



CITY OF PRINCE ALBERT, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 882, Respondent

AND

CITY OF PRINCE ALBERT and PRINCE ALBERT FIREFIGHTERS ASSOCIATION, IAFF LOCAL 510, Co-Applicants

LRB File Nos. 115-22 and 118-22; Date May 25, 2023

Chairperson, Susan C. Amrud, K.C.; Board Members: Shawna Colpitts and Grant Douziech

For City of Prince Albert: Mitchell Holash, K.C.

For Canadian Union of Public Employees, Local 882: Mira Lewis

For Prince Albert Firefighters Association,
IAFF Local 510: No one appearing

Application for amendment of certification order – New position of Fire Administrative Manager – Similarity of new position to other positions, community of interest and history or origin of new position lead to conclusion its proper placement is in CUPE bargaining unit, not IAFF bargaining unit.

Application for amendment of certification order – Confidentiality exclusion does not apply to Fire Administrative Manager – Its primary duties are not of a confidential nature in relation to labour relations, business strategic planning, policy advice or budget implementation or planning and none will have a direct impact on CUPE bargaining unit.

Order granted excluding Fire Administrative Manager from IAFF bargaining unit – Order granted provisionally including Fire Administrative Manager in CUPE bargaining unit.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, K.C., Chairperson: The City of Prince Albert ["City"] has decided to create the new position of Fire Administrative Manager ["FAM"]. On July 6, 2022, the City filed with the Board a Joint Application to Amend¹, also signed by the Prince Albert Firefighters Association, IAFF Local 510 ["IAFF"], agreeing that the FAM would be out-of-scope of the bargaining unit represented by IAFF. On July 8, 2022, the City filed a second application, for a

¹ LRB File No. 115-22.

Provisional Employee Determination² that the FAM also be excluded from the bargaining unit of the Canadian Union of Public Employees, Local 882 ["Union"].

[2] The scope clause for the IAFF, in its most recent collective agreement with the City, reads as follows:

ARTICLE 8 – SCOPE OF MEMBERSHIP

1. This Union shall be understood to include all members of the Fire Department, except the Fire Chief, Deputy Fire Chiefs, Battalion Chiefs, Maintenance Supervisor, and Secretary.

[3] The scope clause for the Union, in its most recent collective agreement with the City, as it relates to the fire department, reads as follows:

ARTICLE 3 – RECOGNITION AND NEGOTIATION

3.01 Bargaining Unit

The City recognizes the Canadian Union of Public Employees and its Local 882 as the sole and exclusive collective bargaining agent for all of its employees save and except the following:

. . .

Battalion Chief

Deputy Fire Chief

Fire Chief

. . .

And . . . those represented by the International Association of Fire Fighters Local #510...

Evidence:

[4] Alex Paul testified on behalf of the City. He has been employed by the City, in its fire department, for 27 years. He has been the deputy fire chief since November 2019. In the fire department the City has six out-of-scope positions: the fire chief, deputy fire chief and four battalion chiefs. The 46 in-scope employees in the fire department (8 captains, 2 inspectors and 36 firefighters) are members of the IAFF. All of the fire department employees work at the fire hall.

[5] Paul testified that he and the fire chief have significant workload issues. The City had two deputy fire chiefs until 2014, when the second position was eliminated. They have been unable to obtain the agreement of the City to reinstate the second deputy fire chief position, because of cost. As a compromise, agreement has been reached to create the FAM position. He elaborated on some of the duties set out in the proposed position description for the FAM, as follows.

² LRB File No. 118-22.

[6] The City undertakes a hiring process for firefighters every year. First they post an ad online. Paul reviews the applications to determine whether applicants meet a specific list of requirements. Those who meet those requirements are asked to undertake a written test, physical test, swim test and, if they pass those tests, an interview. This process takes the vast majority of Paul's time over three to four months. He proposes that the FAM could do the initial vetting of applicants' resumes, to determine if they meet the qualifications. The FAM could also schedule the testing and interviews.

[7] With respect to discipline incidents respecting IAFF employees, he contemplates that the FAM could consult with the human resources department and write reports and discipline letters. In preparation for grievance hearings, the FAM could do research and liaise with the human resources department and legal counsel.

[8] With respect to labour relations negotiations with the IAFF, the FAM could review the collective agreement and gather financial information from fire departments in other municipalities. He acknowledged that the City's human resources staff lead the bargaining with the IAFF; he stated that the role of the FAM would be support and research. The FAM could also be present at the bargaining table instead of the fire chief or deputy fire chief.

[9] With respect to budget planning, the FAM could research costs and write reports.

[10] The role of the FAM with respect to training for IAFF employees will not be to deliver the training but to organize and plan it and keep track of what training each employee has taken.

[11] The FAM could do the administrative work of the fire chief and deputy fire chief. Until October 2020, the staff of the fire department also included a secretary who was a member of the Union. When the new fire chief and deputy fire chief assumed their duties in October/November 2019 they chose not to assign her significant duties. When she retired in October 2020, they chose not to fill the position. Since the secretary retired, Paul has been doing her clerical duties and he contemplates that the FAM would do those duties.

[12] Paul testified that he and the fire chief spend a significant amount of time preparing bylaws. He contemplates that the FAM could contact other fire departments and municipalities to obtain information about their bylaws and their experience with their bylaws. The fire chief also creates all fire department policies. Paul indicated that there are hundreds of fire department specific policies. He sees the FAM as having a role in identifying the need for policies or policy changes and drafting policies.

[13] In his view, no new duties or roles are being created. The work to be done by the FAM is currently being done by the fire chief and deputy fire chief. It is contemplated that the FAM will be part of the senior management team, but without the rank and authority of a second deputy fire chief. This means the FAM could not act in the place of the fire chief or deputy fire chief, and could not respond to emergencies. The FAM will have no supervisory responsibilities. The FAM will only perform administrative functions.

[14] On April 15, 2021 the Union filed a grievance alleging that the City had violated their collective agreement by failing to post a new vacancy to replace the secretary and instead assigning bargaining unit work to an out-of-scope classification, namely the FAM. The issue in the arbitration was whether out-of-scope employees were performing bargaining unit tasks previously carried out by the secretary. The arbitration board denied the grievance. With respect to the FAM it stated:

The grievance specifically references the FAM as the out-of-scope position to which the work of the PAFD secretary had been assigned. The difficulty for the Union is that the FAM did not officially exist on the date the grievance was filed, April 15, 2021, nor did it officially exist by the time of the arbitration in December 2021 and January 2022. There is draft job description and an intention expressed by the fire chief to implement the position sometime in the future. But as of now, there is no Fire Administrative Manager.

Without there actually being an official job description, let alone someone actually in the position performing the work, it is impossible for the Board to find that bargaining unit work has been assigned to this particular out-of-scope classification as alleged in the grievance. Assuming the position is eventually budgeted, posted, and filled, there remain many unknowns. We do not know yet whether in fact the FAM will be determined as a managerial exclusion under the Employment Act, a decision that may ultimately be decided by the Saskatchewan Labour Relations Board. We do not know if the SLRB were to decide that the FAM does not qualify as a managerial exclusion, whether it will be included in the Local 882 bargaining unit or become part of the IAFF unit. The Board does not yet know if the final job description will be the same as the draft description or what the actual duties will prove to be in practice. These are too many unknowns. For these reasons, the Board has no choice but to reject the assertion that the contract was violated by assigning bargaining unit work to the Fire Administrative Manager.³

In other words, the arbitration board made no finding with respect to the FAM.

[15] In cross-examination, Paul admitted that he did not review any Union job descriptions when he was preparing the FAM's job description. He operated on the assumption that an in-scope employee could not perform the FAM's proposed tasks.

³ *Prince Albert (City) v Canadian Union of Public Employees, Local 882*, 2022 CanLII 16607 (SK LA), at p. 27/28.

[16] Tammy Vermette gave evidence on behalf of the Union. She has been a secretary in the City's planning department for 24 years and president of the Union for nine years. She has been a member of the City-Union Joint Job Evaluation Committee since it was formed in 2015. She reviewed the draft position description for the FAM, pointing out many duties that were comparable to her job. With respect to those listed as administrative duties⁴ she noted the following:

- *Research, draft and edit managerial reports, correspondence and presentations on behalf of the Fire Chief, including such documents that are of a confidential nature:* Vermette testified that she does research and drafts and edits reports and correspondence on behalf of her director and other staff, including confidential documents.
- *Arrange and attend meetings on behalf of the Fire Chief as required on assigned projects, including confidential meetings:* Vermette testified that she arranges and attends meetings on behalf of her director.
- *Assist the Deputy Chief with the scheduling of OOS and In-Scope employees, including platoon transfers:* While Vermette does no scheduling, she indicated that some Union members who have supervisory responsibilities do scheduling, for example, the recreation programmer in the community services department.
- *Oversee office and public communications and announcements including the PAFD's social media platforms in coordination with the City's Communication Department:* Vermette indicated that while she does not oversee these kinds of matters, she posts information about the planning department on the City's website. She indicated that the work described here is mainly done by the manager of the communications department, who is in charge of the City's social media.
- *Coordinate the preparation of Council and Committee Reports, Administrative Briefs, Policies, Bylaws:* Vermette testified that she has written council reports. She has also provided feedback on council reports, bylaws and policies. She assists in the development of bylaws, reviews existing bylaws to determine if they need to be updated and edits draft bylaws.
- *Liaise with City Administration to ensure corporate policies and timelines are met:* She indicated that every department has its own policies and sets their own deadlines.
- *Assist with LAFOIP [The Local Authority Freedom of Information and Protection of Privacy Act] investigations and follow-up, including dealing with confidential records:* Vermette stated that she handles the LAFOIP requests received by the planning department. She receives the applications and payment, does the research to find the requested documents, writes the letter in reply, redacts confidential information and provides documents to applicants.

⁴ Italicized words are the administrative duties listed in the FAM position description. Non-italicized words are Vermette's evidence.

- *Work with Management to coordinate departmental events:* She assists in organizing departmental events and conferences, for example, by arranging meals, hotels and registrations.
- *Ensure that practices are consistent and comply with legislation, collective agreements, administrative regulations, and policies and procedures:* Vermette stated that all City employees have policies and procedures they are required to follow. Part of her role is to make sure new staff understand these responsibilities.

[17] The personnel duties of the FAM are listed as follows:

- *Provide managerial support, respecting confidential labour management matters including personnel and discipline issues, labour relation matters, grievance responses and other collective bargaining issues.*
- *Coordinate and track OHS incidents and workplace injuries and ensure that proper documentation is completed and submitted.*
- *Coordinate WCB, disability management processes and facilitate return to work programs with the Human Resources Department.*
- *Provide managerial support to the recruitment and promotion processes.*
- *Create, monitor and maintain confidential, legal and employee personnel files.*

With respect to these kinds of matters, Vermette indicated that her involvement is to provide feedback on the performance of the person she supervises, participate as a member of the interview panel for the position she supervises, and maintain the filing system, which includes confidential and legal matters. She noted that employee personnel files are kept in the City's corporate services department.

[18] The financial duties of the FAM are listed as follows:

- *Responsible for developing, implementing, tracking and reconciliation of financial operating and capital budgets in consultation with the Fire Chief.*
- *Provide recommendations and advice to the Fire Chief on financial reporting, budgeting and accountability.*
- *Ensure processes, procedures and controls are followed to accurately process payroll, employee time and attendance and employee time banks; in accordance with the Fire Association Collective Agreement and Policies. Verify and track attendance and leave requests.*

Vermette noted that, with respect to the budget, she provides input respecting operational needs of the main office, researches costs, and monitors spending. She reviews all time sheets to ensure they are entered correctly and sends them to payroll after they are approved by the manager.

[19] The training duties of the FAM are listed as follows:

- *Conduct research, perform analysis and make recommendations for the training standards and programs for the PAFD, in order to satisfy safety, legislative and regulatory compliance, including developing appropriate budget recommendations.*
- *Ensure proper certification is maintained for all members within the PAFD by tracking and documenting all training.*
- *Coordinate training and educational events with outside agencies.*
- *Coordinating payments, booking lodging and coordinating transportation to training.*

With respect to these duties, Vermette indicates that, for planning department employees attending training, she books hotels and vehicles and pays their registration.

[20] The Union entered eight position descriptions of other Union members employed by the City that indicate that many of the proposed duties of the FAM are performed by Union employees. The City did not object to them being entered, indicating that the City had provided them to the Union.

[21] The Board heard some evidence about the management complement in the fire departments in Moose Jaw and Swift Current, though it appeared to be incomplete. The Board does not consider that evidence relevant in making a determination in this matter.

Argument on behalf of City:

[22] The City argues that the FAM should be out-of-scope because the position is being created to share management responsibilities with the fire chief and deputy fire chief. The work to be undertaken by the FAM is currently being done by the fire chief and deputy fire chief.⁵

Appropriate bargaining unit:

[23] The first issue for the Board to determine is, if the FAM position is determined to be in-scope, which union would it be in, the IAFF or the Union. The City notes that the IAFF, which represents all in-scope employees in the fire department, has consented or acknowledged that

⁵ A number of duties referred to by the City in its written and oral arguments were not in evidence before the Board and are therefore disregarded.

the FAM is out-of-scope. The City argues that the Union provided no evidence to support its position that it is the appropriate bargaining unit. It argues that, since there are currently no Union members working in the fire department, it would be inappropriate for the Union to interject itself into the technical environment of fire services work and a management-union workplace relationship within which the Union has no members.

[24] The City argues that pursuant to the IAFF certification order and collective agreement, the FAM is *prima facie* within the scope of the IAFF bargaining unit. However, it does acknowledge that the Union's certification order and collective agreement scope clause would also *prima facie* bring the FAM within the Union's scope. The City does not agree with the Union's interpretation that the Joint Application to Amend has the effect of the IAFF surrendering the FAM position to the Union's exclusive jurisdiction.

[25] The City referred to five factors that the Board considers when determining the appropriate bargaining unit for a new position in a multi-union workplace.⁶ In making a determination in this matter, three of those factors apply.

[26] The first factor is similarity of the disputed position to positions within the bargaining units. The City argues that the duties of the FAM relate exclusively to fire department work and exclusively to the work performed by IAFF members within the fire department operations. They do not relate to any job function of a Union employee. The City argues that this means that the IAFF is the relevant union to appropriately be recognized to participate in considerations respecting whether the FAM is an employee within the meaning of Part VI of the Act, and the IAFF agrees that the FAM is not an employee.

[27] The second factor is community of interest. The general competencies and qualifications of the FAM relate specifically to an emergency response environment and/or an emphasis on competencies and skills relevant to the out-of-scope work of the fire chief and deputy fire chief. The conditions of employment for the FAM are contemplated to be within the unique and specialized operations of the fire department and its paramilitary, emergency-response structure, and therefore relate exclusively to work conditions relevant to the fire department. Mobility to other positions within the fire department is much more available to the FAM than would be lateral

⁶ *Saskatchewan Polytechnic v Saskatchewan Institute of Applied Science and Technology Faculty Association*, 2015 CanLII 43770 (SK LRB); *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2017 CanLII 85453 (SK LRB); *Saskatchewan Health Authority v Health Sciences Association of Saskatchewan*, 2020 CanLII 37240 (SK LRB).

mobility to unrelated Union positions. The FAM's work in the area of labour relations will relate exclusively and categorically to the collective bargaining interests of the IAFF.

[28] The third factor is the history and origin of the disputed position. The FAM's point of origin is in the second deputy fire chief out-of-scope position that was abolished. The FAM has no historical tie to any Union work functions, except the negligible duties being performed by the secretary before she retired.

[29] Applying these factors leads to a conclusion that the IAFF is the appropriate bargaining unit to make the assessment that the FAM is not an employee and should therefore be determined to be out-of-scope of both unions.

Confidentiality exclusion:

[30] In the alternative, if the Board determines that it is appropriate for the Union to challenge the placement of the FAM, the City argues that it should be excluded from the Union's bargaining unit on the basis that it is not an employee pursuant to paragraph 6-1(1)(h)(i)(B) of the Act, the confidentiality exclusion. The City concedes that paragraph 6-1(1)(h)(i)(A), the managerial exclusion, is not applicable to the FAM.

[31] In making a determination on this issue, the first question is whether the City has followed the appropriate procedure. The City submits that it did. It provided notice of the new position and the proposed job description to both the IAFF and the Union. Then, when the Union challenged the proposed scope of the FAM, it brought this application to amend the Union's certification order. In that the FAM is a new position, the City submits that it has met the requirement of establishing a material change in circumstances for the purposes of this application.

[32] With respect to whether the FAM falls within the confidentiality exclusion, the City refers to what it describes as the threefold test for confidential employees:

- a. *The confidential matters must be concerning industrial relations, not general industrial secrets and not information 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.);*
- b. *The disclosure of that confidential information must adversely affect the City;*

- c. *The FAM 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.*⁷

[33] The City argues that the primary duties of the FAM would fall within the four areas covered under the confidentiality exclusion: labour relations, business strategic planning, policy advice and budget implementation or planning. It argues that the FAM would have a direct impact on the IAFF, the bargaining unit in which it would otherwise be included. In the interpretation of paragraph 6-1(1)(h)(i)(B), it would not be logical or practical to refer to the Union, that has no member in the employ of the fire department.

[34] The City asks for an Order provisionally excluding the FAM from the Union's bargaining unit, pursuant to section 6-105 of the Act.

Argument on behalf of Union:

Appropriate bargaining unit:

[35] The deputy fire chief provided the job description for the FAM to the IAFF. The IAFF agree that the FAM is not within the scope of their bargaining unit. That decision has no bearing on whether the Board can determine that the FAM is within the scope of the Union's bargaining unit. The IAFF can only make that determination for their union, not for any other union.

[36] The Union argues that the application of the factors referred to by the City leads to a conclusion that the FAM is properly within the scope of the Union's bargaining unit. With respect to community of interest, the FAM will be doing very similar work to other Union members. The only difference is that they will be in a different department. The secretary was a Union member because she was doing the same kind of work as other Union members. With respect to lateral mobility, this would be the only non-fire related position in the fire department, but one of many employed by the City. There would be no opportunity for lateral mobility in the IAFF, but considerable opportunity in the Union. The FAM will have employment conditions comparable to other Union members.

⁷ Brief of Law filed by City, relying on *Regina Civic Middle Management Assn. v Regina (City)*, [1994] 4th Quarter Sask Labour Rep 164; *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB); *University of Regina Faculty Association v Canadian Office and Professional Employees Union, Local 397*, 2022 CanLII 111251 (SK LRB).

Confidentiality exclusion:

[37] The City has the onus to prove that the FAM is not an employee within the meaning of clause 6-1(1)(h) of the Act.⁸ The evidence must be sufficiently clear, convincing and cogent.⁹ Exclusions are to be made on as narrow a basis as possible.¹⁰

[38] With respect to the claim of a confidentiality exclusion, the Union relies on *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*¹¹:

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.

[39] Much of the evidence related to the extent of access the FAM would have to confidential labour relations information or budgeting information. Mere access is not enough.¹²

[40] There is a crucial balancing act inherent in the confidentiality exclusion. On the one hand, the City should be allowed the necessary resources to make informed and efficient labour relations decisions. On the other hand, employees have a statutory and constitutional right to access collective bargaining. The Union argues that the City's claims of confidential duties are minimal and in many instances speculative, to the extent that they cannot support interference with the FAM's right to engage in collective bargaining. If the FAM is placed in the Union's bargaining unit, there would be no measurable impact on the City's ability to discuss and make labour relations decisions in an atmosphere of candour and confidence.¹³ A review of the other job descriptions filed by the Union indicate that many Union positions carry out the kinds of duties contemplated for the FAM.

[41] In assessing the operational need for the FAM, the Union suggested that the Board be guided by *University of Regina v University of Regina Faculty Association*¹⁴:

⁸ *Saskatchewan Government and General Employees Union v Wheatland Regional Centre Inc.*, 2015 CanLII 80544 (SK LRB).

⁹ *United Food and Commercial Workers, Local 1400 v Calokay Holdings Ltd.*, 2016 CanLII 74282 (SK LRB), at para 106.

¹⁰ *Saskatchewan Institute of Applied Science and Technology v Saskatchewan Government and General Employees' Union*, 2009 CanLII 72366 (SK LRB), at para 58; *Early Childhood Intervention Program, Regina Region Inc v Saskatchewan Government and General Employees' Union*, 2013 CanLII 53367 (SK LRB), at para 19.

¹¹ 2022 CanLII 45399 (SK LRB) at para 122.

¹² *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB) at para 42.

¹³ *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, 2019 CanLII 76957 (SK LRB) at para 118.

¹⁴ 2014 CanLII 4554 (SK LRB) at para 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.

[42] Applying that reasoning to this matter, the Union argues, leads to a conclusion that the City has not satisfied the test for an exclusion. The majority of the work identified by the City that needs to be done by the FAM is administrative. The deputy fire chief repeatedly identified day-to-day administrative tasks as those that are most necessary and will be of greatest value. The majority of those tasks were identified by Vermette as tasks that are within the scope of the Union's bargaining unit. The evidence did not indicate that the FAM's primary duties will have a direct impact on the Union's bargaining unit.

[43] The Union asks for an Order provisionally including the FAM in its bargaining unit.

Relevant Statutory Provisions:

[44] The following provisions of the Act are relied on 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 as defined in clause 6-1(1)(o) of this Act as that clause read before the coming into force of The Saskatchewan Employment Amendment Act, 2021.

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:

[45] The first issue in an application to amend a certification order is whether the employer has followed the proper process. In *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*¹⁵, the Board confirmed that the procedure established in *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*¹⁶ continues to apply:

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...;*
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.*

[46] The City followed this process. The next question is whether the City has satisfied the Board that there has been a material change in circumstances since the certification order was granted. The Board is satisfied that there has been a material change in circumstances. The FAM is a new position. It is well established that the creation of a new position is sufficient to satisfy the requirement of a material change in circumstances. The final question is whether the

¹⁵ *Supra* note 11, at para 69.

¹⁶ 2006 CanLII 62948 (SK LRB), at para 28.

amendment is necessary. To answer this question, the Board must consider whether the FAM falls outside the definition of employee in clause 6-1(1)(h) of the Act.

[47] The Board heard evidence and argument about whether the City needs a FAM. That issue is not before the Board. The issues before the Board are whether the FAM is an employee within the meaning of Part VI of the Act and, if so, which bargaining unit it should be placed in. Given the IAFF's position that the FAM is not an employee, these issues will be considered in reverse order.

Appropriate bargaining unit:

[48] In a multi-bargaining unit workplace, paragraph 6-1(1)(h)(i)(B) of the Act requires the Board to consider which bargaining unit the FAM would be in if it is not excluded by the confidentiality exclusion described in that paragraph. The Board established the factors to be considered in making this determination in *Saskatchewan Polytechnic v Saskatchewan Institute of Applied Science and Technology Faculty Association*¹⁷ ["Saskatchewan Polytechnic 2015"]:

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

2. Community of interest. *Under this factor, the Board examines the educational qualifications, competencies and skills expected of the incumbent, together with the conditions of employment and avenues for lateral mobility for the incumbent. While this factor also examines similarities in positions, it tries to focus that examination on the anticipated collective bargaining interests of the disputed position relative to the interests of the members of the competing bargaining units. See: CUPE, Local 21 v. City of Regina & RCMMA, supra. See also: SEIU West v. St. Paul's Hospital & HAS, supra.*

3. The history or origins of the disputed position. *Under this factor, the Board examines whether the duties or responsibilities of a newly created position can be traced back to a particular bargaining unit. Evidence that the work to be performed by a disputed position was carved out of a particular bargaining unit supports a rebuttable presumption that the position ought to be assigned to that bargaining unit. See: CUPE, Local 1975 v. University of Saskatchewan & ASPA, supra.*

¹⁷ *Supra* note 6, at para 22.

4. Industrial stability and viability of the bargaining relationship. *Under this factor, the Board considers whether the inclusion or exclusion of a disputed position will jeopardize the strength and effectiveness of either bargaining unit or otherwise endanger the equilibrium of the bargaining relationships. See: Regina Professional Firefighters Association v. City of Regina & RCMMA, supra.*

5. Broader, More Inclusive Bargaining Units: *In the case of multi-bargaining unit workplace involving a middle management unit, there is a rebuttable presumption that new or additional positions belong in the broader, more inclusive bargaining unit. See: CUPE, Local 21 v. City of Regina & RCMMA, supra; and CUPE, Local 47 v. City of Saskatoon & SCMMA, supra.*

[49] The first factor considers the similarities of the FAM with other positions in the Union and the IAFF. When applying this factor, the Board examines the duties to be performed by the FAM, as well as the potential for career advancement, for the purpose of determining whether it bears more similarity to the members of one bargaining unit or the other. This factor clearly favours the Union. The evidence indicates that the duties of the FAM will be similar to duties performed by other Union members. For example, the building inspectors recommend, prepare and coordinate revisions to bylaws, policies and practices. The production manager oversees training of and schedules staff; coordinates OHS checks; and works on the budget. The bylaw enforcement supervisor provides training to and schedules bylaw enforcement officers. The concessions manager schedules and trains concession workers; recommends and administers budgetary provisions and reports; and recommends policy changes. The recreation programmer develops, implements, promotes and evaluates recreation programs and facility usage; prepares written reports including month end and year-end reports on registration numbers, revenues, statistics and other reports as requested; recommends, administers and monitors budgetary provisions for programs and services; recommends policy and procedures for effective and efficient operations; assigns, schedules and trains employees; assists the recreation coordinator with the recruitment process; provides regular staff meetings and in-service training to ensure staff are certified in required areas; liaises with external agencies. Vermette's evidence (which was confirmed by her Job Analysis Questionnaire) indicates that she creates documents and edits and reviews documents for other staff, including reports, letters, bylaws, policies and applications; maintains the file system; arranges meetings and travel for training; reviews staff attendance sheets; and processes reports for council/executive and minutes from meetings. She also testified that she processes LAFOIP applications. The City provided no evidence of any similarity between the duties of the FAM and the duties of the IAFF members, who perform firefighting, emergency response, inspection, investigation and enforcement. While it is unclear whether there is the potential for career advancement in the Union, there is no potential for career advancement in the

IAFF. The FAM will be the only employee in the fire department who will not have rank and will not be uniformed.

[50] The second factor is community of interest. Under this factor, the Board examines the educational qualifications, competencies and skills expected of the FAM, as well as the conditions of employment and avenues for lateral mobility. The position descriptions filed by the Union do not reflect similar educational qualifications, competencies and skills as those set out in the FAM position description. No evidence was provided about the educational qualifications, competencies or skills of the captains, firefighters or inspectors who are IAFF members. Therefore, the Board is unable to determine whether they would be comparable to the FAM. The conditions of employment of the FAM will be similar to Union members; the FAM will not work shift work in rotating platoons, like the firefighters. They will not be on call for fires or other after-hours emergencies. Given the similarity of duties to other Union positions, there would be opportunities for lateral mobility for the FAM in the Union but none in the IAFF. Another important factor in this workplace is the deputy fire chief's emphasis on the fact that, in their paramilitary organization, the FAM will not have rank and will not be uniformed. This again indicates a lack of community of interest with IAFF members. The FAM's community of interest is with Union members. The FAM's collective bargaining interests are aligned with the Union and not with the IAFF.

[51] With respect to the third factor, history or origin of the FAM, the Board is to determine whether the FAM's duties can be traced back to one of the bargaining units. None of the FAM's duties came out of the IAFF. The duties previously performed by the Union secretary will become duties of the FAM. This will include duties respecting payroll that were temporarily removed from her list of duties while a computerized payroll system (which has since been abandoned) was used by the City. These duties do not lead to a conclusion that the FAM's work was carved out of the Union, and are not sufficient to establish a rebuttable presumption that the FAM should be placed in the Union's bargaining unit. They do, however, provide more support for that conclusion.

[52] The Board agrees with the City that factors four and five are not applicable in this matter.

[53] In summary, then, the application of the *Saskatchewan Polytechnic 2015* factors to the FAM leads to the conclusion that, if the Board finds the FAM is an employee within the meaning of clause 6-1(1)(h) of the Act, they will become a member of the Union. The Board does not accept the City's argument that the fire department should be considered the employer for the purpose of making this determination. The City is the employer.

Confidentiality exclusion:

[54] The next issue is whether the FAM is an employee or whether it should be excluded from the Union on the basis of the confidentiality exclusion set out in paragraph 6-1(1)(h)(i)(B) of the Act. In *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*¹⁸, the Board stated that it is well established that the onus is on an employer to satisfy the Board that a disputed position is not an employee within the meaning of clause 6-1(1)(h) of the Act and should therefore be excluded from a bargaining unit. The Board relied on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*¹⁹, which summarized the issues to be considered on an application by an employer to amend a certification order to expand the list of exclusions from a bargaining unit:

[16] The next question, then, is whether an amendment to the description in the certification order of the scope of the bargaining unit is necessary. The creation of a new position will necessitate an amendment if that position is determined by the Board to fall outside the definition of employee. The decision is to be made on a case by case basis. 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.*

[17] The parties cited numerous cases that apply this test. A recent decision of this Board [Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited, 2015 CanLII 19983 (SK LRB), para 118] 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.

[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

¹⁸ *Supra* note 7, at para 64.

¹⁹ 2018 CanLII 91973 (SK LRB).

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.

[55] In *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*²⁰, the Board held:

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.

[56] In analyzing whether the confidentiality exclusion applies to the FAM, the Board must be satisfied that the FAM's primary duties include activities of a confidential nature in relation to labour relations, business strategic planning, policy advice or budget implementation or planning, that would have a direct impact on the Union. The evidence before the Board does not lead to that conclusion.

[57] A review of the FAM's position description²¹ indicates that most of the administrative duties do not include confidential duties. The first two duties refer to confidentiality but do not indicate that they are with respect to any of the four areas identified in the confidentiality exclusion, and the deputy fire chief did not indicate that they are. None of the evidence indicated that the fifth duty, respecting preparation of reports, policies and bylaws, meets this requirement.

[58] The first item listed as a personnel duty relates to labour relations, but not with respect to Union employees. The next three duties do not qualify as confidential duties for this purpose. The fifth item does not indicate that the confidential and legal files referred to are with respect to any of the four areas identified in the confidentiality exclusion. The evidence indicated that creating,

²⁰ *Supra* note 13, at para 118.

²¹ See paras 16 – 19.

monitoring and maintaining employee personnel files is a duty performed by the City's corporate services department.

[59] While the first two items under financial duties relate to budget implementation or planning, they do not relate to Union employees and the evidence does not satisfy the Board that these will be primary duties for the FAM. The final item does not qualify as a confidential duty for this purpose.

[60] None of the training duties qualify as confidential duties for this purpose.

[61] According to the deputy fire chief, the FAM's primary duties will be day-to-day administrative tasks. The FAM's primary duties will not include activities of a confidential nature that will have a direct impact on the Union's bargaining unit. If the FAM is placed in the Union's bargaining unit, the City will continue to have sufficient resources to permit it to make informed and rational decisions regarding labour relations and collective bargaining with the Union in an atmosphere of candour and confidence. The FAM's duties will not create an insoluble conflict between the responsibilities the FAM owes to the City and the interests of the FAM and its colleagues as members of the Union's bargaining unit.

[62] The City admits that any labour relations work the FAM will undertake would relate only to the IAFF. Any confidential matters the FAM is involved in respecting the IAFF are not relevant to a determination of whether the requirements for the confidentiality exclusion have been met. The City did not provide evidence relating to business strategic planning duties. The evidence respecting the work to be done by the FAM regarding policy advice did not indicate that it will have a direct impact on the Union. The evidence respecting budget implementation or planning indicated that the FAM's work could have a direct impact on the IAFF, but not the Union.

[63] While recognizing the need to ensure employers have the managerial and confidential resources they require, the Board grants exclusions on as narrow a basis as possible, to protect employees' statutory and constitutional right to engage in collective bargaining. In this matter, the Board finds that the City has not met its onus of proving that an amendment to the Union's certification order, to exclude the FAM, is necessary. The Board finds that, if the FAM carries out the duties as described by Paul and the current position description, the FAM will be an employee within the meaning of Part VI of the Act.

[64] With these Reasons the Board will issue an Order granting the Joint Application to Amend in LRB File No. 115-22, to exclude the FAM from the IAFF's bargaining unit. The Board will issue an Order in LRB File No. 118-22 to provisionally include the FAM in the Union's bargaining unit, which inclusion will become permanent one year after the Order is granted unless before that date the City or the Union applies to the Board for a variation of that Order.

[65] 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.

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

DATED at Regina, Saskatchewan, this **25th** day of **May, 2023**.

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson