



## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0058-14-U**

Canadian Union of Public Employees, Local 79, Applicant v **Toronto Community Housing Corporation** and Toronto Civic Employees Union, Local 416, Canadian Union of Public Employees, Responding Parties

OLRB Case No: **0319-14-JD**

Canadian Union of Public Employees, Local 79, Applicant v **Toronto Community Housing Corporation** and Toronto Civic Employees Union, Local 416, Canadian Union of Public Employees, Responding Parties

**BEFORE:** Kelly Waddingham, Vice-Chair

**APPEARANCES:** James Nyman and Meg Atkinson for the applicant; Mark Mason and Jennifer Bond for Toronto Community Housing Corporation; Steven G. Bosnick for Canadian Union of Public Employees, Local 416

**DECISION OF THE BOARD:** May 4, 2015

1. In 2013 and early 2014, the Canadian Union of Public Employees, Local 79 ("Local 79") met with the Toronto Community Housing Corporation (the "TCHC") to discuss the conversion of part-time and casual positions (such as Youth Mentor and Program Coordinator) covered by Local 79's bargaining unit into new full-time and part-time entry level classifications. On March 4, 2014, the TCHC advised Local 79 that 30 new positions would be posted. Local 79 sought a higher wage than the \$19.00 per hour proposed by TCHC. The parties agreed to negotiate the salary after the position was posted.

2. On March 26, 2014, the TCHC settled a grievance with the Toronto Civic Employees Union, Local 416, Canadian Union of Public Employees ("Local 416"), regarding the position of YouthWorx Field Worker. The settlement provided that TCHC would hire 30 employees at an hourly rate of \$16.00 for the new classification of Building and Community Facilitator ("BCF"), to be placed in the Local 416 bargaining unit. As described below, all the BCFs hired by TCHC were formerly employed as Youth Mentors or Program Coordinators under the Local 79 Collective Agreement.

3. Board File No. 0058-14-U is an unfair labour practice complaint filed under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") by Local 79 alleging that it had been in negotiations with TCHC for almost two years regarding the introduction of a new entry-level position, and that the BCF position should be in its bargaining unit.

4. Board File No. 0319-14-JD is a jurisdictional dispute application under section 99 of the Act filed by Local 79. It concerns the assignment by the TCHC of work related to two classifications, the BCF and YouthWorx Field Worker, to Local 416. At the hearing, Local 79 advised that it was not pursuing the YouthWorx Field Worker position at this time.

5. The facts that give rise to the jurisdictional dispute are intertwined with the allegations in the unfair labour practice complaint. The Board determined that the most efficient way to proceed was to deal first with the jurisdictional dispute. This decision therefore deals only with the jurisdictional dispute.

### **The Parties**

6. The TCHC provides social housing to low and moderate income tenants in the City of Toronto. It was created in 2002, when the City of Toronto amalgamated its social housing operations.

7. When the TCHC was created, it was party to a number of overlapping collective agreements, and subject to conflicting claims to bargaining rights inherited from its predecessors. Proceedings before the Board resulted in three distinct bargaining units: one represented by CUPE Local 79, one represented by CUPE Local 416, and a bargaining unit of security guards represented by the Ontario Public Service Employees Union ("OPSEU").

8. Local 416's collective agreement with the TCHC has a classification-based recognition clause. Classifications covered by the collective agreement are set out in Schedule "A" of the agreement, and include maintenance staff such as building superintendents and custodians. The recognition provisions of the collective agreement between Local 416 and the TCHC provide as follows:

2.01 The TCHC recognizes the Union as the sole bargaining agent for all employees of the Toronto Community Housing Corporation who occupy the positions set forth in Schedule "A".

2.02(a) In this agreement the word "employee" means a person hired by TCHC for either Permanent or Temporary employment in a position that comes within the bargaining unit described in clause 2.01.

2.02(b) A temporary employee is one who is employed for any one of the following reasons:

(i) to replace an employee who is absent for any reason;

(ii) to work on a special program or undertaking;

(iii) to meet unexpected workload demands of a temporary nature.

2.02(c) "Permanent employees" are employees who have satisfactorily completed the probationary period under Article 5 and occupy a job classification set out in Schedule "A".

9. Local 79's bargaining rights, as set out in Article 2 of its collective agreement, can generally be described as encompassing all professional office and clerical employees, and all part-time and recreational seasonal employees. Article 2.01 of the collective agreement between Local 79 and the TCHC provides:

2.01 TCHC recognizes Local 79 as the sole bargaining agent for all professional office and clerical employees, and without limiting the generality of the foregoing including the employees as set out in Schedule A, save

and except those persons who are not employees within the meaning of the Labour Relations Act.

Clarity note:

The foregoing bargaining unit includes all permanent and temporary employees including part-time employees and all recreational seasonal employees but does not include any persons employed in classifications set out in a collective agreement between Local 416 and TCHC, subject to paragraph 4(b) of the agreement dated June 23, 2006, nor Security related employees covered by a collective agreement between TCHC and OPSEU Local 529.

10. The initial and the subsequent collective agreements between the TCHC and Local 79 included a Letter of Intent, which provided for continued negotiations over the terms and conditions of part-time and casual employees, with interest arbitration identified as the dispute resolution mechanism should the parties be unable to come to a final agreement.

11. The parties were unable to reach an agreement on the part-time appendix, and the dispute was placed before Arbitrator Johnston, acting as an interest arbitrator. Arbitrator Johnston issued two awards establishing the terms and conditions of employment for part-time and/or casual employees.

12. Neither Local 79's nor Local 416's collective agreement with the TCHC contains a provision prohibiting the transfer of work to employees in other bargaining units.

13. There is no agreement between Local 79 and Local 416 regarding the carriage of seniority. If an employee transfers between Local 79 and Local 416, he or she loses their seniority.

### **Discussions with Local 79 Regarding New Classifications**

14. In 2013, the TCHC decided to reorganize the delivery of services in its Resident and Community Services program. Throughout 2013 and early 2014, Local 79 and the TCHC discussed the introduction of new classifications into the collective agreement, including the establishment of new full- and part-time entry-level positions.

15. Local 79 met with the TCHC with a view to extending the positions of Youth Mentor and Program Coordinator into full-time entry-level positions. The TCHC discussed various options, and reviewed draft job descriptions with Local 79.

16. On March 4, 2014, senior members of TCHC management met with Local 79 representatives, and advised that 30 new jobs would be posted. The TCHC proposed that the new positions be placed on the salary grid at a grade five (5) level, approximately \$19.00 per hour. Local 79 proposed a grade three (3) level, which is \$25.00 per hour. The TCHC and Local 79 did not agree upon a wage rate, and Local 79 was asked to wait until the position was posted.

### **YouthWorx Field Worker Job Posting**

17. In 2013, the TCHC hired approximately 140 YouthWorx Field Workers. Their duties included litter clean up, graffiti removal and landscaping. The position was not assigned to a bargaining unit.

18. On September 25, 2013, Local 416 filed a grievance claiming that the classification of YouthWorx Field Worker fell within its bargaining unit.

19. On March 26, 2014, the grievance was resolved and a memorandum of agreement (the "agreement") was signed. The agreement provided that Local 416 would withdraw its YouthWorx grievance in exchange for the posting and placement of 30 newly-created Building and Community Facilitator positions (15 full-time and 15 part-time) into the Local 416 bargaining unit. The agreement set the BCFs' hourly wage at \$16.00 an hour.

### **The BCF Posting**

20. On March 27, 2014, the TCHC invited part-time and casual employees to a meeting, where they were provided with the posting for the new BCF position. They were advised that the position would be in the Local 416 bargaining unit.

21. The TCHC actively recruited and solicited Youth Mentors and Program Coordinators – both Local 79 positions – to apply for the BCF position. Every Youth Mentor or Program Coordinator who applied for the position was hired as a BCF.

22. In late July 2014, the TCHC eliminated the Youth Mentor and Program Coordinator positions.

23. The posting for the BCF position indicates that the position is in the Resident and Community Services division, and in the Local 416 bargaining unit. It set out the following position summary, responsibilities and qualifications:

#### POSITION SUMMARY

Reporting to the Manager of a Resident Engagement & Community Development team or a Resident Access and Support Services team, this position supports a broad range of Resident and Community Services programs, such as YouthWorx, State of Good Repair, Community Revitalization, Unit Condition Follow Up, Participatory Budgeting, and Tenant Leadership Programs.

#### RESPONSIBILITIES

- Provides work direction to program staff (e.g. YouthWorx, Recreation, Revitalization, State of Good Repair);
- Provides work direction to volunteers, program participants and other volunteer groups;
- Minor landscaping, graffiti removal, garbage pick-up and light cleaning as identified by building superintendents;
- Report and document deficiencies, damages, incidents, concerns to their Manager or designate, as appropriate, regarding program space;
- Provides relevant feedback to building staff;
- Assists local site teams working with resident groups;
- Provides coordination and support on unit condition follow-up;
- Assists in the preparation for local building meetings and community events (e.g. room set up as well as TTC token and food disbursement);
- Conducts activities in order to provide information to TCH residents on programs and initiatives;
- Completes administrative forms, reports and statistical information;
- Liaise with building superintendents to obtain access to TCH facilities for program activities or whenever working on-site;

- Participates in special projects, work groups, or integrated teams;
- Responsible for conducting assessments against pre-defined safety checklists for program space, program activities and properties;
- Responsible for maintaining program supplies and equipment and re-stocking as required;
- Prepares pre-approval orders and invoices related to program activities for their Manager, or designate;
- Produce meeting minutes and outreach documents as required;
- Completes surveys in the community as assigned;
- Assist in tracking, asset mapping as well as archiving and filing activities;
- Special Projects and other tasks as assigned.

#### QUALIFICATIONS

- Demonstrates knowledge, experience and/or academic background in working with residents and/or community groups;
- Experience with program delivery and monitoring;
- Ability to conduct effective outreach;
- Experience supervising groups of program participants;
- Experience with program coordination or supervision in the areas of recreation, youth or seniors programs, or other related program areas;
- Experience in cleaning, landscaping and litter removal considered an asset;
- Basic knowledge of building operations;
- Ability to perform manual labour and work outside is required;
- Proven organizational and administration skills;
- Proven communication skills;
- Experience in organizing, promoting and facilitating community events;
- Demonstrates focus on customer service;
- Knowledge of, or experience with Toronto Community Housing considered an asset;
- Experience working in a culturally-diverse environment;
- Proven ability to work in fast-paced environment;
- First aid and CPR training certification an asset;
- Proficient in use of MS Word, Excel and Power Point;

- Knowledge of Occupational Health and Safety Act and WHMIS an asset;
- Fluency in a second language represented in a TCHC community considered an asset;
- Ability to work a flexible work week inclusive of weekends and evenings.

24. In early summer 2014, the TCHC started to backfill temporary vacancies in the Community Services Coordinator ("CSC") position, a senior classification in the Local 79 bargaining unit with BCFs.

### **Comparator Positions**

25. Local 79 claims that the principal duties of BCFs are drawn from or are the same as those of positions in its bargaining unit, namely, Youth Mentor and Program Coordinator. It also claims that the qualifications for the BCF position are largely the same as those for Youth Mentor and Program Coordinator. To facilitate comparison with the BCF position, Local 79 provided job postings for the Youth Mentor and Program Coordinator positions.

26. Youth Mentor is a temporary seasonal (summer) position in the Resident and Community Services Division's Community Health Unit (Children and Youth Team). According to the job posting (2012), Youth Mentors work with Property Management staff and TCHC tenants to identify youth program needs in TCHC communities. They conduct youth outreach activities, and develop, implement and evaluate youth programs. They also provide coaching and mentoring, as well as informal counselling and referrals, to program participants. The wage rate for the position in 2012 was \$14.00 per hour.

27. Program Coordinator is also a temporary seasonal position in TCHC's Resident and Community Services Division. As set out in the "position summary" for the 2013 and 2014 postings, it is intended to be "a progression within available part-time positions, allowing for those who identified social services / social work as their chosen career a clear transition to full-time employment at TCHC." Working within an assigned focus area or initiative (relating to either youth engagement or energy savings), Program Coordinators facilitate group, individual and stakeholder engagement, conduct or facilitate outreach activities, coordinate program and services delivery by part-time staff, and provide instruction to program participants and volunteers. The wage rate for the position in both 2013 and 2014 was \$14.00 per hour.

28. For its part, Local 416 claims that the duties and qualifications of BCFs “substantially overlap” with those of several classifications under its collective agreement. The classifications include: Senior Superintendent, Superintendent, Custodial Maintenance Person 1, Materials Management 1 and 2, Landscape Maintenance Person 1 and 2, Custodian, Cleaner, and Service Worker Maintenance. All of the classifications are within either the Operations Division or the Property Management Division, except for Materials Management 1 and 2, which are in the Finance Division. Local 416 set out the extent of “overlapping” duties in a table in the context of written submissions to the Board. It also provided the Board with job descriptions for all of the relevant positions, except Landscape Maintenance Person 1, Materials Management Person 1, and Service Worker Maintenance. The overlapping duties and qualifications of Local 416 classifications will be referred to, as required, in the analysis below.

### **Analysis**

29. The Board’s jurisprudence regarding jurisdictional disputes has developed primarily out of disputes in the construction industry. However, the analysis is routinely applied to disputes in other industries. The factors typically considered by the Board were set out as follows in *Pioneer Manor – Home for the Aged*, [1993] OLRB Rep. May 447 at para. 15:

- a) collective bargaining relationships;
- b) skill and training;
- c) safety;
- d) economy and efficiency;
- e) employer past practice;
- f) area or industry practice; and
- g) employer preference.

30. These factors are not to be applied in a rigid manner, and a cautious approach must be used in applying the factors in a non-construction setting. (*Canadian Office and Professional Employees, Local 491*, [2006] OLRB Rep. March/April 134 at para. 31). There can also be considerable interplay between or amongst the factors – for example, between collective bargaining relationships and employer past practice (see *Trenton Memorial Hospital*, [1996] OLRB Rep. September/October 897 at paras. 17-18 and *Canadian Office and Professional Employees, supra* at para. 47). In some cases, the enumerated factors cannot be applied readily, or will not produce a

clear result. In such circumstances, the Board may determine the appropriate assignment of the work on the basis of other "labour relations considerations" (*Kawartha Pine Ridge District School Board*, [2003] OLRB Rep. September/October 819 at para. 81).

31. Local 79 asserts that the BCF position is essentially a community development position that falls under its collective agreement. It submits that collective bargaining relationships, skill and training; employer past practice and employer preference along with other labour relations considerations, favour the assignment of the new classification to Local 79 rather than to Local 416. Local 416 submits that collective bargaining relationships, economy and efficiency and employer preference support its position that the new classification is properly assigned to its bargaining unit. It asserts that the Board is not required to, and indeed should not, consider other labour relations factors to determine this matter. The TCHC takes the position that the new classification fits within the Local 416, and submits that factors of economy and efficiency and employer preference support its decision to assign the classification to that bargaining unit. It also maintains that there are no collective agreement proscriptions against it doing so. The TCHC also takes the position that the Board need not (and should not) consider other labour relations factors in determining the proper assignment.

32. Safety, and area or industry practice – were not argued by the parties, and are assumed not to bear on the appropriate assignment of the position. Consequently, they are not considered in this analysis.

### *Collective Bargaining Relationships*

33. Consideration of this factor starts from the question of whether or not both bargaining units can "independently lay claim to the work in question" (*Canadian Office and Professional Employees, Local 491, supra* at para. 35, and *Kingston General Hospital*, [1999] OLRB Rep. March/April 227 at para. 46). In some instances, a claim to the work in question will be founded upon a "work protection clause", which prevents the employer from assigning particular work to another bargaining unit (*Kingston General Hospital, supra; Glebe Centre Inc.*, [2008] OLRB Rep. March/April 266; *AbitibiBowater Canada Inc.*, [2009] OLRB Rep. November/December 788). As neither Local 79's nor Local 416's collective agreement with the TCHC contains a clause of this type, the Board must look at other aspects of the bargaining relationships to determine whether both bargaining units can

legitimately claim the work at issue and, if so, which (if either) has the stronger claim to the work.

34. Local 79's collective agreement refers to "all professional office and clerical employees" while Local 416's collective agreement refers to "all employees of the Toronto Community Housing Corporation who occupy the positions set forth in Schedule 'A'." This language, in and of itself, is not determinative of the proper assignment of BCFs. However, I observe that BCFs are not "persons employed in classifications set out in a collective agreement between Local 416 and TCHC" and, therefore, are not expressly excluded from Local 79's bargaining unit. Meanwhile, as the position has not been the subject of collective agreement negotiations between the TCHC and Local 416, and has not been subject to the inclusion process under Article 2.03 of their current collective agreement, BCF is not (yet) a Schedule 'A' position. Although there is always the blurring of the lines of jurisdiction at the borders, the history and current state of affairs between the two trade unions is that Local 79 represents the "white collar" or "inside" workers, while Local 416 represents the "blue collar" or "outside" workers. In this case, the duties ("responsibilities") of BCFs must be compared to those of classifications in both bargaining units in order to determine which bargaining unit has the better claim to the work.

35. Local 79 submits that the responsibilities assigned to the BCFs largely mirror (or are drawn from) those assigned to positions set out in Schedule "A" to its collective agreement. Those positions, which were generally part-time and/or seasonal, include Youth Mentor and Program Coordinator. Local 79 submits, on the other hand, that BCFs' responsibilities - apart from "minor landscaping" and "light cleaning" - do not fit with the types of duties performed by employees in Schedule "A" to Local 416's agreement. It characterizes the classifications under its collective agreement as "white collar" and those under Local 416's agreement as "blue collar." It asserts that the TCHC has simply added a "smattering" of blue collar duties to "core functions" of several Local 79 positions to create the new position. Local 79 points to the fact that all of the individuals who were employed as Youth Mentors and Program Coordinators were encouraged by TCHC to apply for the BCF positions, and all who applied were ultimately hired into those positions. Local 416 members, on the other hand, were not recruited for the positions. Local 79 asserts that the BCF position is essentially a "community development job", of the same nature as those traditionally performed by its members. It is in fact, Local 79 claims,

the very position (full-time, entry-level) it was negotiating with the TCHC to develop up until March 2014.

36. Local 79 submits that the fact that BCFs have been "backfilling" for Local 79 members in the Community Services Coordinator position supports the view that BCFs are a better fit for its bargaining unit. Local 79 submits that BCFs, drawn as they are from positions in its bargaining unit, are the only employees with the necessary skill set to backfill for Community Services Coordinator. It further submits that the Community Services Coordinator position is the "natural progression" for BCFs who wish to advance in the organization. Thus, the BCF position, it submits, properly belongs in its bargaining unit.

37. Local 79 submits, further, that as Local 416's collective agreement contains no provisions covering part-time employees, it has no means of bringing the fifteen part-time BCFs under its ambit. Local 79 also points to the TCHC's decision not to extend the collective agreement to the fifteen full-time BCFs as evidence that the Local 416 collective agreement is not set up to accommodate them.

38. Local 416 asserts that the BCF is a new position, not a "transfer" of an existing position, despite the fact that the employees hired into the position were employed as Youth Mentors or Program Coordinators, and the fact that Local 79 had been negotiating with the TCHC for a similarly-constituted full-time position that would have employed the same workers. It contends that just because the Local 79 positions ended at the same time as the new position was implemented does not mean that there was a transfer of positions to Local 416.

39. Local 416 asserts that the BCF position has its roots in landscaping positions, formerly in its bargaining unit, that were contracted out. Local 416 filed a grievance in response to the posting of the YouthWorx positions, which it claimed would perform landscaping and cleaning duties previously performed by members of its bargaining unit. Local 416 claims that the BCF position, which was offered in settlement of the YouthWorx grievance, performs duties that were performed, prior to the contracting-out and the creation of the YouthWorx positions, by employees in Local 416 classifications.

40. While Local 416 acknowledges that BCFs have responsibilities that do not derive from Local 416 classifications, it contends that the

"vast majority" of their responsibilities are similar to, or derived from, its Schedule "A" positions. The TCHC has not, the Local maintains, simply "sprinkled" a few 416-related duties onto a position that otherwise bears no resemblance to Local 416 classifications. It points to the following positions as having related duties: Materials Management (1&2), Landscape Maintenance (1&2), Custodial Maintenance (1), Cleaner, and Custodian. It also submits that the Superintendent and Senior Superintendent positions, while clearly senior to BCFs, have responsibilities similar to those of BCFs (for example, administrative and customer service duties).

41. Local 416 acknowledges that its collective agreement does not provide for the inclusion of part-time employees in its bargaining unit. However, it points out that the collective agreement *does* provide for the discussion of (and possible agreement with respect to) any "new non-union positions" established by the TCHC (Article 2.03).

42. The TCHC submits that there is nothing in the Local 416 collective agreement that precludes BCFs from being included in Local 416's bargaining unit. It maintains that the absence of provisions relating to part-time employees does not mean such employees cannot be covered by the collective agreement. It also asserts that the fact that BCFs are backfilling for Community Services Coordinators (Local 79) does not mean that they cannot or should not be included in Local 416's bargaining unit. It contends that its decision to backfill with BCFs is based as much on "ease and convenience" as it is on the nature of the work they normally perform.

43. The TCHC acknowledges that when one picks apart the duties of BCFs, there is a "blurring of the line" between the two bargaining units. It acknowledges that some of BCFs' duties correspond to those associated with Local 79 classifications. However, it maintains that given BCFs' "outside" duties and Local 416's history of performing such duties, the "core functions" of the position align more fully with Local 416. It contends its decision to place the position in Local 416 is based on "fit", not subterfuge. It asserts that despite its discussions with Local 79 regarding a new full-time position, its decision to place the BCF position in Local 416 was well-reasoned, and not improper.

44. As indicated above, the principal comparator positions from the Local 79 bargaining unit are Youth Mentor and Program Coordinator. The responsibilities that BCFs share with these positions are as follows (Local 79 positions in parentheses):

- Provides work direction to volunteers, program participants and volunteer groups (Youth Mentor; Program Coordinator specifies "instruction");
- Assists local site teams working with resident groups (Program Coordinator "participates on special projects, integrated teams or workgroups as assigned");
- Conducts activities in order to provide information to TCH residents on programs and initiatives (Program Coordinator "conducts and supports outreach activities [...] to promote awareness of TCHC programs and initiatives" and "provides program participants, residents information on relevant community programs"; Youth Mentor "conducts outreach activities to establish contact with youth in [TCHC] communities");
- Completes administrative forms, reports and statistical information (Program Coordinator, Youth Mentor);
- Liase with building superintendents to obtain access to TCH facilities for program activities or whenever working on-site (Program Coordinator is "responsible for the access and use of communities' spaces during set program times");
- Participates in special projects, work groups or integrated teams (Program Coordinator);
- Responsible for conducting assessments against pre-defined safety checklists for program space, program activities and properties (Program Coordinators "ensure space is safe for program participants");
- Completes surveys in the community as assigned (Program Coordinator "provides relevant community feedback to manager and team").

45. The classifications in Local 416's bargaining unit with which BCFs are said to share overlapping duties include: Senior Superintendent, Superintendent, Custodial Maintenance Person 1, Materials Management 1 and 2, Landscape Maintenance Person 1 and 2, Custodian, Cleaner and Service Worker Maintenance. According to Local 416, the following BCF duties overlap with those of the classification(s) in parentheses:

- Provides work direction to program staff, e.g. YouthWorx, Recreation, Revitalization, State of

- Good Repair (Senior Superintendent, Superintendent, Custodial Maintenance Person 1);
- Provides work direction to volunteers, program participants and other volunteer groups (Senior Superintendent, Superintendent, Custodial Maintenance Person 1);
- Minor landscaping, graffiti removal, garbage pick-up and light cleaning as identified by superintendents (Custodian, Cleaner, Landscape Maintenance Person 1 and 2);
- Assists local site teams working with resident groups (Senior Superintendent, Superintendent);
- Provides coordination and support on unit condition follow-up (Senior Superintendent, Superintendent, Custodial Maintenance Person 1);
- Assists in the preparation for local building meetings and community events, e.g. room set-up as well as TTC token and food disbursement (Senior Superintendent, Superintendent, Materials Management 1 and 2);
- Conducts activities in order to provide information to TCH residents on programs and initiatives (Senior Superintendent, Superintendent);
- Completes administrative forms, reports and statistical information (Senior Superintendent, Superintendent);
- Liase with building superintendents to obtain access to TCH facilities for program activities or whenever working on-site (Materials Management 1 and 2);
- Responsible for conducting assessments against pre-defined safety checklists for program space, program activities and properties (Senior Superintendent, Superintendent, Custodial Maintenance Person 1);
- Responsible to maintain program supplies and equipment and re-stocking as required (Senior Superintendent, Superintendent, Landscape Maintenance Person 1 and 2, Service Worker Maintenance);
- Assist in tracking, asset mapping as well as archiving and filing activities (Senior Superintendent, Superintendent, and Custodial Maintenance Person 1).

46. Based on the foregoing comparisons and the additional considerations described below, I find that the principal responsibilities and qualifications of BCFs more closely resemble those of Local 79

positions than they do those of Local 416 positions. Considered from a purely quantitative standpoint, BCFs appear to have more duties in common with Local 416 positions than they do with Local 79 positions. However, in my view, three factors combine to diminish the quantitative difference. First, while BCFs may have fewer duties that compare to or overlap with Local 79 positions, those duties overlap with only two Local 79 positions – Youth Mentor and Program Coordinator, in particular the Program Coordinator. By comparison, the duties that overlap with Local 416 positions are spread across a number of otherwise dissimilar positions. In addition, the principal positions identified by Local 416 – Superintendent and Senior Superintendent – are significantly more senior than BCFs, and could reasonably be expected to have supervisory and/or administrative components. In my view, the duties of BCFs should be compared with those of other entry-level positions, rather than with much more senior positions. Considered from this perspective, the duties of BCFs are closer to those of Local 79 positions (Youth Mentor, Program Coordinator) than they are to Local 416 positions (Cleaner, Custodian, Landscape Maintenance Person, Custodial Maintenance Person). Furthermore, and perhaps most importantly, key BCF duties, such as providing work direction to volunteers, program participants and volunteer groups, and conducting outreach and information-provision activities are clearly related to the key duties of Program Coordinators and Youth Mentors.

47. As set out above, there is nothing in either bargaining unit's collective agreement that defeats its (or the other's) claim to the work of BCFs. However, having regard to the duties of BCFs and the substance of the collective agreements, the Board finds that Local 79 has the stronger claim to the position. Accordingly, the collective bargaining relationships criterion favours Local 79.

### *Skill and Training*

48. Local 79 submits that the skills and training required by BCFs are the same as those required for positions in (or formerly in) its bargaining unit. It points out that the qualifications set out in the BCF job description are an almost exact match for those set out in the job descriptions for the Youth Mentor and Program Coordinator positions (the only notable exception being cleaning and landscaping experience, which is specified as an "asset"). It asserts that the fact that BCFs were recruited entirely from the ranks of those Local 79 positions establishes that its members uniquely possess the skills and

training for the new position. It submits that the fact that BCFs are backfilling the Local 79 position of Community Services Coordinator further supports its claim. By contrast, Local 79 submits, the qualifications and skills required for Local 416 positions, both junior (Custodial Maintenance Person, Landscape Maintenance Person, Materials Management) and senior (Superintendent, Senior Superintendent) are not "qualitatively similar" to those required by BCFs. Unlike BCFs, Local 79 maintains, persons in those positions could not backfill for Community Services Coordinators.

49. Local 416 submits that qualifications such as "basic knowledge of building operations", "ability to perform manual labour and work outside", and "knowledge of Occupational Health and Safety Act and WHMIS [Workplace Hazardous Materials Information System]" indicate that the BCF position is substantially akin to other positions in its bargaining unit. It also submits that BCF qualifications are reflected in the more senior Local 416 classifications of Superintendent and Senior Superintendent.

50. Comparison of qualifications was facilitated by the provided job postings. The following BCF qualifications are a close or exact match for those of the Local 79 position(s) identified in parentheses:

- Demonstrates knowledge, experience and/or academic background in working with residents and/or community groups (Program Coordinator; Youth Mentor specifies "working with youth in a community based setting");
- Experience with program delivery and monitoring (Program Coordinator);
- Ability to conduct effective outreach (Program Coordinator; Youth Mentor specifies "community outreach experience");
- Experience supervising groups of program participants (Program Coordinator);
- Experience with program coordination or supervision in the areas of recreation, youth or seniors programs, or other related program areas (Program Coordinator);
- Experience in organizing, promoting and facilitating community events (Program Coordinator; Youth Mentor specifies "organizing, promoting and facilitating special events");
- Proven organizational and administration skills (Program Coordinator, Youth Mentor);

- Proven communication skills (Program Coordinator, Youth Mentor).

51. The following BCF qualifications correspond to those of the Local 416 classification(s) in parentheses:

- Experience in cleaning, landscaping and litter removal considered an asset (Cleaner, Custodian, Custodial Maintenance Person 1 and 2, Landscape Maintenance Person, Superintendent and Senior Superintendent);
- Ability to perform manual labour and work outside is required (Cleaner, Custodian, Custodial Maintenance Person 1 and 2, Landscape Maintenance Person, Superintendent and Senior Superintendent);
- Demonstrates focus on customer service (Cleaner and Custodian specify "ability to provide respectful service to tenants, staff and visitors"; Superintendent and Senior Superintendent specify "demonstrated experience providing excellent customer service");
- Knowledge of Occupational Health and Safety Act and WHMIS an asset (Cleaner, Custodian, Custodial Maintenance Person 1 and 2, Superintendent and Senior Superintendent).

52. Although none of its classifications expressly specifies "basic knowledge of building operations", Local 416 asserts that it is essentially a Local 416 qualification. I accept that this qualification might reasonably apply to positions in the Operations and Property Management Divisions.

53. In my view, the extent to which they share qualifications strongly supports the connection between BCFs and Local 79 classifications. Several key BCF qualifications are identical to those of Program Coordinator and, to a lesser extent, Youth Mentors. These qualifications, in particular ones pertaining to outreach activities and program delivery and monitoring, are central to key duties performed by Local 79 members. The qualifications clearly relatable to Local 416 classifications (points 1, 2 and 4, and "knowledge of building operations"), while having a strong connection to the work of that bargaining unit, are not connected to what I regard as "core" BCF duties, and two of those are specified as an "asset" rather than a requirement. The two additional facts noted by Local 79 also support

the conclusion that the skills and abilities to perform BCF duties are more closely associated with Local 79 classifications. The first is that the TCHC recruited BCFs entirely from the ranks of Program Coordinators and Youth Mentors. When the TCHC sought to fill the new positions, it clearly found the requisite qualifications in persons who were already employed in the Local 79 positions. The second is that the TCHC has been using BCFs to backfill the more senior Local 79 position of Community Services Coordinator. The principal role of the CSC is to "initiate, promote, implement and coordinate a range of resident programs and services" in TCHC communities. I agree with Local 79 that employees drawn from its ranks will have the skills necessary to step into this role, whereas employees in Local 416 classifications may not. Accordingly, the skill and training factor favours Local 79's position regarding the assignment of BCFs.

#### *Economy and Efficiency*

54. Local 416's and the TCHC's arguments with respect to this factor focus on the efficiency of placing BCFs in Local 416's bargaining unit rather than any economy associated with that assignment. They argue that given the nature of the job, BCFs will be "on site" and "interacting with" employees in other Local 416 positions, particularly Superintendents. Local 79 acknowledges that BCFs may interact with Superintendents in the course of performing their duties. It asserts, however, that the bulk of their duties require that they take direction primarily from Community Services Coordinators.

55. Not a lot of evidence was presented as to the amount of direction BCFs take from more senior employees, whether from Local 79 or from Local 416. From the responsibilities enumerated on the job posting it appears that BCFs are likely to take direction from CSCs with respect to tasks related to providing work direction to volunteers, program participants and volunteer groups, conducting information-dissemination activities, and completing administrative forms and reports and compiling statistical information. On the other hand, it is likely that BCFs will take direction from Superintendents with respect to tasks relating to providing work direction to program staff (YouthWorx, State of Good Repair, etc.), landscaping and cleaning, providing feedback to building staff, coordinating unit condition follow-up, and obtaining access to TCHC facilities for program activities. Consequently, this factor (as it was argued) does not strongly favour assignment to one bargaining unit over the other.

*Employer Past Practice*

56. Local 79 submits that the TCHC's past practice was to have the duties performed by BCFs performed by employees in its bargaining unit. It contends that the duties set out in the BCF job posting were largely performed by Youth Mentors and Program Coordinators. It submits that the fact that BCFs were entirely recruited from those positions is clear evidence that the duties now assigned to BCFs were previously performed by Local 79 employees.

57. Local 416 asserts that as the BCF is a new position, employer past practice is not a relevant factor in this case. In support of this assertion, Local 416 relies on *The Board of Health for Kingston, Frontenac and Lennox and Addington Health Unit*, [1995] OLRB Rep. May 587, in which the Board stated (at para. 20) in respect of the Health Unit's newly-created Health Promoter position:

Although the fact that the Health Educator position (which was to some extent the progenitor of the Health Promoter position) was assigned by the Employer to the CUPE bargaining unit provides some support for their contention that the latter position should be similarly assigned, the criterion of past practice is of relatively little assistance to the Board in these proceedings because the Health Promoter position held by Mr. Goodfellow is the first Health Promoter position created by the Health Unit.

58. Although the BCF is, indeed, a new position, it is the Board's view that it is sufficiently connected to previous TCHC positions so as to render the TCHC's past practice a relevant consideration. In my view, in *Board of Health for Kingston, supra* the purposes of the Health Educator and the Health Promoter positions were sufficiently distinct to enable the Board to make the above comment (see the descriptions of the positions at paragraphs 9 and 11). While I agree that the BCF is to some extent a new position, its connections to prior TCHC positions are sufficiently clear so as to render past practice a relevant consideration. On the one hand, Local 416 claims that duties such as minor landscaping, graffiti removal and garbage pick-up were performed by members of its bargaining unit prior to the creation of the YouthWorx position(s). On the other hand, duties such as providing work direction to volunteers and program participants, conducting activities to disseminate information about TCHC programs and initiatives, and completing administrative forms, reports and

statistical information were performed by Youth Mentors and Program Coordinators. As I have indicated, I regard the latter as key duties of the BCF position. The TCHC's past practice with respect to these duties was to have them performed by Local 79 employees. I regard it as telling that the TCHC recruited Program Coordinators and Youth Mentors for the BCF position, and eliminated their prior positions following the implementation of the latter position. This factor therefore favours Local 79.

### *Employer Preference*

59. Local 416 submits that the TCHC's decision to place the BCF position in its bargaining unit (albeit, in settlement of a grievance) was a rational choice, based on the relationship between the two parties (i.e. their history of settling grievances) and the nature of the duties assigned to the position. It submits that the BCFs' duties are ones that arise out of its collective agreement, and are rationally connected to the grievance that was settled by the position being placed in its bargaining unit. Local 416 asserts that given the nature of their duties, there is likely to be much interaction between BCFs and Superintendents. Thus, for reasons of economy and efficiency, the Local submits, it makes sense for them to be in the same bargaining unit.

60. Local 79 asks the Board to consider employer preference not in terms of the TCHC's choice of bargaining unit for BCFs but, rather, in terms of the TCHC's choice of employees to perform the duties assigned to them. It submits that viewed from this perspective, the TCHC's preference is clearly to have Local 79 employees performing the duties, as they alone possess the necessary skill set. It points to the fact that the TCHC was, until March 2014, negotiating with it to create this (or a substantially similar) position. Local 79 also points to the "employer preference" to have BCFs (i.e. former Local 79 members) backfill the Community Services Coordinator position, again, because they possess the necessary skills and training.

61. However, should the Board choose to consider this factor in the more conventional manner (i.e. in regard to the employer's actual assignment of the position to a particular bargaining unit), Local 79 points out that the TCHC's preference must be grounded in "valid labour relations or operational concerns" (*AbitibiBowater Canada Inc.*, supra at para. 35; *Trenton Memorial Hospital*, supra at para. 16). Local 79 submits that that is not the case here. It contends that,

instead, the TCHC's assignment of the position is based purely on cost (the \$16 per hour rate the TCHC was able to set for BCFs versus the \$19-\$25 per hour that it was negotiating for the proposed Local 79 position) and the desire to settle its grievance with Local 416. These are not valid operational and labour relations reasons, Local 79 submits.

62. It makes sense that the TCHC would choose to have a fixed wage rate for the BCF position. However, the extent of interactions between BCFs and Local 416 employees does not support the view that they should be in the same bargaining unit. It is clear from the TCHC's approach to staffing the new position that its preference was to have the work performed by Local 79 members. Since the Board is not prepared to accept the labour relations reasons for the assignment, there is no need to comment on the *bona fides*.

63. Given that the application of the *Pioneer Manor* factors favours the assignment of BCFs to Local 79, I am not required to consider the additional "labour relations considerations" set out by the Local. Should I have needed to, however, I would not have been barred from doing so, as both Local 416 and the TCHC contend. In resolving disputes such as the present one, the Board is not confined to considering only the seven factors which, it should be remembered, were originally developed to deal with jurisdictional disputes arising in the construction industry, and are not always readily applicable in other settings.

### **Order**

64. For all the aforementioned reasons, the Board makes the following declaration and orders:

- 1) The Board declares that the work encompassed by the classification currently titled Building and Community Facilitator is work that is more closely akin to the work performed by employees in the Local 79 bargaining unit.
- 2) The Board orders that Schedule A of the collective agreement between Local 79 and TCHC be amended by adding the classification of Building and Community Facilitator at the wage rate of \$16.00 per hour.

- 3) The Board orders that the Building and Community Facilitator's wage rate will remain in effect until the expiry of the current collective agreement between TCHC and Local 79, or until the TCHC and Local 79 negotiate a new rate, whichever is earlier.
- 4) The Board orders that the seniority of employees who had been in the Local 79 bargaining unit and who, as a result of accepting a new Building and Community Facilitator position, lost their accumulated seniority, be reinstated, and that their seniority in Local 79 shall be uninterrupted. The service of Building and Community Facilitators who were not at the time in Local 79 when they accepted the position of Building and Community Facilitators shall accumulate from the date of this decision.

"Kelly Waddingham"  
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for the Board