

**The Labour Relations Board
Saskatchewan**

REGINA PUBLIC LIBRARY BOARD, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1594, Respondent

LRB File No. 055-09; August 24, 2009

Chairperson, Kenneth G. Love, Q.C.; Members: Marshall Hamilton and Bruce McDonald

For the Applicant: Mr. Brian Kenny Q.C.
For the Respondent: Mr. Guy Marsden

Certification – Amendment – Exclusion – Bargaining unit – Open period – Employee — Board reviews position at issue and orders the exclusion on provisional basis.

The Trade Union Act, ss. 2(f), 5(k), 5(m), 5.2 and 19.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Regina Public Library Board, (the "Applicant" or "RPL") made an application to amend a certification Order issued by the Board on April 5, 2006, which certified the Canadian Union of Public Employees, Local 1594 (the "Union") as bargaining agent for all employees of the Applicant except for certain employees named therein. The application sought to add to the list of excepted employees the positions of Assistant Manager, Public Service Units and Manager, Virtual Services.

[2] At the hearing of this matter on July 15, 2009, the parties agreed that the position of Assistant Manager, Public Service Units should be excluded from the bargaining unit, but the parties could not agree with respect to the position of Manager, Virtual Services.

[3] The Union raised an objection to the application being heard by the Board as an application for amendment of the certification Order because the application was not within the 30 – 60 day open period provided for in clause 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act"), nor did the Union agree to the amendment under clause 5(j) of the *Act*.

[4] The Board considered the preliminary objection and found, for the reasons that follow, that the objection was well founded. However, the Board determined that it would make a remedial order under s. 19 of the *Act* so as to allow the real question in controversy in the proceedings to be determined. That real question was a determination under clause 5(m) of the *Act* as to whether or not the position of Manager, Virtual Services "is or may become an employee."

[5] Subsection 5.2(1) of the *Act* allows the Board to make a provisional determination under clause 5(m) "before the person who is the subject of the application is actually performing the duties of the position in question." That was the case in this application. The position had been recently created, but no-one had been hired to occupy the position.

[6] At the conclusion of the hearing, the Board made a provisional determination under ss. 5.2(1), that the Manager, Virtual Services should be excluded from the bargaining unit as not meeting the definition of employee within clause 2(f) of the *Act*. These are the reasons for that decision.

Facts:

[7] The RPL created two (2) new positions as a part of an ongoing reorganization of staff resources. The changes were identified by the Board as being necessary following the development of a new service plan for the RPL. The chief architect of this plan was Ms. Julie McKenna, the Deputy Director of the RPL. Ms. McKenna provided evidence to the Board concerning the creation of the disputed position of Manager, Virtual Services. Her testimony outlined the rationale for the creation of that position and the functions which the position was to perform in the overall hierarchy of the library organizational structure. Her testimony was uncontradicted and we have accepted her testimony as both factual and accurate.

[8] Ms. McKenna outlined the need for a Manager, Virtual Services. She explained that the provision of virtual services crosses department lines and the position would require co-ordination with other managers. She stressed that the position will have to compete for and negotiate with other line managers for scarce resources, particularly funding and staff.

[9] She described virtual services as effectively a tenth branch of the library (at present the library operates nine (9) physical locations). She noted as well that the RPL had a

"delivery deficit." While originally it was intended to keep virtual services as a separate operation, the library board came to realize that virtual services was, in effect, a whole secondary library and, as such, it needed to cross all organizational lines.

[10] The Manager, Virtual Services reports directly to Ms. McKenna as Deputy Director of the RPL. Other positions which have a direct report to Ms. McKenna are: Manager Collections, Manager Programming, and Manager Public Service Units, all of which are out of scope. The newly created position of Assistant Manager, Public Service Units, which the Union has agreed should be out of scope, reports indirectly to Ms. McKenna through the Manager, Public Service Units.

[11] While the organization chart for the organization shows only two (2) positions reporting to the Manager, Virtual Services, Ms. McKenna advised that there would be four (4) possible additional reports and duties for this Manager.

[12] The job description for the position is appended as Appendix "A" to these Reasons. Under point 1) of the job description, bullet point #2 states that the incumbent will "Manage and supervise staff":

Manage, within established policies and procedures, the human resources assigned to the unit including recruitment, hiring, training, scheduling, evaluation, discipline, termination, layoff and recall, promotions, demotions, and annual increments.

[13] Ms. McKenna testified that the incumbent in this position would:

1. *oversee probationary reviews and performance evaluations, including competencies of employees throughout the RPL, not just those subject to direct supervision;*
2. *enforce the collective agreement, including 1st level grievance involvement under article 9.07 of the collective agreement;*
3. *design jobs for subordinates;*
4. *work with the Human Resources department with respect to recruitment, but the incumbent would determine when and how to recruit new employees;*
5. *negotiate with other line managers for resources and any new positions which might be created;*

6. *be involved on interview panels and determine questions to be directed to potential hires;*
7. *make the final determination as to who will be hired;*
8. *may sit on interview panels for other departments hiring process where virtual knowledge and skills important;*
9. *responsible for discipline and determine if discipline necessary and, if necessary, impose discipline, including progressive discipline;*
10. *determine if termination is an appropriate response in disciplinary situation;*
11. *in situations where layoffs may occur, would negotiate with other managers and would be implemented in concert with other managers and in accordance with collective agreement;*
12. *oversee promotion of existing employees to new position;*
13. *oversee demotion, if necessary, in accordance with the provisions of the collective agreement;*
14. *be responsible for signing off on all performance reviews for annual increments.*

[14] Ms. McKenna further testified that the incumbent would have budgetary responsibilities and would bring the virtual services department budget forward to the budget committee. She also testified that the incumbent could be a part of the management negotiating team, but that he/she would certainly be required to formulate bargaining proposals.

[15] In cross examination, Ms. McKenna acknowledged that the incumbent cannot unilaterally adjust staffing levels or job descriptions. The incumbent would only be able to make recommendations, which recommendations were usually accepted. She also acknowledged that the job description did not explicitly state that the incumbent would act in a confidential capacity with respect to the labour relations of the RPL, but, in her view, that was implicit in the requirements of item 6 of the job description.

[16] She acknowledged that the incumbent would not have an independent ability to discipline without advising herself and/or the human resources department. The incumbent would also have to bring a proposed termination to herself and/or the human resources department before being implemented. However, she repeated that the incumbent would have an independent authority to hire, albeit with the assistance of the human resources department.

[17] She advised that the decision to seek to have the position out of scope was made prior to the development of the job description. Her evidence was that she didn't think that an in scope employee could do the job, *i.e.*: sit at the management table and negotiate for resources within the organization, etc.

[18] She also testified that she also wanted to have sufficient managers to manage the organization. She testified that there were only seventeen (17) employees of the RPL who were out of scope.

Relevant Statutory Provisions:

[19] The relevant provisions of the *Act* provide as follows:

2 *In this Act:*

(d) *"collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*

...

5 *The board may make orders:*

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

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

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

...

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

...

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

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

Employer's arguments:**Preliminary Matter**

[20] Counsel for the Applicant acknowledged that the application had not been filed within the open period as set out in clause 5(k). However, he argued that the application should be permitted to go forward under subclause 5(j)(ii) of the *Act*, pursuant to which the Board has the authority to amend if "in the opinion of the Board, the amendment is necessary." He argued that the Board's decision in *Canadian Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board*¹ was too restrictive and the Board should expand the ability of parties to bring applications outside the open period. He argued that the open period restrictions should be limited to applications involving decertification applications or raid applications.

Main Argument

[21] Counsel for the Applicant argued that even if the application was brought outside the open period, he maintained that the Board should consider the application pursuant to clause 5(m) of the *Act* and that the Board should make a preliminary assessment of the position pursuant to s. 5.2 of the *Act*. He argued that the position should be excluded from the bargaining unit under the "managerial" exclusion from the definition of "employee" in Article 2(f)(i)(A) of the *Act*. In support for his position, he cited *Service Employees International Union, Local 333 v. Lutheran Sunset Home Corp. at Lutheran Riverside Terrace*² and *Canadian Union of Public Employees, Local 1660 v. The Board of Education of the Battlefords School Division No. 118*.³ He also cited a passage from *Westfair Foods Limited v. United Food and Commercial Workers International Union*.⁴

Union's arguments:**Preliminary Matter**

[22] The Union raised a preliminary objection to the timeliness of the application under clause 5(k) of the *Act* which requires that applications for amendments of a certification Order be made within the 30 - 60 day open period. They cited as authority for their objection *CUPE, Local*

¹ [1996] Sask. L.R.B.R. 732, LRB File No. 052-96

² [2002] Sask. L.R.B.R. 685, LRB File No. 184-02

³ [2002] Sask. L.R.B.R. 556,, LRB File No. 022-02

⁴ [1981] Feb. Sask. Labour Rep. 66, LRB File No. 085-80

1788 v. Cuelenaere,⁵ *supra*, and *Swift Current District Health Board v. Service Employees' International Union, Local 336*.⁶

Main Argument

[23] Based upon the Board's decision in *Saskatchewan Government Employees Union v. Saskatchewan Liquor and Gaming Authority et al.*,⁷ the Union argued that the duties of the Manager, Visual Services were supervisory in nature rather than managerial as outlined in this decision. The Union also argued that the managerial exclusion should be made on a narrow basis where management duties were the major focus of the position rather than being performed some of the time or incidentally.⁸

Analysis and Decision:

[24] The Board recently considered an application under clause 5(m) and section 5.2 in *Canadian Union of Public Employees, Local 4923 v. Saskatchewan Society for Prevention of Cruelty to Animals (Saskatchewan SPCA)*⁹. That decision discussed and considered the factors which the Board will consider in making a decision on these two (2) sections of the *Act*.

[25] At paragraph [46], the Board summarizes as follows:

The primary purpose of excluding persons from the bargaining unit on the basis of the managerial exclusion is to ensure that persons who can affect the economic lives of other employees are not placed in a conflict of interest by including them in a bargaining unit.

[26] As noted in *Re: University of Saskatchewan*¹⁰ the determination of whether a position should be excluded is a factual one. The onus of proving that the position sought to be excluded falls upon the person seeking that exclusion.¹¹

[27] The Board is satisfied that the RPL satisfied the onus of proving the position of Manager, Virtual Services should be excluded from the bargaining unit. Furthermore, the Board

⁵ *Supra*

⁶ [2000] Sask. L.R.B.R. 356, LRB File No. 001-99

⁷ [1997] Sask. L.R.B.R. 836, 43 C.L.R.B.R. (2d) 251, LRB File Nos. 037-95 & 349-96

⁸ *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, [2007] Sask. L.R.B.R. 154, LRB File No. 057-05

⁹ LRB File No. 198-08, Reasons for Decision dated April 20, 2009

¹⁰ Op Cit

¹¹ *Canadian Union of Public Employees, Local 4777 v. Prince Albert Parkland Regional Health Authority*, 2009 CanLII 38609 (SK L.R.B.) LRB File No. 011-09

is satisfied based on the evidence presented that the position should be excluded on a provisional basis from the bargaining unit.

[28] The facts in this case, as cleaned primarily from the evidence of Ms. McKenna, show that the incumbent in this position will be expected to perform duties of a management character as his/her primary responsibility. Within the organizational structure, the position reports directly to Ms. McKenna as do most of the other operational managers within the RPL. There is not an abundance of out of scope employees to effectively manage the enterprise. This is notwithstanding that the direct supervisory responsibility of the incumbent will be for only two (2) positions.

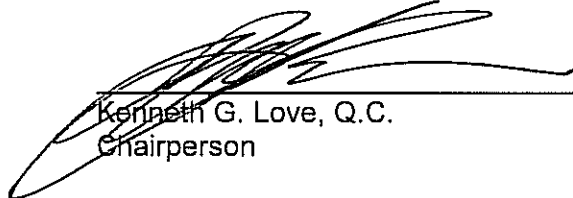
[29] Ms. McKenna's evidence supported an expanding and increasingly important role for Virtual Services within the library structure. While not her words, virtual services represented the wave of the future in library science. The RPL, by the creation of this position, which would cross traditional departmental lines within the library hierarchy, was attempting to catch this wave and bring the library up to date in the digital age.

[30] Based upon job descriptions, without the benefit of hearing from the incumbent as to the actual job duties and responsibilities, it is difficult for the Board to assess with any certainty the actual role and responsibilities of the position. For that reason, a provisional Order under s. 5.2 is appropriate in the circumstances.

[31] The certification Order shall be amended to include the position which is not disputed, that of the Assistant Manager, Public Service Units. The Order shall be provisionally amended to exclude the position of Manager, Virtual Services. That provisional exclusion shall become final on July 15, 2010, unless the Employer or the Union applies to the Board for a variation of this determination before that date,

Dated at Regina, Saskatchewan, this **24th** day of **August, 2009**.

LABOUR RELATIONS BOARD



Kenneth G. Love, Q.C.
Chairperson

Appendix "A"



Manager, Virtual Services
April 2009

JOB CATEGORY: Manager – Out of Scope

JOB CLASSIFICATION: Manager, Virtual Services

POSITION: #

PAY BAND:

JOB SUMMARY:

Under the general direction of the Deputy Library Director, and in collaboration with the Manager, Public Service Units, Manager, Programming, Manager, Information Technology and Manager, Collections, the Manager, Virtual Services provides leadership for the planning, development, and delivery for all of Regina Public Library's public-facing technology services. The Manager works as part of the Library's management team to ensure the effective, coordinated delivery of virtual public services throughout the system.

The Manager will demonstrate strong managerial skills, creativity, ingenuity, integrity, and a keen appreciation for and understanding of customer service in the execution of her/his duties. The position will play a significant role in the continued development of Regina Public Library's programs and services. The Manager has line responsibility for assigned staff, as well as contacts with vendors, Regina Public Library staff, Provincial Library staff, other library systems, staff of SILS Consortium partner libraries other libraries, city and school board staff and the general public.

JOB DESCRIPTION:

- 1) Manage and supervise assigned staff
 - Directly supervise Virtual Services Unit staff: assign work, monitor activities and evaluate performance.
 - Manage, within established policies and procedures, the human resources assigned to the unit including recruitment, hiring, training, scheduling, evaluation, discipline, termination, layoff and recall, promotions, demotions, and annual increments.
 - Adjust staffing levels, job descriptions, and job duties to optimize services and adjust to a changing environment.
 - Participate in the resolution of any staff related issues to ensure that all staff work together in a cooperative fashion.
- 2) Manage all public-facing technology services

Appendix "A"

- ✓ Plan, develop and maintain all aspects of the Library's Virtual Services, including the initiation, organization, presentation, and implementation of use of technology to deliver services to users both within Library facilities and from off site.
 - ✓ Oversee the administration, development and maintenance of the Library's virtual and electronic resources, including the integrated library system and the Library web site. Utilize Library 2.0 and social networking technologies to deliver enriched content.
 - Ensure that web services and virtual resources are integrated and designed for ease of use and convenience of patrons.
 - ✓ Provide direction on all technology enabled public services delivered by Regina Public Library, including the internal work processes and activities required to assure that such services are undertaken efficiently and effectively to optimize the user experience.
 - ✓ Develops annual capital and operating budgets for virtual services and contributes to the development and preparation of the Library's annual budget. Manages capital and operating budgets by monitoring purchases and expenditures and ensuring response to changing circumstances.
 - ✓ In consultation with the Manager, IT, source and recommend the purchase of virtual services and resources, equipment and technology. Work with Library staff and vendors to ensure successful implementation.
 - ✓ Provide technical and subject matter expertise in the negotiation of service agreements with a variety of vendors and suppliers of systems, products and services.
- 3) Provide direction for new initiatives, projects and service improvements
- ✓ Lead and initiate the research and development of all programs, services, and projects utilizing either online or physical public-facing technological solutions that advance the service goals and strategic direction of the Library.
 - ✓ Develop strategic planning initiatives for future virtual services, including coordination with the partners of the SILS Consortium.
 - ✓ Monitor industry trends and developments in the library and public service industries, especially those involving the innovative use of technologies.
- 4) Library management
- ✓ Provide for the effective and efficient co-ordination of projects, through liaison with colleagues on an individual and team basis.
 - ✓ Contribute to the development of library service and strategic planning through participation in the collective decision making processes of the Administrative Group
 - ✓ Participate actively in the management of the Library through involvement on committees, work groups and project assignments from the Deputy Library Director.

Qualifications

- ✓ An ALA accredited Master's degree in Library and Information Studies.

Appendix "A"

2. Minimum of three years of progressively increased responsibilities in an information technology service environment.
3. A record of on-going professional development activities leading to a broad and in-depth knowledge of current library practices, trends, standards, public services and related professional issues.
4. Demonstrated knowledge of current technology, trends and issues and the ability to relate that knowledge to the public library services environment.
5. Demonstrated ability to work with a variety of software applications and utilities, web site maintenance and design. Demonstrated understanding of content management systems and the architecture and function of integrated library systems. General understanding of networks and network appliances, servers, etc. would be beneficial.
- ✓ 6. Knowledge of the principles of human resource management in a unionized environment and demonstrated supervisory skills including the ability to motivate and lead staff in mandate delivery.
7. Demonstrated analytical skills and problem-solving ability, including the ability to evaluate, assess and problem-solve using logical, fact-based reasoning and to participate in an evidence-based decision-making environment.
- ✓ 8. Demonstrated strong organizational skills including the ability to effectively and efficiently manage work, scheduling and priorities to support patron-centered services. Experience in project management and leading staff on multiple concurrent projects.
9. Demonstrated commitment to deliver consistent, high quality customer service and work well with a diverse customer group.
- ✓ 10. Demonstrated ability to work constructively in a collaborative decision-making framework. Demonstrated ability to establish and maintain positive working relationships with the public, staff and external agencies and to work as a member of a team.
11. Demonstrated strong oral and written communication skills.