



SASKATCHEWAN POLYTECHNIC, Applicant v. SASKATCHEWAN GOVERNEMENT and GENERAL EMPLOYEES' UNION, and SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Respondents

LRB File No. 208-17; May 18 , 2018

Chairperson, Kenneth G. Love Q.C.; Members: Aina Kagis and Laura Sommervill

For the Applicant:

Paul L. Clemens

For the Respondent SGEU:

Jana Stettner (watching brief)

For the Respondent SPFA

Gordon Hamilton

Exclusion from bargaining unit – Applicant applies to the Board to have new a position excluded from bargaining unit – Applicant argues that positions will have managerial responsibilities or will have access to confidential information used in strategic business planning.

Material Change in Circumstances required to be shown for amendment – Board discusses rationale for requirement to show material change, which is to avoid continuous review of previous decisions.

Necessity for amendment – Material change is “one step” towards the demonstration of the necessity for an amendment – Board has wide discretion to determine necessity for an amendment.

Management Exclusion – Board reviews facts in this case and determines that position does not have primary responsibility to exercise authority and perform functions that are of a managerial character

Confidentiality Exclusion – Board reviews facts and evidence in this case and determines that position does not have primary duties which include activities that are within the categories of confidentiality as set out in statutory definition.

Provisional Exclusion – Provisional exclusion only available when proposed job duties meet the statutory criteria for exclusion of positions.

REASONS FOR DECISION

Background:

[1] This is an application by Saskatchewan Polytechnic ("Sask. Poly") to amend its certification orders granting representational rights to the Saskatchewan Government and General Employees' Union ("SGEU") and the Saskatchewan Polytechnic Faculty Association ("SPFA"). In particular, Sask. Poly applied to have the newly created position of Manager, Indigenous Strategy (the "Manager") excluded from the bargaining unit of employees represented by SGEU and/or SPFA pursuant to section 6-1(1)(h) of *The Saskatchewan Employment Act* (the "SEA"). SGEU did not take a position with respect to the application insofar as its bargaining rights were concerned and did not file a reply. SGEU kept a watching brief at the hearing of the matter and did not call evidence or advance arguments to the Board. In the alternative, Sask. Poly requested that the Board make a provisional Order pursuant to section 6-195 of the SEA.

[2] SPFA opposed the application saying that the position constituted a replacement of an in-scope position, Aboriginal Coordinator. In their reply, the SPFA alleged that the incumbent would be laid off if she was not the successful candidate for the new position. They also pled that the proposed position duties were the same duties as were being performed by the current incumbent.

Facts:

[3] With the agreement of counsel for SPFA, Sask. Poly filed a joint document book in respect of the matters in dispute. We will refer to these documents, as necessary during the analysis portion of these reasons. In addition to these documents, SPFA also filed 3 documents. These documents will also be referred to, as necessary in these reasons.

[4] Sask. Poly provided evidence from 2 witnesses, Mr. Jason Seright and Ms. Sara Megan Worst.

Evidence of Jason Seright:

[5] Mr. Seright's testified regarding the proposed amendment as the Director of Indigenous Strategy. The Manager position would report directly to him. He testified that his

position was created 4 years ago in recognition of the importance of an indigenous strategy to Sask. Poly. He stated that there were about 4200 indigenous students enrolled at Sask. Poly. He testified that in the future, indigenous students would require more attention from the institution.

[6] Mr. Seright testified that he oversaw 16 employees in the Aboriginal support services division of Sask. Poly. In addition, there were elders who also assisted, as needed, in supporting aboriginal students at Sask. Poly. He provided an organizational chart showing the positions at each of the 4 locations in Saskatchewan at which Sask. Poly operates. He noted that there had been strong growth¹ in aboriginal student enrollment in the past 5 years. He noted that there would be a need for further support, going forward, at Sask. Poly to have indigenous support in all programs. In cross-examination, he also confirmed that the only proposed change to the organizational chart was to rename the position of Aboriginal Strategy Coordinator (the “Coordinator”) to be the Manager position.

[7] Mr. Seright referenced Sask. Poly’s strategic plan in support of his statements that indigenous inclusion was a high priority for Sask. Poly. He also referenced The Saskatchewan Polytechnic Indigenous Student Success Plan 2018-2023, in which he had taken a leading role to develop. While the plan was not finalized, he provided the Board (through the agreed book of documents) a preliminary copy of that plan. The proposed plan outlined 4 major goals as follows²:

- ***Belong*** – *how we will develop a warm, supportive and respectful campus, and build miyo wahkohtowin and authentic relationships with our indigenous students and their communities.*
- ***Welcome*** – *how we will help indigenous students navigate the transition to post-secondary and set them up for success at Saskatchewan Polytechnic.*
- ***Inspire*** – *how we will support our indigenous students while they are with us, encourage them to keep going in difficult times, and how we will learn from each other to continuously improve the student experience.*
- ***Empower*** – *how we will celebrate our indigenous students’ successes and build long-lasting relationships with our indigenous graduates.*

¹ He put a figure of 30% on that growth

² See page 13 of that plan

[8] Ms. Seright testified that the implementation of the plan, to meet these goals fell to himself and the current Coordinator. He espoused the view that the implementation of the plan would require a lot more work going forward. He also provided the Board with the Indigenous Strategy Balanced Scorecard which was utilized by Sask. Poly to track the success of its indigenous students. Its purpose, he testified, was to set goals for the indigenous student branch. He noted that it aligns with the strategic plan and what they should focus on for the next 3 years.

[9] Mr. Seright provided a copy of his current job description. He testified that about 2 years ago some consideration was given to creating a Vice-President level position with either a Director or Manager below that position. However, he testified that proved not to be feasible. He noted that with the growth in responsibility for his position, he found it difficult to delegate confidential information to in scope staff and as a result, he was required to handle such matters himself.

[10] He testified that the budget administered through him was principally wages, with some expenditure for marketing and communication. Mr. Seright testified that he and the Vice President, Strategy and Business Development directed the budget allocation. He noted that he was also responsible for staffing issues, including hiring, firing, and disciplining staff. He noted that whenever such an issue arose, he would be required to “parachute” in to the situation.

[11] Mr. Seright also testified concerning the current position of Coordinator. In his testimony, he noted that the position had been vacant for some time. He testified that the Coordinator was not meant to be a part of the management team, and the current incumbent did not fill the role as a part of that team. Nevertheless, the position was tasked with responsibility to implement the new indigenous strategy plan as well as the old strategic plan. He testified that the Coordinator had no responsibility for discipline decisions. He also testified that the Coordinator had limited or no access to confidential information regarding labour relations. In relation to strategic planning, the Coordinator had a little more involvement. He testified that he ran things past her as he did with advisors and other staff.

[12] Mr. Seright, in his testimony, also reviewed the proposed job description for the Manager. His rationale for the new position was that it was required because of the growth of the division. It had recently grown from 6 employees to 16 and that he was unable to effectively

deal with all of the management responsibilities himself. He needed someone who could hire, fire and deal with disciplinary issues as they arose. The position would also assist in the budget allocation process and would have sign off authority for expenses. In cross-examination, however, he was unable to advise as to why some to the approval process could not now be delegated, with limitations, to other staff members. He testified that he understood that only out of scope staff could approve expense submissions.

[13] In cross-examination, he agreed that his administrative assistant, an SGEU member had access to the Sask. Poly financial system for certain matters. However, he asserted that the Coordinator was unable to have access to that system.

[14] He also noted that the division had recently begun tracking data for coordinators and advisors and that it would be nice to have someone who had the time to dive into that data so that decisions could be made based upon analysis of that data.

[15] He testified in cross-examination that the Coordinator presently received and approved sick leave requests from other employees. However, the Coordinator does not have access to the proper system to allow her to adequately deal with such requests and is required to seek his assistance in getting those requests recorded in the proper system. He testified that he was aware that other supervisors throughout the Sask. Poly organization had access to those systems. He testified that he was not aware why the Coordinator did not have access to those same systems.

[16] In cross-examination, he testified that the terms of reference for the committee that developed the Indigenous Student Support Plan were modified to take the coordinator off that committee. She had been a member prior to the change. The coordinator, notwithstanding the change to the terms of reference for the committee, went to external meetings regarding: the creation of the Indigenous Student Support Plan and her being an in-scope employee wasn't an issue. He also testified that the Indigenous Student Support Plan does not engage any employee related issues.

[17] Mr. Seright testified that the coordinator had the ability to terminate the contractual relationship between Sask. Poly and one of their elder advisors. He noted that such appointments were not labour relations issues as they did not involve members of the bargaining unit. He also testified that he was aware of disciplinary action taken by the

coordinator as he had been advised of them by the coordinator. He testified that it was his expectation that they be dealt with by the coordinator.

[18] He testified that his goal in creating the new Manager position was to free up more time for him to concentrate on higher level activities such as applied research memorandums of understanding in food security and solar energy. He testified that it was essential that relationships established through those memoranda of understanding were dealt with through a higher level position within Sask. Poly. As an example, he noted that it would be disrespectful for a junior person in the organization, who has no ability to make a decision, to meet with the partners in these endeavors.

[19] He also testified that he had never had to terminate an employee during his time at Sask. Poly. He testified that he had started the process to terminate an employee, but never had to finish the process. He testified that during that process he consulted with the Human Resources Department and his Vice-President before beginning the process. He testified that he would never terminate anyone without input from human resources and his Vice-President.

Evidence of Sarah Wurst:

[20] Ms. Wurst is a human resources consultant for Sask. Poly. She has been employed with Sask. Poly for 1 ½ years. Her principal roles have been in labour relations, recruitment, discipline and performance management. She was involved in the creation of the new Manager position which she testified was to provide assistance to the Mr. Seright in doing his job as Director of Indigenous Strategy.

[21] In her testimony, Ms. Wurst discussed several of the provisions in the collective agreement regarding layoffs, discipline, suspension, and dismissal. She also testified that the authorities grid utilized by Sask. Poly did not speak to the ability to terminate or suspend an employee.

[22] Ms. Wurst was asked in examination in chief to advise the Board as to what aspects of the proposed job description, in her opinion, put the new position out of scope. She pointed to the second bullet point under the heading Administrative Management which reads as follows:

- *Develop and implement provincial consistent strategic and operational plans for the Indigenous centers that enact the vision and priorities of the Division of Indigenous Strategy.*

[23] However, she also acknowledged that this provision was in the job description when she took over the preparation of it and was not certain what it referenced. She also acknowledged that the Indigenous Strategy related to a plan to help indigenous student succeed while at Sask. Poly and did not have any connection to members of the bargaining unit.

[24] She also made reference to the provisions of the job description under the heading People Management. She conceded, however, that these functions could be and were being done by in scope supervisors in other areas of Sask. Poly. In particular this was noted when referencing section 23.1 of the collective bargaining agreement where she acknowledged that discipline, suspension and dismissal were often implemented by in-scope supervisors, but only acted upon with out-of-scope approval. This was also the case with hiring decisions where in-scope supervisors (department heads), with the assistance of the human resources department, conducted initial interviews of prospective candidates prior to their referral to an out of scope manager.

[25] Ms. Wurst also testified concerning access to two data bases within Sask. Poly, its BANNER data base and its FAST database. She testified that there were controls in place to limit access to these databases by in-scope supervisors.

Evidence of Warren White:

[26] Warren White is the President of the SPFA. He has held that position for 5 years. He testified about the organization of the workforce at Sask. Poly. Prior to his being elected as the President of SPFA, he was a Program Head in the welding and fabrication department of Sask. Poly. He stated that the Program Head position is the front line for management of the organization. He noted that these were in-scope positions which typically dealt with issues concerning finance, employee performance, recruitment. He testified that Program Heads have full access to budgetary information and had full authority to expend their

budget once approved. He provided a listing³ of typical budget lines managed by Program Heads in the Industrial area. These included:

<u>Expenditures</u>	<u>Revenue</u>
<i>Material Consumables</i>	<i>External Shop Sales</i>
<i>Apprenticeship Books/Materials</i>	<i>Auxiliary Services</i>
<i>Business Meeting/Catering</i>	<i>Tuition</i>
<i>Sask Poly Bookstore</i>	<i>Tuition International Students</i>
<i>Advertising Promotion – Program</i>	<i>Other Student Services</i>
<i>Advertising Promotion – Person</i>	<i>Capital Disposal</i>
<i>Admin Telephone</i>	<i>Scrap Steel Sales</i>
<i>Fees Subscriptions</i>	
<i>Professional Dues</i>	
<i>Sask Poly Printing</i>	
<i>Agency Services</i>	
<i>Equipment Rental</i>	
<i>Equipment Repair and maintenance</i>	
<i>Training and Professional Development</i>	
<i>Other Business Travel</i>	

[27] He testified that there is no pre-approval process for entering of time sheets, but they needed to be verified and confirmed at least annually. Program Heads had authority to review these time sheets and correct or amend them as necessary. Additionally, he noted that sick time, personal time off and other leaves are first recommended by the Program Head and then approved by the out of scope manager involved.

[28] He testified that Program Heads were the first people to know if there were performance management issues with respect to in-scope positions. Program Heads needed to be involved in performance improvement plans as they would be required to monitor them. He noted that Program Heads could be involved in imposing reprimands but, as set out in clause 23.1 of the collective bargaining agreement, they must be signed by an out-of-scope manager.

[29] In cross-examination, he agreed that the responsibility of Program Heads varies widely from one program to another. He also noted that the coordinator position was ill-defined from the beginning. The SPFA was shocked to find that the position was originally classified as a continuing education consultant position, which classification had only recently (1 week ago) been reclassified to an instructor position with a Program Head supplement in accordance with

³ Exhibit U-2

the collective bargaining agreement. He took the position that, proper authorities granted to the coordinator position, as a Program Head, would permit the position to fulfill all the job responsibilities set out in the Manager job description.

Evidence of Deanna Speidel:

[30] Ms. Speidel holds the current coordinator position in the Indigenous Strategy department. She began working in the coordinator position in August 2015.

[31] She testified that she had been involved in the selection of an Aboriginal Student Centre Coordinator in Regina. She sat as a part of the interview team and was involved in the selection process. In the case of the hiring of an Aboriginal Student Centre Coordinator in Moose Jaw, she was able to provide input to human resources regarding candidates and was involved in the selection process but was unavailable for the interview process.

[32] She testified that she was responsible to monitor absence requests from bargaining unit employees whom she supervised and to ensure that proper paper work was completed. She testified that she was also required to ensure monthly reporting is completed by bargaining unit employees under her supervision.

[33] She has not been given access to academic profiles which she needs to complete her responsibilities. She has requested access to that system, but has not been granted access and has not been provided an explanation as to why she is unable to access those profiles and must therefore gain access through the Director or through human resources.

[34] She testified that she has access to student information on BANNER at all 4 campuses. Previously her access had been limited to the Saskatoon campus only. She has no access to the FAST database and has been told that she cannot have access because she is not an out-of-scope employee.

[35] She testified that she has no access to budgetary approvals, including student bursaries. She testified that she could have emergency approval powers that required a 24 hour lead time.

[36] In respect to issues involving potential disciplinary action against bargaining unit staff members in Moose Jaw and Prince Albert, she described her role as being a record keeper.

[37] She reviewed the proposed Manager Job Description and described how her current role as coordinator performed most of the Accountabilities noted therein. Where she did not currently perform those accountabilities, she explained that it was either that no such accountability had been assigned to her or that she did not have access to financial reporting systems to perform that role.

[38] Ms. Speidel testified about a meeting that was held with herself, Mr. Seright, Ms. Wurst, Mr. Nelson, and Robyn Mauza, SPFA Campus Vice-President. After that meeting, Mr. Nelson provided a memo regarding the discussions and conclusions reached in the meeting. The purpose of the meeting, as described in Mr. Nelson's memo to the participants on June 22, 2016 was "seeking clarity with regard to Deanna Speidel's supervisory role in her position of Aboriginal Strategy Coordinator". The memo set out 3 conclusions from the meeting. These were:

- *Mr. Seright and Ms. Speidel sit down and achieve consensus on the details of her supervisory responsibilities;*
- *Ms. Speidel be provided with the necessary tools to perform the supervisory roles of her position i.e. access to Banner, Academic Profiles, Fast System, etc; and*
- *At the commencement of the academic year in September, Mr. Seright communicate with his staff and provide clarity as to Ms. Speidel's supervisory authority, as it relates to them.*

[39] Ms. Speidel testified that she had been working with the SPFA and human resources with respect to a stipend⁴ related to her supervisory responsibilities. She testified that she discussed this with Mr. Seright shortly after the meeting in June. She testified that Mr. Seright's response was that such a stipend would impact the department's budget and would take away from their programing responsibilities. She then contacted the SPFA and human resources.

[40] At a staff meeting in November of 2016, she was advised that the department would be expanded to include additional staff members, as described by Mr. Seright in his

⁴ This stipend was payable under the collective bargaining agreement to in scope supervisors

testimony. She was also advised that Sask. Poly intended to create the new Manager position, that her Coordinator position would be abolished and that anyone could apply for the new Manager position. After this meeting she sought clarification of her rights from SPFA.

[41] She also testified that she had recently⁵ been reclassified as an instructor and was provided a supervisory stipend in accordance with the collective agreement. At the date of the hearing there had been no announcement of this change and her supervisory responsibilities.

[42] She testified that if she was granted access to the BANNER staff module, it would allow her to cut out “waiting” time in not having to try to find time to access the information through Mr. Seright. She would also be able to answer questions regarding budget allocations that she is currently unable to access.

[43]

Relevant statutory provision:

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

(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:

(I) labour relations;

(II) business strategic planning;

(III) policy advice;

(IV) budget implementation or planning;

...

6-105(1) On an application made for the purposes of clause 6-104(2)(i), the board may make

⁵ Within a week of the hearing date which was January 10th and 11th, 2018.

a provisional determination before the person who is the subject of the application actually performs the duties of the position in question.

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

Sask. Poly's arguments:

[44] Sask. Poly acknowledged that it bore the onus of proof to show firstly that there was a material change which necessitated the amendment to the bargaining unit description granted by this Board. Secondly, Sask. Poly acknowledged the onus to show that the proposed position fell outside the definition of employee in section 6-1(1)(h) of the *SEA*.

[45] It pointed to the following as proof of a material change in circumstances which would justify the amendment:

1. The in-scope employee complement has increased from five (5) to thirteen (13) and this increase requires an out-of-scope manager.
2. There is a need for additional resources to permit the Director to delegate managerial and confidential functions so that he can focus on higher level strategy, policy planning and budget allocation functions of his job.
3. That Sask. Poly's focus on aboriginal student recruitment and training would entail increased funding and additional efforts to meet the changing demographic of the indigenous population. The department also anticipated increased staff growth. It argued that there was a real human resources gap that needed to be addressed.

[46] Sask. Poly argued that the Manager position could be excluded from the bargaining unit under either subsection (A) or (B) of section 6-1(1)(h). Alternatively, Sask. Poly argued that the position should be excluded provisionally under section 6-105 of the *SEA*.

SPFA's arguments:

[47] SPFA argued that Sask. Poly had not demonstrated a material change sufficient to justify the bargaining unit Order being amended. It argued that the new position was

essentially the same position as the old coordinator position and performs the same duties and responsibilities which are already being performed by the coordinator with only a minor tweaking". SFPA concurred with Sask. Poly that the onus of proof fell to Sask. Poly with respect to both the material change question and the amendment itself.

[48] SPFA argued that the proposed Manager position did not satisfy either of the exceptions to the definition of "employee" as found in section 6-1(1)(h) of the *SEA*. Nor, it argued should the Board make a provisional determination pursuant to section 6-105.

Analysis:

[49] In the context of this application, the Board will need to examine 4 issues. The first issue, which is the onus of proof, is agreed between the parties as being on Sask. Poly. The second is whether Sask. Poly has demonstrated a material change which justifies the necessity for the amendment. The third is, if the amendment is necessary, whether the proposed position falls outside the definition of employee in section 6-1(1)(h) of the *SEA*. Finally, as the position is not occupied, whether or not the Board should exercise its authority under section 6-105 to make a provisional determination regarding the position

[50] In a recent decision⁶ involving Sask. Poly the Board reviewed its jurisprudence with respect to applications for amendment involving new positions which Sask. Poly wished to create as out-of-scope positions. This decision resolves several of the issues raised in this appeal.

Has Sask. Poly demonstrated a material change?

[51] At paragraphs [15] – [17], of the *Saskatchewan Polytechnic v. SGEU* decision, the Board confirmed its jurisprudence with respect to the need to show a material change. It said:

[15] The Board has adopted the requirement that there be a material change demonstrated whenever an application is made to amend the

⁶ *Saskatchewan Polytechnic v. Saskatchewan Government and General Employees' Union* 2018 CanLII 38248 (SK LRB), LRB File No. 149-17

certification Order for a unit of employees. The rationale for the requirement was described by the Board in SIAST v. SGEU⁷ at para. [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 are 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.

[16] *The need to demonstrate a material change was introduced by the Board as a check against recurrent applications seeking to have the Board review its scope determination. In Re: Federated Co-operatives⁸, former Chairperson Sherstobitoff said:*

It can be inferred that some persons might make applications for amendment in the hope that a new panel will view the matter in a different light. The Board wishes to make it clear that it will not sit in appeal on previous decisions of the board and it therefore determines in this application, as in all applications for amendment, the applicant must show a material change in circumstances before and [sic] amendment will be granted.

[17] *The requirement to demonstrate a material change is, as described by Abella J. in Theratechnologies Inc. v. 121851 Canada Inc.⁹, “more than a speed bump”, and the Board must undertake a reasoned consideration of the evidence to ensure that the action has some merit.*

[52] We are satisfied in this case that Sask. Poly has provided sufficient evidence to support the requirement of showing a material change. The evidence was clear that Sask. Poly was embarking on a strategy to enable and enhance both enrollment by indigenous students as well as mechanisms to insure their success at the institution. This made it necessary to make significant changes in the organization to support this mission. By consolidation, the Department had expanded to 13 or 16 employees and the role of the coordinator had been enhanced. Additionally, it was clear that further changes were contemplated as the goal of enhanced participation by indigenous students was realized. This enhanced focus on

⁷ 2012 CanLII 65539 (SK LRB), LRB File No. 106-12

⁸ [1978] July Sask. Labour Rep. 45, LRB File No. 502-77

⁹ 2015 SCC 18 (CanLII)

indigenous students was not something contemplated by the parties or the Board when the certification Order was originally granted.

Is the proposed amendment necessary?

[53] Again, the Board's comments from the *Saskatchewan Polytechnic v. SGEU* decision are in helpful in this case. At paragraphs [29] & [30] of that decision, the Board reviewed the necessity for the requested amendment. In that decision, the Board said;

[29] The conclusion reached by the Board in Health Sciences Association of Saskatchewan v. Unifor, Local 609¹⁰ is appropriate here as well. At paragraphs [30] & [31], the Board said:

As noted in Battlefords Co-operative, the demonstration of a material change is "one step along the road to an applicant demonstrating the necessity for an amendment". As noted in paragraph 98 of that decision, the Board has wide discretion to determine if an amendment is necessary. The test to determine the necessity of an amendment is an objective test.

Necessity may be shown by effluxion of time from the date of the Order, changed circumstances or material change, changes in business organization or mandate, or other facts which tend to show that the amendment is required. The creation of a new position which was not dealt with by the Board at the time of certification would, in our opinion, necessitate an amendment to the order if that position is determined by the Board to fall outside the definition of "employee". That is particularly true when, as here, there has been a change in the definition by the legislature since the certification Order was made.

[30] Accordingly, given that the definition of "employee" has changed, the Board finds the amendments can be categorized as necessary.

[54] SPFA argued that the creation of the new position was not necessary because the current coordinator position performed all of the duties¹¹ outlined in the job description for the manager position. Furthermore they argued, the current coordinator was handicapped by Sask. Poly as a result of her not having sufficient tools to do the job by reason of her not (a)

¹⁰ 2015 CanLII 43776 (SK LRB), LRB File No. 003-15

¹¹ With the exception of those duties where appropriate access to data systems was not accorded to the coordinator.

having been recognized as a supervisory employee¹² and by reason of her not having been granted access to the necessary systems and databases to perform the job she was supposed to do.

[55] In *Health Sciences Association of Saskatchewan v. Unifor*¹³, the Board confirmed that it has a wide discretion to determine if an amendment is necessary. Furthermore, it confirmed that the Board will use an objective test to determine if an amendment is necessary.

[56] While there is merit in the arguments made by SPFA, there is a logistical “chicken and egg” situation here. If the position falls outside the definition of “employee”, that would necessitate an amendment due to the fact that positions, when created, by default, fall within the bargaining unit.¹⁴ On the other hand, if the positions do fall within the definition of “employee”, the issue of an amendment becomes moot.

[57] Accordingly, for the purposes of the question as to whether the Manager position falls within or without the definition of “employee”, we will presume that the necessity for the amendment has been demonstrated.

Do the proposed duties for the Manager, Aboriginal Strategy place it outside the definition of “employee” is section 6-1(1)(h) of the SEA?

[58] For this position to be excluded from the bargaining unit, it needs to fall within the managerial or confidential exclusions contained within the definition of employee in s. 6-1(1)(h)(i) of the SEA. That definition is somewhat different from the exclusion definition in the former *Trade Union Act*. That difference was also described by the Board in *Health Sciences Association of Saskatchewan v. Unifor, Local 609* at paragraphs [34] & [35]:

[34] *To be excluded from the bargaining unit, the position must fall within the exceptions set out in subsections (A) and (B) of section 6-1(h)(i) of the SEA. Those exclusions, for ease of reference are: (emphasis added)*

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

*(B) a person whose **primary duties include** activities that are of a confidential nature in relation to any of the following and that have a direct*

¹² Something which was corrected just prior to the hearing of the matter

¹³ 2015 CanLII 43776 (SK LRB), LRB File No. 003-15 at paras [30] & [31].

¹⁴ See *RWDSU v. Battlefords and District Cooperative Limited* 2015 CanLII 19983 (SK LRB) at paragraph [58] et seq.

impact on the bargaining unit the person would be included in as an employee but for this paragraph:

- (I) labour relations;*
- (II) business strategic advice;*
- (III) policy advice;*
- (IV) budget implementation or planning.*

[35] *This definition is markedly different from the previous definition of “employee” contained in section 2(f) of The Trade Union Act. Again, for ease of reference, exclusions in that section read as follows: (emphasis added)*

- (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;*

[59] Under the *Trade Union Act*, it was necessary that the employee “actually exercise authority” in reference to the managerial exception, whereas under the *SEA*, the responsibility must be a “primary” responsibility.

[60] With respect to the confidentiality exception, the requirement under *The Trade Union Act* was to “regularly act”, whereas now the requirement is to have “primary duties” which include the 4 areas set out in subclauses (B)(I) to (IV).

[61] SPFA led evidence with respect to the duties which the coordinator performed. This evidence was in relation to Job Information Questionnaire that was completed in 2015. The Board is required to look to the position as it is contemplated and the duties proposed to be assigned. Former position information, while of historical interest, has limited value in evaluating the current situation and the new definitions found in the *SEA*.

[62] Sask. Poly provided the Board with a draft job description for the new Manager position. It is in the context of these proposed job descriptions that the Board must determine if the positions, as proposed, would bring the employee within the exceptions to the definition of “employee”.

Should the position be excluded under the Managerial exception?

[63] Both parties provided evidence with respect to the proposed job description. Ms. Wurst testified that she prepared the final job description based upon an earlier draft prepared by another Sask. Poly human resources employee. When asked which of the proposed duties

in the proposed job description qualified the position to be out of scope, she pointed to two aspects of the job description. The first of these was the second bullet point under the heading Administrative Management as outlined in paragraph [22] above. That bullet point reads as follows:

- *Develop and implement provincial consistent strategic and operational plans for the Indigenous centers that enact the vision and priorities of the Division of Indigenous Strategy.*

[64] In cross-examination, Ms. Wurst acknowledged that she had not developed this bullet point and did not fully understand what it intended to capture. Ms. Speidel testified that this was already one of her responsibilities.

[65] The second item noted by Ms. Wurst was the heading People Management. Among these points are several points regarding ensuring staff performance. Again, Ms. Speidel testified that she already did this performance management. Mr. Seright testified that the department has no formal performance review process.

[66] The responsibilities outlined in the proposed Manager job description are consistent with and could be undertaken by an in-scope manager. Mr. Seright testified that he expected the Manager to be engaged in final decisions regarding hiring, firing and discipline of staff. However, none of these duties are set forward in the proposed job description. Even if they were, however, those duties would have to be the “primary” responsibility of this position.

[67] We cannot agree with Sask. Poly that this position falls outside of the definition of employee in section 6-1(1)(h)(i)(A).

Should the position be excluded under the confidentiality exception in 6-1(1)(h)(B)?

[68] In order to be excluded under this heading, the position must have primary duties which include activities of a confidential nature in respect to:

- (I) *labour relations;*
- (II) *business strategic advice;*
- (III) *policy advice;*
- (IV) *budget implementation or planning.*

[69] Ms. Wurst was unable to identify anything in the job description that would permit us to exclude this position under this heading. While some reference was made to this position

having a role to play in first level grievances, there is nothing in the proposed job description to support this. Nor does this position play any role in providing business strategic advice. The closest reference to this was the suggestion by Mr. Seright that the position should be analyzing student data to determine trends which could have an impact on programing. Again, however, there is nothing in the proposed job description to support this suggestion.

[70] Nor does the job description have any reference to provision of policy advice as a primary duty of the position. As Mr. Seright testified, the purpose of the creation of the new position was to free him up for higher level activities, which, presumably involve policy creation and implementation.

[71] With respect to budget implementation or planning, again, there is nothing in the job description to support this activity as a primary duty. Mr. White testified that it was the responsibility of most in-scope supervisors to monitor and approve budgetary expenditures when the budget had been finalized by Sask. Poly. It appears that Ms. Speidel could, given appropriate system access, have performed this duty as well.

[72] We are, therefore, unable to conclude that this position should be excluded from the bargaining unit.

Is an Order under section 6-105 appropriate?

[73] To be excluded provisionally under section 6-105 of the *SEA*, the Board must be satisfied that the duties of the position fall within one of the exclusions discussed above. As the Board has determined that they do not, we are unable to even provisionally exclude the position as it is not properly excluded from the bargaining unit.

Decision:

[74] The application for amendment is denied. An appropriate Order will accompany these reasons.

DATED at Regina, Saskatchewan, this 18th day of May, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson