

**Manitoba Labour Board**

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**CERTIFICATE NO. MLB-6800**

**Case No. 107/10/LRA**

**IN THE MATTER OF:    *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF:    An Application by**

**Manitoba Government and General Employees' Union,  
Applicant.**

**- and -**

**RURAL MUNICIPALITY OF SPRINGFIELD,  
Employer/Respondent.**

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

**WHEREAS:**

1. On April 22, 2010, the Applicant, pursuant to Section 34(1) of *The Labour Relations Act* (the “*Act*”), filed with the Manitoba Labour Board (the “Board”) an application for certification, for a unit described as:

***“All employees employed as firefighters by the Rural Municipality of Springfield, in the Province of Manitoba, except those excluded by the Act.”***

2. On April 27, 2010, the Employer/Respondent (the “Municipality”), through Counsel, filed its Return. In its Return, the Municipality asserted the following:
  - a) that all of the firefighters covered by the Application work on a voluntary, casual or part-time basis and therefore do not meet the definition of “employee” under the *Act* because they do not work on a regular schedule week by week, but, rather work sporadically. The Municipality relied on Rule 28 of the Board’s Rules of Procedure (the “*Rules*”) in advancing this position;
  - b) that, pursuant to Section 39(2) of the *Act*, the Board ought to find the proposed unit to be inappropriate and exclude all classes of employees because to certify the proposed unit would confer the right to strike on the firefighters in the proposed unit, contrary to the public policy evident in *The Firefighters and Paramedics Arbitration Act, C.C.S.M. ch. F*

60 which prohibits employees of a municipality employed “full time” as a member of a fire fighting department from striking and compels recourse to final and binding arbitration as the method to resolve bargaining disputes with full-time firefighters; and

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- c) that, in any event, the classifications of Fire Chief, Deputy Fire Chief, Captain and Safety Officer ought to be excluded from any bargaining unit because the incumbents of these classifications perform management functions primarily and/or are employed in a confidential capacity in matters relating to labour relations.
3. On April 28, 2010, the Board received a letter of objection, verified by statutory declaration, from one firefighter.
  4. On April 29, 2010, the Applicant, through Counsel, filed correspondence with the Board in reply to the Municipality’s Return and advised the Board that:
    - a) the Applicant agreed to exclude the position of Fire Chief;
    - b) the Applicant opposed the exclusion of the classifications of Deputy Fire Chief, Captain, and Safety Officer;
    - c) the individuals who are subject to the Application are “employees” within the meaning of the *Act*;
    - d) the bargaining unit applied for is appropriate for collective bargaining;
    - e) the circumstances of this Application may be a situation where the Board should modify and/or decline to apply Rule 28 pursuant to its authority under Rule 27 in order to afford the employees affected by the Application an opportunity to bargain collectively, consistent with the purposes of the *Act*;
    - f) the Applicant was requesting an Interim Certificate, pursuant to Section 39(4) of the *Act*; and
    - g) the letter of objection filed on April 28, 2010 provides no specific information in respect of any allegations of impropriety and should therefore be disregarded.
  5. On April 29, 2010, the Municipality, through Counsel, filed correspondence in response to the Applicant’s Reply.
  6. On April 29, 2010, the Applicant, through Counsel, filed documentation with the Board maintaining its position that an Interim Certificate be issued.
  7. On April 29, 2010, the Board, following consideration of all material filed, informed the parties that it was the Board’s intention to proceed to hearing to deal with the following issues raised by the parties, namely:

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- a) whether the individuals subject of the Application are “employees” within the meaning of the *Act*;
- b) whether the applied for bargaining unit is appropriate for collective bargaining; and
- c) the applicability of Rule 28 in these circumstances.

The Board further advised the parties that it declined to issue an Interim Certificate as requested by the Applicant.

8. The Board also advised the parties that it was satisfied exceptional circumstances existed pursuant to Section 48(4) of the *Act*, warranting an extension of time, if necessary, for the conduct of a Representation Vote.
9. On May 10, 2010, the Applicant, through Counsel, filed a “Notice of Constitutional Question” (the “Notice”) involving the applicability of Rule 28 and advised the Board that the Notice was being served on the Attorney General of Manitoba and the Attorney General of Canada. The Notice enumerated the following grounds:

1. *“The Labour Relations Act, R.S.M. L10 and Regulation 184/87R The Manitoba Labour Board Rules of Procedure shall be interpreted in a manner consistent with s.2(d) of the Charter and as such, it shall be considered to permit the certification of a group of employees notwithstanding that they may not meet the requirements of Rule 28 of The Manitoba Labour Board Rules of Procedure;*

2. *If any provision of The Labour Relations Act or any regulation thereunder restricts the Board from certifying the Union as a bargaining agent for a group of employees who do not meet the requirements of Rule 28 of The Manitoba Labour Board Rules of Procedure then such restriction infringes the Union’s and its members’ right to freedom or association and such restriction cannot be justified under s.1 of the Charter.”*

10. On May 12, 2010, the Board informed the parties that, in keeping with past practice, both the Attorney General of Manitoba and Attorney General of Canada will be provided an opportunity to make representations at the hearing, should they choose to do so.
11. On May 13, 2010, the Attorney General of Manitoba, through Crown Counsel, replied to the Notice and the Board’s correspondence of May 12, 2010, advising that the Attorney General of Manitoba did not intend to file any material until it was determined by the Board that the

constitutionality of Rule 28 was a live issue and that, pending such a determination, the Attorney General's Counsel would attend the Board hearing on a "watching brief only".

12. On May 13, 2010, the Applicant, through Counsel, filed correspondence with the Board advising that the Applicant was in agreement with the suggestion of the Attorney General of Manitoba as to the manner of proceeding on the constitutional issues potentially relating to Rule 28.
13. On May 28, 2010 the Applicant, through Counsel filed a copy of documentation from Counsel for the Attorney General of Canada advising that the Attorney General of Canada would not be intervening at this stage of the proceedings, as the Notice did not affect a federal interest.
14. On July 13, 2010, the Board, following consideration of material filed with regard to the Constitutional Question, informed all parties that the Board would defer argument on the constitutionality of Rule 28, pending a decision on the merits of the certification application, including the applicability of the *Rule 28* in the circumstances of this case.
15. On July 22, 23 and 27, 2010, the Board conducted a hearing at which time the parties appeared before the Board and presented evidence and argument through their respective Counsel.
16. In arriving at its core determinations, to be summarized in Paragraph 17, *infra*, the Board made the following material findings, having regard to the evidence and submissions of the parties:
  - a) There is an employment relationship between the firefighters and the Municipality. In fact, employment status was admitted by the Municipality. This employment relationship is objectively revealed in and corroborated by the provisions of the Fire Prevention and Emergency Services By-Law No. 09-02 (the "By-Law") (Ex. 10); the Municipality's Fire and Rescue Service Mission Statement (Ex. 11); the Job Descriptions for all classifications comprising the Fire Service (Exs. 12 to 17); the Disciplinary Policy of the Fire Service, as embodied in Municipality's Standard Operating Procedures (Ex. 18) and the terms and conditions of employment, particularly the remuneration structure for the firefighters, as embodied in the Administrative Procedures for the Fire Service (Ex. 19);
  - b) From an objective perspective, a bargaining unit comprised of firefighters employed by the Municipality, all of whom are subject to common terms and conditions of employment for the purpose of fulfilling the mandate and goals of the Fire Service,

share a distinct community of interest and thereby constitute an appropriate unit for collective bargaining;

- c) The Board does not accept the Municipality's submission that the Board, pursuant to its powers under Section 39(1) and Section 39(2)(b) of the *Act* where the Board may "...exclude employees or classes of employees", ought to find that the proposed unit is inappropriate *per se* because the Municipality is not covered by *The Essential Services Act C.C.S.M. c. E145* and/or *The Firefighters and Paramedics Arbitration Act*, meaning that, if certified under the *Act*, the firefighters in the bargaining unit would have the right to strike. This result, argued the Municipality, constitutes a danger to the public in light of the Fire Department's purpose and mandate and the Board ought to find that the bargaining unit is inappropriate on this basis. On this issue, the Board accepts that municipalities (including the Municipality) are not employers as defined in *The Essential Services Act* and, therefore, are not covered by that legislation nor is the Municipality covered by *The Firefighters and Paramedics Arbitration Act* as that legislation only covers employees of a municipality "...employed *full time* as a member of a fire fighting department", and the firefighters employed by the Municipality are not "full time" employees. However, to adopt the argument advanced by the Municipality would require the Board to assume a surrogate legislative role. The Board cannot use its powers under Section 39(1) or 39(2) to deny an otherwise proper application for certification filed under the *Act* because the Municipality is not covered by the foregoing legislation. The broad public policy considerations advanced by the Municipality are matters for the Legislature to decide. The Board cannot deny an entire group of employees who otherwise comprise a unit appropriate for collective bargaining the right to engage in collective bargaining with their employer because they may exercise their statutory right to strike under the *Act*.
- d) As to Rule 28, it is clear that the firefighters do not work "...on a regular schedule week by week." However, Rule 28 is not immutable or inflexible and Rule 27 and *Information Bulletin No. 2* authorize the Board to waive or modify Rule 28 in specific situations dealing with a unique industry or employment situation. The Board has modified or waived the application of Rule 28 in other situations and, in so doing, has addressed the rationale underlying Rules 27 and 28 and when circumstances may justify a modification. In this regard, see:
- (i) *Portage La Prairie Teachers' Association of the Manitoba Teachers' Society and Portage La Prairie School Division* (2005) 107 C.L.R.B.R. (2d) 161;
  - (ii) *Performing Arts Consortium of Winnipeg Inc. and I.A.T.S.E. Local 63* (2010) 178 C.L.R.B.R. (2d) 20; and

- (iii) *Manitoba Government and General Employees' Union and Government of Manitoba, Family Services and Housing* (Case No. 218/09/LRA), particularly at paragraph 7.

In the Board's view, the factual context underlying this Application constitutes a unique employment situation where a modification of Rule 28 is warranted. None of the employees in the unit, including the Officers, are either full time employees or part-time employees within the normally accepted definition of regular part-time employment. Rather, the firefighters are, in essence, casual employees but they are nevertheless subject to the Municipality's discrete employment regime under which there are clear expectations that they will respond to a defined percentage of calls received on their pagers and that they will attend at a defined percentage of mandatory training sessions and for which they receive remuneration from the Municipality. This is not a case of a proposed unit which includes a mixture of full-time and part-time or casual employees where the casual employees, with a remote connection to the employer, might determine the issue of "certification or not" contrary to the wishes of the full-time employees. Having determined the firefighters share a community of interest and that the proposed unit is appropriate for collective bargaining, the Board is satisfied that Rule 28 ought to be modified in a reasonable manner so that employee support for the Application can be accurately determined.

While the Applicant's primary position was that Rule 28 ought to be waived in its entirety and the Municipality's primary position was that Rule 28 ought to be applied, as written, both parties, in response to the Board's inquiries, provided alternative positions on what modifications to Rule 28 would be acceptable from their own perspectives, in the event the Board determined that a modification of Rule 28 was warranted. Neither of these alternatives was deemed appropriate by the Board. Rather, the Board is satisfied that the firefighters' actual pattern of work (as reflected by the remuneration paid to the firefighters pursuant to Municipality's compensation scheme for their attendance at fire and/or accident scenes under both the MVC and Alarm Calendar Reports and the EMR Calendar Reports –Exs. 6, 7, 8 and 9) for the twelve weeks preceding the date of the Application (the period contemplated by *Information Bulletin No. 2*) ought to remain as the operative time period, provided that, in the context of the expectations of the Municipality regarding attendances at fire or accident scenes, Rule 28 should be modified to include only those firefighters who have been paid for at least one attendance at an accident or fire scene in each month (ie: four week period) during this twelve week period. Those firefighters who do not meet these criteria are to be excluded from the analysis the Board is required to undertake for the purposes of Section 40(1) of the *Act*. This formula is simple, certain, and easily applied and, in the Board's judgment, reasonably reflects the nature of the employment relationship between the firefighters and the Municipality. Adoption of this modified formula reflects the particular circumstances of this case and the Board re-iterates that any modification of Rule 28 in another case will be considered in light of its own particular circumstances

17. The Board, in the context of the findings summarized in Paragraph 16 and following consideration of material filed, evidence and argument presented, and noting the agreement of the parties that the classification of Fire Chief be excluded from the applied-for bargaining unit description, **DETERMINED** that:

- a) an employment relationship exists between the firefighters covered by the Application and the Municipality.
- b) the bargaining unit applied for is appropriate for collective bargaining within the meaning of the *Act*;
- c) given the unique and special circumstances relating to the employment relationship between the firefighters and the Municipality, this is a case when the application of Rule 28 ought to be modified for the purpose of calculating employee support for the Application. In this regard, the Board rules that any firefighter who was employed by the Municipality in the bargaining unit and who has been paid for one attendance at a fire or accident scene in each month (i.e. 4 week period) during the

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12 weeks immediately proceeding the filing of the Application shall be included for the purpose of determining support for the Application. Firefighters not meeting this modified formula are excluded for the purpose of determining support for the Application;

- d) as to exclusions from the bargaining unit, the three Deputy Fire Chiefs are to be excluded from the bargaining unit on the basis that they are employed in a capacity that, in the opinion of the Board, would make it unfair to them, the Union and the Municipality to include the Deputy Chiefs in the bargaining unit because of their management functions and responsibilities as outlined in Ex. 13. The Board finds it to be reasonable that the Municipality have a managerial presence at each of its three fire stations in the Municipality. As to the Captains and the Safety Officer, the Board is satisfied that they do not perform management functions primarily or are they employed on a confidential capacity in matters relating to labour relations and the Captains and the Safety Officer are to be included in the bargaining unit.
- e) in the context of the rulings made in (d) above, the appropriate bargaining unit shall be defined as follows:

*“All employees employed as firefighters by the Rural Municipality of Springfield, in the Province of Manitoba, except the Fire Chief, Deputy Fire Chiefs and those excluded by the Act.”;*

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- f) applying the modified formula under Rule 28, as set forth in (c) above, to the bargaining unit defined in (e) above, the Board is satisfied that the requirements of Section 40(1)1 of the *Act* have been met in that more than 65% of the employees in the unit found to be appropriate wish to have the Applicant represent them as their bargaining agent; and
- g) in view of the result in this case, the constitutionality of Rule 28 does not require analysis by the Board.

18. The Board further **DETERMINED** that:

- a) the Applicant is a Union within the meaning of the *Act*; and
- b) no allegations of impropriety pursuant to Sections 45 of the *Act* have been raised;

Accordingly, the Board **HEREBY ORDERS** certification to issue pursuant to Section 40(1)1 of the *Act*.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY CERTIFIES** to all parties concerned that the **Manitoba Government and General Employees' Union**, is the properly chosen bargaining agent for a bargaining unit described as:

*“All employees employed as firefighters by the Rural Municipality of Springfield, in the Province of Manitoba, except the Fire Chief, Deputy Fire Chiefs and those excluded by the Act.”*

and such bargaining agent and employer are entitled to exercise the rights conferred upon them and are subject to the provisions of the *Act*.

**ISSUED** at **WINNIPEG**, Manitoba, this 10<sup>th</sup> day of September, 2010, and signed on behalf of the Manitoba Labour Board by

*“Original signed by”*

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**W. D. Hamilton, CHAIRPERSON**