

BRITISH COLUMBIA
LABOUR RELATIONS BOARD

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MULTIPLE FAX TRANSMITTAL

Date:	<u>March 13, 2017</u>
Time:	<u>1:43 pm</u>
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(including the cover page)	

From:	<u>Patricia O'Brien</u> Acting Executive Assistant to Leah Terai, Vice-Chair
Faxed By:	<u>Patricia</u>

RE: Coast Mountain Bus Company Ltd. -and- Canadian Office and
Professional Employees Union, Local 378
(Section 139 - Case No. 70070/16N)

BOARD DECISION - BCLRB No. B42/2017

To: Harris & Company **Fax No:** 604-684-6632
Attention: Stephanie A. Vellins

To: Canadian Office and Professional **Fax No:** 604-299-8211
Employees Union, Local 378 (doing
business as MoveUP)
Attention: Stephen Von Sychowski

*Please find attached Board Decision dated March 13, 2017.
Hard copies will be mailed if requested.*

****NOTE:** FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED RECEIVER
AS SOON AS POSSIBLE. THANK-YOU

BRITISH COLUMBIA
LABOUR RELATIONS BOARD

March 13, 2017

"BY FAX"

To Interested Parties

Dear Sirs/Mesdames:

Re: Coast Mountain Bus Company Ltd. -and- Canadian Office and
Professional Employees Union, Local 378
(Section 139 - Case No. 70070/16N)

Enclosed is a copy of the Board's decision (BCLRB No. 842/2017) rendered in connection with the above-noted matter.

For your information, Section 141 of the *Labour Relations Code* allows you to apply to the Board for leave to apply for reconsideration of this decision. Should you decide to apply for leave, then such application must be made within 15 calendar days and in accordance with the *Brinco Coal Mining Corporation* decision, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043. The key elements of the *Brinco* decision are summarized in the Board's Information Bulletin No. 21 on reconsideration, which is enclosed along with copies of Labour Relations Board Rules 2(2), 2(3) and 29 for the assistance of Unrepresented parties.

When an application for leave is made within the 15 calendar day time limit, the applicant must deliver to the Registrar and all interested parties copies of the entire application. Requests for an extension of time, usually up to a maximum of three working days, may be granted orally by the Registrar if requested before the expiration of the 15 calendar day time limit. If granted, the applicant must confirm this extension in writing to the Board, with a copy to the respondents.

If an extension of more than three days is required, the applicant must first seek agreement from all interested parties and then request that extension in writing to the Registrar, confirming the consent of the parties, before the expiration of the 15 calendar day time limit. Again, all parties must be copied. If any of the respondents does not agree to the extension requested, a written application to the Board before the expiration of the 15 calendar day time limit is required, with a copy to all parties.

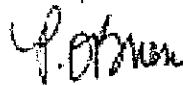
If you require further information on Board procedures, please call the Board's Information Officer.

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Re: Coast Mountain Bus Company Ltd.
March 13, 2017
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Please note that an application for leave for reconsideration shall be subject to a fee of \$200.00. Payment may be made by a credit card, cheque, debit card or by charging the amount to a pre-approved account.

Yours truly,
LABOUR RELATIONS BOARD



Patricia O'Brien
Acting Executive Assistant to
Leah Terai
Vice-Chair

Enclosure(s)
LT/po

Interested Parties:

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ATTENTION: Stephen Von Sychowski

BCLRB No. B42/2017

BRITISH COLUMBIA LABOUR RELATIONS BOARD

COAST MOUNTAIN BUS COMPANY LTD.

(the "Employer")

-and-

**CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES
UNION, LOCAL 378**

(the "Union")

PANEL: Leah Terai, Vice-Chair

APPEARANCES: Stephanie A. Vellins, for the Employer
Stephen Von Sychowski, for the Union

CASE NO.: 70070

DATES OF HEARING: January 23 and 25, 2017

DATE OF DECISION: March 13, 2017

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union applies for a declaration pursuant to Section 139 of the *Labour Relations Code* (the "Code") that the individual in the position of Safety Management System Analyst ("SMS Analyst") is an employee within the meaning of the Code and is included in the unit for which the Union is certified. The Union is certified as the bargaining agent for "employees of Coast Mountain Bus Company Ltd."

2 The Employer's position is that the individual in the position of SMS Analyst is not an employee under the Code and is excluded from the bargaining unit because she is employed in a confidential capacity in matters relating to labour relations or personnel. In the alternative, if the Board determines the individual to be an "employee", the Employer says the SMS Analyst should be excluded from the bargaining unit because her core duties result in a conflict of interest and resulting lack of community of interest with bargaining unit employees.

II. BACKGROUND

3 In February 2016, the Employer announced the creation of a new position of SMS Analyst in the Safety and Emergency Management Department. The Employer posted the SMS Analyst position as excluded from the Union's bargaining unit.

4 The job description describes the primary purpose and key accountabilities of the SMS Analyst to be as follows:

PRIMARY PURPOSE

Coordinates and ensures the development and implementation of the Safety Management System program throughout CMBC by overseeing the development of program processes and procedures and adapting current practices to ensure compliance to the Safety Management System framework. Provides guidance for integration of other safety related programs into the Safety Management System to ensure continual improvement of Safety.

KEY ACCOUNTABILITIES

- Performs systematic reviews of current policies, procedures, protocols and manuals as they align with the regulatory practices and requirements and develops and adapts necessary policies and procedures to ensure compliance [with] regulatory practices. Identify and correct any practices that are not in conformance with the Safety Management System framework.

- Provides specialized advice and facilitates internal stakeholders in operationalizing the Safety Management System. Develops and implements Key Performance Indicators specific to each Safety Management System program to ensure that reliability in the collection of information and performance requirements are met.
- Ensures that safety training meets the Safety Management System training matrix requirements, including supporting and development of curriculum and training materials.
- Develops systematic tests and maintains integrity of internal audit protocols and tools to track Safety Management System compliance and Key Performance Indicators and deploys them out to Safety Officers and stakeholders. Processes and analyses internal audit findings for Safety Management System, Certificate of Recognition and/or relevant OHSAS/ISO elements and follows up with relevant stakeholders.
- Participates in various committees and meetings. Provides specialized advice to supervisors and managers to ensure compliance with policies, procedures, legislation; and, supports achievement of related corporate objectives. Participates in projects and activities to enhance corporate performance and support a culture of safety, taking the lead on designated initiative of small to moderate scope.
- Processes and analyses data of evidentiary value collected from various sources such as CCTV, digital and visual communications, surveillance systems, data systems or media, ensuring adherence to privacy legislation in support to the Injury Management Section (WCB Claims). Assists with the management and processing of WorkSafeBC Production Orders for claims investigations. Departmental liaison for sensitive investigations in support of Injury Management Section (WCB Claims) as required. Provides back-up support to the Senior Safety Analyst and the WCB Claims Advisor.

5 Including the new position of SMS Analyst, the Safety and Emergency Management Department has 10 excluded staff positions, and 11 bargaining unit positions. The 10 excluded staff positions are:

- a. Director, Safety, Environment and Emergency Management;
- b. Confidential Assistant, Safety and Emergency Management;
- c. Manager, Environmental Sustainability;
- d. Manager, Safety Management Systems;

- e. Manager, Safety and Emergency Management;
- f. Assistant Manager Safety;
- g. Emergency Management and Business Continuity Advisor;
- h. WSBC Claims Advisor;
- i. Senior Safety Analyst; and
- j. SMS Analyst.

5 The SMS Analyst position was created to fill gaps in the Safety and Emergency Department which were identified during the first year of the Safety Management System ("SMS") implementation. The duties associated with these gaps were never performed before, either by excluded staff or bargaining unit employees. Specifically, there was no position tasked with ensuring the development, implementation and continuous review and improvement of the SMS. In addition, the new position of SMS Analyst was to provide support and backup for the exempt WorkSafeBC Claims Advisor ("WSBC Claims Advisor") and Senior Safety Analyst positions.

7 The Employer's Director, Safety, Environment and Emergency Management, Derek Stewart (the "Director"), testified that in 2014, the Employer actively moved to implementing a new SMS. The Director testified it was originally intended that a manager would undertake the work of implementing the SMS and to develop policies in conjunction with the SMS working group for submission to the policy committee for approval. The Director testified that the manager did not have enough time to meet the schedule of implementation the Employer wanted so a decision was made to have more resources dedicated to the development of core policies and procedures. These are described as high level policies that the manager did not have time to develop or bring to the working group. The Director testified approval was obtained to create a new position dedicated to the creation of policies and implementation of the SMS. The position created was that of SMS Analyst to do work which would otherwise have been done by a manager. The position was posted in February 2016.

8 The Director testified that the SMS Analyst was to participate with the Manager, Safety Management Systems in conducting high level audits related to the implementation of the SMS and to ensure the process is working correctly, going department by department to see whether the SMS has been successfully implemented.

9 The Director testified that the policy development work the SMS Analyst performs concerns the development of formal policies. One example is the development of the first aid reporting policy and procedure. The Director testified this was an unpopular policy because it requires employees to return to the depot and report to first aid in the event of an injury. Before this policy, employees were not required to return to the depot. Another policy in draft form deals with safety sensitive positions/jobs. The SMS Analyst is responsible for going out and looking at what other agencies are doing, what the collective agreement requirements are, and is responsible for defining roles of

employees with respect to safety. The Director testified the decisions regarding the creation of policy may pertain to issues such as workload and need for resources which may give rise to a potential conflict of interest if the position were included in the bargaining unit.

10 The Director testified that the position profile for the SMS Analyst included duties that were related to that of the Senior Safety Analyst and WSBC Claims Advisor, both of which are excluded from the bargaining unit.

15 The Director described the duties performed by the relatively new excluded position of Senior Safety Analyst. A significant part of his day is spent looking at incidents of assault against employees. The police and crown counsel are often involved. The position involves viewing video of incidents and has a role in preventing future incidents as well as providing information to authorities. There is also an expectation to look at behaviours that potentially compromise safety of employees and to ensure employee behaviour is not inconsistent with Employer policies. The Director testified that although the position of Senior Safety Analyst was relatively new, there was no one to fill the position when the Senior Safety Analyst was away to attend Court or while away on holidays. Before the creation of the SMS Analyst, a manager was expected to fill the role of Senior Safety Analyst when needed; however, it was problematic given the manager's own duties.

12 The role of the WSBC Claims Advisor is to ensure that there is an Employer representative able to manage WorkSafeBC claims and to file appeals. The Director testified the WSBC Claims Advisor needs to be impartial in order to have a fair adjudication of a claim. The management of a claims file often includes handling video of incidents. The WSBC Claims Advisor is the first point of contact for WorkSafeBC. The WSBC Claims Advisor may see information regarding the injury, names and contact information of witnesses, a description of what happened, and the Employer's investigation of the injury. The WSBC Claims Advisor also sees all WorkSafeBC communications. Prior to the creation of the SMS Analyst position, a manager would step in if the WSBC Claims Advisor was away. The Director testified there are certain reporting requirements to be met such as 72 hours to submit an initial report of injury and 48 hours for investigation.

13 The Director testified that it was not practically possible to parse out or divide the job of SMS Analyst to exclude duties which result in the exclusion of the position from the bargaining unit. The Director testified the Employer needed an individual with expertise with respect to WorkSafeBC claims and with respect to safety issues.

14 The SMS Analyst, Monica Szpak, testified as to the duties she has performed since being hired for the position in February 2016.

15 In her role as support for the Senior Safety Analyst, Szpak spends one hour a day reviewing Communications Incident Reports which are emails reporting accidents or incidents of violence in the workplace that occurred the previous day or night. She enters the information such as the employee name, employee number, and reports from

police into an Assault Summary spreadsheet. She also ensures she gets the video associated with any incident. In performing these tasks, Szpak ensures that the Senior Safety Analyst has an up-to-date file.

15 Szpak testified as support for the Senior Safety Analyst she has access to information such as the identity of the employee involved in an incident, the type of assault, the employee statement, transit police and witness statements, the time and date and vehicle distance from the depot. She also secures and reviews video. If there is an assault, transit police are notified and she provides a breakdown of what happened to them and advises that the video is secured. In viewing the video, Szpak looks for what was said by the driver and the witness and will record comments in the section provided, such as whether the employee was following procedure. In such a case, she will send an email to the Operations Manager. In reviewing the video or entering information into the Assault Summary spreadsheet, Szpak testified she is also looking for trends or patterns to find a root cause with a view to developing a policy or procedure to address it.

17 In her role as back-up for the WSBC Claims Advisor, Szpak testified she has access to a secure email with WorkSafeBC where they may send her orders such as to secure video. The kind of information she has access to includes the WorkSafeBC file on the individual, the incident report, independent physician reports, personnel history and medical information. Part of the role of the WSBC Claims Advisor is to decide whether to appeal a decision. Szpak testified that she has not yet had to do this. Szpak testified that, when filling this position, she works at the Vancouver office where the files are kept.

18 In her primary role as described in the position description, Szpak testified that along with the Manager, Safety Management Systems, she conducts audits once or twice a month on different facilities and a report goes to the various managers. The purpose of the audit is to ensure safety systems are in place and to see whether there are any flaws in the system. She testified that the audits she and the Manager, Safety Management Systems conduct do not use checklists and they look at the whole facility. If there is a flaw in the system, it is reported to the manager and a safety officer will be asked to perform a risk assessment on the particular area. Szpak contrasted the kind of audit she participates in with the risk assessment a safety officer may perform with respect to a piece of equipment or process using a checklist.

19 Szpak testified that the findings from the audit are reviewed with the manager and directions are given for corrective action. Once those corrective actions have been completed, they are reviewed by her and the Manager, Safety Management Systems. She and the Manager, Safety Management Systems also review training records for each facility to ensure employees get the training they need.

20 Szpak has been working on the SMS Manual reducing it from 180 pages to 40 pages by redefining all the work procedures with links. Szpak testified that most of her time is spent reviewing policies. She has worked on the first aid policy and currently is working on developing policies for fatigue management and safety sensitive positions.

A draft policy for safety sensitive positions has been reviewed by the working group and was approved. Szpak prepared a matrix and the positions have been put in by the working group.

21 Szpak testified there is going to be a fitness for duty policy as well as one for sleep apnea. She testified her role will be to do background research to see if there are trends or patterns, talk with other agencies and to bring that information to the working group and continuing from there.

III. POSITIONS OF THE PARTIES

POSITION OF THE EMPLOYER

22 The Employer submits that on a review of the evidence regarding the SMS Analyst, the individual in that position is not an employee within the meaning of the Code and/or does not share a community of interest with the bargaining unit. The Employer submits the SMS Analyst is employed in a confidential capacity in matters relating to labour relations or personnel. The Employer submits this arises from the role of the SMS Analyst as support and back-up for the Senior Safety Analyst and as back-up for the WSBC Claims Advisor. The Employer submits the exclusion also applies with respect to the development of policy pertaining to the SMS. The Employer submits all of these roles place the SMS Analyst in a potential conflict of interest with the bargaining unit. The Employer further submits even if it is determined that the SMS Analyst is an employee, she does not share a community of interest with the bargaining unit employees but falls under the management team concept.

23 With respect to the Board's approach in applying the confidential exclusion under the Code, the Employer referred to *The Corporation of the District of Burnaby*, BCLRB No. 1/74, [1974] 1 Canadian LRB 1 ("District of Burnaby"); *Gateway Casinos & Entertainment Inc. carrying on business as Lake City Casinos*, BCLRB No. B81/2010 (Leave for Reconsideration of BCLRB No. B210/2009), 179 C.L.R.B.R. (2d) 134 ("Gateway Casinos"); *City of Kamloops*, BCLRB No. B273/2004; *Health Employers Association of British Columbia on behalf of The Crossroads Treatment Centre Society*, BCLRB No. B39/2013, 223 C.L.R.B.R. (2d) 63 ("HEABC"); and *Health Labour Relations Association*, IRC No. C152/88.

24 The Employer submits here, the SMS Analyst performs work on a daily basis supporting the Senior Safety Analyst and has access to highly confidential information concerning what employees are doing and making judgements on that information. The Employer submits her involvement is not accidental or occasional and it is not a matter of simply processing information.

25 The Employer submits the SMS Analyst's role of filling in for the WSBC Claims Advisor involves highly confidential information including medical information. The Employer submits her role filling in as WSBC Claims Advisor and Senior Safety Analyst

place the SMS Analyst in an actual or potential conflict of interest with the bargaining unit.

26 The Employer submits there is a similarity in the circumstances of the SMS Analyst filling in for the WSBC Claims Advisor with those of the Occupational Health and Safety Coordinator in the case of *City of Kamloops, supra*. The Employer says in that case, the Board found there was a sufficient potential conflict of interest to justify excluding the position from the bargaining unit stating that in some respect, the Coordinator played a role similar to the role of employees in the Labour Relations Division of the Human Resources department which may have an adversarial flavour to them (paras. 38-40). The Employer submits the Board's comments are pertinent in the case at hand with respect to the SMS Analyst's role in backfilling for the WSBC Claims Advisor.

27 The Employer submits the SMS Analyst deals with the implementation of the SMS which is information that is confidential and may be of special interest to the Union before it is finalized. The Employer notes the SMS concerns the continual improvement of safety and the SMS Analyst's role places her in a potential conflict of interest, for example in the development of a policy of fitness for duty. The Employer submits this is similar to the exclusion of an individual in the case of *HEABC* (paras. 29-31).

28 Further, the Employer submits that while the SMS Analyst performs a supporting role for the Senior Systems Analyst and as backfill for the WSBC Claims Advisor, those functions are sufficient to warrant exclusion (*HEABC*, paras. 33-35).

29 The Employer submits the position of SMS Analyst plays a core role in establishing policy; she is not just told what to do. The Employer refers to *Legal Services Society*, BCLRB No. B74/2006 in which the Board stated its concern is with respect to potential conflict of interest between the role as Communications Officer and being a member of the bargaining unit. The Board in that case found the Communications Officer's involvement in confidential matters could not be readily avoided given the nature of her duties and responsibilities (paras. 59 and 61).

30 The Employer notes in the case of *Telecommunication Workers' Union*, BCLRB No. B141/2010, 183 C.L.R.B.R. (2d) 162, the Board found the Communications Specialist performed duties establishing a direct conflict of interest with including the position in the bargaining unit. The Board found the duties were not accidental or occasional (paras. 22 and 26).

31 The Employer submits viewing the position of SMS Analyst globally, there is daily involvement with confidential employee information in her role as support for Senior Safety Analyst or as backfill for the WSBC Claims Advisor. In addition, the work performed in auditing and the development of the SMS concerns issues which would be of interest to the Union. The Employer submits on this view, the SMS Analyst clearly fits within the confidential exclusion.

32 In the alternative, the Employer submits the SMS Analyst also fits within the rare exception of the management team concept. The Employer refers to *Workers' Compensation Board of British Columbia*, BCLRB No. B117/93; *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91), 18 C.L.R.B.R. (2d) 161; and *Howe Sound Pulp and Paper Corp. and Unifor Local 1119 (Clerical Grievance)*, Ministry No. X-021/16, [2016] B.C.C.A.A. No. 204 (Young).

33 In the further alternative, the Employer submits if the SMS Analyst is found to be an employee, she should be excluded on the basis of potential conflict of interest and on the basis that she does not share a community of interest with the bargaining unit. The Employer relies on the SMS Analyst's auditing role as an enforcer of the SMS, her role in surveillance supporting the Senior Safety Analyst, and her role in backfilling for the WSBC Claims Advisor which has aspects which may be against an employee's interests. In this regard, the Employer refers to *City of Campbell River*, BCLRB No. B30/2013 (Leave for Reconsideration of BCLRB No. B198/2012), 224 C.L.R.B.R. (2d) 298.

34 The Employer says it relies also on its written submissions filed in this case.

POSITION OF THE UNION

35 The Union's position is that the SMS Analyst ought to be included in the bargaining unit as she is an employee and does not meet the test for exclusion under the Code.

36 With respect to the confidential exclusion, the Union submits while it is clear the SMS Analyst has access to potentially confidential information, it is not for labour relations or personnel purposes. The Union submits the information is being accessed for the purpose of adhering to the SMS or for the purpose of backfilling to review incidents through a 'safety lens', not for personnel or labour relations reasons such as whether to hire or fire staff. The Union submits the evidence is the SMS Analyst does not make any determinations with respect to employee discipline or dismissals. If the SMS Analyst comes across information that needs to be passed onto management, that is what she does and decisions are made there regarding employee discipline.

37 The Union submits the evidence is clear that the SMS Analyst does not make decisions regarding personnel. It submits access to information itself is not a basis for exclusion if there is no labour relations purpose to it. The Union refers to *British Columbia Public Service Agency and British Columbia Government and Service Employees' Union (Positions Grievance)*, Ministry No. A-019/12, [2012] B.C.C.A.A. No. 24 (Germaine) ("*BC Public Service Agency*") at paragraph 34 as follows:

I do not accept the Employer's distinction. In my view, when the Board said parenthetically in *Vancouver General Hospital* that the conflict of interest to be avoided may simply be the opposite of a finding that the incumbent shares a community of interest with management, the Board was referring to the same conflict of interest which guides every exclusion from the bargaining unit

regardless of the specific ground on which the exclusion is based. In *Gateway Casinos, supra*, the Board reiterated the ultimate foundation for all of the exclusions under the Code. I am satisfied the following comments in that decision apply with equal force to exclusion on the management team basis which, as noted above, is now regarded as residing within the exclusion of those employed to perform, in the words of the Code, the "functions of a manager":

The same underlying rationale for the confidential labour relations exclusion applies with respect to the confidential personnel exclusion: namely, the avoidance of a potential conflict of interest that arises where a person's work duties require them to have regular and substantial access to, and make judgments about, confidential labour relations or personnel information. It is not sufficient for an employee merely to have access to information the employer wishes to keep confidential from the rest of the world, as membership in a union does not render an employee less trustworthy. In order to require exclusion, the confidential information must pertain to labour relations or personnel matters. (paragraph 64)

The underlying policy rationale for the confidential personnel exclusion is the same for all three categories for exclusion from employee status under the Code; i.e., the importance of an arm's length relationship between management and a union and the resulting need to avoid a potential conflict of interest which could be created by placing a person within a bargaining unit when they should be excluded from employee status. Individuals falling within one of those exclusionary categories will not have access to collective bargaining. (paragraph 77)

38 The Union submits the SMS Analyst is not accessing information for the purpose
of labour relations or personnel and there is no reason to believe that in conducting her
work she would somehow be less trustworthy because of membership in the Union.

39 The Union draws a parallel between the SMS Analyst and the Technical
Investigator position referred to in the case of *BC Public Service Agency*. It says here
the SMS Analyst performs audits which can speak to the performance of bargaining unit
members. The Technical Investigator performed investigations which could involve
investigations of employees (paras. 38, 45-49). The Union submits, as in *BC Public
Service Agency*, there is no warrant for assuming union membership will produce
disloyalty (para. 51). The Union says in performing audits, where an employee may be

found not to be performing properly, there is no reason to believe that a person in the position of SMS Analyst will be less loyal or honest in performing her duties.

40 Further, the Union says the information in this case is not of a nature that needs to be kept separate from the Union. The information involves safety which is of common interest with the Union and the position does not involve making decisions. The Union submits there is no basis to exclude the position on its confidential capacity relating to labour relations or personnel.

41 With respect to the Employer's alternative argument concerning community of interest and the position being part of the management team, the Union submits the role of SMS Analyst is in establishing Employer policies and researching and drafting policies, then communicating with the working group. The policies require approval from the policy committee and finally the President. The Union submits thus the SMS Analyst does not create Employer policy and it is subject to approval.

42 With respect to coverage for the Senior Safety Analyst and WSBC Claims Advisor, the Union says the SMS Analyst makes no final decisions regarding the information she reviews or the reports or recommendations she makes.

43 With respect to the *BC Public Service Agency* case, the Union notes the arbitration board's comments at paragraph 28 as follows:

The ground originates in the management team concept. The confidential capacity of employees who meet the test is critical but it is not in relation to matters of labour relations or personnel. Rather, the confidential function relates to a planning or advisory role in the development of management policy. And the management policies must go to the root of the employer's operation. They must involve, for example, corporate planning, financial planning, marketing, or other common management responsibilities. These features of the exclusion emanate from *Board of School Trustees, School District 61 (Greater Victoria School Board)* and *CUPE, Local 947, [1978] 2 Can LRB 454*, and *BC Hydro and Power Authority and Office and Technical Employees Union, Local 378, BC LRB Decision No. L75/80*, both of which are quoted in the *SPA* award at paragraphs 51 and 53.

