PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No.

Decision No. 12-005

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION

BETWEEN

PRINCE EDWARD ISLAND UNION OF PUBLIC SECTOR EMPLOYEES

APPLICANT

AND

EASTERN SCHOOL DISTRICT (WORKPLACE ASSISTANTS)

RESPONDENT

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3260

INTERESTED PARTY

DECISION

Background

On the 24th day of April, 2012, the Applicant, Prince Edward Island Union of Public Sector Employees, filed an Application for Certification with the Prince Edward Island Labour Relations Board (the "Board") pursuant to the *Labour Act,* R.S.P.E.I. 1988, Cap. L-1 and *Regulations.* The Respondent named in the application is the Eastern School District and the detailed description of the unit for which certification was sought is described in paragraph 9 of the Form 1, as "all employees working as Workplace Assistants in schools within the Eastern School District".

The Eastern School District ("ESD") filed a Reply to the application dated the 17th day of May, 2012, with an attached Exhibit "B" to the Reply, sworn by Yvette Blanchard, stating in paragraph 5 as follows:

In the interests of promoting more comprehensive bargaining units and avoiding fragmentation in the workplace, the Respondent submits the Workplace Assistants would more properly be included within the existing bargaining unit of Youth Service Workers and Education Assistants, currently represented by CUPE, Local 3260.

Preliminary Matters

On the 21st day of May, 2012, counsel for the Canadian Union of Public Employees ("CUPE") Local 3260 advised the Chief Executive Officer of the Board, Mr. Shawn Shea, that CUPE Local 3260 would be seeking status at the hearing of the application as an Interested Party. Both the Applicant and the Respondent were notified of CUPE Local 3260's intention to seek status as an Interested Party, and all parties were given an opportunity to make submissions to the Board on the issue.

The Board met on the 9th day of July, 2012, and reviewed the submissions of all parties on the issue, and subsequently rendered a decision which stated in part:

The Board is aware that historically two unions have represented individuals working in the educational sector on Prince Edward Island, namely, the Prince Edward Island Teachers Federation for the instructional personnel and CUPE for non-instructional personnel. As stated above, the Board shall afford an opportunity to interested parties to be heard. The question then is whether or not CUPE Local 3260 is an interested party such that it should be given the opportunity to be heard.

Upon review and in accordance with the provisions of the applicable legislation and the rules of natural justice, the Board has determined that CUPE has an interest in the proceedings and must be given an opportunity to be heard and declares CUPE Local 3260 to be an "interested party".

The hearing of the matter was then set down for the 26th, 27th and 28th days of November, 2012.

Statutes Considered

1. *Labour Act*, R.S.P.E.I. 1988, Cap. L-1

2. *Labour Act Regulations*

3. *School Act, R.S.P.E.I.* 1988, Cap. S-2.1

Texts Considered

1. *Canadian Labour Law*, 2nd Edition, George W. Adams

2. Ontario Labour Relations Board Law and Practice, Sack Mitchell Price, 3rd Edition

Issue

The issue before the Board is whether a unit comprising eight employees employed as workplace assistants with the Respondent employer is a unit appropriate for bargaining. The relevant provision of the legislation is as follows:

> *13.(1) Where a trade union makes application for certification under this Part, the Board shall determine whether the unit in respect of which the application is made is appropriate for collective bargaining.*

Decision

The Applicant is a certified trade union within the meaning of the legislation and has met the technical requirements of the legislation in submitting the application. The Respondent is the largest school board in the province of Prince Edward Island, overseeing the operations and management of all schools in the province east of Summerside, PEI. At issue before the Board is whether or not the unit applied for is an appropriate unit within the meaning of the *Labour Act*, supra.

The Applicant called Lynn Hayes as its first witness. Ms. Hayes testified that she lived in Montague and worked at Montague Regional High School for the past six years, five of those years in the same job. Prior to that she spent several years working with special needs students, in group homes and through alternative education programs. She now works with the designation of Workplace Assistant ("WA") within the Eastern School District, and testified that this job requires her to help transition a student with special needs from high school to the workplace, or to a sheltered workshop. The job includes trying to find a job for the student, to assist the student with learning the job, transporting the student to the job, and then to fade out, if possible, to permit the student to work at the job without her being present. She also assists the student in the school environment with certain tasks at the school, such as jobs that have been developed for the group of students she works with, like collecting the recyclables from the classrooms.

Ms. Hayes testified that she was familiar with the job duties of an Education Assistant, ("EA") and set out the distinction between the duties of an EA and the duties of a WA as she understood them. She indicated that the WA does not provide any personal care of the student, unless the personal care is required while she is off school premises with the student at a job location. She also testified that the WA does not provide any supervision of the student during meal times or breaks, and she is not to be in a classroom working with the student at any time, unless it is a co-op classroom. She summarized the difference as the WA not being permitted to engage in any academic type skills with the student.

Upon cross examination, Ms. Hayes acknowledged that the job duties between EAs and WAs have gray areas, as both groups work with the same students. Each of the WAs and the EAs report to the same resource teacher, and the WAs and the EAs "hand over" the students between each other, as well as attend the transition meetings concerning the students.

She also testified that it was a concern of hers that she would not be adequately represented by CUPE, Local 3260, because it presently represents the EAs and she feels that the voice of the WAs will be swallowed up amongst the larger group of the EAs. She testified that the WAs had made a very careful and considered decision in choosing the Applicant as the union they wished to be represented by, after meeting with representatives from it as well as from the Interested Party, CUPE Local 3260. She explained that a large concern was the previous friction that existed between the WAs and the EAs who are already represented by CUPE.

The next witness to be called by the Applicant was Mary Francis Collings, who testified that she lives in Montague and presently works as a WA at Charlottetown Rural High School. She testified that her job duties require her to work with special needs students to assist in their transition from high school to the workforce. She works with the students to find suitable jobs, and then acts as a transition support and liaison between the student and the employer, and depending upon the job, may stay at the work site. She further testified that she is never in the classroom with the student, unless it is a co-op classroom, and that she does no personal care with the student while at the school, and never takes rotation of duty to cover lunch or break times, as the EAs do. She also testified that she works with the students inside the school on programs designed to meet the needs and abilities of the students such as the school recycling program.

Under cross examination, Ms. Collings admitted that there was a "turf war" between the WAs and the EAs with respect to job overlap. She felt that the main similarity of job duties between the EAs and the WAs was that each group works with the same students. She testified that she felt the roles were very different for each job description, and stated that the EA would never leave the school to transport a student, whereas the WA, as part of the job requirements, had to have a driver's license and sufficient insurance to cover the transportation of the student off school grounds. She also testified that she was not to work inside a classroom, unless it was a co-op class, and that she was not to undertake any academic instruction with the student. She also testified that she was not permitted to handle any of the personal care needs of the student while on the school grounds, and that personal care needs were to be met by the EA.

The Board then heard from the witness who testified on behalf of the Respondent, Ms. Yvette Blanchard. Ms. Blanchard testified that she holds the position of Director of Human Resources for the Eastern School District and has since 2010. Prior to taking her present job, she testified that she had worked in human resources of the Department of Education and Early Childhood Development.

Ms. Blanchard also advised that the provincial government had undertaken the steps necessary to amalgamate the Eastern School District with the Western School Board, and it was her understanding that this newly amalgamated Board would take effect the 1st day of January, 2013. Following that, Ms. Blanchard testified that there would be a single management team in place, whose job responsibilities would include the negotiations of the collective agreements for all schools in Prince Edward Island except the French Language Schools, governed by the French Language School Board.

Ms. Blanchard presented a document that she had prepared titled *"Employee and Staffing Information"* which was marked as Exhibit R-1 at the hearing. In her testimony, Ms. Blanchard reviewed the contents of the document, and explained that there are presently three collective agreements in force:

a) a Memorandum of Agreement with the Prince Edward Island Teachers Federation that includes all teachers and board based consultants, principals and vice principals;

b) a Collective Agreement with CUPE Local 3260 which includes all educational assistants, youth service workers, and a student attendant; and

c) a Collective Agreement with CUPE Local 1775 respecting property maintenance personnel and CUPE Local 1145 respecting transportation/bus drivers and CUPE Local 1770, respecting school administrative assistants, and school board office administration, all three of which operate pursuant to one collective agreement.

Ms. Blanchard also presented a document titled *"Student Support Workers in Education"*, which was marked Exhibit R-2. Ms. Blanchard advised that she had prepared the document to provide a summary of the job description and educational requirements for each of the classifications of Educational Assistant, Workplace Assistant, Youth Service Worker, Student Attendant, and Tutors. Ms. Blanchard testified that the WAs comprise a specific group of employees, who work with special needs students at the high school level, in developing employable skills for post high school settings. She advised that a Youth Service Worker ("YSW") would work with some of the same students, but the focus of the YSW is not on employment skills, and is mainly within in the school setting, although a YSW may be required on an ad hoc basis to work with service providers outside the school if required for the individual student. At present, there are twenty-two full time YSWs, all of whom are part of CUPE Local 3260.

Ms. Blanchard testified that at present there is only one Student Attendant in the ESD. This is a full time position which requires the staff person to have more specific medical training to deal with specific medical needs of a student. The Student Attendant is also a member of CUPE Local 3260. The category identified as "Tutors" refers to people who offer services to individual students and who may have their names on a list kept by the Board, but those individuals are not employed by the Board, and are not part of any union.

The largest category of employees, as shown on Exhibit R-2, is that of the EAs, and Ms. Blanchard testified that, at present, there are two hundred and twenty-six EAs in the ESD, and they are represented by CUPE Local 3260.

Ms. Blanchard testified that within the ESD there is a Student Services Department that looks at the needs of the student in the school system, and in particular, the individual student and the school, and then determines, in co-operation with the school administration, the staffing requirements for each school. She testified that there is much change in allocation of EAs, WAs and YSW's from year to year depending upon the needs of the specific student and the school which he or she attends.

Ms. Blanchard also provided evidence concerning the requirements of the bargaining process as set out in the *School Act*, supra, which states that there must be a representative of the Minister of Education, a representative from Treasury Board, and representatives of the ESD on the negotiating team. She further testified that it would be the normal practice to have at least six people on the bargaining team for collective agreement negotiations. On cross examination, Ms. Blanchard testified that the composition of the bargaining team would be the same for the WAs as it is for the EAs. She also stated that it would be more costly to the employer in both time and money to have an additional unit to bargain with that represented just the WAs.

On cross examination, Ms. Blanchard testified that the job duties of EAs and WAs and the skills required by each job description could be the same, but the context that the EA works within differs from that of the WA job duties. The WA is generally working with the student with a view to the workplace and helping the student to develop skills for employment readiness, whereas the EA works with the student on the same or similar skills, but with a view to developing life skills. Ms. Blanchard also testified that the references to personal care and the requirements of the EA to assist the student with personal care as contrasted with the WA providing assistance with personal care, is again contextual. The EA provides/assists with the personal care of the student within the school setting, whereas the WA would only provide personal care assistance in relation to a work place/employment setting.

The Board then heard testimony from Stacy Delaney, the witness called by the Interested Party, CUPE Local 3260. Ms. Delaney testified that she had previously worked as an EA in the Western School District from 1991-2008, at which time she took a leave from her position to work with CUPE. In 2012, her position with CUPE became permanent, and she is no longer employed with the Western School Board. She testified that as an EA she was a member of CUPE Local 3260, and that she also served on the executive of the Local 3260, as Vice-President, as Secretary, and as President. Since May 2012, she has been in the position of executive director of CUPE.

Ms. Delaney testified that as the President of the CUPE Local 3260, she participated in five rounds of collective bargaining. She also agreed with the testimony of the two witnesses with regard to the job description of the EAs. She recounted her recollection of the development of the position of WAs in the Eastern School District. She advised that the introduction of the WA took place in 2007 as a pilot project. She stated that CUPE was aware of this and had ongoing communication with the ESD regarding the WAs in relation to the job duties of the EAs. She advised that in 2010, the pilot project became permanent positions, following which it became important to CUPE to obtain a job description of the WAs. She introduced a document which was marked as Exhibit I-1, titled *"Educational Assistants and Youth Service Workers Labour Management meeting November 19, 2008"*. She pointed out the notation on page 2 that says:

> *WA start date*
>
> *The WAs pilot project stated on Sept. 2007 as a one year project that has been extended to a three year project.*

Ms. Delaney also introduced Exhibit I-2, titled *"Educational Assistants and Youth Service Workers Labour Management meeting March 26th, 2009"*. She referred to item number 9 in the document which states:

> 9. *WA/SA Time Line*
>
> *Lori will contact Adrian to get "end date" in writing.*

Ms. Delaney offered these documents as indicative of CUPE's interest in the ongoing dialogue regarding the pilot project of the WAs and the employer decision to change this job to a permanent position.

Ms. Delaney testified that it was her understanding that the job duties of the EA and the WA were very similar, and that an EA could substitute for a WA, if a WA had to be out for a day. She also noted that any "team building" that took place within the school would include both EAs and WAs, and that both the EA and the WA report to the same person, ie, the resource teacher, and that there are sharing of resources between the EA and the WA, such as computers and educational manipulators, such as money. She also noted that an EA could be asked to substitute for a WA.

Under cross examination, Ms. Delaney advised that the issue of job security for the EAs was a major concern of CUPE Loal 3260 and that volatility of jobs for EAs was always part of the collective bargaining process due to the nature of the placement of EAs and the movement of students around the schools and the province. She advised that it was important from CUPE's perspective to get the job description for the WAs to ensure that the EAs, who were already part of the collective agreement, were not jeopardized in any way. However, she also testified that it was always the intention of CUPE Local 3260 to include the WAs in the unit as soon as the job description was clarified and the positions made permanent.

She further testified that she understood that a WA could fill in for an EA if the WA had the proper certification. In contrast to this, the Board heard testimony from Lynn Hayes in rebuttal, who advised that she had never been approached to substitute as an EA, that at the school where she worked, it would never happen that a WA would fill in for an EA. She stated that the duties of the WA in relation to the EAs were very clear. She offered the example that a WA was not permitted to do lunch duty or bus duty at her school, but EAs were included in this rotation along with the teachers. She acknowledged, on cross examination that she would not put her name on the substitute list now, even though she has the necessary course certification to qualify her for the position of EA. She also acknowledged that each school operated differently and that it was possible that the duties of a WA and the interaction of a WA and an EA might vary slightly from school to school.

This issue of the appropriateness of a bargaining unit was most recently considered by the Prince Edward Island Labour Relations Board in the case of Canadian Union of Public Employees, Local 4932 and the Summerside Pollution Control Plant [2011] P.E.I. L.R.B.D. No. 1. In that case, a group of five employees was seeking certification as a separate bargaining unit. After a review of the cases and applicable legislation, the Board stated the test as follows:

> *Ultimately, this Board must determine a unit which would most likely facilitate viable and stable collective bargaining, reduce fragmentation, and least likely cause serious labour relations problems. The right of employees to self-organization must compete with the need for viable and harmonious collective bargaining. The Board has a responsibility to create a rational and viable collective bargaining structure; it is at the present time that rationalization can occur.*

In the matter before this panel, the Applicant argued that the group of WA employees is a viable unit deserving of recognition on its own, relying on the community of interest test as well as the choice of the employees to be represented by the Applicant union. In making its decision, the Applicant argues that the Board must give considerable weight to the wishes of the employees and recognize that the group of WAs has a community of interest sufficient to warrant allowing the Application.

In considering the community of interest test in the case before us, the Board was directed by all three parties, to consider the following passage from *Canadian Labour Law* (2nd ed.) Adams, which sets out a list of factors that has been developed to take into account when considering the community of interest:

> *7.60 Save for specific and usually public sector workplaces, the complex and often conflicting considerations involved in the determination of an appropriate bargaining unit has discouraged most legislatures from enacting specific standards which labour boards would be required to utilize in determining bargaining unit contours. ...In making these determinations, labour boards are driven to consider a host of factors which illustrate just how vague or flexible the standard "community of interest" can be. The multiplicity of factors, which seldom point in one specific direction, may include:*
>
> > *(1) similarity in: the scale and manner of determining earnings; employment benefits, hours of work and other terms and conditions of employment; the kind of work performed; and the qualifications, skills and training of employees;*
> >
> > *(2) the frequency of contact or interchange among employees and the geographic proximity of work places;*
> >
> > *(3) continuity or integration of production processes;*
> >
> > *(4) common supervision and determination of labour relations policy;*
> >
> > *(5) relationship to the administrative organization of the employer;*
> >
> > *(6) history of collective bargaining;*
> >
> > *(7) desires of affected parties and employees; and*
> >
> > *(8) extent of union organization.*
>
> *7.70 In applying theses considerations, a labour board's objective is to fulfill its obligation to maximize an employee's freedom to join a trade union of his or her choice while at the same time promoting harmonious labour relations through effective and efficient collective bargaining procedures.*
>
> *7.80 More recently, the sharp focus on community of interest "tests" for fashioning bargaining units as found in Usarco Ltd. has dimmed with recognition that employees of an employer have many different interests, not all of which conflict and not the least of which may be a common interest in combining their bargaining power against their employer. As a result, labour boards have redirected their focus to addressing the more general question of whether or not the proposed bargaining unit is viable for its members and the employer.*

With respect to the question of whether the group of employees sought to be certified has a community of interest, the evidence before us indicates that the job duties are consistent in the identified group, the qualifications and training required are the same, the rates of pay are the same,

the work hours are the same, and the places of employment (high schools) and the reporting structure within them are the same. Accordingly, the Board finds that the group of workplace assistants would have a community of interest. However, evidence was also presented to the Board that all WAs have a community of interest included with the larger category of EAs. The Respondent argues that the job duties of a WA, while somewhat distinct from the job duties of an EA are, at the same time, very similar. Both the EAs and the WAs work with the same students, they are expected to work the same hours, the reporting structure is the same for both, in that each reports initially to the Resource Teacher within the school, and the WAs and the EAs have frequent contact with one another in working with the same students within the school.

In determining whether the proposed unit of WAs has a sufficient community of interest, the Board notes the following passage from the case of Active Mold Plastic Products Ltd. and CAW-Canada [1994] OLRB Re. June 617:

> *As noted by the Board in Burns International Security Services Limited, all employees share a "community of interest" that can be identified in any particular workplace. It is not necessary nor desirable for the Board to assess the relative strengths of the varied "communities of interest" in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems.*

In the case before us, that analysis is applicable. The group of eight employees certainly hold a narrow community of interest amongst themselves, yet at the same time, are part of a larger group of employees that also share a community of interest.

Similarly, in the case of Ride Management Ltd. [2005] O.L.R.D. No. 2829, the Board quoted from Metroland Printing and Publishing and Distributing Ltd, at paragraph 23:

> *23. In my view the result of the evolution of the Board's analysis of the determination of an appropriate bargaining unit is that the Board has recognized that employees share a community of interest simply by being employed by the same employer in the same workplace and that employees with quite different terms and conditions of employment can effectively bargain together.*

The Applicant also argues that the wishes of the employees must be paramount in the Board's determination absent any evidence of serious labour relations problems. The evidence before the Board with regard to the wishes of the employees is limited to the two employees who testified. However, the evidence was not contradicted that the employees met as a group and at least the six employees who signed cards chose to be represented by the Applicant union. Both Ms Hayes and Ms. Collings testified that they believed they would have better representation from the Applicant union than from the Interested Party, CUPE. They relate this concern to the process that led to the

position of WA transitioning from a pilot project within the school system to a permanent position. Ms. Delaney testified that it was CUPE's intention all along to seek to represent the group of WAs, but that CUPE had to clarify the job description first, in order to preserve the job description of the EAs. This has, perhaps justifiably left the WAs suspicious of how well CUPE will represent them.

In the case of Saskatoon Housing Authority v. CUPE, Local 5004 2010 CLB 020815, the Board referenced the issue of employee choice and stated, at paragraph 37:

> *However, as we indicated at the outset, the Board's examination of the appropriateness of the bargaining unit proposed by the Union must be tempered by respect for the right of employees to organize in and join a trade union of their choosing, a right protected by s. 3 of the Act.*

While the wishes of the employees are one factor to take into account, they are not, on their own, determinative. The Board must also turn its mind to the other facts at play and seek to balance the competing interests of the employee's right to organize with the need to ensure harmonious and viable labour relations. In the case of Island Medical Laboratories Ltd. V. Teamsters, Local Union No. 213 1993 CLB 15233, after a lengthy examination of the history surrounding decisions of appropriate bargaining units, the Board stated, at page 15:

> *Further, in defining community of interest more explicitly, we have identified those factors that will constrain the Board's discretion in deciding what is "an appropriate unit". Moreover, we note the following restrictions which have additionally constrained the Board's discretion in deciding what is "an appropriate unit":*
>
> > *1. The wishes of employees is not determinative of the extent of the bargaining unit. The desire of employees to have additional groups included or excluded will not be determinative of bargaining unit appropriateness;*

The Applicant argues that the test of appropriateness of the proposed unit tips the balance in favour of the unit sought to be approved unless there is evidence of serious labour relations problems for the employer. Counsel for the Applicant points the Board to the case of USWA v. Burns International Security Services Ltd. 1994 CLB 15942, where at paragraph 29, the Board states:

> *[29] These goals must be harmonized within a framework that now recognizes (as early Board "policies" might not) that there is no single unique and indisputably "appropriate unit". There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in Hospital for Sick Children put it) "serious labour relations problems". A trade union need not seek to represent the most*

comprehensive or most appropriate bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for. The focus is on concrete problems rather than the sometimes nebulous concept of "community of interest."

The Applicant also pointed the Board to the following passage from Active Mold Plastic Products, supra, at paragraph 31:

Applying the above approach to the case at hand, we are of the view that the responding party has adduced no concrete, demonstrable evidence of serious labour relations problems should the applicant's proposed bargaining unit be accepted by the Board.

Counsel for the Applicant argued that this is the situation in the matter before us, specifically that the Respondent has adduced no evidence of serious labour relations problems. The evidence before the Board however is not that clear. The Respondent's witness, Ms. Blanchard, has testified that another bargaining unit would result in further expense and time for the Respondent, as well as the governmental department which it reports to, because of the legislative requirements laid out in the *School Act*, supra, and its regulations. Accordingly, the Respondent's witness points out that it is not a matter of one, or even two, employer representatives at the bargaining table along with counsel. Ms. Blanchard testified that it would involve no less than six individuals to be present at each round of bargaining. Essentially, the result of allowing this application could be that six representatives of the employer are required to be present for collective bargaining for eight employees. As referenced earlier in this decision, evidence was presented to the Board that there are already five collective agreements and units that the Respondent must bargain with. Clearly, the addition of one more unit adds to the burden.

The Applicant's counsel argued that disallowing the application would effectively disenfranchise the eight workers for whom the application is being made. He suggests that the eight workers would have no voice should they become part of CUPE Local 3260, that they would not be represented fairly by that union because of the "turf war" between the WAs and the EAs. However, the Respondent argues that the eight employees will be at greater risk in a separate union, with a separate collective agreement. The Respondent also references the evidence that was presented about the "turf war" between the EAs and the WAs. He argues that this will only intensify if the application is allowed as there will be arguments over jurisdiction and job duties issues raised by each union, grievances as against the other will increase, and the "turf war" will only escalate. Industrial stability would certainly be threatened.

The Board is mindful of the need to balance the two competing objectives as set out in the test referred to in the Summerside decision: the right of employees to organize and the need to foster viable and harmonious collective bargaining. With respect to the arguments put forward by the Applicant's counsel, the test of community of interest and the wishes of the employees are only two factors for the Board to take into account. As has already been stated by this Board, the need for harmonious and stable labour relations is paramount.

The Board in the case of Saskatoon Housing Authority, supra, commented about balancing the need for harmonious labour relations with the employees' rights to organize, and stated at paragraph 29 therein:

> *[29] It is trite to say that the Board prefers larger, more inclusive bargaining units. However, that preference alone does not lead to the automatic conclusion that the unit sought by the Union is inappropriate in the circumstances of this case. Rather, the Board is required to balance two 2) important policy considerations: (i) recognizing the right of employees to organize in and join a trade union of their choice, a right enshrined by s. 3 of the Act; and (ii) the need for viable and stable collective bargaining structures and the avoidance of fragmentation and a multiplicity of bargaining units.*

The case of Battle River Regional Division No. 31 and AUPE (2003) CLB 14696 has similar facts to the case before us. In that case, the union applied to certify all employees except teachers in a particular county in that province. After a review of the specific facts, the Board stated:

> *There is a presumption against multiple bargaining units and that presumption increases with the number of units: Island Medical, at p. 188. This employer has a relatively large workforce. It is more able to deal with several bargaining units than a small employer would be. However, granting this application would lead to a third certificate affecting the Beaver ward alone. It would increase the number of active bargaining relationships for this Employer to four and three of those relate only to the non-teaching staff in the Division. The non-teaching units currently in place are small and already divided along job function and ward lines. Further fragmentation of the Employer's workforce should be avoided.*

Similarly, in the case before us, allowing the application would increase the number of active bargaining relationships to four, with three relating to non-teaching staff.

The Respondent argues that the size of the group relative to the other bargaining units it must deal with is problematic. The Respondent raises the concern of undue fragmentation within the workplace should the proposed unit of eight employees be certified. Again the Board turns to the Battle River Regional Division case, supra, at paragraph 35:

To establish a ward-based unit may result in disputes over work jurisdiction, difficulties determining applicable pay and benefits, and it creates a situation where employees working in close proximity with each other may be treated differently for performing the same duties. This Division has already witnessed employee unrest over different employment rules that apply to union and non-union bus drivers.

The Union points out that there is no intermingling of employees who fall within some of the classifications (e.g, computer technicians) because, while their work may take them into Beaver ward, they have no counterparts based in Beaver ward. This argument, however, misses the point that such employees currently share similar terms and conditions of employment and many of the same collective bargaining interests as employees in other classifications who do fall within the unit. This broader form of intermingling is a factor we are prepared to take into account, along with the more traditional intermingling that also exists in this case.

Once again, as in that case, the situation is similar to the matter before the Board. The WAs do share similar conditions of employment with the EAs, and many of the same collective bargaining interests.

The same concern was expressed in the Island Medical Laboratories Ltd. v. Teamsters, Local Union , supra, at page 17:

The bargaining unit sets the framework for actual bargaining between the parties. That structure has to be conducive to the orderly resolution of collective bargaining disputes by the parties. If the bargaining unit fails to relate to the specific organization and structure of the employer, efficient and stable collective bargaining will be undermined.

Similarly, in General Signal Limited [1993] OLRB Rep. November 1411, the Board was concerned with "*...labour relations suitability of the unit...*" (Para 12). After referencing the test from Hospital for Sick Children, supra, the Board made the following comment:

This is not to say the Board's discretion in these matters is unstructured nor that the policies respecting bargaining unit composition no longer provide useful guidance as to the appropriateness of a unit. Rather, it is a matter of a change of emphasis. Particularly in such cases as Board of Governors of Ryerson Polytechnical Institute [1984] OLRB Rep. Feb. 371, Kidd Creek Mines Ltd. [1984] OLRB Rep. March 481 and Hospital for Sick Children [1985] OLRB Rep. Feb 266 the Board has expressed a decided preference for broader-based bargaining structures that minimize the fragmentation entailed by a multiplicity of bargaining units, and absent such concerns as the difficulty of organization, it is clear that when the applicant's proposed bargaining unit is, in the Board's view, likely to engender such difficulties, the proposed unit will not be accepted.

As is evident from a review of the above cases, generally speaking labour boards are moving away from smaller more fragmented units towards larger units that provide greater stability in the industry. In addition, the approach taken by this Board in the Summerside Pollution Control Plant case must be given due consideration and weight. After a review of the case law before it, the Board made the following comments at paragraph 42:

In its analysis, the Board has also found helpful the materials provided by the respondent, including the Ontario Labour Relations Board decision of Hudson's Bay Co. and R.W.D.S.U., [1993] OLRB Rep. Oct.1042; and that Board's decision in Coca-Cola Ltd. [1989] OLRB Rep. Jan. 1. The Board recognizes that Hudson's Bay Co. is largely based on s. 7 of the Ontario Labour Relations Act, a provision that is foreign to the Prince Edward Island legislation. However, both of these Ontario decisions, like the decisions presented by the applicant, although certainly not binding on the Board, provide guidance as to the necessary considerations when determining an appropriate bargaining unit. Some of the considerations as suggested by these decisions include the following:

(1) A trend towards more comprehensive bargaining units;

(2) Minimizing fragmentation;

(3) Facilitating viable and stable collective bargaining;

(4) Creating administration efficiency and convenience in bargaining;

(5) Facilitating lateral mobility for the benefit of both employer and employees;

(6) Achieving a common framework of employment conditions; and

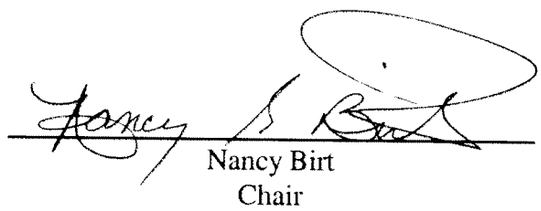
(7) Minimizing the risk of work stoppages.

As is evident from the analysis in the Summerside Pollution Control Plant case, this Board is mindful of the need to balance the right of the employees to organize but it will be hesitant to certify proposed units that do not meet the above criteria. Although the Board is sympathetic to the wishes of the employees, this is only one factor to consider. The Board finds on the evidence before it that allowing this application will clearly not minimize fragmentation, nor will it facilitate viable and stable collective bargaining, and there is evidence before the Board to suggest that if the proposed unit were certified that lateral mobility for the EAs and WAS would be greatly impeded. It is also obvious that allowing the application would not create administrative efficiency and convenience in bargaining. Furthermore, there is a substantial risk of unstable labour relations between the WAs and the EAs should the application be permitted. Accordingly, the Board is of the view that the proposed unit is not appropriate for certification and dismisses the application.

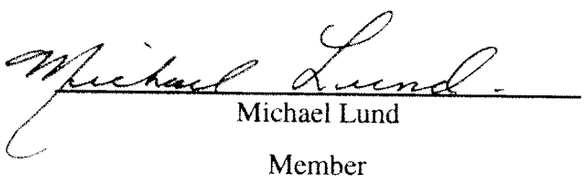
One final matter was raised which requires comment. The Respondent's witness testified that under the newly amalgamated School Board, the larger Board may have a collective agreement with the Applicant Union for some specialized employees who work within the school board, such as speech language pathologists. Counsel for the Applicant argued that this an important factor for the Board to consider, as the fact that there may be a collective agreement between the newly amalgamated Board and the applicant union was an effective answer to the question of fragmentation and additional burden on the employer. However, the Board is of the view that while it may, in future, be the case that the newly amalgamated Board will have a collective agreement with the

Applicant union, there is no evidence before the Board that the proposed unit of eight employees would become part of that existing collective agreement, and there is evidence before the Board to suggest that this is very unlikely.

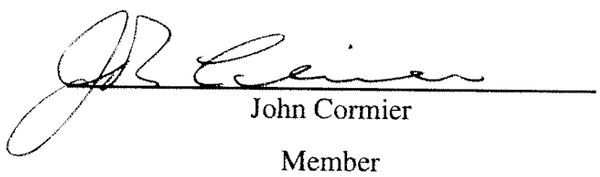
For all of the above reasons, the application is therefore dismissed.



Nancy Birt
Chair

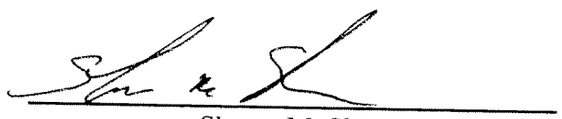


Michael Lund
Member



John Cormier
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 12 day of March, A.D., 2013, and issued under the hand of its Chief Executive Officer on the 12 day of March, A.D, 2013.



Shawn M. Shea
Chief Executive Officer