



SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES UNION, Applicant v. WHEATLAND REGIONAL CENTRE INC., Respondent

LRB File No. 142-15; November 24, 2015

Chairperson, Kenneth G. Love, Q.C.; Members: Laura Sommervill and Maurice Werezak

For the Applicant Union: Ms. Jana Stettner
For the Respondent Employer: Ms. Shannon Whyley

Managerial Exclusion – Section 6-1(1)(h)(i)(A) of the SEA – Board reviews new definitions of “employee” found in the SEA

Managerial Exclusion – 3 positions in dispute between Union and Employer – Board examines managerial exclusion as defined in Section 6-1(1)(h)(i)(A) of the SEA – Board determines that employee must have primary responsibility to *exercise authority and perform functions that are of a managerial character*;

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: This is an application by the Saskatchewan Government and General Employees Union (the “Union”) to obtain bargaining rights for a group of employees of Wheatland Regional Centre Inc. (“Wheatland”). The Board was advised at the hearing of this matter that the parties had reached agreement with respect to employees that should be excluded from the bargaining unit except for two (2) positions occupied by three (3) employees. The positions in dispute were Home Operator Supervisors two (2) employees and the Industry Supervisor one (1) employee. For the reasons which follow, we have determined that the position of Industry Supervisor should be excluded from the bargaining unit, but the positions of Home Operator Supervisors should fall within the scope of the unit.

Facts:

[2] The Board heard evidence from three (3) witnesses for Wheatland and two (2) witnesses for the Union with respect to the positions in dispute. Among these witnesses were the incumbents of the three (3) disputed positions.

[3] Wheatland is a non-profit corporation that provides residential accommodation and services to adults with disabilities. Additionally, where appropriate, Wheatland provides programming and supervised employment to those adults. Wheatland operates three (3) group homes, named Wilson House, Biggar House and Kinash House.

[4] The administration for the Group Homes and the program and employment opportunities are conducted from an administrative centre in Rosetown, Saskatchewan located at 802 6th Ave. East. The Chief Administrative Officer is located at the administrative centre, as are the offices of the Program Director (along with the programming centre) and the office of the Industry Supervisor (along with shop and maintenance areas).

[5] Wheatland also operates an oil recycling business, a Sarcen centre in Rosetown and a campground. These activities and employees exclusively engaged in those areas are not the subject of this application.

The Industry Supervisor Position

[6] The Board heard evidence from the incumbent in this position, Mr. Kim Cordes. Mr. Cordes has held the position of Industry Supervisor for seven (7) years. He works in and has an office in the back shop portion of the main administrative centre in Rosetown, Saskatchewan. Mr. Cordes provided the Board with a copy of his job description. He confirmed in his evidence that he performed all of the duties set out in his job description.

[7] In his position, Mr. Cordes supervises two (2) other employees, one (1) who is responsible for maintenance of the Group Homes and other facilities and an Industry Support Worker who is principally responsible to supervise and train clients while performing work related tasks, such as unloading cardboard for recycling or the completion of woodworking projects.

[8] Mr. Cordes testified that he trained the Industry Support Worker in safety and in the use of power tools that may be used by clients in their work activities. He noted that he did

not provide day to day supervision, but communicated regularly with the two (2) employees who reported to him.

[9] Mr. Cordes testified that he was involved in the hiring of the Industry Support Worker along with the CEO. He testified that he also did regular performance reviews of both employees who reported to him.

[10] Some of the significant points of his job description were:

- Develop and execute vocational training programs for each individual;
- Be responsible for the day-to-day operation of all industry programs;
- Submit recommendations to the Chief Executive Officer for improving service delivery;
- Be responsible for the planning and assigning of activities to all workers in the Industry Program;
- Provide leadership and guidance to any subordinate staff to ensure that programs are carried out in line with each participant's personal programs; and
- Be involved in scheduling and supervising and will assist the CEO with hiring and firing and in discussing and directing staff.

[11] It is noteworthy that the responsibilities of this position included oversight for the (2) two employees, but also participants (clients) who were engaged in the industry program. The Industry Supervisor also had some "hands on" duties such as performance of equipment maintenance used in the program.

[12] Mr. Cordes testified that his supervision responsibilities, insofar as the (2) two direct reports were concerned, was fairly light. He testified that the Maintenance Worker was often away from the shop engaged on maintenance projects outside the main shop. He also testified that this person would keep him informed as to what he was up to, but was responsible for his own time and getting his work done. Similarly, the Industry Support Worker, having been trained over the last (3) three years, was able to work on his own, with ongoing communication

between them. Mr. Cordes testified that he would spend no more than half an hour to one hour/day in supervision of the Industry Support Worker.

[13] Mr. Cordes also noted that (1) one of his primary responsibilities was to ensure that participant's safety was promoted. He noted that he would suspend his other duties to ensure proper supervision and safety for the industry participants.

[14] Mr. Cordes testified that he had not seen the need to discipline any of his subordinate staff, and, apart from breaking up fights between participants, he had not had to otherwise intervene. He noted that if discipline was required that it would be up to the CEO to invoke the discipline on his recommendation. Mr. Cordes also testified that he would not be able to terminate either of his (2) two direct reports. That would be done by the CEO. Similarly, hiring would be done by the CEO on his recommendation.

[15] Mr. Cordes testified that the work environment was very relaxed and that he would communicate with the CEO on a daily basis to keep him abreast of things going on in his area.

[16] Mr. Cordes also testified that he would be able to grant leaves of absence to his subordinates if requested.

Residential Group Home Supervisor

[17] The Board heard testimony from both of the incumbents of the (2) two Group Home Supervisor positions. The Board also heard testimony from the immediate supervisor of the two positions, the Program Director, Ms. Kathy Kummer.

[18] Ms. Kummer testified that she had been with Wheatland for nineteen (19) years and had been the program director for ten (10) years. As program director, she was responsible for the Group Home operations as well as client programs and activities. She testified that she was responsible for preparation and implementation of Person Centered Plans for each client.

[19] Ms. Kummer was the direct supervisor for the group homes and the Residential Group Home Supervisors. Those positions reported to her and she reported to the CEO. In her testimony, she described the staffing and operation of each of the group homes.

[20] Ms. Kummer testified that the Group Home Supervisors did not participate in the scheduling of workers in the homes. That was her responsibility. However, each group home operator was responsible to cover any necessary replacements and, if a replacement could not be found, then the Group Home Supervisor would be responsible to replace that staff person.

[21] She also testified that the Group Home Supervisors did not hire or fire staff because there hasn't been any requirement for them to do so. However, she noted that recently one of the Group Home Supervisors had sat in on a hiring interview for a full time position. She noted that she would hire casual staff without input from the Group Home Supervisors.

[22] Ms. Kummer testified that while her office was in the main administrative center, that she spoke to the Residential Group Home Supervisors on a daily basis, even though she did not go to the group homes often. She noted that she did, if the group homes were very short staffed, fill in at the group homes.

[23] Ms. Kummer testified that the Residential Group Home Supervisors were responsible for direct supervision of group home staff. As a part of that supervision, the Residential Group Home Supervisors were responsible for performance reviews of other group home staff. She produced (2) two of those evaluations.

[24] She also testified that Wheatland had a progressive discipline policy. If an incident occurred, she testified that the Residential Group Home Supervisors would bring it to her and she would pass it along to the CEO. Ms. Kummer noted that they had not had any real issues that required discipline. She testified that there was one issue a month or so ago where she had asked the Residential Group Home Supervisors to speak to the staff person involved.

[25] Ms. Kummer testified that she placed a lot of responsibility on the Residential Group Home Supervisors as they were her "eyes and ears" in the group homes. She also noted that while she tried to co-ordinate group home staff meetings, it was hard to do so due to the fact that there was always (1) one staff member working on shift at all times in the group homes. She testified that the Residential Group Home Supervisors came to the main administration offices frequently. She noted that she relied upon the Residential Group Home Supervisors to look after any appointments that clients in the group homes might have, to look after the finances of the clients, to ensure that the clients got their proper medications, to ensure clients were provided daily care, and to back fill shifts due to illness, etc.

[26] In cross-examination, Ms. Kummer acknowledged that the Residential Group Home Supervisors were working supervisors, that is, that they performed the same duties as the other group home staff while they worked their shift in addition to their other duties as a Residential Group Home Supervisor. She also acknowledged that Residential Group Home Supervisors would require either her or the CEO's permission to spend more than \$50.00 of a client's funds.

[27] The Board also heard testimony from Mr. Roger Haugen, the CEO for Wheatland. Mr. Haugen provided testimony regarding the background of Wheatland's operations and the makeup of Wheatland's Board of Directors.

[28] Mr. Haugen provided the Board with a copy of the Progressive Discipline Policy for Wheatland. He testified that there had been no discipline issues arise since the promulgation of the policy.

[29] Mr. Haugen acknowledged that the ultimate hiring and firing authority fell to him, but that he would seek input from the Industry Supervisor and the Program Director. He also noted in cross-examination that the Residential Group Home Supervisors were working supervisors that required that they do the same duties as Group Home Operators. There would only be (1) one person working in the group home on any particular shift. The Residential Group Home Supervisors worked a normal shift just like the Group Home Operators.

[30] The Board also heard testimony from both of the Residential Group Home Supervisors. That testimony confirmed most of the testimony from Ms. Kummer, with some exceptions, which are set out below.

[31] Ms. Wilson, the Residential Group Home Supervisor for Wilson House, testified that she spends about 5% of her time doing supervisory duties over and above her usual duties in caring for the clients in the group home. She acknowledged that she talked to Ms. Kummer regularly because "pretty much everything needs to go through Kathy".

[32] She testified that she had nothing to do with discipline. That authority, Ms. Wilson testified, fell to the Program Director and the CEO. She testified that she did not set the terms and conditions of employment for the Group Home Operators, had nothing to do with scheduling, except to fill shifts where the employee could not find a replacement. She also noted that she had no access to personnel files of the Group Home operators.

[33] In cross-examination, Ms. Wilson noted that she had been involved in a recent hiring interview and that her recommended candidate had been selected. In redirect, she testified that she had not been alone in her opinion. She noted as well that there had been no discipline issues in her home and she testified that, if an issue arose, that she hoped her input would be respected.

[34] Ms. Collet, the Residential Group Home Supervisor for Biggar House, testified that she spent 2-3 hours a month on her supervisory duties. Except as noted, her testimony was also consistent with that of Ms. Kummer and Ms. Wilson.

[35] Ms. Collet testified that she does direct the Group Home Operators, but that she didn't have much authority. She testified that if one of the Group Home Operators refused to do as she directed, that she could report it to Ms. Kummer. She testified that she is the liaison between staff and Ms. Kummer and that she had a duty to keep management informed as to the goings on at the group home.

[36] She acknowledged that she had dealt with a supervisory issue regarding one of the Group Home Operators by speaking to that person. She noted that she had discussed the issue with Ms. Kummer, but was directed to deal with it herself, which she did.

Relevant statutory provision:

[37] Relevant statutory provisions are as follows:

6-1(1)*In this Part:*

...

(h) **"employee"** means:

(i) a person employed by an employer other than:

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

Union's arguments:

[38] The Union argued that Wheatland had the onus to prove that the (3) three positions should be excluded from the bargaining unit. The Union cited *Lutheran Sunset Home Corp., Re:*¹ and *Saskatchewan Society for the Prevention of Cruelty to Animals, Re:*²

[39] The Union also argued that the exclusion of the 3 positions would be consistent with the purposes behind the managerial exclusion which was to prevent management domination of the union and to ensure that management has sufficient resources to meaningfully engage in collective bargaining. In support, the Union cited *Battlefords and District Cooperative Ltd. v. RWDSU, Local 544*³.

[40] The Union argued that the three (3) positions would not be in a conflict of interest if included within the bargaining unit as those positions did not have the power to affect the economic lives of other employees. In support, the Union again relied upon *Saskatchewan Society for the Prevention of Cruelty to Animals, Re:*⁴ as well as *University of Saskatchewan v. ASPA*⁵.

[41] The Union also argued that the three (3) employees only had the ability to provide minor corrective discipline and that ability was not managerial in nature. Again, it relied upon *Lutheran Sunset Home Corp., Re:*⁶. Furthermore, the Union argued that even if the three (3) employees did have the effective authority to hire and fire (which the Union denied they had), that authority alone would not be sufficient to exclude them from the bargaining unit. In support the Union relied upon *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its territories and Canada, Local 295 v. The Globe Theatre Society*⁷, *Lutheran Sunset Home Corp., Re: (supra)* and *C.U.P.E., Local 4777 v. Prince Albert Parkland Regional Health Authority et al.*⁸.

[42] The Union argued that the Board should look at actual duties of the positions rather than job descriptions, citing the Board's decision in *Health Sciences Association of Saskatchewan v. Unifor, Local 609*⁹.

¹ [2002] S.L.R.B.D. No. 66, [2002] CanLII 52916 (SKLRB)

² [2009] S.L.R.B.D. No. 24, [2009] CanLII 43954 (SKLRB)

³ [2015] CanLII 19983 (SKLRB)

⁴ [2009] S.L.R.B.D. No. 24, [2009] CanLII 43954 (SKLRB)

⁵ [2007] CanLII 68769 (SKLRB)

⁶ [2002] S.L.R.B.D. No. 66, [2002] CanLII 52916 (SKLRB)

⁷ [2011] CanLII 75423 (SKLRB)

⁸ [2009] CanLII 38609 (SKLRB)

⁹ [2015] CanLII 43776 (SKLRB)

[43] The Union also argued that under the *SEA*, supervisory employees are not excluded from collective bargaining. In support, the Union cited section 6-1(o) of the *SEA*, which defines a supervisory employee, and *Health Sciences Association of Saskatchewan v. Unifor, Local 609* (*supra*). It also argued other factors distilled from other cases which should be considered in respect of the managerial exclusion.

Employer's arguments:

[44] Wheatland argued that the Union bore the onus of proof to establish that its proposed bargaining unit is appropriate for collective bargaining. In support, it cited *University of Saskatchewan Faculty Association v. University of Saskatchewan*.¹⁰

[45] Citing authorities from outside the province, as well as authorities referenced by the Board in *Re: Prince Albert Parkland Regional Health Authority*,¹¹ Wheatland argued that the criteria set forth in that case should be examined by the Board in its review of the managerial exclusion. Based upon those decisions, Wheatland argued that the positions under review should be excluded from the bargaining unit.

[46] In respect of the Industry Supervisor position, Wheatland argued that this position was expected to undertake duties which would justify its exclusion from the bargaining unit. Similarly, Wheatland argued that the positions of Home Operator Supervisor performed duties and responsibilities which should also exclude them from the bargaining unit under the management exclusion.

[47] In respect of the Home Operator Supervisors, Wheatland argued that these positions possessed the requisite level of authority and required that these employees held a position of trust between the home operations and the senior management team. They further argued that the evidence established that these positions are, in essence, the sole representatives of senior management that spend any amount of time within the group homes.

¹⁰ [1995] S.L.R.B.D. No. 6 (QL)

¹¹ [2009] 169 CLRBR (2d) 292, [2009] CanLII 38609 (SKLRB)

Analysis:

[48] At the commencement of this hearing, the parties agreed that the exclusion or not of the three (3) employees under review should be determined solely on the management exclusion provision in Section 6-1(1)(h)(i)(A) of *The Saskatchewan Employment Act* (the “SEA”). We have, therefore restricted our analysis of the fact to that provision of the SEA. The parties also provided the Board with written Briefs, which we have reviewed and found helpful.

[49] Some changes were introduced to the provisions, dealing with management exclusions from the bargaining unit, with the proclamation of the SEA. For ease of reference, the former provision regarding the management exclusion and the new provision are as follows:

The Trade Union Act, Section 2(f):

(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...

The Saskatchewan Employment Act, Section 6-1(1)(h):

(h) “**employee**” means:

- (i) a person employed by an employer other than:
 - (A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character...

[50] The definition in the SEA removed the word “actually” in two places from the definition. Otherwise, it is the same. The Board dealt with this change in the definition in *Health Sciences Association of Saskatchewan v. Unifor, Local 609 (supra)*. The Union cited this case in support for its position that the duties of the position, as was required under *The Trade Union Act*, continue to be **actual** duties of the position. In support, the Union referenced paragraph [41] of that decision which read as follows:

[41] In our opinion, the proposed supervisory responsibilities are not sufficient to cloth this position with managerial authority. The SEA requires that the incumbent in this position actually perform managerial duties as a primary responsibility of the position. We cannot agree that the job, as described will include any responsibilities which are sufficient to place this position within the management exclusion.

[51] When read in context, this paragraph contains an obvious error. The SEA definition does not contain the word “actually”. The sentence should, we think, read “The SEA **does not require**”... Notwithstanding that the word “actually” has been removed from the definition, the requirement that the excluded person “exercise authority and perform functions that are of a managerial character”, as a “primary” responsibility, remains.

Onus of Proof:

[52] The parties disagreed over who should have the onus of proof regarding the positions sought to be excluded from the bargaining unit. The Union argued that the onus fell upon the Employer in certification applications citing *Re: Lutheran Sunset Home Corp.*¹² and *Re: Saskatchewan Society for the Prevention of Cruelty to Animals*¹³. The Employer relied upon the Board’s decision in *University of Saskatchewan Faculty Association v. University of Saskatchewan*¹⁴.

[53] In *Re: Lutheran Sunset Home*, at paragraphs 16 and 30, the Board presumes, without stating any authority for that proposition, that the onus is upon the Employer to show, on a balance of probabilities, that the exclusion, in that case, of a hostess, should occur. In the *Saskatchewan Society for the Prevention of Cruelty to Animals* there was a similar assumption that the onus fell upon the employer to, in that case, to show that the position of Coordinator of Investigative Services should be excluded from the bargaining unit.

¹² [2002] S.L.R.B.D. No. 66, [2002], [2002] CanLII 52916 (SKLRB)

¹³ [2009] S.L.R.B.D. No. 24, [2009] CanLII 43954 (SKLRB)

¹⁴ [1995] S.L.R.B.D. No. 6 at paragraph 9

[54] In *University of Saskatchewan Faculty Association v. University of Saskatchewan*¹⁵, at paragraph 9, the Board said as follows:

The Board will not attempt to do what so many experts and legal scholars cannot, and that is to explain the concept of burden of proof in comprehensive terms. It is enough to say that on an application for certification, a union must present evidence which satisfies the Board of the statutory requirements implicit in Section 5(a) and (b) of the Act. Those requirements are that the applicant is a trade union; that the proposed bargaining unit is appropriate for collective bargaining; and that the majority of employees in the proposed unit wish to be represented by the applicant for the purposes of bargaining collectively with their employer.

[55] Relying upon this passage, the Employer argues that the Union must first show that the unit of employees applied for is appropriate for collective bargaining. The Employer acknowledges that when this hurdle has been overcome, then the Employer would be required to present evidence on the issues in dispute or bring forward additional facts.

[56] In each of the cases relied upon by the Union, there seems to have been a presumption that the union had satisfied the statutory requirements and no arguments were advanced contrary to that position. The Board seems to have jumped ahead to placing the onus on the Employer in certification applications without much analysis.

[57] The Board has had, and continues to have, under the *SEA*, the exclusive jurisdiction to determine the appropriateness of a unit for collective bargaining. Sections 5(a) and 5(b) of *The Trade Union Act*, however, have not been reproduced in the *SEA*. Rather, the *SEA* provides that upon an application for certification, “the board shall determine: (a) if the unit of employees is appropriate for collective bargaining”¹⁶. Subsection 6-11(2) provides the Board with the authority to “include or exclude persons in the unit proposed by the union”. This, we think, would include the Board making a determination as to whether or not persons who the union seeks to include within a bargaining unit meet the definition of “employee” as set out in the *SEA*. Similarly, on appropriate evidence, the Board could include additional persons which it finds should be included in the bargaining unit.

¹⁵ [1995] S.L.R.B.D. No. 6, LRB File No. 127-94

¹⁶ See Section 6-11(1)(a) of *The Saskatchewan Employment Act*

[58] The Board, in its decision in *RWDSU v. Battlefords and District Co-operative Limited*,¹⁷ considered an application for amendment of an existing certification Order. In that decision, at paragraph 124, the Board confirmed that the onus of proof in amendment applications fell upon the proponent of the amendment. In making that determination, the Board relied upon its earlier jurisprudence in *CUPE, Local 4777 v. Prince Albert Parkland Regional Health Authority et al*¹⁸.

[59] In the case of certification applications, the responsibility for the determination of the bargaining unit falls to the Board under section 6-11. As a part of this responsibility is the requirement to insure that persons included in the bargaining unit fall within the definition of employee. The Board will require that the parties to the application bring forward all necessary evidence to satisfy it that the unit for which it ultimately grants representational rights is an appropriate unit.

[60] Often, there is no disagreement between the parties as to the scope of the bargaining unit and the Board will grant bargaining rights for that unit with the consent of the parties. In some instances, as here, one of the parties may seek a determination from the Board as to either the appropriateness of a unit or the status of employees who should or should not be included in the unit. However, when disagreements occur, the Board cannot, in a vacuum, make a determination as to inclusion of an employee or not.

[61] In the case of amendments, it falls upon the person seeking the inclusion or exclusion of an employee to provide evidence to support its position. However, a certification is quite different. The Union makes application for the inclusion of a number of employees including some which the Employer says should not be included. Should the onus then fall upon the Union because they initially sought to include those employees, or should it fall upon the Employer who says they should be excluded?

[62] That conundrum was captured by the Board in its decision in *University of Saskatchewan Faculty Association v. University of Saskatchewan*¹⁹. There is a shifting onus, as suggested by the Employer here. It is necessary for the union to first establish “that the applicant is a trade union; that the proposed bargaining unit is appropriate for collective

¹⁷ [2015] CanLII 19983 (SKLRB)

¹⁸ [2009] CanLII 38609 SKLRB, LRB File No. 011-09

¹⁹ [1995] S.L.R.B.D. No. 6, LRB File No. 127-94

bargaining”. Furthermore, the Union must provide the Board with sufficient evidence of support from those persons in the proposed unit.

[63] Once this initial onus has been satisfied by the Union, then the Employer must provide evidence that justifies the exclusion of the positions which it seeks to exclude.

[64] In this case, the determination is, however, not driven by considerations of which party has satisfied the onus upon it. The parties have provided ample evidence in support of each of their positions and the determination can be based upon an analysis of that evidence and the provisions of the *SEA*.

Should the positions in dispute be excluded from the Bargaining Unit?

[65] In order to be excluded from the bargaining unit, employees must have a “primary responsibility...to exercise authority and to perform functions that are of a managerial character”. This “primary responsibility” criterion is unchanged from the provisions in *The Trade Union Act*. The Board’s prior jurisprudence dealing with this criterion can be useful in guiding the Board’s analysis of the managerial exclusion provision in the *SEA*.

[66] In *Re: Prince Albert Parkland Regional Health Authority*,²⁰ the Board set out 6 principles which should be considered in respect of exclusion of employees from the bargaining unit. At paragraph [66], the Board set out those principles as follows:

[66] *The Board considered and dealt with all of the cited cases in University of Saskatchewan Faculty Association v. University of Saskatchewan, supra. That case summarized the following principles to be considered in respect of the management exclusion:*

1. *The determination of whether a position falls to be excluded is primarily a factual one (para 36)*
2. *Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible (para 37)*
3. *A person to be excluded must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient. (para 38)*
4. *The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge,*

²⁰ [2009] 169 CLRBR (2d) 292, [2009] CanLII 38609 (SKLRB)

the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit. (para 38)

5. *In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. (para 38)*
6. *The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. (para 38)*

[67] In *RWDSU v. Battlefords and District Co-operative Limited*²¹ the Board concluded that the rationale for the inclusion of the managerial exclusion and the confidentiality exclusions under the *SEA* were the same as the rationale under *The Trade Union Act*. That rationale was discussed at paragraphs [112] – [122]. At paragraph [122], the Board concludes as follows:

[122] The labour relations scheme established pursuant to the SEA has not changed from that articulated by the legislature under The Trade Union Act. The purpose for which exemptions from the bargaining unit were created remains as set out above. The analysis of such positions may, depending upon the facts of each case, differ under the current provisions, but nevertheless, the purpose for which the exemptions have been placed in the legislation remains the same. Similarly, the definition of “employee” when placed within the context of the SEA supports the analysis above.

[68] Of the criteria outlined in *Re: Prince Albert Parkland Regional Health Authority*, criteria, numbers 1 and 2 remain as guiding principles. However, with the removal of the word “actual” from the definition, further analysis of criteria 4-6 is required. Each of these criterion have their genesis in paragraph [38] of the Board’s decision in *University of Saskatchewan Faculty Association v. University of Saskatchewan*, *supra*.

[69] Paragraph [38] of *University of Saskatchewan v. ASPA*²² had its genesis in the Board’s decision in *Saskatchewan Government and General Employees’ Union v. Saskatchewan Liquor and Gaming Authority et al*²³. In that case, the Board was required to

²¹ [2015] CanLII 19983 (SKLRB)

²² [2007] CanLII 68769 (SKLRB)

²³ [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96.

determine whether liquor store managers, who had previously been specifically excluded by Board order prior to the amendments to s. 2(f) of *The Trade Union Act* in 1994, should continue to be excluded or whether they were "employees" within the meaning of s. 2(f)(i) of *The Trade Union Act*. In that case, both of the definitions referenced by the Board contained the term "actual".

[70] Criteria numbers 3, 4, 5 and 6 rely heavily upon the exercise of an actual authority, something which is no longer required by the statute. While instructive, those criteria have been somewhat displaced by the removal of the word "actually" and the remaining statutory requirement that the employee who meets the definition must have the "primary responsibility...to exercise authority and perform functions of a managerial character".

[71] With this background, we can now proceed with an analysis of the positions in dispute.

Industry Supervisor

[72] The Industry Supervisor's primary responsibility is to operate and manage the industry program operated by Wheatland. While this position does not manage significant personnel, nevertheless, the position's primary responsibilities brings it within the definition in Section 6-1(1)(h) of the *SEA*.

[73] The Industry Supervisor position is the equivalent of the Program Director position which the parties have agreed should be excluded from the bargaining unit. While the incumbent of the position did perform maintenance on equipment, this was not his primary responsibility. He testified that he would stop performance of these duties when required to ensure the safety and supervision of the participants in the program.

[74] This position was responsible for the development and execution of vocational training programs for each individual. The provision of vocational training was a major component of the operations of Wheatland in addition to providing accommodation for the clients under their supervision.

[75] Additionally, the position has managerial responsibilities for the following items:

- Responsibility for the day to day operation of all industry programs;
- Submit recommendations for the planning and assigning of activities to all workers in the industry program (this would include clients who were engaged in the various activities promoted by the industry program, including, but not limited to cardboard recycling, and woodworking programs.);
- Provide training, instruction, and constant supervision to participants;
- Provide leadership and guidance to any subordinate staff to ensure that programs are carried out in line with each participant's personal program; and
- Evaluate the performances of workers and make recommendations with regards to alteration in programming to assist each individual to reach maximum potential (again this is more of a reference to the client participant workers to whom the program was aimed).

[76] The incumbent in the position also supervised two (2) other full time employees. One, the Maintenance Worker is sufficiently well trained that he is able to operate with minimal supervision. The other, the Industry Support Worker has also been trained by the incumbent such that he can also operate somewhat independently, but the Industry Supervisor is, nevertheless, responsible for the management of the activities in which they are engaged.

[77] The organizational chart for Wheatland is also telling insofar as it places this position on the same level as the Program Director as a direct report to the CEO.

[78] For these reasons, the position of Industry Supervisor will be excluded from the bargaining unit.

Group Home Supervisors

[79] The Group Home Supervisors do not have primary responsibility “to exercise authority and perform functions that are of a managerial responsibility”. Their role within the group homes is similar to the role of a “lead hand” or working supervisor.

[80] The evidence showed that the Group Home Supervisors performed, while on shift, all of the duties usually performed by the Group Home Operators. Those duties consumed about 95% of their time and the supervisory duties about 5%. Those supervisory duties included reporting to the Program Director, performing performance reviews annually on the Group Home Operators, checking client medications, monitoring client finances, taking clients to medical and other appointments, maintaining supplies of food and other items in the group homes, submission of time sheets for Group Home Operators and themselves. They had the ability and responsibility to replace staff in the event that the staff themselves could not find a replacement.

[81] Of these duties, the only ones which were managerial in nature were the reporting to the Program Director regarding the ongoing status of the group homes and the clients housed by Wheatland and the performance of annual performance reviews.

[82] The Group Home Supervisors had limited control over their budget, nor did they have much input into the creation of the budget. They controlled the client’s finances and trust funds, but could not authorize expenditures over \$50.00 by a client.

[83] While new hiring had not occurred for some time prior to the application, the evidence was that the Group Home Supervisors would have a role in the hiring of permanent replacement Group Home Operators. One position had recently been filled and the Group Home Supervisor was involved in the hiring decision. However, that participation was advisory only and the ultimate decision was not that of the Group Home Supervisor to make.

[84] The Discipline Policy adopted by Wheatland on March 25, 2015 also provides for a role in the discipline of staff members by the Group Home Supervisor, but that role is limited to a supporting role, with any discipline imposed by the CEO. The Board heard evidence that discipline had not been necessary in the workplace and none had been imposed by the Group Home Supervisors, the Program Director, or the CEO since the implementation of the policy. The only incident which was relayed to the Board was a situation where the Group Home

Supervisor sought advice from the Program Director with respect to a situation involving personal hygiene of a Group Home Operator which the Program Director suggested that the Group Home Supervisor deal with herself, which she did. This would not have been anything approaching discipline.

[85] For these reasons, the positions of Group Home Supervisors will be included in the bargaining unit.

[86] An appropriate order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **24th** day of **November, 2015**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson