



SASKATCHEWAN MUTUAL INSURANCE COMPANY, Applicant v UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Respondent

LRB File No. 004-20; October 14, 2020

Vice-Chairperson, Barbara Mysko; Board Members: John McCormick and Brian Barber

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Saskatchewan Mutual Insurance:

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Forestry, Rubber, Manufacturing, Energy,

Allied Industrial and Service Workers International

Union (United Steelworkers):

Heather M. Jensen

Application to Amend Certification Order – Exclusion of Executive Assistant – New Position – Material Change in Circumstances and Necessity – Provisional Exclusion from Bargaining Unit Granted.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On January 13, 2020, Saskatchewan Mutual Insurance [Employer] filed an application to amend a certification order with the Board. The Employer applies to exclude from the scope of the bargaining unit a position entitled Executive Assistant [EA]. Alternatively, the Employer seeks a provisional order excluding the EA. The Union objects to the exclusion. The Union says that there has been no material change in circumstances that justifies the intervention of the Board, and even if there had been, the position does not satisfy the requirements for a confidentiality exclusion pursuant subclause 6-1(1)(h)(i)(B) of the Act.

[2] The employees in the bargaining unit are represented by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union [Union], pursuant to a certification order, dated November 4, 1970, and a subsequent Notice of Transfer, dated June 23, 1981.

[3] On July 13, 2020, a hearing on this Application was held via Webex pursuant to the Board's existing Covid-19 guidelines.

Arguments:

[4] The following is a brief summary of the parties' arguments.

The Employer:

[5] Although the Employer has attempted to negotiate, the Union does not agree with the Employer's proposals and has signaled that the Employer should bring this Application to have the matter determined. The duty to bargain does not extend to a duty to agree. The EA is a new position with significant duties involving confidential information, and as such, it is properly excluded from the statutory definition of employee on the basis of confidentiality. The Employer has operated for a number of years without the benefit of an out-of-scope confidential capacity role to assist the Executive management team and Board of Directors with administrative functions. The absence of this role is impeding the Executive team's effectiveness on important projects.

The Union:

[6] Although the Employer advised the Union of its intention to create an out-of-scope EA position, it did not satisfy its duty to bargain, and therefore failed to follow the necessary steps prior to bringing this Application. An email exchange and informal conversation do not constitute bargaining in good faith. Further, to the extent that the Board accepts that the EA's duties include such duties as providing input or opinions on strategic decision-making, the Board must also find that the Employer failed to disclose this information and, on that basis, failed to engage in good faith bargaining.

[7] Even if the Employer followed the appropriate steps, it has not satisfied its onus to demonstrate that there has been a material change in circumstances or that the amendment to the certification order is necessary. The EA performs clerical duties. It is an employee under the Act. Although the position has access to confidential information, mere access is insufficient to justify an exclusion from the statutory definition of employee. Furthermore, the EA's duties do not have a direct impact on the bargaining unit.

[8] The workplace already has a disproportionate number of out-of-scope positions. The exclusion of the EA would aggravate this imbalance and contribute to the erosion of the bargaining unit's strength.

Evidence:

[9] Pam Gaddess [Gaddess], Chad Schinmann [Schinmann], and Darrin Kruger [Kruger] were called as witnesses at the hearing of this matter. Gaddess is the Vice President, Human Resources & Chief Compliance Officer [VP, HR] for the Employer. She spoke about the background to the position, the job description, the organizational chart, and the communications with the Union. Schinmann and Kruger testified on behalf of the Union, describing the Union's perspective on the position's duties and recounting the communications preceding this Application.

[10] To begin, in or around August 2019, the Employer created the EA position. The position has not yet been posted or filled. It is intended to report to the President & CEO and work primarily with the Executive team and the Board of Directors.

[11] The organizational chart discloses no out-of-scope Executive level administrative positions. There is an in-scope Administrative Assistant who reports to the Marketing Supervisor, and administrative staff who report to the VP, HR. According to Gaddess, there are approximately 50 in-scope employees and 25 out-of-scope personnel in the workplace.

[12] Gaddess provided some background to creation of the EA position. In May 2003, the Employer created a position entitled the Executive Assistant [Former EA] which provided administrative and clerical support. The Former EA was treated as out-of-scope under the exclusion for "the Private Secretaries for the above positions", being the President & CEO, Vice President Administration, Corporate Secretary, and Treasurer and Underwriting Manager, as set out in the collective agreement. The person working in that role retired in or around 2007, and the position was not subsequently filled.

[13] Preparing for the retirement of the Former EA, in 2006 the Employer created an Office Manager position that assumed the duties of the Former EA, and was treated as out-of-scope. Gaddess held this position. This position reported to the Executive Vice President. According to the position description it was "[r]esponsible for organizing and coordinating all of the administrative activities that facilitate the smooth running of an office". The Office Manager had three direct reports.

[14] An organizational restructuring took place in 2008. The Office Manager became the Office & HR Manager, reporting to the President & CEO. Gaddess held this position as well. According to the position description, the position took on the management of "all human resource activities"

and the provision of “human resource expertise, guidance and advice”. A new position, Secretary II, took on some of Gaddess’ clerical responsibilities and was kept in-scope, and was later renamed Administrative Assistant.

[15] According to Gaddess, during the round of bargaining that resulted in the 2008 collective agreement, the exclusion for private secretaries was removed and the exclusion of the Office & HR Manager was added. The Former EA position was abolished. There was no one left in a private secretary role, and the parties had reached no understanding about how the private secretaries would be addressed on an ongoing basis.

[16] Eventually the Office & HR Manager position was abolished and all of the associated duties flowed to the VP, HR, the position currently held by Gaddess.

[17] According to the job description for the EA position,

The Executive Assistant provides functional and administrative support to the Executive Management Team and the Board of Directors. The Executive Assistant learns the role of the President and of others in the Executive Management Team in order to help them complete their tasks effectively and efficiently. Among these tasks are handling confidential matters relating to the Board of Directors and employee relations; budgets and financial matters; and business and strategic planning for SMI and the Board of Directors. The Executive Assistant also schedules internal and external meetings and proofreads documents for accuracy.

[18] The job description lists the “major responsibilities” of the position, including: to establish and maintain files and records systems involving Executive Management; to coordinate a variety of highly confidential administrative tasks and special projects assigned by the CEO; to take notes at Executive team meetings; to maintain confidential employee files; and to “provide administrative support in confidential labour relations matters, including collective bargaining, grievances and discipline”. It also lists the core competencies of the position, including: leadership, strategic thinking/problem-solving, decision-making, and industry knowledge and business acumen.

[19] Gaddess explained that the EA will work with the President, the Executive team, and the Board of Directors. The EA will have consistent access to all Board material, all employee files, strategic planning minutes and notes, and the SMI budget.

[20] Currently, the Corporate Secretary does most of the Board package preparation. The EA will perform Board package preparation, draft minutes of Board meetings based on notes taken

by the Corporate Secretary, and attend those meetings to take notes in the Corporate Secretary's absence.

[21] The EA will be involved in the collective bargaining process, including by scheduling meetings, preparing agendas, preparing labour cost data, performing research, drafting proposals, and by attending and taking notes at collective bargaining meetings.

[22] The EA will be involved in the recruitment and selection process, helping draft job advertisements and position descriptions, scheduling interviews, taking notes at interviews, and conducting assessments and reference checks. The EA will be involved with employee onboarding and orientation, with drafting offers of employment, and with disciplinary matters, including conducting research, attending investigation and termination meetings, and drafting termination letters. The EA will make arrangements to facilitate last chance agreements and matters arising from terminations.

[23] Gaddess spoke to the EA's involvement with strategic planning and policy advice. According to Gaddess, the EA will be involved in gathering information, doing research, preparing reports, attending strategic planning sessions, taking notes and minutes at those meetings, documenting takeaways, and assisting the President to ensure that those takeaways are being addressed.

[24] Gaddess also spoke to the EA's responsibility to "[c]oordinate highly confidential administrative tasks and special projects assigned by the CEO". The EA will schedule meetings with outside consultants, and be involved in discussions on corporate restructuring and changes to the employee pension plan. According to Gaddess, the EA will be asked to provide opinions and advice based on initial research.

[25] As for budget planning responsibilities, the EA will gather cost information and will assist the President with the monitoring of the overall budget.

[26] The majority of the EA's duties will flow from tasks that Gaddess is currently performing. The EA will take on all of Gaddess' labour relations activities. The absence of an Executive level out-of-scope confidentiality capacity role is impacting Gaddess' ability to work at a strategic level. Without this support, Gaddess has had to put major projects on the backburner. The regulatory environment is complex and time-consuming. Some projects have been outstanding for several years.

[27] The EA will also assume responsibility for tasks currently performed by each member of the Executive team.

[28] The Board received evidence on the nature and extent of the parties' communications prior to the filing of this Application. On August 30, 2019, Gaddess met with Schinmann (the Local's unit Chair), and emailed him the EA job description and a memo outlining the rational for excluding the EA from the bargaining unit. The memo stated:

The Executive Assistant would provide functional and administrative support to the Executive Management Team in order to help them complete their tasks effectively and efficiently. Among these tasks are scheduling internal and external meetings, proofreading documents for accuracy, and handling confidential matters, including confidential labour relations matters. This role will assist in the hiring process, freeing up time for Pam and assist Kerri with the Corporate Secretary role.

...

We feel the position is necessary because of the evolving nature of SMI's workplace. We have gone without an excluded confidential administrative position for several years and it has gotten to the point where it is hampering operations and making ineffective use of management's time.

...

[29] On September 10, 2019, Schinmann wrote back expressing the Union's disagreement with the exclusion of the EA position. Schinmann conveyed the Union's willingness to meet and negotiate the creation of the position.

[30] On September 13, 2019, Gaddess sent another email to Schinmann, with a copy to Kruger, providing additional background on the creation of the position. That email provided the additional information:

The communication provided to you August 30, 2019 states we are of the opinion that the Executive Assistant position is an out-of-scope position due to the fact the responsibilities include activities that are of a confidential nature. I would like to expand on this and clarify that the confidential nature of such responsibilities includes things such as (not limited to):

- *information in relation to employee and labour relations*
- *Board package preparation*
- *potentially attending Board meetings for purpose of minute taking in the absence of Corporate Secretary*
- *involvement in meetings and handling of material relating to overall business and strategic planning*

We would appreciate if you take the time to give this further review and consideration. If you feel there would be benefit in meeting to discuss, please let me know and we can arrange a time, otherwise a response by Friday, September 20th would be appreciated.

[31] According to Gaddess, the parties did not discuss the issue further as it appeared that they were both entrenched. Kruger found the relative lack of in-person communication impersonal and challenging.

[32] On September 27, Schinmann sent an email to Gaddess as follows:

Here's a quick note following up on meeting earlier today. It continues to be the Union's position that the Executive Assistant be an in-scope position. While it is understood that this position would be privy to confidential information, the nature of the role is one of clerical, administrative support. The union's position is that the nature of the work, not the content, should determine the scope in which it lies. The confidential information the Executive Assistant would have access to would not be dissimilar to the confidential information already accessible to current in-scope employees.

With this in mind, the union requests that the creation of the Executive Assistant fall within the scope of the collective bargaining agreement and be an in-scope position.

[33] Although Schinmann's email refers to a meeting, neither Schinmann nor Gaddess suggested that said meeting involved negotiations over this position. Gaddess replied to the email reiterating the Employer's position and inviting a response. A few weeks later, Schinmann sent a holding email to Gaddess explaining that he was hoping to reply within 2-3 days and "hopefully be able to resolve this". Via email on October 29, Schinmann proposed a "test drive" of the position in-scope for a period of 12 months. Gaddess replied on October 31:

To "test drive" the Executive Assistant position for a period of 12 months as "in-scope" would not allow an opportunity to properly assess the actual scope of work, as we would not be able to give the incumbent the appropriate duties if it is within the scope of the bargaining unit....

[34] Instead, Gaddess suggested that the Employer would be agreeable to a 12-month trial out-of-scope. Schinmann replied:

Unfortunately, the Union is not in favour of this position being tried for 12 months as an out of scope position. I understand your desire to move this process along. If that involves filing an application with the Labour Relations to have the position excluded from the bargaining unit, then the Union will proceed with the available recourse provided by this process.

[35] The current collective agreement expired on May 31, 2020. Gaddess noted that the parties were beginning their next round of collective bargaining this Summer.

Applicable Statutory Provisions:

[36] The following provisions of the Act are applicable:

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

...
(h) **“employee”** means:

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

...
(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;*

...
6-4(1) *Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*

(2) *No employee shall unreasonably be denied membership in a union.*

...
6-103(1) *Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) *Without limiting the generality of subsection (1), the board may do all or any of the following:*

(a) *conduct any investigation, inquiry or hearing that the board considers appropriate;*

(b) *make orders requiring compliance with:*

- (i) *this Part;*
- (ii) *any regulations made pursuant to this Part; or*
- (iii) *any board decision respecting any matter before the board;*

(c) *make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*

(d) *make an interim order or decision pending the making of a final order or decision.*

...
6-104(2) *In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

(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;*

...

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

Analysis:

[37] The Union says, first, that the EA is not a new position, and therefore, the Board should respect the parties' decision to remove the exclusion for private secretaries from the scope clause of the collective agreement. Alternatively, if the Board finds that it is a new position, the Employer has failed to follow the steps required in relation to a newly created position.

[38] A newly created position in an all-employee bargaining unit remains within the bargaining unit unless excluded by an order of the Board or by agreement of the parties. The Employer bears the onus to establish that a newly created position is out-of-scope of an all-employee bargaining unit.

[39] In outlining the process to be followed, the Board has repeatedly relied upon *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB), at paragraph 22:

*The required steps were clearly set out by the Board in its decision in *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2006 CanLII 62948 (SK LRB) [Donovel]. At paragraph 28, the Board outlined those steps as follows:*

- 1. Notify the certified union of the proposed new position;*
- 2. If there is agreement on the assignment of the new position, then no further action is required unless the parties wish to update the certification order to include or exclude the positions in question;*
- 3. If agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined...; and*
- 4. If the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position.*

[citation removed]

[40] An employer is not entitled to act unilaterally by excluding positions. The Board confirmed as much in *Donovel*:

[29] An employer is not entitled to act unilaterally by assigning the position as out-of-scope of the bargaining unit without obtaining the agreement of the union or, failing such agreement, without obtaining an order from the Board, or the employer will be in violation of its obligation to bargain collectively under s. 11(1)(c) of the Act[.]

[citations omitted]

[41] The Union argues that the Employer has failed to negotiate the exclusion of this position, contrary to the direction provided by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*, 2015 CanLII 19983 (Sask LRB) [*Battlefords*]:

[85] The duty to bargain collectively requires that the parties meet and bargain in good faith, making a genuine attempt to find a resolve to their disagreement over the status of this position. However, the duty to bargain collectively does not, as a corollary, require that the parties reach an agreement. They must only try to achieve a resolve to their disagreement.

[42] Taking into account the foregoing case law, the Board will next consider whether, assuming the EA is a newly created position, the Employer has followed the appropriate steps.

[43] First, a summary of the relevant evidence. The Employer notified the Union of the proposed EA position. Gaddess met with Schinmann, who was the Local's bargaining unit Chair, and provided him with the EA job description and a memo outlining the rational for excluding the position. Schinmann indicated the Union's disagreement with the proposed exclusion, and explained that the Union was amenable to meet and negotiate. Gaddess invited Schinmann to meet if he felt "there would be benefit in meeting to discuss". Gaddess and Schinmann continued to communicate by email. After a number of weeks, Schinmann proposed an alternative that, according to the Employer, was not a viable option. Gaddess provided a counter offer. Schinmann rejected the offer and expressed his understanding of the Employer's desire to move the process along.

[44] On the basis of the evidence, the Board has found that the Employer has satisfied its duty to bargain in good faith. The Employer prepared and provided information to the Union about the position, including the rational in relation to scope. The Employer made a genuine attempt to find a resolve to the disagreement over the status of this position. Although email was not ideal, the Employer signaled that it was willing to meet in person to discuss further. The Union did not insist

on meeting in person, but continued to communicate by email. The parties discussed and rejected alternative courses of action. The Employer provided reasons for maintaining its position.

[45] For the reasons expressed in the later section of these reasons, the Board does not find that the Employer has failed to satisfy its duty to disclose information in the course of negotiations, as argued by the Union.¹

[46] Next, the Board will consider whether the Employer has satisfied the remaining requirements to justify an amendment to the certification order.

[47] The Board's power to amend a certification order arises from section 6-104 of the Act:

6-104(2) *In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

. . .

(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;*

[48] As per *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2018 CanLII 38248 (SK LRB) [*Sask Polytechnic*], the Employer is required to demonstrate both that there has been a material change in circumstances and that the amendment of the certification order is necessary.

[49] The requirement to demonstrate a material change is a "check against recurrent applications seeking to have the Board review its scope determination". The creation of a new position may be sufficient to satisfy this requirement: *Saskatoon Public Library Board v CUPE*, 2019 CanLII 128791 (SK LRB) [*Saskatoon Public Library*], at paragraph 62. The Board will therefore assess whether the EA is a newly created position.

[50] The certification order lists as exclusions the private secretaries for certain positions. The evidence discloses that the parties treated the Former EA as a private secretary. The Former EA existed until that incumbent retired, and then the associated duties shifted to the then Office Manager, created in 2006. The Office Manager was later rolled into the Office & HR Manager. The Secretary II, which was later renamed Administrative Assistant, took on some of the

¹ See, para 67.

administrative duties. The Office & HR Manager no longer exists, but the Administrative Assistant does.

[51] The Board does not agree with the Union's argument that both the eliminated Former EA position and the existing EA position should necessarily be in-scope on the basis of the parties' agreement to remove the exclusion for private secretaries from the collective agreement. The collective agreement was concluded after the Former EA retired and a replacement position was created. At the time, there was no one left in a private secretary role. The 2008 collective agreement does not contemplate in its salary schedule an in-scope EA.

[52] Furthermore, over ten years has passed since the elimination of the Former EA position. The EA was created relatively recently. The Board has not previously considered the current EA position in the context of a scope determination. The EA is a new position. On this basis, the Employer has satisfied the requirement for a material change in circumstances.

[53] Having determined that the EA is a new position, the Board will now consider whether it is necessary to exclude the EA from the bargaining unit. A new position that does not meet the definition of employee satisfies the definition of "necessary": *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB) [*HSAS v Unifor*], at paragraph 31. The Employer says that the EA does not meet the definition of employee, on the basis of the confidentiality exclusion pursuant to subclause 6-1(1)(h)(i)(B) of the Act.

[54] In *Saskatoon Public Library*, the Board provided helpful guidance for assessing the confidentiality exclusion:

[70] In considering the confidentiality exclusion, the Board has an obligation to balance a number of important competing rights: the rights of individual employees to not be unnecessarily denied access to collective bargaining; the right of the Union to not have its collective strength weakened by an unnecessary reduction of the bargaining unit; and the right of the Employer to make rational and informed decisions regarding labour relations, business strategic planning, policy and budget implementation and planning, in an atmosphere of candour and confidence.

[55] It is a purpose of the confidentiality exclusion to ensure that the Employer has sufficient internal resources to permit it to make rational and informed decisions with respect to labour relations and collective bargaining, and to permit it to do so in an atmosphere of candour and confidence. The Board must consider whether the duties would create an insoluble conflict between the responsibilities which that person owes to the Employer and the interests of that person and his/her colleagues in the bargaining unit. Due to the potential to deny an individual

access to the benefits of collective bargaining and to erode the bargaining unit, such exclusions are made on as narrow a basis as possible.

[56] The Employer relied on a series of cases, decided pursuant to the previous legislation, that support the exclusion of a single position providing clerical and administrative support of a confidential nature. Throughout these cases, the Board recognized that an employer who is obligated to engage in a collective bargaining relationship will likely require some administrative or clerical support.

[57] The Board in *CUPE, Local 3737 v Town of Moosomin*, [1994] 2nd Quarter Sask Labour Rep 92, at page 95, observed that it is “sensitive to the implications of the introduction of a collective bargaining regime for the administrative system of an employer”. Along the same lines, in *Royal Canadian Legion Regina (Sask) No 1 Branch v RWDSU, Local No 454*, [1988] SLRBD No 20, the Board concluded that an assistant office manager should be excluded, being the only clerical person employed by the employer:

The evidence indicated that although the employer's labour relations have been relatively harmonious, the assistant office manager would be solely responsible for typing all reports, memorandum, minutes of Director's meetings and correspondence that concerns her employer's industrial relations. She will be the only clerical person employed by the employer and will regularly provide clerical services with respect to her employer's industrial relations, both during the negotiation of the collective agreement and during its subsequent administration. These duties would not occupy the majority of her time but they would be genuine and of significance to her employer.

[58] In *Hillcrest Farms Ltd. v G.S.U.*, [1997] SLRBD No 50, the Board found that “the exclusion of a single position which would provide clerical and administrative support of a confidential nature” was justified. In coming to this determination, the Board reviewed the related cases, including *Canadian Union of Public Employees v City of Prince Albert*, [1996] Sask LRBR 680, LRB File No. 095-96, in which the Board made the following comment at page 683:

As the representatives of the Union pointed out, the Board has not thought it sufficient to justify the exclusion of a position that the employee be engaged in handling material the Employer considers confidential, as employees in many different kinds of positions are entrusted with sensitive information, and there is an expectation that they will conduct themselves in a discreet fashion. As the passage just quoted indicates, the exclusion which is contemplated in s. 2(f)(i) of the Act is aimed at preventing any conflict of interest which might arise for an employee who regularly processes or handles information of a sensitive nature which is connected with the industrial relations of the employer.

[59] Similarly, the Board observed of a confidential secretary/accounting clerk, in *CUPE, Local 2752 v Town of Unity*, LRB File No 041-88 (July 7, 1998) that,

The confidential secretary/accounting clerk prepares confidential reports for various committees of the town council. Those reports have regularly included labour relations matters, including grievances, and will undoubtedly include matters pertaining to collective bargaining proposals when the current collective bargaining agreement between the parties expires. She has access to all personnel files, both in and out of scope. She takes or transcribes the minutes of all committee meetings, many of which are held in-camera. No out-of-scope person is capable of typing those documents.

[60] More recently, in *Saskatchewan Human Rights Commission v CUPE, Local 1871*, 2011 CanLII 81711, the Board concluded that a position entitled Commission Secretary should be excluded from the bargaining unit:

[86] In normal circumstances, an employer would have the ability to have one confidential secretary excluded from the bargaining unit to act as a support for the industrial relations of the employer. That was recognized by the Board in its 1989 order when the position of "Administrative Assistant" was excluded from the bargaining unit. That position morphed into the dual positions of Human Resource Manager and Manager, Finance and Administration dealt with above. However, with the transformation of the Administrative Assistant position into those two positions, the benefit of having someone to assist in the administration of the organization who is able to deal with confidential matters involving the industrial relations of the Employer was lost. It is therefore, we believe, appropriate to restore this administrative support to the Employer as originally intended by the Board.

[61] All of the foregoing cases were decided pursuant to *The Trade Union Act*.

[62] This issue has been addressed to a lesser extent under the current legislation. However, the Board in *Battlefords* considered the proposed exclusions under the Act. There, the Board saw fit to exclude an Executive Assistant, for the following reasons:

142) Insofar as the Executive Assistant position is concerned, that position is expected to work as a "Confidential Secretary for Senior Management, which position is already excluded from the bargaining unit. Such positions have long been determined[49] to be excluded by the Board under the confidentiality exclusion. In Hillcrest, the Board said at para. 29:

In the case of employees excluded because they act in a confidential capacity, on the other hand, the purpose of the exclusion is to reinforce the collective bargaining process by providing an employer with administrative and clerical resources which will permit decisions to be made about bargaining or about the terms and conditions of employment of employees in an atmosphere of candor and confidence.

143) The current Board Order makes provision for someone to assist management confidentially in respect of labour relations matters. The exclusion of this position is accordingly warranted in substitution for the Confidential Secretary position which is currently excluded.

[63] In *Battlefords*, the Board was guided by the purpose of ensuring that the Employer had sufficient internal resources to permit it to make rational and informed decisions with respect to labour relations and collective bargaining, and to permit it to do so in an atmosphere of candour and confidence. The Board, here, must seek to strike a balance among that purpose, the employees' rights to not be unnecessarily denied access to collective bargaining, and the Union's right to not have its collective bargaining strength weakened by an unnecessary reduction of the bargaining unit.

[64] Next, the Board will turn to the wording of the confidentiality exclusion in subclause 6-1(1)(h)(i)(B) of the Act. As compared to *The Trade Union Act*, the existing legislation includes changes to that aspect of the definition of employee, for instance, the inclusion of the word "primary", the removal of the word "regularly", the inclusion of the four categories describing activities, and the requirement for direct impact on the bargaining unit.

[65] The current legislation excludes from the definition of employee a person whose primary duties include activities that are of a confidential nature in relation to any of the four listed categories and that have a direct impact on the bargaining unit the person would be included in as an employee. The question before the Board is whether the position's primary duties include the activities as described. The Employer's evidence focuses on activities that are of a confidential nature in relation to one of the listed categories, labour relations. It also touches on activities that are of a confidential nature in relation to business strategic planning, policy advice, and budget planning.

[66] In considering the duties of the EA position, the Board is guided by the steps taken in *University of Regina v University of Regina Faculty Association*, 2014 CanLII 4554 (SK LRB), and cited in *Saskatoon Public Library*, at paragraph 83:

[26] In the Early Childhood Intervention case, the Board first examined the duties and responsibilities that were expected to be performed by the new position to determine whether the performance of those duties and responsibilities would place the incumbent into an insoluble conflict with members of the bargaining unit and the extent to which those duties would be regularly performed. In doing so, the Board looked beyond the position's job title and beyond the words set out in the draft job description and considered the evidence as to why the position was created and the operational deficient it was intended to rectify. The Board then reflected on whether or not it was satisfied that the duties and responsibilities assigned to the position were genuine and necessary. In doing so, the Board looked for indications that management had not merely "sprinkled" the proposed new position with managerial duties and/or functions of a confidential nature for the purpose of obtaining an unnecessary exclusion (for a position that would otherwise have fallen within the definition of "employee"). In that case, the Board was satisfied that the

duties and responsibilities of the disputed position were intended to rectify legitimate operational deficits within the employer's management structure.

[67] The Board must look beyond the job title and the job description and consider the evidence, including whether the duties assigned to the position are genuine and necessary. As for whether the Employer “sprinkled” the proposed new position with confidential duties for the purpose of obtaining an exclusion, there is evidence of that here, as there was in *Saskatoon Public Library*.² For example, the Board is not persuaded that the EA will be preparing labour cost data for purposes of collective bargaining, performing research for discipline and grievance matters, performing research for strategic planning, or providing opinions or advice. The Board will consider the request for an exclusion without regard for these duties.

[68] First, the Board is satisfied that the duties of the EA position are intended to rectify legitimate operational deficits within the Employer’s structure. The Board is persuaded that the Employer’s operations, in particular at the Executive level, have been impeded in the absence of this role.

[69] Second, there is no question whether the EA’s primary duties will include activities that are of a confidential nature in relation to one or more of the four listed categories.

[70] The EA will provide functional and administrative support to the Executive management team and the Board. The EA will take notes at Executive team meetings, provide administrative support in confidential labour relations matters, including collective bargaining, grievances, and discipline, assist in the hiring process, maintain confidential employee files, be involved in Board package preparation, distribute materials for all Board-related meetings, attend high level strategic planning sessions, and be involved in budget planning or monitoring. The EA’s primary duties will include activities that are of a confidential nature in relation to labour relations, business strategic planning, and budget implementation or planning.

[71] The remaining question is whether these activities will have a direct impact on the bargaining unit the person would be included in as an employee. In our view, the requirement for a “direct impact” does not necessarily foreclose the exclusion of an administrative position from the bargaining unit. Each case must be decided on the facts. Here, the EA’s significant integration with the role of the President, the Executive team, and the Board, is sufficient to establish a direct

² At para 84.

impact. The EA will be an important and central resource to ensure that the President and the Executive team are performing their duties in an effective and efficient manner.

[72] The EA job description states that,

The Executive Assistant learns the role of the President and of others in the Executive Management Team in order to help them complete their tasks effectively and efficiently.

[73] The EA will help the Executive team “complete their tasks effectively and efficiently”. “Among these tasks are handling confidential matters relating to the Board of Directors and employee relations; budgets and financial matters; and business and strategic planning for SMI and its Board of Directors”. The EA will be taking over the labour relations activities that Gaddess is currently performing. The EA will also be involved in recruitment, discipline, and terminations.

[74] The EA must not only have access to a wide range of confidential information related to grievances, collective bargaining, budget, and strategic planning, but must also “maintain confidential employee files”, and maintain files and records systems involving Executive management. The EA will have access to, maintain, and handle this confidential information to assist Executive management in completing their tasks effectively and efficiently. It is likely that the EA will function as the “right-hand” of the Executive management team.

[75] By point of comparison, the Union says that the EA performs clerical duties very similar to those performed by the in-scope Administrative Assistant, a position that provides clerical support for out-of-scope positions. However, the job description of the Administrative Assistant suggests that this position is not involved in collective bargaining, interacts with confidential information to a lesser extent, does not directly support Executive management, and is less immersed in the managerial roles to which it provides support.

[76] The Union also says that the EA is similar to the Manager, Purchasing and Materials Management, considered in *Sask Polytechnic*. In that case, the Board found that certain administrative duties, associated with operational budgets, did not satisfy the confidentiality exclusion. However, the Board did not describe the position as one that was highly integrated with the Executive team. Nor did it recite any primary duties that included confidential activities in relation to labour relations.

[77] Given the extent to which the EA’s activities will be integrated into the work of the Executive team, it is likely that the EA’s activities will have a direct impact on the bargaining unit

the person would be included in as an employee. If the EA is placed in the bargaining unit, doing so will have a measureable impact on the Employer's ability to make informed and rational decisions regarding labour relations in an atmosphere of candour and confidence. Doing so will likely have a direct, rather than indirect, impact on the bargaining unit. The EA will be able to perform the duties of the position only if placed outside of the bargaining unit.

[78] Here, it appears that the Employer has gone several years without the benefit of an excluded confidential capacity role to assist the Executive team. This absence is interfering with the Employer's operations. The duties of this position are currently being performed by members of the Executive team. For these reasons, it is unlikely that placing this position outside of the bargaining unit will have a negative impact on the strength of the bargaining unit, despite the ratio of out-of-scope personnel to in-scope employees in this workplace. Although confidentiality exclusions should be made on as narrow a basis as possible, the exclusion in this case is justified.

[79] The Board is satisfied that the Employer has met its onus to demonstrate that the amendment to the certification order is necessary. As the person, who is yet to be hired, has not performed the duties of the position in question, the Board has decided to make a provisional determination. A provisional determination will allow the parties the opportunity to re-evaluate this position after it has been filled and the person hired has commenced exercising the duties of the position.

[80] Lastly, the Employer asks the Board to amend the collective bargaining agreement to reflect the exclusion of the EA position from the scope clause negotiated by the parties. The Board has a narrow jurisdiction to set the terms of a collective agreement. The limits on the Board's jurisdiction align with the Board's role, captured by the statutory framework, in promoting the parties' ownership over and participation in the collective bargaining process.

[81] Not only is it inappropriate for the Board to amend the collective agreement here; it is unnecessary. Subsection 6-41(6) of the Act states:

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

[82] For the foregoing reasons, an Order shall issue pursuant to section 6-105 of the Act provisionally determining the position of Executive Assistant to be outside the scope of the Union's bargaining unit on the basis that the duties expected to be performed by this position do not satisfy the definition of an employee set out in subclause 6-1(1)(h)(i)(B) of the Act.

[83] The Board thanks the parties for their helpful submissions and related authorities, all of which have been reviewed and considered.

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

DATED at Regina, Saskatchewan, this **14th** day of **October, 2020**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson