



**The Labour Relations Board
Saskatchewan**

**SASKATCHEWAN INSTITUTE OF APPLIED SCIENCE AND TECHNOLOGY, Applicant v.
SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES UNION, Respondent**

LRB File Nos.: 188-11 & 190-11; July 18, 2012

Chairperson: Kenneth G. Love, Q.C.; Members: Maurice Werezak and Clare Gitzel

For the Applicant Employer: David Stack and Paul L. Clemens

For the Respondent Union: Juliana Saxberg

Provisional Determination – Employer seeking to create two new positions – Manager of Applications and Data Services and Manager of Health and Safety – Board considers evidence presented respecting the proposed duties of the two positions – finds that both positions should be provisionally excluded from the Bargaining Unit.

Practice and Procedure – Material Change – Union argues Board must find a material change to the bargaining unit before it may amend the certification order and make a provisional determination regarding newly created positions – Board reviews its jurisprudence and finds that with respect to provisional determinations the creation of the new positions is a sufficient justification for the making of an order under ss. 5(m) and 5.2 of the Act.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Saskatchewan Government and General Employees Union, (the “Union”) is certified as the bargaining agent for employees of Saskatchewan Institute of Applied Science and Technology (the “Employer”) by Orders of the Board dated September 22, 2010. These Orders created two (2) units of employees for the purposes of collective bargaining. One unit is comprised mainly of Academic employees (the “Academic Bargaining Unit”) and is made up of Professional Services employees (the “Professional Services Bargaining Unit”).

[2] On November 30, 2011, the Employer applied to the Board for provisional determinations of the status of two (2) proposed positions being created by the Employer. These were a Manager of Application and Data Services (LRB File No. 188-11) and a Manager of

Health and Safety (LRB File No. 190-11). For the reasons which follow, the Board allows the application in respect of both of the positions.

[3] At the hearing of this matter on May 1st and 2nd, 2012, the parties provided the Board with an Agreed Book of Documents.

Facts:

[4] The parties conducted a length review of the exclusions to the bargaining unit certified by the Board commencing in 2006¹ and culminating in the two Orders referred to in paragraph 1. The parties also bargained a Memorandum of Agreement (the "MOA") dated September 15, 2010 in which they agreed as follows:

As of the date of this Agreement, the categories and complement of managerial and confidential capacity positions is as appended to this Agreement (the "Appendix"). The parties recognize the right of SIAST to increase the complement of the enumerated categories to address the evolving managerial and human resource needs of the institution provided that increased positions are carrying out substantially the same duties as those within the relevant category in the Appendix.

The parties agree that when SIAST increases the complement of the enumerated categories, it will provide SGEU with timely notice of this increase and reasonably sufficient information and documentation explaining the reasons for the increase and showing the duties and responsibilities of the position. If the Union concludes that the position is not performing substantially the same out of scope duties that are performed by those in the enumerated categories in the Appendix, the Union shall have the right to grieve the increase in complement.

[5] On October 3, 2011, in accordance with the MOA, Ms. Deirdre Marshall, the Human Resource Manager of the Employer, emailed Mr. Jim Steele and Ms. Tracey Kurtenbach, the respective Presidents of the Academic Bargaining Unit and the Professional Services Bargaining Unit respecting a new proposed position of Manager of Health and Safety. On that same date, Ms. Marshall emailed the two (2) Presidents with respect to the proposed position of Manager of Application and Data Services. A position description for each position as well as a revised organizational chart showing the proposed positions was attached to those emails. In her email, Ms. Marshall requested a response by October 14, 2011.

¹ For a description of the process, refer to *Saskatchewan Institute of Applied Science and Technology v. Saskatchewan Government and General Employees' Union*, [2009] CanLII 72366 (SKLRB)

[6]

On October 13, 2011, Mr. Larry Buchinski, an Agreement Administration Advisor with the Union emailed Don Soanes, Director of Human Relations indicating that the Union was of the opinion that the two (2) positions should be within the scope of the bargaining units. He requested that a meeting be held in order that they could further assess the positions. He asked Mr. Soanes to pass the message on to Ms. Marshall as he did not have her email address. Mr. Soanes did so the following day.

[7]

On October 14, 2011, Mr. Steele also responded to Ms. Marshall by email on behalf of the academic bargaining unit. In his email, he advised that the Union was of the same opinion as that expressed by Mr. Buchinski.

[8]

On October 14, 2012, Ms. Marshall responded by email to Mr. Buchinski advising the Employer was prepared to meet with the Union and requested three (3) times on which a meeting could be held. Mr. Buchinski responded that same date advising that he had no availability in October and would be looking at dates in November. Mr. Steele responded on October 18, 2011 also suggesting they meet in November.

[9]

No meeting was scheduled between the parties. On November 21, 2011, Mr. Soanes wrote to Ms. Kurtenbach (and, presumably to Mr. Steele, although a copy of any letter to him was not included in the Book of Documents) advising that the Employer needed to move forward with respect to the positions and that a ruling would be requested by the Board if the parties were unable to reach agreement as to the positions. He also requested that the two (2) bargaining units decide between themselves which of them was claiming which position as being within the scope of their bargaining unit in order that the Employer would know with whom to bargain in relation to that position.

[10]

On November 30, 2011, Ms. Kurtenbach and Mr. Steele wrote to Mr. Soanes reiterating their position that the positions should be within the scope of the bargaining units. They advised that it was their view that the Manager of Application and Data Services should be within the scope of the Professional Services Bargaining Unit and that the Manager of Health and Safety should be within the scope of the Academic Bargaining Unit.

[11]

The Employer then filed this Application to the Board for a provisional determination pursuant to s. 5(m) and 5.2 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the

“Act”) in respect of these two positions. To the date of the hearing of this matter, the positions have not been filled by the Employer.

Manager of Applications and Data Services:

[12] Mr. Raymond Saunders, Director of Architecture, Data and Application Services testified for the Employer regarding this proposed position. Ms. Sharon Dodge, Senior Technical Analyst, Network Services, and Ms. Gwen Bourque, Business Analyst, testified for the Union.

[13] The Information Technology Services Department (“ITS”) where the proposed position would be located has expanded rapidly since 2006. The organizational charts show that the in scope staff of the Architecture, Data and Application Services Division has not changed significantly from a level of 31 in scope employees in 2006 to a current staff of 30 in scope employees. Mr. Saunders testified that as technology has changed and improved over that period, the pressures and demands on the department have increased.

[14] The new position is being created to manage two groups (“silos”) within the ITS, being the Applications, Support and Maintenance Group and the Data Services Group. Seventeen (17) persons currently work within these two groups out of a total of 30² within the Architecture, Data and Application Services Division of ITS. The proposed Manager will report to Mr. Saunders. Mr. Saunders will maintain direct supervision over the remaining thirteen (13) positions in the Architecture, Data Services Division.

[15] Up until August of 2006, ITS had four (4) out of scope employees³. These four (4) positions were A/Director ADR, Director NB, Director CS, and AVP ITS⁴. Subsequent to August 2006 the ITS department was reorganized and (1) one out of scope position was deleted for budget reasons. Following the reorganization the Department was organized as shown on the “proposed Organizational Chart”, with the exception of the Manager position which is proposed to be created.

² This number is taken from the SIAST Information and Technology Services – proposed as of October 2011 Organizational Chart. See Tab 6, Book of Authorities. The employee count excludes the proposed position of Manager, Application and Data Services and the Director, Architecture, Data and Application Services.

³ See Information Technology Services Organizational Chart – August 2006. See Tab 17, Book of Authorities.

⁴ Supra Note 3. Unfortunately, no one identified precisely what these position descriptors were.

[16]

Mr. Saunders testified that he was responsible for all of the Human Resources issues concerning the employees which he currently manages. He is responsible for all employee hiring, although line staff provide recommendations. He testified that he is also responsible for discipline and coaching of all staff, although he may get recommendations from line staff. He acknowledged that he discussed performance issues with senior analysts, but he was solely responsible for all discussions with employees concerning performance issues. He noted that any H.R. problems were not dealt with at regularly scheduled staff meetings. He estimated that H.R. duties required approximately 1/3 of his time. This time commitment, he testified, took away from the time that he could spend on other important work related to strategic development, particularly with respect to the growing need for data for the organization to meet its goals to be accountable, for the organization's "balance scorecard" initiative, its performance measurement and its strategic planning.

[17]

Mr. Saunders testified that the organization's needed someone to be engaged in and focus on the provision of this data, including the design of systems to collect and report on the organizational goal achievement. He noted that he required skills upgrading to take on this task as he was currently a "limiting factor" in this initiative. He testified that he is "spread too thin". The creation of the new Manager position was designed, he testified, to free up time for him to step back to plan and innovate. This would be done by relieving him of the H.R. responsibility for 17 of the 30 employees in the branch.

[18]

The Job Description⁵ for the new position provides under the heading "People Management" that the position is expected to:

- *Effectively recruit, select, train, develop and motivate employees through effective implementation of SIAST human resources policies and practices, in consideration of the terms and conditions of the collective agreement.*
- *Address people management issues with direct reports, including discipline where appropriate, applied in a timely manner and with respect for provisions of the collective agreement where applicable.*
- *Work with direct reports to develop clear performance objectives. Monitor overall effectiveness in meeting these performance objectives and work to overcome obstacles as they arise.*

⁵ See Tab 4, Book of Authorities

[19]

Mr. Saunders testified that this position would be a part of the management team. The Manager would be involved in the decision making for the ITS Department. The position would oversee approximately \$2.0 million of the \$3.5 million budget for the branch. He testified that the Manager would act independently of him in the management of the employees under the Manager's direction. The Manager would be responsible for hiring of new employees, discipline of employees, coaching and performance planning for employees in the two silos for which the position was responsible. He noted that one of the Required Qualifications and Experience listed in the proposed job description for this position was the requirement that the Manager have "[E]xperience working in a unionized environment and supervising unionized employees is desired".

[20] In the area of Employee Management, Mr. Saunders testified that the Manager would be expected to:

1. *be responsible for one on one employee supervision.*
2. *make hiring decisions, firing decisions, and be responsible for the management of all positions in the silos for which the Manager was responsible, including discipline of employees.*
3. *be responsible for probation reporting and observe work performance.*
4. *to consult with SIAST's Human Resources department as necessary regarding employee discipline and discharge.*
5. *to be responsible for level one grievance meetings.*
6. *to replace him as a liaison with senior analysts ("Level 10's").*
7. *to effectively take over from him with respect to the employees that the Manager took responsibility.*

[21] Mr. Saunders testified that there would be no impact on the responsibilities of the Level 10's or other employees other than they would have more focused direction and there would be more frequent interfacing with the senior analysts. He would have direct responsibility for approval of holiday leaves and overtime. The Manager would be expected to make staffing recommendations which would be taken forward in the organization. Furthermore, in the event that layoffs were to occur, the Manager would be privy to that information and would be required to manage the layoff process.

○
[22]

The Union called Shannon Dodge, a Senior Analyst in the Network Services Group and Gwen Bourque, a Project Manager and Business Analyst to testify. Ms. Dodge does not currently report to Mr. Saunders, but reports to Lawrence Boehm, the Director, Client and Information Services. Ms. Bourque currently reports to Mr. Saunders and will continue to do so if the new proposed Manager position is created and staffed.

[23] Ms. Dodge described her responsibilities as a Senior Analyst as follows:

1. *She conducts staff meetings and co-ordinates the work of junior employees under her supervision.*
2. *She discusses vacation leaves and changes of Earned Days Off with employees. She testified that she can also approve overtime without reference to her supervisor, Mr. Boehm.*
3. *To conduct performance reviews of junior employees, but she acknowledged that she had not done any recently.*
4. *Makes no recommendations as to staffing.*
5. *Does informal coaching. If cannot achieve results then it is moved to the out of scope supervisor.*
6. *Screens resumes of job applicants and for some level of employees may sit in on the interview with the Human Resources Department.*

[24] Ms. Dodge made reference to the Job Information Questionnaire completed on May 15, 2005 by Senior Applications Analysts, including Ms. Jean Coates who would be one of the employees supervised by the proposed Manager position. She testified that her responsibilities as a Senior Analyst, Network Services would be the same, but the details of the job would be different. She acknowledged that she does not have final recommendation authority re hiring, but has day to day supervisory responsibility for those hired.

[25] Ms. Dodge testified in reference to the proposed Job description for the Manager, Applications and Data Services, that she did all of the things listed as responsibilities in that job description. In cross examination, however, she acknowledged that she doesn't impose or recommend discipline, that the final hiring decisions are those of the out of scope managers, and that she does not "Collaborate with and advises SIAST senior management and the board on all data administration and governance issues and requirements". She also acknowledged in cross examination that out of scope management selects employees for hiring. She also acknowledged that she participates and assists in discipline, but out of scope

management makes discipline decisions and imposes discipline. Nor, she acknowledged, does she set performance objectives for employees other than on a day to day basis by assigning tasks. She also acknowledged that she had no involvement in the governance side of “data administration and governance”.

[26] Ms. Bourque testified that the first point of contact on H.R. issues currently is to an in scope supervisor. However, she acknowledged that while she talks to the out of scope manager and recruitment of employees is an Human Resources Department responsibility, the hiring decisions are made by the out of scope supervisor. Furthermore, she acknowledged that discipline of employees is done by out of scope managers.

Manager of Health and Safety:

[27] Mr. Ed Lloyd, the Director of Health and Safety, testified for the Employer with respect to this position. He is currently the only employee involved in Health and Safety within the SIAST organization. He works with the Occupational Health and Safety Committees established under *The Occupational Health and Safety Act, 1993*⁶.

[28] Mr. Jim Steele who testified for the Union, explained that the creation of the position of Director of Health and Safety resulted from a report (the “Posniuk Report”) on Occupational Health and Safety issues within SIAST.

[29] Mr. Lloyd testified that the proposed position of Manager, Health and Safety was to be a deputy for him, essentially to be responsible for Health and Safety issues at the two southern campuses of SIAST at Regina and Moose Jaw. He testified that he is the only employee at present in the Health and Safety Department and he required a deputy to assist, particularly in the southern half of the province as he was unable to handle all of the work required at all of the SIAST campuses.

[30] The position of Director, Health and Safety was a recently created position. The Employer and the Union agreed that this position should be provisionally excluded from the bargaining unit and the Board made an order to that effect on May 10, 2010.⁷

⁶ S.S. 1993 c. O-1.1

⁷ See LRB File No.: 120-09

[31]

Mr. Lloyd testified that the proposed Manager position would have the same authority as he enjoyed with respect to stopping unsafe activities and promoting safety within the organization. He advised that the Manager would be an extension of himself in the southern part of the province.

[32]

Mr. Lloyd outlined a concern regarding potential conflict of interest between the enforcement of safety and the work performed by bargaining unit members. He noted that it may be necessary for the Manager to require that work be stopped if it cannot be done safely. Similarly, it may be necessary to report workers engaged in unsafe practices for disciplinary action or remediation.

[33]

He noted that provision of a safe work environment was a management responsibility under *The Occupational Health and Safety Act, 1993* and the regulations to that Act. He pointed to some of the provisions of the Act and the Regulations which the Manager would have to deal with that may put him in conflict with both Union members and potentially management.

[34]

He noted that the Manager may be required to work extended hours due to reporting timelines in some instances. He noted that the Manager, while not being directly involved in discipline of Union members, would certainly be required to report any unsafe work practices and to be involved in advising as to proper discipline and corrective measures. He stated that where an employee is a danger to himself or others, the Manager would be expected to assist out of scope employees to deal with the situation immediately. Furthermore, he testified that the Manager would necessarily have to be able to investigate and make recommendations concerning in scope employees conduct.

[35]

He noted that safety should be a concern for both management and the Union. He testified that the Manager needed to be free to act to insure that both parties live up to their obligations.

[36]

In cross-examination, he testified that the Manager would have to be involved in advising in respect of the conduct of both in scope and out of scope employees. He further noted that Occupational Health and Safety personnel act as management reps pursuant to *The Occupational Health and Safety Act, 1993* and the Regulations. He testified that he and the

Manager would be the voice and face of management regarding workplace health and safety issues.

[37] The job description provided for this position contained similar provisions to those outlined above in paragraphs [18] & [19]. However, it should be noted that the position, as proposed, had no direct reports.

Relevant statutory provisions:

[38] Relevant statutory provisions are as follows:

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:*

(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:

[39] The Employer argued that the requirement for a material change is not required for new positions such as those under consideration here. In the alternative, it argued that, if such requirement arose, that they had met that requirement.

[40] The Employer also argued that both positions should be provisionally excluded from the bargaining unit on the basis of the evidence provided to the Board that these positions met the requirements for exclusion on either the "managerial exclusion" or the "confidential capacity exclusion" found in s. 2(f) of the *Act*.

Union's arguments:

[41] The Union argued that the Employer bore the onus in this application. The Union also argued, relying upon the Board's decision in *Service Employees' International Union, Local 299 v. Canadian Blood Services*⁸ that any amendment to the bargaining unit certificate could only occur if there had been a material change in the circumstances since the earlier of (i) the date on which the parties entered into their last collective agreement; or (ii) the date the last certification order was issued.

[42] In respect of the proposed provisional exclusions, the Union argued that the managerial exclusions should be interpreted by the Board as narrowly as possible. They also argued that the ability to recommend discipline, subject to the direction of a human resources

⁸ [2007] S.L.R.B.D. No. 15, 2007 CanLII 68757 (SK LRB), LRB File No.: 024-07



branch or higher ranked manager was not sufficient to remove an employee from the definition in s. 2(f) of the *Act*.

[43] The Union argued that the actual managerial duties of either of the two positions must constitute “the primary focus of the position”. The Union also argued that both positions “direct supervisory responsibilities” are limited and insufficient to attract the managerial exclusion.

[44] The Union also argued that the positions could not be excluded under the “confidential capacity” provisions of the *Act*.

Analysis and Decision:

[45] The Board appreciated the co-operation of counsel in providing an agreed book of documents in this case. The Board also appreciated the written submissions of counsel which we have read and considered.

[46] Two issues need to be determined in this case. They are:

1. *Is there a requirement to demonstrate a “material change” as alleged by the Union, and if so, has such change been demonstrated by the Employer?*
2. *Should either or both of the proposed positions be provisionally excluded from the bargaining unit pursuant to s. 5(m) and 5.2.*

Material Change:

[47] The Employer argued that there is no requirement to demonstrate a material change in circumstances when the Board is dealing with a provisional determination under s. 5(m) and s. 5.2 of the *Act*. We agree with that submission.

[48] As the Employer correctly pointed out, the Union relied solely upon cases which were decided with respect to changes to the current composition of the bargaining unit. That is, applications under ss. 5(l), (j) or (k) of the *Act* where the application is attempting to remove or add a particular **existing** position into or out of the bargaining unit.

○
[49]

It is usually a management prerogative to create new positions as needs arise in the workplace. How this is done may be the subject of collective bargaining or not, depending on the terms of the Collective Agreement between the parties. When, as here, the parties are unable to agree as to whether the created position should be within or without the scope of the bargaining unit, the *Act* specifically provides for a process whereby the Board may make a provisional determination as to whether the proposed position, based upon the job description and other evidence provided meets the definition of “employee” in s. 2(f) of the *Act*.

[50] The rationale for the requirement for material change in instances other than where a provisional determination is sought for a newly created position is simple. It imposes a requirement that a material change be demonstrated in the duties or responsibilities in the position with respect to which the scope amendment is sought. However, in the case of a newly created position, there is no previously reviewed duties or responsibilities which the Board has considered as to whether the position met the criteria in s. 2(f) of the *Act*.

[51] In the case of an application under s. 2(m) or s. 5.2 of the *Act*, there is no baseline and the creation of the position, in and of itself, is sufficient to invoke the Board’s authority. This is clear from the previous decisions of the Board dealing with s. 2(m) and s. 5.2 applications regarding newly created positions.⁹ Where, however, the Board is dealing with existing employees whose job duties and responsibilities are changing, the Board has considered the materiality test.¹⁰

[52] The rationale and use of s. 2(m) of the *Act* was described by the Board in its decision in *Swift Current District Health Board v. S.E.I.U., Local 336*¹¹

The approach expressed by the Board in John M. Cuelenaere Library Board is cautious – to allow amendment applications without any regard to time restrictions might promote destabilization of collective bargaining relationships – and each case must be examined with a view to balancing the interests of the parties and the obligation of the Board to administer the Act in light of its objects and purposes expressed in s.3 of the Act.

We agree with the Board in that case that in the context of an existing bargaining unit and certification order, s. 5(m) must be applied with reference to

⁹ See for example, the Board’s decision in *Regina Public Library Board v. Canadian Union of Public Employees, Local 1594* [2009] CanLII 45865 (SKLRB) where the issue was not even canvassed by the parties.

¹⁰ See *Saskatchewan Human Rights Commission v. Canadian Union of Public Employees, Local 1871* [2011] CanLII 81711 (SKLRB), LRB File No.: 082-10 at paragraphs 65 & 66.

¹¹ [2000] Carswell Sask 913, C.L.L.C. 220-004, LRB File No.: 001-99

ss. 5(j) and 5(k). In the 1994 legislative amendments to the Act, s. 5.3 was also added to the Act expressly conferring jurisdiction on the Board to make interim orders pending final determination of an application. This change made it easier for an employer to create necessary positions: an employer can apply under s. 5(m) and obtain an interim order, in appropriate circumstances, pending a final determination. And while the Board in the *John M. Cuelenaere Library Board* case did not address the nature and effect of a s. 5(2) provisional order as concerns this issue, clearly such an order can only pertain during the period before the scope of the certification order is amended – not until it is finally determined whether a position is in- or out-of-scope would an amendment be necessary. Once the order becomes final, the certification order can be amended. The whole scheme that has been created allows an employer to react to changing conditions and make changes necessitating the creation of new positions outside of the restrictions of an open period, in appropriate cases, without committing an unfair labour practice by unilaterally assigning a position in- or out-of-scope where it cannot obtain the agreement of the union.

[53] We concur with this reasoning. In so doing, we note the Board in the *Swift Current* decision expressly noted that the scheme (provisional determinations) was created to allow an employer to react to “**changing conditions and make changes necessitating the creation of new positions outside of the restrictions of the open period**”. [emphasis added] It therefore, in our opinion, goes almost without saying that, if there were any requirement for material change to be demonstrated, such material change is demonstrated by the very changes that necessitated the creation of the new position.

Manager of Application and Data Services:

[54] In its November 30, 2011 letter to Mr. Soanes, Director of Employee Relations for the Employer, the Union took the view that this position should be within the scope of the Professional Services Bargaining Unit. No objection to this classification of the position within that bargaining unit was taken by the Employer. We have therefore taken it as settled that the position is to be determined by the Board to be either within or out of the scope of this bargaining unit.

[55] It is also clear that the onus of proof in this case falls upon the Employer since the Employer has alleged that this position should be provisionally excluded from the bargaining unit. In its recent decision in *Saskatchewan Human Rights Commission v. C.U.P.E., Local 1871*¹², the

¹² [2011] Carswell Sask 829, CanLII 81711 (SK LRB) , LRB File No.: 082-10

Board adopted the summary of the purpose for exclusion of employees from the bargaining unit in *Saskatchewan Institute for Applied Science & Technology v. S.G.E.U*¹³.

[55] The Board has on many occasions articulated helpful criterion for the making of such determinations but has also concluded that there is no definitive test for determining which side of the line a position falls (i.e.: within or outside the scope of the bargaining unit). Simply put, the Board's practice has been to be sensitive to both the factual context in which the determination arises and the purpose for which the exclusion have [sic] been prescribed in the Act. The Board tends to look beyond titles and position descriptions in an effort to ascertain the true role which a position plays in the organization. See: Grain Service Union (ILWU Canadian Area) v. AgPro Grain Inc., [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94; Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and University of Saskatchewan vs. Administrative and Supervisory Personnel Association [2008] Sask. L.R.B.R. 154, LRB File No. 057-05.

[56] The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.

[57] The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: 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 Files Nos. 103-04 & 222-04.

[58] The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, *supra*.

¹³ [2009] CanLII 72366, LRB File No.: 079-09 at paras. 55 - 58



[56] The Board stated this more succinctly in *C.U.P.E., Local 4928 and Saskatchewan Society for the Prevention of Cruelty to Animals*¹⁴,

[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.

[57] In our opinion, it is clear from the proposed job description and the evidence given by Mr. Saunders that the position is being created for the purpose of relieving Mr. Saunders from some of the responsibility for management of two groups of employees. The proposed manager will function and will be empowered to both hire and fire employees, and to provide discipline to the employees in those two silos. The duties of the proposed Manager, Application and Data Services would, in our opinion, have the ability to “affect the economic lives of other employees”. To place this position, as described within the bargaining unit, would create a “conflict of interest” between the Manager and the employees which are to be managed by this position.

[58] We are not persuaded by the evidence of Ms. Dodge and Ms. Bourque that the proposed job description is similar to the jobs which they currently perform. As noted in their testimony, they do not do many of the important management functions which are expected to be performed by this position.

[59] In our view, what is being proposed by the Union is that this position could function as an In-scope supervisor similar to the supervisory role performed by the Level 10 employees who are in scope. From their evidence, contrasting that evidence with the evidence of Mr. Saunders, and on reading the proposed job description, it is clear that the Employer envisages much more from this position than mere supervision. It is expecting that this position will, in effect, replace Mr. Saunders insofar as the two silos are to be managed by the new position.

[60] As noted in *Saskatchewan Institute for Applied Science & Technology v. S.G.E.U.*, a decision involving these same parties, it is essential that the parties have clear lines between

¹⁴ [2009] CanLII 43954 (SK LRB), LRB File No.: 198-08 at para. 46

management and in scope employees. The parties are sophisticated and have enjoyed a collective bargaining relationship for many years. They have on numerous occasions bargained the inclusion or exclusion of positions in the bargaining unit. For some reason, those discussions were not fruitful in this instance. However, notwithstanding a provisional order from this Board, the parties can continue to negotiate concerning the inclusion or exclusion of this position and may reapply to the Board within the provisional period should the position not be as described by the employer.

[61] The position of Manager, Application and Data Services shall be provisionally excluded from the scope of the Professional Services Bargaining Unit. In accordance with s. 5.2(2) of the *Act*, this determination will become final after the expiry of one year from the day on which or order for the provisional determination is made unless, before that period expires, the Employer or the Union applies to the Board for a variation of this determination.

Manager of Health and Safety:

[62] In its November 30, 2011 letter to Mr. Soanes, Director of Employee Relations for the Employer, the Union took the view that this position should be within the scope of the Academic Bargaining Unit. No objection to this classification of the position within that bargaining unit was taken by the Employer. We have therefore taken it as settled that the position is to be determined by the Board to be either within or out of the scope of this bargaining unit.

[63] In our opinion, it is clear from the proposed job description and the evidence given by Mr. Lloyd that the position is being created for the purpose of relieving Mr. Lloyd from some of the responsibility for management of the southern campuses of the Organization. The major difference with this position is that it will have no employees to supervise and therefore, while intended to be empowered to both hire and fire employees, to provide discipline there will be no employees on which to perform those functions. However, it is clear that the proposed Manager, Health and Safety would, in our opinion, have the ability to "affect the economic lives of other employees". That is, being the managements delegate with respect to Occupational Health and Safety, this employee would have direct control and input into both discipline for both in scope and out of scope employees when safety risks or infractions of the law are noted by the Manager. Additionally, he would have the ability to shut down unsafe operations, which could

○
result in employee lay offs or cessation of work. The position would have a direct and serious impact on the economic life of other employees.

[64] Again, we are not persuaded by the Union's arguments that the position should be considered as being an in scope supervisory position or that Occupational Health and Safety Committee's established under *The Occupational Health and Safety Act, 1993* or the Collective Bargaining Agreement should have control over safety and its enforcement. While safety is everyone's concern, *The Occupational Health and Safety Act, 1993* makes it clear that the management of an organization is ultimately responsible for and may be found criminally liable for health and safety infractions.

[65] Both Mr. Lloyd and the proposed Manager will be responsible to be managements "eyes and ears" regarding health and safety within the organization. Both the Union and Management were in agreement that Mr. Lloyd's position should be out of scope and the Board so ordered. The responsibilities of the proposed Manager for the southern campuses of the Organization are no different than the responsibilities of Mr. Lloyd who has direct responsibility for the northern campuses and indirect (through the new Manager who will report to him) responsibility for the southern campuses.

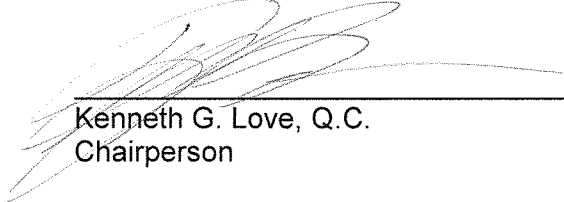
[66] It is important and we think essential to the position that it be responsible as the delegate of management for the health and safety of employees of the Employer at its four (4) campus sites. As such, notwithstanding that there is no ability to hire or fire employees (since the Manager will have none reporting to him), there would be, as noted above, a conflict if this position were placed within the scope of the bargaining unit given the potentially large impact the actions of this position may have on the economic well being of other employees, be that as a result of recommendations made concerning discipline of employees for unsafe or unhealthy practices, or as a result of a required shutdown of a facility or part of a facility with the concomitant impact on the employees working there.



[67] The position of Manager of Health and Safety shall be provisionally excluded from the scope of the Academic Bargaining Unit. In accordance with s. 5.2(2) of the *Act*, this determination will become final after the expiry of one year from the day on which or order for the provisional determination is made unless, before that period expires, the Employer or the Union applies to the Board for a variation of this determination.

DATED at Regina, Saskatchewan, this **18th** day of **July, 2012**.

LABOUR RELATIONS BOARD



Kenneth G. Love, Q.C.
Chairperson