

Manitoba Labour Board

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ORDER NO. 1404

CASE NO. 681/04/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

Canadian Union of Public Employees, Local 1599,

Applicant,

- and -

The Salvation Army Grace General Hospital

Employer/Respondent.

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

WHEREAS:

1. On April 30, 2002, the Manitoba Labour Board (the “Board”), as part of its review of bargaining unit restructuring in the urban health care sector, issued Certificate No. MLB-5930 which certified the Applicant as the properly chosen bargaining agent for a bargaining unit described as follows:

“All other employees employed providing acute care facility support, employed in the Salvation Army Grace General Hospital, in the City of Winnipeg, in the Province of Manitoba, except those included in the physicians, interns and residents, nurses, technical/professional paramedical, and maintenance and trades unit, and those excluded by the Act.” (hereinafter sometimes referred to as the “support unit”)

2. On November 30, 2004, the Applicant filed an Application (the “Application”) with the Board seeking a Board Ruling pursuant to Section 142(5) of *The Labour Relations Act* (the “Act”) that twenty (20) identified positions fall within the scope of the support unit defined in Certificate No. MLB-5930.
3. On December 23, 2004, following an extension of time, the Employer filed its Reply claiming that the incumbents in the twenty (20) positions, are, in the Employer’s opinion, employed in a confidential capacity in matters relating to labour relations and, as such, ought to be excluded from the support unit represented by the Applicant. The Employer, with the

agreement of the Applicant, requested that the Board assign a Board Officer to assist the parties in attempting to narrow the issues in dispute. Further, the Board was requested to defer scheduling a hearing in order to allow the parties an opportunity to address the disputed positions directly.

4. On May 4, 2005, the Board advised the parties that the hearing on any outstanding issues would proceed on November 21, 22 and 23 of 2005.
5. On October 14, 2005, the Applicant advised the Board that the parties had resolved the bargaining unit status of all positions covered by the Application except for the positions of Benefit Support Clerk, Payroll Clerk and Human Resources Clerk in the Department of Human Resource Services.
6. At the request of the parties, the hearing scheduled for November 21, 22 and 23, 2005 was adjourned *sine die* as the parties wished to continue their efforts to resolve or narrow the outstanding issues, including, but not limited to, the three (3) positions in Human Resource Services, as identified in paragraph 5.
7. On September 21, 2006, the Board confirmed that the parties had advised it that all outstanding issues have been resolved, except for the three (3) positions in Human Resource Services. In particular, it was confirmed that there were no positions in dispute involving Diagnostic Services Manitoba (“DSM”) and, therefore, DSM would not be joined as a party to the proceedings.
8. On October 13, 2006, with the concurrence of the parties, the Board set January 29 and 30, 2007, as the dates for the hearing in respect of the three (3) positions in Human Resource Services.
9. In accordance with standard Board practice, the incumbents of the three (3) positions in Human Resource Services had been served with copies of the Application and relevant Notices of Hearing(s), as issued from time to time by the Board.
10. On January 29, 30 and April 16, 2007, the Board conducted a hearing, at which time both parties appeared before the Board and presented evidence and argument, through their respective counsel, in respect of whether the positions of Benefit Support Clerk, Payroll Clerk and Human Resources Clerk, in the Department of Human Resource Services, fall within the scope of the support unit.
11. The Board, following consideration of material filed and evidence and argument presented, **DETERMINED**, to its satisfaction, the following:
 - a. the question of whether the three (3) disputed positions ought to be included/excluded from the support unit will be determined as an exclusion case of first instance,

meaning the Board will apply the principles it normally applies when a ruling of this nature is sought in the context of an application for certification. The Employer argued that this case ought to be assessed in accordance the principle that, where a position has historically been excluded from a bargaining unit covered by successive collective agreements negotiated between two parties, the onus of proof rests with the bargaining agent (here, the Applicant) to satisfy the Board that there have been material or significant changes in the duties associated with the position to sustain the conclusion that the previously excluded position ought to be henceforth included in a bargaining unit. The Board has recognized and applied this principle in cases such as *United Food and Commercial Workers Union, Local No. 832* and *Office and Professional Employees International Union, Local 342 (Case No. 246/04/LRA)*; *Association of Employees Supporting Education Services and University of Manitoba (Case No. 394/05/LRA)* and *University of Manitoba Faculty Association and University of Manitoba (Case No. 111/06/LRA)*.

- b. The “material/significant change” principle relied upon by the Employer is not applicable in the factual circumstances relating to this Application for the following material reasons:
- (i) the three (3) Human Resources positions in dispute had been excluded from the support staff bargaining unit represented by the Applicant from January 9, 1975 to April 30, 2002, under the “office staff” exclusion, pursuant to Certificate No. MLB-2813 issued on January 9, 1975 (Ex 5). During those years, the parties negotiated collective agreements by reference to Certificate No. MLB-2813;
 - (ii) as a result of the Review of Bargaining Unit Appropriateness in Manitoba’s Urban Health Care Sector and the process undertaken during that review, the Board issued Certificate No. MLB-5930 on April 30, 2002 for the new support unit and certified the Applicant as the bargaining agent (Ex 9) for the support unit;
 - (iii) as part of the review process associated with the restructuring of bargaining units throughout the Province of Manitoba, discussions ensued between the Applicant and the Employer as to which positions/classifications properly fell within the new support unit. The Board accepts that these discussions took place over a lengthy period of time during which period the status of many individual positions was resolved by the parties themselves (see Exs 10 and 11);
 - (iv) in the circumstances of this case, the Board is not satisfied that there was an onus on the Applicant, either in advance the issuance of Certificate No. MLB-5930 or during the negotiations leading to the 2002/2004 collective agreement (Ex 12) or the 2004 to 2008 collective agreement (Ex 22) to specifically raise issues regarding the inclusion/exclusion of these three (or any other) disputed positions which remained unresolved at those times;

- (v) the Board accepts that the issue of the inclusion/exclusion of many positions from the new support unit was a matter of ongoing discussions between the Applicant and the Union. The Application, as filed, referred to twenty (20) positions within the Employer's organization and was not restricted to the three (3) positions in Human Resources;
 - (vi) it is significant to the Board that, following the filing of the Application the Employer did not raise, the "material/significant" change principle in its Reply but, rather, joined with the Applicant in requesting that the Board not schedule a hearing for some time, given the number of positions involved in order to give the parties an opportunity to address the outstanding positions and at least narrow the number of positions in dispute. Over the course of two (2) years, the Application was adjourned from time to time, at the joint request of the parties, and during that period the parties resolved the status of at least seventeen (17) positions which had been covered by the Application. Some of those seventeen (17) positions were included in the support unit and some were excluded by direct negotiations between the parties. The parties continued to redefine and refine the outstanding issues to be brought before the Board throughout 2006, all of which resulted in the Board's communication to the parties on September 21, 2006. (para. 7, *supra*);
 - (vii) As to the three (3) positions in Human Resources, the Board does not accept that, from a historical perspective, the Applicant had, through successive collective agreements, agreed to the exclusion of positions which otherwise (arguably) ought to have been included in the support unit, and that the Applicant is thereby estopped from bringing the Application, subject to proving significant changes in the duties of these positions. The Board accepts there were parallel discussions outside of the collective bargaining process where issues arising from the restructuring of the support unit were being addressed by the parties. The objective conduct of the parties supports this conclusion and the Board is satisfied that it would be unfair to the Applicant to apply the "significant/material change" principle relied on by the Employer. The circumstances of this case are distinguishable from other cases where the Board has applied this principle. Accordingly, the Board is satisfied that the determination of whether any, some or all of the three (3) disputed positions in Human Resource Services ought to be excluded from the support unit on the basis that the incumbents are employed in a confidential capacity in matters relating to labour relations must be decided as a case of first instance and by reference to the current duties performed by the incumbents of those positions.
- c. In assessing the three (3) positions, the Board must be satisfied that the incumbents ought to be excluded on the "confidentiality criterion" based on their regular and

material involvement in matters relating to labour relations and that such regular and material involvement must be the core of an individual's job functions and not merely be reflective of an incidental or isolated involvement in some aspects of matters relating to labour relations. Both parties acknowledged the principle that, where appropriate, an employer has a duty to arrange its affairs so as to exclude as few employees as possible under the confidentiality criterion. While the Board accepts that the incumbents of these three (3) positions have access to "confidential" information in the general sense and that there is an expectation that these employees must maintain confidentiality under their duty of fidelity to the Employer, this fact, standing alone, is not sufficient to exclude the positions from the support unit. Access to and the processing of information to which (an) employee(s) in a bargaining unit and/or a bargaining agent are entitled is not a reason to exclude an employee on the confidentiality criterion. Information that is ultimately provided to employees or to (a) bargaining agent(s), such as salary information or disciplinary notices, does not justify exclusion. In assessing these three (3) positions, the Board did take into account the Employer's organizational structure in Human Resources and the manner in which it functions, as the Employer requested of the Board.

- d. The Board is satisfied that the Benefit Support Clerk, Human Resources Clerk and Payroll Clerk are not involved with the disciplinary process, the resolution/settlement of grievances (aside from communicating a decision to the employee or the Applicant), the development of bargaining strategies, the development of bargaining proposals, participation in the budget process or the preparation of performance appraisals.
- e. Taking into account the factual context recited in the preceding paragraphs and the tests established by the jurisprudence regarding the "confidentiality exclusion", the Board has **DETERMINED**, to its satisfaction, the following:
 - (i) As to the positions of Benefit Support Clerk and Payroll Clerk, the duties associated with these positions do not support the conclusion that the incumbents are employed in a confidential capacity in matters relating to labour relations. It would not be unfair to the employees, the Employer or the Applicant to include these positions in the support unit; and
 - (ii) As to the Human Resources Clerk position, it would be unfair to the employee, the Employer and the Applicant to include this position in the support unit because the incumbent is employed in a confidential capacity in matters relating to labour relations to such a degree that the position ought to be excluded from the support unit. The Human Resources Clerk performs duties which differ from those of the Payroll Clerk and Benefit Support Clerk and which duties, in the Board's opinion, warrant the exclusion of this position from the support unit. Of particular importance to the Board is the fact that the Human Resources Clerk is expected to function as and perform the duties of the Human Resource Administrative Assistant when the incumbent of that position is absent. The

Administrative Assistant works directly for and reports to the Director of Human Resource Services performing a range of tasks for the Director of Human Resource Services including the preparation and processing of correspondence for the Director. The parties recognized and agreed that the Administrative Assistant ought to be excluded from the support unit.

Accordingly, based on the foregoing, the Board:

RULES

- a) the position of Human Resources Clerk is excluded from the bargaining unit described in Certificate No. MLB-5930; and
- b) the positions of Payroll Clerk and Benefit Support Clerk are “employees” within the meaning of the *Act* and are included in the bargaining unit described in Certificate No. MLB-5930.

DATED at **WINNIPEG**, Manitoba this 20th day of July, 2007, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W.D. Hamilton, Chairperson

WDH/js/rb-s