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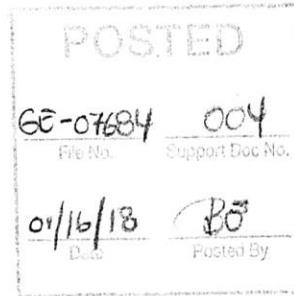
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File #537389

January 16, 2017

VIA FAX

**Tannis Brown, Director of Settlement**  
The Alberta Labour Relations Board  
501, 10808 – 99 Ave  
Edmonton, Alberta, T5K 0G5  
Fax: 780.422.0970



Dear Madam:

**Re: 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 act for Keyano College Faculty Association (“KCFA”) in relation to the above-mentioned matter. This letter comprises the KCFA’s written response to the abovementioned application. I confirm that the contact information of the KCFA is:

Keyano College Faculty Association  
205F Main Building, Clearwater Campus  
Box 76, 8115 Franklin Avenue,  
Fort McMurray, Alberta, T9H 2H7  
O: 780.715.3931  
F: 780.792.5614  
Attn: Michael Smith, President

The contact information of the KCFA’s legal representative, and address for service is:

McGown Cook, Barristers and Solicitors  
120, 7260 – 12<sup>th</sup> Street SE  
Calgary, Alberta, T2H 2S5  
O: 403.255.5114  
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Attn.: E. Wayne Benedict PLC

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KCFA hereby applies to the Board pursuant to LRC, s. 16(4)(e)<sup>1</sup> to have CUPE's application summarily rejected on the ground that the application is "without merit, or is frivolous, trivial or vexatious."

### Background & Submissions

Canadian Union of Public Employees, Local 2157 ("CUPE") claims in its application that the Board of Governors of Keyano College (the "BOGKC") failed in an alleged "duty" to "consult" it prior to designating certain unrepresented "non-academic staff" as "academic staff" in breach of *Post-secondary Learning Act*, s 60(2) ["PSLA"], which reads:

60(2) Subject to section 58.6 of the *Labour Relations Code*, the board of a public post-secondary institution other than Banff Centre may, after consulting with the academic staff association of the institution and with any other bargaining agent representing employees of the institution affected by the designation or change in designation, do one or more of the following: (a) designate categories of employees as academic staff members of the public post-secondary institution...<sup>2</sup>

CUPE relies on the alleged breach of the duty to consult as the sole ground for its "application under Section 58.6 of the *Labour Relations Code*,<sup>3</sup> ["LRC"] to appeal the decision of the [BOGKC] to designate the contract instructors as 'faculty'." LRC s 58.6 reads:

Application respecting academic staff designations

58.6(1) A person or bargaining agent affected by a designation ... made under section ... 60(2) of the *Post-secondary Learning Act*... may apply to the Labour Relations Board to decide whether a category of employees or individual employees are academic staff members.<sup>4</sup>

The BOGKC and its employees are governed by the PSLA.<sup>5</sup> The employees of the BOGKC are statutorily divided into "academic staff" and "non-academic staff", defined as:

"academic staff member", "academic staff" and "member of the academic staff" mean an employee of the board of a public college, technical institute or university who, as a member of a category of employees or individually, is designated as an academic staff member in accordance with this Act;

"non-academic staff", "non-academic staff member" and "member of the non-academic staff" mean an employee of the board of a public college, technical institute or university other than (i) an academic staff member...<sup>6</sup>

<sup>1</sup> *Labour Relations Code*, RSA 2000, c L-1 ["LRC"].

<sup>2</sup> *Post-secondary Learning Act*, SA 2003, c P-19.5, s 60(2) ["PSLA"]; emphasis added.

<sup>3</sup> LRC, *supra* note 1.

<sup>4</sup> *Ibid* s 58.6(1); emphasis added.

<sup>5</sup> PSLA, *supra* note 2.

<sup>6</sup> *Ibid*, s 1(c), (j)(i); emphasis added.

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KCFA is the only statutorily designated "academic staff association" of the "public college" Keyano College:

"academic staff association" means an academic staff association of a public college, technical institute or university established under section 85 or continued under Part 5<sup>7</sup>

CUPE is certified under *Public Service Employee Relations Act*,<sup>8</sup> ["PSERA"] to represent "All ["non-academic staff"] employees of the Board of Governors of Keyano College when employed in general support services." In relation to "general support staff" "non-academic staff" employees of the BOGKC only, CUPE is a "non-academic staff association" under PSLA:

"non-academic staff association" means a bargaining agent, as defined in the Public Service Employee Relations Act, representing non-academic staff<sup>9</sup>

CUPE's PSERA certificate does not cover all "non-academic staff" employees employed by the BOGKC. PSERA does not apply to the BOGKC "while it is acting as the employer of its academic staff" nor to the "academic staff":

Application

2(1) This Act does not apply to (a) the persons named in the Schedule to the extent described in the Schedule,

Schedule

3(1) The board of each public college as defined in the Post-secondary Learning Act while it is acting as the employer of its academic staff as defined in the Post-secondary Learning Act.

(2) The academic staff, as defined in the Post-secondary Learning Act, of each public college.<sup>10</sup>

CUPE admits in its application that it withdrew an application "for reconsideration of Certificate #11-78 to add in the group of unrepresented employees", and that during "collective bargaining [it] alerted the Employer that [CUPE] was actively seeking inclusion of the 'Contract Instructors' in the [general support staff] bargaining unit through Collective Bargaining, which was denied by the Employer." CUPE failed to convince the BOGKC to "over bargain" PSERA Certificate #11-78 to include "non-academic staff" "Contract Instructors" under its collective agreement. KCFA submits that it is plain and obvious that CUPE's unsuccessful discussions with the BOGKC amount to "consultation" for the purpose of PSLA, s 60. Further, CUPE did not represent the "non-academic staff" "Contract Instructors" on 6 December 2017, or at all, and as such CUPE was not a "bargaining agent representing employees of the institution affected by the designation"—the designation did not remove employees from CUPE's bargaining unit, it designated unrepresented

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<sup>7</sup> *Ibid*, s 1(b).

<sup>8</sup> *Public Service Employee Relations Act*, RSA 2000, c P-43 ["PSERA"].

<sup>9</sup> PSLA, *supra* note 2, s 9(k).

<sup>10</sup> PSERA, *supra* note 8, s 2 & Schedule s 3.

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“non-academic staff” employees, as “academic staff”—for the purposes of PSLA, s 60, thus CUPE was not entitled to be “consulted” by the BOGKC prior to its designation decision.

Contrary to CUPE’s pleadings at para (1) of its application, KCFA expressly requested of the BOGKC that it designate “The group of Contract Instructors as negotiated with KCFA” as academic staff—in July 2017 and consistently up to the date of the designation. KCFA, “the academic staff association of the institution” was also consulted by the BOGKC prior to the designation.

KCFA submits that it is plain and obvious on the face of CUPE’s pleadings in light of the legislative provisions that: (1) CUPE is not, and never was a “bargaining agent representing employees of the institution affected by the designation”, and thus it was not entitled to be consulted prior to the BOGKC’s designation of the “Contract Instructors” as academic staff; and (2) even if CUPE was entitled to pre-designation consultation (which is denied) its discussions with the BOGKC in the collective bargaining context amount to such “consultation” for the purpose of PSLA, s 60(2). CUPE’s “ground” for its application is bound to fail, and the application is “without merit, or is frivolous, trivial or vexatious.”

CUPE also complains that “KCFA was also not forewarned of the motion with enough advanced notice to be able to speak to the motion through their Board representative.” KCFA responds:

- 1 CUPE’s nominee<sup>11</sup> to the BOGKC *was* present during the BOGKC’s meeting where there was quorum and the resolution to designate the “Contract Instructors” as academic staff was passed, and *was* “able to speak to the motion” and to vote on it; and
- 2 If KCFA’s nominee<sup>12</sup> to the BOGKC were on the BOGKC to advance the interests of KCFA, then that person would undoubtedly have voted in favor of the resolution to designate the “Contract Instructors” as academic staff. KCFA has no objection that its nominee was not present for the vote.

58(1) A majority of the persons holding office from time to time as members of a board constitutes a quorum of the board.

(2) As long as there is a quorum of the board, (a) the board is deemed to be properly constituted notwithstanding that there are any vacancies on the board, and (b) any resolution or bylaw passed by a majority of the members present at a meeting of the board at which a quorum is present binds all the members of the board.<sup>13</sup>

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<sup>11</sup> PSLA, *supra* note 2, s 16(3)(d)(vi).

<sup>12</sup> PSLA, *supra* note 2, s 16(3)(d)(iii).

<sup>13</sup> PSLA, *supra* note 2, s 58

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Further, the Labour Relations Board's ["Board"] jurisdiction under LRC s 58.6(1) is not to decide whether "the board of a public post-secondary institution" that "designate[s] categories of employees as academic staff members of the public post-secondary institution" complies with the procedure of "consulting with the academic staff association of the institution and with any other bargaining agent representing employees of the institution affected by the designation"<sup>14</sup>—a *procedural* issue; rather it's jurisdiction is limited a review of the *substantive* decision of the BOGKC's designation decision: "to decide whether a category of employees ... are academic staff members."<sup>15</sup>

58.6(2) On considering an application under subsection (1), the Labour Relations Board *may* decide whether a category of employees or individual employees are academic staff members, and in deciding *may* take into account any of the following:

- (a) the history of, and the employer's policies concerning, designations within the public post-secondary institution;
- (b) the results of any consultation referred to in section ... 60(2) of the Post-secondary Learning Act;
- (c) the potential for significant conflict with the managerial responsibilities of the category of employees or individual employees, in the context of a collegial governance structure;
- (d) any arrangements made for any transition in status of categories of employees or individual employees;
- (e) the submissions and interests of any other bargaining agent representing employees of the public post-secondary institution affected by the designation;
- (f) any other factor the Board considers relevant.<sup>16</sup>

"[T]he results of [the BOGKC's] consultation [with CUPE] referred to in section ... 60(2)" were that CUPE was "actively seeking the inclusion of the 'Contract Instructors' in the ['non-academic staff' 'general support services'] bargaining unit... which was denied by the Employer." Other than claiming a right to consultation and an alleged absence of same, CUPE's application pleads nothing in respect of the factors the Board may consider in deciding "whether [the] category of employees ... are academic staff members." KCFA submits that an "other factor the Board considers relevant" would be the standard "functional analysis" applied in employee determination applications generally, and it is plain and obvious that the functions performed by "Contract Instructors" are identical to the functions performed by "academic staff" classified as "Permanent Employee"; "Probationary employee"; "Term Employee"; "Substitute Employee" under the KCFA- BOGKC collective agreement. "Contract Instructors" perform the job functions that

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<sup>14</sup> *Ibid*, s 60(2).

<sup>15</sup> LRC, *supra* note 1, s 58.6(1); emphasis added.

<sup>16</sup> *Ibid*, s 58.6(2); emphasis added.

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“academic staff” (“Faculty”) have always performed at Keyano College; they do not perform the job functions of “general support services” non-academic staff employees.

KCFA submits that as CUPE’s application pleads no facts to substantively establish that the “Contract Instructors” are *not* “academic staff members” on the factors the Board would consider in an application for it “to decide whether a category of employees ...are academic staff members”, its application is bound to fail, and the application is “without merit, or is frivolous, trivial or vexatious.”

Further, CUPE’s application is “without merit” and is a “frivolous, trivial or vexatious” attempt to misuse LRC provisions, and the Board’s process to try and obtain what it could not obtain at the bargaining table—representation of the “Contract Instructors” through over-bargaining its “general support services” “non-academic staff” employee certificate. However, if the Board were to decide that the “Contract Instructors” are not “academic staff” pursuant to LRC s 58.6(1)<sup>17</sup>, after considering the factors in LRC s 58.6(2)<sup>18</sup> (which KCFA submits is impossible on the facts pleaded in CUPE’s application), the effect of such Board determination would *not* be that CUPE would represent the “Contract Instructors”. CUPE did not represent the “Contract Instructors” before they were designated “academic staff”, and it would not represent them if the Board were to determine them not to be “academic staff.”

### Remedy Sought

KCFA asks the Board, pursuant to LRC, s. 16(4)(e),<sup>19</sup> to summarily reject the application on the grounds that on its face “the matter is without merit, or is frivolous, trivial or vexatious.”

I confirm that this response is being served on the other parties, as copied below. If this matter proceeds to hearing, KCFA expects to call up to 4 witnesses and estimates one day of hearing to adduce its case. Dates of availability to be provided if the Board decides that the complaint should not be summarily rejected pursuant to LRC, s. 16(4)(e).<sup>20</sup>

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<sup>17</sup> *Ibid*, s 58.6(1).

<sup>18</sup> *Ibid*, s 58.6(2).

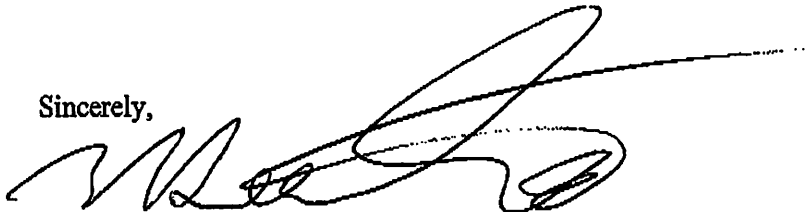
<sup>19</sup> *Ibid*, s 16(4)(e).

<sup>20</sup> *Ibid*, s 16(4)(e).

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Sincerely,



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E. Wayne Benedict Professional Law Corporation  
EWB/

- c.c. - Keyano College Faculty Association  
Attention: Michael Smith (780.792.5614)
- c.c. - Canadian Union of Public Employees, Local 2157  
Attention: Stephanie Lustig (780.743.2896)
- c.c. - Canadian Union of Public Employees  
Attention: Robert Szollosy (780.489.2202)
- c.c. - Keyano College (Board of Governors)  
Attn.: Tracy Edwards (780.791.4841)