

OLRB rules on disputed positions in application for certification proceeding – “if a party agrees to count the segregated ballot, it is an agreement that the position is included in the bargaining unit”

Date : October 3, 2016

The Ontario Labour Relations Board (“Board”) recently ruled that, absent an agreement to the contrary, where a party agrees to count a ballot cast by a person occupying a disputed position in an application for certification proceeding, they are agreeing to include that position in the bargaining unit. In [*Canadian Union of Public Employees v City of Mississauga*](#) (August, 2016), the issue before the Board was whether to amend an interim certificate to include in the bargaining unit a previously disputed position. The Board, in an earlier decision, had certified the Union as bargaining agent for all employees employed by the City of Mississauga’s Animal Services excluding the positions of team leaders and administrative assistants. The Union sought the amendment advising the Board that it had reached agreement with the Employer to include the team leader position in the bargaining unit. It advised the Board that the ballot cast by the person occupying the disputed position was counted on voting day.

The Employer, the City of Mississauga (“City”), argued that the Board’s original certification should stand. It submitted that its representative for the vote process was inexperienced and thought that the agreement with the Union was to include the ballot for the disputed position in the vote, not to include the position in the bargaining unit. The City also took exception to discussions between its representative and the Vote Officer, particularly with respect to the Vote Officer’s explanation of the legal test for managerial exclusions under the Ontario *Labour Relations Act*.

The Board was not persuaded by the arguments of the City. In terms of counting the ballot of the person occupying the disputed position, the Board made the following comments:

In the absence of an agreement to the contrary, when a party agrees to count a ballot cast by a person occupying a disputed position that party is no longer disputing the inclusion of that position in the bargaining unit. This must be the case because otherwise the person’s ballot could not be counted. An individual’s ballot will not be counted if that person occupies a position excluded under the Act. Therefore, if a party agrees to count the segregated ballot, it is an agreement that the position is included in the bargaining unit.

The Board also found that the experience of the City’s representative was not relevant. It noted that there was no claim that the agreement to count the ballot for the disputed position exceeded the representative’s authority, or that he was precluded from seeking counsel from the City, or its

legal counsel. Similarly, the Board found that the discussions between the City's representative and the Vote Officer were not relevant. Firstly, they were in the context of settlement discussions and were therefore privileged. Secondly, it was the City's responsibility to send an informed representative who would seek legal advice when necessary. The Board went on to hold that the original description of the bargaining unit was inaccurate and proceeded to amend the certificate by including the disputed position.

This decision highlights how important it is for employers to exercise caution through the vote process. Employers should ensure that their representative is experienced and knowledgeable. Employers should also ensure that legal advice is available when necessary and should ensure that the terms of all agreements during the vote process are fully understood.

For further information please contact [Paul Lalonde](#) at 613-940-2759.