COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of TOWN OF HARWICH and SEIU, LOCAL 888	Case No. WMAM-08-1011 Date Issued: March 9, 2009

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Appearances:

Daniel C. Brown, Esq. - Representing the Town of Harwich

James A. W. Shaw, Esq. - Representing SEIU, Local 888

DECISION UPON REINVESTIGATION OF CERTIFICATION

Statement of the Case

On May 19, 2008, Service Employees International Union, Local 888 (Union) filed a Petition for Certification by Written Majority Authorization with the Division of Labor Relations (Division) seeking to represent a bargaining unit of employees employed by the Town of Harwich (Town). That petition covered the following twenty-one (21) department head positions: Director of Highways and Maintenance, Golf Superintendent, Deputy Assessor, Building Commissioner, Council on Aging Director,

Channel 18 Manager/Director, Town Planner, Director of Golf, Health Director, Town Engineer, Natural Resources Director, Director of MIS, Water Superintendent, Library Director, Youth Counselor, Community Center Manager, Treasurer/Collector, Cemetery Administrator, Deputy Fire Chief, Recreation Director, and Conservation Administrator.

The Division was designated as the neutral pursuant to Division Rule 14.19(4), 456 CMR 14.19(4). On June 20, 2008, the Town filed written challenges to the following six (6) petitioned-for positions: Director of Highways and Maintenance, Deputy Fire Chief, Library Director, Director of Golf, Deputy Assessor, and Water Superintendent. Because the Division, acting in the role of a neutral, determined that the number of challenges was insufficient to affect the result, the Division dismissed the Town's challenges pursuant to 456 CMR 14.19(8). On June 26, 2008, the Division issued a report of its confidential inspection of the evidence of written majority authorizations proffered by the Union and issued a Certification of Written Majority Authorization. The Division's Certification included the following positions in the bargaining unit:

> Director of Highways and Maintenance, Golf Superintendent, Deputy Assessor, Building Commissioner, Council on Aging Director, Channel 18 Manager/Director, Town Planner, Director of Golf, Health Director, Town Engineer, Natural Resources Director, Director of MIS, Water Superintendent, Library Director, Youth Counselor, Community Center Manager, Treasurer/Collector, Cemetery Administrator, Deputy Fire Chief, Recreation Director, and Conservation Administrator.

On July 28, 2008, the Town filed a Motion for Reconsideration and Reinvestigation of the Certification based on Written Majority Authorization pursuant to Division Rule 14.15, 456 CMR 14.15, arguing that certain positions should be excluded from the bargaining unit as confidential or managerial employees. The Union opposed the Town's Motion. The Division allowed the Town's Motion on October 14, 2008. In

December 2008, the Town and the Union submitted information and position statements in support of, and in opposition to, the Town's Motion.

The Union argues that the Town's challenges must be dismissed by operation of Division Rule 14.19(8), 456 CMR 14.19(8), which states in pertinent part that:

> [i]f the number of challenges referred to in Paragraph 6 and 7, above, is insufficient to potentially affect the result, then the neutral shall dismiss the challenges.... (Emphasis supplied).

As discussed above, acting as the neutral, the Division did dismiss the Town's challenges to certain petitioned-for positions because the number, six, was insufficient to affect the result. That dismissal effectuated the purpose of the Written Majority Authorization statute by allowing the Certification of Written Majority Authorization to issue promptly. However, that dismissal does not foreclose the Town from subsequently raising and having the Division address those challenges to the makeup of the bargaining unit.

Under the Division's current regulations the Town could have refused to bargain leading to the filing of an unfair labor practice charge or the Town could have filed a unit clarification (CAS) petition to clarify the bargaining unit. Either course would have resulted in the Division hearing evidence regarding the challenged positions and making a determination regarding their proper inclusion in or exclusion from the unit certified by Written Majority Authorization.

Instead, the Town filed a Motion for Reconsideration and Reinvestigation of the Certification based on Written Majority Authorization. Pursuant to 456 CMR 14.15, Rule 14.15, for good cause shown, the Board "may reinvestigate any matter concerning any certification issued by it and, after appropriate hearing, may amend, revise or revoke

1 such certification." When a certification has been found to be inappropriate as a matter
2 of law it has been corrected under that provision. See generally Town of Burlington, 5
3 MLC 1234 (1978). The possible inclusion of employees who may be found to be
4 managerial or confidential employees constitutes good cause to reinvestigate the
5 certification issued on June 26, 2008. Proceeding in this manner under Rule 14.15 also
6 will have the practice effect of resolving the underlying dispute promptly.

Findings of Fact[1]

7 James R. Merriam is the Town Administrator and has served as the primary
8 negotiator at the table during collective bargaining sessions. The job descriptions
9 submitted into evidence are accurate reflections of many of the duties, responsibilities
10 and functions performed by the persons in these positions.

11 ***

12 **The Director of Highways and Maintenance**

13 4. The Director of Highways and Maintenance is integral to the planning
14 and management of the operations of the Public Works in Harwich. For
15 example, the Director plans, directs, and administers all aspects of the
16 Highway and Maintenance Department, including the preparation and
17 administration of the budget; the preparation of bid documents and the
18 awarding of bids; personnel administration; and the preparation of payroll
19 and other reports, among other duties.
20
21 5. The Director continues to play a key role in formulating and determining
22 policy as the Town completes its plan to create a Department of Public
23 Works. Among the Director's accomplishments so far is a centralized
24 Vehicle Maintenance Department. Next year, the Director plans on
25 completing the centralization of building maintenance. In addition, the
26 Director plays a key role in collective bargaining with highway and
27 maintenance employees. During the last two contract negotiations, the
28 management bargaining team has consisted of [Merriam] and the Director

[1] The findings of fact are excerpted from the affidavit of Town Administrator James R. Merriam (Merriam) and the written job descriptions that the Town submitted. The Union elected to rely on the facts contained in these documents to support its position.

of Highways and Maintenance. [Merriam] has relied upon the Director in collective bargaining to prepare many of the proposals the Town has put forth. In addition, the Director's role in providing information and otherwise preparing for negotiation sessions has been integral to the process. The Director, the Board of Selectmen, and [Merriam] determine bargaining objectives and strategy.

6. The Director also has the authority to make effective recommendations regarding significant discipline, including discharge. For example, during [Merriam's] tenure as Town Administrator, the Director of Highways and Maintenance has recommended the discharge of several employees under his supervision, which recommendations were approved and acted upon.

7. [Merriam] relies heavily on the Director of Highways and Maintenance for assistance and confidentiality in their professional dealings. In executing all of the duties and responsibilities of his position, the Director has access to labor relations policy and other sensitive policy information. He and [Merriam] often discuss such confidential information together.

The Water Superintendent

8. The Town's Water Superintendent plays an important managerial role in the Town's operations. The Water Superintendent is integral to the planning and management of all aspects of the operations of the Water Department. For example, the Water Superintendent is responsible for ensuring compliance with all applicable local, state and federal regulations relating to the drinking water supply and water treatment operations; plans and supervises the repair and maintenance of the Town's water system; manages capital projects; develops annual and long-term operating and capital budgets for the Water Enterprise Fund; and conducts procurement activities, among other duties.

9. As with the Director of Highways and Maintenance, the Water Superintendent and [Merriam] are the two members of the management bargaining team at the table with unionized water employees. During [Merriam's] tenure, [Merriam] has negotiated two contracts with that group with the invaluable assistance and participation of the Water Superintendent. He attends all the bargaining sessions with [Merriam]. The Water Superintendent's participation as a member of the Town's bargaining team includes providing key information about water department operations as well as formulating bargaining proposals. Like the Director of Highways and Maintenance, the Water Superintendent and [Merriam] play significant roles in developing bargaining objectives and strategy.

10. The Water Superintendent reports directly to three elected members of the Water Commission, and by Charter is to cooperate with and be responsive to [Merriam]. He is instrumental in developing policies for the Water Department, including the development of a seven-year Plan which is entirely his work. His policy recommendations are routinely approved, with minor modifications, by the Town's Capital Budget Committee. The Water Superintendent's position was re-graded last year to M-6 (the same grade held by the Director of Highways and Maintenance).

11. [Merriam] relies heavily upon the person in the Water Superintendent's position for information and advice regarding confidential material including labor relations policy. [Merriam] routinely shares and discusses such information with the Water Superintendent.

The Library Director

12. The job description of the Library Director is attached hereto as Attachment 3. The Town Library is governed by an elected seven-member Board of Library Trustees. The Library Director is appointed by, and reports directly to, the Library Trustees. While the Board of Trustees retains ultimately approval authority on all library issues, the Board only exercises that authority with the advice, research, professional expertise and full participation of the Library Director.

13. The Library Director formulates and determines library policy with some oversight by the Board of Trustees. Library policies which the Library Director formulates include everything from use of library equipment to a five-year plan of service. For example, the Library Director is responsible for the planning and implementation of programs to meet community needs; the preparation and presentation of long-range strategic plans; the development of goals and design of program activities; the preparation of an annual budget; the monitoring and directing of expenditures of Town appropriations, trust funds, gifts, grants and state aide; property management; and preparation of bids, among other matters.

14. The bargaining team for the Town in dealings with unionized library employees consists of [Merriam] and the Library Director. During negotiations, [Merriam] has relied heavily upon the Library Director to prepare proposals and to provide him with key confidential information and advice during the negotiations process. Together, they develop bargaining objectives and strategies. The Library Director attends all bargaining sessions with [Merriam].

The Director of Golf[2]

15. The Director reports to [Merriam] for day-to-day supervision and to the Golf Committee for general direction; he is responsible for the overall management of the Town's golf course and programs and participates in policy making with respect to all aspects of the Town's golf operations. As the department head, the Director of Golf exercises a great deal of independent judgment and discretion in carrying out his responsibilities. For example, the Director of Golf prepares and manages the budget; supervises all golf department personnel; maintains financial records; and is responsible for the financial position of the Golf operations.

The Deputy Assessor

16. The Deputy Assessor operates with a great deal of independence and participates in formulating financial policies for the Town. The term "Deputy" is misleading in that this person is the Town's Chief Assessor and reports to a three-member Board of Assessors which is appointed by the Board of Selectmen. The Assessor is instrumental in determining the financial policies of the Town. The Assessor prepares the Town's tax recap sheets, appraises residential and commercial properties to establish values, and provides any and all financial information necessary in order to gain the Department of Revenue's certification for the Town's tax rates.

17. While the Assessor reports to the Town's Finance Director, he independently proposes policies and strategic planning to the Board of Assessors. The Assessor's proposals are routinely accepted and acted upon by the Board. For instance, the Assessor develops one-year and five-year financial plans for the Town on an annual basis.

18. The Assessor routinely provides confidential financial information to [Merriam] through the Town's Finance Director for the purpose of collective bargaining preparation. In fact, the Finance Director views the Assessor as a peer, rather than a subordinate, in this regard. The Finance Director relies upon the Assessor for access and analysis to all

[2] The job description for the Director of Golf states that the Director of Golf performs management and administrative work directing and overseeing the Town's golf operation under the day-to-day supervision of the Town Administrator within the scope of the general policy and direction established by the Golf Committee. The Director of Golf is responsible for all aspects of daily operations and fiscal performance of the Cranberry Valley Golf Course and carries out operational budgets and policies and procedures for the overall strength and financial position of the Golf Course under the supervision of the Town administrator. [The Director of Golf] must administer and enforce all rules and regulations, policies and procedures of the course and the various divisions at the course. ...

financial information related to the Town's tax levy when formulating confidential Town finance policies, including collective bargaining cost items. Simply put, the Assessor plays a crucial role in the process of determining the overall Town budget, including how much it can afford to pay its employees.

19. As department head, the Assessor supervises three full-time employees and one part-time employee. His duties include making important personnel decisions. For instance, the Assessor recently exercised his judgment and decided not to continue the employment of a probationary employee (principal clerk) past the probation period. [3]

The Deputy Fire Chief

20. The Deputy plays an important managerial and confidential role in the operation of the fire department. He has access to confidential information, including personnel records, bid documents, collective bargaining negotiations, and legal matters. He routinely discusses confidential matters, including collective bargaining, with the Fire Chief.

21. The Deputy is performing an important policy-direction role as the Town moves to a combined public safety civilian dispatch center. By July 2009, a new police station will open and the combined dispatch center will be located at the public safety complex. The Deputy is responsible for all aspects of the new dispatch center, including the budget for the operation. He is also the supervisor of the two full-time and several part-time employees (in addition to his supervisory duties for fire personnel).

Opinion

Section 1 of the Law contains the following three-part test to determine whether an individual is a "managerial" employee:

> Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a

[3] The Deputy Assessor job description states that the Deputy Assessor works under the policy direction of the Board of Assessors and the administrative direction of the Town Administrator, in accordance with state statutes and the directives of the Department of Revenue; performs complex and technical duties requiring considerable judgment and initiative in overseeing valuations on real and personal property; work is reviewed by the Town Administrator and the Board.

> substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

An employee must be excluded from an appropriate bargaining unit under Section 3 of the Law if the person's actual duties and responsibilities satisfy any one of the three statutory criteria. Town of Manchester-by-the-Sea, 24 MLC 76, 81 (1998).

To be considered a managerial employee under the first part of the statutory test, an employee must make policy decisions and determine the employer's objectives. See Wellesley School Committee, 1 MLC 1299, 1401 (1975), aff'd sub nom. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112 (1978). The policy decisions must be of major importance to the mission and objectives of the public employer. Wellesley School Committee, 1 MLC at 1403. This part of the analysis focuses on whether an employee possesses independent decision-making authority or whether the employee's decisions are screened by another layer of administration. See Worcester School Committee, 3 MLC 1653,1672 (1977).

To be considered a managerial employee under the second part of the statutory definition, an employee must participate to a substantial degree in preparing for or conducting collective bargaining. Identifying problem areas to be discussed during bargaining or merely consulting about bargaining proposals is insufficient to satisfy this second criterion. Rather, the employee must either participate in actual negotiations or be otherwise involved directly in the collective bargaining process by preparing bargaining proposals, determining bargaining objectives or strategy, or having a voice in the terms of settlement. Town of Manchester-by-the-Sea, 24 MLC at 81; City of Boston, 19 MLC 1050, 1063 (1992).

1 To be classified as a managerial employee under the third statutory test, an
2 employee must exercise discretion without consultation or approval. Town of
3 Manchester-by-the-Sea, 24 MLC at 81 (citing Wellesley School Committee, 1 MLC at
4 1408). To be "substantial," the responsibility must not be perfunctory or routine; it must
5 have some impact and significance. Id. Further, the appellate authority must be
6 exercised beyond the first step in a grievance-arbitration procedure. Town of Wareham,
7 26 MLC 206, 207 (2000).

8 **Director of Golf**

9 After carefully reviewing the job duties and responsibilities of the positions at
10 issue, we conclude that the Director of Golf does not meet any of the statutory criteria
11 for a managerial employee. Although the Town argues that the Director of Golf
12 participates in policy-making with respect to all aspects of the Town's golf operations,
13 the Town provided no specific information about any policies that the Director of Golf
14 has drafted. Consequently, we cannot conclude that those policies are of major
15 importance to the mission and objectives of the Town. See Town of South Hadley, Case
16 No. MCR-07-5276 (slip op. December 23, 2008) (citing Masconomet Regional School
17 District, 3 MLC 1034, 1040-1041 (1976)). Further, the bare allegation that the Director
18 of Golf "participates" in policy-making does not demonstrate managerial status where
19 there is no evidence demonstrating that he possesses the independent authority to
20 make policy decisions and determine the public employer's objectives. The Director of
21 Golf job description does not show the requisite policy-making authority, but,
22 conversely, indicates that the Director of Golf works within the scope of the policy set by
23 the Golf Committee and administers and enforces the policies of the golf course.

1 approval, Wellesley School Committee, 1 MLC at 1408, and must have significant
2 independent discretion to affect an employer's employment practices and procedures.
3 Town of Medway, 22 MLC at 1269. Here, the Town asserts that the Deputy Assessor
4 independently makes important personnel decisions and has independently decided to
5 discontinue the employment of a probationary employee. This single example is
6 insufficient to persuade us that the Deputy Assessor has the independent discretion to
7 affect the Town's employment practices and procedures. See City of Amesbury, 25
8 MLC 7, 9 (1998) (assessor's authority to hire personnel deemed insufficient to confer
9 managerial status). Moreover, there is no evidence in the record that the Deputy
10 Assessor acts in any appellate capacity. Consequently, we do not find that the Deputy
11 Assessor should be excluded from the bargaining unit as a managerial employee.

12 Finally, the Town argues that the Deputy Assessor is a confidential employee
13 because the Deputy Assessor provides confidential financial information to the Finance
14 Director for purposes of collective bargaining and plays a crucial role in the Town's
15 budgetary process. Section 1 of the Law defines the "confidential" exclusion as follows:

16 Employees shall be designated as confidential employees only if they
17 directly assist and act in a confidential capacity to a person or persons
18 otherwise excluded from coverage under this chapter.

19 The Board has construed this statutory language to exclude those individuals who have
20 a direct and substantial relationship with an excluded employee that creates a legitimate
21 expectation of confidentiality in their routine and recurrent dealings. Town of Medway,
22 22 MLC at 1269. Regular exposure to confidential material directly related to labor
23 relations policy or other equally sensitive policy information while directly assisting an

1 excluded employee is grounds for finding an employee confidential. North Attleborough
2 Electric Department, 32 MLC 66 (2005).

3 The Deputy Assessor analyzes financial information related to the Town's tax
4 levy for the Finance Director's use in formulating confidential Town finance policies,
5 including collective bargaining cost items. The Deputy Assessor also provides financial
6 information to the Town Administrator for collective bargaining purposes. However,
7 there is no evidence demonstrating that the finance records that the Deputy Assessor
8 views and analyzes are non-public,[5] and access to sensitive financial records or data
9 alone does not designate an employee as confidential. Town of Medway, 22 MLC at
10 1270; Fall River School Committee, 27 MLC 37, 39-40 (2000). It is the employee's
11 advance knowledge of the employer's bargaining position(s) gleaned as a result of
12 access to financial data, and not merely the employee's access to financial information
13 that determines whether an employee will be deemed a confidential employee. See
14 generally Millis School Committee, 22 MLC 1081, 1086 (1995). Here, there is no
15 evidence that the Deputy Assessor's access to financial information gives him advance
16 knowledge of proposals that the Town intends to offer at the bargaining table.

17 Finally, there is no evidence that the Deputy Assessor is privy to the confidential
18 finance policies or to collective bargaining cost items that the Finance Director
19 formulates, or any other confidential labor relations materials. Accordingly, we do not
20 find that the Deputy Assessor is a confidential employee.

[5] The Town's bare description of the financial information as "confidential" does not sufficiently describe the information or persuade us that it viewing it makes the Deputy Assessor a confidential employee.

Deputy Fire Chief

Section 3 of the Law provides in pertinent part that:

> ...[I]n any fire department, or any department in whole or in part engaging in, or having the responsibility of, fire fighting, no uniformed member of the department subordinate to a fire commission, fire commissioner, public safety director, board of engineers or chief of department shall be classified as a professional, confidential, executive, administrative or other managerial employee for the purpose of this chapter.

The Town argues that the Deputy Fire Chief is a confidential and/or managerial employee due to his involvement in formulating and developing Town policy and his access to confidential information. However, the express terms of the statute unequivocally prohibit the exclusion of any uniformed member of the Town's fire department subordinate to the chief as a confidential or managerial employee, and we have no authority to deviate from the express terms of the statute. Accordingly, we find that the Deputy Fire Chief is neither a managerial nor a confidential employee.

Water Superintendent and Director of Highways and Maintenance

The evidence in this case demonstrates that both the Water Superintendent and the Director of Highways and Maintenance assist to a substantial degree in preparing for or conducting collective bargaining on behalf of the Town and are, therefore, managerial employees. The Water Superintendent is one of two members of the Town's bargaining team for negotiations involving organized Water Department employees. The Water Superintendent attends all of the bargaining sessions and participates in developing bargaining objectives and strategy. Similarly, the Director of Highways and Maintenance attends bargaining sessions as one of the Town's two-person bargaining team for negotiations involving unionized highway and maintenance employees. He also prepares Town proposals and participates in determining bargaining objectives

1 and strategy. These facts establish that the Water Superintendent and the Director of
2 Highways and Maintenance are directly involved in the actual negotiations as members
3 of the Town's bargaining team and do not play merely a supportive or consultative role.
4 See generally Manchester-by-the-Sea, 24 MLC 76 (1998). Consequently, they are
5 properly excluded from the bargaining unit as managerial employees.

6 **Library Director**

7 The Union and the Town have agreed that the Library Director is a managerial
8 employee. When issues raised by a representation petition are resolved by the parties'
9 stipulations, the Board will adopt the stipulations if they do not conflict with the Law or
10 established Commission policy. Town of Hopedale, 20 MLC 1059, 1067 (1993).
11 Because the stipulation regarding the Library Director's managerial status does not
12 appear to conflict with the Law or established Board precedent or policy, we adopt the
13 parties' stipulation and exclude the Library Director from the bargaining unit.

14 Conclusion

15 For the foregoing reasons, we find that the Director of Highways and
16 Maintenance and the Water Superintendent are managerial employees within the
17 meaning of the Law. Consequently, we amend the Certification of Written Majority
18 Authorization previously issued on June 26, 2008 by excluding the Director of Highways
19 and Maintenance, the Library Director, and the Water Superintendent from the

1 bargaining unit.

2 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F. Wittner

MARJORIE F. WITTNER, CHAIR

Elizabeth Neumeier

ELIZABETH NEUMEIER, BOARD MEMBER