

**The Labour Relations Board  
Saskatchewan**

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4928, Applicant and  
SASKATCHEWAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS,  
(Saskatchewan SPCA), Respondent**

LRB File No. 198-08; April 20, 2009

Vice-Chairperson, Steven Schiefner; Members: Shawna Colpitts and Elma Shoulak

For the Applicant Union: Mr. Guy Marsden and Ms. Crystal Norbeck  
For the Respondent Employer: Mr. Larry Seiferling, Q.C.

**Employee – Managerial exclusion – Board finds that Coordinator of Investigative Services performs managerial functions of a nature and to a degree that would require exclusion from bargaining unit – Board also finds position undergoing re-description at time of hearing that could alter managerial character of position – Under circumstances, Board indicates it would provisionally exclude Coordinator of Investigative Services from scope of bargaining unit.**

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

**REASONS FOR DECISION**

**Background:**

**[1] Steven Schiefner, Vice-Chairperson:** The Canadian Union of Public Employees, Local 4928 (the “Union”) applied to the Saskatchewan Labour Relations Board (the “Board”) on December 5, 2008 to be certified for a bargaining unit comprising all employees of the Saskatchewan Society for the Prevention of Cruelty of Animals (the “Employer” or “Saskatchewan SPCA”), except for the Executive Director.

**[2]** The Employer filed a Reply on December 23, 2008, with the only substantive issue in dispute being the Employer’s position that one (1) additional position should be excluded from the scope of the bargaining unit; that position being the Coordinator of Investigative Services.

**[3]** A hearing of the matter was conducted in Saskatoon, Saskatchewan on February 12, 2009.

[4] The Board's determination on the issue of exclusion of the disputed position had no bearing on whether or not the Union enjoyed the threshold of support required for the conduct of a representative vote pursuant to s. 6 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "Act"), which they did. At the conclusion of the hearing, the Board reserved its decision on the issue of the management exclusion; appointed Ms. Kelly Miner (or her designate) as agent of the Board (Returning Officer) for the conduct of a representative vote; directed that a representative vote be conducted of all employees of the Employer including the incumbent of the disputed position; directed that the ballot of the incumbent of the disputed position be sealed in an envelope and placed in the ballot box with all other ballots; directed that the ballot box be sealed upon the completion of the representative vote; and directed that the ballots be counted following direction from this Board with respect to the issue of the management exclusion (whereupon the ballot of the incumbent of the disputed position would either be counted or destroyed, unopened).

[5] The following are the Reasons for Decision with respect to the exclusion of the position of Coordinator of Investigative Services.

**Facts:**

[6] The Employer called Ms. Francis Emily Wach, Executive Director of the Saskatchewan SPCA. Ms. Wach testified that she joined the Saskatchewan SPCA in 1993 or 1994 and has been the Executive Director for the past eleven (11) years.

[7] Ms. Wach testified that she is responsible for the overall operation of the Saskatchewan SPCA, which is a non-profit society dedicated to animal welfare. Ms. Wach testified that the Saskatchewan SPCA is a membership organization governed by a volunteer board of directors. Ms. Wach described the board of directors as a "governance board", wherein the board approves the general policies of the SPCA and the staff are responsible for implementing all programs, activities and works of the society.

[8] Ms. Wach described the main goal of the Saskatchewan SPCA as the protection of animals, including the prevention of cruelty and their relief from suffering. Ms. Wach indicated that there were two (2) main components to the operation of the Employer; firstly, public education and awareness; and secondly, investigation and intervention services. Ms. Wach testified that the position of Coordinator of Investigative Services was responsible for these later

functions, while she was generally responsible for the former, together with the overall administration of the Saskatchewan SPCA.

**[9]** Ms. Wach indicated that the Employer had approximately twelve (12) employees, excluding herself. The Employer tendered a document entitled “Reporting and Communication Flowchart” indicating that three (3) functional areas reported directly to the Executive Director, including the Program Coordinator (also known as the “Newspaper Coordinator”), the clerical personnel (currently comprised of two (2) “Administrative Assistants”), and the Coordinator of Investigative Services (*ie.* the disputed position). The remainder of the Saskatchewan SPCA’s employees, eight (8) in total, were identified as Animal Protection Officers (the “APOs”), all of whom reported to the Coordinator of Investigative Services.

**[10]** Ms. Wach testified that the function of the Coordinator of Investigative Services was to oversee and direct the investigation and intervention services of the Employer. Ms. Wach testified that the Coordinator required broad knowledge of commercial livestock practices in Western Canada and companion animal care and health; working knowledge of the goals, policies and procedures of the Employer; and general knowledge of the legislation concerning animal welfare and protection.

**[11]** Ms. Wach testified that the incumbent of the disputed position was Mr. Ian MacMillan. Ms. Wach testified that, *inter alia*, Mr. MacMillan was responsible for coordinating the scheduling of APOs, assigning work to the APOs, assisting the APOs in deciding what actions ought to be taken in specific cases (*ie.* whether or not to seize animals, etc.), coordinating with other law enforcement agencies, and reviewing and coordinating the expense reports of the APOs.

**[12]** With respect to the hiring of new staff, Ms. Wach testified that the Coordinator screened applications for new APOs and made recommendations to the Executive Director with respect to who should be hired. Ms. Wach testified that, while she retained the final authority with respect hiring, for APOs, she relied heavy on the recommendations of the Coordinator; testifying that on at least one (1) occasion she approved the hiring of someone whom the Coordinator preferred over her own choice on the basis that the Coordinator, as the head of the department, would have to work with whomever they hired. Ms. Wach testified that she tended to view hiring of APOs as a joint decision with the Coordinator and the only time she recalled

overruling a decision on hiring was an occasion in the spring of 2008, when she decided that no one should be hired until a pending organizational change had been concluded.

**[13]** Ms. Wach also testified that the Coordinator was responsible for the conduct of performance reviews of APOs and the application of corrective discipline in the event of non-compliance or substandard performance by an APO. In cross-examination, Ms. Wach admitted that performance reviews of APOs had not been conducted for the past four (4) years and that the Coordinator had not administered any written warnings to staff regarding performance related issues. However, Ms. Wach did indicate that the lack of written warnings was primarily a factor of few performance related issues in the workplace. Ms. Wach indicated that she was aware of at least one (1) occasion when the Coordinator had administered a verbal warning regarding performance to an APO that was of a disciplinary nature.

**[14]** Finally, Ms Wach testified that, prior to hiring Mr. MacMillan, the Employer had undergone an internal organizational review. Concomitant with this review, the Employer drafted a new job description for the position of Coordinator of Investigative Services. It would appear that more than one (1) version of the job description was prepared; the first version, which the incumbent (Mr. Ian MacMillan) had a copy of, as did the Union, was dated “*Board Approved January, 2003*”; and the second, which was tendered into evidence by the Employer, was dated “*Approved SASKATCHEWAN SPCA Executive March 22, 2003*”. Ms. Wach indicated that the “March 22, 2003” version was the current job description for the position and that this version had been used during the staffing process to hire the incumbent and subsequent thereto. However, Ms. Wach testified that the differences between the two (2) documents was more organizational than substantive; with the latter document containing a more detailed explanation of the various duties which had been enumerated in the prior version.

**[15]** Under the heading “**FACTOR 2 - AUTHORITY TO MAKE INDEPENDENT DECISIONS**”, the “March 22, 2003” version of the job description contained the following information:

*If this position has authority to make independent decisions within existing written policy or regulations, please describe the decisions. Are they reviewed before or after implementation? (Please specify)*

- *Work with APOs to make decisions about when to seize animals within existing laws, policies and procedures. Decisions to seize in*

straightforward cases (e.g. abandoned animals) can be made by the CIS and reported to the Executive Director. More complex situations (e.g. special care handling needs of animals, disease control issues, conflicting expert opinions) should be reviewed with the Executive Director prior to seizure.

- Work with APOs to decide what actions need to be taken in specific cases.
- Work with law enforcement and other organizations to resolve animal welfare problems.

**Decision making urgency/corrective actions**

<p>Provide examples of corrective decisions or actions that this position is required to take independently.</p>	<p>Describe the impact (e.g., the loss, threat being corrected) of these decisions on finances, environment, the well being of others, or public confidence, legal matters, etc.</p>	<p>How frequently is this decision made (almost never, weekly, once a month, etc.)</p>
<ul style="list-style-type: none"> <li>➤ Supervise APOs to ensure that when policies and procedures are not followed actions are taken to correct the situation.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Potential for loss of case in court or civil suit.</li> <li>➤ Potential damage to SSPCA reputation.</li> <li>➤ Potential loss of SAFRR contract.</li> </ul>	<ul style="list-style-type: none"> <li>➤ One to two times a month</li> </ul>

[16] Both versions of the job description also included the following statements under the heading “**FACTOR 4 - RESPONSIBILITY FOR THE WORK OF OTHERS**”:

*Number of staff (full-time, part-time) that report directly to this position: 8 part-time.*

*Indicate the responsibilities for the work of staff that report directly to this position:*

- x *Scheduling, recommending and approving leave and overtime;*
- x *Assigning, distributing, organizing, coordinating and prioritizing subordinate’s work;*
- x *Monitoring the achievements of goals and objectives and ensuring quality and quantity standards are met;*
- x *Coaching for ongoing performance improvements and demonstrating job functions and procedures;*
- x *Resolving conflicts between staff.*

[17] The Union called Ian Donald MacMillan, the current incumbent of the disputed position. Mr. MacMillan described his educational background and his work experience prior to joining the Saskatchewan SPCA in April of 2003; all of which was consistent with the requirements of the job description (both versions) and demonstrative of broad knowledge of current agricultural practices, including animal welfare.

[18] For the most part, Mr. MacMillan's evidence regarding the duties and responsibilities of the disputed position was consistent with the evidence of Ms. Wach; with the primary differences relating to the extent to which Mr. MacMillan actually performed the duties that had been enumerated by Ms. Wach and/or Mr. MacMillan's understanding as to extent of his authority (*ie.* authority to terminate and/or discipline employees).

[19] Mr. MacMillan testified that his office was in Saskatoon and that he typically works an eight (8) hour day, with a significant portion of his time consumed by answering phone calls regarding complaints respecting animal abuses and/or negligent and the ongoing investigations thereof by his staff. Mr. MacMillan testified that he does his own clerical work and maintains his own clerical files, based on a system he developed.

[20] Mr. MacMillan testified that, as complaints come in, he assigns files to APOs based on his knowledge as to their respective schedules and availability, and then monitors the progress on the assigned files by the APOs through to resolution of the complaint and disposition. Mr. MacMillan testified that he provides advice and direction to the APOs as to appropriate investigation techniques, as well as the application of any policies or practices of the Saskatchewan SPCA or legislation that may be applicable to an APO's investigation (for example, whether or not to seize animals in distress). Mr. MacMillan testified that part of his duties was to monitor the reports of APO's (both investigative reports and expense claims) to ensure they were compliant with the Employer's policies and procedures.

[21] With respect to budgeting, Mr. MacMillan testified that he assisted in the development of the budget for his department (*ie.* Investigative Services) but that the preparation of the annual budget was primarily done by the Executive Director. Mr. MacMillan also testified that monitoring his department's budget was primarily the function of the Employer's treasurer.

**[22]** With respect to the hiring of staff, Mr. MacMillan confirmed that, when a new APO was required, he would place an advertisement in the paper, answer questions from the public regarding the position, screen the applications, and would jointly interview candidates with Executive Director. Mr. MacMillan indicated that while he would participate with the Executive Director in all hiring decisions regarding APOs, he did not understand that he had independent authority to hire.

**[23]** With respect to scheduling of APOs, and approving leaves of absence, Mr. MacMillan testified that he assigns files to APOs, approves holidays and short leaves, and resolves conflicts between APO's regarding scheduling and workloads. Mr. McMillian testified that extended leaves of absence must be approved by either the Executive Director or the Board of Directors.

**[24]** With respect to overtime, Mr. MacMillan testified that, following a 2003 ruling from Revenue Canada, the Employer developed an over-time policy for APOs. Mr. McMillian testified that, under this policy, he was responsible for approving overtime requests from APOs.

**[25]** With respect to the reporting by APOs, Mr. MacMillan testified that it was his responsibility to monitor the "quality" of investigative reports to ensure their thoroughness and compliance with the Employer's policies and procedures. Mr. MacMillan testified that his role in reviewing expense reports was mostly related to making sure that they were submitted on a timely basis.

**[26]** With respect to performance reviews, Mr. MacMillan testified that he had conducted annual reviews of all APO's approximately four (4) years previous but that he had not completed any since that time. Mr. MacMillan testified that he had been too busy to complete his performance reviews in the intervening years. In cross-examination, Mr. MacMillan acknowledged that it was his responsibility to conduct performance appraisals of the APOs and that he had "probably been negligent" in failing to complete this aspect of his duties.

**[27]** Mr. MacMillan testified that, while the Employer did not have a formal progressive discipline policy, he understood the Employer's practice to involve a three (3) step process in the event performance related issues arise with the APOs; being Step #1: a verbal warning; Step #2: a letter warning; and Step #3: a letter warning, with notice of possible termination in the event of

non-compliance. Mr. MacMillan testified that he had previously administered verbal warnings to staff regarding performance but that he never understood that he had authority to terminate an employee. In cross-examination, Mr. MacMillan testified that he had been directed by the Executive Director to administer a written warning to an APO regarding tardy expense reports, which he indicated he had done upon being requested to do so.

**[28]** In cross-examination, Mr. MacMillan also acknowledged that he was the head of the department (*ie.* Investigative Services) and that it was his responsibility to ensure that the APOs were “doing their job”. In response to a question from the Board, Mr. MacMillan indicated that disciplining staff was not something he was particularly good at doing.

**[29]** Finally, both Ms. Wach and Mr. Macmillan testified that further organizational changes were anticipated by the Employer; changes that were anticipated to affect the duties and functions of the Coordinator of Investigative Services. Mr. MacMillan testified that, at the present time, the majority of his time was spent in the office and that he conducted very few investigations himself because of the demands on his time, including a significant portion of time that was being consumed by clerical functions (answering calls, organizing files, and monitoring reports from APOs). Ms. Wach testified that the Saskatchewan SPCA was exploring the potential of hiring clerical support for the Coordinator of Investigative Services so as to provide more time for him to be in the field and more capacity to conduct his own investigations.

**Arguments:**

**[30]** Mr. Larry Seiferling, on behalf of the Employer, filed several case authorities, all of which the Board has reviewed. The Employer took the position that the Coordinator of Investigative Services ought to be out of the scope of the proposed bargaining unit. The Employer argued that the disputed position should be excluded because the position exercises managerial authority through decisions that are made on a day-to-day basis on behalf of management and that these decisions would put him in an insoluble conflict of interest with other members of the bargaining unit in the event the workplace is certified.

**[31]** The Employer argued that the Coordinator of Investigative Services is required to exercise discretion in the staffing of APOs, in allocating work to the APOs, in granting or denying requests for leaves of absence, and in monitoring the work performance of APOs. The Employer argues that, because of the exercise of this discretion, the incumbent of the disputed



position would necessarily and routinely be placed in a conflict of interest should this position be included within the scope of the Union. Counsel for the Employer urged the Board to reflect upon the position that Mr. MacMillan would be in if he was a member of the bargaining unit and a grievance or complaint was brought forward by an APO concerning a decision that he had made or had input into, whether it concerned the allocation of work, the granting of a leave or a disciplinary action.

**[32]** Referring to the decision of the Board in *Westfair Foods Limited v. United Food and Commercial Workers International Union*, [1981] Feb Sask. Labour Rep. 66, LRB File No. 085-80, where the status of first line managers was analyzed, the Employer argued that the relevant consideration is whether the job duties of the disputed position would put Mr. MacMillan in a conflict of interest with other employees in the bargaining unit. The Employer argued that the relevant indicator of whether an employee is in a conflict of interest (*ie.* performing functions of a managerial character) is whether the incumbent has the ability to affect the economic lives of other members of the bargaining unit.

**[33]** The Employer also relied on the following cases: *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3<sup>rd</sup> Quarter Sask. Labour Rep. 153, LRB File No. 268-94; *Canadian Union of Public Employees, Local 4449 v. Glencairn Child Care Co-operative*, [2001] Sask. L.R.B.R. 510, LRB File No. 092-01; and *United Food and Commercial Workers, Local 1400 v. Paul Lalond Enterprises Ltd.*, [2000] Sask. L.R.B.R. 590, LRB File No. 123-00, and asked the Board to be mindful of the fact that this is a small, non-profit organization, with limited depth of management, and absent the kind of managerial sophistication that may be apparent in a larger, more structured workplace.

**[34]** The Union took the position that Mr. MacMillan was an “employee” within the meaning of s. 2(f) of the *Act* and that the position did not fall within the managerial exclusion. In support of their position, the Union filed and referred to several case authorities, all of which the Board has reviewed.

**[35]** The Union referred to *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, [2007] Sask. L.R.B.R. 154, LRB File No. 057-05, as standing for the proposition that the management exclusion provided for in s.2(f)(i) must be made “on as

*narrow a basis as possible*” and that it is not sufficient for an employee to only “incidentally” or “occasionally” perform tasks of a managerial character to justify the management exclusion.

[36] The Union referred to the Board’s decision in *Saskatchewan Liquor Store Managers’ Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96 (the “SLGA case”), wherein the Board noted that the primary responsibilities indicative of managerial status are the authority to discipline, discharge and influence labour relations, while the secondary managerial functions include the authority to hire, promote and demote. The Union noted that the Board in the SGLA case concluded that the authority bestowed on a managerial employee must be an “effective” authority and that it is not sufficient that the person only make recommendations and have no further input into the decision-making process. To which end, the Union cautioned the Board to ensure that the managerial functions that were claimed by the Employer to justify the exclusion were genuine and actually exercised by the incumbent and were not merely “paper” authority.

[37] The Union also referred to this Board’s decision in *Canadian Union of Public Employees, Local 4552 v. Deer Park Villa Inc.*, [2002] Sask. L.R.B.R. 488, LRB No. 159-02, wherein the Board concluded that the manager in that case had “extremely limited managerial functions” because the chief executive officer performed the vast majority of the managerial functions. In that case, the Board was not satisfied that the duties of the disputed position (who only had authority to issue verbal warnings and only provided advice to the CEO with regard to hiring and employee performance) would place the incumbent of the disputed position in a conflict of interest with other members of the bargaining unit so as to justify a managerial exclusion.

[38] The Union also referred to *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 Nos. 103-04 & 222-04, and *Saskatchewan Joint Board, Retail Wholesale and Department Union v. Raider Industries Inc.*, [1996] Sask. L.R.B.R. 297, LRB File No. 005-96, as examples of cases where positions demonstrated some managerial duties but not sufficient independence or authority to justify excluding them from the bargaining unit.

**Relevant Statutory Provisions:**

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

2 *In this Act:*

(f) "employee" means:

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

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

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

...

5 *The board may make orders:*

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

...

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

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

### **Analysis and Decision:**

**[40]** We must determine whether or not the Employer has satisfied the onus that the position of Coordinator of Investigative Services should be excluded from the bargaining unit. Several decisions were brought forward by the parties in support of their respective positions. While most of these case use similar language and articulate helpful criteria for distinguishing the kind and extent of duties and the circumstances justifying the application of the managerial exclusion, the common theme of these decisions is that there is no single test for determining whether or not an employee should be excluded on the basis of managerial responsibilities. In *City of Regina v. Canadian Union of Public Employees, Local 21, and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, at 158, the Board stated:

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

**[41]** In *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96, the Board adopted the following criteria for assessing the managerial nature of a position:

*The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work and the like are more indicative of supervisory functions which do not, in themselves, give rise to conflicts that would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.*

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

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

*Home decision, supra, the British Columbia Board explained the term "effective determination" as follows, at 149:*

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

**[42]** The Union's argument was two (2) fold; that the incumbent did not actually perform many of the duties claim by the Employer to justify the exemption (*ie.* duties set forth in the job descriptions); and that the small percentage of time the incumbent actually spent on managerial functions was not sufficient to justify the managerial exclusion.

**[43]** In *Service Employees International Union, Local 333 v. Lutheran Sunset Home Corp. at Lutheran Riverside Terrace*, [2002] Sask. L.R.B.R. 695, LRB File No. 184-02, the Board commented that the proportion of work time spent performing managerial functions is not necessarily determinative of the issue and, with respect to the relevance of job descriptions, stated at 692:

*The proportion of work time spent performing managerial functions is not determinative of the issue – even persons with undisputed independent authority to discipline and terminate employees may rarely be called upon to exercise such authority. Position descriptions often bear limited similarity to the way the job is actually performed. Indeed, such descriptions often contain duties and responsibilities that, on the face of the description, the incumbent may independently exercise, but which in practice may only be exercised with the approval of, or made as a recommendation to, a superior. In the end, it is the real performance of the job that is important.*

**[44]** In *Saskatchewan Indian Federated College Inc. v. University of Regina Faculty Association*, [2001] Sask. L.R.B.R. 657, LRB File No. 049-01, the Board concluded that, while an evaluation of the work actually performed by an incumbent is more important than a job description (for the purposes of assessing whether an employee is performing functions of a managerial character), job descriptions can provide valuable insight into what duties and responsibilities the employee in a disputed position is expected to perform, particularly if the occasion to perform relevant managerial duties has not yet arisen during the period of time the incumbent has occupied the disputed position.

**[45]** In the Board's opinion, a distinguishing factor in the present case is the modest size of the workplace relative to the workplaces in *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, *supra*, in *Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, *supra*, in *Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association*, *supra*, and in *Saskatchewan Joint Board, Retail Wholesale and Department Union v. Raider Industries Inc.*, *supra*. The Saskatchewan SPCA is a small workplace involving a staff of thirteen (13). As is the case in many non-profit organizations, the Employer has a limited depth of management and operates with few documented personal policies and procedures and with no separate human resources function to assist or augment those positions called upon to exercise managerial discretion.

**[46]** The primary purpose of excluding persons from the bargaining unit on the basis of the managerial exemption 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. In our view, in the present circumstances, the Coordinator of Investigative Services exercises a sufficient degree of managerial authority to affect the economic lives of the other employees in the bargaining unit. To include this position in the bargaining unit would place the incumbent in an insoluble conflict of interest with other members.

**[47]** In coming to this conclusion the Board notes that the Coordinator of Investigative Services is the head of the largest division in the workplace and the operational arm of the Saskatchewan SPCA. The incumbent makes effective recommendation to the Executive Director respecting hiring decisions (for employees within his department – Animal Protection Officers). The disputed position allocates work, makes discretionary determinations respecting leaves of absence, and qualitatively monitors the work performance of the APOs. Although obviously not the incumbent's favorite thing to do, the position is responsible for administering discipline to the employees within his department.

**[48]** Finally, in the event this workplace is unionized, because of the small size of this organization, the Coordinator of Investigative Service (as the head of the largest division in the Saskatchewan SPCA and the operational arm of the society) would necessarily play an integral role in both labour relations and collective bargaining with the Union.

**[49]** For the reasons outlined above, we are satisfied that the position of Coordinator of Investigative Services should be excluded from the scope of the bargaining unit. As a consequence, we hereby direct that the ballot of Mr. Macmillan be removed from the ballot box and destroyed (unopened) and that the remaining ballots be counted in accordance with the Board's usual practices at the time and place determined at the discretion of the Board's agent, Ms. Miner, or her designate.

**[50]** In the event the Union's application for certification is successful, in our view, this is an appropriate situation in which to make a provisional Order pursuant to s. 5.2 of the *Act*. At the time of the hearing, it was apparent that the organization structure of the Saskatchewan SPCA had evolved in recent years and there were indications from the Employer and the incumbent that the disputed position was anticipated to experience further change in the coming months. While there was little evidence to establish the manner in which the position was anticipated to evolve, the Board was satisfied that the changes appeared to be of a nature that could affect the conclusions of the Board regarding this position. As a consequence, in the event the Union's application is successful, it would be the Board's intention to make a provisional Order respecting the position of Coordinator of Investigative Services. To which end, the Board assumes that one (1) year from that date should be sufficient to allow any changes in the duties of the position, if any, to crystallize. At the end of that period, if neither the Union nor the Employer objects by bringing the matter back before the Board, the position shall become finally out of scope.

**DATED** at Regina, Saskatchewan, this **20<sup>th</sup>** day of **April, 2009**.

**LABOUR RELATIONS BOARD**

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Steven Schiefner,  
Vice-Chairperson