



SASKATCHEWAN POLYTECHNIC, Applicant v SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 080-21; May 31, 2022

Vice-Chairperson, Barbara Mysko; Board Members: Don Ewart and Shawna Colpitts

Counsel for the Applicant, Saskatchewan
Polytechnic:

Kit McGuinness and Stephanie Nemeth

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

Application to Amend Certification Order – s. 6-104(2)(g)(ii) of *The Saskatchewan Employment Act* – New Position – Manager, Donations & Trusts – Definition of Employee – Managerial and Confidentiality Exclusions.

Managerial – Exercising Authority and Performing Functions of a Managerial Character not Primary Responsibility – Managerial Responsibilities not Genuine – Managerial Exclusion not Applicable.

Confidentiality – Internal Resource Necessary to Enable Employer to make Informed and Rational Decisions regarding Business Strategic Planning – Insoluble Conflict of Interest – Provisional Order.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for an amendment to a certification order, pursuant to section 6-104 of *The Saskatchewan Employment Act* [Act] brought by the Employer, Saskatchewan Polytechnic, in relation to a new position, entitled Manager, Donation & Trusts [Position]. Saskatchewan Government and General Employees' Union [Union] is the exclusive bargaining agent for an all-employee unit of employees, subject to a list of exceptions, as described in an amended certification order in LRB File No. 140-21, dated April 12, 2022.

[2] The Employer seeks to remove the Position from this bargaining unit on the basis that it does not come within the definition of an employee pursuant to clause 6-1(1)(h) of the Act. The Employer says that the Position comes within both the managerial and confidentiality exclusions.

[3] The application was filed on June 30, 2021, and a hearing was held on November 17 and 19, 2021, and January 14, 2022. For the following reasons, the Board has decided to grant a provisional order to exclude the Position, pursuant to paragraph 6-1(1)(h)(i)(B) and section 6-105 of the Act.

Evidence:

[4] Three witnesses presented evidence at the hearing: Kris Brown and Jody Molnar for the Employer; and Kathy Mahussier for the Union. Mr. Brown is the Associate Vice President [AVP] of the Department of Advancement. Ms. Molnar is the Director of Advancement Services. Ms. Mahussier is a Labour Relations Officer with SGEU.

[5] As background, in February 2016, the parties agreed to an irrevocable election in relation to supervisory employees pursuant to what was then clause 6-11(4)(a) of the Act. At the time of the hearing, there were supervisory employees within the scope of the bargaining unit.

[6] The Position was created in or around May 2021. It has not been advertised and there is no incumbent in the role. The general accountability for the role is described as follows:

The Manager, Donation and Trusts is a new role accountable for the financial administration and service-delivery of charitable gifts and trusts, gift acceptance and processing, and payment requisitioning, and disbursement[,] and is the primary resource for the consultation and review of Gift Agreements and Terms of Reference for philanthropic gifts to Saskatchewan Polytechnic. This position provides expertise on trusts and charitable gifts to ensure the strategic directions of the institution are achieved, and the key objectives and priorities of the Office of Advancement are accomplished. It also oversees the development and implementation of processes and information management related to gift processing, gift agreements and stewardship-related fund analysis and reporting.

The Manager, Donation and Trusts is the primary liaison with Finance, working collaboratively to ensure donation and disbursement information contained within the Advancement databases and systems (Raiser's Edge and Awards Management) agrees with and is reconciled to, the financial system (Banner) as the system of record. The Manager is responsible for the supervision of staff, with the authority to hire, fire, and discipline employees reporting to the Manager. This position leads the design and development of process improvements as required by Advancement. These projects involve participation in cross functional teams with representation from across the institution.

The incumbent is responsible for ensuring that the acceptance, processing of gifts including gift-in-kind and the creation of trusts complies with internal policy and guidelines as well as the guidelines of external agencies such as the Canada Revenue Agency, the Provincial Auditor and charitable monitoring organizations. Demonstrating best practices in philanthropic operations, this role ensures timely and accurate delivery of charitable receipts and letters of gift acknowledgment to the community.

[7] The Position is to be situated in Advancement, which is a relatively new area that builds on the previous Donor & Alumni Relations (DAR) unit. The objective of Advancement is to expand fundraising to significantly grow revenue to support the institution. The strategic plan of Advancement seeks to promote relationships, including philanthropic support “with the goal of advancing the strategic vision and mission of the organization.”

[8] The six-year strategic plan consists of three phases: planning and capacity building, building relationships, and integrating engagement strategies across the institution. The three phases are critical to ensure that the necessary structure is in place before the active campaign begins. The strategy is currently in phase two, which involves building relationships to support institutional priorities. The third, and last, phase involves an active campaign with formalized programming. A very significant fundraising campaign, especially relative to past fundraising efforts, is expected. A focus of the campaign will be on strategic or targeted gifts.

[9] During the days of the previous DAR unit, the fundraising efforts of the institution were relatively stagnant. Correspondingly, the structure of the DAR unit was quite flat. As of January 2019, there was only one Director position, the Director of Development. The renewed emphasis on fundraising necessitates an emphasis on dedicated areas to address specific needs and to have strong leadership in those areas.

[10] In Advancement, the leadership team consists of the AVP, Kris Brown, who oversees the department, and three out-of-scope Director positions within three separate areas - Jody Molnar (Director of Advancement Services), Joanne Kozlowski (Director of Alumni & Donor Engagement), and the Director of Giving (Vacant). Each of these areas is staffed by in-scope positions. The AVP allocates the budget, along with the directors.

[11] Advancement Services is the backbone of the Department of Advancement, providing the infrastructure and technology needed to support the Department. Raiser’s Edge is the fundraising and donor management software that they use. The core functions of Advancement Services include prospect research, records administration, student awards, gift acknowledgement and receipt, and program support. Advancement Services consists of many program areas with relatively thin staff coverage in each area.

[12] Ms. Molnar described her current workload as the Director of Advancement Services. She is the only out-of-scope person in the unit. Her role involves extensive day-to-day people management, strategic leadership, project management, program development around data

reporting, and counterpart relationship management. Ms. Molnar spends much of her time dealing with trusts, endowments, and gift agreements. Out of necessity, she is currently the primary liaison with Finance. Student awards is an extensive program but there is only one person handling that, and as a result, Ms. Molnar is very hands-on in this area. Given her current workload, she is not able to devote the necessary energy to relationship management and does not have capacity to be directly responsible for Donation and Trusts.

[13] In 2021, the leadership team identified a need for a dedicated resource to oversee the Donation and Trusts area. Financial Services was approached but was not able to offer the assistance that was needed.

[14] The Position will report to the Director of Advancement Services. Reporting to the Position is the pre-existing Gift Processing Administrator [GPA].

[15] The Position is accountable for financial administration and reconciliation and for gift compliance and reporting. It is expected to be the primary liaison with Finance. According to Ms. Molnar, the manager in Finance is the counterpart to this position. Ms. Molnar testified that she is currently doing the financial work that is required of the position, including by working with the manager in Finance to set up the necessary systems to enable payment platforms. This is supported by the relevant job description, which states that the Position “leads the design and development of process improvements for more effective delivery of timely and accurate information related to gift compliance and processing as well as other process improvements as required by Advancement”.

[16] The Position will be the primary resource for the consultation about and review of gift agreements and terms of reference. It will be involved in discussions with the leadership team or Deans about a possible donation prior to it being secured and prior to a gift agreement being drawn up. It will provide guidance to the leadership team about unusual situations and will ensure that the relevant gifts are compliant, including in relation to the institution’s strategic direction.

[17] The fundraising procedures stipulate that the AVP, or designate, must be consulted in relation to a negotiation of a gift that is considered unusual. If a gift is unusual, the AVP will refer the gift to Senior Management Council for consideration, and the Council may make a recommendation. The President & CEO makes the final decision. When the offer of the gift is contrary to the institution’s best interest, the AVP or the designate in consultation with the President & CEO may request that the terms be revised or decline the offer. The procedures

make clear that unusual offers of gifts raise issues and necessitate decisions that are highly sensitive and involve significant strategic implications.

[18] When a gift is secured from a donor, a gift agreement is drawn up and executed. The negotiation and development of terms and conditions relating to any gift is coordinated through Advancement. The number of gifts and the complexity of agreements have been increasing and are expected to continue to increase as the strategic plan is implemented. Some of these are what are considered “confidential agreements” or “confidential gifts”.

[19] Mr. Brown attempted to describe “confidential agreements” or “confidential gifts” but he offered varied and uncertain descriptions. This testimony was not very helpful.

[20] Ms. Molnar provided a helpful, more consistent explanation, supported by her testimony about the types of agreements that are accessed by in-scope staff. She described confidential agreements as those that are not shared with in-scope staff because they contain confidential information about, for example, program expansions or decommissioning, or because the agreements are contingent on project approval. She provided the example of an agreement to fund a new in-scope position.

[21] Donor support is often vital to accomplishing certain strategic priorities. For example, a gift could be tied to the creation of a new school, which would have implications for organizational restructuring. A gift might be contingent on a project’s approval. A confidential agreement may impact project decommissioning, expansion, or approval, or be contingent on supporting a new position. Such agreements will include information that could impact resourcing due, for example, to shortfalls in funding.

[22] Both Ms. Molnar and Mr. Brown explained, as well, that publicity around certain agreements could undermine a project, for example, by encouraging speculation. The Union suggests that this evidence undermines the reliability of the Employer’s evidence about confidentiality. From the Board’s perspective, this evidence is consistent with the strategic considerations arising from agreements related to projects that are in whole or in part pending government approval.

[23] Ms. Molnar explained that confidential agreements currently represent approximately 10-15% of all agreements. They are not secured frequently but tend to consist of relatively larger donations and can be more complex. They are expected to increase in frequency.

[24] Currently, only Mr. Brown and Ms. Molnar work on these agreements, with some assistance from the President's office. Communications with respect to these agreements occur only with out-of-scope managers, Directors, the Executive, and the institution's Board, if necessary. They are not included in the database, Raiser's Edge. Only members of the leadership team have access to them.

[25] Clearly, not all strategic projects are outside of public view. However, with the upcoming campaign, it will be necessary to make strategic, focused, and confidential requests to specific donors. Mr. Brown and the incumbent of the Position will meet with donors to secure such gifts.

[26] The Position will handle the administration of confidential agreements. To do this, it will need to be able to identify whether an agreement is confidential and decide how it should be handled and where it should be stored. In assessing whether a gift is confidential, it will draw on information from conversations with the leadership team.

[27] The Position will provide gift information, including trust fund performance, to the AVPs for strategic planning. It will be privy to funding shortfalls. The Position will engage in ongoing consultation with the AVPs to ensure that the funds provided through the gift agreements are being properly utilized. It will provide information to the AVPs and Deans for strategic and budgetary planning.

[28] The Position will participate in the development of endowments and long-term trusts, including through the development of terms of reference that pertain to the reinvestment of earnings. It will review requests for the use of funds in trust to ensure that the use is permissible and will ensure that trusts are being used in compliance with donor intent.

[29] Trust and endowment financial information contained in the Banner information system is restricted to out-of-scope positions. In-scope staff have access to information about trusts only at a transactional level, including details such as the donor name and fund amount. They do not have access to investment performance information. The leadership team is on a committee with Financial Services for the purpose of overseeing the investment performance of trusts.

[30] The Position will develop policies and processes to ensure that the donors' and the institution's needs are being met, requiring an understanding of the institutional and departmental priorities. As an example, the Position could develop a policy about whether the institution will permit donors of student awards to confirm the recipients of those awards.

[31] The Position will identify resource requirements for projects. For example, it may consider whether to outsource gift processing, introduce and implement technology to deal with changing needs, expand methods of accepting donations, introduce new ways of disbursing payments, or engage in new partnerships with payment processors.

[32] According to the Employer's witnesses, the Position is expected to recruit, interview, hire staff, do performance reviews, do probation reviews, make recommendations for permanent status, and revise Job Information Questionnaires [JIQs] to ensure that the employee's work is properly represented; it will work with the human resources consultant but will make the decisions whether to hire or fire and will approve leaves.

[33] As mentioned, the Position will have one direct report – the GPA. The GPA was created in 2020 due to the increase in volume and complexity of gifts received by the institution. The GPA is involved when the gift has been secured, by acknowledging, receipting, and recording the gift, reconciling financial records, and requisitioning payments from the student awards program. There is time sensitivity to the accomplishment of its duties, and if the incumbent makes mistakes there is significant impact to the institution's reputation.

[34] There is only one of these positions. When the major fundraising campaign begins, there is an expectation that another GPA will be needed and will report to the Position. However, there is no current plan or approval to hire a second GPA. Down the road, it is possible that another, existing position will also report to the Position. Again, there is no decision or plan in place.

[35] Ms. Molnar testified that the GPA works at the operational level; it is privy to granular information, such as outstanding pledges, outstanding income over the coming, for example, thirty days. She explained that the GPA is not involved in giving advice about whether a gift is acceptable to the institution but instead is involved with gift administration after gifts have been secured.

[36] Ms. Molnar testified that the GPA will follow the policies and procedures developed by the Position. The GPA job description and JIQ suggest that the GPA is expected to develop some processes around gift administration. Ms. Molnar explained that the GPA provides advice about operations, for example, on how to fill out forms, but not advice as to whether gifts are acceptable to the institution.

[37] There are statements in the job description and JIQ which suggest that the GPA has a role in determining whether a gift is acceptable to the institution. For instance, the job description

states that the GPA ensures “gift administration aligns with ... institutional gift acceptance”. In addition, the brief explanation contained in the JIQ states that the GPA is “critical to ensure the successful development of institutional-wide gift acceptance and receiving including daily operations and establishment of gifts, interpretation of complex gift agreements as well as donor acknowledgements.” The JIQ states that it ensures “alignment with institutional policies regarding gift acceptance and fundraising as well as CRA rules”.

[38] On the other hand, the job description contained in the JIQ emphasizes operations, the transactional experience, and day-to-day service delivery relating to gift processing. Examples are tracking and monitoring of pledges, gift acknowledgment and receipting, and stewardship administration. The education and experience required of the position are consistent with a focus on administration and operations. References to strategic activities suggest that the GPA works to implement the existing strategic plan.

[39] The Board accepts that the GPA focuses on administering gifts at an operational level, perhaps with the exception of some higher-level responsibilities over gifts-in-kind. The job description in the JIQ provides comprehensive and detailed information about the functions of the role. On the whole, it supports the characterization of the GPA as an operational role. This is consistent with Ms. Molnar’s testimony. The GPA reports to Ms. Molnar. Ms. Molnar is familiar with the role.

[40] The GPA does not work with gifts that are considered confidential.

[41] Also reporting to the Director of Advancement Services is an in-scope supervisor, the Advancement Services Specialist [Specialist]. Reporting to this position are six positions, one of which is vacant.

[42] Ms. Molnar was in the Specialist role during a bridging period between the two structures (DAR and Advancement). At the time, there was no out-of-scope role in the Advancement Services area. She testified that the scope of the role has been reduced since then. She testified that it is now primarily a technical role involving records processing, deploying necessary supports, and implementing new processes. The position has access to some agreements - typically those that relate to student awards - but not to any of the agreements that are held confidentially.

[43] Mr. Brown acknowledged that the Specialist was involved in daily supervision and work planning, however, it did not have the final say in work planning, and this was why the organization

needed the Director of Advancement Services position. Unlike previously, the current incumbent does not approve leaves or do performance management.

[44] Reporting to the Director of Alumni & Donor Engagement are five in-scope positions. The Director of Giving has been vacant since it was posted. Reporting to this position, in theory, are five in-scope positions, one of which was vacant until just shortly before the hearing of this matter. All of the positions are giving or gifts officers. Due to the vacancy, these positions report to the AVP. Mr. Brown testified that it has been difficult to fill this Director position but that remains the intention. When it is filled, his daily supervisory work will be reduced.

[45] Ms. Mahussier has a concern with the expansion of out-of-scope positions listed in the collective bargaining agreement. In the 2009-2012 CBA there were 99; in the 2012-16 CBA there were 109; in the last CBA there were 174. Since March 2020, there have been at least 25 more requests for out-of-scope positions. There are 524 full time equivalents and many part-time positions within the bargaining unit, for a total of approximately 600. Ms. Mahussier testified about the Union's approach to these requests, including the factors that the Union would consider in deciding whether to agree. She explained that the Union agrees to exclude positions that are clearly out-of-scope and has probably agreed to more exclusions than it is comfortable with.

[46] Ms. Mahussier is particularly concerned with the vacancies for out-of-scope positions agreed to by the Union. Of relevance is the Director of Giving which has not been filled since the day it was approved three years ago. Ms. Mahussier keeps copies of all the job postings, and she has only one in relation to that job. When the Employer shows little interest in filling out-of-scope positions that were allegedly "necessary", this erodes trust.

[47] Ms. Mahussier provided examples of in-scope employees who have access to confidential information, including IT employees, nurses, and employees working in Finance. Employees are bound by the Code of Conduct.

[48] Budget Unit Managers are a category of positions that are included on the Management Authorities Grid. Some are out-of-scope. Ms. Mahussier knows of one that is in-scope.

[49] In her role, Ms. Mahussier is privy to the terminations. She has never seen a termination letter that was signed by anyone below the Director level. However, the Management Authorities Grid states that out-of-scope managers, with HR, have authority to perform probationary reviews, extend probation, fail and terminate, and impose any discipline as per the CBA.

Statutory Provisions:

[50] The following provisions of the Act are applicable to 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:*

...

(f) *rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;*

(g) *amending a board order if:*

(i) *the employer and the union agree to the amendment; or*

(ii) *in the opinion of the board, the amendment is necessary;*

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

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

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.*

Arguments of the Parties:**Employer:**

[51] The Employer argues that the Position fits within either or both the managerial and confidential capacity exceptions.

[52] The main issue is whether the amendment to the certification order is necessary. This requirement necessitates consideration as to whether the Position falls within one or both exceptions. There is no definitive test. The Board must consider all the relevant facts.

[53] The first exception is managerial. The Position should be excluded from the bargaining unit on this basis. The Position will have managerial responsibilities in relation to in-scope employee(s). It will recruit, select, train, develop and motivate employees by implementing human resources policies and practices, will have authority to discipline up to and including termination, will develop and monitor performance objectives for direct reports, and will do resource and workforce planning. The Position will have authority over conditions of work, including by approving leaves of absence and authorizing overtime.

[54] The Position was created, in part, for the purpose of relieving an out-of-scope position from some of her managerial responsibilities. Unlike the supervisory positions within the organization, the Position's responsibilities will include performing managerial duties as opposed to recommending courses of action.

[55] The second exception is confidentiality. The Position will have extensive access to confidential information that impacts the labour relations of the organization, including information relating to confidential gifts and trusts. With the investment in Advancement, there are more confidential projects. The new direction of Advancement allows for the possibility of new schools and administrative units, which are confidential until they are public and can be launched. A confidential gift agreement may also be directed towards programming, staffing or resources that have a direct impact on labour relations. The Position will be immersed in the strategic planning and budgeting process in relation to confidential projects.

[56] The Position will be responsible for monitoring financial performance of endowments and bringing that information to senior leadership. Resultant budget shortfalls mean that the funding for a position may not be available. The Position's advice to senior leadership about the use and stewardship of gifts will have the potential for altering program offerings and capacity limits for

programs. The Position will also have access to the organization's entire financial system, which would include information restricted to out-of-scope positions.

[57] The Position will be involved in the leadership team of the Advancement Department. It will therefore be involved in discussions about the unit's future direction and budget.

[58] In its argument, the Employer referred to the following cases: *C.A.W. v Toronto Transit Commission*, [1994] OLRB Rep 319, 1994 CarswellOnt 1395 [*Toronto Transit Commission*]; *C.E.P. v E.C.C. International Inc.*, [1998] SLRBD No 25, 1998 CarswellSask 936 [*CEP*]; *Unifor Canada, Local 594 v Consumers' Co-Operative Refineries Limited*, 2015 CanLII 43766 (SK LRB) [*Consumers' Co-op*]; *CUPE, Local 1660 (Re)*, [2002] Sask LRBR 556, [2002] SLRBD No 52 [*CUPE, Local 1660*]; *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Regional Health Authority*, 2009 CanLII 38609 (SK LRB) [*Prince Albert Parkland*]; *Canadian Union of Public Employees, Local 4928 v Saskatchewan Society for the Prevention of Cruelty to Animals*, 2009 CanLII 43954 (SK LRB) [*SPCA*]; *Early Childhood Intervention Program, Regina Region Inc v Government and General Employees' Union*, 2013 CanLII 53367 (SK LRB) [*Early Childhood Intervention*]; *Elmwood Residences Inc. v Service Employees International Union, Local 333*, 2005 CanLII 63090 (SK LRB) [*Elmwood Residences*]; *LIUNA, Local 1036 v R.M. Belanger Construction Ltd.*, 2018 CarswellOnt 3634 (Ont LRB) [*Belanger Construction*]; *O.P.S.E.U. v Providence Continuing Care Centre St. Mary's of the Lake Hospital Site*, [2003] OLRD No 3384, 2003 CarswellOnt 9320, [*Providence*]; *Crossroads Treatment Centre Society and HEU, Re*, [2013] BCWLD 2896, 2013 CarswellBC 423 [*Crossroads*]; *Regina Public Library Board v Canadian Union of Public Employees, Local 1594*, 2009 CanLII 45865 (SK LRB) [*Regina Public Library*]; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*, 2018 CanLII 91973 (SK LRB) [*Beeland*]; *Saskatchewan Human Rights Commission v Canadian Union of Public Employees, Local 1871*, 2011 CanLII 81711 (SK LRB) [*SHRC*]; *Saskatchewan Institute of Applied Science and Technology v SGEU*, [2012] SLRBD No 11, 2012 CarswellSask 749 [*SIAST, 2012*]; *Saskatchewan Institute of Applied Science and Technology v SGEU*, 173 CLRBR (2d) 1, 2009 CarswellSask 897 [*SIAST, 2009*]; *Saskatchewan Mutual Insurance Company v United Steel*, 2020 CanLII 76678 (SK LRB) [*SMI*]; *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2018 CanLII 38248 (SK LRB) [*Sask Polytech*]; *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB) [*Saskatoon Public Library*]; *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, 2019 CanLII 76957 (SK LRB) [*Verdient*]; *U.F.C.W., Local 1400 v Wal-Mart*

Canada Corp., [2008] Sask LRBR 951, 2008 CarswellSask 919 [*Wal-Mart*]; *University of Regina v University of Regina Faculty Association*, 2014 CanLII 4554 (SK LRB) [*University of Regina*]; *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB) [*University of Saskatchewan*]; *United Steelworkers v Riide Holdings Inc.*, 2019 CanLII 86848 (SK LRB) [*Riide*]; *SGEU v Wheatland Regional Centre Inc.*, 2015 CanLII 80544 (SK LRB) [*Wheatland Regional*].

Union:

[59] The Board must look beyond the Position's title and description and instead consider its true function. The relevant duties expected to be performed by the Position do not differ markedly from those already performed by in-scope employees.

[60] First, the primary function of the Position is to assume responsibility for the financial administration and service delivery of charitable gifts and to provide related expertise. There is no evidence that an in-scope placement would result in managerial domination of the Union or an absence of resources to permit the Employer to meaningfully engage in collective bargaining.

[61] This Position does not have a "significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees". The Position will have only one direct report. Its supervisory duties are peripheral and are not sufficient to justify its exclusion from the bargaining unit. Supervisory positions have long been included within the unit, and they have the authority to coach, direct and appraise performance and to recommend hiring and termination. There are in-scope employees with the authority to hire employees. The ability to hire employees does not justify exclusion from the bargaining unit.

[62] The Board should look beyond the boilerplate language contained in the job description. Other than boilerplate language, there is no mention in the job description of a labour relations responsibility. Relatedly, the Board should consider whether the duties assigned to the Position are genuine and necessary. Within this organization, termination decisions are not made at the managerial level but by a Director or higher. It is unreasonable to expect that the Director of Advancement Services would have authority to make termination decisions for all positions within the Department except one. It is also unlikely that the placement of this Position outside of the bargaining unit would meaningfully reduce the workload of the Director of Advancement Services.

[63] There is no evidence that the Position will have any meaningful role in the creation of budgets. The job description does not contain the word "budget". Out-of-scope managers within

the organization do not have authority to hire or create new positions that have not already been budgeted for, to abolish positions, or to agree to severance pay or labour relations settlements. There is no evidence that the Position would be budgeting for the creation or elimination of positions.

[64] Next, there is no basis upon which the Position should be found to come within the confidential capacity exclusion. The evidence on this issue lacked specificity. Mere access to confidential information is not a sufficient basis for such an exclusion. The job description does not describe the nature of the confidential information, does not suggest that the confidential information would have a direct impact on the bargaining unit, and does not differ from the nature of professional discretion and confidentiality required by other in-scope positions.

[65] The evidence is unclear as to how confidential gift agreements are confidential in a labour relations sense or how the Position's involvement in those agreements could have a direct impact on the bargaining unit. The Position would not be a part of the decision-making team or process related to budgeting. The Position would simply provide donation information to the senior leadership to be used for making decisions. Nor is there any evidence that the Position would need to be advised about those decisions. The job description includes no information about how the Position will provide input on budget decisions or play a role related to bargaining strategy.

[66] Furthermore, the evidence as to the volume of confidential gift agreements is lacking, and for what evidence there is, it suggests that they are infrequent and minimal relative to the whole of the existing agreements.

[67] The Position will not have any meaningful role in collective bargaining or labour relations. The Employer already has an abundance of out-of-scope positions and there is no risk that it will lack sufficient resources to make informed and rational decisions about labour relations in an atmosphere of candour and confidence.

[68] The Union relied on the following cases: *SEIU-West v Saskatoon Twin Charities Inc.* (City Centre Bingo), 2019 CanLII 98487 (SK LRB) [*Saskatoon Twin Charities*]; *Saskatoon Co-operative Association Limited v UFCW*, 2020 CanLII 71339 (SK LRB) [*Saskatoon Co-op*]; *Saskatoon Public Library*; *Sask Polytech*; *Prince Albert Parkland*; and, *SIASST*, 2009.

Analysis and Decision:

[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.*

[70] 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*], the Board affirmed this process.

[71] The Union has not raised any concerns, nor has the Board identified any problems, with the Employer's conduct in relation to this process.

[72] Therefore, the Board will move on to consider whether to grant the requested amendment to the certification order. The Employer has accepted that it bears the onus to prove the requisite elements of an amendment application, on a balance of probabilities.

[73] In deciding whether to grant the requested amendment, the first question is whether there has been a material change in circumstances. The material change requirement acts as a check against repeated applications to the Board seeking to overturn previous decisions. To find that there has been a material change, the Board must be satisfied that the application is not "an effort to circumvent a previous determination of the Board": *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB) at paragraph 28.

[74] The Board is satisfied that there has been a material change in circumstances. The Position is a newly created position. It is well established that the creation of a new position is sufficient to satisfy the requirement of a material change in circumstances: *Saskatoon Public Library*, at paragraph 62.

[75] The next question is whether the amendment is necessary. To answer this question, the Board must consider whether the Position falls outside the definition of employee contained in clause 6-1(1)(h) of the Act. If it does, then it needs to be excluded from the scope of the bargaining unit.

[76] The Board in *Beeland* summarized the general principles underlying the managerial and confidentiality exclusions:

[16] ... The Board has stated on numerous occasions the purpose for the exclusion of persons from a bargaining unit in accordance with that definition:

- *Authority and functions of a managerial character: 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).*
- *Duties of a confidential nature: To assist the collective bargaining process by ensuring that the employer has sufficient internal 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[5].*

[17] The parties cited numerous cases that apply this test. A recent decision of this Board, issued after the enactment of the Act, states as follows:

The Board has, on many occasions, been required to balance the independence of a union from management influence with the right of those employees to be represented for the purposes of collective bargaining. This Board, like most boards across Canada has taken the view that the exclusion of persons on managerial or confidential grounds should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible[6].

[18] In Saskatchewan Institute of Applied Science & Technology v. SGEU, 2009 CarswellSask 897, the Board cautioned, at paragraph 58:

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, exclusions are generally made on as narrow a basis as

possible, particularly so for exclusions made because of managerial responsibilities.

[citations omitted]

Managerial Exclusion:

[77] Pursuant to subparagraph 6-1(1)(h)(i)(A), a position falls outside the definition of employee if its primary responsibility is to exercise authority and perform functions that are of a managerial character. There is no definition in the Act of “managerial character”. Instead, the Legislature has left it to the Board to determine the meaning of that phrase. In doing so, the Board draws on its extensive case law considering this issue.

[78] As explained by the Board in *Saskatoon Public Library*, it is necessary to consider the purposes of the exclusion in assessing whether it applies to the position in question:

[65] The determination of whether the ACI Analyst and SEP Analyst positions meet the criteria to be excluded under the managerial exclusion requires a careful review of the stated purposes of the exclusion: to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining; to avoid muddying or blurring the lines between management and the bargaining unit; and to ensure that persons who can affect the economic lives of other employees are not placed in an insoluble conflict of interest by including them in a bargaining unit[31].

[79] The Board in *Prince Albert Parkland* described the principles and factors to be considered in making the determination:

[66] The Board considered and dealt with all of the cited cases in University of Saskatchewan, supra. That case set forth the following principles to be considered:

- 1. The determination of whether a position falls to be excluded is primarily a factual one (para 36)*
- 2. Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible (para 37)*
- 3. A person to be excluded must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient. (para 38)*
- 4. The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union*

by placing a person too closely identified with management in a bargaining unit. (para 38)

5. *In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. (para 38)*

6. *The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. (para 38)*

[80] *Prince Albert Parkland* was decided based on the managerial exclusion contained in the (now repealed) *Trade Union Act*. The only difference between that exclusion and the current exclusion is that the word “actually” has been removed. The previous exclusion was for “a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character”; the exclusion now reads “a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character”. The Employer suggests that the removal of “actually” should be interpreted as a substantive change.

[81] In *Saskatoon Public Library*, at paragraph 68, the Board found that the removal of “actually” is more reasonably interpreted as a modernization of language than as a substantive change. The reason for this is that the word “actually” does not change the meaning of the verbs, “exercise” and “perform”, that it purports to modify. The presence or absence of “actually” is immaterial to the interpretation of the exclusion. Therefore, the cases that interpret the exclusion, as it was worded prior to the removal of the word “actually”, continue to apply. By extension, the principles and factors outlined in *Prince Albert Parkland* continue to apply.

[82] In assessing the Position, the Board is guided by the following excerpt from *University of Regina v University of Regina Faculty Association*, 2014 CanLII 4554 (SK LRB):

[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.

[83] To be excluded there must be an insoluble conflict between the responsibilities owed to the Employer and the interests of the persons and colleagues as members of the bargaining unit. As the Board has explained, “[b]ecause such a conflict is in many cases a matter of degree, it is impossible to state any one test which can be used to determine whether a particular person falls on one side of the line or the other.”¹ The assessment is highly fact specific. Depending on the circumstances, some factors may be more relevant than others.

[84] Furthermore, the question is not whether the Position has some responsibility to exercise authority and perform functions of a managerial character but whether its primary responsibility is to exercise those functions. In this respect, the wording of the exclusion is consistent with the longstanding approach of this Board to interpret managerial exclusions on as narrow a basis as possible. In utilizing this approach, the Board is careful not to unnecessarily prevent employees from exercising their statutory and constitutional rights to collective bargaining.²

[85] In assessing a request for an exclusion, it is necessary to look beyond the job title and description and consider why the Position was created, including the operational deficit it was intended to address. The Board should consider the “true function” of the Position.

[86] The Union makes two main arguments in opposition to the managerial exclusion. It argues, first, that the purported managerial duties of the Position are peripheral to its role. It points to the Board’s decision in *Sask Polytech* which confirms that peripheral duties do not justify the exclusion of a position based on managerial status. According to the Union, the Position’s primary responsibility is for the financial administration and service delivery of charitable gifts and to provide expertise on trust and gifts, and not to exercise authority and perform functions that are of a managerial character.

[87] The Union argues, second, that the purported managerial character of the Position is not genuine. It says that the supervisory language contained in the job description is boilerplate and has been included only to influence a managerial exclusion. The Union observes that there is only one role reporting directly to the Position, alleges that the supposed managerial duties are the same as duties performed by in-scope supervisors, and argues that it is not believable that the Position will perform managerial duties as opposed to supervisory duties.

¹ *Regina (City) v CUPE, Local 21*, [1995] 3rd Quarter Sask Lab Rep 153 (Sask LRB), at 159, as cited in *CUPE, Local 1660*.

² See, for example, *Saskatoon Public Library*, at para 70.

[88] The Board will consider, first, whether the purported managerial duties are a primary responsibility.

[89] In considering this question, it is necessary to consider the reason why the Position was created, including the operational deficit it was intended to address. In the present case, to support its institutional priorities, the Employer has increased its strategic reliance on fundraising initiatives. The establishment of the Advancement area is intended to advance this objective. Advancement's strategic plan is currently in its second phase and the significant fundraising campaign is yet to launch. Due to the efforts of the Advancement group, there has been and will continue to be an increase in the volume and complexity of gifts, including confidential gifts and trusts, being secured. The leadership team has identified a need for a dedicated resource to oversee the Donation and Trusts area. The Position is expected to fulfill that role.

[90] Ms. Molnar testified that the Position is expected to recruit, interview, hire, do performance reviews, do probation reviews, make recommendations for permanent status, and revise JIQs. All of these responsibilities will be performed in relation to only one direct report.

[91] The Board has, on occasion, commented on whether the amount of time spent performing managerial duties or the number of direct reports is relevant to a determination of managerial status. In *SEIU, Local 333 v Lutheran Sunset Home Corp.*, [2002] Sask LRBR 695 [*Lutheran Sunsef*], the Board stated that the proportion of work time spent performing managerial functions is not necessarily determinative of the issue. In *University of Saskatchewan*, the Board stated that the number of reports is relevant only in limited circumstances:

[95] In our view, this position should not be excluded from the ASPA bargaining unit. The University's indication that it is not relying on the managerial exclusion because the position manages only a .3 ASPA position merits comment. The fact that an individual supervises members of the same bargaining unit is not indicative in itself of managerial status. Over the years, a number of positions have been assigned to the ASPA bargaining unit where the position has the responsibility of supervising members of its own bargaining unit and the concept of an individual being an in-scope supervisor is well established in the case law. What are of significance are the actual managerial duties exercised by the incumbent. The only time the number of reports might become relevant to determining whether managerial duties are the primary focus of the position is where there are a large number of reports and that leads the Board to conclude that the individual must spend a great deal of time on managerial functions. In any event, Mr. Hildebrandt does not exercise actual managerial authority; his participation in management decisions being limited to making recommendations. It is clear that actual authority lies with Dr. Rhodes.

[92] The Board would approach this issue differently than did the Board in *University of Saskatchewan*. Certainly, there is no authority to the effect that a position must have more than

one direct report to be found to be managerial. However, it is necessary that the managerial responsibility be the Position's primary responsibility. As the Board found in *University of Saskatchewan*, the amount of work time spent performing managerial functions may be indicative of whether a position's primary responsibility is managerial. Or it may not be. It depends on the circumstances. Just as a large number of direct reports may be relevant in determining whether managerial duties are primary, so may a small number. The question is whether the whole of the circumstances indicates that the managerial responsibility is primary.

[93] At the same time, the nature of a position's power over in-scope employees may be sufficient even though it exercises that power infrequently. For instance, in *SPCA*, the position's power, while exercised infrequently, was sufficient to meet the test for a managerial exclusion. Of relevance was the fact that the position was the head of the largest division in the workplace.

[94] Here, the Position will report to the Director of Advancement Services, who in turn, reports to the AVP of Advancement. In this respect, it is different than the other out-of-scope managers within Advancement. In both *Wheatland* and *Regina Public Library*, although the Board excluded positions with only two direct reports, the positions in question reported either directly to the CEO or were placed at the same level as other operational managers. In *Wheatland*, the position was found to be equivalent to another position that the parties had agreed to exclude.

[95] Furthermore, there is no evidence of any authority or any plan to hire additional direct reports. Therefore, the idea that the Position could, eventually, have more than one direct report is theoretical. The Employer argues, based on *Elmwood*, that the Board should consider whether the responsibilities of the Position are expected to evolve over time. In *Elmwood*, the Board found that the time frame for a provisional order would "be sufficient to allow the duties of the position to crystalize".³ In the present case, the Board is not confident that the Employer will have made a final decision about potential, additional direct reports within a period of a year. Besides, if a material change in circumstances occurs then it is open to the Employer to bring an amendment application. The possibility that the Position will have additional direct reports in the future is too uncertain to be of any assistance to the Employer.

[96] However, clearly, the fact of there being only one direct report is not the end of the matter. The Board should fully consider the true function of the Position.

³ At para 71.

[97] In this respect, the job description can provide valuable insight. The Board made a similar observation in *SPCA*:

[44] In Saskatchewan Indian Federated College Inc. v. University of Regina Faculty Association, [2001] Sask. L.R.B.R. 657, LRB File No. 049-01, the Board concluded that, while an evaluation of the work actually performed by an incumbent is more important than a job description (for the purposes of assessing whether an employee is performing functions of a managerial character), job descriptions can provide valuable insight into what duties and responsibilities the employee in a disputed position is expected to perform, particularly if the occasion to perform relevant managerial duties has not yet arisen during the period of time the incumbent has occupied the disputed position.

[98] In a case such as this, where the Position has not been filled and no duties have been performed, a job description can be helpful.

[99] The job description does not demonstrate that the primary responsibility is managerial. First, in the General Accountability section, there is a detailed description of the expectations of the role. Buried within that description is a single line stating that the Position is “responsible for the supervision of staff, with the authority to hire, fire, and discipline employees reporting to the Manager”. The following section, which provides the Job Context, contains no reference to such duties. It states only that the Position “will be required to review their own and other’s work”.

[100] Granted, within the specific Accountabilities section, there is a People Management accountability section. Other specific accountabilities, in addition to People Management, are Donation and Trust Management, Risk Assessment and Management, and Relationship Management. There is no mention of managerial responsibilities in any of the other accountabilities. Internally, Relationship Management focuses on relationships with divisions, stakeholders, schools, units, Deans and AVPs.

[101] The People Management section, considered within the job description as a whole, does not persuade the Board that the managerial responsibility is primary.

[102] Ms. Molnar testified that the GPA needs robust oversight due to the institutional importance of fundraising and the reputational risk associated with making mistakes. That may be, but it does not mean that the Position is necessarily managerial. The Board stated in *Prince Albert Parkland* that job functions, such as directing the workforce and assigning work are more indicative of supervisory functions, which do not alone give rise to the requisite conflict of interest.

[103] As suggested by the Union, it is also necessary to consider whether the duties and responsibilities assigned to the Position are genuine and necessary. In considering this question,

the Board has concluded that the Employer has included managerial duties in the job description for the purpose of obtaining an unnecessary exclusion pursuant to subparagraph 6-1(1)(h)(i)(A).

[104] First, as mentioned, the references to managerial duties in the job description are minimal. The duties outlined in the People Management section are not well integrated into the rest of the job description.

[105] Second, the current reporting relationships are inconsistent with the requested exclusion. The Director has managerial responsibilities in relation to 10 positions, including positions that are supervised by the Specialist and that are vacant. The notion that the Director would have authority to perform probationary reviews and make termination decisions for all positions within the area except for one is not credible. There are no other examples of this type of structure within Advancement. In comparison, the Specialist position, which also reports to the Director, acts as an in-scope supervisor to 6 positions (4 of which are 0.5 FTEs).

[106] The need for the Position to oversee the GPA does not explain why it would be given managerial authority that the Specialist does not have. Granted, the Employer suggests that the risk of error in the tasks performed by the GPA is high. Also, according to the Management Authorities Grid, in-scope supervisors do not have authority to perform the mid-point review, final review, or extend the probationary period on their own.

[107] However, in-scope supervisors have the ability to provide daily oversight, to coach, to make recommendations about discipline, and to be involved in appraising performance. They have the ability to recommend hiring and termination actions. The Donor Relations & Stewardship Specialist supervises one employee with whom she has regular, daily interactions. A number of in-scope positions, including the two Specialist positions, have authority to coach, direct, and appraise performance of subordinates. The Donor Relations & Stewardship Specialist also recommends hiring and termination actions. Lastly, in-scope Budget Managers have authority to manage a budget that has been allocated to them.

[108] As well, the Employer says that another reason for creating the Position was to reduce the workload of the Director of Advancement Services. However, it is very unlikely that, by transferring the Director's managerial responsibilities over the GPA to the Position, much of the Director's time would be saved.

[109] The Union also argues that the scope of approved activities for out-of-scope managers suggests that the purported managerial responsibilities are not genuine. According to the

Management Authorities Grid, out-of-scope managers do not have authority to hire positions that have not been budgeted, to abolish positions, to negotiate severance pay, or to enter into labour relations settlement agreements. The Union suggests that, because the Position would not have the authority to do these things, it could not operate in the manner that has been described.

[110] The Board is less persuaded by this latter argument. Effective authority may come in a variety of forms. In *S.G.E.U. v SLGA*, 1997 CarswellSask 823, [1997] Sask LRBR 836 (Sask LRB), at 67, the Board explained how this is true within the “modern corporation”:

...Decisions related to labour relations are often made by a manager after consultation with her superiors, human resources personnel and on some occasions, legal counsel. Despite the trend to disperse managerial functions among different levels of management, it is not uncommon for an employer to require that certain decisions, such as the termination of an employee, be approved by senior management before being implemented by the person whose status is in question. However, this multi-layered approach to decision-making does not detract from the managerial status of the person in question if it can be demonstrated that the individual has an ability to make an effective determination....

[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.

[113] Therefore, the request for an exclusion pursuant to paragraph 6-1(1)(h)(i)(A) of the Act is denied.

Confidential capacity:

[114] In considering a potential confidentiality exclusion, the guiding provision is paragraph 6-1(1)(h)(i)(B) of the Act, which states:

...

(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;*

[115] This provision stands in contrast with the following provision of the (now repealed) *Trade Union Act*:

(f) “**employee**” means:

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

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

[116] To conclude that a position should be excluded under this heading, it is necessary to find that the primary duties include activities that are confidential in relation to one or more of the listed areas: labour relations; business strategic planning; policy advice; and budget implementation or planning. It is also necessary to find that the confidential activities have a direct impact on the bargaining unit.

[117] In *Saskatoon Public Library*, the Board described the competing rights at stake when the Board is deciding whether a position comes within 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.

[118] The Board also recognized that, in addition to the kind of work described in subparagraph 6-1(1)(h)(i)(B)(I) (labour relations), 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”.⁴

[119] Next, it is necessary to determine whether the Position comes within the exclusion.

[120] The Board has no doubt that the Position has primary duties that include activities of a confidential nature. The Position will participate in the analysis and establishment of a wide range of gifts, including endowments and trusts, through the development of terms of reference and gift agreements. It will be involved in discussions with the leadership team about a possible donation prior to it being secured and prior to a gift agreement being drawn up in the early stages of strategic initiatives. It will provide guidance to the leadership team about complex gifts, and to

⁴ At para 80.

some extent unusual situations, and will ensure that the relevant gifts are compliant, including in relation to the institution's strategic direction. These conversations may take place without a formalized gift agreement ever materializing and without a project ever being approved.

[121] The Position will handle the administration of confidential agreements. The intention is to transfer the primary responsibility for confidential agreements from the AVP and Director to this position. The Position will have to understand the difference between confidential and non-confidential agreements. It will need to be able to identify whether an agreement is confidential, which understanding may be assisted through conversations with the leadership team. The Position will have to make decisions about what is confidential and for whom, where documents should be stored, and whether in-scope staff can access the agreements. The job description states that the Position will "[e]xhibit a high degree of professional discretion and confidentiality in the handling of requests from donors and maintaining appropriate confidentiality of information and materials."

[122] However, it is not enough that the Position 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.

[123] The first category requires that the Position's primary duties include activities that are of a confidential nature in relation to labour relations. Even if the Position is involved in grievance procedures, its involvement will not be included in its primary duties. There is no mention in the job description that the Position will be involved in collective bargaining. Nor is there any need for additional resources around or in relation to the bargaining table, in particular, for the Advancement area.

[124] To be sure, in providing advice to the leadership team about gift agreements and trusts, the Position will seek to ensure compliance with institutional procedures, policies, and collective agreements.⁵ It is likely that issues will arise, especially with respect to restricted or contingent agreements, as to whether there will be impacts on existing positions, including through program expansions, specified recruitment, or technological changes. However, the evidence about the Position's duty to ensure compliance with collective agreements is minimal. Therefore, the Board cannot conclude that this duty is indicative of a confidentiality exclusion.

⁵ See, "3. Rick Assessment and Management ...

- Ensure compliance with funding agency restrictions and Saskatchewan Polytechnic procedures, policies and collective agreements ensuring adherence to generally accepted accounting practices."

[125] The next category requires that the Position's primary duties include activities that are of a confidential nature in relation to business strategic planning. The evidence with respect to this category overlaps, to some extent, with budget implementation and planning.

[126] The Accountabilities section of the job description states that the Position "[p]articipates in the development of strategic and annual plans to ensure consistency and integration both internally and externally to Advancement". The Advancement area has developed a strategic plan and is currently in phase two of that plan. The strategic priorities are outlined for a period of two years.

[127] There is an obvious synergy in the strategic planning of Advancement and the institution as a whole. Fundraising, including targeted fundraising, is critical to the achievement of the institution's goals. The AVP's job duties and the organizational structure suggest that the AVP works at a high level to set directions for fundraising in alignment with strategic goals. Fundraising priorities must be jointly approved by the AVP of Advancement and the appropriate Dean or AVP elsewhere in the institution before being submitted for final approval. Given this collaboration, the Advancement leadership team needs significant access to confidential information across the institution to be able to accomplish its objectives.

[128] The Union argues that the Position interacts with strategic planning in a manner that is similar to many in-scope positions. In considering this argument, the Board has reviewed the job descriptions and JIQs for the in-scope positions that have been put in evidence, which provide the following information:

- a. The Donor Relationship & Stewardship Specialist is responsible for the stewardship and donor relations program. It develops a strategy that targets all levels of giving. It participates in donor engagement strategy planning meetings with donor solicitors and meets regularly with senior Advancement leadership to, in part, design new initiatives. It works collaboratively to develop and implement strategies to attract additional contributions.
- b. The job description of the Leadership Giving Officer states that it develops and manages strategic leadership level annual giving plans and campaigns.
- c. The Major Gifts Officer and the Senior Major Gifts Officer, positions that are responsible for gifts of \$5,000 and up, develop fundraising strategies. The JIQ for

the Senior Major Gifts Officer states that its “work has the potential to significantly impact fundraising efforts particularly those directly related to immediate and future capital expansion efforts, organizational reputation, and the ability of the institution to attract and keep the financial support of business and industry”. It also says that it “[incorporates] the major gift program into the general development program in such a way as to maximize resources and position the major gifts program as the main component of the development efforts”.

[129] Unfortunately, the Board heard only minimal testimony explaining how the relevant duties, expressed in the job descriptions and JIQs, are performed by any of the in-scope positions (except for the Advancement Services Specialist). The absence of this explanatory context, considering the extensive organizational restructuring in recent years, has made it difficult for the Board to draw comparisons with the Position.

[130] To be sure, the documents suggest that many employees have been brought on board to advance the strategic objectives of the institution, and to some extent, contribute to strategic planning. This makes sense given the significant reorientation of the institution’s fundraising goals in recent years. However, these documents signal that the focus of those positions is on developing projects that are strategically aligned with the Advancement plan, as opposed to high-level, confidential strategic planning with an impact on the bargaining unit.

[131] The JIQ for the Specialist is distinct. It states that it “is a member of the Advancement leadership team, contributes to the planning and implementation of the Advancement integrated strategic plan, and [is] critical for the successful function of the area.” This statement is repeated in the detailed job responsibilities. The JIQ also indicates that this position is to “[p]articipate and work collaboratively with Advancement leadership providing input on business directions to meet operational needs”.

[132] The Union suggests that Ms. Molnar’s description of this position as a “technical role” is inconsistent with the role as it is described in the JIQ. The JIQ does suggest that the Specialist has a role in strategic planning. However, the Board heard testimony that the Specialist role has narrowed since the JIQ was approved in January 2019, when Ms. Molnar was still the incumbent. She left that role when she became the Director at the end of November 2019, and since then, the role has evolved to match the skillset of the current incumbent. The Board accepts this evidence. The organizational structure of Advancement has changed considerably in just a few years. It is obvious that the relevant documents, including the JIQs, have not kept pace with all of

the changes that have occurred. Ms. Molnar is familiar with the position. Her explanation for why the scope has changed, related to her own skill set, is plausible and internally consistent.

[133] Mr. Brown also explained why it is that the Specialist may, initially, have had a larger role. He explained that he had created the Specialist role early in his appointment to the AVP position. In those early days, the Specialist acted as member of the leadership team. This was necessary to develop and implement critical initiatives. This explanation is also plausible, and it is consistent with the testimony about Ms. Molnar's skill set.

[134] The Board does not believe, however, that the Specialist did not, in the early days, have access to confidential strategic information. To the extent that Mr. Brown denied that the Specialist had access to confidential strategic information, he contradicted his own explanation for why the position was created in the first place, including the Position's involvement in high level planning. His testimony on this point was inconsistent and uncertain.

[135] The Advancement Services Specialist likely had access to and was involved in confidential strategic planning information when Ms. Molnar was in the role. At the time, the Employer did not seek an exclusion for this position. The Union argues that its decision not to seek an exclusion for that position signals that the exclusion request under consideration is not necessary.

[136] However, there are key differences with the current Position. These differences include the increasingly crucial role of targeted, confidential strategic gifts, and trusts, in achieving the institution's strategic objectives, and the Position's role in the establishment of these gifts. It is obvious that, to perform its role in the establishment of these gifts, the Position will have to have access to a high level of detail about strategic initiatives at an early stage of planning. The Position will be performing tasks and accessing information which, until present, have been performed and accessed only by out-of-scope staff. Duties performed by the out-of-scope Director will be transferred to this Position.

[137] In deciding whether to exclude this Position, the Board has also considered whether it is similar to positions that were previously excluded by the Board.

[138] First, in *Saskatoon Public Library* the Board excluded the ACI Analyst and the SEP Analyst. Both were expected to assume leadership roles including "evaluating current programs, establishing goals and objectives, providing recommendations, implementing updated services

and programs, and measuring key success factors.”⁶ Both positions would be involved at the planning stage of proposed changes to the employer’s operations. The Board found that the Systems Engineer would perform similar work but “will be more focused on providing advice and recommendations respecting the role of modernized IT systems in those processes”.⁷ The Board provided the following reasons for excluding the three positions:

[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.

[139] The current Position shares some similarities with the ACI Analyst, the SEP Analyst and the Systems Engineer. It will be responsible for the development and implementation of processes and information management related to gift processing, gift agreements and stewardship-related fund analysis and reporting. These activities are included in the primary duties of the role and are in relation to business strategic planning and budget implementation and planning. In performing these activities, the Position will collaborate with the Manager of Finance and will need to have access to confidential information about trusts and endowments. The Position will be involved not only in the planning stages but also the implementation of changes to operations. Whether these specific activities will have a direct impact on the bargaining unit is less clear.

[140] The Employer also describes the Position as a “topic specialist”. In *SIAST, 2009*, the Board found in relation to “topic specialists” that it is “not so much the confidential or sensitive nature of the information which the disputed position has access to, it is the uses to which that information is being put that places the disputed position within the [confidential] exemption”.⁸ There, the Recruitment and Retention Analyst researched data related to the labour relations of the

⁶ At paras 5, 6.

⁷ At para 78.

⁸ At para 75.

employer. The fact that the position was researching a topic would be sensitive from a labour relations perspective. The work of the Representative Workforce Consultant was similar. The Board found that the essence of the position was to assist the employer in altering its industrial relations. This decision was made pursuant to the previous test under *The Trade Union Act*.

[141] Also relevant is the *University of Regina* case. There, the Board found that the Public Affairs Consultant would be providing “advice to the University’s executive team on public relations matters, including matters involving or touching upon labour relations”, would be “present during the University’s decision-making process on a variety of major strategic issues”, and that “the kind of informational access that management intends to grant this position is wholly incompatible with membership in the Union’s bargaining unit”.⁹ The Board found that the information the incumbent would have access to would touch upon labour relations matters and could adversely affect the employer or materially jeopardize its position with the union.

[142] It is not fair to say that the “essence” of this Position is to assist the Employer in altering its labour relations. However, that is not the test. Pursuant to paragraph 6-1(1)(h)(i)(B) of the Act, the question is whether the Position’s primary duties include activities that are of a confidential nature in relation to business strategic planning (or another listed area) and that have a direct impact on the bargaining unit that the Position would be included in.

[143] To perform its role as the primary resource for the consultation and review of gift agreements, and in particular, to identify issues with strategic alignment of gifts, the Position will have to be fully informed about strategic projects. It will have to be privy to significant sensitive and confidential information at a very early stage in the planning process for program development, expansion or decommissioning and will need to fully understand Advancement’s strategies for accomplishing these objectives. It will also be privy to major funding shortfalls and will have a comprehensive understanding of the implications of those shortfalls. It will be privy to information about expected expenditures for upcoming projects. It will be privy to information about the development or expansion of programs with impacts on the creation of new positions.

[144] Moreover, the leadership team, in developing strategic goals, will rely on the Position’s compliance advice, including in relation to the use of existing gifts and the potential problems with proposed major, targeted, and complex gifts on confidential projects. The Position will be asked to provide advice on gifts that support confidential projects. Some of these projects will be

⁹ At para 27.

contingent on the establishment of targeted gifts. The advice that it gives will necessarily impact the establishment of gifts. In these respects, the Position will have to play a role in decision-making in relation to high-level strategy that will have a direct impact on the unit.

[145] The Position will also be providing advice to leaders across the institution about the use of trust funds for potential projects, which is a confidential activity in relation to budget implementation and has the potential for a direct impact on the unit.

[146] The Position is the type of internal resource that is necessary to enable the Employer to make informed and rational decisions regarding business strategic planning and budget implementation. It will not be able to provide its advice with the necessary candour and exchange of information if it is included in the bargaining unit. The extent of access to information, and the uses to which this information will be put, place the Position in an insoluble conflict of interest with the members of the bargaining unit.

[147] The Position is distinct from the Lab Technician and Lab Analyst positions considered in *Verdient*. The main issue in *Verdient* was whether the positions' access to certain confidential information was sufficient. The confidential information to which those positions had access consisted of trade secrets, product quality, and intellectual property. The positions had minimal involvement in the decision-making process related to strategic planning. By contrast, the current Position will have extensive access to high-level confidential strategic information from across the institution and will be more critically involved in decision-making processes that will have a direct impact on the bargaining unit.

[148] The Union suggested that, because confidential agreements currently comprise only 10-15% of all agreements, the Position's confidential responsibilities are not primary. The Board disagrees. The Position's responsibilities for confidential agreements are primary. They are also inextricably interwoven with its overall responsibilities, as the primary resource for the consultation and review of gift agreements. The Position could not perform its role without responsibility for confidential agreements. The volume of the Position's confidential work is expected to increase; this increase is an integral part of the strategic plan. The Position was created, in part, to meet the operational need for greater emphasis on strategic, targeted gifts.

[149] Finally, the Board has to consider whether the exclusion of the Position results in an unnecessary reduction in the bargaining unit that will erode its strength. In considering this issue, the Board has turned its mind to the significant increase in out-of-scope requests in recent years.

The Union has agreed to many of the requests. The failure of the Employer to fill all of these positions has eroded the trust between the Union and the Employer. In particular, the Employer has not filled the Director of Giving position, which was created and posted as a replacement for the Director of Donor & Alumni Relations position around the same time that the other two director positions were created. The failure to fill the Director of Giving position has raised questions for the Union about whether the current Position is necessary.

[150] The Position is situated not in the Giving area, but in Advancement Services, and it is clear that the Position is a necessary resource for the Advancement Services team. Advancement Services was described as multiple program areas in one; it currently has one out-of-scope position, and the workload of that position exceeds what one out-of-scope position can handle. The Director of Giving performs a role that is not directly related to the Position. Although there is overlap between the two positions in the areas of strategic planning and leadership, the overlap is not specific to the subject-matter handled by each of the positions. If anything, the overlap confirms that the Position is expected to assume leadership responsibilities.

[151] The Board is not persuaded that the Position's exclusion results in an unnecessary reduction of the bargaining unit that will weaken the Union's collective strength. The unique circumstances of the Advancement Services area, comprising multiple program areas with only one assigned out-of-scope position, justify the exclusion.

[152] Finally, it is obvious that this workplace has undergone significant change in a short period of time. Many of the job-related documents contain references from past structures and reporting relationships. The testimony of the Employer's witnesses articulated an organizational vision that remains in flux. These issues are not surprising, but they have made the task before the Board more difficult.

[153] In the absence of evidence from an incumbent, the role and responsibilities of the Position are theoretical. For this reason, as in *Regina Public Library*, a provisional order is appropriate. The Board has discretion, on an application made for the purposes of clause 6-104(2)(i), to make a provisional determination before the person who is the subject of the application performs the duties of the position, pursuant to section 6-105 of the Act. The provisional determination is intended to allow management to react to changing circumstances which necessitate the creation of new positions. It also permits the parties a period of time to assess the position while an incumbent is performing the role.

[154] In accordance with section 6-105 of the Act, the provisional determination will become final one year after the day on which the determination was made unless, before that period expires, the Employer or the Union applies to the Board for a variation of the determination.

[155] An appropriate order will accompany these Reasons.

[156] Finally, the Board wishes to extend its gratitude to counsel for their excellent advocacy on this matter.

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

DATED at Regina, Saskatchewan, this **31st** day of **May, 2022**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson