



SASKATCHEWAN POLYTECHNIC, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent and SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Respondent

LRB File Nos. 134-17 & 135-17; December 7, 2017

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

For the Applicant: Paul Clemens

For the Respondent, Saskatchewan
Government and General Employees'
Union: Jana Stettner

For the Respondent, Saskatchewan
Polytechnic Faculty Association: Gordon Hamilton

Jurisdictional Dispute – Two certified Unions within workplace both claim newly created position of Student Relations Coordinator – Board considers previous jurisprudence with respect to jurisdictional disputes and considers additional criteria from Ontario Labour Relations Board.

Jurisdictional Dispute – Board considers factors relevant to determination as to which bargaining unit employee position should be placed. Based upon analysis, Board determines position should be represented by the Professional Services employee group.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** Saskatchewan Polytechnic ("Sask. Polytech") applied to the Board for an order amending either the Order granted to the Saskatchewan Government and General Employees' Union ("SGEU")¹ in respect of a unit of employees of Sask. Polytech or the Order granted to the Saskatchewan Polytechnic Faculty

¹ LRB File No. 135-17, amending LRB File No. 238-14P issued April 28, 2016 between Sask. Polytech and SGEU

Association (“SPFA”)² in respect of a unit of other employees of Sask. Polytech. At issue was a position entitled “Student Relations Coordinator” which Sask. Polytech intended on creating and which it now wanted to staff. Sask Polytech originally brought an interim application³ to the Board which was heard on October 11, 2017. The interim application was dismissed by the Board as a result of the Board granting the parties an expedited hearing of the matter, which was scheduled to be heard on November 8 & 9, 2017.

[2] Sask. Polytech applied to amend both bargaining unit Orders because the two Unions were unable to agree as to where the disputed position fell, in relation to their bargaining unit description. Both parties claimed the position fell within the scope of their bargaining unit. The Board was tasked with the responsibility to determine which bargaining unit should represent the employee who obtained the appointment as the Student Relations Coordinator.

[3] For the reasons that follow, the Board is of the opinion that the position should be represented by the SGEU bargaining unit, thereby amending LRB File No. 238-14P.

Facts:

[4] The Board heard from several witnesses from whose testimony the following summary was developed. However, should it be necessary during the analysis and discussion portion of this decision, we will refer to other facts or testimony as necessary.

[5] Sask. Polytech was originally known as the Saskatchewan Institute of Applied Science and Technology (“SIASST”). When this institution was provided the authority to grant degrees in addition to certificates and trade status, the institution changed its name to the Saskatchewan Polytechnic. Employees at what was then SIASST were originally all represented by SGEU, which was divided into two distinct units, the academic⁴ and professional⁵. SPFA was subsequently established as a trade union and organized to represent “academic” employees and was certified to represent those employees in 2012⁶.

² LRB File No. 134-17, amending LRB File No. 107-15 issued July 2, 2015 between Sask.Polytech and SPFA

³ LRB File No. 200-17

⁴ LRB File No. 079-06.1

⁵ LRB File No. 079-06.2

⁶ LRB 106-12

[6] Kathy Mahussier, who testified for SGEU, provided the Board with some history regarding SGEU's representation of employees of what was SIAST. She was involved with representation of both the current unit of SGEU members and the former academic members who are now represented by SPFA. She noted that the groups had originally bargained as one group, but in later years, prior to the formation of SPFA and its obtaining a certification Order, SGEU had bargained for each group separately.

[7] The Student Relations Coordinator is a newly created position at Sask. Polytech. The position was created to fulfill what was seen as a need to establish a new policy respecting non-academic misconduct at the Institution. Ms. Tobi Strohan, Associate Vice-President of Student Services, provided testimony regarding the creation of the new position and the creation of a new student conduct policy for Sask. Polytech. She distinguished in her testimony between "academic misconduct" such as cheating on exams or plagiarism, and non-academic misconduct which she defined as everything else.

[8] Ms. Strohan described the current system whereby non-academic misconduct was dealt with, noting that it was very decentralized and that the investigatory methods, discipline imposed, and appeal structures were fragmented. A new policy was developed which would divide misconduct into the two types noted above, that would centralize the administration of the system, and would allow for common investigative methodologies, penalties and appeal mechanisms. Key to this new structure was the creation of two Student Relations Coordinators.

[9] Ms. Strohan provided the Board with a job description for the new position. That job description is attached hereto as Appendix "A". The general job description reads as follows:

Student Relations Coordinator

Under the direction of the Director, Student Engagement and Learning Services, the Student Relations Coordinator promotes the rights and responsibilities, well-being and safety of students and the whole Saskatchewan Polytechnic community. The Coordinator is responsible for the administration of Sask Polytechnic's student conduct policy portfolio; working with students, faculty and staff to address confidential student conduct issues and identifying students needing support. The Coordinator also offers information and guidance of the Student Code of Conduct (Academic and Non-academic) and related processes to members of the Saskatchewan Polytechnic community. Additionally, the Coordinator will plan and assist in the administration and evaluation of the Office of Student Relations and provided input into the development of departmental goals strategies, operations and procedures.

[10] The Board also heard from several witnesses called by SPFA: Robert Mohagan, Hudson Bilbow, Maggie Finney and Warren White, the President of SPFA. Mr. Mohagan is a counsellor for students in the Faculty of Adult Education at Sask. Polytech. He testified that his job as a counsellor was similar to the position description for the Student Relations Coordinator and that by the nature of his position, he often was involved in non-academic misconduct issues. He provided the Board with a Job Description for his position and noted several areas of similarity between his position and the description for the Student Relations Coordinator. In cross examination, he noted that his position was not to be an adjudicator, but that he was a student support advocate. He noted that he would never be adversarial with a student.

[11] Mr. Bilbow is an instructor in literacy and adult education. He taught people returning to school. He described their situation as coming back from cultural poverty. He described his role as an instructor dealing with discipline issues. He too noted that his job performed some of the duties set out for the Student Relations Coordinator. In cross examination, he described his primary role as fostering relationships. He also acknowledged that he was not familiar with the new process that resulted in the creation of the new positions.

[12] Ms. Finney is the Program Head for basic education. She described her duties as encouraging students, administering the student's programs, overseeing the work of twelve faculty members and overall administration of the program. To shorten her testimony, counsel agreed that as Program Head, she currently deals with some non-academic conduct using a progressive model, in collaboration with instructors, and that some of this misconduct would, in some cases, get advanced to the academic chair for resolution. She too noted that she performed some of the duties noted in the job description for the Student Relations Coordinator.

[13] Mr. White, the President of SPFA, testified that he didn't think that there was a difference between non-academic misconduct and academic misconduct. He took the view that it all should be considered under the banner of "student behavior". He was not supportive of the new policy which had been developed and felt that keeping counsellors out of the mix regarding sanctions for students was not a "holistic approach". He was of the view that the process should function within the academic unit. Through him, SPFA introduced several job descriptions which were similar to the Student Relations Coordinator and which were positions within the SPFA bargaining unit.

[14] Ms. Mahussier, as noted above, testified for SGEU. She noted that the SGEU bargaining unit has a wide variety of educational qualification and backgrounds. She provided examples of similar positions within the SGEU bargaining unit which also performed duties similar to those proposed for the Student Relations Coordinator. She noted that in addition to academic staff, there has been the transfer of librarians from the SGEU unit to SPFA based upon their community of interest and wish to be represented by SPFA.

Relevant statutory provision:

[15] Relevant statutory provisions are as follows:

Board powers

6-104(1) *In this section:*

- (a) ***“former union”*** means a union that has been replaced with another union or with respect to which a certification order respecting the union has been cancelled;
- (b) ***“replacing union”*** means a union that replaces a former union.
- (2) *In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
 - (a) *requiring an employer or a union representing the majority of employees in a bargaining unit to engage in collective bargaining;*
 - (b) *determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
 - (c) *requiring any person to do any of the following:*
 - (i) *to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
 - (ii) *to do anything for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*
 - (d) *requiring an employer to reinstate any employee terminated under circumstances determined by the board to constitute an unfair labour practice, or otherwise in contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*
 - (e) *fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*
 - (f) *rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or*

collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;

(g) amending a board order if:

- (i) the employer and the union agree to the amendment; or*
- (ii) in the opinion of the board, the amendment is necessary;*

(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;

(i) subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee;

(j) when acting pursuant to section 6-110, relieving against breaches of time limits set out in this Part or in a collective agreement on terms that, in the opinion of the board, are just and reasonable.

(3) The board shall not certify a union or a labour organization as a bargaining agent if, in the board's opinion, the union or labour organization is dominated by an employer or a person acting on behalf of the employer.

(4) If a former union is administering or controlling any benefit plan, program or welfare trust, the board may, on application made to it, make any orders it considers appropriate:

(a) to assist in the orderly transfer or transition of the benefit plan, program or welfare trust; or

(b) to require or facilitate the continuation of benefits for employees in receipt of benefits pursuant to the benefit plan, program or welfare trust.

(5) Without restricting the generality of subsection (4), the board may:

(a) require that a benefit plan, program or welfare trust be transferred;

(b) require the former union to provide to the replacing union or the employees any documents or information required to effect the transfer of the benefit plan, program or welfare trust;

(c) require that the former union continue to administer the benefit plan, program or welfare trust with respect to those employees in receipt of benefits until:

(i) all of those employees cease to qualify for those benefits; or

(ii) the benefit plan, program or welfare trust is transferred to the replacing union;

(d) if the bargaining unit is being divided:

(i) divide the benefit plan, program or welfare trust between the different bargaining units or between the bargaining units and employees; or

(ii) divide the assets and liabilities associated with the benefit plan, program or welfare trust;

- (e) *require the replacing union or the employees to pay to the former union the costs of the transfer of the benefit plan, program or welfare trust in an amount determined by the board;*
- (6) *When making an order in accordance with subsection (4) or (5), the board may declare the replacing union or one or more of the employees to be a party to a contract respecting a benefit plan, program or welfare trust in cases where the benefit plan, program or welfare trust is administered or controlled by a third party.*
- (7) *Notwithstanding any terms of a contract respecting the benefit plan, program or welfare trust or any other Act or law, on the making of a declaration pursuant to subsection (6), the replacing union or employees are deemed to be a party to that contract.*
- (8) *At any time after an application for the purposes of subsections (4) and (5) is made, the board may defer or dismiss the application if the board is of the opinion the issue in dispute is more properly resolved:*
- (a) *by regulators responsible for making decisions respecting the benefit plan, program or welfare trust; or*
- (b) *in another forum.*

Employer's arguments:

[16] The Employer noted that it was trying to stay neutral in the dispute between the two unions, but acknowledged a preference for the unit of employees represented by SGEU. He noted that the new position was being created to address concerns respecting only non-academic misconduct. The Employer noted that if the position were placed within the SPFA bargaining unit, there would be an inherent conflict between people like the counsellors and some instructors who took a role in advocacy for students and fostering relationships between students and their instructors.

SPFA's arguments:

[17] SPFA provided a written Brief and a case authority which we have reviewed and found helpful. It identified five factors that the Board normally utilizes when faced with a jurisdictional dispute such as is the case here.

[18] SPFA argued that there were many similarities between the job duties of the Student Relations Coordinator and other positions within the scope of the bargaining unit represented by SPFA. SPFA noted that non-academic misconduct is often linked with academic misconduct and that the working environment in one in which counsellors, instructors and department heads all work toward a common goal of achieving the best outcome for students.

[19] SPFA argued that there was a community of interest between the new positions and the group of employees who are represented by SPFA. If placed within the SPFA unit, the incumbents would have greater mobility within the unit.

[20] SPFA also argued that the history or origins of the disputed positions should place the position within the SPFA bargaining unit as historically, non-academic misconduct has always been dealt with by SPFA members as this misconduct, it argued, typically takes place in the classroom setting or is brought to the classroom setting.

[21] SPFA argued that placing the positions within its bargaining unit would enhance industrial stability. It disputed the SGEU's position that there was an inherent conflict between the role of the Student Relations Coordinator and role as advocate and support for students by other members of the bargaining unit. SPFA took the view that strategies could be evolved to avoid any conflict which might arise.

[22] SPFA disputed the claim by SGEU that it should be the default bargaining unit or a "catch all" for positions which did not involve a teaching element. It noted that the SPFA included librarians, counsellors, curriculum developers and continuing education consultants. It noted that the certification orders which defined the two bargaining units were mutually exclusive units, i.e.: each unit was described by excepting the other unit.

[23] In support of its position, SPFA cited a recent Board decision which dealt with a similar dispute between the two bargaining units in *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees' Union*.⁷

SGEU's arguments:

[24] SGEU also provided a written Brief which we have reviewed and found helpful. SGEU also cited the same decision cited by the SPFA as noted in paragraph 23 above. It too relied upon the five criteria set out by the Board in that decision.

[25] SGEU argued that the newly created positions were more similar to the positions within the SGEU bargaining unit. It argued the role of the new positions was to investigate and

⁷ 2015 CanLII 43770, LRB File No. 238-14

adjudicate complaints of non-academic misconduct. The position was intended to fill a gap in how non-academic issues were being addressed within Sask. Polytech. Put in “broad strokes”, it argued the position was of a non-academic nature and thus appropriately within the SGEU unit. It argued the Board should take a pragmatic approach “intended to promote homogeneity and functional coherence in bargaining units”.

[26] SGEU argued that the position as described was not “academic” in nature. It was created and intended to remedy a perceived gap in the process for dealing with misconduct. SGEU noted that non-academic misconduct, contrary to the position taken by SPFA does not always occur in or is brought to the classroom. Examples were in parking lots, hallways, and in social media.

[27] SGEU argued that there was a community of interest between its current members and the proposed positions. It also noted that there were different qualifications for persons holding the counsellor positions and that mobility between those positions was not a certainty.

[28] SGEU acknowledged that their bargaining members had not historically performed any role in the non-academic misconduct process. However, it argued that this should not be determinative of the issue. It argued that such duties must be core duties and not peripheral to those core duties. It argued that instructors did not have the investigation and adjudication of non-academic misconduct as one of its core duties. It argued that the evidence of Ms. Strohan was that many instructors had advised her that they do not have the requisite training and experience to perform this role.

[29] SGEU argued that the proposed positions were high level positions that were non-academic in nature. It is a new position that did not previously exist in this form. Because it is non-academic in nature, SGEU argued that the placement of the position within the SGEU unit would lead to better industrial stability.

[30] SGEU also argued that its unit should be considered as the “catch all” unit notwithstanding the current definition of the bargaining units. It argued that its unit contains non-academic employees and therefore any employee who is not an academic employee should fall within that unit.

Analysis:

[31] Whenever there are multiple bargaining units within a workplace, the potential for jurisdictional disputes between those bargaining units exists. When formulating appropriate bargaining units, the Board must be careful to define, as much as possible, the scope of the bargaining unit both in terms of the present circumstances and what might occur in the future.

[32] This is not the first jurisdictional dispute between these parties, nor is it the first jurisdictional dispute heard by this Board. There are a number of similar disputes pending before the Board. We are, therefore, by these Reasons, addressing the current situation, but also are hoping to provide guidance for future disputes not only among these parties, but other parties who may have jurisdictional issues arise.

[33] In large organizations such as Sask. Polytech, it is difficult to define bargaining units by reference to job description alone. Even if that were done, a constantly changing work environment would lead to numerous applications by one party or another, for amendment to certification orders when job descriptions or titles changed⁸.

[34] In its recent decision in *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees' Union*,⁹ the Board outlined five factors which the Board routinely reviews to provide guidance to it in determining the proper assignment of newly created or additional positions in a mult-bargaining unit workplace. In that case, the Board identified the following factors:

1. ***Similarities of the disputed position and other positions in the competing bargaining units.*** Under this factor, the Board examines the role to be performed by the incumbent in the workplace, together with the work, duties and responsibilities of the position, as well as the potential for career advancement; all in an effort to determine whether the disputed position bears more similarities to the member of one unit or another. See: *SEIU West v. St. Paul's Hospital & HAS*, supra. See also: *CUPE, Local 1975 v. University of Saskatchewan & ASPA*, supra. This is a pragmatic analysis intended to promote homogeneity and functional coherence in bargaining units. To a certain extent, the Board has also considered which bargaining unit would present the best career option for the

⁸ Assuming the parties were not able to negotiate amendments to their scope clauses, otherwise the amendments would be jointly submitted.

⁹ 2015 CanLII 43770, LRB File No. 238-14 at para. 22

incumbent. See: Regina Professional Firefighters Association v. City of Regina & RCMMA, supra.

2. **Community of interest.** *Under this factor, the Board examines the educational qualifications, competencies and skills expected of the incumbent, together with the conditions of employment and avenues for lateral mobility for the incumbent. While this factor also examines similarities in positions, it tries to focus that examination on the anticipated collective bargaining interests of the disputed position relative to the interests of the members of the competing bargaining units. See: CUPE, Local 21 v. City of Regina & RCMMA, supra. See also: SEIU West v. St. Paul's Hospital & HAS, supra.*
3. **The history or origins of the disputed position.** *Under this factor, the Board examines whether the duties or responsibilities of a newly created position can be traced back to a particular bargaining unit. Evidence that the work to be performed by a disputed position was carved out of a particular bargaining unit supports a rebuttable presumption that the position ought to be assigned to that bargaining unit. See: CUPE, Local 1975 v. University of Saskatchewan & ASPA, supra.*
4. **Industrial stability and viability of the bargaining relationship.** *Under this factor, the Board considers whether the inclusion or exclusion of a disputed position will jeopardize the strength and effectiveness of either bargaining unit or otherwise endanger the equilibrium of the bargaining relationships. See: Regina Professional Firefighters Association v. City of Regina & RCMMA, supra.*
5. **Broader, More Inclusive Bargaining Units:** *In the case of multi-bargaining unit workplace involving a middle management unit, there is a rebuttable presumption that new or additional positions belong in the broader, more inclusive bargaining unit. See: CUPE, Local 21 v. City of Regina & RCMMA, supra; and CUPE, Local 47 v. City of Saskatoon & SCMMA, supra.*

[35] In the following paragraph, the Board cautioned against reliance on titles or position descriptions as the Board “tries to look beyond” such titles and/or position descriptions “in an effort to ascertain the true role which that position will play in an organization”.¹⁰

[36] These limited headings, do not, in our opinion, properly capture the analysis which must be undertaken in this case. We are of the view that the examination should be expanded to include some of the factors routinely considered by the Ontario Labour Relations Board in dealing with jurisdictional disputes. The Ontario Board recently restated the factors which it considers in its decision in *Canadian Union of Public Employees, Local 79 v Toronto*

¹⁰ Cases cited in support were *Saskatchewan Institute for Applied Science and Technology v. Saskatchewan Government and General Employees' Union*, (2009) 173 C.L.R.B.R. (2d) 1, 2009 CanLII 72366 (SK LRB), LRB File No. 079-06.

*Community Housing Corporation and Toronto Civic Employees Union*¹¹. At paragraph 29, the Ontario Board lists 7 factors which it routinely considers. These are:

- a) *collective bargaining relationships;*
- b) *skill and training;*
- c) *safety;*
- d) *economy and efficiency;*
- e) *employer past practice;*
- f) *area or industry practice; and*
- g) *employer preference.*

[37] Some of these seven factors are similar or the same as the factors which the Board has previously relied upon. Additionally, it must be remembered that these factors were derived from jurisdictional disputes primarily within the construction sector and allowance must be made for that factor. Nevertheless, the Board proposed to deal with these factors in addition to those dealt with by the Board in *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees' Union*.

Analysis of the disputed Position

[38] Sask. Polytech, through its witness, Ms. Strohan, provided its analysis for the creation of the new positions of Student Relations Coordinator. It arose out of a review of the Sask. Polytech Student Conduct Policy which determined that there should be a redefinition and separate paths for student's academic misconduct and non-academic misconduct. Previously, these two forms of misconduct had been dealt with together usually by faculty members. It was determined that non-academic misconduct should be separated and dealt with separately, as had been done in other polytechnical institutions in Canada which were studied.

[39] Both of SPFA and SGEU acknowledged that the creation of this policy and the separation of the streams of misconduct were within the purview of Sask. Polytech and they took no exception to the policy. Mr. White expressed some concern respecting the policy, due

¹¹ 2015 CanLII 24830 (ON LRB)

to his opinion that there had not been proper consultation with SPFA in the development of the policy.

[40] The policy, as enunciated provides for separate streams, appeal mechanisms, and consequences for each of the forms of misconduct. The role of the Student Relations Coordinator is noted in clause 3.2.2 of the policy as follows:

3.2.2 Student Relations Office

*The Student Relations Office promotes the rights, well-being and safety of students and the whole Saskatchewan Polytechnic community. The Office is **responsible for investigating and making decisions on possible violations of this Code where informal resolution is not possible or not successful**, for Level 2, 3, and 4 violations, or for Level 1 violations referred to the Office. The Office also offers information and guidance on this Code and related processes to any members of the Saskatchewan Polytechnic community. (emphasis added)*

[41] The policy then went on to describe four incident levels, from minor to more major incidents on non-academic misconduct that might occur. Minor, Level 1 violations such as smoking, or using e-cigarettes in non-designated areas; failing to provide proper identification while on campus; creating a disturbance; or failing to properly monitor the conduct of a guest would, under the new policy, continue to be moderated or dealt with by academic or non-academic staff that witnessed or became involved in such misconduct. More serious misconduct was to be dealt with by the Student Relations Coordinators upon report of such behaviors. The policy then also outlined the process to be followed in the event of misconduct and possible sanctions that may be imposed.

[42] Ms. Strohan testified that one of the major concerns which lead to the formation of the new policy was to ensure consistency of treatment for students across the numerous campuses and programs operated by Sask. Polytech. She noted that the old policy had no central repository for behavioral complaints nor a consistent approach to dealing with such complaints. The new policy sought to address those concerns by adding certainty and consistency with a defined policy and process.

i. Similarities of the Disputed Position and Other Positions in the Competing Bargaining Units: *(Skill and training in the Ontario analysis)*

[43] Both SPFA and SGEU provided examples of positions which it felt were comparable and performed similar functions to the Student Relations Coordinator position. This evidence was of little value to the Board because it addressed only the similarity in some tasks performed by each of the other employees. The evidence did not address the key question that the Board needs to consider under this heading, which was the true character of the position and its proper placement within one or the other bargaining unit. That is, was the position “academic” in nature, or was it “administrative” or provided professional services to the “academic” unit in support of their academic function?

[44] From the evidence which the Board did have on this point, principally from Ms. Strohan, points to the position being one which provided professional services to the institution and would, therefore, fit more properly within the SGEU bargaining unit.

[45] As an aside, all of the witnesses pointed out that the major goal of the institution was to enable students to obtain training in the field of their choice. In order to do that, all of the witnesses acknowledged the need for both academic and non-academic employees to work collectively towards that goal. It is, therefore, important that the Board, in making its determination, ensure that that goal is supported.

ii. Community of Interest with other Members:

[46] SPFA argued that his position would have a greater community of interest with its bargaining unit since their unit previously had responsibility for the process of non-academic misconduct. Furthermore, they argued that the position of Student Counsellor was similar to the proposed position and that these employees, along with instructors and department heads routinely dealt with incidents of non-academic misconduct by students. SPFA noted that the educational requirements for both positions were similar such that persons employed as Student Relations Coordinators may wish to apply for a position as a Student Counsellor, or *vice versa*, which would be more difficult if the positions were not in the same bargaining unit.

[47] SGEU took the position that the educational requirements for the Student Relations Coordinator position and the Student Counsellor position were quite different and that

the Student Relations Coordinator position performed a much different role from that of the Counsellor. They argued that the new position is being created because the job skills needed are not present currently in the organization. They noted that counsellors normally held degrees in social work or had a counselling background. This they noted was not a requirement for the Student Relations Coordinator position.

[48] In this analysis, we agree with SPFA that there are similarities between the counsellor role and the Student Relations Coordinator role. However, there are also dissimilarities in the two roles which causes the Board to favour the position taken by SGEU in respect to this factor.

[49] The function of the counsellor, as described by Mr. Mohagan, is to be a support for students, not to investigate student misconduct or to make determinations as suggested in the new policy. He provided examples of informal resolution to issues he had dealt with. However, the new policy seeks to formalize a new process for dealing with such issues. He will, under the new policy continue to have the ability to affect informal resolutions in the past. However, should that now occur, the incident gets elevated to the Student Relations Coordinator for investigation and determination. The roles performed by each are markedly different.

iii. Economy and Efficiency

[50] This heading is similar to the Community of Interest analysis conducted by the Saskatchewan Board. However in the context of the Ontario analysis, this factor looks at how the position will interact with other employees and from whom the employees will take direction.

[51] Ms. Strohan provided evidence which is useful in this analysis. She described the reporting arrangements as outlined on the Organizational Chart provided for her area of responsibility (AVP Student Services). This organizational chart has the positions reporting to the Director, Student Engagement and Learning Services, an out of scope position. This is a different reporting mechanism from the reporting arrangements for counsellors who report to the Manager of Counselling and Health. In turn, the Manager reports to the Director, Counselling Health and Accessibility. Ms. Strohan testified that the two Director positions were recently split from one position which formerly performed both roles.

[52] This analysis shows that the position of Student Relations Coordinator is placed at a higher level within the organization than the counsellor position, being a direct report to a Director, whereas the counsellor has a direct report to a Manager, who, in turn, reports to a Director.

[53] The interaction of the Student Relations Coordinator is similarly at a higher level within the organization. This was noted as well in evidence heard regarding possible salary grid establishment for the position within each of the competing bargaining units. That evidence placed the Student Relations Coordinator at a fairly high level as well regardless of the unit in which it would be placed.

[54] Additionally, evidence from Ms. Strohan noted that the Student Relations Coordinator would have normal contact with senior members of both bargaining units in the performance of its investigation and adjudication roles, as well as in the appeals process established by the new policy.

[55] This analysis does not lead to any particular conclusion with respect to which unit the positions should be placed. Arguments could be made on either side to support its placement within either unit.

iv. History or Tracing of Duties of the Disputed Position (Employer Past Practice)

[56] It is SPFA's position that the position should be placed within its bargaining unit because under the previous policy, non-academic misconduct was dealt with exclusively by members of its bargaining unit. It argued that academic and non-academic misconduct were normally linked and that it either occurred within the classroom to be dealt with there, or was brought to the classroom to be dealt with.

[57] This position was the antithesis of the position taken successfully by SPFA in *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees' Union*. At paragraph 34, the Board distinguished this factor because the prior duties were not the core duties performed by the members of the bargaining unit. It said:

[34] SGEU argues that many of the duties and responsibilities to be assigned to the Instructor of Assistive Technology can be traced back to

members of the Professional Services Unit. While some of the duties to be performed by the disputed position find their origins in the duties previously performed by members of SGEU, these duties are not the raison d'être of the position. In our opinion, the true role that the Employer's new position will place in the workplace will be to bridge a gap that has been identified in the services delivered to students with special needs. In this respect, the disputed position will provide services that were not previously being provided in the workplace. In the absence of this new position, it is more likely to assume that the Employer would turn to members of the Academic Unit to prepare assistive technology plans for students with special needs and to report on the efficacy of the assistive technologies that have been prescribed to students.

[58] Similarly, in this case, the duties performed by members of the SPFA bargaining unit, as described by their witnesses, were not the core duties or the raison d'être for the position being created. The core function of the new positions is the investigation adjudication, and processing of non-academic student misconduct. The role performed by members of the SPFA bargaining unit in relation to non-academic misconduct (in minor cases) remains with those bargaining unit members to deal with.

[59] This newly created position does not evolve from the former duties performed by the SPFA bargaining unit members. It is a new position which was intended to fill a gap perceived by Sask. Polytech in its administrative processes.

[60] Another important factor to be considered in this analysis which was not considered in *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees' Union* is the history of the two bargaining units and the types of employees they were certified to represent.

[61] Ms. Mahussier testified that SGEU was originally certified to represent an "all employee" unit for what was then the Saskatchewan Institute of Applied Science and Technology. In 2012, a group of academic employees formed the Saskatchewan Institute of Applied Science and Technology Faculty Association which was recognized by the Board as a trade union¹². In that decision, at paragraph 13, the Board pointed to a provision in the constitution of the Association which provided one of the purposes of the Association to be "to

¹² See *Saskatchewan Institute of Applied Science and Technology Faculty Association v. Saskatchewan Government and General Employees' Union* 202 CanLII 65539 (SKLRB)

act as the negotiating body for academic faculty members in reaching collective agreements with SIAST....”.

[62] Since the formation of the SPFA, and its certification to represent those “academic faculty members”, as testified to by Mr. White and Ms. Mahussier, another group of employees (loosely here referred to as “Librarians”) chose to be represented by SPFA for collective bargaining. The two unions negotiated a transfer of bargaining responsibility for those employees and did not return to the Board for an adjudication or amendment.

[63] SGEU argued that it should be considered to be the “default” Union, based upon its original representational rights for the all employee unit. It argues that where a new position is created within the scope of either Union, that position should, by default, be placed in their bargaining unit unless SPFA can demonstrate that such position was “academic” in nature.

[64] Based upon the history of employee representation outlined above, the Board agrees with SGEU in this regard. They were originally certified to represent all employees. SPFA was “carved out” of this larger bargaining unit ostensibly for the purpose of representing academic faculty members. With respect, the Board is of the opinion that these historical bargaining units should be respected and newly created positions within the Unions’ scope should, unless this presumption can be rebutted by SPFA, be placed within the SGEU bargaining unit.

[65] In *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees’ Union*, SPFA successfully rebutted this presumption and the Board agreed that the position of “Instructor, Assistive Technologies” was better contained within the academic faculty bargaining unit.

[66] In this situation, the opposite is the case and the Board is of the view that the SPFA has failed to discharge the onus of rebutting the presumption in favour of SGEU.

v. Industrial Stability (area or industry practice and collective bargaining relationships in the Ontario analysis)

[67] As was the case in *Saskatchewan Polytechnic v. Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees’ Union* this is not a particular concern in this case. These two positions

should not, in themselves, cause any issues for collective bargaining or create any industrial instability.

vi. Broader, More Inclusive Bargaining Unit

[68] Again, this is not a particular concern in this case as the original SGEU unit was an all employee unit and the SPFA unit was a carve out from that unit.

[69] There are two factors in the Ontario analysis which are not, the Board believes, applicable in this case. They are the factors of *safety and employer preference*. In the construction sector from which the factors were adopted, safety may well be an issue. That is not the case here.

[70] Nor will the Board give consideration to the Employer's stated preference for the positions to be placed in the SGEU unit. The determination of an appropriate unit of employees for collective bargaining has always been one of the primary responsibilities of this Board. That responsibility cannot be delegated to employers to choose what unit a particular employee or group of employees is to be represented.

[71] For the above Reasons, the Board concludes that the positions of Student Relations Coordinator should be placed within the SGEU bargaining unit. An appropriate Order will accompany these Reasons.

[72] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this 7th day of **December, 2017**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson