

UNIVERSITY OF REGINA FACULTY ASSOCIATION, Applicant v CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 397, Respondent

LRB File Nos. 002-22 and 003-22; November 25, 2022

Chairperson, Susan C. Amrud, K.C.; Board Members: Brian Barber and Jim Holmes

For University of Regina Faculty Association:

Jared M. McRorie
Nathan Sgrazzutti, Student

For Canadian Office and Professional Employees
Union, Local 397:

Dan LeBlanc

Application to amend Certification Order and Application for Provisional Employee Determination – Employer followed required procedure – Employer demonstrated material change in circumstances by proving Executive Financial Manager is new position – Employer proved amendment is necessary.

Application to amend Certification Order and Application for Provisional Employee Determination – Board grants provisional Order excluding Executive Financial Manager from bargaining unit under confidentiality exclusion but not managerial exclusion.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, K.C., Chairperson:** On January 14, 2022, the University of Regina Faculty Association [“Employer”] filed two applications with the Board: Application for Provisional Employee Determination¹ and Application to Amend the Certification Order². These applications relate to the proposal of the Employer to create a new position of Executive Financial Manager [“EFM”], outside the bargaining unit of the Canadian Office and Professional Employees Union, Local 397 [“Union”]. The Union does not agree that the EFM should be outside the bargaining unit. The applications were heard on July 6, 2022. There was one witness, Heather Ritenburg, the Employer’s Executive Director.

¹ LRB File No. 002-22.

² LRB File No. 003-22.

Evidence:

[2] The Employer currently has seven employees, all of whom are in-scope, except Ritenburg. The six in-scope employees are two administrative assistants, one communications officer and three member service officers. A Certification Order³ was issued by the Board between the parties on March 17, 2010, at which time there were three employees in the bargaining unit. The bargaining unit was described as “all employees of the University of Regina Faculty Association except the Executive Director in the Province of Saskatchewan”.

[3] The background to the EFM position started with an in-scope position called professional officer that existed prior to 2018. The duties of that position included responsibility for developing and monitoring the annual budget and financial policies. In 2018 that position was abolished and its duties were divided between two in-scope positions, one of which was a part-time financial officer. When the Union and Employer last negotiated a collective agreement⁴, the financial officer was a member of the Union’s bargaining committee.

[4] On November 12, 2021 Ritenburg wrote to the Union and provided it with a job description for the proposed EFM position and a letter explaining the rationale for creating the new position and proposing that it be out-of-scope. Ritenburg’s evidence was that the Employer planned to create the EFM position to assist her in addressing managerial, financial and human resource duties. The Employer’s plan was that the financial officer position would be eliminated and the tasks previously performed by the financial officer would be performed in the future by the EFM. On January 31, 2022, the financial officer voluntarily resigned, and the position was abolished. The financial officer’s duties have since been performed by Ritenburg in conjunction with a contracted bookkeeper. As of the date of the hearing, the Employer had not hired an EFM.

[5] The job description for the EFM⁵ reads as follows:

Position Description:

The Executive Financial Manager works alongside, and at the direction of, the Executive Director and assists the Executive Director in managing the necessary aspects of the business from the side of management. The Executive Financial Manager’s duties include managing, administrating, and providing opinions on all financial aspects of the Association and is immersed in confidential, management-only aspects of the business. The Executive Financial Manager will occupy a key role in bargaining on the management side, fulfill Human Resources and payroll administration functions, provide financial advice,

³ LRB File No. 004-10.

⁴ Exhibit E3.

⁵ Exhibit E1. Bullets were alphabetized for ease of reference later in these Reasons.

information, and deal with budgeting and planning, and will assist the Executive Director when needed with respect to hiring, firing, and discipline.

Executive Financial Manager Functions

- (a) Assist in budgeting and planning based on requirements put forward by the Finance Committee and Executive and knowledge of previous years including by providing financial advice.
- (b) Monitor budgets and analyze and report deviations.
- (c) Assist Executive Director and Treasurer in making decisions outside of the approved budget.
- (d) Provide recommendations on costing including where cost reductions are necessary or advisable including on reductions or modifications to staffing.
- (e) Provide financial advice, information, and assessments to the Executive Director and participate in the decision-making process where such decision-making impacts finances.
- (f) Act as resource to various URFA committees within the confines of the confidentiality requirements of the role, given the confidential financial information the Executive Financial Officer is aware of and has access to.
- (g) Prepare year to date and projections to year end statements.
- (h) Responsible for entering accurate journal entries, deposits, confirming invoices, writing cheques, doing bank reconciliations each month.
- (i) Confirm and cross check all transactions that happen in the Operating, Trust and Bursary Funds. Ensure accurate recording and conversion to CDN funds for US accounts in the Trust Fund Equity and Trust Fund Mutual Accounts.
- (j) Provide all information required for auditors annually. Verifying and producing financial statements; determining year end values and making adjusting entries; conducting reasonability test and answer all questions from auditors on policies and procedures.
- (k) Keep an inventory record of assets for determining insurance requirements and asset replacement. Determine and record depreciation each year.
- (l) Calculate and provide remittances to CAUT, COPE 397 for employee benefits, pension plans and dues for URFA employees.
- (m) Review and suggest changes to financial policies, produce new policies as required for review and approval by the appropriate committee.
- (n) Manage, and provide financial opinions on, investments.
- (o) Act as liaison between investment firm and various committees and Treasurer.
- (p) Act as a negotiator on the side of management in collective bargaining and fulfill all duties and obligations regarding same, including by preparing for management: costing assessments (including providing opinions on staff reductions, wage reductions, and on other aspects of labour), budget and planning opinions and assessments, and providing input and recommendations on amendments to the collective bargaining agreement that would be beneficial to management.
- (q) Assist the Executive Director with managing the business in the event of strike or lockout, including by assisting in managing the strike or lockout itself.
- (r) Maintain loyalty dedicated solely to the employer and maintain expected standards of confidentiality. Maintain and uphold fiduciary duties owed to the employer.

Human Resources/Payroll Administration

- (s) Participate in hiring, firing, and discipline alongside the Executive Director when needed.
- (t) Act as managing authority whenever required including while the Executive Director is on vacation.
- (u) Enforce policies with respect to employees in the bargaining unit including respecting vacation time and including approving or denying overtime requests.
- (v) Act as witness and notetaker for investigations and discipline meetings.
- (w) Provide general assistance and support to the Executive Director including, but not limited to, duties commonly assigned to an executive assistant.

- (x) Obtain new employee numbers, computer access, email, etc. for new employees.
- (y) Track all vacation, overtime and sick leave for URFA staff.
- (z) Ensure new employees are enrolled in the appropriate CAUT benefits plans at the appropriate time.
- (aa) Act as liaison between staff and CAUT for disability; ensure appropriate forms are provided to the employee and that the employer portions of the forms are accurately recorded.
- (bb) Ensure all payroll requirements for URFA staff are met and entered each month on the URFA payroll system; work with PayWorks if there are any issues/discrepancies.
- (cc) Ensure employee reimbursements for taxable and non-taxable items are paid through the URFA payroll system.
- (dd) Ensure sessionals are paid honorariums through the URFA payroll system.
- (ee) Provide ROEs for employees/sessionals who require them.

[6] The letter of November 12, 2021 that Ritenburg sent to the Union with this job description, included the following paragraph:

It is clear to us that in order for a financial officer to function effectively it cannot have divided loyalty nor can it be mired in conflicts of interest. It has come to our attention that the current FO position has such divided loyalties and is subject to issues of conflict of interest. As an employer, the URFA needs their financial officer at the bargaining table with them in order to provide advice on costing analyses, budgeting, labour relations management, reorganizations, labour costs, debts and liabilities, affordability of union requests, and many other aspects of a financial and confidential nature. As a union member, the FO has divided loyalties between the union and management which is a cause of significant concern for the employer and so too should it concern the union. As financial officer the FO has fiduciary duties to the employer but as a union member the FO is represented by, and has duties to, the union. This could result in inappropriate disclosure of confidential information to the union but so too could it result in a reporting back to the employer about the goings-on at the union due to the duties the financial officer has to the employer as a consequence of their position.

[7] According to Ritenburg, the EFM will have managerial duties, including direct responsibility for performance reviews, supervision, hiring and discipline of the two administrative assistants. The EFM and Ritenburg will work together respecting the management of the other four employees. The EFM will be in a position to direct the work of all in-scope staff. The EFM will be Acting Executive Director in Ritenburg's absence. The EFM will be involved in creating new policies and have responsibility and authority to enforce policies. The EFM will take the lead in creating and managing the budget and will have complete access to all financial information of the Employer and insight into and knowledge of all aspects of the business and future plans of the Employer.

[8] The EFM will have a direct role in collective bargaining. This is particularly important to the Employer because of the following provision in the parties' collective agreement:

26.3 *The parties agree that neither the Executive Director nor the President of the Faculty Association shall serve on the Employer's bargaining team in any round of collective bargaining.*⁶

Volunteers from the Employer's membership serve on the bargaining committee, but no one familiar with the Employer's operations. Ritenburg provides information to them but is not at the table. Cost analysis for bargaining was previously done by the financial officer; in future it will be done by the EFM.

[9] The financial officer position had no role with respect to hiring, discipline, performance reviews, assigning work, drafting and enforcing human resource policies, or confidential discussions respecting the direction of the Employer.

Argument on behalf of the Employer:

[10] The first issue the Employer addressed is with respect to the proper procedure for it to follow in a situation like this, where the Union would not agree that the EFM should be placed out-of-scope of the bargaining unit. In *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*⁷ ["Sask Polytechnic 2022"] the Board stated:

[69] In most amendment applications, the first question is whether the employer has followed the proper process. A newly created position in an all-employee bargaining unit remains within the unit unless excluded by an order of the Board or by agreement of the parties: Saskatchewan Government Employees' Union v Wascana Rehabilitation Centre, [1991] 3rd Quarter Sask Labour Rep 56, at 59. In Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2006 CanLII 62948 (SK LRB), the Board set out the process for an employer to follow when creating a new position:

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.*

The Employer says it complied with the process described in *Sask Polytechnic 2022*.

⁶ Exhibit E3 at page 40.

⁷ 2022 CanLII 45399 (SK LRB)

[11] Next, relying on *Saskatchewan Institute of Applied Science and Technology v Saskatchewan Government and General Employees Union*⁸, the Employer argues that since the EFM is a new position, it is not required to demonstrate that a material change in circumstances has occurred:

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

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

[12] The Employer argues that the EFM is a newly created position. It has management responsibilities and duties requiring confidentiality, including involvement in representing the Employer's interests during collective bargaining by sitting at the table as a member of the Employer's bargaining team. While it will take over the duties of the financial officer, its duties will extend beyond them.

[13] The issue before the Board is whether the amendment to the Certification Order is necessary. The onus is on the Employer to satisfy the Board that the amendment should be granted. The Employer argues that the amendment is necessary, because the EFM is not an employee within the meaning of clause 6-1(1)(h) of the Act. It argues that the EFM position should be placed outside the bargaining unit on the basis of both paragraph 6-1(1)(h)(i)(A) ["managerial exclusion"] and paragraph 6-1(1)(h)(i)(B) ["confidentiality exclusion"]. The Employer points to the duties of the EFM described in paragraphs (a), (c), (d), (e), (f), (m), (p), (q), (r), (s), (t) and (u) of the job description as being managerial duties and confidential financial duties.

[14] With respect to the managerial exclusion, the Employer relies on two decisions of this Board, first *Saskatchewan Institute of Applied Science and Technology v Saskatchewan Government and General Employees' Union*⁹ ["SIASST v SGEU"]:

The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial

⁸ 2012 CanLII 79022 (SK LRB).

⁹ 2009 CanLII 72366 (SK LRB) at para 56.

character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit).

[15] The second decision the Employer relies on is *Canadian Union of Public Employees, Local 4928 v Saskatchewan Society for the Prevention of Cruelty to Animals*¹⁰:

The primary purpose of excluding persons from the bargaining unit on the basis of the managerial exemption is to ensure that persons who can affect the economic lives of other employees are not placed in a conflict of interest by including them in a bargaining unit. In our view, in the present circumstances, the Coordinator of Investigative Services exercises a sufficient degree of managerial authority to affect the economic lives of the other employees in the bargaining unit. To include this position in the bargaining unit would place the incumbent in an insoluble conflict of interest with other members.

[16] The Employer argues that the EFM will exercise managerial authority while making decisions that affect the economic lives of the other employees. The duties of the EFM could act against the interests of the Union and in-scope employees. The Employer emphasizes that the EFM will be expected to participate on the Employer side of the bargaining table in collective bargaining. In this regard, it argues, “there is no room for divided loyalties either at the bargaining table or in the workplace”¹¹:

10. Managers are expected to manage: to monitor and correct employee performance, to encourage employee productivity, and to ensure that employees adhere to workplace rules. Management controls the system of rewards and penalties by which the workplace is regulated, and may resort to those rewards or penalties to maintain employee cooperation. The employer needs to know that those administering that system will do so with the objectives of the enterprise in mind. There is no room for divided loyalties either at the bargaining table or in the workplace.

11. From a union's perspective, there is also a value in clearly identifying and separating the two "sides". In a system of institutionalized collective bargaining and latent conflict, the union is always poised to challenge the exercise of management authority; and the first level of management is often the point of contact between two potentially conflicting interest groups. The union needs to know where the line is drawn, and benefits from a clear delineation of loyalties and responsibilities. For example, a union is obliged to fairly represent all employees for whom it is the bargaining agent, and might find itself in difficulty if the "grievance" of one of its members arose from the actions of others, acting on behalf of the employer. From a collective bargaining point of view, "managers" - even first level "foremen" - are the agents of the employer, who are required in the ordinary course of their duties to direct, reward or penalize employees for whom the union is bargaining agent. They are on the employer's side of the bargaining table.

¹⁰ 2009 CanLII 43954 (SK LRB) at para 46.

¹¹ *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880 v Ford Motor Company of Canada Limited*, 1993 CanLII 7810 (ON LRB).

[17] Looking at the responsibilities as a whole, it is clear that the EFM is intended to be part of management. The EFM has an insoluble conflict of interest with the members of the bargaining unit.

[18] With respect to the confidentiality exclusion, the Employer relies on *University of Saskatchewan v Administrative and Supervisory Personnel Association*¹²:

In Bank of Nova Scotia, supra, a decision of the Canada Labour Relations Board, the Board set out a three-part test for a confidential exclusion at 537, which may be summarized as follows:

1. *The confidential matters must be concerning industrial relations, not general industrial secrets and not information that the union or its members have knowledge of (salaries, performance appraisals, etc.) or information that may be obtained from other sources (personal history, family information, etc.);*
2. *The disclosure of that confidential information must adversely affect the employer; and*
3. *The person must be involved with the confidential information as a regular and not occasional part of their duties, and that simple access to such information through employer laxity does not suffice.*

[19] The Employer says that the EFM will need to be fully versed in the entire financial portfolio of the Employer. This will include knowledge of all financial information and industrial relations interactions. This confidential knowledge will be a regular aspect of their position. The Employer also relies on the following description of the confidentiality exclusion, in *SIAST v SGEU*:

[57] The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association, [2005] Sask. L.R.B.R. 274, LRB Files Nos. 103-04 & 222-04.

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

¹² 2007 CanLII 68769 (SK LRB) at para 47.

exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, supra.

[20] The role of the EFM, the Employer argues, is to remain involved in not only collective bargaining itself in a direct manner, but to assist the Employer in carrying out its collective bargaining through participating in the decision-making process regarding labour relations in an atmosphere of candour and confidence.

[21] The Employer argues that the duties of the EFM are comparable to the duties of the positions excluded by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*¹³: an office manager who had some responsibilities for hiring and performance evaluations of employees and involvement in labour relations; an executive assistant who was a confidential secretary for senior management; and an operations manager who worked directly with other out-of-scope employees to oversee operations and had authority to enforce the collective agreement and take corrective actions against employees.

[22] The Employer also relied on *City of Regina v Regina Civic Middle Management Association*¹⁴, where the Board excluded from the bargaining unit an employee who was described by the employer's witnesses as someone who would have great influence on management in that they would assist directors and executive directors in the analysis of budgetary and program options, some of which could have serious ramifications for the unionized workforce. The costing of collective bargaining proposals was also considered significant in excluding the position from the bargaining unit. The Board granted a provisional exclusion:

[24] The job description itself, as noted in paragraph 7 above, does not provide much support for the accountabilities referenced by both of the City's witnesses. As noted by the Union, it utilizes phrases such as "advise", "support", "report", "provide guidance", "participate", "analyze", "recommend", "assist", "involved in", "conduct research" etc. Notwithstanding the use of these words in the job description, the evidence from each of the City's witnesses was that the position had the capability of impacting on members of the bargaining unit. If so, this certainly has the potential to create an irresolvable conflict between the incumbent's loyalty to the employer versus his/her loyalty to the Union.

The Employer argues that the position in that matter is comparable to the EFM, which should lead to a conclusion that the EFM should be provisionally excluded from the bargaining unit.

¹³ 2015 CanLII 19983 (SK LRB).

¹⁴ 2018 CanLII 127659 (SK LRB).

Argument on behalf of Union:

[23] The Union argues that the first issue before the Board is that the Employer is required to establish that there has been a material change in circumstances since the Certification Order was granted, and it has not done that. The onus of proving the material change in circumstances is on the Employer. In *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*¹⁵, the Board stated:

[15] The Board has adopted the requirement that there be a material change demonstrated whenever an application is made to amend the certification Order for a unit of employees. The rationale for the requirement was described by the Board in SIAST v. SGEU 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-operatives, 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 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., "more than a speed bump", and the Board must undertake a reasoned consideration of the evidence to ensure that the action has some merit.

[24] The Union argues that the EFM position is not new in substance, but only a slight expansion of the recently abolished in-scope financial officer position. The tasks are essentially those of the financial officer position. Ritenburg testified that all of the financial officer's duties are being folded into the EFM's position. Since the financial officer was a .53 position, the Union argues, the new position is composed of at least 53 percent in-scope work and is not new in substance.

¹⁵ 2018 CanLII 38248 (SK LRB).

[25] In its cross-examination of Ritenburg, the Union entered as an exhibit an unsigned and undated document entitled “URFA/COPE Joint Job Evaluation Questionnaire – Financial Officer (new position)” that was disclosed to the Union by the Employer in preparation for the hearing in this matter. The Union compared the primary duties and responsibilities in that document to the job description for the EFM and found 20 instances where it says the duties were identical or comparable.

[26] Although the Union led no evidence on this issue, it argues that it is a reasonable assumption that when the Board issued the Certification Order between these parties someone, likely an in-scope employee, was providing financial and accounting services for the Employer. The Union asks the Board to assume that when the Certification Order was issued, the Board was aware that this work was being done by someone other than the Executive Director, and decided that the work should remain in-scope. This means the Employer is asking the Board to sit in appeal of its 2010 order. Rearranging in-scope work does not amount to a material change in circumstances. The applications should be dismissed on that basis.

[27] In the alternative, even if the EFM position is new, it belongs in the bargaining unit. If the Board decides to evaluate the Employer’s applications on their merits, and consider whether the proposed job description demonstrates that the position falls within either the managerial exclusion or the confidentiality exclusion, the Union cautions that the Board must rely on only those portions of the job description that are genuine.

[28] The Union relies on *Sask Polytechnic 2022*, where the Board denied a request for a managerial exclusion:

[111] Nonetheless, there are several factors that persuade the Board that the managerial responsibilities are not genuine. These include the deficiencies in the job description, the inconsistencies with the organizational structure and reporting relationships, the authorities and abilities of in-scope supervisors, and the reasons put forward for creating the Position.

[112] In conclusion, the purported managerial responsibilities are not a primary responsibility of the Position. Nor are they genuine or necessary. The managerial responsibilities would not rectify legitimate operational deficits within the Employer’s management structure.

[29] The Union argues that the EFM job description in this matter also has contrived elements that were included to obtain an unnecessary exclusion. Those elements should not be considered in the Board’s assessment of whether the position falls into either exclusion. The Union cites three examples.

[30] In the position description, the job description states:

The Executive Financial Manager works alongside, and at the direction of, the Executive Director and assists the Executive Director in managing the necessary aspects of the business from the side of management. The Executive Financial Manager's duties include managing, administrating, and providing opinions on all financial aspects of the Association and is immersed in confidential, management-only aspects of the business.

The Union argues that these sentences presume a legal conclusion rather than describing duties.

[31] The Union suggests that clause (f) is argumentative:

Act as resource to various URFA committees within the confines of the confidentiality requirements of the role, given the confidential financial information the Executive Financial Officer is aware of and has access to.

[32] Clause (r) is aimed at establishing an insoluble conflict; unwavering loyalty is not a valid element of a job description:

Maintain loyalty dedicated solely to the employer and maintain expected standards of confidentiality. Maintain and uphold fiduciary duties owed to the employer.

[33] With respect to the managerial exclusion, the Union relies on *SEIU-West v Saskatoon Twin Charities Inc. (City Centre Bingo)*¹⁶:

[53] The Employer has suggested that Supervisors qualify as managers under the Act. For a position to qualify as managerial, it must have as a primary responsibility to exercise authority and perform functions that are of a managerial character: Saskatchewan Polytechnic v SGEU, 2018 CarswellSask 260, 23 CLRBR (3d) 90, at paragraph 59. Managerial positions are to be excluded from a bargaining unit for two major purposes, as outlined 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 (SK LRB) ["Battlefords"], at paragraph 116:

...Firstly, it excludes management domination of the union and its activities by precluding involvement of management within the bargaining unit. Secondly, it provides management with sufficient resources to meaningfully engage in collective bargaining.

[54] The question of whether a position should be excluded is a factual determination. Exclusions on the basis of the managerial exceptions should be made on as narrow a basis as possible, so as not to unduly restrict the extension of bargaining rights to those who choose to be represented by a union. Managerial exclusions should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible: Battlefords, at paragraph 118. The Board must be alert to the possibility of denying access to collective bargaining and to the potential for weakening the bargaining unit in doing so.

¹⁶ 2019 CanLII 98487 (SK LRB).

[34] The Union also relies on the description in *Sask Polytechnic 2022* of the factors relevant to a managerial exclusion. To be excluded, a person must have a significant degree of decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees, including the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Duties such as providing direction, training, assigning work, approving leaves and scheduling work are more indicative of supervisory functions. The Board must also consider whether the position has actual authority and effective authority.¹⁷

[35] The Union agrees that clauses (p), (q), (s) and (t) of the EFM's job description speak to management-type tasks. However, the Union does not agree that these duties lead to a conclusion that managerial functions will be the EFM's primary responsibility. With respect to clause (p), the Employer did not demonstrate a need for a management employee at the bargaining table. Ritenburg is clearly involved in determining bargaining strategy even if not physically at the table. The Employer agreed to her not being present at the table. With respect to clause (q), this duty is hypothetical. Further, easing management's burden in the event of a labour disruption is not a valid reason to exclude a position. With respect to clause (s), the Union argues that the evidence suggests that the Executive Director and the board will retain final decision-making authority with respect to these tasks. This is not effective authority. The Union suggests that the duties described in clause (t) arise infrequently.

[36] The Employer has not provided sufficient evidence that the EFM's "primary responsibility" will be to perform managerial functions. It cannot be primarily engaged in managerial functions when 53 percent of its time will be spent performing the duties previously performed by the financial officer.

[37] With respect to the confidentiality exclusion, the Union relies on *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*¹⁸:

[116] The Employer, in its brief, states that,

Verdient likely needs to make business decisions about what the company can change to ensure it is not wasting time and resources in preparing an unsatisfactory product. These business decisions may have a direct impact on the employment and day-to-day operation of other positions that are included within the proposed bargaining unit.

¹⁷ At para 79.

¹⁸ 2019 CanLII 76957 (SK LRB).

[117] The Employer is required to satisfy its evidentiary burden to demonstrate that the disputed positions should be excluded from the proposed bargaining unit. At best, the Employer's argument amounts to speculation about an undefined and indirect impact on the bargaining unit.

[118] The primary duties of the position must be of a confidential nature and have a direct impact on the bargaining unit. This impact must be direct, not indirect. It is not apparent, on the evidence, that the duties of these positions, in relation to any confidential data, have a direct impact on the bargaining unit or place the positions in a labour relations conflict with the rest of the proposed bargaining unit. The positions' duties in relation to the confidential information would not undermine the adequacy of the employer's internal resources to make informed and rational decisions regarding labour relations. At Verdient, labour relations decisions are made by managers. Neither of these positions are providing confidential information or advice to managers in relation to labour relations, or confidential information or advice that would have a direct impact on the bargaining unit in relation to labour relations, as a regular part of their responsibilities. If these positions are placed in the bargaining unit, doing so will have no measureable impact on the Employer's ability to proceed to make informed and rational decisions regarding labour relations in an atmosphere of candour and confidence.

[38] As the Board confirmed in *Sask Polytechnic 2022*, it is not enough for the Employer to establish that the EFM has primary duties that include activities of a confidential nature. The activities must relate to one or more of the four listed categories and must have a direct impact on the bargaining unit.

[39] The Union argues that while duties of a confidential nature need not be the primary focus of the position, they will lead to an exclusion only if they are regularly performed and genuine.¹⁹ The Union argues that infrequent or sporadic activity does not meet this test.

[40] The Union acknowledges that certain duties listed in the job description include activities that are properly characterized as confidential: clauses (a), (d), (e), (f), (p), (q), (r), (s), (v) and (w). However, the Union argues, the EFM will have no decision-making authority respecting any of these matters. That authority lies with the Employer's board. The EFM will merely be assisting, making recommendations, and participating in these matters. Any confidential financial work that has a direct impact on in-scope employees is not regularly performed. Confidential labour relations work will be peripheral to its central tasks. Confidential activities cannot be the primary task of the EFM position, because 53 percent of its work was historically performed by the financial officer and those tasks included no confidential matters.

¹⁹ *SIASST v SGEU; University of Regina v University of Regina Faculty Association*, 2014 CanLII 149798 (SK LRB); *City of Regina v Regina Civic Middle Management Association*, *supra* note 14.

[41] It does not require two out-of-scope staff to supervise a staff of six. The Employer does not require a new out-of-scope position to supervise two administrative assistants. There is no demonstrated need for an additional out-of-scope position.

Relevant Statutory Provisions:

[42] The following provisions of the Act are relevant in this matter:

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;

6-104(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;

...

(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;

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 and Decision:

Preliminary Issues:

[43] The first issue before the Board is whether the Employer followed the required procedure in this matter²⁰. The Board agrees with the Employer that it did. It notified the Union of the proposed new position, and sought its agreement that the position be created outside the

²⁰ *Sask Polytechnic 2022* at para 69.

bargaining unit. When the Union would not agree, the Employer filed these applications. As of the date of the hearing, the Employer had not hired an EFM.

[44] The next issue is whether the Employer is required to demonstrate that a material change in circumstances has occurred since the Certification Order was granted, that would justify its amendment. The Employer argues that, since the EFM is a newly created position, it is not required to demonstrate a material change in circumstances. The correct statement of this principle is that the creation of a new position is sufficient to satisfy the requirement of a material change in circumstances.²¹

[45] The Union questions whether the EFM is actually a new position. It argues that it is merely a slight expansion of the former in-scope financial officer position. The difficulty for the Board in accepting this argument is that the Union chose to call no evidence. Exhibit U7, "URFA/COPE Joint Job Evaluation Questionnaire – Financial Officer (new position)" is undated and unsigned. Ritenburg could not confirm whether it accurately described the financial officer's duties. She did say that the EFM would be taking over the duties previously performed by the financial officer. She also noted that the financial officer had no role respecting hiring, discipline, performance reviews, assigning work or enforcing financial or human resource policies. The Board does not accept the Union's argument that the Board today should assume that, when the Certification Order was issued in 2010, the Board was aware that the work, recently being performed by the financial officer, was being performed by an in-scope employee. There is no evidence before the Board on this issue and the Board is not going to guess or make unfounded assumptions about that issue.

[46] The Board is satisfied that the EFM is a new position. While it will undertake the duties of the former financial officer, it will have a significantly expanded role. This is evidenced not only by the additional duties the EFM will undertake that the financial officer did not perform, but also by the fact that the EFM is a full-time position and the financial officer was a part-time position, working 53 percent of full-time hours. The Employer has met the requirement to prove a material change in circumstances.

[47] The next issue, then, is whether the amendment to the Certification Order is necessary. The onus is on the Employer to satisfy the Board that the EFM should be excluded from the bargaining unit on the basis of the managerial exclusion and/or the confidentiality exclusion. The

²¹ *Sask Polytechnic 2022* at para 74.

question of whether a position should be excluded is a factual determination. The determination requires a careful consideration of the evidence. The exclusion of positions from a bargaining unit is to be made on as narrow a basis as possible.

[48] In the absence of evidence from an incumbent, the role and responsibilities of the EFM are theoretical. The process established by the Board, which the Employer followed in this matter, leads to this result. The Board has recognized the challenge this creates for employers, in presenting their evidence, and for unions, in assessing new positions.

[49] In *City of Regina v Regina Civic Middle Management Association*²², the Board stated:

It is always difficult to have any certainty as to the impact upon a position when the job duties are just proposed rather than being performed by an incumbent. It is for that reason that the Board tends to look beyond titles and position descriptions in an effort to ascertain the true role which a position plays in the organization.

[50] In *University of Regina v University of Regina Faculty Association*²³, the issue was described as follows:

... While only time will tell whether or not (or the extent to which) the incumbent will perform these duties, these are clearly the kind of functions that would place a person performing these duties into an insoluble conflict with other members of the Union's bargaining unit. On this basis, we are satisfied that the Employer has satisfied the onus with respect to the exclusions sought. On the other hand, a provisional determination will allow the parties the opportunity to reevaluate the disputed position after it has been staffed and after the incumbent has begun performing the duties and responsibilities expected of the position.

[51] The option for the Board to issue a provisional Order in a matter such as this one addresses this issue in a manner that is fair to both the Employer and the Union.

[52] The next preliminary issue that arose in this matter was whether decisions of the Board that were interpreting the definition of employee in *The Trade Union Act* are applicable to the interpretation of the definition of employee in the Act. In *The Trade Union Act*, the comparable portion of the definition of employee read as follows:

(f) "employee" means:

(i) a person in the employ of an employer except:

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

(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.

²² *Supra* note 14, at para 27.

²³ *Supra* note 19, at para 29.

[53] The only difference between the description of the managerial exclusion in *The Trade Union Act* and in the Act is the removal of the word “actually”. The Board has previously determined that this is not a change in substance²⁴. Therefore, decisions made pursuant to *The Trade Union Act* respecting this issue can continue to be relied on.

[54] On the other hand, the description of the confidentiality exclusion in the Act is significantly different than its description in *The Trade Union Act*. This means that the Board must exercise caution in relying on decisions on this issue made pursuant to *The Trade Union Act*. Under *The Trade Union Act* the Board considered whether the person was “regularly acting” in a confidential capacity with respect to industrial relations. Under the Act, the Board now considers whether the person’s “primary duties” include activities of a confidential nature, that have a direct impact on the bargaining unit, in respect to labour relations, business strategic planning, policy advice or budget implementation or planning.

Managerial Exclusion:

[55] Turning first to the managerial exclusion, an employee will be excluded from the bargaining unit on this basis if their primary responsibility is to exercise authority and perform functions of a managerial character. In *Sask Polytechnic 2022*, the Board described the test as follows:

1. *The determination of whether a position falls to be excluded is primarily a factual one.*
2. *Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible.*
3. *A person to be excluded must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient.*
4. *The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.*

²⁴ *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB) at para 68.

5. In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace.

6. The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process.²⁵

The Board found that these principles, which were initially established pursuant to *The Trade Union Act*, apply to the interpretation of the managerial exclusion under the Act.

[56] Applying these principles to the EFM position, the Board is not satisfied that the managerial exclusion applies. The EFM will not have a significant degree of decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of the employees in the bargaining unit. The evidence provided by Ritenburg indicates that managerial-type functions respecting those employees, including the administrative assistants, will be performed by Ritenburg. The duties that will be performed by the EFM are more accurately described as supervisory. The EFM will not have actual authority or effective authority with respect to responsibilities such as discipline and discharge, labour relations or hiring, promoting or demoting staff.

[57] As the Board found in *Canadian Union of Public Employees, Local 4928 v Saskatchewan Society for the Prevention of Cruelty to Animals*²⁶, the primary purpose of this exclusion is to remove people from the bargaining unit who can affect the economic lives of other employees. In this matter, the evidence led by the Employer does not lead to a conclusion that the EFM will have that kind of authority. The Board is not satisfied that the EFM will exercise a sufficient degree of managerial authority to affect the economic lives of other employees.

[58] Further, the Board is not convinced that all of the duties the Employer describes as managerial are genuine, for example, clauses (f) and (r) appear contrived. The Board is not satisfied that the EFM position was created to rectify a legitimate operational deficit in the Employer's management structure. The only duty of the EFM that is truly managerial is set out in paragraph (p) of the job description. This does not lead to a conclusion that their primary responsibility is managerial.

²⁵ At para 79.

²⁶ *Supra* note 10.

Confidentiality Exclusion:

[59] Turning next to the confidentiality exclusion, a position will be excluded from the bargaining unit on this basis if its primary duties include activities of a confidential nature, in relation to labour relations, business strategic planning, policy advice or budget implementation or planning, that have a direct impact on the bargaining unit. The requirement of “regularly acting” in a confidential capacity is no longer part of the test.

[60] The Board finds that *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*²⁷ is particularly applicable here:

[74] The Union argues that the ACI Analyst, SEP Analyst and Systems Engineer do not meet the criteria to be excluded under the confidentiality exclusion because they are not the final decision-makers when it comes to issues of labour relations, business strategic planning, policy advice or budget implementation or planning. The final decision-makers in the Employer’s organization are the Board members. To adopt the Union’s interpretation would mean no employees of the Employer would satisfy these criteria. While the Board agrees that the exclusions must be interpreted narrowly, the Board does not agree that would be a reasonable interpretation. These positions will be directly involved in budget planning and project planning. The evidence demonstrated that they will be part of the decision-making team.

...

[79] These three positions will have access to information about the possible reduction of the workforce, the change or abolishment of positions or the increase or decrease of employment hours, during the planning stages, when the need for confidentiality is high. They may also receive confidential information that pertains to the purpose, goals and objectives of the analysis and improvements, such as information relating to labour relations, business strategic planning or budget planning. This information is needed to develop the monitoring systems, analyze the information and provide recommendations.

[80] They represent the kind of internal resources that are necessary to enable the Employer to make informed and rational decisions regarding labour relations, strategic planning, policy and budget planning and implementation. In reviewing their job descriptions, it is necessary to consider the reason they will have access to the information and how it will be used by the employee, to determine whether it will have a direct impact on the bargaining unit. The Board must also respect the intention of the Legislature, in elaborating on the description of the confidentiality exclusion. The Legislature has established that the kind of work described in subparagraphs 6-1(1)(h)(i)(B)(II) to (IV) can also have a direct impact on the bargaining unit. The Board is satisfied that the primary duties of these three positions will have a direct impact on the bargaining unit.

...

[84] In reviewing the evidence, the Board has considered whether the Employer has inserted into the job descriptions managerial duties and/or functions of a confidential nature merely for the purpose of obtaining an exclusion for a position that would otherwise fall within the definition of employee. While the Job Descriptions for the Disputed Positions include some examples of this, distilled down to their core duties and the responsibilities expected of these new positions, the Board is satisfied that three of the four Disputed Positions meet the test to be excluded from the bargaining unit on the basis of the confidentiality exclusion. They will not incidentally or occasionally perform tasks of a confidential nature; in their primary duties they are expected to have input and influence in

²⁷ *Supra* note 24.

the Employer's decision-making processes with respect to labour relations, strategic planning, policy and budget planning and implementation.

[61] The EFM will not be the final decision-maker on issues of labour relations, business strategic planning, policy or budget implementation or planning, but that is not the test. Based on Ritenburg's evidence a number of the EFM's functions lead to a conclusion that the EFM's primary duties include activities of a confidential nature that will have a direct impact on the bargaining unit, in the areas of labour relations, strategic planning, policy advice and budget planning and implementation, for example:

- (a) *Assist in budgeting and planning based on requirements put forward by the Finance Committee and Executive and knowledge of previous years including by providing financial advice.*
- ...
- (d) *Provide recommendations on costing including where cost reductions are necessary or advisable including on reductions or modifications to staffing.*
- (e) *Provide financial advice, information, and assessments to the Executive Director and participate in the decision-making process where such decision-making impacts finances.*
- ...
- (p) *Act as a negotiator on the side of management in collective bargaining and fulfill all duties and obligations regarding same, including by preparing for management: costing assessments (including providing opinions on staff reductions, wage reductions, and on other aspects of labour), budget and planning opinions and assessments, and providing input and recommendations on amendments to the collective bargaining agreement that would be beneficial to management.*

[62] The evidence demonstrated that the EFM's primary duties will require them to be directly involved in budget and other planning. They will be part of the decision-making team. They will have access to confidential information relating to labour relations, business strategic planning, policies and budget planning for purposes that will have a direct impact on the bargaining unit. The EFM's primary duties will include providing confidential information and advice to Ritenburg and the board in relation to labour relations, business strategic planning, policy and budget implementation and planning. This confidential information and advice will have a direct impact on the bargaining unit. The EFM will be in an insoluble conflict with the members of the bargaining unit.

[63] The Board does not accept the Union's argument that because, in its view, the EFM will be spending 53 percent of their time doing work that the financial officer previously performed, managerial or confidential duties cannot be their primary duties. There is no evidentiary basis for the Union's assertion that the EFM will be spending 53 percent of their time doing work that the

financial officer previously performed. Even if there was, determining the primary duties of a position is not a mathematical calculation.

Conclusion:

[64] Based on the evidence provided by the Employer in the EFM job description and Ritenburg's evidence, the Board has determined that an amendment to the Certification Order is necessary. The Board has decided to grant a provisional Order excluding the EFM from the bargaining unit. A provisional determination will allow the parties the opportunity to re-evaluate this position after it has been staffed and the person hired has commenced exercising their duties and responsibilities. If, once the position is filled, it turns out that the EFM is not performing the duties that the Employer is now contemplating that they will perform, the safeguard of the provisional determination provides a remedy for the Union to return to the Board for a reassessment of the position. For this reason, a provisional Order is appropriate.

[65] Accordingly, with these Reasons an Order will be issued making a provisional determination that the EFM position is excluded from the bargaining unit.

[66] The Board thanks the parties for the submissions they provided to assist the Board in making a determination in these matters. The Board has reviewed all of them and found them helpful.

DATED at Regina, Saskatchewan, this **25th** day of **November, 2022**.

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson

DISSENT OF JIM HOLMES

[1] I have read the majority decision and with respect must disagree.

[2] The Board's task is set out in *SEIU-West v Saskatoon Twin Charities Inc. (City Centre Bingo)* 2019 CanLII 98487 (SK LRB).

- a. the Board must balance the request of the employer to have exempt employees whose loyalty is undivided to the employer against the employees right to have a bargaining unit which is inclusive and effective.

[54] The question of whether a position should be excluded is a factual determination. Exclusions on the basis of the managerial exceptions should be made on as narrow a basis as possible, so as not to unduly restrict the extension of bargaining rights to those who choose to be represented by a union. Managerial exclusions should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible: Battlefords, at paragraph 118. The Board must be alert to the possibility of denying access to collective bargaining and to the potential for weakening the bargaining unit in doing so.

[3] Some bargaining units, like construction trades and nurses derive their bargaining power from the key skills of their members. However, most bargaining units derive their bargaining power from numbers and inclusiveness. COPE derives its power from the inclusiveness of its unit.

[4] This power is recognized in the employers statement that it needs this exclusion in order . “...assisting URFA Management in the event of a strike or lockout.” (Application to Amend (c)).

[5] With respect it is not proper for this Board to grant exemptions from the bargaining unit to assist management in the event of a strike or lockout.

[6] The employer also argues that its ability to bargain is severely restricted by Article 26.3 of the Collective Agreement. *The parties agree that neither the Executive Director nor the President of the Faculty Association shall serve on the Employer's bargaining team in any round of collective bargaining.*

[7] This restriction is a self-inflicted injury. If the Employer has nailed its shoes to the floor, it cannot complain to the Board that it finds it difficult to walk. It has been settled law from the first decade of this Board that one party cannot dictate the membership of the other parties bargaining committee. This principle is clearly set out in *CUPE 5430 vs COPE 343* LRB File No. 127-21.

[8] If the employer wants the Executive Director on its bargaining committee, URFA can negotiate a change to Article 26.3.

[9] Without being proscriptive, the Employer could achieve this in many ways. It could take a position it would not negotiate monetary issues until the Union agreed to the deletion of Article 26.3. It could lock out the union until the Article 26.3 is removed. It could offer to withdraw its application to the Labour Relations Board for the exclusion Executive Financial Manager in return for the removal of Article 26.3. It could conceivably file an Unfair Labour practice that a Unions refusal to remove Article 26.3 constitutes prohibited interference in the Employer's right to choose its bargaining committee.

[10] The removal of Article 26.3 would not limit the Employer's decision of who it chooses NOT to put on its bargaining committee.

[11] The Board's majority decision determines the proposed position be excluded from the bargaining unit primarily based on its proposed confidential labour relations capacity.

[12] This role must be put into context.

[13] The Employer, URFA, derives its revenue from one source, the dues it collects from its members. These dues come in the form of a payment from each of the employers URFA bargains with, The University of Regina, Campion College, Luther College and the First Nations University of Canada.

[14] While not without challenges, the budgets of universities are relatively stable and publicly known. Most of the COPE members assist in the negotiations of these URFA Agreements and assist URFA members who experience employment difficulties. *URFA ANNUAL REPORT 2020-2021. P.9.*

[15] The URFA membership fees and any increase to them must be approved by a vote of the entire URFA membership. *URFA Constitution* p.15 and *URFA Annual Report 2020-2021* p.16.

[16] All employees of URFA are broadly aware of the financial state of URFA.

[17] The business and affairs of URFA are managed by an Executive Committee of 9 members including a Treasurer. *URFA Constitution* p. 5 and 6.

[18] There is a Finance Committee chaired by a member of the 33 member Council of Representatives. *URFA Constitution* pp 7 and 8.

[19] The Council of Representatives shall provide policy advice and recommendations to the Executive Committee for the benefit of the Association. p7.

[20] All unions rely on dedicated volunteers. URFA is almost unique that among its members are experts who research and teach finance, administration and labour relations. Although likely none of the URFA members participate in their unit for the purpose of bargaining with COPE nonetheless the expenditures on the COPE salaries and benefits are an important part of the URFA budget.

[21] There is an established and knowledgeable network to assist the Executive Director in financial planning and setting its strategy for bargaining with COPE.

[22] The COPE bargaining unit currently contains 6 members. One position, the Financial Officer is vacant and would almost certainly need to be filled if this application is not granted. The ratio would then return to seven bargaining unit employees for each excluded position. If the application is granted there would be 3 bargaining unit positions for each excluded position.

[23] In summary the Board needs to look further than how closely the application echoes the wording of the Act but also look to structure and practice of the Parties when deciding which positions are excluded from the bargaining unit.

[24] Although not determinative, an increasing ratio of excluded staff to bargaining unit members is significant. When the rationale includes the intent to shift the relative strength of the Parties in case of work stoppage, the Board must be vigilant. When the financial situation is relatively stable, simple and, if not transparent, then translucent, the veil of confidentiality is flimsy.

When the Executive Director is part of a large team of knowledgeable and committed volunteers, the argument for additional positions excluded for planning and strategy is unconvincing.

[25] For these reasons I would not agree to the requested exclusion.