



**GOVERNMENT OF PRINCE EDWARD ISLAND  
LABOUR RELATIONS BOARD**

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DEPARTMENT OF LABOUR  
P.O. BOX 2000  
CHARLOTTETOWN  
PRINCE EDWARD ISLAND  
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**RE: APPLICATION FOR AMENDMENT OF CERTIFICATION ORDER 11 - 75**  
**RE: Managerial and Confidential Labour Relations Exclusions**

**BETWEEN:**

**UNIVERSITY OF PRINCE EDWARD ISLAND**

**APPLICANT**

**AND:**

**CANADIAN UNION OF PUBLIC EMPLOYEES  
LOCAL 1870**

**RESPONDENT**

\*\*\*\*\*

**REPRESENTING THE APPLICANT:**

**GERALD B. HOGANSON**

**REPRESENTING THE RESPONDENT:**

**SUSAN COWEN**

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**DECISION**

**BACKGROUND OF APPLICATION**

1. On November 14, 1991, the Applicant (hereinafter referred to as "UPEI"), filed an Application for Amendment of Certification Order 11 - 75 with the Labour Relations Board (hereinafter referred to as the "Board"). The amendment requested was to enable the bargaining unit described in the said Certification Order 11-75 to read as follows:

"a unit of employees of the University of Prince Edward Island engaged in the

classifications listed in Appendix 'A' [which listed the various classifications that UPEI wished to have included in the Order] to this order, but excluding Supervisors, those above the rank of Supervisor and the positions listed in Appendix 'B' to this Order".

2. The exclusions requested by UPEI were listed in Appendix "B" to the Application and can be summarized as follows:

Secretary to the President

Assistant to the Director of Administration and Finance

Employment Officer

SY 3 in the following offices or departments, namely:  
Personnel Office; Dean's Office, at the Atlantic Veterinary College (hereinafter referred to as AVC);  
and Office of the Director of Administration and Finance

SY 4 in the following offices or departments, namely:  
Business Manager's Office; Administrator, Veterinary Teaching Hospital; Secretary - Chief Librarian;

SY 5 - Secretary - Dean's Office, AVC

Clerk V - Security Office

Supervisors in the following offices, namely:  
Payroll; Central Supply Room; Radiographic Services;  
Central Services; Accounts Payable; Accounts Receivable and Research Grants; Data Control; Registration;

AD1 (Admin. Assistants) to the following departments:  
Chair - Anatomy & Physiology; Dean - School of Nursing;

Contract Employees

3. Certification Order No. 11-75 dated July 22, 1975 and issued by the Board stated in part:

"NOW, THEREFORE, it is hereby ordered by the Prince Edward Island Labour Relations Board that the Canadian Union of Public Employees, Local 1870, be and it is hereby certified to be the bargaining agent of a unit of employees of the University of Prince Edward Island comprising all employees of the Respondent engaged as Library Assistants I, II and III, Clerical Staff, Laboratory Technicians, Library Workers, Audio Visual Technicians, Audio Visual Technical Assistants, Programmers, Information Assistants, Rink Attendants, Laundry Attendants, Assistant Registrar, and Computer Operators, but excluding Supervisors, those above the rank of Supervisors and the classifications listed in Appendix "A" to this Order."

4. Appendix "A" to the aforesaid Certification Order 11-75 listed the exclusions from the bargaining unit and those were: Secretary to the President; Clerk - Personnel Office; Budget Research Assistant - Comptroller's Office; Secretary - Business Manager's Office; Clerk III - Security Office; Equipment Custodians; Payroll Supervisor; Contract Employees

5. The Canadian Union of Public Employees, Local 1870 (hereinafter referred to as "CUPE") is the bargaining unit that was certified by the Board on July 22, 1975 to represent the employees at UPEI. On December 12, 1991, CUPE filed an objection to the requested amendment indicating that:

- (a) certain positions had already been excluded by CUPE and UPEI, namely, Secretary to the President; Employment Officer; Payroll Supervisor; SY 3 - Personnel Office; SY 3 - Office of the Director of Administration and Finance; SY 4 - Business Manager's Office; SY 5 - Secretary - Dean's Office - AVC; Clerk V - Security Office; Assistant to the Director of Administration and Finance; and Contract Employees;
- (b) the other positions for which exclusions were requested did not fall within the meaning of Section 7(2)(b) of the Labour Act R.S.P.E.I. 1988, Cap. L-1 (hereinafter referred to as the Labour Act).

6. The matter was originally scheduled for hearing on February 17, 1992. It was adjourned on consent and it came on for hearing on March 10, 1992 and was continued on March 11, 1992 and March 12, 1992. The Board took the matter under advisement.

#### LEGISLATION

7. The legislative provision dealing with this issue is found in section 7(2)(b) of the Labour Act which states as follows:

"7(2) For the purposes of this Part, no person shall be deemed to be an employee ...

- (b) who, in the opinion of the board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."

**LAW AND DECISION:**

8. At the outset, the Board wishes to state that it is not its practice to include the number of classifications that were listed in Appendix "A" to the Application for Amendment in a Certification Order. Rather, it is normal to include all employees of an employer except for those specifically excluded.

9. It was agreed by the parties that the Application for Amendment essentially involved eleven (11) positions that were not currently excluded from the bargaining unit. The position of SY 3 - Dean's Office Atlantic Veterinary College, was originally sought for exclusion, but was withdrawn. UPEI took the position that the positions were either confidential or the positions were managerial. CUPE objected to all eleven (11) positions that were sought to be excluded on the basis that there was no confidential information relating to labour relations matters passing through the employees hands and/or the employees did not exercise managerial functions within the meaning of the term.

10. Clearly, for the Board to exclude any positions from the bargaining unit, the Board must be satisfied that the exclusion comes within the provision outlined in Section 7(2)(b) of the Labour Act.

11. The onus is on the party seeking the exclusion to satisfy the Board that the position warrants exclusion. See: City of Charlottetown v. Canadian Union of Public Employees, Local 3041 (June 14, 1990, PEILRB). The Board must be provided with clear convincing evidence that would justify the Board the exclusion of certain positions from the bargaining unit. The Board would have no hesitation in excluding positions on the ground that the position was managerial and/or on the ground that the position involved dealing with confidential information relating to labour relations, providing the Board is satisfied that the exclusion from the bargaining unit is necessary.

12. The Board will not exclude positions which are sought to be classed as managerial on the basis only that the gender of the person holding the position at the particular point in time the exclusion is sought happens to be female. If a position is managerial, the Board would exclude the position from the bargaining unit regardless of the gender of the person holding the position at the time the exclusion is sought. To suggest to the Board, as was done in this case, that the Board should consider the gender of the positions sought to be excluded, is quite simply inappropriate and unwarranted. The Board does not make decisions that could be equated with "affirmative action" but rather makes decisions based on the evidence and the law presented to it. It is unfortunate that such a comment was raised at the conclusion of the hearing, and that the Board feels obliged to make a reference regarding same; however, the Board was of the view that such a suggestion could not be permitted to stand without comment.

13. The Board recognizes that a number of the employees whose positions were sought to be excluded by the Board perform a vital role to the inner working of the university. A great many of those individuals are long standing employees whose knowledge of the day to day operations of the organization is invaluable. However, having stated the foregoing, that alone does not necessarily mean that the employee in question should be excluded from the bargaining unit on the grounds of the managerial or confidential exclusion that is provided for in the legislation.

14. The Board now proposes to deal with the various positions by grouping those positions into the appropriate category, namely, those sought to be excluded on the ground of being managerial and those sought to be excluded on the basis of confidentiality.

**Managerial Exclusion:**

15. Dealing firstly with the managerial exclusion, the positions which UPEI wished excluded from the bargaining unit on the sole ground that the position involved the employee exercising

managerial functions are those outlined below, namely:

Supervisors in the following departments:

Accounts Receivable and Research Grants; Accounts Payable; Data Control; Radiology at the AVC; Central Supply Room at the AVC; Central Services in the AVC; and Registrars Office;

AD1 (Administrative Assistant) to the Chair of Anatomy and Physiology at the AVC

AD1 (Administrative Assistant) to the Dean of the School of Nursing (exclusion also sought on a confidential basis)

16. There is no definition contained in the legislation that would indicate at what stage a person has crossed the line from being an employee to that of being classed as management. Essentially, it is a matter for the Board to determine based on the facts of each case.

17. A somewhat lengthy passage set out in the case of J.M. Schneider Inc., Link Services Inc. v. The Schneider-Link Office Employees' Association, [1987] OLRB Rep. March 381 (Ontario Labour Relations Board) is helpful to the Board. The equivalent section to that found in this Province was in issue and the Ontario Board, at pages 384 to 386, reproduced the following passage from the case of The Corporation of the City of Thunder Bay, [1981] O.L.R.B. Rep. Aug. 1121, namely:

"4. The line between 'employee' and 'management' is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or 'input' should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of

interest which section 1(3)(b) was designed to avoid. Persons making 'effective recommendations' of this kind are regarded as part of the 'management team', and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only 'paper powers' contained in a job description or a 'managerial' job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service section) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced 'journeymen' or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the 'team' and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the

employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are ...

The cases cited above would seem to indicate that while a person may have minor supervisory functions or very limited confidential functions in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly 'managerial' character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).

...

7. We can summarize these general approaches then as follows:

(1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

...

(4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the 'traditional foreman', so that he is no longer the king-pin he once was. This process has



several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with 'real' managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported 'manager' has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.

- (5) The acceptance of the 'effective recommendation test' mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are really effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide concrete examples of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available to all, or when examined closely, amounts to no more than a 'participatory decision-making style'. Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards. [emphasis added]

18. While the foregoing quote is a lengthy one, it is directly relevant to the situation currently facing this Board.

19. The Board was advised that UPEI was different from other employers and we should take guidance from the case of York University Staff Association v. York University v. Group of Employees, [1975] OLRB Rep. Dec. 945 (Ontario Labour Relations Board). This Board has reviewed that case and quotes the following

from pp.946-947 and 949-950 respectively:

"3. The Board in determining the issue of the managerial exclusion from the bargaining unit appears to be repeatedly confronted with two general factual circumstances. In the first instance, we are often required to separate the actual from the peripheral in the policy making functions of the enterprise under review. And in the second instance, the Board is usually required to ascertain whether the persons authorized to implement policy decisions once arrived at have been couched with sufficient discretion to justify their exclusion from an appropriate bargaining unit. The more diverse and bureaucratic the enterprise the more diffused and fragmented is the decision making function. In this regard, the Board's task is to separate 'the effective and the meaningful' exercise of managerial authority from the supportive and supplemental functionaries without whom prudent decisions could not be made. The tests applied by the Board in distinguishing between the real decision making authority and the collators and conduits of information *in the supervisory context* have recently been reviewed and no useful purpose will be served by repeating them in this decision. (See, *The McIntyre Porcupine Mines Ltd. case* OLRB M.R. April [1975] 261). What ought to be emphasized, however, having regard to the peculiar nature of this case, is the unique decision making process of the university setting. The consistent theme reflected throughout the lengthy Labour Relations Officer's Report was the inordinate effort resorted to by the respondent to democratize the decision making process among the manifold interest groups that comprise the university community. (See, Bowen H.R. 'University Governance, Workable Participation, Administrative Authority and Public Interest' [1969] Labour Law Jo. at p. 517). The logical extension of these efforts often found expression in the innumerable committees comprised of members holding responsible positions at various levels of the university hierarchy. These committees are essentially designed to deal with particular subject matters pertaining to the operation of the university. The ancillary effect of these committees created the need for meetings accompanied by the preparation of agenda, the research and analysis of problem areas and the recording and filing of minutes. As a result support staff is employed to aid and supplement the efforts of members of committees in forwarding their parochial concerns. Generally the areas of dispute between the parties to the instant application pertained to whether persons occupying these supportive and resource positions ought to be excluded from the appropriate unit because of the exercise of managerial functions.

...

7. The employees who have been reviewed herein in the most part are assigned limited supervisory functions within the ambit of their particular job functions. Each is answerable to an immediate supervisor for their job performance and must on matters of consequence seek their approval. And in other matters pertaining particularly to supervising employees little occasion arises whereby control and direction requires the necessity to exercise disciplinary functions. When employees require time off, or overtime is assigned or vacations are scheduled or salary increases are reviewed, supervisory discretion is restricted to predetermined guidelines of the handbook or university policy. Budgetary functions are restricted to collating and analysing past expenditures in context of future forecasts. Monies are released within

predetermined ceilings in excess of which permission must be sought from persons occupying higher positions of authority. These employees perform significant and important functions within the particular branch of the university organization as assigned to them by the employer. In concluding that Florence Griffith and Olga Cirak in their capacities as assistant to department chairman and assistant to Master Rock at Stong College do not exercise managerial functions, we do not intend to demean or disparage their invaluable contribution to the university. Nevertheless, as employees they are entitled to rights of representation by the applicant in that we have not been satisfied that they exercise managerial functions for purposes of section 1(3)(b) of the Act. In respect to Miss Nadkarni, the Board is satisfied that in the performance of her general duties of being responsible for the smooth operation of Law Library acquisitions department she has subsumed a managerial function that may very well not have been anticipated in her job description. It appears to us that save for the final approval of the purchase of books and periodicals by Mr. Halevy, Miss Nadkarni has effective control of the operation of the acquisitions department. The decisions relating to the hiring of employees, the promotion of employees, the transfer of employees and indeed the discharge of employees is effectively performed by Miss Nadkarni upon Mr. Halevy's 'rubber stamp'. The evidence compels us to conclude that Miss Nadkarni exercises managerial functions within the meaning of section 1(3)(b) of the Act.

20. The Board finds that in essence UPEI has put in place a model of "participatory decision-making". The senior or more technical employees are involved by coordinating the work, sitting on hiring committees and making recommendations as to who should be hired (which may or may not be accepted), completing performance evaluations, authorizing vacation, leave and sometimes overtime.

21. There did not appear to be a rational relationship between those management employees UPEI sought to have excluded and the subordinates that they were to supervise. In one department mentioned, there were only twelve employees of which two were already excluded. Three more exclusions were sought and those individuals would apparently supervise between one and four employees.

22. A number of the employees, especially those involved at the Atlantic Veterinary College, perform technical functions and as such, their input into the hiring process would be invaluable. Their knowledge of a potential employees job capabilities would be far superior to those of any other individual. They would

undoubtedly assist in the training of that person and perform an evaluation of the manner in which the employee performed. While these technical people would be the most appropriate to rank another's technical skills, that does not make them managerial employees. Those employees do play a role of co-ordinating the activities of other employees and in fact, do the same work as those they apparently supervise.

23. The business office essentially operates in the same fashion as the Atlantic Veterinary College in that all individuals holding positions for which exclusions were sought perform a great deal of "hands on" work. Again, while UPEI refers to these individuals as "Supervisors", they essentially coordinate the daily work load, sign leave and vacation forms, and authorize overtime, all of which only employ a very small percentage of their daily duties.

24. There was no independent decision making ability, and as noted previously, while a number of the employees did sit in on a hiring panel and recommended who should be hired, their recommendations might or might not be accepted.

25. Turning to discipline, in almost all cases, the employees did not have occasion to discipline anyone, nor was there any evidence that they could exercise disciplinary powers. In fact, some of their superiors could not even perform this function alone. There was one situation involving the "Supervisor" of the Central Supply Room where discipline was in issue; however, it was readily apparent that the Personnel Office and other people who had more authority were in fact directing the event, indicative of no independent authority on the part of the employee in question. In fact, the evidence submitted to the Board was while one of the employees for whom an exclusion was sought thought that she had such power, her immediate superior disagreed and indicated that others would be involved.

26. As noted previously, UPEI has a participatory model and

involves its employees in a "team" approach in certain aspects of its organization. While these individuals perform certain functions such as signing authorization forms, in all of the instances demonstrated to the Board, a miniscule percentage of the employees time was spent on these duties.

27. The Board does not wish this decision to demean or disparage the duties performed by the employees in question. Without hesitation, the Board is satisfied that each contributes in their own way to the better functioning of UPEI. For example, Kay Martell, a long term employee helps to keep her department running "smoothly". The Board notes that she had more employees to supervise than anyone else; however she admitted quite candidly, that the bulk of her time is spent performing her own duties, and while she does coordinate the employees in her office, she has no independent decision making power and the personnel duties account for a very small part of her time.

21. The York University case is not helpful to the position put forward by UPEI in that the Board is not satisfied that any of the employees exercise effective and meaningful managerial authority. There has been little or no occasion to discipline and leave or vacation time has never been refused. Accordingly, the Board holds that UPEI has not satisfied the onus for the Board to state that any of the positions fall within the meaning of the managerial exclusion.

28. In light of the foregoing, the Board will not exclude any of the positions from the bargaining unit. The individuals essentially all perform the same tasks as the employees UPEI states they supervise, the amount of "supervision" that apparently occurs constitutes an extremely small percentage of their duties, they have no power to deal with problems or discipline individuals and have no independent decision making power. In fact, in a number of cases, even their immediate supervisor cannot make the decisions. In essence, the Board concludes that there is no

effective decision making role being performed by the individuals who hold the positions that are sought to be excluded.

29. It appears to the Board that perhaps it would be befitting of UPEI and CUPE to develop other classifications that would recognize that while these employees are not managerial, they play an important role in the operation of the university. Perhaps what is needed in this particular unit is, as the Board has noted, other classifications together with appropriate salary scales.

30. It also appears that UPEI has itself recognized that certain of the employees are valuable when it reclassified one of the employees and gave that same employee a unilateral pay raise without notice to the exclusive bargaining agent. It does not need to be stated that such action would undoubtedly be in violation of the Collective Agreement. Furthermore, the Board was somewhat dismayed with the documentation it has seen and the evidence it has heard in this matter regarding the "Non-Union" positions.

**Confidential Exclusions:**

31. Turning now to the positions which UPEI wished excluded from the bargaining unit on the ground that the position involved the employee dealing with confidential matters, those positions are Secretary to the Chief Librarian, Secretary in the Office of the Director of Administration and Finance at the Atlantic Veterinary College, and the AD1 (Administrative Assistant to the Dean of the School of Nursing). The latter position was applied for on both the grounds of managerial and confidential exclusion.

32. The test for the confidential exclusion has been enumerated in the case of York University Staff Association v. York University v. Group of Employees, [1975] OLRB Rep. Dec. 945, where the Ontario Labour Relations Board stated at page 951:

11. The parties appeared to be in agreement with respect to the interpretation of the phrase 'employed in a confidential capacity in matters relating to labour relations'. That is to say the Board must be satisfied of 'a regular, material involvement in matters relating to labour relations' to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge*

*Nickel Mines Ltd. case OLRB M.R. September [1969] 379*). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board case OLRB M.R. April [1974] 220.*). Nor is mere knowledge of matters that may be deemed 'confidential' in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See, *The Comtech Group Limited case OLRB M.R. May [1974] 291*). The important test is whether there is consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employees' service to the employer's enterprise. (See, *The Toledo Sales Division of Reliance Electric Limited case OLRB M.R. June [1974] 406*).

33. The aforementioned position has essentially been reaffirmed in Canadian Labour Law by George W. Adams (Canada Law Book Inc., Aurora, Ontario; 1985) where it has been stated in relation to this point at pp. 280-281:

" The Ontario Labour Relations Board applies the confidential employee exclusion with a view to balancing the rights of employees to collective bargaining with the rights of the employer to confidentiality. The Board strives to provide the greatest degree of access to collective bargaining consonant with employees not being placed in a position of conflict of interest where their interests as members of the bargaining unit would interfere with the performance of their job functions on behalf of the employer. To this end, the Board has developed a rule that an employee will be excluded from the bargaining unit as a 'confidential employee' where that person's access to confidential information is not merely 'incidental', but rather is of such a nature that disclosure of facts within the employee's knowledge would materially jeopardize the employer's collective bargaining position.

This proposition is illustrated by the case law. If an employee's access to confidential information is only in the nature of transcribing, consolidating or collating salary information, there is not a 'regular material involvement' with confidential material that justifies exclusion. An exclusion is only to be made where the 'handling of collective bargaining information [is] at the core of the disputed individual's job functions'. This condition will be met where the employee's duties consist of engaging in financial planning, including the assessment of projected wage increases and other costing data, or the computer programming of the costs of various wage proposals, or the handling of information relevant to the negotiation and settlement of grievances. ..."

34. Essentially, employees sought to be excluded on a confidential basis must have a "regular and material involvement" with matters relating to labour relations. An isolated incident

will not suffice. The information must be at the core of the individuals job function.

35. On the facts presented to the Board, one employee only handled correspondence dealing with negotiations a couple of times a year. The others had absolutely no involvement with matters pertaining to labour relations. While perhaps, they do see confidential information, it is not confidential information pertaining to labour matters and that is what the Board is concerned with.

36. The employees testified that they would not open confidential mail if told not to and this aspect of their job functions is so small, it is hardly worth mentioning. The handling of the information is not at the core of the individuals job functions.

37. Regarding the confidentiality of the personnel files, the Board was advised that the employee also gets a copy, so it cannot be said that there is a conflict. Essentially, UPEI appears to have requested these exclusions when there are isolated incidents of access.

38. The comments of the Ontario Labour Relations Board in York University Staff Association v. York University v. Group of Employees, [1975] OLRB Rep. Dec. 945 are directly on point where it was stated at p. 19:

"... We are not satisfied having regard to the totality of their duties and responsibilities that the secretary is involved in a regular and material manner in confidential matters relating to labour relations. Secondly, we are satisfied that the secretaries' access to such information is highly susceptible to control in the sense that persons not included in the bargaining unit may be made available to perform the functions performed by the secretary as it may relate to information pertaining to the President's Council. In the final analysis, we have not been satisfied that the secretaries to deans and principals including the assistant to the department head and assistant to the master ought to be excluded from the bargaining unit because they are employed in a confidential capacity in matters relating to labour relations."



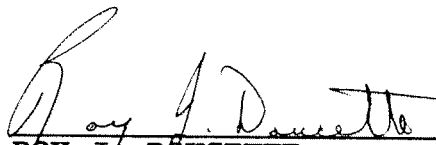
39. The Board is not satisfied that the individuals are involved in a regular fashion in confidential matters relating to labour relations and accordingly, will not exclude any of those employees from the bargaining unit.

**CONCLUSIONS**

40. For the reasons noted herein, the unanimous decision of the Board is that it is not satisfied that any exclusions are warranted and accordingly, the Application for Amendment is dismissed.

41. The Board also wishes to take this opportunity to agree with the statement put forward by UPEI, namely, that there have been many changes at UPEI since the original Certification Order 11-75 was issued in 1975. These changes have occurred in size and also with the introduction of the Atlantic Veterinary College. It does appear to the Board at first glance that certain positions in the Atlantic Veterinary College were excluded which might otherwise not have been and it would appear to serve the parties to have a complete review of the positions that are included and excluded in the bargaining unit and an appropriate application made to the Board on consent to amend the said Certification Order to reflect these changes.

This decision of the Labour Relations Board was made this 22nd day of April, A.D. 1992 and issued under the hand of its Chief Executive Officer.

  
\_\_\_\_\_  
ROY J. DOUCETTE  
CHIEF EXECUTIVE OFFICER

**PANEL:**

M. Lynn Murray,	Chair
Jean-Marc Gallant,	Member
Judy Goodwin,	Member