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Alberta Labour Relations Board  
501, 10808-99 Avenue  
Edmonton, Alberta  
T5K 0G5

**Attention: Tannis Brown, Director of Settlement**

Dear Madam:

**An Application for reconsideration brought by Canadian Union of Public Employees, Local 2157 affecting Keyano College (Board of Governors) and Keyano College Faculty Association - Board File No. GE-07684**

We are counsel for Keyano College (Board of Governors) (the "Board" or the "College") with respect to this application made pursuant to section 58.6 of the *Labour Relations Code* (RSA 2000, c L-1) (the "Application") by the Canadian Union of Public Employees, Local 2157 ("CUPE"). This letter sets forth our position with respect to the Application.

On December 6, 2017, pursuant to section 60(2) of the *Post-Secondary Learning Act* (SA 2003, c P-19.5) ["PSLA"], the Board passed a motion designating Contract Instructors (defined below) as faculty (the "Designation Decision"). In so doing the Contract Instructors were to be included under the Keyano College Faculty Association's (the "Faculty Association") bargaining unit. CUPE brings this Application seeking to challenge the Designation Decision.

We note that CUPE's Application seeks to appeal the Designation Decision with respect to all of the Contract Instructors (defined below). The Alberta Labour Relations Board's (the "ALRB") correspondence of December 21, 2017 states that the Application is "requesting that the Board decide if employees of the Employer designated in the position of LINC Instructor are academic staff members". It is our understanding that in its Application, CUPE seeks to appeal the Designation Decision with respect to all of the Contract Instructors, not simply the LINC Instructors.

In response to the Application, and as set out in greater detail below, the College takes the position that section 60(2) of the PSLA does not require the Board to have consulted with CUPE regarding its Designation Decision. Section 60(2) of the PSLA only requires the Board to consult with the academic staff association of the institution (i.e., the Faculty Association) as well as other bargaining agents representing the employees of the institution that are affected by the designation at issue (emphasis added). As the Contract Instructors were never organized by CUPE, CUPE is in no way affected by the Designation Decision. Given that CUPE is unaffected, it does not have standing under section 58.6(1) of the *Labour Relations Code* to bring this Application. On this basis, this Application should be dismissed.

Further and contrary to the position advanced by CUPE in its Application, the College's position is that it engaged in extensive consultation with the Faculty Association regarding the Designation Decision.

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Further, the College takes the position that the Contract Instructors (defined below) should not be included under CUPE's Certificate No. 11-78 with the bargaining unit description "All Employees of the Board of Governors of Keyano College when employed in general support services". The inclusion of the Contract Instructors under CUPE's certificate would be inappropriate for the purposes of collective bargaining. The Contract Instructors are separate and distinct in actual function from the employees engaged in general support services. The Contract Instructors share a greater community of interest with members of the Faculty Association because they are all engaged in the prime function of providing instruction to students and/or consulting, supervising or evaluating students.

Further, with respect to CUPE's assertions that neither it nor the Faculty Association were provided with adequate notice to respond to the motion, the College respectfully submits that such issues are beyond the ALRB's jurisdiction. The Board controls its own process and whether or not such process was followed is a matter that is not properly before the ALRB.

**Background**

The College is a public, board-governed college operating as a Comprehensive Community Institution under the authority of the PSLA. The College has bargaining relationships with each of CUPE and the Faculty Association.

As previously noted, on December 6, 2017, the Board passed a motion designating the Contract Instructors as faculty. As a result, the Contract Instructors are now included in the Faculty Association's bargaining unit. On this date, the Faculty requested that the Board designate the following categories of individuals (hereinafter collectively referred to as "Contract Instructors") as faculty:

- An individual providing instruction, developing course materials or supervising practicums for a credit program;
- An individual providing instruction within credit or non-credit courses that are longer than four weeks. These include individuals involved in programs such as Language Instructions for Newcomers to Canada ("LINC"), Aboriginal Education and Regional Stewardship Programs, Career and College Preparation

Previously, in June of 2017, CUPE brought an application (the "June 2017 Application") before the ALRB seeking reconsideration of its Certificate 11-78 to add in representation of the LINC Instructors. In its June 2017 Application, CUPE also requested that the Certificate 11-78 be amended to describe its bargaining unit as "all employees of the Board of Governors of Keyano College except those represented by the Keyano College Faculty Association and Security Personnel". On June 15, 2017, through its counsel, the College responded in writing, opposing this application. Among other grounds, the College noted that the proposed certificate amendment was overly broad and that there was no community of interest between the LINC Instructors and the existing support staff bargaining unit.

On June 27, 2017, Labour Relations Officer, Fenton Corey, provided a Board Officer's Report summarizing the results of his investigation into CUPE's June 2017 Application. In his Report, Mr. Fenton noted that carving out a small group of instructors, namely the LINC Instructors, was inappropriate; as a result, he held that the proposed add on group instead be "all unrepresented employees". The unrepresented employees consisted of 36 employees that were full-time/part-time/casual contractors. Mr. Fenton noted that on the date of CUPE's June 2017 application, less than 40% of the proposed add-on group demonstrated support for the union. On this basis, Mr. Fenton recommended that the ALRB dismiss CUPE's application. As a result, on June 30, 2017 CUPE withdrew this application.

**The Board Satisfied its Obligations under the PSLA**

Contrary to the assertions made by CUPE in its Application, the Board was not required to consult with them with respect to the Designation Decision. Section 60(2) of the PSLA requires that the Board consult with the

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academic staff association and other bargaining agents affected by the designation at issue. As previously noted, CUPE does not presently, nor has it in the past, represented the Contract Instructors that were the subject of the Designation Decision. On this basis, CUPE is in no way affected by the Designation Decision; prior to the Designation Decision, the Contract Instructors were unrepresented. The fact that CUPE attempted to broaden its certificate to include all unrepresented employees in its June 2017 Application, does not render them "affected" for the purposes of the PSLA. As CUPE is not in fact affected by the Designation, it does not have standing to bring this Application. We respectfully submit that this Application should be dismissed on this basis.

The Board acknowledges that it was required to consult with the Faculty Association with respect to the Designation Decision and states that in fact it did engage in such consultation on an extensive basis. Between August and November of 2017, several meetings occurred and extensive correspondence was exchanged between the Faculty Association and the Board regarding the Designation Decision. It is to be noted that it was the Faculty Association itself that proposed including Contract Instructors in their bargaining unit after CUPE's June 2017 Application. Contrary to the assertions made by CUPE in its Application, the Board was consulting with the Faculty Association on this issue as late as November 20, 2017, prior to the motion on December 6, 2017.

In the event that the Alberta Labour Relations Board determines that the Board was to consult with CUPE regarding the Designation, the Board submits that such consultation did in fact occur. During collective bargaining in October of 2017 (following the June 2017 Application), the Board discussed the inclusion of the LINC Instructors in CUPE's bargaining unit. The Board maintained its position that contract instructors did not have a community of interest with CUPE's bargaining unit as they were not engaged in "general support services".

**Recent Amendments to the Alberta Labour Relations Code**

The *Labour Relations Code* was recently amended to provide the ALRB with the power to review designation decisions made by the boards of post-secondary institutions. Specifically, pursuant to section 58.6(1) of the *Labour Relations Code* the ALRB may now determine whether a category of employees or individual employees are academic staff. This ability to review the decision of the board of a post-secondary institution with respect to its academic staff designations is a newly conferred power on the ALRB. The exercise of this discretion is presently without precedent.

The ALRB's Information Bulletin #22 "Determinations" sets forth the process for determining whether employees fall within a particular bargaining unit. Information Bulletin #22 specifically states that the ALRB determines which bargaining unit a person is a member of by using the "prime function test". This test seeks to evaluate the functions performed by the person during a reasonable period of time surrounding the date of the application.

The ALRB's use of the prime function test is well illustrated in the nursing home and hospital context, where each employer also negotiates with multiple bargaining units that represent its employees. The ALRB's Information Bulletin #10 sets forth the bargaining units for hospitals and nursing homes. In accordance with the ALRB's prime function approach to designation determinations, Bulletin #10 states that the basis of the bargaining unit descriptions in the hospital and nursing home context is "job function." The Board assigns persons to a particular bargaining unit based on the functional role that the individual occupies in the workplace.

The leading case with respect to this functional determination in the hospital context is *UNA Local 151 v Alberta Hospital Assn* ([1986] Alta LRBR 610). In this case, Chair Sims stated that: "The Board has consistently chosen to base its bargaining unit descriptions on the function persons perform, not the titles or qualifications they hold. [...] The Board's five [now four] functional bargaining units are based primarily on the concept of community of interest [...]" (¶¶ 26-27).

In accordance with the approach outlined in Information Bulletin #22, we respectfully submit that the ALRB should adopt the prime function test when reviewing designation decisions pursuant to section 58.6(1) of the *Labour Relations Code*. We respectfully submit that the prime function of the academic staff unit is to provide instruction to students and/or consult, supervise, advise or evaluate students; this is the basis of the community

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of interest among the Faculty Association. The prime function of the support staff bargaining unit is providing support services to the College, more specifically, services that are not inherently providing instruction and/or consulting, supervising, advising or evaluating students. Contract Instructors are primarily engaged in instructing students. On this basis, the Contract Instructors share a greater community of interest with the Faculty Association than the support staff association.

Yours very truly,

*per [Signature]*

William J Armstrong, Q.C.  
Senior Partner

BA/sh/jw

Cop(y/ies) to: Keyano College Faculty Association  
McGowan Cook