IN THE MATTER OF AN ARBITRATION BETWEEN:

Ontario Public Service Staff Union

("the Union")

and

Ontario Public Service Employees Union

(the "Employer")

Re: Exclusion Grievance, 2017-28

Before: Matthew R. Wilson - Arbitrator

For the Union:

Riley Palmer – Counsel
Tim Mulhall – Chief Steward
Lois Boggs - President

For the Employer:

Mark Mendl – Counsel
Stephen Giles – Senior Advisor, Employee Relations

Hearing held on June 11, and November 14, and November 26, 2018.

AWARD

1. I was appointed by the parties pursuant to the collective agreement to determine the union's grievance challenging the exclusion of the temporary position of Acting Supervisor, Employee Relations.

2. The only witness called by the employer was Steve Ward, the incumbent at the time of the grievance. He was no longer in the position when he testified and the position remains vacant. The union did not call any evidence. Pursuant to the parties' request, I have not identified the names, titles and job descriptions of the individuals that Mr. Ward investigated during the course of his duties.

THE COLLECTIVE AGREEMENT

3. The recognition provision of the collective agreement reads as follows:

> The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees of the Employer save and except the Administrators, General Counsel, Executive Assistants, Supervisors, Assistant(s) to the President, Assistant(s) to the 1st Vice President/Treasurer, Corporate Secretary, Administrative Assistant Employee Relations, Assistant to Legal Counsel, Assistants to the Administrators, Articling Student and Legal Counsel.

4. As framed by the parties, the only issue is whether the position of Assistant Supervisor, Employee Relations is an employee in the bargaining unit.

THE EVIDENCE

5. Steve Ward was hired into the position of Temporary Acting Supervisor, Employee Relations in August 2016. He reported to the Administrator of Employee Relations.

6. I was provided with a list of his duties that he prepared for the purpose of his evidence. The document was entered as an exhibit on consent and there was

no serious challenge to the description of the duties in cross-examination. These duties are written as follows:

- I supervise all the security of all our buildings across the province, including approving staff and member access to our buildings.
- I control all of the vehicles owned by OPSEU, I ensure the vehicles have proper maintenance done as well as have all the proper insurance, and that anyone using the vehicles have a valid driver's license and keep records of them on file.
- I am given all staffing changes that take place within our organization as to ensure staff and members have the proper access to the area within our buildings they need to go and the areas they cannot go.
- I have access to detailed reports on staff coming to work and when they are leaving, as part of security control.
- I direct any outside security that might be needed for any conventions or conferences.
- I work with the building services supervisor with any maintenance issues on our doors and fire panel issues.
- I monitor all security of our building.
- I keep the master code to let anyone into any of our buildings across the province remotely in case of emergency meetings or staff sickness or lateness.
- I maintain and control all our security cameras and search the views when asked by either the police or administration due to any incident that occurs
- I report to employee relations supervisors in building strong cases in any possible discipline hearings related to duties.
- I handle and (sic) confidential and sensitive information and report directly to the president and the first vice president and treasurer (access to all human resources files, information, and computer files).

7. Mr. Ward explained that he controlled access to the various buildings owned or controlled by the employer. He issued and revoked access for individual employees. He monitored security cameras, interacted with emergency services when there were issues, and controlled the alarm systems.

8. Mr. Ward also testified about the various investigations that he was involved in that led to discipline of bargaining unit employees.

9. In one instance, Mr. Ward was directed by his supervisor to conduct an investigation into a bargaining unit employee who was showing up late and leaving early. This investigation lasted approximately one month. Mr. Ward prepared a report about the times that the alarm was set, checked the records of the employee's access to the building, and reviewed security camera footage. Mr. Ward communicated his findings – that the employee was late for work and went home early on a regular basis - to the Administrator, Employee Relations.

10. During this time, Mr. Ward also conducted an investigation into another employee with regards to his attendance at work. He reviewed the computer records that show when he accessed the building. Mr. Ward testified that on one occasion he was told that a bargaining unit employee was suspected of working on his private business during work hours. He obtained the employee's access records. I was not told what he did with the records or the extent to which, if any, he analyzed those records.

11. Mr. Ward testified that some investigations took longer than a month to complete. As one example, Mr. Ward hired a third party company with expertise in computers to examine the activity on employee computers in the IT department. This investigation took a couple of months to complete, but Mr. Ward had no direct involvement in the investigation. Mr. Ward turned over the investigation report to his supervisor. Although the employer issued discipline to the employees, Mr. Ward had no involvement in the discipline decision and was limited to escorting the employees out of the building.

12. He testified that over the two-year period he conducted 10 to 15 investigations involving bargaining unit employees. He explained that the investigations were time sensitive and that he had to be mindful that the video recordings needed to be retrieved within 30 days. Some investigations were simple inquiries into why a building was not open on time.

13. There were occasions when Mr. Ward was contacted late at night if an alarm was triggered. He was in communication with police to resolve the issue and, on occasion, retrieve video footage of the property. Mr. Ward testified that he utilized video footage for emergencies or vandalism on more than 25 occasions.

14. A further component of Mr. Ward's work was to examine the attendance records of employees. He explained that he looked for patterns of absences and worked with Employee Relations staff to examine the employee's history of absences. He testified that he had access to employee records and files. Mr. Ward's office was initially located in the executive wing of the building and later moved to the job security wing.

15. Mr. Ward testified that he was involved in the preparation for a labour dispute during the last round of collective bargaining. While there was no labour dispute, Mr. Ward had to determine which buildings needed to be locked down if a labour dispute occurred. He was the only individual who had access to the computer system to lock down access in the event of a labour dispute.

16. In cross-examination, Mr. Ward acknowledged that no employee reported to him. He was never involved in making decisions about discipline, promotions, hiring or firings. He had no involvement in the grievance procedure. He also had no involvement in the collective bargaining process other than to make arrangements to shut down security access in the event of a work stoppage.

ANALYSIS

17. The onus is on the employer to establish that the position ought to be excluded. The recognition clause covers "all employees". Thus, on its face, the position falls within the scope of the collective agreement. As the authorities make clear, the employer must establish that the position should be excluded (See for example *Prescott-Russell Services to Children and Adults*, [2006] O.L.A.A. No. 239 (O'Neil)).

18. The employer argues that there are two reasons why the position should be excluded from the bargaining unit. First, it asserts that Mr. Ward was a supervisor and supervisory roles are excluded pursuant to Article 2.01 of the collective agreement. Second, it argues that Mr. Ward was employed in a confidential capacity related to labour relations and was therefore not an employee for the purposes of the Labour Relations Act. The employer relies on section 1(3)(b) of the Act.

19. I will deal with each of the employer's arguments.

(i) Was Mr. Ward employed in a supervisory role?

20. The evidence was that Mr. Ward had no employees reporting to him, either directly or indirectly. He did not hire, fire, discipline, approve time off, conduct performance evaluations or provide feedback to employees. It was his evidence that he rarely spoke with bargaining unit employees.

21. Thus, there is no evidence that he was a supervisor of employees.

22. The employer argues that Mr. Ward had the responsibility of supervising buildings, vehicles and other assets of the employer. It also points to the preparations he needed to make in the event of a work stoppage during collective bargaining as a key part of his supervisory role. The employer also emphasizes Mr. Ward's work in conducting investigations into employee behaviour and attendance at work.

23. While Mr. Ward may have been given responsibilities for security and management of assets, this is merely a delegation of the employer's responsibilities. It is not supervision of assets that excludes employees from the bargaining unit. It is fairly common for employees to be assigned responsibilities and oversight of assets such as vehicles, buildings, including issuing access cards. A supervisor in the traditional labour relations parlance means a supervisor of employees, not assets.

24. There were no conflicts of interests between Mr. Ward and bargaining unit members simply because he was responsible for the fleet of vehicles, monitoring security cameras or granting access to buildings.

25. Employer counsel stressed that Mr. Ward had a role in ensuring safety and security of buildings during a work stoppage and that Mr. Ward had confidential information about the timing of the work stoppage. Putting aside that there was no work stoppage, Mr. Ward's role was limited to restricting access to buildings once he was told to do so. It was no more than flipping a switch when he was told to flip the switch. This is not a responsibility that must be held only by an individual excluded from the bargaining unit. There was no evidence that Mr. Ward was involved in collective bargaining, strategic decision-making about the work stoppage, or other confidential labour relations.

26. Although I will discuss Mr. Ward's role in investigations later in this decision, the evidence does not support that he was engaged in investigations in any supervisory capacity. He was told when to look into employee activity and access to buildings and then reported that information back to the

Administrator, Employee Relations. He was also told what to look for (e.g. time theft), who to look for, and the scheduled start/finish times. Although counsel for OPSEU said these were independent investigations, there was no evidence of independent decision-making or investigative steps taken by Mr. Ward. He gathered the information that he was told to gather and then passed it along to his supervisor.

27. Thus, for these reasons, I conclude that Mr. Ward was not a supervisor and could not be excluded from the bargaining unit on this basis.

(ii) Was Mr. Ward engaged in a confidential labour relations capacity?

28. The employer relies on section 1(3)(b) of the Act to argue that the position ought to be excluded. That section reads as follows:

> 1(3) Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,
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> > (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

29. There was no dispute that the test to be met in order for a person to be found to be employed in a confidential labour relations capacity is as follows:

a) the disputed individual must be employed in a confidential capacity;

b) the material with which that individual works must be confidential; and

c) the materials must be related to labour relations.

30. In *Champlain Community Care Access Centre*, 2012 CarswellOnt 9823 (Goodfellow), the arbitrator explained the challenges for employers in these types of cases:

> 30. When dealing with an employee who plays absolutely *no* role (supporting or otherwise) in collective bargaining, *no* role in the formal processing (*at least*) of grievances, and no role in the administration of the collective agreement, an employer has something of a steep uphill climb in establishing that the employee is "employed in a confidential capacity in matters relating to labour relations".

31. These circumstances are applicable to the case before me. Mr. Ward had no role in collective bargaining, no role in the processing of grievances, and no role in the administration of the collective agreement. Thus, as observed by Arbitrator Goodfellow in *Champlain Community, supra,* the employer has a steep uphill climb to establish that Mr. Ward's position ought to be excluded.

32. In *Scarborough Hospital*, [2011] O.L.A.A. No. 211 (Gray), the arbitrator reviewed the principles applied by the Ontario Labour Relations Board in an analysis under section 1(3) of the Act:

> [42] The principles that the OLRB applies in determining whether someone is "employed in a confidential capacity in matters relating to labour relations" were reviewed in its decision in *United Community Fund of Greater Toronto* [1979] OLRB Rep. Dec. 1292:
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> > 3. The purpose of section 1(3)(b) of the Act is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest, as between their responsibilities and obligations as persons who 'exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations' and their responsibilities and obligations as members of the unit. Collective bargaining, by its very nature, requires an arm's length relationship between the 'two sides' whose interests, objectives and priorities are often divergent. Persons employed in a confidential capacity relating to labour relations are regularly involved with information and matters which, if disclosed, would adversely affect the collective bargaining interests of the employer. Section 1(3)(b) ensures that the employer need not be concerned that such persons will have 'divided loyalities.'
> >
> > 4. Section 1(3)(b) involves three separate criteria: the disputed individual must be employed in a confidential capacity; the material with which that

individual works must be confidential; and the material must be related to labour relations. The Board summarized its approach to these criteria in *York University,* [1975] OLRB Rep. Dec. 945 at page *951:*

> ... 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, [1969] OLRB Rep. September 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 [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed 'confidential' in the sense that the employer would not approve of disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited case* [1974] OLRB Rep. May 291). The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See. *Toledo Scale Division of Reliance Electric Limited* case [1974] OLRB Rep. June 406).

5. The handling of collective bargaining information must be at the core of the disputed individual's job functions. An occasional or peripheral involvement is insufficient to justify his exclusion. As the Board observed in *Falconbridge Nickel Mines Ltd.,* [1966] OLRB Rep. Sept. 379:

> A person to be excluded under this provision must be employed 'in a confidential capacity', i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of

> the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

The application of this 'test' to the facts in *Frito-Lay Canada Ltd.,* [1978] OLRB Rep. Sept. 831 prompted the Board to reach the following conclusion:

> While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial strategy, and the Board must conclude that these employees are not employed in confidential capacity in matters relating to labour relations.'

6. It is also necessary that the information with which the disputed employee works is 'confidential' so that its disclosure would undermine the employer's industrial relations position *vis-a-vis* his employee(s). In *Holophane Co. Ltd.,* [1972] ORLB Rep. Dec. 999 the Board found that a switchboard operator, who had access to the absenteeism and disciplinary records of employees was not employed in a 'confidential capacity' because the employees knew, or should have known, the contents of those records. And in *Daal Specialties Ltd.,* [1973] OLRB Rep. Nov. 592, the Board concluded that a switchboard-receptionist who types replies to grievances was not employed in a confidential capacity since these replies were obviously known to trade union officials to whom they were sent and were in no sense 'confidential.'

33. The arbitrator went on to observe that the handling of collective bargaining information must be at the core of the disputed individual's job functions.

34. In *Peel Children's Aid Society*, 2015 CanLii 57037, the OLRB stated as follows:

> 22. In applying these three criteria the Board has articulated principles, including the following, which will determine whether or not a person is employed in a confidential labour relations capacity:
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> - "access to confidential information relating to labour relations must be distinguished from access to other information that may be confidential to the employer but be irrelevant for collective bargaining purposes. The Board has also distinguished personnel information and information relating to labour relations, particularly where the personnel information is known to the employee or is information that would be required to be disclosed in bargaining" (*The Corporation of the Town of Innisfil* [1994] OLRB Rep. 76 at para. 14);
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> - "mere access to confidential information that may pertain to labour relations such as having access to personnel information is not sufficient to warrant exclusion" (*University of Windsor* 2009 CanLII 45723 (ON LRB) at para. 23);
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> - determinations are made based on the duties and responsibilities performed at the time the application for certification is filed and not on assertions of duties an employer intends to assign to an employee at some future point (*United Community Fund of Greater Toronto* [1979] OLRB Rep. 1292 at para. 8; *University of Windsor, supra,* at para. 13);
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> - the involvement with or access to matters involving confidential labour relations must be "regular and material". Mere access to confidential information relating to labour relations information is not sufficient to justify exclusion (*The Dufferin County Board of Education* [1995] OLRB Rep. 1364; *York University* [1975] OLRB Rep. Dec 945; *Falcon-bridge Nickle Mines Ltd.* [1969] OLRB Rep. Sept. 379; *Metropolitan Separate School Board* [1974] OLRB Rep. Apr. 220);
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> - the focus of the Board's inquiry is "labour relations content and potential collective bargaining use" (*York University, ibid,* at para. 17);

> • the level of exposure to confidential labour relations information must constitute "an integral part of the employee's service to the employer's enterprise" (*York University, ibid,* at para. 17), or to put it another way – it must be "at the core of the person's job function" (*University of Windsor, supra*, at para. 23);
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> • a "mere "sprinkling" of tasks, or tasks that are occasional or peripheral" is not sufficient to warrant exclusion (*Greater Essex County District School Board* 2010 CanLII 47900 (ON LRB) at 25; *Reynolds-Lemmerz Industries* [1995] OLRB Rep. Jan. 59 at para. 5);
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> • the Labour Relations Act is "remedial" legislation enacted for the purpose of facilitating collective bargaining and, therefore, exclusions which can have the effect of depriving persons from what would otherwise be a right to collective bargaining must be construed narrowly (*Greater Essex County District School Board, ibid,* at paras. 33 and 34).

35. The employer pointed to the following evidence in support of the exclusion of the position on the basis of being involved in a confidential labour relations capacity:

- involvement in preparations for potential work stoppage;
- controlling access to buildings, including codes and passwords; and
- access to employee files and confidential information pertaining to investigations.

36. However, the evidence does not establish that there was much to this work or that it consumed much of Mr. Ward's time at work. Although Mr. Ward may have been the one to terminate access to buildings, there was no evidence that he was involved in the preparations or contingency planning for a work stoppage. He was merely required to take instructions on when to terminate access to the buildings. Similarly, in controlling access to buildings on a day-to-day basis, the retention of codes and passwords is nothing more than retaining confidential information about the employer's operations and buildings. It has nothing to do with labour relations. Finally, although Mr. Ward had access to employee records, there is no evidence that he ever accessed such records or was given information contained in the records.

Moreover, his office was at some point moved out of the area where those records were held.

37. I accept that some of Mr. Ward's duties were confidential. He had control over passwords, access to buildings, and controlled security access of employees. However, his duties were only incidentally related to labour relations. At best, Mr. Ward was aware when there might be a labour stoppage, although the evidence falls short of establishing that he had any precise details. There was no evidence that the employer selected a date to lock out the employees. Nor was there evidence that the union announced a strike date that triggered certain actions by Mr. Ward. It is axiomatic that strikes/lockouts are subject to procedural requirements under the Act. Thus, it is fairly predictable when parties are in a position where a strike or lockout is permissible.

38. The employer relied on *Ontario Power Generation Inc.*, 2007 CarswellOnt 10525 for the principle that the employee need not be a labour relations decision-maker to be excluded from the bargaining unit. Certainly, as explained by Arbitrator Surdykowski at paragraph 22 of that decision, an employer would be justified in excluding the position if there was access to confidential labour relations information as part of the *regular core duties and responsibilities of the position*. However, that is not the evidence in this case. Mr. Ward was told that there might be a labour disruption and that he might need to restrict access to the buildings. Knowing when the employer might lock out its employees may be confidential, but it is a single isolated incident that is incidental to the overall duties of the position. It is also not the type of confidential information where disclosure would undermine the employer's industrial relations position. Thus, it does not bring the impugned position within section 1(3) of the Act.

39. Similarly, controlling access to buildings, including codes and passwords, is rarely a matter of labour relations. Mr. Ward exercised no independent thought about whether to allow an employee or union officials access to a building. He did not have the authority to restrict an employee's access without direction from his manager.

40. Also, as the authorities have repeatedly concluded, having access to employee files is not, on its own, enough to be considered 'confidential labour relations'.

41. The conduct of investigations does give me pause about whether this position could be included in the bargaining unit. Mr. Ward testified that he

was involved in 10 to 15 investigations over a two-year period, some of which led to discipline being issued to bargaining unit employees.

42. At first glance, this appears to be in conflict with the loyalties expected towards fellow bargaining unit employees. However, the evidence did not show much more than collecting information about the "comings and goings" of employees that were the subject of the investigation. Mr. Ward was told who was the subject of the investigation, the work schedule, the work location, and the reason for the investigation. Mr. Ward did little more than collect data from the access records and match it with the video surveillance for those specific times. While it may be true that he was not told how to conduct the investigation, it can hardly be said that he had unrestricted investigatory powers. Put simply, Mr. Ward did what he was told to do and nothing more.

43. The IT investigation was little more than hiring a third-party IT company to conduct a forensic audit on the computers of some employees. There was no evidence of independent decision-making by Mr. Ward.

44. In many ways, Mr. Ward's investigative duties are similar to the Quality Assistant position under scrutiny in *Prescott-Russell Services to Children and Adults*, supra. In that case, the arbitrator found that the position may have tracked complaints about staff, sick leave usage, and "all things that could become the subject matter of bargaining or discipline", but it was not enough to be excluded from the bargaining unit. The arbitrator explained that the Quality Assistant merely passed along the information.

45. Similarly, Mr. Ward was not privy to employer strategy or intentions with respect to labour relations or collective bargaining. He did not have the freedom to conduct the investigation in any way he saw fit. Rather, his role was limited to passing along information to the Administrator, Employee Relations. He had no discretion in the matters. In this way, he was a "conduit of information" --- a role that has been allowed to be part of bargaining unit jobs (see for example *Bannerman Enterprises Inc.*, [1994] O.L.R.D. No. 4056)).

46. Thus, the position cannot be excluded on the basis of an analysis under s. 1(3)(b) of the Act.

CONCLUSION

47. After carefully considering the evidence and the submissions of the employer, I am not persuaded that there was a legal basis for excluding the

position of Temporary Acting Supervisor, Employee Relations from the scope of the collective agreement. I conclude that the position was covered by the collective agreement and should have been posted accordingly.

48. As the position has not been filled since Mr. Ward vacated it, it should be fairly straightforward to determine any remedy that flows from this award. However, I remain seized to deal with any issue of remedy should the parties not be able to resolve the matter.

Dated in Toronto, Ontario this 2nd day of January, 2019.

Matthew R. Wilson