44 The Union submits the policies in the present case do not meet the test above. Here, the policies are about workplace safety which is a common interest to the parties, unlike financial planning which may have an impact on collective bargaining. The policies here do not have that kind of impact. The Union submits the SMS Analyst is not establishing policies or enforcing policies nor are the policies central to the operation of the Employer and they do not impact on relations with the Union.

45 The Union submits the coverage for the Senior Safety Analyst or WSBC Claims Advisor during their vacations comprises 25-35% of the year. The Union submits performing those duties for a minority of working time in a year should not result in an

exclusion particularly since there are certain duties at issue. The Union relies on *Island Savings Credit Union*, BCLRB No. B118/94 where the Board held it will require an employer to organize its affairs. The Union says here the concern is with respect to a small part of the year and certain duties. The Union submits if the Employer needs coverage, it should look at whether duties could be done by other management employees. For example, the evidence is that the SMS Analyst has not had to decide whether a WorkSafeBC claim should be appealed. The Union says this is not a constant or day-to-day kind of task and, when it arises, the decision could be handed off to a manager.

46 The Union submits the position of SMS Analyst does not meet the test for confidential exclusion because the information is not confidential with respect to labour relations or personnel. Further, there is no reason to believe that there would be a potential conflict of interest if the position was included in the bargaining unit. The Union submits the SMS Analyst position is not part of a management team nor does it share a particular community of interest with the Employer.

47 The Union relies on its written submissions which have been filed.

IV. ANALYSIS AND DECISION

48 Section 1 of the Code provides:

"employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,

- (a) performs the functions of a manager or superintendent, or
- (b) is employed in a confidential capacity in matters relating to labour relations or personnel...

49 Sections 139(a) and (l) provide:

The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether

- (a) a person is an employer or employee,

- (l) a person is included in or excluded from an appropriate bargaining unit...

50

In *District of Burnaby*, the Board described the confidential exclusion in respect of labour relations as follows:

... A second group of persons subject to this enquiry were alleged to be excluded from the statutory definition of "employee" because they were "employed in a confidential capacity in matters relating to labour relations". This "confidential" exclusion may overlap with the "managerial" one, but often that will not be true. The Legislature has decided that there is a second general category of employees who must be excluded from collective bargaining because of its special situation. However, it has set three conditions which must be satisfied before this happens and each of these is important. The person must be "employed" in a certain "capacity"; we are concerned with functions which are a substantial and regular part of a person's job, not just a matter of occasional and accidental involvement. Moreover, the person must be employed in a "confidential" capacity and this requires a judgment about the seriousness of the need for secrecy for the information which the employee is privy to.

Finally, the matters to be kept confidential must be "related to labour relations". As stated earlier, this represents a significant change from the earlier law (e.g., when the 1944 certificate was granted) which required the exclusion of employees who were confidential in any respect. The explanation for that change is legislative recognition that we are concerned with a special problem here -- conflicts of interest arising from membership in the bargaining unit. An employer has an interest in keeping all its confidential information from reaching the outside world but there is no reason to expect that being represented by a trade union makes any employee less trustworthy than one excluded from such representation. It is only where knowledge of that information is of special interest to the union and the employer has a special need to keep it from the union -- i.e., where it relates to labour relations -- that the potential conflict of interest becomes compelling enough to require exclusion from the Code. Accordingly, the third issue requiring the exercise of judgment from the Board in such cases is exactly what is meant by "matters relating to labour relations". (p. 11)

51

In *Gateway Casinos* (at para. 60), the Board's authorities on the confidential personnel exception were reviewed beginning with *Burnaby General Hospital*, BCLRB No. 50/78, [1978] 2 Canadian LRBR 550 as follows:

The parties agree that the confidential personnel exception is narrow, but that it is not limited to those employed in personnel departments. Both parties appear to accept the following description of the exception in *Burnaby General Hospital*, and in any event we find it constitutes a useful statement of the Board's law and policy regarding the exception:

We now consider the kinds of persons who may be said to be employed in a confidential capacity in matters relating to personnel. As a general rule those so employed will be persons regularly and materially involved in personnel matters such that they are entrusted with confidential information about employees and must act upon it discreetly. The information will include facts of a character which if divulged or misinterpreted could impact upon the relationship between the employee and employer, or for that matter between the employee and his fellow employees. Finally, the person receiving the information will be responsible for making judgments about it, as opposed to recording it or processing it in a routine way. (p. 552, emphasis added)

52 The principles to be considered in determining whether a person is employed in a confidential capacity in matters relating to labour relations or personnel are summarized in *Gateway Casinos* as follows:

The Board's interpretation of the confidential personnel exclusion as illustrated in these decisions can be summarized as follows:

- The purpose of the 1977 addition of the words "or personnel" to the confidential labour relations exclusion was to enlarge somewhat the scope of persons excluded from the definition of employee.
- Those captured by the confidential personnel exclusion are persons whose work requires them to be regularly and substantially involved in confidential personnel matters. They are entrusted with confidential information about employees and must act on it discreetly. They will be responsible for making judgments about the information, as opposed to merely recording it or processing it in a routine way.
- While such persons will mostly be found in personnel departments or positions, they may occasionally appear elsewhere in an employer's organization. In personnel departments, those excluded on this ground will be generally be [sic] relatively senior in status. A person will not be excluded where it is possible for an employer to rearrange its affairs so as to avoid the person having merely occasional access to, or involvement with, confidential personnel information. However, a clerical staff member may be excluded notwithstanding they do not make judgments about confidential personnel information, if their

exclusion is necessary in order for the employer to have an excluded staff person to record and process confidential personnel information.

- The same underlying rationale for the confidential labour relations exclusion applies with respect to the confidential personnel exclusion: namely, the avoidance of a potential conflict of interest that arises where a person's work duties require them to have regular and substantial access to, and make judgments about, confidential labour relations or personnel information. It is not sufficient for an employee merely to have access to information the employer wishes to keep confidential from the rest of the world, as membership in a union does not render an employee less trustworthy. In order to require exclusion, the confidential information must pertain to labour relations or personnel matters. (para. 64)

53 The Board in *District of Burnaby* noted the importance of each of the three conditions to be satisfied before an individual may be found to fall within this exclusion. (These conditions of course also now apply to matters relating to personnel.) First, the Board noted, the person must be "employed" in a certain "capacity". The functions must be a substantial and regular part of a person's job. Second, the person must be employed in a "confidential" capacity which requires a judgment about the seriousness of the need for secrecy of the information which the employee is privy to. Third, the matters to be kept confidential must be "related to labour relations." The Board noted that the third issue required the exercise of judgment from the Board as to what is meant by "matters relating to labour relations" (*District of Burnaby*, p. 11).

54 The primary purpose of the position of SMS Analyst is described in the position profile as coordinating and ensuring the development and implementation of the SMS program by overseeing the development of program processes and procedures and adapting current practices to ensure compliance to the SMS framework. As part of fulfilling this primary purpose, once or twice a month, the SMS Analyst and the Manager, Safety Management Systems conduct an audit on a facility and they prepare a report to the manager of the facility audited.

55 Szpak testified her days are spent mostly reviewing policies. She has been working on the existing SMS Manual reducing it from 180 pages to 40 pages; instead of putting all the procedures in one document, it has been redefined with links. She is also working on a fatigue management policy and a policy on safety sensitive positions. There is a plan to have a fitness for duty policy as well as one for sleep apnea. Szpak described her role as providing background research to see whether there are trends and patterns, to speak with other agencies and bring this information to the working committee.

56 There is an approval process in place whereby the draft policies worked on by the SMS Analyst are discussed by a working group which includes the SMS Analyst. After the draft policy has been worked on by the working group, it moves to a policy committee comprised of managers. Once approved by the policy committee, the policy is put before the President for final approval.

57 On the evidence in this case with respect to the primary function of the SMS Analyst, I am not persuaded that the duties with respect to the development and implementation of the SMS and the development of various policies are such that the SMS Analyst has regular and substantial access to, and makes judgements about, confidential labour relations or personnel information. I do not find the kind of information the SMS Analyst accesses in performing her primary function meets the requirement that the information be in respect of confidential labour relations or personnel. Overall, I find the primary function performed by the SMS Analyst does not satisfy the three conditions necessary for the confidential exclusion under the Code to apply.

58 Other duties relied on in this case in support of a confidential exclusion are the duties the SMS Analyst performs when acting as backup support for the Senior Safety Analyst. In this case, the SMS Analyst spends one hour a day reviewing Communications Incident Reports which report accidents or incidents of violence in the workplace from the previous day and night. The Communications Incident Report is a form which includes headings for "incident description" for which there are "incident code[s]" and "incident type[s]", an area for comments and a heading for "actions taken". The SMS Analyst takes the information from the Communications Incident Report and fills in a spreadsheet document which has already been developed. The SMS Analyst also secures video, and she has access to information such as the employee involved, the type of incident or assault, the employee statement, the witness statements taken by transit police, as well as the time and date and vehicle information. The SMS Analyst also views the video to note what the driver said and puts in comments based on her assessment of the video. The SMS Analyst has to sign a confidentiality document in order to have access to the video. The SMS Analyst also views the videos looking for trends and patterns in order to do a root cause analysis and, from there, develop a policy or procedure to address it.

59 The work the SMS Analyst performs for one hour per day in support of the Senior Safety Analyst consists of recording information from the Communications Incident Reports into a spreadsheet. I am not persuaded that the information being viewed or transferred into the spreadsheet is confidential in relation to labour relations or personnel. I do not find the information as it has been described in the Communications Incident Report includes facts, which if divulged, could impact upon the relationship between the employee and the Employer. Further, and more significantly, I do not find the SMS Analyst is responsible for making judgements about the information that she is recording in the spreadsheet (see *Burnaby General Hospital*, supra, as cited in *Gateway Casinos* at para. 60).

60 The SMS Analyst also acts as backup support for the WSBC Claims Advisor for approximately six weeks in a year during which time the SMS Analyst has access to WorkSafeBC files. While information in WorkSafeBC files is confidential with respect to an individual employee, I find that the SMS Analyst does not have regular and substantial access to the information. In addition, the evidence in this case does not establish that the SMS Analyst makes judgements about the information she does have access to. Although the Director testified that the SMS Analyst would make decisions as to whether to appeal a WorkSafeBC decision, the SMS Analyst did not know who would make such a decision and she has not been faced with having to make one herself.

61 In *District of Burnaby*, the Board considered the application of the confidential exclusion to the position of the Training and Safety Supervisor, noting:

Two of the other members of this group are more difficult. Mr. Ed Williams is the Training and Safety Supervisor. He has certain functions which involve him somewhat in "management" but not to a degree necessary for finding that to be the "primary purpose" of his employment. As regards his "confidential capacity", he keeps personal records of employees' driving and accident behaviour and can consult the employee's personal file for medical and other reports relevant to his driving. While certainly confidential, I don't believe that this kind of information about individual employees -- largely consisting of material the employee is already aware of -- is sufficiently connected with "labour relations" as such to warrant excluding him from the Code on this ground. (p. 12)

62 *City of Kamloops, supra*, relied on by the Employer here, dealt with the position of Occupational Health and Safety Coordinator. In that case, the Board found a "significant part of the Coordinator Position's function is to act as the Employer's advocate in numerous respects under the WCB Act" (para. 39). The Board noted "the Employer is entitled to require undivided loyalty from its WCB advocate no less than it would have required from its lawyer in a civil lawsuit for negligence or in dealing with the WCB representatives on other issues" (para. 39). The Board further found "the Coordinator Position deals with disputes between the employee, the employer and the WCB. In some respects the role that the Coordinator Position plays is similar to the role played by other employees in the labour relations division of the Human Resources Department" (para. 40).

63 I do not find the evidence in the present case supports the exclusion of the SMS Analyst on the basis of the time she spends in the role as backup support for the WSBC Claims Advisor. The evidence did not establish that in her role as backup, the SMS Analyst has or will be acting as the Employer's representative as was described in the *City of Kamloops, supra*. Rather, I find the evidence here to be closer to the circumstances of the Training and Safety Supervisor in *District of Burnaby*.

64 The kind of evidence which the Board has found to warrant exclusion is also not present in this case. For example, in *Legal Services Society, supra*, the Board found that the duties of the Communications Officer had changed and her involvement in confidential matters relating to labour relations was both substantial and regular (para. 54). The Board stated "as the Communications Officer, Shreve has ongoing and regular access to confidential information, involving labour relations, which if divulged or misinterpreted could impact on the relationship between the employer and employee" (para. 54). The Board went on to note the Communications Officer was privy to, and actively involved in, the development of the strategic direction of the Legal Services Society. She was also privy to, and an active decision maker, with respect to operational, financial and management issues including the annual budgeting process. That process included a determination of the priorities which the Legal Services Society could financially support in the coming year. The Board also noted the Communications Officer was not only privy to confidential labour relations information but was an active decision maker in matters directly affecting the bargaining unit, including collective bargaining planning and updates, grievances, staffing changes and performance issues (para. 55).

55 In *Telecommunications Workers' Union, supra*, the Board described the duties of the Communications Specialist as follows:

The Communications Specialist is required to instruct and advise the TWU executive concerning communications strategy and messaging around any labour dispute or other labour relations issues with COPE. In my view, these duties establish a direct conflict of interest with including the Position in the bargaining unit.

The legislature has seen fit to exclude persons employed in a confidential capacity in matters relating to labour relations from the definition of "employee" in Section 1 of the Code. The Position fits within the confidential exclusion in the Code because its duties include advising the Employer in a confidential manner with respect to communications strategies during labour negotiations and labour disputes with COPE. I therefore find the Position should not be included in the COPE bargaining unit. (paras. 22 and 27)

56 The Employer submits in the alternative that the SMS Analyst should be excluded as falling within the rare exception of the management team concept. The Employer also submits that the SMS Analyst should be excluded because of a potential conflict of interest with the interests of the bargaining unit and because she does not share a community of interest with the bargaining unit.

57 In *Vancouver General Hospital, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91)*, 18 C.L.R.B.R. (2d) 161, the Board stated: "The management team concept will be a 'relatively rare' ground for exclusion. ..." (p. 214).

58 In *Gateway Casinos*, the Chair in concurring reasons, noted the "management team" concept approach to employee status and exclusions under the Code had been superseded by developments in the law and policy on exclusions (para. 108). The Chair noted (at para. 109):

In *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91), (1993), 18 CLRBR (2d) 161 ("VGH") and *Cowichan*, in heavily contested contexts, the Board clarified its approach to the potential conflict of interest rationale for exclusions under the Code. As part of that analysis, in rejecting separate bargaining units as a means of resolving a potential conflict of interest, the Board in *Cowichan* noted it had earlier rejected in *VGH* the conceptually similar approach to exclusion in the management team concept:

The Board in *VGH* rejected such a varying or sliding scale in regard to the management team concept for analogous reasons. Previously, if an individual did not fulfill the criteria of a "manager", then the employer was able to argue that an individual was a "near manager" and nonetheless excluded. This sliding scale of what constituted a manager under the management team concept, in effect, lowered the test for managerial exclusion. (*Cowichan*, para. 116)

69 In the case at hand the evidence does not persuade me that the SMS Analyst falls within the rare ground of exclusion based on a management team concept. Nor do I find the evidence supports exclusion based on a community of interest with management or a potential conflict of interest if she is included in the bargaining unit. To the extent a potential conflict of interest exists in respect of the SMS Analyst's access to information as backup support for the WSBC Claims Advisor or the Senior Safety Analyst, it is up to the Employer to organize its workplace assignments so as to avoid that potential. As the Board stated in *District of Burnaby*:

it is a serious matter to find that a non-managerial employee should be excluded from collective bargaining. The employer has an onus to organize its affairs so that its employees are not occasionally placed in this position of a potential conflict of interest if that result can readily be avoided. (p. 12)

In this case, prior to the creation of the SMS Analyst position, the Employer assigned backup support duties, particularly with respect to the WSBC Claims Advisor, to managers in the department.

70 Having considered the evidence, case authorities and submissions of the parties, I conclude that in the circumstances of this case, the SMS Analyst is an employee within the meaning of the Code and is included in the Union's bargaining unit.

V. CONCLUSION

71 For the reasons set out above, the Union's application is granted. I declare the SMS Analyst is an employee within the meaning of the Code and declare that the SMS Analyst is included in the Union's bargaining unit pursuant to Section 139 of the Code.

LABOUR RELATIONS BOARD



LEAH TERAJ
VICE-CHAIR



Reconsideration of Board Decisions

Purpose

The purpose of this Information Bulletin is to provide general information and guidance about reconsideration of Board decisions. It is not a legal document and is subject to the provisions of the *Labour Relations Code*, the *Labour Relations Regulation* and the *Labour Relations Board Rules*.

**Legislative
References
(Code,
Regulation,
Rules)**

Section 141, LRB Rule 29

Law

Any party affected by a decision of the Labour Relations Board can apply to have the Board grant leave for the party to apply for reconsideration of the decision.

There is no absolute right to reconsideration under the Code. A party seeking leave must satisfy the Board that it should exercise its discretion under Section 141 to grant leave for reconsideration. A reconsideration is not a full appeal of the merits of an original decision.

Test

The Board will not grant leave unless the applicant demonstrates "a good arguable case" that it will succeed on one of the established grounds for reconsideration. This standard requires more than a *prima facie* case. There must be a "serious question raised as to the correctness of the original decision".

Application

When a party requests leave to apply for reconsideration, the written application should fully set out submissions with respect to *both the leave request and the merits of reconsideration*.

Reconsideration of Board Decisions

Discretion of Board

Even where the test for leave has been met, the Board retains the discretion to deny leave, based on other relevant factors. These may include the importance of the original decision to the parties and to the labour relations community, any prejudice which may be occasioned to the respondent, and the practical utility of the reconsideration (e.g. whether the matter is academic).

Leave will rarely be granted where a party seeks to reconsider a procedural, evidentiary or other "interlocutory" determination by an original panel.

Compliance or Stay

As a general rule, the Board will require as a pre-condition to granting leave, that the applicant comply with the original decision. Where a party feels there are good reasons why it should not have to comply with the original decision, it must seek and obtain a stay of proceedings within the 15 day time limit (see Stay of Proceedings, Information Bulletin No. 25).

Grounds

The established grounds for reconsideration are:

- new evidence has become available which could not have been obtained earlier through reasonable diligence, and there is a strong possibility that the new evidence will have a determining effect on the original decision,
- the original decision is inconsistent with the principles of the *Labour Relations Code* or any other statute dealing with labour relations, or
- the panel which made the original decision acted contrary to principles of procedural fairness and natural justice.

Reconsideration of Board Decisions

Time Limits

An application for leave to reconsider must be made within 15 calendar days of the publication of the reasons for the decision that is the subject of the application. For more information, see the section on "Extensions" in either Information Bulletin No. 25 "Procedural Matters", or Practice Guideline No. ADJ-1 "Processing of Applications - General".

Cross-Appeals

If an application for leave to reconsider is made, another party affected by the decision may also apply for leave within the longer of:

- the 15 day period referred to above, or
- 5 days of receiving the initial leave application.

**Extensions of
Time Limits**

The 15-day time limit runs from the publication date of reasons for the decision. Any extension should be requested before expiry of the 15 days. Short extensions of 3 working days will usually be given by the Registry without consultation with the other parties. A party requesting a longer extension should first seek agreement from the other parties before contacting the Board. An applicant seeking an extension after expiry of the 15 days must, in addition to its submissions on the extension, include its full submissions on the leave request and the merits of the reconsideration application. An applicant granted an extension should confirm the extension in writing to the Board, with copies to the parties. For more information, see the section on "Extensions" in either Information Bulletin No. 25 "Procedural Matters", or Practice Guideline No. ADJ-1 "Processing of Applications - General".

**Leave Request
Assessed**

Upon receipt, a leave application is reviewed for timeliness and sufficient particulars. The file is then assigned to a panel to determine whether the test for leave has been satisfied. No

Reconsideration of Board Decisions

Denial of Leave

submissions are requested from the other parties at this stage. In some cases, leave will be denied based on the application. If leave is not denied at this stage, submissions are requested from the other parties and a formal hearing may be scheduled. Leave and reconsideration applications may be adjudicated without an oral hearing.

The Board will *not* grant leave for reconsideration where the applicant simply disagrees with the original panel's findings of fact, or where the applicant is advancing arguments which were made to the original panel and do not disclose a reviewable error. Nor will leave be granted based on arguments which could have been made to the original panel.

Statutory Declaration

Where an application for leave or a reply to it depends on material facts which are not evident on the face of the Board's original decision, a statement of these facts verified by statutory declaration must accompany the application or reply (see Rule 29 (2)).

Only One Leave

Only one request for leave to apply for reconsideration is allowed to each party for each decision. There is no provision for reconsideration of a decision to either grant or deny leave to apply for reconsideration.

Remedy

On reconsideration under Section 141 the Board may vary or cancel the original decision, or it may remit the matter to the original panel.

Leading Cases

Brinco Coal Mining Corporation, BCLRB No. B74/93, 20 CLRBR (2d) 44 (general law)

Robinson Little and Co. Ltd., BCLRB No. 32/75, [1975] 2 CLRBR 81 (findings of fact by original Panel will generally not be reviewed)

Reconsideration of Board Decisions

**Decisions
(Copies)**

Roberts Roofing and Sheet Metal Ltd., BCLRB No. B313/94
(findings of fact will generally not be reviewed)

John Robertson, BCLRB No. B505/2000 (extension of time for
filing)

Board decisions since January 1, 2000 are available without
charge on the Internet at www.lrb.bc.ca.

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Advice

LRB Staff provide general information and assistance to the
public, but they cannot act as your representative or advisor. For
answers to specific concerns related to your situation, you should
consult a lawyer or an advisor experienced in labour relations. For
general clarification, call the Board's Information Officer at 660-
1300.

PART 2
GENERAL RULES

Applications and commencement of proceedings

2. (1) An applicant shall commence a proceeding before the board by filing a written application with the registrar within such time as may be prescribed by the Code or these Rules.
- (2) In addition to any other information required by the Code, these Rules or the board, an application shall contain
 - (a) the full name, address, and telephone and facsimile numbers of both the party commencing the proceeding and any representative filing the application;
 - (b) an address for delivery, where different from the address of the party or representative filing the application;
 - (c) where known, the full name, address, and telephone and facsimile numbers of the respondent and any other person who will be affected by the application;
 - (d) the number of employees in any bargaining unit or units which may be affected by the application;
 - (e) the section or sections of the Code or other enactment under which the proceeding is commenced and a remedy is sought;
 - (f) an outline of the facts and circumstances upon which the applicant intends to rely, including when and where the relevant facts occurred and, where known, by whom any actions alleged were taken;
 - (g) the order, relief, interim relief, declaratory opinion or other remedy requested from the board, together with the basis for the request;and shall also
 - (h) state whether a hearing before the board is requested;

- (5) if a hearing is requested, state the form of hearing considered appropriate and provide reasons for the request, together with an estimate of the time required and the proposed location of the hearing; and
- (6) contain a statement as to the urgency of the matter and the reasons for any stated urgency.

(3) A party commencing a proceeding shall forthwith serve a copy of the application on all persons referred to in sub-rule (2)(c) and shall indicate to the board at the time of filing what provision has been or is being made to effect such service; except that this sub-rule shall not apply to applications under Section 12 of the Code, or to applications for certification or revocation of bargaining rights.

Reconsideration of decisions

29. (1) Subject to Section 141 of the Code, any person directly affected by a decision or order of the board may make application to the board for leave to apply for reconsideration of the decision or order, if that person
- (a) applies for leave in writing within fifteen (15) calendar days after the date of publication of reasons for the decision or order;
 - (b) complies with Rules 2(2) and 2(3) in particular; and
 - (c) sets out the grounds for seeking leave to apply for reconsideration.
- (2) Where an application for leave or a reply to it is founded upon material facts which are not evident on the face of the board's original decision or order, a statement of those facts verified by statutory declaration must accompany the application or reply.
- (3) The board shall determine its own practice and procedure for the hearing of applications seeking leave for reconsideration. Without limiting the foregoing, the board may determine whether submissions should be sought from other affected parties before considering the leave application, and whether a hearing should be conducted.
- (4) Where leave to apply for reconsideration is granted, the board may permit or require the filing of submissions on the merits of the reconsideration in accordance with time limits set by the board.