There was uncontradicted evidence that the incumbent made the decision to move a displaced ASPA member to a term position and that she made the decision to create a new position and there was therefore no basis for Board to conclude that the incumbent's superior made those decisions and that the incumbent only made a recommendation. In any event, the incumbent did make an effective recommendation. *Our response:* Reading the Board's statements in their context, it is clear that the Board found that many of the decisions made were done so by a committee and that the Board found that the evidence was insufficiently specific to conclude that the incumbent was solely responsible for or had effective determination for those decisions. However, it must also be noted that the Board referred to hiring decisions such as these as "secondary" managerial functions and gave several other reasons for finding that the incumbent did not meet the tests for exclusion (see paragraphs 75 to 80). The Board did not ignore the evidence referred to by the Employer – it only found it not indicative of managerial status, both considered alone and along with several other factors.

Director, Finance and Administration, Veterinary College – *Employer's argument:* There was evidence that the incumbent provides advice on the handling of labour relations and the interpretation of collective agreements and that he also sits on a human resources committee which takes proactive steps to address human resource problems. The Board improperly dismissed this uncontradicted evidence, without cause, by stating that the employee was not required to give this advice and he had no particular training. The evidence indicated that the incumbent performed these labour relations duties often and therefore the Board could not exclude this incumbent on the basis that the duties had not yet been exercised, a basis upon which the Board held that many of the other positions in dispute could not be excluded. *Our response:* Again, the Employer is not focusing on the whole of the evidence adduced in relation to this position. The Board did not ignore the evidence that the Employer referred to. It

took this evidence into account along with other evidence and found on the whole of the evidence, an exclusion of this position was not warranted, a position that had been within the ASPA bargaining unit since 1971 (see paragraphs 95 to 97 of the original decision). In examining all of the incumbent's duties, the Board found that the incumbent's participation in management decisions was through recommendation only, that the Dean admittedly made those decisions himself. It must be noted that the Board's discussion of the evidence now referred to by the Employer was actually dealt with in the context of the Board's consideration whether the incumbent should be excluded because he regularly acts in a confidential capacity with respect to the Employer's industrial relations (notably, the Employer took the position at the original hearing that it was not seeking to exclude this position on the ground of a managerial exclusion because the incumbent supervised only .3 of an ASPA position, although the Board did go on to consider whether exclusion was warranted on a managerial basis). The Board dismissed this argument primarily on the basis that the human resources consultation he performed was "primarily informal … 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 to give advice" (see paragraph 96 of the original decision). Further reasons for not excluding the incumbent include the fact that his participation on the human resources committee was directed to preventing human resources problems, not dealing with discipline or making determinations, and because the Board could not determine, on the evidence presented, if the information that was discussed related to industrial relations or collective bargaining (see paragraph 97 of the original decision). In addition, the evidence indicated that the incumbent's inclusion in ASPA had not caused any problems with the College (apparently over several years). Lastly, we wish to make one additional observation about the Board's decision not to exclude the incumbent in the disputed position and the significance of its finding that the incumbent was not "required" to give the labour relations advice that he did. It must be remembered that the Board, in determining whether to exclude a position from the bargaining unit, must focus on the position itself, in other words, the duties and responsibilities of the position that are actually exercised by the incumbent. It appears that the incumbent in this disputed position engaged in the giving of some informal labour relations

advice because of attributes unique to him, not the position – he was consulted because he had a lot of knowledge due to his long service and experience in the workplace, not because it was part of the regular duties of his position. We believe that it is important that the Board focus on the position itself and not responsibilities the incumbent has voluntarily taken on where those responsibilities would not be required or expected of an individual who may ultimately replace the incumbent in this position in the future.

Summary:

[80] We have found that the Employer has failed to prove that any grounds exist for reconsideration of the Board's original decision dated April 30, 2007. The decision is well reasoned and sound and we are not persuaded to embark upon consideration as to whether it should be changed in any way. As such, the application for reconsideration is dismissed. In so doing, we wish to make one final comment. Although we have dealt with each of the Employer's arguments separately and at length in these Reasons, generally speaking, the Employer's arguments fell into two categories:

- *Arguments that the Board "erred" in some way or acted without or outside its jurisdiction – arguments that are only appropriately made to the Court of Queen's Bench on a judicial review application; and*

- *Arguments that were the same as those made at the original hearing or in a small number of instances, a slightly different legal argument based on the discovery of case authority that we have found has no application to the circumstances of this case.*

[81] While we believe that the Board has in the past attempted to be very clear that the power of reconsideration will be used sparingly and only after the establishment of precise grounds, we will once again state that a reconsideration is not an appeal. It is not intended to provide an opportunity to try the case over again whether using the same substantive arguments or the use of different case authority in a creative way, all with the hope of a different result. It appeared to the Board that this was the intention of the Employer, given the content of its letter requesting reconsideration and its request that an expanded panel of the Board hear its application. As previously stated, the Board has a long-standing practice of having the same members on the panel hear the reconsideration application as those who made the original decision. This practice,

along with the Board's legal approach to a reconsideration application, support the position that the power to reconsider must be used sparingly, "in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster, " recognizing "the value of finality and stability in decision-making" (see *Imperial 400, supra*).

[82] These principles are of obvious importance in the type of case before the Board. Making a decision on scope requires the assessment of evidence and the weighing of many factors. It can be a complex decision to make. The Board's task has been made somewhat more difficult in this case by reason that the University has an unusual structure of bargaining units, atypical of most workplaces. Over several years, there have been many applications brought before the Board by these parties (and the other bargaining agents at the University) concerning the proper placement of positions where the parties involved have been unable to agree in which bargaining unit, if any, a position belongs. This does not mean the bargaining unit configurations are wrong but rather, that the Board must deal with each application in the context of this unique workplace with its unique history. In our view, the original decision of the Board clearly establishes, on its face, that there was a careful and lengthy review of the evidence, a reasoned consideration of the relevant case law (including the basic principles applicable to amendment applications of this kind as well as that case authority which has developed between these parties and other bargaining units at this workplace), and an application of those legal principles to the facts as found by the Board, all in the context of the peculiarities of this workplace with its unusual bargaining unit structure. While the Board must necessarily be responsive to any changes that occur in this workplace, there is obvious need for the finality of litigation, particularly in relation to issues of scope.

[83] The University's application for reconsideration is dismissed.

DATED at Regina, Saskatchewan this **28th** day of **October, 2008.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson