

**The Labour Relations Board
Saskatchewan**

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4777, Applicant v. PRINCE ALBERT
PARKLAND REGIONAL HEALTH AUTHORITY and MONT ST. JOSEPH HOME INC. OF
PRINCE ALBERT, Respondent**

LRB File No. 011-09; July 17, 2009

Chairperson, Kenneth G. Love, Q.C.; Members: Maurice Werezak and Brenda Cuthbert

For the Applicant: Rhonda Heisler

For the Respondent: Michael Phillips

**Health care – Scope of Bargaining Unit. Board reviews considerations for
exemption from Bargaining Unit.**

**Onus of Proof – Board discusses onus when positions sought to be
included within bargaining unit by Union or excluded by Employer**

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

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 4777 (the “Union”), is certified as the bargaining agent for a unit of employees of Prince Albert Parkland Regional Health Authority and Mont St. Joseph Home Inc. (the “P.A. Health Authority”), by Order of the Board dated October 28, 2002, LRB File No. 205-02.

[2] The Union applied to amend the certification Order pursuant to Section 5(k) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “Act”) to include four (4) positions within the bargaining unit. Those positions were: Assistant Director, Environmental Services, Confidential Secretary, Acute and Emergency Services, Food Services Supervisor (two (2) positions), and Payroll/Benefits Officer. At the hearing of the matter, with the consent of the P.A. Health Authority, the Union added an additional position to the list to be included, that was Supervisor of Environmental Services.

[3] The positions the Union sought to include within the bargaining unit had historically been excluded from the bargaining unit. Both the P.A. Health Authority and the Union were the result of amalgamation of various health care facilities, now operated by the P.A. Health

Authority. The workforce of the amalgamated Health Authority was also restructured by the Dorsey Commission under s. 12 of *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03 Reg. 1 (the “Dorsey Regulations”).

[4] The P.A. Health Authority was created as a part of a province wide reorganization of health care administration which began in 1997 with the creation of 32 district health boards. In 1977, the Board issued a certification Order in favour of the Union (the “1997 Order”). That Order excluded the four (4) positions that the Union originally applied to include within the bargaining unit.

[5] In 2002, a further reorganization of health care administration took place which resulted in the creation of twelve (12) regional health authorities, including the P.A. Health Authority. The Board issued an Order in favour of the Union in 2002 (the “2002 Order”) to recognize the reorganization, which Order rescinded the 1997 Order.

[6] The 2002 Order was silent with respect to specific exclusions. It certified “all health services providers” as an appropriate unit of employees. Furthermore, the Order defined “health services providers” as:

(d) “health services provider” means an employee, but does not include a health support practitioner or a nurse, as both terms are defined in s. 2(h), (i), (j) and (k) of the Health Labour Relations Reorganization (Commissioner) Regulations, a chiropodist, a chiropractor, a dentist, a duly qualified medical practitioner or and optometrist, or those management classification excluded by Memorandum of Agreement between the parties or as directed by an Order of the Board.

[7] The 1997 Order not only excluded the four (4) positions sought to be included by the present application, but also a number of other positions. The Union and the P.A. Health Authority have bargained since the issuance of the 2002 Order with respect to those other positions and have reached agreement with respect to all other positions except those for which the present application has been made. The position of Superintendent of Environmental Services is a newly created position which the Union believes should be placed within the scope of the bargaining unit.

Relevant statutory provisions:

[8] The relevant provisions of the *Act* include:

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;

(i.1) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining.

(ii) **Repealed.** 1983, c. 81, s.3.

(iii) any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor; and includes a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;

...

5 *The board may make orders:*

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

...

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

...

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

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

Analysis and Decision:

Onus of Proof

[9] Before dealing with the five (5) claimed positions, the Board would like to deal with an issue raised by the P.A. Health Authority related to the onus of proof in this case. In this case, the Employer argues that it should not bear the onus of proving that the positions should be excluded from the bargaining unit, which is the usual requirement. In support of that position, the Employer cited the Board's decision in *Saskatchewan Union of Nurses and Saskatchewan Association of Health Organizations and Prince Albert District Health Board*, [1999] Sask. L.R.B.R. 549, LRB File No. 078-97. In that case, the Board was dealing with a similar situation during the 1997 health care reorganization. The case dealt with whether a nursing supervisor was an "employee" within the meaning of the *Act*. In that case, the Employer argued that because the position had historically been excluded from the bargaining unit, the Union bore the onus of proof that it should fall within the scope of the bargaining unit.

[10] In that case, the Board did not make a determination as to who should bear the onus, but rather, appeared to exercise its jurisdiction to review the nursing supervisor's position without placing the legal burden of proof on either party. Counsel for the Employer in this case argued, based upon this decision, that the Board should determine this matter without placing the legal onus on either party to this application.

[11] The Board usually mandates that it is the responsibility of the Employer to ensure that matters of scope of new positions are resolved within the parameters of the legislation and that the onus normally falls upon the Employer seeking to exclude positions to justify their exclusion. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc., et al.*, [1996] Sask. L.R.B.R. 297, LRB File No. 005-96, the Board stated as follows, at 310-11:

Based on this view of the significance of the certification order in determining scope, the Board has been exceedingly clear about the process which must be followed if an employer wishes to create a position out of the scope of the bargaining unit. In Canadian Labour Congress, Local 481 v. Saskatchewan Government Employees' Association, LRB File No. 192-78, the Board outlined the alternatives:

It has been the policy of the Board, in cases of all employee units, where a new classification is created, to put the onus upon the employer to satisfy the Board that the occupant of the new classification is not an employee within the meaning of Section 2(f)(i) of The Trade Union Act and therefore should be excluded from the unit.

[12] Similarly, in *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK L.R.B.), LRB File No. 057-05, the Board placed the onus of proof upon the Applicant to justify the exclusion of positions previously within the scope of the bargaining unit.

[13] This case is similar to the above noted cases, except that here, the Union is seeking to include positions not previously within the bargaining unit, and which positions were previously excluded from the bargaining unit by Order of the Board. It would be illogical to require an onus in the case where an Employer sought to exclude positions from within the bargaining unit, but to have no onus where the Union is the applicant and wishes to have those positions included within the bargaining unit. Such an onus of proof is consistent with the usual onus which falls upon an applicant to prove its application. (See: *Saskatoon Regional Health Authority v. Service Employees' International Union, Local 333*, 2009 CanLII 2051 (SK L.R.B.), LRB File No. 296-04.

[14] It should be noted, however, that the position of Supervisor of Environmental Services is a newly created position which was not previously covered by the Orders of the

Board in relation to this collective bargaining unit. As such, the onus of proof with respect to that position will fall upon the Employer in accordance with the Board's usual practice.

[15] For ease of reference, the Board will deal with each of the disputed positions and will outline the facts and evidence lead by the parties with respect to that position under that particular heading.

Food Services Supervisor (Two (2) positions)

[16] During the hearing of this matter, the evidence presented through the witnesses called by the Union, Brenda McDougall and Janet Carrier, the incumbents of the claimed positions, raised two (2) significant concerns for the Board. The first concern being that there were other Food Services Supervisors in the P.A. Health Authority which the Union has not applied to include within the bargaining unit. The evidence established that there were a total of six (6) Food Services Supervisors in the P.A. Health Authority, but the Union applied only for the positions occupied by the two (2) above named persons. Secondly, the evidence established that both employees who occupied the disputed positions held a diploma from the Kelsey Institute, in food service management and both were members of the Saskatchewan Society of Nutritionists.

[17] The first issue raised the obvious question of why the Union would apply for only two (2) of the six (6) positions. They provided no evidence that these two positions were in any way different from the other four (4) positions. The job description provided was a generic one which presumably applied to all of the six (6) positions in the P.A. Health Authority.

[18] The second issue identified as to the diploma in food service management, raises the question as to the appropriate unit to which these positions were attached under the Dorsey Regulations. That is, whether the appropriate unit would be the health service providers unit for whom the Union was the certified bargaining agent, or if these positions were more properly represented by health support practitioners unit for whom the Health Sciences Association of Saskatchewan ("HSAS") was the certified bargaining agent.

[19] While the second issue was not expanded upon by the parties, the Board undertook a review of the certification Orders issued by the Board in respect of the P.A. Health Authority. That review found that the classification of Food Services Supervisor was a

classification that was excluded from the bargaining unit of health support practitioners represented by HSAS by virtue of an Order of the Board dated August 8, 2000, LRB File No. 212-00.

[20] The Board has concluded that the application for these positions by the Union is not well founded. The Board, through its Order on LRB File No. 212-00, has established that these positions would fall within the health support practitioners unit, not the health service providers unit. Furthermore, the Board has determined by that Order that these positions should be excluded from the bargaining unit for which HSAS is certified to represent.

[21] Furthermore, even if these positions were properly within the unit designated by the Dorsey Regulations for health service providers, it is incongruous that there would be two (2) of these positions within the scope of the bargaining unit and four (4) outside, given there is no evidence that distinguishes the two (2) positions sought from the other four (4)

[22] For these reasons, the application to include these positions within the scope of the bargaining unit set out in the 2002 Order is denied.

Payroll/Benefits Officer

[23] The application for this position was also puzzling. The evidence established that there were four (4) such positions within the P.A. Health Authority. The evidence established that one (1) of these positions was within the scope of the bargaining unit, but the other positions were not. The position which was in-scope was brought within scope when the incumbent of that position retired. The Union lead uncontradicted evidence that the parties had reached an agreement to bring the positions, which the Union was now applying to bring in-scope when the incumbents of these positions retired.

[24] This position was one which had been excluded from the bargaining unit by the 1997 Order. No evidence was lead to establish any differences between the positions which are out-of-scope from the position which is in-scope. Absent such evidence, it is difficult for the Board to determine how some positions can be maintained as being out-of-scope while one is within scope.

[25] The P.A. Health Authority argued that this position should be excluded from the bargaining unit because the Payroll/Benefits Officer regularly acts in a confidential capacity with respect to the industrial relations of the P.A. Health Authority in accordance with subclause 2(f)(i)(B) of the *Act*.

[26] The Employer relied upon a number of decisions of the Board with respect to the application of subclause 2(f)(i)(B). It cited *Canadian Union of Public Employees, Local 882 v. City of Prince Albert*, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96 as authority for the proposition that the exclusion under subclause 2(f)(i)(B) is “aimed at preventing any conflict of interest which might arise for an employee who regularly processes or handles information of a sensitive nature which is connected with the industrial relations of the employer.” (See: para. 15).

[27] The Employer also cited *Grain Services Union (ILWU - Canadian Area) v. Hillcrest Farms Ltd*, [1997] Sask. L.R.B.R. 591, LRB File No. 145-97 as support for the proposition that an Employer requires a modicum of administrative resources and clerical support. In that case, at para. 29, the Board says:

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

[28] However, as noted in *Communications, Energy and Paperworkers Union of Canada v. E.C.C. International Inc.*, [1998] Sask. L.R.B.R. 268, LRB File No. 362-97, the exclusion of such employees applies only so long as the employee performs such duties regularly. At para. 34, the Board says: “Unlike the instance of managerial exclusions, the Board has not required that the duties performed in a confidential capacity be the primary focus of the position, although they must be performed ‘regularly’ rather than incidentally.”

[29] As further support for this position, the Employer also cited *Canadian Union of Public Employees, Local 1594 v. Regina Public Library*, [1993] 1st Quarter Sask. Labour Rep. 276, LRB File No. 250-92, which case involved whether or not the payroll administrator at the Regina Public Library was regularly acting in a confidential capacity with respect to the Employer’s labour relations.

[30] The cases cited by the Union in support of their position focused on the exclusion provided for in subclause 2(f)(i)(A) which is the “managerial” exception, as distinct from the exception provided for in subclause 2(f)(i)(B), which is the “confidential capacity” exception. While the two exceptions are often dealt with in combination by the Board, the language in clause 2(f) makes it clear that the two exceptions are distinct, by use of the word “or” as the separator between subclauses (A) and (B). In *Hillcrest Farms, supra*, the Board confirmed this distinction in paras. 28 and 29 of that decision.

[31] In *Hillcrest Farms, supra*, the Board also quoted from its earlier decision in *Canadian Union of Public Employees v. Town of Moosomin* [1994] 2nd Quarter Sask. Labour Rep. 92, LRB File No. 038-94, in respect of the confidential capacity exception at p. 95 as follows:

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

[32] It will, of course, be necessary in every case, based on the facts of that particular case, and the particular labour relations context in which the exception must be evaluated, to determine the level and nature of “confidential capacity” which is both necessary and warranted. However, it is clear that the Board recognizes and supports that some level of confidential support personnel will necessarily have to be excluded from the collective bargaining unit in order to allow the collective bargaining system to function as intended by the *Act*.

[33] The evidence established that the Payroll/Benefits Officer works in the same area (the 3rd Floor of the P.A. Health Authority’s corporate office) as the human resources department and is directly supervised by Mr. Glen Corruthers, the Manager of Payroll and Benefits. Mr. Corruthers reports to Ms. Jamie Callahan, the Vice-President of human resources who has an office in the same area where the Payroll Department is housed. Ms. Callahan testified that she often dealt directly with the Payroll/Benefits Officer in respect of labour relations matters, including costing of such items as termination packages and contract proposals. She

acknowledged in cross-examination that normally she would deal with Mr. Corruthers with respect to such matters, but would deal directly with the Payroll/Benefits Officer in his absence.

[34] Evidence from one of the incumbents of the position, Brenda Mills, established that the Payroll/Benefits Officer regularly accesses personnel files which were located near their workstations to confirm eligibility for benefits, and to check start dates, etc., of employees. She acknowledged that those personnel files contained records of employee performance and discipline since no other separate files were maintained other than the personnel files to which she had access.

[35] Ms. Mills also testified that she often handled questions from employees regarding interpretation of the collective bargaining agreement, particularly insofar as access to benefit programs was involved. Furthermore, she testified that she regularly attended courses put on by SAHO regarding interpretation of new contract language and benefit provisions.

[36] She also testified that while she had not personally provided any assistance or coverage in the area of Occupational Health and Safety and labour relations, that one of the Payroll/Benefits Officers had done so for periods of three to four years. Her reason for not having done so was that she was too busy with her own job to provide such coverage.

[37] Ms. Mills testified that in the past, she had been a member of the bargaining committee on the Employer side, but with amalgamation of the P.A. Health Authority and changes in responsibilities, that involvement ended. During that period, and as requested since then, she advised that she had formulated bargaining proposals and had also costed out employee severance or facility closure costs. She testified, however, that she had no authority to hire, fire, or discipline employees.

[38] Her direct responsibility was the maintenance of payroll and benefits for nursing staff in the P.A. Health Authority. As such, she audits the time keeping records as well as compliance by nursing staff with the provisions of the collective bargaining agreement.

[39] The cases cited by the Employer favour the exclusion of these positions from the bargaining unit. When the Board examines the positions dealt with in those cases, the level at which these positions act in a confidential capacity meets the criteria established by the Board in

those cases. In the *City of Prince Albert* case, *supra*, the Board excluded a Computer Systems Support Technician on the basis of subclause 2(f)(1)(B), insofar as the evidence showed that this employee “would spend approximately 60% of her time performing clerical duties of a confidential nature in support of the work of the Mayor, the City Council, and the City Commissioner.” (see para. 12).

[40] In *Hillcrest Farms*, *supra*, the Board excluded a newly created position of Administrative Secretary on the basis of that position regularly acting in a confidential capacity with respect to the industrial relations of the Employer.

[41] In *Regina District Health Board v. Canadian Union of Public Employees*, [2001] Sask. L.R.B.R. 466, LRB File No. 054-00, the Board considered an application for exclusion of the office assistant to the Director of Occupational Health and Safety. At para 23, the Board stated:

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

[42] In the *University of Saskatchewan* case, *supra*, the Board also adopted a three (3) part test for a confidential exclusion which was derived from a decision of the Canada Labour Relations Board in *Canadian Union of Bank Employees v. Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 910). That three (3) part test was summarized by the Board as follows:

1. *The confidential matters must be concerning industrial relations, not general industrial secrets and not information that the union or its members have knowledge of (salaries, performance appraisals, etc.) or information that may be obtained from other sources (personal history, family information, etc.);*

2. *The disclosure of that confidential information must adversely affect the employer; and*
3. *The person must be involved with the confidential information as a regular and not occasional part of their duties, and that simple access to such information through employer laxity does not suffice.*

[43] From the evidence presented concerning this position, both by the incumbent, and Ms. Callahan established that this position regularly deals with confidential matters concerning the industrial relations of the Employer, the disclosure of which would adversely affect the Employer. This is particularly true with respect to the costing of facility closures, severance payments, and collective bargaining proposals by these staff positions. Furthermore, these positions had and continue to require access to personnel files maintained by the Employer, which files contain confidential materials other than just salary information, performance appraisals, etc.

[44] The incumbents of these positions worked closely with both the human resources personnel and the labour relations personnel of the Employer. As such, they would undoubtedly be privy to significant information regarding the Employer's industrial relations than persons working elsewhere in the P.A. Health Authority. It would, we believe, put these employees in an untenable conflict of interest, working so closely with other employees who are directly involved in collective bargaining, discipline, discharge and other industrial relations matters.

[45] For these reasons, the positions of Payroll/Benefits Officer shall be excluded from the bargaining unit pursuant to subclause 2(f)(1)(B).

Confidential Secretary – Acute and Emergency Services

[46] The Union has also sought to include within the bargaining unit the position of Confidential Secretary – Acute and Emergency Services. The Board heard from the incumbent of this position, Elaine Bourassa and Frank Suchard, the Director of Nursing for the P.A. Health Authority, who is Ms. Bourassa's direct supervisor.

[47] Ms. Bourassa testified that she had been a confidential secretary for 29 years. She began her employment at Holy Family Hospital, which became a part of the P.A. Health Authority. Some time after the Holy Family Hospital became a part of the P.A. Health Authority, she became the confidential secretary for the P.A. Health Authority's property manager, working out of the district head office. She testified that she also worked at the Victoria Hospital when

the main office was there, but when it moved out of that facility she became the confidential secretary to the Director of Nursing, Acute Care at Victoria Hospital.

[48] Her evidence was that she doesn't attend meetings regarding essential services, but does type Minutes occasionally. Her evidence was that she handled only a couple of documents dealing with essential services in the past three (3) years. Her evidence was that "[S]he doesn't do industrial relations." She also testified that she had never typed Minutes or correspondence dealing with CUPE and discipline.

[49] She acknowledged in cross-examination that she did handle calls and correspondence from employees who might be involved in discipline matters, but she testified that she had no ability to make any decisions regarding such calls.

[50] Mr. Suchard testified that in his absence or if he is unavailable, Ms. Bourassa will direct calls and correspondence, including voice mails left for him, to other supervisory personnel who will deal with that call or correspondence. He testified that he spends 20% of his time on human resources issues and works on essential services matters. He testified that Ms. Bourassa regularly attends Nursing Administration meetings and keeps the Minutes for such meetings. He testified that Ms. Bourassa also assembles materials for and distributes materials resultant from such meetings.

[51] He testified that Ms. Bourassa prepares correspondence in respect of policies and procedures as well as confidential documents regarding essential services. While he initially testified that Ms. Bourassa handles grievances, he clarified in cross-examination that her handling of grievances involves redirecting the matter to the out-of-scope person in charge while he is absent.

[52] Based upon the three (3) part test in *Bank of Nova Scotia, supra*, the Board has concluded that this position does not meet the criteria necessary to be excluded under ss. 2(f)(1)(B). While on occasion Ms. Bourassa may deal with matters that would be confidential, it is clear that she does not do so on a regular basis.

[53] Notwithstanding that Ms. Bourassa has been out-of-scope for all of her 29 years with the P.A. Health Authority, the position which she currently holds does not regularly act in a

confidential capacity with respect to the labour relations of her Employer. Therefore, the Board finds that the Confidential Secretary, Acute and Emergency Services position should be within the scope of the collective bargaining unit.

Assistant Director - Environmental Services

[54] The incumbent of this position, Terry Fjeld, reports directly to the Director of Environmental Services. The Assistant Director of Environmental Services is directly responsible for coordinating and directing the day to day operations of certain facilities within the P.A. Health Authority. Environmental Services includes the housekeeping (cleaning) functions and laundry/linen services.

[55] Ms. Fjeld testified that her department is a very large department. She has direct supervision over approximately 90 full-time, part-time and relief employees. She testified that the majority of her time is devoted to staffing issues, which included hiring, training, scheduling, dealing with injuries and back to work programs, and employee discipline.

[56] She testified that she was directly involved in the hiring process. The Environmental Services Department is an entry level department, that is, that many new hires to the P.A. Health Authority start their employment in the Environmental Services Department and from there, bid into other jobs within the district. As such, she is constantly hiring and training new employees either on a full time or part time basis to fill positions vacated by those persons bidding into other jobs in the P.A. Health Authority.

[57] As a part of the hiring process, she receives applications, screens them for basic competencies, determines candidates she wishes to interview, conducts interviews and makes the hiring decision. She is supported in this work by the human resources department who do some of the necessary paperwork, but her testimony was that the decision to hire is strictly hers or, as we will note later, that of the Supervisor of Environmental Services. Ms. Fjeld testified the Director of Environmental Services had stepped back from the hiring role and no longer participated in the hiring process, leaving it to her and the Supervisor of Environmental Services.

[58] Ms. Fjeld also testified that she attends grievance meetings on behalf of the department and usually conducts those meetings. Occasionally, she may be the second out-of-

scope in the room if the Director of Environmental Services is in attendance. She does not respond to the grievances, that task is handled by the human resources department.

[59] Ms. Fjeld is directly involved in supervision of the housekeeping and laundry/linen staffs. She makes the schedules for the staff, determines their job assignments, and directs them in the conduct of those assignments.

[60] She participates in the budgetary process, but acknowledged that it is generally the finance department that sets the final budgets.

[61] She is not a member of the collective bargaining team, nor is she involved in the formulation of proposals for this current round of collective bargaining.

[62] She also supervises two (2) schedulers/trainers who report to herself, the Supervisor of Environmental Services, or the Director of Environmental Services. Those schedulers/trainer provide introductory and safety training as well as training on equipment and procedures such as safe lifting procedures.

[63] Ms. Fjeld testified that she does impose discipline. We were provided with numerous examples of letters written by Ms. Fjeld to employees which either terminated their employment or provided discipline.

[64] She also instigated a process of kudos and complaints for employees. Rather than provide regular performance appraisals, her department provides regular feedback to its employees by way of either kudos or complaints, when received by the department. She also initiates and issues, as necessary, corrective advice memos to staff as a part of the P.A. Health Authority's progressive discipline process. Such a corrective advice memo may be issued either by herself, the Supervisor of Environmental Services, or the Director of Environmental Services. The severity of the matter usually determines who issues the Memo.

[65] The Union argued that this position, and the Supervisor of Environmental Services positions did not meet the requirements for exclusion under the management exclusion in subclause 2(f)(1)(A) of the *Act*. In support for their position, the Union cited *University of Saskatchewan, supra, Saskatchewan Government Employees' Union v. Saskatchewan Liquor*

and Gaming Authority, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96, *Canadian Union of Public Employees, Local 4552 v. Deer Park Villa Inc.*, [2002] Sask. L.R.B.R. 488, LRB File No. 159-02, *Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association*, [2005] Sask. L.R.B.R. 274, LRB File Nos. 103-04 & 222-04 and *Raider Industries, supra.*

[66] The Board considered and dealt with all of the cited cases in *University of Saskatchewan, supra.* That case set forth the following principles to be considered:

1. *The determination of whether a position falls to be excluded is primarily a factual one (para 36)*
2. *Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible (para 37)*
3. *A person to be excluded must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient. (para 38)*
4. *The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit. (para 38)*
5. *In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. (para 38)*
6. *The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. (para 38)*

[67] The Employer argued that this position, and the Supervisor of Environmental Services position, should be excluded from the bargaining unit. Their arguments focused primarily on the authority to discipline and discharge, the authority to influence labour relations, and the power to hire, promote and demote.

[68] However, the factors which the Board will consider in its determination of the managerial exclusion are not as limited as suggested by the Employer's arguments, and reference must be had to all of the six (6) criteria noted above.

[69] First of those consideration is the factual situation presented through the evidence and its relationship to the other criteria referenced by the Board. Secondly, we must be cognizant of the requirement that this exclusion should be maintained as narrowly as possible. With those overriding considerations, we can then turn to the other four (4) factors which are indicia of management authority.

[70] It is clear from the evidence of the incumbent of this position that she enjoys a high degree of independence in her decision making ability. While she has limited influence on the collective bargaining negotiations, she does have full control of the supervisory functions of the position, but also has the actual authority to hire, fire and discipline employees. This authority is an effective authority as was shown by the discipline and discharge letters which she authored. It is also shown by the fact that her hiring decisions are her decisions alone and are not merely recommendations for hiring. Those candidates that she selects are those candidates who are hired.

[71] As such, it is our determination that the Assistant Director of Environmental Services has sufficient impact on employees in the Environmental Services Department that it would be inappropriate to place that position within the scope of the bargaining unit. As noted in point four above, placing this position within the scope of the bargaining unit would, "give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit."

[72] Also as noted above, the management authority which this position has is both an actual authority and an effective authority. It is not a mere supervisory power, but one which can, has and will, have impact upon members of the bargaining unit. For those reasons, the

position of Assistant Director of Environmental Services is excluded from the bargaining unit under subclause 2(f)(1)(A).

Supervisor of Environmental Services

[73] With respect to this position, we heard testimony from the incumbent of the position, Brenda Anne Felske. This position was a newly created temporary position and Ms. Felske has occupied the position since its creation.

[74] Ms. Felske testified as to her job duties which included the day to day supervision of staff of the facility. She testified that she also supervises and monitors special projects. Her position is effectively to control the distribution of linen throughout the hospital. The Hospital contracts for the majority of its laundry services from a facility attached to the hospital. However, it is a separate facility and the Supervisor of Environmental Services co-ordinates the pick up and delivery of dirty laundry and the distribution of clean laundry and linen throughout the hospital. In addition, however, there is a small laundry facility under her direct supervision that is contained in the Herb Bassett Home which is also attached to the hospital.

[75] However, laundry services is only one of her responsibilities. She also assists the Assistant Director of Environmental Services with respect to the housekeeping function as well. Her evidence was that she and the Assistant Director of Environmental Services function as a team with respect to the functions performed in the Department, albeit she reported to the Assistant Director and the Director of Environmental Services.

[76] Her specific job duties include responsibility “for hiring, discipline and dismissal of staff as required within the department.” She testified that she had full authority to hire staff and was involved in the review of applications, screens them for basic competencies, selects candidates she wishes to interview, conducts interviews and makes the hiring decision. In that regard, she enjoyed the same ability to hire employees as the Assistant Director of Environmental Services.

[77] The majority of her duties, however, are supervisory in nature. While she was involved in corrective discipline, it was on a day to day basis and was not usually taken through to the “progressive discipline” process. She kept records of staff performance and monitored staff performance.

[78] She did not participate in the grievance procedure. She had infrequent contact with the Union with respect to grievances and complaints (once a month). While she testified that she had the same power to deal with grievances and complaints as the Assistant Director, there was no evidence that she attended grievance meetings or that she imposed progressive discipline. Her testimony was that she usually makes recommendations and asks for advice from the Assistant Director.

[79] This position does not deal with budgets and is not involved in collective bargaining or the formulation of collective bargaining proposals.

[80] This position does not meet the criteria for exclusion set out above. As noted in point four, above, her duties are principally supervisory as distinct from managerial. As a result, this position should be within the scope of the bargaining unit.

[81] An appropriate Order will issue specifying the positions which shall be included and those excluded from the bargaining unit.

DATED at Regina, Saskatchewan, this 17th day of July, 2009.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson